Corporate Secretary: A Position In Transition

The Editor interviews ***Tom Wardell,*** *McKenna Long & Aldridge LLP.*

Editor: Please give our readers something of your background and experience.

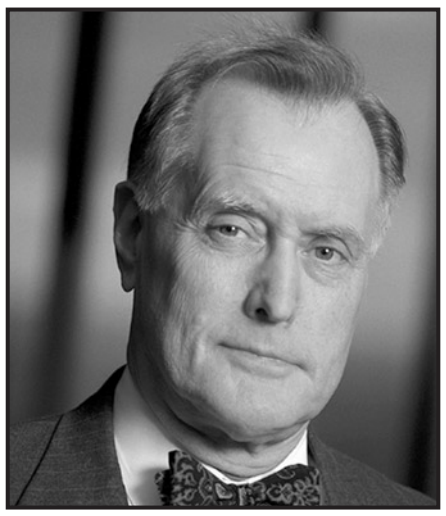
Wardell: After Harvard College and Harvard Law School I practiced first in Chicago with Mayer, Brown, Rowe & Maw, then in Boston, principally with Sullivan & Worchester. In 1988 I went into business with a former client. I then retired in 1993, after having sold the business, and moved to Atlanta. There I was approached by McKenna Long & Aldridge, which was interested in expanding its public company practice, and, after some discussion, I agreed to join the firm for a period of two years. This spring will mark ten years that I have been at McKenna Long, and I am now the head of the firm's corporate practice. This has been an interesting ten years, for me, for Atlanta and for the Southeast.

Editor: You have lectured and written extensively on a variety of corporate governance issues recently, including the new role of the independent director. What has taken place, as a general matter, in this area of the law in recent years?

Wardell: I think governance issues have become much more complicated as a result of the pressure placed upon the securities exchanges by the Securities Exchange Commission, by Congress through Sarbanes-Oxley and, of course, by the corporate scandals. In a time of corporate turmoil it is a legitimate question to ask who has been minding the store. Attempting to answer the question has led to an increasing emphasis upon the responsibilities of directors and, specifically, responsibilities they exercise as members of board committees. The committee structure that is now imposed on governing boards by the securities exchanges asks a great deal because it anticipates, one, that a majority of the directors will be independent and, two, that the various committees – and most pointedly the audit committee – will be populated by independent directors.

I hasten to add that independence is a concept that has become so convoluted that it is really difficult to assess accurately. At the most basic level, independence means not having such an affiliation with the company that your judgement is compromised or rendered other than objective. Whether one is employed by the company is an obvious test of independence. So is the amount the directors are paid for their services by the company, or whether they have some relationship with the company's auditors. The ultimate test is that set for the board itself, which must determine whether those directors identified as independent are, in fact, so. At the present moment we are engaged in that process of determination in a very substantial way.

Much of the confusion in this area arises because, notwithstanding the listing requirements of the securities exchanges and the rules and regulations of a variety of federal agencies, there is no overriding public corporate law. Rather, corporate law is the creature of



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the states, and most particularly of Delaware. What has taken place recently in Delaware is very interesting, but I am not certain that the standards by which independence is judged have changed. Independence is still described as a state of mind that allows the director in question to be objective about the circumstances. The recent decision of the Delaware Court of Chancery in the *Oracle Corp.* case is much cited for the proposition that the definition of independence has undergone a startling change. You will recall that Oracle had formed a special litigation committee to investigate allegations of breach of fiduciary duty on the part of four of Oracle's officers in connection with trading in Oracle stock. In ruling on the company's motion to dismiss the suit against the four officers, based on the special committee's recommendation, the court found that the committee was not comprised of independent directors. The common denominator between the committee members and the Oracle defendants was Stanford University, and it was an affiliation – underpinned by substantial donations – that was simply too strong to ignore. I do not believe that this decision represents any sea change in the way independence is perceived by the courts, either in Delaware or elsewhere. What the *Oracle Corp.* decision does say is that independence will be evaluated in context – in this case, the context of very serious possible consequences to the defendants. The case, along with other recent ones, also signals that the judiciary, and particularly that of Delaware, is going to take a long, hard look at whether directors are meeting their responsibilities. They must, for example, receive meeting materials well in advance of the meeting, and they must review those materials with sufficient care to make their deliberations at the meeting a meaningful exercise of their fiduciary responsibilities. Directors have always been expected to make informed decisions; now they are going to be held to that expectation with rather more scrutiny from the courts.

Editor: Please tell us about the role of the Corporate Secretary in the traditional scheme of things.

Wardell: Traditionally the Corporate Secretary kept the minutes of corporate proceedings and certified official documents. It was, generally speaking, a low profile position. The person who held it, however, very often had another, often more high profile, role in the company.

Editor: Is there any truth in the observation that the Corporate Secretary is in a position to make the governing board appear to be very attentive to its responsibilities or very negligent?

Wardell: I would agree with that assessment. It is not that the directors are looking to the Corporate Secretary to make them look good, but rather that they have a concern – particularly in the present climate – that the minutes of their deliberations convey a picture of an attentive, well-informed governing board. In light of the attention now focused on the board, there is a tendency to pay attention to how minutes of meetings are written and to what they say. And by whom. Minutes may be getting longer as a consequence, but this is not to say that everything that is said at the meeting finds its way into the minutes. That is definitely not a good idea. Minutes that have been carefully edited, however, constitute an important record, and this may entail drafting on the part of the Corporate Secretary, by members of senior management and by outside counsel. There is a recognition that the company and its governing board have too much at stake to have that record show a breezy, offhand and casual manner of conducting board business. I am not suggesting that the minutes are getting better because the meetings are getting better. That remains to be seen. The minutes are getting better because a realization of their importance has finally sunk in.

Editor: How has Sarbanes-Oxley changed the role of the Corporate Secretary?

Wardell: Sarbanes-Oxley has become the source of all kinds of changes, real and imagined. With its emphasis on the role of the governing board, and most particularly on the role of board committees, the statute has given an importance to the paper trail of corporate governance, and to the people called upon to create that trail, that may not have been there in the past.

Editor: What kind of background should the ideal Corporate Secretary possess?

Wardell: I don't think it is necessary that the Corporate Secretary be a lawyer or someone with an accounting or financial background, although these are helpful. What is important is for the Corporate Secretary to have the ability to quickly grasp the thrust of the discussion in the board room or at a committee meeting. He or she should have a clear idea of the mission of the committee, for instance, and what the full board expects of the committee. He or she should recognize when the discussion has reached the point at which a vote is required, and how to conduct and then record that vote. There is also a need for sensitivity to the nuances of governance interplay. This is particularly true in the handling of votes. For example, if a director has a relationship with a major stockholder in the company, most state corporation statutes will require him to disclose his interest and abstain from any vote authorizing any transaction between the company and that stockholder. The Corporate Secretary must have a skill set that permits the proper handling, and recording, of this state of affairs. In the current climate, I think that means that many people who fill this position are going to be lawyers by background. Lawyers are trained to make the appropriate assessments and to create a clear and distinct record of the proceedings. A lawyer is also, very probably, in a position to make sure the right questions are being asked if the committee as a whole is not asking them.

Editor: Should the office of Corporate Secretary be combined with some other position? Say, that of General Counsel? Or should it be held by someone who devotes all of his energies to it?

Wardell: At the moment I think the position is one that, in most settings, is going to be combined with some other position. We are still in transition from a place where the Corporate Secretary, at least in most settings, was a person who simply recorded what was said to a place where the Corporate Secretary evaluates and advises, engages in critical thinking and critical judgements. I do not think that companies are ready to make the position a full-time job and to pay for the skill set I have described to fill it. We are evolving in that direction, certainly. In the meantime, I think the position of Corporate Secretary is going to filled by someone who possesses the requisite abilities but who is also holding down another set of responsibilities. Let me also say that there are situations where the Corporate Secretary is, and has been, a full-time position. That is where a certification function is important – say, the enterprise has operations at a multitude of sites and there are dozens of subsidiaries – but the sensitive job of recording the corporate record is going to devolve upon someone with the critical skills I have described.

Editor: What about the degree of independence? Who should the Corporate Secretary report to?

Wardell: I think the Corporate Secretary should report to the General Counsel and then, by way of the General Counsel, to the CEO. This position, in my view, should be part of the legal department because it is connected, in a very fundamental way, to the legal life of the company, particularly that of public companies. Indeed, since it entails being conversant with everything going on at the governing board and with senior management, the position constitutes an education in how the enterprise operates and might be a stepping stone to the position of General Counsel itself. I am making generalizations, of course, and the needs of large, publicly-held companies are very different in this regard from those of small or medium-sized enterprises. The one certainty I have is that the position of Corporate Secretary is today more important than it was in the past and likely to become even more important in the future.

Please email the author at twardell@mckennalong.com with questions about this interview.