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SPECIAL SECTION

Pro Bono

Helping In-House Counsel To Serve Organizations Working To Improve Our Communities

The Editor interviews William B. Lytton, General Counsel, Tyco International Ltd. and Board Member, The Pro Bono Partnership.

Editor: Please tell our readers about your background.

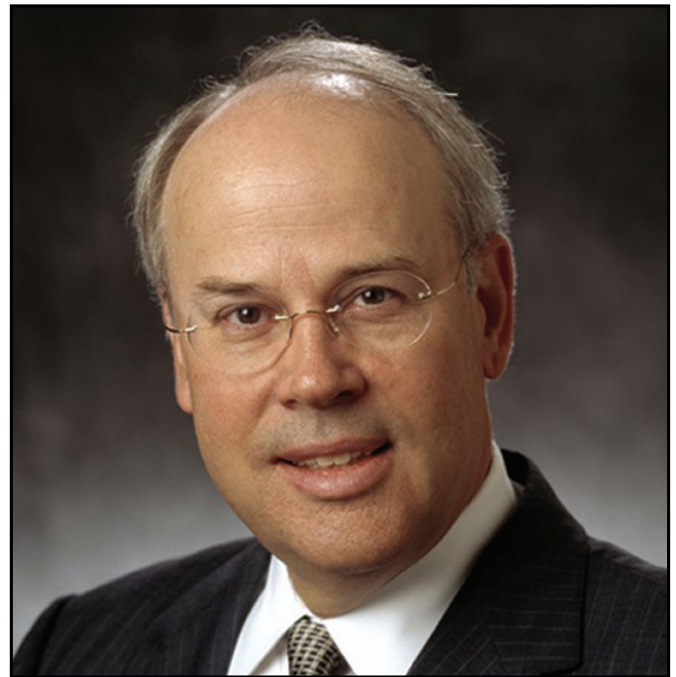
Lytton: I have been Executive Vice President and General Counsel of Tyco International Ltd. since September 2002. Immediately prior to that, I served for six years as General Counsel at International Paper Company. And, prior to that, I held general counsel positions at operating divisions of Lockheed Martin and Martin Marietta, as well as at GE Aerospace. I also served as a federal prosecutor for eight and a half years in Chicago and Philadelphia and as deputy special counselor to President Ronald Reagan in 1987.

Editor: How did you become involved with the Pro Bono Partnership?

Lytton: In the late 1990s, while at International Paper, I was also serving on the board of what was then known as the American Corporate Counsel Association (ACCA). The Partnership's founder Bob Healing, former Corporate Counsel of General Electric, and Rick Hobish, the Partnership's executive director, invited me to lunch and introduced me to the Partnership and its goal of marshalling the resources of inside counsel to address the needs of non-profit organizations.

At that time, it was my understanding that about 25 percent of corporate counsel participated in any pro bono work, compared to a rate two to three times higher among the private bar. This was cause for concern for the American Bar Association and for ACCA. So, I was very interested in the Partnership's potential to address that issue, even more so as I thought about the potential impact such work could have on the poor and disadvantaged. I also saw that the Partnership would generate goodwill for the profession and provide personal and professional enrichment for individual attorneys. It seemed like a "win win" proposition.

Bob and Rick convinced me to join the Partnership's board of directors, and I have remained a strong



William B. Lytton

advocate for its programs ever since.

Editor: What are your responsibilities on the board of the Pro Bono Partnership?

Lytton: The Partnership's board consists entirely of general counsels and other members of the in-house bar. Extremely well run, the organization provides ongoing and detailed programmatic and financial information to the board on a regular basis. I think highly enough of the organization's mission and performance that I have chosen to focus my energies on advocating amongst my peers – for pro bono service generally and the Partnership in particular. I also do a considerable amount of fundraising to help ensure that the Partnership has the financial wherewithal to carry out its mission effectively and efficiently.

Editor: Could you please describe the opportunities available to the volunteers through the Partnership and why you think they are particularly appropriate for in-

house counsel?

Lytton: What makes the Partnership so attractive to the in-house bar is that it focuses on the skills that business law attorneys and, in particular, in-house counsel use daily. And, the Partnership provides volunteer opportunities that are discrete, manageable, non-litigation matters and, generally, not subject to time deadlines. For example, the Partnership's volunteers provide assistance with: corporate structure and governance, contract and lease review, real estate transactions, employment law counseling, tax law and tax exempt status, environmental law, intellectual property, mergers and dissolution, and Internet and e-commerce. Volunteers also sometimes present seminars for nonprofit executives, draft articles, or counsel clients on the phone.

Editor: Why should in-house counsel volunteer through the Pro Bono Partnership?

PLI Roundtable

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sensitive topics, executive sessions can be used to air conflicts. If a maverick director consistently drains the time, energy and attention of the other directors, executive sessions provide a low-profile forum for managing the maverick.

Editor: What is the value of advance materials?

Hale: Advance materials give the board and management a common focus. If the directors learn that they are expected to read the materials in advance, you can

move to more substantive discussions.

Shank: A lot of experts on a board like to wander into details. Segregating the advance material to be discussed from an appendix with detailed attachments communicates a structure that helps steer the meeting to a higher value discussion with more strategic direction.

Dolan: A common industry complaint is that board members are given too much financial data. The data needs to be put into the context of the business by providing competitive analysis and other reference tools.

Hale: I agree with Janet. It's well and good to send out financial statements

showing that store sales have increased by five percent, but it's more helpful to know that your figures are twice those of your competitor. The reverse is also true. The board wants to know if the figures are way behind their competitors' before the company is hammered in the press.

Editor: How do board and management collaborate in setting strategies?

Dolan: Boards should insist that a strategy be of a longer range than one year. You need a thread of consistency so that you can compare the plan against your current position from year to year.

Filters are needed. Management can use a matrix like "pearls and dogs." This helps them focus on the risk/reward assessment.

You should share with your board initiatives that did not make the list. The board adds real value when a director asks what is not there. We live in a fast paced, global world. The more we can vet plans internally, the more likely we are to succeed.

Shank: If the board is properly structured, it includes members with different backgrounds that are important to the company so that they can contribute outside perspectives that challenge management.

Hale: To preserve the right balance of members representing different industries and talents, a board may set a policy requiring members to resign if their principal employment changes. When the board receives a resignation, it needs to step back to ask if the person had been doing a good job.

It is important to involve the board early in strategic discussion. *Smith v. Van Gorkum*, 488 A.2d 858 (DE 1985) stands for the proposition that you better not go to the board with no notice and tell them that you need a vote for selling the company.

Equally important, you do not want a split vote in the board. Split votes can be avoided by going to the board early so that if it is clear that the board is not supporting you or that there is a substantial minority; you can tailor your strategy without the embarrassment of being voted down.

Editor: What is the key to effective CEO succession planning?

Shank: Most companies do not have candidates waiting to be nominated. A contingency plan should be ready to prepare the board for taking a more active role in holding the organization together until a new CEO comes aboard.

A true succession plan requires good communication with the current CEO beginning with an understanding of how long the CEO's tenure is likely to be. It also requires a process for the board to interact regularly with potential internal candidates so that board members can form their own judgments about each candidate's potential to become a CEO.

Dolan: Succession planning is an important responsibility of the CEO. The first thing a new CEO should think about, when appointed to the position, is who his or her successor will be and how to groom him or her effectively. I have been on boards that have brought in outsiders and on those where an

insider is selected. While both processes worked, selecting the insider is often better for the organization. The insider's institutional knowledge makes for a smoother transition.

Editor: What are the important elements of a CEO performance review process?

Shank: First, avoid surprises. You should have a shared understanding of how the process should work and what the board's expectations are of the CEO's performance. Start with performance goals submitted by the CEO but responsive to the issues the board is concerned about.

The process needs to be formalized. Most companies have a set form for individual evaluation of the CEO submitted by each of the directors which is then compiled by the lead director. That is taken back to the executive committee for discussion. Then that is reviewed with the CEO and used as a basis for setting his or her compensation.

The more that performance standards can be measured, the better communication and matching of expectations are going to be. Feedback to the CEO and a matching of expectations should not be a once a year thing. The vehicle of having a process with a feedback session to the CEO every quarter of how it is going and what we are concerned about is also an important part of the process.

Dolan: Having no surprises should be the theme of this discussion. The CEO needs to seek input from the board of how the management team is performing. The CEO is the conduit for very important confidence building for the whole organization. The organization's future depends on how well the CEO understands the board's perspective and on building a good working relationship with the board.

Hale: It is important to create a culture in which constructive criticism is expected. If you have an environment in which the CEO or any manager in an organization expects to receive nothing but praise, it can be destructive when criticism is given. We try to indicate specific times in the year when constructive criticism is going to be given.

Editor: How does the communication change when the board begins to lose confidence in the CEO?

Hale: One of the reasons for succession planning is that sometimes the board decides that the CEO should leave. Boards and CEOs alike want to avoid this. An environment that has regular executive sessions can go a long way in addressing the problems early so that the situation can be saved.

Shank: That is not a good place to be because the board has to be concerned with dealing with the ultimate situation with the CEO and with continuity and confidence of the organization. The more the executive session and the periodic feedback to the CEO can be used as a vehicle to face difficult issues, the more easily the board can get the CEO to a point where he or she understands that severance is going to come. It can help the severance to take place in a way where the damage can be managed.

William Lytton

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Lytton: First, simply, it is the right thing to do. And, volunteering is personally enriching, provides a valuable service to organizations working to improve our communities, and it generates goodwill for the company or firm. Pro bono work may also exempt an attorney from mandatory pro bono assignments in New Jersey or provide New York CLE credits.

Volunteering through the Partnership is especially easy. The Partnership's staff attorneys screen clients, contact volunteers to offer matters and, in general, coordinate the process. They are experts in the law of nonprofit organizations and are readily available to provide support and back up if and when a volunteer needs it, including access to model forms and documents. There is no quota for pro bono hours – volunteers choose matters that match their expertise and fit their schedules. The Partnership will even take matters back and reassign them if a volunteer has something come up unexpectedly. They provide professional liability insurance coverage and, when appropriate, access to other in-house or private counsel for team support.

Editor: Would you also encourage an in-house legal department to make a commitment with the Pro Bono Partnership?

Lytton: Absolutely. Pro Bono work is an excellent opportunity for good corporate citizenship, and the work is interesting and rewarding for the individual attorney. And, the Pro Bono Partnership makes the entire experience easy and meaningful.

Editor: Would you provide an example of a matter or two that in-house counsel have handled?

Lytton: Lee Braem, Tyco's Counsel for Environment, Health and Safety and the Partnership's 2002 Volunteer of the Year, has been involved with the Partnership from its earliest months in New Jersey, and has taken on several pro bono matters, including among many

others, assisting a statewide community development organization with real estate issues, reviewing release forms for a multi-purpose social service agency in Connecticut and advising several clients on the implications of HIPAA, the federal privacy legislation.

Editor: Does the Partnership operate outside of the New York tri-state area?

Lytton: The Partnership is in the process of exploring other major cities that could benefit from its programs. It has already played an active role in helping to create the Pro Bono Partnership of Atlanta and the Hartford Non-profit Pro Bono Initiative. I wholeheartedly support such an expansion and intend to dedicate some of my energies to facilitating the process. I think it is important to note, however, that many good pro bono programs already exist elsewhere. In some cases, the Partnership may be looking at those locations, but it has no interest in supplanting existing programs. It will only proceed in the event that it can complement those programs' current activities.

Editor: Where can in-house counsel learn more about volunteer opportunities?

Lytton: They can call the Partnership at (914) 328-0674 (NY) or (973) 273-0600 (NJ) or take a look at the current volunteer opportunities listed on the Partnership's website: www.probono-partnership.org. There are also several good testimonials from other volunteer attorneys on the site.

Editor: Is there anything that you would like to add?

Lytton: Anyone who has ever been involved in community service – whether working in local government, volunteering to coach a child's soccer team, or sharing one's professional skills to help those in need – has experienced the tremendous satisfaction of giving something back to the community. The Partnership is frankly an easy way for in-house counsel to get involved in pro-bono in subject matter areas they know and are comfortable with – and with flexibility to deal with the demands of our corporate clients.