



Does your Corporate Secretary have to be your company's attorney?

The Corporate Secretary role has evolved

The role of the Corporate Secretary has evolved from primarily taking minutes of Board and Committee meetings to entailing many and varied managerial and administrative responsibilities. These responsibilities include board and committee support, board and committee meeting preparation, subsidiary management, corporate governance service partner management and corporate governance consulting.

Distinctly different roles

The Corporate Secretary responsibility is usually assigned to another corporate officer, typically the general counsel. If there is no general counsel, some companies will ask an attorney in a law firm to perform the Corporate Secretary role, in particular to take minutes at Board meetings, at substantial cost. The corporate governance role of the Corporate Secretary is distinctly different than the legal counsel role of the company's internal and external attorneys, even though the two roles have often been combined for convenience purposes. The Corporate Secretary's broad set of responsibilities does not involve providing legal advice to the company.

There is no legal requirement that the Corporate Secretary be the company's internal or external counsel. A legal background is not

should be separated. There are a number of reasons for the separation of the two roles.

FIRST, having the company's legal counsel also serve as the Corporate Secretary diminishes the legal counsel's ability to perform his or her core professional responsibilities. The responsibilities of the Corporate Secretary are demanding and cannot be adequately performed if they are assigned to the company's legal counsel, who has a separately demanding role. Also, the company's legal counsel may not have the background and experience necessary to perform the Corporate Secretary role, for example when the company's legal counsel has a regulatory or intellectual property law or litigation background or has not previously served as a Corporate Secretary. When the two roles are combined, the performance of the Corporate Secretary role typically takes a "back seat" to the performance of the legal counsel role, a result that is not good from a corporate governance perspective.

SECOND, if the company's legal counsel has the responsibility to take minutes at board and committee meetings and attend to the board's meeting logistics and other requirements, he or she is less able to actively participate in the board and committee meetings in his or her capacity as the company's legal counsel. In that regard, the ideal independence between the company's legal counsel and the Corporate Secretary roles is necessarily compromised when the two roles are combined.

THIRD, there is a potential conflict of interest between the company's legal counsel and Corporate Secretary roles when the same person performs both roles. In situations where the Corporate Secretary and the company's legal counsel are the same individual, it is often unclear as to whether communications between the person performing both roles and the board or executive management constitute legal advice provided by the company's legal counsel, which is protected by the attorney-client privilege, or corporate governance advice provided by the Corporate Secretary, which is not protected by the attorney-client privilege. In those ambiguous situations there is a strong possibility that an attorney-client privilege challenge may evolve in any potential future litigation in which those communications will become the subject of discovery during the lawsuit process. This risk can be avoided by separating the roles of the company's legal counsel and the Corporate Secretary so that it is clear as to which communications are privileged and which are not. The corporation's objective should be to adopt practices that ensure the attorney-client privileged nature of all of communications from the company's legal counsel to the board and executive management. These practices should include having communications from the Corporate Secretary be completely separate from communications from the company's legal counsel.

FOURTH, a separation of the role of the Corporate Secretary from the role of the company's legal counsel provides the Corporate Secretary with the latitude to robustly perform the increasingly important, demanding and expanded nature of the Corporate Secretary role.



required to perform the responsibilities of the Corporate Secretary, which are distinctly different than those of the corporation's attorneys who provide legal advice. Many Corporate Secretaries do not have a legal background.

The pitfalls of combining roles

There is a growing school of thought in the corporate governance community that the Corporate Secretary and corporate counsel roles

Not a full time role

Except in very limited circumstances, the Corporate Secretary role is not a full time role. In many circumstances, particularly in companies with limited managerial or administrative personnel resources to staff an Office of the Corporate Secretary, the Corporate Secretary role is often not performed in an appropriately robust manner. Also, in circumstances where a company both has a general counsel and chooses to assign the Corporate Secretary role to that individual, the company's general counsel would have more time to properly perform his or her primary professional role if he or she could be relieved of the burden of performing the managerial and administrative responsibilities of the Corporate Secretary. A retained external Corporate Secretary could perform those responsibilities instead.

Outsourcing—the best of both worlds

For corporations that would seek to separate the fractional officer role of the Corporate Secretary from the full time role of the general

counsel or other corporate officer in order to relieve the general counsel or other corporate officer from the burden of performing the Corporate Secretary role, outsourcing the Corporate Secretary role completely or partially to an external “fractional officer” provider that has the resources and relationships necessary to fully deliver the services of an expert and professional Corporate Secretary is an option to be considered. A company can engage external Corporate Secretary service providers in order to improve its internal Corporate Secretary capabilities without increasing staff. This approach allows a company's general counsel or other corporate officer that is also elected to be the company's Corporate Secretary to focus on their primary professional responsibilities while enabling the company's Corporate Secretary responsibilities to be performed by experienced external corporate governance professionals. These external corporate governance professionals employ the breadth and depth of their corporate experience to help Boards of Directors practice robust corporate governance. When situations arise that require legal advice, they partner with the company's legal counsel to ensure that the company's attorneys handle the company's legal matters

Do More

Do Less

Do More With Less

About the author

PAUL MARCELA served as General Counsel and Secretary of two Cerberus Capital Management portfolio companies. Previously, he performed as Associate General Counsel and Assistant Secretary of Dow Corning Corporation. Paul is now President of Governance Partners Group, a professional services firm that is exclusively devoted to providing external Corporate Secretary services for companies that seek to outsource all or a portion of their Corporate Secretary functions.

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