

CORPORATE / COMMERCIAL

Adviser or 'tattler'? New role for in-house counsel?

By Timothy B. Corcoran

Few pieces of legislation have had as much impact on the role of legal professionals and business advisers as the American *Sarbanes-Oxley Act*.

One of the more startling components of the new law is that any practising lawyer — in-house or outside counsel — is now required to report material violations of securities laws up the chain to the general counsel of the company.

Moreover, any outside lawyer who doesn't feel the general counsel is responding adequately to these violations is now obliged to take his or her concerns to federal authorities. These new reporting responsibilities have the potential to turn lawyers into tattletales.

The implications of *Sarbanes-Oxley's* reporting requirements was the focus of a recent Martindale-Hubbell Counsel-To-Counsel session in New York. This was one of Martindale-Hubbell's ongoing series of forums that allow corporate counsel and law firm partners to share ideas and best practices relating to the

management of corporate legal departments.

Some of the highlights from the session included the following key findings:

Guidelines are unclear

A number of participants shared their frustrations with



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how vague the new reporting rules are for in-house counsel to interpret.

The primary concern is that the requirements and their lack of clarity create a barrier between lawyers and the busi-

ness executives they are paid to advise.

For instance, if executives fear in-house lawyers will act as whistleblowers, they're less likely to consult with them on key issues.

As a result, the executive loses the benefit of the lawyer's advice and the lawyer loses the chance to steer the company away from a potential problem.

How best to comply

Another topic of discussion was how best to approach compliance with the new reporting rules.

Some participants favoured implementing new formal internal reporting procedures, while others suggested that their preference was to deal with the rules in less structured ways.

There was a consensus, however, that the challenge in addressing the need to comply with the new reporting requirements under *Sarbanes-Oxley* is going to be to promote collaboration among senior executives in the atmosphere of a strict regulatory environment that typically fosters concealment.

Communication is key

The session participants agreed that constant and effective communication between the legal department and senior management is more critical than ever in the post-*Sarbanes-Oxley* world.

Ultimately, general counsel are most effective when CEOs

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share with them their most significant ideas, plans and fears on a weekly basis. Armed with this routine dialogue, in-house counsel can participate in various business pursuits from their inception, rather than being drawn in at a later date when problems emerge.

Striking the balance

Finally, the participants agreed that the only realistic goal under the new law is to prevent their companies from

getting involved in gray areas and catch the occasional mistake; there's little anyone can do to stop someone who is determined to do wrong.

As one participant put it, the new reporting requirements demonstrate the need for in-house counsel to seek a balance between being a business enabler and a police officer.

Striking this balance may be the toughest challenge many corporate counsel have faced since law school.

Timothy B. Corcoran is vice-president of large law at New Providence, N.J.-based Martindale-Hubbell, the leading client development company for the legal profession. Martindale-Hubbell's Counsel To Counsel series consists of individual forums throughout the world where general counsel and select law firms share ideas on a variety of best practices in corporate legal services in an "off-the-record" exchange.

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