The Synergy of the CEO and CLO

Career Development

Many publications have examined the rapidly evolving role of the chief legal officer (CLO) from legal advisor to business advisor as well as their broadened responsibilities, from risk management to government affairs to other functions. These trends are attributed primarily to the CLOs' increased business acumen and their role as a strategic thinking partner. This article does more than describe ***what*** is happening; it goes further by explaining ***why*** it is happening. Importantly, the CEO and CLO need to act on the opportunities of this evolution. The underlying impetus of this positive development rests primarily with the concept of "common purview" — a holistic view of the business shared between the roles.

Establishing the optimal C-suite is essential for any CEO. The successful CEO must create an environment that maximizes synergy across the members of the leadership team and establishes each member as a true thinking partner. However, the CLO role is unique in that it can provide a degree of alignment with the CEO that is not generally present with other C-suite executives.

The leaders of an organization's various functional groups wear both a corporate hat as well as their functional leadership hat. As such, the latter role inevitably influences their role as corporate officer. This dual role is a good thing. What CEO does not want their chief technical officer passionately lobbying for the funding of new R&D projects, or a chief commercial officer advocating for more resources to drive corporate revenue? The CFO, CIO, and other senior executives also have their own coveted initiatives — and potential blind spots. However, because the CLO should have the same corporate purview as the CEO, the CLO has a unique partnering opportunity with the CEO.

A seat at the table

The CLO's responsibilities span all departments at the company and typically also include the board of directors. That broad scope, which provides a window into strategy and operations across the company and its board, creates the opportunity for a CLO to have a perspective different from other C-suite executives and, in many ways, aligned with the CEO's perspective. It is this common purview/alignment, this synchronicity, that the CEO should leverage. Contrast this view with how others have described the CLO role as being more strategic; the CLO has been presented as a *counterbalance* to the CEO in the now classic modern articulation of the CLO's business partner/company guardian tension.

The CLO will typically be the only other C-suite member who resembles the CEO by having a seat at the table in all of the company's key decision-making bodies. By being "in the room where it happens," the CLO can contribute to those discussions, challenge assumptions and, importantly for this discussion, gain a broader perspective on the company and one that closely mirrors that of the CEO. That unique perspective should allow the CLO to partner with the CEO in weighing business tradeoffs and priorities.

In addition to this common purview, the CLO has a number of attributes that enhance their value to the CEO and company, especially given the many uncertainties in today's business environment.

First, attorneys are trained to be dispassionate experts in risk/benefit analysis, a paramount skill for all decision-making matters and especially critical during times of crisis. Nearly every decision a CEO makes includes an inherent risk/benefit element and partnering with one's CLO on potential high-impact issues regarding risk/benefit can be invaluable. The CLO can also teach other members of the executive team how to objectively weigh risks and benefits when making decisions. Over time, such lessons can contribute to building awareness (i.e., they "build executives' antennae") and result in a richer thinking process that more thoroughly considers potential outcomes and consequences of key decisions.

Second, as an attorney, a CLO has been trained to be a problem solver and to seek resolution. The most obvious target for this skill is the resolution of the many legal issues that develop at companies, especially publicly traded ones. However, a CEO can deploy a talented CLO more broadly to resolve some of the complex, cross-functional conundrums that arise at all companies. The dilemma of how companies initially responded to the challenges of the COVID-19 pandemic was a problem that required firms to weigh HR, business, reputational, legal, medical, and practical concerns, with very limited precedent to provide guidance. Smart companies quickly assigned a leader to assemble a task force and determine which actions it would take in response. In many cases, that leader was the company's CLO, who had the credibility, gravitas, in-depth knowledge of the company, and most importantly in such a novel case, the ability to weigh different options and come up with guidance for the organization on what to do, even in the face of great uncertainty.

Last, the CLO is trained to present the "unvarnished truth," even if it is unwelcome news. That quality is valuable to every CEO because other direct reports likely share the human tendency to avoid displeasing the boss, particularly if the organization is under considerable strain. Other executives might portray a situation with too much optimism or delay in alerting the CEO to bad news, which of course blindsides the CEO and sets the company up for potential problems. This can be exacerbated if the situation requires the team to point out an error made by the CEO. These challenges are especially problematic for the new CEO, particularly if they do not have well-established relationships with members of the executive team. By contrast, the CLO knows that their role is sometimes to

serve as the one who tells the emperor that “he has no clothes.” That “truth teller” capacity, particularly when combined with a broad purview of the organization and an ability to dispassionately assess a situation, means that the CLO, as truthsayer, may be able to support a CEO in a way that other executives cannot. Furthermore, in times of crisis management, this degree of transparency is absolutely vital.

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Maintaining and developing the seat at the table

These attributes — the common purview, expertise in risk/benefit analysis, problem-solving mentality, truthsayer — contribute to the CLO’s ability to have and maintain a “seat at the table.” CLOs can increase their positive impact on a company by deploying these attributes in certain key areas: risk analysis/management (e.g., financial strategy), regulatory interactions, business development, and onboarding other C-suite executives.

However, first and most important is the CLO’s role with the board of directors and the value that relationship can bring to the CEO.

The board of directors

Understanding, developing, and optimizing the relationship with the company’s board of directors is one of the CEO’s most important responsibilities, and especially critical for those who are new in the role.

The relationship between the CEO and board is based on concepts of corporate governance rather than traditional hierarchical relationships. Such a relationship can be particularly challenging for first-time CEOs who have had limited experience with or appreciation of governance, and who may often struggle to find the right balance between autonomy and collaboration with the board.

Further, although the CEO primarily communicates with the board through the chair or a lead director, the CEO reports to the entire board. Accordingly, establishing the appropriate communication framework is vital, e.g., one-on-one meetings/calls (especially with the chair or lead director), CEO updates between board meetings, interim conference calls, calls to key board members prior to board meetings, and interface with board committees and their chairs.

In light of these considerations, what role can the CLO play to support the CEO regarding their relationship with the board? The CEO-CLO-board triangular relationship has often been described in context of the tension that such a relationship can create for the CLO. However, one could instead look at it as another opportunity for the CEO to positively leverage the unique role of the CLO and, in turn, strengthen the overall CEO-CLO-board relationship.

Within the overall governance structure, the CLO is the go-to resource for the board regarding the cadence of board activities and decisions, as well as the company’s multiple compliance obligations. Conflict of interest and related party issues involving board members will require the CLO to navigate important legal issues with great diplomacy. CLOs at public companies will also need to weigh materiality and disclosure questions on a broad range of issues, as well as explain their reasoning to

the CEO and others. In partnering with the CLO on these sensitive issues, a CEO has an opportunity to demonstrate to their board an ability to understand often complex compliance obligations and exercise thoughtful leadership.

Aside from the CEO, the CLO usually has the most interaction with the board of directors of any C-suite executive. These discussions range from questions on SEC filings, IP matters, litigation, D&O insurance, corporate governance, executive compensation, as well as general industry networking inquiries, e.g., recommendations for outside counsel in context of board members' roles at other companies. The CLO can also assist in developing the essential communication frameworks the CEO establishes with the board. The CLO can support the CEO in maintaining those communications, which is especially important when the CEO becomes immersed in operational responsibilities such as what occurred when CEOs were dealing with the many challenges resulting from the COVID-19 pandemic. A CLO who has insight into the perspectives of various directors on different issues can be a valuable sounding board for a CEO debating how to best present a sensitive topic to the board.

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It is during these interactions that the CLO gets to know the board members and, over time, identify "the pulse" of various board members. This CLO/board rapport can be extremely helpful to the CEO in strengthening relationships with board members.

Risk analysis and management

Risk management is a paramount responsibility of the leadership team, but it is also a key oversight responsibility for the board. Despite its importance, risk assessment and contingency planning are too often given only perfunctory attention by meeting minimum compliance requirements.

A public company's SEC 10-Q and 10-K filings devote considerable text to risk factors. However, much of the language does not differ significantly from company to company. Moreover, even when risk factors are specific to a company, the company drafts these risks in large part to address potential litigation. The firm's Audit Committee usually has responsibility for risk assessment, yet its focus is generally on financial controls and reporting. While obviously important, it is not a substitute for the leadership team's need to drive broad risk assessment and contingency planning on a regular basis.

Assessing the inter-relationships of risks is critical. For example, for companies who need to access the capital markets, a financing strategy is often developed to capitalize on expected positive inflection points. However, the strategy must include contingencies for adverse events in the company's key value-driving activities. This is especially true in high-risk non-revenue companies, such as many early stage life sciences companies. Due to the often-tenuous viability of emerging companies, its risks are highly interdependent. Early-stage companies benefit from an integrated risk assessment approach that takes into account these interdependencies, rather than the more traditional silo-oriented risk management framework. Because of the existential nature of many of these scenarios, the CFO often leads this risk management process, particularly given the formal responsibilities of the Audit Committee. However, due to the CLO's risk/benefit and truthteller

orientation, the relationship with the board, the likelihood of litigation if risks are mismanaged, and the common purview with the CEO, the CLO should play an important role in or even lead the company's risk analysis/management initiatives.

Updating the board regarding risk assessment is essential, particularly because recent survey information suggests that there is a critical gap between what boards think is going on and what is really happening regarding risk: "Boards are significantly overconfident when it comes to addressing the thorniest issues facing organizations today. Board members have greater confidence in their organizations' ability to manage key risks than members of management actually do, according to a breakthrough survey of board members, executive management, and chief audit executives released by The Institute of Internal Auditors (IIA)." This overconfidence may be due to the lack of sufficient board attention to risk or because the board members lack the experience needed to address the increasingly complex risks organizations face.

Regardless of the reason, the CLO can be a strong partner in helping the CEO to ensure that the board is aware of and faces the company's most critical risks. From including risk topics in every board agenda, to making sure that the annual board evaluation highlights the directors' abilities in this area, to providing feedback to the CEO on risks that the CLO has identified at the company, the CLO can help to highlight the organization's blind spots and garner support to address them.

Regulatory interactions

All companies have a range of interactions with regulatory agencies. In the United States, these could include the Food and Drug Administration (FDA), Federal Communities Commission (FCC), Securities and Exchange Commission, and the Federal Trade Commission. In Europe, such bodies include the European Commission and the European Medicines Agency. Given the complexities of regulatory law and the complex negotiations that often occur with regulatory bodies, regulatory counsel is essential. Even if this is an internal function, outside counsel is frequently utilized given the stakes involved. The CLO should play a critical role in determining the timing and extent of regulatory counsel involvement as well as playing an important role in the management of the relevant cross-functional activities.

Business development initiatives

Business development is broadly defined as the creation of long-term value for an organization from customers, markets, and relationships, and it is an essential activity for companies to achieve sustainable business growth. Identifying and maximizing that long-term value has its basis in the legal relationships established with the relevant parties. CLOs can provide invaluable guidance on the structure of those relationships.

The CLO contributes to this creation of long-term value in the following ways:

- As a general business executive who has a broad view of the company and its overall strategy
- As a technical expert who is skilled in structuring and executing legal/business relationships
- As a professional who is skilled in analyzing and solving problems
- As an advisor to the BOD and thus someone who understands what deals will resonate with the BOD and what information they will need to make a decision

In the event outside counsel is used, the in-house counsel is best positioned to partner with and

leverage that resource. The experienced CLO can facilitate and help establish the appropriate relationships between the internal business development group and outside counsel that specializes in licensing, partnerships, M&A, and other forms of collaboration.

Recruitment and onboarding of C-suite executives

From a cross-functional perspective, one goal of the CEO is to develop the dynamics across the C-suite such that they are synergistic and not merely additive — and certainly not conflicting. The recruitment and onboarding of a new C-suite executive can entail a number of challenges that may include transition from a large company to small (or vice versa), different corporate cultures, transition from functional expert to a corporate officer role, to name a few.

Adding a new C-suite executive is obviously more involved than a straightforward hiring being led by the HR department. Also, in smaller or emerging companies, one of the last functions that is generally elevated to the C-suite level is human resources as a result of the firm's size and its HR functional requirements. As a consequence, more complex HR issues (employee terminations, a reduction in force, executive compensation, etc.) are generally addressed by the CFO *and* the CLO.

In regard to hiring and onboarding new C-suite executives, the CLO can also play an important role. In terms of recruiting a new C-suite executive, a CLO can be a persuasive member of the executive team, whose assessment of the company and its board is viewed as credible and trustworthy. And, after hire, a CLO can be a useful partner to the CEO in helping the new executive to become operational by providing the "big picture" of the company, explaining how to work effectively with the CEO, and how to present well to the board. In conjunction with the CEO, the CLO can monitor the onboarding process and can provide helpful insight and guidance for the new executive's onboarding.

Final thoughts

The CLO role is unique in that it has a seat at virtually "every table" and therefore can provide a degree of alignment with the CEO that is not generally present with other C-suite executives. Because the CLO should have the same corporate purview as the CEO, the CLO has a unique partnering opportunity with the CEO. In addition to this common purview, the CLO has several key attributes — expertise in risk/benefit analysis, problem-solving mentality, truthsayer — that can be invaluable to the CEO. These skills can be especially helpful in developing and strengthening the CEO's relationship with the company's board of directors. For all these reasons, companies are recognizing the value of the chief legal officer.

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