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Partnering In The New Legal Environment – Barton, Barton & Plotkin LLP

The Editor interviews Roger E. Barton and Johnnie M. Jackson, Jr., Partners, Barton, Barton & Plotkin LLP.

Editor's Note: *The purpose of this series of interviews is to explore how law firms partner with corporate counsel to assist them in their efforts to meet the challenges of the New Legal Environment (including Sarbanes-Oxley, the revised Organizational Sentencing Guidelines and other requirements that grew out of the scandals as well as the corporate governance requirements of state law and the securities exchange rules). "Partnering" means working with clients to consistently anticipate and meet their needs. It also includes keeping clients informed of issues that might otherwise take them by surprise and helping in-house corporate counsel effectively and efficiently work in a business environment where their duty to the corporation has the potential to create sensitive situations with management.*

Editor: Describe generally how the New Legal Environment has affected your firm's relationships with its corporate clients and their in-house counsel.

Barton: The New Legal Environment has greatly increased corporate awareness of legal compliance issues at all levels, from the board room to the assembly line. As a result, our relationship with corporate clients, at their invitation, has become *much* more pro-active. The emphasis is on awareness and prevention.

Editor: What makes your firm uniquely qualified to help corporate clients and in-



**Roger E.
Barton**



**Johnnie M.
Jackson, Jr.**

house counsel understand the New Legal Environment and evolving compliance requirements?

Barton: I am glad you used "understand the... Environment" in your question, because that is the key. It is not just about understanding the letter of the law but also understanding how organizations work, the importance of compliance leadership at every level and the challenges corporations face as they implement changes required to put effective, best practice compliance and governance measures in place. It's not easy. What makes BB&P unique in that regard? Simply put, it's the combination of outside law firm and inside general counsel perspectives and expertise: we have both. We value the expertise of our in-house colleagues but we also recognize that they each have a business role. We understand that, in order for us to be effective, we must understand the business side of their responsibilities and we make the investment of time and energy necessary to learn their businesses. We emphasized BB&P's commitment when we invited Johnnie M. Jackson, Jr., former VP, General Counsel & Secretary of Olin Corporation, (NYSE: OLN), to become a

partner of the firm. During his tenure at Olin, Olin was a diversified Fortune 500 company, and he brings a very diverse, valuable and practical in-house perspective to conversations with clients about their best practice options.

Editor: Johnnie, please give our readers an overview of your experience as general counsel in the areas of corporate governance, compliance and sentencing guidelines issues.

Jackson: Paul MacAvoy and Ira Millstein have characterized what corporate America is going through now as part of a "recurring crisis in corporate governance." Crisis or not, I had the privilege of being a general counsel when some of the trends they speak of unfolded. In the mid-1990s, boards of major corporations were being publicly criticized for certain governance practices. There was a call for transparency. Preparing board and committee charters and going through board self-assessments were touted as being the means to identify appropriate governance best practices. Olin was one of the first companies to engage in such a comprehensive exercise, not because it had to, but because it was a best practice. I was very involved in that process and take great pride in the fact that Olin was one of the first companies to institute reforms that today are either required or considered to be best practices. I also take great pride in the fact that the compliance measures implemented during my tenure at Olin were ahead of the curve and anticipated many of the reforms that are required today by law.

Editor: Does your firm keep its corporate

Please email the interviewees at rbarton@bartonesq.com or jjackson@bartonesq.com with questions about this interview.

clients informed on an ongoing basis of developments that may affect their compliance efforts?

Jackson: I am sure that every firm to which you put this question will reply with an emphatic “yes – of course!” Having been a general counsel myself, I understand that the worst thing that can happen at a meeting is to be confronted with information that you should, but did not, know about.

Barton: We have an absolute rule: no surprises. We track matters relevant to our clients’ businesses and pass on what they need to know in a variety of ways including client advisories, letters, emails and, if urgent, by telephone.

Editor: What is your relationship with the general counsel when you are retained as independent counsel by the Board or a Board committee?

Barton: Board Committees are between the proverbial rock and a hard place regarding hiring independent counsel. They are not required to do so but, if they don’t and something goes wrong, the Committee would have great difficulty explaining to a jury why they did not. If they do, the issue becomes one of managing expectations. Contrary to what the headlines suggest, our experience is that people generally want to do the right thing. When we are hired as independent counsel, one of the first things we do is have a conversation and establish a relationship with the general counsel in order to understand what we can expect of each other. It is in the best interest of the company if the relationship between the general counsel and the Committee’s independent counsel is professionally collegial and not adversarial.

Editor: Suppose your firm is hired by a manager other than the general counsel and told that there is no need to keep the general counsel informed?

Jackson: Except for engagements on limited, special counsel assignments and except where boards and committees retain independent counsel, our preference is to be hired directly by a company’s general counsel who has responsibility for managing the entire range of the company’s legal affairs. Anything else raises the specter of unclear lines of responsibility and accountability. A company that permits business managers to hire their own outside counsel, not accountable to the general counsel, creates a corporate infrastructure ripe for less than the optimal management of legal issues.

Barton: If, in the course of representing any corporate client, we concluded that we had an up-the-ladder-reporting obligation, the general counsel would likely be the first person we would talk to, no matter who hired us.

Editor: In connection with the certification required by Section 302 of Sarbanes-Oxley, the general counsel is required, in most companies, to provide a sub-certification to the CEO and CFO. How has your firm helped general counsel to satisfy this requirement?

Barton: It is interesting that the sub-certifications to which you refer were first viewed as “cover my behind” certifications and, some employees say, a convenient vehicle for the downward delegation of fault. We have a different view. We counsel clients to view the certification requirements as nothing more than a requirement that the company implement and certify that it has good business practices in place. The certification process is an opportunity to “test the system.” It’s all about best practices.

Editor: Does the business judgment rule provide a safe harbor from director liability under state law where it can be demonstrated that directors deliberated in good faith and made a business decision (even though it may prove to have been wrong)?

Barton: The business judgment rule is an oft quoted creature of state law and one of the enduring benchmarks used to measure the fulfillment of a director’s fiduciary duty. Your question, however, raises another interesting issue all by itself. The issue is one of interpreting the seemingly overlapping nature of the requirements of state and federal law. What is a good faith business judgment? Is it to be measured under state law in the traditional sense or is it compliance with evolving federal “process” requirements? We believe the answer involves a little of both.

Editor: How should general counsel respond to a direct question from a director in the New Legal Environment asking whether she is fully protected against liability?

Jackson: I can understand the motivation for a director to ask such a question but the answer is not a simple “yes” or “no.” A general counsel cannot fully answer that question until there has been some kind of a risk assessment focused on the risks that are peculiar to the company. Our recommendation would be for the general counsel to

answer the question with an answer that expresses what *is* known, what she knows *is not* known and underscoring the need for a risk assessment to discover what she *doesn’t know she doesn’t know*. This third category is what most directors worry about.

Barton: The next step would be to map out an action plan to put reasonable procedures and protocols in place to ensure future compliance to minimize liability. The law does not require that companies guarantee perfection, only that they design systems reasonably expected to minimize compliance anomalies. The tone is set at the top. Adequate resources and effort must be expended. It’s an evolving process.

Editor: General counsel may feel that they cannot properly discharge their compliance responsibilities unless all lawyers within the company report directly to them. Do you agree?

Barton: Clear lines of responsibility and accountability are crucial to any effort undertaken by any organization. We recommend that all lawyers have primary reporting lines leading to a company’s Chief Legal Officer. We also recommend that the general counsel report directly to the CEO.

Jackson: It’s a matter of “independence” and it’s a matter of “control.” In-house lawyers must be aligned with the business objectives of their divisions but their first loyalty must be to the company as a whole. The do-it-right tone at the top, as set by the general counsel and the CEO, should be the controlling default mechanism whenever a lawyer faces a questionable decision.

Editor: The New Legal Environment appears to place a disproportionate burden on smaller companies. What is the firm doing to help them?

Barton: Congress seems to be taking notice that there is a disproportionate burden on smaller companies and foreign filers. Until the burden is modified, what we do for those companies is to give them the benefit of our large company experience, tailored to meet their small company needs.

Jackson: BB&P can quickly assess what they need to do to meet the requirements of the New Legal Environment and we can also give them personal insights based on our experience into the practical aspects of what they are likely to encounter. It’s all about awareness of what is required and the implementation of best practices.