

Is It Over?

An Interview with the Honorable Eliot Spitzer,
Attorney General, State of New York



Hon. Eliot Spitzer

EDITORS' NOTE "You can't legislate values," declares New York State Attorney General Eliot Spitzer, but that has not stopped him from using the might of the legal system to try to stop corporate leaders from "straying from integrity and transparency in transactions." Indeed, in his esteemed opinion, the only way to ensure that business leaders "recognize proper values and understand them" is to send a clear message that "there is a risk attached to improper behavior," for ethical lapses in New York State may well lead to "due criminal prosecution." This notoriously tough approach has yielded impressive results thus far, he reports, noting that "the frequency of financial restatements and major revelations has clearly declined" as "a direct consequence of the reconsidered behavior of many leaders." So much so, in fact, that "we are now on the downside of the bell curve in terms of the number of cases that will be brought," Spitzer believes.

But despite this success, the state attorney general stops short of admitting he feels proud of his work and that of his team. After all, he reflects, it is simply a part of putting "public service at the heart of what we do." Otherwise put, "whether we get wages back for somebody who wasn't paid properly, protect the environment, or pursue a financial-services case," he and his office have a

duty "to figure out what the public interest requires and then go after it."

Prior to becoming New York State's 63rd attorney general on January 1, 1999, Spitzer accumulated considerable experience in the legal profession. He served as a clerk to United States District Court Judge Robert W. Sweet and, later, as an associate at Paul Weiss, Rifkind, Wharton, and Garrison. From 1986 to 1992, Spitzer served as an assistant district attorney in Manhattan, eventually becoming chief of the Labor Racketeering Unit for the prosecution of organized crime and political corruption cases. He has also worked at the New York law firm Skadden, Arps, Slate, Meagher and Flom, and was a partner at Constantine & Partners. Spitzer is a graduate of Princeton University and Harvard Law School, where he was an editor of the Harvard Law Review.

Many CEOs of New York State's largest firms must tremble with fear when your name is mentioned. It stands to reason that the question on their minds is: When will the scrutiny end?

The good news is it's ending as we speak. The frequency of financial restatements and major revelations has clearly declined, and that is a direct consequence of the reconsidered behavior of many leaders, and their dedication to restoring integrity and transparency to corporate governance. We are now on the downside of the bell curve in terms of the number of cases that will be brought. That doesn't mean that other revelations will not occur, or that there won't be discomfort in watching pending cases move to trial. But I think we are through the worst of this period of intense examination of corporate ethics.

Are you optimistic that the situation has changed for the long term?

I am optimistic that it has changed for the medium term. In my mind, the question is not: Have these cases and the efforts to reexamine corporate activity been successful and had some impact? Rather, the question is: How long will that impact last? Unfortunately, this kind of behavior is cyclical. Issues tend to reemerge as folks forget the lessons learned from previous scandals.

So yes, things are better, and they will continue to improve. However, they will not improve indefinitely. There will be another turn of the wheel and, at some point in the future, we will go through another period in which we will have to reexamine our behavior.

What about boards of directors? Have they changed enough?

Enough is a hard word to measure. They are changing, and we are doing much better as a result of board members' renewed attention to their responsibilities. The crisis of governance over the last several years has focused our efforts not only on boards but also on audit committees, outside lawyers, institutional shareholders, and the decision makers who are supposed to complement the work of the CEOs governing any organization. Boards now have a much greater understanding of their particular burden and obligations, and the consequence of that greater understanding is that they are doing much better now than they were before.

Many overseas companies have divisions doing business in New York, where the laws are different from those in their home countries. They might worry that their executives may unwittingly break the laws of New York State and end up in jail.

Those who are doing business in New York are bound by our laws and our principles of doing business. So I feel no sympathy for anybody who says, "I didn't know that in New York this behavior constituted fraud. Therefore, don't penalize the company or me." Those who are doing business here should know what the standards are. Having said that, we have been very careful in establishing the intent underlying the fraud in each case where someone has pled guilty or been convicted of fraud.

You have been very aggressive in this matter, and may have made enemies in the financial community. Have you noticed any indication of that?

Not really. There are certainly individuals who disagree with some of the cases my office has brought, and with how we have acted since I have been involved as a prosecutor handling organized crime,

political corruption, and various other types of cases. Clearly, I disagree with those who oppose the types of cases we have been bringing in the financial sector. If there has been a pushback in any form, I just view that as part of being an appropriately aggressive prosecutor.

You've been responsible for a great deal of change in the financial community. It must give you a sense of pride in your office.

Well, pride is something I try to avoid, I suppose. We are doing our job, and we hope it reflects the public interest. Whether we get wages back for somebody who wasn't paid properly, protect the environment, or pursue a financial-services case, we try to do our job with a degree of balance and care that reflects the public interest. We always try to figure out what the public interest requires and then go after it.

With regard to the regulation of mutual funds, what initiatives should be put in place in order to protect the interests of private investors and pensioners?

There are three distinct areas that need to be addressed. One is the problem of trading patterns that are contrary to the fiduciary interest of the investors – the late trading – and the SEC has promulgated some rules that will address that issue in due course. The second issue is fees. The structure of governance within mutual funds permitted the fees to spiral out of control. I am hopeful that through either congressional legislation or some SEC rules, mutual-fund governance will be tightened up so that the fund boards begin to pay attention. If we tighten up that governance, fees will ratchet down. Fees have been extraordinarily high – higher than is justified by any recuperation of the market. The third distinct factor, which is perhaps a corollary to the second, is that boards have to awaken to their responsibilities. They have unfortunately been quiescent and weak, and that must change.

In comparison to the SEC, your resources are limited. However, you have managed to make great strides in the fight against corporate malfeasance. Where do you draw the line between the responsibility of the attorney general's office and that of the SEC?

It's a difficult boundary line to draw, because we have overlapping and, in certain respects, nearly identical jurisdictions in terms of enforcement of the laws. Obviously, the SEC, as a rule maker, has a much more expansive jurisdiction than I do. I do not have the authority to promulgate rules. But if fraud is committed in New York, my office has the jurisdiction to pursue it, and we do so when we believe a case should be brought.

What purpose do state attorney generals serve in regulating the securities markets? Does there need to be

one central federal regulator, and if so, how does an AG's office fit into the regulatory process as a whole?

Yes, there does need to be one permanent, primary regulator that will lend order and uniformity. The SEC has that power and will continue to use it when necessary and appropriate, of course. The supremacy clause gives federal law primacy over state laws, and so that role has never been endowed to state attorney generals. Consequently, our objective is to use the multiple enforcement agencies to ensure that adequate resources and attention are

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being paid to the many different areas of fraud. Then each of us focuses on one area, because duplication is wasteful and we need to preserve resources to pursue the range of impropriety that is out there.

Are you happy with the regulatory process as it is today?

I think it works very well. There have been moments of disagreement between my office and the SEC, but we have worked those through and have continued to focus on where and how we can work together, and I think we have done quite well.

Can regulations be wholly successful in achieving widespread ethical behavior on the part of corporations and financial institutions?

I don't think so. You can't legislate values. Laws themselves can't remedy something as deep-seated as a fundamental straying from integrity and transparency in transactions. What will remedy that is due criminal prosecution, which sends the message that there is a risk attached to improper behavior. The leaders of the business community need to recognize proper values and understand them. They need to pay a bit more attention to values, and not primarily because of legislation, but rather because they understand that values need to be attended to.

Does the Sarbanes-Oxley Act go too far?

I don't know. I have heard very reasoned arguments that the statute makes it difficult for certain small private compa-

nies to access the capital market and do IPOs because the costs of doing so have increased. On the other hand, of course, there is a fair amount of good in the statute. When the pendulum swings, does it always stop at the perfect point? Of course not. Taking a broad view, I think we need to wait a bit of time before we begin to reevaluate the statute.

Many young people graduate from school without an answer to one age-old question: What do I want to be when I grow up? What advice would you give them?

Pursue something that will challenge you intellectually every day. I derive enormous joy from thinking every day, being creative, and trying to accomplish something that is useful. I hope others within and outside of my office derive that joy as well. You can experience that feeling working in the private or public sector, for the government, in the not-for-profit world, and elsewhere. There are many different ways to do it, but you should find a source of employment that is not only valuable financially, but also valuable intellectually, because it forces you to be creative on a regular basis.

How do you find good people for the attorney general's office, which can't pay as much as some of the big law firms? After all, not everyone is buoyed by the feeling that they are doing something good for the world.

People attach a significant value to the public service at the heart of what we do, day in and day out. It's very real. Most of the lawyers in my office could earn substantially more elsewhere, but the value of doing the type of work we do compensates for that. Consequently, I suggest to those I try to recruit that the value of the joy they will derive from working for the AG's office is more than sufficient to offset the loss of the financial benefits of a larger paycheck.

Whom do you admire most?

Like most individuals, I would point to my parents, who I credit for teaching me so much in so many different ways. In the narrower world of lawyers, there are a few who have been my mentors. First, Judge Bob Sweet, for whom I clerked, is a wonderful man and a great judge. He taught me a great deal about what the judicial system can be and should do. Second, I learned a lot from Arthur Liman, one of the great practitioners of the last several decades, who was the senior partner at Paul Weiss when I was a very junior associate. I think most people view Robert Morgenthau [district attorney of New York County and former U.S. attorney] as the leading prosecutor in the nation. He defines how to do the job properly.

When are you going to run for governor?

Well, I can only talk about my plans once I figure them out. We'll deal with that in due course. ●