

## No, GCs Should Not Be on the Board

By: Ben Heineman, Jr.  
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A provocative headline recently topped a CorpCounsel.com story: [“Should GCs Be on the Board? GCs Say Yes.”](#)

This former GC says “no.”

In fact, the story presented a much more modest and qualified account of that issue in describing “The General Counsel Excellence Report 2013,” prepared by the news site Global Legal Post, in association with legal referral network TerraLex and based on a survey of 270 chief legal officers globally.

Only 9 percent of the GCs surveyed were on their companies’ boards, and only 20 percent thought that GCs should be on the board. Those 20 percent, in my view, are wrong—and it is a mistake for a trend to develop among general counsel to aspire to membership on their company’s board.

As this site’s readers know well, the GC represents the company, not the CEO. The representative of the owners of the company—who protect both shareholder and stakeholder interests—is, of course, the board of directors. So, the directors are the day-to-day representatives of the company, not management, and thus the ultimate client of the GC.

To me, it is obvious that the GC should not be both lawyer and client, as this creates insoluble conflicts of interest. It makes no sense to be on the board when the GC has to recuse herself, as she must, from every decision on issues in which she is involved as lawyer/counselor. The GC’s job is to provide advice and recommendations on a variety of hard issues, acting as a wise counselor who seeks to help the company fuse high performance with high integrity. The board’s job is to make decisions based on those and other management inputs.

This is really the beginning and end of GCs as board members for their own company. No—because of conflicting roles—period. Full stop.

But GCs should be engaged with the activities of the board, even if not as a formal board member. The key is that the GC should be an integral part of board culture. Only the CEO should be on the board, but other key business leaders—vice chairs, CFO, and GC—should be present at every board meeting strictly in their capacity as management. And they should also be present at key committee meetings—audit, nomination/governance, risk, public responsibilities—with the exception of compensation. They should also be involved in board dinners, board travel, and other board events.

And as a key participant in the board culture, without being a member of the board, these executives can be free to comment at board meetings, either if asked or if they believe it is appropriate to elucidate an issue. By being part of the board culture, they will also develop relationships with directors who will feel free to call the vice chairs or CFO or GC if they have a question between board meetings and don't want to bother the CEO. If necessary, the non-board management attendees (including the GC) can be asked to leave either board meeting or committee meeting if the board wishes to deliberate alone, although this is likely to be a rare occurrence in part because of the now-common practice of boards meeting by themselves—before or after board meetings—without anyone from management present, including the CEO.

I believe that having top management attending board meetings and events and becoming part of the board culture, so that their voices are readily available to directors, is a best practice. With the exception of the CEO, having top management be actual members of the board is a bad practice, as it compromises the necessary independence of the board and, in the GCs' case, creates insoluble conflicts of interest.

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