FINAL TRANSCRIPT

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**ACC - In-house Counsel as Targets: Fact or Fiction?

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CORPORATE PARTICIPANTS

Fred Krebs
ACC - President and COO

John Villa
Williams & Connolly - Partner

Rob Lavet
SLM Corporation - SVP and General Counsel

PRESENTATION

Fred Krebs - *ACC - President and COO*

Good afternoon, ladies and gentlemen, and welcome to the ACC webcast, In-house Counsel as Targets; Fact or Fiction. My name is Fred Krebs and I am the president of the Association of Corporate Counsel.

Joining today are John Villa, a partner with Williams & Connolly and one of the leading experts on attorney ethics, liability and professional responsibility issues. John is the author of Corporate Counsel Guidelines published jointly by ACC and West, as well as Ethics and Privilege, a regular column in the ACC docket. And perhaps most importantly for this conversation, John is a trial attorney who regularly tries cases and represents both law firms and inside counsel when they are targets.

Also with us today is Rob Lavet, senior vice president and general counsel for the SLM Corporation, commonly known as Sallie Mae. Rob also serves on the ACC Board of Directors and has experience as a trial attorney with the Department of Justice.

Before we get started, let me go over a few items. First, this program has been approved for one CLE credit in California, Florida and Texas. The CLE approval is pending in New York, Virginia and Washington State. To receive CLE credit for this presentation, please download the webcast CLE request application form. It is shown on and there is a link for it on the webcast page. Complete the application and include the two code numbers that will be provided during the presentation.

Again, please note I will provide you with two CLE code numbers during this program. You must include both of those numbers on your CLE form in order to get credit. The completed application should be faxed to ACC by Thursday, September 22, 1 p.m. Eastern Time. The fax number is on the form. If you have any CLE questions, you can email Jacqueline Windley at windley@acca.com or call 202-293-4103, extension 314. Again, if you have questions, call 202-293-4103, extension 314.

Now, I'd like to get started, Corporate Counsel as Targets: Fact or Fiction. We have all seen the press accounts that describe an increasing number of inside lawyers as targets of SEC and criminal enforcement actions. As Ben Johnson once said, nothing concentrates the mind like the prospect of hanging.

In today's session, John Villa will first report on the result of his study of the SEC actions and the criminal proceedings against the in-house counsel over the past several years. This study is unique and it is comprehensive. However, it is not about civil litigation nor does it cover insider trading. ACC members may access a copy of this analysis by clicking on the link at the bottom of the webcast page.

Following John's remarks we will have some reactions from Rob Lavet and myself and then we will pose some questions that we received prior to the program. Time permitting, we will also address questions sent us via email during the program. If our conversation triggers a question, please send it to the following email address, jvilla@wc.com.

Now, John, tell us about your review of the SEC actions and the criminal proceedings over the past six years.

John Villa - *Williams & Connolly - Partner*

Thank you, Fred.

I'd like to take 10 to 15 minutes and summarize this study that we have just completed regarding SEC enforcement actions and criminal prosecutions against inside corporate lawyers.

I undertook this study for the very reason that there is very little hard data on the frequency and nature of actions against inside lawyers and there have been no analyses of the steps that inside lawyers could take to protect themselves from these types of claims. And I hope the work that we did and is available to you on the website advances the ball, at least on the first point, and I think we'll talk a little bit about the second point here today.

First, let me describe briefly how we conducted this study. A fine researcher who works for me, Ann Foley (ph), conducted a review of the literature, other articles, news clippings, and finally actually went down to the Securities and Exchange Commission and sat there for days reviewing press releases and Commission files to find every SEC case against an inside lawyer. We also looked for all of the criminal cases against inside lawyers.

When we found a case we tried to find out everything in the public domain about it, including interviews with defense counsel, statements of the parties, court pleadings and press releases. Then we put this together in a chronological order in order to try to capture the frequency and, in some sense more importantly, the evolution of the SEC and criminal actions reaching back almost 10 years.

Now, I recognize that the information that we have is really quite incomplete because very few of the cases actually have contested evidentiary hearings. Most of them were resolved with (inaudible) statement of facts that may or may not reflect the real events. But I am pretty confident that it is the best evidence that's publicly available about the SEC and criminal cases against inside lawyers.

The paper itself, as I said, is on your website and it runs 73 pages. You may find all of it worth reading, but time and patience are limited for busy people. So I tried to distill the trends in the first seven to 10 pages of the study and I think that might be very well worth your time because it tries to pick out the various principles that at least I saw in the case law.

Let me begin now with an overview of the SEC proceedings against inside lawyers. I have excluded from this SEC proceedings insider trader cases because I thought that insider trading was a strain of misconduct that really had nothing to do inherently with the role of an inside general counsel. That is to say, everybody could be engaged in insider trading, whether or not you're an inside lawyer.

First, let's look at the pre-2002 cases. What we'll find, by the way, is that there's a fairly dramatic break in the enforcement approach prior to the end of 2002, so -- I'm sorry, 2001. So from the beginning of time to the end of 2001 is the first time period and from beginning of 2002 forward really is the outer time period.

In the period from 1998 to the end of 2001, basically four years, the SEC brought 12 actions against inside counsel. In about three-quarters of the cases the SEC pursued the chief legal officer or general counsel. In the few instances where it went lower in the organization, the SEC seemed to be pursuing the most senior lawyer who worked on the matter. In virtually every instance the SEC alleged that there was a fraud perpetrated by the executive management of the company and that the lawyer acted affirmatively in furtherance of the fraud by the preparation of false or misleading documents.

Although there are a few allegations of "should have known" sprinkled in some of the charging documents, the thrust of each case was that the inside lawyer actually knew of the fraud and acted to further it. The nature of the claims are, to a large extent, at least as (inaudible) by the SEC, not subtle questions of judgment. The underlying themes in most instances have been as described in the SEC in their documents are obviously fraudulent conduct.

Another striking aspect of the pre-2002 cases is that there's a virtual absence of reliance on outside lawyer's defenses by the inside counsel who were pursued. To try and explain that, it does not appear that the SEC went after inside lawyers who put up as a defense, in almost any instance, that they had relied on outside counsel. Again, the record that we can examine is often imperfect, but it appears that we don't have inside lawyers who relied upon outside lawyers and still got dinged.

And finally, the SEC's actions don't highlight financial motives of the lawyers involved. That is, the SEC does not obviously go after only those inside lawyers who profited significantly.

Now, let's go from 2002 until the present. By the way, I think there's a typo on page 22 of my report. It should say from the beginning of 2002. In the three and three-quarters years since the beginning of 2002, the SEC has brought 19 actions against inside lawyers. Once again, the vast majority of the cases are brought against the chief legal officer of the companies, while only a few lower level legal officers are targeted. Again, the conduct that is the core of the problem is that of the senior executive management and the inside lawyers are generally charged to have aided and abetted.

There is a pronounced shift in the nature of the conduct that is the basis for enforcement actions. While most of the pre-2002 cases involved what is described by the SEC as pretty clear-cut frauds, a number of the more recent cases involved judgments at the margin, for example, actions to meet earnings expectations by extending the month to include income from the first few days of the following month.

The post-2002 actions clearly focused more directly on very large restatements or corporate failures, as compared to the earlier ones. That's probably because there were more of them after 2002 than in the years before.

Another important explanation is that in large corporate failures or large restatements, there is usually much more SEC and Justice Department focus and during the course of that review, the SEC gets a much more complete picture of what the inside lawyers are doing. And I think this is an important lesson in itself. I have my doubts that the SEC initiates major investigations to examine the conduct of inside counsel, at least as a general rule. Much more often it seems a major restatement or failure generates a large SEC investigation and the inside lawyer's problems bubble up during the course of the investigation.

Once again, they have very few cases even involving large companies, in which the inside lawyer was pursued when the inside lawyer argued that he or she had relied upon an outside law firm or an outside counsel.

Finally, to some of us perhaps the most interesting aspect of the enforcement cases we saw was that some of them appear to have been brought essentially to send messages to inside lawyers. For example, there were a couple of cases in which the inside lawyer was at least taking the position that he had relied upon inside non-lawyer experts who proved to be wrong. This just didn't fly with the SEC. And there were several cases in which the SEC seemed to be going out of its way to bring actions against inside lawyers who failed to bring some troublesome matter before the Board of Directors, even if there was arguably no legal or ethical requirement to do so.

Now, as most of you know, under Model Rule 1.13, which governs the duties of corporate lawyers, the need to take an issue up the corporate ladder is, in very general terms, restricted, in most circumstances, where the lawyer knows that illegal conduct has occurred. The SEC was not happy about the ABA's refusal to rewrite that provision. And what we see here is that the SEC is bringing actions that you might argue apply a lower standard, i.e. that the lawyer is the gatekeeper and should make sure that every questionable call, even if it doesn't arise to knowing illegality, makes it up to the Board. The actions that the SEC are brining are mirroring in some ways the things that the SEC adopted in the Sarbanes-Oxley regulations about reporting up the ladder.

My final take on the SEC actions; relatively few compared to the thousands of inside lawyers, but the threshold is clearly dropping. Ironically, the day after we released the study, General Re announced that the SEC has issued a Wells Notice against the assistant general counsel, to some extent inconsistent with the notion that only chief legal officers are targets.

Let me turn quickly to criminal cases against inside lawyers. The news regarding criminal cases against inside lawyers is that there are relatively few, even after 2002 when the Justice Department convened the Corporate Crime Taskforce. No doubt that there's a significant difference between the frequency of indictments prior to the establishment of the Justice Department's Corporate Crime Taskforce, or Corporate Fraud Taskforce in 2002, and the indictments before. But I'll warn you that it is more difficult to find criminal cases against inside lawyers because they are blocked by the United States attorneys offices throughout the U.S. and they're not centralized, so we could have overlooked some.

Let's turn first to the pre-2002 criminal cases against inside lawyers. In order to find a large enough sample of criminal cases I went back to 1995 and looked at those from 1995 to the end of 2001. In that six-year period, there appear to be five indictments against inside counsel of corporations that relate essentially to their activities as inside lawyers. These five indictments involved allegations that the inside lawyer was a direct, active and knowing participant of a fraud that resulted in significant financial loss to investors. They involved claims of bogus transactions that did not take place, large profits that did not occur, and Ponzi schemes.

If the indictments were to be believed, the frauds were not very subtle. There appears to be little or no involvement of outside counsel in these. And most of the companies involved were relatively small. The sentences imposed were up to seven years of imprisonment.

Post-2001, so 2002 forward. In the past three years the pace of prosecutions has increased, but the absolute numbers remain surprisingly low. There are eight cases against inside lawyers that we have found and most of them have received significant press attention. Thus, the apparent number might have been magnified in your own mind and those of most readers, thinking that they're only seeing the tip of the iceberg but, in fact, that saw most of the iceberg.

A number of the prosecutions involved inside lawyers where there were huge losses. Examples of the companies involved post-2001 include Rite Aid, McKesson HBOC, Symbol Technologies and Computer Associates. Although some of the indictments resulted from sham transactions and offshore companies, what we might call more typical fraud, several of them involve complex accounting manipulations where the inside lawyer was alleged to be a direct, active and necessary component.

The lessons to be learned from the more recent cases? Activity (inaudible) the fraud, that is to say sham transactions and false documents, is now the basis of prosecution of inside lawyers. But look, if you can -- if anyone can tell you that they can distill any clear rules from the criminal cases, they're a lot better at it than I am. The truth is that the discretion to bring criminal cases rest largely on the many United States attorneys throughout the United States. What may be prosecuted in one district may not be the basis for charges in another.

Once again I remind you that the major failures, large restatements and other corporate catastrophes, generated a great deal of law enforcement attention and that in turn reveals information that (inaudible) inside lawyers. In other words, I doubt that prosecutors typically start out targeting the lawyers the same way they clearly start out targeting the CEO or even the CFO.

Now, I'm sure there's much more that can distill from the cases that we collected, but I hope this serves as a beginning for our discussions.

Let me turn this back to Fred Krebs now.

Fred Krebs - *ACC - President and COO*

Thank you, John. Let me remind folks who are listening in that if you have any questions, and we will try to get to them -- we have a series of questions that we received prior to this broadcast -- but if you want to send them in by email, again to jvilla@wc.com, and that's all one word, jvilla.

Rob, do you have any comments that you would like to make to John's opening presentation?

Rob Lavet - *SLM Corporation - SVP and General Counsel*

Yes. Thank you, Fred, and thanks, John.

My reaction as an in-house counsel is really that because of the passage of Sarbanes-Oxley and the new SEC rules involving the attorney conduct there's been much more press attention given to SEC and criminal actions against high profile companies and general counsels. And, in addition, there have been some actual trials, namely the cases against Tyco's former general counsel and Rite Aid's general counsel, that just received a tremendous amount of press attention.

But what really stands out to me is that many of the general counsels of companies that have been caught up in very high profile accounting fraud cases resulting in billions of dollars of lost market cap do not appear to be the subject of SEC or criminal investigations. And I have to add a disclaimer that obviously I don't know what is in the works, but I can certainly say that specifically I'm not aware of actual enforcement actions from the SEC or criminal cases brought against in-house lawyers at WorldCom, at Enron.

I guess there was one exception at Enron, which involved a lawyer who was a general counsel of one of the subs, but that was really more for actual participation in the (inaudible) partnership and receiving money. But if you look at it, the general counsels of WorldCom, Adelphia, HealthSouth or some of the other big companies caught up in large accounting restatements have not really been named in these cases.

And from a lessons learned standpoint, I would agree with -- which in John's piece that really, if you look at the common thread, and there are exceptions we're going to talk about, the common thread of the SEC enforcement actions really involved active participation by the general counsel and facilitating a corporate fraud. And I think some good examples there would be the cases against the general counsels of Computer Associates and Symbol Technologies.

For example, the case against the former GC of Computer Associates, which was a securities fraud case charging him with backdating sales documents and obstruction of justice by urging employees to lie to investigators, that's kind of a classic case of active participation in the fraud. But there are a few anomalies that are mentioned in John's piece that I think do cause concerns to general counsel.

And one specifically that I think is troublesome really is the case -- the Isselmann case, which is the case against the former general counsel of Electro Scientific Industries. And that general counsel settled to a cease and desist order. The allegation that the SEC made was simply that he failed to provide his company's Audit Committee and Board with legal advice from outside counsel. That took issue with a decision made by the CFO and the Controller of the company to eliminate certain vested retirement benefits, which were prohibited by law.

And in that case, there was no allegation that this general counsel was involved, present or consulted when the CFO and the Controller made the accounting decision. And the SEC described his conduct as "a failure to fulfill his gatekeeper role" and was a cause of the company's reporting materially false financial results for the first quarter in '02. And I think that word, the failure to fulfill a gatekeeper role, is one of the SEC's -- one of the enforcement division's themes.

And if you look back at some of the speeches that Steve Cutler, who is the former -- recently was the chief counsel -- I'm sorry, the chief of the enforcement division, you'll see lot of mention of the gatekeeper role. And I think what he said in the speeches really is consistent with the Sarbanes-Oxley focus on the importance of -- important role of lawyers as gatekeepers; "We have stepped up our scrutiny of the role of lawyers in the corporate frauds we investigate."

And what his prediction for the future, and I think some of it's come true, this was a year ago, was based on the current investigative docket, I think you can expect to see one or more -- and I'm quoting from his speech -- "I think you can expect to see one or more actions against lawyers that we believe assisted their clients in engaging in illegal lay trading or market planning arrangements that harm mutual fund investors. We are also considering actions against lawyers both in-house and outside counsel who assisted their companies in covering up evidence of fraud or who prepared or signed off on misleading disclosures."

And then he concludes by saying, "Another area of particular focus is the role of in-house lawyers in internal investigations and a concern that lawyers may have conducted investigations in such a manner as to help hide ongoing fraud or may have taken actions to obstruct such investigations."

And then finally, just getting back to John's point about the reliance on outside counsel, I think he's absolutely correct but there are a few anomalies there as well. And I think another troublesome recent enforcement action by the SEC was the action against the general counsel of Google. And in that case -- that case really involved the alleged failure to register the issuance of $80 million in option grants to employees preceding the IPO.

And in that case I do believe -- and, John, correct me if I'm wrong -- that the general counsel of Google actually had obtained the advice of outside counsel. And so he was the subject of an enforcement action basically for recommending a strategy that was later found to be in violation of the law.

So I think while I agree with John, there are some anomalies and those are a concern for general counsel.

Fred Krebs - *ACC - President and COO*

A couple of points worth noting, I believe, and that is again this gatekeeper concept. And what you'll see if you take a look at these cases, and that is what appears to be very much the importance of bringing anything that seems to be potentially controversial, bringing it up to the Board of Directors so they may take action on it.

A couple of other general comments and then I'll go to some of the questions that we received prior to this program. The numbers, notwithstanding all the publicity and all that has gone on, the numbers of actual cases that have been brought, if you consider the number of business transactions that take place, are relatively small. I mean I think the one was 12 and the other was 19 in the past several years. And so I think that's worth noting.

I would also point out that the numbers are also very small, clearly if the inside lawyer did take the advice of outside counsel, that appears to be, while not perfect, it appears to be a pretty good prophylactic measure to protect yourself. And I think both of those are definitely worth noting.

Now, John?

John Villa - *Williams & Connolly - Partner*

Let me emphasize I think one point that Rob brought out that I really probably should have made more profoundly and that is I think there's a sense among many inside counsel that I talk to, for some that at least are willing to talk about it, that they're always looking over their shoulder and wondering whether everything they do is likely to be the subject of some sort of SEC enforcement action or criminal case. And I think what Rob has correctly identified is that it takes a fairly high level of active involvement in the wrongdoing aspect of it, in general, to get criminal and in most cases to get SEC.

The exception and the reconciliation I think that we can draw from this, sort of why the Isselmann case or some of the other cases came out, is they -- I'm not sure that they were so critical of the conduct of the general counsel and their dealing with the legal issues, but more in terms of corporate governance almost, that we want to send a message to general counsel that even

if you've got an opinion and it's a close case and there's a lot riding on it, maybe you shouldn't -- maybe you should make sure that it's fully ventilated with the Board and that there are opposing views out there and that the Board understands it.

Again, here we see the SEC utilizing enforcement cases, basically not quite in a rulemaking mode, but in a way of trying to direct the conduct of inside lawyers.

So I think in some ways that's why both Rob and I found this to be a very interesting case because it is somewhat of an anomaly when you compare it to the cases that preceded it and historically the way they'd approached it. And you have to say why was it brought? Perhaps it was brought just so that 2 or 300 lawyers would have a webcast and talk about the issue and they succeeded in doing that.

Fred Krebs - *ACC - President and COO*

So what you're saying, then, is really they've tried to, as you said, almost in a regulatory manner, codify the corporate up-the-ladder reporting rules and really take away the discretion and almost make it mandatory that on any issue of controversy or close call you take it to the Board.

Is that what you'd say?

John Villa - *Williams & Connolly - Partner*

Well, I think if you don't do so and you turn out to be flat wrong, you do so at your peril in this environment. They are certainly suggesting that whether or not you believe you are governed by the Sarbanes-Oxley rules that would require you take it up the corporate ladder, your responsibilities as a public company are to make sure some of these important issues that have significant ramifications, on which there are substantial grounds for disagreement, should be -- you should consider seriously how far up you should go before you decide the issue.

Fred Krebs - *ACC - President and COO*

Can you say again -- I see one email question and it was a simple one -- the number of indictments post-2002? Do you have -- if you can take a look at that?

And while John's looking that up I'll ask Rob. Rob, there's been no mention of the civil liability of inside lawyers, nor have we had any conversation about insurance coverage in that regard. Do you have any thoughts -- do you have any thoughts on either of those?

Rob Lavet - *SLM Corporation - SVP and General Counsel*

Yes. It's a very good question. I would just note that recently I read about a shareholder case against the -- I guess the former general counsel of Morgan Stanley, which is really quite striking, and that's a case many of you have probably have heard about the decision and the jury verdict in Florida, which was in excess of $1 billion. Well, the shareholders brought a derivative suit naming, there are bunch of defendants, but the former general counsel was named and basically the claim is almost a malpractice claim that you messed up the case and it cost the shareholders a lot money.

And what's interesting really is from the press reports, the general counsel had been recommending to try to settle the case for, I think $20 million before it went to trial. So really unfair and it shows the potential civil liability that you have as a general counsel now getting into areas of your litigation strategy and management.

But on the insurance end, I do think that most in-house departments are not -- probably do not have specialized insurance for attorneys, that they rely on the bylaws. And certainly for attorneys who also have officer titles, their DNO insurance, which -- and the corporate bylaws and indemnity, which, for the most part, would be the Delaware and not opposed to the best interests of the company.

Fred Krebs - *ACC - President and COO*

I would note that we did -- that the discussion's on civil liability and the issue of insurance is a bit of a digression from the general topic that we're trying to cover.

I'll alert you now that I'm going to give you the first webcast code number. So I would encourage you to grab your pencil and write this down because again, as I said, you need to include this on the email -- excuse me, on the webcast CLE form that you fax back to us. And that code number is ACC1025. I'll repeat it again, ACC1025.

And, John, that question about the number of indictments that you -- ?

John Villa - *Williams & Connolly - Partner*

Yes, there were -- I may have gone over that too quickly. There were eight indictments for the time period beginning in 2002 to the present in which it appeared that an inside lawyer was indicted for conduct that is unique to an inside lawyer.

And let me pick up on one statement that -- one question that was posed to Rob as well. In the course of preparing the Corporate Counsel Guidelines book for ACC and West several years ago, I did do a, probably not an exhaustive study, but a pretty complete study of potential civil liability of inside lawyers and found remarkably few cases. I mean really you could count them on the fingers of one hand, significant cases again inside lawyers for civil liability.

And the reasons for that really were a couple of financial and related reasons. Let me lay them out to you. Number one, there isn't much insurance for inside lawyers, so most people don't think it's worthwhile going after them. That becomes kind of a circular analysis in some ways. Number two, corporations typically don't sue their own inside lawyers for misconduct because to do so opens up all kinds of can of worms on privilege. I think they more typically simply discharge the inside lawyer and the lawyer has to then find another job.

And number three, outside parties don't find it useful to sue inside lawyers in most circumstances because they didn't -- in principle, rules governing lawyers, they don't have (inaudible) with them in that unless the inside lawyer committed fraud. It's pretty hard to find a basis to sue an inside lawyer. Now, it's becoming less true with inside lawyers issuing more and more counsel opinions on various issues, but I would say that the number of cases against inside lawyers were, to me, shockingly low. It's even below the number, maybe 15 or 20% of the cases we would see against the SEC.

Now, they do occur in certain unique situations where an inside lawyer also represents a director or officer in litigation and is their counsel or an inside lawyer represents a trader or a broker in a MASD proceeding, sometimes you see it there. But that's a pretty unique situation. So I think that the number of cases are probably lower than any of you realistically expect.

Fred Krebs - *ACC - President and COO*

And it would also be true, wouldn't it, that if you saw some sort of action like that, to the extent that being brought by the company, it's a successor in interest that is likely, a trustee, or that in some way there's -- and somehow there's a successor in interest with the company and they're looking to go after somebody. So to the extent you're going to see it, that may be one of the more likely modes.

John Villa - *Williams & Connolly - Partner*

Correct. There's very little incentive for current management to sue an inside lawyer because, as I said, really opens up a can of worms. When you have a company that's gone through a bankruptcy or has had -- has been effectively taken over and all management replaced, they perhaps don't care as much about it. Even then, oftentimes they try to preserve some aspects of the attorney/client privilege. But the suit against your own inside lawyer is still a very rare, I think very rare event.

Fred Krebs - *ACC - President and COO*

I have two questions here that are related that have come in and that is what are the types of SEC proceedings that could be brought against the corporate counsel? And related to that, if -- should an in-house attorney obtain separate counsel and if so, at what point in time? I'll ask John and then, Rob, if you have any comments on that, please chime in. John?

John Villa - *Williams & Connolly - Partner*

Well, of course this is an SEC webcast, but let me try to outline very quickly that there are a number of different remedies that the SEC has against lawyers in these circumstances. It can bring a civil injunctive action in federal district court, it can bring administrative proceedings under Section 15 of the Exchange Act, it can bring administrative proceedings under SEC Rule of Practice 102e, and it can bring a cease and desist orders prohibiting people -- individuals from violating any securities laws.

So there are a number of different ways that they can do it and this is in the non-criminal context altogether. And, as we've seen in the course of looking at it, a number of these have been used by the SEC over the years.

The second question was what again, Fred?

Fred Krebs - *ACC - President and COO*

At what time should -- should an in-house counsel obtain his or her representation and if so, when?

John Villa - *Williams & Connolly - Partner*

Let me answer that in kind of a purely ethical -- from an ethical standpoint and then throw it over to Rob to answer it perhaps from the standpoint of practicalities.

Under the ethics rules, I think Model Rule 1.7 says that when a lawyer's own interests would conflict with those of his or her client, then the lawyer has a conflict of interest that, at a minimum, has to be waived by the client with consultation or may require the lawyer to withdraw from the particular matter, that is to say to withdraw from the representation, that aspect of the representation.

So it would seem that in most circumstances, if the lawyer found out that he or she was receiving essentially a Wells Notice, it would be difficult to see how 1.7 wasn't implicated and the lawyer would have to think very seriously about whether they could ethically continue representing and making decisions for the client in the SEC investigation.

Now I'll let Rob address the question of how the proceeding itself would be affected if the Commission or any enforcement agency thought that the general counsel was itself -- himself or herself a target and still directing it.

Rob Lavet - *SLM Corporation - SVP and General Counsel*

Yes, I think that's what -- I was going to try to drill down from the hypothetical question. It seemed to me that the lawyer at this point would have to have been identified as a target or possibly a witness if the SEC wanted to come in and interview or depose the person. And I would have a hard time seeing really how that lawyer, once the lawyer got notice that he or she was going to be interviewed by the SEC, could actively conduct the investigation.

And I guess -- John, I guess it really raises a question, probably in that circumstances the lawyer would probably not have a long future at the company. and I think then it would become a question, too, in terms of getting their own counsel. You'd have to then look at your bylaws on indemnity and make decisions.

But I think it's a pretty -- as we said in the opening part of this presentation, it's a fairly rare occurrence when the -- it certainly has happened more lately, but it's still a fairly rare occurrence when the in-house lawyer is a target of the SEC investigation. So I think this would still be -- this area and the answer to that question probably is still developing.

Fred Krebs - *ACC - President and COO*

We also were -- continuing on the use of outside counsel or getting your own counsel, one of the questions that we also have is does it matter what the form is of the advice that you receive from the outside counsel? Does it need to be an opinion? Just how formal does it have to be in order for it to provide you with any protection?

John Villa - *Williams & Connolly - Partner*

That's a hard question to answer because what I've done basically is to take a look at a large number of cases and see whether there's any defenses being -- sort of any type of reliance upon counsel in those cases and in a high percentage of them there's no type of reliance on counsel. So I think that it's really more evidentiary issue than it is a question of law. If you could show that your outside counsel knew everything that you knew and that they focused on the issue and gave you the views (ph), then I think it would go a long way to showing that the lawyer's actions -- the inside lawyer's actions were reasonable.

But there is a case, I think it's the Rite Aid case, where the allegation is that the inside lawyer pressured outside counsel to give an opinion. And it's very interesting. Here's a case where there is actually an outside counsel opinion and they went ahead and indicted the inside lawyer. And this does raise an issue that you all ought to think about.

And that is that if you ever want to rely upon the opinion of an outside lawyer, or any lawyer if your inside executives want to rely upon your opinion or if you want to rely upon the opinion of an outside lawyer, you have -- you will effectively -- you may very well effectively be deemed to have waived the attorney/client privilege to the extent of that opinion, which means that the SEC or the Department can (inaudible) argue they could get into the outside law firm's files to see what they were actually told at the time they issued their opinion, whether it's oral or in writing, and whether pressure was placed upon them. I mean if you get a bunch of emails in there that showed that the inside lawyer really turned up the heat on them to get an opinion, it may not be worth the paper it's written on.

And that's, in fact, exactly what happened in the Rite Aid case, from appearances, because the allegation was that the outside law firm was pressured to give an opinion by the inside lawyer. And so they completely dismissed the opinion and, in fact, that was one of the acts in furtherance of the misconduct.

Let me make one point. I don't want to prejudge the truth of these allegations; these are just allegations. But sometimes allegations are very important to understand the mindset of the regulator, whether or not they prove to be true. I represented too many people over the years where the allegations haven't been proven. But certainly the nature of the allegation does tell you what their thinking is.

Fred Krebs - *ACC - President and COO*

Rob, do you have anything you'd like to add to that?

Rob Lavet - *SLM Corporation - SVP and General Counsel*

Just one kind of practical point as a general counsel. I mean if I were getting into an area that's somewhat of a gray area and I went to outside counsel, I would want something in writing, I would want something more than just a phone conversation. And, as a practical matter too, so much today is done with email that you don't necessarily retain emails for a long time. Many companies have auto-deletes, so you don't want to be in a position down the road where you say you relied on counsel and you have no evidence to back that up.

So I would think, especially if you're seeking guidance on an issue that's not black and white, you do want to get some kind of written communication from your outside counsel.

Fred Krebs - *ACC - President and COO*

And, John, a question here. Again, this relates and that is if you have the in-house attorney and she is threatened with individual fraud charges and she happens to be the chief legal officer, would her or should her role in supervising the company's defense be restricted? She has her own defense to worry about and you want to make certain that all decisions are made with the company's best interests in mind, so what are the implications of that?

John Villa - *Williams & Connolly - Partner*

I think that I would subscribe to the view that Rob talked about in connection with a similar issue that I do think it would be difficult in those circumstances for the lawyer to continue directing the corporate defense. I think it also -- I mean I'm not saying that it's impossible. A corporation is deemed to be a highly sophisticated entity and it could, by using other lawyers, waive any potential conflict and allow the general counsel, even though the general counsel is herself or himself the focus of an investigation, to continue directing it. I think they probably have a knowing and intelligent waiver or consent after consultation, as it's deemed in the Model Rules.

However, so much of what you do with the SEC and the Justice Department is appearances as well as realities and if the person who is directing your defense and your negotiations is somebody that the government is already pointing a finger at as themselves corrupt or fraud (inaudible), I think it does impair tremendously your ability to reach a favorable resolution. So I would have to say that I don't think I would ever reach the ethical or legal issue or corporate governance issues, if you will, because I think I had decided on prudential issues that it's just unwise in those circumstances.

Rob Lavet - *SLM Corporation - SVP and General Counsel*

And, John, just to follow up on that and I know this is in a slightly different context, but it just occurred to me this is a fairly good analogy from that practical standpoint is if you recall the Spitzer case against Marsh, I mean Spitzer basically forced the company to get rid of their management, including the general counsel and the general counsel was fairly adversarial with Spitzer at the start of the investigation. So that was the -- a case where the -- and I'm not saying that the lawyer was accused of anything wrong there, but the lawyer was -- the general counsel was replaced in fairly short order in that matter.

Fred Krebs - *ACC - President and COO*

That's extremely interesting because there is, I think, a very fine line here between regulators who say I won't deal with you because I don't like the fact that you've got a tough person as general counsel and you've got to get rid of them, otherwise I'm going to hurt the corporation. In which case somebody has to go overboard. And the other side of the line is the general counsel is part of the problem. And I don't know enough about the facts, but it sounded it was more like the former than the latter in that case.

And that to me is something that people really haven't thought about much. If you're the general counsel of a company and you've got the company's history and stature at heart and you say I won't -- we're not giving up because we didn't do anything wrong and all of a sudden you hear somebody say well, we're just not talking to you until you get rid of that tough guy, Krebs, that are sitting there, it's troubling.

I think in the Marsh case, Marsh McClellan, I don't know which one it was, I don't think there's really any implications the general counsel did anything wrong. And that to me was a very -- it was an issue that really did not get a lot of play in the, that I'm aware of, in the corporate counsel press, but was one that I found deeply troubling, you know, throw this guy overboard because he's being too tough with us.

But certainly it's an easier question if they've actually said that they're going to go after somebody and suggest that the person's engaged in wrongdoing.

Fred Krebs - *ACC - President and COO*

In this same vein, because you are driving at again the relationship with the CLO and company or the CEO, and that is it seems one of the reasons that a COO might be a target would be to drive a wedge between him or her and the CEO of the company. And this certainly would or could eliminate the CEO's defense in this situation that he or she relied on advice of counsel. John and then Rob, could you comment on that, on the potential impact of the relationship and the practical aspects of that?

John Villa - *Williams & Connolly - Partner*

Well, I've speculated, both I think in the corporate Counsel Guidelines book and in the comments that are at the beginning of this article, that in some circumstances the planned strategy of the prosecutor is when he gets -- he or she is focusing on the CEO and sees that the CEO has an advice of counsel defense on everything to try to put pressure on the CLO or the general counsel to undermine that defense. And that can be done in a number of ways, including, for example, if you pressure the general counsel on the issue, the general counsel's either got to say I knew everything and I blessed it or I didn't know everything; I knew most things but there were some critical issues that I didn't know. And that comes up from time to time in these cases.

I may be reading too much into it, but I think that's been the grand strategy I've seen in some cases. Now, this is probably more true years ago than it is now. And it does undermine, I think, the relationship between a general counsel and the chief executive officer if the CEO realizes that there's a real question as to how long they can rely upon the CLO. But I'll turn that over to Rob because that's more of a practical question.

Rob Lavet - *SLM Corporation - SVP and General Counsel*

Well, the interesting thing, though, is you really didn't see evidence of this in the recent trials. When you go back to the Tyco cases and the WorldCom cases, I don't remember the general counsel, who's the general counsel at the time even being a witness in the case. Now you query whether when the government initially went after Tyco's former general counsel, was that part of a strategy to get him to turn on Koslovsky. Well, as we all know, he went to trial and won so it didn't work if that was the strategy.

So I don't know. I just haven't seen a lot of evidence of that in the recent corporate scandal cases. But I think John's correct, theoretically. And just the whole way I think that with Sarbanes-Oxley there is the potential and I think CLOs -- I'm sorry, CEOs are a little bit more cautious in their dealings with CLOs because they may, in the back of their mind, think at some point their interests will diverge or could diverge.

Fred Krebs - *ACC - President and COO*

We have a question that has come in about malpractice insurance or other type of insurance coverage for in-house counsel and is it very expensive. A shameless plug for ACC, we do offer through an alliance program with Chubb coverage. I don't believe it is that expensive but you'd have to get the details on that. But my understanding is to the extent that that type of coverage is offered, it provides defense costs. It does not provide coverage for liability and so that's the way it is normally handled.

We have said and it's been noted several times that the numbers, the actual number of cases that have been brought are relatively small number of cases against in-house attorneys. This is a question for John and that is what about the outside lawyers? Can we say misery loves company here in some instances? The numbers against in-house seemed to have jumped a little bit, but they're relatively small. What's been the experience with respect to proceedings against outside lawyers?

John Villa - *Williams & Connolly - Partner*

Well, I have collected some figures on that. I haven't done as thorough analysis of the facts. But the SEC has historically taken a slightly different position, I think, with respect to inside and outside lawyers on their 102e, which is the most -- the one that has been used most often. So I would say that with respect to outside lawyers, the SEC usually goes after them when the -- when a third party has demonstrated that their conduct was fraudulent or when they were acting other than in the course of their work as lawyers.

Now, I say I think that the changes in the SEC rules with the Section 207 and the new up the ladder rules portend a fairly significant shift in the way that the SEC is going to apply its standards to outside counsel from mid-2003 forward, but given the lag in the enforcement process, at least from the SEC, between the events and the corporate problems and the investigations and the bringing of charges, I don't think we've yet seen that come true. So we're looking mostly at the pre-2003 rules and they haven't been as active against outside lawyers in exactly the same circumstances as they have against inside lawyers.

The question was what does it portend for the future? Is that what you said?

Fred Krebs - *ACC - President and COO*

Yes.

John Villa - *Williams & Connolly - Partner*

I do think that the Commission is putting a lot more emphasis on the responsibility of both inside and outside lawyers. And I would be personally surprised if the frequency of SEC cases against lawyers did not increase significantly over the next three and half years as compared even to the last three and a half. I would be surprised if it didn't.

Fred Krebs - *ACC - President and COO*

Rob, any thoughts on that topic?

Rob Lavet - *SLM Corporation - SVP and General Counsel*

Well, I agree with John. I guess the question really is whether the change in management at the SEC is going to lead to a change in the way they look at enforcement actions against professionals, not just lawyers. And I think the jury's still out. Although the -- Cutler's left, his deputy is now -- his chief deputy is now, I believe, still the head of enforcement. So I think time will tell. But I would not -- I would agree with John; I don't see the SEC reversing course from their gatekeeper view and that will likely continue.

Fred Krebs - *ACC - President and COO*

Okay. Just a reminder to everyone that we will -- this broadcast has been taped and it will be available. We've got one or two more questions to go, but to let you know it has been taped and will be available next week if you want to sit through it again or refer it to somebody. Additionally, there will be a transcript available and you'll be able to access that through the ACC website.

Also, your bar identification number that you'll need in order to get your CLE credit, the second number that you need is ACC20036. Again, that is ACC 20036. And both of the numbers that I've given you have to be on the CLE request form that is returned to us. You can get that request form, there is a link to it from the webcast page and any questions should be directed to 202-293-4103, extension 314.

John, there's one other question that sort of wondering about here. There's been quite a bit of attention paid to the obligations of companies to collect and produce discovery information and there have been some high profile cases recently against Wall Street firms for discovery problems. Have you seen any cases where inside counsel have been personally charged or sanctioned for one of those, I guess you could call it a disaster or certainly one of those egregious situations?

John Villa - *Williams & Connolly - Partner*

Well, that's another interesting question. A friend of mine who was a general counsel, when he heard I was doing this, asked me to look into that and I did. And we tracked down some of the major discovery cases to see whether sanctions had been imposed personally on the inside lawyers. And it's just -- I can't say there's no case in America when it's happened, but it's just not the norm. When there's been a problem like this, sanctions have typically been imposed upon the parties, not on lawyers. And so even the ones that you look at in the newspaper and your blood runs cold, it's not -- I'm not saying that lawyers who conducted it won't get a black eye and cause them some severe problems in their own personal promotion within the company, but in terms of what's happened, the lawyers have not typically been the focus of it.

Now, I've put off to one side an issue in which the allegation is essentially obstruction, which is, for example, what happened in the Arthur Anderson case in which Anderson was alleged to have destroyed documents and ultimately not exonerated, at least their conviction was reversed by the Supreme Court. But in the typical case where it's just a screw up in terms of document collection and preservation, I have not seen inside lawyers being personally fined or sanctioned. I'm not saying it never happens, but it's very, very rare.

Fred Krebs - *ACC - President and COO*

There have been some high profile SEC enforcement actions against companies for failing to preserve documents and I'm wondering whether that really drilled down to the level of the in-house counsel at those companies.

John Villa - *Williams & Connolly - Partner*

I'm now aware of any individuals being (inaudible). I might be wrong, but I'm not aware of that.

Fred Krebs - *ACC - President and COO*

We're nearing the end of our call. What I think I'd like to do is ask each of our participants here to just take a minute or so and just sum up what their thoughts on this, if they have any concluding remarks or comments that they would like to make for the audience. And I think again I'll start with you, John, and if there are any final words that you would like to leave with our audience.

John Villa - *Williams & Connolly - Partner*

I guess the observation I had from 30,000 feet is that other than the general counsel or CLO, inside lawyers have very little to worry about. And even when you're dealing with the general counsel or CLO, it doesn't look like people are gunning for you. It looks like when there is a major problem you end up -- what ends up happening is that there's a big investigation and conduct of the CLO or general counsel kind of bubbles up into the gun sites of the regulators and then they go after them. So I don't think that you run around with a target painted on your back.

I also think that the tendency in the modern era of corporations to waive their attorney/client privilege in order to get favorable prosecution treatment or SEC treatment does suggest to me that people who are inside counsel and put in a hot spot should not make any assumption that anything that they touch or do will remain privileged. Even if you were punctilious in your application of the privilege rule, the chances are pretty good that your corporation, if it needs to, will waive the privilege in order to get favorable treatment and then everything you ever touch or say or do will be opened up.

And it's in this circumstance that I think lawyers, inside lawyers have to ask themselves where they need to get help and who they need to consult because that's the danger zone. It's the big transactions that are going to have a big impact and the scary decisions that are the ones that are ultimately going to come back and hurt people, not the stuff that you do every day. So you should be able to go to sleep with that put away.

Fred Krebs - *ACC - President and COO*

Rob, any final words?

Rob Lavet - *SLM Corporation - SVP and General Counsel*

Well, I would just say that clearly if you're going to commit fraud, we can't help you. And if a general counsel commits fraud, he or she is going to be treated like any other corporate officer.

But I do think it's important to kind of take heed of and be aware of some of the statements made by the SEC and to govern yourself accordingly. And I think the statement I had made reading from Cutler's speech that consistent with Sarbanes-Oxley's focus on the important role of lawyers as gatekeepers, the SEC has stepped up its scrutiny of the role of the lawyers in the corporate frauds it investigates.

And a further statement that from the SEC's views they've really seen too many examples of lawyers who "twisted themselves into pretzels to accommodate the wishes of company management and failed in their responsibility to insist that the company comply with the law", and I think that militates in favor of, as we spoke earlier, going to your Board, disclosing more to your Board, and making some difficult decisions. So I think those would be my parting words.

Fred Krebs - *ACC - President and COO*

All right. And I'm going to give a final, final word here to Mr. Villa.

John Villa - *Williams & Connolly - Partner*

Mr. Krebs demonstrated his erudition by quoting Ben Johnson I think and I'll demonstrate my views by quoting the sergeant from Hill Street Blues when he says to his police that fill out their job, "It's dangerous out there."

Fred Krebs - *ACC - President and COO*

Thank you, John. Thank you, Rob. Thanks to all of you for listening. Again, as we said, this will be available next week in both audio and transcript form.

Thank you all for participating in the ACC webcast and for your support of the Association of Corporate Counsel.

Thank you.