DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Thomas L. Sager

Senior Vice President & General Counsel, DuPont

THE SPEAKERS

Thomas L. Sager
Senior Vice President & General Counsel, DuPont

Veta Richardson
Executive Director, Minority Corporate Counsel Association

Alanna Rutherford

Jack Simms, Jr.

Partners, Boies, Schiller & Flexner LLP

Milton Marquis

Bernard Nash

Partners, Dickstein Shapiro LLP

Patricia Carson

Thomas Fleming

Partners, Kaye Scholer LLP

Kathleen Furey McDonough

Michael Tumas

Partners, Potter Anderson & Corroon LLP

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 our distinguished Guest of Honor's personal accomplishments in his career and his leadership in the profession, we are honoring Thomas Sager, General Counsel of DuPont. His address will focus on diversity in corporate law departments and law firms.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator

Thomas L. Sager
Senior Vice President & General Counsel, DuPont

Thomas L. Sager is senior vice president and general counsel, DuPont Legal. He started his career with DuPont in August 1976 as an attorney in the labor and securities group.

Mr. Sager helped pioneer the DuPont Convergence and Law Firm Partnering Program and continues to have oversight responsibility. Through his leadership, this program has become a benchmark in the industry and has received national acclaim for its innovative approach to the business of practicing law. He was named associate general counsel in 1994. In January 1998 he was named chief litigation counsel, where his responsibilities included oversight of all litigation and IS support for the entire function. He was named vice president and assistant general counsel in November 1999, and to his current position in July 2008.

Born May 25, 1950, in Winchester, Mass., he received his J.D. from Wake Forest University School of Law in 1976.

Mr. Sager is past chairman of the Minority Corporate Counsel Association, a group that advocates for the expanded hiring, retention and promotion of minority attorneys in corporate law departments and the law firms they serve. In addition, he serves as a board member for the CPR International Institute for Conflict Prevention and Resolution; Appleseed; Delaware Law Related Education Center; and the Atlantic Legal Foundation. He is also a member of the CPR National Task Force on Diversity in ADR; the Board of Overseers at Widener University School of Law; Law Board of Visitors at Wake Forest University School of Law; and the NALP Foundation for Law Career Research and Education Board of Trustees.

He is the Editor-in-Chief of *The DuPont Legal Model...A New Era*, c. 1996, revised edition, 1997, Editor-in-Chief of *Leaps and Bounds: Moving Ahead with the DuPont Legal Model*, and Editor-in-Chief of the latest treatise on the principles and initiatives of the *DuPont Legal Model, The Competitive Edge... The Growing Power of the DuPont Legal Model*, c. 2005. Mr. Sager is the author of numerous articles.

In January 2005, Mr. Sager was the Distinguished Lecturer for the Corporate Counsel Technology Institute, at the Inaugural Annual Technology Lecture Series, held at Widener University School of Law.

In addition, Mr. Sager has received the following recognition:

The Thomas L. Sager Award from the Minority Corporate Counsel Association. This award was established in his name and given in recognition of his individual efforts and achievements to promote diversity in the legal profession and will be presented annually. In 2001 he received the Spirit of Excellence Award, presented by the American Bar Association Commission on Racial and Ethnic Diversity in the Profession. In 2009 Mr. Sager received the CPR Corporate Leadership Award. Mr. Sager also was recently recognized as one of the 20 Most Influential General Counsel in America by *The National Law Journal.*

JACK FRIEDMAN: I am Jack Friedman, Chairman of the Directors Roundtable. Many of you have been invited to our events in the past. To give a very brief orientation for those who haven't been here before, we're a civic group that works with corporate boards and their advisors, nationally and globally. We've organized 750 events during 20 years, and I'm very pleased to say that we have never charged the audience to attend, for the events or materials. We're truly pro bono.

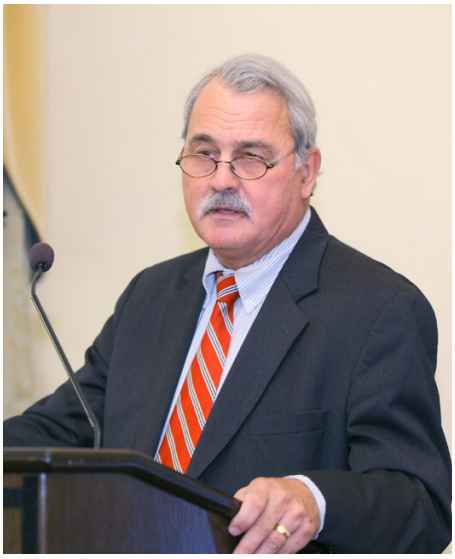
We are presenting the leading world honor to General Counsel. The transcript of this event will be sent out globally in the near future. This series started when Directors told us that companies do not get the recognition that they should get for the care that they take or the good that they do. I think you know that if you serve on a corporate board or you are advisor to a board, outside references to a company tend to be critical, whether it's the press, politicians, or someone else.

The program today is special for several reasons. One is, of course, our Honoree, Tom Sager, the global General Counsel of DuPont. He will be making opening remarks in a moment. Secondly, while there will be a number of topics discussed regarding the challenges facing General Counsel, this program has a special focus on diversity.

Diversity is important to the business community. It is a very worthy topic. Our emphasis has tended towards the great record of accomplishments and contributions of people of diverse backgrounds. What already has been and is being done, which is, of course, the best witness to why it should be done more in the future.

Now I'd like to introduce our first two speakers. We keep our introductions brief. Otherwise, if we go through the qualifications of the people here, we would spend the whole morning on their great achievements.

Our Guest of Honor, Thomas Sager, is recognized not only for his leadership at



DuPont. He is also recognized as a person who takes an enormous interest in a variety of public issues and challenges of concern for the country, of which diversity is a most special concern of his.

I'd like to also introduce, as the second speaker, Veta Richardson, who is the Executive Director of the Minority Corporate Counsel Association, a very special and worthy group, which she'll be speaking about in a moment.

Without further ado, let's welcome our Guest of Honor, Thomas Sager.

THOMAS SAGER: Well, thank you, Jack. Good morning to everyone. First, I'd like to thank Jack and the Directors Roundtable for the recognition and the opportunity to speak to you today on a subject of my choice.

We're actually here today to celebrate diversity, its critical importance to the profession, and what we can do collectively to make our profession more inclusive and reflective of the population at large. Like many of you in this room and literally thousands of others, I believe in the power of diverse perspectives and thinking and the critical need for our profession to mirror the population that it serves.

Corporate America is what I know best, but our challenges and focus must, of necessity, go far beyond that limited and well-represented client base. All of you in this room are uniquely positioned and qualified to advance the interests of those who would otherwise not be represented or even heard and, of course, to create a bar and bench that more appropriately mirror society at large.

But before I go on, I would like you to view a video we produced on the pathways to the power of diversity. Could we show the video, please?

[Videotape begins.]

NARRATOR: The pathway to the power of diversity in the legal profession starts with bright, promising students from diverse backgrounds seeking a legal education. Even when the cost of law school makes it a challenge for them to afford it, the key that unlocks the door to education for these talented young men and women is a scholarship. One of the most supportive organizations in this pathway is the Minority Corporate Counsel Association, MCCA.

Here is MCCA's Executive Director, Veta T. Richardson.

VETA RICHARDSON: The young attorney you just saw, Haris Khan, began his legal career as one of the law students selected for an MCCA scholarship. In fact, Haris is but one example of the outstanding, committed, and highly capable young attorneys that were assisted by the MCCA's Lloyd M. Johnson Jr. Scholarship program. To date, MCCA has offered financial and professional development support to more than 90 like Haris.

Named for MCCA's founder, this scholarship program represents the largest annual financial commitment of educational support made by any legal association. Each year, MCCA commits several hundred thousand dollars in support of outstanding diverse law students. We are so proud of this scholarship program because, together, we are changing the profession one student at a time, and we're also changing the lives of these students and their families.

But I'll let Haris share his story with you, and we invite you to get to know the MCCA scholarship program through his eyes.

HARIS KHAN: When I was admitted to Boston University School of Law, while very pleased, of course, I asked myself, "Now how am I going to pay for all of this?" The answer came from the MCCA.

Not only had I been awarded a Lloyd M. Johnson Jr. Scholarship, but the message said, "Just focus on your studies. We'll worry about internships and networking opportunities with people that could help your career." What a relief to have such a safety net to fall back on.

And MCCA was good to its word, sending me opportunities all the time. MCCA even invited me to its conferences, where I could mingle with leading lawyers. In fact, at MCCA's New York conference in 2006, I met a lawyer from DLA Piper who asked for my résumé. That led to an interview, a summer internship, and eventually my hiring by the firm as an associate in its local communications, eCommerce, and privacy group.

Coming from an immigrant Asian-American family of modest means, including two older siblings, my pathway to a career in law would not have been possible without the scholarships and mentoring I have received along the way. I hope to pay it forward by mentoring and supporting similarly situated students and serving as a bridge between underrepresented communities in the legal field.

NARRATOR: Haris Khan's story is a prime example of the growing pipeline to legal education supported by organizations and corporations alike. For example, the Street Law program, started at Georgetown University Law Center in 1972 as a local high school project, has become national and international in scope.

Street Law is a nonprofit organization dedicated to providing practical participatory education about law. The DuPont company's Street Law program is a successful example. Let Tom Sager, DuPont's general counsel, tell you about it.

THOMAS SAGER: In my 34 years as a DuPont attorney, we have been working to increase the number of attorneys of color and women in our law department and the legal community. Approximately 10 years ago, we realized we had to put more emphasis on starting with high school students to fill the pipeline with young minorities interested in the practice of law.

> "Diversity, inclusiveness, or as we now refer to it as 'respect for people,' is one of four DuPont core values, along with safety, environmental stewardship, and ethics."
> — *Thomas Sager*

So, in 2006, we formed a partnership with Street Law. Our Legal Street Law Diversity Pipeline Initiative is conducted at Howard High School of Technology in downtown Wilmington. It is the only predominantly black high school in the State of Delaware.

Howard High has a career track called "legal administrative assistant program," and students in the track learn about the basics of the law and administrative skills to work in a law firm or legal department while lawyers go into the classes to teach students basic legal subjects as well. In addition, DuPont also brings students to its offices for instruction, mentoring and, in some cases, paid internships.

I'm pleased to say that the vast majority of these disadvantaged youngsters go on to college. One of these interns is Dolores Smith, who recently graduated from Howard High School and is now a freshman at Wilmington University.

DOLORES SMITH: I went to Howard High with the idea that I might want to be a nurse. But once I took a class on the Introduction to Criminal Justice, I was hooked on a legal career. I entered Howard's legal assistant career path, and I was assigned to DuPont legal's Street Law program. That was an amazing experience.

I got to work with DuPont attorneys, who not only helped me understand the law, but mentored me on preparing for college, including how to get federal student aid. The lawyers at DuPont were so nice. As a graduation gift, they gave me a laptop computer.

Best of all, I was given an internship at DuPont legal so I can earn some money while continuing my education. I'm a criminal justice major at Wilmington University. I can get a paralegal certificate at Wilmington, but I'm considering going on to Widener Law School. I really would like to be a litigator.

NARRATOR: These are examples of what companies such as DuPont and organizations such as MCCA can do to promote pathways to diversity in the legal profession. But the benefits of diversity go both ways.

THOMAS SAGER: From DuPont's perspective, to succeed in today's highly competitive global marketplace, our company must have an employee base and a law firm network that is as diverse as the customers who buy our products, its shareholders who purchase our stock, the vendors who supply us with goods and services, and the judges and juries who hear our cases.

It long ago became clear to us that juries, judges, regulators, and policymakers were becoming increasingly diverse, and this trend impacted our ability to connect with these segments of the legal and business world. So besides valuing people of all races, ethnicities, and genders, diversity efforts also became a business imperative.

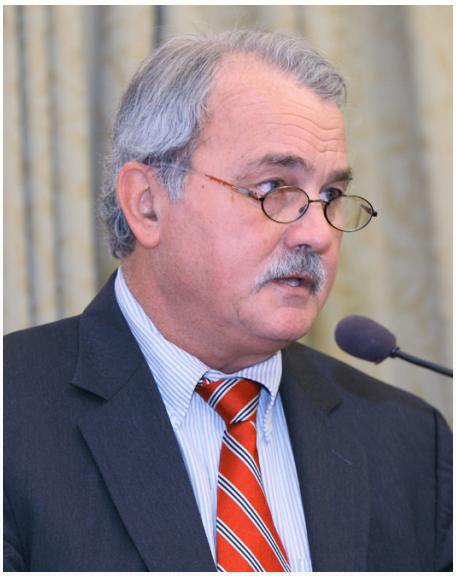
It has proven critically important in a number of cases. One of them allowed us to find an alternative solution to a lawsuit against former lead pigment and paint manufacturers.

NARRATOR: The case that Tom Sager refers to was resolved in 2005, when the State of Rhode Island agreed to drop DuPont from its public nuisance lawsuit against the makers of lead paint. In return, DuPont would donate $9 million to the Children's Health Forum for efforts geared to avoid childhood exposure to lead.

Instrumental in this solution was the late Dr. Benjamin Hooks, a civil rights activist and pioneer. He was the forum's co-founder, along with U.S. Housing and Urban Development Secretary Jack Kemp. Dr. Hooks was also the first African-American commissioner of the Federal Communications Commission and the head of the NAACP.

The Rhode Island attorney general said the money would be used to protect children in the state, particularly those in the inner cities, from the hazards of lead poisoning. The organization's work yielded impressive results, greatly reducing the number of children with elevated blood levels.

Thus, in the world of diversity, DuPont benefited from doing good. As you can see, DuPont is an example of how companies can support diversity.



Here's Sharon Leyhow, DuPont Associate General Counsel, to discuss some of the company's diversity programs.

SHARON LEYHOW: Diversity at DuPont is defined through the corporate mission to be a great global company through people. Not only has DuPont supported high school students through the Street Law program, but it has organized a series of minority job fairs since 1994, presenting law school students with an unmatched opportunity to meet representatives from its network of law firms to be interviewed for both summer and permanent jobs.

Noticing a decline in the number of successful minority-owned law firms, DuPont, along with other Fortune 100 companies, has sent millions of dollars in business to these law firms to foster their sustainability. Also, I'm pleased to have participated in the Minority Counsel Network of DuPont and its law firms, which has worked on solutions to the unique issues of recruitment, mentoring, and retention for attorneys of color.

Another DuPont diversity initiative has been the creation of the DuPont Women Lawyers Network, which promotes legal excellence through the professional advancement of women lawyers. These programs, and the whole diversity initiative at DuPont, have been championed by general counsel Tom Sager and are one reason MCCA named its award recognizing the diversity accomplishments of the law firms after him.

VETA RICHARDSON: The Sager Award is one of the many ways MCCA salutes progress on the pathway to diversity. For example, our Diversity Dollars Grants Program gives up to $10,000 to attorney-based organizations, from local bar associations to national law foundations, to implement programs encouraging diversity in the legal profession.

But we believe getting organizations to sponsor scholarships probably has the most impact on the future of diversity in the legal profession. We're proud to report that MCCA has given out more than $1.5 million in scholarships and fellowships in recent years.

Also critical are pipeline projects that MCCA and companies such as DuPont sponsor. It's never too early to get promising minorities interested in the law. One program in particular that we have been proud to support is the Just The Beginning Foundation. Among its many programs for minority youth is the Schools Project, designed to help underprivileged high school students understand the legal profession and encourage the pursuit of law-related careers.

When it comes to programs supporting minority students, no one has been more involved than one of the founders of Just The Beginning, the Honorable Ann Claire Williams, United States Court of Appeals Judge for the Seventh Circuit.

JUDGE WILLIAMS: While the Just The Beginning Foundation has several initiatives, one of the partnerships I am most proud of is its Schools Project and its collaboration with MCCA. My parents, both college graduates, stressed the importance of education to me and my sisters. I realized early on that education was the pipeline to success.

So providing middle, high school, college, and law students with the foundation and training to pursue law-related careers is the key for success not only for the students, but for the legal profession. The MCCA offers great mentoring and programming resources to children, often first-generation college and law students.

Before I became a lawyer, I was a third-grade teacher in the inner-city public schools of Detroit. So I know firsthand that, given the opportunity and support, children of color and those from other underrepresented groups can shine for us in the legal profession. We want them to shine brightly on their pathway to a legal career.

[End of videotape.]

THOMAS SAGER: So our journey within DuPont started in earnest in the 1980s with an almost exclusive focus in the name of diversity to ensuring equitable treatment and opportunities for disadvantaged groups. But our efforts have gotten much broader over time.

We are now focused on the theme of inclusiveness in order to overcome any and all cultural and structural barriers that dampen motivation, stifle creativity, and deter full participation at all levels of our company, regardless of socioeconomic background, race, gender, ethnicity, or social or sexual orientation.

While some of you know something about DuPont, I think a little additional background may help you to better understand where we might be coming from on this subject. So let me start by stating that diversity, inclusiveness, or as we now refer to it as respect for people, is one of four DuPont core values, along with safety, environmental stewardship, and ethics.

It is one that has helped us create an empowered, energized, inclusive environment that provides competitive advantage to DuPont globally. We in legal experience the power of diverse creative thinking and representation daily. Our audiences are varied, diverse, and oftentimes skeptical and

suspect of whom we are and what we are advocating. That is a fact of life.

Being perceived as a large global chemical company, we find ourselves in a constant struggle to overcome negative biases and reactions directed toward DuPont. So, with every interaction with a decision-maker, whether it be judge, jury, regulator, or elected official, we have a very limited and finite period — it could be literally minutes, hours, days, or weeks — to connect with those individuals in a favorable and a meaningful way.

In short, we need to take advantage of every legitimate opportunity we have and means to achieve a favorable outcome for our company. And having a diverse, energized team only increases the odds of successfully advancing our position with that audience.

So it is obvious to us that diversity is a business imperative and critically important to how we provide legal services to DuPont and connect with the external world.

So let me shift gears on you and talk a little bit about the challenge facing our industry. And the challenge, over time, has become increasingly more real and acute, given the current economic environment.

A recent ABA article entitled "Recession Is Hurting Legal Profession's Diversity Efforts" I found to be right on point and one which I found not particularly surprising, but nonetheless disturbing. My reaction to the article and to the actions taken, which I've heard anecdotally; there must be another way.

But, of course, this is not the time for defeatist attitudes, but for increased resolve and renewed commitment to creating opportunity for many of the young professionals such as Haris — the future of our profession, who are depending upon us to make our profession more accessible and available to all.

> "Real, sustainable change in this space only comes about through perseverance and at many times making others feel uncomfortable."
>
> — *Thomas Sager*

So we need to ask ourselves what specific actions, both legal department and law firm, we might take to further our collective journey toward a better state? Well, from my vantage point, law firms and legal departments alike need to do some real soul searching, and right now. Does diversity bring competitive advantage to your legal department or law firm or not?

Those that see that it does, I think, will be the ultimate winners. Those that do not will struggle for identity, focus only on the needs of a few, and will continue to lose talent year over year, and that is a fact.

So it is critical that the level of engagement and discourse on this subject remain at an all-time high. Otherwise, many will feel comfortable in simply paying lip service to this issue. And yes, real, sustainable change in this space only comes about through perseverance and at many times making others feel uncomfortable. And that is reality, folks.

Let me make one more observation. Advances in this space, this area, within our profession and, of course, within our own organizations do not — and let me repeat — do not have to come at the expense of others. We need to recognize also that there are many forces at play now — I call them "tail winds" — working to reinforce the need to embrace diversity within our respective firms.

They include, among others, a rapidly changing political landscape, dramatic shifts in demographics, globalization, and an increasingly competitive world becoming flatter, smaller, and more connected daily. In short, the legal landscape is changing as we once knew it.

As lawyers serving an ever-increasing globally challenged client base, the case for diversity becomes even more compelling every day. And let me share with you a recent experience to illustrate.

At a corporate officers meeting at DuPont, a professor from Northwestern University's Business School presented on the subject of "Marketing and Innovation at DuPont: The Role of Leadership." One of his subtopics was entitled "Global Network Innovation."

His comments were focused upon the rapidly changing innovation landscape and the challenges it presents to DuPont and others. His premise was based upon a number of underlying assumptions, all of which I found quite compelling.

First, DuPont cannot go it alone to sustain the pace of innovation. Second, there are many more smart people outside of DuPont that we cannot possibly hire. And finally, the global talent pool dwarfs the talent in developed markets.

He then listed a number of multinational companies that deploy global innovation networks on a regular basis. On one slide, he had a graphic that depicted a Boeing airplane and cited the source of key components of this 787. No fewer than nine countries were listed as being the point of origin of innovation for a component of this airplane.

He then went on to note that every emerging market has opened innovation labs of late, citing China, India, and Malaysia. At DuPont, we have been, along with others, of course, at the forefront of this trend, with new technical labs being recently opened in India, China, and Brazil.

So, for you in this room, the opportunity is fairly obvious. We live and practice in one of the most creative, innovative, and sophisticated countries in the entire world. In addition, our intellectual property system is the envy of every major country and company with whom we compete, wherever it may be located.

Given this state of play, we can expect that most innovation roads will ultimately lead to the U.S. for the foreseeable future, point one. Second, the trend of global networked innovation will require increased collaboration among clients and their providers across a wide spectrum of cultures, languages, and environments. Third, cross-border collaborations are rising at a dramatic pace. And fourth and finally, new alliances, joint ventures, joint research and development partnerships, cross-licensing arrangements, and other forms of technology transfers are now the norm, with the innovation universe becoming more and more dispersed.

Many of you, I'm certain, and your firms are extremely well positioned to take advantage of these changes and challenges. If you're not, you need to anticipate the diversity-related and cultural challenges that will flow from this globalization dynamic. Those that do not I fear will be left on the sidelines.

So what can we do about it? With my remaining minutes, let me address the all-important role that your firm and you can play in addressing diversity.

The role of this group cannot possibly be overstated. Your sheer numbers, the reach of your firms, and your ability to influence all aspects of our profession through the bench and bar should be viewed as an incredible means to effectuate positive change.

It could be as an engine for social justice advocacy and reform, or as the source of inspiration for young aspiring women and students of color through pipeline or other outreach initiatives, or simply by advancing the profile and careers of your successful attorneys of color. Whether it be as a mentor, role model, benefactor or advocate, there is a role and perhaps multiple roles for you to embrace.

Personally, I have found support and great inspiration from one organization, the Minority Corporate Counsel Association. I believe the MCCA is the nation's foremost legal diversity organization. No offense to the ABA.

As this video showed, MCCA's research and educational programs and, in particular, its scholarships have had far-reaching impact on diversity in our profession. MCCA's executive director Veta Richardson is here to tell you more about it, but suffice it to say MCCA's work has touched a lot of young lives.

So, for me, legacies are best defined and remembered by the people you have touched and benefited in life. It's not about the awards won, money earned, trial successes experienced, or positions held. It's all about making a difference.

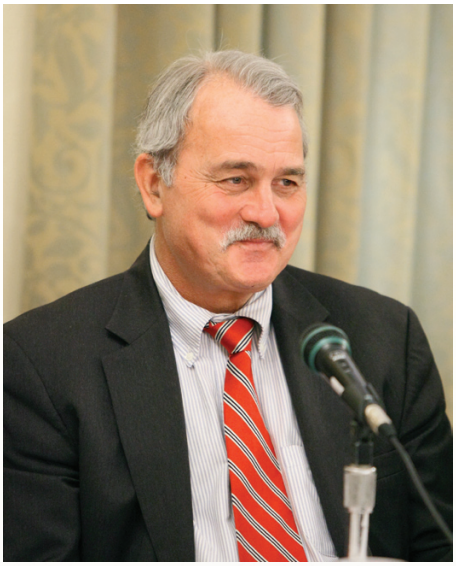
In making a difference, remember that it's not about you or me. We need to take ourselves out of the equation. It's about creating a legacy of giving back, sharing, and creating an environment that will benefit others.

We at DuPont believe in giving back, and that is why this morning I am announcing we'll make another additional $30,000 gift over three years to the MCCA scholarship program for outstanding diverse law students in need.

VETA RICHARDSON: Thank you.

THOMAS SAGER: I truly hope many of you in this room will follow our example, as you've done in the past, with a scholarship contribution that will make a difference in some young law student's life.

So, in closing, my simple counsel to all today is "think positive." Think about making a



difference for the benefit of others. Help us write the story of the power of diversity, like how an energized group of diverse professionals contributed to an incredible result through their own creative devices and, finally, of how you helped to inspire and create a career path in our profession for a highly deserving attorney of color who anxiously, but patiently awaited an opportunity to stand upon your shoulders in order to one day advance the mission of making our profession a beacon of fairness, inclusion, empathy, and compassion.

Thank you.

JACK FRIEDMAN: I wanted to start with a classic question which is of interest to law firms. This is their favorite question.

As a general counsel, what are some of the expectations that you have for them in terms of diversity? You also work with other general counsel. So it's not just your own expectations.

THOMAS SAGER: It's a multifaceted approach. It starts with the hiring, and we would expect them to be quite aggressive and not always go to the same sources for new law students, law schools that may not be considered tier one. So that it's going to require some research and some due diligence on their part.

But I think there are an incredible number of talented law students and, hopefully, would-be associates who would bring a lot of value to the firms and yet come from law schools that are not necessarily at the top of the list in people's minds when they think about law schools.

Second, once you're successful in recruiting, the issue of retention looms large and how you can engage them in a way to make them feel part of that law firm. How you can invest through your daily interactions that you're willing to invest in them and ensure that they have a bright career path. That takes a lot of effort and a lot of mentoring and a lot of back and forth and candid feedback.

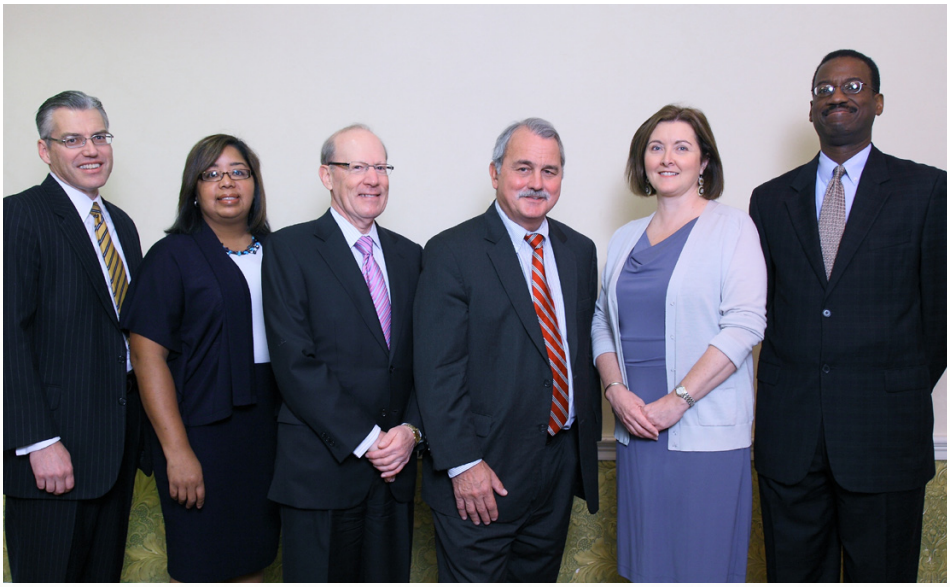
Third, it's about outreach, because I think through the outreach efforts of the firm it really indicates to me or gives me a strong indication as to whether they truly embrace the notion of the importance of diversity; not only within the firm itself, but in the surrounding community and the legal profession and the legal environment.

Many firms do just that. It is a pipeline. It's scholarships. It's any number of things that they do — pro bono activity. When that is embedded in the fabric of the firm, you know that they have their heart in the right place and they'll attract the types of students and lawyers that we're looking for to represent us.

JACK FRIEDMAN: I remember when I was in college; I'm class of '69 at the Harvard Business School. I remember writing an article at that time on the efforts of the university to go to the traditional black colleges in the South to have them apply to Harvard Business School as students.

For the first couple years, it was so novel to the students that they would not apply. Admissions would personally go down and say, "Please apply. Some of you will get in." They wouldn't do it.

Then, after about two years of Harvard showing sincere interest, they did apply. A



number got in, and that relationship grew from there. Sometimes you have to try hard at the beginning just to break the ice and make things work with new relationships.

I'd like to introduce Veta Richardson. Veta, by the way, has about the heaviest travel schedule I've ever heard of, and I hope that she gets to use the miles if she wants to go on a personal vacation on occasion.

VETA RICHARDSON: Thank you. Good morning, everyone. I am really very pleased to be here, and I want to publicly thank Tom Sager and DuPont for the very generous and completely surprising contribution to our scholarship program. It wasn't expected, but I think you know that we will put the funds to very good use.

I also want to thank you, Jack, and the Directors Roundtable, for recognizing Tom for his leadership. Tom is someone who is widely known within the legal community. He is certainly a longtime friend with MCCA. Tom had been involved in founding MCCA. He's been a member of our Board of Directors since its founding in 1997 and is the immediate past chair of our Board of Directors.

His vision in terms of pipeline and advancing diverse young people is unmatched in the profession, and I've been delighted to be Executive Director and to work side-by-side to help make Tom's vision and that of our Board of Directors a reality.

Tom is also the type of person as a general counsel, who manages important issues. He also manages people and central to his heart is the belief in making sure that diverse people have opportunities.

So I'm really thankful that you would extend to me the right to be able to speak to you this morning about some of the things that MCCA is doing, especially with respect to people management, and the wonderful perspective that I have as the leader of MCCA. It's really a bird's eye view of the profession regarding what's going on with respect to diversity leadership around the nation in corporations and firms.

Jack alluded to the fact that I travel a lot. In fact, within less than 15 days, I have been in Toronto, where they've launched a fantastic effort called the Call to Action Toronto. It's being led by David Allgood, who is the General Counsel of Royal Bank of Canada.

I've been to Eaton Corporation, who partnered with KeyBank to start an effort in their city with respect to diversity. They

held a major summit and brought in a lot of the firms from Cleveland and the surrounding area.

Earlier this week, I just came back from speaking at Nationwide in Columbus, Ohio. So Ohio was really active. If you have firms or offices in Ohio, you might want to check out what's going on there. But Nationwide was also leading a major diversity effort.

Also within the last 15 days, I spoke to a group of about 400 people at the invitation of Brackett Denniston, who is the General Counsel of GE. He brought together all of the major leaders of his law department, which is worldwide, and they convened for a summit to specifically focus on how GE is going to advance diversity, not just within their internal team, but with respect to their outside counsel as well.

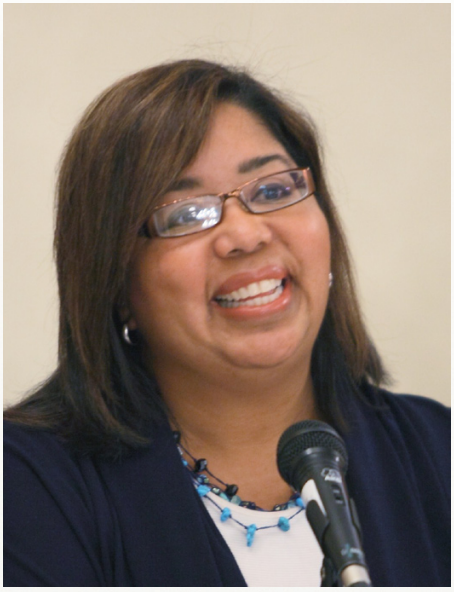
So what I see, from my wonderful vantage point at MCCA, is a strong commitment to diversity that is going on throughout the nation and certainly now with our northern neighbors in Canada. I think that much of that vision and that general counsel activism stems from people who, like Tom Sager, very early in the game made a commitment to diversity and to making things different for diverse groups of attorneys.

As I mentioned, Tom was involved with MCCA's founding. We have one mission, which is to advance diversity in the legal profession. We're an organization that focuses on research and education, in publishing, and we're very, very proud of the scholarship program that we launched in 2005.

From the perspective of our Board of Directors, they believe that advancing diversity is a business as well as a moral imperative. We focus on the business side when those of us who think about business issues tend to think of it in terms of supply and demand. If you apply that supply and demand thought to managing a talent equation, here are my thoughts on how that shapes up.

From the supply side, we see in terms of our customer bases, the way that we do business globally, and also the changing demographics of our nation's law schools. Some of us may believe they're not changing fast enough or far enough and that there is a lot of work yet to be done. The fact is that for more than the last decade, law schools have been generating significant classes of diverse groups of students for quite some time.

It's certainly well beyond the early days when you could count the number of women or diverse people who were in a law school graduation class. As a result, we see that on the supply side, the whole equation has changed.



Then we look at what's going on with demand, demand from general counsel offices for talent. There again, we see that general counsel are increasingly focused on the fact that in order to serve their corporate interests and meet the expectations of their CEOs — and I'll mention that when I was at Nationwide, their CEO spent a good bit of time, and his Chief Financial Officer, talking about their expectations of outside counsel with respect to diversity. These types of conversations are game-changing moments.

We also see socially, in terms of the demand side, the Securities and Exchange Commission changing rules or revising its rules to request that corporations disclose the efforts that they're making with respect to diversity outreach and their Board of Directors and leadership. We're also seeing, in terms of societal impact, game changers at the U.S. Supreme Court in terms of the number of women who now sit on the court.

So it's a very exciting time to be at the work of advancing diversity, particularly in the area of legal education. But in order to do so, we need to be focused on priming that pipeline. Priming that pipeline means supporting organizations like Street Law or the Just The Beginning Foundation. I'll even toss in a commercial for my own group, MCCA.

We believe that we have a wonderful scholarship program, our Lloyd M. Johnson Jr. Scholarship program. We're very pleased to have named it for Lloyd Johnson, who is the visionary that worked with a group of general counsel, including Tom Sager, to start MCCA in 1997.

Lloyd is way at the back of the room. But, Lloyd, if you could stand, I just want to recognize you. Thank you for the instrumental role that you have played. Our scholarship program is terrific in that organizations such as DuPont do more than just make very, very generous financial contributions. They also commit their staff to serve as mentors.

Tom personally had a game-changing moment when he extended his card to several of our students, and they've had the opportunity, unlike many law graduates, to sit down with top general counsel and hear about their career paths. It's been very life-changing moments for them.

Students also had the opportunity to meet with Stacey Mobley, who is Tom's predecessor as General Counsel of DuPont. Stacey,

I want to recognize you for all the support that you've provided to MCCA as well.

So, in our belief, aside from the opportunities to support organizations financially, we encourage all of you to think how you might want to get involved and extend yourself in support of mentoring or professional development, encouragement of diverse students throughout the country. Talented young people, such as Haris Khan, who was the attorney that was profiled in our video, are shining examples of the difference that your participation and your engagement can make.

So, Tom, I congratulate you on this honor and thank you very much for all of your support and the opportunity to be here with all of you.

JACK FRIEDMAN: There are many distinguished people in the audience, but there were three in particular that I want to mention.

I know that Stacey Mobley is here, and I want to say that his years of leadership as General Counsel of DuPont are very well recognized. Also, he had the wisdom and good taste to work closely with Tom for all those years.

THOMAS SAGER: I'm not sure he'll agree with that. *[Laughter]*

JACK FRIEDMAN: I want to acknowledge that Fred Krebs is retiring after a number of years as a driving force and the head of the Association of Corporate Counsel. His achievements are legendary in his field and with his organization.

William Coleman, apart from being in President Carter's Cabinet, worked on the case of *Brown v. Board of Education* with Thurgood Marshall. When someone has gone through as much as he's gone through and seen what he's seen, there is an incredible amount of wisdom. I'm very happy that you joined us here today.

On our first panel, we'll start with Milton Marquis and Bernard Nash at Dickstein Shapiro and with Kathleen Furey McDonough and Michael Tumas of Potter Anderson & Corroon.

MILTON MARQUIS: Good morning, everyone. I'm Milton Marquis, and along with Bernie Nash, we're going to talk about an issue that is of concern to large companies, and they are state attorneys general. It's very timely, given the announcement yesterday of the 50-states, plus D.C. — and I don't know if there are territories also involved — in investigation of the mortgage foreclosure issues that have been in the headlines recently that illustrates that when there is an issue of concern to consumers, state attorneys general will be involved.

Bernie and I will talk about who they are and how companies should or can work effectively with them. But before I do that, I want to just state that we are honored to participate in this program with our dear friend and leader, Tom Sager.

As a primary law firm, Dickstein shares his commitment to diversity, excellence, and leadership in the legal profession. So we congratulate you, and it's been a personal and professional honor for me over the last eight years to work very closely with you. Thank you for putting up with us and for giving us an opportunity to assist DuPont.

We are also honored to participate on this program with our dear colleagues, fellow primary law firms Potter Anderson, Kaye Scholer, and Boies Schiller. We work very closely with other PLFs as a partnership, sharing the common values of DuPont.

I am also honored that you mentioned the Rhode Island example. We'll talk about that in a few moments. We're honored to have been involved in that issue with lead paint.

So let me start off with what I call AG-101, and some of this will be familiar to some of you. But it never surprises us that the AG world is a mystery to many companies.

Of course, they're the chief legal officer of their states. As you know, they're elected in most states, 43 all together. `There are some states where they're appointed by the governor, and in one state, they're appointed by the Supreme Court and in another in the legislature.

One key factor, having worked in a couple of state AGs offices as a younger lawyer and working with them throughout my career in private practice, is that one question that we get — always from new clients, never from DuPont — "Well, we have this issue with an AG. We're friends with the governor in that State, and so we're going to call the governor to tell the AG what to do."

We don't always charge for this advice, but we'll say, "Let me just give you the first piece of advice. It might be the only free advice we're going to give you and that is, that it's not a good idea." It's often counterproductive even in those states where the AG is appointed. Because once the AG is appointed, they're independent. They are a constitutional officer, and they tend not to take orders from the governor.

They'll say, "Well, they're in the same political party." I'm not a big politician. I mean, I'm a lawyer by trade. But if you work in an AG's office, there are going to be politics.

It's almost like *Casablanca*. You know, you go into the bar, "I'm shocked. There's gambling here." Well, you're shocked that there's politics. Somebody will say, well, they're both Democrats or they're both Republicans and they ran together on the same ticket.

It's been my experience that there's usually more friction between AGs of the same party than when they're of opposite parties. A lot of it has to do with an AG trying to demonstrate his or her independence as a constitutional officer, not as the general counsel of the governor, even though the

AG does render advice to the governor as one of his or her constitutional responsibilities. So that's a key takeaway.

The traditional duties of an AG are to handle criminal appeals, defend State agencies, and render legal advice. But I want to focus on the nontraditional ones, and it's these nontraditional duties that impact corporate America. That is affirmative litigation, whether it be in the areas of antitrust, consumer protection, or public nuisance. We'll talk about public nuisance in a few moments.

The most notable example in the past of AGs working together on affirmative litigation that impacted significantly an industry was tobacco. As you may recall, in the tobacco litigation, the AGs were working together — even though most of them filed individual lawsuits. So there wasn't one big lawsuit. There were separate lawsuits filed in state courts. The AGs, in effect, through the master settlement agreement, reformed many of the practices in the tobacco industry.

Now, at the same time, because this was very controversial, the master settlement agreement required states to pass statutes that some have been critical of, that requires nonparticipating tobacco companies — those are companies that weren't even in existence at the time — if they were to come into existence, to do certain things. And that illustrates the ability of states to work together.

There was perceived to be a void in that, as you all may recall, the Senate failed to pass a tobacco regulation bill. The Department of Justice had not, at that time, filed its own tobacco lawsuit. DOJ filed its tobacco lawsuit after the states. And as I recall, that case was litigated well after the master settlement agreement.

You have other examples, like Microsoft. State attorneys general have been actively involved in the pharmaceutical industry. Currently, as I mentioned, they have their attention on financial services including the mortgage foreclosure crisis.

As I mentioned before, AGs are elected in 43 states, and I dare to say that most AGs do not consider being an AG their dream job. It's a great job. Most will say or many will say that it's the best job that they have had, but they don't consider that to be their last job. Many of the AGs have gone on to great success.

So it's a great benefit not only to get to know and work constructively with AGs while they're AGs — it may pay dividends when they go on to higher office. AGs that have gone on to success include former President Clinton. You have Senator Lieberman was an AG, Bingaman, Whitehouse, Cornyn. You name it. You have Governors Granholm, Doyle, Beebe, Charlie Crist, and Jay Nixon, just to name a few people who have gone on.

So I hope you were taking notes here. If you ever have this as a Trivial Pursuit question or it's a *Jeopardy* question, you'll be able to get that right: "How do the AGs work together?"

So the AGs organize themselves in various ways, and these organizations, again, are opportunities for companies to interact with AGs. The organization of AGs is called the National Association of Attorneys General, NAAG. They call it NAAG. *[Laughter]*

This is not just some inside deal with smart-alecky outside counsel. But they call themselves NAAG. And I'm tempted to say — and they joke about it so — that it's often been referred to as the National Association of Aspiring Governors. They joke about it themselves.

NAAG is a clearinghouse for information among AGs, is a source of assistance for AGs and it's also a forum for interacting with AGs. They have meetings, most of which are open to the public. They have open sessions; it's an opportunity to interact with AGs.

NAAG is also organized into substantive legal committees. You have antitrust, consumer protection, Medicaid fraud, environmental, you name it, are substantive legal committees of NAAG. Getting to know the chairpersons of those committees and affirmatively and proactively addressing issues of your company and your clients can be very beneficial.

There are also staff-level organizations, task forces that are under the leadership of senior career staff, such as antitrust, consumer protection. They have their own meetings, and they're also led by state AGs. But most of the work is done at the staff level.

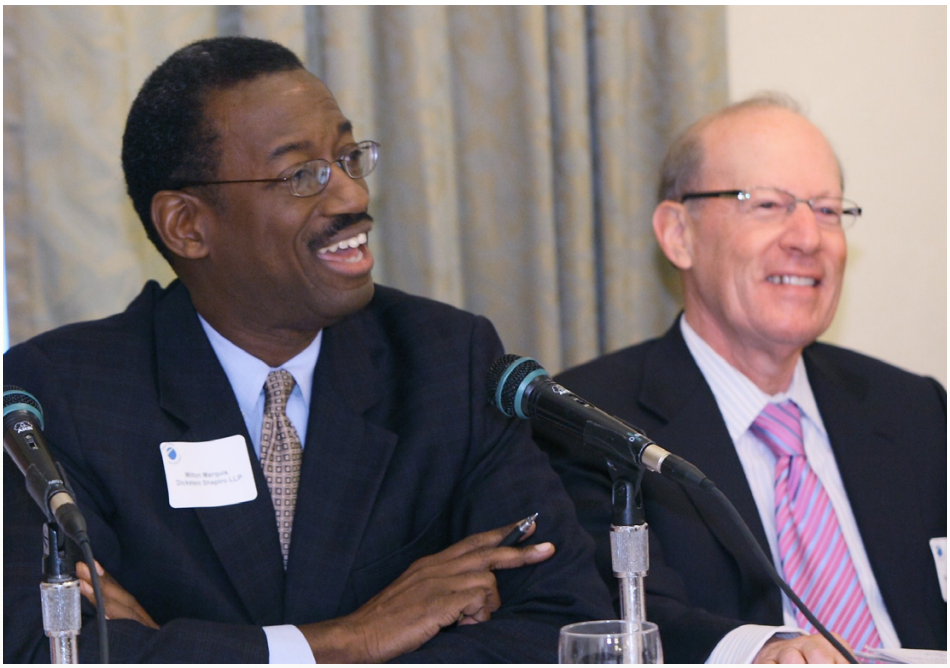
A more recent phenomenon in the AG world is the formation of political groups. Historically, and I think it's safe to say that it's still the case, AGs have been very bipartisan. Unlike, say, the governors — even though I'm not an expert in that world — or the various Senate committees, the AGs tend to work very closely across party lines. They get along very well. But they have formed a Republican attorney general association and a Democratic association.

They have two meetings a year, which are open to the public. Again, these are opportunities to meet with the Democratic AGs, the Republican AGs, and they are very open to topics. They have industry people on panels with AGs, as well as lawyers from law firms and in-house counsel.

The purpose of these organizations is to raise money, to support their colleagues. It won't shock you that this has been a very busy year, since I think there are 33 or 34 state AG races this year. Again, these present opportunities to interact with companies.

Finally, there is the Conference of Western Attorneys General focused on Western issues but are open to AGs from throughout the country. These meetings tend to be also open to the public.

So, before I turn it over to Bernie: AGs have wide authority. They enforce state consumer



protection statutes, and many of these statutes are very broad because in many states, the state consumer protection statutes outlaw unfair business practices. Unfair is not just in the eye of the beholder; it is in the eye of the state Supreme Court.

In many states, the unfairness doctrine, which is patterned after the Federal Trade Commission Act, has been interpreted to reach a wide range of business practices that it would probably never occur to many of us in the room would constitute consumer protection violations. If you just look at what's happening now in the mortgage foreclosure issue, states are proceeding under these very broad statutes.

I mean, there is no state statute that says that mortgage lenders have to read all of the documents and not have people robo-signing them. But under broad statutes, that could be interpreted as a violation of their state statutes.

Companies should take the opportunity to not just wait for a crisis, but to be proactive, be creative — as I'm sure Bernie will talk about in the public nuisance area, where State attorneys general have taken the opportunity to stretch common law doctrines to address problems that they believe need to be addressed in the public interest.

So, with that, I'll turn it over to Bernie to talk about some ways in which companies can work with State attorneys general.

JACK FRIEDMAN: I want to ask a quick question. In terms of internal corporate process — and anybody on the panel can react to this — one of the responsibilities of the legal department is to try to make sure that the business practices and the legal requirements mesh well. One would have thought that somebody in some of these financial institutions would have said this is the most dangerous, because we're being blamed for bringing down the whole economy and destroying the country. So let's make sure that every mortgage, the paperwork on every mortgage is done just perfecto.

So my question is — again, I'm not saying any particular bank — but isn't that an example of where the legal department really has to work carefully with the business side to say it's not just technical. It's our whole reputation. It's our whole political position that's affected by the integrity of our paperwork? I don't know if you have a reaction to that.

MILTON MARQUIS: On mortgage foreclosure issues, I'll just say, as a general matter, that's correct. I believe that most companies have devoted significant resources to compliance. But no matter how careful the company is, stuff happens.

It's incumbent upon companies that when issues arise, whether through mistakes or through differences of opinion as to the law and the requirements, that they reach out proactively. That's something we'll talk about in a few minutes; that it can't be a situation where companies hide their heads in the sand and believe, "Well, let sleeping dogs lie. We're not going to go out and talk to the AGs."

This also applies to any government regulator, but we're talking specifically about AGs here because it's a different dynamic than dealing with federal or state regulators; because AGs wear a policy hat as well as a legal hat.

Being proactive, trying to address a problem head on, those are the keys to minimizing exposure, and also protecting your corporate reputation because that's also very important. AGs, as well as other officials, whether it's U.S. attorneys, they have the bully pulpit, and so it's critical that you work proactively and constructively with them.

Bernie?

BERNARD NASH: Well, thank you very much. First, let me thank Jack for the opportunity and the invitation to speak with you here. Of course, it's always an honor to be with Tom on a panel or in any other setting. He truly deserves this honor. Tom and I have worked together and been friends for, give or take, 30 years. Tom once had hair other than gray. I once had hair. *[Laughter]*

Life moves on. I can tell you from 30 years of working and knowing Tom and considering him a friend that Tom lives what he preaches. He believes to his core what he spoke about and the joy you'll get from participating in the MCCA and contributing toward the future leaders of a diverse culture.

So, Tom, we thank you. For those from Dickstein who are here, you all know that but for Tom, I would not be anyplace at 7:30 a.m. in the morning. *[Laughter]*

Now as to why I'm actually here. Milton told you a little bit about AGs, AG-101. I'll try to encapsulate why you should care. Why, if you're from the corporate setting, your company should care. If you're from the private law firm sector, you should counsel your clients to care.

AGs are game-changers. AGs, although they probably spend no more than five to ten percent of their resources on what you read about in the newspapers, and spend 90 percent of their resources and aggregate staff time defending the state in litigation and giving the governor private advice, the five to ten percent of their activity that you read about is in the headlines.

They are law enforcement officials, but they also make law, make policy, and make headlines. The last thing in the world that your board wants or your CEO wants is to read about the company on the first page of any newspaper is a headline with critical commentary.

It's bad enough if one AG is making the critical commentary. Imagine if the headline says 30 AGs sued company X, or 20 AGs just sent a letter to the President saying do something about the practice of an industry. That is what AGs are doing with increasing frequency. They are making policy, using the law and the bully pulpit to make policy, much of which is adverse to the corporate community and much of which is extraordinarily costly to the corporate community.

You heard from Milton about tobacco. Well, tobacco was anywhere between $300 billion and $370 billion, depending upon who is calculating it and what mechanism was being used. That brought AGs into the limelight.

So, since tobacco, there has been an increasing frequency to use the same combination of litigation, legislative initiatives, and regulatory changes combined with publicity to change industry practices, which AGs believe and honestly believe — perhaps wrongly believe, but honestly believe — are inimical to the public interest.

That used to be a legislative function. To a large extent, it still is. But AGs are now in that space. So, over the past 10 or 15 years beyond tobacco, they have made major changes and reforms in the pharmaceutical industry and recovered billions of dollars through settlements. Not much through litigation, but billions through settlement, although litigation has been filed.

They recovered almost half or more than half a billion dollars from predatory lending industry and the credit card industry, from Wall Street through the pay-to-play scandal, the mutual fund scandal, etc. Normally, these would have been areas of first initiative by federal regulatory agencies. But because they were perceived as being lax or slow or too pro-business, the AGs stepped into the void.

Today, AGs are really not stepping into the void or stepping on the prerogatives of federal regulators. The AGs today are being welcomed into the space and being welcomed in legislative enactments — at the legislative enactments to be co-enforcers of federal law.

So, instead of having the Department of Justice or a federal agency enforcing securities laws or new consumer protection laws by the new Financial Consumer Protection Bureau within the Federal Reserve, AGs are equal enforcers. That would mean you could have 50 different AGs taking 50 different views of what very ambiguous statutory language means. You're going to be dealing with them, whether you realize it or like it or not, much more frequently than in the past.

The incoming president of the National Association of Attorneys General, Roy Cooper of North Carolina, who is viewed within the handful of attorneys and firms that practice in this space — Dickstein being one of them — in his opening address, accepting the gavel to run NAAG. He will be the leader of the other AGs for the next 12 months, and I'll just quote a couple of lines because Milton had it typed in here for me. [Laughter]

BERNARD NASH: I wouldn't want to disappoint Milton. He said —

MILTON MARQUIS: Knock yourself out.

BERNARD NASH: In June of this year he actually had some foresight. His initiative for the year for all AGs is titled "America's Financial Recovery: Protecting Consumers as We Rebuild."

Now, remember, this is an attorney general charged with enforcing North Carolina law and, to some extent, federal statutory law where he has jurisdiction.

His initiative "will be to find ways to detect and prevent financial scams that sink people further into debt and hurt businesses, to make financial products fair to consumers, and to help prevent future financial calamities like we just experienced."

So this is an attorney general initiative for the next year, hardly what we would think of as law enforcement. Far more we would think of as an executive branch initiative, a legislative branch initiative, etc. But that's our microcosm.

Roy is viewed as a pro-business Democrat. He's not viewed as anti-business or filing crazy cases. He's one of the few AGs, I think, who has never used an outside contingency fee attorney, for example, to extract or some would say extort settlements from large companies. But that is what is out there.

Going forward, given what I've seen, the attorneys general are going to be in the financial space, as you just heard from this initiative. They're having weekly meetings with Elizabeth Warren. I'll call her the pseudo-chair, respectfully, because she was not confirmed. But she was appointed special deputy or special assistant to both the President and the Secretary of the Treasury to run the Consumer Financial Protection Bureau, and AGs are working with her on a weekly basis to develop the new regulations, to develop the policies, and develop the priorities. They will have co-enforcement responsibility.

So they're going to be in that space. If you read the newspapers or the younger ones probably don't read newspapers, but they'd read it on the Internet, things my grandkids do now. Basically, you know that there are now either 49 or 50 AGs, depending upon which news service is correct, that formed a mortgage foreclosure task force being run by Iowa Attorney General Tom Miller.

The President announced that there is not going to be a nationwide moratorium. At least a third of the AGs want a nationwide moratorium on foreclosure, and they're using both their consumer protection status and authority to basically bring the large companies to the table to basically say we might sue you. We have problems. How are you going to help us solve our problems because our constituents don't like what's happening?

If we raise our profile, we have a better shot at being reelected AG, if that's our desire, or perhaps becoming governor, perhaps becoming senator, etc. So AGs are going

to be in this space and to a much greater frequency.

They're also going to be in the obesity space. They're going to impact beverage manufacturers, fast food restaurants, cereal manufacturers, and so on and so forth, because they've now seen that this is an area where, in their view, the federal government has fallen short. Therefore, there is a space that can be filled. There is a space that they can use their consumer protection statute to fill, and they're going to push the laws out to the outer edge and bring companies to the table, saying work with us or we can do it the hard way.

The very respected large companies don't want to read about themselves in the newspaper. They don't want to see five AGs making a statement that you're responsible for obesity in the United States. They don't want to see 10 AGs sue them, saying your advertising is false and deceptive. So they're going to be in that space.

In addition to the spaces that they have been in and are going to be in, there has been a recent phenomenon — increasingly so, I'd say, over the past ten years — with respect to what some call the marriage of certain state AGs and the contingency-fee plaintiff law. Where, for these initiatives, if the companies don't cave and don't crumble on the one hand or sit down in a reasonable way with reasonable AGs to work out a reasonable solution, which is very possible; the plaintiffs bar is basically telling the AG, say, we will take on the case for a contingency fee. It won't cost you a nickel of cash, and it won't cost you a nickel of expenses.

If you believe in the case, but don't have the resources, then we are happy to be your outside counsel. If the plaintiffs bar gets three, four, five or more AGs to retain them and file such a case, then the target has a much, much greater risk for calamity and disaster.

So if you believe what I have said regarding what they've done in the past and how much more powerful they're going to be in the future, what should you do? What should you not do?

Certainly, you should not ignore the warning signs. You should not bury your head in the sand and hope they don't find your industry or your company. There are 50 of them. They've got large staffs. They know the same issues that you know about. Whatever you're worried about, they already know it is a worry.

So you really need to have early constructive engagement. You need to develop a relationship and get your point of view across before there is a crisis, before you read about it in the newspapers; because most are very reasonable and most don't even understand at the beginning what the true issues are, how you really want to be good corporate citizens, how you want to protect America in an appropriate way. But they don't understand some of the obstacles that the companies have.

They have open doors. They are willing to listen. They are willing to have meetings. I urge you to seek out those who have open-door policies — and most do — and identify your issue before they identify it and start talking about it so you can determine what's to go on.

Even if you agree to disagree, if they see that it's a respectful disagreement, you're far less likely to read about yourself in the newspapers. You're far less likely to be demagogued. So constructive engagement is the way to go, and I'm being told I'm running out of time.

So I'll leave it at that, and if there are questions, I'll be happy to provide more information.

JACK FRIEDMAN: You've inspired me to put this on our agenda of programs because I think it's an overlooked topic in a lot of circles.

Thank you very much, gentlemen.

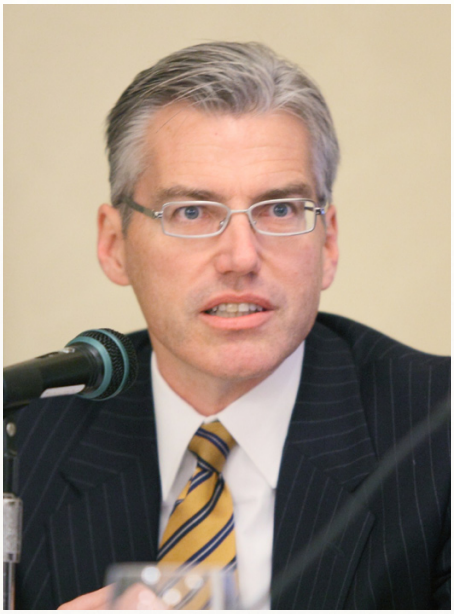
I'd like to ask Kathleen and Michael to begin their commentary.

MICHAEL TUMAS: Thank you, Jack.

First of all, we're pleased and honored to be here today with some of our fellow PLFs in the DuPont network and, of course, with Tom. Our firm has benefitted greatly over the last 13 or 14 years in our partnership with those fellow PLFs and with DuPont and Tom in the diversity area, and we hope to continue those initiatives in the coming years.

We're here today to honor Tom. It's a very strange way of doing so. We're basically going to just scare him. He's got to worry about AGs. I'm going to now talk a little bit about how he has to worry about his shareholders and regulators and the like, and I think there are some other people who are going to scare you with some other things.

So Tom got up, I'm sure, very early today, as I'm sure he does most days because he probably doesn't sleep a whole lot, being the general counsel of a big global chemical company. I think he was probably pleased to hear from our friends at Dickstein that they're worried about tobacco, energy, and obesity. He didn't hear anything about chemical companies. So maybe you're off the hook for now.



JACK FRIEDMAN: He already knows.

BERNARD NASH: I ran out of time. *[Laughter]*

MICHAEL TUMAS: But there are, obviously, being in Tom's position — and for any of the rest of you in the audience that serve as in-house counsel or are fortunate enough to serve as general counsel for public companies — significant pressures on corporations, their Boards of Directors and, in particular, their General Counsel over the last several years, spurred in large part by the recent and, many would say, continuing financial crisis.

Those pressures or pressure points come from regulators; investors, both long-term investors and now short-term investors such as hedge funds and the like; institutional shareholder services. Those pressures have led to significant governance changes — destaggering of many Boards of Directors for our public companies, reduced numbers of shareholder rights plans or poison pills, increased ability of shareholders to call special meetings, majority votes for directors and withhold campaigns, say on pay, proxy access, and compensation reform.

So, Tom, if you're getting nervous — those things all don't just come about every time you get ready to file a proxy. Those are pressures that exist every day.

During the past few years, as a result of the financial crisis, we've seen a fairly significant decline in M&A activity. Many companies, including DuPont, are very conservative with their cash, cut costs, and now, as earnings continue to increase, there are a lot of companies out there with some pretty big war chests. As a result, I think we're going to see, and have already seen, an increase in hostile activity taking place out there in the marketplace.

This isn't the '80s. This isn't the old days of some corporate raiders looking to break up big public companies. These are hostile bidders that are your competitors and people who stopped or may have rebounded a little bit more quickly than you, or were a little bit more successful at riding out the storm. So it is a different environment out there for public companies and potential hostile activity.

With that being said, I just want to talk a little bit about proxy access, proxy expense reimbursement, rights plans, staggered boards, and some activity that's taking place in our small state of Delaware, where we're fortunate to have one of the best courts, if not the best court in the land, deciding some of those issues, and a very active legislative branch and bar that tries to keep Delaware in the forefront on some of these topics.

Proxy access, which has been about for a bit — and for those of you who don't practice in this area, proxy access is essentially giving

shareholders access to a corporation's proxy. It's very expensive to run a proxy contest, and therefore, not many happen or not as many as some folks would like to see happen.

So proxy access, i.e., just like with 14a-8 proposals, getting shareholder proposals on the ballot, shareholders have been pushing for quite some time now to get their director nominees on the ballot. Think about fighting a proxy contest where you have to file all your own proxy materials or, the alternative with proxy access, you get to use the corporation's own proxy to run your slate.

In Delaware, in 2009, we adopted a whole slate of amendments to our general corporation law to make it clear to enable companies and their shareholders through bylaw provisions to permit proxy access, to permit reimbursement of proxy expenses and the like. I think the hope and the thinking in Delaware is we don't like to dictate what companies do or what particular bodies of shareholders of companies want to do with their corporation vis-à-vis proxy access or proxy reimbursement.

So our statute was really enabling, making it clear that there is a clear path by a bylaw amendment to allow proxy access, to allow reimbursement of proxy expenses, and to set out various conditions: precedent, limitations, and the like.

That didn't deter or slow down the federal government. Obviously, proxy rules and proxy is really in the federal domain. So last month the SEC adopted final proxy access rules and new 14a-11, which essentially says that a nominating shareholder or group who owns both a voting and an investment interest in three percent of the company's voting power, has held that interest for a three-year period, may now nominate up to a third — assuming they meet all of the requirements for nominating directors — up to a third of the company's Board of Directors and have those nominees included in the company's proxy.

Proxy access rules are applicable to all public companies. There is no opt-out. So if Tom didn't have enough to worry about, he probably got about ten memos or 15 or 20 from various law firms around the country, saying, "Quick, look at your bylaws. We have proxy access now."

Now in the initial release of the rules, it was unclear, if you already had advance notice provisions in your bylaws for director nominees, how those advance notice provisions were going to correlate with 14a-11 and the proxy access rules. Many of us, myself included, thought that the federal proxy access rules were going to preempt state law and that, in effect, if you had additional requirements for directors to serve or to be qualified to sit on your board that those were going to be difficult to uphold.

Shortly after proxy access was passed, the U.S. Chamber of Commerce and another group challenged the law and sought a stay. The SEC granted that stay. So we have a bit of a reprieve.

Also, in granting that stay, the SEC made some additional public statements that the intent of proxy access was not to preempt state law and that if you have otherwise valid requirements in your bylaws for director nominees or for qualifying to be on the Board of Directors, and those are deemed to be valid, that there is a way to keep people out of your proxy by essentially doing the old 14a-8 routine or filing an opinion of counsel with the SEC, seeking an advance ruling that those nominees no longer need to be included.

So what's going to happen now, it appears, is the D.C. Circuit Court will probably hear the challenge — I'm told sometime in February or March. Originally, if you had mailed your materials for your annual meeting after March 15, 2009, you were going to be subject to proxy access. That seems to be put on hold. So, Tom, that's one less thing to worry about maybe in the next month or two; but will be back, I'm sure, and you'll get another slew once the suit is decided.

Proxy access is something that everybody needs to keep on the front burner. We have a bit of a reprieve here for a couple of months probably, maybe up to six months. So it looks like the 2011 proxy season may not have mandatory proxy access.

Another interesting development, actually, just last Friday, a case my firm is involved in, and this is the little bit along the lines of the big competitors now involving themselves in hostile takeovers. It's the Airgas–Air Products hostile fight, where Air Products has made an offer to take over Airgas. Again, not a corporate raider, not somebody looking to break up the company; a well-funded adversary, so to speak, going hostile.

Airgas has a staggered board. For those of you who don't know the intricacies of staggered boards: essentially, the idea behind a staggered board is the board is divided into three. Each director serves a three-year term. So at any particular annual meeting, only a third of the directors are up. So, as a result, if you are in a hostile situation, it takes two cycles or two annual meetings for the acquirer to get its nominees or a majority — to constitute a majority of your Board of Directors.

This is particularly important if, as in the case of Airgas, Airgas has a poison pill. So if you have a poison pill in place and, obviously, very dilutive to try and swallow a poison pill. It's only been done once, maybe twice in different situations, but very difficult to proceed in light of a poison pill.

The strategy is to run a slate, and if you have staggered board terms, to run a slate one year, then wait until the next year and run another slate, and try and get control of two-thirds of the board and hope that those directors that are your nominees on the board think differently about the offer and think differently about keeping the pill in place and potentially decide to redeem the pill or exempt the acquirer from the operation of the pill.

Until the Airgas case, I think many thought that that would take two years to do, that you would have a meeting — Airgas had their annual meeting in September — and so, therefore, you wouldn't be able to actually get control of the Board of Directors of the target until the following September.

Very good lawyering on the part of the Air Products lawyers, they proposed a bylaw amendment that said that the annual meeting for 2011 would be in January. That's only four months from the annual meeting that just took place in September. So, needless to say, that bylaw provision was adopted. It was then challenged.

I think there was a declaratory judgment action for the validity of that bylaw amendment. Airgas filed one for the invalidity, and that case was decided on Friday. The last witness was heard either late Thursday or early Friday, and I know I read the opinion on Friday night. Again, I give kudos to our court for being prompt. It's obviously a very heated debate going on.

At the end of the day, what was decided is that the certificate of incorporation and bylaws of Airgas were ambiguous as to what was meant by "annual" meeting and whether or not those particular directors had a "three-year term" or whether they were only to serve until the next annual meeting. The court found in this particular instance, as a result of the shareholder franchise and interpreting anything that's ambiguous to enhance shareholder rights and the shareholder franchise, that "annual" meant just that, once a year and, therefore, upheld the validity of the bylaw for January.

So anybody in the audience or on the panel that has a staggered board that thinks that, as a result of that staggered board you get a whole other year, as in a whole other fiscal year, to convince the shareholders that the long-term objectives of the company are the right way to go and to basically increase earnings and the like during that year period: depending upon the language of your certificate of incorporation and your staggered board, and depending upon when your annual meeting is, that could be as short as three or four months as opposed to a 12-month period.

> "Legacies are best defined and remembered by the people you have touched and benefited in life. It's not about the awards won, money earned, trial successes experienced, or positions held. It's all about making a difference."
>
> — *Thomas Sager*

That is something to look at. There are ways to draft around the case. I mean, the case made it very clear that you could say in your charter that each director on the staggered board shall have a three-year term. If that were the case, the court said that everyone could serve for 12 months, and therefore, you would not have been able to accelerate the meeting.

I don't think those of us — and I've been practicing for a while — ever really thought about this as something — a staggered board, I always thought three-year terms. So have a look at the charter. I think it is a difficult thing to fix, though, to be frank; to go out to your shareholders and say, "Yes, we have a staggered board, and in light of this case, we want to make it clear that there are three, three-year terms."

As a result of pressures from ISS and others to really get rid of staggered boards, I think going out and asking your shareholders for a majority of the outstanding vote to amend your charter to clarify, I think, would be quite difficult.

I know I'm a little short on time. So I'll just round out by talking a little bit about rights plans. Rights plans, I think now for the first time in the last ten years, there are less than 1,000 public companies with rights plans in place. Again, there is a lot of pressure from institutional shareholders to eliminate rights plans or have very short-term, 12-month rights plans or rights plans that are only approved by the shareholders.

There is recent case law in Delaware. Both the Barnes & Noble case and in Airgas–Air Products, the issue before the court still is whether or not they have to pull the rights plan or redeem it. The recent law and the recent Selectica case, which was just decided by our Chancery Court and affirmed by the Supreme Court, that rights plans are still fine. They're still valid. They still work under Delaware law.

Whether or not they have to be redeemed in a particular instance will be subject to specific facts and circumstances of a particular case. So what I would say to Tom and others in his position, if you don't have a rights plan, and a lot of companies don't now; most companies do, however, have rights plans "on the shelf." There is sufficient time, usually, when someone goes hostile, to put a rights plan in place in a fact-specific situation.

So many companies have taken a lot of time and effort to design a rights plan and literally put it on the shelf so that within about six to eight days, they can call a meeting of the board. All the materials are ready. The plan has been drafted to have the board approve it and to implement it.

With that, I'll turn it over to Kathleen.

JACK FRIEDMAN: Kathleen, if you could use part of your time to talk about the issue you had raised earlier before we started the event.

KATHLEEN FUREY MCDONOUGH: Absolutely. Well, I share with my colleagues here the sense of honor and privilege it is not just to be here, but to join in

an event that honors Tom Sager and that focuses on diversity.

I am a labor and employment lawyer. In that regard, I think that I am well positioned to speak to what I see as the twin themes of this morning, which are to recognize diversity initiatives, to honor DuPont and Tom Sager for their commitment to diversity, for the encouragement that they give to firms throughout the PLF network to remain true to and to strive for even better results on diversity.

But also the secondary theme that I see developing is to take a role in scaring the daylights out of Tom Sager and his colleagues here. That part I wasn't aware we were going to do, but I'm happy to rise to that challenge. *[Laughter]*

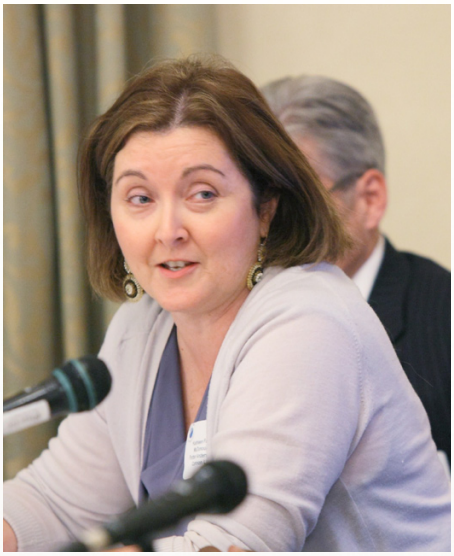
THOMAS SAGER: Nor was I. This feels like "This Is Your Life," for you people who are as old as I am.

KATHLEEN FUREY MCDONOUGH: No, our job is to keep you out of trouble, to continue to keep you out of trouble.

I believe that the point that Jack just referred to has to do with my thoughts about the first theme, and that is the diversity issues and challenges that we all face in dealing with those issues.

My second theme was to sound the alarm and tell everyone of what you may already know, but the implications of which you may not be fully aware. That's the Dodd-Frank Financial Reform Act, one of Congress's more recent pieces of big legislation, and the fact that there is not a whole heck of a lot you can do when the SEC promises a bounty or a finder's fee to your employees who rat on you to the SEC about possible security law violations.

Because the new Dodd-Frank law does what no other whistleblower statute has done in the past, which is provide to the employee who reveals to the SEC what he or she believes to be a securities law violation a share in the fine that's assessed against your company by the SEC. If a fine is more than $1 million, the employee can get 10 to 30 percent, at the discretion of the commission, of the penalty that's assessed against the company.



So we don't need to spend a whole lot of time thinking about the incentive that is provided by that statute for employees to supplement their retirement plans with part of a penalty assessed against the company by going to the SEC with potential violations.

Probably one of the greatest threats to people in the room — to Tom, to others — is the increased reporting that will happen, the increased focus the SEC will have on you. Not that there will be penalties assessed or violations found, but employees, learning of this program, will say, "I could get a very significant amount of money if something that I report to the SEC actually turns out to be a violation."

Lots of employees making these complaints and giving these tips, which they can do anonymously under Dodd-Frank, will not necessarily even know if it's a violation. But what the heck? Why not let the SEC know about it. If it turns out that it's something that the employee brought to the SEC, was not known already by the SEC, was not known by the media, and the employee cooperates with the SEC and in some way the investigation leads to a finding of a violation that leads to a penalty, the employee gets a payoff.

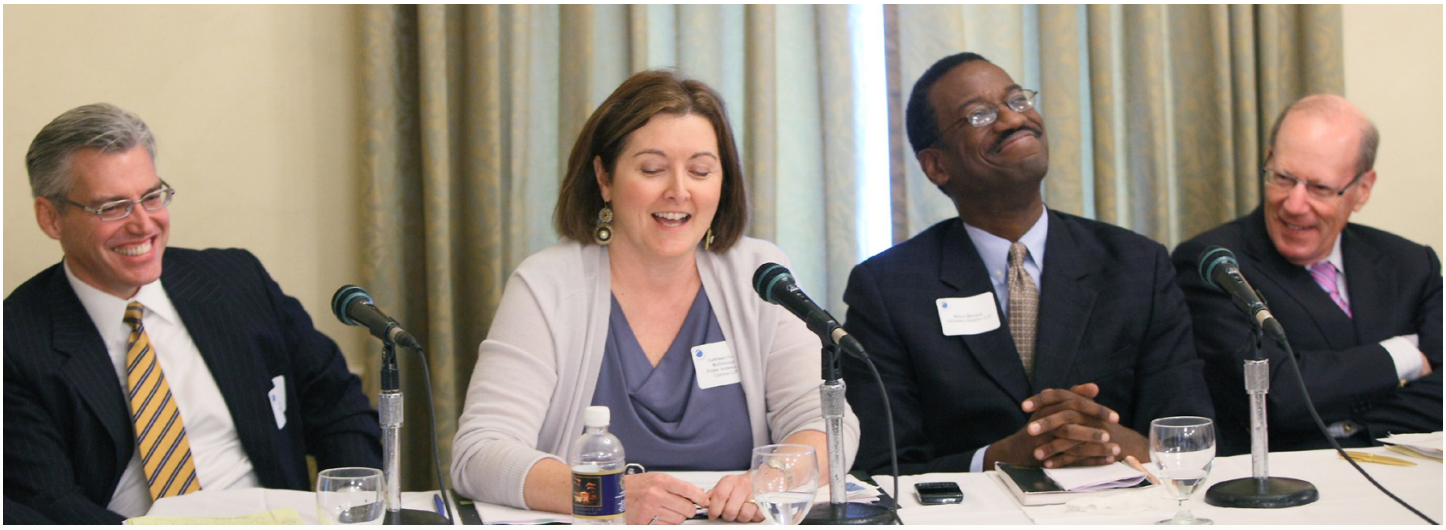
There are some other things that happen in Dodd-Frank, amendments to Sarbanes-Oxley. Many of us have lived with Sarbanes-Oxley whistleblower protections for some years.

Again, Dodd-Frank is very significantly different. The provisions of Dodd-Frank that provide this new recovery for employee whistleblowers are very different from Sarbanes-Oxley in the sense that in order to be liable under Sarbanes-Oxley whistleblower protections, a company has to have taken adverse action against the employee as a result of the employee blowing the whistle to the SEC or other federal regulatory agency, to a member of Congress, or to a supervisor or member of management in the company. But there's not a cause of action under Sarbanes-Oxley unless there has been a retaliatory action committed against that employee.

There are amendments to Sarbanes-Oxley contained in Dodd-Frank which make it easier for employees to pursue claims against you, that allow for employee whistleblower claims to go straight to federal court. They don't have to go through an administrative process, as they did previously, although that administrative process is still present.

The time period for the employee to pursue a claim for the administrative process — in that situation, it's OSHA — is doubled in time. As is the statute of limitations for these violations under Dodd-Frank, up to ten years for whistleblower retaliation causes of action, six years from the time you learned about it or three years from when it happened, but in no case more than ten years. But ten years, I think we all know, is an extraordinarily long statute of limitations.

So that's my point about the need to sound the alarm, bring to your attention



something very new, something that's significantly different, something that everyone has to be aware of. In terms of compliance, it only gives all of your compliance officers another issue to be concerned about. It only heightens the importance of making sure that when you have these investigations, when you learn from the SEC that an investigation has commenced into potential violations by your company, that no part of your company's reaction to that news should be trying to find out who made the tip.

Frankly, at that point, if a violation is found and there's a recovery or there's a penalty assessed, and it's more than $1 million, the path is clear under the statute for the SEC, again, in its sole discretion to share some portion of the penalty with the employee whistleblower. So that's very important.

On the diversity side, though, to the question that Jack asked; we talked earlier, those of us on the panel, about how to present and address issues of diversity, since that is one of our themes for today. Recognizing that, like many issues, it is a business-critical area that we need to be concerned about — not just because Tom Sager and his colleagues, general counsels across the country, care about this issue and want law firms to care about these issues. But we need to care about it because it makes good business sense, the case Tom made in his address and that has been made many times before.

The problem that so many of us run into — I see it all the time in my practice — is when our firm is asked to help clients navigate challenges that are created by a diversity initiative on one hand and federal and state laws prohibiting employment discrimination on the other hand. Those are often, if they're not handled with planning and with vision, and usually quite a lot of creativity, can be very challenging cases to defend because there is no federal law in the employment discrimination area, that says, for example, that you can't treat women badly. The laws all state that you cannot treat any person adversely, affect them adversely in connection with their employment on the basis of their protected characteristics.

The challenge is that, of course, every one of our employees — every one — is in a protected class. A white man is as protected from discrimination as is a mentally challenged racial minority who's pregnant. That is just the way the law works.

So those employers who, with the very best and noble of intentions say, "We have to have a downsizing," not a lot of them will say, "Let's let the newer people go." People don't tend to do that. Employers need certain skill sets. They need certain kinds of experience. They need people who are multidimensional, who can handle multiple duties, who are cross-trained.

It's not the case usually that you're only looking at the last people to come in. But those companies who do that, and that can be a bit of a safe harbor in terms of EEO laws, those companies who do, who have more recently become concerned about and committed to issues of diversity — Tom sort of alluded to this a little bit about the recession having such an impact on law firms and diversity. When you're letting your newer people go and you're newer to the table in terms of really being committed to diversity, you're losing your diverse candidates.

It is simply not okay under EEO laws for employers to say we don't want to let our newly more diverse employees go. We want to continue to maintain the same kind of diverse workforce and yet lose 10 percent of our people.

If you're looking at keeping newer employees because you want to protect the diversity goals that you've reached, so you let a lot of the older employees go, you may well face challenges from people who say you took race or gender into consideration in making downsizing decisions, characteristics that federal and state law prohibit you from taking into consideration.

I said earlier the way to address these issues requires advance planning.

If you're looking at a diverse workforce and you're looking at what your goals are for the future, your selection process should be thinking about and taking into consideration issues beyond just technical skills. Issues like language skills, your interest in advancing into other countries. You may have employees whose ability to be bilingual is important. Leadership skills, being able to lead a group of people who are composed themselves of diverse people from different backgrounds and the ability to be a leader of those people. People who have strong interpersonal skills are needed.

As you're doing your designing for downsizing or restructuring needed in your company, think about the kinds of skills that are important to you that will bring you at the end of your process the kind of diverse workplace that you had in the beginning, that you want to try to maintain in the end.

That's where the thoughtfulness and the planning and the creativity come in because you are simply going to have a difficult time successfully defending the challenge from the nondiverse person who says, "You chose me to go because you had to cut people, and you didn't want to destroy a diverse workforce so you took me instead."

Those are difficult cases to defend, which is to say that I think it's not news to any of us who have worked with and care deeply about diversity goals. For the last 25 years, as long as I have been practicing law, I have seen many of my clients who do care deeply about their own diversity initiatives, who do not want to lose ground when recession hits and downsizings are necessary. But it does require some thoughtfulness, some advance planning in terms of being able to justify the decisions in front of a court, or in front of a jury.

JACK FRIEDMAN: That was wonderful.

I wanted to thank all of the panelists on the first panel. We're going to proceed with the second panel and then a couple of questions for Tom. The audience will be invited to join us one-to-one to say hello. Okay, the second panel will come on up.

Thank you. We have partners from Boies Schiller & Flexner and partners from Kaye Scholer. We will start with the partners from Boies Schiller. Thank you.

ALANNA RUTHERFORD: Hi, I'm Alanna Rutherford. I'm a partner at Boies Schiller & Flexner. I'm here with my fellow partner Jack Simms.

I know that we've already run a little bit long this morning. So we're going to cut our presentations short. But we're talking about strategic planning for litigation.

Most of these issues are things that the people in this room are quite familiar with — marshaling all the facts and getting your legal arguments lined up and things like that. So I'm going to focus on and very briefly hit on some of the pitfalls and core concepts that are a problem when people are going through this process with which they're very familiar.

In part because of the familiarity with it, I think we tend to forget to reexamine what we're doing throughout the litigation. For those of you who are in-house counsel, it's really important to press your outside counsel to keep on top of these issues and constantly reconsider their arguments and what they're doing.

So, with that said, I think one of the key concepts is what is your client's goal? I think often we examine it in terms of, okay, this is the legal fact. We can get injunctive relief. We can get money damages. But the question is: "What is the real business need behind whatever legal action that you're taking?"

I know we all hate to lose out on billables, but sometimes it's worth having a conversation with a client where you say to them, okay, if you win this litigation, you may win X amount of dollars. But it's going to cost you the same amount in legal fees. In the long term, I think your client appreciates that and will come back to you as a result of the honest discourse.

Always keep in mind asking what the purpose is for the litigation and what the end goal is for the business also helps you focus on what your strategy should be and adjusting your strategy to meet that goal. Sometimes there is a principle underlying it that no matter how much you'd actually make in damages, it's worth pursuing.

Another key issue is the confidentiality of the issues involved in litigation. Obviously, all of us know and are familiar with protective orders in cases and things like that, and in the current environment, everybody is concerned about what will end up on the front page of *The Wall Street Journal* or *The Washington Post* about their business. But more key to examine is, do you need a PR team involved? Do you need to consider who at the business has access to these documents if we have a particular type of confidentiality agreement in place?

Really talk to the client about how this affects their business and whether in-house counsel can see the documents, but not the business, whether anybody should see it and how it affects the other side. Because whatever you have in place for your side is also going to apply to the other side and vice versa.

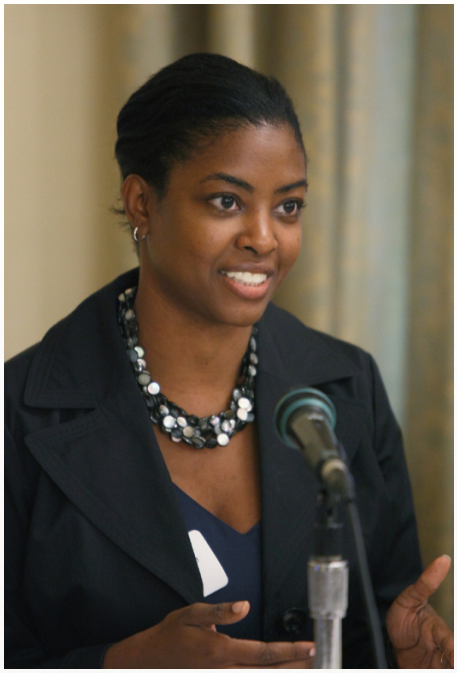
You also have to fundamentally understand your client's business. It is not enough to simply know that you're litigating about widgets and that this breach of contract case is about widgets. But understand what your business unit means to the company, what it means to the bottom line, where they fit into the organization. What is the long-term strategy of the business?

If they're planning on selling that unit in a couple of months or in a year, that changes your litigation strategy. It may mean that you're going to look for a settlement for this deal rather than a being entrenched in long-term litigation.

You may be worried about the stock price. I think a lot of lawyers say, "Oh, I'm focused on legal things," and don't consider the larger ramifications. Litigation can affect corporate bottom lines. You see it when new cases are announced, the stock price of certain companies falls. People need to examine that and really understand their business needs.

I've run into lawyers on the street, and I'll say, "Oh, I saw your client on CNBC this morning." And they respond, "Really?" I will say, "Well, he was talking about the case."

So, really think about the larger picture of your litigation. It's not just about the briefs, but it's about what's going on in the real world and with the real business situations.



Similarly, you also have to learn about your opponent's company. If it's two corporations litigating against each other, the best way to achieve your litigation goals is to understand what the other side's business is doing. That affects what you'll ask for in discovery because you'll know who to ask it from, what business units to ask it from, what terms they use, and how they keep their documents.

It also can affect what kinds of information you can get. Are there disgruntled employees who've left the company who you can talk to about the business? Are there people outside who know a lot about the business? Is the key person who created some part of the business now working somewhere else but has some interest in it?

All these things are things that can affect your litigation strategy and benefit you if you think it through.

So the next thing I wanted to talk about is developing your legal theories. I think everybody knows in the beginning you go through, you find out what the elements of whatever claim you're bringing are, and you make your best arguments. Then people stop.

You can't stop. You have to constantly reevaluate and reconsider the strengths and weaknesses of your arguments as discovery progresses and even past that. The reason is, is because the strengths and weaknesses of your arguments turn not just on the facts, but what subsequently happened in the litigation.

It may be that somebody made a new argument, for example, in a summary judgment brief that affects the strength of something that you've looked at before. Or even up to the day of trial, it may be that a motion in limine has now completely changed your position.

You have to be flexible and willing to adjust and really think about what your core business needs are and what you're trying to achieve and how best to achieve it. Because it does change as you learn new facts, as the law changes, as litigation strategy changes.

I've seen David Boies, who's the chairman of our firm, change the week before trial one of his key legal theories. Everyone was kind of panicked about that, but it was also successful to change it, and that flexibility and the understanding that you have to move with the punches, roll with the punches is really important.

Finally, you have to think like your opponent and understand what your opponent is trying to achieve on their end of the litigation and also not lose sight of the big picture. I think often, especially for litigators, as you get closer to trial, you start to think "this is war," and you get entrenched in your position and you demonize the other side. But by doing so, you lose the objectivity about what the strengths and weaknesses of your case are and really what the strengths

and weaknesses of your opponent's case are. These are all things that constantly need to be examined and reevaluated.

So, just in sum, I think it's important to keep your litigation and business goals in mind at all times and not be afraid to reevaluate your position. For those of you who are in-house counsel, push your outside counsel to consider, evaluate, and reconsider their ideas, their legal theories, and the strengths and weaknesses of their case all the time. Also push them to really understand your business and your business objectives because these are all really important.

Thank you.

JACK FRIEDMAN: More and more in the modern period, companies have to hold back on their ability to go to the mat on litigation because of the reputational issue. They're afraid that if they assert all their rights, they'll drive away customers or make the politicians regulate them, etc. Public image has a huge bottom-line effect. How does a general counsel deal with that issue?

ALANNA RUTHERFORD: This is something you have to be cognizant about in pursuing litigation: "What are the client's sensitivities?" This is why I said you really need to understand the business and the business objectives and needs because that is something that is core to creating and developing a litigation strategy.

There may be certain issues you do not push on, not just because you're worried about the public relations ramifications. But it could be that this particular provision in a contract or a particular agreement is litigated in many different forums all the time, and you want to make sure that whatever strategy you're pushing in your case doesn't conflict or interfere with something that's going on in another environment.

So constantly ask yourself, "What is the big picture?" and talk to your client, really get to know your client and to what they're sensitive, because your opponent will be doing that. If you're not equally on top of these things, you're going to lose out on some respect.

THOMAS SAGER: I'd say, Jack, the sensitivities are particularly acute if the government is on the other side, and the reputation to the company is really the core issue.

When we're thinking about suing a supplier or a customer, it comes down to two things — the risk tolerance of the client at issue, and then, second, do we value this relationship and do we want it to withstand a potential bump in the road?

So, a lot of vetting goes on around the relationship issue, but also the strength of the case. If you think you have a fairly meritorious case, it's well documented, there are ways to advance it without necessarily suing the other side. That's pretty much how we approach it.

THOMAS FLEMING: Yes, there's one more issue that I think I'd like to add. Since we're all members of the DuPont legal network, we are imbued with the DuPont legal model. It's something more than just a website. It is the core morality by which DuPont conducts its business. I've sat in meetings with Tom, and we've talked about litigation, and I've said to him and Alanna made this point perfectly. We've got these great arguments, and we're going to eviscerate them, and we're going to kill them. We're litigators. That's the way we talk. "We're going to rip 'em apart."

Tom responded, "Wait a minute, what's the right thing to do? Are we right as a company? Are we socially responsible in taking this position and advocating this?"

I have to tell you, I was floored. I had very rarely sat with a client with a conscience and a moral compass so focused on what they wanted to do, as opposed to evisceration of our adversary. It was, for me, an epiphany of sorts.

But that is, in part, why we all value working with DuPont. That is why Tom is here today being honored, as he rightfully should. As a company, DuPont will almost value, more than winning, doing the right thing and not for appearance's sake, but because as a company that is what they're driven to do.

As far as I'm concerned, and I'll stop gushing over you now, Tom, because you only gave me five bucks to say that, it is deserving and appropriate for DuPont to be and Tom particularly to be recognized here. Jack, did I answer your question?

JACK FRIEDMAN: Yes. I appreciate it.

ALANNA RUTHERFORD: If I can add just one thing, because I think this is an interesting issue, is that I think often it's easy to forget that you're not representing necessarily the business unit. You're representing the larger company. The business unit may have one idea of what they want to do, but it's also important to keep in mind that the big corporate entity is your client, and you have to think about what's right and what is good for them as a whole.

JACK SIMMS: My name is Jack Simms. I'm a partner in the Washington office of Boies Schiller.

On behalf of our firm, I want to thank Tom Sager and our co-counsel up here and Jack Friedman for putting this together. It's been an honor to work for DuPont and be a part of the DuPont legal network.

Some of the things that Tom just talked about, about doing the right thing, about litigating the right way, are very important to how we do business for our client. We had a long presentation about litigation strategy, and we're running a little bit over on time.

The most important piece of what we do when we litigate cases for DuPont is that we partner with them, and it's important. We need to develop core themes. That's what I want to talk about, core litigation themes.

You don't do it in isolation. You don't do it within the vacuum of one business unit. You don't do it within the vacuum of your law firm. You do it by working effectively with your client, your client's legal department, and your client's business leads.

Briefly, I'll go through this, and there's one other thing I want to talk about if we have time. It's about working with co-counsel, a concept that is near and dear to all of our hearts.

ALANNA RUTHERFORD: You should know that Kaye Scholer and Boies Schiller have worked on a number of cases together.

JACK SIMMS: And Potter Anderson as well.

THOMAS FLEMING: We don't like to work with Dickstein Shapiro, though. *[Laughter.]*

JACK SIMMS: No, Milton left.

THOMAS FLEMING: Yes, Milt and Bernie are gone. So we can talk about them now.

BERNARD NASH: I heard that. *[Laughter.]*

JACK SIMMS: Your core themes in litigation are basically, simple, affirmative, declarative propositions that explain why you win and why your opponent loses. Your core themes are your opportunity to put your client's story together. You cannot develop your client's core themes by working with only your law firm colleagues or reading cases. You've got to involve your client in this process.

Earlier, Tom Sager and Tom Fleming mentioned that you, as outside counsel, have to understand what your client's business goals are. You have to understand what's important to your client because this is a story you're going to tell to a court or an arbitration tribunal. It's a story that's going to end up in *The Wall Street Journal*. It's going to end up online somewhere, and you've got to be right. You absolutely have to be right.

Part of that is on the substance piece, like Alanna was saying, you've got to understand your client's business. If they make nylon intermediates, you need to go figure out what nylon intermediates are and how they work. If they grow crops and they have traits and they have germplasm, go figure out what those products are. Learn it. Be fluent in it. These are very important things.

If you don't understand your client's business, you can't litigate for them. It's that simple. You see today, if you're litigating in large complex cases where complex technology is at issue, you've got things that you typically don't see in your day-to-day experiences, but you have to learn what they are and why they are important. For example, I don't work with nylon intermediates every day, but when I litigated a case involving that product, I went to the factory and learned how they were made.

I've also spent time at Pioneer, the wholly-owned affiliate of DuPont in Johnson, Iowa. I've learned how Pioneer produces corn and soybeans. I've learned the difference between corn hybrids and soy varieties. It's very important to know and understand the products and industries involved in the cases that you are litigating.

THOMAS FLEMING: That's really impressive, Jack. I've got to say, you've got that down. *[Laughter.]*

JACK SIMMS: Thanks. I want to ask Tom what a dihaploid is later on.

When you're developing your core themes, you've got to keep in mind externally, what are you really saying? What's your story? It's got to be coherent. It's got to be persuasive. You've got to frame the right legal and factual issues.

It's got to be uncluttered and simple; for the cases we're talking about, it's not as simple as the contract was breached because someone did not pay the amounts owing. It's not that simple. We're talking about things like antitrust concepts. You want to explain the market, and what's going on in the market.

Let's say, for example, you're defending a company that's accused of violating the antitrust laws in a particular industry. You set up a core theme that the industry is intensely competitive. Under that, when you're preparing your order of proof, you want to examine and develop discovery on each issue. How is the industry competitive? What are people in this market doing to increase competition? Those are critical issues and facts you can develop in discovery.

You also want to look at the data that shows intense competition, such as a decline in demand, coupled with new market entrants, where you've got more firms competing for fewer dollars.

Now, you've got to work — as I had mentioned earlier, you've got to work very

closely with your client to develop these core themes. You've got to learn the facts. At the outset of every case, you've got to do your due diligence. Your due diligence means sometimes getting on a plane or getting on a train or getting in a car and going somewhere. You are litigating a certain kind of technology. Go there and understand how it works. Meet the frontline people. Take the time to do that.

As you know, many of these matters involve contracts. The person that makes or rejects an order usually doesn't look at the contract between two Fortune 500 companies. What they do is they execute. But you need to know how they execute because it is part of your job as an outside counsel. When your in-house says to you, "Okay, I'm going to expose you to the business, I'm going to send you to talk to my business people because I want to understand what's going on." You have to ask the right questions that let you pinpoint the critical areas at issue and then explain how they impact your dispute. In other words, how do the facts affect and shape your story in litigation? Sometimes they are helpful to your case; sometimes they make your case more challenging.

That's important to know at the inception of a case as early as you can because you want to be able to inform your client and give them an honest assessment of where they stand. These are our core themes. Here's a real problem we have. Did you know that the people who are seven steps down on the chain from you aren't doing things the right way? Here is what we can do to fix it. This is something we've got to live with.

You'll find a lot of the time in a lot of these cases, things aren't wrapped up in a bow where it's real simple and real easy. Part of your job as outside counsel is to work with your inside counsel and with your business leads also to present the best package and to do it in a manner that makes sense and is consistent with the values of your client and what they want to portray publicly, because there are lots of audiences.

The government looks at what you're doing. Your competitors look at what you're doing. Your shareholders look at what you're doing.

There is one other point with respect to working with your client. Some of you are in-house. Some of you are outside counsel. One of the tensions we all face is making sure you are efficient when you are doing your due diligence. You want to find the right people to whom to ask the right questions, but you also need to be efficient and sensitive to the client's business needs.

When you go to a place like DuPont or Pioneer, you've got to remember that your clients have jobs, and they have things to do. They run a business. They make money for the company. They're not professional litigation witnesses. You don't have days and days and days. Keep it simple and efficient. If you're doing your due diligence, this isn't your chance to go ask five hours of questions. Go ask, find out what you need to know, and do it in an efficient manner. Don't waste their time.

They're paying you because they want to know certain things. They're not paying you to go and spend days on end asking tangential questions. Identify the facts and issues that are relevant to your case strategy. Learn the important facts and concepts so that you do not ask the same questions over and over again.

One of the things about working in the DuPont legal network and working on these big, complex cases, you'll have firms that are assigned as co-counsel across different areas of a case. You've got to learn to work together as an integrated team. It's very, very important.

That's something that DuPont values, and it's something that we value. Over time, you develop relationships, and you get used to working with people. But it can be difficult. We are all very competitive people. We all want to win.

But what you have to do is take a step back from that and say what's best for our client? You've got to learn to communicate with co-counsel. There are times when you're going to have a great issue in your case. You write a motion, and you're excited to move forward.

You pick up the phone and you call your co-counsel and say, "Here's what I want to do. We've been waiting. We've drilled this down." Then he says to you or she says to you, "If you do that, you are going to undermine a core proposition of my side of the case."

Look, we all get excited. We all have great ideas. We're all very bright, or most of us are very bright. I work with very bright people who do a good job of taking care of me.

But you've got to do what's right for the client. They pay for the sum of your advocacy and the sum of your creative decision-making process. They don't pay for two different firms with two different agendas.

So it is critical. Communicate early on, and you avoid these problems. Develop a relationship and be nice to each other. Because it's not your firm, it's not Kaye, it's not Dickstein, it's not Potter Anderson. You're working for DuPont. That's the goal to never lose sight of.

JACK FRIEDMAN: Thank you very much.

THOMAS FLEMING: Hi. I'm Thomas Fleming from Kaye Scholer in New York.

I want to first say that Jack Simms is the best-looking lawyer in Washington, D.C. *[Laughter.]*

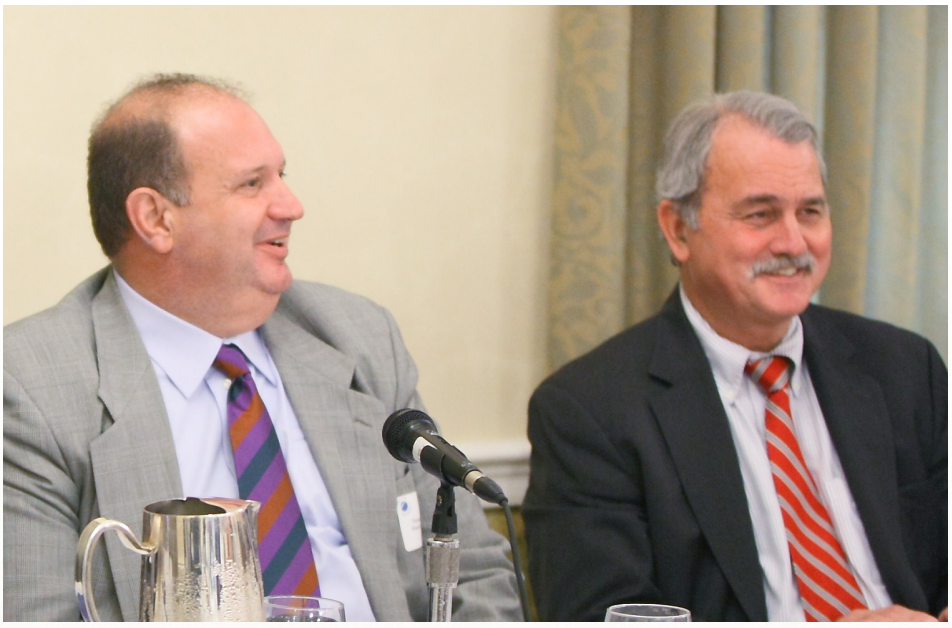
JACK SIMMS: Thank you, Tom.

THOMAS FLEMING: But his comment about law firms cooperating in servicing a single client, it can't be underscored enough. We have, from our personal experience, worked with some of the preeminent law firms in the country — Dickstein Shapiro, Boies Schiller, Potter Anderson. You can't have that many intelligent, high-powered, focused professionals working together without the ability to cooperate toward a common goal.

To have people who are such consummate professionals subjugate their egos — and I hate to break this to you, lawyers have egos — in order to best serve the client's need is a tremendous, tremendous accomplishment. We've done it, and I think we've done it fairly successfully. We've worked together well, and we like each other.

PATRICIA CARSON: Most of us.

THOMAS FLEMING: They liked that line. When Alanna was talking about "demonizing the adversary," she was talking about me.



But you learn that in a way from DuPont that you've never really focused on before. Tom embodies that spirit. Tom says, "I want the best people in the country working for DuPont, and I want them working in a way that's efficient, that's productive, and that's successful."

The way he's been able and the people who are in his legal team are able to marshal these talents — these thoroughbred horses all want to run in their own direction — and keep them focused in a common way is a very significant accomplishment.

People have often said that my wife, personally, has made me a better person because I'm the demon, is absolutely true. To answer the question that Jack had asked before, working for DuPont has made Kaye Scholer a better law firm in terms of embodying and recognizing the moral value, the value of diversity, the value of cooperation, and the value of doing the right thing has turned us into a better firm not just because we want to continue to work for DuPont, because it's the right way to practice law.

What I meant to talk about today was electronic discovery but first, I want to say it just occurred to me that Tom, being based in Wilmington, has a particular challenge because I heard yesterday, when he was addressing his board, he had to say, "I'm not a witch. It's okay." *[Laughter.]*

But he is a magician. He is a magician in the way he's able to fix things within this company.

Now, he hasn't been able to fix things in terms of his Phillies, his beloved Phillies because the Yankees... Who won the World Series last year? I forget. But this year, he'll have another crack at it, and so maybe it will be better.

But when it comes to electronic discovery, in terms of the litigation world, we are inundated. It has become a cart run amok. The courts are struggling to keep up with it. The litigators are struggling to keep up with it, and dragging behind are the clients, desperately struggling to keep up with it. The reason that it's become such an issue is because of the cost in terms of human time and in terms of dollars and from their very, very precious litigation budgets that are at stake.

Discovery has always been sort of the animal that drove the horse behind most litigation. What's happening now with electronic discovery is that it's out of control.

It's literally out of control. Federal courts particularly across the country are struggling to adopt pilot guidelines to help the judges understand what they need to do and how they need to do it in dealing with electronic discovery issues in every case. They have predominated cases now.

In terms of the planning that Jack and Alanna talked about, you have to also do a significant amount of planning in terms of electronic discovery issues with your client. So as much as you need to know about the business of the client, you need to know their computer infrastructures as well in order to be able to protect the client — because that's our job, to protect the client.

DuPont has a phenomenally sophisticated system. They have professionals that are in place, IT professionals, whose job it is to liaise with the litigators. I'm saying a lot of nice things about DuPont today. Are you getting an award or something?

To liaise with the litigators to make that effort seamless and efficient is difficult. Many, many companies, and we all represent very large companies, don't have that. So if there's any takeaway from anything that I say to you today — besides that the Yankees will win 28 — is that companies need to go out and look at how they handle electronic discovery.

It's not a private company issue. It's a regulatory issue. When the regulators are involved they want electronic information, too. This is more Jack and Alanna's bailiwick in the antitrust world, in looking at company businesses.

It has been estimated that a single email within a medium-sized corporation will spawn at least 10,000 other emails. So if you magnify that times the number of employees on a given day that are texting and emailing and doing all of this type of electronic communication, it's explosive.

We're doing cases for DuPont where tens and millions of pages of documents in an electronic data format are implicated. They have to be collected. They have to be processed. They have to be reviewed. The costs attendant with that are astronomical, as you can imagine.

So what are some of the things to think about? Let me give you five. You have to understand the infrastructure of the client. It's not just email anymore. It's Skype. It's instant messaging. It is every form of social networking that you can imagine. It's your client's Facebook account.

Now, Tom has a very good Facebook, and I invite you all to visit his page.

THOMAS SAGER: It will take a while to find it. *[Laughter.]*

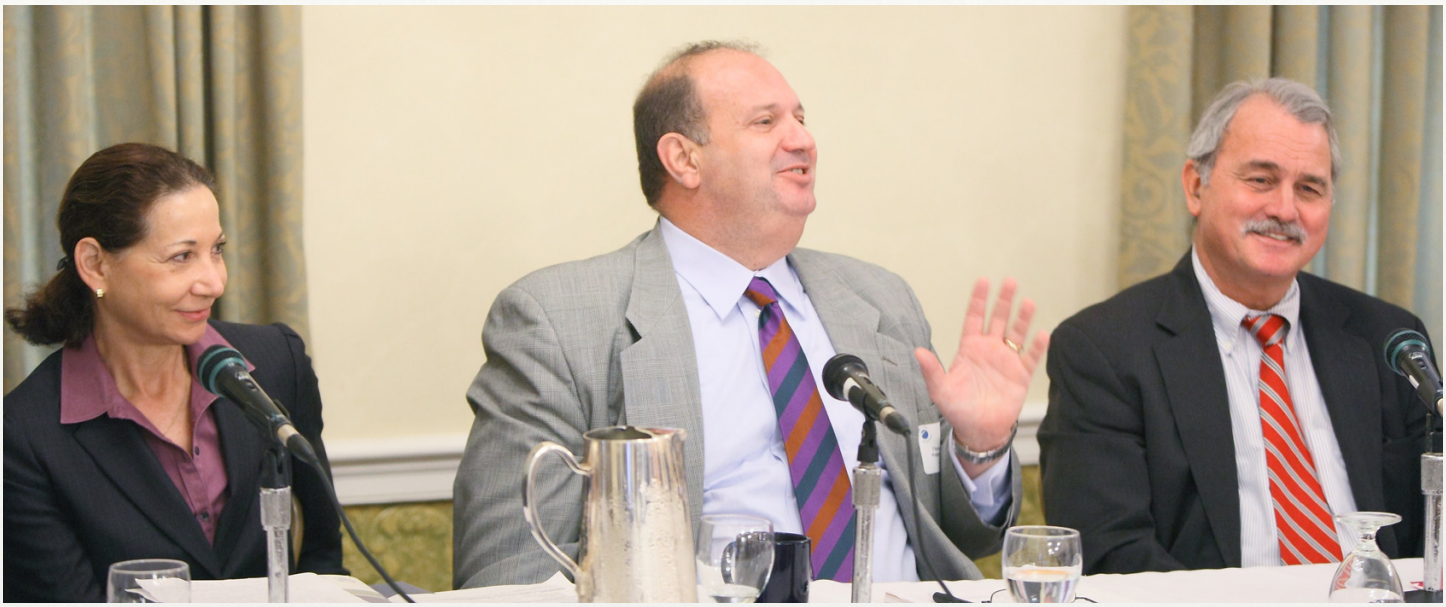
THOMAS FLEMING: It's under "whycan'tthephillieswin.com," right? So it's not just email.

THOMAS SAGER: That was three shots, Tom.

THOMAS FLEMING: That's "whycan't" — I was going to say that again.

It's all of that or not. You have to think creatively in terms of any form of electronic communication in play: company databases and in terms of the SAP system, structured databases. This is a tremendous amount of data that you better be prepared and, in some cases, you've got to do even before the litigation.

The most significant issue is preservation. Let me say that again, preservation. You don't want to go into a case and be sitting next to Tom Sager at his deposition and



say, "Mr. Sager, where are those documents that are relevant to issue three on the clause of the contract?" He goes, "Oh, I deleted those two weeks ago." Then have to defend him at the sanctions hearing that is sure to follow.

Preservation is the key. So it has to be done early. There are cases that have come up in New York most recently where people have attacked the privilege log that had a document from 1996 that said "work product." Ordinarily, that seems innocuous enough.

The problem is that the hold order for the company didn't go out until 2001. So if, in 1996, you knew enough about this case to create a work product document, you better have issued a hold order in 1996. This company didn't do it, and there were serious consequences.

So part of your planning needs to be education. The client educates us, but we need to help educate the client in terms of thinking strategically about how to preserve these documents.

One last point I want to make is when you're dealing with international companies like DuPont, you're going to be faced with incredibly different legal issues from different countries. There is a very predominant concept called "data privacy," which exists in many European countries. For instance, in Germany they have incredibly strong data privacy laws, which means even though you provide a computer to an employee and that employee does all sorts of personal and business-related issues, you cannot, as a company, look at that employee's computer.

I can't look at their email account. I can't look at their hard drive. I can't see what documents they saved. It's not permitted unless they specifically consent, and most companies in Germany do not want to ask for permission.

What do you do? You go to your New York court, who said to produce all these documents from your employees, and say, "Well, I can't because it's Germany, Judge." The judge says, "I don't care." What do you do? What do you advise your company?

There was one recent case about a Malaysian bank involved in U.S. litigation. It had a subsidiary in Malaysia. The court issued an order to produce documents. They went to Malaysia. Under Malaysian law, if you produce documents without specific consent, it's a criminal act. You can go to prison.

So we went back and said, "Judge, we can't. It's a crime. We don't want to put our general counsel in jail." The judge said, "Oh, well, you should have told me that. I don't care."

You have to be cautious. You have to be alert, and you have to be responsive. So these issues can be tremendously complicated.

The majority of the time you'll spend in a litigation is negotiating the electronic discovery to stipulation. Why, because nobody wants to guess wrong. When you have a stipulation, everybody knows what the groundwork is. These electronic discovery stipulations are incredibly important.

I'll stop right there. Oh, did I say that the Yankees will win the World Series?

THOMAS SAGER: More than once.

THOMAS FLEMING: Okay. Good. So I'll pass it on to Pat.

PATRICIA CARSON: Hi. I'm Pat Carson. I'm a partner at Kaye Scholer, and I'm not Leora Ben-Ami.

Yes, DuPont has changed Kaye Scholer, but it has not changed me into Leora Ben-Ami.

I know that everybody is ready to leave, and I'm taking the program back to where it was before. It would be "let's scare Tom." I was going to talk about patent trolls.

A lot of the work that we do with DuPont is in the patent area, and as Tom is probably well aware, he doesn't have to just worry about patent litigation from his competitors anymore. He doesn't just have to worry about litigation from his competitors, the government, and disgruntled employees. Now he has to worry about things called patent trolls.

A troll is also sometimes known as a non-practicing entity. It is a company or an entity that has patents and just monetizes the patents. It doesn't produce anything. The problem is that trolls can also — that description can also apply to an independent inventor. It can also apply to a university. It can also apply to a research institute.

The way a lot of patent cases are in front of juries, the way a jury is going to view an independent inventor or a university or a research institute that helps people is going to be very different than the way they're going to view a patent troll.

Now why is there this proliferation of cases? Well, first of all, patents are not just on widgets. They are on business methods. They're on ways of doing business. There are patents out there that DuPont has that are not on something. If it's in their business area, they could be subject to a patent litigation.

Why is this a problem? E-Discovery is a big issue why it's a problem, because if you're being sued by an entity that just owns patents, it doesn't have any documents. It doesn't have any electronic discovery. They sue DuPont for patent infringement on these patents that they own, and DuPont is faced with God knows how much electronic discovery and the costs that are associated with that versus "let's pay the troll" — and that's where the troll comes from: guys who live under bridges and extract penalties from people crossing over the bridge. Perhaps the better way to go about it is just to pay off the company.

Now, this is important again for a company like DuPont to recognize when they're sued. Is this actually a patent troll or is this a sole inventor? It's going to be a very different type of litigation and there's going to be a very different way of going about handling that litigation. In-house counsel has to be very conscious of the way the outside counsel is handling the case.

It's very important if it is an inventor who's suing. You cannot, in front of a jury, denigrate the inventor's contribution. A jury will identify with an inventor, because they've all watched the movie *Flash of Genius*. They've heard about Thomas Edison. Juries want to identify with inventors.

So you can't get up there and say their invention is nothing. You have to figure out creative ways to say, "That's a great invention. We don't do it." "That's a great invention. You had a patent on it, but now your patent is expired. It shouldn't be in existence anymore." That's the way you have to deal with it.

The final thing that I want to leave you with is just because a company is a patent troll — there was a case down in Texas, *i4i v. Microsoft*. You can't just assume that the jury is going to have these preconceived notions and that they're going to say this is just a troll. They don't deserve any money.

There, the jury gave i4i $200 million. As a matter of fact, the defendant was also assessed another $90 million in penalties that was awarded to the plaintiff because the defendant made disparaging comments about the i4i company and basically called them a troll. So it didn't make any difference to the jury, and it also cost the defendant more money for trying to disparage them.

So that's a very quick summary of what I was going to talk about today.

JACK FRIEDMAN: Can I ask you a quick question about false marking? It's a new development and it's troll-like. So I think it might be of interest to the audience.

PATRICIA CARSON: Actually in the materials is something that we recently released on this. Part of the patent statute says you can't mark your items with patents that are either expired or improperly marked, and it provides for a penalty of $500.

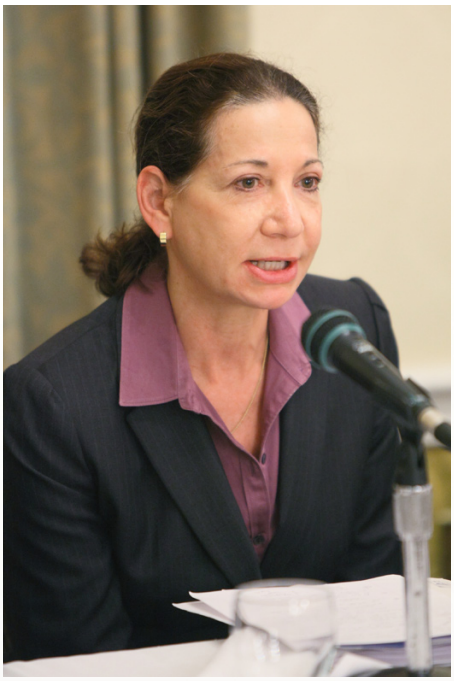
There are a couple of questions. One is, "Can anybody sue under this statute?" It was recently answered that, yes, pretty much anybody has standing to sue. So I could go out and buy a DuPont product and...

THOMAS SAGER: No, no, no. A competitor. We're buying Monsanto product.

PATRICIA CARSON: A Monsanto product, determine that they have expired patents listed on that. I could file a false marketing suit against Monsanto. Now what is the motivation to file that other than because they're an enemy of DuPont?

Well, the motivation is, is that $500 was recently determined per item. It could be per item. It's up to $500. So if somebody makes a gazillion of something, you can get $500 per on that. Half of the money goes to the individual or the company that actually filed the case, and the other half goes to the government.

So, yes, it's a real big issue. If you watch patent filings now, I would say 60 percent of the cases you're seeing are false marking because they file them one after another. I don't know if DuPont has been a target, but just about every client that I can think of has been.



JACK FRIEDMAN: I'd like to close with a couple of very quick remarks. I was speaking to a prominent woman attorney on Wall Street, with a very fine firm. She said that in her judgment she was a better lawyer because she had come from a modest financial background where she had been a babysitter, a waitress and about 50 other jobs to get herself through school. Many of the lawyers at fine firms come from prominent families where the kids went to the finest summer camps, private schools, and universities. They are very good at doing a formal memo, but when it comes to actually advising the client about how the law relates to the real world of business, she felt that she may give better practical advice. This is an important argument for diversity.

I would like to thank Tom Sager. I think that the humanity of his department at DuPont is remarkable. It reflects well on industry and has been reflected today. I want to thank you very much.

Veta T. Richardson

Executive Director
Minority Corporate Counsel Association

MCCA
MINORITY CORPORATE COUNSEL ASSOCIATION

Veta T. Richardson was named the Executive Director of the Minority Corporate Counsel Association in January 2001. Veta also serves as the Director of Publications for MCCA's magazine, *Diversity & the Bar*, which is published bimonthly and distributed to a global circulation base of more than 35,000 corporate attorneys. MCCA's mission is to advocate for the expanded hiring, promotion, and retention of minority attorneys by corporate law departments and the law firms that serve them. Since its founding in 1997, MCCA has emerged as a knowledge leader on diversity issues in the legal profession, and its expanded platform addresses diversity management issues involving women, physically challenged, and lesbian, gay, bisexual and transgender (LGBT) lawyers, in addition to lawyers of color (which remains its primary focus).

Prior to joining MCCA, Veta was vice president and deputy general counsel of the Association of Corporate Counsel and in-house counsel to Sunoco, Inc. in Philadelphia, PA, where her practice focus was corporate governance, transactions, securities and finance.

She received a B.S. in Business Management from the University of Maryland at College Park and a J.D. from the University of Maryland School of Law.

Veta has been recognized for diversity leadership by a number of organizations, including the U.S. Equal Employment Opportunity Commission, Black Law Students Association, National Minority Business Council, Association of Corporate Counsel, Bar Association of the District of Columbia and the Asian American, Korean American, and South Asian Bar Associations of New York.

The Minority Corporate Counsel Association

The Minority Corporate Counsel Association advocates for the expanded hiring, promotion, and retention of minority attorneys in corporate legal departments and the law firms that serve them. MCCA furthers its mission by publishing research on achieving diversity and best practices in the legal profession, honoring innovative diversity programs with its Employer of Choice and Thomas L. Sager awards, and assisting diverse law students through the Lloyd M. Johnson, Jr. Scholarship Program. MCCA's work has been recognized with awards from the National Minority Business Council, Inc., the U.S. Equal Employment Opportunity Commission, the National LGBT Bar Association, and the Association of Corporate Counsel.

Founded in 1997, MCCA is headquartered in Washington, D.C., and also has a Southeast regional office in Atlanta, Georgia. For more information, go to www.mcca.com.

Jack A. Simms Jr.

Partner

BOIES, SCHILLER & FLEXNER LLP

Jack Simms' practice focuses on complex commercial litigation and antitrust matters across a variety of industries.

Mr. Simms' current matters include the representation of a Fortune 500 corporation in defense of claims for misappropriation of trade secrets, unfair competition and breach of agreement. Mr. Simms is also a member of the litigation team appointed as interim co-lead counsel in *In re Municipal Derivatives Antitrust Litigation* (S.D.N.Y.), where the firm represents direct purchasers of guaranteed investment contracts and other financial products that were the subject of a wide-ranging conspiracy and other anticompetitive conduct.

Mr. Simms' representative matters include:

- the successful representation of American Express in its antitrust case against Visa and MasterCard in which American Express recovered a record-breaking $4 billion winning summary judgment (affirmed on appeal) for a Fortune 500 corporation against charges it had violated the Robinson-Patman Act and Section 2 of the Sherman Act where damages sought were in excess of $250 million
- winning judgment on the pleadings (appeal dismissed) for a Fortune 500 corporation against charges brought by a competitor that the corporation had violated Section 2 of the Sherman Act
- winning pre-discovery summary judgment in favor of several hedge funds and investors asserting claims for breach of agreement with respect to redemption of preferred shares; and
- representation of Mr. Richard Fields, a well-known independent business developer, in connection with litigation brought by Donald Trump's hotel and casino company.

Prior to joining Boies, Schiller & Flexner LLP, Mr. Simms was associated with the Chicago office of Baker & McKenzie. While there, Mr. Simms represented a variety of clients in commercial and bankruptcy litigation before various courts. Mr. Simms also represented clients in professional liability and white-collar criminal defense matters.

From July 2005 through December 2005, Mr. Simms was a partner at the law firm of Perry & Haas, LLP, in Corpus Christi, Texas.

Alanna C. Rutherford

Partner

Alanna Rutherford is a partner at the firm. Her primary areas of practice are antitrust and complex civil litigation. She has participated in a number of major litigations, including the trial teams for:

AIG v. Starr Int'l Corp., where BS&F obtained a jury verdict successfully defending the Starr charitable organization and Maurice "Hank" Greenberg against AIG's claim of $4.3 billion of stock in damages that it claimed Mr. Greenberg and Starr had promised and owed to AIG in trust

SR Int'l Business Ins. Co. v. World Trade Center Properties LLC, where BS&F obtained a jury verdict in federal district court in 2004 on behalf of Lloyds of London in the World Trade Center insurance trial that helped determine whether the Silverstein Parties were entitled to one payout or two following the events of 9/11

In the *Matter of New York Stock Exchange Archipelago Merger Litigation*, where BS&F represented Goldman Sachs, who served as facilitator for the merger between the two exchanges. The case ultimately settled following the testimony of Goldman's key witness.

Ms. Rutherford also participated in crafting the legal strategy in *American Express v. Visa & MasterCard*, an antitrust case against the two dominate credit card organizations and several of the banks which issue their cards. The resolution of the case resulted in one of the largest case settlements in history, with $4 billion to be collected by her client over time.

Ms. Rutherford continues to work for several of the Firm's major clients including American Express, Barclays Capital, E.I. DuPont de Nemours & Co., Goldman Sachs, and the New York Jets.

Prior to arriving at the firm, Ms. Rutherford clerked for Judge Charles Wilson on the Eleventh Circuit.

Ms. Rutherford attended Columbia University School of Law, where she was a Harlan Fiske Stone Scholar and senior editor of the Columbia Law Review, Georgetown University's School of Foreign Service, and the Institute of Political Studies ("Sciences Po") in Paris, France.

Ms. Rutherford is fluent in French and conversant in Spanish. She has lived in France, Jamaica, New Zealand, the Philippines, the United States and Zambia before college.

Boies, Schiller & Flexner LLP

Boies, Schiller & Flexner LLP, founded in 1997, has become one of the nation's premier law firms. Today, with over 200 lawyers practicing in offices across the country, we regularly serve as lead counsel in the most significant and highest-profile disputes in the world. While best known for landmark cases such as *United States v. Microsoft*, *Bush v. Gore*, and *In re Vitamins*, we represent some of the largest and most sophisticated organizations in the world when the results matter most. In less than a decade, we have won and saved our clients billions of dollars in trials, arbitrations, and settlements. We have been described by *The Wall Street Journal* as a "national litigation power-house" and by the *National Law Journal* as "unafraid to venture into controversial" and "high-risk" matters.

And we are just getting started.

In 1997, David Boies and Jonathan Schiller combined their talents and set out to build the most interesting and dynamic litigation practice anywhere. Two years later Don Flexner joined them. Since then, they have recruited and litigated side-by-side with a group of the most accomplished and effective lawyers in the country. Our lawyers have tried more than 400 cases, and include two former United States Attorneys, numerous former Justice Department officials and Assistant United States Attorneys, several former Supreme Court clerks, and many former partners of prestigious law firms. The talent of our partnership is matched by the skill and diversity of our associates, who come mainly from judicial clerkships and top law schools. Likewise, our corporate practice brings our standard of excellence to bear in negotiating complex and sophisticated transactions. For that reason, *The American Lawyer* noted that the firm has assembled "a team of seasoned attorneys to form one of America's most successful and sought-after law firms for cases that matter."

Our clients know and rely on our talent, standard of excellence, relentlessness, creativity, and track record of success in a wide variety of practice areas and industries, for both plaintiffs and defendants. We have successfully defended and brought actions on behalf of our clients in some of their most high-stakes litigation. This record of success is the foundation on which the firm was built. It has distinguished Boies, Schiller & Flexner LLP as the law firm of choice for "the cases that matter."

Milton A. Marquis

Partner

DICKSTEINSHAPIROLLP

Milton Marquis joined Dickstein Shapiro in 2002. He is a partner in the State Attorneys General Practice and has developed an active antitrust and public policy litigation practice. He served with the government for 14 years at the U.S. Department of Justice and the offices of the Attorneys General of Virginia and Massachusetts. In private practice, Mr. Marquis has provided advice and counsel to clients on a wide range of antitrust issues, including the development of intellectual property rights policies for standard-setting organizations, the antitrust implications of settlements of patent infringement litigation, the establishment of antitrust corporate compliance programs, and joint ventures.

PROFESSIONAL ACTIVITIES
Mr. Marquis is admitted to practice in the District of Columbia and the states of Massachusetts, Virginia, and Georgia. He is a member of the Section of Antitrust Law of the American Bar Association and currently serves as a Vice-Chair of the Section's Corporate Counseling Committee. Mr. Marquis currently serves on the Advisory Board of the American Antitrust Institute. He also is a member of the National Bar Association and the Energy Bar Association.

EDUCATION
Mr. Marquis received his B.A. from the University of Georgia (1979), and his J.D. from the Case Western Reserve University School of Law (1984).

Bernard Nash

Partner

Bernard Nash joined Dickstein Shapiro in 1988 and leads the firm's State Attorneys General Practice, where he represents clients in complex state and federal legal and legislative matters. Mr. Nash's work typically involves cases of first impression, matters having public policy implications and/or a governmental interest, and complex litigation. He routinely counsels major private sector clients on a wide range of matters involving State Attorneys General and also has represented states in significant policy disputes.

Under Mr. Nash's leadership, the State Attorneys General Practice has become the country's largest and premier practice devoted to resolving State Attorney General disputes. Mr. Nash's clients include AT&T, DuPont, Pfizer, MasterCard, U.S. Chamber of Commerce Institute for Legal Reform, Time Warner Cable, and Pepsico.

PROFESSIONAL ACTIVITIES
Mr. Nash is admitted to practice in New York (1967), the District of Columbia (1976), Maryland (1977), and before the U.S. Supreme Court and other federal courts.

AWARDS AND HONORS
Mr. Nash is ranked in *Chambers USA: America's Leading Lawyers for Business* as "the leading practitioner in the country" in representing clients before State Attorneys General, "offering a combination of intelligence, creativity and diligence, and personality." *Chambers* referred to Mr. Nash as "the godfather of State Attorney general work." He also is named in *The Best Lawyers in America* in the area of Administrative Law.

EDUCATION
Mr. Nash received his B.B.A. from the City College of the City University of New York (1963) and his J.D., *cum laude*, from Brooklyn Law School (1966), where he served as associate editor of the *Brooklyn Law Review*.

Dickstein Shapiro LLP

Dickstein Shapiro LLP, founded in 1953, is internationally recognized for its work with clients, from start-ups to Fortune 500 corporations. Dickstein Shapiro provides strategic counsel and develops multidisciplinary legal solutions by leveraging its core strengths — litigation, regulatory, transactions, and advocacy — to successfully advance clients' business interests.

COMPLEX DISPUTE RESOLUTION
Dickstein Shapiro's Complex Dispute Resolution (CDR) Practice provides comprehensive solutions to avoid, limit, and resolve complex litigation and liability problems. This work includes: negotiating and structuring nationwide and statewide class settlements; providing comprehensive risk analyses and strategic planning; and representing individuals and organizations in high-profile federal investigations.

CORPORATE & FINANCE
Dickstein Shapiro is a leader in providing sophisticated legal services to business entities of all types, including financial institutions and individuals. Our Corporate & Finance Practice is international in scope and ranges from small, traditional transactions to large, highly complex transactions and provides a full range of corporate, financial, and transactional legal services to its clients.

ENERGY
Dickstein Shapiro's multiservice Energy Practice offers a complete range of services to companies that develop, finance, operate, acquire, sell, restructure, or manage large energy infrastructure projects, including renewable and conventional power plants, transmission lines, pipelines, and water desalination plants.

GOVERNMENT LAW & STRATEGY
The Government Law & Strategy Practice seeks to advance clients' interests before the legislative and executive branches of government — a practice unique to Washington, D.C. Our attorneys and advisors provide support in a number of areas, including public policy, government contracts, state attorneys general, homeland security, political law, and congressional investigations.

INSURANCE COVERAGE
Dickstein Shapiro's premier Insurance Coverage Practice represents policyholders around the country in disputes with their insurance carriers. We represent clients in resolving coverage disputes in negotiations, arbitrations, and litigation, helping them recover billions of dollars under a wide range of insurance policies.

INTELLECTUAL PROPERTY
Combining decades of litigation experience with a robust procurement and asset management practice, Dickstein Shapiro's Intellectual Property develops comprehensive IP programs and strategies encompassing all aspects of clients' intellectual property needs, including patent and trademark litigation, asset management, patent and trademark procurement, licensing, and counseling.

LITIGATION
With more than 200 litigators in offices nationwide, Dickstein Shapiro's attorneys excel in litigating and settling complex, high-stakes business disputes. Whether through trial verdicts, arbitrations, settlements, or other litigation alternatives, Dickstein Shapiro's litigators seek the best outcome possible for their clients' goals and their bottom line. Our litigation practices include antitrust and financial services, commercial litigation, employment, financial institution dispute resolution, financial restructuring and bankruptcy, state attorneys general, and white collar.

Patricia Carson

Partner

KAYE SCHOLER

Ms. Carson's practice focuses on patent litigation and patent counseling matters, including IP due diligence and licensing. She has a broad range of experience in the patent law area, having prosecuted and licensed patents and counseled patent holders in a variety of fields.

Ms. Carson has represented clients in the pharmaceutical, biotechnology, chemical, medical device, consumer healthcare, consumer electronics and semiconductor fields. In a landmark victory in *Wyeth v. Kappos*, she prevailed on behalf of Wyeth and Elan, at the district court, and in the government's appeal to the Federal Circuit. The case successfully challenged the U.S. Patent and Trademark Office's interpretation of the statute designed to compensate patent holders for loss of patent term due to delays in processing applications. The victory resulted in significant patent term being added to the patents at issue in that case and ultimately, to patents assigned to countless other companies as well.

Drawing on her strong scientific background and experience as a patent examiner, as well as her extensive background in patent litigation, Ms. Carson brings a broad prospective to counseling clients on patenting strategy, patenting evaluation and IP due diligence relating to transactions, including licensing, joint ventures and acquisitions. As a patent litigator with extensive trial experience, she provides patent infringement, validity and freedom to operate opinions based on practical, real-world analysis. Ms. Carson was named to *The National Law Journal*'s "Defense Hot List" in recognition of the jury trial verdict on behalf of Ariad Pharmaceuticals against Eli Lilly. This year, *Intellectual Asset Management* (IAM) Magazine identified her as one of the "World's Leading Life Sciences Patent Litigators."

Ms. Carson holds a Ph.D. in Microbiology and Immunology from Temple University School of Medicine. She devoted several years to postdoctoral studies at the Medical College of Virginia and the National Institutes of Health. She also spent several years in the U.S. Patent and Trademark Office as a patent examiner in the biotechnology group.

Thomas F. Fleming

Partner

Education: J.D., Brooklyn Law School, 1987 (*summa cum laude*); B.S., New York University 1984 (*cum laude*)

Thomas F. Fleming is a veteran trial lawyer with considerable experience in complex commercial litigation, intellectual property litigation and particularly patent litigation. He has co-chaired numerous jury patent trials in the areas of VoIP, chemical products, semiconductor components and biotech products. He has also represented wireless and telecommunications companies such as Nice Communications and RIM. In addition, Mr. Fleming has represented clients in patent litigation and counseling ranging from Roche, Genentech and ARIAD to DuPont Displays on light-emitting polymer devices and OLEDs, Danieli & Officine Meccaniche, and DuPont Dow Elastomers on complex polymers. He has also advises Fortune 100 companies on intellectual property aspects of international merger and acquisition matters. Mr. Fleming has directed several successful trademark and Lanham Act litigations on behalf of international clients and their U.S. subsidiaries.

Mr. Fleming is a member of the Intellectual Property Owners Association, and is a Committee member on U.S. Patent Law. He contributed to the 2010 Thomson/Reuters Publication on "Recent Trends in Patent Infringement Lawsuits," and also contributed to the 2010 West Publications treatise *Commercial Litigation in New York State Courts*. Mr. Fleming has co-authored the NYSBA articles "Federal Rules of Civil Procedure: Amendments" and "Expert Witness Disclosure and Core Work Product." He is admitted in New York State Courts, as well as the Circuit Courts of Appeals for the Second and Federal Circuits. Mr. Fleming is a member of the American Bar Association Sections on Litigation and Intellectual Property and a member of the New York State Bar Association Commercial and Federal Litigation Section Committee on Discovery.

Mr. Fleming is also a recipient of the 2010 Legal Aid Society Pro Bono Publico Award.

Kaye Scholer

Kaye Scholer LLP is a leading international law firm representing public and private companies, governmental entities, financial institutions and other organizations in matters across the U.S. and around the world. Founded in New York City in 1917, the firm counts more than 450 lawyers in nine offices: Chicago, Frankfurt, London, Los Angeles, Menlo Park (CA), New York, Shanghai, Washington, D.C. and West Palm Beach (FL). Our ability to handle sophisticated representations has consistently attracted clients who depend on the highest standard of legal counsel.

Kaye Scholer is consistently recognized by the legal industry's most well-known and respected publications and organizations for its achievements and sophisticated delivery of professional legal services. Sixteen of the firm's practice areas and 37 of its lawyers were ranked among the nation's best in *Chambers USA – America's Leading Lawyers for Business* (2010). The firm has also been recognized in *Chambers UK* (2010) and *Chambers Asia* (2010). Kaye Scholer's recognition in *Chambers* follows a number of accolades and rankings that the firm has received, including recognition by *The American Lawyer*, *The National Law Journal*, *Legal 500*, *PLC Which Lawyer?*, *The Lawyer* and *JUVE*, among others.

Kaye Scholer lawyers bring a diverse range of professional and personal experiences. On a professional level, they have served as federal and state government officials, counsel to government agencies and to House and Senate committees, members of Presidential Commissions and special counsel appointed by the President, law school professors, United States Attorneys, court-appointed special masters, mediators, trustees, venture capitalists, law clerks to Justices of the United States Supreme Court and to other federal and state courts, and as editors of their law school law reviews. Many of our lawyers have specialized undergraduate and graduate degrees in business, accounting and technology.

Our lawyers are proficient in foreign languages, including Chinese (Mandarin and other dialects), Farsi, French, German, Greek, Hebrew, Italian, Japanese, Portuguese, Russian, Spanish, Thai and Ukrainian. We also have language capabilities in Danish and Korean among our professional staff members.

Our combination of worldwide resources, professional leadership and entrepreneurial spirit defines Kaye Scholer, a firm renowned for its capabilities in a wide range of substantive practice areas.

Kathleen Furey McDonough

Partner

Potter Anderson & Corroon LLP

Kathleen Furey McDonough has practiced law at Potter Anderson & Corroon LLP since 1985, and has been a partner in the firm since 1993. She is the founder and head of the firm's Labor and Employment practice, representing management clients in all manner of labor and employment disputes. She also represents a number of secondary and post-secondary institutions with respect to employment and education law issues. Ms. McDonough provides clients with advice regarding all aspects of personnel policies and practices, with a strong emphasis on litigation avoidance. She regularly represents employers before federal and state administrative agencies and courts, and represents public and private employers in union negotiations and labor arbitration, including appearing before the NLRB and the Delaware Public Employee Relations Board. Ms. McDonough provides training for clients on employment-related topics such as union avoidance, employee supervision, discipline and discharge, sexual harassment, reductions-in-force, and employment discrimination.

Ms. McDonough is rated AV® in Martindale-Hubbell's peer review certification, which is the highest rating available and is reserved for attorneys whose "peers rank him or her at the highest level of professional excellence."

Ms. McDonough has been selected as one of the nation's top 100 corporate employment attorneys for 2009 by Human Resource Executive and Lawdragon, awarded to a select few practitioners based upon exhaustive review of nearly 1,000 nominees from around the country.

Ms. McDonough has been recognized by *Chambers USA: America's Leading Lawyers for Business* as a leading Delaware practitioner in labor and employment law (management) each year since 2003. In its most recent edition (2009), Ms. McDonough received the highest designation for Labor and Employment practitioners in Delaware. Ms. McDonough has been named in the 2010 edition of *The Best Lawyers in America*, touted as the preeminent peer-review based referral guide to the legal profession in the United States.

In 2008, Ms. McDonough was honored by receiving the Themis Award, which is the highest honor bestowed by those involved in the DuPont Women's Network.

Michael B. Tumas

Partner

Mr. Tumas is the chair of the firm's Corporate Group and is a member of the firm's Executive Committee. He concentrates his practice in the area of corporate law with specific emphasis on mergers and acquisitions, issues of internal governance, and commercial transactions involving Delaware corporations. Mr. Tumas's practice often involves counseling boards of directors and special committees of boards of directors regarding their duties, fiduciary and otherwise. Mr. Tumas also has extensive experience inrepresenting both sellers and buyers in negotiated acquisitions of divisions, assets and businesses.

Mr. Tumas is listed in *Chambers USA: America's Leading Lawyers for Business*, Lawdragon's 500 Leading Dealmakers, *The Best Lawyers in America* and Delaware Super Lawyers and has received an AV® rating in Martindale-Hubbell's peer review certification. Recent publications include "Analyzing the Latest Amendments to the Delaware General Corporation Law," published in the September/October issue of *The Corporate Governance Advisor*; "Recent Developments in Delaware Corporate Law," presented at the 22nd Annual Corporate Law Institute at Tulane University Law School in New Orleans, Louisiana on April 15–16, 2010; "Amendments to Delaware General Corporation Law," published in the April 2009 issue of *InSights*; "An M&A Lawyer's Guide to the DGCL Amendments," published in Spring 2009 issue of *Deal Points*; "Rethinking the Blasius Standard of Review: The Implications of *Mercier v. Inter-Tel* (Delaware), Inc.," first presented at the 20th Annual Corporate Law Institute at Tulane University Law School; "The Disclosure of Projections Under Delaware Law," published in the Spring 2008 issue of *Deal Points* and "The Last Word on Disclosure of Projections Under Delaware Law," published in the June 2008 issue of *The Metropolitan Corporate Counsel*.

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Potter Anderson & Corroon LLP

Potter Anderson & Corroon LLP is the oldest Delaware law firm and the eighth oldest continuing law firm in the United States of America. Since its small beginnings in 1826, Potter Anderson & Corroon has become one of the largest and most recognized Delaware law firms, providing a full range of legal services to its local, national and international clients.

Potter Anderson & Corroon maintains a strong belief in the importance of client commitment. The firm is focused on providing excellent, responsive, innovative and creative legal services that exceed the client's expectations. It is this commitment and focus that has resulted in Potter Anderson & Corroon being the firm of choice for clients ranging from Fortune 500 companies and some of the largest national law firms to individual clients.

The strength of Potter Anderson & Corroon lies with its very talented and knowledgeable attorneys, paralegals and administrative staff. This is evident not only from the long history of landmark cases and complex commercial matters in which the firm's members played a leading role, but also from their commitment to serving the public in legal and corporate endeavors locally and nationwide.

The firm's attorneys have served as members of the Delaware Court of Chancery — considered the leading business court in the country — as well as the Delaware Supreme Court, federal bench, and the United States Senate. They also have held key positions with the American and Delaware State Bar Associations. The firm's attorneys also have played a continuous role in the rule-making arms of the Delaware trial and appellate courts, including on the Supreme Court Rules Committee and the Delaware District Court Advisory Committee. The firm also has the largest private law firm library in the State of Delaware, with a full-time library staff to assist attorneys and clients visiting the firm.

Although steeped in history and experience, another strength of Potter Anderson & Corroon can be found in its ability to seek creative and innovative solutions in meeting client's needs. The attorneys at Potter Anderson & Corroon recognize that clients demand not only top-notch legal solutions but also flexible and responsive methods of delivering those solutions. Potter Anderson & Corroon understands that the excellent reputations of our attorneys are not sufficient, in and of themselves — details still matter significantly. We strive to provide exceptional services in all aspects of our relationships with our clients — no detail is too small.