GC
LEADERSHIP SERIES

the evolving role of GENERAL COUNSEL

Meeting the Challenges of Corporate Crisis

A Roundtable Discussion

Keynote Speaker:

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the PANELISTS

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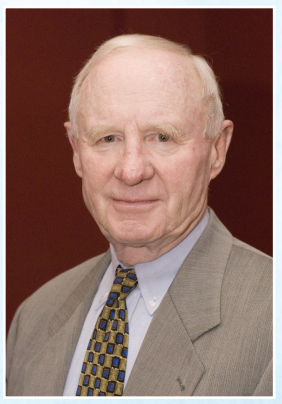

Robert B. Fiske, Jr.
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TO THE READER:

Crisis. How would you handle it if it came knocking at your door?

In this, the latest in our GC Leadership series, we present Peter Beshar, Executive Vice President and General Counsel of the insurance titan Marsh & McLennan Companies (MMC), who is credited with having navigated the 130-year old company through its most harrowing business crisis — the allegations by Attorney General Elliot Spitzer charging MMC with bid rigging and collusion.

With the Attorney General stating that he wouldn't negotiate with MMC's senior management and that he would possibly seek a criminal indictment of the company, Beshar, then co-chair of the litigation department of Gibson, Dunn & Crutcher, accepted the position of general counsel within 48 hours of being asked and reported for duty within seven days to, in his words, a "hurricane" state of affairs.

Beshar leads off this most informative roundtable discussion and provides an engrossing account of the events. Beshar's first days on the job included managing the onslaught of subpoenas from 60 or so law enforcement and regulatory agencies and responding to suits from employees, policy holders and against the board itself. He reveals what it was like to go face-to-face with Attorney General Spitzer and the offensive strategies the company used that eventually led to MMC setting up an $850 million nationwide settlement fund. Beshar also reminds us of the importance of leadership and decisiveness in times of crisis, emphasizing how clients and employees must be engaged in the process as well.

Our three other distinguished panelists pinpoint critical issues attorneys and management should be aware of when managing a business crisis of this magnitude. Robert B. Fiske Jr., a senior partner of Davis, Polk & Wardwell, stresses the importance of a company speaking with one voice. He cautions attorneys that they need to effectively deal with the media and the public relations side of the situation — in particular, how any statement, including statements to employees, will play with regulators. He also discusses the offensive reform strategy MMC employed before the formal Complaint had been filed, in an effort to preserve MMC's industry leadership position. Finally, he addresses the proposed changes to the Federal Rules of Evidence in connection to waiving privilege in litigation.

Mitchell J. Auslander, a partner in the Litigation Department of Willkie Farr & Gallagher, who regularly represents MMC, discusses how to pay for a crisis through the use of company insurance policies. He reminds us of how we need to communicate effectively with our carriers. He also stresses that key legal or business decisions, such as appointment of counsel or offers of settlement, should not be made without first conferring with the carrier.

Finally, Theodore B. Olson, former U.S. Solicitor General and now a partner with Gibson, Dunn & Crutcher, reminds us of the importance of having a crisis management strategy already in place. He stresses that in times of crisis top management must swiftly recognize it and commit the resources and leadership necessary to effectively deal with it. Mr. Olson also provides an insider's look at the crude realities of Congressional investigations and forewarns officers that one day they may be held accountable if they fail to plan for crisis.

No one expects disaster within their own company, yet none of us are surprised when another corporate catastrophe makes the front page. MMC's crisis could easily have ended in corporate dissolution, but prior planning and deft implementation averted disaster. Ignore the lessons of these four eminent jurists at your peril. Better still, read it and file it in a folder close by that you hope you never need.

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MR. FRIEDMAN: Good morning. I'm Jack Friedman, Chairman of the Directors Roundtable. For those of you who are not familiar with the Roundtable, we're a civic group that works worldwide with boards of directors and their advisors in roughly 20 countries and 30 cities in the United States. We're very pleased to co-host this event with *The National Law Journal*. Our guest of honor today is Peter J. Beshar, Executive Vice President and General Counsel of Marsh & McLennan Companies. We are delighted that Peter could join us today and look forward to his insights regarding the challenges faced by General Counsel during corporate crisis.

Also joining us today is Theodore B. Olson, a partner at Gibson, Dunn & Crutcher LLP; Robert B. Fiske Jr., a Partner at Davis Polk & Wardwell and a former U.S. Attorney (SDNY); and Mitchell J. Auslander, a Partner at Willkie Farr & Gallagher LLP. We are fortunate to have each of them with us today. Please help me welcome, Peter Beshar.

MR. BESHAR: Thank you Jack. Jack called me about this program a couple of months ago and asked me whether I was interested and I said, "Well Jack, explain to me a little bit, how does it work?" Jack pauses and he says, "Well, normally, we pick somebody as the honoree who is a titan in their profession — somebody who has accomplished so much that just through the force of their career, they have the star power that really attracts everybody to the program — and then we fill out the program with a bunch of other people. In your case, Peter, we're going to need some real stars on the panel." So I'm very grateful to Ted and to Bob and to Mitch for coming.

Two years ago, almost to the day, Attorney General Spitzer dropped a bomb on Marsh & McLennan, filing a Complaint charging the company with bid rigging and collusion. Two AIG officials pled guilty that same morning and, at a press conference announcing the charges, the Attorney General said first, that he wouldn't negotiate with the senior management of Marsh, and second, that he quite possibly would seek a criminal indictment of the company. As you can imagine, the reaction in the marketplace was swift and severe. Marsh's stock price plummeted, erasing billions of dollars of market capitalization, the company's A+ credit rating was slashed by four notches and, with almost $2 billion of debt that had resulted from the Kroll acquisition coming due in a couple months, the company's access to the public debt markets essentially evaporated and lenders refused to provide further financing. In addition, within a matter of days, 60 state and federal law enforcement and regulatory authorities served subpoenas on the company: 22 Attorneys General; 38 Superintendents and Commissioners of Insurance; and a veritable alphabet soup of federal agencies including the SEC, the PBGC, and the DOL. On top of all this, virtually every form of litigation that exists in America was filed against the company: policyholder suits; ERISA suits by employees; and derivative suits against the board. It was an extraordinary array of civil litigation.

Then you have the clients. The hundreds and thousands of Marsh & McLennan clients who were outraged, feeling that the company betrayed their trust and demanding to know whether any of their placements had been affected. Then, perhaps most importantly, the employees of the company were absolutely devastated by what happened, concerned about their jobs, of course, concerned about their stock plans and their pensions, but also just overwhelmed at what could happen so swiftly to such a great company like Marsh & McLennan.

> "What is critically important in a crisis: first, you have to be decisive....the second thing you have to do is to be positive."
>
> —*Peter Beshar*

In sum, in a matter of hours, the viability of a Fortune 200 company with $12 billion in revenue, a storied 130-year history, and 60,000 employees operating in 100 different countries, was called into question. It's an amazing concept that this can happen to a Fortune 200 company. The unfortunate truth was that in that environment, with the company that vulnerable, unilateral action by any one of an array of stakeholders could push the company over the edge. The action by regulators, by the rating agencies, by lenders, by the institutional shareholders, by clients, or, indeed, by the company's own employees, if any of these stakeholders decided that they lost confidence in this company.

If you haven't been inside of one of these hurricanes, and I certainly hadn't, it's very hard to fathom the pace and dynamic change that occurs. The distinguished panelists we have with us here — I will refer to them as "the Stars" — will give you advice based on their experience in handling a corporate crisis of this sort. I'll just speak to you briefly and share with you a couple of the steps that we took, some good, some less good. We certainly kept in mind Winston Churchill's good advice: "When you're going through hell, by all means, keep going."

So, the first question was: "who's in charge?" Chain of command is incredibly important in a crisis, but the Attorney General, with his statement that he would not negotiate with the senior management of Marsh, had effectively decapitated the organization. So it fell to Mike Cherkasky, who had been the CEO of Kroll and who had come to Marsh as part of the acquisition in the summer of 2004, to try to persuade Attorney General Spitzer not only to not pursue a criminal indictment of the company, but to say up front that he would not pursue it, because that's what the company needed. And so Mike went down and told the Attorney General that he was committed, and that the company was committed, to reforms of the sort that the Attorney General was

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>
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advocating; that it was in no one's interest, not Marsh's certainly, and also not the Attorney General's, to have this company, with its 60,000 employees, collapse. Fortunately Mike was able to persuade the Attorney General to pull back and to publicly state that he would not pursue a criminal indictment.

At this point in the process, I was a happy person. I was a partner at Gibson, Dunn, and Crutcher, attending programs like this one thinking to myself, "Those poor souls." Then I got contacted about becoming the General Counsel. I was told that I had 48 hours to accept and seven days to start; a pretty good indication of what was to come. Well, my first day on the job, at 8:00 in the morning, I picked up the phone and called Attorney General Spitzer. I wanted to signal to him that I understood that he, unfortunately, controlled the destiny of this company and that I got that. I went downtown and had a meeting with him that I must say was an extremely pleasant meeting; it was the last pleasant meeting that I would have. The only word I can think of to describe the discussions we had with the Attorney General's staff and the Attorney General is "brutal," just absolutely brutal, physically exhausting, emotionally exhausting, nasty at times — just extraordinarily difficult negotiations. We had been contacted by literally 40, 50, 60 law enforcement and regulatory authorities from outside New York. So we told the Attorney General that we wanted California, Florida, Massachusetts, Ohio, and everywhere else, brought into the process so that we could have one global deal. The Attorney General said that's very nice, that's what you would like, that's not what I want; if you want a deal, you'll do a deal with us alone. So we reflected on that and came back in response and said that we had to have two things: first, any money that we paid could not be seen as a fine or a penalty going into the coffers of the State of New York to the exclusion of Florida, and California, and Ohio, and Massachusetts, and the other states, and; second, that the restitution fund that would be created with these monies for the benefit of clients, had to be, not simply for policy holders in the State of New York, but for people across the country. After getting over that hurdle, what followed was an incredible roller coaster of negotiations as discussions would essentially collapse and then get resuscitated and then collapse again.

I remember in particular on Friday night, January the 28th, going down to the AG's office with a group of about a half dozen of us, thinking that we were getting fairly close to finalizing an agreement. I see Scott Gilbert is shaking his head, he remembers being at that meeting where we were met with an array of new demands and, at the end of the meeting, essentially thanking the AG's staff for their time and for their courtesy and trudging back on the subway to the office convinced that we had to come up with a non-settlement strategy; we simply could not agree to the terms. There was then a flurry of telephone calls, literally at 10:30 p.m. on Saturday night. The basic gist from the Attorney General was that if we could conclude a deal by 5:00 p.m. on Sunday, they would try to work with us. Now, the reason for that deadline was leaks; all of us were concerned about leaks. We felt that they were leaking; they felt that we were leaking. The idea was that if you could try to get a deal done before the markets opened on Monday, it made sense to try to do.

So, we all got into the office at 7:00 in the morning on that Sunday and spent a frenetic day with faxes going back and forth with the Attorney General, Mike Cherkasky, and others, getting involved at different points in time. We finally reached a deal at about midnight that night, January the 30th. One enduring image that I have in my mind is of Bob Fiske, then 70-something years old, just the picture of calm in this whole process, looking fresh as a daisy. The rest of us did not. At 1:00 in the morning, Bob was sitting there with a yellow pad in front of him basically revising the press release announcing the settlement that we had hastily put together that day.

The press release went out at 8:00 Monday morning. What do we then do? At 8:01 we start calling the 60 other regulators to tell them what we've done, to explain to them the reasons that we've done it. As you can imagine, those calls weren't always met with glee and happiness. But it was a process of trying to engage them, to try to humanize a company that had been demonized and, to be fair to them, if all you knew about Marsh & McLennan was what you read on the front page of the *Wall Street Journal*, you too would take an exceedingly dim view of the company. Over the months ahead, we criss-crossed the country meeting with different regulators, trying to explain to them the almost unprecedented series of remedial steps that the company had taken and to also remind them, fundamentally, that tens of thousands of honorable employees and professionals work for the Marsh & McLennan Companies. That essentially was the strategy with the regulator stakeholders.

Then there were the clients, critically important. There were many people, both inside the company and outside, who said "the relationships with the clients are so frayed right now, you shouldn't touch it." We had the peculiar benefit of the fact that, in many cases, insurance placements only come up once a year. So, for example, if the renewal for Boeing happened not to come up for six months, that would give us six months time to let emotions simmer a little bit; we could then see if we could engage them and hopefully have a more constructive dialogue. We rejected that approach; we were concerned that if we waited, we wouldn't have any clients by the time that we were ready to engage them. So we sent a letter to all clients immediately after October the 14th; it went out within 24 hours. We then had five separate telephone calls with all clients of Marsh & McLennan. Mike [Cherkasky] was on the phone. On the first call there were 9,000 clients; 9,000 telephone lines tapped into that call. We knew that plaintiffs' lawyers were on the phone. I remember one question in which a client, or perhaps it was a plaintiffs' lawyer, asked "Can we come in and inspect all of our placement files at your office?" Mike turns to me; I shake my head no. He, of course, turns to the phone and says "Absolutely." And that's just what clients did, hundreds, if not thousands, of them came into our offices and reviewed the files for themselves. That was a critical part of the process of rebuilding, or beginning to rebuild, those relationships.

The second key step with clients was the notices that we sent advising them of their allocation under the settlement. We had agreed to pay, through the Attorney General's settlement, $850 million; now we had to take that obscene amount of money and basically try to allocate it to each individual client. So how much is Boeing entitled to? How much is Xerox entitled to? We sent those notices out on May the

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20th and we intentionally took a very dispassionate approach to it. We didn't try to hawk for the settlement. Many people within the company believed that these settlement payments were windfalls — that these were amounts that weren't justified because individual placements hadn't in fact been impacted in more than a relatively limited number of instances. We very consciously did not take that position, but just made it clear that it was the client's choice. It is what it is. If you want to accept the settlement offer — in some instances it was seven figures — that's your choice, but then you have to sign a Release waiving any claims against the company. Conversely, if you don't want to accept the settlement — your choice again — you retain every single one of your rights to sue the company and, in fact, here are the names of the plaintiffs' lawyers who have already filed the class action suits that are pending. There was a lot of betting going on. No one knew how clients were going to react. Some people said 20% would accept. Some people said a third, but there were very few people who said that more than 75% of clients would in fact accept the settlement. Come mid-September when the deadline occurred, over 90% of the fund had been claimed. Almost all of Marsh's biggest clients felt that the company had tried to do the right thing and that this was fair restitution. This was a critical piece in repairing those relationships. It also had the derivative benefit of helping with our interactions with other regulators. If you went to a particular state now, you were equipped with data. You could say, that 95% of the Marsh customers in your jurisdiction have made the conclusion that this [the settlement] represents fair restitution for what occurred. That was a constructive fact to have in the dialogue with the regulators — it also obviously does not hurt the company to have 70,000 releases in the existing class actions. So that was the client strategy.

Lastly, it's incredibly tempting when all of these external audiences are clamoring for attention to focus less energy internally. We had calls from regulators at 3:00 on a Friday afternoon saying, "I want you in my office at 9:00 on Monday morning. Do you understand?" You would say yes, you understand, and you would get out to that office at 9:00 on Monday morning. So there's incredible pressure from the outside demanding management's time and attention. But it's the people of Marsh & McLennan that have made this company the greatest insurance broker in the world.

Think about that for just a moment. How many of you in this audience can say that you work for an institution that is the undisputed number one player in your space? Well, the insurance brokers at Marsh & McLennan can say that. The benefits consultants at Mercer can say that. The risk consultants at Kroll can say that. And the re-insurance brokers at Guy Carpenter can say that. That is an incredible constellation of businesses and it is the professionals that have made this company the company that it is. Those people deserve to know what the hell is happening to their company when something like this happens. So you have to communicate with them, and communicate with them frequently. We hosted, if not weekly, at least every 10 days, an all colleague call. Now communication sounds great, who can be against communication? But there are uncomfortable questions that get asked that, particularly as a lawyer, you don't always have the answers to. Mike gets asked, "Have you identified all the misconduct that occurred?" or "Have you identified everybody who engaged in that misconduct and asked them to leave the company?" We didn't always have the answers to those questions, but the fact that you don't have the answers, can't be an excuse for not communicating.

> "Every single thing you say is going to become public....you have to think in your mind, how is this going to play with the regulators?"
>
> —*Robert Fiske*

In closing, I have two thoughts. Based on my limited experience at Marsh over the last two years as to what is critically important in a crisis. First, you have to be decisive. For those of us who are lawyers in this room, that doesn't come naturally. We want more time. We want more ability to assess the situation so we can come to the right answer, the unquestionably right answer. Well you don't have that luxury in a crisis. You've got to make your decisions and after you make them, you cannot get plagued by self-doubt and try to revisit those decisions. The second thing you have to do is to be positive. People are incredibly stressed in an environment like this. I don't think "shell-shocked" is too strong a word to use and it was particularly acute at Marsh, because over the preceding three years the company had been through three calamitous events: losing 300 employees on Sept. 11th, the market timing scandal at Putnam, and then the bid rigging scandal at Marsh. Three enormous events. In that environment people need to hear that there's a plan and that we are going to get through this. They deserve to hear that, and if you're not in a position to say that, then I think you ought to get out of the way and make room for somebody who is prepared to say that. And so, I'll say that again here, that we are going to get through this process and this company is going to emerge in the months and years ahead as an even greater company. Thank you.

MR. FISKE: Good morning. As Peter indicated, I lived through that Marsh experience with him and with Mike Cherkasky and one lesson from that is a lesson that has been proven true in so many other situations, which is the truly extraordinary and in many cases unfair leverage that regulators have in a situation like this. For a company in a regulated industry, an indictment — and a potential conviction — presents the potential of collateral consequences that in most cases will put the company out of business. So, simply stated, a company can't afford to fight. If you're indicted in the first place, just the risk of a conviction ordinarily will lead the management to say we can't take the chance. Even if we think we have a chance of winning this case, a good chance of winning this case, we can't take the chance because the risk is so great. Even worse, even if the management were ready to take that risk, in most cases they can't afford to because the specter of the indictment, the pending indictment, and the overhang of the potential collateral consequences puts pressure on the stock which doesn't give the company the opportunity to litigate the case and seek an acquittal because during the time that the indictment is pending, as long as it's out there, there's going to be enormous pressure on the company from the analysts and from the stockholders to "put this behind us" and putting it behind us usually means an extraordinarily large settlement as was the case with Marsh. There are just a couple of examples that bring this home and many of you in the audience are familiar with them. Probably the most glaring is the case that the Boston U.S. Attorney's Office brought against TAP Pharmaceuticals and, I think, eight or nine individuals alleging kickbacks to doctors. There was enormous pressure on TAP. If they were convicted, they would be cut off from Medicaid, so they reached the largest settlement ever, a combination civil and criminal settlement of $875 million. Two years later the case went to trial against the nine individuals, the individuals who engaged in the conduct which was the basis for TAP paying $875 million. All nine individuals were acquitted and the jury basically found there had been no criminal misconduct by any of those individuals. The company simply couldn't afford to go to trial the way the individuals could. A few years ago, we represented Warner Lambert in a case brought by the U.S. Attorney's office down in Baltimore which involved a drug called Dilantin. The charge was that the company had failed to file what were called field reports with the FDA. There had never been a criminal prosecution brought on that theory before, but the U.S. Attorney's office in Baltimore indicted Warner Lambert and two individuals. The company, again faced with a potential debarment and loss of Medicaid if they were convicted and with the threat of the overhang of an indictment, pled guilty and paid a fine. The individual went to trial about six months later and was acquitted. I'm sure there are other examples of this, but simply stated, it's a fact of life now that if you're dealing with a company in a regulated industry, you just have to deal with the regulators even though it often means that you reach a settlement that's out of proportion with the misconduct involved.

Ordinarily, you have time to do that. An investigation starts and you engage in global negotiations. That is the key. If it's a federal investigation, you know there are going to be state Attorneys General involved in investigating the same conduct. You try to reach a global resolution that sweeps in not only the federal criminal case, but the federal civil case, the state Attorney General's criminal claims, and the civil claims all in one package. Most of the time, you have time to do that but as I said, you may end up paying more than the circumstances warrant just because nobody can afford to be indicted. The thing that was so unusual about Marsh was that there wasn't time to do that because there were no negotiations with Spitzer until after the Complaint was filed and after he had said publicly that unless there were changes in the management at Marsh, he wasn't going to negotiate. He [Spitzer] was considering a criminal prosecution, which of course produced immediate change in management and the discussions that Peter referred to that satisfied Spitzer that he should make a public statement that there would be no indictment in order to keep the company from going under. The banks were basically saying that if there's a threat of an indictment, we're not putting up any more money. So, as Peter said, that the situation to negotiate this same kind of global resolution that I was talking about and he [Spitzer] said no to that. So we ended up with this $850 million settlement and I was with Peter when we visited a couple of Attorneys General in the aftermath of that. People that we had not had a chance to negotiate with before and the argument was you don't have to do anything because Spitzer's already taken care of the people in your state because there will be a prorated allocation and actually the policyholders in New York were fourth or fifth in terms of the amount of the settlement. Most of the money went to California and there was a lot going to other states. You could make a credible case that Spitzer had not put New York policyholders ahead of any other policyholders. It was a true nationwide settlement. Importantly, he had elected not to impose any fine so we were in a position to argue with regulators in other states that since the criminal conduct that led to the indictment of some of the Marsh individuals occurred in New York and Spitzer said there's no need for a fine, then you Attorneys General in the other states, you don't need to impose a fine because there was no misconduct in your state. What I think was so crucial in the civil negotiations — even though we paid a little bit more to get it — was a condition of the settlement that anyone that received the money would give a Release. The original position of the Attorney General was to pay the money and that will be a credit against whatever they eventually collect. Fortunately, Mike and Peter held out and said no, we're not going to do that. If we're going to pay this money, we want peace and so the two key components of the settlement were (1) no fine so we could say if Spitzer doesn't think a fine is necessary in the state where the conduct occurred, you guys out in Idaho and Kansas, you shouldn't impose a fine because nothing bad happened in your state and (2) to the extent that you're protecting the policyholders in your state, well, Spitzer took care of them and they, as Peter

> "You have got to speak with one voice and you got to decide whom that voice is."
>
> —*Robert Fiske*

said, basically voted with their feet because as these negotiations with the other states were going on, I think 90% of the total money involved in the policyholders across the country had accepted the settlement and given a Release. So you could say to the regulator, the people that you're supposedly protecting have already accepted this. They think it's fair. They've given a Release. Even though we weren't able to negotiate a global settlement, those two conditions of the settlement with Spitzer, no fine and the Release, to a large extent accomplished the same result.

> "Insurance turns out to be a major factor in dealing with the aftermath."
>
> —*Mitch Auslander*

What do you do in a situation like this? Peter covered some of the basic points. I would like to just mention two or three other things. Peter said a question is who's in charge and that is obviously crucial and that's become more complicated since Sarbanes-Oxley with the emergence of the increasing roles played by audit committees and independent directors. Back three or four years ago, it was relatively simple. It was never simple, but at least there was one firm in charge, the company would have its company lawyers, and they would deal with the situation. Increasingly now, there's pressure on the audit committees and the independent directors, particularly when there's questions about the conduct of management. Well, this firm that's been representing the company all along, maybe they're a little too close to the management. Maybe we need independent counsel representing the independent directors and the audit committee that among other things can look at the conduct of the management more dispassionately, more independently than the traditional company counsel. Perfectly legitimate concept, but then the question is okay, well now who deals with the regulators? On the one hand, the audit committee is supposed to be totally independent. They're conducting an independent analysis. They're maybe not supposed to be advocates for the company. On the other hand, if the audit committee and the independent directors want to take charge, there's nobody that really can tell them that they shouldn't. That becomes a very important dynamic in these investigations when you're dealing with the regulators. You have got to speak with one voice and you got to decide whom that voice is. Crucial to the negotiation with the regulators is the credibility that you can present and that requires total candor and total cooperation. One of the monkey wrenches or one of the things that you have to watch out for as lawyers in this situation is the media side of it — the public relations side — because in every company, there's always the people that say we didn't do anything wrong. We want to tell the whole world we didn't do anything wrong and there's pressure to put out statements that paint the situation in the most favorable way to the company. That has risks that we're all familiar with, but a particular risk it has is the impact that that kind of a statement can have on the regulators in the middle of an investigation. We had a situation and I won't name the company right now — it certainly wasn't Marsh — a few years ago while the company was under investigation, the public relations people in the company were pushing them to put out a statement saying this investigation is hogwash. There's nothing to this, you know, we didn't do anything wrong and the lawyers understandably were saying don't do that. Well, they went ahead and did it anyway. They had a press conference with the CEO, arranged by the public relations department, where he actually said that. We don't think we did anything. We're going to persuade the investigators that they should spend their time doing something else — investigating real crime, something more profitable. Well, that came out in the press. The next morning our phone rang and it was the U.S. Attorney's office wanting to know the name of the public relation officer who had orchestrated this and later that day, he was in the grand jury testifying and there wasn't a worse way to start the relationships with the U.S. Attorney's office than having to explain away that kind of a media statement. Lawyers deal with this all the time. There's always this tension between the PR people and the lawyers, but one of the things that people don't always focus on and should focus on is that every single thing you say is going to become public. It can include statements to your own employees because obviously they're going to become public; you have to think in your mind, how is this going to play with the regulators? Even if you think it's the right thing to say. Even if you believe it, is this going to be something that is going to turn them off and make it more difficult to resolve this? So you have to manage your PR people with that in mind.

Secondly, in terms of cooperation, two things that were key in persuading Spitzer not to go ahead with an indictment were: one the change in the management and two the fact that Mike Cherkasky was able to say that even before the Complaint had been filed, there were discussions going on at Marsh and that he was able to in a very short period of time, in about two days, put together a list of reforms that Marsh was going to put into place which were exactly what Spitzer thought should be the model for the industry. So Mike was in a position to say, not only are we doing the right thing in making these reforms, but we are in a position to lead the industry. We will do this. We will lead the industry. If you indict us and put us out of business, then we won't have that leadership potential. Secondly, was restitution and that was certainly accomplished with the $850 million and third, what have you done about the individuals that were engaged in this conduct. As Peter said, the top management left, but individuals that had been involved in this conduct were identified and were also asked to leave. So the key to resolving this with Spitzer was reform, reforming the practices that he said were the basis for the Complaint, making full restitution to the policyholders and taking appropriate remedial action against the individuals and then, finally that leads to this basic issue of cooperation and just a few words about some possible changes in that, many of which you're all familiar with.

Traditionally, the prosecutors, U.S. Attorney's office have taken the position pursuant to the Thompson memo that you can't pay the attorneys' fees of people who won't cooperate. You should terminate people if they're not ready to come in and be interviewed. You should fire them and you should conduct an internal investigation, waive the privilege, and turn all the information over to us. I think as a result of Judge Kaplan's decision in the KPMG case, prosecutors aren't any longer insisting that someone who doesn't come in and be interviewed has to be terminated. That's a decision, by the way, the audit committee may make independently of the U.S. Attorney's office. They may say we think our people should cooperate with an investigation no matter what the U.S. Attorney's office says and they may decide that unless they go in, they'll be terminated, but that's a company decision. That's no longer a government decision. Secondly, the same is true with respect to paying attorneys' fees for people who are under indictment. The company should be free to do that and shouldn't have to make a premature judgment as to whether they're guilty or not and should be able to continue to pay the fees even after there's been an indictment and finally, with respect

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>
> —*Mitch Auslander*

to the waiver of attorney/client privilege, although that's coming a little more slowly, there's some very encouraging developments there. The ABA has come out very strongly against the practice of prosecutors requiring companies to waive the attorney/client privilege in order to get credit for cooperation. A huge step forward was taken when the sentencing commission eliminated that as a factor in determining whether a company was cooperating or not. Finally, there is pending, as some of you may know, a proposed amendment to the Federal Rules of Evidence, Rule 502(b)3, dealing with a situation where if you waive the attorney/client privilege in connection with a government investigation, there is a high risk that that will be considered a total waiver so that you waive it for all civil litigation and whatever other collateral proceedings follow . There are many situations where companies will want to waive the attorney/client privilege in order to make presentations to the government, in order to submit white papers saying why a prosecution or an SEC case shouldn't be brought which may involve disclosure of privileged information and companies ought to be able to do that without waiving the privilege afterwards. There is a proposed amendment to the Federal Rules of Evidence 502(b)3 which says exactly that. It's called Selective Waiver, that you can make disclosures to the government without waiving the privilege in civil litigation. That's controversial. Plaintiffs' lawyers are opposing it and ironically, there are some defense lawyers that are opposing it because they say if you do this, that will take the pressure off the government in this other argument that you shouldn't be asking for a waiver in the first place because the government would now be able to answer one of the arguments that we traditionally make. Don't make us waive the privilege because if we do, much as we like to cooperate with you, we'll lose it in civil litigation. If this rule gets passed, people won't be able to say that anymore. The government will say, go ahead, give us your internal investigation. You won't waive the privilege in anything else. I personally believe, but it's a decision that everyone should make for themselves that this proposed change in the Rules of Evidence is a good thing because there are so many situations where you may want to waive the privilege and you ought to be able to do that without waiving it in civil litigation. We can deal separately with this issue about whether the government should ask for the waiver when the company doesn't want to. If the company wants to do it itself to make a presentation, they ought to be able to do it without waiving in civil litigation and still preserve the argument that if the company doesn't want to do it, the government should not be able to require them to do it in order to get credit for cooperation. This is very much a live issue right now with the Advisory Committee on the Rules of Evidence. The reporter is a professor at Fordham named Dan Capra. If any of you have any views on this and want to weigh in on it, you should certainly give him a call because right now, they are considering sending this

proposal to the Standing Committee, but it's bracketed because they haven't really yet decided in view of the conflicting arguments whether they want to go ahead with this proposal or not, and if people in the corporate world think that it's a good idea, this is the time to speak. Thank you.

MR. AUSLANDER: Good morning. First, I would like to start by congratulating Peter Beshar for being honored here today. I have been representing Marsh & McLennan in one way or another for between 20 and 25 years, notwithstanding this youthful appearance, and have, it's fair to say, seen it through many, many ups and downs. But the last two years, nobody could have predicted. Nobody could have been prepared for what this company has gone through in the last two years. It has truly been an extraordinary achievement to get to where we are today and as Peter said, we will be moving forward and forward very aggressively. That is a tribute to the people who work at Marsh, the management, and the lawyers, including some of the people who are sitting in this room today. It was really quite an accomplishment, and I congratulate Peter and everyone else who was involved for that.

MR. BESHAR: Okay, Mitch, we'll pay your bills now.

MR. AUSLANDER: Funny you should say that because my subject today is how you pay the bills when you're in a crisis, and that was not planned. I'm actually surprised Peter didn't mention it before then because we have had this conversation on one or two occasions over the last couple of years.

Of course, any time you're in this type of a crisis, there is an enormous amount of expense and obviously an enormous amount of liability that a company faces. In addition to the regulatory investigation itself that you're dealing with, and in this case it was Attorney General Spitzer's office, there are many, many other regulatory issues to deal with. Many lawyers end up getting hired for the company at enormous expense. There is an enormous amount of civil litigation, the inevitable securities litigation. Or there can be anti-trust litigation. In our case, there has been a considerable amount of that. There are audit committee investigations, ERISA claims, claims by employees for indemnification. Each employee who is either the subject of the investigation or somehow involved may appoint counsel to represent him or her and there's a lot of expense associated with that. Wrongful termination claims — the entire panoply of problems that a company can face in this kind of a crisis. In the midst of it, although nobody ever truly loses sight of what it's actually costing, the primary goal is to get through it, save the company, save people's jobs and do the right thing. In this type of environment, it is easy to forget one of the main sources of payment that a company might have — and that is looking to its insurance policies.

It may sound very mundane, but insurance turns out to be a major factor in dealing with the aftermath. We tend to think of insurance as D & O insurance for the directors and officers that covers the securities claims, but in fact, it can be much broader than that. D & O

insurance can cover not only the securities claims, but crisis management in some circumstances, audit committee investigations and other related matters. There are also other insurance policies that may come into play, including Errors & Omissions insurance in the right circumstances, policies that cover ERISA claims, employment practices coverage and sometimes Comprehensive General Liability insurance. When all of the insurance is aggregated together, it can amount to tens, if not hundreds of millions of dollars to pay for the expenses as well as for the ultimate liabilities.

To take advantage of a company's insurance, one needs to have a team involved at the outset working with the people who are dealing with the crisis to make sure that the insurance aspects of the matter are properly handled. First of all, it's important to take care of notification to the insurance companies and, as what I said before indicates, based on the number of lines of insurance that could be involved, that could be pretty complicated business. Figuring out who has to be notified. Figuring out what to tell them. By the way, we often think of insurance as applicable when there is a claim, when a claim hits the company. Well, that's not necessarily the trigger for insurance policies. The trigger is often knowing about a circumstance which could give rise to a claim under an insurance policy and certainly when you're in a crisis mode like this, you are aware of circumstances that could reasonably be expected to give rise to claims. In that situation, you want to make sure that you at least consider giving your insurance carriers notice of the potential claim. You may not choose to trigger your insurance and there are different tugs and pulls regarding that, but it's certainly something that has to be considered very carefully. You may conclude that you have multiple lines of insurance available and millions of dollars of policy limits.

You might even conclude that you have multiple years of insurance that you may be able to call upon in order to have the company's expenses and the liabilities paid for. This will depend on an analysis of your policies and the facts. The other thing to bear in mind in a crisis is that insurance policies typically require the insured, the company in crisis, to seek the approval of the insurance companies before it retains counsel. In a crisis situation, the company may need to retain many counsel to handle all different kinds of problems in all different parts of the country. It is important that the insured, the company, partner with the insurance companies, who typically are pretty good about consent, (except when you fail to give it to them, then they're not so happy about it), to obtain consent to the counsel you want.

So once you've notified the proper insurance companies, you've decided what the policy years are, you have selected your counsel with the consent of the insurance companies, you then have to communicate and communicate effectively with the carriers. Again, you may be dealing with dozens of insurance carriers and they themselves may appoint their own individual counsel. Each insurance company in each line for each year may have its own law firm that is representing it for purposes of helping figure out whether the claim is a covered claim and dealing with potential coverage disputes, and they will typically ask for a lot of information. They will occasionally ask for interviews of the people involved in the problem, but most likely they will ask for reams of documents just at a time when they are very difficult to provide because you are preoccupied with the crisis. Nevertheless, by virtue of contractual provisions in the insurance policies and in particular the cooperation provisions in most insurance policies, it's essential that the information flow begin as promptly as possible. This is important to assure that you have satisfied your contractual obligations and so that you have the insurance companies in a position to respond by paying money at the time you will need it, either to pay for your lawyers or to pay for the ultimate liability.

So one must communicate, one must provide the requested information, and one must report on an oral or written basis about what is going on in the underlying problem. That usually involves coordination with defense counsel. Defense counsel who are actually handling the matters — the regulatory side, the securities side, the anti-trust side, the ERISA side — need to be in a position to speak to the carriers and they need to be in a position to understand the tugs and pulls of the insurance policies themselves. They need to understand what is and is not covered. They need to know in advance what is excluded from the policies so that they can explain it to the insurers in a way that's honestly designed to maximize the coverage the company is seeking. If that is done properly, in my experience, insurance companies typically respond responsibly and pay. If, on the other hand, the insurance carriers, the ultimate source of the funds, feel that information is being withheld or is not being provided to them in a fair and candid way, their reaction obviously will be quite different.

> "The most important thing is instant recognition at the very top of the corporation that this is a crisis or is a potential crisis."
>
> —*Ted Olson*

One tricky aspect of communication with insurers that comes up quite frequently is the sharing of privileged information. Bob alluded to it, spoke about it in a different context, but it is also very, very important in the insurance context. By virtue of the cooperation clause in most insurance policies, insurance companies typically take the view that they are entitled to whatever information the company may have that will explain what happened in the underlying situation. Obviously, privileged information is often the most sensitive information the company has and, in the case of a crisis, there may be internal investigation reports. There may be interview memoranda. There may be just the kinds of materials that the company wants to protect to the extent it can and certainly wants to protect vis-a-vis the plaintiffs' bar that is only too anxious to get their hands on it at the right time.

It is important to understand that major corporate crises are not like slip and fall cases where an insurance company appoints counsel that jointly represents the interests of the insurance company and the insured. In those cases, the insures normally can take advantage of the joint interest privilege so that information that is privileged can be shared without fear of it falling into the wrong hands. It's much more complicated in a crisis situation where the insurance companies have appointed their own counsel, have potentially reserved their rights to deny coverage, perhaps have denied coverage or threatened to rescind their policies. In those circumstances, it is very problematic whether the common interest privilege will be upheld by a court later on down the road. By giving over that privileged information to the insurance company, there is a risk that the privilege will be waived. Although insurance companies don't always like to hear this, prudence in protecting privileged information is good for them too because they want to make sure that if they're ultimately going to pay the legal expenses and liabilities, they don't raise the price by handing over the most sensitive information to the wrong people. So one hopes that a company can speak to its insurers logically and sensibly, or at least economically, so that they don't press for information that could cause everyone more harm than good.

Related to that question, and this Bob also alluded to, is a circumstance where the regulators have required the company to waive the attorney/client privilege. In that instance, the insurance companies are likely to say, well, you've waived the privilege. You've given it to them. It's out there. You may as well give it to us. That's a mistake and it's a mistake because the company may very well take the position in subsequent litigation that the waiver that led to the provision of the information to the regulators, was a limited waiver for that purpose alone. The company may also want to take the position that the information was provided to the regulators pursuant to a Confidentiality Agreement and in some jurisdictions, that is an argument that may fly. It may serve to protect the information from the plaintiffs who would otherwise use it to the company's disadvantage. Finally, the company might contend that the waiver that was given to the regulators, was given under circumstances that could be construed as a coerced waiver and in that circumstance, the company may have an opportunity to argue to a court that the information was provided, not on a broad-based waiver basis, but on a very limited basis and no one else should have it. Insurance companies should be willing to work with the company to make sure that these positions are protected. The insistence that privileged information be turned over makes it all the more likely that the information will fall into

the hands of the wrong people. But if you have established a cooperative relationship with insurance companies, some of whom I believe are represented in this room, that should lead to a resolution that serves everybody's interests.

Finally, with respect to insurance, I want to remind everyone that if they ever have the misfortune of being caught up in a major crisis, they should not let the business and legal aspects of the problem get out ahead is very, very difficult in a crisis atmosphere which is why it is often a good idea to have a team that is dealing with the insurance in conjunction with the team that is actually managing the crisis.

In conclusion, I guess I would say that insurance policies may be the one saving grace a company has in a crisis. They can be quite a gold mine. But they are also loaded with plenty of land mines. Please tread carefully. Thank you.

cies and practices and procedures, aggressive state Attorneys General that are finding that they can advantage themselves politically and also do what they believe is in the right interest of the public by taking aggressive positions, more aggressive regulators and all of this is somewhat synergistic. When the Attorneys General get aggressive, then the federal government and the SEC doesn't want to be left behind, so they get more aggressive and then

of the insurance considerations. There is often great pressure on a company to reach settlements, whether it be settlements with the regulators, settlements with individual civil plaintiffs, or maybe groups of plaintiffs, and it may have to be done quickly and in an atmosphere of some secrecy. Most insurance policies require that before a company can settle a case, the company must obtain the consent of the insurers. If that consent is not obtained, the insurance companies may very well say, we might have paid, but we're not going to pay now. So, it is important that the insurance companies be kept informed all along so that they understand when the settlement comes, they know what it's about, they know what the case is about, and they're in a position to analyze whether it's a fair and reasonable settlement to which they can give their consent. Again, this

MR. OLSON: This all sounds pretty gloomy, doesn't it? It would be nice if I could get up and give you all the good news, but that's not what this program is all about. I'm very pleased to be here to talk about crisis management. It seems to me that this is something new, relatively new. We always had this type of situation before facing corporations, but it's manifested itself in new, broader, and more threatening ways in recent years. We have a crisis management group in our law firm. I think other law firms have the same. That sort of thing didn't exist five years ago. It's a recognition that these sorts of things are happening frequently. Just think Hewlett Packard, think the options investigations and all the panoply of things that go with it. What is bringing this all about? Aggressive Department of Justice enforcement policies and practices and procedures, aggressive state Attorneys General that are finding that they can advantage themselves politically and also do what they believe is in the right interest of the public by taking aggressive positions, more aggressive regulators and all of this is somewhat synergistic. When the Attorneys General get aggressive, then the federal government and the SEC doesn't want to be left behind, so they get more aggressive and then the Justice Department does this as well. There are a proliferation of class actions and things like punitive damages that make it extremely attractive for plaintiffs' lawyers in the private bar to be involved in this and that is synergistic with the law enforcement investigations. We have seen an increase in the criminalization of regulatory policies at the state and the federal level. We've seen more and more doctrines evolve of enterprise liability that makes the stakes great. Whole industries can be sued for the behavior of certain product or certain members of the industry, prompting Congressional investigations; I'll talk a little bit more about that, all of which fuels this sort of thing. We should remember when we're thinking about this, something that President Kennedy said: in the Chinese language, the symbol

for crisis is the combination of two other symbols — one is danger and the other is opportunity. I think that's a very good way to look at it. It's not only an opportunity to prevent the risk and danger and disaster from occurring, but it's an opportunity to be constructive. It's an opportunity in advance to do some planning. It's also an opportunity for people that are out to get you. There are large stakes and there are great opportunities for them.

These crises are all different, but they all have certain essential, common characteristics. They are major. They are threatening the financial viability of the company or a product line or a brand or a reputation or the corporate structure or licenses that are necessary to do business. They are usually multi-dimensional. They almost always involve the coalescence at the same time of law enforcement and regulatory activities, criminal and civil litigation, or enforcement at the federal level and at the state level, at the executive branch, at the legislative branch level with Congressional investigations or potential legislation and civil litigation. They involve the media, a public relations frenzy that can cause an abrupt and severe and sometimes irrecoverable drop in the market capitalization, turmoil and tension within the company, distention between the officers, stockholders and the management of the company, inside counsel, outside counsel, conflicts of interest, problems with lenders, suppliers, credit availability and all of those things can be coming together at the same time on a schedule that's unpredictable, constantly changing, uncontrollable and very, very, very rapid. Often unanticipated and emotional as Peter was saying, I think, emotionally and physically exhausting because you can't let up when these things happen.

I was going to talk a little bit at the end about some planning that should take place. I mean, if failing to prepare for a crisis is preparing to fail when the crisis occurs, and at the end of the day, if we do leave any message here, is that there are things that can be done to anticipate the things that are going to go bad or the potential, or to put together the potential of people to deal with these problems when they occur and to try to identify in advance where the problems may be coming from. I've put together over time a list of some of the things that are important when these things happen, assuming that they haven't already been done in advance or the planning hasn't been done for them. The most important thing is instant recognition at the very top of the corporation that this is a crisis or is a potential crisis. Problems sometime emerge and they're not a crisis right away, but they can be made into a crisis if they're not handled properly, if someone goes out and says the wrong thing. I don't know whether it was Bob or Mitch who talked about the media person that went out and said the absolutely wrong thing. Well, all of a sudden a problem can be a crisis. There must be recognition at the very top of the company that we've got a potential or an actual problem and we must provide the resources and leadership necessary to do it. There's too often a head in the sand, it'll go away tomorrow, or someone else will have a problem. That usually doesn't happen and if that's the attitude at the top, then it will be a crisis and a team must be assembled to deal with the crisis that's coordinated. Often, corporations have their securities lawyers or they have their media team. They have their in-house counsel. They have the lawyer that deals with the insurance or their environmental problems or the product liability products or the FDA problems, whatever the type of problem it might be and they're off all going in separate directions. The team that needs to be assembled to deal with a crisis needs to be a cohesive, cooperative, disciplined team that has immediate access to the very top of the company. Bob Fiske is probably a perfect example of the kind of person that you want. You want someone who is trusted, mature, seasoned, and unflappable, who's been through it all, and who has that kind of gravitas and reputation that the person at the top will listen to. The CEO may not want to do things a certain way. He or she may not want to recognize how severe the problem is or want to take advice. The outside world wants to look to somebody they trust because it's exceedingly important in the communications part of this to give direct, candid, straightforward, not misleading, not evasive messages and information. If you put someone at the top of the team that's done it before, who has the credibility to be believed in the marketplace or ideas and the marketplace of crisis, then a lot of the problem is being solved. That individual needs to have the trust of people working with and under him or her. You need people that are in the legal community that can deal with the substantive problems. It might be a product liability problem. It might be an oil spill. It might be an FDA problem. It might be an insurance problem, but you have to have substantive people working with the team leader. The various different types of lawyers working with the team leader and the media and public relations part of it is exceedingly important. The team working together can then sit down and figure out, well what is our problem? It isn't just an oil spill. It's a concern about the credibility of the whole enterprise. If there's a pipeline that's leaking or a product causing rollovers on the highways or a pharmaceutical problem that's causing problems is that the problem or is that the problem that the company manifests a lack of concern or care about doing things a certain way. An image of the entity that suggests irresponsibility or lack of care for the welfare of citizens. What is the problem, and what are the messages that can be crafted to deal with the problem? We think of rapid response, but too often, it's just rapid and it's not an effective response.

> "When the crisis happens and the mess occurs and the stock falls off the cliff, then someone's going to say, well, what did you do to anticipate that problem? What team did you have in place?"
>
> —*Ted Olson*

Here's the stage of these things. There's the immediate first day, first second day, first third day type of crisis where what people say is exceedingly important and can set the stage for what happens later on, but it plays out in the second phase where the media then and the public reacts to what was said the first time or the developments and they keep unfolding and unfolding and make it more complicated. Then you have the intermediate stage and the long term stage of how these things play out. All of these things may need to be addressed. There may be a tendency for many lawyers and for many corporate communications departments to say no comment because they're not sure of what's going on. A friend of mine wrote a pamphlet called "No Comments and other Admissions of Guilt." I mean, that's not to say that you need to rush out and say something. Every one of these things is different and we talk in terms of generalities, but the message and the communication is exceedingly important.

One other aspect is that some evaluation has to be given to who the constituencies are. The constituencies are the regulators. They're the prosecutors. They're the shareholders. They're the financial community. They're the customers. They're the general public that care about your brand and there's a tendency also to think about either those in compartments or not to think about all of those things together because what you say in one environment may affect the other. Then the part that I thought I'd mention a little bit more that hasn't been mentioned, but is a part of the today phenomena, is the Congressional investigation.

We just saw it last week. I guess it was last week or the week before, with Hewlett Packard. It's happening more and more and it's happening all of the time. A month or so ago, it happened with BP, with respect to their pipeline and some other issues. It's going to happen and it's going to continue because there are so many advantages for the members of Congress and staff to have these kinds of hearings and investigations. When you're in the midst of one of these things, there's several things to know about them and I'll just mention a couple. It's impossible to control the timing. They decide there's going to be a hearing on a certain date and that's pretty much it. It's virtually impossible to change because there are lots of people that are involved in that, lots of potential witnesses, Congressional timetables, when they're going out on recess. Their schedule is not your schedule. Your schedule is not their schedule and so it's very difficult to deal with when it's going to happen and it will probably happen at the worst possible time in terms of the class actions, the federal and state law enforcement investigations, and so forth. There will be the hearing and subpoenas with

respect to the hearing, will be accompanied by exceedingly broad demands for the production of documents and they won't be too specific and it will be very, very difficult to negotiate with respect to narrowing things down. They just won't pay any attention to you. I mean, I'm overstating a little bit, but you have to assume that. It's very difficult to narrow the scope of these things because they will want everything because they will have the staff that they want to have to turn over to look at these things. Privileges, attorney/client privilege, work product privilege, they don't care about that. Those are things client's ear, but most of them won't. The lawyer will be sitting back here and the client is up there pretty much all by himself or herself. The witness is going to be exposed to argumentative, rhetorical, colorful, ambiguous, headline grabbing sound bites in the form of the questions because you see, the questions aren't for the purpose of getting information. The questions are for the purpose of the sound bite in the evening news. Often, because you see that they get five minutes apiece, there will be five minutes of question and no time for answer at all. That's because the answer is not necessarily the purpose, sarcastic, can't do anything other than be humble and polite and that's very difficult for a lot of people to do. They will have to answer questions that are incomplete, argumentative, complex, and terribly devastating, you know, depending upon the answer that might be given and when these documents demands are made and all these documents come in. Those documents don't remain confidential with the committee. They are shared with the law enforcement operations, the regulators, the press, and plaintiff's class action lawyers. So you can't control that and there's a synergistic relationship that builds up

for the courts, the federal evidence, Rules of Evidence, and things like that. Members of Congress will tell you over and over again, we don't - what's attorney/client privilege to us, you know, that doesn't matter, give us the stuff. Now, maybe you can negotiate, but you've got to be dealing with the attitude that Congress and Congressional committees basically believe that things like attorney/client privilege are something that are court created and have little to do with Congressional investigations.

Then the hearing takes place. The role of a lawyer is very limited. Some Congressional committees will allow a lawyer to be there and to whisper in the but witnesses have to deal with that. Witnesses can't be told just answer the question. We've all done that in depositions to a witness — just answer the question. Well, you can't do that at Congressional investigations because they will beat up on you until you answer some question that you can't understand.

There's a Gresham's Law involved in these Congressional hearing. The person that makes the most noise, that says the most outrageous thing, is the person that you're going to see that night on television and therefore, there's sort of a race to the bottom. Witnesses have to sit there docile, submissive, unemotional, can't argue with the question, can't be the size of the threat. The witness usually has a choice between testifying and looking bad. You've seen all these people standing up there with their hands up looking like they're in one of these shooting galleries at the state fair where the bottom's going to come out and they're going to go into the tank of water. That's what it all looks like. It looks like they're guilty because they wouldn't be standing there or sitting there anyway with their hand up in the air. So they can testify, look bad, possibly give testimony that's harmful to the civil cases, to the regulatory process or the law enforcement investigation or their reputation or to create tension with other

people in the company, the other officers who are saying no, he did it or she did it or I asked the right question, but I didn't get the right answer and being forced into making bad strategic choices. Early in the evolution of one of these crises, you have to go out and do these things that you don't want to do. You have to make decisions that are sometimes bad decisions, sometimes decisions that have consequences that you can't control.

So virtually nothing good can happen by testifying, but the other choice is not testifying, taking the Fifth Amendment. It's damming in and of itself. It has consequences for regulators, licensors — reputational damage. It's embarrassing because by and large now, they're used to, but they don't anymore allow you to take the Fifth Amendment and not show up. Now, they'll make you show up and stand there and take the Fifth Amendment over and over again and be badgered. There are follow-up questions, damaging one-sided reports and there are now, not just one Congressional investigation because if it really looks like fun to one Congressional committee, it'll look like fun to another Congressional committee.

I will just say that there can be some planning that's done. There are ways to put systemic evaluations of where the risks are for these crises, what types of teams, who should we have in our radar screen to put together a team if something untoward happens. It is like buying insurance in a sense, but everybody says well, yeah, we ought to buy insurance, but not everybody says yes, we ought to have a strategic crisis management plan in place before it happens. That seems like money with respect to things that well, that'll never happen and how do we plan for it anyway, but I submit that the time is going to come when there will be lawsuits against the officers for failing to have done this. When the crisis happens and the mess occurs and the stock falls off the cliff, then someone's going to say, well, what did you do to anticipate that problem? What team did you have in place? What did your people do? What cultural changes did you make within the corporation to prevent that from happening and so forth? So, it behooves everybody who's in the corporate world that's dealing at high-risk levels and that pretty much is everybody, to do some planning to anticipate for these types of problems. Thank you.

MR. FRIEDMAN: What I wanted to ask the panelists is to comment about interacting with the lay businessperson. When a crisis arises, how does the lawyer, whether it's inside or outside lawyer, deal with the business person who's on the board who may not be sympathetic with all these legalisms and you have to explain exactly what's going on and what's going to be permitted or not in terms of how they conduct themselves?

MR. BESHAR: I'll start off. With respect to the Marsh & McLennan board, I think one of the great things that helped the company, was the way in which the board stuck together. In many of these instances, as Jack has said, every single board member gets their own counsel. You can imagine then you've got essentially 15 or 16 different law firms all with very strong views about how board meetings should be conducted and what issues should or should not get raised at the time. At the Marsh board, there was a single counsel that the independent directors retained and we have a very strong working relationship with them and I think it was extremely important in just trying to keep the focus as much as possible on the institution as a whole.

> "For a company in a regulated industry, an indictment — and a potential conviction — presents the potential of collateral consequences that in most cases will put the company out of business."
>
> —Robert Fiske

MR. FISKE: I would say an important component is the composition of the board itself. Obviously one of the benefits of independent directors is that they have been officers or CEOs of other companies — and very often you have a board where when a crisis hits, you have two or three people on the board that have already been through this at another company and if a person like that can sort of calm everyone down and say look, it isn't as bad as you guys think it is, we got to stay together here, that person can have a very calming, very constructive influence to prevent the kind of thing that Jack was talking about where everyone scatters to the winds and runs in a different direction. So I think it's a way of saying it's an important thing to have on a corporate board enough diverse representation so that when a crisis occurs, you have people there that have been through it before.

MR. AUSLANDER: I agree with what Peter and Bob said. I think it is also important, and this is true even beyond the crisis setting, that your people feel that you're there to help them on an individual basis as well as a collective basis. If they feel that, it seems to me, and they should feel that, they're entitled to feel that, then they are more apt to act together as a group. If, on the other hand, they feel that your interests are not exactly aligned with theirs and you haven't explained to them where they are and where they aren't, they're less likely to be cooperative with the collective effort.

MR. OLSON: We've seen this very thing happen that Jack's describing because this happens fast. People start being concerned with their own welfare and they tend to scatter in self-protective directions. It may be important in advance to assume that something like this may come along and if so, is there a wise person out there that if we had this kind of crisis, we'd be able to turn to. I use the example of a Bob Fiske before. Some of you know I was involved in the *Bush v. Gore* five weeks of chaos in Florida.

It's important that I get that in. What then Governor Bush did was find Jim Baker and the Gore people did the same thing with Warren Christopher. Jim Baker was a perfect person to do this. He had that gravitas. He had experience. He had reputation, what we call ethos. I mean people believed him, trusted him. He had good instincts. He was unflappable and he could basically take command and give orders and assume a role of delegated field commander that would take charge of things, act in the field, but also, in a political campaign, believe me, everybody's going in every single different direction that they possibly can all of the time. He was able to pull this all together to a degree that I felt was quite remarkable. There are very few people like that out there in the world, but there are some.

MR. FRIEDMAN: I'd like to open it up to the audience. Go ahead. Yes.

AUDIENCE MEMBER: Scott Gilbert. I turned 50 last year, so I'm beginning to feel old and reflective and I'm thinking about a lot of things that you've talked about. Much of it seems reminiscent of things that happen in every decade. But what hurts me and is truly game changing is the sort of the speed of which the Internet media allows things to happen with such force and speed that there is much less time to reflect about things. What can you do in advance, and any strategies for how to deal with e-mail in an investigation? Then what effect do you think the Internet media situation has had?

MR. FISKE: I think e-mail is a potentially enormous problem. One of the most dangerous things that can happen is when there's a fast moving investigation and the government or the regulators call people in for testimony, people go in and testify. The company takes positions before all the e-mail has been reviewed and then all of a sudden the bad e-mail shows up directly contrary to what the person said. I guess this isn't always controllable, but to the maximum extent possible, you really shouldn't let anybody say anything about anything until you've got the best handle you can on the e-mail. Time and time again, that's where the bombshells come from.

MR. OLSON: I was reminded of that exact point when I saw the thing that Jack handed me. One of the previous keynote speakers was James Comey who's now general counsel at Lockheed Martin. He was U.S. Attorney here and Deputy Attorney General, and I heard Jim give a speech one time and he said, the greatest weapon that prosecutors have since the beginning of time is e-mail and no matter what anybody tells you, it never, ever goes away. It can always be found and so, that's very true and people

will say the most stupid, ridiculous things and the most mature, otherwise sensible person will do the dumbest things with e-mail. I don't know how you create a culture within a company that requires people to read it again before you push the send button. Think about the line where it says to, you know, all kinds of accidents happen with respect to the button. Of course, that doesn't get to the fact that whoever it's to, it's still there, but the reply all button. People just don't realize it's permanent. It's replicable. It can go anywhere and the synergy with respect to e-mail and the Internet, your point about the Internet, you've seen this playing out with the Congressional page situation. Here are these really awful things being said and said in e-mails which are then transmitted all the way around the world and then all these bloggers are mining that material and then turning it around. The other part about the Internet and we were thinking about this during the *Bush v. Gore* campaign, it's a 24 hour day and that's really 24 hours a day, seven days a week, whatever you know, but moment to moment, things change. Something may be said this instant which will be all over the world in one minute later. So all of those things have really complicated things. It's also complicated in terms of dealing with the message. We used to think in terms of news cycles. Well, what's a news cycle now? A news cycle is 24 hours a day. Well you can control certain things. You can say things at a time that will get in the *New York Times* and the *Wall Street Journal* the next morning and on the evening news. You can sort of control that, but in the meantime, everything else is happening during the day and so that involves a lot of strategy once the crisis has occurred with respect to how do you manage that? How you put your message out and what form do you put it out, who you use to put it out, what surrogates you employ because you need — we talk in terms of feeding the beast — the vast beast out there of the Internet and cable media which has to have things to consume. If you don't give the beast something of yours to replicate, they will use something from somebody else to replicate. So you have to feed the beast and be careful what you feed it. It's a very, very complicated thing because of things like that.

MR. AUSLANDER: I'm reminded by this discussion of a speech that Eliot Spitzer once gave to a bunch of investment bankers which he began by saying: It's nice to put faces to your e-mails.

AUDIENCE MEMBER: Before sending an e-mail, one of the major Washington law firm's computer systems has a message that pops up and says have you reviewed this email? Are you sure that the wording is what you want? Do you understand the consequence of what you're sending? But that's for every e-mail that goes out even internal e-mail. In essence what it does is not only remind you, but it slows down the speed with which you send things because you have to sort of now pause every time you do it.

MR. BESHAR: I'll give you a very quick reaction, Scott, that notwithstanding all the horrific prosecutions that have resulted from it and the good prophylactic steps that we think that we can take, it's in fact going to get significantly worse in the future for two reasons. You see it in IMing now that this is basically now permeating corporations and then you also see it in our kids, the extent to which my nine year old, 12 year old, and 14 year old are constantly sending messages all day long. It's just a nonstop process.

MR. FRIEDMAN: Question in the back.

AUDIENCE MEMBER: Sticking with technology in the middle of a crisis like this, your message board is populating constantly. Do you read it?

MR. BESHAR: Chat boards, on your chat boards, are you looking at them in a crisis and if so, what do you do about it? I do look at it. I sometimes think it's a hopeless waste of time when you open up some of the messages and it's just scatological bologna, but I've also found that you get insight. These corporations are so large, 60,000 people in 102 different countries around the world. It's so hard sitting in New York to feel like you have any sense of what's really going on within the company and sometimes you do get a little bit of insight through the chat room where they'll say that, in the Chicago office, there's some issue. You print it out. You take it over to somebody in operations and ask them is there any merit to this whatsoever.

MR. OLSON: I'll add this. We developed this in *Bush v. Gore* because messages were coming in from all over the world and they were coming in constantly and I've done this subsequently. We didn't have time to read all that stuff and a lot of it was really totally crazy and bad ideas, but I was afraid that some person out there from Sioux Falls was going to know a case that would help - I didn't read the damn e-mail that had that case in it. So I appointed a person and I called him the brilliant idea person who would read all these e-mails and act as a filter and if by any chance, something sounded like it made some sense, you know, bring it to me, but for god's sake, don't bother me the rest of the day. I do think that you know you may get some good ideas. You may get tips, information tips. You may get a whistle blower out there. You can't ignore that sort of thing, but on the other hand, if you're trying to run the show, you can't be spending your whole day doing it. It's addictive too you know, I mean, you start looking and you can't turn away from it.

MR. FRIEDMAN: Ted, isn't it a problem that you can be held accountable for things just because the adjudicator doesn't really appreciate the message flow coming across your desk?

MR. OLSON: I think that's definitely a problem. I mean, is the person going to be held accountable for things that came in through e-mail, this vast message system. We're going to see it in January when the Scooter Libby trial takes place. I mean here's Scooter Libby who is a friend of mine, so I'm admit this bias, Chief of Staff to the Vice President of the United States dealing with major big problems all day long and contacts and press relationships and so on and so forth and now he's been indicted for not remembering accurately conversations that it turns out that other members of the press don't remember accurately and other witnesses don't remember accurately and how does he explain to the jury, well you were dealing with this most important thing at 10:05 a.m., how come you can't remember that six months later? It's a very difficult problem for a trial lawyer to deal with.

MR. FISKE: I just think that there is a growing recognition out there that people are deluged with e-mails, not only e-mails that are sent directly to them, but which they're copied on and I think there is a growing sense out there that will hopefully increase over time that if someone gets 200 e-mails a day, they can't be expected to remember five years later one out of 200 that really was on an issue that they weren't responsible for.

MR. BESHAR: One of the grimmest aspects of my job over the last two years is that, early on, you're trying to make some personnel decisions on the basis of incredibly ephemeral information. They come to you with five or six e-mails they may not, Ted, even be to the person, but it's cc'ed to the person and you're trying to make some judgments on whether that person should remain at the company on the basis of a cc e-mail.

AUDIENCE MEMBER: Just a quick question with regards to the Marsh matter. What rationale, if any, did Spitzer give initially to declining to accept Releases. I think what you said earlier was that he didn't want to allow or he wanted it to be a credit rather than getting a Release. You know, how could he justify that position?

MR. BESHAR: The question is what support for the Attorney General's position could there possibly be? Is that a fair description of it? To simply say that it's an offset or a credit as opposed to a Release. I think the Attorney General had history on his side that certainly the big analyst settlements with the banks, the $1.4 billion that was paid. That was simply paid and the banks still faced all the civil litigation and other aspects of it and so really this concept of a Release was something quite novel and I think appropriate.

Were we surprised if anything about the aftermath of the settlements with the other insurance brokers and then over to AIG and the other carriers. My fundamental reaction was, trying to use the right word here, at least contentedness that the focus had been removed or at least lessened on Marsh because there was clearly a point in time there where we were just had a big bulls-eye on our chest. Everything was about Marsh & McLennan and that, at least, as the process begins to move on to others, there's a little bit more of a sense of parity that at least some other people in the industry have been, if not similarly affected, at least affected in some part. So when you're going out and trying to now market your services, you don't have this incredible handicap of having been branded as the sole participant in the process.

MR. AUSLANDER: I have one footnote on that having been involved in the civil litigation aftermath and am still involved in it. In a sense the plaintiffs' bar did us a favor. They chose to take it as an opportunity to attack the entire insurance industry in which we were certainly a central player, but not the only player,

and so we have a lot of comrades in arms in defense of the case. We are but one of dozens of defendants.

MR. FRIEDMAN: Peter, as general counsel in charge of a legal department, could you just describe your department? For example, how large is it?

MR. BESHAR: With great pleasure I will do that and something that I've neglected to say at this point and it's very important is to recognize the incredible efforts of the members of our legal department. A number of them are here, John Dutt, Kevin Crowley, Derek McKenzie, so many other people who have distinguished themselves. It's a funny process in some ways for a legal department at a big corporation that is in the middle of a hurricane that it is an opportunity for you to demonstrate the value that you bring to a corporation and be at the vanguard of the effort to reform the business practices and really lead the company through this remarkable process that it goes through. I am immensely proud of what this legal department has accomplished. The fellow who asked the aggressive question there, Scott Gilbert with the gray hair, he's the fellow that we hired as the Chief Compliance Officer and he's the person who basically implemented all of these remarkable business reforms. One of the great decisions that I made at Marsh & McLennan, apart from hiring Scott, was after Sunday night came and we in this flurry of negotiations had to agree to a menu of business reforms, and in all candor, we didn't understand the full implications of. On Monday morning, I called Scott into my office and said you've been at the company for now five days at that point, and I said Scott, I think I have a terrific project for you. You are going to run the process of implementing these business reforms across the world and you have to do it in the next 60 days. You don't know anybody at this company yet, but this is going to make you immensely popular. In the Legal Department, we have about 135 lawyers across the globe, because if you operate in 100 countries, you need people reasonably geographically dispersed, but they have done just an exceptional job.

MR. FRIEDMAN: Second question I'd like to ask each of our honorees is in the very little free time that you have, what do you like to do on your own time?

MR. BESHAR: I'll tell a quick anecdote and then I will stop. I love the game of ice hockey. I don't happen to be very good at it, but it gives me immense pleasure and so I read on the front page of the *New York Times* about two and a half years ago about this ice hockey tournament outside in Canada – four on four. So I signed up for it. It's a lottery to get into it. I put in September of 2004 to get into this and I get notified in December of 2004 that I hit the lottery. My little team from Larchmont, New York has been selected to go to New Brunswick, Canada to compete against 96 other teams. The date of the tournament is February 7th of 2005. So many people now understand the reason why the negotiations had to conclude on January 30th. So I slip up to Canada one week after the negotiations have concluded, play in this tournament; NBC News happens to follow my little team from Larchmont, New York. So they follow us around. We happen to do okay in the tournament because I have a habit of picking terrific people on my team. We come back and it's shown on NBC Evening News about a month later. I am quietly pretty pleased with myself for this, but I get a call from the Deputy Superintendent of Insurance in the State of New York and she says to me, Peter, the oddest thing happened to me. I was watching the tube last night and I saw somebody I swear that looked just like you playing in this ridiculous pond hockey tournament up in Canada. That was one of those moments where you just say "really." So that's what I did.

MR. FISKE: Jack, I don't think anybody can follow that.

MR. FRIEDMAN: Neither do I. I want to thank our guest of honor and our distinguished panelists and speakers for making their expertise and their time available. I'd like to thank the audience because in the end the Roundtable is about the audience, so thank you very much. ■

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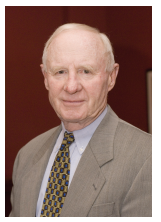

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JACK FRIEDMAN
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Jack Friedman, Chair of the Director's Roundtable, is an executive and attorney active in diverse business and financial matters. He has appeared on ABC, CBS, NBC, CNN and PBS, and has 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, UC (Berkeley), 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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