

# IBA online article: In-House Perspective October 2014.

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## An undeclared conflict of interest



**Dina Medland argues that combining the role of general counsel and company secretary could be more trouble than it's worth.**

A potential conflict of interest is sitting quietly in many boardrooms, just waiting to explode into a corporate governance disaster. It is the practice of allowing the same individual to hold the title of both general counsel (GC) and company secretary.

It's a fairly common phenomenon. For example, at the end of July this year, Rentokil plc announced that Paul Griffiths was stepping down as company secretary after a staggering 35 years of service. He is succeeded by Daragh Fagan, Group General Counsel, who has taken on the 'additional responsibility of company secretary', according to the announcement.

John McAdam, Rentokil Chairman said: 'I'm delighted that Daragh will be taking over the Company Secretary role supporting the board.' However, that brief phrase highlights exactly where the seeds of conflict lie.

The first consideration when taking on any dual role is over how to allocate sufficient time to each area of responsibility. In the case of Rentokil, if 75 per cent of Fagan's time is spent on being general counsel, that leaves relatively little time to devote to being an effective company secretary.

A dual role may offer the opportunity for the GC to attend board meetings. However, a GC would attend those meetings in a different capacity to the company secretary: the GC usually reports to the chief executive, whereas the company secretary reports to the chairman.

While all UK plcs are required to have a company secretary, the role itself varies enormously, and is changing rapidly. A recent collaborative study between the Institute of Chartered Secretaries and Administrators (ICSA) and Henley Business School highlights the evolution of the role through discussing it with those at the coalface.

'I think as general counsel you are heavily involved in the running of the business and are the chief executive's right hand. I don't think that's compatible with (being the) company secretary, where you should be (the) Chairman's right hand' said report participant.

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Even where the roles are separate, problems can arise if the company secretary reports to the general counsel, instead of to the chairman. The company secretary will be privy to information from the boardroom, which is likely to be sensitive. What can you reasonably be expected to withhold from the person to whom you report? Should you even be asked to make that decision, with all its consequences?

The reporting lines for company secretaries in FTSE plcs can cause all sorts of issues. An excerpt from another interview in the report highlights a wider corporate governance issue in terms of what is expected of lawyers. 'I reported to the finance director, who told me that if I knew what was good for me I would never discuss things I'd seen with other people and he thought that it was very inappropriate for me even to be raising it. So I then went to see the CEO who said, "Well, you're a lawyer, you understand how these things work"' said one company secretary.

Being a lawyer and therefore understanding 'how things work' sounds like it could be a euphemism for being able to argue one's way out of anything. This is an issue that has been getting some attention in the United States. In his [Foreign Corrupt Practices Act \(FCPA\) blog](#), Richard Cassin recently used the backdrop of GM and internal company knowledge about ignition flaws, to address a dilemma that often faces in-house lawyers.

'A lawyer is supposed to be an advocate for his or her client. In exchange for faithful advocacy, lawyers have traditionally enjoyed protection against public condemnation and government reprisal, even when representing vile and unpopular clients or causes. But for in-house lawyers today, advocacy is colliding head on with the modern concept of ethics and compliance,' wrote Mr Cassin.

Trends in the US are always worth watching closely. The growing emphasis on ethics in global regulation is one that demands crystalline clarity from all roles in a listed business, most clearly when they involve access to the boardroom.

'The devil makes his Christmas pies of lawyer's tongues and clerks' fingers' reads a proverb attributed by the Oxford Dictionary of Quotations to the late 16th century. Given that the company secretary role was historically an administrative one, many plcs are still in danger of considering it a 'clerk's' function and underutilising this critical role in the boardroom. Add to that any confusion about the role of general counsel, and it is apparent that things could become very messy indeed. It may be up to the lawyers in the end to take a long, hard look at how they define the roles they are asked to perform to ensure they fulfil them to the highest standards expected of them.

Ellisa Opstbaum Habbart, the Delaware Counsel Group and Secretary of the IBA Corporate Governance Subcommittee, argues that there can be both advantages and disadvantages in combining the role of general counsel and company secretary. 'In-house counsel must remember that he or she represents the company rather than the board. When in-house counsel attends a board meeting, he or she may be privy to discussions that conflict with the interests of the company. In some cases, as lawyers they have specific reporting requirements related to certain issues under discussion at a board meeting, which might make their attendance impossible.

'However, the company acts through its board and in-house counsel must work with its members. Personally, I believe that when in-house counsel works with board and also takes on the company secretary role, it can be a good thing. There is also something to be said for combining a thorough working knowledge of the legal issues affecting the business with the process of minute taking undertaken by the company secretary at the board meeting.

'In-house counsel can also remind the board of their legal obligations and highlight any issues that may be in conflict with their duties. This can only help a board comply with its corporate governance obligations. On a practical level, in-house counsel often work with business units of the company. As a result, in-house counsel may understand how issues will impact business in light of how they operate. This provides a great opportunity for in-house counsel to educate the board in these important areas.'