

# Setting your place at the top table

How can in-house lawyers be effective if they are ignored by their company's key decision-makers? A recent LexisNexis Martindale-Hubbell Counsel to Counsel forum examined how best to be heard at the highest levels. By RICHARD PARNHAM

In order to achieve their strategic objectives, general counsels require the continued support of their board of directors. But, with few counsel sitting on their company's board, it is not always easy to build credibility with these important individuals. The latest C2C session in London discussed how counsel can enhance their status with their company board – and what to do if their advice is not heeded.

## A good crisis

Although it may sound cynical, several speakers suggested that a corporate crisis is probably the best way for general counsel to improve their credibility with their company's board. In a crisis, a competent general counsel can often become the face of the enterprise to a hostile regulator and can become pivotal to deciding whether the company – or at least, its reputation – sinks or swims. Even if a crisis is outside the counsel's sphere of competence, simply maintaining an up-to-date list of outside law firms that board members can turn to is a unique skill that no other department can offer. And, where a crisis is due to a regulatory investigation or possible legal breach, the event presents counsel with a – possibly unique – opportunity to deliver a positive influence over the company's legal governance.

This challenge was faced by one general counsel present at the meeting, as

they worked to rebuild their company's reputation after a series of financial scandals. Ironically, the counsel proved their worth to the company's shareholders and the directors by helping to persuade the entire existing board to stand down. This process took several months, but it was essential for the company that this should happen," they said. "The board members were obviously concerned about their potential liabilities and whether they would be covered by indemnity insurance." Fortunately, the crisis dramatically improved the reputation of the company's legal function, which had previously been regarded as weak and ineffective. "The incoming board members introduced a world-class compliance culture, with a full-time general counsel reporting directly to the board," said the in-house lawyer.

However, counsels do not have to wait for a 'bet the company' crisis to prove their worth to their directors. In some situations, particularly in relation to reputation risk, a counsel can prove their worth even when the risk is – in reality – of trivial legal significance. At the meeting one practitioner, who had worked at both a law firm and in-house, recalled how they once were able to obtain an injunction against a newspaper which prevented them from publishing an unproven allegation in relation to a company employee. In

another instance, the company's lawyers were able to block a hostile press story relating to the remuneration of one of the company's senior directors. "This matter went to the heart of the director's standing with the business community, which was very important to them," the lawyer said. "Proving your worth is very much about seizing opportunities that present themselves."

## Day to day credibility

For those counsel fortunate enough to sit on their company's board, building credibility is normally relatively straightforward. A persuasive persona, technical competence, and the ability to give clear and commercially-focused legal advice is usually the easiest way to ensure senior counsel are taken seriously.

However, several speakers – particularly from Asia Pacific jurisdictions – warned that board culture in some countries was very different to that in Anglo-Saxon territories. Unlike Anglo-Saxon board meetings, where disagreements between directors are fairly commonplace, board meetings in other countries are not always so combative. Western counsel taking up a new position on a company board in an unfamiliar jurisdiction should therefore consider opting for cultural awareness training. "In Korea, decisions are never made in the board meeting – they are always decided

*'General counsel and the top table: working more effectively with your board of directors'*  
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## Session co-chairs:

James E Brumm, executive vice president and general counsel, Mitsubishi Europe Corporation  
Giuseppe Sanna, senior vice president and general counsel, CHEP Europe  
Tim Flanagan, senior vice president and general counsel, Tyco International Inc

## Subject matter expert:

Philip Keevil, senior counsel, Compass Advisers

## Session co-hosts:

Mike Schuette and Peter Fitzpatrick, Howrey LLP  
Denise Jagger and Ed Paget-Brown, Eversheds  
Kathryn Thomas and Jeremy Davis, K&L Gates

## Session facilitator:

Leigh Dance, ELD International Inc

either before or after the meeting," said an in-house lawyer representing an Asia Pacific-based company. "Also, you should never disagree with someone in a Korean board meeting, no matter how stupid you think the comment is." Another in-house counsel said: "In Japanese company culture, the board meeting is a ceremony to conclude what has already been decided. Japanese directors do not like to be surprised at their board meetings."

Of course, most general counsels are not also >

members of their company's board and, unless their role is combined with that of company secretary, are not guaranteed regular contact with directors. With many boards meeting just a few times per year, opportunities to impress directors 'in the flesh' will invariably be limited. The process of building credibility with board members must therefore take place largely outside the board room.

Several speakers outlined how counsel should build credibility with their directors, despite these constraints. For example, they suggested that the legal function should submit regular reports to the board, outlining their department's recent activities – even if not asked to do so. However, others expressed doubts whether, in reality, submitting papers to the board would be sufficient to raise the legal department's profile. One UK company counsel said: "As a board member myself, I can tell you that we receive lots of information packs and reports from departments. But, unless the counsel is actually present at the meeting, there's no way that they can tell how their report was received."

Alternatively, another in-house lawyer suggested that counsel should volunteer to run projects, which may not necessarily have a specifically legal context, as a way of obtaining board-level contact. "I volunteered for projects that would otherwise have been given

to the finance director," they said. Meeting with new and potential board members was also suggested as a way of raising their profile. The meeting should aim to explain the legal risks directors may be exposed to.

Another practical issue for in-house counsel is that the composition of boards is, by necessity, fluid. Board members come and go – and not always in pleasant circumstances. For in-house counsel, therefore, maintaining a good relationship with a board must be an ongoing process, and not an activity that can be 'checked off'.

Developing this theme, several speakers recalled how their employees' complex ownership structures regularly frustrated their ability to identify and influence key directors. Some worked for multinational companies that also operated national subsidiaries or joint ventures. Naturally, each of these legal entities came with their own legal risk profiles, boards of directors and local management teams. "In my company managerial decisions are taken at different levels in different countries," said an in-house counsel working for a large multinational: "I can advise my local board members on how they should proceed, but I cannot guarantee that this advice will be followed at group level."

*When relationships break down*

It is an unfortunate truth that expertise in a particular

subject does not always guarantee recognition and respect, or that advice will be adhered to. This is certainly true of the role of general counsel. In some companies, the general counsel may be a board's trusted strategic adviser. In others, they may be treated as little more than a glorified paralegal, who can safely be ignored.

Many general counsels will be familiar with the problems of 'lawyer shopping'. Here, local line managers attempt to buy legal advice which is more favourable to their commercial objectives than that offered by the company's own lawyers. Unfortunately, this tendency is not limited to low level managers. While the latter may be excused for trying to place their own sectional interests above the interests of the company as a whole, the same behaviour can also be observed among board members. One speaker recalled instances, both within his own company and with other companies they were involved with, where lawyer shopping has occurred. For this practitioner, one of the key roles of the in-house lawyer is to advise the board on how to behave in a manner that is not only legally correct, but which also takes into account 'best practice'. In some situations, 'best practice' may require a board to adhere to a higher ethical standard of behaviour than is legally required.

Where counsel suspect that their advice is not being listened to, one way they can protect their position is through their contract of employment. For example, one former in-house lawyer said their contract of employment at their previous position had given them the sole right to instruct outside counsel. This provision should, in effect, prevent other company personnel from 'lawyer shopping' without counsel's express approval. Similarly, another in-house counsel enjoys a contract provision which mitigates against the impact of not being listened to: "If my company chooses not to follow my advice, I can issue them with a notice giving them 30 days to comply. If they still don't do so, I am entitled to resign with a pay-off equivalent to two times my annual salary."

In some situations, the board of directors may treat their general counsel with such disrespect that the counsel's position is no longer tenable. One speaker was able to give a singular anecdote of a general counsel who had taken 'mild exception' to a comment made by the company's chairman at a board meeting. "After the break, he was locked out of the meeting," they said. "Remarkably, the general counsel remained in his position for a year-and-a-half after that event. If, as a company counsel, that kind of thing ever happens to you, my advice is run, don't walk, from the company and don't look back." ■