Arbitrating Corporate Malfeasance

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With the Sarbanes-Oxley Act as a backdrop, this symposium explored the ramifications of the Sarbanes-Oxley Act on the securities industry and how regulatory organizations address corporate malfeasance. Participants discussed how securities firms comply with Sarbanes-Oxley, including the effects of the attorney disclosure rules recently adopted by the Securities and Exchange Commission. The discussion addressed recent enforcement actions that resulted from Sarbanes-Oxley and the types of civil disputes that are arising. Finally, the participants described how dispute resolution mechanisms such as arbitration and mediation are being utilized for investor and employment cases arising on the heels of the enforcement cases.

Panelists:

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Linda D. Fienberg, President of NASD Dispute Resolution, Inc. and Chief Hearing Officer of NASD Regulation, Inc.

Deborah Masucci, Esq., Vice President, Professional Development and Training, JAMS

John F. X. Peloso, Esq., Senior Counsel in the Litigation Practice, Morgan Lewis & Brockius LLP

James A. Tricarico, Jr, Esq., Partner, Kirkpatrick & Lockhart LLP

Deborah Mascucci, Vice President, Professional Development and Training, JAMS : Now to the issue at hand. The idea that lead to this symposium started with Enron. Here was an example of corporate America at its worst. Employees of Enron lost their jobs, and in many instances, their life savings. Billions of dollars of losses were suffered by investors and a proud accounting firm now faces ruin and criminal charges. Careers of hundreds of professionals are tainted and ruined. In addition, investor confidence in the integrity of the financial markets has been shaken. Enron, unfortunately was followed by WorldCom and Global Crossing and then there was the New York State Attorney General's action joined by the New York Stock Exchange and NASD finding proof of members for activities involving research analysts. This lead Congress to act quickly and decisively with legislation resulting in the Sarbanes-Oxley Act of 2002.

Congress recognized that substantial change was necessary to right the system and restore investor confidence in the markets. Congress directed the SEC to adopt rules to enable the Act to particularly raise professional, legal and ethical standards to the gate keepers of our financial institutions. The SEC adopted 11 new rules in January of 2002. During that process they received over nine thousand comment letters– evidence that people were interested and involved and wanted change to occur. All of those letters were read and posted on the SEC's website, and you, yourself, could go on the website and read them. The rules that were adopted require securities lawyers to report evidence of fraudulent corporate conduct up the ladder to the chief legal officer, CEO or Board of Directors if necessary. Research analysts also came under severe scrutiny because investment banking revenues became a large part of brokerage firms profits. So pressures

were placed on analysts to deliver favorable recommendations to issuers whose business they want to attract. Additional conflicts arose when these analysts had personal holdings in stocks which they recommended and did not disclose or where research reports were issued to boost buying interest in a stock prior to the expiration of the lock up period. Then there were the infamous e-mails in which analysts jokingly disparaged their recommendations–talk about shaking investor confidence. I have asked the panel to discuss the fallout of Sarbanes-Oxley and all of these events with particular emphasis in four areas.

First, Jim Tricarico, is going to talk about the advice given to firms regarding compliance with rules and communications with firms looking at e-mails and how they are used and what instructions should be given on the e-mail issue. Second, John Peloso will talk about the rules of conduct for attorneys, specifically Rule 2e and up-the-ladder reporting. Third, Rob Whitman will talk about the protection for whistle blowers and whether when they do claim there is a dispute with their firm, whether they should be required to arbitrate those disputes arising from their openness and blowing the whistle. Fourth–are we seeing disputes filed in arbitration involving activities of research analysts or other Sarbanes-Oxley related issues? I asked Linda Fienberg to talk about the Docket at the NASD, which is where you would see more of these cases coming forth.

Then the group will examine whether the current ADR rules work to the advantage of these cases or should other approaches be taken, including setting up separate procedures, to arbitrate mass actions. There is a lot to discuss in this period of time and I hope that you will be engaged and that you will ask questions and that you will enjoy the panel. Let us begin.

James A. Tricarico, Jr, Esq., Partner, Kirkpatrick & Lockhart LLP : Thank you Debbie. I'm going to start by talking about the use of e-mails and what it means in litigation, and what it means generally to major corporations, and the impact that e-mails have, and I am going to obviously, given my experience and background, focus on the securities industry because–I would focus on the medical industry but I don't know anything about that–so I will stay with securities if I may. First of all, the concept of e-mail was new to the industry several years ago and new in the following respect: there has always been a requirement for broker/dealers, particularly, to maintain written communications that involve the business of the company. The whole issue that presented itself to the industry at the time was: is an e-mail a written communication as it was contemplated by the rule? And the rule really was a New York Stock Exchange and a NASD rule, but it was really part of the rules and regulations of the SEC. The issue came down to the industry arguing that an e-mail is not a written communication—it is much more liking to a telephone call. It is a back and forth, and the industry prevailed on that for about a second and a half and in fact, it was considered to be written communication under the rules, and as a result needed to be captured and maintained in the records for a period of time. In fact, when it involved communications with the public, required some supervisory obligations over this writing. Back in 1997, I think it was, the New York Stock Exchange and thereafter the NASD, rewrote their supervisory rules for written communications to specifically include and contemplate the use of electronic communications and the new rule that exists today. I do not think it works as well as it should and in fact, I was on the committee that wrote it and I can be critical of it, but let me give you some of the specifics of the rule. Initially, all written communications that went out to the public needed to be reviewed before they went to the public. A supervisor had to look at this and it had to be pre-reviewed. The scheme contemplates a review of these writings on a random basis and it can be post-review–so after it has been used. In order to do this, the firm has to implement a training program, education for the people who are writing these things, and then it can be sent out. What does this have to do with arbitration and any of the alternative dispute resolution vehicles? The answer to that is: these items–e-mails–are so much a part of every one of the major cases you have seen, that I think that the most significant thing that anyone can do today, in terms of protecting the corporate client, is to throw out the computers. The reality is that people still write e-mails as if they were talking on the phone and do not realize the importance of what they are saying, and that the second worst button on a computer is the delete button because people honestly believe when they hit that button the e-mail is deleted. Nothing is deleted. Everything is retrievable. Nothing goes away. I do not know where they keep it. I do not know why it is there, but there is a computer guy that comes in and finds it. And when you find these pieces of paper, often people really did not think that this is anything that people will ever see again—kind of like the conversation on the phone, or the way you might sit down and have a face-to-face with somebody and have a conversation. But it is not—it is a written conversation, and

they come back to haunt people all the time. And in the securities industry this has come fifteen-fold in the big cases that have occurred recently.

Panelist : I suppose that but for Mr. Grubman and his twins going the YMCA up on 92nd or the 92nd Y as it is called, we might not have some of the most important case we have today.

Jim Tricarico : That is probably true. The reality of communications are such that people are not giving them the gravity that they should. They aren't approaching this with the seriousness that they should when they write these things. Unfortunately, they come back to haunt people as I have said. The question then, as I see it, is how do you deal with these things in a litigation setting? What do you do with e-mails? And I am going to get to instant messaging because it is a little different right now and I will touch on it. Let us talk a little about e-mail. I said to you that–you have the supervisor. There had to be a program of supervision going on with communications with the public. However, there was really no such program for internal communications. There is no requirement under the securities laws, or the rules and regulations of the SEC, or the self regulatory organizations to supervise a review that is written internally. Thus, you get some of these very interesting internal communications that came out in the New York State Attorney General's investigation with regard to communications that some of the analysts had with some of the bankers and so forth. These items are subject to the retention requirements–so as a writing, it has to be kept. And it has to be kept in an easily accessible place for at least two years, and then thereafter you keep it for another year, and some things you keep for six years depending on what it is. But you keep it for another year and even if it is not easily accessible, it will be retrievable.

Panelist : Jim? Just before you leave the point, you have indicated that there is no specific rule or regulation requiring an act of supervision of e-mails internally, but has any body made the argument from the regulators for that. In today's climate, and given the material that has showed up in that, a good supervisor ought to be reviewing e-mails. Or is that going to be regarded as offensive–a little bit like listening in on telephone conversation? For example, traders, I guess, have for years had their conversations taped. And there was always a debate as to what point do you intrude on privacy verses what is good supervision. I would think that a regulator could make a pretty good argument today that there ought to be a new rule saying that in addition to monitoring communications between brokers and their customers, that there ought to be a supervision of internal e-mails. How do you react to that?

Jim Tricarico : Well, let me give you two reactions. One, I am sorry you have said that and wished you had not brought that up. And, two, I think without a rule today, there is a whole regimen going on out there at firms to come up with policies and procedures and supervisory procedures, in particular to help spot problematic e-mails and internal communications. I do not think there is a rule yet requiring this. Although as you get into Sarbanes-Oxley, we could talk a little bit about whether or not that takes you down that road. But I think that any diligent compliance and legal department internally is going to have to sit down and seriously consider an audit department. Seriously consider how should you review, at least on some systematic basis, internal communications between certain departments, or perhaps between certain areas and certain individuals in the firm, just to assure that they is no impropriety going on. I think you are going to see more and more of that whether or not there is a rule. And I'm hoping there is not a rule. And I think at a point in time you can write a rule for everything and get nothing accomplished.

Panelist : Many of you are too young too remember the Bankers Trust case dealing with derivatives about nine years ago. But what ultimately did Bankers Trust in were the tapes of the traders talking–in one particular case a trader talking to his fiancée and telling his fiancée how he was taking advantage of (I have cleaned up the language) some major corporations, including one that John and I represented (Johns' firm and my firm). One could argue that some supervisor of e-mails by analogy might be a useful thing for the firm to do even internally even if it is not required. One way to accomplish that, I suppose, is to set up screens. At the NASD we have screens for our employees. One of my colleagues teaches a class in arbitration at Fordham Law School and was trying to send a Supreme Court decision to his class to read. It was about sexual harassment and arbitration, and it got kicked back with a note to all the people to whom he sent it that you should ignore this because this person is improperly using the computer and sending pornographic e-mails because the word sex occurred more than three times in the decision. There are all kinds of problems you can run into when you try and screen but clearly it does have its advantages. I guess I am with Jim

thinking it is better if people would do it voluntarily in a way that makes sense for their particular business than to have it imposed.

Jim Tricarico : Let me talk a little bit, because I think that is a very good point. But it also takes me to an issue I will address in just a little bit about such supervision. Let us talk a little bit about the e-mails. Let us talk about in particular an arbitration setting–generally a mediation will not be conducted before an exchange discovery has occurred. Today you can not enter into this kind of litigation, whether it is a public customer with a broker/dealer or a bigger group or a group of investor in a securities case, where demand is not made for all communications, particularly electronic communications, e-mails in particular. One of the things I have discovered is: you have a major task on your hands when looking for your e-mails and how you retrieve e-mails. How do you search and retrieve e-mails? Who does the retrieve? Who does the search? How can you assure the tribunal, or the other side for that matter, that the appropriate search has been made, and how do you want to assure yourself that the appropriate search has been made because there is nothing worst than during the course of the hearing or the middle of a trial or the middle of some proceeding where some e-mail that existed did not get produced, pops up, and sneaks up on you. Every firm does it differently so you really have to go to those firms and see who is doing the search and how they're searching for it, and if they are prepared to testify, or at least attest, to that search and what they did. After you have accumulated what you have agreed (if you can agree), or an order gets issued with regard to what is material or relevant to the case, is it admissible? It may well not be for a lot of reasons. But let us face it—we are talking mostly; certainly in this discussion and most of what we do is in arbitration. Quite honestly, admissibility in arbitration is very different, in my experience, than admissibility in a court room. Arbitrators tend to take a lot more into evidence in the case than you would be able to get in under strict rules of evidence in the case than you would be able to get in under strict rules of evidence in a state or federal court.

Panelist : Jim, do you have any views about costs? Because one of the issues in terms of discovery, whether it is in the arbitration or litigation context, with e-mails, is that they may no longer reside on somebody's actual hard drive at their desk, in their in-box, or their deleted item folder. But it might be on a folder somewhere, or it might be on a back-up tape from two years ago that might be subject to an automatic purge, and it is an extraordinary expense to resurrect that in some kind of readable form.

Jim Tricarico : I think that in a lot of situations you need to establish the parameters up front about what is being asked. And when you get into unusual costs for a search and retrieval, you apply to have the other side participate in that cost. Now, as I said earlier, in the broker/dealer setting, you have to maintain records for a specific period of time. You also have to maintain the electronic communications in a specific way. It is called "write once, read many", the short term being WORM. This industry will come up with these things all the time. But WORM is a very expensive and cumbersome way to store, so it is hard to retrieve from that. The reason it is required under the rules at this stage of the game (and many of us hope this will change) is simply, it was thought to be at the time a system that could not be altered and that you could not alter a document. Now, whether it really can't be altered–there are lots of different opinions about that, and certainly they are systems today that the technical folks tell me are just as good, if not better than that, and much easier to work with. But right now, that is what the rule requires, so in most of the situations the firm is required to have it, and depending on the timeframe, supposed to have it in an easily accessible fashion. It is hard to argue that–at least in the broker/dealer setting, it is particularly expensive.

What I find more interesting at this stage of the game is: what is the e-mail? What are you producing? What if you have been asked to produce all e-mails from John Peloso for a period of time–March 30 to April 15, 2003 —that is totally privileged according to John. And when you get to Sarbanes-Oxley, we will get to the issue whether anything is privileged anymore.

Let us assume you have that request–what do you produce? You see on the screen an e-mail that John sent to another attorney at his firm and it talks about X, and there is a body of it. Is that the e-mail? Well that is just a picture on a screen—it is certainly not all the properties of that e-mail. Suppose there was a bcc:–you would not see that on a screen perhaps, but that would be a property of the e-mail. Perhaps John did not send it directly–maybe he asked his assistant or his secretary to transmit it for him. Well, that becomes part of the underlying document. You now have that document going through another individual. Is that part of the e-mail that has to be produced? Suppose John composed that over some period of time, and did some

drafting and re-writing that is part of the properties of that e-mail. In many systems you can go in and see every draft of that. If any of you compose like that and do a lot of drafts, like I do, it is a pretty scary thought. What could scare me is that people could tell just how badly I spell. The reality of that—it is technically the property of the e-mail.

Panelist : But you know Jim, that is countered–because you do tell people now that they should think through what they send in an e-mail.

Jim Tricarico : I used to have meetings with hundreds of people in an auditorium, telling them you really can not treat this like verbal communication. You really have to treat this like writing. If you were sitting down and writing a memo that is how you should write e-mails. I had about as much success then, as I am having now, telling people not to do it. And then the *Microsoft* case came out, and there were all the problems with their e-mails. I sent this around to the world at my firm and everyone sent back and said, "you live in a cave and you got to get with it. It's the wave of the future." I do think that the issue of what really makes up an e-mail is really yet to be determined by the courts. But I can tell you that when you get to an evidentiary question, particularly in a court room, it will have to occur in the arbitrations as well. As time goes on, you are going to really have to determine what exactly constitutes this e-mail that you are producing.

Panelist : I guess the bottom line for going forward is: you need to advise your clients when you have this; that no one should ever put anything in an e-mail that they would not put in a formal memorandum. It is not going to help that all of the e-mails that have been drafted and sent up until this point, but going forward, nothing should go in an e-mail that you would not put in a formal memo. In addition to that, and I have told my staff this for many years, you should–because we communicate so frequently in e-mails–they should be thoughtful and well written, in the same way a letter or a memo would be written. When you get out into the real world, and if you are practicing at a firm, you do not want to send the partner an e-mail that is poorly done–just like you would not send her written memorandum that are poorly done. E-mail today is the way we communicate, and we have to treat it like we treat correspondence and memorandum.

Jim Tricarico : You have this problem–you try and appropriately deal with how you compose the e-mails so that when you are producing the document, you can produce a document that really reflects what the underlying communication was all about. Let me tell you–the button I hate worse than the "delete: button: it is the "reply to all" button. If they took that off the computer, I would be the happiest person in the world, because what happens is: someone sends you an e-mail that is particular to you, and they copy it to their boss and to the people that work for you. And all they want is a communication back from you with regard to this, but somebody decides, "I'll hit the reply to all" since all these names are on it–they should know what I have to say. Two of the people who get this e-mail either by cc: or just because they were on the direct "To" reference, decide, "well, it came to me so I guess they want me to comment on it too so I'd better send off a little response." Now all of a sudden this e-mail that was four lines or two paragraphs, now becomes five pages. The good news is many of these systems have different colors for different people so if you look at it is very pretty. It leads to trouble.

There may be nothing substantively wrong with anything that is written in that e-mail. It might not be at all adverse to what you are trying to show in your case. But you have now opened the discovery door that you did not want to open because now you have three other people that are going to be put on a witness list and called as witnesses, or at least attempted to be called as witnesses–and you have to deal with that. The e-mail problem in any litigation, particularly in an arbitration, is significant. Of course, there is no reason if you have an e-mail that is related to the request, and that has other, which you believe to be superfluous or non-relevant information in it, to attempt to redact that and produce it redacted explaining what you are doing.

Then of course, I said I would touch on supervision. Well, you have document retrieval history that you have to look at. Where did this document go? Has this document been previously produced to a regulator (for instance)? And I can assure in the analysis cases that this is what happened. Does that become the history of the document and is that something you have to produce along with e-mail? I would suggest to you that it is not. But I am not as comfortable that if that was a document that was subject to some supervisory review, even if it is an internal document, that this isn't part of the document's history–because it will show that the

document thereafter went to Mary or Fred, who was the boss, and was looking at it, and does that open that door–both from a liability and a discovery standpoint?

So I think that those are issues that we have to confront. Now I think that you should not supervise something, or compliance should not institute policies and procedures because they could come back to haunt you in litigation. I would like to say that, but history teaches us that is not the way to do this. The key here is to understand what the document means and how it might be used later. That is true with any document, but it is particularly true with e-mails, because people do not think of it that way–they do not look at it that way and that is a difficulty.

Let me just touch on Instant Messaging for a minute–because that is something that is still an open issue as far as I am concerned. I am not at all convinced at this stage–nor do I think that the regulators are at all convinced, and I am not going to put words in their mouths–that this is the same as an e-mail written communication. Instant Messaging, in many instances is not kept, is not retained, and is not retainable–sometimes it is.

Panelist : Would you define it for some of us please?

Jim Tricarico : Well, I have to go to the paper to explain it. Maybe one of our law students could define it.

Panelist : Since most of us up here did not know what it was, we thought maybe some of our colleagues did not know either.

Jim Tricarico : Instant Messaging–my only personal experience with Instant Messaging occurred a year ago when one of my daughters was waiting to hear from admission from college. And I discovered that colleges now e-mail the information.

Panelist : Acceptances?

Jim Tricarico : Yes, acceptances. You do not have to, but if you request, most colleges will do it. Actually she had gotten an early acceptance. She knew where she was going. We knew what she was doing, but she was waiting to see. So I am sitting with her at her computer screen, and all of a sudden, things start popping up on her screen. Over here it was; over here it was. I mean–the names; the names of the people popping up on the screen–I knew these friends of hers; these boys and girls, young men and women whose names you could not believe on the screen. I would not even repeat them, and what they were doing was each trying to find out, “did you get in? Did you get in? What happened?” And she was having a conversation with five people at the same time–moving at lightning speeds in short hand language: “who is that” and “who got into what?” But the Instant Messaging is essentially a person, usually in a chat room, and it is just a way. It is literally a telephone conversation on the screen and it is instantaneous. I was amazed at how–I have four daughters–trust me they can all have five conversations at the same time on the computer. It is an amazing thing. So Instant Messaging is that. And it occurs, in the industry certainly, a lot of it occurs between traders–not just internally between traders, but on some of the trading systems such as Bloomberg, and so forth–where you back and forth on an Instant Messaging situation.

Panelist : So, how does it differ from e-mail?

Jim Tricarico : Well, it differs from e-mail in that it is not generally captured and stored, I am told. And it happens on a lot of different systems, so firms do not even know and can not even find it. Let me give the written definition I have here. Instant Messaging, IM as they call it, allows direct communication between individuals on the Internet on a more “real time” basis than e-mail. Consequently, it more closely resembles telephone communications and chat rooms. Regulators have not addressed whether or not Instant Messaging is equivalent of e-mail for supervisory purposes, and therefore subject to supervisory requirements applicable to correspondence of sales literature, or whether Instant Messaging is more similar to chat room participation, and therefore subject to the significantly less burdensome supervisory

requirements applicable to public appearances. Even if an IM is ultimately found to be more like a chat room than an e-mail, firms should provide training in some level of reasonable supervision over e-mail. I agree with that. I think that the issue with Instant Messaging for a lot of firms is, simply, that they do not allow it. They just outlaw Instant Messaging. They tell you do not go on chat rooms and we do not want Instant Messaging.

I am sure that can not last forever given the technology–but a lot of firms do not allow it and you can not necessarily police it. You have to have

Instant Message that they would not put in an e-mail, that they should put in a legal memo, because there is no way to be assured that it would not be captured somewhere by someone.

Panelist : Of course you are right. There is an additional issue–which goes actually one step past your point–and was something that I know I have been vocal about with a law firm from the beginning on this. There are things that you should never put in e-mail even if they would go in a memo, because they are confidential. For example, what if you send an e-mail through the system and you say “privileged and confidential attorney-client communication,” and it does leak to a third party? Does that destroy whatever privilege exists? Who do you want looking at that e-mail? Does it come into a secretary’s desk?

There are a host of problems in using e-mail. I know that is not on today’s agenda but there are all sorts of problems that exist in using e-mail for perfectly legitimate communications, but communications which are and should remain privileged.

Jim Tricarico : I think that you will find in all of the large cases that the industry has been confronted with right now, e-mail has played a very significant role. You have read about–if you have paid attention to the cases–certainly the internal communications that were had by a certain analyst with regard to the firms. I think it was alluded to earlier–and even in the Arthur Anderson criminal case, I think–the single most significant piece of evidence was an e-mail from an in-house counsel which ultimately was produced, privilege aside. E-mail had a great deal of significance and the outcome of that case was not good for Arthur Anderson.

Panelist : For those of you who are now starting out… it has permanently ruined her legal career, my hunch is that she will never practice as an attorney again and she was only in her early 30s. It is not clear that she actually did anything wrong. That is open to debate. But Arthur Anderson lost its case because of the e-mail that she sent.

Jim Tricarico : With that, I will pass it on. But I just want…I can not emphasize the importance of e-mail today, and I think that in your practice of law its going to be that much more important. The difference, I think will be, you’ll have a much better sense of e-mail than we do.

Panelist : Eventually we will all go back to manual typewriters and slate tablets.

Panelist : Yellow pads?

Panelist : The other day I sent somebody a thank you note–for participating in a program–that I hand-wrote. I got an e-mail from him–stunned that he was getting a handwritten note, instead of an e-mail from me. Some people do things like that.

Jim Tricarico : I can not leave the subject without telling just a little story about the Director of Dispute Resolution at the NASD, George Friedman, who works for Linda. I was privileged to serve on their National Arbitration and Mediation Committee for a few years and George was very upset when I had a period of time where I did not have an e-mail address. And he would call once every month and say “do you have an e-mail address yet?” I said no, “I’m fighting it. I’m not going to do it”. And when I got the e-mail address and gave it to him, he refused to send me anything.

Deborah Masucci : Now John is going to talk about the confidentiality issues and how it affects lawyers, especially the upward reporting requirements under the Sarbanes Oxley Act, actually under the SEC's rules that they just recently adopted.

Jim Tricarico : Guess who is the law school professor?

Deborah Masucci : He is standing up so I will have the microphone free to ask him questions.

John F. X. Peloso, Esq., Senior Counsel in the Litigation Practice, Morgan Lewis & Brockius LLP : I'm tired of sitting down, you don't mind if I stand?

Deborah Masucci : No.

John Peloso : My subject here is the standards of professional conduct for attorneys. And what I am going to talk about is exactly what Debbie said in the context of the Sarbanes-Oxley legislation, which is so far-reaching. I guess I have been doing this for more than forty years and I ca not remember any legislation that has come down in the time I have been practicing law that is as far-reaching as the Sarbanes-Oxley legislation and in so many ways which are not part of the discussion here today. But the lawyer provisions are important aspects of that legislation and worth talking about. Traditionally, standards of professional conduct for lawyers has been the function of the state, courts, and the state legislation and has essentially focused on the conduct of lawyers insofar as how they have represented their clients. How does a lawyer function with respect to representation of the client? Now you hear people saying: have lawyers fulfilled their responsibilities as I think the phrase Debbie used "gatekeepers"? Gatekeepers to what? To prevent their clients from violating the law. Now this is a new idea. And so now the question becomes: what new obligations do lawyers have under this legislation? What standards of conduct are they now going to be held to? And those are important questions. And to what extent has this changed from what we have known in the past. Now the new Sarbanes-Oxley provisions–which I will come to more specifically in just a moment–are really perceived from an analysis of the lawyer/client relationship only where the client is a public accountant–an issuer of securities–and only insofar as the lawyer is representing that client, or acting for that client toward the Commission–the SEC.

When you read the legislation which I am not going to go through here, you will see that the interpretation of when people are performing those rules is very broad. And so it is broad enough to reach people drafting documents as lawyers in a law firm that they know will be used in filings with the Commission. It is very broad–so what we are talking about is the Sarbanes- Oxley legislation. The new SEC rule that has been promulgated for standards of professional conduct for lawyers, which is what it is called–appearing before the Commission in representation of an issuer–essentially, these new provisions are an elaboration on the question: who is the client when the client is a corporation? Is it management? Is it the Chairman? Is it the shareholders? Who is it? It is really that theme that underlies these new provisions. And Sarbanes-Oxley has been generally imposing new responsibilities, new expectations, and new sanctions for lawyers who do not perform.

So let us take a quick overview: the Sarbanes-Oxley Act passed by Congress required the SEC to adopt rules within a specific period of time regarding, what is called "up the ladder of reporting"–when lawyers become aware of material violations of the securities laws. Actually the language is slightly broader than that, but that is the essence. They deal with a situation when a lawyer becomes aware of material violations of securities laws. The legislation mandates the Commission to implement rules designed to compel the lawyer acting as the issuer in representation before the Commission to report the evidence of that violation up the ladder.

I will get to that in a moment–what "up the ladder" means. So in November of last year, 2002, the SEC proposed a set of rules designed to implement Sarbanes-Oxley. In essence, they required–emphasis on required–required up the ladder reporting in certain circumstances, when they became violations. This was a change from what various codes of professional responsibility are provided, and still provide, namely that via the code of professional responsibility, if a lawyer representing a company comes across information that

somebody in the corporation did something wrong, they are permitted to walk up the ladder and report that. They are not violating any rules. This is a change in that it is requiring lawyers to do that when this comes to their attention. And “if the up the ladder”–meaning reporting it to the Chief Legal Officer–doesn’t work, going all the way up the line to the Board of Directors.

There are alternatives such as reporting this to what is called a qualified legal compliance committee, and there are all sorts of variations on this so you have to read the legislation. Then the scheme of the proposed rule was that if after reporting this, the lawyer is not satisfied with the reaction of the client or the Chief Legal Officer of the client, then he has all sorts of obligations. If this is the proposed rule–if the violations they were talking about were ongoing– then if he became unsatisfied with the response, he had an obligation to withdraw–if he was outside counsel, to withdraw from the representation and notify the SEC that he was withdrawing for unstated but reason such as this. If the activity being that he found had stopped, some past fraud, he was not required to withdraw, but could–could withdraw and notifying the Commission that he/she was withdrawing for this reason.

This is called “noisy” withdrawal. And when you think about it for just a moment, the permissive withdrawal for past violations was really a problem for a lawyer because: how will a client ever confide in you–that to hire you or a law firm to deal with a serious problem that is past. They have corrected it but now you have to defend lawsuits. So you sit down and say what happened? So you learned what happened. Under the first proposed rule, that lawyer, without breaching the attorney/client privilege, could if he/she wanted to, report that, withdraw and then say that I am withdrawing for ethical or important reasons, thereby triggering an investigation by the SEC.

Linda D. Fienberg, President of NASD Dispute Resolution, Inc. and Chief Hearing Officer of NASD Regulation, Inc. : John, would that rule–if adopted–would that preempt differing state laws with respect to attorney responsibility?

John Peloso : I think under the first proposal, Linda–I think that was the question. Under the final rule, it is attempted to be made clear. I am not so sure that it is clear–that these rules preempt the state, except where a state has a stricter rule. In which case, the stricter rule dominates. I think that is about it.

Okay, so the first rule proposed mandatory and noisy withdrawal–and the last thing I will comment on is: that the proposed rule permitted a lawyer to make a report to the Commission, the SEC if–I should read it to you, “in order to prevent the issuer from committing a material violation likely to cause substantial injury to the financial interest or property of the issuer, to prevent the issuer from committing perjury or obstructing the SEC, and to rectify the consequences of a material violation that caused or could cause substantial injury to the financial interest of the property of the issuer or investors, in furtherance of which the attorney’s services were used.” In other words it permitted the lawyer to go to the Commission; breach confidentiality in order to prevent the things that it indicated would rectify past problems in which the lawyer’s services were used. Very radical. So, what happened? There were–as Debbie said–loads of comments about this. And in January the Commission issued its final rule.

And how is it different? Well the “up the ladder” reporting remains as it was mandated to remain because of the Sarbanes-Oxley legislation. On the other hand, it has been softened quite a bit. You have to read the variance. For example–the first rule–lawyers are required to document what they did and keep records. And all that is gone but the essence of it remains. If a lawyer finds a problem, he or she has to report it up the line to the Chief Legal Officer. Secondly, the noisy withdrawal provisions were withdrawn. They are very controversial and they do not find themselves in the final rule. But the commission has issued a letter asking people to comment further on whether it is a good idea or a bad idea so they are not gone yet.

Lastly, the provision permitting lawyers to go to the SEC for the reasons I indicated, remained in the rule. And so the net of all that is that the new SEC rule requires lawyers becoming aware of material violations of the securities laws to report up the line does not require noisy withdrawal but it does permit the lawyer–if the client does not correct the problem, for example–it permits the lawyer to go to the Commission.

Now, how does that square with current rules? The reason why this has been very controversial–the permissive disclosure–is because it goes right to the heart of the ethical rules in most of the states. Up until now, most states have the provision saying a lawyer has to keep confidences confidential unless the client is about to inflict serious bodily harm on someone. If some client comes to you and says they are about to commit an ax-murder, you are not obliged to keep that confidential. Indeed you probably have an obligation to go to the police and stop the person's severe bodily harm. But there has been a line drawn on many states on bodily harm verses financial harm.

For years there have been advocates who have been advocating that financial harm is as bad as severe bodily harm. Therefore: if somebody comes to you and says that they are about to commit a manipulation in the stock market which is going to severely hurt a lot f investors, a lot of people have advocated that the lawyer be able to, and maybe ought to, have to go to the authorities and say, "hey, stop this person." That has been very controversial. The ABA and various task forces have recommended that we go to that. And, in essence, the Sarbanes-Oxley legislation has accepted that ordinance.

And so now we have it. Many states have it ready, and so it is not completely new. The people who argue against this say that lawyers are supposed to be zealous advocates. They are supposed to be people who clients come to and confidentially tell their problems, and their entitled to have that lawyer represent them, and they are not supposed to be policemen policing their clients. The two roles are inconsistent. Other people, such as judges, sometimes say, "well when all of this stuff is going on within Enron, where were the lawyers? Who was it who constructed all of the sophisticated partnerships, and were they not aware of the likely affect on investors and perhaps the illegality?" Who knows? An interesting series of questions, and you'll have your own view about it, but regardless of what your opinion is, we have Sarbanes-Oxley. That is not all. There are some provisions of–there is one particular provision of Sarbanes-Oxley which has not gotten very much play. And you probably have not read very much about it, but from her comments, I know that Debbie has read about it. And it is important for all lawyers practicing before the Commission.

The Sarbanes-Oxley Act itself and the rule also says that a violation of either the Act or the rules will constitute a violation of the securities laws and subject the person to civil actions by the Commission for penalties etc., and also to administrative action. So now you have lawyers with these ethical responsibilities, but who are not subject to enforcement proceedings against the Commission. The Act and the rule specifically say, "no private cause of action exists" for private purposes. However, it would seem to me that if a lawyer violates one of these provisions he/she has violated an industry standard, and it is not much of a jump to bring a civil suit or to include a lawyer in a civil suit saying that that lawyer acted contrary to an industry standard. It seems to me it provides a platform from which people can sue lawyers. But that is only part one.

Part two is this: the lawyer is also subject to an administrative proceeding by the SEC by which that lawyer can be barred from practicing before the SEC. How many of you have taken Securities Regulation and know that there is a Rule 102(e) which has been used for years by the Commission to sanction lawyers and accountants? And for years there has been a debate as to whether the Commission could bring a proceeding for just what they regarded as an ethical lapse or incompetence, or whether the activities had to rise to the level of violation of the federal securities law. There are all sorts of jurisprudence on this subject. And before Sarbanes-Oxley the SEC took the position that regardless of what the law was, that they were not going to bring these cases unless the lawyer acted in a way which violated the federal securities laws.

Well, with the stroke of a pen, that jurisprudence disappeared and the Sarbanes-Oxley Act in Section 202 adds a new section to the securities law. Section 4(c) of the Securities Exchange Act of 1934 talks about appearance and practices before the Commission and what it now does is it permits the commission to censure the privilege of practicing before it. If the person after noticing an opportunity for hearing is found (1) not to possess the requisite qualifications to represent others—the SEC can decide you are not qualified to practice before it– (2) to be lacking in character and integrity, or to have engaged in unethical or improper professional conduct such as failure to do what Sarbanes-Oxley says–and (3) to have willfully violated the securities laws. So you see what this "sleeper" provision–I think it's a "sleeper" provision because it just really got in at the end. It's a completely reverse 180 degrees all of the debate over when can the SEC staff take the provision that a lawyer ca not practice before them.

Jim Tricarico : What I think is significant here too, is where that proceeding takes place at this state in the game.

John Peloso : It takes place before the SEC and the administrative tribunal–before an administrative law judge who is part of the SEC.

Panelist : And I think it had an action brought against an attorney, but that action would have to have bought in a court, essentially. And now you have an appeal to federal court after a decision, but essentially the SEC gets to bring it in their own forum.

Panelist : Not only that your appeal rights are somewhat limited because an appeal would go from the ALJ to the Commission and from the Commission to a court of appeals–which reviews it for substantial evidence on the record? Is that what it is? You do not go before a court as you would if you were before a district court. You go before a court of appeals on a much more limited review standard.

John Peloso : That is right. The Commission would review it, meaning they would read the whole record and if they have a different view they would say so. When you go from the Commission to the United States Court of Appeals, the Court of Appeals review is limited to determining whether the Commission acted appropriately in exercising their judgment, whether their decision was based on substantial evidence or whether they abused their discretion regarding damages and so forth. That is all I have to say and I think the bottom line here is that the standard for lawyers have been raised considerably, and it would be very important if you get involved in dealing in any way with the Commission, or working at a law firm whose clients involved issuers of securities who file their papers with the Commission–which is practically everybody. You have all sorts of obligations and you have to read the statute because it talks about the role of supervising lawyers. It talks about the role of junior lawyers–how far do you have to go. There are thousands of questions. We could have easily spent four hours on this subject with questions relating to what all of these words mean. But that is just the outline.

Jim Tricarico : John, let me give you at least one question–because under Sarbanes-Oxley there is a lot of reporting up going on–not only by an attorney up the line to the Chief Legal Officer and perhaps to the Legal Compliance Committee–but there is also a line of reporting that can happen internally by a whistle blower that has to go up a line by an Audit Committee. The question I have is: if you take this back to the litigation setting when it could be an arbitration of course–these reports, this history–what happens to that as far as its evidentiary value, and whether or not its discoverable at this stage. Have any sense?

John Peloso : I have got to believe that since the report is mandated–I have not thought a lot about this, but since the report is mandated it has to be, I ca not imagine why it would be privileged because by definition, it has to go. I do not know that. Suppose—let us take your question–suppose I am a lawyer in your corporation. I discover a severe question, so I write a memo to my boss and I say “privileged/confidential”—I am giving the corporation legal advice. It has not asked me for the advice but the statute asked me for the advice. Therefore I evoke the attorney/client privilege on behalf of the corporation–so to speak–and this is a privileged and confidential communication I sent out. It is not discovery.

Panelist : On the one hand, I would make the argument if I wanted the document that it was a mandated document. On the other hand, why should it be privileged? I do not know.

Jim Tricarico : I agree. I think in that situation where it is an internal lawyer reporting out; and under Sarbanes-Oxley there is an interesting dichotomy here. Your obligations are essentially discharged if you’re an in-house attorney and you discover “evidence of material violation” and there will be reams of law and what that ultimately means. But evidence of material violation and you report it to a supervisory attorney? Now your job is done. Now it is the supervisory attorney’s job to see to it that it gets up the line, and the supervisory attorney has more obligation under the law/rules.

John Peloso : You see the great danger here is: if people get overly concerned about this and you have a really junior attorney–like somebody graduating Cardozo and starting next year–and we all scared the hell out of you today right? So you go down to this law office and somebody sends you to look at this document and you say . . . "holy smokes, this is evidence of a material violation of the securities laws!" You say, "what do I do?" And you want to protect yourself. You do not want to be like the young woman Linda talked before. So you write a memo and you begin the chain that Jim's talking about. And you now—it is like reporting a complaint to the police–once you started it, it lasts forever right? So, you now have started a chain which everybody will live with in our litigious society for the next year. You have questions of confidentiality. You have questions of what is the evidence; what do we do with it. And if you have a bunch of people up the line who are really worried about this, and do not want to make any decisions, they will keep sending it up the line. And all of a sudden what somebody thought might be a problem becomes written in stone–all sorts of possibilities.

Panelist : I think this is going to be critical for many of you if you go to either a public corporation or to a law firm. Feeding off of what John just said: suppose you are the young associate and you are overseeing the legal assistants doing document discovery, and you find such a document and you take it to a partner. Presumably you might be reporting to a senior associate or a junior partner–and that person tries to deep-six it–and then what do you do? Do you take it to the partner in charge? Suppose he/she does not do anything? Do you take it to the partner in charge of the client; you take it to the managing partner, and if none of them decides to do anything these can be really challenging issues for you–and the fact that the Commission now has real teeth in Rule 2(e)–I guess for those of us who are old as I am it will always be Rule 2(e) rather than 102(2) before renumbered. The commissioner really has teeth now which it did not have before Sarbanes-Oxley, and these are issues that are going to be real issues for you in all kinds of situations. I guess I do not envy you. I am glad I am doing what I am doing now instead of what I use to do.

Panelist : Let us get into a different issue before we get into whistleblowers. This morning I was on the phone with a lawyer who has been retained as an expert witness in two arbitration malpractice cases. And in one instance, the lawyer representing a party–in fact the winning party in an international arbitration did not ask for attorney's fees. And for those of you who do not know, in domestic arbitration attorneys fees are awardable except for certain limited circumstances and in international arbitrations, they are. You do not even have to ask for it. If you do not ask for it the arbitrators will go ahead and award it but you ca not deny them–deny the request. So he also has another case involving the New York Mercantile, but the issue is that people are exposing themselves if you do not know the rules–if you do not know the practice and it really puts a lot of responsibility on your shoulders.

Jim Tricarico : Now how many of you want to drop out of law school?

Deborah Masucci : It is too late. Actually unfortunately it is becoming a cottage industry that we are going to have to watch. Well, we have talked about whistleblowers quite a bit, it has come up in various context and now we are going to hear from Rob Whitman–who has, I think, the first whistleblower case in your firm?

Rob Whitman, Partner, Orrick, Herrington and Sutcliffe LLP : I think so, I think so. When Debbie started the program she said that we are here because of Enron and one of the reasons why Enron got the notoriety it got was because of an internal whistleblower. And if you followed that story in the papers at all in the last year and a half ago or so, there was an Enron mid- to upper-level finance executive, Sharon Watkins, who blew the whistle, wrote a memo, expressing grave concern about some of the accounting–what she viewed as accounting improprieties that took place at Enron and in the 20/20 hindsight and the postmortem of Enron, critics, congressional investigators, expressed the view that if we had just paid attention to this whistleblower we could have avoided the mess that Enron got itself into. Enron was not the only instance of that in the dominos of corporate scandals that we saw– Global Crossing, Tyco, WorldCom, all had prominent whistleblowers who played significant roles in exposing what they viewed as corporate malfeasance, and helped bring those companies down to where they are today. As part of that, Sarbanes-Oxley was enacted in response to that wave of corporate scandals. And one of the provisions of the statute was a series of protection for internal corporate whistleblowers, and it is the first piece of employee protection legislation at the federal level–I believe–in about ten years. The last one was the Family and Medical Leave Act in 1993. Before that there was a wave of significant employee protection statutes and we went through the 90's pretty

much with the status quo. And then in 2002 we had Sarbanes- Oxley and the whistleblower protection. So it is a significant statute for that reason among many others. Let me give a very brief summary of what the whistleblower protections are in Sarbanes- Oxley. Essentially it protects any corporate employee who makes a complaint internally and externally of what they view as fraudulent activity that violates–activity that would violate the federal mail and wire fraud statutes–that would otherwise be fraudulent activity with respect to the shareholders of the public corporation. Sarbanes-Oxley only applies to public corporations. The complaint is: what constitutes a complaint? Essentially it is a report to anyone in a management or supervisory position to anyone on the Board of Directors level, or even a complaint outside the four walls of the corporation to an appropriate federal investigatory authority or a member of Congress or the staff of a member of Congress. So what the statute does is it protects individuals who go public either outside the corporation or inside the corporation with what they view as fraudulent activity that the company is engaged in. If an employee suffers some adverse action as a result of blowing the whistle; if their employment is terminated; if they are harassed for some reason; if they are denied a promotion; if they are demoted–any sort of adverse employment action as a result of blowing the whistle then that employee may bring a claim alleging a violation of Sarbanes-Oxley.

Panelist: I suppose the issue that many of these cases may turn on is the “as a result of.”

Rob Whitman: Yes. That’s the issue in virtually all of employment law–whether it is a discrimination claim. Somebody claims that their employment was terminated because of their gender or age–proving that causation is critical and the same would be true in the Sarbanes- Oxley context as well. The dispute resolution mechanism is a little bit unusual–its not that the employee could go straight to federal court and bring a lawsuit, instead, they must file a complaint with the Department of Labor under procedures that were set up in a very different context affecting the airline industry, and those procedures have been for the moment adopted for purposes of Sarbanes-Oxley whistleblowers. They make a complaint to the Department of Labor and eventually get a hearing before an administrative law judge–which is a really a form of alternative dispute resolution as well, if we think of the “standard” being court system and the “alternative” being anything else than a hearing before an ALJ. ALJ is an adjudicatory on the record proceeding, but without a jury. Its not public as far as we know yet, although that may be an issue open floor debate and the ALJ issues a decision as to whether that person has established a violation of the statute or not. On an interim basis, if it is determined that there is probable cause to believe that there was cause or relationship between the whistleblowing and the adverse employment action, then on an interim basis, before the hearing before the ALJ is even completed, the employee is entitled to, if they were terminated, to reinstatement. And that is something that is just a sea change in the world of employment law.

Panelist : Is that like a preliminary injunction?

Rob Whitman : It is like a preliminary injunction but in employment it is virtually unheard of that if somebody is terminated than a court would, on an interim basis, order that that person be reinstated. They might order that after the fact, after the trial was completed or the arbitration was completed and there was a determination that that person was, or had been, treated unlawfully, but this quite unusual in Sarbanes-Oxley to find it. Yes, question?

Audience Member : Who has the burden of proof?

Rob Whitman : Once the employee satisfies an initial burden of showing that there was cause or a relationship, then the burden shifts to the employer. And this is another significant change, to show that by clear and convincing evidence that the same action would have been taken against that employee notwithstanding the whistle-blowing activity. That is again–for those of us who represent management in employment cases–that is a very different paradigm for resolving cases that we are used to dealing with.

Panelist : Are there parallels for clear and convincing evidence in the civil context? I am not sure I am aware of any. I am sure that there must be some that exist, but people have tried that before in the context of SEC proceedings and failed to establish that as the burden. That is a very heavy burden on employers–by clear and convincing evidence.

Rob Whitman : It is a heavy burden and the employee first must establish the cause of relationship–in effect a prima facie case and in the discrimination contest the prima facie case cause is a very low burden. My guess is that as we see the cases develop under Sarbanes-Oxley we will find the prima facie case will be a somewhat more onerous burden for an employee because of the significant burden shift that takes place.

Panelist : Does the employee ease burden of preponderance of evidence?

Rob Whitman : I believe so.

Panelist : The affirmative defense is clear and convincing.

Rob Whitman : That is right.

Panelist : Doesn't sound right to me.

Rob Whitman : No shortage of issues ripe for active debate in the court as the cases find their way there under Sarbanes-Oxley. The state was enacted with, I think, zero or virtually no legislative history and on an extraordinarily fast track, and I agree with you completely—it is one of the most far-reaching statutes in decades. And for a statute of that magnitude to have been enacted so quickly and with so little legislative history cynics would say: full employment for lawyers.

Rob Whitman : Agreed. The question was: what is the rationale for reinstating the employee since back pay could make them whole after a hearing. I agree.

Linda Fienberg : I would argue that back pay may not make somebody whole. For example, if you are in the technology field–if you are out for three or four months, particularly in this environment where getting work could be hard–you could loose a lot of what we might call "up-to-date skills" and what not. I do not know whether that was the rationale, and as Rob has suggested, there is not enough legislative history. But I do not ever think that just compensation makes you whole. I think, also part of the rationale–and again the legislative history is very scant–it is to discourage firms from in any way, shape or form of retaliating against whistleblowers–and I mean to the extreme, obviously because you never heard of a burden shift like this before. And I think that any firm that has looked at this and understands it realizes that to discharge a whistleblower is something that you can not do lightly, and if you do it, you should have a very, very strong case that you already got prepared when you do it. Now, that takes you to the ultimate conclusion that there are going to be a lot of people who are worried about their job become whistleblowers and hope that they can hang on to it like that, and if I think you are wrong, it will.

Panelist : That is going to happen, and if you do want to fire someone or take adverse action, you had better have a really strong record of everything that this employee did that was not up to par before the employee blew the whistle–otherwise I expect people like Robert, who are going to advise you just to sit tight with that employee.

Rob Whitman : And people like Rob are going to advise you that: "how come you only did it for this employee and kept such a record. And did you have it out for this employee" –so you better have a good system as to all employees.

Panelist : You have been assuming that the whistle actually is correct. What we have today is the gray area. And what if they were wrong but it was done in completely good faith?

Rob Whitman : The statute again is silent on that point. The question was: what if the whistleblower is wrong but acted in good faith? There is no requirement that the whistleblower be right in blowing the whistle. And again, the statute is silent on this, but my guess it that what we will see is a standard of the whistleblower acting in both subjective and objective; acting reasonably on both the subjective and objective basis.

Objective, meaning that it was reasonable–a reasonable person would have concluded or suspected that there was some fraud or untoward activity going on–and also on a subjective basis–that the individual truly believed in good faith that there was something untoward going on as opposed to the beleaguerer who was just trying to insulate themselves with what they view as an impending termination. But the statute is not clear on it–but that has been the standard in the retaliation context under the civil rights laws. If somebody claims that they were terminated in retaliation for making a complaint of discrimination: that is the standard courts have adopted. In that context, I would see that becoming the standard in whistleblower cases as well. Let me transition to just talk about the arbitration issue…

Panelist : If the ALJ decides for the whistleblower, who can appeal and to where?

Rob Whitman : The appeal process works like this: if the ALJ does not issue a decision in 180 days, then the employee has a right to take the case to federal district court and pursue it just like any civil law suit. If the ALJ does issue a decision within 180 days, then the appeal is taken to a federal court or the appropriate regional federal Circuit Court of Appeals on a standard of substantial evidence.

Panelist : And either side could take it to the Court of Appeals?

Rob Whitman : Correct. Correct. Transitioning into the issue of arbitration…a question has arisen whether claims under Sarbanes-Oxley can be subject to arbitration of employment disputes–in particular, whether they can be subject to the mandatory pre-dispute arbitration agreements that many employers have with their employees in that the self-regulatory organizations have in place for registered representatives, with limited exceptions in the context of statutory employment discrimination claims. We are handling a case on behalf of a client that is now pending in the Southern District of New York, in which a former employee's research analyst brought a claim alleging, among many other things, termination in retaliation for blowing the whistle in violation of Sarbanes-Oxley. This is an employer that has an arbitration policy in place for its employees that has been tested and upheld many times in the courts–that the agreement is enforceable as to employment claims. And we have taken the position on behalf of this client that claims under Sarbanes-Oxley are just as arbitrable as any other employment claim would be under the employer's policy, as well as under the NASD code. The employee, through his lawyer, has opposed that. And the issue is now pending before the court, so we do not have a decision on that, but I think that I am biased on it. I am not personally involved in that case, but I have read the papers and I think that clearly we have the better of the argument to support the conclusion that claims under Sarbanes-Oxley really are no different from a claim of breach of contract, claim of employment discrimination, or any other sort of claim that an employee would bring with respect to termination of employment. And to the extent that there is a valid, enforceable arbitration agreement in place, the Sarbanes-Oxley claims would fall within that just like any other claim.

Panelist : Can you tell us who is the judge that you have?

Rob Whitman : Judge Owen in the Southern District.

Panelist : And what is the status of the case?

Rob Whitman : The motion has been argued and is pending before the courts. It is not yet decided. It is a motion that we brought on behalf of the client to compel arbitration–that is to force the case into an arbitration forum before the NASD and have the litigation be either dismissed or staid pending the results of that arbitration.

Linda Fienberg : Thank you, Rob.

Panelist : Could you send me a copy of the paper.

Rob Whitman : Sure.

Debbie Masucci : He is going to write a law review article on it.

Rob Whitman : Yeah.

Debbie Masucci : You know, we touched upon a lot of areas that arbitration hits in all of these topics. But I asked Linda to talk about what she is seeing in the dispute resolution forum. Are there claims being filed? What is the experience up to date? Linda?

Linda Fienberg : Ok. Thank you. Let me just give a little bit of background because there is no reason that any of you should know much about what we do. Most of you–if you have a brokerage account, you may not yet, but if you do–you have signed 99 out of 100, I bet every single one of you–if you have an agreement, have signed a pre-dispute arbitration agreement, pursuant to which you agreed that if you want to bring a case against your broker or the brokerage firm, you will bring it to a self-regulatory organization arbitration forum. Most often, that is either the NYSE or the NASD. NASD has over 90% of the cases. I would like to think we are better than the NYSE but really it is because every broker and every firm must be a member of NASD and the number of NYSE members is much, much smaller. So we get the bulk of the cases. And when you sign this agreement, it is not supposed to be hidden from you that you are signing it. Part of the agreement that requires arbitration is right above the signature line in bold print, and tells you the differences between arbitration and going to court. It tells you essentially what rights you are giving up: right to a jury trial; that if you have a panel of 3 persons, one of them may be from the industry; that discovery is more limited; that you do not get a "reason decision," and that your appeal rights are limited. I urge everybody to read everything they sign. I am one of the few people. When I am in a store they think I am nuts when I am reading through whatever I am signing.

We have three kinds of cases: over 70% of our cases are investors bringing a case against their broker or against the brokerage firm. Almost in all cases, they also name the firm because that is the deep pocket. Occasionally, a firm will bring a case against a customer, particularly a customer owes the firm money on a margin debt. The other 30% of the cases involved employees against their firms, firms against the employees, or firms against firms. And to be either a firm or an associated person, you have to essentially agree that you will arbitrate at the instance of the customer, or that you will arbitrate against each other. So that if an employee wants to bring a case against the employer, the employee has agreed in advance that they will under what is called a Form U-4 that they will arbitrate. Now there is one carve-out that fits into what Rob is doing, and I will mention that first before I will go into the enforcement kind of stuff. We have an exception from the Form U-4 requirement that everybody arbitrate for statutory discrimination claims. We permit firms to require their employees to enter into these pre-dispute agreements, but we do not mandate it. For customers, we do not mandate it at all, but for employees we do not mandate it in the area of statutory discrimination claims. So, one of the first issues will be the whistle-blowing Sarbanes-Oxley statutory discrimination case, and should there therefore be something specific in the pre-dispute agreement that either mentions it so that a firm clearly covers it.

Assuming that it does properly belong in arbitration, the second issue will be: will that whistleblower case in arbitration get out special provisions for statutory discrimination cases. A number of years ago, we adopted special requirements for the arbitration panelist, special requirements for discovery, and special requirements for what the award has to say in identifying the reason for the decision in the statutory area that only pertain to statutory discrimination cases. So there is a question about whether Sarbanes-Oxley whistleblower provisions will be under these special provisions. My hunch is that if firms win in getting these cases into arbitration, they properly are not going to want to take on the issue also of whether these cases are entitled to these special provisions. My hunch is that they will agree to live with them on the theory that if you win half-way—do not kill a good thing. I also believe that bad facts make bad law, and if you keep people from having these special provisions that are designed to protect employees in these kinds of situations, ultimately the firms will lose out. So, we do not have any of these cases yet under Sarbanes-Oxley, but we will see what happens which this case.

John Peloso : I am assuming that that issue was raised in your case?

Rob Whitman : In terms of the carve-out, the statutory employment discrim–

Linda Fienberg : Yes.

Rob Whitman : Yes. It is not a determinative issue in that case because this employer does have their own, much broader arbitration policy which covers all claims–statutory, discrimination or otherwise. So to the extent that that policy will apply to Sarbanes-Oxley…we argue that it should. Then the issue of the NASD code will fall by the wayside.

John Peloso : There are firms who take the position that they will not force employees to arbitrate, even though there is this U-4 requirement. The U-4 registration form that an employee signs to be a registered representative of a broker-dealer–that form incorporates the rules and relegations of the NASD. One of the rules and regulations of the NASD being the arbitration of claims with the exception of the statutory discrimination claims. However, some firms have taken the position publicly and in their day-to-day practice that they will not attempt to enforce that. That if an employee does not want to arbitrate, they will not attempt to force the employee to arbitrate any issue. They will allow an employee to bring a case wherever they want. Most of those firms have their own internal process for an employee to bring a claim and "up-the-line" to an ombudsman-type of review.

Linda Fienberg : There is a perception that arbitration–and maybe you all do not hold it–that arbitration particularly–when customers or employees do not have a choice, is not there. But let me tell you some of the things about arbitration that are really good, particularly for customers. It is definitely faster, even in a full case that goes all the way through the discovery process and then in award—you are in and out in approximately 16 months. In Miami, you can not get a civil case on a docket. I do not know–they are turning 3 or 4 years now. I do not know if it is any better in New York, but that is just by want of example. Discovery is limited. Now that may sound like a disadvantage, but if you were, for example, Merrill Lynch, you have an endless pocket with which to take depositions. Depositions are hugely costly. If that were to happen in a case where you lost $25,000, you would–even if you got full recovery–you would be out of the ball game just from the cost of those depositions. So, although there is document discovery, depositions are very, very limited except in extraordinary circumstances. It is also cheaper. It is also private. Now some people wish it were open and transparent. But suppose you were a really well-heeled customer, and you have had to turn over your tax returns, and you have accounts at a variety of firms, trading in a lot of esoteric instruments. If it were not private, the whole world could sit in and write about your arbitration case. So for many people who arbitrate the fact that it is private is an incentive rather than a disincentive.

Debbie Masucci : Except that does not help when the award becomes publicly available if it does go to an award.

Linda Fienberg : That is right. Seventy percent of the cases settle. They settle early on. We encourage the cases to go into mediation. The award itself is public. But the award will not go into the kind of detail that would have been presented. A couple of other advantages: the rules of evidence do not apply. That most often helps the investor or the employee rather than the firm. And you can represent yourself. Now, we actually advise in cases over $50,000 that you have a lawyer. If you have to get a lawyer in a smaller case, it is a good thing. Most of these cases are handled on a contingency. But, in fact, if you have a $10,000 case and you do not want to hire a lawyer, you can have the case decided just on the papers that you have presented, and you do not have to be represented. So those are just some of the advantages. The other real advantage is that customers settle 70% of the cases, which means they get some remuneration, and they win about 55%-62% of the cases that go to an award. I think we all on the panel here would say that half of them would get kicked out by a court on statute of limitations grounds, failures to really state a claim for damages, failure to prove that the firm actually is responsible for failure to supervise–which is a heavy burden. So investors win many more cases in arbitration than they would ever win in court. And my own view is that 85%-90% of the cases…if there were no pre-dispute agreement requiring investors to come to arbitration, that 85%-90% of the cases still would.

Rob Whitman : The evidence also shows that employees fare better in arbitration, at least in the securities industry forums, than they do in court–in terms of prevailing and the median time from when the claim gets filed to when the judgment gets issued is much fast in arbitration than it is in court.

Linda Fienberg : That is definitely the case, but it is not to the same extent as an investor case.

John Peloso : I can not resist saying to you, though, that a couple of you go on as panelists at the Bar Association on arbitration, and I was asked to talk about the advantages and disadvantages of arbitration versus court. I started out by saying that there are five real advantages of arbitration: (1) there is no judge and you have arbitrators who do not have to apply the law, (2) there is limited discovery; (3) there are no rules of evidence; (4) there is no motion of summary disposition, so you can bring any claim you want and get a trial; (5) lastly, there essentially is no real right of appeal. There are five disadvantages of arbitration: (1) you may not have a judge who applies the law; (2) you have very little discovery; (3) you do not have rules of evidence; (4) you can not get a case won or lost on motion – you have to go to trial; (5) and lastly, you really can not appeal the decision. It seems to me that this is a glass half-empty and half-full.

Linda Fienberg : John is absolutely right. The main advantage–that I believe for investors, apart from these things–is that they win a lot more often. The main advantage for firms is that they have calculated that for them–the cost of not having an elaborate discovery process, and to be able to be represented across the country by their in-house counsel, is worth it even though they may lose more cases (which they definitely do) than if they were in court. So apart from the five or six steps that John has gone through, those two things that I think really weigh heavily.

Let me talk a little bit about enforcement. We are different from Debbie's forum, JAMS or the AAA, because we are part of an organization that is a regulatory. NASD's job is essentially being a regulator for the securities industry. So there are intersections between the two that do not happen in other forums, and thy will play, I think, on a lot of the cases that will be brought ultimately relating to particularly the analyst cases. For example, the awards are public documents. It is very difficult, even if an associated person or broker prevails, to get that information taken out of his public–what is called a CRD record–it is a registration form. The enforcement arm of the NASD now reviews every claim when it comes in the door, even before an answer is filed to see whether they can spot a trend, or whether there is some activity they should be looking at on the disciplinary side. NASD regulation has a new initiative which essentially says that if they are investigating a firm, and they send the firm a letter that we are not going to go forward to bring a case against you, that the firm cannot introduce that in the arbitration to show that there was no liability in the part of the firm. And if somebody does try to introduce it, the NASD said that it will bring disciplinary action. NASD can, and has, brought enforcement cases against brokers for what they do in the arbitration forum. The most recent one was a case where the arbitration panel told the firm it wanted to see a document that the firm was claiming to be privileged. The firm refused to give it to the arbitration panel for in camera review, and at the end of the case, the NASD brought a disciplinary action for refusing to turn that document over to the arbitration panel. And finally, if the investor wins and does not pay in 30 days, NASD can bring a proceeding to suspend the firm or an individual broker for selling securities to the public–which of course is pretty drastic and will put you out of business. So, there are a lot of intersections between the enforcement area and the forum.

Rob Whitman : We are presented with the following: you have an arbitration in that case where an assertion is made that a document is privileged. The panel decides they want to see it anyway, and they ask for an in-camera review. I have no knowledge of that particular case, but I am assuming there was a reason that they wanted to maintain the privilege with regard to this document–probably unrelated to that particular case. By virtue of turning it over to an arbitration panel–because they decide that they want to see it in camera–will not necessarily preserve the privilege in that document. They are not a judicial forum. It is not a judge, and there really is not such a thing as selective waiver. Not true necessarily under Sarbanes Oxley, with regard to that. So, by turning this document over to arbitration panel, you may have waived the privilege with regard to that document and anything else you want to use. So to have enforcement on, and have the NASD come in and bring an action against the firm, a disciplinary action for failure to produce that to a panel seems pretty extreme to me.

Linda Fienberg : I think the law is pretty unsettled as to whether the arbitration panel would be treated as a judge for waiver purposes. I think it is unsettled. There are a lot of difficult issues in what we do. One answer–which the industry finds very unsatisfying–is that if you are going to force investors into this forum and not give them the choice to go to court, you are going to give up certain kinds of things you might be able to do if you were in court. It is a very unsatisfactory answer, but it is an answer, and it does, in a lot of ways, create an aura about what we do, or certainly make conditions about what we do. It makes us different from JAMS or the AAA because of that, and because we are so highly regulated by the SEC.

Rob Whitman : Linda, did the firm in that case apply to the court?

Linda Fienberg : No, it did not.

Debbie Masucci : And is it appealing the fine?

Linda Fienberg : No, it did not. It may have ended in a.., I do not remember. The case is over. I can not remember whether they settled it ultimately, or whether … I do not believe it went through a hearing panel, so I think it was settle.

John Peloso : That firm went out of business. That may be…

Linda Fienberg : No, but this happened before that. They settled first.

Panelist : I was going to mention terms of the enforcement of judgments. There is a case recently that came down where the SEC when to court to enforce a judgment–an award–against a member firm. If the NASD does not have the power to compel someone to give money, they have the power to affect their license essentially. The question is what happens if a firm does not pay; if they want to go out of business. The SEC just recently had a case upheld in federal court enforcing an SRO order, which I think is an extension of the powers.

Linda Fienberg : One of the problems we have–this is a bit of an aside–are unpaid awards. Because is a firm is terminated, goes into bankruptcy, or otherwise goes out of business, there is no mechanisms for an investor to be paid an award, but that is really no different than if the investor had a court judgment. If someone has filed bankruptcy or is proof-proof, you are not going to be any better off, and you can take an award, actually, and get a court to confirm it which would give you the same rights that you would have as you would have had a court proof to collect that.

But to answer Debbie’s question–what are we seeing? We are seeing a huge increase in the number of cases. Last year we hit an all-time high of 7,704 cases. In the last 2 years, that is up 40%. This year we are already 23% ahead of last year’s record number of cases–which means we could easily have over 10,000 cases this year.

In terms of Enron and analyst cases and related kinds of things, we have about 110 cases that have come in the past few months which we have coded as “analyst cases.” Now I would not have been able to identify them (because we do not identify cases before an award is issued) except the lawyers for the customers have been talking to the paper now for 3 months about these cases. One of the majority series of cases is against Salomon Smith Barney and Mr. Grubman for the advice that Mr. Grubman gave…no that is putting it wrong; for the analysis that the claimants have alleged Mr. Grubman gave with respect to WorldCom. And those cases are all for claims under $25,000, and they will present interesting issues because none of the claimants had an individual relationship with Mr. Grubman. None of them has claimed that they ever spoke to Mr. Grubman. But they all did have accounts at Salomon Smith Barney. That is one kind of case that we are seeing. We are going to try and find mechanisms to make the cases be handled efficiently. There are 70 of them. They are all for under $25,000, but they have all been filed as individual cases. And the parties have agreed to pick 6 cases apiece, which will be mediated. So we have 12 cases that will be mediated. The others will be held in abeyance. If they are satisfied with the results, we are hoping that we can get them to

agree to put all of the cases in mediation with just a few mediates. We can do it much more cheaply for the parties.

“This analysis was not very good. It should have deterred me from trying to buy the stock.” Now, that case we would serve mandatorily, because the investor has an account at Merrill even though it is likely that the arbitrators would dismiss a case like that, because there absolutely no nexus between the customer’s account at Merrill and Mr. Grubman’s advice at Salomon Smith Barney. Most of these cases allege that the firm failed to supervise. They also allege that the firm breached its fiduciary duty to the customer and that there were either outright misrepresentations or omissions. We expect that once there is the global settlement that you have all read about with the 7 to 10 firms, depending on how many sign up, that we are going to have huge numbers of cases based on those settlement documents. We have been told by counsel who represent investors that we could see upwards of 1,000-2,000 cases based on the settlements in the global settlement relating to the kinds of analyses that were done at the large firms. John, you look like you wanted to ask a question? No?

John Peloso : No.

Linda Fienberg : As a general matter, I think I have indicated investors do really well in the forum. It will be interesting to see how well they do in these analyst cases. We have a couple of cases, in-house, against Merrill and Henry Blodgett. One arbitration panel dismissed Mr. Blodgett from the case and another panel did not. So one of the things that happens in arbitration is that you get inconsistent results, but I can be much more informative about these cases if you invite me back a year from now when we will have a lot more information–because they are just starting to come in the door.

Debbie Masucci : Is there anything like consolidation of…

Linda Fienberg : We have the authority to consolidate the cases. We have elected, with respect to these 70, not to do so. They were brought as individual claims. The investors have paid their fee to be in the forum. The parties, certainly the counsel to the investors, have indicated that they want to have separate cases. Nothing, however, stops. If the director of arbitration does not consolidate, nothing stops an attorney from a firm to ask that it be consolidated. And then that gets complicated, because the panel you get to first is the one that hears the question. But there is some authority to do that, if we thought, in our discretion, that it was the best way to go.

Debbie Masucci : Putting discretion aside, in the last few years, there have been a number of mechanisms that have been used to handle mass cases in different situations. One, where a class action was being filed in an employment context; another, where there was a single product that was involved–and as a result, a regulatory settlement, a whole dispute resolution process, was put together. And, one where a mediator actually crafted with the parties a dispute resolution process. And I have asked individual people to talk about separate types of these processes so that we could learn from them for the future use of the NASD or any other forum. So John, because yours is the last, will you talk about yours? Prudential is the first one.

John Peloso : Right. Prudential Securities created a claims analysis process several years ago to deal with claims related to limited partnership problems. As settlement was reached, the regulators, specifically the SEC and the NYSE as well as the states that required, in part, for Prudential Securities to pay a significant amount of money into a pot. That money was to be used to pay valid customer claims with regard to certain direct investments and limited partnership products. And there were several limited partnerships, but essentially the product in question was limited partnerships. And what we did was set up a claims process whereby we went out and hired a group of attorneys–individual counsel–to join us in-house. And then we commenced the claims process. We sent out approved forms–approved by the regulators–a claims form that was sent to anybody and everybody who purchased the limited partnerships, and they were given an opportunity to fill out the form and send it in and make a claim. Now, there were certain circumstances in which they were not eligible to make a claim. For instance, if they had they previously made a claim that had been adjudicated, could have been an arbitration, or it could have been by virtue of a class-action settlement with regard to one of the limited partnerships. But if that was not the case, the claim came in, and was initially

reviewed by one of the in-house attorney. For the most part it was the attorneys–some legal assistants–reviewed by attorneys and the initial determination was made as to whether or not they thought the claim was valid, and if it was valid, how much they thought the claim was worth. This whole process was overseen by an independent consultant that we brought in to look at this–Pollock, who was the former commissioner of the SEC–and he along with some outside counsel that he had retained, had oversight review of everything that was done, how it was set up, the criteria that was used and so forth. And thousands and thousands of claims were reviewed on a consistent basis over a couple of years (probably three, I do not even remember now). And a response was sent back to the customer with regard to their claim, and the customer had the right to accept it. And, you know, whether they agreed to accept the response, which might have been, “Sorry we don’t think you’re entitle to anything,” or “Yes, we think you’re entitled to X.” Or, if not, an adjudicative process was created where hearing officers who were selected by Irving Pollock were available around the country to hear these claims–these individual claims. Now, they were not done in group fashion–we did not join a bunch of people together–the people were afforded the ability to do them individually, and many of them were done on phone or in a conference call setting so you do not put people to the expense of being in certain locations, and so forth. This afforded a very informal and simple process for the claimants to utilize. The hearing officers were, as I say, selected by Irving, not by us, and their views were overseen by Irving and his people. And in fact, many, many hearings were held. Now, the advantage of the hearing officers after a while was that they certainly knew–they were very familiar with the individual limited partnerships, and having done any number of hearings, there was lots of information that they did not need to get at the new hearing about particular partnerships, about representations that were made, and so forth. So they came to the hearings with a great deal of knowledge and expertise as time went on. So the process went on for a significant period of time and hundreds of millions of dollars were paid out in this process over that period of time. There was somewhat of a review process post-hearing, on a very limited basis.

Panelist : How much money was paid out? Do you know the amount?

John Peloso : I do not, you know. I knew the answer to that question, but I meant to check. But I do not remember the exact number at the end of the day because often times they get grouped together with the fines that were paid and so forth.

Panelist : Was there a cap on the SEC settlement?

Panelist : There was a program subsequent to Prudential and they proved very, very beneficial to investors.

John Peloso : I think that the interesting thing that is going to come up in the analyst cases–and Linda certainly referred to it–involves the document that is being finalized with the regulators. The AWC will spell out what the settlement with the regulators is, and how this document is used. The settlement document that was used in the Prudential case with the regulators was a significant document. This document, I can assure you, will be attempted to be admitted into evidence in the arbitration. OK? I believe, and I am not involved in the negotiations and I do not know what discussions have been had with regard to language. But certainly, if I were on the defense side of that case with the regulators, I would want language–I guarantee–it will say that the firm neither admits or denies that violations. However, I do think that counsel will want to give language that the documents are not admissible in litigation or in arbitration. Now, whether that happens, I do not know. And I said, I am not a part of…

Linda Fienberg : I have not seen the documents involved in the negotiations, but I would be surprised if it really had that language.

John Peloso : Again, I ..

Linda Fienberg : Let me just say that there are lots of investor counsel out there.

John Peloso : I am sure that is true. And I am sure they are going to have the input into…I do think, though, that whether or not it has that language, one of the problems that you have in arbitration is that it will get in

front of the arbitration panel. And if it has the language, it will argue that it should not be admissible. And if it does not have the language, it will argue that it should not be admissible for a lot of good reasons. We talked about that the strict rules of evidence really do not apply in arbitration, and the panelists are free to take, for what it is worth, anything they really want to, just about. And I can guarantee you that whatever the language is in that agreement, that the agreement will get in front of lots of arbitrators.

Linda Fienberg : It is going to be interesting to watch and see how this will all develop. Now, we just talked about a situation where the arbitration process that was designed was out of a regulatory proceeding. There is a special provision under the self-regulatory rules that does not permit a class action from being filed, and it does not permit a party to basically break the opportunity of the class action by asserting that one of the putative class members is part of the class action. So a number of years ago, there was an employment discrimination claim against a few firms, and the employees did attempt to file a class action. What resulted from that process was a dispute resolution process that included both mediation and arbitration. And Rob, do you want to talk to that?

Rob Whitman : Yeah, this was a case that was filed as a class action on behalf of female employees of a brokerage firm alleging gender discrimination, harassment and other forms of gender discrimination. The case was settled and as part of the settlement, there was an elaborate claims resolution process that was set up similar to what was set up in the Prudential cases, but with some important differences. And that process is still going. Essentially the way it works is that there are a number of different steps in the process. There was a period of notice given to the members of the class about this process. Notices went out, published in newspapers, in various sorts of ways in publicizing this to the class members. They then had a period of time to submit claims to the company in order to be addressed, and they did not have to be represented by counsel. I do not believe that there was any specific forum that the complaint had to take–just that if you fell within the class and you felt that you were subjected to unlawful treatment on the basis of gender during the specific time period, submit a claim to the company and the company will address it. About 2,000 claims were submitted. The company then did its own internal analysis of each claim and made a determination as to whether to make monetary settlement offers to particular claimants. On some of them they determine there was no merit to it at all and didn't make any settlement offer. If they made a settlement offer, they would communicate that to the claimant for her counsel. And then the claimant decides whether to accept that offer or not. If they rejected the offer, the parties agreed, as part of the settlement agreement, to engage in non-binding mediation under the auspices of the Duke University Private Adjudication Center, which is an organization like JAMS, like NASD dispute resolution, like AAA. It is a private entity which is in the business of offering dispute resolution services. Before this took place, the parties on both sides agreed on a large group of individuals to serve as potential mediators and potential arbitrators as part of this process. So, if the offer was rejected, the case then went to the Duke system for private mediation. And mediation–I do not know how familiar you are with that process, but it involves a neutral third party who gets the two sides together and tries to broker a compromise. Now most of the time that works, but sometimes it does not. And if it did not work, then under this arrangement, once the mediator determines that the parties were at an impasse will make a mediators proposal which in my experience not through this process, but generally involves a mediator saying that one side is at $1 million, the other side is at $100,000, the mediator will make a proposal usually somewhere in the middle but sometimes skewed more in one direction or the other. It will say, "This is what I think the case settle for and this is my proposal, and you have 24 hours to give me a confidential yes or no. If you both say yes, we have a deal. If one of you says no, then there's no deal." If that mediator's proposal was rejected, then the claimant had 30 days to submit a complaint for arbitration which would also be handled by the Duke University Center and would also be subject to an arbitration panel that would be chose from this same group of potential mediators and arbitrators. The mediator who handled that particular case would obviously not be able to serve as an arbitrator in that same case, but individuals could sometimes serve as mediators in one case and arbitrators in another case. It is just a random selection process that Duke was overseeing. The arbitration process was to be completed in 6 months from the time of the mediation failed and there is no limit to what remedies the 3 member arbitration panels–no limit on the remedies that they could award other than the limits that are established by law. So if there is a claim for gender discrimination which allows awards of punitive damages or compensatory damages or reinstatement or attorney's fees, then that is what the arbitration panel is allowed to award. If a particular source of the claim did not allow that sort of relief, then the arbitrators could not award that sort of relief. The same sorts of efficiencies in terms of discovery applied in its arbitration system. There is a strong presumption against depositions (which are timely and costly) and there is no time limit, I believe, on when the arbitrators have to

issue a decision after the hearing is completed. But they do have to issue written, reasoned decisions, which is unlike the system in some other forums. The process has generally worked well. There are now out of the 2,000 or so claims that were filed, and now just under 100 claims that are left for resolution. Only 2 have thus far gone forward to a complete hearing on the merits, although there is a handful that are one the track and ready to be heard in full-blown arbitrations.

Debbie Masucci : Thank you. There is also one other model that occurs–and it is seen by JAMS more and more–but I think that there is a spread on this type of process developing, and that is where the parties–and generally that is where a claimant has a number of cases against one particular organization, whether it is a business, company or broker-dealer–and they hire a mediator. And the mediator's role is initially to help the parties craft a mechanism to resolve the dispute(s). And in a recent case, what the mediator did was craft a mediation process that would be used initially. And what they did was they identified several cases which would be representative cases similar to what Linda mentioned earlier, and those cases went first in mediation. They used the results of those mediations to determine if they could settle individually other cases. The remainder of the cases that could not settle either through mediation or negotiation were then subject to an arbitration process, where it was a high-low arbitration process. The parties would assess the case and each sign or seal an individual estimation of what they thought the value of the case would be, and what the result would be in the arbitration case itself. They again went before, not the mediator, because the mediator now converted his or her hat to an arbitrator, and started to offer evidence to that arbitrator. On the instant case that we recently had–by the time the evidence was offered to the arbitrator, the parties got a little cold feet because they were not sure which demands that the arbitrator was going to select and decided that they were going to settle the case themselves. So, none of the cases actually went to arbitration. But it is representative of a process that forces the parties to negotiate early on and forces the parties to look at alternatives that would result in the fast resolution of the case.

Linda Fienberg : I will also posit that any process that gets the parties to reach a settlement themselves–whether it is the cold feet at the end of the day–is the right process. We work very hard to push our parties to mediation when they come into the forum to arbitrate a case. Mediation is voluntary. It is a win-win for everybody and if parties can settle on their own, so much the better. But if they can not, they should use a mediator. But any process that gets the parties to come to their own agreement instead of waiting for someone to issue a decision is definitely a better form of ADR for everybody.

Debbie Masucci : I am going to give the panel 1 minute each if they want to make any final comments. John?

John Peloso : I have got $1 that says no one sticks to a minute!

Rob Whitman : Lawyers get paid by the word.

Debbie Masucci : Six months ago when I first called John and talked to him about this idea, we talked about how rich this topic was, and how the areas of arbitration and mediation really are intertwined. I think that what you have learned today is that there is still more experience that we are going to have, and that our imagination is all that limit the use of arbitration and mediation, and that the Sarbanes-Oxley Act will result in a lot more questions than answer that they thought it was going to answer. But we have only brushed the top level of the topics that can be identified in this Act, but I think you got a flavor for the different issues that have already come up.

I want to thank the panel for their time. This was put together for 2 ½ hours. I did not think it would go 2 ½ hours. We are short 10 minutes, but that is OK. Thank you very, very much for your time and thank you for your attendance.