

For example, in representing the client—the company—the CLO normally has extensive dealings with and takes direction from the CEO. However, what if the board of directors disagrees with the CEO? And what if the shareholders of the company disagree with the board? In these and other circumstances, it can be difficult for the CLO to know who can speak for the client and whose directions s/he must take.

Another example is what happens when an executive or other employee informs the CLO that s/he has engaged in illegal or questionable conduct. At that point, the CLO may be required to let the individual know that, as CLO, s/he represents the company rather than the individual and that the individual's admission will not be protected by the attorney-client privilege. This example brings home the fact that other constituencies within the company—including the board itself—may be confused as to the CLO's role and when s/he can be trusted with certain types of communications.

From the board's perspective—Making the best/highest use of the CLO Relationships and interactions with the board, committees and their leadership.

These relationships and interactions are not limited merely to reporting on developments; rather, to add value, it should include providing the board and committee(s) with ongoing evaluations of the risks, exposures and possible outcomes associated with these areas. The importance of keeping boards and committees current in these areas is demonstrated by the fact that CLOs (or members of their teams) customarily report to audit committees, and occasionally to other committees and the full board, including in executive session, to preserve attorney-client privilege or confidentiality due to the sensitive nature of the matters discussed.

From a more general perspective, the CLO or someone reporting to him/her frequently functions as the corporate secretary. This gives the CLO's team a significant role and even a degree of control over the agendas of the board and committees, including the topics to be covered and even the amount of time to be spent on each item. It also means that a CLO or his/her designee attends board and committee

meetings and provides ongoing advice and guidance as to the items under discussion. Last, it provides the CLO with many opportunities to interact with the board leadership—the board chair (whether or not the CEO holds that title) and/or the lead or presiding independent director, and the chairs of the committees with which the CLO interacts.

Supporting the CLO

In these and other functions performed by the CLO, there are many ways in which a board can make the best and highest use of the CLO, including the following:

- **Treating the CLO as a valued "consigliere":** The board can help the CLO fulfill his/her responsibilities, not only by treating him/her as a valued advisor but also demonstrating that it places trust and confidence in the CLO. There are several ways that the board can achieve this goal. For example, while it may be necessary or advisable for the board or a committee to engage outside counsel, the CLO should generally be able to effectively and properly advise the board and its committees or to manage the relationship between the board or committee and outside counsel. However, a board's decision to seek its own counsel at all times or to routinely exclude the CLO from its meetings and deliberations will send a signal—not only to the CLO but also to other members of the c-suite and employees generally—that the board does not trust the CLO and/or may not be comfortable in relying upon the advice rendered by the CLO.

Of course, the unusual nature of the relationship between the board and the CLO—at least one in whom the board has trust and confidence—can impact the CLO's relationship with the CEO. The CLO is typically hired by and reports to the CEO, at least for administrative purposes, and some CEOs may be threatened by the independent relationship of the CLO with the board, particularly when the CEO is new, does not have a good relationship with the board, or is otherwise insecure. For that and other reasons, to the extent feasible, it is desirable that, in dealing with the board, the CLO keep the CEO informed of the board's views and not go behind the CEO's back.

The complex relationships among the board, the CEO and the CLO can become even more complicated in cases where the board decides to make a management change—i.e., to replace the CEO. Particularly when the board takes the CLO into its confidence when making the change, the CLO's role may be akin to walking on a tightrope, as s/he has to continue to report to the CEO without betraying the board's confidence or taking actions that may cause the CEO to realize that his/her position is in jeopardy.

- **Providing and disseminating knowledge and information:** One of the many challenges facing any board is that it lacks detailed knowledge of and information about the company, its businesses and its people; after all, being a board member is a part-time position, and as a practical matter the board cannot possibly know as much about the company as someone who works there day in and day out. In contrast, a key attribute of the CLO is his/her detailed knowledge of the company. Thus, one particularly important use of the CLO can be to provide information to the board. Boards often ask management to provide "color" about the company on subjects such as the functioning of and relationships among the c-suite, the extent to which members of the c-suite and employees generally "walk the walk" on issues such as diversity and compliance generally, and other areas that are difficult for a board to know, and a CLO can provide critical insights in these and similar areas.

"Learn to simplify. Because you are speaking to a board that may not have prior knowledge about the topic or what the legal issues may be. Make it board simple. I think that is very critical."

Mark Roellig, Executive Vice President and General Counsel, Massachusetts Mutual Financial Group ➤



The CLO as a board member

Given that many CLOs are intelligent and have knowledge of and experience with the dynamics of boards of directors, it seems reasonable to consider whether CLOs make good directors.

There does not appear to be any research on the number of CLOs—or even attorneys in general—that serve on boards. In the absence of such evidence, what are the factors that might be taken into account in considering a CLO for a board?

- While legal skills can be an important asset for a board member, in most instances—e.g., unless the company is involved in “bet the farm” litigation—such skills should not be the only attribute a CLO can bring to the board. In fact, many boards view legal advice as something they get from their CLO or from an outside law firm rather than from a director. In considering a CLO for a board seat, the company should consider whether the CLO has the necessary range of knowledge, experience and focus and/or whether s/he sees only one way of addressing problems and challenges, particularly in the case of certain legal specializations.
- A similar concern is whether CLOs lack operational experience.
- Many CLOs have an understanding of the responsibilities of the board and management (i.e., corporate governance), how companies work, and how things can get off the rails.
- Attorneys tend to be very thorough and detail-oriented. This trait is admirable when providing oversight for transactions, litigation and other matters, but could raise a question whether this could lead a CLO to micromanage in his/her capacity as a director.

At the same time, it can be difficult for a board to communicate information to the company; directors often speak to the CEO, some (but usually not all) members of the c-suite, and on a limited basis to people who report to c-suite members. However, while directors may have more access to the employee population now than has been the case for many years, it can still be challenging for directors to convey their views to employees below the c-suite. The CLO can also be used as a conduit to convey information to other members of the c-suite and to the larger employee audience.

- **Demonstrating tone at the top:** The board has oversight responsibility for the “tone at the top”—setting and maintaining high ethical standards. However, because the board is not present day in and day out, it cannot show employees at large that it is “walking the walk” where these standards are concerned. However, the CLO can demonstrate that the board and senior management take tone at the top very seriously. Sometimes this may be achieved by taking disciplinary action against an employee—or even a member of the c-suite; however, at other times it can be demonstrated by “doing the right thing” even though it may not be legally required. For example, actions and behaviors of the CLO and other C-Suite members can speak volumes concerning the company’s commitment to diversity.

CLO’s perspective: Walking the tightrope

In many and hopefully most cases, the CLO’s role is not likely to create the challenges outlined above; particularly in a healthy company that is performing well, the board and management, including the CEO, are likely to be aligned and able to work well together. However, a forward-thinking CLO, realizing that difficult times could arise, will engage in behaviors to establish credibility and trust to minimize problems that occur in hard times.

- **Integrity and trust above all.** First, above all, the CLO should demonstrate the overarching importance of integrity in his/her behavior. In other words, in providing both legal and business advice, the CLO should show that s/he has a strong ethical and moral compass. As discussed above, while the board of directors has oversight responsibilities for setting and maintaining the proper “tone at the top”, senior management has a primary role in doing so, and in that regard the CLO has a major and possibly unique responsibility. At the same time, to establish trust, the CLO must act with discretion and demonstrate that s/he can keep confidences.
- **Accept risk and ambiguity.** Second, as a practical matter, the CLO should understand and accept the risks and ambiguity that go along with his/her role. A CLO who does not appreciate that s/he has more than one role at the company or that those roles may occasionally conflict with each other may be blind to those conflicts when they occur. This can happen when the CLO “goes along to get along” by not attempting to prevent illegal or unethical conduct in which the company and/or its management may be engaging. Ignoring improper actions, whether consciously or unconsciously, may cement the CLO’s status as a member of the senior management team—and can sometimes be lucrative—but it may render the CLO incapable of performing his/her proper role and can have other serious adverse consequences. At the same time, the CLO needs to be aware that if management or the board prevents him/her from “doing the right thing,” s/he may need to resign. ➤

- **Avoid unilateral behavior.** Third, while the CLO should maintain strong relations with the CEO and the management team (and be a part of the latter), as well as with the board, s/he should be careful not to get out in front of any of these constituencies. In other words, the CLO needs to understand that s/he reports to the CEO and to the board for various purposes, and cannot act unilaterally on matters within their respective areas of responsibility without consulting either or both of them and, hopefully, securing their approval. For example, a CLO would be ill advised to report wrongdoing to the government without informing the CEO, other relevant members of the c-suite and/or the board and getting their approval to do so. In some cases, the CLO may also need to consider the actions that may need to be taken if that approval is inappropriately denied.
- **Know who the client is/is not.** The CLO should understand and communicate who the client is, and is not, and how this can change over time. For example, the members of the management team who seek the CLO's counsel should understand that s/he represents the company, not the individuals who run the company on a day-to-day basis. An effective CLO can convey this over time so that his/her role is clear.
- **Roles and behaviors.** Similarly, because the CLO combines the roles of attorney and business advisor, there may be times when s/he needs to be clear as to the role in which s/he is functioning. Further, to establish and maintain credibility and trust with both management and the board, the CLO should understand and communicate when s/he is acting as an advisor and confidant of the board versus acting in those roles for the CEO or other members of management.

The CLO also should be able to achieve an appropriate balance between pushing back to management or the board and stepping back from confrontations with either. Of course, it is appropriate to push back when management or the board proposes to take actions that are inadvisable. This can be a great challenge for some attorneys, who are trained—quite properly—to advise management as to risks and leave it to management to decide whether and the extent to which risks can be taken (assuming that the risks in question are neither illegal, unethical nor grossly negligent). The joint role of the CLO—as an attorney and a member of management—can mean that s/he not only needs to advise as to risks but also to advocate for or against taking them.

By the same token, the CLO should know when to step back. As a general rule, attorneys have a strong need or desire to win, but if a CLO insists upon winning every battle, s/he may be viewed as an obstructionist who is more concerned with being right than with being a member of the team capable of pursuing and achieving common goals.



The CLO's role in diversity

In all of the CLO's roles—attorney, business advisor, management team member or director—s/he can demonstrate leadership by working to effect diversity throughout the organization. Here are a few examples where the CLO may impact diversity within the organization:

- **Promote board diversity:** Counsel the board to consider diverse candidates to fill board vacancies; expand the definition of diversity to include gender, race, ethnicity, and diversity of thought. Use a skills matrix to determine the gaps in skill sets (i.e., not limiting board candidates to current and former CEOs.)
- **Support management diversity and lead by example:** Encourage other members of the management team to support diversity in their hiring practices, particularly at senior levels, including the c-suite. Lead by example within the legal team, by hiring and promoting women and minorities.
- **Be an effective spokesperson and role model:** Demonstrate a commitment to diversity in all daily actions and behaviors and “walking the walk.”

Conclusion

The role of CLO provides many opportunities, but it can also present many challenges. The board, management and the CLO him/herself need to be careful and vigilant to facilitate the optimal performance of the person filling this critical role. ➤

Authors:

Ken Avery

**Leader, US CLO Program
Partner, Deloitte Advisory**

Deloitte Financial Advisory
Services LLP
keavery@deloitte.com

Bob Lamm

Independent Senior Advisor

Center for Board Effectiveness
Deloitte LLP
rlamm@deloitte.com

Debbie McCormack

Managing Director

Center for Board Effectiveness
Deloitte LLP
dmccormack@deloitte.com

Contact us:

Deborah DeHaas

**Vice Chairman, Chief Inclusion Officer
and National Managing Partner**

Center for Board Effectiveness
Deloitte LLP
ddehaas@deloitte.com

Henry Phillips

**Vice Chairman and National
Managing Partner**

Deloitte & Touche LLP
henryphillips@deloitte.com

Maureen Bujno

Managing Director

Center for Board Effectiveness
Deloitte LLP
mbujno@deloitte.com

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