

THE BOARD OF DIRECTORS AND THE NEW REALITY IN THE RECRUITMENT OF GENERAL COUNSEL

The corporate scandals of the past several years have fueled significant boardroom change at companies across America. With the adoption of the Sarbanes-Oxley Act of 2002, now more than ever board directors rely on the company's general counsel. In addition to serving as the consigliere to the chief executive officer and as a key adviser to the board, a general counsel also typically manages compliance, regulatory, complex transactions and "bet-the-company" litigation.

When companies need to hire a new general counsel, it is not surprising — or even unwelcome — that directors are more likely to be hands-on during the recruitment process than prior to the scandals of the late 1990s. It is, however, critical that board members understand their role in the search process to avoid possible recruitment failures, which can result when directors are not fully briefed or do not understand what is being asked of them.

Based on our experience as dedicated legal search consultants, we have identified a number of best practices that will greatly increase the likelihood that a search will end successfully given the new paradigm of significant board involvement in the recruitment of general counsel.

ASSESS THE BOARD'S EXPECTATIONS

Before undertaking a general counsel assignment, we encourage the CEO to assess the board's expectations for the position. The CEO should consider the specific requirements that directors may have for the role, including the expectation that the new general counsel will have significant government compliance experience, specific experience working on director and officer liability questions, and experience assessing risk in bet-the-company situations.

In addition, CEOs should be aware that some board members may believe that a senior partner from a prominent Wall Street law firm not only would be a perfect fit for the role, but that such a partner also would be interested in the opportunity — often an unrealistic expectation. If directors' preferences are understood at the outset, the CEO can work during the early stages of the search to manage their preconceptions.

ESTABLISH THE ROLE FOR DIRECTORS

Board members, and particularly the lead director, need to work with the CEO to understand their role in the search and determine how large a voice the board will have in the decision-making process.

Clearly defining the board's role also will lessen confusion as the search progresses. For example, while a board may want to evaluate the position specification, it is not recommended that the board be involved in crafting the document. Rather, if directors have strong opinions about the role's requirements, these should be shared and vetted prior to initiating the search and then incorporated into the position specification. Suggested questions that the CEO should ask the board, while understanding that the process is dynamic and may change as the search progresses, include the following:

What processes are in place to ensure that a lone director will not be able to inappropriately derail the search?

How many candidates does the board want to meet?

When and with which directors will candidates, or just the final candidate, meet?

If the company has a lead director, will that director work closely with the CEO on the search or wait until the process is further along before becoming actively involved?

Establishing the appropriate role of the board upfront helps ensure that each candidate sees a search process that is well conceived, organized and structured to maximize everyone's limited availability and designed to get to the best solution for the company and the candidate.

EDUCATE THE BOARD

One of the biggest challenges raised by the board's increased involvement in the search process is that directors often are inexperienced in hiring general counsel. While board members are seasoned executives who frequently interact with lawyers, directors typically do not have experience hiring lawyers, which may lead to misinformed expectations about the available talent in the marketplace.

Although a potentially sensitive task, CEOs should discuss with directors the changing nature of the general counsel position in a post-Sarbanes-Oxley world, present any potential legal challenges facing the company and talk

about the legal skills that the management team believes are needed to meet both present and future challenges. CEOs should share market information with the board; unlike other senior management positions, the availability of qualified legal talent can be limited as corporations must compete with higher paying law firms for the best legal talent. In addition, the specificity of the credentials, skills and experience required for the position also can overly narrow the pool of available candidates.

COMMUNICATE

In addition to establishing the roles of the CEO and the board, CEOs are advised to make the search process as transparent as possible. This includes proactively preparing and disseminating board-ready documents and periodic search updates to the directors, as appropriate.

The company also should communicate regularly with the general counsel candidates. CEOs and their executive search advisers need to inform candidates that the board will be involved in the process. Not only does this minimize the element of surprise for the candidates, but it also demonstrates the importance that the board places on hiring a top-flight general counsel.

PARTNER WITH AN ADVISER

CEOs are well served by partnering with legal search specialists associated with executive search firms. Experienced search consultants can tap into a wider universe of potential general counsel candidates than typically would be known to a CEO and his or her company network.

Equally as important, legal search consultants can assist the CEO in navigating the search process with the board of directors. For example, it is critically important that smart, well-connected directors — often with the best of intentions — not conduct informal reference checks on candidates. Directors who become too enthusiastic about participating in a search can inadvertently damage a candidate's reputation and risk jeopardizing his or her current employment. A professional legal recruiter can work with a CEO and the company to minimize this risk.

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Profiling the general counsel

Boards of directors today are actively involved in the recruitment of the general counsel. One challenge in the search process is ensuring that the CEO and the board share the same vision of the experience required for the general counsel role.

Management and directors are particularly attracted to candidates who currently are general counsel of a public company who have major law firm and senior government experience built on superb academic credentials and a judicial clerkship, preferably a Supreme Court clerkship. Boards and CEOs also consider the following qualities and experiences when recruiting a new general counsel:

- > Ability to provide senior management and the board with a 35,000-foot view of the company while also managing the intricate, day-to-day duties of a general counsel
- > Chemistry with the company's CEO
- > Exceptional judgment and unquestioned integrity
- > Experience working closely with boards of directors
- > Interpersonal skills that mesh with the organization's culture
- > Experience managing a legal department
- > Experience working at a senior level at the U.S. Securities and Exchange Commission, the Department of Justice or as an assistant U.S. attorney

CONCLUSION

In these complex times, most CEOs understand the forces motivating director involvement in general counsel recruitment and take it in stride. They appreciate the reasons for the board's expanded role and understand that director input is a way to elevate the importance of the general counsel role, strengthen the relationship between management and the board, and ensure that regulators see that the company is serious about compliance.

Ultimately, the extent of the board's involvement will be dictated by the state of the business, the board's relationship with the CEO and the directors' level of interest. Little doubt exists, however, that CEOs need to proactively manage board involvement in the process, as directors are now critical to the successful recruitment of a top-flight general counsel.

ABOUT THE AUTHOR

Catherine Nathan, based in New York, is a lawyer and co-leader of Spencer Stuart's Legal Search Practice. Since entering search in 1988, Catherine has developed a successful retained legal search practice, recruiting general counsel, senior in-house lawyers, including chief patent and intellectual property counsel, and partners for major corporations, financial institutions and law firms. Her diversified client base includes Amgen, Bank of New York, Baxter International, Bechtel, Bristol-Myers Squibb, ConAgra, Diageo, Harley-Davidson, International Paper, MCI (2003), Pitney Bowes, Reuters America and Tyco International (2002). Catherine earned her law degree from Boalt Hall School of Law, University of California at Berkeley, and her undergraduate degree as an honors major in Russian studies from the University of Pennsylvania. She practiced law for six years with two Wall Street firms.

ABOUT THE LEGAL SEARCH PRACTICE

Spencer Stuart's Legal Search Practice focuses on the recruitment of general counsel for major corporations and financial institutions, and senior partners for preeminent law firms around the world. Over the past two years, we successfully have conducted more than 250 assignments. Our consultants, most of whom are lawyers, bring to each assignment a sophisticated understanding of the legal community, coupled with unparalleled access to the finest in-house and private practice lawyers. In addition to focusing on recruiting general counsel, we assist clients in building their legal and staff functions, including assistant general counsel, chief compliance officers, chief patent counsel, securities counsel and corporate secretaries.

ABOUT SPENCER STUART

Spencer Stuart is one of the world's leading executive search consulting firms. Privately held since 1956, Spencer Stuart applies its extensive knowledge of industries, functions and talent to advise select clients — ranging from major multinationals to emerging companies to nonprofit organizations — and address their leadership requirements. Through 50 offices in more than 25 countries and a broad range of practice groups, Spencer Stuart consultants focus on senior-level executive search, board director appointments, succession planning and in-depth senior executive management assessments.

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