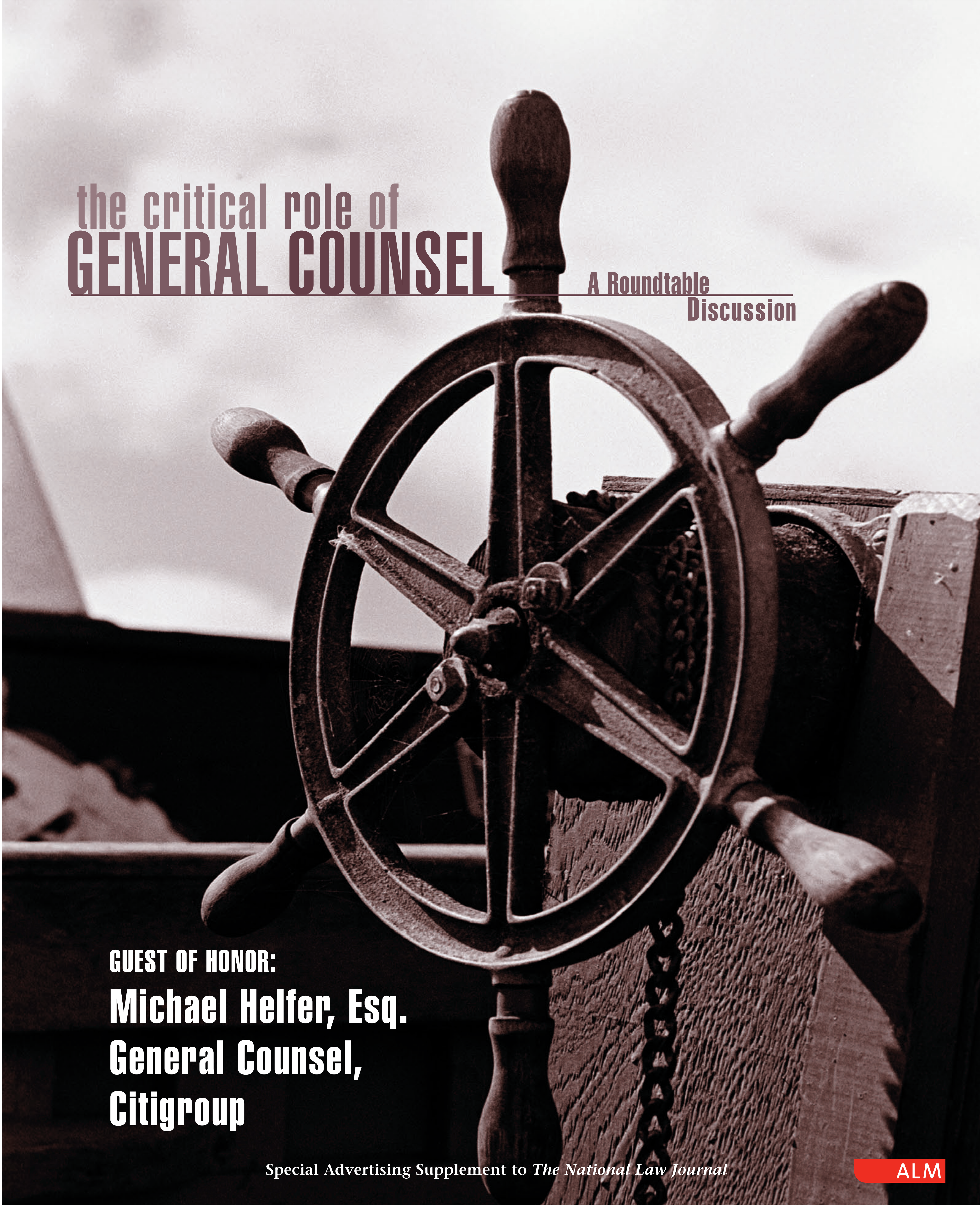

the critical role of GENERAL COUNSEL

A Roundtable Discussion

GUEST OF HONOR:

Michael Helfer, Esq.
General Counsel,
Citigroup

Special Advertising Supplement to *The National Law Journal*

ALM

the PANELISTS

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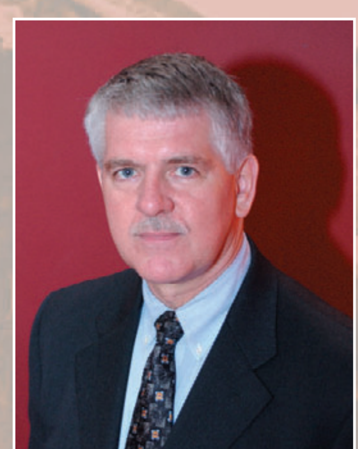

William McLucas
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Jack Friedman
Moderator
Chairman
The Directors Roundtable

TO THE READER:

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, Chariman & Partner of Proskauer Rose; David Heleniak, former partner of Shearman & Sterling and newly appointed Vice Chairman of Morgan Stanley and; William McLucas, Partner, Wilmer Cutler Pickering Hale and Dorr. This dinstiniguished 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. FRIEDMAN: I'd like to welcome everyone here to the Directors Roundtable. Today we are going to be talking about the changing role of corporate counsel in the wake of Enron, Worldcom, and similar cases. There's been a lot of emphasis on the evolution of duties for boards of directors, but greater responsibilities are also being placed on corporate counsel who must ensure that their own department, and every department in the corporation, is doing the right thing.

I believe that giving recognition to corporate counsel function and general counsel position would be appropriate at this time. Furthermore, many people have the impression, unfortunately, that the business community only does the right thing when the government beats on it. However, the fact is that the business community puts a tremendous amount of effort into compliance on its own.

I'm going to be the moderator for today's event. Our three panelists will each speak briefly on an area of their respective expertise that is very important to general counsel: William McLucas of Wilmer Cutler Pickering Hale & Dorr, whom I think you know from his SEC days; Allen Fagin, Chairman and Partner of Proskauer Rose; and David Heleniak, former Senior Partner of Shearman & Sterling, who was recently appointed vice-chairman of Morgan Stanley.

Then our guest of honor, Michael Helfer, General Counsel of Citigroup, will address us. I want to thank Michael for making his time available because being the general counsel of Citigroup is obviously an awesome responsibility. Finally, after our distinguished guest of honor speaks, we'll have an informal discussion among these speakers. Without further ado, I'd like Mr. McLucas to begin the comments.

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 the government is handling. These are people who do what 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 - now get viewed in the press as being obstructionist and lacking contrition. 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.

WILLIAM MCLUCAS

William McLucas is the co-chair of the firm's Securities Department. Mr. McLucas's practice focuses on securities enforcement, regulation and litigation matters. In 1977, Mr. McLucas joined the Securities and Exchange Commission's Division of Enforcement, where he rose through the Division to serve as Director of Enforcement for eight years—longer than any other Enforcement Division Director in Commission history. Mr. McLucas led the Division's Staff in numerous high-profile investigations and landmark enforcement actions, including: settlement of the SEC's cases against Michael Milken; the Salomon Brothers government bond trading; hundreds of insider trading cases; the limited partnership investigation which led to approximately $1 billion in restitution by Prudential Securities to investors; the NASDAQ Stock Market investigation and report; and numerous cases involving the issuance of municipal securities.

> "[U]ntil 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: 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 from 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 consequence. 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 in employment discrimination cases. That's not necessarily the case, indeed it is often not the case, with respect to state and local law.

For example, here in New York, under the New York State Human Rights Law, there is an aiding and abetting concept that makes it possible to sue individual officers and directors of corporations. There was a fairly recent age discrimination case, in which the board of directors voted to terminate the general manager of a company, and the general manager sued for employment discrimination. The court dismissed federal claims against the directors but refused to dismiss those claims against individual directors under New York State law.

There are other various significant differences between state and federal laws that are economic in nature. Under federal law, compensatory and punitive damages are capped. For example, under Title VII there's a $300,000 cap on compensatory and punitive damages. Those caps typically do not exist under state and local law and most smart plaintiffs' lawyers will sue under each relevant federal, state, and local statute and seek compensatory and punitive damages in uncapped amounts.

Let me very briefly illustrate this trend in three particular contexts: ERISA, Sarbanes Oxley and the enormous increase in wage and hour litigation. I'll start with ERISA. As of 2004, there was approximately $4.3 trillion, or about a third of the total value of the nation's retirement assets, held in private sector employer-sponsored retirement vehicles, typically pension plans and 401(k) plans. Significant ERISA claims have been brought against a large number of companies that choose to invest all or a portion of those assets in their own stock.

Let me quote to you from a speech that Secretary Chao, the Secretary of Labor made about a year ago. She said, "The time has come to move the focus of pension plan governance out of the human resources department and beyond compliance with tax law.

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 paradox 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.

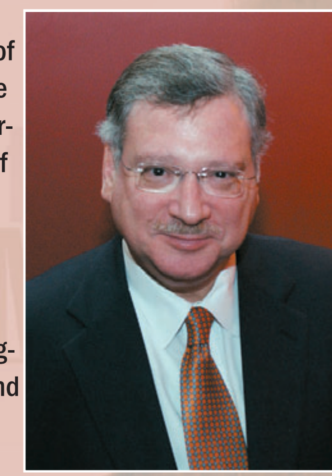
Wage and hour claims. We're talking here primarily about overtime claims, regulated both at the federal and the state levels. Wage and hour litigation has now become a cottage industry. These are easy cases to bring and easy cases for plaintiffs to litigate. You find a job title that is in a gray area of exempt or nonexempt status under the overtime regulations, you try to find a position that has numerous incumbents all of whom do the same thing and you file a lawsuit claiming that the position is in fact nonexempt.

These cases can result in two to three years of back pay liability. In some states, for example California where this has become a particularly significant issue, liability can extend back even further. And the kinds of recoveries that we've seen in the wage and hour context are very, very substantial - in the tens of millions of dollars. This is yet another issue that is particularly important to focus on, to audit and to try to deal with prospectively before some smart plaintiff's lawyer finds that position and brings a lawsuit.

MR. FRIEDMAN: Let me thank you very much. I want to now introduce Mr. Heleniak, whom you see many times in the Wall Street Journal these days.

MR. HELENIAK: I'm delighted to be here with such a distinguished audience and such a distinguished panel. I'm going to talk about the impact of the new environment on mergers and acquisitions. But I want to go back to a time that now is hard to remember and consider the initial reaction and response of the business community to the scandals of Enron and Worldcom.

ALLEN FAGIN



Allen Fagin is the Chairman of Proskauer Rose LLP and the former co-Chair of the Labor and Employment Law Department. Allen is a recognized expert and leader in the field of labor and employment law and has appeared on CNN and been quoted in numerous publications, including *The New York Times; Crain's New York Business; Business Week; ABA Journal; US News and World Report*; and *New York Law Journal*. Allen is a member of the American College of Labor and Employment Lawyers, was named in The Best Lawyers in America, was chosen by *New York Magazine* as one of the hundred best lawyers in New York, and was profiled by *The National Law Journal* as one of the top employment litigators in the country. In 2002, Allen was again honored by being one of 118 U.S. attorneys nominated to *The International Who's Who of Management Labour & Employment Lawyers*.

> "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 ... 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" _ALLEN FAGIN

DAVID HELENIAK

David Heleniak is the Vice Chairman of Morgan Stanley. Prior to that, he was the Senior Partner of Shearman & Sterling and a partner in its Mergers & Acquisitions Group, which he co-headed or headed from 1987-1995. In that capacity he represented, on a regular basis, the mergers and acquisitions groups of the leading investment banks, as well as Adobe Systems, Anglo American, Citigroup, Consolidated Edison, Novartis, PG&E and the Thomson Corporation, among others. Mr. Heleniak has published numerous articles on legal topics in various publications. While in Hong Kong, as head of Shearman & Sterling's office there from 1981-1984, Mr. Heleniak represented China National Coal Development Corporation in the first major joint venture completed by a Chinese entity with a U.S. partner.

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 management. At the same time, some of the legal proceedings that both Bill and Allen talked about began to worry directors far more than they ever had before. That has gotten worse recently with some instances of directors - in one case in Delaware and in the Enron and Worldcom settlements - voluntarily agreeing to personal liability against the threat of litigation.

The governance changes established a new balance between the board and management and it had characteristics that were mixed in my view. One is that was there was an emphasis on process that, under the wrong set of circumstances, put process before what was good for the corporation. Secondly, it created, at least initially, a sense on the part of the board that their principal obligation was to keep an eye on what management was doing as opposed to supporting its good actions and decisions while being alert to signs of possible bad actions, which obviously was lacking in the case of Enron and Worldcom.

When you take that dynamic and set it against the background of the burst of the tech bubble, the effect of 9/11 on the business community, and the decreased confidence of business leaders in the financial statements of other companies, I think it undermined the confidence of CEOs to bring acquisition opportunities to their boards. Whereas such opportunities would have been applauded before these changes, now there were questions: Is the board going to support me? Should I take a chance even though I know there is a tremendous business opportunity for the shareholders now? Can I really be confident that the information I have about the target company is accurate and that there are no issues that will surprise me? The board members, for their part, wondered how to ensure that the shareholders' interests were protected, and incidentally, how to ensure that there was no personal liability for them.

I think the combination of those things resulted in the very significant slow down in mergers and acquisitions activity that we saw. When activity resumed due to increased confidence in the economy, initially there was a tremendous increase in acquisition transactions done by private equity firms, not done by strategic buyers, which had marked the previous period. The reason, I believe, is that management was still reluctant and uncertain about its relationship with the board. But when a private equity firm buys a company, it doesn't have to worry about Section 404 or any disclosure issues because by nature it's taking a company private.

I think we're starting to emerge from that and we're seeing far more strategic transactions in addition to a healthy number of private equity deals. There is still a bit of stagnation in the marketplace but I think CEO self confidence is returning. There is also a greater degree of comfort between boards and management about what their relationship to one another is, and we will see more opportunities coming forward as a result. Of course boards and management are now much more careful to ask the thoughtful questions that the good ones were already asking. And boards are asking questions of their lawyers about the risk of personal liability.

In the last couple of months I've had a tremendous uptick - from zero to a fair number - of corporate boards that have asked me to speak to them simply to answer the question: Does it make sense after Worldcom and Enron to still be a director or am I putting my entire net worth on the line? My answer is that it does make absolute good sense and that the risks in a good company of personal liability continue to be remote. But there is something to think about.

There are a few other trends that might have emerged. Today, the owner of a private company who is trying to get out of the business might prefer to be purchased instead of doing an IPO - which would have been the likely choice before - in order to avoid the regulatory environment.

A second possible trend is that some foreign issuers who have not listed on the US exchanges are highly reluctant to do so. A number of them are looking for ways to delist, and so the prospect of doing a share-for-share acquisition of a US company is less attractive to them. There are even some US companies that might be reluctant to make foreign acquisitions because they may be less comfortable with the disclosure obligations in those jurisdictions.

And of course there are companies that at one point somebody might have taken a chance on but now if there is some negative information, it might not be deemed to be worth the risk.

I'll conclude by noting that the role of lawyers in M&A transactions has changed to some degree, not significantly, but there is greater emphasis on due diligence, greater emphasis on building a thoughtful record when presenting something to a board, and new provisions in acquisition agreements that were once subsumed under the general covenants and representations and warranties but now have become quite specific about things like 404 compliance, whistle blower activities and so forth.

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 very 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 staggered boards are an idea whose time 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 up 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 loans we can make to the primary business affiliations of the directors.

We have adopted one additional governance principle, which I commend to your consideration, first created by either B of A or Wachovia, I think, by which the director will not be considered independent if under the OCC (Office of the Comptroller of the Currency) rating guidelines - a bank regulatory rating system - the Company would classify a loan to that entity as substandard or worse.

It has never happened to us but we thought it was a good practice to conclude that a director is not independent if a loan to his or her company might result in us taking action against the company. This might help to avoid the appearance that we were taking or withholding the taking of action in an attempt to influence the director's independence.

One of the other controversial independence issues has to do with charitable relationships. Our rule is that for the director to be considered independent, contributions cannot exceed ten percent of the gross revenues of the charity that is affiliated with the director. In addition, we report all contributions to any director-related charity, no matter how small, to our nomination and governance committee, which makes independence determinations annually. Therefore, they have a complete list, not just the ten percent list.

I think this is going to be increasingly controversial. There is a concern among charities - particularly where the director is simply a member of the charity's board of directors or board of trustees and not an executive officer of the charity - that such scrutiny could lead either to a reduction in charitable giving by corporations or senior people getting off the boards of the charities so as not to impede corporate donations. I think you are going to see the latter happening a lot because many of these charitable boards can have 30, 40, 50 members and they would rather have the money than the board membership.

We have a rule that I think it is fairly standard, about no interlocking directorships - that is, no executive officer of Citi can serve on the board of a company if a Citi director is an executive officer of that company. That has not been a significant issue for us in part because we actively discourage our senior people from taking board seats.

We do that, not by an absolute prohibition, which I think some firms have adopted, but by requiring very senior approvals to do it, and that's a pretty effective way to get somebody not to ask.

We do prohibit more than one seat per officer, although there is some grand-fathering on that. We also prohibit service on audit committees for a variety of reasons, including that under Sarbanes Oxley, we might not be eligible to compete for certain investment banking business of a company if one of our senior people sits on that company's audit committee.

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As a matter of public policy, I must tell you that there is serious question whether this is a good thing. We are taking 25 or so very senior, very experienced business people out of the pool of possible directors of publicly held corporations. It's one of the reasons why we didn't adopt a flat prohibition against it. It gives us a little flexibility. But we recognize that as we go out to look for directors, who are typically for us CEOs of other companies, we are going to have an increasingly difficult time if other companies have the same rule that we do.

We have them all the time. There is one at every board meeting. There are three at every audit committee meeting: a session involving members only; a session involving members, the chief auditor and the outside auditor; and an executive session involving an outside auditor and the members. There's also one at every governance committee meeting.

Of course we do this as required by the applicable rules. Typically in the past, we sent questionnaires out to the members about the effectiveness of the board and the committee, and then the responses were analyzed anonymously, and summaries were provided to the board and committee members.

We're trying something new this year. We have hired an outsider to interview each member individually about the effectiveness of the board and the committees on which he or she sits and their ideas for improving effectiveness. This was suggested by one of our board members as a way to perhaps get more meaningful detailed feedback from the board. So we're trying that this year but we don't yet have the results.

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. It obviously eliminates any incentive to do something to boost the stock price, exercise options, and sell them and get out, because we're just not allowed to do that.

As this is something that is very deep in the culture, we decided this year to extend the idea to the next 3,000 senior managers. These next 3,000 senior managers, or about 1% of the roughly 300,000 people in the company, will now be required to hold 25 percent of stock they receive from the company.

The issue here is support for the board and its committees. We explicitly provide in our corporate governance guidelines the authority for the board and any of its committees to hire and fire legal, financial and other advisors without any consultation with management. I think that has probably become fairly standard. But beyond that, the company obviously has an obligation to provide support for the board in terms of providing information.

I report to the board on judicial and regulatory legal proceedings of importance that affect the company's activities as well as on other important developments. In the past, we would sometimes bring in outside counsel to talk to our board

MICHAEL HELFER

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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."

about some of these developments.

We assist the board in making the independence determinations. We have a process we go through every year, which starts with the typical D&O questionnaire, but it goes well beyond that in providing information to the board for making the annual determinations of independence and reminding board members of their duty to notify us of any material changes in their situation during the course of the year.

We also spend a lot of time assisting in finding new board members. It is an enormous task to find board members who are qualified, who are not over-burdened, whose companies don't have restrictions like our company has regarding board membership, and whose own companies' board meetings don't conflict with ours.

The legal department also does the corporate secretarial function at Citi. This leads to the question that many of us are grappling with now, which is how detailed minutes should be.

When I started practicing law, if you were to take minutes, you were told by the senior partner to simply note: "the board met, discussed some things, passed the following resolutions, a quorum was present, and the meeting was adjourned." The idea was that the less you recorded, the better. Now I find myself making increasingly detailed minutes.

The most important corporate governance issue though, in my view, is the information flow to the board. The board can only be as effective as the information it receives. At Citi, our CFO, the business head and I spend a lot of time trying to deal with this issue. Note that in Caremark the judge stated that relevant and timely information is an essential predicate for satisfaction of the board's supervisory and monitoring rule under Delaware law. That's right as a legal matter. It's also clearly true as a practical matter.

There are a number of issues related to information flow that we are grappling with. First, when do you send the information? I've never heard a director say that we sent it too early. Directors like to get information as far in advance as possible, and it makes perfect sense. So in getting this done, there's always the tension of making sure it's right and getting it out, particularly when you're in an M&A context and you are dealing with a public company, and you are racing through trying to get done before there is a leak. Second, there is the question of how much information to provide. We produce reams of information and deciding what it is that the board ought to see, in what form, and with what kind of summaries is a difficult and important task that the legal function is very much involved in.

One thing we've done, which I think is a great innovation for which I can take no credit, is that we now have tutorials for the board on a fairly regular basis. These are two or three and sometimes four hour sessions that go in depth on particular topics of importance to the board, that you simply as a practical matter cannot do at a regularly scheduled board meeting. For example, we did one on derivatives, how they work, what the accounting is, etc. You may know that we have some large litigation pending involving Enron and Worldcom and other matters, and we do tutorials at which we bring the board up to date on what's going on in those cases, what our position is, and where we see things going. At one of them recently we had lawyers conduct a kind of mock trial right in front of the board, and it gave the directors a real feel for the issues and arguments we faced.

Last year we made our compliance function independent of the business unit. That was a big change for us. We also had compliance at the top level report to our chief risk officer rather than to our general counsel.

The business practices committee is another Citi innovation, I believe. Let me explain what these are because I think these are very important. The business practices committee is made up mostly of business people, typically including risk or compliance personnel or lawyers - I sit on the one at the Citigroup level - and the job of the committee is to evaluate whether particular products or activities are consistent with our values.

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.

Right now when you vote your proxy, you can vote "yes" for a director or you can withhold your vote but you can't vote "no". And under Delaware law, directors are elected by plurality vote, so conceivably, one shareholder can cast a vote for a director and all others can withhold their votes and the director would be elected. But that never happens. At Citi, 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 including 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 advocates and other companies to address issues such as "majority of what?" Majority of votes cast? 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 prevail.

Other issues under Delaware law include: What if no one on the board gets a majority? If the board just holds over what should happen, does that undermine the very principal of majority vote that you're trying to implement?

Another problem can arise when the people who you nominated in order to meet the independence requirements of the New York Stock Exchange listing standards don't get elected and therefore you fail the listing standards. That's not going to be in the company's interest.

So, there are technical issues that need to be worked on but this is clearly the issue of the future.

These are very common. The proposal for separate chairman and CEO in our company has always failed because we have a lead director (we actually have a separate Chairman and CEO but the Chairman is not considered independent because he's our former CEO). My view is that it's not necessary to have a separate CEO and Chairman when you have a lead director with the right set of responsibilities designated in the bylaws that provides balance between the CEO and the outside directors.

You're all familiar with the Oracle case decided in November 2004. Here, a Delaware judged ruled that Stanford University professors who were on the special litigation committee were not independent for SEC purposes because of various connections between board members who were under investigation and Stanford University.

Now let me suggest that you read another recent decision issued by the Delaware Chancery Court on April 29 (In re J.P. Morgan Chase). In that case, a JP Morgan Chase ("Chase") shareholder brought a derivative action alleging that Chase paid a premium for Bank One in order to keep Bill Harrison as CEO of the merged company, when Jamie Dimon, the CEO of Bank One, had offered to do a no premium deal if he could be CEO right away. The plaintiff challenged the independence of the Chase board because Chase had provided financing to board members' companies, and one of the director's sons worked at Chase, although he was not an executive officer. The judge found that these allegations were not sufficient to impair the independence of the Chase board and distinguished Oracle on the ground that the complaint there "had many more particularized facts about the materiality of the relationships" relevant to the independence determination.

Nevertheless, you can't read the two cases without believing that different approaches were employed in each case and that pendulum does seem to be swinging back to the middle.

Finally, let me talk for a minute about director liability after Enron and Worldcom, a subject that David touched on. In those two cases, the directors settled by paying money out of their own pockets. That's highly unusual. It was reported to be about 20% percent of their net worth after deducting equity in their homes and retirement assets and other items. The question is whether this is the beginning of a trend or whether it is unique. I don't know the answer to that question but I will give you some thoughts on it.

Worldcom and Enron were extraordinary cases. There were, of course, allegations of massive accounting fraud. But there are two factors that are most important, in my view, about Enron and Worldcom that may distinguish it in the future for purposes of director liability.

First, these are failure cases. So, a failure case may be different from nonfailure cases, at least with some of the biggest bankruptcies in history. Second, there were bankruptcy examiner 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 corporate-defendant in *Dynegy* was solvent and made a settlement 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 pockets 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 public 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. HELFER: 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 intently on how we conduct our business. Our own CEO has been traveling around the world, devoting huge amounts of his time to delivering that message.

Secondly, I think it's absolutely critical to align your compensation system with your values.

Again, we have taken further steps to do that because people 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. HELENIAK: 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 room for 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

are concerned?

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 delicate 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 benefits and real estate. As I understand it - I could have this wrong - the Enron penalty was 10 percent of the net profits that the directors received for selling their shares before everything was disclosed, 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 corporations 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 the top people in companies are scrutinized regarding how 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. HELFER: Yes, we have about 1,000 lawyers around 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 business 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 the outside firm wants 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 experiences where, for example, that one last interrogatory that you sent out brought back, once in 25 years, a bonanza of information that helps you win the case and you can never get over it once that's happened to you. But we are managing a portfolio 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 counsel 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. FRIEDMAN: 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. ■

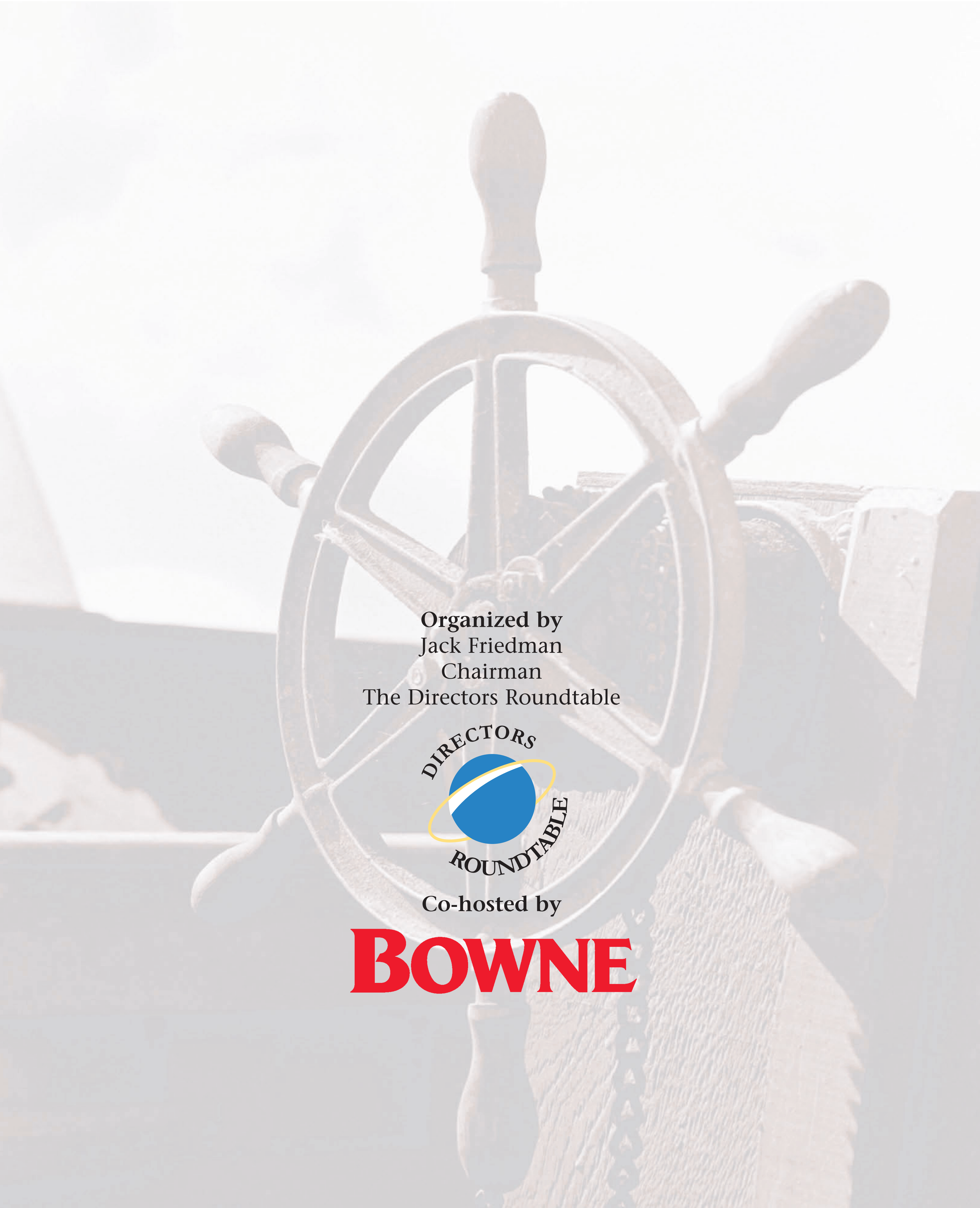
MODERATOR

JACK FRIEDMAN

Jack Friedman, Chair of the Directors Roundtable, is an executive and attorney active in diverse business and financial matters.

He has appeared on ABC, CBS, NBC, CNN and PBS, authored numerous business articles in the *Wall street Journal*, *Barron's* and the *New York Times*.

Mr. Friedman has served as an adjunct faculty member of Finance at Columbia University, NYU, US (Berkley), and UCLA. He received his MBA in Finance and Economics from Harvard Business School and a J.D. from the UCLA School of Law.



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