

AGGRESSIVE GOVERNMENT POLICIES PROMPT NEW AGE FOR CORPORATIONS FACING INVESTIGATION

The Sarbanes-Oxley Act signaled a “new age” in the way business leaders view ethics and governance of public and private companies, in organized patterns of government regulators seeking cooperation from targets of corporate investigations, and in the cooperative approach among federal agencies.

But the pendulum is swinging back, in the view of panelists at the program “The New Age of Corporate Investigations” during the ABA Annual Meeting. There is push-back in such areas as attorney-client privilege, with companies asserting it more strongly and declining to waive it more often, for example.

From Judith A. Miller, general counsel of Bechtel Corp., to Helane L. Morrison of the San Francisco office of the Securities and Exchange Commission, and private lawyers advising targeted corporations, there was consensus that heightened regulatory and prosecutorial aggressiveness has forced strategic change.

Morrison agreed there is more cooperation among government agencies, which often share information though they pursue their own investigations. The SEC does not coerce corporations to cooperate with government investigations, though it does reward those who do so, she said. The SEC may act more quickly than the Department of Justice in some cases, she said, because it has more personnel focused on securities cases.

Bart H. Williams of Los Angeles cited increased press scrutiny of corporate wrongdoing, attributing it to growing wealth and disparities of wealth in America that

make abuse of privilege more notable. He and Miller also noted the infusion of public relations professions on the litigation teams of corporations facing indictment, regulatory action or civil suit.

“There is less and less tendency to say no comment” when cases are pending, said Williams.

When asked how to structure a defense team when faced with investigation, Miller noted that general counsel often start responding to a potential problem without knowing if it’s genuine, or if so, how much of a problem it represents.

“You still have to staff at the outset as though you have a big problem,” she said, adding that inadvertent mistakes can occur at the outset of a process and haunt defense later when not enough expertise is at hand.

The team structure also can influence the mindset of regulators, said Morrison.

“We don’t tell a company who to hire, but we give more weight to investigations we view as independent,” done, for example, by outside counsel other than the company’s usual roster, she said.

When companies bring public relations into the defense mix, does that effectively waive attorney-client privilege? It can, according to Brad D. Brian, who moderated the panel, if the public relations goal is to convey information to the media. But Daniel Bookin suggested using public relations consultants who also are lawyers might preserve the privilege.

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