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Peter G. Verniero: Bringing Multiple Talents To Corporate Investigations

The Editor interviews ***Peter G. Verniero****, Of Counsel, Sills Cummis Epstein & Gross P.C., co-chair of that firm's corporate investigations and business crimes practice group and chair of its appellate practice group, former associate justice, Supreme Court of New Jersey.*

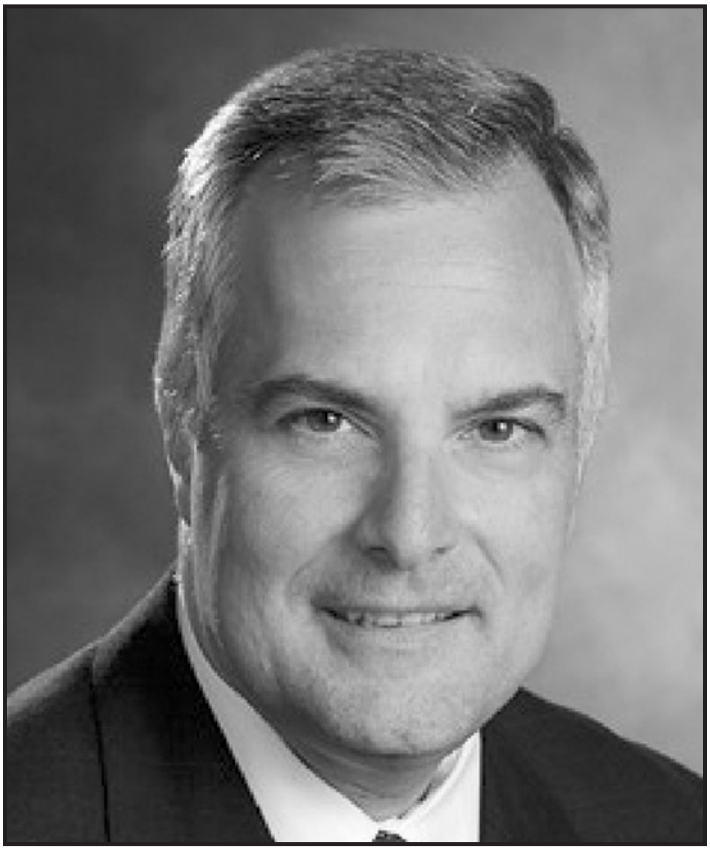
Editor: Tell us about your background:

Verniero: I was appointed by Governor Christine Whitman as her chief counsel and served in that capacity from January 1994 to February 1995. At that point, I became the Governor's chief of staff. I remained in that position until July 1996 when I became attorney general of New Jersey. While I was attorney general, I personally handled several landmark cases, appearing for example in defense of Megan's law in the United States Court of Appeals, which upheld the law in 1997. In 1999, I was appointed to the Supreme Court of New Jersey. I served in that capacity, as associate justice, for a five year period until August 2004. While on the bench, I authored 124 judicial opinions touching on a wide range of matters, including employment, corporate and constitutional law.

Editor: Why did you decide to leave the Court and join Sills Cummis?

Verniero: I left the Court primarily for financial reasons. In considering which firm I should join, I was looking for a New Jersey based firm with a national clientele and one with a reputation for excellence and professionalism. I was also seeking a firm where I could make the best use of the skills I had developed in the course of my career. I felt that serving as co-chair of the firm's corporate investigations and business crimes practice group and as chair of the firm's appellate practice group would be a good fit. Since joining the firm, I not only have been impressed with the quality of its work, but also with the collegial atmosphere that pervades the firm.

Editor: In the wake of Sarbanes-Oxley and in an era of crusading federal and state officials, corporations and their leaders seem to be faced with a growing number of allegations of wrongdoing. On the basis of your background as a former prosecutor and judge and your experience interfacing with the public as Governor Whitman's chief of staff, what do you think is the single most important thing that a corporation faced with such allegations should do?



Peter G. Verniero

Verniero: Get the facts and, where the circumstances require, get them quickly and then be prepared to share with regulators the conclusions of an investigator who has credibility with those who will review those conclusions. The legal climate has changed considerably since Sarbanes-Oxley in terms of the value being placed on corporate investigations.

In my view, the need for investigations was there before Sarbanes-Oxley whenever serious allegations of corporate wrongdoing were alleged and whatever the subject matter, whether they related to antitrust violations, misleading consumers, self-dealing by executives, allegations of discrimination in the workplace, accounting fraud and so forth.

Editor: You mentioned the need for speed.

Verniero: CEOs, directors and other corporate decisionmakers are well advised to initiate an investigation promptly after a serious situation comes to their attention that will need to be explained to regulators or the general public. This kind of self-evaluation enables a company to learn the true facts and then, if the investigation is properly conducted, to respond quickly and effectively to a regulator or to the public.

Editor: Who should conduct such an investigation?

Verniero: In some cases, it may be best to have a law firm that is familiar with the company and with its practices conduct the initial investigation. This is particularly true where it is necessary to get a quick evaluation of the facts by lawyers who are already familiar with the company, its practices and its personnel. In other cases, particularly where the corporation may be faced with a skeptical public, regulator or court or where the law requires greater independence (such as in connection with the dismissal of derivative litigation), it may be prudent or necessary to use a law firm that has no previous ties with the company.

I am comfortable in this practice area. It enables me to bring my own independent analytical thought to a set of facts and to arrive at conclusions that ultimately will not only help the client to sort through some difficult issues, but to provide conclusions that can be used effectively in other forums, such as a regulatory or litigation forum.

Editor: I gather you feel it may be prudent or necessary to use a firm that has not previously been used by the company, yet you mentioned that a key ingredient in investigations is the need for speed.

Verniero: Speed can be essential when it first becomes evident the corporation needs reliable facts developed by a credible investigator to respond to charges being leveled against the corporation. It is prudent in this climate to know at least as much about yourself as a diligent regulator might. I think of the phrase "know thyself, heal thyself." Boards and managers are coming to realize this and say to themselves "We should be as prepared as possible."

Because of the importance of developing the facts quickly, it might be desirable for companies to select in advance an independent law firm that could conduct an investigation. Obviously, a prudent corporation might wish to undertake a cost benefit analysis if putting a preselected firm on a standby basis would involve significant costs.

What is emerging from newspaper reports relating to recent scandals is that regulators and prosecutors put great weight on "tone at the top" and the adequacy of a company's financial and legal compliance systems. Every company that feels that it could conceivably be exposed to scrutiny should be prepared to respond to charges of wrongdoing and to conduct an investigation, detailing its compliance efforts and the steps taken by senior management to endorse and encourage such efforts.

Because the question "Where were the lawyers" has been raised in many of the scandals, a company's review might specifically cover such issues as: (a) whether the company has a legal staff that is adequate in terms of number of personnel and training to identify legal concerns in those activities within the company where problems are most likely to arise, (b) whether members of the legal staff maintain sufficient contact with middle and senior management to identify and address developing problems, (c) whether the company's lawyers understand their ethical obligations to report significant unresolved concerns up the ladder, and (d) whether their reporting relationships are such that they are likely to do so.

The facts marshaled by such a review would enable the company to address situations created by wrongdoers within the organization by making it clear that the company has made every reasonable effort to assure compliance with the law and that it has the right "tone at the top."

Editor: You co-chair your firm's corporate internal investigations and business crimes practice group. Is your prior experience helpful in conducting an investigation and reporting on its findings?

Verniero: Yes. I believe that any investigation must be conducted with a view toward examining carefully those facts that will be of greatest interest to the ultimate audience for the report, whether it be corporate decision-makers, prosecutors, judges, or the general public. Similarly, the conclusions in the report should be formulated in a way that will address the specific concerns of these audiences. I believe my prior experiences help suit me for those tasks.

Editor: Concern has been expressed that Sarbanes-Oxley and its progeny make it impossible for lawyers to meet their professional obligation to serve as vigorous advocates for their clients.

Verniero: I have been giving thought to the impact of the up-the-ladder reporting provisions of Sarbanes-Oxley and where they might lead as the case law develops. There are a number of unanswered questions posed by those provisions. It is not clear from the statute concerning what precisely will trigger up-the-ladder reporting. The impact on the attorney-client privilege remains an open question. Lawyers are put in an awkward position by the requirement that the client must report back to the attorney whether or not the client has accepted the attorney's advice.

The traditional attorney-client relationship is further affected by the requirement that the attorney must report failure by the client to take his or her advice up the ladder. Everyone wants to follow the existing law and to do what is right for the investing public, for consumers, for employees, etc. But, at the same time you have to do what is fair for the corporation and its management and you have to do what you can to preserve the attorney-client privilege, which is deeply embedded in our

legal system and in our concept of due process of law. The tension between the requirements for reporting up in Sarbanes-Oxley and the attorney-client privilege is growing and at some point might have to be resolved by the courts.

Editor: Let's turn to your experience as associate justice of the New Jersey Supreme Court. What motivated you to accept appointment to the Supreme Court?

Verniero: Service on the New Jersey Supreme Court is one of the highlights of any lawyer's career. I was honored when Governor Whitman asked me to serve. From that perspective, joining the Court was a fairly easy decision as you might imagine.

Editor: I understand that during your tenure on the Court, it took a major step that should improve the ability of the court system to handle complex business cases.

Verniero: Yes. We put in place a Pilot Program that is consistent with sound business practices. The Pilot Program for handling complex commercial cases offers advantages to the parties similar to those available in the Delaware Court of Chancery. The Commercial Case Pilot Program is designed to allow specially trained judges in the pilot counties to handle complex commercial cases. The Supreme Court approved the Pilot Program during my last year on the Court in May 2004 and it was put into place this past September.

The Pilot Program includes Burlington, Hudson, Mercer, and Ocean Counties. Complex commercial cases filed in those counties will be eligible for the program. Parties to this type of case may request that the case be assigned to the program and transferred to a general equity judge for individualized case management.

To join the program, parties must request to join the program and agree to waive a jury trial. In addition they must agree to an expedited discovery process and serious use of complementary dispute resolution techniques. The goal is to resolve the case within twelve months.

A single general equity judge will oversee each complex commercial case from beginning to end. These judges, who already have experience with commercial cases, will receive additional training for their new roles. Undoubtedly, the parties to these cases will benefit from these judges' expertise and the involvement of the same judge in each case as it proceeds to resolution.

I feel confident that the Pilot Program, if it receives continued support from the judiciary and the business community, will prove successful. There is a real need in view of the fact that about 300 complex commercial cases are now being filed each year in New Jersey. This number can only grow in view of New Jersey's thriving economy.

Editor: What has been the reaction of business?

Verniero: Leading up to the development of the Pilot Program, we had heard comments about what was going on in other states and the need for New Jersey to consider whether New Jersey should implement such a program. I recently spoke to a gathering of business lawyers about the Pilot Program and their reaction was positive. I expect that as parties experience the benefits of the Pilot Program, we will get additional positive feedback.

Editor: Are there other ways that the Court can be helpful in handing down decisions that affect business?

Verniero: I hope that the Court will continue to strive for clarity. Take employment law cases for example. In some of the decisions that I wrote, the Court provided guidance to employees as well as employers on such issues as what constitutes a valid waiver of rights in the context of arbitration, spelling out the particular rules that will apply in determining whether an agreement to arbitrate will be upheld if challenged. I feel that whenever any court can decide an issue and do so in a fashion that is clear, concise and straightforward, that approach helps everybody. I appreciate very much the need on the part of business leaders and business planners to have certainty in the law. In my view, my former Court has done a good job issuing clear decisions. You might not agree with some decisions, but if they are clear and concise, you can rely on them for planning purposes from a business perspective.

Editor: It has become a practice for organizations and law firms to file amicus briefs on important issues. Are such briefs valuable to the Court?

Verniero: Amicus briefs can be very helpful. My former Court reads these briefs carefully and relies on them when necessary. From my perspective, when you have a clearly formulated view that you feel the Court should consider, you ought to seek to file a brief.

Editor: Based on your experiences on the Court, what qualities should one look for in selecting judges?

Verniero: We want judges to bring into the court their life experiences, but at the same time bring to the court the impartiality that is the hallmark of a good judge. I think that by and large judges meet that standard – certainly, I feel that the members of my former Court do.