



The Board's Reliance on Corporate Counsel

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ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel, the National Association of Corporate Directors and SmartPros Legal and Ethics welcome you to today's broadcast, The Board's Reliance on Corporate Counsel.

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Our presentation today will be moderated by Steven Walker, deputy director of board advisory services at the National Association of Corporate Directors. Mr. Walker will introduce our speaker today, Chief Justice E. Norman Veasey.

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STEVEN WALKER: Thank you Roberto. Can you see my screen?

ROBERTO SCALESE: We cannot, Steven. If you could just show your screen.

STEVEN WALKER: All right. I am looking for the command for the screen.

ROBERTO SCALESE: Okay, while we are waiting for that...and we see it now.

STEVEN WALKER: Thank you very much and welcome to today's broadcast, everyone. Thanks for your patience. This is "The Board's Reliance on Corporate Counsel." It's presented jointly by the Association of Corporate Counsel and the National Association of Corporate Directors.

Again, my name is Steve Walker. I'm the deputy director of the board advisory services and corporate secretary of the National Association of Corporate Directors. I've been an active member of ACC since 1993 and I'm really excited today about the opportunity to partner with the ACC team. Today's webcast marks an important day for ACC members as ACC launches its offering of national webcasts for continuing legal education credit. Members asked for ACC for desktop access to CLE credit and today ACC delivers. To learn more about ACC webcasts and about the ACC membership, please visit the ACC Web site at www.acc.com.

And by way of introduction, the National Association of Corporate Directors, or NACD, is a nonprofit organization dedicated exclusively to serving the corporate governance and education needs of corporate boards and individual board members. NACD's board advisory services educates boards by providing organizations with sitting board members to facilitate custom in-boardroom training ranging from board self-evaluations to director education programs on a variety of subjects like the board's role in strategy, risk, and crisis management just to name a few.

You know, as a former general counsel for two public companies and a venture-backed private company, I've had a variety of experiences with boards. What I've always found challenging is trying to constantly juggle between my day-to-day responsibilities, serving members of the senior management team, and serving my ultimate clients, which of course were the corporation and the board of directors. We're very fortunate today to have an expert on this subject who will discuss how corporate counsel can honor their obligation to ensure that directors are appropriately informed and focused on the important issues.

Chief Justice Norman Veasey is the former Chief Justice of Delaware, having stepped down from the Delaware Supreme Court in 2004 after serving a 12-year term as a top judicial officer and administrator of that state's judicial branch. Currently, he's a senior partner at Weil, Gotshal, and Manges. Of special note, he's a vital member of our board at NACD. Now, without further ado, I'd like to turn this program and presentation over to Chief Justice Norman Veasey.

NORMAN VEASEY: Thank you very much Steve. It's a pleasure to be with everybody today. I wish we were in a room where we could have eye contact, but we'll try voice contact.

I've had an opportunity, both on the bench and in private practice, to work with general counsel, CEOs, and boards of directors, and it's always a challenge in each culture to figure out the best way the general counsel can relate to the board and the CEO. Of course, the general counsel has one client and that client is the corporation. Steve mentioned that and that is something we always have to keep our eye on, so the CEO himself or herself is not a client of the general counsel or the in-house counsel for the corporation or the outside counsel for the corporation. I like to think of the general counsel as the glue, the glue between the board and the CEO in carrying out the legal mission for the corporate entity, the client. And the goal in what the general counsel does and the general counsel's staff, in-house staff and outside counsel, is achieving understanding by the board of directors and by the management of the environment in which the corporation is functioning, the legal issues involved, and the processes that the board and management need to go through.

So, we now look at the slide that says, "Mechanisms to Ensure Appropriate Board Focus." We have to verify that the processes are in place to assist in identifying the issues and the information for board attention. We have to make sure the board and management are engaged in discussion about the expectations of how, when, and in what circumstances information will be provided.

Now we hear a lot about red flags. You don't know exactly what's going to be a red flag or a yellow flag until it hits you right in the face and then you have to do something about a red flag. A red flag could be a potential problem with fraud, or it could be the SEC wants to know about something, or there's an article in The Wall Street Journal that there's been a foreign payment made that's illegal. Those are obvious red flags, and there are others that are a little more subtle and you can't always recognize them right up front, but the general counsel is the person that really has to be able to be on the alert for identifying those red flags.

You have a question here about what should trigger a report to the board. Well it should never come to a problem in that because the general counsel and the CEO and the board need to have complete transparency and a complete understanding of how things are going to operate, so it shouldn't be any surprise when an issue arises about whether a report should be made to the board of directors. They should be on the same wavelength. We'll see later about reporting up the ladder potential problems of fraud and the like. Again, it shouldn't come to that because everybody should be on the same page, so we'll get to that in a minute.

I've said here that I think it's helpful to have a written policy about when the board should be informed or take action on issues. That's hard to do, but it's a pretty good goal. And then what are the resources and the expertise the board needs to determine what information it requires to help that process? They usually get their information from senior management or counsel or outsiders like investment bankers, and sometimes they need a second opinion from any of those experts.

Now we have a new governance environment with the meltdown that has been happening. The directors' duties are to be active and informed about the material risks facing the companies, and the board needs to have a predominance of independent directors. Of course, that's an irony because they don't necessarily have a complete understanding of the risks and understanding that the management is expected to have, so corporate counsel is the person who has an obligation to ensure that directors are appropriately informed and focused on these important issues.

One issue is compliance. Compliance is necessary. Sarbanes-Oxley Section 404 requires some compliance standards. Delaware law, which is the law that applies to most corporations, also requires that there be an information system in place and that it be effective and that it be monitored. So the directors have to monitor as well as to direct the management's performance.

We all know that corporate crises often occur under the watch of honest directors whose downfall is simply not knowing or understanding, and that gets back to that word "understand" that we talked about at the beginning. So boards can't fulfill their duties without having relevant and timely information about strategy and risks. Later on, we're going to talk about the kinds of questions that boards should be asking themselves about risk and about strategy and how the two fit together.

What's the role of general counsel in governance? There might be an ambiguity in the minds of some about the general counsel's role. Is she hired solely by the CEO and presented to the board as a fait accompli, or should the board be involved in the process of hiring the general counsel? I think that's the better model. Before the general counsel is hired, the board needs to have a buy-in to that, or before the general counsel is fired, the same thing has to happen, because the general

counsel represents the corporation through its management and its board of directors. The general counsel is the advisor to the board and to management, and the general counsel has some basic responsibilities: familiarity with corporate governance, intimate knowledge of the company's activities and areas of risk, and responsibility for supporting the board process. Finally, the general counsel and her staff and her outside counsel colleagues are uniquely positioned to provide and are responsible for providing the board with support.

You'll notice on this slide that I put down a couple of sources. There's a very good source in the New York City Bar report on the lawyer's role in corporate governance. It came out in November 2006 and it was published in the Business Law Review as noted there. I've also written an article with a colleague of mine, Christine Di Guglielmo, on "The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation," which also appears in The Business Lawyer as noted.

Now we'll go to what is the anatomy of the role of the general counsel. The general counsel has four main areas: legal advisor to the board and management, corporate officer and a member of the senior management team—now you can see the possibility for a few conflicts there—administrator of the in-house legal department, and the corporate agent in dealing with third parties, including outside counsel. Now there are all kinds of duties that are subsumed under these general categories and there are ten of them that are listed here. I just want to talk about three of them.

The third is the mediator among corporate constituencies. Now that means that the general counsel sometimes has a nearly impossible job of reconciling conflicts between the board and management and among management people and within the board itself, so the general counsel is really the person at the hub of this wheel. The mediation ought to be easy if there's transparency and understanding up front, but sometimes the mediation has to take on a more direct role.

Then I'd like to go down to the last two bullets here. Persuasive counselor. Some say that the general counsel is a gatekeeper. Others say the general counsel is an enabler. Well, she's both, but at the end of the day she's the persuasive counselor. She is the one who must be able to absorb and understand the information and work it out among all of the various constituencies in a persuasive manner.

Finally, the general counsel is the manager and educator on legal, enterprise and reputational risk, and we're going to get to risk in a minute. But many corporations have a chief risk officer, and they should. That person is not necessarily the general counsel; depends on the corporation. Often it's not, but the chief risk officer must coordinate with the general counsel, and whether the model has the chief risk officer reporting to the general counsel or if it's just a dot-line relationship, that's fine. Depends on the company. There is no one size fits all. In fact, at the board level, dealing with risk there's no one size fits all. The point committee could be the audit committee—often is. There could be a risk committee itself of the board of directors, but at the end of the day the entire board needs to function on all of these risks: legal, enterprise, and reputational risks. We're going to get to how that would be worked out and the questions that the board should ask itself in a few minutes.

I'd like to focus on two of these ten functions: the compliance program designer or implementer and manager and educator on legal enterprise and reputational risks. Let's start with ethics. We have ethics under state law and ethics rules under federal law. Under state law, if you look at a lawyer's responsibility in the Model Rules of Professional Conduct, you see the basic ones that we've listed here, the five basic ones: competence and diligence, not enabling client fraud, honoring confidentiality and its exceptions, and one of those exceptions might be reporting out if necessary to prevent substantial harm, avoiding conflicts, there's an elaborate rule on that, and reporting wrongdoing up the ladder, Model Rule 1.13. That's kind of an ethical framework. Then there's a legal framework under federal law; Sarbanes-Oxley itself imposes responsibilities on management and the audit committee to establish and monitor internal controls and to develop compliance and whistle-blowing structures.

But then when it gets to the lawyer, take a look at Section 307 of Sarbanes-Oxley. Many of you know that requires the SEC to adopt rules, and they have adopted rules, on some minimal professional responsibilities of lawyers appearing and practicing before the SEC. Let me pause there. That means almost anybody that has a role of any kind in SEC reporting, so it's a broad brush, appearing and practicing before the SEC. Lawyers have certain responsibilities to report up the corporate ladder, and sometimes outside to the SEC, evidence of material wrongdoing likely to hurt the corporation and investors.

Look at the next slide. The federal sentencing guidelines encourage active involvement of boards in overseeing programs to identify the risk of criminal violations and promote a culture of ethics and compliance. The stock exchange rules, including the New York Stock Exchange rules, require the audit committee to discuss policies with respect to risk assessment and risk management.

We have compliance, and we have the next slide, which is the persuasive lawyer and the compliance function. The directors have a duty of oversight, and that duty means that they have to take steps to ensure that there are reasonable systems and internal controls in place and secondly that those systems are regularly monitored so that the compliance function is carried out appropriately. Now I've said here on the slide, "See Caremark and Stone." Those are two Delaware cases that are very important in the oversight responsibility. Not only does Delaware have those, but other states have similar regimens about compliance. Caremark, decided in 1996, says that the board of directors should have a responsible reporting system in place and that the utter failure to have one could result in a lack of good faith and therefore liability. That's the utter failure to have one or the utter failure to monitor it.

Along came a second Delaware case, Stone versus Ritter, in 1996 that was decided in the framework of "what is good faith?" In that case, the court said that if they have a decent compliance system in place, and in that court case they found that they did, then it's very hard for a plaintiff to prove a lack of good faith because in the Disney case, and in other cases, the Delaware Supreme Courts have said that good faith, which is now part of the duty of loyalty, means the intentional disregard of a known responsibility. Why is that important that it goes to good faith and duty of loyalty? That is because due care violations are often excused or exonerated—liability of directors for due care violations are often exonerated under Delaware law and other laws if the charter of the corporation permits that, and most of them do. Plaintiffs want to be able to show that there's a lack of good faith, that there's an intentional disregard of a known responsibility, not just gross negligence, but something beyond that, in order to lay personal liability at the feet of the directors.

So there we are. Compliance function goes to the question of whether the board has utterly failed to set up a compliance program, utterly failed to monitor it when it knew, and intentionally disregarded that responsibility.

Mere negligence or even gross negligence will not result in liability, but a standard of conduct for directors expects that they will adhere to the due care responsibility and that's what they should be told by counsel, that is to say, "You need to exercise due care. You need to have proper processes in place. You need to do your homework. You need to understand these things. Even if you're not going to be held liable at the end of the day for mere negligence, you shouldn't be negligent. In fact, if you're negligent your transaction could be enjoined even though you wouldn't have any personal liability." What you have to preach to the board of directors is due care, best practices, best processes, and the avoidance of any problem with due care. Then when you get to good faith and the duty of loyalty, then you have real problems with potential liability. We have compliance under Delaware law, Caremark and Stone. Then we have Section 404 of Sarbanes-Oxley and even the recent Emergency Economic Stabilization Act about compliance, but they don't change the Delaware jurisprudence of Caremark and Stone.

The \$64,000 question is, over time, what is the function of a director's understanding of her known responsibilities? Is the bar constantly moving or is it not in terms of known responsibilities? But you have to understand—we all have to understand—that personal liability of directors requires a scienter element, that is to say an intentional disregard of those known responsibilities.

I think the most important slides are now coming. These are the ones that relate to risk. We've talked about compliance. We've talked about good faith. We've talked about information flow. We've talked about the board's understanding of the business of the company, understanding of a transaction, and the board's responsibility for oversight.

Now we come to risk, and there's been a lot of discussion in the recent meltdown about risk. In the media and in the halls of Congress it was said that a lot of CEOs took excessive risks, that boards took excessive risks, and that those risks resulted in terrible damage to these corporations and investors and ultimately the taxpayers of the United States.

So what's the matter with risk? There are two sides to the risk coin. Directors are expected to take prudent risks, and management is, for the corporation, because a car that's running in neutral doesn't go anywhere, so they have to take some risks in business in order to have a profit for the stockholders. So there have to be prudent risks taken, "prudent" being the operative word there. Excessive risks, that's maybe in the eye of the beholder. I think sometimes risks are taken by some people who had blinders on their eyes and they just went into these risks willy nilly.

How do you prevent that going forward in the future? You're the persuasive counselor. You have to make sure that the directors, for example, ask themselves a lot of questions. I have on the next several slides a number of questions they should be asked, and they start with this. What are we aiming to accomplish and how are we aiming to accomplish it? What is our corporate strategy? The board of directors has to be right at the heart of corporate strategy. The board has to buy in on the strategy. Are we going to change from a widget company to a financial services company or both? What are the strategic issues involved there? What are the risks as well as the opportunities for profit? What's our strategy?

Second question, what could derail our strategy? What are the bumps in the road? You know we all know about Murphy's Law, but what are the things that are out there that are likely to happen or could happen to derail the strategy? The board has to ask these questions. What assumptions underlie our strategy? Maybe there's an assumption about interest rates. Maybe there's an assumption about international sales. Maybe there's an assumption about labor costs. What are the assumptions that underlie our strategy? Does the board understand that? Have they asked the right questions? Which of those assumptions could change or be wrong?

Well you can see how these first four slides all go to setting up the question of how do we take risks. What risks should we be taking? Well first we have to start with an understanding of where we are and where we hope to go and what could go wrong. Look at the next slide. What process did management use to identify risks? How is management dealing with the natural conflict between a business unit and corporate views of risks? The corporation may have ten business units out there all doing different things, and then there's a corporate risk and a corporate strategy that has to be taken into account. What capabilities are required to address the risks? Where do we have capability gaps?

The last two bullets on this page I think are key bullets. Is there a common understanding about the rights, roles, and responsibilities and accountabilities on strategic risk? Who is responsible for what? Where's the board responsibility? Where's the management responsibility? Where are the outside experts' responsibilities? The next slide is: How can a discussion of these questions become part of our regular routine? That's what we need to look at. What's going to be our regular routine on these questions?

Look at the next slide. Is the board and are the appropriate committees focused on liquidity, availability of credit, valuation issues, hedging strategies, and the like? A lot of those questions depend on whether the company's involved in financial services, manufacturing, or something else. The next [question] is: Does the board have a clear understanding of where these matters are delegated in the processes that management uses?

The third bullet on this slide I think is an important one. Is the board and are the appropriate committees focused on financial, enterprise and reputational risk management? Let's just talk about reputational risk. If the management wants to go into a venture that looks a little shady or is very problematic from the point of view of the corporation's reputation, have they thought that through and has the board asked the right questions about that? Then of course there are financial enterprise risks as well. Reputational risk is very important.

The next [question] is: Has the board and have the appropriate committees revisited with management expectations about the company's risk appetite? We have risk appetite. We have risk management. Are we risk averse? Are we running in neutral? Do we want to take some prudent risks? What is our risk appetite? How far can we go down the road? What risks should we take? What is the risk/reward ratio?

Now I don't think that in most boards these conversations really take on the kind of focus that we're talking about right now. You can't stop every board meeting, take a time out, and ask all these questions. Maybe you can do it at a retreat, but there has to be some understanding going in that these things are in the back of people's minds, these kinds of questions. I've told boards of directors that there's no such thing as a stupid question. I've told CEOs that the director who asks the most questions—difficult, penetrating questions—is the best friend of the CEO in order to get an understanding delivered to the board of directors and to make the management think through its own strategy. You know, sometimes they think they're right, but somebody raises a question and they say, "Oh, maybe we should go back and rethink that." The board's doing management and the corporation a big favor by asking these kinds of questions about risk appetite.

Then you have the process question about: Is the board and are the appropriate committees meeting regularly with the chief risk officer? The chief risk officer is the person that they're relying on but he's only the point person. There has to be an understanding of what the risk officer and his staff are doing. The next [question] is: Has the board ensured that the chief risk officer and the general counsel have adequate resources and appropriate reporting lines to bring any changes in material risk to the board's attention? The board needs to ask that question.

All right, turning to the next slide, does the board and do the appropriate committees have access to the information they need to provide oversight in these troubled financial times? I must say that in developing these slides, we really were thinking in the context of the present meltdown that started in 2008 and continues; hopefully it's getting better. But these are the things that really brought this to our attention. For example, would it have been a good idea for some corporations to have asked: What is our exposure to subprime mortgages? What are these derivatives, credit default swaps and the like? How do they work and what happens if they go bad?

Well, you know, this is hindsight and we can ask this question. I must say that the courts will not fault people for not asking the questions that are clear in hindsight. For example, there's a recent case in the Delaware Court of Chancery that was decided by the chancellor involving Citigroup and its board of directors. The case was dismissed on the pleadings, but the pleadings basically said that all of this problem with subprime mortgages and the like were out there in the media and the board should have known about it and should've done something about it. Well the chancellor said that's not enough to say that they did know, that it was something that they lacked good faith in intentionally disregarding a known risk. Sure, in hindsight it looks like they should've done it and maybe in the next case that comes around there'll be a little different atmosphere, but the court dismissed that case because there just wasn't enough, based upon media reports of these problems, for the board of Citigroup to be held liable for being able to foretell and do something about these problems. As I say going forward, the general counsel now and her staff and her outside counsel have to tell the board of directors, "Well now look, have you looked at the atmosphere about subprime mortgages or the like? What is our exposure and what happens if something goes wrong?" Getting back to those earlier slides, those first four bullets, what's our strategy? What can go wrong, etc.?

The third bullet on this slide brings us now to politics. Has the board and have the appropriate committees reviewed excessive executive compensation practices and considered how well they will withstand scrutiny in the current highly charged political environment? Well I misspoke there for a minute. I said "excessive" and that was a Freudian slip because that's what's out there in politics and in the media, that there's too much excessive compensation being paid to senior management and CEOs, particularly those whose companies have failed and particularly those who went charging off into uncharted waters of risk. That's going to play itself out in a lot of ways in legislation to be considered and the like.

Now, as those things having been brought to everybody's attention, the board has to have the appropriate committees and the appropriate processes on executive compensation. For example, how does risk and strategy play into compensation consideration? For example, look at the next slide. Does the board have the appropriate committee structure for its significant oversight obligations in the area of risk and finance? Has the board and have the appropriate committees reviewed board composition and director skill sets in relation to up-to-date competencies for oversight of the company's strategy and business lines and material risk? Has the board encouraged unnecessary and excessive risk taking in order for managers to drive up profits for their own compensation at the risk of the company coming a cropper? Those are questions that now have to be asked. Then the question is: Does the board have adequate board leadership structure that ensures that independent directors have a clearly defined leader?

In the few minutes we have left I think maybe I'd like to touch a little bit on board governance structures because there's the Schumer Bill out there that would impose at a federal level some board governance structures, would require every corporation to split the CEO and the chairman of the board, would require every corporate board of directors to have a risk committee. I don't think that's a good idea because there is no one size fits all. Some companies do better having a split CEO and chair, and others do better having combined CEO and chair. That wasn't the problem with the meltdown that occurred.

Likewise, having a risk committee of the board of directors may or may not be the right answer for a particular board. Sometimes the point committee for risks should be the audit committee, but at the end of the day it's the entire board of directors that has to ask all these questions about risk. Their not being one size fits all means that each board has to work within its own culture, and the general counsel is the one that has to make sure that these questions are asked and answered and that the board listens to the answer and that the management listens to the answer. The board, with the help of the general counsel and the outside counsel, has to recalibrate its thinking.

That's the next slide. General counsel and outside counsel must see to it that boards recalibrate their thinking in decision-making and oversight. You see the board has two responsibilities. The statutes of most states say that the business and affairs of the corporation shall be managed by or under the direction of a board of directors. That means that they have decision-making on transactions that come before the board and there needs to be some understanding of which transactions come before the board, and they have an oversight responsibility to ask the right questions, have compliance systems in place, and have risk systems in place. That's their responsibility, decision-making and oversight.

Now, today, I think in many cases in big corporations—big multinational corporations and the like and even smaller corporations—we're dealing on a day-to-day basis with something that may be considered a crisis norm. If there's a crisis norm, or potential crisis norm, the board of directors has to go into overdrive. Sometimes there's an overload on the board of directors, an overload on the audit committee of their responsibilities, but each corporation has to deal with that in its own way. Look at these bullet points here, if you will, and I don't have all the answers certainly. I have a lot of questions but not many answers. I think the board needs to make sure that they replace blind compliance with efficient compliance and

sometimes get a second opinion. As I said before, there's no such thing as a stupid question. The board needs to continue asking questions until they understand it and they need to listen for the answer. If they don't understand it at the end of the day, if it's too technical, get a second opinion. Get another expert in there. Take your time. Don't be stampeded into quick action when it's not necessary. Then do a little kind of audit, documentation audit and a corporate governance audit. Take a look at your director and officer insurance policies. That's pretty important for directors. The general counsel has to see to it that that happens.

Plan for a crisis. Act while you still can. Know what a good outcome will look like in advance and have a definable goal beyond simply ending the crisis. Focus on the issues that can arise in companies facing possible insolvency. There you have a problem. There's the vicinity of insolvency. Where are the board's responsibilities? You've got creditors. You've got stockholders. Who are they responsible to? They're responsible to the corporate entity and the general counsel has as her only client the corporate entity.

Let's go to the conclusion here and then we'll see if we can take some questions. I've read a lot of cases and I've written opinions that say what this first bullet says on the conclusion page. The world of corporate directors is complex, challenging, and continually evolving. The recent meltdown and the liability and regulatory consequences have intensified the directors' concerns. So by doing the right thing, directors should be empowered, without reasonable fear of ultimate liability, to advance the best interests of the corporation and its stockholders. Finally, to get around to our mission today and that is to talk about the persuasive corporate counsel, particularly the general counsel, is increasingly crucial in guiding directors as well as management. Questions?

STEVEN WALKER: Actually I believe we have a public service announcement at this point.

ROBERTO SCALESE: We do indeed Steven. Thank you very much.

[The CLE code and instructions provided by the moderator here were for use only by attendees of the live webcast. To obtain your CLE certificate for this archived webcast when you have finished listening to it, click the EXIT COURSE button at the top right of the screen to return to your My Courses page and then click the certificate link or icon beneath the course listing. In the pop-up window, select the desired jurisdiction from the drop-down list and enter any requested data, such as your bar number and the CLE code that popped up while you were playing the archived webcast. (This code is required for New York and Ohio attorneys only.) You may submit questions and comments regarding the content of this course using the Questions and Comments link on the left side of your screen below the video.]

With that said, I'd like to hand the presentation back to Steven Walker, who is going to open up the Q&A session. Take it away, Steven.

STEVEN WALKER: Justice Veasey, that was fantastic and I really appreciate that and the time you spent with us. It was a very comprehensive presentation, and God bless, you didn't even have a chance to get a drink of water through that. It was amazing. You've touched on a lot of issues that are close to my heart and close to, I'm sure, our audience's heart. We've got nearly 300 or more people on this webcast that I'm sure are very interested in what you have to say on these questions, and we've got a number of questions that have come in, the first of which is: If the general counsel is, as you say, the advisor to the board and management, what do you recommend when the legal counsel becomes aware of a risk that hasn't been disclosed to the board?

NORMAN VEASEY: I think that the answer to that is that there should be an understanding up front about the obligation to the board and transparency. That is to say that the board shouldn't have surprises, that there should be complete transparency and communications all the time between management and the board of directors, and I think the general counsel should see to it that that transparency and communications issues are addressed right up front. Up front, there should be that understanding.

Secondly, if there is something that the general counsel becomes aware of, a risk that hasn't been disclosed to the board, the general counsel I think should go to the CEO and ask him or her to go to the board and talk about this risk. If the CEO refuses, that's a real governance problem. Then the general counsel has to take things into her own hands and go to the board herself.

STEVEN WALKER: Which of course we know can be very uncomfortable, which leads us to the next question, which is: What is the dividing line between the counsel's responsibility to the CEO and the board?

NORMAN VEASEY: Well I think that there shouldn't be a dividing line because the general counsel's client is the corporation. The general counsel reports to both the CEO and to the board of directors and is responsible for complete communications transparency, as I've said before. It's part of one seamless web and there isn't a real dividing line between the general counsel's responsibility to the CEO and to the board. The functioning is different. That is to say, when we go back to the anatomy of the job of the general counsel, we said the general counsel has all these jobs, all these roles, one of which is being a member of senior management. Another one is being the advisor to the board. So the general counsel sits next to the CEO's office. They talk all the time. So those functions are quite different, and I think that the functions are different, but the responsibilities are the same, and reporting both to the board and to the CEO means that the general counsel, as I said at the very beginning, is the glue between the two of them.

STEVEN WALKER: In your opinion, is it the legal department's responsibility to arrange for board governance education, evaluations and to keep them abreast of director duties and responsibilities?

NORMAN VEASEY: Well I can answer that quickly. The answer is yes, but I think that the general counsel has the responsibility for seeing to it that the board does have the educational responsibility and opportunities and that these opportunities lie in the right areas. Certainly they can delegate the details, but if the general counsel has told the board that they need to focus on succession planning, they need to focus on how to maintain corporate records and minutes and how important minutes are, and minutes are very important and I could take a whole ten minutes and talk about that, but the general counsel has to see to it that these opportunities are presented to the board and the details can be delegated to somebody else.

STEVEN WALKER: Well that's fantastic. Justice Veasey, I want to thank you on behalf of ACC and NACD once again. This has been a fantastic kickoff to the CLE webcasts that ACC is sponsoring. I'm a proud member and I would like to take this moment to thank everybody for participating. I think we've had a great presentation. We've stayed on time and I appreciate everyone's patience with the registration process and can assure you that the next one's going to go seamless. This has been a fantastic event and I thank you and hope you'll join us next time. Have a great day.

ROBERTO SCALESE: On behalf of the Association of Corporate Counsel and the National Association of Corporate Directors and SmartPros Legal and Ethics, thank you again for listening to today's program.

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Thank you again and have a great day.

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