interview

How to Avoid Going to Jail

An Interview with the Honorable Alfred J. Lechner Jr., Partner, Morgan, Lewis, & Bockius, LLP, Princeton, New Jersey

The Hon. Alfred J. Lechner Jr.

EDITORS' NOTE *"In today's climate of current disclosure and fairness, there's no room for executives to cut corners," the Honorable Alfred J. Lechner Jr. staunchly asserts. For, according to the former federal judge and current trial attorney, the recent Sarbanes-Oxley Act means that today's executives must "certify that the information is correct" when "they sign their company's SEC filings." And "if their statements contain material misstatements or omissions," they can be exposed "not only to civil penalties and lawsuits, but also to criminal prosecution and prison." In this context, executives must protect themselves, first and foremost, by following the law. But beyond that, if misconduct is discovered – and even if it is not – corporations should rely on experienced, "independent, outside counsel" to conduct internal investigations and analyses.*

Prior to joining Morgan, Lewis & Bockius in October 2001, Lechner served as a U.S. district court judge in New Jersey for more than 15 years, during which time he published more than 250 opinions. Before that time, he was judge of the Superior Court of New Jersey and previously worked as a trial lawyer for a New Jersey law firm. Lechner is a lieutenant colonel in the U.S. Marine Corps Reserve. He is admitted to practice before the U.S. Supreme Court, is a member of the bar in New Jersey and New York and holds a B.S. from Xavier University and a J.D. from the University of Notre Dame Law School.

COMPANY BRIEF *Founded in 1873 by Charles Eldridge Morgan Jr. and Francis Draper Lewis, Morgan, Lewis & Bockius, LLP now ranks among the nation's top-10 law firms, with nearly 1,300 lawyers in 16 offices around the globe. With offices in Philadelphia; Washington, DC; New York; and California, the Princeton-based firm helps its clients to consistently meet their legal and business objectives in a timely and cost-effective basis and serves some of the world's largest corporations, including Goldman Sachs, Morgan Stanley Dean Witter, & Co., Charles Schwab Investment Management, Inc., and Colgate Palmolive.*

Executives worldwide now face concerns that they will be blamed for a lack of integrity in their organizations. How can they avoid going to jail?

Being in charge puts executives at greater risk. The recent Sarbanes-Oxley legislation and the regulations from the Securities and Exchange Commission [SEC] obligate them to know what's going on when they sign their company's SEC filings. While this new legislation doesn't significantly change what their obligations were in substance, it does change them in form. Executives are now obligated to sign these SEC filings and certify that the information is correct. When they make that certification, they expose themselves not only to civil penalties and lawsuits, but also to criminal prosecution and prison, if their statements contain material misstatements or omissions. While the principle of being honest and forthcoming has always been there, the Sarbanes-Oxley Act has increased penalties, fines, and the possibility of prison exposure.

Contrary to popular understanding, the existence of a traditional compliance program is but one component of an effective program to both prevent and detect violations of the law. The sentencing guidelines require that a company train its employees on the requirements of the program, continuously monitor the effectiveness of the program, and discipline those who fail to comply with the policies set out in that program. Simply stated, the company must ask, "Have we established governance mechanisms that can effectively detect and prevent misconduct?"

Will international companies with securities trading on a U.S. exchange or otherwise registered in the United States face the same obligations as American companies?

If the company's securities are traded as American depository receipts or American depository securities in the United States, it would be subject to Sarbanes-Oxley regarding certification.

You spent many years as a distinguished federal judge. Are you better able to advise your clients because you can offer a judge's perspective?

In addition to trying cases and helping clients prepare strategies for securities and other class-action lawsuits, I've been assisting companies in their review of their compliance plans to make sure that what they have in place is adequate. I look at such things as if I were still a federal judge. The person who signs these documents has a limited ability to say, "I didn't know." The buck stops with the signatory.

When evaluating litigation for a company, I look at it from the perspective of 15 years on the federal bench to evaluate not only strengths and weaknesses, but also to develop a strategy for trial.

Does Sarbanes-Oxley go too far?

That is debatable. However, in light of today's investment culture, investors want, need, and demand to know what's going on. Also, it seems that the SEC was moving, even before Sarbanes-Oxley, from periodic to current disclosure. Of course, Congress wants current disclosure so that when something happens, it's revealed to the public on a timely basis; this puts heavy pressure on management to be responsive to situations as they develop.

What should a corporation do after discovering such misconduct?

It's not simply a Sarbanes-Oxley problem, which is bad enough; instead, it's an issue that involves the public relations and civil liability of companies. So there's a lot that needs to be done. An

internal investigation should be conducted, but depending on how that investigation is carried out, it could cause additional problems. For example, the impact of the federal sentencing guidelines for criminal defendants must be considered, concerning what was done with respect to self-reporting. Was there, in fact, a self-report of particular internal misconduct? And if there was, obviously there must have been an internal investigation, so who ran that investigation – in-house or outside counsel?

Of course, if there's going to be an internal investigation, it's always better to use independent, outside counsel. By that I mean someone who's totally independent and who doesn't usually do business with the company. He or she should also have enough experience and stature in the legal community, or outside of it, to add credibility and substance to the investigation, which, in turn, must be thorough, complete and revealing.

Does Morgan Lewis also advise on the public relations issues?

We are not a PR firm; we advise and counsel our clients on legal matters. We're a worldwide law firm that uses its practice groups to meet corporate needs. And with some 1,300 lawyers, we have the ability to deploy significant resources to respond to emerging situations, whether they're class-action lawsuits or internal-misconduct situations that must be handled immediately. With our corporate practice, we have the ability to advise management from an unbiased, untainted point of view.

You have offices across the United States, in Europe, and in Tokyo. Can you directly serve overseas-headquartered companies that are doing business within the United States?

Absolutely. I've been in our Tokyo office for weeks working with clients. Our European offices in Brussels, Frankfurt, and London serve many companies that do business in the United States. One of the crucial factors when selecting a law firm is determining the fit and motivation of the lawyers. Will they fit within the corporate culture and value the client relationship they're building? These are things Morgan Lewis takes very seriously. The legal teams we deploy have a comprehensive knowledge of their clients' industries because it's not enough for today's law firms to simply practice law; instead, they must efficiently provide legal services and assist management.

What strategies should executives employ to avoid these problems?

Honesty is the key. Fundamentally, management must follow the law. Again, in today's climate of current disclosure and fairness, there's no room for executives to cut corners. There's also no room, once a problem is discovered, to let it continue or try to cover it up. Some executives have operated this way in the past, but that conduct simply can't be condoned or tolerated anymore. As I mentioned, an important strategy is the use of independent, outside counsel to investigate an internal problem. This strategy allows executives to approach their boards, audit committees, the SEC, and the sentencing courts, and say, "I received advice from an independent, outside attorney."

A compliance program is but one component of corporate self-policing. As part of such a program, a company must determine whether its compliance program is effective. Does the program actually detect and prevent violations? Are all employees knowledgeable about the program and have they received appropriate training? Has the program been audited?

The law imposes significant corporate, as well as personal, liability for transgressions. In the past, it was possible for a company to pay a fine in connection with certain minor transgressions in exchange for non-prosecution of current employees. This option will be virtually non-existent in the future. Simply stated, the future focus of law enforcement will be on disclosure, cooperation, and compliance. A company should have a contingency plan in place for addressing difficult issues before they occur.

What are some of the most fascinating experiences you've had on the bench and in private practice?

On the bench I handled criminal cases, from simple drug busts to organized-crime rings to securities and anti-trust cases. One of my more interesting experiences was a terrorism case in the late '80s where a so-called Japanese Red Army terrorist was planning to blow up the Navy-Marine Corps Recruiting Station in New York City. The well-known criminal defense attorney, William Kunstler, represented the defendant. I found Kunstler to be a very good lawyer and a charming person. Although the case was difficult and contentious at times, it ended with a guilty plea and an extensive sentencing hearing pursuant to the federal sentencing guidelines. The terrorist was sentenced to about 25 years in federal prison.

That case is relevant today because, although there's now a heightened awareness of terrorism throughout the United States and the world, the phenomenon is not new. It has been around for quite some time, and in some ways, it corresponds with what's currently happening in the world of corporate management. The question is, how will corporations operate in the face of terrorism, with respect to ensuring they have what they need should an unfortunate act occur?

As far as trial work, it's often interesting to see what goes on in courtrooms. Sometimes attorneys from large firms, perhaps litigation partners, come to court for a complex antitrust case or securities matter, and at some point, it's revealed that this is their first trial. It's fascinating to watch those situations spin out, as the corporation has placed all its eggs in one basket that's being carried by an attorney who's invariably smart and well bred but has little experience in federal court.

One of the problems, of course, is that few cases go to trial, so that's something a corporate litigant needs to consider: Does the attorney being hired have jury-trial experience? Such experience is absolutely crucial, and it's an entirely different ballgame from trying cases before a judge, who essentially acts as a one-person jury. At a jury trial, there are 6 to 12 people sitting in that box watching everything that goes on.

I tried jury trials weekly for 18 years, and after each one I had the opportunity to speak with the jurors about what they liked, what they didn't like, and what they considered when making their decision. One of the key elements they always look at is whether they've been given reliable information that helps them to understand the case. At the end of the day, all a jury wants to do is look in the mirror and say, "I did the right thing."

The fact is, I've seen organized-crime defendants be acquitted because the government didn't prove its case. Although the jury knew in their gut that the defendants were guilty, the government didn't prove it. Along these lines, many folks say that in today's climate – in light of Enron, WorldCom, and other financial debacles – corporations can't get fair jury trials, but I disagree: A jury trial is probably the fairest venue in which such a case can be presented. It gives an attorney the opportunity to teach and convince the jurors that what the corporation did was correct, fair, and reasonable, but the key, again, is courtroom, jury-trial experience.

Sometimes attorneys advise their clients to take the Fifth. Should an executive who's on trial always follow his attorney's advice?

Well, an executive hires an attorney to receive advice. But in the end, it's the defendant who must make the decision as to whether he or she will take the stand and testify. I've been involved in a number of cases where the defendant didn't testify and was acquitted. But walking into a courtroom as a defendant must be one of the most unsettling moments of anyone's life. Again, advice is worth more when it is offered by an attorney with federal jury-trial experience. There is simply no substitute for experience.

Do you like being an attorney better than being a judge?

It's an entirely different world. I was a trial attorney before I sat on the bench, now I'm a trial attorney again, and I truly enjoy being an attorney. I like getting up every morning, going to work, dealing with our clients, and being an advocate. When you're a judge, obviously you can't be an advocate. But being a trial attorney with the support that's offered to me at Morgan Lewis is an unparalleled experience and opportunity; I thoroughly enjoy it. ●