

Restoring Public Confidence: Corporate Governance As Institutionalized Integrity

The Editor interviews **Scott Harshbarger**, Senior Counsel, Proskauer Rose LLP, Boston.

Editor: Mr. Harshbarger, would you tell our readers something about your professional experience?

Harshbarger: I have been an attorney since 1968 after graduating from Harvard Law School. After starting my career with Goodwin Procter & Hoar, I went to the Lawyers Committee for Civil Rights and then to the Massachusetts Public Defender's Office and the Attorney General's Office. In 1982, after serving as the first General Counsel of the State Ethics Commission, I was elected District Attorney for Middlesex County, where I served for eight years, and in 1990, I was elected Massachusetts Attorney General, where I served for another eight years. Since 1998, I have experienced life after politics, as a Visiting Professor at Harvard Law School and as President and CEO of Common Cause. Several months ago I had the good fortune to return to private practice with Proskauer Rose.

Editor: What drew you to a career in public service?

Harshbarger: My father was Chaplain and Professor of Religious Studies at Penn State, and my mother was a school teacher. I was raised to believe that public service – serving the community – was at the heart of what it meant to be a professional person. When I was in college President Kennedy exemplified for many of my generation the proposition of government service as a distinguished and honorable undertaking. It appeared to be a way in which one could combine personal values with professional skills to make a real difference in the lives of people. I thought that serving the public interest could be an enormously rewarding experience, and as things have played out over the course of my career, I was right in that assessment.

Editor: What were the high points of your years as Massachusetts' Attorney General?

Harshbarger: The Attorney General of Massachusetts has broad common law and statutory powers, and during my tenure the office employed about 500 lawyers, paralegals and investigators. Consequently, we represented the state in almost every major action. While I served as President of the National Association of Attorneys General, Massachusetts was one of the first states to sue the tobacco companies. Our Safe Neighborhood Initiative served as a model of urban crime reduction throughout the country. We were engaged in utilizing conflict resolution to deal with high school violence. Because of the breadth of experience and expertise in the office, we were able to play a major role in preventing the conversion of non-profit hospitals and HMOs to for-profit status. We also handled a variety of consumer protection, environmental protection and civil rights matters. It was an exciting time to be Attorney General because of the many high profile public and social policy issues that the office was being asked to address. There were many high points.

It is important to note, however, that the office requires you to make the right decision, which is not necessarily the correct political decision. That can have an impact

on your ability to attain higher political office down the road. Doing what is right does not always lead to political advancement. It does, however, lead to real personal and professional satisfaction.

Editor: How has your service as Attorney General helped in your private practice?

Harshbarger: My experience as Attorney General has been of great benefit as I try to help clients navigate the variety of issues that arise in the public arena. I know how law enforcement people, prosecutors and the holders of public office think about these issues. I have the experience to help clients develop strategies to deal with the concerns of public officials, to negotiate with them in the resolution of issues and, when necessary, to contest their rulings. One of the major contributions someone with my background brings to the table is the ability to explain what it is the client is attempting to do and, at the same time, translate to the client the concerns of the officials. In this particular arena – where the private sector and the public sector converge – conflicts often arise because of a lack of understanding between the two sides. My role is to serve as a two-way conduit in this discussion.

Editor: Would you tell us about your leadership of Common Cause?

Harshbarger: In the summer of 1999 Archibald Cox, Chairman Emeritus of Common Cause, and Derek Bok, former Dean of Harvard Law School and President of Harvard, asked me to consider becoming President and CEO of Common Cause. I accepted. One of the principal benefits was then to meet John Gardner, the organization's founder and a great American, in the final years of his life. This was also an exciting period of "renewal" for Common Cause, as we led the coalition formed to support the effort of Senators McCain and Feingold to win the campaign finance battle to ban "soft money" from federal campaigns.

At the time of the Enron-WorldCom debacle, I discussed with Arthur Levitt, who had been President Clinton's Chairman of the SEC, the need for a corporate accountability project to help restore public confidence in the integrity of the securities markets. That was the origin of Common Cause's corporate governance project and has led to my current practice at Proskauer.

Editor: Please tell us about your decision to join Proskauer. Can you share with us the things that attracted you to the firm?

Harshbarger: I was attracted most by the real personal and professional interest that people at Proskauer had in my background and experience. There was an understanding of how I might add value to what the firm was doing for its clients, and this contrasted with the way in which other firms – which were interested primarily in the business I might bring through the door – looked at me. Proskauer offered an opportunity to utilize my strengths to enhance an already strong national platform. It was too good an opportunity to turn down.

Editor: Please describe the corporate governance practice that you are establishing at Proskauer.

Harshbarger: Corporate governance cuts across a variety of disciplines and practice groups. There are attorneys who practice in

the areas of compliance, Sarbanes-Oxley, corporate ethics, independent investigations, civil and criminal defense, and so on, and I am attempting to coordinate these areas of expertise in a way that will best serve the firm's clients. Among other things, we are thinking about the new realities of external regulation and media focus with an eye to putting systems into place that will address the issues that arise before they turn into problems. A strong institutional governance system – and that can mean a stronger governing board, a better and more responsive system of internal reporting, better and more comprehensive compliance, independent audits and reviews, and the like – is in the interests of everyone. I believe that most clients are trying to do the right thing. Many of them, however, do not have the structures in place that will enable them to avoid the worst case scenario. This practice is primed to address that. We will, of course, work with organizations in crisis, but we hope to enable our clients to build the systems that will enable them to avoid crises.

Editor: Who are the clients here?

Harshbarger: The clients include *Fortune* 500 companies that have a familiarity with Sarbanes-Oxley and deal with it on an ongoing basis, and there are also clients such as the National Hockey League which deal with independent investigations. The latter are handled by my partner Bob Cleary, a former U.S. Attorney.

A second group of clients includes many non-profit organizations. Strictly speaking, these organizations are not subject to Sarbanes, but accountability, increased disclosure and transparency are all current issues in the non-profit arena. I have participated in several national panels discussing the standards to which non-profit organizations are subject today.

Yet a third group consists of public agencies. I represent several state agencies and a number of individuals in connection with independent investigations and reviews. I have also chaired the Commission on Corrections Reform in Massachusetts and a public employee reform initiative begun by the Public Employee Retirement Commission.

Editor: Why is corporate governance such an important issue today?

Harshbarger: What we have experienced is a massive breakdown in self-regulation and ethical conduct at the highest levels of corporate America. This has resulted in a 7.5 trillion dollar loss in shareholder value, and, of course, the loss of public confidence in the integrity of the leadership and the governance systems in these companies. To restore that confidence, we have attempted to define exemplary corporate governance practices and procedures. It is up to corporate America to implement these things, and I hasten to add that it is impossible to legislate integrity.

Nonetheless, a culture of integrity must exist at the top. Institutional investors and the public generally are prepared for legitimate risks, but they are not prepared for dishonesty, fraud and illegitimate risks. The combination of best practices in the corporate governance arena, together with the increased scrutiny of the media means, I think, that the behavior that led to the corporate scandals will not recur. It remains a challenge, however, for both non-profits and for-profits to show that they can still do well by doing good.

Editor: Would you tell us about the convergence of corporate governance and private equity?

Harshbarger: Since the Enron and WorldCom bankruptcies, every sector of corporate America has had to take a long hard look at its conduct. Initially, the mutual funds believed they would avoid public scrutiny, but a whole series of market timing issues affecting the industry came to be aired. Similarly, the insurance industry has had to undergo similar scrutiny.

At the moment it appears that private equity and venture capital are one scandal away from the same type of regulatory focus. At Proskauer we have been working with clients to help them get ahead of this particular curve. By that I mean helping them to put best practices into place now, before they are imposed by statute and regulation. At a time when public pension plans are increasing their investments in private equity and venture capital to increase returns, making decisions on the basis of the merits and best business judgment is essential, and, in addition, to be perceived as doing so is the key to investor confidence.

Editor: Has the focus on corporate governance pushed us too far in one direction? Some commentators believe that compliance has become so important that process is trumping substance in executive suites and board rooms of major enterprises.

Harshbarger: I have heard that complaint, and I think it is something of an overstatement. Sarbanes-Oxley, and the regulatory scheme that derives from it, has helped ensure that a fair measure of accountability, disclosure and transparency now prevails in the corporate arena. That, in turn, has contributed to a restoration of public confidence, which is crucial to our economic system.

Having said this, we must be aware of unintended consequences. The cost of compliance, particularly for smaller enterprises, may outweigh the benefits derived. Similarly, many non-profit organizations – and I reiterate that these corporate governance issues are being addressed by the non-profits irrespective of the inapplicability of many, if not most of the provisions of Sarbanes-Oxley – are hard pressed to find the resources with which to comply. The balance between process and substance is a subtle one. I would suggest that it is important for the leadership of corporate America – whether directly subject to the new regulatory framework or not – to understand the need for change and the importance of self-regulation in this process.

Editor: Where do you expect this practice to be in, say, five years?

Harshbarger: I am hopeful that the standards of corporate governance will have been so incorporated into the day-to-day operations of corporate America that they come to be a kind of institutionalized integrity. As a consequence, a practice such as this would be called in to conduct periodic independent audits or reviews and would function as a kind of external, and credible, partner of the internal corporate governance team. We believe this practice will be an essential means by which our clients validate their response to the inevitable challenge.

Please email the interviewee at sharshbarger@proskauer.com with questions about this interview.