the critical role of
GENERAL COUNSEL

A Roundtable Discussion

GUEST OF HONOR:
Michael Helfer, Esq.
General Counsel, Citigroup

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While most companies are managed in a lawful and socially responsible manner, corporate scandals such as Enron and Worldcom have inflicted damage on the public’s perception of and confidence in Corporate America. In the wake of such scandals, the fall-out of which continues to attract attention, American businesses have become subject to more scrutiny both externally and internally. This environment of enhanced scrutiny now challenges General Counsel more than ever before. Boards of Directors look increasingly to General Counsel to help ensure sound financial and business strategy, compliance, and the integrity of corporate operations to support shareholder value.

The Directors Roundtable, a civic group which organizes events globally on issues relevant to corporate directors and their advisors, teamed with ALM Media, Inc. to host an event examining the changing role of General Counsel.

The event also recognized specifically the accomplishments of its distinguished speaker, Michael Helfer, General Counsel of Citigroup. Joining Mr. Helfer were corporate lawyers from the country’s top law firms: Allen Fagin, Chairman & Partner of Proskauer Rose; David Heleniak, former Senior Partner of Shearman & Sterling and newly appointed Vice Chairman of Morgan Stanley; and William McLucas, Partner, Wilmer Cutler Pickering Hale and Dorr. This distinguished panel joined together to contribute their observations and thoughts on how this new environment affects corporate conduct and the legal representation of corporate clients. The text of the panelists’ comments, edited for clarity and brevity, follows.

The views expressed are those of the panelists and do not necessarily represent the positions of their firms or companies.

This roundtable discussion was co-hosted by the marketing department of ALM Media, Inc., and is included as a special supplement to The National Law Journal. It is produced independent of the NLJ’s editorial staff.

—Brian Corrigan
ALM Media, Inc.
Mr. McLucas: I want to talk a little bit about what’s happening with attorney/client privilege and waivers and what it’s doing, not just to lawyers, but to the system as a whole, and ultimately the effect it’s having on corporate governance. Everybody knows about the Thompson memo from the Department of Justice and the Seaboard 21(a) Report, issued by the SEC in 2001. Both of those documents - from the two most prominent government agencies that we have to worry about generally - articulate that the waiver of the attorney/client privilege is something for which credit will be given in the course of evaluating what, if anything, ought to be done to a corporation under investigation.

That notion of waiver in government matters has taken on a meaning in today’s environment that I think far eclipses what anyone would have anticipated a few years ago. While the Department of Justice and the SEC would say that waiver is a carrot not a stick, I fear that it has in fact developed into far more of a stick and far more of an everyday expectation with which the government approaches any matter involving a public company. The waiver issue is not just attached to the notion of a special committee investigation or an audit committee investigation. It now is a feature of a panoply of every-day substantive matters involving a public company and its in-house and outside lawyers. I think a fair question that we all might have is how did we get to where we are today, and I think that the answer to that is relatively simple. Enron, Worldcom, and their progeny have created an enormous reservoir of doubt, concern, and skepticism about how the corporate animal has behaved, how the system has worked, how self-regulation, compliance with the disclosure rules, application of accounting principles - everything that the corporate enterprise presumably tries to do right every day - has not worked over the last decade or so.

Look at the sequence of events between Enron and Worldcom. Enron declared bankruptcy on December 7, 2002. Worldcom announced in early June of the following year the first installment on its restatement, which would be in the order of one or two billion. Alternately the restatement was in the order of nine or ten billion dollars. Sarbanes Oxley was passed within 60 days of that announcement, which is quite remarkable when you think of the amount of deliberation that must have gone into a piece of legislation like that.

So this reservoir of concern and doubt and skepticism about the corporate institution pervades the way lawyers behave, and the concepts of legal advice and privilege are being eroded. It affects your behavior dramatically, certainly, when you’re dealing with the government. With the publicity that’s been attached to the concept of waiver, most people in public companies generally recognize that the New York Times test now applies to virtually every communication within the organization and with its lawyers. That is, can you live with what you say if it were printed on the front page of the New York Times? And I think that is becoming the primary test because you have to presume that an event may occur which can give rise to a massive waiver of all privileged communications.

If we talk about where we are today, notwithstanding the government’s claim that it rarely asks for a waiver, I will tell you that I think that the waiver request is being made more and more frequently, in virtually every kind of case.

Why is that? Well, I don’t know a government prosecutor or a regulator or a law enforcement official who does not believe that his or her case is among the most significant that they do because they believe it is right, they are pursuing the public interest. If they have the tools and the ability and the power to get a waiver of the privilege, they’re going to do it. And I think that we’re going to see this become a feature of the legal landscape in the future far more than it is today.

We are changing the adversary system. No longer can one defend and advocate and take positions the way you could have a decade ago. Fighting, fashioning arguments, being creative - the way lawyers envisioned those concepts a decade or so ago - are perceived to be basically illegal before any Article III judge or court rules on the conduct at issue. Practices, however gray we may argue they are in the eyes of the law, are now conceived to be basically illegal before any Article III judge or court rules on the conduct at issue.

I think this phenomena is going to dramatically change how public companies conduct business and how lawyers, both in-house and in the private bar, advise public companies, in a way that may not yet be clear to those of us who wrestle with this on a daily basis.
MR. FRIEDMAN: Bill, I want to ask one question now. You used to be the Director of Enforcement at the SEC. What do you see as some of the differences at the SEC since you were there?

MR. MCLUCAS: Well, it’s not news that the regulatory competition from state attorneys general, Elliot Spitzer, being the most prominent, has driven the process to do things that I don’t think it would have, could have, or should have done a decade ago. The fact that you have the DA’s office here prosecuting former executives of a multinational corporation – forget whether they’ve done anything wrong or not – is a phenomenon that is quite remarkable in a global marketplace. And I think that Mr. Spitzer deserves an enormous amount of credit.

I happen to think that there are huge public policy issues about whether you can run, oversee and police a global marketplace with every state attorney general literally having the mandate and authority to wade in and affect policy matters and corporate governance decisions in a manner that fairly ought to be done at a federal level. Beyond that, I think until we get beyond the current perception of scandal and skepticism in the marketplace which exists, not just in the offices of the prosecutors but, frankly, in mainstream America, we are in for a tough row to hoe with regulators and with the prosecutors.

MR. FRIEDMAN: Thank you. Now we will hear from Allen Fagin.

MR. FAGIN: Good morning, everyone. I’m going to spend a few minutes talking about the explosion in employment-related litigation which I think is one of the critical issues that now face boards of directors and general counsel throughout corporate America.

In 2004, there were 40,000 employment-related lawsuits filed in the federal courts alone. Probably about a quarter of them were lawsuits filed under ERISA, which is about a 50 percent increase in the number of filings just a few years ago. On top of that, there were about 80,000 charges of employment discrimination in 2004 filed with the Equal Employment Opportunity Commission. That’s just the federal docket. If you add to that the number of cases that are filed in the state courts and with both state and city regulatory bodies, we’re looking at literally tens of thousands of employment-related claims, many of them single-plaintiff cases but increasingly class actions as well.

Employers are now spending hundreds of millions of dollars defending, litigating and paying out on these cases. I’m sure you’ve seen many of the headlines that illustrate these kinds of situations. A California jury awards almost $100,000,000 against Farmers Insurance in California to a class of 2,400 insurance adjusters. A jury in the Southern District of New York awards almost $30,000,000 to a single plaintiff in a gender discrimination case and over $500,000,000 is paid out by Voice of America in a class action settlement based on gender discrimination.

These numbers themselves are staggering, just in terms of their economic consequences. But add to that the enormous public relations and employee morale consequences that these suits can have for employers.

As it relates to boards of directors there is also the issue of personal liability. You probably all know that under most federal statutes there is no individual liability, only liability at the corporate level; so officers and directors typically cannot be held responsible to employment discrimination cases. That’s not necessarily the case.
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The executive level suite needs to focus on pension plan governance itself, especially the responsibility and liability of pension plan fiduciaries. In most instances throughout corporate America, pension plan fiduciaries will be officers and directors of the company.

The Department of Labor has now made enforcement under ERISA one of its highest priorities. In 2003 alone, the last year for which we have statistics, the Department of Labor collected almost $1.5 billion on behalf of pension and health benefit plans, often naming officers and directors as defendants in those proceedings. And that is without regard to what the private plaintiffs’ bar is doing in this area, particularly as it relates to the 401(k) and pension plan context. These are not necessarily Enron-type cases involving widespread allegations of fraud, although there have been some of those as well.

Almost any significant drop in the value of a company’s stock can precipitate a claim that the fiduciaries of a pension plan have acted negligently or inappropriately in their investment decisions regarding the company’s stock and can give rise to very, very large class cases. There probably are 60 or 70 pending right now. Our office is handling about 14 of them. And it’s a litany of household names of Corporate America.

Next I want to touch on the whistle blower provisions of Sarbanes Oxley. It’s a relatively new statute so we don’t have a lot of case law under the statute but we do have a lot of claims. The whistle blower protections of Sarbanes Oxley protect employees who raise, internally or externally, allegations of fraud with respect to publicly held companies. It applies as well to the subsidiaries of publicly held companies, even if those subsidiaries are not themselves publicly traded.

Let me give you an example of the sort of paradigm that we see in the Sarbanes Oxley context. An employee participates in some form of regulatory proceeding at which he makes certain allegations of corporate misconduct. The company subsequently determines that the employee needs to be terminated. The employee then claims that the termination resulted from his cooperation with the regulators. It’s a classic catch-22. The employee is obligated to tell the regulators whatever they want to know and then claims that he was terminated, not due to his own conduct, but simply because he provided information to the regulators.

To compound the problem, there are two unique aspects of the whistle blower protections of Sarbanes Oxley. First, the enforcement mechanism. Because of some fascinating history within government regulation, the whistle blower protections of Sarbanes Oxley are administered by OSHA. OSHA is now dealing on a daily basis with the most complex, the most sophisticated types of accounting issues - fraud issues - which is a far cry from its regular docket of safety/health issues. It is difficult to explain to someone with no background in any of these types of issues - which are enormously complicated for any of us - the context of a Sarbanes Oxley investigation.

Second, this is the only statute that provides that if there is a finding at the administrative level of an employer violation, the employee must be reinstated pending any trial on the merits. That means if you terminate an employee, presumably for fraud or misconduct, you’re obligated to bring that employee back pending the outcome of a trial if the regulators find that the termination violated Sarbanes Oxley. It’s an extraordinarily difficult statute to live with.

Wage and hour claims. We’re talking here primarily about overtime claims, regulated both at the federal and the state levels. Wage and hour litigation has resulted from his cooperation with the regulators. It’s a classic catch-22. The employee is obligated to tell the regulators whatever they want to know and then claims that the termination

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I'll share an experience that stood out for me. Sandy Weil was kind enough to invite me to a gathering of about 15 CEOs of major New York City businesses to meet with Tom Daschle, and the meeting was, if I remember correctly, just about the day after Congress had passed Sarbanes Oxley and about a day before the President signed it. The 15 leaders -- probably very few who came from the same political party as Tom Daschle -- were falling all over themselves to thank Tom and the Congress for having taken decisive action to deal with the bad reputation that the business community had developed as a result of these two scandals. And that was a very sincere feeling.

I'm sure that nobody in the room, at least not I, had read Sarbanes Oxley at that point; we knew only a little bit about it. But we knew it was a wonderful statement about the belief of the corporate world that integrity is a hallmark of it, and that it's our duty to act decisively when that is not the case.

But of course things changed that affected the business community and, in my judgment, the way in which people viewed mergers and acquisition opportunities. Almost indistinguishable from Sarbanes Oxley is the change in corporate governance standards established by the stock exchanges, with the approval of the SEC, which altered the relationship between boards of directors and man-
MR. FRIEDMAN: Thank you very much. We will turn now to our distinguished guest of honor, Michael Helfer.

MR. HELFER: Thank you, Jack. I'm going to talk a little bit about corporate governance issues, touching on a few of the practices and issues that have arisen at Citi and then I'll talk about some current issues that are quite live right now.

People often ask me what I do, how I spend my days. I spend about a third of my time on board-related issues, and that includes preparing for board meetings, overseeing the corporate secretarial function and some other things that I'll describe. So corporate governance matters are a substantial part of my responsibilities. Let me make a few points based on my experience about a few of these practices.

At Citi, our whole board is up every year. My own personal feeling is that the whole idea has come and gone, and I was always very skeptical about their effectiveness as an anti-takeover device when I was in private practice, but in any event, it is not something that we think about.

But the concepts of annual elections and stockholder meetings do bring up some interesting questions. One thing I noticed this year was that a number of companies have decided to require written questions, some requiring written questions in advance, and many more putting time limits on individual stockholder statements. Time limits have been around for a long time but the idea that you would make stockholders submit written questions seems to be a new one in an effort to assure that the meetings are dealt with promptly.

Our view at Citi is that senior management will stay on that stage at Carnegie Hall as long as it takes and that this is the shareholders' opportunity to speak. As long as it takes was three and a half hours this year. We have had individual stockholders who have come up for the third, fourth and fifth time, booed by the other stockholders but, in my experience at Citi, we have never asked anybody to sit down or stopped them from talking.

But one can understand why some management might want to get written questions or make the process easier on the New York Times test that Bill referred to before. I think that issue requires a lot of thought.

We have a lead director, he's the chairman of our governance committee. He has designated responsibilities that I think have become fairly standard, including presiding at executive sessions, approving agendas and board schedules, reviewing information before it is sent to the board, and having the authority to call a meeting of the independent directors.

It's a lot more work for a general counsel and a secretarial function when you have, as we have, a separate CEO, a separate chairman, and a separate lead director. So it does present some logistical challenges in preparing for board meetings but it works well.

You are all familiar with the basic rules we follow regarding independence, what I consider to be the standard rules – no compensation other than as a director, third-party terms and conditions on any kind of financial relationships. Obviously there are provisions in Sarbanes Oxley as well as in the banking rules that limit the ways we can make an idea whose time has come and gone, and that is the shareholders' opportunity to speak. As long as it takes was three and a half hours this year. We have had individual stockholders who have come up for the third, fourth and fifth time, booed by the other stockholders but, in my experience at Citi, we have never asked anybody to sit down or stopped them from talking.

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Our stock ownership commitment is something that is very fundamental at Citi and an important part of our governance structure. The top 120 officers and all of the board directors are required to retain 75 percent of the stock they receive from the company until they retire, as long as they hold top positions. Our view is that this aligns the long-term interest of our shareholders with the long-term interest of our senior management.

Michael Helfer
In addition to his experience in law firm practice and as corporate counsel, Mr. Helfer clerked for Chief Judge David Bazelon (D.C. Cir.); and served as a U.S. Senate Judiciary Committee Counsel. He is a founding director of Lawyers for Children America, which provides pro bono legal services to abused and neglected children, and is a director of the Legal Aid Society of New York and the Lincoln Center Theatre. Mr. Helfer earned a J.D. from Harvard Law School and B.A. from Claremont Men’s College.

I'm very rigorous in trying to enforce that a product or an activity ought to go to business practices only after we've concluded that it's legal, because I don't want to mix the legal decision with the business practices decision. This has been a very effective tool for us. Sometimes we decide in business practices to stop doing something. Sometimes we decide we'll only do it under a certain set of conditions, and sometimes we decide that, although there was a legitimate question about the product or activity, we're going to go ahead and do what we're comfortable with under the New York Times test.

Our business practices committee process has now been embedded in the culture. And because the business units lawyers are in a very good position to identify business practices issues we encourage them in particular to raise these issues. This is the hot issue as far as I can see in corporate governance right now, other than compensation for senior executives, which is always a hot issue.
“no”. And under Delaware law, directors are elected by plural-
ity vote, so conceivably, one shareholder can cast a vote for a
director and all others can withhold their votes and the direct-
or would be elected. But that never happens. At Cit, we’ve
never had a director get less than an affirmative 93 percent of
the votes cast. So the issue of majority vote has not been a
practical issue but it nevertheless is a hot corporate governance
issue these days.

Majority vote is a very appealing concept because it seems
fair and it’s generally the way we do things. These proposals
got majority support from shareholders at several shareholder
meetings this year and some strong support at others includ-
ing at our meeting, where they got about 40 percent of the vote.

At Citigroup, we have said that we have no objection to
majority voting in principle, but we first need to work out a
series of very technical legal issues. And to that end, we have
joined a working group of unions, corporate governance advoca-
cates and other companies to address issues such as “majority of
what?” Majority on the go? Majority of the votes present
and entitled to vote? Majority of the shares outstanding? We
presume that it doesn’t mean the latter because that would make
it very hard to avoid the two cases without believing that it’s
future for purposes of director liability.

First, these are failure cases. So, a failure case may be dif-
f erent from nonfailure cases, at least with some of the biggest
bankruptcies in history. Second, there were bankruptcy exam-
iner reports in both Enron and Worldcom that were highly
critical of the directors. Those reports made it easier for the
lead plaintiffs to reach a settlement that included payments from
the directors because their wrongdoing had been laid out so
publicly and in such black and white terms.

Another important case that did not get a lot of attention is
Dynegy, an action brought by institutional investors. The cor-
porate-defendant in Dynegy was solvent and made a settle-
ment payment to the investors, as did its insurers. Since there
was no bankruptcy examiner report, there was no public report
that was critical of the way the board acted. And there was no
participation by the individual directors out of their own pock-
ets in that settlement. I think it’s something to consider.

At the same time, you have to recognize the fundamental
change made by the Private Securities Litigation Reform Act
(PSLRA) here by putting institutional investors in the role of
lead plaintiff. That’s good public policy, and it’s also generally
good for corporate-defendants in these cases. It turns out that
a public pension fund will often be the lead plaintiff and that
total pension fund will often be run by an elected official who
will make the key settlement decisions, obviously subject to
court approval. That elected official may feel that he or she
does not want to be accused of “letting the directors off the hook.” So the PSLRA, which was generally
very good for the defense side and I think for public policy as
well, does change the balance. Back in the days when these
cases were run solely by the plaintiffs’ lawyers themselves
without a real client, the pressures and issues raised in Enron
and Worldcom were not present.

This is a critical issue for us. The booklet I left for you on
the desk outside describes Citigroup’s five-point plan. We
have undertaken a massive program, and it’s a top priority to
implement that plan and to embed in our corporate culture a
long-term view of what’s in the best interest of the Citigroup
franchise. We’re convinced it exists in the overwhelming
majority of our employees and we just want to ensure that it’s
fully embedded into the culture.

Thank you very much.

MR. FRIEDMAN: As far as the whole panel is concerned,
my reaction is “wow”. This is truly a wonderful presentation.
I’d like to start the informal discussion phase by asking
Michael and the panelists to comment on how to translate the
high principles and the structure that exist at the top level of
the organization to the whole enterprise.

MR. HELFNER: That’s what our five-point plan is all about. I
believe that there are two absolutely key elements to it. The
first is what is generally referred to as tone at the top. From
the top of the organization through its executives and
throughout the entire company, the message should be that
how we do business is just as important as how much money
we make, and that the long run interest of the company and
shareholders are best served by focusing intensely on how we
conduct our business. Our own CEO has been traveling
around the world, devoting huge amounts of his time to deliv-
ering that message.

Secondly, I think it’s absolutely critical to align your com-
pen-sation system with your values. Again, we have taken
further steps to do that because peo-
ple come to work for a whole lot of reasons but one of them
is make money and one way you signal what’s important to
you is by how you pay people.

MR. FRIEDMAN: Anybody else have any comments on
that?

MR. HELENIK: You have to have a zero tolerance policy. If
there’s any breach of ethical standards, certainly at Shearman
& Sterling, somebody is asked to leave because there can’t
be any doubt about that, particularly in the legal
community.

MR. FRIEDMAN: I’d like to follow-up on the point about
the personal liability issue for directors. Does anyone have a
sense of how much personal liability is likely as far as directors

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He has appeared on ABC, CBS, NBC, CNN and PBS, authored financial matters.

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MR. MCLUCAS: I don't think that Worldcom and Enron type settlements are the last that we're going to see. I believe that the Sarbanes Oxley and the government approach to getting people's attention boils down to now using the liability side of the equation to affect behavior.

As David and Michael both alluded to when talking about notes, minutes and conduct in the board room, there is a delic- balance here. The current system is driving individual directors to focus far more on personal liability and risk avoidance, and that's being articulated in the meetings, in the minutes. It's also being driven by the current trend of directors more frequently resorting to the special committees and outside investigations, where the privilege issues all get exposed.

Not to speak against the legal community's economic self-interest in doing these inquiries, but I'm not sure where the

right balance is between directors' tendency to resort to that process on the one hand and good corporate governance on the other. But I do believe that the personal liability concern of directors has taken on an extraordinarily higher profile in the minds of individual directors than it perhaps ever has.

MR. HELENIAK: I don't think the risks of personal liability are extraordinary, and I have one point of clarification. The Worldcom penalty was 20 percent of net worth after retirement ben-

efits and real estate. As I understand it - I could have this wrong - the Enron penalty was 10 per-
cent of the net profits that the directors received for selling their shares before everything was dis-
closed, which some of us might think was a modest penalty under the circumstances.

So, while there will be instances of personal liability, as Michael pointed out, I think it's unlikely that it will exist in 99.9 percent of the cases. But because of the new litigation rules, the likelihood that elected officials may be the ones who determine settlements does increase the risks as long as the officials perceive it necessary to crusade against very bad acts.

MR. FRIEDMAN: The chairman of one of our great corpo-
rations stepped down because of some bad publicity based on a consensual personal relationship even though there was no legal issue there. Are we going to be in a position where they conduct their personal lives?

MR. HELENIAK: I think that in almost every context I've seen, what Bill called the New York Times test has now replaced legal scriptures and it's had a curious consequence. I never thought when I graduated law school that I was going to become one-third psychiatrist, one-third public relations advisor to clients. But the public relations consequences of almost any form of misconduct in the current environment are so intense that one automatically assumes that if someone has acted inappropriately in a purely personal context there is a reasonable likelihood that he acts inappropriately in other contexts as well. I think everyone races to outdo each other in a form of zero tolerance that goes well beyond any form of legal requirement.

MR. FRIEDMAN: Michael, as general counsel you're in charge of hundreds and hundreds of lawyers all over the world.

MR. FRIEDMAN: What are some of the approaches you're taking to manage your department and also your relationships with outside firms?

MR. HELFER: Let me focus on relationships with outside counsel. We are alert to conflicts of interest of course, but we are mostly focused on getting efficient and effective legal services and that means cheaper legal services from our outside counsel.

We get discounts from virtually all of our law firms. We provide various incentives for higher discounts although we will not agree to provide a firm with a certain amount of busi-

ess in return for a certain level of discount. But I believe that the real action is not in rates and discounts, although we're not giving those up, but in staffing patterns and risk/reward decisions.

Outside counsel are in the worst possible position to make risk/reward decisions and indeed shouldn't be asked to make them, although they should be asked to advise on them. That's because outside firms want to do a good job on every case. It doesn't want to be embarrassed, it doesn't want to be surprised. It wants to win the case. Therefore, if left to its own devices, the firm will make no risk/reward assessment because it wants to do it all. Of course, we've all had experi-

ences where, for example, that one last interrogatory that you sent out brought back, once in 25 years, a bonanza of infor-
mation that helps you win the case and you can never get over it once that's happened to you. But we are managing a port-
folio of cases and on balance, winning one of them that way and spending that money in all those cases just isn't worth it.

So, managing the staffing and activity of the outside coun-
sel is the one thing I've asked our people to focus on, and we're developing tools that are in the process of being rolled out to help them do that. Some law firms may have seen them already, particularly for litigation cases in the United States.

MR. FRIEDMAN: How do you have the in-house capability to supervise or review those types of decisions by outside counsel?

MR. HELFER: We identify cases which we classify as major cases based on the amount of legal fees that we expect to spend and the exposure and risk to reputation that we think the case presents. We assign individual lawyers to these cases and give them a computer-based tool that we have developed for this review. We're just at the beginning stages of this but I think it will make a big difference.

MR. HELFER: What do you see law firms doing to meet the budgetary and other concerns of corporate clients?

MR. HELFER: Well, we're seeing a lot of cooperation from the law firms in terms of alternative fee arrangements, fixed fee arrangements, discounts, and some very limited use of contingent fees, and risk sharing relationships. And we are going to move business to the firms that are most responsive to our needs to control costs, although this will take some time to be felt in the legal community.

MR. FRIEDMAN: I want to thank all the panelists for their presentations. One message that comes through clearly is the earnestness with which the business community is working to take the lead in governance, ethics, compliance and social responsibility.
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