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Project: *Corporate Counsel Part II (Compliance Readiness) – Law Firms*

Sarbanes-Oxley Three Years On: An Evolving Compliance Structure

The Editor interviews Peter G. Verniero, Sills Cummis Epstein & Gross P.C.

Editor: Mr. Verniero, would you share with our readers some of the highlights of your time as Attorney General of New Jersey?

Verniero: Unlike many state AG offices, the office in New Jersey has jurisdiction over a full range of criminal and civil law issues. For example, the New Jersey Attorney General supervises all county prosecutors, and even serves as acting governor when the governor and legislative leaders are absent from the state. So my experiences were varied.

As Attorney General, I defended Megan's Law before the Third Circuit Court of Appeals, appearing and arguing in a case captioned *E.B. v. Verniero*. At the time of the court's decision, it was the first federal appeals court in the nation to uphold a state's version of Megan's Law.

Editor: And your five-year stint as a member of the Supreme Court of the State of New Jersey?

Verniero: Serving on a state supreme court is the highlight of any lawyer's career, and my experience was no exception. I enjoy writing, so writing judicial opinions was my favorite aspect of the job. I think organization and clarity of expression are essential to opinion writing. Those elements also are critical to effective appellate advocacy. Indeed, words are a lawyer's stock in trade, and a



Peter G. Verniero

good lawyer must possess an ability to write clearly and effectively. I believe all lawyers, and particularly young lawyers, should concentrate on improving their writing skills. It would be time well spent.

Editor: How did you come to Sills Cummis? What attracted you to the firm?

Verniero: Sills Cummis offered everything that I was looking for in a firm. It employs a dedicated group of lawyers, and the issues that the firm addresses are both challenging and interesting. I wanted to remain in New Jersey, and the firm's location was consistent with that goal. The firm is well managed, and the work environment is quite collegial, in

my view. After nearly a year at Sills Cummis I can say that my positive expectations have been validated.

Editor: You have spoken and written on a variety of corporate compliance issues in recent months. For starters, why is it so important for a corporation to have an effective compliance strategy in place today?

Verniero: In the aftermath of the Sarbanes-Oxley Act, the importance of corporate compliance cannot be overstated. As the statute and the recent spate of corporate prosecutions make clear, corporations will be held accountable on a range of issues, so it is incumbent on officers and directors to facilitate effective compliance programs. Corporate compliance is no longer something that "only the lawyers need worry about."

Editor: What do you believe the components of a good compliance strategy to be?

Verniero: From an officer's or director's perspective, a big part of the strategy is to ask the right questions of the right persons within the organization. Corporate managers should work to instill a "culture of compliance" throughout the company. Companies should adopt codes of conduct and should devote sufficient resources to enforce them. Allegations of improprieties should be promptly investigated, and the climate should be such that everyone associated with the company feels comfortable bringing an allegation

Please email the interviewee at pverniero@sillscummis.com with questions about this interview.

to the attention of the appropriate corporate official without fear of retribution.

Editor: Who should be in charge of the strategy? General counsel? Someone independent of the company's legal department?

Verniero: To some extent, the answer depends on the size of the company and the complexity of the issues it might be facing. Ultimately, the CEO, the CFO, and the board of directors may be held responsible, especially if something goes wrong, but certainly the general counsel should be very mindful of these issues as well.

Editor: Where does outside counsel fit into this evolving compliance structure?

Verniero: Outside counsel can play a critical role in providing an independent perspective on a range of compliance issues. For that reason, especially in the area of corporate investigations, an outside lawyer in many ways is better suited to the task than an in-house lawyer.

Editor: What is the role of the board of directors in the development of a corporate compliance structure? Recently there has been some criticism to the effect that, as a result of the corporate scandals and Sarbanes-Oxley and the other regulatory responses to the scandals, the governing board is so focused on process – that is, on form – that it is not paying any attention to operations, which constitute the real substance of the enterprise. Is that a fair comment?

Verniero: Under Sarbanes-Oxley and in this current regulatory climate, the role of directors in developing compliance programs is absolutely essential. Even before the enactment of the statute, directors were well advised to consider compliance a key element of corporate management. That said, directors must focus on other issues as well – such as business planning and a host of other subjects that are important to the success and health of the company. Recently, the SEC appointed an advisory committee to evaluate whether the costs of compliance

under Sarbanes-Oxley are commensurate with its benefits, particularly in the context of smaller issuers. That suggests that the government is sensitive to the criticism voiced by some in the business community that such costs may be outweighing the statute's salutary purposes. The statute is still relatively new, so it is too early to draw any firm conclusion. The creation of the advisory committee is a useful step.

Editor: Where does corporate counsel turn to find some guidance to deal with the complexities of compliance?

Verniero: The statute and related rules and regulations, the public statements and commentary of the regulators and other experts, the Federal Sentencing Guidelines and all of the commentary that has derived from the Guidelines, applicable judicial decisions, and Department of Justice guidelines are useful sources.

Editor: Sarbanes and its progeny have changed the legal landscape dramatically in the last three years. Do you have any sense that the dust is beginning to settle? That a coherent legal framework for corporate compliance is emerging? Where is this going to take us in, say, five years?

Verniero: As I suggested earlier, it's probably too early to tell whether the dust is settling. Clearly, the statute was needed to restore investor confidence shaken by scandal. Whether it represents an overreaction is the key question. Much of the statute's success, in my opinion, will turn on how the government goes about implementing it. If the regulators proceed in a thoughtful and fair manner, we should be fine. Again, only time will tell if the statute has been worth the effort. Five years is probably a good time frame within which to evaluate the statute's effectiveness.

Editor: You have recently addressed the assault on the attorney-client privilege in the corporate context. Please tell us about the consequences – unin-

tended or otherwise – of compelling the disclosure of confidential communications between a lawyer and his client in this context.

Verniero: We have to keep in mind that the fundamental purpose of the attorney-client privilege, which literally has been around for centuries, is to encourage unfettered legal discussion between a lawyer and his or her client. As the privilege erodes over time, those discussions will become chilled. That concerns me because, as a matter of sound public policy, we ought to be encouraging rather than discouraging full and candid conversations of this sort. Put differently, I think the marketplace is better off having an executive turn to legal counsel for candid advice when grappling with a complex legal issue as opposed to creating disincentives for such advice.

Editor: Is the issue one of an overreaction that will be corrected as a matter of course? Or does it represent something ominous for the future?

Verniero: Again, time will tell. But it is an issue worthy of public discussion.

Editor: This privilege is among a group of rights that we use to define ourselves as a nation. We are in very troubled times, however. Do you have any thoughts on whether it is possible to win the war on terrorism without subverting the rule of law?

Verniero: I do not believe that we should sacrifice all that is good about America in the name of national security. I do believe, however, that this is not an all-or-nothing choice. Since the founding of the Republic, we have had to balance civil liberties with the need to protect the community as a whole. That is why the United States Constitution prohibits not all searches or seizures but only *unreasonable* ones. Where to draw the line is sometimes difficult, but I am hopeful that the elected branches, with the appropriate level of judicial review, can both defend us against terrorism and preserve our basic liberties.