



# WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

## Michelle Banks

Executive Vice President, Global General Counsel,  
Corporate Secretary & Chief Compliance Officer, Gap Inc.

## THE SPEAKERS



**Michelle Banks**  
*Executive Vice President,  
Global General Counsel,  
Corporate Secretary &  
Chief Compliance Officer, Gap Inc.*



**Robyn Crowther**  
*Partner, Caldwell  
Leslie & Proctor, PC*



**Mark Krotoski**  
*Partner, Morgan Lewis  
& Bockius LLP*



**John Yslas**  
*Partner, Norton Rose Fulbright LLP*



**Jessica Perry**  
*Partner, Orrick, Herrington  
& Sutcliffe LLP*



**Cristina Shea**  
*Partner, Reed Smith LLP*

(The biographies of the Distinguished Panelists are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, [www.directorsroundtable.com](http://www.directorsroundtable.com).)

## TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished guest of honor's personal accomplishments in her career and her leadership in the profession, we are honoring Michelle Banks, Global General Counsel of Gap Inc., with the leading global honor for General Counsel. Gap Inc. is a global retailer comprised of the Gap, Banana Republic, Old Navy, Athleta, and Intermix brands. Michelle Banks will address several initiatives, including the company's work to empower women. Following her remarks, the panelists will discuss a range of topics, including employment, cyber risks and other cyber liability insurance, diversity, and dispute resolution.

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

Jack Friedman  
Directors Roundtable Chairman & Moderator



### Michelle Banks

*Executive Vice President, Global General Counsel, Corporate Secretary & Chief Compliance Officer, Gap Inc.*

Michelle Banks is Executive Vice President, Global General Counsel, Corporate Secretary and Chief Compliance Officer of Gap Inc. (Gap, Banana Republic, Old Navy, Athleta, and Intermix) located in San Francisco, California. She reports to the Chief Executive Officer and is a member of his senior leadership team. Michelle currently leads the Company's global equity, governance, integrity, legal, and privacy functions. During her tenure at Gap Inc., she has also overseen the foundation, franchise services, sustainability and government affairs, and public policy functions. Michelle joined the Company in 1999.

In addition to her current role at Gap Inc., Michelle is the Senior Executive of the Alliance for Bangladesh Worker Safety, a

consortium of 26 North American retailers, and Chair of the Board of Directors of Minority Corporate Counsel Association. She is also Co-Chair of UCLA Law Women LEAD and serves as a Commissioner on the American Bar Association's Commission on Women in the Profession.

Michelle has been recognized as a Most Influential Woman in Bay Area Business and Corporate Counsel Diversity Champion by the *San Francisco Business Times*, a Most Powerful and Influential Woman by California Diversity Council, a Woman of Achievement by Legal Momentum, and a Top General Counsel to Watch by *Corporate Board Member*. In 2014, Santa Clara University Law School presented her with their Social Justice and Human Rights award.

# Gap Inc.

## Gap Inc.

### Who We Are

Doris and Don Fisher opened the first Gap store in 1969. The reason was simple: Don couldn't find a pair of jeans that fit.

They never expected to transform retail. But they did.

Guided by humility and a strong desire to win, the Fishers grew their company thoughtfully. Customers responded.

Today, Gap Inc. is a leading global fashion retailer with five brands – Gap, Banana Republic, Old Navy, Athleta and INTERMIX – over 3,700 stores and more than 130,000 employees. Customers in over 90 countries can buy our products.

For more than 45 years, Gap Inc. has stood for opportunity and equality. Doris and Don each contributed an equal amount to open that first Gap store. They also shared an unconditional commitment to make a positive impact on people whose lives we touch.

Starting with Doris, women have always been vital to our success. In 1969, having a woman and man co-found a company, with the woman having an equal stake, was revolutionary.

We have a proud tradition of women leaders. From store managers to division presidents, to the women who over the years have run and helped to grow each of our five brands, to our current female leadership team members.

A diverse group of women make up 74% of our employee base. And women are the majority of our customers. Around the globe, women control 65% of purchases and about \$28 trillion of global consumer spending each year.

We are on a journey to be the best fashion retailer, from value to luxury, in the world. This will be achieved by delivering great product to our customers and continuing to be an inclusive employer, that is the best place for women to work and shop.

While many things have changed since 1969, the principles on which we were founded have stayed the same: operating with values and ethics, and delivering great product to our customers.

**JACK FRIEDMAN:** I'm Jack Friedman, Chairman of the Directors Roundtable. We are a civic group which has done about 800 events globally. We've never charged anyone to attend, and our mission is to do the finest programs for Boards of Directors and their advisors, including General Counsel.

We're very privileged today to present the leading World Honor for General Counsel to Michelle Banks, Executive Vice President, Global General Counsel, Corporate Secretary & Chief Compliance Officer, Gap Inc. Michelle has a very interesting background. She was in private practice; she's a graduate of the UCLA Law School. We were actually at the law school overlapping one year, although I didn't know her at the time. She has important activities outside her corporate responsibilities. She's the Chairman of the Minority Corporate Counsel Association, which is the leading group for minority corporate counsel in the country. She's also going to talk about her work with the retail industry, including Bangladesh.

I would like to explain the nature and the purpose of the series. Directors around the world have told us that people do not really understand what their companies do. They wanted a series with integrity, where business leaders and General Counsel can talk about their companies, their legal departments, and how important it is to be a good citizen, so we have provided this forum as part of our many programs that we do. We're very pleased that Michelle accepted our invitation, and that Gap Inc. will be featured today. We would like to have her start now. Thank you.

**MICHELLE BANKS:** Good morning. Thank you, Jack and the Directors Roundtable. One can hardly feel worthy of an honor with "world recognition" in the title! [LAUGHTER] Thank you all for coming to this breakfast so early, and I really want to say that I'm very grateful for the Gap Inc. legal team that I work with, and for all of our external partners. Many of you are here today and have been longtime supporters, so thank you.



Gap Inc. is a \$16 billion global apparel retailer comprised of the Gap, Banana Republic, Old Navy, Athleta, and Intermix brands. Gap Inc. continues to rank as a top corporate citizen, with recognition as the World's Most Ethical Company, the Brand That Changed the World, Hundred Best Corporate Citizens, and recognized on the Dow Jones Sustainability and the Corporate Equality Indices.

We were founded here in San Francisco in 1969, in a single store. Today, we've grown to more than 3,000 stores globally. We have more than 130,000 employees, and our customers can buy our products in 90 countries around the world. While many things have changed at Gap the company since 1969, the priorities that we were founded upon have not. We want to delight our customers with quality clothing, and at the same time, we want to do what's right. Our philosophy is simple: we seek to make a positive, lasting change on the people and in the places where we do business.

We recognize that the most sustainable progress can be achieved when business results are proven. One example of this commitment to people and communities at Gap Inc. is our Personal Advancement & Career Enhancement program, or what we call the "P.A.C.E." program. This program benefits female garment workers who make our clothes throughout our global supply chain. Our P.A.C.E. program empowers women to expand their horizons and change their lives through education and professional opportunities. To date, more than 30,000 women in 10 countries have taken the educational steps to participate in the P.A.C.E. program. They have gained confidence and acquired skills through this program. The program, very importantly, generates business results, helping to reduce turnover and absenteeism, and increase productivity and promotion.

Based on these proven results, we've recognized the opportunity and the potential to achieve an even larger impact, and last month, some

of you might have seen our CEO, Art Peck, announce at the Clinton Global Initiative that we will seek to reach one million women with the P.A.C.E. program by 2020. We want to move beyond our factories into the communities where we do business around the world, and we want to strengthen the impact that women and girls can have around the globe. This is something that I am very personally excited about. As someone who *has* had the opportunity to pursue an education and gain skills, I am personally very excited about the P.A.C.E. One Million Women program.

I'd like to try to bring it to life for you. If you would just watch this brief video, telling what the difference this program has made in one woman garment worker's life.

[\[Click to See Video\]](#)

As you can see, Gap Inc. is committed to creating opportunities for women around the globe.

Continuing our values-based culture, Gap Inc. promotes strong ethics across our company and our business. This is supported by a code of business conduct and my Global Integrity Team within our Legal Department. We take corporate compliance very seriously. Our comprehensive program is designed to ensure that all of our employees and our board of directors are meeting legal requirements by going beyond that, and providing appropriate governance and transparency to really do what's right in everything we do. A combination of written guidelines, formal processes, and management and board oversight help us ensure that we work with integrity.

I am really pleased to work at Gap Inc. and feel the strength of the commitment amongst our senior leaders, including our board of directors, with respect to the importance of doing business in the right way.

Gap Inc. founders Don and Doris Fisher built a company and a culture with a long-standing belief that advancing women is not



only the right thing to do, it's good for business. In 1969, when they opened the first store here in San Francisco, they each put in an equal investment. At the time, their idea of equal partnership was pretty revolutionary. Women have, since then, been vital to the success of our company. Gap Inc. has committed to – and has continued to prioritize – diversity and inclusion, especially the promotion of women, since our founding. Today, four members of our board of directors are women, and Doris Fisher still remains as an honorary lifetime director, participating in every board meeting.

In addition to my role as global General Counsel, women serve as Gap Inc.'s Chief Financial Officer, Head of Global Supply Chain, Head of Talent & Sustainability, and President of three of our five brands. In fact, as of this year, a majority of our Chief Executive Officers' Senior Leadership Team are women.

Within Gap Inc., female representation at all leadership levels is meaningful, and meaningfully above societal and retail averages. We recognize, however, that there is more work to do. We are focused on building a deep bench of women who are ready to lead our company forward. We offer women many growth and professional development opportunities, and this is very important to building that bench.

One of our top priorities at Gap Inc. is to make sure that we are viewed as a great place to work. Not all organizations are viewed as a great place to work for women. A *Wall Street Journal* article earlier this year provided a statistic that you would have thought was from history: women working full-time in the United States last year earned 82.5 cents for every dollar a man earned. More alarming is that in my own profession – the legal profession – women attorneys earned 56.7% of their male counterparts. I have long wondered how it's possible that we go to law school at 50%, and when you get to women General Counsel, it drops to 20%, and when you get to women equity partners, it drops below that.

At Gap Inc., we believe equal work deserves equal pay. In today's society, this should be the standard. As the national conversation around gender equality grew last year, we thought it would be beneficial to check in and really see, scientifically, how we were doing. We knew that equality and opportunity were inherent in our DNA, so we wanted to engage a third party to check us.

So it was not a surprise when we looked at our data, and we had it vetted by a third party, and we concluded that we pay equal for equal work. Very significantly, we pay equally for the same job, men and women, whether you are in the U.S., Tokyo, Shanghai, London – wherever you are in the world, within our company.

That was a moment of pride for us, but it's something that we also decided to share externally once we had validated it. In part, it was recognizing that while we're not perfect, we did want to be a role model, and we did want to try to inspire others.

We remain, to this day, the first and only Fortune 500 company that has validated and disclosed our pay practices. Our commitment to equality builds on our decision to raise our hourly wages for our employees last year. Seventy percent of our employees

are women, and it has a great impact to raise the hourly minimum wage to ten dollars voluntarily. This benefitted more than 60,000 employees across the United States over the course of this year.

As former DuPont General Counsel Tom Sager said – and for those of you who don't know Tom, he's a diversity icon – when he received this recognition in 2011, I read his speech, because I knew it would be inspiring. He said, "It is obvious to us that diversity is a business imperative and critically important to how we provide legal services and to how we connect with the external world."

At Gap Inc., we know that appreciating and understanding the diversity of our customers and our employees around the world will make us more successful, and we want everyone to feel invited to our workplace and to our stores.

In Gap Inc.'s Legal Department, we have a sustained commitment to diversity and inclusion. We have a three-part strategy focused first on fostering an environment of inclusion within our department, and developing our talent to their full potential, increasing diversity in the legal profession, and particularly the pipeline, through *pro bono* activities, and holding our network of external law firms – many of you are in the room, so thank you for that – accountable for their diversity and inclusion. We serve as vocal advocates, giving speeches like these at many organizations, and participating in the activities of many dedicated organizations that prioritize diversity and inclusion the way we do, including the California Minority Counsel program.

I personally serve as the chair of the board of directors of Minority Corporate Counsel Association, or MCCA, as we informally call it. We are committing to advancing all forms of diversity to achieve a stronger, more relevant profession, and to help diverse lawyers succeed in every stage of their career.

Gap Inc. continues to rank as a top corporate citizen, with recognition as the World's Most Ethical Company, the Brand That Changed the World, Hundred Best Corporate Citizens, and recognized on the Dow Jones Sustainability and the Corporate Equality Indices. — Michelle Banks

The past two successive leaders of the Gap Inc. Legal Department have been women, and I am very grateful for the mentorship of Anne Gust Brown, and the sponsorship of Lauri Shanahan. I am well aware that I am standing here today on their shoulders.

Across our brands and businesses, Gap Inc. maintains a commitment to integrity and inclusion, and we have zero tolerance for discrimination of any kind. We firmly believe that corporations should contribute to the communities in which they do business. I am proud to report that last year, 50,000 employees in Gap Inc. volunteered over 500,000 hours in our community. We serve youth through programs like This Way Ahead, Plan Ahead, and Camp Old Navy, and we have impacted 5,500 community college students through Gap for Community Colleges.

We are also committed to giving back to the community through *pro bono* activities. We were one of the founders of the Pro Bono Alliance, and we serve as the in-house legal department to four local non-profits here in San Francisco – Breakthrough Collaborative, First Graduate, Juma Ventures, and Youth Uprising.

Through our Pipeline program, we are hoping to advance diversity in our profession, and we are hoping to impact the youth in this community. It's unacceptable to me, personally, that our profession – the legal profession, which is so critical to achieving justice in our society – is one of the least diverse white-collar professions in the United States. Our lack of inclusion prevents us from reaching the best legal solutions and leveraging the best potential talent.

We have a long history of supporting women, but everyone has work to do in supporting all forms of diversity. I strongly believe that we can make a difference in the garment industry. It's an industry that provides the first job for many people, and takes them out of subsistence agricultural existence.

Outside of the apparel industry, women tend to have fewer alternatives than their male counterparts. But within Gap Inc. suppliers' garment factories, which operate at the highest international standard, we can provide a paycheck for many people around the world, and we seek to do that at the same time we seek to drive positive change in those workplaces.

We want our efforts to be greater than one company alone, and that's why we've joined a number of collaborations, from the She Works Partnership with the World Bank and the UN, that will impact 300,000 women over the next two years in a collaboration, to signing the UN Women's Empowerment Principles, which our new CEO did this year as one of his first actions. We hope to impact women in the marketplace, in the workplace, and in our communities.

I have worked at Gap Inc. for 16 years, and I'm very proud to work there, because of our integrity and our inclusion. I hope that everyone here, whether you're a legal or another professional, will take back to your office an inspiration to do something – maybe something very small – in the interests of greater diversity and inclusion, and in supporting women and girls around the globe.

Thank you for the opportunity to speak with you. I'm not going anywhere – I'm going to sit on the panel with my fantastic colleagues



over here. I would like to give a personal thank you to the Directors Roundtable; to the 115 members of the Gap Inc. legal team, that do amazing work every day, and many of them are here today. Again, thank you to my partners who are here. I would like to thank Orrick Law Firm, who has been our external partner for a very long time – thank you for hosting us here today.

**JACK FRIEDMAN:** I'd like to address one or two questions to Michelle before we move on to the other speakers. For thousands of years, and literally everywhere in the world, virtually the most important work that women could do to supplement farm income was in the textile industry. They could take in wool or cotton or other materials and work on it at home. Then maybe once a month, the business person would come by and collect it. The garment industry has a unique tradition of giving women opportunities. It's wonderful to hear that it continues today.

You referred to why it's important to Gap, not only for the humanitarian/social justice side, but also how it may be an important benefit from the business success aspect. Why should companies have an interest in terms of their business success, to show that they have a good heart?

**MICHELLE BANKS:** I mentioned a couple things. We've really been amazed with the results that a number of our partners have reviewed for us in terms of the

P.A.C.E. program. It has resulted in better employees and people being more productive and getting promoted, having less absenteeism, and leaving the workplace less. We truly believe that inclusion will not only improve our own business, but improve the economy as a whole. I'm pleased to say that there have been a number of external stories on this in the media recently, that if only we could tap into women and girls, we could achieve great things. The greatest thing for me, personally, having viewed the P.A.C.E. program in Delhi, India and in Dhaka, Bangladesh, is that the result is not about one woman working in our factory; it's about their communities. They lift up their families, and then they lift up their communities. The stories that some of these women would tell about how they not only took the skills that they learned through the P.A.C.E. program, and they resulted in them being more successful in the workplace. They then were motivated, as the woman in the video mentioned, to educate their girls, to empower their girls, to go out into their communities and come up with systems for cleaner water and for other important things that people need – safety in neighborhoods. I really believe that inclusion will make us a more successful company and result in our customers wanting to shop with us. But it will also be of benefit to society as a whole. I feel like I have the world's greatest job, because I get to do it all.

**JACK FRIEDMAN:** Thank you. Since we are in the Bay Area, I'd like to tell the following story. I happen to have known a woman who was the first woman to win the Nobel prize in medicine after Madame Curie. Her daughter was admitted to Stanford Business School. After she was admitted, she found out she was pregnant. She thought that she would have to make a choice between school and taking care of the baby. She decided to stay in school, and when she started at Stanford, her fellow students volunteered to organize themselves so that they could babysit at the school while she was in class. It's wonderful that people can be so helpful

and responsible to a colleague. I assume that there must be other stories like that, that nobody even knows occurs.

I would now like to read a letter from the Dean of the UCLA Law School, Jennifer Mnookin.

On behalf of the entire UCLA School of Law community, I would like to extend my deepest congratulations to Michelle Banks on this remarkable honor by the Directors Roundtable. I've had the great pleasure of getting to know Michelle through her work with our alumnae initiative, UCLA Law Women *LEAD*, and I've seen firsthand the characteristics in Michelle that are being so deservedly celebrated today.

Those here to celebrate and honor Michelle already know about her distinguished track record of professional success, including her most recent role as Executive Vice President, Global General Counsel, Corporate Secretary and Chief Compliance Officer of Gap, Inc., so I will not delve into that here. But I do want to say that Michelle Banks has been a veritable force of nature in helping us to conceptualize and build our new alumnae initiative at UCLA Law School: UCLA Law Women *LEAD*, which she currently co-chairs. *LEAD* stands for Leadership, Empowerment, Advancement and Distinction, and Michelle truly exemplifies all four of these qualities. Though this initiative and network started only a year ago, the early efforts — substantially spearheaded by Michelle — to offer fantastic programming, valuable mentoring, networking opportunities, and a sense of meaningful and intergenerational connection have been, honestly, nothing short of dazzling. This investment Michelle has made in *LEAD* links not only to UCLA Law, but to an issue she has long been passionate about: addressing the challenges women face in the legal field, and helping to find new ways to address them.

Though of course it takes a village, Michelle has truly been at the very center of UCLA's *LEAD* initiative – indeed, it's fair to say she's genuinely been a “but-for” cause of its early

success. She is in a true sense a connector, bringing the UCLA Law community together behind a shared vision of empowering women, a vision that she has both strongly supported and exemplified throughout her own career. She has opened her home to host more than 100 women for a Bay Area reception; chairs the committee to create and build our virtual network, already more than 1,000 strong; regularly speaks on panels throughout the world; and spends countless hours on precious Sunday afternoons working to make *LEAD* stronger.

Michelle has demonstrated her dedication to empowering women at every level, and I'm so grateful that she is wielding a portion of her remarkable energy and talent for the benefit of UCLA and its students and graduates.

As I've seen firsthand in our board meetings and elsewhere, Michelle has an extraordinary ability to use her tremendous knowledge to inspire community, and uses her authenticity to promote openness and collaboration. She is vivacious, energetic and engaging – precisely the type of leader all of us want to learn from, listen to, and have in our corner. She also has that remarkable quality of making everyone she interacts with feel special. She engages with laser-like focus, and manages to make whomever she is speaking to feel, for that moment, like she or he is the center of the universe. She is full of ideas and yet able to take on board the input of others. Her passion and her enthusiasm are contagious, and she has the ability to keep a conversation on track while still making those in the room feel included and involved. I am certain that the lawyers who have the chance to work with her at Gap feel like they hit the jackpot; I have seen firsthand, the way that the more junior lawyers on the *LEAD* board regularly use her as a mentor and a sounding board.

It's always gratifying when one of our alums is recognized for their professional distinction, especially one so deserving as Michelle, and this, of course, is no exception. But it's actually that much more special because the Directors Roundtable and UCLA School

of Law are connected. The group is the brainchild of UCLA School of Law Professor Emeritus (and former Dean) William Warren, and current Directors Roundtable Chairman Jack Friedman – another UCLA Law alumnus – who recognized the value in bringing together the leadership of the business and legal communities. What started as an idea has grown into the preeminent professional education forum for corporate directors and their advisors. I – and the entire UCLA Law community – are so very proud to count both Michelle and Jack among our UCLA Law alumni. Michelle truly embodies the values we work so hard to instill in all of our graduates. We applaud and celebrate her continued commitment to equity and excellence.

I would now like to introduce the Distinguished Panelists: John Yslas, partner at Norton Rose Fulbright; Jessica Perry, partner at Orrick, Herrington & Sutcliffe; Robyn Crowther, partner at Caldwell Leslie & Proctor; Mark Krotoski, a partner at Morgan Lewis & Bockius; and Cristina Shea, a partner at Reed Smith.

I would like to have John Yslas give his opening remarks.

**JOHN YSLAS:** Thank you, Jack. Just a little bit about my background to set the stage for what I'm going to briefly talk about. I'm a partner at Norton Rose Fulbright. The firm has close to 3,800 lawyers around the world. My practice deals largely with high-stakes wage and hour and consumer class actions, and larger employment matters. I've just picked out a few select issues that are important to be thinking about, and high-level, practical solutions and prevention in the brief time I have.

I also want to mention because we're going to have a discussion later about diversity in the Roundtable that I serve on the Mexican-American Bar Foundation board of directors, and the California Minority Counsel Program board of directors. I'm really honored that we have our executive director and former executive director in the



crowd with us today. It's a very important topic that I look forward to getting to more later.

The first issue touches on the wage and hour class action space, I'm seeing a few emerging issues to be thinking about. One of them is off-the-clock work, in particular – in this day and age of technology and smart phones – with hourly employees, there are a lot of class actions for off-the-clock work. Engagement in communications after hours with hourly employees is a big one. Other issues that are less thought of are employees that work in the field that are entering data after hours. This is a big area in wage and hour, and I don't think the law has really caught up with it, or folks aren't thinking with it. You can have small amounts of time that, over a period of time, over years, add up to a large matter.

The other issue in the wage and hour arena is technical violations, such as wage statements, or even calculation of overtime rates – small things that folks maybe don't think about. For example, there are bonuses that are based on objective criteria being factored into the rate of pay. These relatively small items can multiply over time.

The issue that immediately comes to mind for me is prevention. What does that mean?

It deals with investment on the front end with a highly focused compliance department that's knowledgeable and detail-oriented, working oftentimes with outside counsel. It deals with clear procedures, clear messaging. What gets lost sometimes, also, is the training for many levels. In large organizations, what I see, on occasion, is the message gets clearly conveyed at the top level, but it gets diluted at each level down. By the time you get to a lower level of management, it's been diluted enough, and over time, that it is forgotten. We all get involved in our own sort of myopic world, and then there can sometimes be a tendency to think about profit or utilization in our own particular space. It's at the expense of these larger issues, maybe working off the clock or reaching out to people after hours.

It's important that you have constant monitoring and auditing of these kinds of things, and training, and that it filters all the way through each layer down. Then by the time folks get to me, which involves class action litigation, the things to be thinking about now are prevention or mitigation from a larger standpoint. The first thing that comes to mind is, for example, arbitration in class action waivers. This is a growing area of law. The United States Supreme Court has clearly spoken about the enforceability of class action waivers. It's something to think about to include in an agreement.

I do have to measure and temper it by saying that we are, after all, in California, and, not surprisingly, that both plaintiffs' lawyers and the Legislature often come up with an attempted workaround. I'm going to give you an example. There is a statute in California called the "California Private Attorneys General Act," which is, by short, "PAGA." PAGA is essentially when an employee steps into the shoes of a governmental agency to enforce wage and hour laws. What the California Supreme Court has found is that you can't waive a PAGA action. It's a

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– Michelle Banks

representative action, albeit with a shorter statute of limitations than a class action, but it can't be waived. Query, will the United States Supreme Court take this up at some point? Maybe, what's sometimes frustrating for employers, is when you look at the PAGA actions, they don't have to be certified as class actions. Yet, the plaintiffs' lawyers are attempting to take class-wide, company-wide discovery. It's a growing area and an evolving area of law in my space, that I could give a whole hour on – which I obviously won't!

The other thing I'd like to note is, for example, just this month, Governor Brown vetoed AB 465, which was a measure passed by the Legislature to essentially prevent mandatory arbitration class action waivers as a condition of employment. But you can see that there is a constant evolution in this area, in the Legislature and by the plaintiffs' lawyers.

I really want to note, that the issue of wage and hour in class actions, and consumer class actions, for that matter, is smaller errors that multiply. In a refund policy in a consumer class action, the errors multiply over time, and they also have a tendency sometimes to morph into, for example, governmental investigations or compliance documents that may come up. They may be unrelated to the litigation, but they might be related, and I'll just cap this by giving you an example.

In the area of wage and hour, you may have folks that feel like they're not taking meal and rest breaks. That seems like a discrete issue. But the overall global issue is that they are feeling pressure to work hard to not comply with the law. That can lead to other types of mindsets, including not following

certain kinds of policies and procedures under the law or with the compliance documents, that can spawn into completely different issues. You start with something very small, with an individual employee, and it morphs into a big class action, and can also morph, potentially, into a governmental investigation.

I've tried to give you a little bit of a high-level view of things and emerging issues in my space, and when all else fails, then a topic for a different day is how to aggressively defend these class actions, which is largely what I do.

**JACK FRIEDMAN:** Thank you.

Michelle, how many employees does Gap have?

**MICHELLE BANKS:** A hundred and thirty thousand, approximately.

**JACK FRIEDMAN:** They are in many countries and different states?

**MICHELLE BANKS:** Correct.

**JACK FRIEDMAN:** You and your counsel have to be on top of all the different requirements; it's really mind-boggling.

John, what would be an example of how big a class action in the employment area can get, at least in terms of claims and the asserted damages by the plaintiff?

**JOHN YSLAS:** I've handled cases easily where the potential liability is \$200 million. Those are nationwide class actions. They can be as small as 50,000 in a class, and as big as a million and a half in a class. It's routine for me to handle nationwide class

actions with 50,000 in a class, where there's a repetitive issue going on across the nation. It generates — potentially \$200 million liabilities, which is certainly considerable.

**JACK FRIEDMAN:** Thank you. Our next speaker will be Jessica Perry of Orrick, Herrington & Sutcliffe.

**JESSICA PERRY:** Good morning! Congratulations to you, Michelle, on this honor. Thank you to the Directors Roundtable for having us.

This morning, I want to spend a few minutes discussing the top five ways to keep the boardroom out of the headlines and the courtroom. I'm an employment litigation partner at Orrick and I'm frequently in the courtroom handling employment issues for employers, so that is the prism through which I'm looking at these issues.

There are probably a lot of different things that we could talk about on this particular topic, but we only have a few minutes, so I've focused on five things to think about from an employment perspective. Number one would be arbitration agreements. As John mentioned a few minutes ago, there are a variety of tricky issues to think about in California, and the law is ever-changing. At the end of the day, arbitration agreements make a lot of sense in many different situations. I bet no one in this room would know who Ellen Pao was, had she had an enforceable arbitration agreement with her employer.

There's a variety of different things to consider when thinking about arbitration provisions — such as whether they should be applied only to more senior executives, so that if legal proceedings occur, they occur in a private setting and not on the front pages of the newspapers, or whether to implement arbitration for all rank and file employees, to avoid class actions through an explicit class action waiver. Other issues to think about are whether to make arbitration mandatory or whether to allow employees to opt out; how to handle Private Attorney



General Act (PAGA) claims and whether they can be severed from the arbitration agreement; whether to exempt certain claims from arbitration for both parties; and whether the employer is prepared to pay the entire cost of the arbitration. While there has been a lot of litigation around the viability of arbitration in California, in particular, arbitration agreements remain a very interesting option for employers to consider. Adopting an arbitration program requires careful consideration and drafting to ensure that they're as enforceable as possible in California, which is always looking for a reason to invalidate them.

Number two on my list is a transparent promotion and review process. As I've seen over time through a lot of litigation, black box systems or systems in which promotion criteria or review criteria aren't clear tend to breed distrust and anxiety.

There's a very well-written article by Prof. Thomas DeLong, who teaches at the Harvard Business School, which talks about how driven, ambitious people generally assume the worst about ambiguous responses. If there is repeated ambiguity, they tend to turn those negative feelings inward. They create worst-case scenarios in their minds about that ambiguous

response. I've seen this play out in litigation over and over and over again, when a plaintiff assumes that bias, instead of some other legitimate reason, has motivated decisions regarding the lack of a promotion or the failure to receive the best review possible.

It is important to combat those negative feelings and misplaced assumptions with clear and transparent criteria and well-documented feedback. It helps employees understand the expectations and their performance in light of those expectations, and it provides a good defense to litigation.

Number three on my list is a process to question decisions. This can take on a variety of forms in different organization, both large and small. In a small organization, it may be something as simple as ensuring that there's a sympathetic HR person who can listen to concerns. In a more sophisticated and larger process-oriented organization, it can be a formal review committee that an employee can appeal to if they have a question about something or don't understand why they weren't selected or why a certain personnel decision was made.

There are many options here and it is driven by culture and what is right for a particular organization, but in a world in which the

millennial workforce is only growing, and by 2025 is going to be 75% of the global workforce, having these types of processes, in which employees can get information, receive feedback and feel like they have a clear understanding of decisions as they're made can be enormously helpful to keep companies out of the courtroom.

Number four on my list is privileged audits. For years, I've talked about audits and how helpful they can be in the workplace, and I've traditionally talked about them a lot in the wage and hour context. A large part of my practice is wage and hour litigation, and wage and hour was an area in which I often did audits to try to find issues and correct them before there was litigation. Audits are going to become even more important with the passage of SB 358, which is California's version of the Equal Pay Act. This is an area in which employers can invest to look into particular compensation and promotion practices, and determine if there are issues that need to be addressed, and address them before litigation strikes.

A couple of key things about conducting audits: One, you need a commitment up front from management on this important initiative. Management needs to be committed to doing the project and addressing whatever issues are uncovered. Two, an employer needs to be prepared to devote the necessary resources to the audit. There's no one-size-fits-all for an audit; they come in all shapes and sizes. So what is essential is figuring out what resources are available, what priority areas need to be audited, and coming up with a plan that works for the company. There's nothing worse than doing a really bad audit, so I believe it's better to do a deep audit in one particular area than trying to do an overly broad audit where you just touch things but don't really figure out what the problems are or the solutions. Three, maintaining the attorney-client/work product privilege on the audit is probably the most important thing about it. You're bound to discover some things that

Gap Inc. founders Don and Doris Fisher built a company and a culture with a longstanding belief that advancing women is not only the right thing to do, it's good for business. In 1969, when they opened the first store here in San Francisco, they each put in an equal investment. At the time, their idea of equal partnership was pretty revolutionary.”

– Michelle Banks

may be problematic, and you want to make sure that you're dealing with those issues in a privileged setting as you try to solve them.

Finally, make sure that you fix the problems that you find. It's very likely there will be something that you need to address, and you want to make sure that you do in fact deal with the issues that you find.

Number five on my list and the final point I want to make has to do with exits and transitioning employees out of organizations. I've seen in litigation in the last couple of years that this really makes a difference. Sometimes you have to cut the cord with an employee that needs to leave your organization, and that's fine and should be done, but softening that blow with severance can often help. I like to think of severance agreements as a tool. How somebody leaves, and the feelings that they leave with and the way that they feel that they were treated in their exit is important for morale and culture for employees who remain, but it's important for other reasons, as well. Too often people overlook how they can use transition packages to help people find their next role, to leave the relationship in a very amicable way, and have cooperation from that exiting employee in the event that you do have future litigation. You often don't know that you may need to call on a former employee for information in litigation or that you need cooperation for some business initiative. Having a cordial relationship with that former employee can make a world of difference in that situation.

So, there is a lot more I could say on each of those five tips, but with the time we have today, that is a good introduction to my top five tips for how to keep the company out of the media headlines and out of the courtroom.

**JACK FRIEDMAN:** Thank you. A speaker at a prior event told about a company that had to lay off 22% of the workforce but needed to keep the remaining 78% motivated. One of the elements of handling exits was to remind the 78% that the fact they had worked at that company was going to be on their résumé for the rest of their lives. Even if someday they wanted to leave, try to help the company be successful now. If a company on their résumé had problems but ended up being successful, and they were part of that change, it would be positive for them.

Michelle, how do you keep the morale up when a division is not doing well?

**MICHELLE BANKS:** Keeping morale up is very challenging when business times are hard. Unfortunately, I have a fair amount of experience with it.

The biggest thing is engagement – open door, being communicative with people, listening to people. It's what Jessica was alluding to – treating people well when they're exiting or treating people well when they're joining goes a long way. Most people that bring wrongful termination litigation feel that they were treated

unfairly in some way, so communication and engagement with people is the most important thing.

You come across all different kinds of cases when you work with a variety of different companies, and sometimes you have an employee, or an exemployee bringing a lawsuit who's just making things up out of thin air. Sometimes you have people who have entirely different perceptions. If two people sat through the conversation and heard two entirely different things, the truth lies somewhere in between. Every case is different, and the fun part of the job is trying to figure out which kind of case you have.

**JACK FRIEDMAN:** Right. I wanted to bring in John just for a second and ask, "What is the perception of juries – and it can change – when you have the so-called little person against the big corporation?"

**JOHN YSLAS:** When you're representing a big company, it's important to actually be liked. I guess what I'm telling you, Jack, is that my feeling is, when I walk in as a trial lawyer – and really, I started and made my bones in a small firm trying cases right away out of law school – but it was important that the jury like you and feel like you're the face of a fair company.

**JACK FRIEDMAN:** You, the lawyer?

**JOHN YSLAS:** Me, the lawyer, and you have a representative there, too, so you need to have folks prepared in that manner. I'll give you a quick anecdote about what I mean. I tried a case many years ago with a co-defendant, and we felt like we were really winning this case. It was a 14-plaintiff trial, about five weeks long, and I could *feel* that the jury didn't like how aggressive the lawyer representing the co-defendant was being with some of the plaintiffs who were lower wage earners. I felt like it wasn't necessary, that kind of aggressiveness. Or if we were going to go into this space, we could be a lot more, "respectful" is the word I used. To make a long story short, after trial, three of



the jurors stayed behind. Even though we prevailed, they refused to talk to the other lawyer that I prevailed with.

He is a great lawyer, just doing his job, and my observation does not even remotely reflect anything disparaging about him. But what I'm trying to underscore is that it's important, to me as a trial lawyer, that you be yourself in the courtroom; that's actually true in life. But when you present, you have to remember, you're not just presenting black and white issues and bullet points; you're talking to people. People have a disposition, sometimes, to think of some companies as this big faceless company.

It's important that, as a trial attorney, you present and you understand these are real people. My clients are really decent people, and I'm a decent person. As a trial lawyer, I've found that's something that's really evolved over time. The years have gone by; it's something I really try to slow down in trial, collect myself and remember I'm presenting not just facts, but I'm presenting the face of the company and who we are and that we're good people.

**JACK FRIEDMAN:** Jessica, you were a lead attorney in the executive employment-related case with Kleiner Perkins, the

venture capital firm; where a senior woman felt that she had not been treated properly. Could you tell us, besides the fact that one of the parties is very famous, any comments about the significance of the case and what it means for other companies?

**JESSICA PERRY:** That case was an interesting convergence of events, in that it was, in a lot of ways, the right issue at the right time; it just happened to be the wrong case and the wrong defendant. For those of you who don't know, Jack is talking about the *Pao v. Kleiner Perkins* gender discrimination and retaliation claims based on a failure to promote.

It shined a very bright light on an important issue, and people are talking about the issues, so in a lot of ways that is positive. Certainly, we've seen more in the media about the issues and I think more women will bring claims. It is challenging though, because certainly in the Pao case, and others, the evidence isn't there and doesn't support the allegations being made. So there will certainly be more litigation in this space, it will just be harder to figure out which claims have merit to them.

The case also showed how interested the tech media is in venture capital and in technology in general. The press and the media attention that the case received was really quite remarkable for an employment case; I can't think of a time since probably the *Weeks v. Baker & McKenzie* case that there's been so much attention on an employment case. That was interesting as well, and it showed that people are interested in hearing about these issues. And when you have salacious details, whether they're true or not, people pay more attention, especially in an industry that people don't know that much about.

**JACK FRIEDMAN:** Thank you. Our next speaker is Robyn Crowther of Caldwell Leslie & Proctor.

**ROBYN CROWTHER:** Good morning. I consider myself to be part of a dying breed of general commercial litigators. I



don't have an expertise, and since we are honoring General Counsel – and a wonderful General Counsel today – I wanted to think about something that might be interesting to people across various practice areas. Because if I talked about what I do on a daily basis, you'd all be asleep already. Unfortunately, I have colleagues who will engage me on that, and I'll try to stay away from the nitty-gritty today.

I've had the opportunity to work with Gap and its legal department for more than 10 years, and to really appreciate what a wonderful General Counsel and legal department can do. I was embarrassingly senior in my career before I realized that in-house lawyers have clients, and sometimes those clients are far more difficult than who I consider to be my clients. To watch a legal department that navigates that area proficiently has been a real pleasure.

The General Counsel's job is incredibly complex. I was thinking, while Michelle was talking today, of all the different areas in which she participates: diversity, employment, international, corporate. It's incredibly complex. As a general litigator, the truth is that if the General Counsel is familiar with the day-to-day of my case, it's usually not a good thing! [LAUGHTER] *Maybe* it means something is going really, really well – though not usually. Usually, something has gone really, really badly, either before the case

came to me or in the process of us handling it – which is the worst of all possible worlds and has not happened, ever.

But the truth is that the General Counsel, even for a litigator, touches on what I do every single day, because, as John was just speaking, who the company is, is critical in litigation. The General Counsel's office is critical in defining who the company is in a couple of ways. As we heard in Michelle's talk, this is a company who knows who they are and knows what their values are, in a "big picture" sense. A large company also needs to know who they are, and the litigation strategy. I recently heard a report of a General Counsel who decided that when their company was sued by non-practicing entities for patent infringement, that they were going to litigate the case to its finality, in court.

It was either going to be a motion ruling or a trial, and that was going to be how they decided the case. They wanted the deterrent of that notoriety that this was not a company that you could extract a quick settlement from; that they would invest up front. That was a company who wanted to be known as a litigant.

On the other hand, the Director of Outside Litigation for a major studio once told a colleague of mine that if a case of theirs went to trial, he thought he had failed in doing his job. His job was to make sure, as Jessica said, that you never end up in the courtroom; that you don't have notoriety. The General Counsel is critical in deciding: are we somebody that wants people to know that we litigate, or are we somebody that wants that to be quiet? That strategy dictates a lot of what we do as litigators, and it happens at a very high level.

In addition, the General Counsel's office and the legal department are involved in defining who is going to be the face of the company in the courtroom as that matter is litigated. Sometimes you have choices about

that. There can be a deposition where you get to elect who your corporate representative is going to be.

Often, far too late in the game, companies might think about, "If this case goes to trial, who will be the face of the company that's at counsel table?" Often that person needs to testify. It can be very difficult to find the right person for those two things. It needs to be the person who has the time to sit in a courtroom two weeks, three weeks, four weeks, six months. It needs – if the company is going to have the same person representing them day after day, it has to be somebody who has time.

On the flip side, it often needs to be someone who can take responsibility credibly for the decisions that the company has made. Rarely are those people the ones who have two weeks, four weeks, six months to sit in a courtroom nine to five every day and be the face of the company.

A couple of years ago, we tried a case for Old Navy where we had to find a corporate representative who was going to participate with us; and the truth is that the people who were personally involved in the decisions that were made, many of them had left. The plaintiff's counsel used, in his opening statement, a placard that had the names of the people who were no longer with the company. I'm not sure what they were supposed to have done by leaving the company, but it was definitely nefarious! [LAUGHTER] However, because the Gap Legal Department knew their business unit, they helped us find someone who had the gravitas, the experience, the title and the commitment to be able to say, "I take responsibility for what was done here." As senior as she was, she put in a tremendous amount of time to sit with us in court, to prepare for her testimony. So we really had the best of both worlds. By the end of the trial, those missing employees were not mentioned in the plaintiff's closing argument. The placard sat there conspicuously off to the side, and plaintiff's counsel never

referenced it. Although the plaintiff had been asking for millions and millions of dollars in damages and for injunction, the jury awarded no damages, and the judge awarded no injunction. In large part, they told us, because they didn't feel that Gap had done anything wrong. That was directly related to the fact that we had a credible corporate representative as part of our team. That doesn't happen if your in-house legal department doesn't know your business unit.

That's when you get to pick who your witnesses are, if only. A lot of times, the facts come to us and those fact witnesses have been determined long ago. They are technical people who don't communicate with the outside world for a living; they are the CEO of an entrepreneurial company who thinks this entire lawsuit is a huge waste of time and cannot understand why they have to answer questions about it over and over and over. They are former employees who left on bad terms, and frankly have no love for the company that they're representing.

In the written materials, I've provided an article from a jury consultant named David Parrott who we work with, about preparing corporate witnesses, that has really valuable information. He tells a story on one of my clients. I had a case where I was representing a t-shirt company that made the t-shirts with the Obama "HOPE" poster on it. The company was roped into copyright litigation over the photograph that inspired that image. It was transformed into art by the artist Shepard Fairey and then marketed on and given away on t-shirts that my client had created.

A big, high-profile case; the Associated Press was the plaintiff; and we did some jury research. The case was pending in the Southern District of New York. My clients were based in Orange County, California. One of the arguments that was being raised was whether they had done enough diligence to be sufficiently aware of the various parties who owned rights or potentially owned rights in this photograph. Their hard work was directly on the table.



I love the CEO. He's a wonderful man; they have a wonderful company; they treat their employees well; they do everything right. He has a background in sales, so he is a great communicator. I was really excited about how the jurors were going to react to him. He didn't have a General Counsel, so I had to be the one to deliver the news that the mock jurors in the Southern District of New York thought that he was too tanned to be doing any work. [LAUGHTER]

Our consultant said, "Could you be a little less tanned by the time of our trial," which was going to be in March, and he said, "I'm Mexican." [LAUGHTER] "So, no, not really!"

We ended up settling that case about a week before trial, so we never had to appear, and he was allowed to then go outside and possibly get a little more tanned! But that was not something that we could choose; it was not something that we could control. The only thing we could do was try and prepare around it. If we had an in-house legal department, who might have been able to help us identify somebody else who could be the face of the company or other fact witnesses, it would have been a tremendous help.

I'm thrilled to have the opportunity to honor Michelle today. It has been a pleasure to spend more than a decade working with a good company that's trying to do the right thing and has great lawyers who are giving us

advice along the way. As you are going forward and considering disputes in the future, just remember, you need to define who your company is, and how that's going to play.

**JACK FRIEDMAN:** Thank you. You gave us some fascinating stories! Our next speaker is Mark Krotoski of Morgan Lewis & Bockius.

**MARK KROTOSKI:** Thank you very much. First, I wanted to also join with others in congratulating Michelle for her recognition today. Sixteen years at the Gap and also nine years as a global General Counsel, and all the leadership that she's brought to that position.

I'm going to be talking about cybersecurity, and that's something that's on the minds of a lot of people. My perspective comes from my experience as a Computer Hacking and Intellectual Property (CHIP) prosecutor here in Silicon Valley, and then eventually in Washington, D.C., as National Coordinator for the CHIP Program at DOJ dealing with a host of cybersecurity issues. When I go out and meet with various companies, I see that many companies are taking a lot of steps to promote and protect cybersecurity. However, the consequences and the costs of any weak link can be very significant. For example, a company may spend a lot of money on Information Technology (IT), which may be warranted, but one act of inadvertence by an employee — leaving a laptop at an airport, for example — can undermine all those efforts and subject the company to very significant costs and consequences.

I want to highlight some significant weak links that we see on a recurring basis that General Counsels and companies can consider.

The first, for me, is that any cybersecurity must be holistic, integrated and tailored. Those three elements are very important. I'll start with tailoring, because all information is different. With cybersecurity, we're talking about information security. The security should be designed around



the particular information that is being protected and the risks associated with the information. You would protect a trade secret differently than you might safeguard protected health information (PHI), or Payment Card Industry (PCI) information. It really takes a tailored approach for meaningful cybersecurity, designed around the particular information and risks.

Effective cybersecurity also has to be holistic, in that it has to consider the complete cybersecurity perspective for the company. The technological security is reinforced by policies and training. An isolated approach or partial solution will not work. Some vendors and others will say “almost one size fits all” and “if you follow these particular best practices, you will be reasonable in your security.” That’s not necessarily so.

Meaningful cybersecurity also has to be integrated, which means that the company has to make sure that its policies and training are in line with their technology issues and other security measures. For example, if you have strong technological security, and can see that employees are emailing or sending data outside the company, you should also have policies and training that back that up.

The overall objective is to establish a culture of cybersecurity. Now, we heard John Yslas talk about the different layers, how

sometimes it starts at the top and it may not filter all the way down within the company. Ideally, a company with strong cybersecurity will have sensitivity to those issues at every layer, so that if someone at the top or on the board sees a cyber threat or risk, they can immediately address it. And someone who is a new employee may see a cyber issue, like an unencrypted laptop, and take steps and know what to do to address that situation.

Another weak link is third-party data transfers. Many business models deal with the collection of data that is shared. What we see in a lot of these cases is that once the information is shared, there may not be sufficient protections in place. This vulnerability came to light just a couple of months ago, when two enforcement actions were brought by the Securities and Exchange Commission and also the Department of Justice. In these cases, individuals abroad were able to hack and obtain inside, non-public information and trade on it and profit on these trades. The vulnerability occurred not with the company that originally possessed the sensitive non-public information, but with the newswires the companies had transferred this data to, where the hacking occurred. The companies had taken steps with contractual and other protections to protect the transfer of data. But these cases highlighted that whatever information you have, it’s got to be protected at each step of the way.

Another weak link that can occur in cybersecurity deals is ensuring that you have an attorney-client protected investigation. We just heard Jessica Perry mention privileged audits. The approach is similar for cyber investigations. The attorney-client privilege is very important in cybersecurity because when these events occur, it often will be many weeks, if not months, before the company can fully understand what was the cause of that attack, what was the scope of the breach. Many of the hackers who commit a cybercrime are very good and adept at wiping code or concealing their conduct through proxies or things like that, so you may not fully comprehend who is behind it.

An attorney-client privilege-protected investigation will protect the company, allow for a full investigation, and allow for that candid and frank advice that the company will need to address many of those issues.

Now what’s important here is often, when there’s a cyber-attack, company counsel, in engaging with outside counsel, will need to bring in other vendors – like forensic specialists, such as a malware specialist. It’s important that the privilege cover the forensic investigation. Whatever the forensic specialists are doing is at the direction of counsel, so that the attorney-client privilege covers that part of the investigation, as well. The privilege allows the company to gather all the relevant facts to obtain legal guidance and advice.

Another weak link can deal with untested incident response plans. Now, many companies are aware of the importance and role of an incident response plan. But ask yourself, “When was the last time your plan was tested?” The testing becomes very important, because almost every time a company tests the plan, the company will learn something new.

We had a recent example where a company told us that they tested their plan. The company had everything in place, and the managers thought they had a good plan and they had identified the best team to respond. It turns out in testing the incident response plan, they didn’t have the right phone numbers for a number of key individuals. They had the right individuals, but some of the numbers had changed since the plan had been drafted. In that emergency moment, the company may not have been able to reach the top people that they needed to reach. The regular testing of the plan becomes important, as well.

Protecting unencrypted information seems somewhat obvious as another weak link, but many of the cases – particularly in the protected health information or health area – time and again involve a laptop that had health information that was not encrypted

and it's left someplace inadvertently. The Department of Health & Human Services (HHS) Office for Civil Rights (OCR) has said how encryption can provide an effective defense for information stored on laptops. The California Attorney General also has said, in the 2014 California Data Breach report, how this one step could have saved many companies from the cost and consequences of dealing with the breach incident that occurred.

I'll mention one last cybersecurity weak link, and that is spear phishing. Again, it seems somewhat obvious, but there is a business email compromise scam that's been going on over the last couple of years – resulting in hundreds of millions of dollars being lost. The cyber-scam is very targeted. It typically involves an email message to a subordinate which appears to be from someone with authority – either the CEO or CFO – who is directing that certain funds be transferred, or certain financial steps be taken. It's so important that the Financial Services Information Sharing and Analysis Center issued an alert in June, because the compromise scam is working. Again, the email message has an aura of legitimacy since it appears to be from someone who would make this type of request, and this is something to which I should be responding. Based on a recent FBI report, there are hundreds of millions of dollars that have been lost from this spear phishing scheme.

Many of these malware or other exploits that are placed on company networks are the result of spear phishing involving an attachment an individual should not have clicked on or opened up, or there's a link that should not have been accessed. Training in this area can be very important.

**JACK FRIEDMAN:** Tell people what spear phishing is, for those who aren't familiar.

**MARK KROTOSKI:** Sure. Spam involves untargeted emails that will blast out to millions of emails with the hopes that a few individuals might open them, and the

access by a few will be profitable. Spear phishing, instead, is email tailored and targeted to a specific individual. It might be based on some reconnaissance or intelligence from social media – for example, based on someone's background discovered on Linked In – and using this background information to target this particular attack to lull the recipient into believing that the email is legitimate and they might open the attachment or link. In many instances, there can be malware that is attached to these messages which can have significant security consequences.

Reminding employees and conducting training to be alert to spear phishing attacks is important. Some companies have gone so far as to engage other vendors to send phony spear phishing emails that have these types of messages, and then if the links or attachments are opened, they'll use it as a reminder to the employee that this was a fake message; you shouldn't have opened it. If it were real, it could have been much more significant in impacting company security.

It's commendable to see the attention on cybersecurity, but it is a reminder that it really takes just one weak link, and how important it is to take a holistic, tailored, and integrated approach to promote cybersecurity within the organization.

**JACK FRIEDMAN:** Thank you very much. Our next speaker is Cristina Shea of Reed Smith.

**CRISTINA SHEA:** Thank you. Good morning. I also would like to congratulate Michelle Bank and Gap Inc. for the recognition that they are receiving today. I would like to thank my fellow panelists; it's an honor to be up here with all of you.

I'm going to spend the next few minutes talking about cyber policies and cyber insurance. As Mark said, cyber policies are just one aspect of cybersecurity that a company should look at when they're looking at their overall assessment of cybersecurity.



The questions that we most frequently hear when we're asked about cyber insurance is "Does my company need it; if yes, what is the 'it' that the company needs? What do I need to be aware of when placing coverage; and does any of my existing insurance cover these types of risks?" For today's purposes, I'm just going to focus on number three, "What do I need to be aware of when I'm placing cyber insurance?"

Now, the first one is just a theme that runs through the other four, but it really is the most important. It's "know what you're buying." It sounds obvious; it sounds almost not worth noting; but I can't tell you how many times we have looked at clients' policies, only to find that the policy doesn't cover their specific risk. You start thinking, and you see it time and again, "Why is this happening?" It's happening for a couple of reasons.

As Mark said, cyber risks and cyber vulnerabilities for companies are very varied. The risks for Visa are going to be different than the cyber risks for Blue Cross. Those will be different than the cyber risks for Gap. You need to make sure that your policies are covering your specific risks. The good thing about that is that these are very modular policies,

so you can pull in aspects of coverage that are particular to you and your company, and take out others that you don't need.

Another reason I think this is happening is that the policies are very technical, so you need to read the fine print in the policies, because this is where the rubber is really going to meet the road. You will read your insuring agreement, and that's going to be your coverage brand. But you also need to read the definitions and the endorsements and the exclusions, because those are the areas that will chip away at your coverage. You want to make sure that your definitions aren't so narrow that you are excluding risks that should be covered, and you want to make sure that your exclusions aren't so broad that you're eviscerating the coverage that you paid for. So you really need to know what your policy offers and what it has for you.

Next, is employee negligence covered? Now, most of these policies do a very good job of covering hacking and criminal or malicious attacks, and companies are getting very good at protecting themselves from these types of external attacks. Where companies are less adept lately is protecting themselves from employee negligence. Fifty-three percent of cyber breaches are caused by human error. It's somebody leaving a laptop in an airport that's not password-protected; it's losing a thumb drive that's not encrypted; it's an employee opening an email that has malware on it that makes its way into your systems.

You don't want to have an exclusion in your policy that says — and I've seen these exclusions — “We do not cover loss caused by employees.” That is absolutely an exclusion that you can't have.

Next are retroactive and extended reporting dates. Typically, a cyber policy is written on a claims-made basis, and that means that the discovery of the loss and the resulting claim have to occur within the policy period. There are some policies that require that the actual



breach and the claim result in the same policy period. Retroactive dates and extended reporting dates serve to extend the outside and the forward edges of your policy period.

Let's say, for example, you buy a policy, and three months into it, you realize that you have a breach. You investigate the breach and you realize that the actual breach happened six months before you bought the policy. If you haven't negotiated retroactive dates, chances are that loss won't be covered. We know that on average, from the time that a system has been penetrated until that breach is discovered: 228 days. That's eight months that somebody has been in your system until you figure it out. Ideally, you want to have your policy covered at least by eight months on the front end and the back end.

Personally, I like to negotiate for 12 months, because it gives you a little buffer time, but you do want to have retroactive and extended reporting dates on your policy. This is largely to cover this eight-month period.

Next to consider is the geographical limitations to coverage. Most of these policies have limitations on how far their coverage will reach, and typically it's within the United States or within a certain geographical distance of the company's offices. We know that most data now is not stored within the

company's walls; it's stored on servers that are overseas; it's on employees' computers and mobile devices, and those employees are travelling all over the world; and it's stored on the cloud servers. You want to be sure that you don't have any limitations on your geographical range when it comes to your policy. Where your company stores its data is a very key piece of the analysis that you need to consider.

Last is to understand your policy limits and your policy sub-limits. In the United States, on average, a data breach costs \$6.5 million per company. If you break it down further, it's about \$217 per compromised record. To put that into context, let's say you're a relatively small company that has 25,000 records. You do the math and you say, 25,000 times \$217; I need a \$5 million policy. You have a breach, and your 20,000 records have been compromised. Your \$5 million policy will cover you. But let's also say that due to a state statute, you're obligated to pay a \$1,000 penalty to every person whose records were hacked; those are your damages. That's a \$25 million loss that you're looking at all of a sudden, so your \$5 million policy isn't going to do you any good. You need to really consider whether your policy has fully covered you for all of your risks.

With respect to sub-limits: sub-limits are an insurance company's way of limiting its own exposure in an insurance policy. Sub-limits are a lower limit, a limit that's lower than the overall limits of your policy. Typically in cyber policies, they are going to give you a lower limit for what really are the most expensive parts of a data breach. You will have sub-limits for crisis management expenses, for breach notification costs, regulatory investigations, and regulatory fines. Those are the really expensive parts of a data breach. You need to make sure that even though your sub-limits are going to be there in a policy, that they are high enough to cover whatever your exposures as a company might be. I can tell you that you will always have some limits, and they're always going to be inadequate, so you need to negotiate for higher sub-limits.



That's it for these five. This is an artificial list of five, in the sense that there are 10 or 20 other things that we could talk about that are also critical to know, but for purposes of today, these are the top five that came to mind. Thank you.

**JACK FRIEDMAN:** Thank you very much. I'm going to open this up to the panel generally and then take some questions from the audience with interaction among the panelists. On the cyber area, Michelle, what are examples of what law departments and their advisors are doing to keep up with all the technological change affecting business operations?

**MICHELLE BANKS:** There are a couple of trends. There's a trend towards hiring attorneys who have privacy and data security as an expertise. There's a trend towards ensuring that you have better encryption and other security practices. There is a trend towards internal auditors getting very involved in this area, as the panelists mentioned, doing privileged audits and, if necessary, investigations. There's a trend for boards spending more time understanding this area, and in some companies, even recruiting board members who have more technology or security expertise.

So, there are trends within the companies and trends within the legal departments and trends within the boardrooms, all just essentially bringing more focus and heightened awareness and a higher level of expertise.

The last thing I would say is it's become more and more common for third-party advisors to step into the boardroom and give expertise in the area of data security, because it is an area where a number of directors don't feel that they have the full expertise that might be needed to ensure that they are fulfilling their fiduciary duties and their obligations to ensure that the company has an effective compliance program. It's a complicated area, and requires new knowledge and constantly changing knowledge.

**JACK FRIEDMAN:** Examples of the largest publicized cases of hacking are Sony, Target, Home Depot, banks, health care companies, and so forth. How big have the damages been for these cases where companies got mega-hacked?

**MARK KROTOSKI:** Based on some recent published reports with regard to Target, the loss was around a couple hundred million dollars. Their cyber insurance coverage offset some of the costs. The cyber insurance does not cover everything, but it covered some of the losses.

In assessing loss, the key issue is demonstrating damages. For the individual whose data was breached, can they show that they were harmed? A number of cases actually here in the Northern District of California, have been wrestling with that issue. Then on November 2, 2015, the U.S. Supreme Court in the *Spokeo, Inc. vs. Robins* case is going to be looking at standing with regard to what sort of harm must be shown in order to demonstrate damages.

Now, what's interesting in some of the cases you mentioned, if you look at the data in each one of them, they're all a little bit different in terms of determining damages. In some instances, credit card data was at

issue. In Sony Pictures, it was not credit card data – it was motion pictures and intellectual property, it was personal emails, it was other company information that they did not want to be shared. If you take the different types of data, you might be able to focus on what is the harm in a particular breach. A different loss would result from cyber espionage to steal trade secrets. But right now, the courts are focusing on what is the harm from the breach, and then what are any damages that can be compensated. In many instances, the companies can act quickly to mitigate the harm, and you'll see in the SEC disclosures when they report that there has been a breach, that they'll say things like, "We have this data breach under investigation. At this point, we are not aware of any of the data being used by anyone." In that instance, it may be hard for someone to be show harm for data that was not exfiltrated or used.

**JACK FRIEDMAN:** To what extent do, for example, retailers who have a data breach, find that they lose revenue because people are afraid to give their credit cards?

**MARK KROTOSKI:** The reputational harm can be one of the most significant costs resulting from any data breach. Cristina pointed out that data breach costs are about \$6.5 million or so, in general, for a company. That is just a rough average. But there are other significant costs that may result, like the reputational harm that you're alluding to, and that's one of the most important things that a company must act promptly to mitigate. For example, I've talked to call centers that are in the business of trying to staff and assist a company where there's been a data breach. They've told me that companies are asking them, "Can you staff up and respond to a data breach within 24 hours?" For example, if one of their customers learns that there's a breach through either the news or on a blog, they're immediately going to feel vulnerable, and they're going to want to ask someone, "Is my data at jeopardy?" The ability for a company to staff a call center

to respond to those types of questions is important in terms of maintaining customer and business relationships. In many instances, a company will post “frequently asked questions” about the data breach incident, so that their customers have a place to go for confident and reliable information.

**JACK FRIEDMAN:** The *New York Times* did an article a few months ago to show how impossible it is for companies to totally defend themselves and protect their data. They picked one example — right on the front page of the *New York Times* — and said that hackers had reached the main computer of an oil company through a Chinese restaurant down the street which employees called for deliveries.

I want to ask the panel about the relationship between outside law firm and in-house counsel. How have those relationships and involvement with boards changed over the time you’ve been an attorney? Maybe start with Michelle.

**MICHELLE BANKS:** There is more openness in boardrooms to bringing in external advisors on technical subjects such as data security. There is a push for diversity in boardrooms that’s relatively new and relatively pervasive. You’re seeing more diversified boards at larger companies, at least.

The other thing is, there is now an expectation of good governance that has become very foundational. It used to be notable if you were more transparent or had positive governance practices; today, that’s just a foundational expectation.

**JACK FRIEDMAN:** I’d like to open it up to questions from the audience. Yes, sir?

**[AUDIENCE MEMBER]:** I’m Dave Burleigh, Cloud CFO for Startups. One of the problems we have in the startup industry is startups trying to hire each other’s employees. The big problem that we’re having is a lot of employees are intimidated, that if they work for a large company and want to go to



a small company, that company will be hit with a SLAPP [strategic lawsuit against public participation] suit, to prevent them from leaving, in a non-compete. I was wondering if you have any strategies or ideas for how to encourage people to do this in an ethical and legal way.

**JOHN YSLAS:** If I understand the question correctly, it’s about movement in the California workforce. I’ll start with a basic principle. Obviously, I’m in these situations typically defending the bigger companies. I want to point out that non-competition agreements in California are generally unenforceable. The key is when an employee moves — and this is really from my perspective, too — is that what they can’t do is misappropriate trade secrets. You can’t prevent an employee from leaving. There’s got to be a freedom of movement in California. But you have to be careful, as an employee — and actually, as a new employer — that you don’t have somebody taking something that is a trade secret (and I could give 20 minutes on what that is); customer lists or something that’s arguably a trade secret; or some piece of technology or innovation that’s protected. The employee has to be careful of that, and frankly, the new employer, as a best practice, has to have

the new employee sign an agreement that represents that they’re not presently taking anything with them from the old job. Sure, they have a skill set that has probably blossomed wherever they’ve come from — but they’re not taking a piece of information that’s protected in some way to the new job. That is relatively the pathway that gets taken.

**JACK FRIEDMAN:** How much can you have in your memory that you’re allowed to take with you?

**JOHN YSLAS:** Jack, I’m going to sound like a lawyer here for a second. “It depends.” Let me try to distill it in something that I think is straightforward.

Sure, there’s going to be know-how. Let me back up for a second. In terms of customers and customer lists, there actually is an argument that the identity of customers, themselves, can be trade secrets. I will tell you something frankly, even from a big company perspective — that’s a hard thing to prove, the identity of a customer. It’s really the issue of when you’re using a carefully crafted customer list that has been protected internally — maybe password protected and only a certain amount of people know it — the issue of know-how, that’s a very difficult fact-specific area. Again, it really comes down to what you know and how you’re using it, specifically, and not taking the specific technology. We’re going to learn and grow as people at companies, and so it’s difficult to say somebody has developed know-how unless it’s in a very specific area that is protected. There used to be, in California, something called the “inevitable disclosure doctrine” (it’s been rejected in California), which is to say, you’re going to go to the competitor and it’s just inevitable that you’re going to disclose it.

What I’m really saying, Jack, is that it depends, but it’s the general know-how of doing something is something that’s difficult to argue, and it can be successfully argued that the company is protected. It really comes down to something that is more identifiable,

is protected in a very specific way, and you're not using that specific protected piece of information in your new employment.

**JACK FRIEDMAN:** Any questions for Michelle?

**[AUDIENCE MEMBER:]** In the 90 countries that you operate, is there a difference between the companies in the public eye regarding diversity? Is such a difference impacting how you operate in your general strategy?

**MICHELLE BANKS:** Yes. That's a very good question. We have looked at, but have never perfected, a global standard for diversity. I think it's impossible. So we have to have different focuses in different countries. For example, in the United States, we have a very active employee resource group that is in support of LGBT employees. To my knowledge, that doesn't operate across all of our countries; whereas, women's empowerment is something that's pretty active across all of our countries. Then within the United States, of course, there is a specific focus on representation of different racial and ethnic minority groups that wouldn't at all be appropriate or applicable in various countries.

We have a desire to be diverse and inclusive globally, but the definition of what diversity looks like would be different in each area. We don't have that many things that we would try to say, "this is the definition of 'diversity' across." The only thing I can think of off the top of my head is women's representation and women's equality and education.

I also think that we at Gap Inc. have tried to be very inclusive with our definition of diversity. It's on our website, and if you read it, it basically says, "We embrace diversity with a very kitchen sink approach." It's all forms of diversity. For a global corporation, that's important, because what diversity looks like needs to be different in different workplaces and in different countries, to your point.

“Very significantly, we pay equally for the same job, men and women, whether you are in the U.S., Tokyo, Shanghai, London – wherever you are in the world, within our company.”

– Michelle Banks

**JACK FRIEDMAN:** Michelle, what is the Bangladesh Initiative that you're involved in?

**MICHELLE BANKS:** In addition to serving as Global General Counsel of Gap Inc. and the Board Chair for Minority Corporate Counsel Association, I'm currently leading a non-profit organization that Gap Inc. formed two and a half years ago. It's called the Alliance for Bangladesh Worker Safety. It was formed in the aftermath of the Rana Plaza and various fire safety challenges that resulted in loss of life in Bangladesh. Bangladesh is an important apparel retail country for sourcing, for Gap Inc. and for many other global retailers. We're up to 27 companies have joined together and created an organization that is investing in improving the safety of the garment factories in Bangladesh. It's a challenge. It's a very developing country, with all of the challenges that you would expect to find, from labor issues to social issues to physical issues. It's an important project that we have invested a lot of resources into, but it's a great example of collaboration among not only Americans, but Canadian and other global retailers, as well, to try to ensure that we are working to improve our supply chains, and that we have knowledge of what's happening in the factories no matter how far away they are.

**JACK FRIEDMAN:** Is there an increasing trend for American companies to have suppliers with humane employment policies?

**MICHELLE BANKS:** Yes, of course. There is a legal trend towards holding the companies responsible for their supply chains. It's a trend not just in the U.S. – and of course, California is leading the way on supply chain transparency – but there's

also a trend, now, in Europe, and the U.K. has adopted the Modern Slavery Act. There is going to be more and more pressure on corporations to have knowledge about their supply chains, and to be working diligently through having codes of conduct and through engaging in transparent operations to what's actually happening, whether it's in the U.S. – and there are issues in the U.S., as well – or in another country. There's definitely both a reputational trend and a legal trend towards holding corporations more and more responsible for the activities in their supply chains, from the safety perspective, from the social perspective.

**JACK FRIEDMAN:** Other questions?

**[AUDIENCE MEMBER:]** Robert White with California Minority Counsel Program. Michelle, you talked about trying to help your law firms with accountability for diversity in their own practices. Can you tell us a little bit more about what things you do to encourage or support them in that?

**MICHELLE BANKS:** I've been wanting to meet you. Nice to meet you! Congratulations on your new job!

Emily's sitting right here – you should meet her. I'm referring to Emily Sullivan, who's an Associate General Counsel in my department, who leads a very important committee within the legal team, which is the Law Firm Diversity Committee. We have a group of approximately six people who put a lot of energy into thinking about our strategy to improve the external diversity of our law firms. They do lots of different things, but one of the most important things that they do is they engage with those firms. We do a survey every year; it



is very robust and comprehensive. We ask a lot of hard questions – some data-driven, about the demographics of the firm, but a lot more qualitative, about what are you really doing to change your firm and to change the profession and to increase the diversity and inclusion.

Some of the enhancements that we've made over the last few years is we just keep asking harder and harder questions, so it's more and more difficult to look good. We've also focused on things that really matter, like the diversity on our account, not just the diversity in the law firm. The diversity at the senior-most level – do you have a woman on your compensation committee? Is she sitting there in a room of 10 people and she's the only diverse person in the room?

Then we've tried to really up our game and ask more and more challenging questions. What we do at the end is we give a report back to the firms; I actually write a letter with the help of Emily and her team, where I say to the firms, "This is what we're seeing. Firms are doing better on a, b, c, but I am very troubled by x, y, z." This year, since a lot of my firms are in the audience – you're giving me a platform to preview that letter – we intend to say that we are tired of seeing written glowing descriptions about all the good diversity initiatives that you have in your firm but then the data does not support them. This year, we are going to ask for our qualitative question, "What is the one program that has had

the most impact, and where is your data to support it?" So everyone's now on notice! [LAUGHTER]

**JACK FRIEDMAN:** What are examples of other initiatives on diversity by corporate counsel?

**JOHN YSLAS:** In particular, I'm going to speak as a diverse partner in a global law firm, and also as a proud board of directors' member of the California Minority Counsel Program. I have a lot of visibility to these issues, and certainly seeing from the companies that really mean it, in terms of what they're doing or they're asking for. What I'm seeing is a trend – and I think you started to touch upon it, Jack – of asking for actual data, and analyzing actual data. Certainly what the workforce looks like is the first question. The second question is, who is actually working on our matters? We had people at the pitch that were a diverse team, but we want to actually analyze the hours to make sure that we're seeing the actual work conducted by a diverse pool of candidates.

I'm also seeing a real movement to find a connection between diverse lawyers and companies that are seeking to increase their pool of potential candidates to do that kind of work. An example of that is the board of directors that I sit on, the California Minority Counsel Program, something called Corporate Connections, where we bring people together specifically

to interview in a room. Companies like the Gap and other lawyers to meet with them, so that we're facilitating a dialogue between those companies. Those are the kinds of things that are important.

It is also very important to set goals. I'm very proud that our law firm has set a goal of 30% women partners by the year 2020. It's important you set those goals – and on leadership positions in our firm – because you need to see change.

Another major thing that is sometimes overlooked is the issue of retention. That's a big one. If you really want to be a diverse law firm, you need to retain a diversity of people. That takes the form of affinity groups, of support groups, of mentorship, an atmosphere of inclusion, and where you're not ignoring somebody that might feel excluded; that you're proactive in your approach internally. That applies to all companies.

**MICHELLE BANKS:** One other thing I'll mention. When he was at Wal-Mart, Joseph West, the current CEO of MCCA, started an initiative where Wal-Mart very publicly said that it would select its relationship partner for its firms. Many of us have law firms that we have formal relationships with. Before Wal-Mart very publicly started saying that they were not just going to be part of the conversation and they were not just going to insist on succession planning, but they were actually going to designate the relationship partner. We all

know that that tends to lead to economic results for that partner. They were going to use diversity as a filter in selecting those relationship partners, none of us did it.

That has become more mainstream now, as a result of the world's largest company doing it. They really have been trendsetters, and I applaud them for the work that they have done.

**[AUDIENCE MEMBER:]** I have a question. You mentioned that you want to look at who's doing what work. Michelle, do you look at the litigation team and see who's actually in court, fighting the fights, and look for it from the viewpoint of diversity?

**MICHELLE BANKS:** Yes, we do, which is why there's a lot of women sitting up here! Yes, we do. I can't say I personally do it, but my law firm's diversity team, as well as my General Counsel and Deputy General Counsel and Associate General Counsel, who work on my team, are all responsible for ensuring that our law firm diversity applies in all aspects of the teams that work for us, including at trial.

Frankly, that's just good business. When you have as many employment cases as I have, you want every form of diversity in your trial lawyer.

**[AUDIENCE MEMBER:]** That includes color?

**MICHELLE BANKS:** Yes, absolutely.

**JACK FRIEDMAN:** We will take two last questions. Go ahead, ma'am.

**[AUDIENCE MEMBER:]** I've heard that the Bar Association in San Francisco is going to come out with new timetables and data and specifics, and from a little inside source, we're going to see a significant decline, particularly in the area of underrepresented minorities. I wanted to ask, do you think if firms actually experience the consequences of not meeting goals

“Across our brands and businesses, Gap Inc. maintains a commitment to integrity and inclusion, and we have zero tolerance for discrimination of any kind. We firmly believe that corporations should contribute to the communities in which they do business.”  
– Michelle Banks

and objectives, as opposed to just collecting the data – consequences such as being terminated – would that have an effect on increasing the percentages in terms of outside counsel as it relates to underrepresented minorities and in areas where we're seeing a significant decline in this country?

**JOHN YSLAS:** The answer is unequivocally “yes.” Diversity and equality are moral imperatives, period. The business reason for it depends on companies like the Gap that hold the key, in my mind, to effectuating that kind of change. If they demand results, people are going to react to those kinds of things.

**MICHELLE BANKS:** I should say that we have both fired firms for lack of diversity on our account, and given firms significantly more business because of their ability to provide more diversity on our account. We try to be public about that, so I'm taking this opportunity to say that out loud. I'm leading round tables for an initiative for the ABA Commission on Women, called “The Power of the Purse.” If any of you are interested, there are materials online, on the ABA website, about how General Counsel have an obligation to provide both a carrot and a stick to their law firms – if they truly want to achieve greater inclusion, they need to back it up with their business, absolutely.

**[AUDIENCE MEMBER:]** Wal-Mart's new program, Wal-Mart Ready, is where they will be selecting women and minority-owned firms that can do their work and bringing them back to Bentonville, Arkansas to spend time to learn Wal-Mart's business, to spend time with the lawyers who hire, other case managers who hire in those areas, to actually

meet the people, and be prepared to go out so that they can be ready to be engaged. That's actually something you need to see a company doing.

It brings me to my question for Michelle. You're the only GC on the panel. Regarding the use of women in minority-owned firms as alternative to big firms, how do you see that impacting the large law firms and diversity as people move out to form these high-quality firms?

**MICHELLE BANKS:** It puts pressure on law firms to become more diverse, because most very significant-sized companies, and all companies that do business related to the government are adopting programs, whether it's informally or formally, to engage with minority, women and other forms of diverse firms. It creates an incentive for majority firms to become more diverse. You now see, unfortunately, majority firms fighting over minority partners, because there's not enough of them in the pool and many of them are going off and forming alternative firms.

It's a nice problem to have as a General Counsel, because a lot of times, those firms are doing great work at more reasonable cost. I applaud the organizations out there that are promoting people to support both. It's really important to support both; I have no intention of pulling all my work one way or another. It takes a village to do the optimal legal work, and so we use minority-owned firms, we use majority firms, and we push our majority firms to be more inclusive. I really do applaud the large companies that are engaged in, for example, a new program called “Engaged Excellence” that is promoting

diversity on trial teams. I applaud organizations that are trying to support and drive more economic power into minority firms.

The bottom line is that, like all things, just talking about diversity and inclusion is not enough; we need to back it up with business. We can't just be doing this because it's morally the right thing to do; you have to be doing it because it's the right economic thing to do.

**JACK FRIEDMAN:** I want to thank the panel. We've had 800 events over 24 years. The General Counsel of a major bank told

the story that for years, he was proud of the diversity of their outside law firms — the smaller firms, particularly. A consulting firm came with statistics, and showed that they had a poor record. He said he regretted not knowing this; it is important to really know what's going on in a company.

I have one last question for Michelle. In the five minutes a month that you have free, what do you like to do?

**MICHELLE BANKS:** Since I took on Bangladesh, I don't even have five minutes. But I like to relax with a glass of wine.

**JACK FRIEDMAN:** I want to thank all of our Distinguished Panelists and our Guest of Honor for sharing their wisdom. We thank the audience, because the Roundtable is all about the audience. Thank you very much for coming.



**Robyn Crowther**  
Partner, Caldwell Leslie  
& Proctor, PC

## Caldwell Leslie

Caldwell Leslie & Proctor, PC

Robyn Crowther has a diverse civil litigation practice that includes matters in state and federal courts, institutional arbitration tribunals, and other alternative dispute resolution forums. Her practice covers a wide variety of substantive areas of the law, including entertainment and intellectual property disputes, legal malpractice claims, real estate and employment disputes, and many others.

Ms. Crowther has represented individuals, multinational corporations, municipalities, and small businesses, regularly obtaining extraordinary results for her clients. She has substantial experience in provisional and preliminary remedies, pleading attacks, and motions for summary adjudication and summary judgment.

Before joining the team at Caldwell Leslie & Proctor, Ms. Crowther was an associate in the litigation department at Gibson, Dunn & Crutcher. Prior to that, she clerked for the Honorable Gary L. Taylor on the U.S. District Court for the Central District of California.

### Representative Cases

- Defeated summary judgment brought by the Associated Press in litigation relating to Shepard Fairey's 2008 campaign poster of Barack Obama on behalf of Fairey's exclusive licensee, Obey Clothing, leading to successful resolution of dispute.
- Obtained eight-digit arbitration award representing 100% of damages, interest, fees and costs sought for multinational

company against an international conglomerate after a three-week trial.

- In two separate FINRA arbitrations, obtained awards of full rescissions of transactions plus over 98% of attorneys' fees and costs requested against E\*Trade Securities, LLC.

### Clerkship

- Law clerk to the Honorable Gary L. Taylor, United States District Court, Central District of California, 1996-1997

### Professional Achievements

- Author, "Prosecution of Trade Secret Theft on the Rise," No. 10 *The Recorder*, May 25, 2011
- Member, California State Bar; U.S. District Court, Central District of California; U.S. Court of Appeals, Ninth Circuit
- Member, American Bar Association; Los Angeles County Bar Association;
- Member, Women's Law Association of Los Angeles (WLALA); Joint Task Force on the Retention of Women in the Law; Board of Governors, 2011-2015; Co-Chair, Litigation Committee, 2011-2015.
- Member, Association of Business Trial Lawyers (ABTL); Board of Governors, 2012-2016; Co-Chair, ABTL's Court's Committee 2014-2015; Co-Chair, ABTL Lunch Program, 2015-2016
- Super Lawyer, *Law & Politics* and *Los Angeles Magazine*, 2009, 2010

## Caldwell Leslie & Proctor, PC

Caldwell Leslie & Proctor, PC is dedicated to providing our clients with strategic, creative and cost-effective representation in complex, high-stakes litigation. According to the authoritative *Chambers USA*, Caldwell Leslie is a "go-to firm" consisting of "incredibly smart attorneys who tailor their approach to the matters at hand, and are just very good at what they do."

Founded in 1988 as an intelligent alternative to large law firms, Caldwell Leslie's record of success at trial, alternative dispute resolution proceedings, and on appeal has attracted a loyal roster of clients, including Fortune 500 corporations, closely held businesses, major studios and networks, new media and emerging technology companies, cities and counties, state and local agencies, foreign companies, professionals and community groups. Indeed, prominent law firms routinely rely on Caldwell Leslie for excellent representation in high-stakes

litigation, a testament to the reputations of our attorneys, who are primarily recruited from prestigious federal clerkships.

We commit the superior talent, determination and results-oriented mindset that distinguish Caldwell Leslie from other firms to each case we take on, because when the stakes are high, nothing less will do. We believe that a small team of the right lawyers with the right strategy offers value that cannot be matched by large law firms.



**Mark Krotoski**  
Partner, Morgan Lewis  
& Bockius LLP

## Morgan Lewis

### Morgan Lewis & Bockius LLP

At Morgan Lewis, we partner with clients to understand their needs and craft powerful solutions for them. Our team encompasses more than 2,000 legal professionals, including lawyers, patent agents, employee benefits advisers, regulatory scientists, and other specialists, working together across 28 offices in North America, Europe, Asia, and the Middle East.

We offer truly comprehensive services for clients as they work across the globe. If a client has a question, we'll find the person in our network with the answer. If there's a shift in the legal landscape, we're on top of it, and our clients will be too.

Whether a client has been with us for days or decades, whether it's today's industry leader or tomorrow's game-changer, we're always responsive and always on.

During nearly 20 years as a federal prosecutor, Mark handled a variety of complex and novel investigations and high-profile cases. As the assistant chief of the National Criminal Enforcement Section in the DOJ's Antitrust Division, he oversaw international criminal antitrust cartel investigations and successfully led trial teams in prosecuting antitrust and obstruction of justice cases involving corporations and executives. He also provided guidance on electronic evidence and forensic issues.

Mark served as the national coordinator for the Computer Hacking and Intellectual Property (CHIP) Program in the DOJ's Criminal Division, which involved approximately 250 federal prosecutors specially trained to prosecute cybercrime and intellectual property enforcement cases. He successfully prosecuted and investigated virtually every type of computer intrusion, cybercrime, and criminal intellectual property violation.

As chief and deputy chief of the Criminal Division in the U.S. Attorney's Office for the Northern District of California, he supervised cases involving white collar crime, securities fraud, computer intrusion, intellectual property, organized crime, and antiterrorism. While serving as a Special Assistant Attorney General in California, Mark was counsel of record on 10 amicus briefs filed in the U.S. Supreme Court on criminal justice matters.

He is a former law clerk to Judge Procter R. Hug Jr. of the U.S. Court of Appeals for the Ninth Circuit and Chief Judge William A. Ingram of the U.S. District Court for the Northern District of California.

Mark frequently speaks at national and international conferences on topics involving criminal antitrust enforcement, cybersecurity, cybercrime, and trade secret issues, as well as the use of electronic evidence in investigations and at trial.

#### Corporate, Finance & Investment Management

We counsel a diverse clientele of Fortune 500 companies and public and privately held businesses of all sizes. We know and understand our clients' industries and business enterprise structures. Handling complex transactions well requires a multidisciplinary approach, and our corporate, finance, and investment clients are well served by the firm's breadth and depth across a wide variety of practice areas.

#### Intellectual Property

We draw on the diverse strengths of patent, trademark, and copyright litigators; transactional lawyers; and other professionals.

Our full range of services include litigation, patent preparation and prosecution, trademark and copyright registration, counseling and opinions, transactions, and due diligence. Clients range from Fortune Global 500 companies to start-ups.

#### Labor, Employment & Benefits

We help employers around the world navigate the constantly changing landscape of global, U.S., state, and local laws and regulations governing the workplace. We apply a solutions-oriented approach to give clients a competitive edge as we work with them to address the full range of workforce matters that affect their bottom line.

#### Litigation, Regulation & Investigations

In today's global economy, multidimensional corporate challenges often play out on the world stage. Clients turn to us when vital interests are at stake, looking to our trial capabilities, legal and business sophistication, broad scope of services, and ability to find solutions. With experience in most jurisdictions worldwide and a rare combination of trial capacity and practical insight, we frequently serve as trial, strategic, permitting, and coordinating counsel in large, complex matters.



## John Yslas

Partner, Norton Rose Fulbright LLP



John Yslas represents companies in a wide variety of actions, and concentrates on wage-and-hour and consumer class actions (both state and federal law), while also routinely handling single plaintiff employment and commercial litigation cases.

He has defeated class certification on numerous occasions on a variety of issues. He has also routinely defended and counseled companies on such issues as wage-and-hour compliance, unfair business practices, misappropriation of trade secrets, breach of contract, commercial contracts disputes and practices, discrimination, retaliation, harassment, wrongful termination, breach of fiduciary duty, and unlawful interference with prospective business opportunity.

John's litigation practice encompasses all aspects of litigation, including extensive pre-trial, jury trial, arbitration, and appellate experience. He has served as trial attorney in successfully defending multi-million dollar commercial and unfair business claims in trials of up to five weeks and involving up to 14 plaintiffs. He also successfully challenged a wage and hour rule promulgated by the California Department of Labor Standards and Enforcement (DLSE) in a declaratory relief action against the DLSE; the trial court granted Mr. Yslas' summary judgment motion, and the Court of Appeals affirmed the decision in a published decision.

### Areas of concentration

- Class actions
- Dispute resolution and litigation
- Employee benefits
- Employment and labor

### Professional activities

John is active in several organizations. He is an active member of the Mexican-American Bar Association. He served on the 2008 Hispanic National Bar Association Convention Planning Committee. He also served on the Los Angeles County Bar Association Lawyer Referral Service Committee. John currently serves on the board of directors of the Mexican American Bar Foundation and on the board of directors for the California Minority Counsel Program (Executive Committee).

### Publications

- "Wage and Hour Update," Labor & Employment Summit (October 2, 2013)
- "Headline News: *Wal-Mart v. Dukes* - Impact on Class Action Litigation," Employee Benefits Broadcast (July 26, 2011)
- "Privacy Issues in the Employment Environment," Labor & Employment Inner Workings Web Conference Series (December 3, 2009)
- "Overview of Trade Secret Law," Energy Company Presentation (March 2, 2009)

## Norton Rose Fulbright LLP

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Los Angeles, Minneapolis, New York, Pittsburgh-Southpointe, San Antonio, St. Louis and Washington, D.C.

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**Jessica Perry**  
Partner, Orrick, Herrington  
& Sutcliffe LLP



## Orrick, Herrington & Sutcliffe LLP

Orrick is a leading global law firm with a particular focus on serving companies in the technology, energy and financial sectors. We are recognized worldwide for delivering the highest-quality, commercially oriented legal advice and for our culture of innovation and collaboration.

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Orrick practices in five core areas: Corporate, Energy & Infrastructure, Finance, Intellectual Property, and Litigation. Known for our

Jessica R. Perry, an employment partner and Deputy Leader of the firm’s Litigation Business Unit, represents clients in their most significant class, collective, representative, and multi-plaintiff actions under state and federal laws. She focuses her practice on wage-and-hour and discrimination, harassment and retaliation claims for industry leaders within the technology, retail, and financial services sectors.

Jessica’s discrimination, harassment and retaliation practice focuses largely on representing employers facing claims of discrimination and harassment on the basis of gender, race, disability and age, and other protected categories. Most recently, Jessica obtained a complete defense verdict in *Pao v. Kleiner Perkins*, the high-stakes gender discrimination and retaliation case that garnered intense national media scrutiny. Following six weeks of trial and three days of deliberations, a state court jury in San Francisco rejected all of plaintiff’s claims that she was

passed over for promotion because of her gender and complaints about discrimination.

Jessica also leads a number of significant wage-and-hour class action matters, focusing on overtime, minimum wage, vacation and personal days, meal and rest break penalties, reporting time wages, expense reimbursements, waiting-time penalties, Private Attorney General Act penalties and work uniform violations. In addition, she also has experience advising companies in the emerging sharing and gig economy on strategic business decisions including the classification of those providing services.

Jessica has also successfully represented clients involved in investigations and audits by the Department of Labor and the California Division of Labor Standards Enforcement, and assists in the development of compensation policies and measures designed to reduce potential exposure.

work in the technology sector, we act for many of the world’s top public companies as well as more than 1,200 startups. We also are recognized for working on the most innovative deals in the renewable energy and PPP markets. Our municipal bond practice consistently ranks No. 1 in the United States, and we offer top-tier structured and leveraged finance practices. *Financial Times* commended our intellectual property teams for securing two of the most innovative patent litigation wins of 2012. Our litigation teams represent a third of the Fortune 100 in resolving high-stakes matters involving a broad range of disciplines before trial and appellate courts and forums worldwide. In 2012, *The American Lawyer* named Orrick to its list of leading litigation departments for the second consecutive time and selected an Orrick partner as Litigator of the Year. All together, Orrick is recognized by Chambers Global for strengths across 43 transactional, litigation and regulatory practice areas in the United States, Asia, and Europe.

Orrick also is known for innovation in the delivery of sophisticated legal services. We have revolutionized the law firm talent model to ensure we assign the right talent to the right task. Our Global Operations Center in Wheeling, West Virginia, is the longest standing and most successful legal and administrative insourcing center in our profession. We have pioneered the use of innovative pricing models. Selected by *Financial Times* among the most innovative U.S. law firms in 2011 and again in 2012, Orrick was cited for leadership in both legal advice and client service.

Collaboration – one of the firm’s core values – defines our relationships with our clients, our people, and our communities. This is evident in the way our lawyers partner with our clients’ in-house teams, our approach to lawyer development, our efforts to enhance the diversity of our profession, and our commitment to *pro bono* and community responsibility.



## Cristina Shea

Partner, Reed Smith LLP



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Cristina is a litigation partner in Reed Smith's San Francisco office and is a member of the Firm's Insurance Recovery Group. Cristina's practice focuses primarily on insurance coverage matters where she represents corporate policyholders in disputes with their insurance carriers. In addition to handling complex litigation, Cristina also counsels clients on their existing insurance programs, policy renewals, and prospective coverage.

Cristina represents clients in industries that range from telecommunications, to financial institutions, pension funds trustees, technology companies, restaurants/food manufacturing and oil and chemical companies.

Cristina has counseled multiple pension fund trustees on issues ranging from fiduciary liability claims, establishing self-insurance programs, and advising on alternative coverage options.

Cristina has counseled a host of clients on their cyberliability policies, including regional banks, public pension funds, and retail stores.

Most recently, Cristina is part of a legal team representing a Fortune 500 financial institution in multiple cases throughout the country involving mortgage insurance, subprime mortgage claims and mortgage fraud claims. In that representation, Cristina was trial counsel for matters venued in federal court and multiple arbitrations.

More broadly, Cristina has represented clients in matters involving environmental and remediation claims, mortgage insurance, data and network security (cyberliability), employment practices liability, fiduciary liability, professional liability, securities fraud, directors and officers ("D&O") liability, and claims under comprehensive general liability (CGL) policies.

Cristina has also represented multiple clients in first-party property claims, including property damage, and business interruption claims.

Cristina is admitted to practice in California, including all state and federal courts.

## Reed Smith LLP

Reed Smith represents many of the world's leading companies in complex litigation and other high-stakes disputes, cross-border and other strategic transactions, and crucial regulatory matters.

With lawyers from coast to coast in the United States, as well as in Europe, Asia and the Middle East, Reed Smith is known for its experience across a broad array of

industry sectors. Reed Smith counsels 13 of the world's 15 largest commercial and savings banks; 25 of the world's 35 largest oil and gas companies; and the world's three largest pharmaceutical distribution and wholesale companies. Reed Smith's shipping practice has been designated among the most preeminent in the world, and its advertising law practice is regarded as among the legal industry's finest.

Reed Smith has grown in large part because of its uncommon commitment to delivering

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Based on the results of a survey of large and Fortune 1000 in-house counsel, the BTI Consulting Group has ranked Reed Smith among the top firms for client service eleven years running. Reed Smith has been identified as one of the few large law firms with a strategic focus on client satisfaction.