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GCs Weigh The Dangers Of Engaging In Risky Business

Sarbanes-Oxley Regs Create Barriers To Managing Legal Risk

BY ROBERT VOSPER

COUNSEL SESSIONS

WHEN THE CITY of New York called AMEC plc on Sept. 11, 2001, to help in the cleanup efforts at the World Trade Center, the British-based construction and engineering giant didn't give it a second thought. Within a few days, its workers were on-site digging through 1.6 million tons of debris. But AMEC's decision to enter ground zero wasn't based on business considerations; rather the company felt it had a duty to help.

"We had built a lot of downtown Manhattan," explained Katharine Braid, senior vice president, chief legal officer and corporate secretary of Canada-based AMEC Americas Inc., which manages the American operations of the parent. "There was a serious job to be done, and we had the knowledge and skills to help."

But this philanthropic gesture carried a huge risk.

During the early stages of the disaster, none of the three cleanup crews were operating with written contracts. The problem was that no carriers would offer them liability insurance during the nine-month operation. This made the contractors vulnerable to financially crippling lawsuits if third parties were injured during the cleanup efforts or exposed to the hazardous dust that had contaminated the air around the site.

"We were operating there with no insurance, and there was no cap on liability," Braid said. "If there was a huge claim for asbestosis from people living in Battery Park, we would be jointly and severally liable."

In addition, the contractors knew they weren't going to make much money on the project. In fact, most reports estimate each contractor made only a few million dollars in profit.

So, how does a CEO weigh the risks and benefits of such an activity, and what role should the legal department play in guiding the executive team and board through such a legal minefield? A group of GCs, including Braid, attempted to answer this question at a recent Martindale-Hubbell Counsel-to-Counsel forum in Toronto titled "Risky Business: Corporate Counsel Approaches to Managing Risk in a Tough Economy."

The participants also discussed best practices for managing legal risk. To be successful in this endeavor, many argued, a legal department must immerse itself in the business operations, develop internal pro-

(Clockwise from top left): **Katharine Braid**, CLO of AMEC Americas Inc.; **Michael Doody**, GC of Thomson Canada Ltd.; **Robert Richardson**, VP of legal at CIBC World Markets; **E. Jennifer Warren**, VP and assistant GC of Rogers Communications Inc.

cedures to measure and monitor risk, and exploit the expertise of outside counsel.

Meet And Greet

The general consensus at the forum was that in order to manage legal risk, in-house counsel need to move beyond simply crafting policies, setting up controls and then crossing their fingers. Managing legal risk, the participants agreed, requires in-house lawyers to be proactive, understand the intricacies of their business and industries, as well as build relationships with key decision makers and frontline employees.

"An absolutely indispensable thing the general counsel's office needs is to have excellent and ongoing communication with all the company's departments and divisions," said Michael Doody, vice president and general counsel of Thomson Canada Ltd., a Toronto-based information resource provider. "You really have to have a good relationship with them. They have to see you as being part of their team."

When employees feel that the lawyers are part of the business team, they are more likely to seek out legal advice when problems arise. The other option is to implement a sweeping compliance program, but that can be damaging if taken to the extreme.

For instance, there arguably weren't enough controls placed on those making decisions in corporate America in the 1990s. In fact, many companies embraced a decentralized decision-making process, believing it would allow the organization to respond faster in the ultra-competitive business environment that defined the Internet economy. Today, the opposite is true. In response to Sarbanes-Oxley, companies have piled layer upon layer of controls on employees, hoping to stop any activities that might damage the company's reputation or give regulators an excuse to investigate.

"Once you have identified what level of risk your company is willing to assume, you need to empower people at various levels to make decisions up to that point," said Peter Ross, legal manager at the University of Western Ontario in London, Ontario. "You need to give employees flexibility to make decisions on their own. It's the job of the general counsel to tell them how far they can go."

It also is the job of the GC to ensure policies and regulations don't backfire, leading employees to become lackadaisical about legal risk.

"I'm concerned that Sarbanes-Oxley will overshadow substance," said Bryan Robb, vice president and general counsel of ATI Technologies Inc., a developer of computer graphics chips and boards. "Basically, people will sign the risk forms and have the risk documents. But have they truly examined the risks involved? My other concern is whether Sarbanes-Oxley will kill risk. After all, risk-taking is a good thing. It's what makes companies grow. My fear is that there will be an overemphasis on not having any risk."

For some companies, however, eradicating risk is the name of the game. Whereas AMEC was willing to bet its financial health on a decision to aid the people of New York, the University of Ontario rarely takes any kind of risk.

"We basically represent faculty members and professors who are fairly independent and often unyielding to rules and regulations," Ross says. "That is our challenge. There are 1,200 of these people, and we are supposed to control the process. [The university is] risk adverse and risk intolerant, so we have to spend a lot of time educating our people about where the limits are. We have to communicate the impact of not complying."

Outside Help

To communicate this impact to employees and calculate risk, however, requires in-house counsel to have all the necessary information at their fingertips. For instance, legal departments, especially those operating in highly regulated industries or in multiple jurisdictions, need constant updates on regulatory, legal and governance changes, as well as insight into the evolving business environment and culture.

"To be on top of my game, I need access to as much information as possible," says E. Jennifer Warren, vice president and assistant general counsel of Rogers Communications Inc., Canada's largest cable and communications provider. "So, what I need is outside counsel who really understand my industry and the regulatory issues that are relevant to our business. An outside lawyer who has specific information about relevant proposed legislation and, even better, influence with the legislators, is a valuable commodity."

Many participants complained, however, that outside counsel often do a poor job of feeding them information. Part of the problem, they said, was that law firms, especially those in Canada, have a tendency to be reactive rather than proactive.

"We have developed procedures that we follow internally before any of our public offerings go to market," says Robert Richardson, vice president and associate general counsel at CIBC World Markets, the investment banking and brokerage division of the Canadian Imperial Bank of Commerce. "But we need our law firm partners to tell us about the risks we face with these transactions. They should be feeding into this process and providing information to help us deal with these issues."

Not everyone, however, agreed that outside counsel are that useful when it comes to managing legal risk.

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> ATI Technologies Inc.

"Outside counsel have only a limited role to play in risk management," Warren says. "It's our job to manage risk. We understand the business; they don't. A law firm lawyer once asked me how much I would pay him to be my risk-management adviser. 'Not much,' I replied. 'You are a great lawyer, but proactive risk management requires a deeper understanding of my business.'"

Although outside counsel might not be much help in directly managing legal risks for their clients, they can be useful in helping the board understand the risks of engaging in certain activities. And most boards are more than happy to get a second opinion these days.

"In-house counsel can enhance their credibility and impact by having external counsel with them when they make significant presentations to the board," says Rod Crown, assistant general counsel of Hydro One Networks Inc., the main supplier of electricity in Ontario. "They can help underline the thrust of the point you want to achieve."

Most boards are under tremendous pressure to sign off on a lot of decisions that could place the company in financial jeopardy. And that is making them nervous, especially after watching Enron, WorldCom and Arthur Andersen implode. As a result, boards are asking for as much information

Counsel-to-Counsel Forum At A Glance

"Risky Business: Corporate Counsel Approaches to Managing Risk in a Tough Economy"

Co-Chairs:

- **Peter Ross,** University of Western Ontario
- **E. Jennifer Warren,** Rogers Communications Inc.

Law Firm Co-Hosts:

- **Joseph Dehner,** Frost Brown Todd
- **Jay Tannon,** Frost Brown Todd
- **John Clifford,** McMillan Binch
- **David Matheson,** McMillan Binch

Facilitator:

- **David Goehl,** Martindale-Hubbell

as possible. They want assurances that every decision and report they need to approve has gone through the right channels and has been evaluated from every angle.

"Board members, especially those serving on audit committees, can't sit still," says David Matheson, counsel at McMillan Binch. "They are so restless. They want to know everything: What is my exposure? What is my mandate? How do I relate to the rest of the board? And they are looking for in-house counsel to make sure they are doing the right thing. They want to make sure the processes and internal controls are in place in order to minimize risk to the company and themselves."

Cultural Values

While developing procedures, consulting with outside counsel and responding to board concerns is essential, GCs need to realize that in some cases there is little they can do to minimize risk. Employees will sometimes ignore policies or make mistakes, and CEOs often will roll the dice one too many times. And in some companies—especially ones that place little value on the work, expertise and guidance of the legal department—senior management will never understand the value of managing risk. In these cases, the most well-crafted compliance programs and policies will go to waste.

After all, most experts believed Enron had written one of the best codes of conduct in corporate and ethics policies in corporate America. In fact, many a company used Enron's code as a template when it came time to revise their own policies. The problem, however, was that Enron's policy sat on a shelf in the legal department collecting dust and its board agreed on a number of occasions to waive provisions in the policy. In addition, everyone in the company knew that upper management had little respect for the legal department and its leader, Jim Derrick. In fact, senior managers viewed the legal department as a nuisance. Adding to the problem was a company that was operating at breakneck speed and rewarded employees who circumvented the system in order to improve the company's financials.

The lesson for in-house counsel is not only to keep in constant contact with decision makers, facilitate business decisions and obtain updates about the regulatory and business environment in which they are operating, but also to remind executives that cutting corners on risk management can have dire financial consequences.

"It's important to get management to think of risk as a bottom-line issue," Warren says. "Many businesspeople think of risk only in abstract terms. You need to educate management that risk is a bottom-line issue."

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