The world of transactional lawyering has changed dramatically, even in the course of my professional career. The advent of junk bond financing in the mid-80s destabilized traditional corporate/law firm relationships, leading to more of a focus on retaining individual lawyers for particular transactional work. Likewise, advances in communications technology and the globalization of markets lead to the growth of larger national (or global) law firms. The advent of substantial in-house law departments (in a real sense, internal law firms) has tended to position inside counsel as the “trusted advisor”, often relegating outside law firms to more of a managed commercial service provider role, competing to deliver increasingly commoditized services. Deregulation of major sectors of our economies (e.g., telecom, finance, transportation, energy) has also tended to promote the view of outside lawyers as “zealous advocates” charged with the aggressive and efficient execution of transactions. Each of these dynamics has shifted the focus of transactional lawyers on duties owed to the client rather than to the “public” (other than refraining from facilitating the violation of law or lying on behalf of clients).

All of this has occurred in the context of market forces which have driven corporate (and public sector) clients (and the decision makers within such organizations) to ever shorter term incentives and behaviour. While one’s client may be the corporation, relationships are developed with and instructions received from its senior agents, who generally have an even shorter time horizon than the organization itself.

Moreover, heightened liability concerns have driven corporate decision-makers to increased reliance on outside counsel. This reflects the fact that liability can often be mitigated by good faith reliance on “expert” advice. Hence it is that the very “agency conflicts” that inform corporate law (i.e., ensuring that management or controlling shareholders behaviour is consistent with the interests of shareholders and other stakeholders) has spawned a new set of concerns relating to third-party agents (who owe no duties, beyond their professional standards of conduct, to the corporation), including corporate counsel.

The risk, of course, is that in a world of short-termism and zealous advocacy it is all too easy to lose sight of
the fact that our major institutions function as much on trust as on strict legal compliance. It is striking how public distrust in corporate conduct has escalated in the face of enormous investments made to better regulate governance practices through mandated structures and processes. Trust is a valuable asset that emerges from shared norms and fair dealing, based on current and past practices and an expectation of future behaviour. The erosion of such trust will, over the long term, significantly impair any enterprise’s value.

This risk falls heavily on transactional lawyers because of the critical structuring and execution roles they often play. A consequence is that lawyers (and the opinions they provide) are often subject to “hindsight bias” – being judged after the fact, with a critical eye, when the focus is on assigning blame. For this reason alone lawyers should be mindful of changing norms and the broader context within which their advice is being relied upon.

The Law Society of Upper Canada specifically addresses these concerns in its Rules of Professional Conduct. Rule 2 (Relationship to Clients) notes that, notwithstanding instructions may be received from a representative, when a lawyer is employed or retained by an organization (including a corporation), the lawyer's duty is to the organization. This includes an obligation to report “up-the-ladder” and/or withdraw from acting once a lawyer believes that the organization intends to act in a wrongful manner. The commentary to Rule 2 recognizes that:

“Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization’s responsibilities to its constituents and to the public.” [emphasis added]

Perhaps the time has come for the Law Society to offer more pro-active guidance on this issue – indicating that lawyers should (in appropriate circumstances) seek to guide their clients as to responsible conduct.

Equally importantly, in a world where public expectations and legal norms are evolving rapidly, corporate boards should recognize their particular need for dispassionate and independent legal counsel. In seeking such advice, they should be satisfying themselves that counsel acknowledge such professional obligations and carefully consider any incentive that might lead to counsel’s judgment being compromised. Directors should be aggressively supporting a restoration of the balance between zealous advocacy and the exercise of independent judgment by their counsel concerning the underlying meaning and purpose of the law. So, too, should be the leading law firms. It goes to the heart of what we should want to be.

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