Accountability And Responsibility – In Scandals Both Public And Private, One Or Both Are Absent

The Editor interviews the ***Hon. Milton Mollen****, Counsel, Herrick, Feinstein LLP.*

Editor: Would you summarize your background?

Mollen: Most of my career has been in public service as a lawyer for New York City and as a judge for 24 years, the last 13 as Presiding Justice of the Appellate Division. Since 1995, I have been in private practice.

On several occasions, I was involved in investigations of corruption in public agencies. One involved the New York Police Department, and it is commonly known as the Mollen Commission. Another investigation involved a review of the awarding of waste management contracts by a town on Long Island, New York. I served as Special Counsel to the Nassau County Legislature investigating corruption in the awarding of an insurance contract, as a result of which $19.5 million was recovered, and seven people were indicted and await trial. I also serve as a federal court-appointed monitor and corruption counsel of a Teamsters local.

Editor: You have been involved in several major investigations of corruption in the public sphere. Do you see any similarities between those situations and the recent corporate scandals?

Mollen: Yes, I do, to varying degrees. There are certain similarities between what we are now witnessing and what I saw when I investigated public corruption.

First of all, I believe strongly in the principle of accountability. In our investigation of the New York Police Department in the early 90s, we identified accountability as the single most important factor missing in the organizational structure of the department. We stressed the necessity of holding everyone responsible for his or her conduct, up and down the chain of command, regardless of rank. I think the same is true in corporate governance.

I see two problems in corporate governance. The first is internal accountability. There must be a strong sense of accountability at all levels of corporate governance. The second is a disconnect between a board of directors and the executives of a corporation. The board of directors is dependent on the corporation's executives for information that they need to make decisions. Sometimes, management fails to make known to the board the information that the board needs to fulfill its responsibilities. I have seen the same problem in governmental bodies, too. When a group, such as a board, meets only periodically and has no independent ability to secure information, that group is at a disadvantage in its efforts to hold accountable those who provide that information – this creates the disconnect.

A corporate board of directors has two roles, in my view. The first is to set policy for the company. The second is to hold management accountable for the performance of the company. The board must have independence from management in order to fully and properly discharge the latter responsibility.

I serve on the board of a nonprofit hospital and on the executive, finance and audit committees of that organization. At times, I have been frustrated in my efforts to get information, including information I need simply to know what questions to ask. A board is only able to monitor the performance of corporate management if it is able to gather information relevant to that issue and if the board has no independent means of acquiring that information, it is at a severe disadvantage.

Another issue that has received a great deal of attention and that has a good deal of merit is that of the independence of the directors of a corporation. Generally, the CEO and other senior executives play a significant role in the selection of the board members. That may compromise, to some extent, the ability of members of the board to question the actions and decisions of corporate management. While no system is perfect, there should be some mechanism to assure greater independence on the part of the board. For that reason, Sarbanes-Oxley focuses on assuring that corporate boards have more independent directors and that the independent directors have greater authority, such as requiring that the audit committee consist solely of independent directors.

Editor: Do you think that lessons learned from the scandals will enhance the status of in-house counsel?

Mollen: I do a great deal of mediation and when I am involved in a commercial dispute, I often hear hints or suggestions that the corporate leadership has little respect for in-house counsel. Though the in-house attorneys often fulfill their responsibilities by telling senior management why a desired action is inappropriate or can be achieved in a proper, albeit different, way, management does not want to be told what to do or what not to do, so they may look on their in-house law department as a necessary nuisance. I hope that the scandals of the past couple of years may lead to a greater sensitivity to the concerns of corporate counsel and a greater tendency to solicit their input and follow their guidance, rather than summarily discarding that guidance if it does not comport with what the executives want to do.

Management should view their counsel as useful partners in the management of the company. Let me go back to one of the corruption investigations that I chaired in the early 90s – that within the New York City Police Department. I feel strongly that the department should have set up an ongoing entity to continue the role of the Mollen Commission, in the sense of monitoring the department's continuing adherence to appropriate standards of accountability and behavior. I did not see my commission as adversarial to the role of the city's Police Commissioner. So it should be in corporations. CEOs should appreciate that in-house attorneys can help them achieve their business goals without being exposed to the kind of liabilities faced by the executives of the Enrons of the world.

Editor: Do you think Sarbanes-Oxley will affect the relationship among in-house counsel, outside counsel and management due to the requirement that management's failure to make required disclosures be reported to the board or audit committee?

Mollen: They probably will lead to additional tension, but tension may not be a negative effect. Tension can sharpen peoples' interest in fulfilling their responsibilities. I often heard stories, for example, of how President Franklin D. Roosevelt enjoyed the tension between members of his Cabinet, all of whom were extremely capable and intelligent personalities, with strong opinions. He believed that it would lead ultimately to the best result because it created competitive intellectual rigor in the deliberations of that group. While not entirely comparable, the environment within a corporation, if properly managed, can be a place where people are on their toes on a continuing basis.

The statute and regulations need not lead to an adversarial relationship between in-house and outside counsel. The law and regulations should cause the attorneys to work together for the benefit of their common client –- the corporation.

When counsel are retained, they need to understand the identity of their client. While the law has always been that the entity is the client, rather than management or the board, for example, that concept may have been honored less assiduously than it should. Sarbanes-Oxley certainly codifies the existing law by highlighting that the corporation is the client.

New York City's Corporation Counsel is the city's attorney, analogous to a general counsel of a corporation. Another officer of the city is the Counsel to the Mayor. At times, the Corporation Counsel has served as attorney for the mayor, though that is not appropriate. Each of those lawyers, however, should be in a position, organizationally and otherwise, to advise the mayor frankly as to the legality or appropriateness of a proposed course of action. So it should be for in-house counsel also, who must be able to deliver honest legal advice to senior management, even when it contravenes management's desired plans. Outside counsel can be a natural ally in providing support for in-house counsel's conclusions.

Editor: Do you care to add anything else?

Mollen: An important point to remember is the nature of the relationship between the board of directors and corporate executives. Directors need to understand that the board must be truly independent from management. The directors must be familiar with corporate governance. It is their obligation to assure that management acts in the best interests of the shareholders and the corporation. They must be in a position to hold management's feet to the fire. Inside and outside counsel, because of their ethical, and now legal, responsibilities, should be natural allies to guide management in this effort.

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