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The GC's Role in Managing the Board/Management Dynamic During Times of Crisis

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By Michael W. Peregrine

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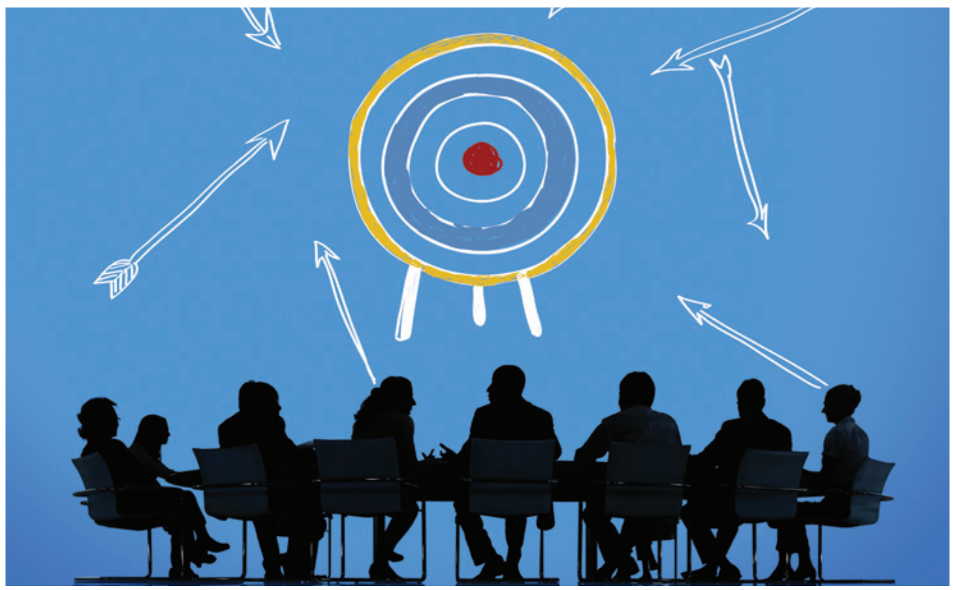
The ability of both constituents of senior leadership to faithfully execute their duties in times of crisis requires a shared understanding of the basic distinctions between the roles of governance and of management. This is particularly the case as both seek to satisfy enhanced expectations of their conduct created by the crisis. The general counsel, as senior legal adviser to both, is well-situated to advise them on their respective responsibilities.

Basic elements of the respective duties are set forth in state corporation law, and helpful position descriptions are the subject of much attention in governance guidelines prepared by leading public policy organizations. Take, for example, the Business Roundtable's helpful perspective.

It ascribes to the board the basic responsibility for oversight of corporate management and business



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strategies, consistent with the goal of long-term sustainability. Specific responsibilities extend to the selection and supervision of the CEO and the CEO succession process, well as oversight of the corporate risk appetite; allocation of capital; annual operating plans and budgets; the integrity of financial statements; corporate strategy and the implementation of strategic plans; business resiliency plans; the relationship with the outside auditor; compliance plans; the nomination of directors and committee members; and executive compensation.

And it ascribes to management (led by the CEO), responsibility for establishing, managing and implementing corporate strategies, including but not limited to the day-to-day operations of the company under board oversight and updating the board on operational status. Specific responsibilities extend to strategic planning, risk management and financial reporting. The expectation is that management will execute these duties in the context of a "meaningful" time frame (i.e., not unduly focused on short-term metrics).

But it would be far too convenient to conclude that the line separating what is the responsibility of the board, and what is the responsibility of management, is that clearly black and white. Rarely has it been that clear in the past, and it certainly is not the case currently. In times of great stress and disruption, the lines between what constitutes oversight and what constitutes operations tend to blur. This is especially the case with issues that materially affect lines of authority, changes in strategy, major business initiatives, capital plans, investment philosophies and fundamental corporate purposes.

The absence of a "bright line" separating what is the responsibility of governance, and what is the responsibility of management, can be the source of much leadership-level friction. The board and management can jockey for primacy, based upon equally legitimate interpretations of their respective duties.

As the Business Roundtable notes, there have always been circumstances—-none so dramatic as the current pandemic—that require more fulsome board involvement in operational matters, as in the case of a government investigation, financial crisis, or business interruption. Similarly, there are also areas where the board is normally expected to assert more authority than the CEO, for example regarding outside auditor relationships and executive compensation decisions.

Yet, the Commonsense Principles of Corporate Governance encourage the board to focus on "big picture issues," delegating other matters to management. And the National Association of Corporate Directors (NACD) has historically warned against undue due board involvement in the domain of management.

In this debate, it's likely that both sides are right. While both the board and management may from time to time make an effective case for the expansion of their respective authority, any such expansion should be the byproduct of thoughtful dialogue and sensitivity to both the dictates of corporate law and the recommendations of governance principles. That's especially the case when the company, its industry sector and/or the economy as a whole are facing extraordinary challenges.

The tensions inherent in a crisis-driven dynamic are often sharp. The board wants to make sure its response is consistent with what it knows to be an enhanced standard of fiduciary conduct. Directors seek a role commensurate with their responsibilities. The CEO and its senior executive team, on the other hand, seek the ability to guide the company through the shoals of calamity without unnecessary interference from board members who may lack commensurate operational skills. That's what they're trained to do.

The general counsel, with her professional responsibility to the corporation as a whole, is well suited to support leadership in crafting a solution to this problem. Given her unique dual role as technical expert to the corporation, and business partner to management, she is exceptionally well qualified to advise on the board/management dynamic from the perspective of the corporation as a whole, as well as of its respective leadership constituencies.

This is particularly so given her familiarity with applicable law and the company's governing documents, in her roles as adviser to both the company and the board on governance matters. She truly "sees the whole field," and that is a skill set that may be particularly helpful as leadership seeks to preserve continuity, coordination and collegiality during times of crisis. Board and executive leadership are well advised to be attentive to the potential for "role confusion" in times of crisis, and to invite the general counsel to serve as an expert facilitator of differing views.

***Michael W. Peregrine**, a partner at the law firm of McDermott Will & Emery, advises corporations, officers, and directors on matters relating to corporate governance, fiduciary duties, and officer and director liability issues. His views do not necessarily reflect the views of the firm or its clients.*