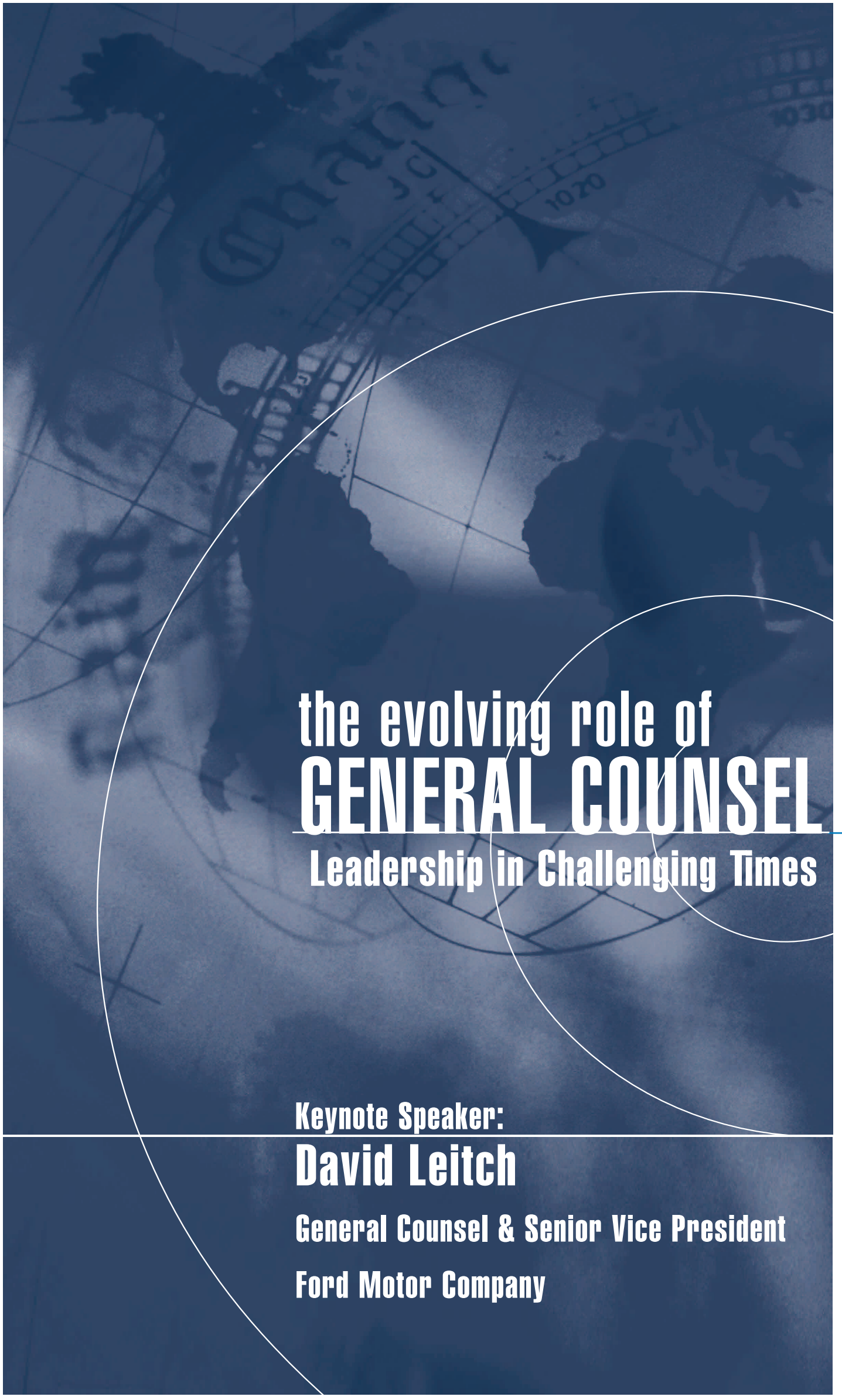

GC
LEADERSHIP SERIES

the evolving role of GENERAL COUNSEL

Leadership in Challenging Times

A Roundtable Discussion

Keynote Speaker:

David Leitch

General Counsel & Senior Vice President

Ford Motor Company

Special Advertising Supplement to *The National Law Journal*

ALM

TO THE READER:

For over 100 years, Ford Motor Company has been an icon of American ingenuity, innovation and industry. Henry Ford is rightfully credited for putting the world on wheels and providing his employees with the means to buy them. Ford transformed business, manufacturing, society, and the world we live in. At the dawn of its second century in business, Ford, and the graying American auto industry face a daunting series of challenges: foreign competition; shrinking market share; challenging labor, health care and retirement issues; and ever more stringent regulatory schemes. It is, to borrow from our honored keynote David Leitch, an industry in the middle of a perfect storm.

Mr. David Leitch, General Counsel & Senior Vice President, Ford Motor Company, confronts these daunting issues daily. David is no stranger to tackling the big issues as former White House Deputy Counsel; FAA General Counsel; US Deputy Assistant Attorney General and Law Clerk to Chief Justice William Rehnquist. Throughout this discussion, Mr. Leitch emphasized the need for GC's to fulfill their expanded role beyond legal adviser, to be a counselor in the truest sense of the word, providing ethical guidance and business solutions. He reminds us that successful general counsel must: constantly tune their ethical antennae; remain a student of the press, politics and public perception; know their client's business inside and out, and develop the backbone needed to act on the tough decisions. He also credits cooperation between the law firms servicing Ford for much of his department's success and efficiency.

Our other distinguished panelists were Louis Goldberg, a partner with Davis Polk & Wardwell; Richard Cullen, chairman of McGuireWoods; David Sorkin, a partner at Simpson Thacher & Bartlett LLP at the time of this discussion – now GC of KKR Private Equity; and, Kathleen Lang, a litigation partner at Dickinson Wright.

Courts are imposing additional scrutiny on the board of directors' conduct, Mr. Goldberg observed, but the business judgment rule is still alive and well absent a systematic failure on the part of boards to exercise oversight. However, the trend toward boards adversarial to management is still on the rise. He concluded that a consistent and reasonable process will satisfy the director's duty and insulate against liability, but that only best practices will protect against reputational risk.

Chairman Cullen addressed a wide range of issues including the merits of public service. The panel chimed in regarding the lack of respect afforded to the role of attorneys in public service, their unceremonious discharge, and the routine public bashing which occurs after they are gone. Despite the slings and arrows, they concluded, it's still worth doing, because it's all about performing service.

With boards of directors and individual board members frequently seeking their own counsel, Mr. Cullen noted, CEOs and GCs are discovering that post-SOX, the quick, collegial, low-profile resolution of even the smallest of crises is an endangered species. He also reflected on the unintended consequences that full cooperation and adherence to the Thompson and McNulty memos might have for company personnel and company morale.

David Sorkin tried to make sense of shareholder contradictions, on the one hand they want short-term profit – even sale of the business, but then become skeptics if a sale is pending because surely we're not getting top dollar from a private equity fund. Mr. Sorkin also addressed M&A due diligence by the board and emphasized the need to seek out the appropriate number of suitors for a potential sale. He also examined several emerging strategies to assuage shareholders in a "going private" deal by allowing them to retain some interest in the new company.

Finally, Kathleen Lang, shared her observations regarding litigation trends and tort reform. She noted real progress in Michigan tort reform resulting in a tremendous decrease in product liability filings which, unfortunately, has not been replicated elsewhere. While the federal Class Action Fairness Act has had some early success, Kathleen also commented on a Plaintiff's workaround: Class actions being premised on state law consumer fraud and consumer protection statutes rather than traditional and difficult-to-certify products liability claims. She also noted the rise of the so-called "no injury" class action; an easing of class certification standards; and, new theories for class certification including employment discrimination claims.

Ms Lang offered the pragmatic advice that business needs trump litigation interests when confronted with "troubled supplier" litigation. GC Leitch, citing the inherent pressures on both sides of the Manufacturer and Part Supplier dynamic, concurred.

This Roundtable Discussion was co-hosted by the marketing department of *The National Law Journal* and The Directors Roundtable and was produced independent of the NLJ's editorial staff. The text of the panelists' comments, edited for clarity and brevity, follows. The views expressed are those of the Roundtable participants and not necessarily the views of their firms or companies.

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The National Law Journal | New York Law Journal

the PANELISTS

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General Counsel & Senior Vice President, Ford Motor Company

Louis L. Goldberg
Partner, Davis Polk & Wardwell

Kathleen A. Lang
Partner, Dickinson Wright

Richard Cullen
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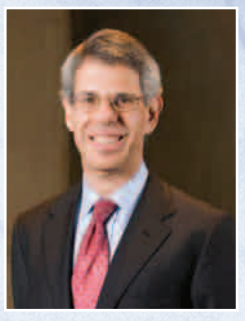

David J. Sorkin
Member and General Counsel Kohlberg Kravis Roberts & Co. (KKR) (formerly Partner at Simpson Thacher and Bartlett LLP)

From left to right: Louis L. Goldberg, Richard Cullen, David G. Leitch, David J. Sorkin, Kathleen A. Lang & Jack Friedman of Directors Roundtable.

MR. FRIEDMAN: I am Jack Friedman, Chairman of the Directors Roundtable. Today, we have the privilege of having as our guest of honor, David Leitch of Ford Motor Company. David has had a remarkable variety of experiences, both in the private sector and in government, including the White House, the FAA, the Justice Department, and as law clerk to Chief Justice William Rehnquist. That means that he probably got an A+ in every class he took from nursery school through law school, because it takes a very good academic record to be able to have that law clerk position.

The other speakers today are Louis Goldberg, of Davis Polk & Wardwell; Kathleen Lang, of Dickinson Wright; Richard Cullen, Chairman of McGuireWoods; and David Sorkin, of Simpson, Thacher & Bartlett. We would like to recognize the public service of Mr. Cullen who is the former Attorney General of Virginia and a former U.S. Attorney.

Without further ado, I'd like to introduce our Guest of Honor, David Leitch.

MR. LEITCH: Thank you, Jack. It's a real pleasure to be with you this morning, and I want to thank you for this occasion honoring me. I'm especially honored to have so many distinguished friends and colleagues here this morning.

Of course, recognition of a general counsel is first and foremost recognition of a great team of lawyers and professionals, and I'm fortunate enough to lead an outstanding team at Ford Motor Company.

The quality of the team was much to my surprise, frankly. I didn't know what to expect when I went to Ford, but I discovered that they are really, without a doubt, some of the finest lawyers I've had the privilege of working with. They're loyal professionals, and they're some of the best people that I've been associated with — including many of you in the room, of course. And they would be the first to recognize the importance of our law firm colleagues who partner with us on a daily basis to defend and advance the interests of Ford Motor Company.

I thank the men and women of Ford's Office of General Counsel for their professionalism and their teamwork, and together, we thank all of you for your partnership with us.

It's been a little more than two years since I accepted the position of General Counsel at Ford Motor Company, after serving in the Administration for nearly four years. Coming in the door, I of course knew there were going to be challenges, particularly for someone who had never worked in the corporate environment, let alone at Ford — a place where, if you've been there for less than twenty-five years, you're a newcomer.

But the challenges were far deeper and different that what I expected. I walked into an industry that one analyst described as being "in the middle of the perfect storm." Monumental ground shaking changes were underway. The Big Three automakers — Ford, GM, and what was then Daimler Chrysler — were all losing ground in their battle with the imports.

At Ford, market share was plummeting in the critical North American market, and even the optimists conceded that the company was unlikely to recover all of those lost sales.

There were tough financial decisions ahead, including painful cuts to the salaried workforce and the idling of many of our manufacturing plants. There were challenging healthcare and labor issues.

No crystal ball was required to predict that those problems were likely to get worse before they got better, and unfortunately they did. In 2006, Ford lost more than twelve billion dollars, as we began to incur the significant costs of a major restructuring. An aggressive plan to fix the business, called "The Way Forward," demands that we cut five billion dollars in costs by the end of 2008. We've cut our salaried workforce by one-third, or about fourteen thousand positions. The Office of General Counsel has not been immune from these cuts. We lost 32% of our employees in the past year alone.

Today, the message for Ford Motor Company is clear: We must change or die, as many of our executives like to say. And those changes cannot be subtle. They must be big enough to transform one of the world's largest companies and make it much leaner, more efficient, and more focused than it is today.

Now, like most Americans, I like cars. But my background is not in the automotive world, and I certainly would not be considered a "car guy." When I came to Ford, in fact, one of my teenaged sons — who is a true lover of cars — promptly told me that the job was completely wasted on me, because I didn't understand the true joy of working at a company that included not only Ford, but brands like Jaguar, Volvo, Land Rover and Aston Martin. My first car when I got to Ford was a very nice Jaguar, and he certainly enjoyed taking that out every now and then.

I also didn't grow up in Michigan, where families going back several generations have worked in the industry. So why did I sign on to Ford and join an industry that was fighting for its life?

Well, first, I recognized that this was an opportunity to work for a true American icon. That phrase is thrown around a lot when you're talking about various companies, but I think this one fits the bill better than most. Henry Ford and his Model T put the world on wheels. More than that, Ford and his company changed our way of life forever. So significant is the role of Henry Ford in our history that most school children learn far more about Henry Ford than they do about presidents of the United States like John Tyler and Millard Fillmore or Chester Arthur.

After more than a century in business, the company that still bears his name makes more than three million vehicles a year across six continents. Even on our toughest days, I'm proud to, to be associated with an American icon like Ford Motor Company.

Secondly, I considered this an opportunity to be more than a provider of legal analysis to a company at a pivotal point in its history, although that's certainly exciting and challenging in and of itself. But as I talked to Bill Ford and others at the company, it was clear to me that they were interested in someone who would not only dispense good, sound legal advice, but also in a general counsel who could serve as a valued member of the management team. In short, it was an opportunity to act as a general counsel in the broadest sense of the role.

And what I mean by that, and the way the roles of general counsels can and should expand, is my central point today.

In today's legal and business environment, being a general counsel at any company, but especially a company like Ford that is in a "change or die" mode, means more than being a sharp lawyer, though that will always be a foundational requirement.

It also means having a strong voice on what I will refer to as "post-legal issues" — those issues that remain the duty and responsibility of the lawyer, even after giving our legal advice. It means being a counselor, in the truest sense of the word, on significant matters like finance, human resources, labor issues, and business strategies.

In considering the general counsel's role with respect to post-legal issues, it is perfectly appropriate — indeed, some would say necessary — for a general counsel in today's environment to consider questions such as these:

- The proposed course of action is legally defensible, but is it ethical or moral? Do we want to defend it?
- You'd be on solid legal ground if you take the course of action you propose, but will it be misunderstood by the public or by the press?
- While this argument bolsters our legal position, it is not necessary and might be misperceived; do we want to make it anyway, and risk criticism based on a misimpression?
- And finally, will regulators, shareholders, employees, or congressional committees think you're making a bad decision, despite its legal propriety?

David G. Leitch

These considerations — which come into play after giving our best legal judgment — are and ought to be a common part of the role of general counsel to today's corporate clients.

And so, as we consider this part of the evolving role of the general counsel, we have to ask, is the general counsel prepared to offer clients advice and counsel on these post-legal issues? In my judgment, it's essential that he do so. Indeed, the roles of counsel and counselor are mutually reinforcing. It's a given that a general counsel must be in the room and have a seat at the table to offer legal advice when major decisions are made. Once at the table, however, he is expected, both by wise management and by those who might be examining the process in retrospect, to be fully a member of the team and offer judgments and opinions on a wider range of perspectives that must be considered. And if he is not in a position to do so, he will not be considered a valuable member of the team, and may not even be included in the room, even for the benefit of his legal views when important decisions are made.

But where does the general counsel learn the skills necessary to serve this broader role?

Law school education in this country generally does not prepare us for this expanded role. It is appropriately focused on making us outstanding lawyers in the first instance. It should be a given that newly minted lawyers have the tools necessary to provide clients with, or at least to develop, an informed understanding of their legal rights and obligations, or to zealously assert the client's position under the rules of the adversary system. To that end, most law school involves learning about the law and the legal process, learning the language of the law, and learning to think like lawyers.

Now, all this is very important foundational learning, and frankly, the most that young lawyers can be expected to master, but it barely scratches the surface on the broader skills necessary to serve as a counselor.

Some of us went from law school to judicial clerkships. In *that* capacity, there is tremendous pressure, as I felt when I was clerking for Chief Justice Rehnquist, to use all the tools I learned in law school

to come up with the correct, or at least the best, answer to each legal issue. But certainly in *that* environment, consideration of other issues, the post-legal issues that I'm talking about, is not even appropriate, and in all events, it's not the place of the law clerk, as my former boss would have been quick to remind me.

Most law students leave law school and become associates at large law firms. If you know the basic doctrines of the law and learn how to do legal research, train yourself to think logically and persuasively, and worked on your writing skills, you all had the tools you needed to serve the interests of the partners, who were, in effect, your clients in your early years.

I had the unparalleled privileged to work at Hogan & Hartson with a partner named John Roberts, from whom I learned a great deal about the broader range of considerations that the lawyer *must* take into account in connection with dispensing legal advice.

Not many young lawyers are so fortunate, but it is clear they must seek out opportunities to provide themselves with the skills necessary, not just to offer the best legal answer, but to provide a broader role so critical to clients. Lawyers who want to advance in the profession and serve not just as general counsel, but also as counselor, must make a conscious effort to observe and develop all sorts of skills that are not necessarily connected purely to the practice of law.

I have come to this realization over time by observing the expectations placed on others at a time when I still had the opportunity to learn from their experience. In my own case, after clerking and being an associate at Hogan & Hartson, I left to work at the Justice Department's Office of Legal Counsel. In each case, I had a supporting role, providing my best legal judgments to those who had to make the ultimate calls — judges, partners in law firms, or clients, or senior government officials. In the Office of Legal Counsel, in fact, we prided ourselves on making no judgments *other* than legal judgments.

As you may know, OLC provides definitive legal advice to the Executive Branch. Agencies may, and often do, disagree about who has the authority to do what, or about the limits of the law or the Constitution. It is OLC that definitively resolves such legal questions for the Executive Branch, except, of course, when overruled by the President or the Attorney General.

In answering these types of questions, OLC lawyers do not offer advice on the proposed course of action as a matter of policy. They offer no suggestions on how it will be perceived by the public. They have no stated views on the morality, the effectiveness, the wisdom, or the efficiency of proposed solutions to problems. Now during my years at OLC, I was of course aware that somewhere, *other* people — decision makers and policy folks — were struggling with all of these issues. But at least in the early years, I naively assumed that this was not something a lawyer had to be concerned with. What a luxury *that* was — and how mistaken.

Eventually, as I saw people like Mike Luttig and Tim Flanigan head off to give the advice of the office to senior government officials, I began to appreciate what I would come to understand more personally in later years: lawyers do not have the luxury of offering legal advice and walking away. At least the good ones don't.

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For each of the knotty legal matters we considered at OLC, the lawyers actually *delivering* the legal advice were in the room when decisions were made, and by being in the room, they were often expected to offer judgments beyond the legal answer. Had they not gone into these situations ready to volunteer thoughts or respond to questions about other than legal considerations, they would have been woefully unprepared, and even embarrassed by their narrow approach to the whole problem in all its complexity. Because, however, they were not just counsel, but also counselors, they were prepared to discuss a broader range of advice, and their counsel was often sought out and valued.

This is not just a question of having an opportunity to offer policy judgments, ethical views, public affairs advice, or common sense; we are expected, as senior lawyers, to provide a wide spectrum of advice to our clients, so that they are not criticized or embarrassed or harmed *despite* the legality of their actions. They may not always accept our views, but we are derelict if we are not prepared to offer them, especially when we think something important is being overlooked.

A recent example of the broad role that attorneys can and should play involves the controversy over the Administration's dismissal of U.S. Attorneys. If one thing is clear about this controversy, it's that the Administration's action to dismiss certain U.S. Attorneys was perfectly legal. U.S. Attorneys, like all presidential appointees, serve at the pleasure of the President. This means the President can remove appointees whenever he chooses to do so. There was nothing wrong, nothing improper, and no laws were broken, when the handful of U.S. Attorneys were asked to step down.

Now, if the sole public focus was on the legality of removing U.S. Attorneys, the outcry would have ended after the first week, or perhaps the event would not have even been raised to the level of public consciousness. And yet, this issue continues as part of our national discourse, because *other* considerations have come to dominate the debate. Chief among those, of course, has been the political outcry by opponents of the Administration and Senators who feel that what they regard as their prerogative over U.S. Attorney appointments was not respected.

Curiously, when you examine the record, it is clear that some of the lawyers involved in the process anticipated the likelihood of fallout. For example, the Attorney General's Chief of Staff, Kyle Sampson, expressly advised the White House and others of the many complexities that could be involved in this perfectly legal action.

My point is not to debate the merits of the decision or the way it was handled. My focus is on the role of the lawyer. And I think it's quite clear that any lawyer involved in this decision would have been derelict simply to point out the legality of dismissing U.S. Attorneys without also highlighting the other issues for decision makers. As this case demonstrates, of course, fulfilling that broader responsibility is not necessarily sufficient to avoid later controversy, but we must take appropriate opportunities to make our clients aware of the broader issues we see.

The lesson for the general counsel is that the advice we must be prepared to give our clients — CEOs, CFOs, board members — has to be informed by the fact that situations in our companies, from behind the doors of our boardrooms, can be compliant with every law and every regulation, yet utterly non-compliant with the best advice and best resolution, with the best *interests* of our clients.

The need to consider the broader array of issues is not limited to the white-hot glare of partisan politics. Indeed, I can tell you that in my current role, I am routinely expected not just to offer my views in the legality of what the company intends to do, but also to give my views on ethics, morals, public affairs, strategy, policy, and other post-legal issues.

Some days, I long for the time when my job was more narrowly defined. I love what I do. But it is a far distance from the pure practice of law that shaped my career earlier, and I assume that the same is true for many of you. When I was doing the mental gymnastics necessary for my job with Chief Justice Rehnquist, or trying to convince my partner John Roberts of the most effective way to grapple with a

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legal argument in a brief we were preparing, I never thought there would be a time when so little of my daily role would involve the intellectual challenge of a mind-bending issue of Constitutional law, statutory construction, or reading of precedents. And yet, from the vantage point I now enjoy, it is plain that it is a rare company, and an unwise and perhaps unsuccessful one, that does not expect its chief legal officer to help protect the company from all sorts of harm — not just legal harm, but reputational, financial, political, and public harm.

As the ABA Model Rules of Professional Conduct state, in rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

As I said before, we are not really taught what this means in law school. We may or may not learn how to serve clients in this broader way during the course of our careers. And yet, here we are, in a business that demands us to take leadership, to use our wisdom and our intellect, and to have influence and input when important decisions of all kinds are being made.

How, then, should a general counsel prepare himself to be in a position to offer this kind of advice? Let me offer five suggestions for general counsels, and for that matter, their outside advisors.

First, constantly sharpen and refine your ethical antennae. To fulfill your broader role as a counselor, you need to develop the moral compass that tells you what is right and what is wrong in any particular situation. Resolve to yourself never to set aside your moral and ethical compass when you are giving legal advice to a client.

Second, be a student of the press and of public perception. Both the press and the public are notoriously fickle and hard to predict. Quite apart from the ethical questions it raised, how many of us would have predicted last year's firestorm over HP's pretexting practices? To truly serve our clients, we must have a strong sense of how things will be judged in the event they are made public. When I worked in the White House, we called this the "*Washington Post* Standard": Is the decision you or your client is about to make something that you would be comfortable reading about in the *Washington Post* the next morning? This doesn't mean you let public perception dictate all of your decisions. Sometimes the best decisions are unpopular. But you ought to be in a position to raise the issue.

Third, and I don't have to tell a Washington audience, learn about politics and politicians. When issues touch on public policy, be aware of the views held by influential political players. Who are they, and what do they think? Is there a particular constituency that would be offended by an action? Should someone reach out to them for consultation, or at least give them a heads up about what's to come? Be smart and savvy about the political world.

Fourth, develop a backbone, because you'll need it. It's often not easy to speak up in the management committee or in the halls of a government agency and say to your client that you believe a proposed course of action is immoral, unwise, or politically risky. Some decision makers or experts in politics or public affairs will resent what they believe is an intrusion on their turf. You are playing in their sandbox, and they'd appreciate it if you'd stick to the legal sandbox. But if you are to be effective in fulfilling a broader role for your client and your duties to your client, you have to be willing to speak up and offer your views on these other issues.

And fifth, know your business, or your client's business, inside and out. In order to have credibility with senior leadership, you will need to earn a seat at the table. You must be interested in and educated about the business itself, not just known as the person who offers legal guidance when the client thinks it's appropriate.

Finally, a word of caution. A general counsel should be careful not to view her role as counselor as a license to become a crusader. She should choose her battles wisely. We must recognize that while we can and should share views on the non-legal aspects of issues with our client and the team, it is only on legal questions that we are the true expert and authoritative. On other matters, we must be willing to defer to the expertise of others. If we are unwilling to show some restraint and humility, we will become the proverbial noisy gong or clanging cymbal, and will be ineffective as a lawyer, not to mention as a counselor.

Doing all of this well, every day, can be the challenge of a career, especially in a company that is going through difficult times. But it can also be the most gratifying experience of a career. Even on the most trying days, that's how I view my job at Ford.

Right now, the blue oval might be a little tarnished, but I still am proud to say that I work for Ford Motor Company. The vast majority of my colleagues feel the same way: we are fiercely invested in the company's long-term viability. There is a long road still ahead, but we're making solid progress in accordance with a well-thought-out strategic plan. Years from now, I hope I will be able to say that I was an integral part of the team that turned Ford Motor Company to profitability and gave it its second century, and I hope I will be able to say that my contribution wasn't just as the general counsel, but as a counselor to our company's leaders in the truest sense of the word. That's something worth pursuing with vigor every day.

Again, I appreciate you for honoring me today, and I look forward to hearing the rest of the remarks from the panelists. Thank you.

MR. FRIEDMAN: I would like to mention that in the sixteen years that we've been working with General Counsel, the issue of ethics and integrity has been an overwhelming theme. It might be the number one theme. The question I'd like to ask you is the following: What does the lawyer have to educate business men and women about the law?

MR. LEITCH: II think it's more often the lawyers that miss something about the businesspeople, which is that we cannot just be perceived as an obstacle without helping them solve their problems. And one of the things that I always urge the lawyers at Ford to do, which they do very well, is to be innovative and creative, and when they have a seat at the

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table, to help solve the problem — not just to say, "You can't do that; come back to me when you've got a better idea." And at that point, many people won't come back, because then you are just an obstacle, instead of being a member of the team. So, I think most of the businesspeople that I've dealt with, certainly at Ford, are more than happy to take the legal advice when it's offered in a constructive and helpful way, as opposed to a way that says "You can't go there; good luck next time."

MR. FRIEDMAN: You mean when there are legal problems, the lawyer figures out what to do about it and then tells executives about the legal problems, and they figure out how to run their business with those problems in mind.

MR. LEITCH: Yes, right. And it won't work if you're just consulted to give a legal thumbs up or thumbs down to a proposed solution that people have been working on for weeks or months. If you haven't been part of the process and you're only brought in at the end of it, you are really, then, just an obstacle to what they want to do, as opposed to being in the process, being integrated with your clients, and helping to shape the proposal from the beginning. That is why you stay consulted and in the room when the decisions are made in the first place.


David G. Leitch

Another difficulty with having the lawyer simply brought in at the end of the process is that you're counting on non-lawyers to identify legal issues. They don't know that there might be a legal issue that they haven't identified. You have to be in the room and spot the legal issues. They don't know when to ask permission. They may think something's perfectly appropriate, and they don't see an issue that's out there. You can't count on them to just come to you and ask. You've got to be involved.

MR. CULLEN: There's something that's been stuck in my craw, and David sort of —tore open an old scab, and I've just been sitting here just bleeding about it, and I wonder if it's alright if I can raise it up.

MR. FRIEDMAN: You can. This is what the, the word "Roundtable" in our name means — Roundtable.

MR. CULLEN: I might need a psychologist, too, in addition to David, for this one. It is about the firestorm, the outcry, after the eight U.S. Attorneys had been dismissed. You know, I still can't get over March 31, 1993, when I was sitting in my office as the U.S. Attorney in the Eastern District, and I got a call saying I was out of there in three days, and the only person who cared was my mother! And it was only because she wanted to know whether the story was going to be in the paper before or after her Bridge Club meeting! So, I mean, what has happened, and why did I get so little respect?

MR. LEITCH: I think we need a couch to answer that one!

MR. FRIEDMAN: We watch things through the media all the time, and the question which I think you are raising is the question of the reality and perception of public service. Why should people go into public service when they're not going to be appreciated and their name can be thrown around when they leave, no matter what they accomplished. Why do public service, if it's so unappreciated?

MR. LEITCH: Well, I think the issue is not the going in, it's the getting out. The question is when did you get out — you know, in my own case, I was fortunate enough to leave at the beginning of the second term, which has turned out to be obviously much more difficult, particularly since control of Congress changed. But, look, why do public service? There's a whole range of reasons to do public service, not the least of which is it's service, and many of us in this room have felt called to do it as part of our obligation to give back. So it's not just self-interest; it's also service. But, in addition, you get to work on the most fascinating issues of the day, you get responsibility early, and if you leave at the right time, you end up being honored at events like this!

MR. FRIEDMAN: I just wanted to mention that Ford Motor Company, under Mr. Leitch's leadership, received *Corporate Counsel Magazine's* 2006 Law Department of the Year Award for outstanding leadership and contributions to the profession. In reading the article, I was impressed by the fact that they emphasized the close working relationship between the legal department and the business. They kept going back to that as a very major factor in why your legal department was recognized as number one in the country. So, congratulations for that additional award!

MR. LEITCH: Thank you. Thank you.

MR. FRIEDMAN: I'd like to have us, for now, move ahead. I'd like to have the panel address a series of issues including corporate governance, litigation and others. I'm going to have each of you start the discussion of these various topics, and then the other panelists can jump in as we go through it, and finally the audience will be invited to raise some questions. Everybody will be invited to come up at the end of the event and speak to Mr. Leitch and the panel, one-on-one, at the end. So let's get started. Louis Goldberg, could you start off by addressing the state of play on director duties.

MR. GOLDBERG: Sure. Thanks, Jack.

In planning for this discussion, we thought of themes and subjects that, just to build on what David had to say, talk about the role of general counsel and the role of lawyers. We also wanted to think about areas that are either trends, or challenges for companies and management teams and boards today. We picked some subjects that we thought would be interesting and topical, so I'll kick off with state of play on director duties, which is a focus on, I think, state law — my expertise, Delaware — so I'll sort of focus my discussion on Delaware, and then we'll try and go from there to other areas that place challenges or pressures, particularly on boards.

When I think of director duties and the state of play, in that area, I think it's helpful to divide the discussion into liability risk and best practices or reputation issues. Because the boards I speak to and the

directors that I talk to are focused not just on liability, but also on, perhaps more importantly, on reputation, and where their practices and processes ought to be.

From a liability point of view, I think things have been on a little bit of a rollercoaster the last few years, but my view — David, I don't know if you disagree — is that things have, fortunately, returned to a much better state of equilibrium in the law.

MR. SORKIN: Yes. I would agree with that, even outside of Delaware as well.

MR. GOLDBERG: A couple of years ago, you had, in the aftermath of the Enron and WorldCom situations, in the federal securities area, two landmark events where there were settlements of those securities cases in which directors had personal liability, which was quite a shock to the system; and then shortly after that, you had the Delaware court in *Disney v. Ovitz* at the motion to dismiss stage, not dismissing the case outright, and finding there might be sufficient basis to move forward on a breach of fiduciary duty case, in the context of whether Mr. Eisner, the then-CEO, had conducted an adequate process — whether the Board had sufficiently engaged and been involved and shown oversight in the hiring and then firing of Mr. Ovitz.

And the Delaware court in the *Disney* case was clearly reacting to the concern that many major corporations in this country are incorporated in Delaware, and there was a sense that maybe people had felt that the Delaware courts had been caught napping, had been asleep at the switch, that too many acts of wrongdoing had occurred on their watch, and that maybe Delaware law was behind the curve. There was a sense for a while that there was an evolving duty, a *new* fiduciary duty, sometimes called the "duty of good faith," and no one quite knew what it was.

Ultimately, when the case went to trial, although there was some criticism by the court of the extent of oversight by the directors, the court found that the directors had satisfied their fiduciary duties, and set out a standard that basically said that there would be a breach of good faith only if there's been a systematic failure on the part of a board to exercise oversight or conscious indifference to the board's duties.

Practitioners, directors, management teams, and general counsel can take a lot of comfort in the fact that if a board goes through a reasonable process, if directors take the time to consider the decision or action at hand, and they make sure they're properly informed and go through a reasonable process, then their decision making ought not to be second guessed. In other words I really believe that the business judgment rule is still alive and well.

MR. FRIEDMAN: The other thing I'll add on *Disney* is that a large part of the attack of the plaintiffs in that case was that CEO. Eisner had taken on much of the planning and execution of an important corporate decision in the hiring of someone who was going to be his number two for a contract valued in excess of a hundred million dollars. The plaintiffs basically said that was a failure of the board to supervise Eisner, but the court was very deferential to the bylaws and the general approach that the board had long taken to delegate those type of decisions to the CEO. So I think the Court's decision was helpful in that respect as well.

"[I]f directors take the time to consider the decision or action at hand, and they make sure they're properly informed and go through a reasonable process, then their decision making ought not to be second guessed. In other words I really believe that the business judgment rule is still alive and well."

— Louis L. Goldberg

MR. GOLDBERG: Another case in late 2006, that has also calmed people's nerves, is *Stone v. Ritter*. While the *Disney* (Eisner) *Ovitz* case was more focused on a particular corporate act, an agreement regarding the hiring and firing of Mr. Ovitz, the Ritter case was more focused on the board's oversight of whether things were going wrong inside the company. I think the *Ritter* case restores the whole landscape of director duties to a good place of equilibrium.

The court said that (and this theme of yellow flags and red flags is recurring in the cases): "In the absence of red flags, so long as a board has assured itself that there's a reasonable information and reporting system, the board can satisfy its oversight responsibilities by relying on periodic reports from management, and the board will not be held liable for reporting failures by employees." And here, I'm quoting. "There's no duty to operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."

I'd like to end this part of my presentation, and then anyone else can jump in, with one thought: What I've tried to summarize is that from a liability point of view, from a duty point of view, the state of the law has become much clearer. I don't think there's any need for hyperbolic concern about liability risk, as long as there's a reasonable board process. What I do think, though — and this will come out later, when we talk about the M&A context (which is David's and my specialty), regarding cases like *CVS/Caramark*, *Kermark* and *NetSmart*, is that from a reputation and a best practices point of view, I think that the bar has been raised. You as a director might not be held liable, but if you don't go through a reasonable process — if not a best practice process — I don't think a minimalist approach to board process is going to be acceptable. If the case does end up getting scrutinized, if it does go to court, the judges in Delaware are going to be very ready to criticize the board. That's what's happened in recent cases. So I think from a reputation point of view, there's every reason to think that there are higher expectations of corporate boards.

MR. FRIEDMAN: As an observer, I'd add that it seems many courts outside of Delaware are not following that approach at all. We've had some decisions in the last few months in Tennessee and Texas where courts have said, "That's very interesting that Delaware may impose a very high standard in the M&A context but our standard, absent a conflict, is still the business judgment rule." So, we'll see how that develops, because sometimes Delaware leads, and sometimes it comes back into line after a while.

MR. CULLEN: David, do you notice a heightened sense of nervousness on the part of board members since *Sarbanes-Oxley* and some of the other things that put the focus on board conduct?

MR. LEITCH: Well, I wasn't at the company before Sarbanes, so I can't do a before and after. But I think what Louis has said is exactly right — that of course board members want to know that they're not going to face legal liability, but that is just the start, that's presumed. Then there are all sorts of reputational and public perception risks that are hashed out in great detail. Not that they're primarily interested in their own reputation, but certainly as individuals and as a board, they want to make sure not only that they're not going to be liable, but that they're doing the right thing, that they're going to be perceived to be doing the right thing, that they're good stewards of their positions. And that's a lot more than just the bare minimum of no legal liability.

MR. GOLDBERG: Richard, just to kick it back to you, I spoke about Delaware law, and directors that I've advised have been quite relieved that the liability landscape has calmed down. What's your view on areas outside the Delaware law, *Sarbanes-Oxley* and enhanced roles of audit committees?

MR. CULLEN: That prompted my question. How many of you here are on a board, a public board? And how many represent boards or in one form or another give advice to boards as outside counsel? Quite a few, I see.

There's been more focus on the audit committee responsibility under *Sarbanes-Oxley*, and the audit committee generally has a direct reporting duty to the full board. So there's a heightened sense of importance. CEOs in a lot of companies have to get used to the fact that the audit committee chair may say, "I want my own outside counsel hired; I want somebody who has no former relationship with us and with the board." It's a recipe for tension sometimes, because the CEO is trying to solve a problem fairly, but quickly, and without a lot of publicity, but you may have an audit committee chair who says, "Well, that's all fine and good, but I have my own reputation and, by the way, I happen to be a CEO or a retired CEO of another company." There are complicated relationships where people come to one board meeting but can't lose sight of the fact that their name is tied with another company that has another board.

So, *Sarbanes-Oxley*, for all the good things that it did, certainly complicated the basic interplay between board members who used to be, perhaps, somewhat deferential to the CEO, and who now feel that those days are over.

MR. FRIEDMAN: I invite comment on the concept of "we vs. them," as in "We will defend ourselves." "We" used to include the corporation and the officers and the outside directors together. After Enron, "we" became the independent directors. And now it's moving toward "we" means "I". Everybody is looking over their shoulder about their own legal representation, even if they're only a witness in a case.

MR. CULLEN: Yes.

MR. FRIEDMAN: The question is, when there's a critical situation that arises, how do you keep the board and top management together, when everybody is watching out for themselves?

MR. CULLEN: That's a very good question. I'd be really curious as to what the other panelists and David think. Without naming companies, just in the past three years, I've been involved in the representation of large public companies that were involved in major SEC and U.S. Attorney investigations occurring at the same time. That prompted an internal investigation, and that lead to a host of interesting issues.

How many here have heard of the Thompson Memo, and now the McNulty Memo, and understand how that plays into a company's responsibility? Raise your hand. So, you understand that in today's practice, cooperation is key. Cooperation is the first factor among equals in the Thompson Memo affecting whether or not the Justice Department and the local U.S. Attorney's Office are going to decide whether to indict or whether to find some other resolution. So everybody wants to cooperate, assuming that there isn't something *so* terribly bad that you don't want to turn over to them. That's the rare exception.

I've noticed recently that there's a by-product of this cooperation, I saw it just three or four months ago in a case out of the Western District of Virginia. A company headquartered in White Plains decided "we're going to cooperate, we're going to do everything by the book, we're going to turn everything over, we're going to have McGuireWoods go in and do an internal investigation and hand it right over to the government. That's what Thompson and McNulty says we should do, and we get good points for that." But what we lose sight of is that you are

Louis L. Goldberg

Richard Cullen

turning over a report documenting the actions of real people. That raises legal issues. Do these individuals have their own counsel? Do they realize that we're not representing them personally? Have proper warnings been given? Do they know that what they say to us may be a secret in terms of what the company wants to keep secret, but that the company has the right to turn it over if they choose to do so. As General Counsel, some of these people may be your friends. They may be people that you're coaching Little League with; and who you eat in the cafeteria with; and they've always looked at you as their counsel; and now they're told you guys are turning them in! And so, listening to you discuss the expanded role of the General Counsel, I ask, how do you deal with something like that? Do you want to make a lifelong enemy of your CFO, for example?

MR. LEITCH: That all comes back to the point I mentioned earlier about having a backbone. I mean, when you get in these situations, they're not easy calls to make, but you have duties that you have to follow, or else pretty soon you're going to be the one on the hot seat.

MR. CULLEN: Yes.

MR. LEITCH: And I'd like to think that mature professionals will understand — particularly if you've always been candid and open with them, and had a healthy relationship — that you're doing what you have to do and you're acting in good faith. We saw some of this in the White House Counsel's office when the leak investigation started in the White House. Once it came time to talk about turning over documents to the Justice Department, there was a certain distance between us and the people that we were working with every day on things, both prior to and after the investigation began. But everyone was mature enough to know that that's just the way it had to be handled.

So you like to think you're dealing with people who will respect the role that you have to play. And that's not something you can just develop the day the crisis starts. That has to be something that you're developing before the crisis comes in the door.

MR. CULLEN: Yes. The other issue, and then I'll leave it, is that the other unintended fallout from the full cooperation mode under the Thompson and McNulty memos, particularly if headquarters is making a decision, is whether the people in the divisions believe the lawyers are not willing to fight. The people in the division may think that all they want to do is find the dirt and turn us in. What happened to the old spirit where we circled the wagons and we're fighting, we're presumed innocent and not guilty, and this sure isn't the old fort. It can cause major problems between headquarters and the divisions.

MR. GOLDBERG: I just want to ask Richard another question, which ties to what Jack said earlier about the "we" and the "I", regarding the behavior of board members. The thing that I have noticed in an investigation situation is — I don't know if it's the additional pressure since *Sarbanes-Oxley* on the audit committees, or whether it's the effect of the "you need to cooperate" mindset when you're in a white collar situation — but when the audit committee or the special committee of a board is hiring its own advisor, and "we" becomes the independent directors, how do you somehow try to preserve a balance so it doesn't become an inquisition?

MR. CULLEN: Selection of the counsel for the audit committee is critical.

MR. GOLDBERG: Yes. I've seen a couple of cases where the audit committee was not interested in

hearing from the general counsel. They've been almost suspicious when we as company counsel would say, "Well, we think a very good choice would be...." Not because we're trying to predetermine the outcome, but because we'd like to see a balanced approach without over-reacting, and the audit committee responds: "No, we want to prevail on the decision and choice of outside counsel." Then you see a really adversarial situation between the board and the management.

MR. CULLEN: Yes. I would use every ounce of influence and persuasive powers that the CEO or the chairman of the board has, if they're not the same person.

MR. FRIEDMAN: No!

MR. CULLEN: It might be necessary to say, "I can tell you that the Justice Department thinks the outside firm you want to hire for the audit committee is somebody you're not going to want to use." Whatever firm you use, should be a top notch firm with a great track record. The selection of that outside law firm to represent the audit committee is the most fundamentally important decision.

> "[The] unintended fallout from full cooperation under the Thompson and McNulty memos is whether the people in the divisions believe the lawyers [at headquarters] are not willing to fight... that all they want to do is find the dirt and turn us in."
>
> —*Richard Cullen*

MR. LEITCH: I think part of the way to get your arms around that, too, from where I sit, is not to be threatened by the fact that the audit committee or the independent directors want their own counsel.

MR. CULLEN: Yes.

MR. LEITCH: As opposed to a general counsel who is offended and feels that it's a judgment about the way he's doing his job, and a lack of confidence. If you react negatively, the audit committee would then, I think, be much less likely to want to listen to you when you're giving them names, because they assume that you are so threatened, you're trying to get somebody who's not really going to work with them, but is going to work with you.

MR. CULLEN: Yes.

MR. FRIEDMAN: Let's examine corporate governance from the owner's or shareholders' perspective. What are the latest developments in terms of shareholder power, activism, new rights that they may have, new rights they want to have. Give us some idea about it.

MR. SORKIN: What's interesting about the M&A context today is that shareholders are a much more important presence, but their views are characterized by some fairly contradictory impulses. On the one hand, you have a shareholder base in many public companies that is fairly short-term oriented in terms of demands for value to be extracted from the ongoing business and changes to be made, including, if necessary, changes in senior management or, or sales of businesses, or even sale of the company.

On the other hand, we've increasingly seen a lot of the old Groucho Marx maxim that you wouldn't want to be a member of any club that would have you. Once a company is up for sale or sold, there's then a lot of skepticism, especially when dealing with private equity buyers who are viewed as quite sophisticated, as to whether the price that was paid for the company was fair, almost the reaction that anybody who would buy the company must be getting it for a discount. These two impulses are driving a lot of what's going on in the M&A world today, and they're also starting to have some feedback into the judicial domain, as well.

Both the courts and shareholders are very focused on process. That's what Louis was alluding to in his earlier remarks about Delaware law and directors' duties. The process point also ties back to some of what David was saying, because you not only have to focus on how you can steer your way through the courts, but also how the situation is going to read on page 1 of the *Washington Post* or, more likely in this context, of the *Wall Street Journal*, and how the shareholders are going to react to that.

So I'll give a couple of examples of the process issues. First, we've had a number of situations where senior management has driven the process of sale and has occasionally gotten ahead of the board. Whether it's a general counsel role or an outside counsel role, it is important not to let a CEO get too far ahead of his or her board, in terms of discussions they may be having with potential buyers. Both the courts and shareholders are increasingly concerned that such an approach may foreclose other options that could be available to the company in the context of a change of control.

A second example, from a case called *NetSmart*, is who do you need to talk to once you've decided to sell the company? Traditionally, Delaware law, where there's been a lot of action over the last few decades, said you have to obtain the best price reasonably available under the circumstances. Decisions under Delaware law indicated that absent some self-interest on the part of the board, the universe of buyers contacted could be as small as a single party. In the NetSmart decision, we saw quite a different tone. Do you disagree with that?

MR. GOLDBERG: No — Justice Strine was very clearly critical of the management process.

MR. SORKIN: NetSmart was a relatively small company, about a hundred million dollar market capitalization. What happened is that the bankers, advisors and the management had spoken with private equity firms, although frankly they did speak with a lot of private equity firms, and the private equity firms are driving a lot of the M&A activity in the current market. The advisor and management went out to the seven private equity firms. Four were quite interested. They actually had quite a boisterous auction, and, a team of two of the firms ended up signing a contract to buy the company. Then there was a standard, "fiduciary out provisions," that allows the board to entertain additional offers. No additional offers or interest surfaced.

And the crux of the decision, or the crux of the court's problem on the fiduciary issues, was that the process had thoughtfully excluded the strategic buyers. In other words, the court said, "It's odd that you didn't go out to talk to any strategic buyers in this context."

MR. FRIEDMAN: Strategic buyer being?

MR. GOLDBERG: Industry players.

MR. SORKIN: "And that your reasons for not, approaching these industry buyers was that you had spoken with them in the past, and they appeared not to be interested." So, on this point, there are really two ways to read *NetSmart*. One would be that the court effectively is following a long line of Delaware cases that defers to the board and says, "Well, you, the board, can decide under the circumstances who the right people to talk to are, but in this case you made the decision on a set of old and potentially invalid assumptions." Personally, I hope that's the way the courts, courts read the case going forward.

There's also language in the case that indicates that it's always a mistake not to go out to the broadest group of available buyers possible, particularly when you're talking about small companies that may not get significant news media attention when they're sold and may not draw interest of strategic buyers. So we'll have to see where the case goes. I think most lawyers are reading *NetSmart* to say that to the extent that a set of reasoned decisions have been made not to approach a broad group of strategic or even financial buyers, that's a valid decision and, and should be upheld by the courts.

MR. GOLDBERG: David, let me interject and say one thing. I happen to think an important underpinning theme of *NetSmart* was deficiency in process. Justice Strine got really suspicious where the special committee was not acting as a special committee. The management was participating with the special committee, and the special committee did not hire separate advisors. That just set him off on the wrong track. Additionally, he became immensely suspicious that a management-led process with no real special committee process was clearly skewed to private equity in order to facilitate management's attempt to double-dip. In other words, the management going private, taking their change of control payments, staying in place as the management team, and, and then having a second dip if the company goes public again. So, there's a saying, bad facts make bad law. I don't know if this is bad law, but clearly the facts there skewed the case.

> "[It's] the old Groucho Marx maxim that you wouldn't want to be a member of any club that would have you. Once a company is up for sale or sold, there's then a lot of [shareholder] skepticism... almost the reaction that anybody who would buy the company must be getting it for a discount."
>
> —David J. Sorkin

MR. SORKIN: I'm glad you mentioned those points, because it circles back to a couple of key items, including one that I've already mentioned, which is that the board really needs to run any M&A process. When you deviate from that, you do so both at your legal risk now and at your reputational risk. Second, what we're seeing in most situations, and I think *NetSmart* is an exception — particularly when you compare larger companies, is an enhanced, maybe even overly conservative, use of special committees that have their own counsel.

It used to be the case in the M&A context that unless a member of the board was participating in the bid being made, very few companies would use any sort of special committee with its own counsel. Now you see a much greater reliance on special committees, particularly where private equity firms are the buyers, on the theory that even if you have just one or two managers sitting on the board, they may have an interest in their continued employment and their future arrangements.

The interesting thing here is I don't know why those factors wouldn't be present in any M&A transaction, including a strategic deal, because management often profits from the parachutes or whatever other arrangements may be in effect in a corporate deal, as well.

MR. GOLDBERG: The counterbalance there is in the strategic deals. They typically are stock deals, and there's a perception, perhaps over-emphasized, that the public is at parity because on both sides they can participate in the upside. The suspicion in private equity deals is the going private, the cashing out of the public, whereas the management gets to participate in the ongoing opportunity, and an interesting question then is the extent to which, in the public deals you've seen, the minority equity stub tries to address that. I think that's a reaction to that.

MR. SORKIN: Actually, a good segue into the second theme I wanted to discuss which is how shareholders then respond in voting, which in any public company M&A transaction is ultimately what you need — you need to get the shareholder vote.

What we've seen recently, in light of some greater shareholder skepticism and activism, are some creative attempts to pre-empt or assuage shareholder opposition. Clearly, there are still plenty of transactions without meaningful shareholder opposition, but we've also seen a couple of innovative recent transactions. One is the Clear Channel transaction, and the other is a transaction called Harman International, either from the outset (in Harman International), or in reaction to shareholder opposition (in Clear Channel), the buyers offered the historical shareholders an opportunity to retain some of their interest in the company: in each case between 25% and 30% of the ongoing company. I think we'll see some more of that, because clearly the objective is to get these transactions done, although it remains to be seen how much of a trend retained equity will be, whether other responses to shareholder opposition will appear that also help move transactions forward and, whether shareholder opposition really is at the end of the day more opportunistic than heartfelt.

Finally, going back to Louis' point from a moment ago — distinguishing private equity and strategic transactions. I agree that stock transactions are different in some respects from cash transactions, I'd only observe that many strategic deals are cash deals, and in those transactions I think there shouldn't be any distinction with a private equity buyer.

MR. FRIEDMAN: I wanted to thank everybody on the private equity side. Anybody who has maybe five or ten billion dollars burning a hole in your pocket, just go up and talk to them. I'm sure they can put you into a good transaction. If five or ten billion is enough any more! They're getting so large.

Next, I'd like to have us discuss the sort of litigation and regulatory issues that challenge Ford and companies like it. David, could you give us a sense of the variety of litigation and regulatory issues you face as general counsel? From the ridiculous to the sublime, from slip and falls to mega cases, could you give us a sense? .

MR. LEITCH: Yes, we have on the litigation side about 13,000 cases pending against us at any given point in time.

MR. FRIEDMAN: Thirteen thousand!

MS. LEITCH: Yes. Probably 10,000 of those are asbestos-related in one way or another, and not particularly active. I would say another 2,000 to 2,500 at any given point in time are product liability cases, auto accidents where, for example, we're allegedly responsible for the drunk driver who decided to try to jump his Mustang over a bridge that was out or something like that. We have all sorts of issues involving product liability.

Then, of course, we have just what any other company would have in terms of employment litigation. Probably a greater share of that based on recent personnel actions where we let a lot of people go, and so there are issues there. We've got labor issues and the whole gamut of environmental issues from plants that have been closed down to existing plants still operating.

On the regulatory side, of course, it's everything from NHTSA safety regulation to fuel economy standards. CAFE is the number one issue right now facing our company and the industry — what is Congress going to do with CAFE regulation, or more accurately fuel economy, because we don't want to assume that CAFE is the answer. It has some problems in terms of being an effective policy. But that's the number one regulatory issue we face right now, and then workplace health and safety and other issues. So it, it's a pretty wide range.

MR. FRIEDMAN: What are some examples of the international litigation that you have outside the U.S.?

MR. LEITCH: Well we do have international cases pending against us in all parts of the world, but the volume is so dramatically different than you would face in the United States that frankly it doesn't hit the radar screen too often. We'll have a handful of cases in, from operations in places like South America, Europe, China and Australia, for instance.

MR. FRIEDMAN: The *Corporate Counsel* article honoring your department said that one of the factors that they were impressed with, was the way in which your in house people worked with outside counsel on litigation. The favorite topic at many of these events is how the general counsel works with outside counsel. It's fascinating to the audience.

MR. LEITCH: The one thing I would say about our litigation program that is unusual, if not unique, is we try a lot of cases. Of all those cases pending against us, we tend to try 80 to 100 product liability cases in a year, as well as a handful of employment and other types of cases. We therefore have a pretty sophisticated program to handle litigation that involves being willing to try cases, and we have to have outside counsel who are not just in a position to get cases ready to try and then settle, but who can go through with the threat that we do go through with quite often, to put our case before a jury and let them decide. The interesting thing is that year in and year out, we win about 80% of the cases that we take through the trial. Some of that has to do with knowing how to pick the cases to take to trial, and one benefit of having a big docket of cases if you've got a lot of experience to judge it against, so you've kind of seen things before, you know the plaintiff's counsel, you know the jurisdictions.

But we've tried cases all over the country, and last year, for example, we had a bit of a nervous moment when we took a case to a jury verdict in the Bronx, which doesn't happen very often, and we won that case. This kind of trial program can't take place without daily interaction with our outside counsel and interaction among the outside counsel, as many of you in this room know from working on our cases. It's not just this case goes off to McGuireWoods and this case goes off to Snell & Wilmer, but the lawyers for McGuireWoods and Snell & Wilmer know each other; they know the issues; they know in different parts of the country who's working on what. We have a real team approach with our outside counsel, and it's managed across the board by a really outstanding group of lawyers inside the company.

MR. FRIEDMAN: Given that you've been with Ford for a relatively short portion of the company's history, or even recent history, there's accumulated wisdom in the department, I assume, on litigation matters that have gone in the past. What is the climate of juries toward big corporations, if not yours, per se, but just generally it tends to come and go, and sometimes corporations are considered all bad, and sometimes people are more sympathetic.

MR. LEITCH: Yes, you have to look at individual jurisdictions, individual cases, and even individual jurors, but our general view is that jurors are willing to listen to the evidence put in front of them. We trust juries. Of course, we don't blindly trust them, so there are times when we feel that a jury that we're not as happy about has been seated, and it affects the calculus of the case. But, in the main, we're willing to trust juries where we feel like we're going to get a fair opportunity from the judge, we picked a good jury, and the facts are with us. So I'm a firm believer, just from seeing the kinds of things I've seen, that jurors acting in good faith with a fair view of the evidence will generally reach pretty good decisions. This is even true in some of our cases that have involved pretty gruesome facts arising out of auto accidents. Those facts of course don't necessarily make it the company's fault. We win a lot of those cases, and we win them with juries who are willing to put aside their natural and understandable sympathy toward a person who's been seriously injured in an auto accident. But they put it aside because the evidence shows that it wasn't the fault of the car or it wasn't something which we want to have Ford Motor Company and others change their behavior to address. If jurors were just interested in being sympathetic on a human level with the plaintiffs in front of them, we'd be crazy to try any cases. But jurors generally have listened to the evidence.

MR. FRIEDMAN: Kathleen, I'd like to invite you to talk a bit about your practice and your observations. You do a lot of class actions and also commercial litigation., could you please tell us a little bit about the trends you are seeing.

David J. Sorkin

Kathleen A. Lang

MS. LANG: Well, I must say, sitting up on this panel and listening to the others, I am drawn back to my roots as the daughter of a minister in a small town; I am a stranger in a strange land. I'm your basic all-purpose litigator from Detroit, Michigan, so I spend most of my time in the auto industry and dealing with issues in the auto industry. It was ironic in some ways when I was first contacted about being on this panel and asked to talk about product liability and class actions. In Michigan, we have had a monumental change in the product liability law. In 1996, we had tort reform that is probably the most stringent and far-reaching of any state in the country, and you can see who it was largely driven by!

I talk to people about tort reform a lot. I don't think that people throughout the rest of the country realize what has occurred in Michigan. We've eliminated joint and several liability in product liability cases for the very reason that David alluded to — a lot of automobile accidents where a drunk driver was 99% fault and one of the auto companies or auto suppliers or their manufacturers paid 100% of the verdict, regardless of what the amount was. We have capped non-economic damages, a maximum of $500,000 in a death case, and we have barred recovery when the plaintiff is more than 50% at fault for any given accident.So with those provisions of the tort reform, which have never been challenged in our Michigan Supreme Court and still stand since 1996, our Court Administrator's Office is reporting that our cases have fallen almost 75% in product liability in the last ten years. We went from over 55,000 cases to somewhere less than 20,000 for all tort cases, and in product liability cases, from 3,500 cases a year to less than 900 cases.

So, it has been a dramatic drop based on tort reform, and product liability in Michigan has significantly changed. Unfortunately for the clients who are based in Detroit and produce products all over the world, their future has not changed since many other states have not followed Michigan's lead in tort reform.

I don't think you could talk about the trends in class actions without talking about the Class Action Fairness Act that was passed in 2005. Obviously, one of the main purposes of the act was to increase federal jurisdiction of class actions, and that is the one change that we can really see has occurred.

I looked up some statistics, because I'm a numbers freak anyway, and it appears in the two years since Class Action Reform was passed by Congress that the number of cases going to federal court from state courts has doubled. Interestingly, the cases have not increased in the area of product liability, but in contracts, consumer fraud and other types of statutory cases.

They said, about three-quarters of the overall growth resulted from state law contract and fraud cases, which is another area that I think product liability class actions are moving to. We are seeing more and more class actions now being premised on consumer fraud statutes, consumer protection acts, and different statutory schemes, as opposed to traditional negligence product liability actions, because it is so difficult to certify a product liability class action in many jurisdictions.

Typically, plaintiffs' attorneys are excluding from their classes any personal injury that arises out of those cases, and bringing claims now based on a defect in a product under the state statutes. They are becoming more common in terms of multi-district nationwide class actions. Many courts are applying consumer protection acts from the corporation's home state in order to get certification across the state. They're allowing for trebling the damages and attorneys' fees. So those type of class actions have become a big threat that many manufacturers are having to deal with.

The other emerging area that we're seeing more and more of is what I call the "no injury" class action, and that being class actions where because of an owner notification or a recall program, plaintiffs' counsel are filing class actions saying, "While we haven't suffered an injury, nor have we even seen the defect in our product yet, the value of the product has been lessened to us." And so they file a nationwide or a statewide class action based on the loss of value of the product merely by the fact that there was a defect.

There appears to be a split in the jurisdictions

right now as to whether those cases are being allowed to proceed forward. Many jurisdictions find without an injury, an actual injury, there's no standing, there's no cause of action, while other courts are holding that if the case sounds in warranty as opposed to negligence, that the mere fact of a defect is enough to have a cause of action to go forward.

The final area that there's been some recent action in, although not limited to the product liability area, is in the standard of review in class actions. Recently, the *Dukes v. Wal-Mart* employment case brought by female workers against Wal-Mart was recently certified. And the Ninth Circuit specifically held that there is no need to do a *Daubert* analysis on expert testimony that's offered for class certification purposes. They did go on in that case to say, "If you had done a *Daubert* analysis, it would have been satisfied here," but they did hold that there was no need to do *Daubert* analysis. That is in direct opposition to many courts across the country that have held when evidence is offered for class certification purposes, it has to be held to the same rigorous standard for the court to make that determination. So I think that will be a continuing area of controversy in the whole class action area of products and otherwise.

MR. FRIEDMAN: What about punitives?

MS. LANG: Well, again, being that stranger in a strange land, Michigan has never had punitive damages.

MR. FRIEDMAN: Really?

MS. LANG: Never. So we have not had the same experience that maybe others have had that would want to comment. It's amazing that Michigan's not a more economically robust state in light of all the efforts that have been made to make it business-friendly.

MR. FRIEDMAN: Haley Barbour, Governor of Mississippi and now a famous Washington figure, gave a talk about how they got civil justice reform through the legislature which was two-thirds Democrat, and his observation was that the public just doesn't relate to tort reform in manufacturing, they just don't know what it is, really. It's all vague, that sort of thing. Obviously, manufacturers get it, and they are trying to educate the public, but he did note that the one thing the public does know is medical reform. The idea that doctors can be driven out of business or have all kinds of headaches — they relate to that! He recommended that wherever tort reform is pursued around the country, be sure to include a medical element so the public can relate to the whole thing as opposed to just doing something separate from the doctors. He cautioned that the situation will arise where the doctors say, "Gee, we can cut a separate deal with the legislature," and the business community should respond, "No, don't cut a separate deal, because we need to have a united front in getting something through."

Michigan obviously has the image of a labor state, a union state with big manufacturers, Democratic and pro-consumer. With that mix in mind, what is the nature of the political environment in Michigan? I'm not asking you to take sides, but just to explain a little bit about how these things that are maybe pro-business issues can get through the legislature.

MS. LANG: Tort reform in Michigan was passed when we had a Republican governor and legislature – both houses. We now have a Democratic governor, so there's been a shift there. In Michigan, the focus on jobs and employment is what allows these reforms to happen. We still have double-digit unemployment in Michigan, and what people recognize is that the cost of torts, the cost of lawsuits, have dramatically increased the cost of products that are manufactured in the United States compared to other parts of the world. That also, when taking an industry like the auto industry, where we've become a global industry in terms of global competition, puts the U.S. manufacturers in a very difficult position. People recognize that.

MR. FRIEDMAN: You mean the competition between the states causes people to say, "We'd better be a little more business-friendly if we want to keep people prosperous."

> "In Michigan, the focus on jobs and employment is what allows [tort] reforms to happen. [P]eople recognize that lawsuits have dramatically increased the cost of products manufactured in the U.S. compared to other parts of the world [putting] manufacturers in a very difficult position. People recognize that."
>
> —*Kathleen Lang*

MS. LANG: It's more about the competition between nations, with the non-U.S. auto manufacturers.

MR. LEITCH: Yes, I would add just two things. One is, an important factor in Michigan is the strength of the state Supreme Court, which, though closely divided, has been generally willing to consider the arguments of the businesses in the state, in ways that other state Supreme Courts have not.

Second, with respect to the legal environment being related to the business environment, I believe it's true that when Toyota announced they were going to build their next U.S. plant in Mississippi, they expressly stated that one of the reasons that they were going to locate in Mississippi was because of the tort reform and the environment that they felt existed in Mississippi after the adoption of tort reform. Haley Barbour and Toyota kind of did a little bit of a road show on that issue, as a way to say to other states, "this is a way to attract business to your state and have this kind of business environment." So it was directly tied together in that context.Beyond tort reform, you also do a substantial amount of complex business litigation in the contractual area. How does an auto company deal with the demand from all corners to re-negotiate existing contracts be it with unions, suppliers, governments or private entities all over the world.

MS. LANG: We're seeing quite a bit of this type of litigation in the industry. Obviously, we have had some of the major suppliers in the industry go into bankruptcy. We spend a great deal of time dealing with what we term "troubled supplier" issues, where we have a supplier who may be the sole supplier, or one of the few suppliers, who is about to go under. The manufacturers work with the lenders to try to save the company. We do spend a great deal of time trying to save the contract as the contract, regardless of the consequences. The problem is you, you get into a real practical vs. legal battle on those issues, which is you can make all the legal arguments you want, but if the company can't produce the product you need, it doesn't help you in the long run.

MR. LEITCH: These issues are generally best handled outside the legal context, in terms of the people who are running the business operations dealing with each other to come up with practical solutions. Because, in fairness, it's not just suppliers who can't and don't want to live up to their contractual obligations; it's also the companies who told the suppliers that we were going to build 300,000 of a particular automobile in the year "X", only to find out by the time we get to the year "X" that demand is 200,000, the supplier has ramped up and invested capital to produce 300,000 units.

MR. FRIEDMAN: So they can be mad at you? Everybody can be mad at everybody. It's under scale.

MR. LEITCH: That's right. Everyone can be mad at everyone, and so we should work it out in a way that acknowledges that there are business difficulties on both sides of the equation. That's not to speak to any particular case, but I think all the manufacturers rec-

> "[T]he over-arching issue right now for the industry, including Ford, is greenhouse gas, environmental issues, and fuel economy. .. [T]he issue with fuel economy... is not an inability to produce [efficient vehicles]. We can produce them. It's you who don't want to buy them."
>
> —*David G. Leitch*

ognize that in particular circumstances, suppliers are stressed sometimes by their own mismanagement, and sometimes by our economic difficulties or our product-based problems, and it doesn't really do us much good to end up in litigation with each other — not to say we don't, but if we can avoid it, we need to continue to do business, particularly where somebody is a sole source for a part. You can't just turn around the next day and get it from somebody else. If you have a product that you're trying to sell, you need to figure out a way to work things out so that you get that part on a continuing basis. And so there's a lot of leverage on both sides of the equation, and people are pointing guns at each other but very reluctant to fire them.

MR. FRIEDMAN: Do you have the problem that foreign courts may not want to enforce your rights? Let's put that mildly. I could underline that a hundred times.

MR. LEITCH: I don't think that's a major issue for us. You know, the place where it becomes particularly an issue of concern is in I.P. That's the knottiest legal issue we face.

MR. FRIEDMAN: Because some of them don't even think that I.P. protection should be a legal right — that is, so long as the theft is of something they didn't create.

MR. LEITCH: Well, yes, many have a very different way of thinking about it.

MR. FRIEDMAN: Let me move on, before I open it up to the audience, I wanted to cover two things. One is the regulatory, and the other is issues that have to do with the people side of the business, because that's obviously a huge area for every modern company. What are some of the big agenda items at the federal or state level, for Ford, or for the industry?

MR. LEITCH: Well the over-arching issue right now for the industry, including Ford, is greenhouse gas, environmental issues, and fuel economy. Not just in the United States, but also in Europe, which is engaged in a parallel debate to the one that's going on here about fuel economy standards. I might sound like a salesman here for a minute, but the issue with fuel economy for the most part is not an inability to produce cars and trucks that meet certain reasonable fuel economy standards above the current ones. We can produce them. It's you who don't want to buy them. In Japan and Europe and other parts of the world, average fuel economy is 35 or 40 miles to the gallon. It's not because somehow the technology is better; it's because when you measure average fuel economy, you're measuring what the consumer buys, not what the producer makes. The consumers in those countries buy smaller, more efficient, manual transmission vehicles. They do that because gas costs eight or nine dollars a gallon.

So in this country, the program that we have is one that essentially makes us push things through the market that otherwise would not be in the market, because consumers in this country don't want to buy as many small, fuel-efficient, manual transmission vehicles; they want big cars, SUVs and trucks. Here's an example. The Ford Fusion is a mid-size car, has done very well for us. We just introduced that into Brazil, and it's considered a *large* car in Brazil. When you have that kind of difference in the mix, if you measure it by average fuel economy, you're going to end up with much different numbers, even though the technology is obviously available everywhere in the world.

So, we really feel like we're perfectly happy to have demands for reasonable increases in fuel economy, but we ought to do it in a system that doesn't push what people don't want to buy. There ought to be a way to incentivize the kinds of behavior we want, not just at the cost of the automobile company.

MR. FRIEDMAN: Any specific proposals or it's just in a general discussion phase?

MR. LEITCH: Well, the general approach that I think works better is an attribute-based standard, which says when you have a certain wheel base or a certain shadow, the fuel economy ought to be at such a level, and it's not based on a mix of what you sell. Right now, an automobile company can't tell whether it's going to meet its CAFE obligations until you get to the last few days of the year and see what people buy, because again it's not what we make; it's what people buy. So the last few days of the year, if you need to increase your average fuel economy, you all of a sudden have a huge sale on Focuses, and you try and pump them out into the market so you can raise your fuel economy average.

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MR. FRIEDMAN: You mean that if you buy a large car or SUV it should be a fuel-efficient large car relative to other large cars, and if the public wants small cars, it should be efficient that way. How does the industry educate government officials on the issues?

MR. LEITCH: Well there are lots of methods of persuasion, none of them particular to the auto industry. Obviously, you need to have good arguments about your policies and their effects on constituents and the economy at large; you have good relationships with policymakers and representatives; and you need to have good spokesmen to carry those out. We have a very effective Washington office run by Ziad Ojakli, who used to be in the Legislative Affairs shop at the White House, and he has very good relationships. Working with the other automobile manufacturers, we try hard to get our point across about things like CAFE and safety and other regulatory matters.

MR. FRIEDMAN: Now, again, the last topic before we open up to the audience. First of all, about how many employees does Ford have, worldwide, just order of magnitude?

MR. LEITCH: Slightly under 300,000.

MR. FRIEDMAN: Certainly there are a whole host of

employment issues with a workforce of that magnitude. What are the big labor issues for the auto industry?

Richard Cullen, Kathleen A. Lang, David J. Sorkin, Louis L. Goldberg and David G. Leitch

MR. LEITCH: I would say there are two categories in which to think of them. One is the salaried employees, and you have all the issues that any company would have from health care benefits, working conditions, discrimination issues, workplace, environment, all those issues. The overriding difference for Ford from many companies is the hourly workforce, which is represented by the UAW.

MR. FRIEDMAN: What type of specific proposals are there on the table to deal with the legacy costs of these pensions in the industry?

MR. LEITCH: I can only speak for what I see at Ford, but I think we have a very cooperative relationship with the Union, and during the life of its contract, we have worked together on a number of very difficult issues that required engagement and cooperation and agreement in ways that would not have been done five, ten, fifteen years ago during the life of the contract. They would have waited for the next negotiation cycle. So, I think the Union has a very healthy recognition of the critical issues facing Ford and the industry, and has been quite reasonable and been willing to work with us during the life of the contract.

MR. FRIEDMAN: What are just some of the *pro bono* or social type programs that Ford is involved in?

MR. LEITCH: The range of things is pretty wide, but we have something called the Ford Fund, to which the company donates millions of dollars every years – no relation to the Ford Foundation, which is wholly independent of the Ford family and the company. The Ford Fund funds a lot of community programs, including something called the Henry Ford Academy, which is a charter school in Dearborn that will be duplicated elsewhere. It also funds something called "Driving Skills for Life," which is driving education for teenagers. It's involved in lots of other charitable things, and of course the Office of General Counsel participates in pro bono activities, mostly in southeastern Michigan, because that's our locus of operations. We try to be very active in things like volunteer tax assistance and those kinds of projects. Kathy can tell you that in southeastern Michigan, it's hard to find a charitable event or organization that doesn't have the logo of one, if not all three, of the manufacturers. Unfortunately, the level at which the giving has occurred has been diminished in recent years because of the companies' financial difficulties, but they still participate in just about every charity auction and golf tournament and fundraiser that you can imagine. So it's a big part of the community.

MR. FRIEDMAN: I want to thank everyone here for their presentations. We have a much better sense of many matters, including the corporate leadership of Ford, the industry and the State of Michigan. I'd like to thank the speakers again for sharing their wisdom and their time, and our Guest of Honor for letting us know about these important matters. ■

David G. Leitch

General Counsel & Senior Vice President,
Formerly White House Deputy Counsel; FAA General Counsel; U.S. Deputy Assistant Attorney General; and Law Clerk to Chief Justice William Rehnquist
Ford Motor Company

David G. Leitch is general counsel and a senior vice president of Ford Motor Company. Immediately prior to joining Ford, Leitch served in the White House as Deputy Counsel to President George W. Bush. In that capacity, he advised the President and his staff on a variety of legal issues, including issues involving the war on terror, judicial nominations, legislative proposals and ethics.

From June 2001 through December 2002, Leitch served as Chief Counsel for the Federal Aviation Administration, overseeing a staff of 290 in Washington and the agency's 11 regional offices. He is also a past deputy assistant attorney general in the U.S. Department of Justice, Office of Legal Counsel.

Leitch's law career includes serving as law clerk to U.S. Supreme Court Chief Justice William H. Rehnquist, as a law clerk to Circuit Judge J. Harvie Wilkinson, III, and as a partner in the Washington, D.C. law firm of Hogan & Hartson, L.L.P. Leitch is a graduate of the University of Virginia School of Law, where he graduated first in his class, and received his undergraduate degree from Duke University.

Louis L. Goldberg

Partner,
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DAVIS POLK & WARDWELL

Mr. Goldberg is a member of Davis Polk & Wardwell's Corporate Department, practicing in the Mergers and Acquisitions Group. His practice focuses on public and private mergers and acquisitions, private equity transactions, board and corporate governance advice, joint ventures, spinoffs, and restructurings and recapitalizations. He also has extensive experience in securities offerings.

Mr. Goldberg joined Davis Polk in 1989 and became a partner in 1997. He received his B.Bus.Sci. LL.B., magna cum laude, from the University of Cape Town in 1987 and in 1989 received his LL.M., first class, from Cambridge University.

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Our practice is global, with offices in New York, Menlo Park, CA, Washington, D.C., London, Paris, Frankfurt, Madrid, Tokyo and Hong Kong. More than one-third of our principal clients are non-U.S. companies.

Kathleen A. Lang

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DICKINSON WRIGHT PLLC

Kathleen A. Lang practices in the areas of general commercial litigation, insurance law, intellectual property, product liability defense, and class actions. She is a member of the American Bar Association, the State Bar of Michigan, the Michigan Defense Trial Counsel Association, the Association of Defense Trial Counsel, the International Association of Defense Counsel, and the Defense Research Institute. A member of ICLE's Litigation Advisory Board, Ms. Lang is a coeditor and contributing author to "Michigan Civil Procedure" (ICLE) and a contributing author to "Guide to Michigan Statutes of Limitations" (ICLE) and "Michigan Causes of Action Formbook" (ICLE). She has been a member of the faculty for ICLE's Trial Advocacy Workshop and is a frequent lecturer for ICLE on a variety of litigation topics.

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Dickinson Wright was founded in Detroit in 1878 by two young lawyers, Henry M. Campbell and Henry Russel, and has since grown to be one of the most respected law firms in its region. With more than 240 attorneys and offices in Detroit, Bloomfield Hills, Lansing, Grand Rapids, Ann Arbor, and Washington, D.C., the firm provides comprehensive legal services to a broad range of clients, from very large corporations to small businesses, new ventures, individuals, and governmental units.

The breadth of the firm's capabilities is reflected in the list of more than 40 practice areas in which its attorneys specialize. This exceptional level of expertise is matched by the firm's nearly 130 years of commitment to the service of each client. Dickinson Wright attorneys have represented many companies on the firm's client list for more than three-quarters of a century and, in a few instances, even longer.

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Richard Cullen

Chairman,
McGuireWoods

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Relationships That Drive Results

Mr. Cullen is the firm's chairman, and has been with McGuireWoods since entering practice in 1977. He represents corporations in complex civil commercial litigation, and advises corporations and key executives facing investigation by prosecutors or other governmental investigative agencies. His practice includes representing corporations in dealings with state attorneys general.

He was appointed U.S. Attorney for the Eastern District of Virginia by President George H.W. Bush in 1991, a position he held until April 1993. In 1997, Governor (now Senator) George Allen appointed Mr. Cullen Attorney General of Virginia, where he served from June 12, 1997, until January 15, 1998. He is a member of the firm's Executive Committee.

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David J. Sorkin

Member and General Counsel
Kohlberg Kravis Roberts & Co. (KKR)
(formerly Partner at Simpson Thacher and Bartlett LLP)

David Sorkin, 48, joined KKR in December 2007 as a Member and General Counsel from Simpson Thacher & Bartlett LLP, where he was a partner and member of the Firm's Executive Committee. At Simpson Thacher, he specialized in mergers and acquisitions and corporate and securities law matters, including a wide range of private equity transactions. During his tenure at Simpson Thacher, which began in 1985, Mr. Sorkin worked on numerous KKR transactions, including RJR Nabisco, Borden, Inc., Duracell, SunGard Data Systems, Texas Genco, HCA and TXU. He also advised KKR in connection with the initial public offering of KKR Private Equity Investors in 2006.

Mr. Sorkin received his B.A. summa cum laude from Williams College and received his J.D. cum laude from Harvard Law School. From 1984 to 1985, Mr. Sorkin clerked for the Hon. Charles M. Merrill of the U.S. Court of Appeals for the Ninth Circuit in San Francisco.

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Jack Friedman

Chair, Moderator
Director's Roundtable

Jack Friedman, Chair of the Director's Roundtable, is an executive and attorney active in diverse business and financial matters. He has appeared on ABC, CBS, NBC, CNN and PBS, and has authored numerous business articles in the *Wall Street Journal*, *Barron's*, and the *New York Times*.

Mr. Friedman has served as an adjunct faculty member of Finance at Columbia University, NYU, UC (Berkeley), and UCLA. He received his MBA in Finance and Economics from Harvard Business School and a J.D. from the UCLA School of Law.

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