DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Maria Green

& the Law Department of Ingersoll Rand

THE SPEAKERS

Maria Green
Senior Vice President & General Counsel, Ingersoll Rand

Gray Styers
Partner, Fox Rothschild LLP

Rachelle Thompson
Partner, McGuireWoods LLP

Mike Brown
Partner, Nelson Mullins Riley & Scarborough LLP

Melanie Dubis
Partner, Parker Poe LLP

Cyrus Morton
Partner, Robins Kaplan LLP

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, www.directorsroundtable.com.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of the achievements of our distinguished Guest of Honor and her colleagues, we are presenting Maria Green and the Legal Department of Ingersoll Rand with the leading global honor for General Counsel and Law Departments. Ingersoll Rand is an international manufacturer of products that create comfortable, sustainable and efficient environments. Her address focuses on legal issues for international companies, including multi-site manufacturers with multiple product lines. The panelists' additional topics on that theme include renewable energy; labor and employment; commercial disputes; trade secrets; and patents.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel. Join us on social media for the latest news for Directors on corporate governance and other important VIP issues.

Maria Green
Senior Vice President & General Counsel

Maria Green is senior vice president and general counsel responsible for all Ingersoll Rand legal and compliance activities worldwide. She joined Ingersoll Rand in 2015 from Illinois Tool Works (ITW), where she served as senior vice president, general counsel and secretary.

During her 18 years with ITW, Maria guided the company's expansion through both acquisitions and organic growth. She also provided leadership for environmental, health, safety and sustainability as well as government affairs and risk management during her tenure as general counsel.

Prior to joining ITW, Maria held leadership roles at the Chicago Transit Authority and AMTRAK. She practiced law with Hazel Thomas Fiske Beckhorn & Hanes, P.C. and Akin, Gump, Strauss, Hauer & Feld, LLP, private firms in Washington, D.C. She began her career at Continental Illinois National Bank & Trust Co.

Maria holds a bachelor's degree in Sociology/Economics from the University of Pennsylvania and Juris Doctorate from Boston University School of Law.

Ingersoll Rand

Ingersoll Rand creates comfortable, sustainable and efficient environments that advance the quality of life across the globe.

With world-leading people and family of brands including Club Car®, Ingersoll Rand®, Thermo King® and Trane® – we heat, cool and automate homes and buildings; enhance commercial and industrial productivity; keep transported food and perishables safe and fresh; and deliver fun, efficient and reliable transportation solutions.

For more than a century our business has been rooted in anticipating and addressing global trends – like climate change, exponential technologies and diminishing resources – that impact the way we live, work and move. It's what we do, it's what we're good at, and it's how we are inspiring progress.

Today, we are a $14 billion global business employing over 44,000 people in more than 60 countries around the world. Diversity, engagement and teamwork drive innovation and fuel our passion for exceeding customer expectations and building a winning culture.

Above all else, we remain committed to creating a world of sustainable progress and enduring results. By thinking bigger and acting bolder to help the world solve these challenges, we are doing the right thing for our communities, our environment and our business.

JOHN MCDONALD: Good morning, everyone!

AUDIENCE: Good morning!

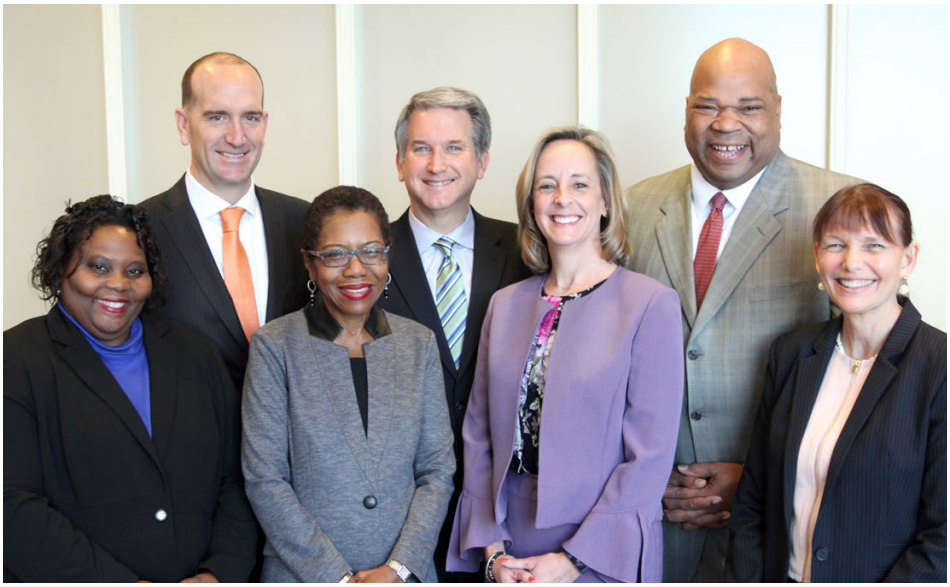
JOHN MCDONALD: Thank you! My name is John McDonald, and I have the pleasure of being the managing partner for the Charlotte office of McGuireWoods, and I'd like to welcome you here this morning. This is going to be a great program, and we're delighted to host Directors Roundtable and, more importantly, Maria Green and the folks from Ingersoll Rand.

With that, I'm going to turn it over to Karen Todd with Directors Roundtable. Thank you!

KAREN TODD: Thanks, John! I really appreciate all the help that McGuireWoods has given us this morning in providing the space and hosting this program. I would also like to welcome all of you. My name is Karen Todd, and I'm the executive director and chief operating officer of Directors Roundtable.

We're very pleased that you're here today. I want to especially thank the people of Ingersoll Rand, the outside law firms, the Bar groups, the university law schools, local chambers and other organizations who made a point to be here today. We're also very appreciative of McGuireWoods. They did a wonderful job, so let's give them a hand, please. [APPLAUSE]

The Directors Roundtable is a civic group whose mission is to organize the finest programming on a national and global basis for Boards of Directors and their advisors, which, of course, include General Counsel. Over the last 27 years, this has resulted in more than 800 programs in six continents. Our chairman, Jack Friedman, started this series after speaking with corporate directors, who told him that it was rare for a large corporation to receive validation for the good they do. He decided to provide a forum for executives and corporate counsel to talk about their companies, the accomplishments



in which they take pride, and how they have overcome the obstacles of running a business in today's changing world.

We honor General Counsel and their Law Departments – it's a team effort – so they may share their successful actions and strategies with the Directors Roundtable community via today's program and the full-color transcript that will be made available to 100,000 leaders worldwide.

Today, it's our pleasure to honor Maria Green, Senior Vice President and General Counsel, and the Law Department of Ingersoll Rand, many of whom are here today. Let's also acknowledge them. [APPLAUSE]

I would also like to introduce our distinguished panelists: Gray Styers, with Fox Rothchild; Rachelle Thompson, from McGuireWoods; Mike Brown, of Nelson Mullins Riley & Scarborough; Melanie Dubis, with Parker Poe; and Cyrus Morton, from Robins Kaplan.

I have a special surprise for Maria. It's a letter from the Dean of Boston University School of Law, her alma mater, that I would like to read to you this morning. It says:

Dear Mrs. Todd:

It is a pleasure to extend my congratulations to Maria Green, Senior Vice President and General Counsel, and her law department colleagues at Ingersoll Rand. We are proud to include Maria as an alumna of Boston University School of Law and are excited to celebrate her recognition by the Directors Roundtable Institute at the World Recognition of Distinguished General Counsel. Maria's professional accomplishments reflect the mission of the BU Law, as we recruit and educate the top legal minds in the field of law. We are thrilled to know that this recognition will spotlight her excellence as a leader and expertise as General Counsel.

We wish her well as she is honored on Wednesday and wish Maria all the best as she continues her career at Ingersoll Rand.

Sincerely,

Dr. Angela Onwuachi-Willig
Dean & Professor of Law,
Boston University School of Law

[APPLAUSE]

I'm now going to turn it over to Maria for her presentation.

MARIA GREEN: Good morning, everyone! It is a pleasure to be here with you this morning. I want to thank the Directors Roundtable for this honor. I'm honored and humbled to be part of a terrific legal department. I work with a phenomenal group of lawyers, and I feel privileged to do that. I'd also like to thank McGuireWoods for hosting us here today.

Without further adieu, I'll turn to our first topic. I thought I would talk about, what I call "market disruptors for public companies," or "what keeps GCs up at night." [LAUGHTER]

I thought we would focus on some of the things that have been in the headlines recently. We'll talk a little bit about cyber security and cyber breach including data privacy. We'll talk about brand and reputation as it affects public companies. We'll also speak a little about shareholder activism and some of the trends that we've seen in that area over the past year. We'll talk about managing the legal department and managing legal cost. Time permitting, we'll also say a little bit about enterprise risk management and how to manage threats to the company or to the industry in which the company is involved.

We've all seen the headlines on cyber security in recent years. It really crosses every sector and every part of every industry. We've had breaches at Equifax, at American Express, at KMart, at Delta Airlines, at Whole Foods – you name it – every single industry has been the subject of some sort of data breach. I'm sure you've heard the expression, "It's not a matter of *if* a company will get hacked, but *when* they will get hacked." It's something that all companies deal with, and we know that as a result, there can be shareholder derivative suits, there can be other law suits that come out of a cyber breach for a company.

What I thought was particularly interesting to focus on is a report by the SEC that was issued in October of this year. The SEC talked about a number of companies. They didn't sanction any of the companies in the report, but they named a number of companies, and they said that those companies could potentially be cited for violation of the federal securities laws, because they were subjected to a hack. They said that the failure to have sufficient controls, sufficient systems over their internal accounting controls could potentially be the basis for a finding that they were in violation of the federal securities laws.

In the report, the SEC noted that each of the companies that they mentioned had suffered losses of over $1 million, and that in the aggregate, cyber schemes had caused over $5 billion in losses since 2013. It's a big problem, as we all know.

In talking about the potential sanctions, the SEC talked about Section 13 of the '34 Act, which requires that management have either specific or general authorization programs in place to create specific or general authorization for individuals to access information. Obviously, if there's a data breach and information goes outside the company, or someone is able to get the company's financial information, for example, that is not pursuant to management authorization and, therefore, potentially, the company is in breach of this SEC regulation.

I find it particularly interesting that a company could once be victimized by a hacker and then be subject to sanctions by the SEC. Something for companies to keep in mind as we move forward.

I'd like to talk a little bit about GDPR. Those initials strike fear in the hearts of every in-house lawyer, given what we've been through this past year. GDPR stands for "General Data Protection Regulation," and this is an EU law that was enacted in May of this year. GDPR covers not only companies that are domiciled in the EU, but it covers U.S. companies, as well, if the U.S. company processes personal information in relation to the offering of goods or services in the EU, or monitors individuals' behaviors within the EU.

For example, even if Facebook were purely a domestic company, the fact that they monitor information of EU citizens would make them subject to GDPR. The reach of the regulation is very far and broad.

GDPR covers a number of things. The most important, in my view, is the fact that once a company becomes aware of a breach, it has 72 hours to notify the regulator of the fact that a breach has occurred.

What's important about that is, number one, you have to know where the breach occurred; what date it was taken; have a remediation plan for what you're going to do about the data that was taken; and all of that has to occur within a 72-hour period – not much time for you to figure out what you're going to do and then, in turn, notify the regulator.

Also, the *types* of data covered by GDPR are what we call "PII," or "Personally Identifiable Information." That could be an individual's name; it could be a Social Security number; but it could also be a

username and password to access a system. It's not just if the *company* inadvertently releases that information. If someone hacks the company's computers, or if someone responds to a phishing email and *gives out* their username and password – that's considered a GDPR breach that the company then has to report.

As you can see, it's very far-reaching, and the jury's still out on exactly what the implications of the regulation will be in a number of areas. Those who are EU citizens who are subject to GDPR, they have the right to notice; they have the right to know what types of PII a company is keeping. They have the right to access that information. The one right that GDPR gives that gave U.S. lawyers quite a bit of pause, is what we call "the right to be forgotten." In other words, an individual can contact the company and say, "I'm an ex-employee, and I know you have books and records on me; you have information. I want you to wipe your data systems clean of any information that affects me." The company has to do that.

Clearly, what happens if an individual does that and the company has an obligation to keep certain books and records for some period of time – or the company has ongoing obligations to pay a pension to that individual, and it's wiped its books and records clean, it doesn't have the information that it needs to make those payments.

It will be interesting to see what happens going forward, as companies try to comply with the regulation but have other laws or obligations that need to be complied with.

For violation of the law under the GDPR, sanctions can be the greater of $10 million or 2% of the company's worldwide turnover. Again, it'll be interesting to see what happens, because in my view that is extraterritorial. In other words, let's say a breach happens in France. The EU regulator in France determines that it will levy a fine on a company based on its worldwide turnover in Germany, China, India and other parts of the world. Number one, how is that enforced? Number two, does a company based in a particular country have the extraterritorial right to fine a company based on worldwide turnover?

> "GDPR covers a number of things. The most important, in my view, is the fact that once a company becomes aware of a breach, it has 72 hours to notify the regulator of the fact that a breach has occurred... where the breach occurred; what date it was taken; have a remediation plan for what you're going to do about the data that was taken; and all of that has to occur within a 72-hour period."
>
> – *Maria Green*

Stay tuned, and more to come on GDPR.

GDPR was a big regulation and requires the appointment of what we call a "data privacy officer" or "DPO." It also requires that there be privacy impact assessments done by the company. The company must audit its books and records so that it knows where its personally identifiable information is stored, and that it has appropriate security with respect to that data. It keeps records of those processing activities; so, in the event that a regulator wants to come in and make sure that the company is in compliance, those books and records are available for the regulator to inspect.

The other aspect of GDPR that caused quite a bit of work over the past year is the requirement that not only the company comply, but that the company ensure that its suppliers, its customers – any third party that the company does business with – is also in compliance with the law. For us, it required that we look at *all* of our contracts to make sure that all of our suppliers were in compliance with GDPR. They had to have the right controls in place and mechanisms to make sure that they were able to do what they needed to do under their obligations with GDPR. We needed a way to monitor *their* performance.

It was a huge undertaking in terms of looking at all the contracts, making sure the right systems were in place, lots of partnerships between the Legal Department and our IT group, and making sure that we were ready for compliance and ready for the reporting obligations that came out of GDPR.

I want to talk a little about brand and reputation as it affects public companies. Again, this is something that's been in the news in the past two years. This is the #MeToo movement. This is something that crosses all spectrums and sectors of business. We've seen claims coming out of academia, government, the tech industry, the financial sectors industry, the entertainment industry – you name it – those industries have been subject to sexual harassment or sexual misconduct claims. That has now been dubbed as the "#MeToo movement."

What can a company do to protect itself? Obviously, if there's a rogue actor in the company, sometimes that just can't be controlled. I would offer to you that there are things that companies *can* do to try to protect themselves in the event that an individual engages in sexually improper conduct or sexual harassment.

A company can cultivate a culture that's based on respect and integrity and inclusion. It can make it clear that the company has zero tolerance for sexual harassment or sexual misconduct. Also, it can make it clear that if someone is guilty of that type of conduct, an individual has the right to speak

up. It can foster a "speak up" culture where people feel free to come forward if they feel that they've been victimized, without fear of retribution or retaliation by the company.

It's important to have certain policies in place. It's important to have an anti-discrimination policy. It's important to have a code of conduct that emphasizes respect for individuals and integrity. It's important to have, from the very top of the company – from the Board of Directors, from the senior leadership – a message that that type of behavior will not be tolerated. People pay attention not only to what senior leaders say, but also what they do. It's important to have senior leaders that are above reproach, and who act in a way that they walk the walk as well as talk the talk.

It's also important to have online training, so that there's a mechanism, at least annually, to train employees and let them know what the company's values are with respect to harassment or sexual misconduct.

It's also important to have a mechanism for reporting and investigating any claims that come in. If you're talking about a U.S. public company, that company already has that mechanism in place. Under the Sarbanes-Oxley Act, we're required to have a hotline where any individual can report misconduct. If you're not a U.S.-based public company – then I would encourage companies to try to find a mechanism – like a help line or a hotline – where people can report if they've been the victim or they've observed any type of misconduct, whether it's sexual misconduct or otherwise.

It can create certain tensions. It's great to have a hotline and a way for people to report, even anonymously, if that's what they choose to do. In certain jurisdictions, and especially in the EU, anonymous reporting is not permitted. If someone wants to report, they need to provide identifying information. The tension between making sure that there's no retaliation, but also making sure that people can report without fear, is something that we grapple with in certain jurisdictions outside of the U.S.

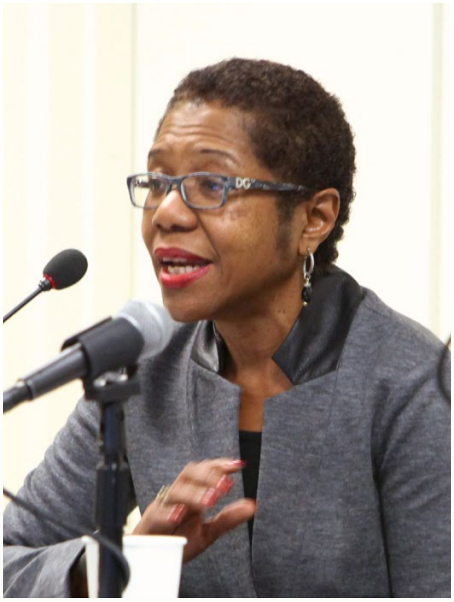
The other thing that is important is not only should an individual have the ability to report, but they should feel confident that the company will follow up, investigate the report, and take appropriate action.

Sometimes that's difficult to do, even when the reporter identifies him or herself, because you can't go back and say, "We investigated your complaint, and as a result, we fired Joe Blow." There are privacy laws; there are other reasons why you can't always go back to a reporter and let them know what action was taken. That creates a tension between wanting the reporter to know that action has been taken, and the privacy laws or other requirements to which a company may be subject.

Oftentimes, what companies do is rather than going back to each individual, in the aggregate, the company will, on an annual basis, say, "Look, we had 'X' number of complaints; we took the following actions – we terminated 'X' number of individuals; we put certain policies and procedures in place." There are ways of letting people know that their complaints to a hotline are effective, without actually going back to each individual reporter and letting them know the outcome of their particular complaint.

The other area where we see a lot of discussion, and that's really fraught with potential problems in terms of brand and reputation for a public company, is under the Foreign Corrupt Practices Act. FCPA is not new; it's been around for a long time – since 1977 – but consistently, year after year, we see companies that are caught in FCPA violations and end up paying huge fines and suffering quite a bit of damage to their reputation as a result.

In 2018, we had Volkswagen, who is currently in a shareholder suit for $10.7 billion. At Barclays, their CEO was fined



$1.5 million because he tried to unmask the identity of a whistleblower. Presumably to take some action or penalty against the whistleblower, but just the act of trying to find out who the whistleblower was subjected that CEO to a fine. Then, a banker at Goldman Sachs pled guilty to helping to orchestrate a fraud at the Malaysian State Investment Fund, and the Department of Justice is currently investigating that action.

There were some good things that came out of DOJ this year, so we should focus on that, as well! [LAUGHTER]

In May, the DOJ formalized a policy that would have government agencies only impose one set of penalties or sanctions for particular actions. If a company were to violate FCPA, rather than being fined by the SEC, DOJ, FTC and myriad agencies, the government is now looking to consolidate penalties and just have one set of penalties for any particular action or violation.

In July, the DOJ did something that will be very helpful going forward to companies that are looking to engage in M&A activity. Sometimes it's the case – we've experienced this, as well as other companies – that an acquiror may look at a particular target company and decide that this is a business that

they're interested in acquiring. As part of due diligence, it may be discovered that the company has some FCPA problem. It has a corruption problem or an anti-bribery problem, and the acquiror may step away and say, "We don't want to take on that liability, so we're going to step away from this particular acquisition." What the DOJ said was, "If you discover, as part of your due diligence, that there's a corruption problem or a bribery problem, you can go forward. You can consummate that transaction; and what the DOJ will ask is that once you've consummated that transaction, self-report. Let us know what the problem was and help us collaborate with you to draft a solution. If you do that, then it's much less likely that the company will be fined or otherwise penalized for the violation that occurred at the business that your company acquired." That's a good thing that will foster more M&A activity going forward.

The Second Circuit also narrowed the reach of FCPA, based on a decision in August of this year.

Finally, it was not uncommon in the past if the DOJ found that there was an FCPA violation, they would appoint what's called a "corporate monitor." That would be an individual who would monitor the business of the company going forward to make sure that they were in compliance. Of course, the company is the one who would pay for the corporate monitor and be responsible for overseeing the activities of the corporate monitor. What the DOJ said is, "Going forward, we understand that there's a tremendous amount of cost to the business, both in terms of loss of focus and financial cost, so we're going to be very judicious and very thoughtful before we decide to appoint a corporate monitor in the event of an FCPA breach."

Some good developments coming out of DOJ, in my view, this past year.

I will just close with some enforcement actions that happened for FCPA violations in 2018. The Brazilian company, Petrobras, paid fines of $1.7 billion for FCPA violations. The French bank, SocGen, or Société Générale, paid $585 million in fines based on Libyan offenses in violation of FCPA. Panasonic paid $280 million to resolve FCPA offenses related to payments to consultants.

The message on FCPA is very much the message on what a company can do to insulate itself from problems for sexual misconduct. It's important to have the appropriate training. It's important to set the right tone at the top, so that everyone understands that misbehavior will not be tolerated. It's important to have a strong and robust code of conduct, and it's important to train employees on an ongoing basis on what that code of conduct entails and what are the penalties for violation of the code of conduct.

I want to spend a few minutes talking about shareholder activism. This is something that we've seen in the last 10 years or so, there's been a lot of activity where activists have started to take positions in public companies. I want to address some of the trends that we saw in 2018.

The number of campaigns has increased significantly in 2018, over 2016 and 2017. You can see this on the slide of the companies that are typically taking an activist position in public companies. These are some of the more active shareholder activists. The average size of companies that have been targeted by shareholder activists has gotten larger, and the most *common* reason for an activist to buy into the stock of a public company is around M&A activity. The company may have announced that it's doing an acquisition, and the activist may feel that's not a right business for the company to go into, or it's just not a right business or it's paying too much money. It may come in to try to change that dynamic, *or* it may be that the activist wants the company to break into smaller pieces or to focus on a particular sector. Therefore, the activist is asking that the company change its structure and divest some of its businesses.

Clearly, the most common reason that you see shareholder activism is some sort of value maximization that the activist perceives it can create for the company. It's either breaking up into smaller pieces, doing an acquisition, failing to do an acquisition, or maybe it's encouraging the company to do more share buyback of its own stock or encouraging the company to pay higher dividends. It's typically around some value creation activity.

We've seen that there's been a decrease in shareholder activism around governance issues, but what we've actually seen is that the larger institutional investors, like BlackRock, have come into that space. They've been a lot more active in asking companies about issues like sexual harassment or sexual misconduct. They want to know what the company is doing as far as social issues and governance issues. That

space has been taken over by the larger institutional investors like BlackRock. We're seeing more activity there.

What are some of the things that a company can do if they are subject to activist activities? First of all, it's important for the company to think like an activist. Look around the company and see what you are doing that might make you vulnerable to an attack by an activist. Is there a particular line of business that you're focusing on that's not particularly profitable, or where margins are lower? Is there something that the company can do to create greater value? Think like an activist and be proactive, and do the things that you think an activist will ask the company to do once they come into the space. It's important to regularly engage with your shareholders. You don't want the first time that a shareholder hears from the company to be when there's a shareholder proposal that the company doesn't like or when there's an activist campaign. Have a regular cadence of engaging with shareholders so that they know who's in the Investor Relations Department, who they're talking to, so that when you need to contact them, it won't be the first point of contact. Keep the Board of Directors informed, and just know that in certain situations, like CEO succession, those are the types of situations that are right for an activist to come into the stock and launch a campaign.

I want to briefly talk about managing the Legal Department. Since I'm in a group full of lawyers, I wanted to acknowledge that a lot of what I'll have to say on artificial intelligence came from a recent article in the *American Corporate Counsel* magazine.

We've heard a lot about AI and how it can help lawyers and legal departments. What I thought was really interesting about this article is it also made clear what AI *cannot* do. Artificial intelligence can't do complex analytics. It can't make value judgments. If you need to make a decision about whether something is ethical or whether it's demonstrating the right values, AI can't do that for you. AI cannot respond to changing situations. You can train a bot to do a particular thing, but if it encounters a different situation, it may *eventually* be able to adapt to that change, but it can't adapt immediately.

I don't think we're in any danger of losing our jobs to bots. [LAUGHTER]

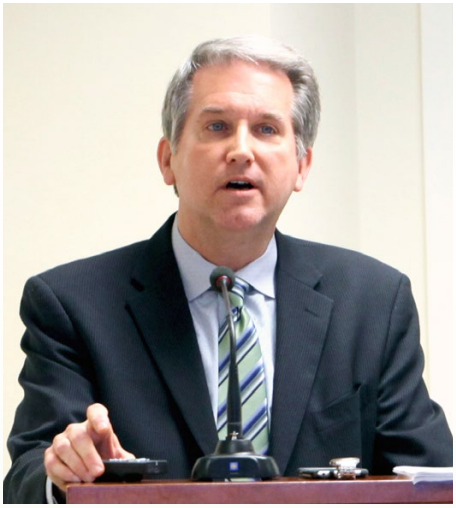
There will be a role for the lawyers in the future. However, AI can make us more efficient. There are things that AI can do in terms of doing searches of documents, identifying keywords or key phrases; helping with due diligence. These are ways that we can have AI do the more routine work and free up the lawyers to do the more complicated work.

That's pretty much what I wanted to say on managing the Legal Department and the use of artificial intelligence. In the interest of time, I won't talk about enterprise risk management; I'll just commend to you the slides that are here and say that it's important for a company to have a good view about how it manages its risk. It's important for senior management of the company to think about the risks that the company is facing. How they will manage those risks, how they'll identify those risks. Think about the company's risk appetite and the types of risk that the company is willing to take. Also, it's important for the Board of Directors to have a good view in terms of risk oversight and understanding what the company is doing to manage its risk.

Thank you for your attention. I'll turn it over to my fellow panelists. [APPLAUSE]

KAREN TODD: First, Maria, Ingersoll Rand has so many different product lines, and distribution in many different countries. How is your Law Department organized to handle all the different regulatory regimes that you have to deal with?

MARIA GREEN: We handle everything locally. We have a core team of lawyers here in Davidson. We have some other lawyers



in the U.S. For example, our Club Car business in Augusta, Georgia, has a lawyer there who's the General Counsel for that business. We have some lawyers in Minneapolis for our train business. Outside of the U.S., we're organized geographically, so we have a core group of lawyers in Brussels that manages our European business. We have a group of lawyers in Shanghai that manages our Asia Pacific business; and we have a group of lawyers in Latin America. The regional businesses are, from a legal perspective, handled by the local lawyers. I will also say that one of the things I love about our Legal Department is how collaborative we are. We all work together very closely. The commercial lawyers, the litigators, the labor and employment lawyers, the M&A lawyers work together very collaboratively, and that enables us to get a tremendous amount of work done with our relatively small legal team.

KAREN TODD: Great. I'm now going to turn it over to Gray Styers from Fox Rothschild.

GRAY STYERS: Thank you, Karen. I'll be referring to some appendices, and I have an outline in my materials.

Your client or your CEO walks into your office and says, "Our largest customer (our largest institutional investor) wants to see our green renewable energy policy and we don't have one. How do we develop, before the next board meeting, a green policy for

> "People pay attention not only to what senior leaders say, but also what they do. It's important to have senior leaders that are above reproach, and who act in a way that they walk the walk as well as talk the talk." – *Maria Green*

our company?" Or perhaps your client, your CEO, walks in and says, "We just passed a green renewable energy policy for our company. Implement it with our operations manager." What do you do?

First you say, "It's not easy being green. I can wear a green tie, but it's not easy being green." On second thought, "Or maybe it *is* easy being green."

Now, in the information that's being distributed, the first appendix is a list of companies that's called "The RE100.org". It is a list of almost now 200 companies – I didn't even take the time to print the entire list; I just did "A" through "M." That was more than enough companies to illustrate the point that green policies are increasingly popular; they run from ABInBev to almost Z, with Wells Fargo, Workday and Yoox. I'm not endorsing any of these companies. I'm not even endorsing these policies as examples of optimal policies. But I will point out that if you are looking for examples of green policies, there are plenty to look at, and they are readily available. They are not confidential corporate documents. In fact, they are posted by these companies on their websites and promoted prominently so you can see that they are green, if their customers or investors are interested. There are plenty of examples. In the outline, I've just highlighted five or six of them for your review.

There are not only private-sector, but also public-sector green policies. (I will point out that in this presentation, every statute, every rule-making, every executive order and every case law that I cite has come into effect in the last 15 months. Nothing in this entire program is more than 15 months old.) The governor of the State of North Carolina issued an Executive Order on October 19th, about six weeks ago, in which he set forth three 2025 targets: 1) 40% statewide reduction in greenhouse gas emissions (in other words, using renewable resources rather than petroleum-based resources); 2) a goal of 80,000 zero-emission vehicles (if you have a large fleet in your company, this is something that you'll be reviewing as part of your green policies); and 3) 40% reduction in state building energy usage. Energy efficiency is a part of this formula. The executive order, which is attached to the materials, also discussed immediate action by state agencies and long-term planning for the state. A lot of the case law I'll be talking about later is North Carolina-based, and I'll explain why in a moment.

Before we get to case law and policies, I want to focus on energy efficiency. I don't endorse any of those companies that were listed in the RE100, but here is my one endorsement: One company that is doing as much to promote energy efficiency, time-of-use shifting and helping their customers reduce energy usage, as much as any company I know in the country, is Ingersoll Rand. The work that you are doing is absolutely amazing, and you are cutting-edge on energy efficiency and helping, both internally, in your own organization as well as helping your customers, in what you're doing in energy efficiency. [APPLAUSE]

I'll also promote one other institution. I have degrees from Wake Forest and Carolina; my wife has degrees from Duke and Carolina; so I will promote, of course, NC State in my next few slides. [LAUGHTER]

The North Carolina Clean Energy Technology Center is housed at NC State, and it is one of the world's leading think tanks and developers of programs on energy efficiency and renewable energy programs. The next few slides are compliments of my friends at the Clean Energy Technology Center, and I would refer them to you. It also frames what we're trying to do in energy efficiency. Basically, they look at efficiency programs and the benefits they can provide, as well as fuel diversity (such as renewable energy). Often, utility customers can request a third-party assessment report to look at how they can realize energy savings and energy reductions. The North Carolina State Clean Energy Technology Center does that assessment for your clients or your customers to see where you can reduce usage and your energy costs.

The most important takeaway I have for you is the website, www.dsireusa.org – or DSIRE – which stands for the Database of State Incentives for Renewables and Efficiency. If you Google "desire," be careful what website you may land on. [LAUGHTER]. So, type in the letters correctly. This is the leading database in the *country* if you're looking for programs or incentives in your jurisdiction, in your city, in your state, that can help reduce energy costs and usage, and that are available for your companies and your clients.

Energy efficiency potential is an important issue. The U.S. Department of Energy – this is not a private assessment – has evaluated the energy efficiency potential of companies in the United States and believes that a reduction of 18.4% can be achieved by energy efficiency measures, such as through the products and services of Ingersoll Rand.

The commercial sector alone has a 20% savings potential from energy reductions. There is also a state analysis that indicates that 16.8% reduction of energy usage is very reachable. As noted in the top right-hand corner of that slide, there is the potential for $1.7 billion in commercial and industrial retrofit in *annual* savings *in North Carolina alone*. What does that mean for an energy

efficiency in North Carolina? Over 100,000 jobs. About $17.5 billion in revenue has been created in the clean energy sector in North Carolina, with savings of 17.9 metric tons of CO2 in a given year.

That gives you a snapshot of the potential of what you can realize in energy savings by utilizing energy efficiency measures.

Now, I want to talk about energy policy, tariffs, practices, and programs in North Carolina. Many of you are from North Carolina, and you represent companies all over the country. Energy regulation at the retail level in the United States is by state. The wholesale sector regulation is by the Federal Energy Regulatory Commission or the Department of Energy. On the retail side, where the customers are using the energy, the regulation is *by state*. It's going to vary from state to state, but some of the policies, practices and programs that are being implemented in North Carolina are illustrative of what you're finding nationwide. You've got Duke Energy, one of the nation's largest utilities – whose headquarters is a few blocks away – rolling out these programs.

I'm highlighting North Carolina state policies and practices and issues, but they're illustrative of similar programs and concepts in different forms around the country.

First, is time-of-use energy rates. Basically, energy is priced on the margin. At that point in time, how much does the last megawatt hour of energy produced cost? Guess what? It costs a whole lot less in the middle of the night than it does at 5 o'clock in the afternoon in July. Therefore, if you can shift your energy usage from peak time to off-peak hours, you're going to realize significant energy savings. A great way to do that is to use – if you're a large industrial customer – large chillers that can produce cold water or ice at night, and then use that for air conditioning during the daytime. One of the leading providers of that kind of service is Ingersoll Rand.

I will stop my shameless plugs in just a minute. [LAUGHTER]

AUDIENCE MEMBER: Keep going! [LAUGHTER]

GRAY STYERS: Now, you may say, "If I just need renewable energy, I can purchase it. I'll find a solar farm and I'll purchase it from someone who's providing energy from a solar farm or a wind turbine." Unfortunately, in North Carolina and most states, you cannot do that. You can only purchase energy from utilities. That was most recently affirmed by the North Carolina Court of Appeals in a case at the end of last year, which has been also affirmed by the North Carolina Supreme Court. There's the case cite on the slide, which basically says *you have to purchase your energy in North Carolina and most other states from the utility.* (So you have to look at other workarounds or ways around that limitation.)

We have some legislative reforms that have not passed in North Carolina, but it is something that is being actively talked about.

Now, in 13 states and the District of Columbia that do have what is called "retail choice," – they're shown on this map on the far right – you *will* be able to do a direct purchase of renewable energy. Five states have some limited purchase options, including nearby Georgia and Virginia. There are trends that ebb or flow at different times, whether you have retail choice, or you stay with your vertically integrated utility. The most recent indication of that was two weeks ago: Nevada had a referendum on retail choice, which failed. I don't know how the winds are blowing; it may vary in different parts of the country.

What about self-generation? Historically, self-generation in North Carolina was largely textile mills that built a dam on a river to produce electricity to turn the textile machines. More recently, you've got combined heat and power, cogeneration, where you need processed steam for your manufacturing, and you build a power plant on-site to produce steam, and it also produces electricity for your factory.

Today, this is what self-generation looks like, and it is only about 30 miles away from here: that is the Apple data farm in Maiden, North Carolina. That is self-generation of the 21st century. I understand that Apple owns, controls, manages and operates that solar farm for the power for that data farm, all behind the meter.

Other issues that you will see, trends that are developing, new developments in North Carolina, are the leasing of solar facilities, addressing the issue of how to finance these solar facilities. Most states allow leasing; North Carolina did *not* allow leasing until just this past year, in the enactment of House Bill 589 – which I'll talk about in just a few minutes – that allows some leasing of facilities. You have someone other than the utility customer owning the rooftop solar panels on your large distribution warehouse, or on your parking decks. You're able to then provide power behind the meter by self-generation, but from leased facilities. There's a new North Carolina regulation, Rule R8-73, that lays out that program.

Another development you've seen more nationwide but that's just starting in North Carolina is called "Community Solar": a

large renewable energy facility – a solar farm, a windmill – and you don't fully own, but you have the possibility of having a percentage ownership in the output of that facility. It allows utility customers to jointly own a solar facility or subscribe to a portion of the facility's output. That's also allowed by House Bill 589, which is the last appendix attached. That bill, 589, passed last July. It was a major overhaul of energy policy in North Carolina, and the first time that these types of programs were allowed and authorized out in the state. I point you to that as an example of what states are doing by statute to start programs like Community Solar.

Many states have solar rebates. You'll find that also in House Bill 589. It's codified in North Carolina General Statute 62155(f). The program was approved on April 3rd of this year. I can't remember what date the rebates became available; but I understand they were fully subscribed within a few days of when they became available. If you go to that DSIRE website from North Carolina State Energy Center, they could point you to the solar rebate programs in all 50 states and jurisdictions around the country.

Now, if you're looking at what's coming down the road, I would encourage you to think about energy storage. Unfortunately, the wind doesn't blow all the time; the sun doesn't shine all the time. How do you get renewable energy if the wind is not blowing and the sun is not shining, but you want to be 100% renewable?

Many people believe the holy grail is "battery storage." This is your hot topic alert right here. Be on the lookout for energy storage technology developments. A study was authorized by House Bill 589, Part XII. I wish I could tell you what's in that study; it will be released this Friday. Go to that website and see what that study reports about the future of energy battery storage.

Last, I'll touch on green tariffs. As I said earlier, you can't buy renewable energy directly from the market. Is there a way for the utility to offer you a "green tariff" by which you can designate the source of a certain percentage of what energy you utilize? The utility goes out and purchases those megawatt hours, that percentage, of energy from a renewable facility. That's called a "green tariff," whereby the customer is able to purchase part or all of their electricity directly – *or indirectly* – from renewable resources. This concept also was Part 3 of House Bill 589. That program will run for five years in North Carolina, and it's for 600 megawatts. One hundred is for major military installations; 250 for the University of North Carolina system. (Full disclosure: I'm representing the UNC system on this issue, as we speak, although I do not represent or speak for my client in these remarks – just for myself.) Here's the takeaway for the private sector: there are 250 megawatts that will be available in this program for qualified commercial customers. Nuts and bolts: to qualify for a green tariff in North Carolina, you must use one megawatt of load in a single location or five megawatts of aggregate load at multiple locations; you can enter into a renewable contract for two to 20 years and receive a renewable energy certificate for the power purchased.

> "The message on FCPA is very much the message on what a company can do to insulate itself from problems for sexual misconduct. It's important to have the appropriate training. It's important to set the right tone at the top, so that everyone understands that misbehavior will not be tolerated."
>
> – *Maria Green*

It is a complicated structure that the customer pays the cost of the renewable energy purchased – from the solar farm or the wind turbine – and then you receive a credit for the energy purchased against the bill. This is an infamous triangle that Duke Energy has used to try to illustrate the complexity of the program, what it calls its Green Source Advantage Tariff, which was introduced earlier this year. There has been a lot of controversy as to whether it is workable or not in North Carolina; there have been multiple hearings on this. I was hoping I could report on how the program will be structured. The hearings were in September; I was expecting an Order out in early November, so, stay tuned if you want Green Source Advantage. I expect an Order out from the Utilities Commission soon resolving some of the disputes about how this program is going to be rolled out, so that 250 megawatts is available for your clients or your company through a green tariff.

I'll end where I started, with a list of companies. In the Green Tariff docket before the Utilities Commission, who was involved and participated and weighed in? It was Apple and Google; it was UNC; it was the United States Department of Defense; it was Walmart. Letters were filed in the docket by Davidson University, Duke University, Wake Forest University, New Belgium Brewing, SAS, Sierra Nevada, Unilever, and VF Corporation. There's a lot of interest in this, so stay tuned, and look to this as a way to find that it's not so difficult being green.

Thank you very much – I appreciate your attention. [APPLAUSE]

KAREN TODD: Gray, with all the rapid change in this field, what would you recommend as a first target for most companies looking to be green?

GRAY STYERS: First, there's still a lot of low-hanging fruit on energy efficiency. Second, if you are a large energy user, your customer, client, or company should have a good relationship with the utility.

Talk to the utility about what tariff is most advantageous for energy savings, and what to implement to do time-of-use shifting, such as for air conditioning or wastewater treatment. If you have wastewater treatment facilities, run them at 2:00 a.m., and find a tariff that gives you cost benefits to do that. Third, look at green tariffs and self-generation. As the cost of solar panels continues to drop, self-generation becomes more affordable. Finally, see what the green tariff programs are in your state.

KAREN TODD: Thank you so much. [APPLAUSE]

Our next speaker is Rachelle Thompson with McGuireWoods.

RACHELLE THOMPSON: Good morning!

AUDIENCE: Good morning!

RACHELLE THOMPSON: First, I'd like to say it's an honor to be here, where we have the opportunity to recognize Maria Green and the Law Department of Ingersoll Rand for being, simply put, thought leaders in this space. Kudos to you.

I am a partner in the Raleigh office of McGuireWoods. My specialty is intellectual property, and I have a science background; hence, the talk today on the Internet of Things, which I will abbreviate as IoT.

Before I get started, I want everyone to take a deep breath. [PAUSE] [LAUGHTER]

It's here! [LAUGHTER]

IoT is here, and it's not going anywhere. Let's embrace it; let's prepare ourselves for the next tech generation.

Let me tell you why I'm going to warn you to do that. I have a tech background. I actually am the first African American woman in Stanford's history to get a Ph.D. in Chemistry. [APPLAUSE]

My love of science and law is deeply rooted. Here's what you're not going to clap on.

I remember, as a graduate student, getting an email from the founders of Google, asking us students if we wanted to leave Stanford and join their startup company.

Even worse, my husband, who is also a patent attorney and a techie and an electrical engineer, the brother of his labmate started Yahoo.

We got emails asking us if we wanted to leave Stanford and join these startup companies, at least two missed opportunities. [LAUGHTER]

The punchline is this: make sure you're always at the cusp of technology and innovation, and that is why we're going to talk briefly about IoT today.

Now, what is IoT? Simply put, IoT refers to the connectivity of devices. I like to refer to it as making dumb devices smarter, smarter devices even smarter, but now we're going to live in a world where *everything* is connected. Take a deep breath. It's not sci-fi; it's actually here. The data shows that by 2030 – merely 12 years from now – we're going to have 30 billion devices connected all over the world. That raises a lot of interesting legal and regulatory challenges.

Today, I'm not going to focus on *all* of those challenges; my focus today will be on intellectual property. Even within the intellectual property world, there are enough issues that keep the Feds up at night, as well as GCs.

You talk about the Internet, it usually relies on you and me to input information to drive it. IoT is a different world. We're going to take a step back, and we're going to take a regular device; we're going to install actuators or sensors. Now we have a lot of data. You heard Maria talk earlier about cyber security. Thanks to IoT, people who work in cyber security, you have job security for at least the next 12 years. [LAUGHTER]

If we're having a hard time managing the data we have now, the situation is going to be worse by 2030. Let's deal with it now. Data and connectivity are important. Technology drives the connectivity. How should that impact your business strategy? From doing your supply chain agreements; from changing your products so they can be compatible with the next generation technology – what should you do?

Today, we'll talk about IP. There are several aspects of the IoT that we can talk about protecting, but I'll keep it at a high level. Simply this: data. Data's the new commodity. A lot of GCs stay up at night trying to figure out how to monetize data, protect data, and control data. In the IP space, we spend a lot of time advising clients on how to protect and enforce and license technology that deals with data or deals with methods that use and control that data. It is not an easy task.

Now, this part of the slide I'm going to call the "alphabet soup." I want to focus on all the different standards that are involved. There are a lot of standards, and unlike the privacy world, there doesn't seem to be any uniformity in how the world treats privacy

laws. The laws tend to be stricter in Europe, where even things such as lab notebooks will be considered private. I've run into that problem in a litigation context. Here, the goal is to have uniform standards. When you're a global company like Ingersoll Rand, you want to make sure your devices are able to communicate all over the world. If you do it correctly, you even want that communication to happen in real time. There is an impetus on making sure that the technology that is driving IoT is, in fact, standard all over the world.

What does that mean for you? If you know nothing about this space, the time is *now* for you to get into that space. The time is *now* for you to come up with your company's standards policy. Send delegates to the meetings where there's a *group of minds* in a building just like this, thinking about what standards should be in play. Do those companies who are involved at the forefront have patents on that technology? Is that nefarious? For you, as a company, to promote a technology standard, don't tell the players in the room that you own the IP on that technology! Why? One day, five years from now – after the technology is implemented – you can sue them, and make money, because you protected a standard that *you* were involved in implementing. It doesn't seem fair. There are measures in place to deal with that. You need to know about that as a business strategy. You need to know about that when you are doing deals with your vendors. This is a new world. We can no longer take a step back and ignore it; the world has completely changed, and it will continue to change.

As an example, there were companies who were just brick and mortar companies; they did their transactions personally. When they transitioned to the eCommerce world, they realized they'd entered into a new form. They had more exposure because they decided, for efficiency purposes, to sell the products online, not realizing that they were exposing themselves to additional suits because they were doing it electronically

> "What are some of the things that a company can do if they are subject to activist activities? First of all, it's important for the company to think like an activist. Look around the company and see what you are doing that might make you vulnerable to an attack by an activist." – *Maria Green*

– something that simple. IoT is no different. Your autonomous devices – whether we're talking about the Club Car, or autonomous control of refrigeration systems in trucks – you need to understand the standards that undergird *all* of that technology, and how you can protect yourself.

Most people wouldn't think about copyrights in the context of IoT, but you should. Why? This technology is run by software. Software can be copyrightable. If you make the decision to make sure your devices are now interoperative with other devices, so they can communicate with each other, who owns that software? Is it protectable? If we're talking about data, it's just simply data. Do I just *have* to worry about privacy? No. If it's data, then do I need to think about ways in which I can protect that data? Maybe the mere facts themselves are not copyrightable, but the way I expressed it *is*. Maybe I will associate an image or a tone, when the sensor goes off, to let you know that the tire pressure is off. Do I copyright that tone? Do I copyright the image? More importantly, are your competitors doing it? Do you want to be sued because you're in a connected world where some companies had the foresight to protect that aspect of IoT via copyrights? Who owns the data? How do you protect the data? Consider copyright protection.

Trademarks are important. You heard Maria talk about brand and reputation. We know Ingersoll Rand's brand. Do we know the brand of the company with whom you're partnering in the IoT space? You need to think about certifying your trademarks, to denote that your autonomous cars, your autonomous trucks, your autonomous refrigeration systems comports with certain standards carrying the strong name of Ingersoll Rand. That is a strategy you all need to think about as we move forward in this IoT space.

Patents are a good thing. In our world, in 2014, the Supreme Court issued a decision called *Alice*, which made it arguably more difficult to patent technology in this space. It came up with a two-step process to determine if patents generally in this area should be patentable. Now we need to be strategic about what we're patenting. Are we just patenting the data? Probably not; but maybe the infrastructure that's involved, and the interconnectivity. We need to be very creative about how we are explaining IoT, so that we *can* get patents in this space.

If you *are* fortunate enough to get a patent, the next headache you have is, again, standards. How much are your patents going to be worth in this space? It's based on the standard that everyone in the world is doing. What's so special about your patent? How can you divorce what your patent covers from the general standard?

We have a world where, unfortunately, you may have more exposure to litigation. Take another deep breath. [PAUSE]

You may have more players, more plaintiffs. Now, in our world, we have what we call "non-practicing entities." I use the pejorative term, "trolls." These are companies that do not make anything; they don't have any products; their sole business model is to buy up a bunch of patents and sue you. A nuisance suit, but because patent litigation is so expensive, they sometimes have

a lot of leverage. Guess what? Trolls are in the IoT space. They are buying up patents that undergird the basic technology for IoT, whether it's the Internet or safety standards for autonomous cars – they are there. They are planning for the next wave of litigation. So should you.

Now, in this space, we also have brand competitors, also participating in standards and ready to sue each other once those standards issue. Now there's more exposure. Now you don't have to worry about trolls suing you; you have to worry about your competitors suing you, as well, in the same space. Why? You followed the wave and decided to connect your devices to the rest of the world, for efficiency or just to be cool, because that's just what we do with tech revolution.

That's another thing to think about. Now, I've got more exposure because I may be sued by my competitors; I might *also* be sued by trolls; but we're all interconnected. Who is the right defendant? Should it be me? Because now, *my* truck is connected to the infrastructure of another tech company. Do you need to bring us both to the lawsuit?

We will live in a world where you will have multiple defendants for that reason – to show that there *is* this interconnection. In our world, for example, if you have a patent on just the basic steps of an invention – for example, three steps, keep it very simple – you have to prove infringement by showing that someone is practicing *all three steps*. In the IoT world, one company may only be doing Step 1. That means that the plaintiff will either do one of two things: bring in all the other defendants and sue all three defendants for three steps; or try to argue that even though it's one defendant, that one defendant is controlling the other suspects, and under that theory, I can prove liability.

What does that mean for you as a company? When you're drafting your contracts, your supply chain agreements, is it a good idea to put in there that you control the vendors? No, everyone say, "No!" [LAUGHTER]

Would it be helpful to include different language? Such as, "Vendor, you're just providing this component; you can manufacture it the way you want to; you can make sure it comports with standards, but it's *all on you*, because we're not joint; I have no control over you; you do your thing, and I am just your customer." Is that a better approach, in the IoT world? Everyone say, "Yes!" You're going to be great patent attorneys. [LAUGHTER]

Again, the strategies are different. Is IoT a can of worms? Yes. Hopefully, you'll have some tools where we can remove the worms, and you can breathe a little bit easier.

Do I see a "Yes"?

AUDIENCE: Yes!

RACHELLE THOMPSON: Yes! [LAUGHTER]

[AUDIENCE MEMBER]: (Question about recent California legislation)

RACHELLE THOMPSON: Very good question, especially if you have products that are in California. Yes, it is going to impact global companies that have a presence in California or are doing business in California. There's also a global component, as well. Complying with the California Act, you also need to be concerned about whether or not you're running afoul of other global standards. Yes, it's going to be something that keeps you up at night. It is very akin to how California has interesting rules on product labeling with respect to false advertising claims and things of that nature. I expect that to be a similar headache for companies.

What do you need to think about? Indemnification is going to be key. It's a big thing. You're living in a world that's going to be IoT-based. Should you have to pay for lawsuits just because your device is not interconnected to others? You want to make sure your provisions are indemnification provisions, not hold harmless. I want broad protection, even against third parties. That's going to be very important. Joining patent pools may buy you a little bit of peace. Joining organizations that have licenses to a myriad of patents; some of them are owned by trolls, such that if you do get sued, there's a possibility that you have a license. That's a strategy you now need to think more about, because the problem's going to be more prolific.

On standards, I would suggest that you don't wait for IoT to hit you. Be proactive. Know whether or not certain standards apply to your technology and get involved. See if your competitors are involved. You want to have a seat at the table for a technology that is going to transform your products over the next 10 years.

Thank you. [APPLAUSE]

KAREN TODD: As an individual, I see IoT creating problems for individual data privacy. What do you see as the future with respect to an individual monetizing their data?

RACHELLE THOMPSON: Good question. It goes back to who owns the data. If I buy a device that's monitoring my house, is that data mine? Does that data belong to all the companies that were involved in setting up that system? If it's my data, then arguably I have a privacy interest. If I am forced to sign away my ownership rights when I do a contract with the company in order to purchase that product, then, arguably, that company owns the data, and it's not privacy. That's something that companies need to think about. In this interconnected world, if that data's going to be important, if you want to monetize it, you need to think about ownership on your end – not just from the vendors you're doing deals with, but also from the customers.

KAREN TODD: Thank you. Our next speaker is Mike Brown with Nelson Mullins.

MIKE BROWN: Good morning, everybody! After hearing two people talk to you about some cutting-edge stuff and the way the world is going forward, I am here to talk to you about an age-old problem that we've had, which is corporations and in-house counsel trying to save money, and outside law firms trying to get paid more. [LAUGHTER]

It is the struggle which has persisted forever!

Companies like Ingersoll Rand work so hard on this issue, and many others around the country can spend days, weeks, or months. I'm going to try to jam about 50 pounds of topic into a one-ounce bag.

We are seeing in my law firm, Nelson Mullins, more and more multi-litigation lawsuits. It is not always in the context of products cases. We're seeing it in all different types of class actions and litigation that is going on all over the place. MJLs (Multi-jurisdictional Lawsuits) are still around, and for lots of different reasons.

Media has a lot to do with it. The plaintiffs' bar is so much further ahead than the defense bar when it comes to working together, advertising, doing media. They are constantly spreading around the country and working together in order to increase their depth in terms of litigation. Corporate worth is always in the headlines; it's one of the problems we have with juries. When you do get to a verdict, $100 million means nothing to a jury – that's about one-third of LeBron James' sneaker contract! [LAUGHTER]

The perception that we have with people is very different. Juries are hearing about these runaway verdicts, as well.

Rising costs are an issue. Law firms have a tendency to raise their rates every year to keep up with the cost of living. In-house corporation and counsel are trying to keep the costs down. We're trying to figure out what might be the best way for us to have a strategy to work effectively with in-house counsel and outside counsel, so we can both reach our goals, and everybody can be in the same place.

This sounds like a simple issue. Everybody should be able to know about setting goals, or one clear goal and having a corporation follow through on goals. Those of us who are outside counsel who do a lot of litigation will tell you, typically, we do not know what the end game is, and what the goal is. There are some folks who do it well, but there are a lot of places that don't. Setting a clear goal and making sure that people follow through on a goal, is one of the best ways to manage litigation. If we can get one clear goal from the time we were initially retained by in-house counsel, that they are trying to set, that would really help us figure out, as outside counsel, how to retain costs, how to limit the dollars that are being spent. If we could get folks to collaborate together on different areas – sometimes you have commercial matters; sometimes you have products matters; sometimes you get really smart people like Rachelle doing intellectual property – I don't know any of that stuff. Sometimes the disciplines collide. Getting people to work together can help us a lot in continuing to always evaluate the way things are going.

There are so many in-house counsel who are doing work and are busy doing their work. They're hiring outside counsel, and a lot of that has to do with the fact that you don't know you've got a problem until you've got a problem. It's not like you have 20 years to prepare for the fact that there's going to be 50,000 asbestos lawsuits. When you get folks in and you start looking for counsel in order to do the work and to get the work done and solve that problem – one of the problems that outside counsel will tell you, because I did a little research on this in preparing for this, is there are so few outside counsel who actually know what it is that you are trying to achieve in-house, and how your business, today, actually works. More of a conversation and a dialogue between outside counsel and in-house counsel as to, "Here I am in the Litigation Department. My responsibilities are this. I am required to do this. The business focuses on this. The Board is going to get really pissed off if this happens. We have to make sure this does not occur." Those are conversations which candidly rarely happen between outside counsel and in-house counsel. If we

know the responsibility and the burdens and the pressures that in-house counsel have on themselves, it can help outside counsel, in *any* matter, be more effective in trying to deal with your issues and your problems when you are in-house.

You also want to make sure we know what the end game is. Some companies say, "We will take 100 verdicts until we kill this litigation; we'll keep taking them." Some corporations say, "We cannot take a verdict; shareholders and the Board of Directors will freak out; we can't do it." Letting people know exactly what the tolerance is helps people establish a more effective way of how outside counsel are spending your money, for those of you who are in-house.

Maria started to talk about this, but she didn't get an opportunity to finish, because she ran out of time. She was starting to talk about IT, and possibly artificial intelligence, AI. Technology is something that can really be done. There are a lot of folks inside Ingersoll Rand who already do it – the ones who I have worked with – in terms of getting information so you know your business. Knowing what your cases are; where they are; what the expenditures are; and getting the information to the point where it is so specific that it's not just looking at whether you're spending $20 million in California. It's *what you're getting* for spending $20 million in California.

Using the information and using artificial intelligence can help you figure out specifics about new cases per year, resolved cases, pending cases, resolution ratio, frequency, categorizing the types of cases. When you can crunch that data down, you can invite even more specific information; you can figure out waste that is going on, more with outside counsel, because they're doing the same old thing on cases that don't require the same old thing. Giving them that data and using it to crunch it down can be a lot more effective in helping outside counsel control costs.

> "Can I rely on empirical data if my product's software constantly continues self-developing throughout the product's lifetime? The answer may be, 'Don't just test, but insure, too.' That could be a possibility. But then the insurance company would have to ask how they establish and evaluate their risk."
>
> – *Maria Green*

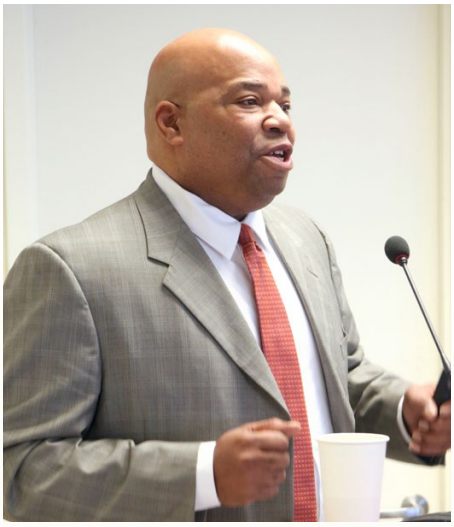
Now, in terms of the overall strategy, I looked at a lot of material before I came up here to talk about this. The people who get on problems early and set up a firm network, whether it is requiring coordinating counsels or discovery counsel, or scientific counsel, are the people who contain their litigation the best. Setting a plan, giving it to a team and sticking with the plan all work. If a corporation, for instance, determines that, "We're going to take some verdicts; we're going to stay on this plan until we crush this problem down," you can't change to a different direction if you take a hit. You've got to stick with the plan in order to be consistent. Plaintiffs' lawyers smell blood before it even comes out of the body. They know when they can go ahead and keep pushing your buttons in order to get settlements, in order to take advantage of the fact that you don't want to spend a lot of money on this case, or you're trying to limit your costs in this litigation.

If you put competitive and competent teams in place right up front, that will allow you to go ahead and set up a system. If you stick with that plan and get everybody working together, you can bring down costs by following the plan, no matter what happens. You'll see we have listed different things – coordinating counsel, discovery counsel, scientific counsel, trial counsel. Setting those budgets and scopes will work well.

If you are seeing cost overruns, start doing alternative fee arrangements. One of the things I personally became privy to is getting a success fee. "Mike, we'll put you on this case. We're not going to pay you $500,000 to litigate this case all the way, but if you get this case resolved under this number, we'll pay you another couple of hundred thousand dollars on top of the limited fees we already gave you." Make people prove themselves as outside counsel. Most outside counsel will tell you, "We ain't got a problem with that *at all*." Give people the opportunity to show value to you if you are in-house counsel, and that way, you can contain costs, and law firms can do better work at their cost and still be able to succeed and get paid the outside fees that they're seeking.

You see here a few different types of scenarios. National coordinating counsel (NCC) and those roles; national discovery counsel (NDC) and those roles; national coordinating counsel, and what you could do with those folks in order to try to identify cases up front. Using your teams, you can identify cases for early resolution, like whether it's arbitration or mediation or alternative dispute resolution.

Obviously, the goal is if you've got a "piece of crap" case, you don't want to spend $100,000 of legal fees on one you could probably get rid of for $5,000. Get people to get it up front, so you don't need to bother using money on legal spend. Save your money – I'm sure there are many other things you could do with it. It requires everybody to know exactly what you expect of your outside counsel. If you see a "piece of crap" case, get it out of here, get to in-house counsel, notify them this is something we can try and get rid of right up front, before you even start seeing outside counsel spend money.



Motions are underrated in litigation. You could start filing motions immediately, as everybody here knows – because we're lawyers – or after cases are filed. One of the things that I have always thought about, as a defense lawyer, is the plaintiffs' lawyers that work the hardest are the ones who are going to get a bigger settlement out of the case, because those are the ones putting the energy in – I'm getting the impression you're building a better case – and then everybody thinks because they're working so much harder, they're going to end up getting the case to a point where you need to pay a bigger settlement. Let's file some motions right up front. Make sure your outside counsel knows that this is a tool that needs to be used regularly and effectively as a way to stop the flow of what the plaintiffs are doing. Try to badger and harass people with depositions, corporate witnesses, all that stuff they do to put pressure on in-house counsel.

It's the same thing with knowing about trial candidates. If you know this is a case with a law firm because you asked for a demand, and they refuse to give you one. You know it's a case that you've got a good defense on, based upon the history that you've established. Let him know that it's probably going to have to go to trial. There are times when you have to try some cases, there will be opportunities – sometimes the only way to stop a bully from constantly trying to get in your pocket is to punch him in the face! [LAUGHTER]

That's the only way to stop them sometimes. You've got to go to war to let people know you're not going to take it no more! You could put mechanisms in place in order to make sure you don't have to get to that point up front, but there are times when you don't have a choice but to let people know you're going to slap them back – you're tired of being hit! [LAUGHTER] We're going to do it to you every time you bring a "piece of crap" case looking for a million dollars.

Identifying those cases early, getting your trial counsel in early, even negotiating success fees and making sure you don't spend too much money – there's a way that you can still control the costs.

I got a little bit ahead of myself. Trying cases where it's appropriate; making sure that workup from the initial investigation to trial is done thoroughly and identifying trial candidates are all part of this.

If you can, one of the things that I'm going to have in here specifically, and I want to talk about quickly, is getting your team set. That means witnesses, expert witnesses, corporate witnesses and identifying documents. By far, the single biggest cost every in-house counsel says that they have, in terms of surveys that I've seen, is discovery. If you get a discovery plan with artificial intelligence and IT set up early, and get your documents in, you can start to limit discovery, because all it requires is a press of a button to respond to the discovery. All it requires, then, is a flick of a key, because all the data is already there. Getting that information up front is crucial to containing costs.

Getting your experts and your witnesses set up front, so that you know who you are going to call whenever you have a certain kind of case, is also extremely crucial. We have some clients that every time a case comes, we are looking for witnesses again and again and again. It costs a fortune to do it that way. That early setup of witnesses, discovery documents, IT and AI in order to get information in one place is effective.

Let me just tell you about a couple of different scenarios in how people approach these things, and then I'm going to sit down.

I'm from Maryland. There was a hospital there that got served with a thousand cases at one time, having to deal with lead paint issues. They were run by a national insurance company out of Ohio, who came in. The first thing they directed everybody to do with these thousand cases was to get expert witnesses *now*, right off the bat. Here is the end game: we're not paying a dime to these cases; we believe in the project; we believe in this hospital. We spent six months right up front just getting expert witnesses lined up. There were documents from 40 years ago. Then spent another three months getting IT folks and professionals, to conglomerate all this, and get all this information together, in order to provide consistent discovery responses to all these cases. After doing all of that, we tried the first five cases. For the first five cases, we got defense verdicts on *all* of them. The other 995 cases went away.

It took six years, but it would have taken an awful lot longer than that if we were dilly-dallying around with the strategy and the clear, concise direction that was provided to outside counsel for how the in-house counsel wanted to provide and pursue on these cases.

One other quick one. There was a company that has multi-state litigation that we represent, and they had over 175,000 claims filed all across the United States. We did the same thing – first worked up expert witnesses; got containment on discovery documents; set up local teams all over the country, and gave them clear, concise direction on how they were going to proceed with defending the company's interests in all this litigation. It

took 10 years, which seems like an awful long time – unless you know some corporations are still involved in some of the same litigation going on 20, 25, 30 years! In 10 years, they were able to stop any new filings against them. After doing discovery and getting their cases together, they took the approach that they were not going to pay on trials. For a while, that meant some headlines and some bad hits. Then the verdicts started coming – defense verdict after defense verdict and defense verdict.

Last year, when they used to get 1,400 new cases every year, they got six claims filed. Part of that strategy is working together with the things we talked about – coordinating with your outside counsel, setting clear, direct and concise plans. When you do that, you can save money, you can save time, you can kill litigation, you can have a more profitable and successful business enterprise.

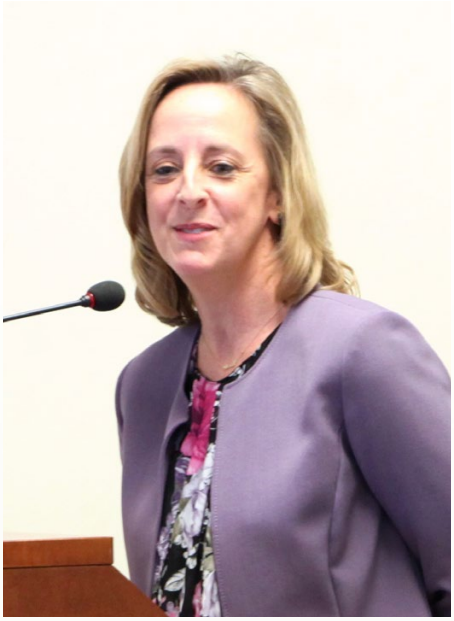
Are there any questions?

[AUDIENCE MEMBER]: Can you briefly discuss the role of the different types of national counsel and how they coordinate with each other?

MIKE BROWN: Yes! As a matter of fact, I will go back to that slide. I knew I only had 10 minutes, so I was trying to whip through that, so forgive me.

Okay, some firms and companies go with a national coordinating counsel model, and that's somebody that you use overall to try. Everybody who's in-house, they've got time to be doing that. Anybody got time for that? [LAUGHTER]

You use those folks to collaborate with the law firms across the country in all the different states to get your reporting information. What's going on with these cases? Give us the status of this. Get that information compiled into your NCC. They are then supposed to take that information, crunch it down and deliver data to the in-house people, that can be used to report up.



That data should include information on the amount of cases; cases that are either going to be resolved early or are going to trial; costs; what you're spending monthly, and what that is on each case. The NCC does that. National discovery counsel helps provide you with one consistent response. One of the problems that a lot of people in here could tell you about is that sometimes you say something in a set of interrogatories that's different than what you said in the same interrogatories two years ago in another state. National discovery counsel ensures that there is consistent coordination with regard to discovery responses that are given to different plaintiffs' lawyers in different lawyers around the country.

Those are what those two roles are. With regard to national trial counsel or national scientific counsel, it is somebody you use to coordinate the defense. Expert witnesses, folks that you build up that you want to get on your team so that you know you can go back to those same experts every single time that you have a case and national trial counsel – that's good. [LAUGHTER]

When you've got to swing, then you bring in national trial counsel to either one, start to apply pressure on cases – there are a lot of times, for instance, when trial lawyers should be pro-active. Our motions are entered, and we hop into cases and we start showing up, then people know you're serious. There are times when you've just got to go. At trial, all of these different types of counsel, depending upon the model that in-house counsel wants to set, coordinate together and have specific roles.

If you do that right, and everybody's on the same plan, it really is an effective way to manage it so there's no duplication of effort. Have local counsel doing what discovery counsel should be doing – there's really a way to do it where there's a clear, precise direction given, to limit the roles. That's one of the ways that outside counsel waste a lot of money for in-house counsel, is duplication of efforts. [APPLAUSE]

KAREN TODD: Thank you. Our next speaker is Melanie Dubis with Parker Poe.

MELANIE DUBIS: Good morning! First of all, on behalf of my colleagues from Parker Poe who are here, and those of us who have had the privilege of working with Ingersoll Rand, I'd like to thank Maria and her Legal Department for the opportunity to be with you here this morning.

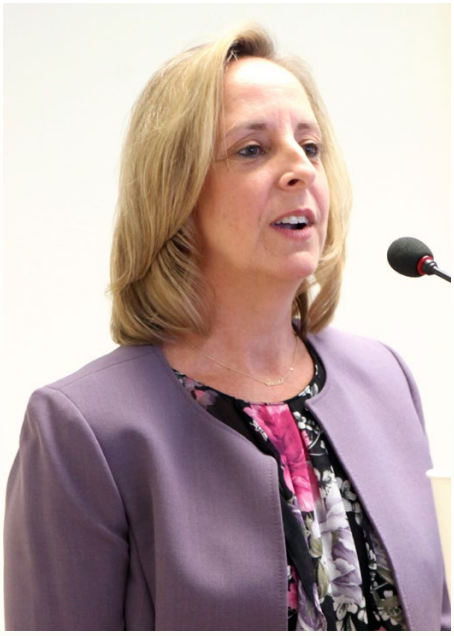
I'm going to talk this morning, about managing threats to your innovative company. For those of you who are on boards or who are in-house, how do I know that your companies are innovative? The first thing I did was look at the attendee list that came out last week, and I noted that approximately 48% of our attendees are women. Then I looked at the panel that was invited to speak to you today and noted that two-thirds of us are female or people of color. Then you compare that to partners at Am Law 200 law firms, only 22% of whom are women and only 7.5% are people of color. By and large, we, here today, are beating the odds in terms of diversity. What in the world does that have to do with innovation?

Like Gray, I'm a Carolina graduate, so it's heresy for me to be praising NC State, but our friends at NC State's Poole College of Management did a study last year, and they wanted to know whether companies who have policies that promote the promotion and hiring and retention of a diverse workforce also performed better at developing innovative products and services. Their conclusion is – short answer – they do. Companies that are more diverse, like your companies, produce more new products each year, produce more patents each year, and your patents are cited in more patent applications as prior art, so you're spawning additional innovation.

What kind of threat does that create? That creates the threat that the innovation that you are creating is more likely to be compromised. Former Attorney General Eric Holder would tell you that, like data privacy, there are only two types of companies: those who know they've been compromised, and those who don't know that they've been compromised. When it comes to innovation and your trade secrets and your confidential information, because you're more innovative, you're more likely to face that threat. In fact, the statistics bear that out, as well.

Litigation involving the theft of trade secrets increased 14% from 2001 to 2012, and since 2016, trade secret litigation has increased again an additional 30%. This is a rising problem for companies, particularly innovative companies.

What can you do to manage that threat? I want to talk today about the North Carolina Trade Secrets Protection Act and, again, one of the reasons I focused on the North Carolina Act, it is modeled after the Uniform Trade Secrets Act, which most states' acts are modeled after. I also want to talk about the Federal Defend Trade Secrets Act of 2016. Like the North Carolina Act, this act is modeled after the Uniform Act, so you'll see some similarities there. Another way to defend yourself against threats of



your innovations being compromised is, obviously, non-disclosure, non-compete and other contractual restrictions.

Under the North Carolina Trade Secrets Act, that protects trade secrets (which include business and technical information), is information that derives actual or potential commercial value from being not generally known and not readily ascertainable, and information that is the subject of efforts that are reasonable under the circumstances to maintain the secrecy.

I want to pause here for a minute, because these "reasonable efforts to maintain secrecy" are where you can shortcut these threats, trade secret misappropriation, on the front end. They are also where you can set yourself up to have the best case if you find yourself in litigation and you have to try a trade secret case.

Reasonable efforts are based on the facts and circumstances of the case and of the company. What is reasonable to a closely held company with 12 employees is going to be a lot different than the reasonable efforts that a large international company needs to take. Some of the things that courts have focused on with respect to these reasonable efforts are: Are you restricting access to the trade secret and the confidential information? Are you keeping information in a locked location? Do people have to have certain badges to get in and out of certain areas of the plant? And are you restricting computer access? As we've discussed this morning, all the data is electronic. What are you doing to protect the data, to protect your trade secrets and your confidential information? Again, using password protection, using encryption; and I.D. badges to restrict access to certain locations are key. As the technology gets more sophisticated, these restrictions get more sophisticated, as well. Courts are going to start looking at that.

Are your trade secrets shared only in discrete parts, or do you pass them around in whole? If you're Coca Cola Company and you've got the secret formula, do you relay that one ingredient at a time so that if it gets intercepted, people can't put it together, or do you just hand it over to people who need to know? That's something the courts have looked at.

Have non-disclosure agreements, both with your employees, where your employees agree that they will not disclose your confidential information and trade secrets; and have those agreements with your vendors, as well. Any vendor – even our law firm, our copiers, our copy center – we have to have agreements with them that they're going to have access to client-confidential information and that they contractually agree to keep that confidential and not disclose it.

Obviously, you want to limit the number of people with access to trade secret and confidential information. In your exit interviews and your exit procedures, make sure that you have a procedure in place where when employees leave, they are reminded of their confidentiality obligations; make sure you get the computers back, the hard drives, the thumb drives, the company phones – whatever it is, make sure there's a procedure in place when they exit, that that's returned.

The trade secrets are protected from misappropriation, which is the acquisition, disclosure or use of the trade secret. For a company like Ingersoll Rand and international companies, the question arises, where does the misappropriation occur? That's also going to impact whose law applies and where you can seek redress of trade secret misappropriation.

There's a recent case out of our North Carolina Business Court, the *Cyberith* case; it was decided in January, and this is your classic fact pattern where a former employee downloaded data on a thumb drive when he left, and then took the data to the UK. In the UK, he did research and development on his own competing product and then filed a patent application in Europe. He was sued; he had clearly taken the data from a North Carolina company in North Carolina. The court said, we apply the *lex loci* test, and typically in trade secret litigation, that means that the misappropriation occurs where the information is received and used. In this case, though, the court said the information was misappropriated and used, not in the place where the defendant acquired the trade secret, but in the location where he used the trade secret to develop a competing product, i.e., the UK. It was case dispositive in this case; the court granted summary judgment against the employer in favor of the employee. It said the North Carolina Trade Secrets Act doesn't apply, because you did not misappropriate the trade secret in North Carolina; it was misappropriated and used in the UK.

How do you avoid chasing people down in the UK or California or Idaho or wherever it may be? Two thoughts: In your employment agreements, your non-competes, your confidentiality agreements, think about choice of law and forum selection clauses. The employment lawyers in the room will tell you that's a delicate balance to strike, and courts obviously are going to look to protect the employees' interests. But where there is a legitimate interest and connection with a particular state and law and jurisdiction – for example, the employee is employed in North Carolina – think about using those in your forum selection clauses and choice of law clauses in your agreements.

> "Artificial intelligence can't do complex analytics. It can't make value judgments. If you need to make a decision about whether something is ethical or whether it's demonstrating the right values, AI can't do that for you. AI cannot respond to changing situations... it may eventually be able to adapt to that change, but it can't adapt immediately."
>
> – *Maria Green*

Another tool that you have in your arsenal now is the Defend Trade Secrets Act [DTSA], the federal act. If this happens and the employee is in a different jurisdiction, pleading multi-state conduct and that the product that is used is related to or used in or intended for use in interstate or foreign commerce will get you jurisdiction under the Defend Trade Secrets Act, and you have a little bit more control over your federal court and your federal jurisdiction.

I'd like to talk a little about the federal act. It was passed in May of 2016. It's part of the Espionage Act, but it provides a private cause of action to the owners of a trade secret which is misappropriated, and again, which is related to a product or service used in or intended for use in interstate or foreign commerce. That's a pretty broad definition – just about everything that any company does is used in or intended for use in interstate commerce.

A couple of unique features of the federal act that you don't find under a lot of state acts – the federal act provides for an *ex parte* seizure order, and I'll talk a bit about that. There are also some whistleblower protections that are part of the federal act, that it's important to know about and to plan for in advance.

A couple of other features of the DTSA: it has a three-year statute of limitations from the date of misappropriation or the date that it's discovered. For purposes of calculating the statute of limitations, a continuing misappropriation constitutes a single claim. Again, this can be case-determinative. The *Attia v. Google* case, out of the Northern District of California earlier this year, was a case in which the plaintiff alleged that Google had misappropriated his trade secret or confidential information and disclosed it in a patent application. The patent application was filed in 2012, but the plaintiff claimed it's a continuing misappropriation; it continued into 2016, and therefore, the federal act applied. The court said, "No, there's no continuing misappropriation to extend the date of misappropriation or the statute of limitations. The first disclosure – 2012 – is the disclosure that counts for purposes of the statute and for purposes of the application of the Act, and it doesn't apply."

Then lastly, the DTSA, another feature, does not preempt state law, and so you still have the options of pleading under the federal statute and under state statutes.

Here's a little bit about the *ex parte* seizure orders. Again, this is a really powerful tool that is built in to the federal act. If the defendant has actual possession of the trade secret, you can describe what it is with particularity so the judge knows what to tell the Federal Marshals to get. If you can prove that the target would destroy the trade secret or would make it unavailable to the court for purposes of litigation going

forward, and you can show that you have not disclosed, other than to the court in the *ex parte* application, you haven't disclosed the request for the seizure, the court can – again, without notice to the defendant – order the seizure of the trade secret.

Now, before everybody gets excited at the concept of getting the Federal Marshals to go out and break in to somebody's house, bust down the door and seize the trade secret – that makes me excited, because I'm a litigator. We get excited about things like that. [LAUGHTER]

There are only two reported cases since the passage of the DTSA in 2016, where a court has actually issued the *ex parte* order. Courts are not comfortable yet with the power of that order. They do, however, still issue injunctions under Rule 65, order expedited discovery so that the court can understand what has been misappropriated, where it is, what it is, etc. There still is a lot of injunctive relief being awarded under the DTSA. The seizure orders haven't quite taken hold. Hope springs eternal!

The other requirement to the DTSA that's important for employers to know is that employers have to provide notice of whistleblower protection in any agreement with employees that govern the use of trade secret or confidential information. That's true of any agreement that's entered after the passage of the Act, May 11, 2016. The failure to include these whistleblower provisions means that you cannot take advantage of the exemplary damages and the attorneys fees provisions. If the employee has not been given the notice of the whistleblower protections, that employee puts in a thumb drive, takes your data, and you sue them under the DTSA. Without that notice having been given, you can't receive all of the damages that are available.

For purposes of this part of the Act, "employee" includes not only W2 employees – individuals working for the company – but also contractors and consultants.

This is some sample language that we have started using since 2016 in employment agreements that comply with that requirement of the DTSA to give notice.

Takeaways would be that the DTSA expands a trade secret owner's options and the tools you have in your toolkit. Take stock *now* for your companies of what information you are protecting as a trade secret as opposed to information that's patented or copyrighted. What confidential, proprietary innovations are you maintaining, and what are you doing and what *can* you do to protect the threat that those will be misappropriated? That includes, of course, updating your employee and consultant agreements to include this whistleblower language and thinking about the choice of law and informed selection clauses. Also, update the reasonable efforts that you're taking to maintain secrecy. As technology advances, courts are going to be looking for higher levels of protection for that confidential information from international companies.

Again, the *ex parte* seizure orders will be rare, but if you find yourself in litigation, continue to seek those Rule 65 injunctions and expedited discovery to recover and maintain and protect your innovation, and that state law analysis will continue to be important. Federal courts under the DTSA are continuing to look to state law, and keep up-to-date with the appropriate jurisdictions, the applicable jurisdictions, and their state law and trade secret protection.

Thank you very much! [APPLAUSE]

KAREN TODD: In the interests of time, we're going to move on to our final panelist, Cy Morton with Robins Kaplan.

CYRUS MORTON: Good morning, everyone! I'm Cy Morton from Minneapolis; I'm happy to be here today. I do a lot of patent litigation, which I'll talk about. I'm really glad it's finally my turn to talk for more than the 10 minutes Karen allotted us! [LAUGHTER]

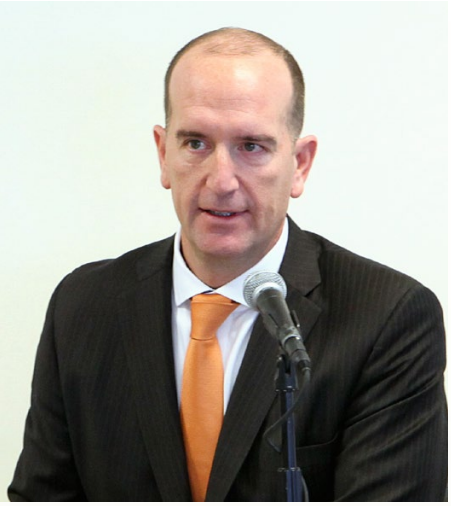
It's been my pleasure to work for Glenn Edwards, Chief IP Counsel for Ingersoll, for the past 10 years, and for Maria and Glenn here at Ingersoll for over three years. I'm honored to be here to speak today. I wanted to thank both of them for the invitation and the opportunity, and congratulations again on the award. Thank you.

What I plan to do today is not talk about everything there is to know about patent litigation, but to pull the camera back a bit and look at the last 15 years, and the trends that have happened, and how that affects the value of innovating and owning U.S. patents today.

How does this work? There we go!

Today, my central thesis, what I'm going to call "the patent pendulum," has swung wildly during that time. Patents were *extremely* valuable around the turn of the millennium. Over time, that value has eroded *dramatically*, for various reasons. There have been various court decisions, legislation, and changes in the Patent Office. Today, in 2018, patents are coming back.

The reason all this happened, and it was mentioned earlier in Rachelle's comments and her talk, was this idea of patent trolls,



and the idea that patent litigation had gotten out of control and patent trolls were suing everybody, and we needed to *do* something. The reason that it's coming back today is because changes to handle patent trolls, a lot of them missed the trolls and just made the patent system worse for everybody – including Ingersoll Rand – and devalued patents in general. This is my thesis, my opinion.

With that, let me get into it. I have a timeline here of all the things that happened. I'll go through those; it's court cases and legislation. First, let's talk about what is a patent case. What is it all about? It's pretty simple. A patent owner has a patent and alleges a competitor infringes and owes a large amount of damages. In fact, they *knew* about the patent, so they are *willful* infringers that owe treble damages. In the future, there should be an injunction to prohibit further infringement. The accused infringer, of course, says the opposite. It says the patent is invalid for one reason or another.

Now, keeping those things in mind, here's what's happened: In 2006, the Supreme Court largely wiped out the ability to get injunctions. It's the rare case, in the *eBay* decision, that you're able – even if you win a case – to get an injunction.

In 2007, in the *Seagate* decision, the Federal Circuit – which is the Appellate Court that hears all patent appeals – wiped out willful infringement, so that even in cases where there was copying, if you could come up with a decent defense at trial, you wouldn't be found to be a willful infringer. It's still possible, but highly unlikely.

At that same time, the Federal Circuit attacked the damages. There were many decisions over a few years I'm not going to go into, but the Federal Circuit went on a rampage of knocking down what are available patent damages.

Despite those changes, we have Senators Leahy and Hatch proposing patent reform legislation. That was pending for about eight years; they finally got it done. You can see, even in 2008, '09, '10, they're saying we need to make patents harder to get and easier to challenge.

That led to the passing of the America Invents Act, signed by President Obama in 2011. It did a lot of things. It was the biggest reform to the patent system since the 1952 Patent Act, which I'm sure you all remember well and fondly! [LAUGHTER]

The main thing that it did, for purposes of today's conversation, is come up with new procedures where you can go in the Patent Office and challenge the validity of patents. The board that hears those challenges was soon dubbed a "death squad" by the head of the Federal Circuit Court of Appeals, because of how many patents they were killing.

Again, the pendulum is swinging more and more toward the accused infringers in this case.

There were still calls for more patent reform. Now you start to have some debate. Now, we are at 2012. You have the director of the Patent Office, David Kappos, starting to say that everybody says the system is broken, give it a chance. We've changed all these things. Let's not keep doing more and more reforms!

The patent pendulum kept swinging. This again came up in Rachelle's talk, and this is the idea of patentable subject matter over a number of Supreme Court cases, made it very difficult to patent some medical technology, and especially the Internet of Things. You talked earlier about trying to protect data. A patent having anything to do with data controlling devices – controlling HVAC systems, for instance – is much more difficult. Here, the court system was just laying waste to another whole category of patents during this timeframe.

We are still not done; the pendulum is still swinging. In the *Octane Fitness* decision, the Supreme Court addressed the issue of getting attorneys' fees awarded. We're not a loser-pays system, in general, in America. Under *Octane Fitness*, it's much easier for district courts to award attorneys' fees to the losing party. It could go either way, certainly, but that has a major chilling effect, especially when you know patent cases can cost several million dollars (and my apologies to Maria and Glenn for that).

Despite all of that, one of the chief patent reform guys, Congressman Goodlatte in Virginia is still saying, we've got to get these patent trolls. This is in 2015. We've got to have more reform and more legislation, more changes, to make it harder to enforce patents.

Now, we're finally starting to get the debate coming the other way. This is a former chief judge of the Federal Circuit saying about those new procedures in the Patent Office to challenge patents, that they have gone too far. We've had three or four years of that; we know it's not working; they're killing too many patents.

What was all the stuff I've been talking about? The problem is you've got everybody trying to fix the system, and it's a complicated system. You've got the courts trying to do it, legislators trying to do it, the Patent Office trying to do it; all of the rhetoric I've been talking about. For anybody who's ever

done a scientific experiment, you know you change *one* variable – keep everything else constant – so you can tell what happened. We changed every variable. Everything that I knew about in law school about patents has changed in the time that I've been practicing.

That's where we are now.

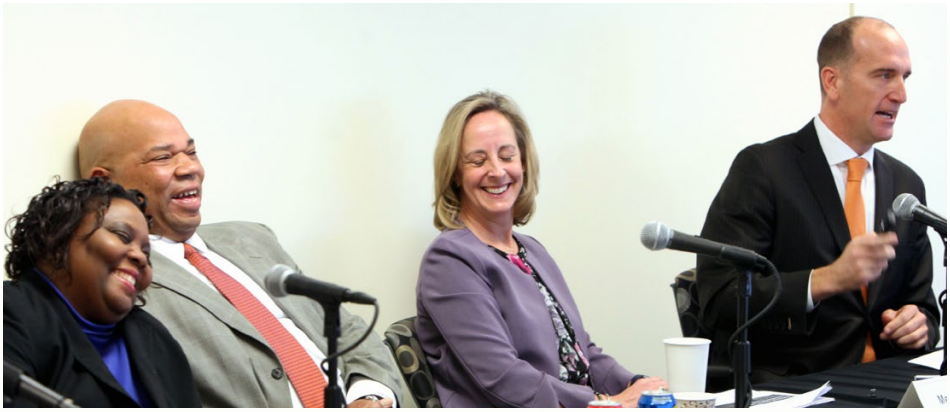
The good news: the pendulum is coming back a little bit the other way for patent owners.

The Supreme Court's *Halo* decision overturned that horrific *Seagate* decision on willful infringement. It's still difficult to prove willful infringement, but it's *possible*. If you have a case where somebody's copied you, you have a good chance to show that they're willful infringers, and you have those potential enhanced damages.

Damages are still very hard to prove. In the *WesternGeco* case this year, the Supreme Court expanded some damages for patent owners, so that you can get worldwide damages if you can show that it was caused by U.S. infringement, a positive for patent owners.

The *Berkheimer* decision addresses, again, the patentable subject matter. The problem with protecting the Internet of Things, among other things, saying it's a fact decision. It's much more likely that will go to trial than be decided, as it was, on the pleadings at the start of the case. Again, good news for patent owners.

At the Patent Office, there is reform happening. We have a new director, Director Andrei Iancu. I had worked with him before; as soon as he was nominated, I was so happy. I'm thinking, he's for sure going to do something about all these things. He's already instituted many new – I won't go into the details – patent owner-friendly reforms to the process, just to make the process *fair* when you're challenging patents at the Patent Office. He's given many speeches, but I'll just leave you with one quote of his. He is definitely trying to change the overall narrative in Washington. He's pointing out



that we have a great patent system, and he is working to return it to be the gold standard system that it should be.

With that, the basic takeaway is that patents are coming back. A lot of these changes are just this year. Director Iancu, to paraphrase the illustrious man who appointed him, is trying to "Make Patents Great Again." [LAUGHTER]

It's never going to be back the way it was in 2000, but it's definitely coming back. It's definitely a good time to be an innovative company aggressively pursuing patent protection. So now is the time, Maria, to make sure that Glenn has a complete and full budget and support for everything he wants to do. [LAUGHTER]

Now's the time – patents are coming back!

Thank you. [APPLAUSE]

[AUDIENCE MEMBER]: With globalization and increased competition outside of the U.S., how have you adapted your practice to adjust to patent protections in developing countries?

CYRUS MORTON: I mostly litigate in the U.S., so I can't say I've adapted my practice that much. The point in my talk that relates to that is the fact that you can patent things in Europe and in Asia that you can't patent in the United States. That relates to some of the cutting-edge medical technology, the Internet of Things, data, etc. As far as emerging countries, that's difficult. Are you really going to pay the money to get patent protection there when the sales don't support it? Rachelle?

RACHELLE THOMPSON: From my perspective, we are oftentimes in communications with our client regarding a global patent strategy. Even though I do not litigate patents abroad, we do work closely with clients who do, so we make sure that the strategies are in sync. It's a bit of a problem for emerging countries. There are a couple of countries that tend to be problematic and keep us up at night. Sometimes those clients have to make a tough choice. You patent in a certain country, knowing that they're going to copy it, and you're not going to force it, but you're making enough money elsewhere where it's okay. That's one approach. The other approach, and particularly in the UK – we've seen a lot of litigation there – that impacts our U.S. litigation. We make sure that our claim construction strategy is consistent. Oftentimes, we will even adjust the timing of lawsuits in the United States. We may slow down things a bit so that we can get rulings over in the UK that will impact our litigation. That's our approach when dealing with global litigation.

KAREN TODD: Thank you. I would like to thank all of our panel for sharing their expertise with the audience today. I'd like to thank Maria for accepting our invitation, and also the Ingersoll Rand company. Let's give them all a round of applause. [APPLAUSE]

Gray Styers

Partner

Fox Rothschild LLP
ATTORNEYS AT LAW

M. Gray Styers Jr. practices in the areas of regulatory and administrative law, energy/utilities law, zoning/land use, government relations and large infrastructure matters.

Wherever business strategy intersects with government regulation and public policy issues, Gray assists clients in navigating the political and legal environments to achieve their objectives.

He represents numerous energy, telecommunications and project development clients before state government agencies, permitting officials and local zoning boards as well as in appeals to both state and federal courts. He has served as regulatory counsel for renewable energy facilities, two natural gas distribution companies as well as municipal natural gas systems, advises independent power producers and major wireless telecommunications service providers and handles zoning and permitting for large commercial and residential developments and infrastructure projects. Gray is a "Utilities Law Specialist" as recognized by, and meeting the criteria of, the North Carolina State Bar Board of Legal Specialization.

A mediator certified by the North Carolina Dispute Resolution Commission, Gray is often asked by other attorneys across the state to help mediate disputes in his areas of experience.

Gray earned his law degree from the University of North Carolina School of Law and an MBA from the University of North Carolina at Chapel Hill, as well as a bachelor's degree in political science from Wake Forest University. He began his legal career as a judicial clerk for Chief Judge Sam J. Ervin III on the U.S. Court of Appeals for the Fourth Circuit.

He was recently named 2019 Raleigh *Best Lawyers* Lawyer of the Year for Land Use and Zoning Law, a designation he has earned in past years in the categories of Energy Law and Litigation – Land Use and Zoning. Gray's long list of other honors includes the 2013 North Carolina Bar Association's Citizen Lawyer Award.

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Rachelle Thompson

Partner

McGUIREWOODS

Rachelle Thompson is a registered patent attorney and partner in the Intellectual Property department of McGuireWoods. Based in Raleigh, North Carolina, she is a former patent prosecutor who brings an advanced technical background to litigating patent disputes in technical disciplines such as biotechnology, pharmaceuticals, telecommunications, smartphones, wireless technology, e-commerce, semiconductors, data encryption, and computer software. She also represents clients in trademark and copyright litigation, and provides IP-related counseling on a range of technologies to clients across industries.

Rachelle currently serves as a member of the 2018 Law360 Intellectual Property Editorial Advisory Board. She received a Bachelor of Science in chemistry from Furman University (graduating first in her class and summa cum laude) and a Juris Doctor degree from the University of San Diego (magna cum laude).

Before law school, Rachelle conducted research in the areas of synthetic organic chemistry, phospholipid chemistry, and lithography. In 2001, she became the first African American woman at Stanford University to receive a Ph.D. in chemistry.

Before private practice, Rachelle served as an extern and law clerk to the Honorable Rudi M. Brewster, Senior District Judge of the U.S. District Court for the Southern District of California, and as a law clerk to the Honorable Paul R. Michel, Chief Judge of the U.S. Court of Appeals for the Federal Circuit. She is a member of the Board of Trustees of her alma mater Furman University.

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Working together from 26 offices in the U.S., Europe and Asia, McGuireWoods and McGuireWoods Consulting share a dedication to diverse perspectives, impeccable service, and innovative delivery of practical, business-minded solutions.

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First things first: we get results. Our clients win their cases, close their deals, and safely navigate the regulatory risks they face. But that is not all we are about. Our passion — what drives us above and beyond — is doing all of that *and* adding value every step of the way.

What does that mean? Value is a slippery concept. The definition varies from client to client and industry to industry. Here's how we see it.

There are no cookie-cutter solutions. Even with seemingly routine matters, you have to take time to listen to clients, to hear and understand what's important to them, to craft solutions tailored to their businesses and aligned with their cultures, and to do it all in an efficient, cost-effective and transparent manner. Our goal is to leave clients wondering why all service providers don't deliver more than they expected. More proactive thinking. More diverse views. More attentive service. More innovative approaches. More connections. More bang for the buck. More *value*.

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We've made the necessary commitments. We invest in listening to our clients directly and through third-party interviews that deliver the unvarnished skinny on our performance and how we can continuously improve our service delivery.

Mike Brown
Partner

NELSON MULLINS

Mike Brown handles complex cases in jurisdictions around the country. Mr. Brown has experience in the areas of products liability defense, mass tort litigation, employment law, medical malpractice, and insurance defense, as well as commercial and real estate litigation matters.

In addition to his national clients, Mr. Brown also serves as general counsel to numerous local companies and corporations, advising on a variety of matters related to employment and business litigation, real estate issues, and concerns unique to the Baltimore-Washington region.

Following is a selected sampling of matters and is provided for informational purposes only. Past success does not indicate the likelihood of success in any future matter.

- During more than 25 years of practice, has represented large national corporations that run the gamut of industries and include 17 Fortune 500 corporations in numerous litigation matters
- Has tried more than 80 cases to verdict for these corporations and has tried cases in 24 states, including in some of the most challenging jurisdictions in the United States, from Maryland to Pennsylvania, New York, New Jersey, Virginia, Mississippi, Florida, Ohio, California, Louisiana, Missouri, Arizona, and Washington, D.C., among others
- Has obtained defense verdicts in more than 95 percent of his matters, including a defense verdict in a landmark products liability asbestos action in Alameda County, Calif., in 2006

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- Chambers USA: Litigation: General Commercial, Recognized Practitioner (2018)
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- Best Lawyers in America®, Mass Tort Litigation (2011 – 2012); Mass Tort Litigation/Class Actions – Defendants (2011-2019); Products Liability Litigation - Defendants (2011 – 2019); Commercial Litigation (2013 – 2019); Medical Malpractice Law – Defendants (2019)
- Greater Baltimore Committee Bridging the Gap Award
- Martindale-Hubbell Peer Review Rating: Distinguished Rated

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Nelson Mullins' clients range from Fortune 500 companies to private equity and venture funds and portfolio companies to emerging growth companies and start-ups.

Melanie Dubis

Partner

Parker Poe

Attorneys & Counselors at Law

Melanie Dubis handles complex patent, securities, and other business disputes at the trial and appellate level for corporate and individual clients in the pharmaceutical, manufacturing, insurance, financial services, and technology industries.

She has experience in North Carolina state and federal courts, the U.S. Courts of Appeals for the Fourth and Federal Circuits, and in arbitration proceedings.

Melanie has represented generic pharmaceutical manufacturers in patent litigation under the Hatch-Waxman Act, served as national defense counsel in class action lawsuits involving insurance regulations pending in multiple federal jurisdictions, and defended clients in false advertising and unfair competition claims filed by the Federal Trade Commission (FTC). She also represents corporations and their boards of directors in derivative actions.

She appreciates that her clients benefit from doing business in a thriving business region with a high quality of life, and she plays an active role in keeping the Raleigh-Durham area at the top of the "best of" lists through service on numerous boards and committees.

Parker Poe LLP

For more than a century, Parker Poe has represented many of the Southeast's largest companies and local governments in transactions, regulatory issues, and complex litigation. Our attorneys have extensive experience representing clients in the education, energy, financial services, government, health care, life sciences, manufacturing, and real estate industries. Parker Poe has more than 200 attorneys serving clients from seven offices in Charlotte and Raleigh, North Carolina; Charleston, Columbia, Greenville, and Spartanburg, South Carolina; and Atlanta, Georgia. Lawyers in each of our offices are rated among the highest quality attorneys across their respective states, recognized for effective and efficient service. *The Best Lawyers in America* lists more than 80 of our attorneys in its rankings, and we are also well-recognized by *U.S. News & World Report*, *Chambers USA*, and other ratings publications. Independent surveys by financial, accounting, and research organizations rate Parker Poe among the top law firms for high-value, quality service. Research by Pricewaterhouse Coopers reveals our rates to be in the midrange of competing firms, both regionally and nationally. Service satisfaction research by Altman Weil and BTI identifies Parker Poe among the leaders in client satisfaction and loyalty. For 2019, Parker Poe was named to the BTI Client Service A-Team, which is the gold standard used by law firms and corporate counsel to measure client service. Parker Poe has received that recognition 10 of the past 11 years.

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Cyrus Morton

Partner

ROBINS KAPLAN LLP

Cyrus Morton is a trial attorney whose complex litigation practice has included an emphasis on patent litigation since 1998. His representation of small companies and inventors has included a number of trial successes including an $89 million judgment against Clear Channel, a $12 million judgment against Apple, and a $7.4 million judgment against Itron. He has also successfully defended companies such as Medtronic, Liberty Mutual and Draeger in patent cases.

Mr. Morton is also the Chair of our Patent Office Trials Group which focuses on the new procedures for patent office trials on patent validity or derivation created by the America Invents Act. Since the passage of the AIA, Mr. Morton has established himself as a thought leader on issues surrounding the Patent Trial and Appeal Board (PTAB), and in 2018, the PTAB instituted the first-ever derivation proceeding on behalf of his client, Andersen Corporation. His past experience as a patent attorney, combined with handling numerous patent litigation disputes with co-pending reexaminations, makes him ideally suited to lead this practice area.

Prior to becoming a lawyer, Mr. Morton saw the patent system from the inventor's side. While working at 3M Company, he co-authored three Records of Invention and was a named inventor on U.S. Patent No. 5,858,624, titled Method for assembling planarization and indium-tin-oxide layer on a liquid crystal display color filter with a transfer process.

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