



6-1-1981

## Foreword

Collins J. Seitz

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

### Recommended Citation

Collins J. Seitz, *Foreword*, 56 Notre Dame L. Rev. 751 (1981).

Available at: <http://scholarship.law.nd.edu/ndlr/vol56/iss5/1>

This Introduction is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# Symposium: The Role of Professionals in Corporate Governance

## Foreword

*Collins J. Seitz\**

In recent years there has been a resurgence of interest in the multifaceted subject of corporate governance. In compiling contributions for this Symposium, *The Notre Dame Lawyer* should be commended not only for choosing this timely subject, but also for soliciting such distinguished contributors who bring to this subject diverse perspectives. Because my role is only to introduce the works of these contributors, I will limit myself to some general observations about corporate governance.

In writing and speaking about the corporate entity there is often an unconscious tendency to deal with the subject as though corporations are freefloating entities completely divorced from those who give it substance. Similarly, there is a tendency to use the term "corporate governance" as though it were a particularized subject with a single meaning.<sup>1</sup> In reality, a corporation is a projection of human activity. A complete study of corporate governance would therefore examine all human forces, as well as the political, social, and economic factors, at play in corporate decisionmaking. To examine such factors would indeed be a prodigious undertaking. The objective of this Symposium, while comprehensive, is more circumscribed. It seeks to isolate and analyze the role of professionals in corporate governance by presenting papers by some of the most sophisticated professionals in their respective fields.

The word "professional" is a broad term that encompasses corporate management as well as lawyers, accountants, investment bankers, and other specialists. In these introductory remarks, however, I use a narrower definition. By "professionals," I mean those individuals engaged in occupations that historically have been independent of the corporation itself: lawyers, accountants and investment bankers.

Of course, lawyers, accountants and investment bankers are not the only professionals who have had an increased impact on day-to-day corporate decisionmaking. Corporations are employing the services of other professionals such as social scientists to improve both working conditions and worker attitudes in the hope of improving productivity.<sup>2</sup> Specialists in areas such as ethics also are beginning to have an increasing role in corporate decisionmaking.<sup>3</sup> However, my

---

\* Chief Judge, United States Court of Appeals for the Third Circuit; Former Chancellor of the State of Delaware.

<sup>1</sup> For a more complete discussion of the meaning of corporate governance, see I. Shapiro, *Corporate Governance* (Oct. 24, 1979) (paper presented as part of the Fairless Lecture Series at Carnegie-Mellon University, Pittsburg, Pa.).

<sup>2</sup> See generally Purcell, *Institutionalizing Ethics into Top Management Decisions*, 22 PUB. REL. Q. 15 (Summer 1977).

<sup>3</sup> See *id.*

introductory remarks, as well as the Symposium articles, focus on the legal, accounting, and investment banking professions, because their presence in, and impact on, the corporation today are more pervasive and obvious than other professions whose presence in the corporate community is just beginning to surface.

Today professionals have become an almost indispensable and pervasive adjunct of corporate governance. This can be seen when one looks either at discrete corporate projects and undertakings or at the overall ongoing process of corporate life. Why have professionals assumed so great a role?

There are many reasons for the magnitude of the professional involvement in corporate governance. One is simply the need to do "good business." The very complexity of corporate operations requires professional advice to ensure an efficient and competitive operation. This goal is particularly crucial as our economy takes its toll on American businesses. Problems associated with compensation systems or personnel decisions, for example, call for sophisticated professionals to devise and implement plans designed to maximize the performance of the workforce. On the other hand, the corporation may call upon an entirely different group of professionals to ensure that it makes the most efficient use of its capital resources.

Another reason for increased professional involvement in corporate governance is that government regulation and control of corporations require constant input by professionals in corporate decisionmaking. Regardless of the wisdom of such regulation, the brute fact is that it is so pervasive and complex that corporations have turned more frequently to professionals in order to comply with required standards.

Of course, government regulation is not confined to the corporate world. Government regulation of corporations seems especially pervasive, however, because corporate activity encompasses almost the entire spectrum of human activity, and thus corporations are affected by many diverse government regulations. Government regulation of corporations is also more noticeable because of the impact of corporate activity on the general welfare. For example, corporations constantly make decisions that may affect the environment or result in charges of discrimination. In these two areas alone, corporations inevitably turn to attorneys and other professionals for guidance.

Professional input is and will continue to be important in guiding both short- and long-term corporate decisions. One repercussion of this increased professional input in corporate decisionmaking is that more professionals are becoming corporate employees. Concerns about conflicts of interest and the proper exercise of professional judgment have surfaced as a result of this practice.

The growing use of professionals in corporate governance requires careful orchestration on the part of those who are ultimately responsible for conducting the corporation's business. There has always been the potential for conflict between a particular professional and the governors of a corporation: The course of action recommended by legal counsel, for example, may be the course of action least desirable to the corporate directors. When a collection of diverse professional talent converges on a problem, each professional having a particular area of concern, this potential for conflict is exacerbated. Additionally, "outside" and

“inside” professionals in any particular discipline may find that they do not agree on the best route for the corporation to follow, and they may in fact suspect each other’s professional judgment. The traditional dominance of retained legal counsel may be changing also, as in-house counsel begin to oversee and seek to control the work of the outside lawyers.

This increased potential for conflicting views of the corporation’s best interests puts new demands on the management talents of corporate officers and directors. They must continually reexamine the roles assigned to professionals in their corporations and be alert to the need for professional assistance in areas of corporate life that have grown more complex over the years. They must evaluate and choose among differing recommendations for corporate action. This, of course, may require that these managers themselves attain a level of professionalism never before demanded of them.

Not only must the officers and directors of a corporation examine the role of professionals, but professionals themselves must examine their part in corporate governance. For example, the American Bar Association Code of Professional Responsibility provides that “[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.”<sup>4</sup> In practice, however, it is not always easy to determine who the client is. As I have mentioned, there is a tendency to regard a corporation as a freefloating entity. But a corporation does not exist apart from the directors, officers, shareholders, employees, and others who are engaged in its activities. As a result, when intracorporate conflicts arise it is often difficult to determine the “entity” to which the corporate lawyer owes his or her allegiance. Who is the client in a corporate derivative suit? Do the directors or the shareholders speak for the corporation? Should a corporate lawyer disclose information to the shareholders when the directors have determined that the information is not “material” to a decision to be made by the shareholders?<sup>5</sup> For counsel regularly retained by the corporation, these issues are often further complicated by close personal and working relations with the officers of the corporation.

Duties placed upon professionals by those outside the corporation also create difficulties in determining to whom the professional owes his or her allegiance. For example, the Securities and Exchange Commission recently has attempted to place upon corporate lawyers obligations to the public.<sup>6</sup> These obligations may even include a duty to “blow the whistle” on the client when the lawyer becomes aware of violations of the federal securities laws.<sup>7</sup> Similar watchdog responsibilities have been placed on accountants. Investment bankers have long been held responsible to shareholders and potential investors for failing to conduct a rea-

---

4 ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18. The proposed ABA Model Rules of Professional Conduct would not change the substance of EC 5-18. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.13 (Discussion Draft, Jan. 30, 1980).

5 *See, e.g.*, SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978).

6 Rule 2(e)(3)(i) of the SEC’s Rules of Practice gives the SEC power to forbid a lawyer, engineer, accountant, or other professional or expert from practicing before the SEC if the professional has been found to have violated any of the laws, rules, or regulations of the SEC. 17 C.F.R. § 201.2(e)(3)(i) (1980).

7 Recently, however, the SEC denied a rulemaking petition that would have imposed disclosure requirements on attorneys. The Commission noted that the ABA was studying proposals similar to those presented by the petition. *See* Securities Exchange Act of 1934 Release No. 16769 (Apr. 30, 1980), 6 FED. SEC. L. REP. (CCH) ¶ 82,501.

sonable investigation into the contents of registration statements they prepare.<sup>8</sup> These responsibilities, above and beyond the duties owed by professionals to the corporation, further add to the complex role of professionals in corporate governance.

Given the extent of professional involvement in corporate governance, one might well ask whether a substantial reduction in government control over corporate action would produce a concomitant reduction in the amount of professional input into corporate activities and policy determinations. In other words, would implementation of a "government-off-our-backs" policy substantially moderate the role of the professional in corporate governance?

The answer to this question depends on whether one believes that corporate life can ever revert to the "good old days." Of course there would be some changes with less government regulation, but I do not believe that most modern corporate executives would turn away from the goals of achieving a better environment or of engaging in fair employment practices.

While fewer new regulations may be a realistic possibility, at least in the near future, it is difficult to imagine the repeal of the numerous statutes providing "private" actions against corporations in many situations. As long as these statutes are on the books, corporations will continue to need ongoing professional advice both in formulating policy to guide future conduct and in processing lawsuits.

The process of governing corporations has become so infused with professional guidance that professionals are here to stay. This is certainly good news for the professional community, although it may seem a mixed blessing to the corporate hierarchy.

---

<sup>8</sup> 15 U.S.C. § 77k(a) (1976). See *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 578 (E.D.N.Y. 1971); Comment, *BarChris: Due Diligence Refined*, 68 COLUM. L. REV. 1411, 1420-22 (1968).