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Public Relations

Howard J. Rubenstein

Jill Fisch

John Elsen

Stanley S. Arkin

Randall Smith

See next page for additional authors

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Public Relations

Authors

Howard J. Rubenstein, Jill Fisch, John Elsen, Stanley S. Arkin, Randall Smith, and Carl Felsenfeld

PANEL 3: PUBLIC RELATIONS

Panel Chair

Howard J. Rubenstein^{*}

President, Rubenstein Associates, Inc.

Panelists

Professor Jill Fisch^{**}

Fordham University School of Law

John Elsen^{***}

Business Page Editor

New York Post

Stanley S. Arkin^{****}

Senior Partner, Arkin Kaplan LLP

Chairman, The Arkin Group LLC

Randall Smith^{*****}

Investigative Reporter

Wall Street Journal

PROFESSOR FELSENFELD: Our next, and final, panel of the day will be a discussion of managing reputational risk—how the word gets out, what corporations say about themselves and how they present themselves to the world.

Heading this panel is Howard Rubenstein. Mr. Rubenstein is

^{*} Howard J. Rubenstein has presided over the public relations agency that bears his name since he founded it in 1954. Today the firm is one of the nation's largest independent public relations agencies with a staff of more than 160.

^{**} Jill Fisch is a Professor at Fordham University School of Law and the Director of the Fordham Center for Corporate, Securities and Financial Law.

^{***} John Elsen is the Business Page Editor for the New York Post.

^{****} Stanley S. Arkin is a Senior Partner at Arkin Kaplan LLP and the Chairman for The Arkin Group LLC, a private intelligence agency. He graduated Harvard Law School in 1962 and has been a trial lawyer, an author and a columnist.

^{*****} Randall Smith is an investigative reporter for the Wall Street Journal.

the President and CEO of one of the largest independent public relations firms in the country and a very influential voice in the presentation of corporate reputation. Happily, although Mr. Rubenstein is in public relations, he is here at a law school and I learned that he is a lawyer. So you are legitimate. He finished first in his class in the night school division at the St. John's University Law School. A professor takes that very seriously. He is a Trustee of the Police Athletic League. He is a Trustee of the Central Park Conservancy. He served on the Mayor's Committee on Business and Economic Development for Mayors Beame, Dinkins, and Giuliani, so this wonderful city, this greatly improving city we see all the time, is in large measure due to Mr. Rubenstein's activities.

So let me turn it over to you. The floor is yours.

MR. RUBENSTEIN: Thank you very much.

The issues we will be looking at today have taken on a great urgency in recent months. Until the Enron scandal, very few people had any opinions at all about corporate accounting methods. Why should they? The economy was booming and most investors felt they were becoming richer, partly as a result of corporate behavior. Today, months after Enron broke, the market remains extremely volatile. You all know that. Some analysts tie this continued roller coaster to a fall in corporate reputation. Suddenly, public perception of how you do business may be just as important as the numbers in your earnings report.

We are going to explore this issue today from a number of different perspectives. I am fortunate to be joined by four very distinguished panelists, and I would like to introduce these people to you now.

Stanley Arkin is a founding member and the Senior Partner of the law firm Arkin, Kaplan & Cohen. Stanley has been lead counsel in some of the most significant business crime and insider trading cases of the last twenty years. He defended Vincent Chiarella in the first insider trading prosecution, a landmark case that Mr. Arkin took successfully all the way to the Supreme Court. He writes a regular column for *The New York Law Journal* on business crime and is the lead author of *Business Crime*, a six-volume definitive text.

Jill Fisch, who many of you know, is a Professor of Law and

Director of the Center for Corporate, Securities, and Financial Law at Fordham University. In addition to teaching at Fordham, she is a member of the American Law Institute and serves on the faculty of the New York City Law Department's Civil Trial Advocacy Workshop. She is a past Chair of the Committee on Corporation Law of the Association of the City of New York. Professor Fisch's scholarship includes work on corporate law, securities regulation, and federal courts.

John Elsen has been Business Editor of the *New York Post* for the past three years. Before that, he was Business Editor and telecommunications reporter for that newspaper. Previously, he covered mergers and acquisitions at *Investment Dealers Digest*, and he has also covered general news for a range of papers, including the *Hartford Courant* and the *Bergen Record*.

Randy Smith is a reporter for *The Wall Street Journal* who covers the securities business. This past year, he and his colleague, Susan Pulliam, won the George Polk Award for Financial Journalism for their articles about investigations by the National Association of Securities Dealers ("NASD") and the SEC into improprieties related to the allocation of hot IPOs during the Internet stock boom.

Here is how we will proceed. I will ask a series of questions based on some feedback I have had from the panelists. Some of the questions will be directed at them individually and others will be addressed to the group at large. I encourage the panelists to jump in after any panelist gives an answer. And mix it up. We will have a free run. Keep your answers short so that we can get a lot of questions on the table. And let's try to have some controversy and a good, solid debate.

I will start with John Elsen. The 1980s and 1990s have seen the rise of the so-called "celebrity CEO." We have all seen that. And, as you know, the bigger they are, the harder they fall. Should the media take any responsibility for having created these larger-than-life CEOs? Doesn't the media expect too much in terms of performance from these CEOs? Very often, in cases with which I am involved they blame the media; they do not even blame themselves. Are you to blame?

MR. ELSÉN: Of course. Yes, it is true that the press does

take a great interest in people, partly because our readers take a great interest in people, and executives have really become celebrities in their own right, as you mentioned. That is partly because we cover what they do, but largely because of their incredible impact on this country. It affects everybody's lives. So we write about that.

And yes, when they run into trouble, we cover that as well. I think everyone expects that, because they care about the companies, they know people there, or because they are investors. So I think they expect that.

MR. RUBENSTEIN: Well, some of these CEOs wanted those covers on *Fortune* and *Business Week* and *Time*. The next thing they know, they are under the gun and on the way out, or the focus became their marital life. Is that right?

MR. ARKIN: Absolutely. We need morality tales. We need standards by which people can, hopefully, live up to probity, and the kind of things that make the financial markets secure and reliable. And while I do not much like the tabloid aspect which seems to accompany some of these reports, some of them I think are informative.

I do not like the notion that we follow somebody around, like baying dogs, and certain chairmen have been afflicted that way. And I certainly do not want to prejudge somebody's guilt. But celebrities, Howard, as you well know, are in our society, particularly in America. I mean, the fact that Martha Stewart or Britney Spears may take a fall I think gets to more people as to why they took the fall than simply if it is somebody as modest and reclusive as you or me, for example.

MR. RUBENSTEIN: Well, I do not know about that, Stanley.

MR. ELSEN: I would add, Howard, that corporate executives are public figures, very much like any public official—or, at the very least, like a celebrity—except that they have so much more impact than Britney Spears or any of these people who also people are interested in reading about, and have every right to read about, because these people have put themselves out there. Corporate executives obviously affect the lives of Americans as much or more than any politician.

MR. RUBENSTEIN: But isn't that relatively new? I know

when I first started, they were not the super-stars in *People* magazine and in the tabloids.

MR. SMITH: Howard, if I could jump in, I think that a lot of that was a function of the bull market. As the stocks were going up, the CEOs invited the attention because they thought it would add a few points to their stock or their multiple. And I think there was a temptation to lionize them while their stocks were going up because they were making other people rich, and that is what the shareholders were paying them to do.

MR. RUBENSTEIN: And they started writing books and they started to go on the talk shows. They were on all the morning talk shows. An incredible time.

Have they created a recipe that has helped to undermine them?

MR. ARKIN: Things have changed somewhat, Howard, in the last century or so, but a lot of that is because communication has exploded so much.

MR. RUBENSTEIN: Right, you bet.

MR. ARKIN: You have all kinds of media outlets and you need to have stuff for the consumers. And, more than ever, you have people with the capacity to be informed about what goes on perforce—not just all the newspapers, but email, Internet and television.

And so I think that the personality cult of senior executives is something that just flowed naturally. And what happens is these people get involved in charities—which they should; they get involved in community affairs—which they should; they see themselves as leaders and visionaries. They see themselves, if you will, as somewhat more holy than the most profound of our philosophers. That is a thing that people take on when they become wealthy, they become powerful for the moment, and so I think it is a natural consequence.

And, by the way, if you get to that position, I think you have got not only a fundamental obligation to show probity and to use some common sense—but if you have any sense of survival, you should do the same.

MR. RUBENSTEIN: You bet. That is good advice.

MR. ELSEN: I do not know that they should necessarily just

try to keep a low profile for the sake of it. I mean, the business press has really mushroomed in this country. It is much different than it was, and it has sort of more of an adversarial bent than it used to. That is largely because, as Randy said, of the bull market. There is so much money in it now, everybody wants to watch what these people are doing and to respond. I think their profile has risen. I do not know. It would probably be hard for them to avoid to some extent.

PROFESSOR FISCH: I think there is also a real potential here in the long run for greater accountability. We used to view corporations as kind of a “black box” and not focus very much on the key decision-makers. But we are talking about people who have an awful lot of power, an awful lot of control over political decisions, jobs and the economy. They should be accountable.

MR. RUBENSTEIN: Well, what do you think, Jill, that the directors and corporate officers of good companies can do, or any companies can do, to develop and maintain investor confidence in this terribly cynical—not terribly cynical—in this rightfully cynical environment? Should they be doing something else?

MR. ARKIN: How about skeptical, as opposed to cynical?

PROFESSOR FISCH: That is the \$64,000 question today, isn't it? Although, as the stock market goes down, it will soon be the \$64.00 question.

I think traditionally a lot of good managers have steered clear of the spotlight and been concerned about liability issues and disclosure issues and so forth. I think what good managers have to do today is recognize the fact that there is this need for disclosure, transparency, and communication with the public and the investors. They need to start to embrace that, and not tie themselves up in the formalities of the legal disclosure requirements and the accounting standards and things like that.

MR. RUBENSTEIN: Are you seeing any of that now? Are you seeing any change?

MR. SMITH: I think that Wall Street is a lot more sensitive to allegations of transgressions that were committed during the bull market. I mean, I remember writing a story about a particular incident.

In 1999 or 2000, we printed a story about how Jack Grubman

had changed his recommendation on AT&T. There was a suspicion that he had done it to get an underwriting assignment and that it had been at the behest of Sandy Weill. When the story appeared, it was unchallenged. Then, a few weeks later, Salomon Smith Barney in fact got the underwriting assignment that we thought they were going to get. The market was riding high. The story came and went. Nothing happened. Now that, two and a half years later, the S&P is down 50 percent, it is being investigated as a crime.

So I think the context has really sobered people up to change reactions that were like “Ha, ha, ha, he changed his tune to get some banking business” to “he defrauded investors.”

MR. RUBENSTEIN: Do you think the government has some complicity in it by looking the other way all those years?

MR. ARKIN: I do not think so. There is an almost deep-seated cultural need to euphemize—not euthenize; that may also be more appropriate—but to euphemize what it is that goes on. Whether it is how bad your quarter is, or for that matter how much your executive makes, you try to keep the numbers down, you do some creative gerrymandering in terms of what you are going to produce to the public and everybody knows that all your press releases and your 8-Ks and your reports are all drafted skillfully by people who have a Goebbelian background, or they hope they do, referring to Goebbels of the last war.

I must tell you that in my experiences, chief executives seek to conceal how much they make, what their entitlements are and what problems they have. I think that is a cultural thing that needs to be changed. I am not suggesting one has to fall on the sword verbally, or write your own obituary in the financial pages, but you certainly should seek to not be simply, if you will, opaque—but to not make everything look too good, or to keep things away which may create controversy.

You hear people say, “If you put it in the article, then one of these guys like Mel Weiss or Arthur Abbey”—the plaintiffs’ lawyers—“are going to come at us.” Or “if you put something else here, it will be like a red flag”—it is not a red herring, but sort of a very attractive thing for the regulators. But Elliot Spitzer would look at it as a great political thing.

MR. RUBENSTEIN: You are good at what you do, Stanley. Keep going.

MR. ARKIN: It is like a game. The regulators are out there, like hunters. And then you have—I do not want to say the fat cats—hiding and preserving their entitlements, putting moats around their castles.

I think we have got to change that. I think the way you change it really is through your professionals. Lawyers have obligations, which I think we have been derelict in for many years. We compete for business. It is very much like the consultants at Arthur Andersen and throughout our auditing and accounting community.

And what is it? It is like a fight against the shareholders and the public by management, because management does not really want them to know—that is not all companies—does not really want these people to know what is going on, how their parties are paid for, how much they are paid, how cushy the planes are, what kind of deals they make. That is not true of everybody, but it is certainly true, I think, of what is happening these days very much.

It is like a “bubble” market phenomenon, but it is not really that. We have had gold rushes before; we had the roaring ‘80s; the M&A phase—you are going back to the Rockefellers and the Mellons and all of those people who now are lionized, institutionalized in our culture, and towards whom we all owe obsequence and reverence.

But what happens is this self-interest is projected to the public. We have got to change it, with people like you, as well.

MR. ELSEN: I think the government is responsible to some extent. During this bull market, the SEC has a very important regulatory role. Under Levitt, now under Pitt, I think it has been quiet and somewhat passive. There are a lot of people, a lot of organizations, with responsibility. The auditors obviously are a major one that come to mind. But the government is the one that does not have, supposedly, a financial incentive to hop on-board the bull market.

The motivation to cheat and steal and do everything that has been done is enormous, and has been for more than a decade now. Well, who is going to be there saying, “This does not affect us; we

are going to really watch?" I think there are organizations that fell down.

MR. RUBENSTEIN: Yes. Randy, a CEO's leadership style and character set the tone for a company's behavior and ultimately its image. If the CEO has a bad reputation, what do you think the directors and other executives at the company can do to overcome that fact? And is the only answer to replace the CEO who has a bad rep?

MR. SMITH: I think ultimately the shareholders pay the CEO, or they elect the directors to pick the CEO, and if the CEO is the guy who built the company, it is going to be hard for the directors to replace him or rein him in to any degree, particularly when the stock is going up. When the stock is going down and there are problems, the directors have a little bit more power. But again, if you have got a director who is "independent," because they are the faculty professor somewhere or a lawyer or a non-business person, it is going to be very difficult for that person to get support on the board to replace the CEO.

So I think it is difficult. I think people who expect CEO pay to be reformed and directors to be more independent and start exercising meaningful power over the CEO—I think that is really hard for me to envision because the CEO is chosen to move the company ahead. He may be replaced if he does not deliver, but it is hard for the directors to second-guess him in the middle of that.

MR. ARKIN: Well it has grown up, Howard, in the last twenty years. A great industry for lawyers is executive compensation lawyers. And advisors—some of them are not lawyers; they are simply bandits without a license.

What happens is you get these contracts. Well, getting rid of a CEO or getting rid of a CFO is almost impossible. And if you do, the emollents on their exit are so grand that that itself is embarrassing. And the causes for discharge have been raised so high that the capacity for governance by your boards has been concomitantly reduced.

PROFESSOR FISCH: I certainly think that asking boards to be independent in firing CEOs without taking into account the consequences, the termination packages and so forth, is a little bit short-sighted. A little bit more focus up-front on what kind of

contractual protections we should have and what is the board's fiduciary duty at that point, which nobody really explores, that is very important.

MR. ELSEN: It also strikes me that the board members should just be a lot more aware of why their chief executive has a bad reputation, if they do. It has to be for the right reasons. If they are doing something that is wrong, board members have some sense of that. They should act.

MR. RUBENSTEIN: You see when somebody is subpoenaed to testify, all of a sudden the board gets uptight. Some are asked to take a leave of absence. Some are not.

The question is: If one of the CEOs pleads the Fifth Amendment ("Fifth")¹ at one of these public congressional hearings, does the board have any kind of obligation to demand or ask anything of that CEO?

MR. ARKIN: Oh, I think so. As much as I believe in the Fifth—and I do want to comment on something having to do with prosecutors and regulators—I think if you have a chief executive, or for that matter any employee, who refuses to testify or speak about his or her duties with respect to that company, they can no longer represent that company.

MR. SMITH: Has that actually happened, though? Has a CEO pleaded the Fifth, Howard?

MR. RUBENSTEIN: Recent CEOs have pleaded the Fifth.

MR. ELSEN: Which one are you thinking of?

MR. RUBENSTEIN: Some, in fact, started to testify and then subsequently took the Fifth. Some of them did some obscure things. They appeared before investigative committees in private, and then when they were called in public, they pleaded the Fifth, fearing that they might have lied, perjured themselves—and they may have, even if they pleaded the Fifth.

MR. ARKIN: You know, it is interesting that when these things start out and you have somebody in a position of being attacked or potentially attacked, the general response is, "I am going to tell them; I have nothing to hide." And then, as you lie awake at night, you ponder the past and you remember things and

1. U.S. Const. amend. V.

maybe put things in better perspective, then you plead the Fifth.

Let me suggest something here. We have been pounding on the system and all of the abuses which we have seen, and which I think quite appropriately have been revealed, and which we focus on. We live in a time right now which is, at least in my short living experience, though I am older than some of the students here, the most immense and intense populist fervor in respect to Wall Street I have ever seen. This populist fervor translates itself into—and I do not mean to joke about my old friend Elliot Spitzer—but it translates itself into more and more and more relentless and aggressive prosecutions and regulatory inquiries, both of which may have a marginal value.

To some extent, that unbalances the system. Even Pete Peterson told us about his wonderful remark about “we have got to put these guys in cufflinks” and remember, they had plenty of cufflinks.

But the fact is that by doing that, it is like—and I am not going to comment on my views of the Iraq war—but it is a little bit of a political weapon, and it is tougher on these people who are essentially predators taking bread from the mouths of our workers.

MR. SMITH: Are you saying Spitzer’s case against Merrill was of marginal value?

MR. ARKIN: I do not want to say that. I do not even want to suggest that.

MR. SMITH: I think a lot of people learned a lot from that case. Harvey Pitt certainly did not bring it, or even the NASD.

MR. ARKIN: Well, they did not. Actually, the SEC and NASD did not bring it, I agree. Nor did the prosecutors look into it, though they are now.

MR. SMITH: So why was it of marginal value?

MR. ARKIN: I am not suggesting that particular case was. What I am suggesting is that he is the New York Attorney General, and so I happen to be more familiar with what he is doing because I read the local papers as well as the national ones.

But virtually all attorneys-general and prosecutors, if you look at what is happening—the press pronouncements of our regulators, prosecutors, congresses and legislatures—what I am concerned about is that when you have too much anger which is fueled in

society, and basically what you are doing—we do not have mobs in this country, we do not have lynch mobs, except occasionally in other parts of the world, but not in New York.

MR. ELSEN: We should not.

MR. ARKIN: Maybe we should. I do not think so.

But what you do is you make people and people in power more angry and ambitious. To some extent, I think it is part of the function that people do what you do, and hopefully what we do, to moderate that.

MR. SMITH: People are angry because they lost a lot of money.

MR. ARKIN: I understand, but they lost a lot of money because they were equally fools with the people who ran the companies in which they invested. I think most investors to some extent and those people who advise them, the registered reps and whatever else is out there, are people who just showed bad judgment. It was a gold rush. It was a tulip craze.

I do not think that anger at that should be directed at people whose lives and liberties and futures you are seeking to destroy. That is a false anger.

MR. ELSEN: I think, Stanley, you are right about the excesses now in terms of backlash and investigations. You see grandstanding in Congress and prosecutors fighting over turf.

But you have to counterbalance that against the excesses of the abuses and the frenzy. I mean, it is almost natural that you have this kind of corrective action. And yes, people like you have to vigorously defend the rights of people who are now being scrutinized.

MR. ARKIN: Unless they prosecute them for the protection of the capitalist system.

MR. ELSEN: I think it is worthwhile that we have this kind of intense scrutiny of what happened. I mean, yes, you do not want excesses, but I would err on the side of really coming down on this and punishing everyone who is involved, because then it will at least go away maybe for a few years before it returns into the next bull market.

MR. ARKIN: You know, we cannot do too much. I mean, obviously if people commit crimes—that is, they make false

disclosures, steal money and engage in terrible conflicts of interest as to how they do business—those things are prosecutable, and they are fundamental things we have to avoid to keep our system honest.

But I think that what we need to do is to look at it this way. Probity cannot be bottomed on fantasy. Probity has to be bottomed on what takes place. If you are going to make disclosures, you have got to have something to disclose which is worth disclosing.

So you need more transparency, but also I think you have to take a hard look at how executive compensation packages are structured.

Pete Peterson had a wonderful notion there, which is that Blackstone, of which he is Chairman, never invests in companies—and I think it is very smart—unless the executive has “skin in the game.” One of the things we can do is to have executives with “skin in the game.”

We can look, I think, at compensation packages. We can do that because that is going to enable us to, if you will, be more honest and transparent, because the moment you have a motivation to hide or conceal the opulent perks which certain people think they deserve because they have ascended in a bubble economy to chairman of some company—those are things which people seek to hide because they are basically embarrassing. We have to change that.

MR. RUBENSTEIN: John, what is the best way of getting the press to write fairly about a company, once that company is faced with a growing scandal? Is there a best way? And I will open that to the floor.

MR. ELSEN: The only way really is that there has to be a conscious decision that a company is going to confront this head-on and going to be open and honest. If it wants to separate itself from the actions that happened, one way to show that to the public in general and to the press specifically is by being accessible, available, honest and forthcoming. It may sound naïve, but that is the only way I have ever seen a company effectively deal with that kind of crisis.

MR. SMITH: Howard, your question sort of implies that it is

going to be unfair as soon as the scandal coverage starts. Is that your opinion?

MR. RUBENSTEIN: No. What I really am implying is that a company under attack usually says to me, "The media is unfair to me. What should we do and how do we handle it and how do we get fair coverage?"

The reason they do not look at it as fair coverage is because all of the negative disclosures are out and they have usually said nothing. They took a "media Fifth"—"no comment, no comment." You see that all the time.

What is the best way for a corporation under attack to act? Is there a best way in your mind?

MR. ARKIN: The first thing you do is hire Rubenstein.

MR. RUBENSTEIN: What is the second thing, though?

MR. ELSEN: I would just add one other thing. I was going to say that I think the CEO who asked that question is already defeated, because if he is saying "the media is killing me," he has not accepted the fact that the media is doing its job. And he has to conform his reaction to the reality of how the media works, usually in the best interests of the American people.

MR. ARKIN: I think one of the things is that there is a lot to be said for defending yourself in the media. I mean, all of us know that lawsuits, investigations or prosecutions are only one way in which an organized society reacts to an issue which it finds troublesome or which needs to be made better. Certainly this kind of society does.

And so, companies oftentimes will work on a program, Howard, as to: "What kind of things can we say about what we do? What kind of things can be better that we can put out?"

For example, what you saw recently I thought was kind of bush league. The Global Crossing Chairman was running down to Washington, having made a modest \$800 million, \$100 million of which he is using to build a home because he needs a \$100 million home, and he agreed, I am sure at the insistence of somebody advising him in his propaganda effort, to give \$25 million back to his employees, enough for a McDonald's sandwich and a bus ticket possibly for each.

But I think what you have to do is look at what you have. I

mean, everybody has good things, I think. Companies have lots of positives. What you are doing is building an image to the public and the shareholders which shows there are things that are worthwhile and things which are not worthwhile that we are trying to change.

I think there is a great deal to be said for people like you advising—not alone on how you get something into the press, which is not what people like you do, but how you solve this crisis.

It is true that generally a CEO or a corporate officer will say, “The press is against me. They are only printing bad things.” That is because the fact that you belong to Little League or you cut your own hair is not as interesting as the fact that you have been diddling the company.

MR. SMITH: I guess my experience has been that the company has a problem, even if they want to say good stuff to you about the case or other stuff that is not related to the scandal, that the lawyers will advise them to say as little as possible because whatever they say that gets into the paper can be used against them in court in either criminal, civil or private litigation.

MR. RUBENSTEIN: The way it usually unfolds is the first negative story, the first negative inquiry, or the first subpoena or inquiry from a government agency arrives on their doorstep. Then they will very often call me or someone in my office.

The first question I ask is, “Do you have a good lawyer?” Many of them have Stanley and others have others. But seriously, I always ask the question, “Do you have a good lawyer?”

Very often, the law firm will hire us, creating some type of privilege. It has rarely been tested, in my experience—only once, and it succeeded. But I usually ask the law firm to retain us.

Then we have a meeting called by the law firm. I always ask the same question—not “what do you say?” but “what is the right thing to do? Do you have a real problem? And if you do, if you have committed a crime, do not tell me about it; tell your lawyer about it.”

But let us assume it is something that is somewhat unethical, not a crime. I say, “What is the right thing to do to correct it? Get busy correcting it. Do something about it. Then we will know what to say publicly because we will reflect what you are doing that

is right.”

I often ask a client to acknowledge a mistake, to make an apology. The public is ready to accept a real apology, not a phony apology. And, very often, I have gotten clients sort of on the sideline of a controversy by saying, “I did wrong and here is how we are correcting it.”

In a crime, that is a totally different kind of issue.

MR. ARKIN: Do you ever ask your clients or advise your clients to suspend or fire a particular employee or to bring in a particular kind of expert, be it a special forensic auditor or some other professional who can come in and look at what is being done, so that you hopefully have an independent, well-informed face to the world which is being brought to focus on the problem?

MR. RUBENSTEIN: Absolutely, if it is a self-contained group, buttering each other's bread, all of whom are pulling money out of the company and there is an issue on the table.

I just had one of those cases, which I will call a sexual harassment case. It was much worse. They all wanted to circle the wagons around this person. It hit the papers. I said, “You have got to suspend that person. You might suspend him with pay, but he should not be in your office now, pending the outcome.” A very serious criminal charge was brought against him—not on insider trading or anything like that.

You have got to look at what the charge is. Very often, if your internal investigation shows that he very well may have done that, you put the person on the sideline, in my estimation, and you keep paying him until maybe the judicial system works it out.

But you have got to be cautious that you just do not blindly defend someone who apparently has done something egregiously wrong.

MR. ARKIN: You would advise somebody to have a special committee or to have the audit committee focus on these issues and to retain the right professionals and control the process?

MR. RUBENSTEIN: Absolutely. In fact, I have advised some clients to change lawyers. They may have a lawyer with no experience at all in an insider trading area but the lawyer was their lawyer for twenty years. I say, “Where was he when all this went on?” Sometimes I run into some controversy with that lawyer. I

say, "Keep the lawyer, do not make that lawyer hostile to you, but get an expert, get a pro, get a Stanley Arkin, get a person like that to advise you."

In my estimation, in some of the gigantic investigations that have gone on, some very famous people made public moves prematurely without adequate legal advice. That now is coming back to really hurt those individuals. I will not name the individual.

You do not make a premature move. It is better to take a hit in the media at the beginning and do the right thing to protect yourself, your company, your reputation. They rush out at the first thing, the first call from The New York Times, Wall Street Journal or New York Post—"I did not do it, someone else did it, and how dare you ask me that question? You are calling me at home at night. That is wrong." I hear it all the time. That is so ridiculous.

If somebody gets into trouble, their first call should be to their lawyer, without making any statements whatsoever.

The second call should probably be to their in-house PR counsel or outside PR counsel, who should give a reasoned, accurate answer. You never lie publicly.

MR. SMITH: Howard, can you give an example of a company that sort of successfully navigated out of trouble by following this course?

MR. RUBENSTEIN: I really do not want to because that would be unfair, my putting them on the block again. What I try to do is get them off.

If any of you are involved in something like this, when you are in the midst of a scandal, you think your world is coming to an end. It is not. If you have not done a criminal act and they do not indict you, your world is not coming to an end.

I will give you an example of someone who did a criminal act and served time, Mike Milken. He came back in his reputation by doing some extraordinarily good things with prostate cancer and other charities.

You can come back from a scandal. If you are not indicted, you certainly can come back.

Why some of the people did not take the Fifth rests on the idea that up here they say, "If I take the Fifth, everyone will think I

am guilty.” And then, the wife is sitting next to him—“How dare you take the Fifth? This is terrible.” I have been through meetings like that.

You can plead the Fifth. The person says, “I might not remember everything that they ask me. They will hit me with a document and then I lied inadvertently, I made a mistake, and then suddenly they go after me on obstruction or on perjury.” Very tricky situation now.

And lawyers very often resisted the intrusion of a PR person who said, “Anything but ‘no comment.’” Many of the lawyers that I have met over the years say, “We cannot say anything, say ‘no comment,’ do not be available.” Some of them have even suggested inaccurate comebacks to questions. You cannot do that. They will Shanghai you afterwards, and rightfully so. I do not blame a reporter who is lied to for coming back and trying to really upturn the liar.

I will open it up for questions.

QUESTIONER: There was mention of getting the directors in on the game. Just before Enron broke, *The Business Lawyer* ran a celebratory piece on the Model Business Corporation Act’s² indemnity procedure.³ It pointed out that in the first draft, or in the first version, a director could recover legal fees only if (a) they were acquitted, (b) it was found to be a proper business purpose, and (c) that the sector benefited from that.⁴ I am wondering if returning to more of that type of standard, rather than just cutting a check and signing off the premium, might affect that.

And then, just general comments from Professor Fisch and Mr. Arkin on the Private Securities Litigation Reform Act,⁵ and *scienter* specific pleading, and accountants’ joint and several liability.

PROFESSOR FISCH: On the indemnification provision, I

2. MODEL BUS. CORP. ACT § 8 (1999).

3. James J. Hanks, Jr. & Larry P. Scriggins, *Model Business Corporation Act—50th Anniversary: Protecting Directors and Officers From Liability—The Influence of the Model Business Corporation Act*, 56 BUS. LAW. 3 (2000).

4. *Id.* at 16–17.

5. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

think you are describing mandatory indemnification. I do not think that the Model Act or any statute limits all indemnification to circumstances in which the director is vindicated, and for I think some pretty good policy reasons. I think there may be cases in which it is not in the corporation's interest to require the director to defend a decision to the eleventh hour. So on that, I think that standard is a little bit strict.

Indemnification really is not the key issue in anything that we are talking about. For the illegal acts, for the scandals, for the cases where the company is ruined, indemnification is not going to protect anyone.

With respect to the more modest passivity issues and things like that, directors right now face no meaningful liability exposure. Indemnification does not come into play because they are not sued, there are no enforcement actions, they are not held accountable in any way.

So I think focusing on that is really a second-best, kind of a second-step response, and it does not get at the main question.

MR. ARKIN: The fact is that, first of all, you have to distinguish between directors and management, in the sense that there is a different role. I think increasingly in this country directors will have a different role than management. It will be a check and balance. We will have more independent directors.

But I think the notion of not defending people who are either management or directors by not enabling them to retain professionals to help them is a mistake. I agree with Howard in that if you are not indicted for a crime and if you do not have some serious disease, you can probably get your life back.

But, on the other hand, I have known of people who have lived as the upper middle class or even more, and have had all of their money wiped out. While one does not, for a while maybe, if you are a populist, feel too sorry for somebody who lived on \$5 million and you are living on nothing, but the fact is they may not have the resources to defend themselves and their resources may indeed be frozen in some way.

Every company should conduct internal investigations in the event that there is some kind of an attack so that you have a better sense of what is going on than simply relying on outside regulators.

I think these people deserve to have their fees paid and to be protected until there is in fact a finding, one way or another, that they have done something which transgresses.

And so I do not think I would withhold paying for representations or the kind of services that they need to protect themselves and the company. If they end up being wrong, they have to pay it back, if it is left. That is something that any company should do.

It is not so much turning on these people and making things more difficult for them. You need to encourage more independence, you need to encourage the fact that they are not so passive, and I think you need to make people understand that there are going to be terrible sanctions if you do something wrong.

But let me tell you one story. I do not want to mention the case. But there is a company which was based in Washington where you had a chairman who was utterly corrupt, but he had a certain charm. His charm enabled him to attract some remarkable people as his directors. They were household names. These people came on. They thought they were doing a good job. The board packages they got looked okay. They were given their, if you will, lies and visionary remarks about what should be done. But very few directors, as I am sure Jill would say, scooped down into what was going on.

What happened here was that this chairman of the company did a variety of things. He failed to pay the D&O insurance. He ended up bankrupting the company, and not himself, because he shoved assets out into some Bahamian corporation, which went on down to Trafalgar or something. These directors, mainly former public servants, were left with all kinds of regulatory, potentially criminal, and then of course civil lawsuits. They had basically nothing to defend themselves. And they were being sued.

So what do you do there? It seems to me that if this company has none, you would want to defend them, because some people go on to boards, particularly if we want to attract independent directors, who may not be people who have resources of their own of any significance. And so I think you have got to be more benign in that regard to attract them.

Now, one of the issues we have not talked about is how do you

attract these days really good, honest, effective, independent directors or CEOs to our companies? It is getting to be not as quite a high-risk occupation as being in the Green Berets, but it does have risks which are ascending.

I know people, many people, who would have otherwise been on boards of directors, who are now calling me and asking, "Stanley, what do you think?" I say, "you do due diligence. You find out. On the other hand, how many boards are you on, or should you do it at this point in your life? You know, you are seriously middle-aged, you are thirty-nine. Why should you burden yourself with this kind of thing?"

And so I think that is a bad thing in this country.

MR. SMITH: What about the point of view, though, that these people are trading on their former public service and selling their reputation to whoever comes along with a decent offer, and that that is a risk they take if they wind up throwing their lot in with a bad guy? It is sort of coup for them. If they are lending their character or reputation to endorsing this individual and it turns out they were wrong, isn't that sort of the way the system works, that they should be penalized in some way?

PROFESSOR FISCH: Who do you want to have serve on these boards, though? If public companies are important, if you need independent monitors to make sure that there is appropriate risk management and internal controls and so forth, who is going to do it? There is obviously a problem with just looking to CEOs of other Fortune 500 companies. We all know the problems there. If you do not look to former public servants, who else is there?

Somebody made the comment on an earlier panel, and I think it is quite right, that it is awfully difficult for a professor, for an academic, for somebody who is not associated with a comparable-size company, to act independently in the dynamics of a board room.

MR. SMITH: So these directors, just following your thought, they are doing this like pro bono because no one else will.

MR. ARKIN: They are doing it because they get \$10,000 or \$20,000 or \$50,000 a year and they get some options and because they have no money. This is a way of building their estate. They have families, and they want to be compensated.

MR. SMITH: But nobody is forcing them to do this.

MR. ARKIN: No.

PROFESSOR FISCH: Quite honestly, a lot of directors — certainly for a lot of them, the compensation is not a substantial factor.

MR. SMITH: So why do they do it?

PROFESSOR FISCH: A lot of them do view it as a form of public service.

MR. SMITH: I think they are kidding themselves.

PROFESSOR FISCH: Yes, there is recognition, it is wonderful to be asked, and all of that, it enhances your reputation in the business community, but I do not think they are doing it for the money, for the most part.

MR. RUBENSTEIN: Are there any other questions?

QUESTIONER: The panelists have talked about how it is very important to either not say anything, or certainly not to lie publicly. But it strikes me that it is also quite important when you do choose to speak not to insult the intelligence of the public. For example, in the tobacco litigation, it is proven that one of the reasons juries assigned large verdicts, like \$28 million, is because the public is agitated that they were lied to and they feel insulted. While the general public may be lay persons compared to CEOs, attorneys, or others, they cannot all be treated in that way. I wonder if any of you could comment on that.

MR. ARKIN: The fact is that oftentimes you deal with zealous fools, and so you are going to have that kind of thing go down. I agree, you cannot—the first thing I ever advise anybody, I work with, is: “You can never tell a lie. Be very careful of what you say if you say anything.” I am not one of those lawyers who always tell people to shut up. I will do that a good percentage of the time. But there are times when the services and, indeed, the strategies of somebody like Howard or other people who do this kind of thing are extremely necessary.

And going forward in the public and, in effect, telling your side of the story has to do not alone with the regulatory agencies or the prosecutors or plaintiffs’ lawyers. But you know you have customers, you have a community of clientele, you have suppliers, and it seems to me if you leave festering out there some unhappy

ornament of somebody's attack upon you, that is going to affect your business.

I will give you one example because I went public with it today. There was a man in his fifties, a lawyer, who left Pillsbury Winthrop, this large law firm, and he went to Latham. Pillsbury issued a mean-spirited, terrible press release, which said, among other things, "he was not this, he was that," and destroyed his Latham partnership.

Now, if you think after something like that—and you can analogize it to a company—any sane human would advise this man to sit back and take it, and perhaps go to confession, that is ridiculous. So you will see a response because you have to do that sometimes.

When you have, for example, a phony allegation which you feel comfortable is phony, you have got to respond. And when somebody says something which is not accurate or does not understand what took place, you have got to explain.

One of the most important things is keeping, if you will, some sense of credibility or probity of the institution or individual. Silence oftentimes does not buy you that. Silence can buy you, perhaps, a better defense in a criminal case, and I am all in favor of that, but you have got to think a little bit more ecumenically about where you are in our economy and our society.

Does Professor Fisch agree?

PROFESSOR FISCH: Absolutely.

MR. RUBENSTEIN: Very often, a newspaper will report inaccurately on something and it is not necessarily their fault because maybe they were given false information. If the reporting was inaccurate, I will always go for a correction or a restatement, or fit into another story something that corrects the record. Once it is in one of the daily newspapers, someone will call it up on the Internet and then it is a fact. I am very careful, either through letters to the editor or direct correction, to try to get that. Even though many people might not see it, I want it in the record.

PROFESSOR RECHTSCHAFFEN: I want to thank everyone for being here. I want to thank one of my mentors and friends, Howard Rubenstein, for chairing such a phenomenal panel; Jill Fisch, without whose institute this symposium would not

have happened; and the rest of your panel on Fordham's behalf as well. I am going to introduce Carl Felsenfeld again, who opened up the proceedings today.

PROFESSOR FELSENFELD: Many hours ago, I started these proceedings. Now I will conclude them. I had planned to give a speech. I will not. I cannot summarize all the things that have been said. There has been too much said.

But there is one message that comes through to me that I think I may try and leave you with, which is that we are here in a Law School. Laws are written down, they are read, they are there in the library, you open the book and you see what you are supposed to do. Congress is in session all the time; they are seeing what should be voted on, what should be delegated. The regulators are in session all the time; they are promulgating regulations, informing us of things you are supposed to do and things you are not supposed to do.

But what I have heard through the course of the day, more than anything else, are words like "leadership," "boldness," "propriety," "ethics" and "integrity." This is a whole series of words conveying human attitudes, human behavior, qualities that have probably always been in short supply but have always been in massive supply. And I think it is probably the goal of all of us, every one of us, in our daily behavior to see that we honor those words, that we work with those people, with people we work with, with our children, with our wives, with our friends, with our employees, with our secretaries and see that those qualities are honored and observed.

That is the final thing I will say on the subject.

I would like to thank Helen Herman for doing all the work putting all this today. Thank you. You once again did a great job.

I would like to thank Jill Fisch, Director of a sister institute, the Fordham Center for Corporate, Securities and Financial Law, for working so cooperatively with the Fordham Institute on Law and Financial Services, to see the successful completion of this event.

And finally, and probably most of all, I would like to thank Alan Rechtschaffen, who is mainly responsible for everything, who worked tirelessly and endlessly to see that the speakers came, to

see that I did what I was supposed to do, to see that it all happened. Thank you very much, Alan.

PROFESSOR RECHTSCHAFFEN: That was great. We are very grateful to our moderators and panelists and to all of you for spending the day with us. Thank you.

Notes & Observations