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Private Directors Association Newsletter March 2017
*Part II on the Corporate Secretary Role in Private Companies:
 Should the Corporate Secretary and General Counsel Roles be Separated?*

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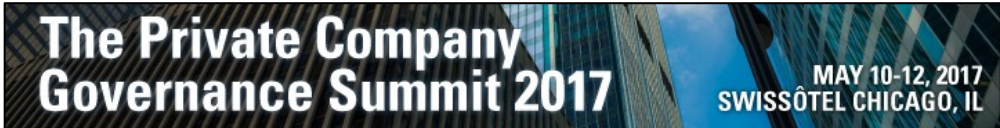
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Contributing Editor: Paul Marcela was Associate General Counsel and Assistant Secretary of Dow Corning Corporation, and more recently Paul served as general counsel and secretary of two Cerberus Capital Management portfolio companies. Paul has developed a professional services firm exclusively devoted to providing a fully or partially outsourced Corporate Secretary function for companies that seek to outsource the function.

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The role of the corporate secretary has evolved to entail many and varied managerial and administrative responsibilities. These responsibilities fall into the categories of board and committee support, executive management collaboration, legal entity governance management and governance program and process development and enhancement. In most corporations, the role of the corporate secretary, who is an elected corporate officer, is a fractional officer role. As a result, the corporate secretary responsibility is typically assigned to another corporate officer, such as a general counsel. In companies that do not have a legal department, the corporate secretary role is often combined with a chief administrative officer, chief financial officer, chief compliance officer or other corporate officer role. Some companies will ask a lawyer in a law firm to perform the corporate secretary role under the belief that attorneys must necessarily perform the role.

There is a growing school of thought in the corporate governance community that the corporate secretary and general counsel roles should be separated. The two roles are distinctly different, even though they have often been combined for convenience purposes. There is no legal requirement that a company's corporate secretary should be the corporation's internal or external legal counsel. A legal background is not required to perform the responsibilities of the corporate secretary, which are managerial and administrative in nature. These responsibilities are different than those of the corporation's attorneys who provide corporate or securities law advice.

There are a number of reasons that the roles of the corporate secretary and general counsel should be separated. Having the general counsel also serve as the corporate secretary takes time out of the general counsel's schedule to perform his or her core managerial and professional responsibilities. The responsibilities of the corporate secretary are demanding and cannot be adequately performed if they are assigned to the general counsel or another corporate officer, who has a separately demanding role. Also, a general counsel may not have the background and experience necessary to perform the corporate secretary role, for example when the general counsel has a regulatory or intellectual property law or litigation background and/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 general counsel role, a result that is not good from a corporate governance perspective. This situation also exists when another corporate officer performs the role of the corporate secretary.

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Second, if the general counsel has the responsibility to take minutes at board and committee meetings and otherwise attend to the board's requirements, he or she is less able to actively participate in the board and committee meetings in his or her primary capacity as the company's legal counsel. In that regard, the ideal independence between the general counsel and the corporate secretary roles is necessarily compromised when the roles are coupled.

Third, there is a potential conflict between the general counsel and corporate secretary roles when the same person performs both roles. In situations where the corporate secretary and the general counsel are the same individual, a question arises as to whether communications between the board and/or executive management and the person performing both roles are legal advice provided by the general counsel, which is subject to the attorney-client privilege, or general corporate governance and non-legal advice provided by the corporate secretary, which is not subject to the attorney-client privilege. As a result, if it is not clear as to which communications between the board and/or executive management and the general counsel and corporate secretary are legal, as opposed to business, in nature, 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 general 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 the general counsel's communications to the board and executive management. These practices should include having communications from the corporate secretary be completely separate from the communications from the general counsel.

Fourth, a separation of the role of the corporate secretary from the role of the general counsel or other corporate officer provides the corporate secretary with the latitude to robustly perform the increasingly important, demanding and expanded nature of the corporate secretary role.

Except in very limited circumstances, the corporate secretary role is not a full time role. In many instances, particularly in private companies with limited managerial and administrative personnel resources to staff an office of the corporate secretary, the corporate secretary role is often not performed in an appropriately robust manner. In addition, a chief administrative officer, chief financial officer, general counsel, or other corporate officer who would be relieved of the burden of performing the managerial and administrative responsibilities of the corporate secretary would have more time to properly perform his or her primary professional roles.

For corporations that would seek to separate the fractional officer role of the corporate secretary from the full time role of another corporate officer in order to relieve that 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 a an option to be considered. A company can engage those service providers in order to improve its internal corporate secretary capabilities without increasing staff. This approach allows company officers that are also elected to be the corporate secretary to focus on their primary professional responsibilities while enabling the company's corporate secretary responsibilities to be performed by an experienced external corporate governance professional.

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Body of Knowledge Categories: Board Operations and Law