DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Seth Hoogasian

General Counsel of Thermo Fisher Scientific

THE SPEAKERS

Seth H. Hoogasian
Senior Vice President,
General Counsel and Secretary,
Thermo Fisher Scientific Inc.

Daniel O'Connor
Partner, Ropes & Gray LLP

Graham Robinson
Partner, Skadden, Arps, Slate,
Meagher & Flom LLP

Lisa Stephanian Burton
Partner, Morgan Lewis
& Bockius 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.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished guest of honor's personal accomplishments in his career and his leadership in the profession, we are honoring Seth Hoogasian, General Counsel of Thermo Fisher Scientific Inc. with the leading global honor for General Counsel.

Thermo Fisher Scientific serves the scientific community by enabling its customers to make the world healthier, cleaner, and safer. His address includes issues facing a company at the intersection of law and science, as well as lessons learned from heading the legal function of a global company that has grown from $700 million to $17 billion in revenues during his tenure. The panelists' additional topics include governance, compliance, enforcement, and M&A.

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

Seth H. Hoogasian

Senior Vice President,
General Counsel and Secretary,
Thermo Fisher Scientific Inc.

Seth Hoogasian joined Thermo Fisher Scientific in 1990 as Senior Counsel, and became General Counsel in 1992, Secretary in 2001 and Senior Vice President in 2006.

Prior to joining the Company, Mr. Hoogasian served as a partner in the Baltimore, Maryland-based law firm of Weinberg and Green (now Saul Ewing LLP), and an associate at Shaw, Pittman, Potts & Trowbridge (now Pillsbury Winthrop Shaw Pittman LLP) in Washington, D.C.

Mr. Hoogasian received his J.D. degree with distinction from Duke University School of Law, where he served as a member of the Editorial Board of the Duke Law Journal. He received his B.S. degree with distinction in mechanical engineering from Cornell University.

ThermoFisher SCIENTIFIC

Thermo Fisher Scientific Inc.

Thermo Fisher Scientific Inc. is the world leader in servicing science, with revenue of $17 billion and approximately 50,000 employees in 50 countries. The company helps customers accelerate life sciences research, solve complex analytical challenges, improve patient diagnostics, and increase laboratory productivity. Through its premier brands — Thermo Scientific, Applied Biosystems, Invitrogen, Fisher Scientific and Unity Lab Services — Thermo Fisher Scientific offers an unmatched combination of innovative technologies, purchasing convenience and comprehensive support.

Thermo Scientific provides innovative analytical instruments, lab equipment and specialty diagnostics that provide rapid and accurate results for customers in research, clinical, and applied markets.

Applied Biosystems™ instruments and reagents have been trusted in the lab for over 20 years by the world's top scientists. Researchers who demand efficiency, accuracy and gold-standard technology use Applied Biosystems integrated systems for sequencing, flow cytometry, and real-time, digital and end point PCR — from sample prep to data analysis.

Invitrogen™ instruments and reagents are some of the most-cited products for genetic engineering, amplification, purification, quantification, and analysis. From TOPO™ Cloning Kits and high-quality SuperScript™ and Platinum™ enzymes, to Dynabeads™ separation technologies and GeneArt™ Gene Synthesis, Invitrogen™ cell and molecular biology technologies are designed to help ensure that the time you invest in your research is efficient and is rewarded with the reliable results you're counting on.

Fisher Scientific provides convenient access to the most comprehensive offering of products and services to allow customers in a range of industries to increase productivity and efficiency. There are three broad categories of products and services: scientific, safety, healthcare, and science education for elementary through college level students.

Unity Lab Services is a single source for integrated services, support and asset management for laboratory customers to maximize operational productivity. Enterprise Solutions addresses asset management, asset utilization monitoring, consulting services, multi-vendor services, scientific support services and supply management. Instrument Services covers instrument compliance and validation; maintenance, calibration and repair; multi-vendor situations, new instruments, and support plans. Parts and Consumables provide parts for Europe and North America.

RICK WILLIAMS: We're here today to honor Seth Hoogasian, who is the Senior Vice President and General Counsel of Thermo Fisher Scientific. We're honoring him for his many contributions, not only to Thermo Fisher, but for the broader business, legal and scientific communities. Seth has agreed to share some of his insights from helping Thermo Fisher through a very strong period of growth and rationalization for the company, and effective collaboration with multiple stakeholders in both the private and public sectors.

Following Seth's remarks, we have a very distinguished panel who will share their take on trends in corporate finance and relations with the SEC and other public sector players.

Our Distinguished Panelists are Dan O'Connor, a partner with Ropes & Gray; Graham Robinson, a partner with Skadden, Arps; and Lisa Burton, a partner with Morgan Lewis. Matt Guest, who is a partner with Wachtell, Lipton, was to join us today but client responsibilities had to take precedence. I want to thank Lisa and Morgan Lewis for sharing this beautiful conference center with us and allowing us to have this program here.

We're very fortunate to have Jack Friedman to moderate today's discussion. Jack is the Founder and Chair of the Directors Roundtable, and without him, we wouldn't be here today.

JACK FRIEDMAN: Thank you. Rick and I both went to Harvard Business School, decades ago.

Directors Roundtable is a civic group that has hosted about 800 events in 24 years around the world. We have never charged for anyone to attend a program. Our purpose is put on the finest programming that we can for Boards of Directors and their advisors, including General Counsel. This leading world honor for General Counsel arose from comments that boards made to us that companies rarely receive understanding or acknowledgement of their contributions and efforts to be good citizens around the world.

As a brief introduction, Seth is in charge of the legal area globally for the company, and is an alumnus of Duke Law School. Without further ado, Seth will make his opening remarks.

SETH HOOGASIAN: Thank you, Jack. I'm really thrilled and honored to be up here, receiving this award from the Directors Roundtable. I first want to say that I can't do this by myself; I've benefitted from a world-class legal team and partnerships with many law firms, several of which are here on the panel or in the audience. Everyone's made my job much easier, and I really appreciate all the work over the years that's allowed me to be able to stand up here and accept this award.

I've been with Thermo Fisher for 25 years, the last 23 as General Counsel. In addition to managing the 100-lawyer legal team, I also have responsibility for Environmental Health & Safety, Export-Import Trade Compliance, Internal Audit, and Insurance. As far as tenures of General Counsels go, that's a pretty long time to be at one company. I thought it might be of interest to share some lessons I've learned over this period, mostly from the perspective of the in-house legal team.

First, I'm going to briefly describe what Thermo Fisher does, and its history. Next, I'll share some thoughts about a topic that I feel strongly about, which is government and industry collaboration — which is particularly relevant for us as a science company. I'm going to then share some lessons learned from my 23-year career as General Counsel at the company.

Thermo Fisher Scientific is the world leader in serving science, with revenues of $17 billion and 50,000 employees in 50 countries. We help our customers accelerate life sciences research, solve complex analytical challenges, improve patient diagnostics, and increase laboratory productivity.

At Thermo Fisher, we have a corporate mission that is our guiding principle: our mission is to enable our customers to make the world healthier, cleaner and safer. I'm going to use our mission statement to

frame some of my remarks today, because to me and my 50,000 colleagues, it's real and very relevant.

The history starts with Thermo Electron — that was the name of the company originally — founded in Belmont, Massachusetts, in 1956, by George Hatsopoulos, who was an MIT Professor of Mechanical Engineering. His business plan was to develop technological solutions to pressing societal problems. I'm going to give you some examples of those: alternative energy power plants, ventricular assist devices to keep the heart pumping while patients wait for heart transplants, explosives detectors, and paper recycling equipment. These are examples of products developed to address the following: the energy crisis of the '70s; poor cardiac health; terrorism; and landfill waste, respectively.

Fundamental societal issues are still top of mind at Thermo Fisher. This includes better health care, a cleaner environment, and safer cities. The difference now is that these issues have become global in scope; they're not constrained by political difference or geographic boundaries. Advancements in global commerce, technology and transportation have dramatically changed the way the world interacts. It's very daunting, and it gives both political and business leaders pause. But the good news is that these issues can be addressed. One way we've been able to turn the challenges into opportunities is through collaboration with those who are implementing public policy.

It may surprise you, coming from the Chief Legal Officer of a Fortune 500 company, but I firmly believe that balanced government policies and regulations can and do create opportunities for business, while at the same time serving the public interest.

Regulators have been the subject of much criticism for putting unnecessary burdens on industry to comply with an ever-increasing flurry of laws and regulations. Of course, there are examples of excess. But private-public collaboration can actually have a positive impact on the economy, by driving technology advances, supporting entrepreneurship, creating jobs, and in the end, helping the United States remain competitive on a global scale.

As a global leader in the life science and diagnostics tools industry, we're seeing this play out. The objective of our industry is compelling, because by providing these technologies and the tools to make regulatory compliance possible, it can enable government to develop sound public policy. It's exciting to be a part of this industry, because it can directly contribute to solving the many challenges that touch people in all regions of the world. It's the reason our employees are passionate about their jobs and the role that our company can play.

As I go through various examples, I'm going to try to frame how we work with government agencies and regulators, as well as the challenges that we have in bringing such disparate interests together.

I can't think of many topics more important and more challenging than providing improvement in patient outcomes at a more reasonable cost. It's challenged many presidential administrations, and drives industry to develop new solutions that give doctors and patients more treatment options.

In 2010, Congress passed the sweeping health care reform. This law, like many proposed health care reform laws before it, has the primary goal of expanding access to health care and reducing costs. While it's too early to say whether or not this legislation will be successful — and there's obviously many opinions on that — the providers of health care and the companies that support them, including Thermo Fisher, are working with Congress and the U.S. Department of Health and Human Services to help lower the cost of care by providing better diagnostic tools.

Of course, we were investing in this opportunity long before Congress started debating and working on the health care reform law. Our customers have continuously demanded better diagnostics to assess patient conditions and improve and save lives. Let me give you a couple of examples.

The first one is going to involve health care-associated infections. The healthcare reform law incentivizes hospitals to improve the quality of care and reduce the risk of infections. Hospitals are now able to detect so-called "superbugs," such as methicillin-resistant *Staphylococcus aureus* (MRSA), at lower levels and more efficiently to meet this objective. Thankfully, there are tests available today, including from Thermo Fisher, to more rapidly identify and treat a patient that has a life-threatening infection, such as MRSA. There are more effective diagnostic options in the pipeline.

In addition to early identification of health care-associated infections, Thermo Fisher is also playing a critical role in the prevention and treatment of antibiotic-resistant bacteria. In particular, we are addressing the overuse of antibiotics which leads to these so-called superbugs. Our antibiotic susceptibility testing helps physicians choose antibiotics that are most likely to be effective in treating a patient's specific infection.

For decades, physicians and the general public, alike, saw antibiotics as wonder drugs, because they worked quickly and with few side effects. Many of us received courses of antibiotics that might have been unnecessary or ineffective. Today, we can use tests to determine if a particular antibiotic is effective against a specific bacteria, and results are now available in days instead of weeks.

Another threat within many healthcare facilities is sepsis. Sepsis is a blood infection that can cause a patient's death within hours. Using a test developed by Thermo Fisher, however, medical personnel can now identify a biomarker for sepsis in a patient's blood, enabling them to determine the likelihood of a patient developing sepsis before the symptoms would otherwise indicate. Early detection enables physicians to take proactive steps, including the use of specific antibiotics, to reduce the number of fatalities attributed to sepsis.

Another example is one that you're probably all familiar with, and that's allergies. What many don't know, however, is that allergies are a leading cause of asthma-related visits to doctors and, even worse, emergency rooms. These visits, many of which could be prevented, drain billions from the economy globally, much of which could be avoided through early diagnosis and better management of allergic triggers.

In the U.S., we are partnering with allergy organizations, collaborating with the Congressional Asthma Allergy Caucus, and working with our Federal Department of Health and Human Services, as well as state agencies, to put the spotlight on better diagnosis and management. We're helping to raise awareness of *in vitro* allergy testing, and working to ensure that reimbursement for these proven allergy tests is consistent nationwide.

Now, to the next element of our mission: enabling our customers to make the world cleaner. A host of challenging environmental issues affects both developed and emerging economies, and if left unchecked, can hinder a region's ability to prosper and grow. Let me focus on one example today, and that's air quality.

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Too often, damage to our environment is the price of prosperity. In fact, our company's growth and diversification really took off in the late '60s, when Congress started debating policies that would limit auto emissions and reduce nitrogen oxide, or NOx, which is a primary source of smog. The Clean Air Act Amendments of 1970 required automakers to measure NOx down to parts per million, which, at that time, wasn't possible. For our company, however, this was an opportunity. At the request of the EPA and Ford, we developed a NOx analyzer to meet this challenge. Today, we are able to measure particulate in parts per *billion*.

These early innovations became a foundation for our company's growth, and we became a leader in what is now a $40 billion global analytical instruments industry. We continue to work closely with the EPA to develop new methods and technologies that help industry achieve compliance in a cost-effective manner. Regulation can only be as good as the technology that's available for helping industry to comply.

What's really encouraging is that we're seeing the U.S. regulatory model being adopted internationally, creating opportunities to export these technologies to Europe, China and other global markets. The U.S. EPA has been working collaboratively with China's EPA, for example, for over two decades, to reduce air pollution and greenhouse gas emissions there. For instance, they partnered with the organizers of the 2008 Olympic Games in Beijing to monitor and measure air quality.

Turning to the third element of our mission: enabling our customers to make the world safer. As the world becomes more complex, we face new challenges in protecting the public — keeping people safe from terrorism, maintaining safe work environments, providing safe consumer products. Thermo Fisher offers technologies to address all of these, but let's focus on one that seems to be in the headlines a lot these days, and that's food safety.

The food and beverage industry has been plagued by recalls over the years. Even when contamination strikes someone else's brand, all brands can become suspect. In 2011, the United States took the unprecedented step of passing the Food Safety Modernization Act to address the increasing issue of food contamination. Experts from our analytical instruments business worked with Congress to help draft parts of this law. We wanted to make sure policymakers understood the levels at which contaminants could be detected, how quickly the test would generate results, and how much it would cost to do the analysis. This information would be critical to industry adoption and enforcement.

Contamination of food products is a global issue that affects populations thousands of miles away from the source of the production. Some of these sources aren't well-developed, and lack proper sanitation, regulation or even access to clean water. This is why better tracking and monitoring are crucial to preventing or mitigating the impacts in the global food supply chain.

Across that supply chain, testing for known food pathogens, such as *Salmonella* and *E. coli*, is already supported by tests developed by Thermo Fisher. There are unknown threats to health, too. Our analytical instruments can also detect yet unregulated substances, such as residue from pesticides or crops grown in contaminated soil, that can eventually find their way to consumers via products packaged thousands of miles away.

Now, I stated at the outset that many of these challenges are global in scope, and a recent example will illustrate this point well — a product as simple as your morning orange juice. Recently, our Food Safety Response Center in Germany detected traces of an anti-fungicide in orange juice from fruit grown in Brazil. Brazil is one of the largest producers of oranges in the world, and this presented a major issue for the industry there, since the anti-fungicide was prohibited in the U.S., which was a major market. We worked with the agricultural industry in Brazil to rapidly develop a testing method that would prevent contaminated fruit from reaching the U.S.

For many of today's challenges — and I've touched on only a few — government has turned to private industry. It's often left to the scientists, the engineers, and the business leaders to push the envelope of what's possible; to develop and deliver the tools that protect our health and well-being, the air we breathe and the food that we eat. It's clear that these issues are top of mind for us, and if business is willing to collaborate with government to solve them, it can end up being a win-win.

Now I'm going to turn to my own career at Thermo Fisher. The year I joined, in 1990, revenue was $700 million. It's now $17 billion, so that's an increase of 24-fold. It's been quite a privilege for me to participate in this wonderful growth.

What attracted me to leave private practice for the company was its unique capital structure. Each of its novel technologies was transferred to a new subsidiary, which would then sell a minority equity interest to the public. If an investor wanted to own a pure play on paper recycling, it could do that. Investors looking for more diversity, but still wanting to stay in the technology space, could buy the parent company, which always kept the majority interest in its public subsidiaries. At the height of this so-called spin-off strategy in the 1990s, Thermo Electron controlled 22 public subsidiaries. The Legal Department became so experienced at IPOs that we ended up doing many of them entirely in-house.

The spin-off strategy eventually ran its course and fell out of favor. From 1999 to 2002, we took 21 subsidiaries private, spun off two businesses to the Thermo Electron shareholders, and sold off dozens of businesses in order to focus primarily on analytical instruments. Now, there was no playbook to follow for such a massive financial restructuring, and so this reorganization is probably the highlight of my career.

Since 2002, the company has grown through a combination of organic activity and acquisitions. The largest of these transactions were the $10 billion merger with Fisher Scientific in 2006, and the $13 billion acquisition of Life Technologies in 2014. In addition to these two transformative deals, over the last 10 years, we deployed another $14 billion on 90+ acquisitions.

When I started as General Counsel, the legal team consisted of just six lawyers, four of whom were focused on securities, corporate finance and M&A. The business was primarily U.S.-based. I didn't hire a lawyer outside the U.S. until 2001; now, we have 36 lawyers in international locations, in addition to the 64 in the United States.

What have I learned from this experience? What's the difference about leading a legal team now versus 25 years ago?

First, most businesses change more rapidly and dramatically than law firms do, for example. In-house lawyers need to accept and, indeed, embrace this change. If you do, it will open up your mind to new challenges that will keep you energized. I've had

the privilege of working for all four of the company's CEOs, and they each effected significant change. I was in the epicenter of reorganizing the company from a holding company to an integrated operating company, and learning how an operating company runs was a completely new experience, and it provided me the opportunity to change the priorities of the legal team to align with the new business realities.

Second, I think the stature and quality of in-house teams continues to rise. There is much more fluidity between law firms and in-house teams in both directions. For better or for worse, companies have witnessed an explosion in legal and compliance matters, and can justify hiring top talent to work solely for them. The increased pressures on law firm economics have led many lawyers to embrace the in-house practice. Choosing now depends more on whether you like working for one client or many, and the degree to which you want to be known as an expert in a narrow field or have a broader perspective.

Third, IP issues for a technology company are more important and complex than ever. A long time ago, if you owned the patent on something like a sewing machine, it was pretty easy to determine if someone was copying your product and infringing your patent. Today, especially in fields where innovation is incremental rather than revolutionary, the judgments needed to form an opinion on infringement or freedom to operate are much more nuanced.

To protect or monetize your IP, or respond to an accusation by someone else that you infringed their IP, the last resort should be going to court. My experience has been that it's unrealistic and, indeed, unfair to expect lay people on a jury to master the underlying science well enough to grasp the subtle differences in the product at issue; plus, the litigation process still takes years. The complexity of the technical issues and the unpredictability of litigation should drive rational people to consider alternative solutions, like cross-licensing or collaborations.

Some recent improvements in process at the U.S. Patent and Trial Appeal Board — most notably the inter partes patent review — can speed up some challenges, but they don't supplant eventual litigation if one party remains unsatisfied after the Patent Office finishes. Of course, sometimes you have no alternative to litigation, and then you must be prepared for a wide range of outcomes.

Fourth, international work now dominates like never before, in line with the globalization of business. Over half of our revenue is now international. Global trade compliance; product registrations in new markets; unique employment practices; and IP protection in more countries than ever account for an increasing share of the legal team's efforts.

When I'm asked why have I stayed at one company so long, I usually joke that it must be because I have no ambition, I'm lazy, and I suffer from inertia. [LAUGHTER] In reality, as long as a company changes, there's little need to switch employers to

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experience new challenges. An example is the dramatic increase in the globalization of the legal team. Every year or two, we all gather in Waltham for a few days, and I'm constantly learning from my legal colleagues in China, India, Europe, South America, and elsewhere how they go about serving their clients under often disparate legal systems. It can sometimes create some tension between the desire for standardization across the company and local requirements or expectations, but it's still a great opportunity to learn new things.

A lot of what lawyers do is playing defense, trying to reduce risk and protect the company. Acquisitions are a great way for an in-house legal team to meaningfully contribute to actually growing the business. Over my 25 years, I've been lucky to work on some transactions that have moved the needle for the company. At the same time, I've witnessed some significant changes in the M&A process that can make deals less predictable.

When I started in the early '90s, you usually signed a letter of intent (at least for private transactions), followed by due diligence and then the negotiation of a definitive agreement. The trend now is that more deals, including privates, are being done under a formal auction process with due diligence and all documents completed before the seller decides on a winning bid, or accepting any bid at all.

This has significantly increased the cost of pursuing transactions, as you are bound to lose out on many, despite having expended substantial resources along the way. As recently as 10 to 15 years ago, my experience was that we had a greater degree of certainty at an earlier stage of the process, which reduced the risk of ending up with no deal but large bills. This dynamic has led me to try to develop an in-house team that can take potential deals as far forward as practical without significant outside help. Of course, the bigger deals still require lots of outside help, and as deals continue to become more global, the cross-border issues multiply, including as a result of the proliferation of antitrust filings that are now required.

The last point I want to make about learning how to manage a legal team that supports a growing business concerns scalability. By that, I mean designing a solution that doesn't just solve the immediate problem, but can easily be expanded to accommodate a bigger organization.

In the beginning of my career, the standard response to the challenges posed by more legal work from acquisitions or organic growth was, "Go hire more lawyers!" Now that may work in the short-term, but it doesn't really scale well. We started looking at techniques, like automated contract prep, for relatively straightforward matters; a global entity management database for our hundreds of subsidiaries, making it easier to change common directors or officers across multiple subs; more paralegal and contract managers, instead of lawyers; ebilling from law firms; matter management systems; and an automated system of linking HR systems with the document retention notifications we issue to employees when litigation is brought or is imminent. We've also borrowed a page from the playbook of our Operational Excellence colleagues, by applying their continuous improvement process thinking to legal workflows that are repetitive in nature.

Organizationally, scalability for me means moving from a relatively flat org chart with many direct reports to a more vertical structure. I have 13 direct reports now, which ideally is probably still a few too many. A more vertical organization also creates opportunities for junior lawyers to advance to new levels of responsibility. Like a law firm, I try, as much as possible, to grow from the bottom and avoid taking on laterals unless absolutely necessary to fill a hole that can't wait.

The last aspect of scalability that I wanted to mention concerns redefining what we actually do as lawyers for a company. With the years of experience, you learn that not all risks are equal or worthy of the same amount of legal attention. We don't need lawyers to review and negotiate straightforward nondisclosure contracts that have a history of no or few problems; properly trained paralegals or contract administrators can do a good job. Small purchase orders for products that have a good track record of performance can be handled similarly. This all helps to free up the legal team's time so that it can focus on what is really material to the organization.

Now, how you organize a large in-house team may not be the sexiest or most intellectually challenging aspect of the job, but it's a key part of the toolkit to effectively and efficiently deliver quality legal services across a diverse and expanding enterprise.

To wrap things up, I've been privileged to grow my legal career over 25 years at a company whose mission is as relevant today as it was when Dr. Hatsopoulos founded it almost 60 years ago. I've seen an awful lot during this period. I'm excited about leading the legal team through the next round of challenges and opportunities. Thank you for allowing me to share some of my experiences with you.

JACK FRIEDMAN: I'm going to ask our Guest of Honor a couple of questions before we move on to the other speakers. I also wanted to mention that up until yesterday afternoon, another Distinguished Panelist was going to join us, Matthew Guest of Wachtell, Lipton. He had a client issue come up that had to be handled. I wanted to thank him and his firm for their support of the program.

Seth, it's very common when you have programs with executives to relate to the key departments in most industries. How is that different in an intensive scientific company? Could you also give us a sense of the type of expertise that the firm employs?

SETH HOOGASIAN: It takes a combination of skills. You have Ph.D. scientists who are working to develop the latest technologies, but they also have to work with marketing people. Sometimes just developing a new mouse trap that the market doesn't want to pay for isn't the right thing to do – you still need to sell products that make money. Marketing works with the scientists to tap into what the customer base is looking for. We have a scientific advisory board that is comprised of leading thought leaders in labs and research organizations who help give their insights to the R&D and marketing people. Then, from the legal side, that's where the IP lawyers jump in, because if somebody decides to try something new, the first thing we want to do is what's known as a "freedom to operate" analysis to make sure somebody hasn't already come up with that invention. The IP team rides, in shotgun style, with the R&D and marketing people, so that one doesn't get too far ahead of the others. Then you can patent a new product that the marketing team has told you is going to be a success.

JACK FRIEDMAN: One of the global semiconductor companies, who sells to Apple and others, commented that they choose not to patent most of their production know-how (which is the key to their whole business), because they'd have to spell out too much information about their techniques.

Is there any consideration regarding whether to patent or not?

SETH HOOGASIAN: Yes, we have a healthy combination of trade secrets and patents. Trade secrets – obviously you have to keep them secret – and then patents, which becomes public, but well define what you can stop someone else from doing.

We believe in a combination of the two. Trade secrets are great, as long as you can keep them secret. Sometimes things leak out and then you've lost control of the protection. You haven't got a patent, so now you've lost the ability to say that's ours and ours alone.

JACK FRIEDMAN: If an employee, without any authorization, gives out to the world a trade secret, does the company lose its rights?

SETH HOOGASIAN: What I would say is we are careful to not always have one person or sometimes even one site have all the information that's needed to do something, especially on a very complicated product. We may make parts of a product in two or three different locations, and keep knowledge of the secret sauce to a small number of people. The more diffuse the information, the harder it is for any one person to either get access to it all or pass it to the outside.

JACK FRIEDMAN: Right. What are some of the government agencies that you deal with?

SETH HOOGASIAN: I mentioned a couple — EPA, for air monitoring, for example; FDA. Those are the two big ones for us right now, and because FDA reviews new products, we want to help them understand what our thinking is behind the underlying innovation. EPA, as I indicated with a couple of examples, can often work with us to help understand what's technologically possible, before they decide how to regulate something.

JACK FRIEDMAN: I assume that the FDA process of approvals, testing, and everything else must be quite extensive.

SETH HOOGASIAN: We have a large regulatory affairs team that oversees testing done all over the world.

JACK FRIEDMAN: I'm going to have Lisa Burton of Morgan Lewis speak next.

LISA BURTON: Like everyone here, I want to congratulate Seth on his achievement. The growth of Thermo Fisher is something we've all watched and equally impressive is how Seth created his legal department so as to enable that growth.

I'm an employment partner here at Morgan Lewis's Boston office. In addition to what

one would consider the traditional employment issues: discrimination, compliance, and management concerns; today we are particularly challenged with bringing our core business concepts into the modern day economy — specifically with regard to exemption, non-exemption, clawbacks, the salary basis and hourly rates of pay.

We work with directors, General Counsel and business folks on how to structure employee compensation to meet business needs and legal compliance. We do investigate issues that cross over with what Graham and Daniel do, because at the end of the day, everything involves employees. Unless you're dealing with a customer or a regulatory agency, anything that's coming up internally — be it a SOX audit, a whistleblower complaint, attorney general investigation that is coming from an employee complaint — that's where the employment lawyers come in and partner across areas.

I like to say employment lawyers get it all: advising, litigation, and best practices locally and globally. Right now, we're seeing a lot of our clients trying to figure out if their employee classifications and exemptions are correct. If they're not correct, what does it mean when the Department of Labor comes in with its new salary basis tests? What does it mean for you in California and all the other various states that have additional requirements? We try to provide our clients and their board guidance to understand points of liability. In fact, we were all talking with Jack just before the program about all the things you can get insurance on, but wage liability is not one of them.

JACK FRIEDMAN: In the employment area, there's the idea of the little person up against the big corporation in litigation. What is the attitude of juries when they see these cases? Do you try to settle the case out of court to avoid reputational problems for the corporation?

LISA BURTON: I can say that there are some clients that have a standard process when people are terminated; they give severance in exchange for a release. But for large employers, that just doesn't work. The costs become too great and it is more important to put processes in place. You can't necessarily have employees with an attitude that they will always get six months' severance, nine months' severance, or a year's severance. What people perceive as a *de minimis* payment amount isn't *de minimis* any more. Because of the costs, a lot of large employers are trying to make sure that they have arbitration agreements and class action waivers, because the individual employee complaint can quickly escalate to a class action. There's no one-size-fits-all on having that.

JACK FRIEDMAN: Are the provisions in employment agreements that say it has to be arbitrated enforceable? Do the courts have a view of not discouraging employees from suing?

LISA BURTON: You're always going to have a state agency in California or Massachusetts, or other entities such as the NLRB, that may stand behind a public policy argument against enforcement. We have had very good success with our clients in putting together class action waivers; making sure that when we do releases and agreements, we include class action waivers in them.

Again, a part of it's going to be your culture. Just as some companies don't have non-competes, some companies don't have these kind of extensive employment agreements, NDAs; others are going to have it up front and be consistent.

JACK FRIEDMAN: There was a case that was recently settled in Silicon Valley for $415 *million*. Intel, Google, Adobe Systems, and Apple allegedly got together and explicitly agreed not to hire each other's technical people, to avoid a bidding war and the salaries hikes that would ensue. An email from Steve Jobs to the chairman of Google was the smoking gun. It's obvious you shouldn't put illegal agreements in writing.

LISA BURTON: Or make illegal agreements!

JACK FRIEDMAN: Right! California is very famous for not wanting to have restrictions on mobility of talent. It's incredibly hard to have non-compete agreements when you hire people in California.

LISA BURTON: Yes, California has a specific public policy that prohibits non-competes. If California has it, everybody follows it, and their expansion of it now not only prohibits non-competes, but makes it very hard when you start getting into customer non-solicits and other aspects. California is California. It will keep employment lawyers very busy for a very long time to come. Talk to any one of my partners practicing there; you've got the assigned seating cases, you've got the PAGA cases, and you've got the wage and hour. The problem is California sets the trends this way. It's something that we're all dealing with, but I think you said something during your speech about how federal government regulation can make it easier. That is true on the employment side, because we have everybody jumping in on sick leave laws, paid leave laws and they are all different.

To answer your question: yes, California is different in that aspect, but it's something that companies are all dealing with. At least on the employment side, it would almost be easier if we had something at a federal level, because it's the compliance — particularly when you have employee basis of the size of Thermo Fisher and others — that one size is not going to fit all, but you have to have efficiency. How do you go and do that?

JACK FRIEDMAN: What are some of the people aspects of business that are appropriate for the board or a committee of the board to consider?

SETH HOOGASIAN: We have a compensation committee, for example, that looks at compensation practices, mostly focusing at the officer level, but occasionally across the whole company. We all struggle with the variability in employment practices across jurisdictions, country to country or state to state. Even in Massachusetts right now, there's debate about whether non-competes should follow the California approach or not. That was a topic for Governor Patrick, and now Governor Baker may have to deal with it. These types of topics may from time to time get to the board or a committee, depending on what the issue is.

LISA BURTON: The whistleblower hotline is a SOX issue. In essence, the audit committee is supposed to look at everything, particularly when employee issues come up. It may or may not be a SOX issue, regardless you have an employee relations issue that has to be dealt with.

JACK FRIEDMAN: If anybody here serves or is thinking of serving on a board audit committee, their duties have vastly expanded.

DANIEL O'CONNOR: Reviewing financials is still a significant part of what an audit committee does day in and day out. But they absolutely are going to have an oversight or at least informational role in all the various compliance challenges that a company can face. One of the things that I plan to talk about is the whistleblower idea. The very initial phase and evaluation of that whistleblower claim, trying to separate out the

employment issues — most of these claims come from someone who has a disgruntled point of view because either they're in the middle of something, themselves; or might be terminated or concerned about that. Separating out the employment issue from the nature of the allegation, and evaluating when it is — most of the allegations can be dealt with by in-house counsel, maybe with some outside assistance. You do need to be thoughtful about how you report those issues up, *when* you report those up to the audit committee. Audit committees also usually want to bring in the outside auditors. Then think about the rare circumstances when you actually need to shift and have outside counsel assist the audit committee to do an evaluation. It is a rare circumstance; it's only usually when you have an allegation that goes up to someone in the C-suite, where it would be difficult for the C-suite to be examining themselves or having the General Counsel, who reports in to the CEO, examining the CEO or a peer of his or hers. That reporting structure, especially in a company that has a lot of regulatory oversight, whether it be the FDA, the SEC, or some other outside

organization that is otherwise examining it, can result in looking at the company in the wrong way. That has become a fairly significant, in my experience, part of what the audit committee does, while still — and day in, day out, it never goes away — dealing with the financials and understanding how they're coming together.

JACK FRIEDMAN: Daniel, could you go ahead with your presentation on whistleblowers, and dealing with the government in other regards?

DANIEL O'CONNOR: Absolutely. I'm Dan O'Connor, partner at Ropes & Gray. I'm one of the co-heads of our Securities & Futures Enforcement Group. I want to talk about the whistleblower issues that companies often confront. Three particular issues: that initial evaluation; talk a little bit about the process; and then the followup.

What we see, through a variety of different mechanisms — whether it be the bounties that were put in place by Dodd-Frank, or some of the other ways that these laws are being interpreted — there is, and has been, an increase in the number of complaints that are coming up, primarily from inside a company. Evaluating those is very challenging. It's challenging because companies need to thread the needle.

When an outside regulator — the DOJ, the SEC, the FDA — hears a whistleblower complaint, they treat those things as gold. Oftentimes, outside regulators, having been at one find it hard to penetrate into an organization and understand what's actually going on. If you get someone on the inside who has that roadmap and provides that story — to a regulator, that's very alluring.

Companies, however, when they see that, know the context. They know that Mary Smith or Bob Jones or whoever has had a troubled history, and maybe is trying to blow the whistle to avoid some real negative consequences to his or her own self.

Companies sometimes have a challenge of separating the employment issue from the allegations. That's a really important first step. Regulators want to treat these things as gold; companies sometimes want to treat them as dirt. Finding a balance between those views is really the challenge.

The first step is to evaluate the merits of the allegation itself — separate, if you can, from the employment issues that are tied in. You certainly need to take into account the nature of the source when you're weighing the allegation, but you do need to be able to treat it as a real allegation, almost regardless of the source. The nature of the source may dictate the process you put in place. You need to think about it.

The first part of the evaluation is where in the organization does this reach? Does the allegation implicate the C-suite? Does it implicate the people that might otherwise be investigating the issue? That's the first step in the process. In those rare circumstances where it *does* reach up fairly high within the organization, that's where you might get an audit committee or a special committee oversight process. Most of the allegations, though, that are going to come in — through a hotline, through exit interviews, things like that — are going to deal at a much lower level. It's very appropriate for in-house counsel, internal audit, maybe with the assistance of outside counsel, to address them.

Once you've gone through that initial evaluation stage, you've determined how you're going to structure your review, then you need to do something. You need to do some sort of review. Oftentimes, companies can get a little bit caught up, as I said, in the employment issues. They focus on *who* (if it's anonymous) sent this in, and why did they do that, as opposed to the nature of the allegation itself.

What you always need to be thinking about is, even if on its face, this doesn't look real, if it turns out three years from now it could be an actual issue that gets out into the public, how is the process that I put in place to evaluate that going to be judged? You need to be thinking about it from that point of view. Every case doesn't involve the full-on email review and forensic analysis of financial statements, but you do need to have a risk-based approach. You need to put in place a process that you can stand up and justify to your internal audit people — whether it be the audit committee or your outside auditors who, more and more now, are asking about these types of issues. If needed, you may be doing the same for outside regulators. Oftentimes, that does involve outside counsel, maybe not to run the whole process, but to assist with things like some interviews. If you do need to do some doc review, you need to figure out ways to very efficiently get at that doc review.

Running through your process, one of the things you're eventually going to need to do, which is always somewhat of a difficult thing, is engage with the whistleblower. Sometimes you can't do that because it's anonymous, but I think at least try to make that attempt. It's something that if someone's coming in afterwards to look at the evaluation, they're going to want to make sure that you've at least tried to do that, that you've at least understood it.

Putting your process together, it's important to think up front to have a plan, to follow through on that plan. Then to be able to document what you've done, whether it's an internal menu or a collection of materials in a key document finder — something that you can, if you need to, pull off the shelf later and identify, "This is what we did, maybe we didn't find the actual root issue, but we had a legitimate process." That's going to be very important to get your other constituencies very comfortable with the process.

The third thing is the followup. Once you've gone down the road — I've done enough of these — oftentimes, you end up with a very inconclusive issue. They said that "my boss was embezzling money," or "my boss was paying bribes," or "avoiding this test" or "avoiding that test." Sometimes you really can't find the issue. You need to be able to step back and say, "Okay, this immediate problem wasn't something we need to deal with, but is there a training opportunity here? Is there some initial monitoring we might want to think about to do that?" That's part of closing out the process.

If you do have an issue, you need to run it through. You need to think about what remedial steps you are going to take, both at the individual employee level but also on a process basis.

The other thing you really need to do is to ring-fence an issue. All right, I've got a problem at this plant with this employee; is there a process issue that allowed that to happen, that could exist other places? If it ever gets out in public, and there is a real issue, one of the questions that the regulators are going to ask is, "What did you do to ensure that that problem didn't exist other places?" The time to do that is right up front, when you're doing the investigation. Ring-fencing becomes a really important piece.

The last piece, if you've found an issue, is report it. Usually, that's internal. That's talking to the management of the company to make sure that everyone who has some type of ownership in the interest understands this issue and can be an active member of going forward to help avoid those types of problems. It's also going to be, usually, your board. If it's something that's been raised up through a whistleblower, you've found an issue, you took steps, you're going to want to let your audit committee know. That also typically involves letting your auditors know, depending on the nature of the issue. If it involves internal controls, it's almost always going to involve your auditors. We find that letting your auditors know up front that you have a little bit of a problem, you're looking through it and how you're doing it, can save you a headache later on when they're coming in and second-guessing. We often evaluate and assist people in trying to think about how you talk about issues with your outside auditors.

The final step is whether you go outside the organization and report it. That's always the most challenging situation and the most difficult case. Every regulatory agency out there talks about rewarding self-reports; the importance of bringing things forward, and how they reward that. Sometimes it's very difficult to actually find what those tangible rewards are, aside from avoiding the downfall of not having done it. You do need to evaluate that. The first step usually is, is it going to otherwise come out? If it's otherwise going to come out, then you've got to get on the bandwagon right away. You don't want to be late for the party in that regard, and that's one of the very key factors.

After that, you need to think about, what am I going to be able to do; how am I going to be able to control this process? Many of these investigations where you see the rewards, maybe a smaller penalty, maybe a deferred prosecution agreement. It's great to get those, but you've still spent the millions and millions of dollars associated with the additional expense that comes from a government investigation. Oftentimes, taking your remedial steps; putting yourself in a position, if you can, to say, "We did everything otherwise we would have done but gone in and self-report," and not self-reporting, is the actual path. It's a very challenging situation.

JACK FRIEDMAN: We hosted the head of the Whistleblower Office at the SEC. In the course of the program it was asked — apart from liability issues, what is a very irritating aspect of this? An example was a Texas company which had individual employment contracts with several thousand people, some of them foreign. It required employees to go to the company first before contacting the government. Apparently, as far as the SEC is concerned, this is against the law. You can't force an employee who wants to go to the government anonymously first, to go through internal procedures initially. The SEC required the company to go through each individual employment contract and change that requirement.

Our next speaker is Graham Robinson, who will talk about current developments in board fiduciary duties.

GRAHAM ROBINSON: I'm Graham Robinson. I lead the M&A practice here at the Boston office of Skadden, Arps.

I'm going to talk a little bit about an issue that comes up a lot in deal making, although it can be broader than that: the issue of when independent directors can be found to be personally liable for a breach of fiduciary duty; in other words, actually have to write a check for their breach of fiduciary duty.

First let's level set on where we've been before we talk about some recent cases that have possibly muddied the waters on this issue. I'll call it "traditional," certainly a decades-long view of practitioners, as expressed and articulated by the Delaware courts, that for independent directors, they are essentially completely protected from financial liability for breach of fiduciary duty. Now, the lawyers in the room are familiar with an idea that there's an exception for that if they act in bad faith. But the Delaware courts have defined this concept of bad faith to date, until potentially recently, in an extremely favorable way for well-meaning independent directors. A comprehensive articulation of this standard came in a case called *Lyondell* in 2009, where the Delaware Supreme Court said that, "To have acted in bad faith, a director has to have either been motivated by an intent to do harm or knew that he or she had a fiduciary duty to take an action and simply and completely refused to do it."

Let's pause for a moment and think about what that means to a director. Keep in mind I'm making an important distinction. We're talking about independent directors. Where directors have a conflict of interest — including in a lot of headline cases that you've seen recently — it's a completely different legal analysis. The Delaware courts dig deeply into evaluating the conduct of the director, *and* the Delaware courts do expose those directors to personal liability. Some in the room may have experience with that. But I'm focusing on independent directors — the directors who make up the overwhelming majority of most large, publicly held corporations in the United States

Those directors, as of *Lyondell*, are in a position where their counsel can state to them, "You'll make decisions. A Delaware court might disagree with your decision. There's a whole legal regime around what degree of scrutiny the courts might apply to reviewing your decision. But if they choose to disagree with your decision, the worst that they will do is change it. They might invalidate a contract; in the M&A context, they might say, 'We're going to keep this deal open for another 30 days to see if another suitor emerges; we might require you to make some disclosure,' but that's just part of the process of being a director engaging in not just M&A but in carrying out your duties as a director general." Unless you're found to act in "bad faith," which *Lyondell* defines to be something that I think most directors would feel confident they're sure they can keep themselves away from — "you'll never have to write a check."

There's an important policy issue behind this. The Delaware courts, the Delaware Legislature, want to encourage good, well-meaning people to be independent directors. They know that if they expose the people — most of whom are retired or at least experienced; many of whom have built some degree of treasure from their life's work — if they expose them to serious personal financial consequences, the pool of independent directors may dry up quickly.

With that in mind, how do we make sense of some of the eye-popping headlines that we've seen in the last couple of years? There's a $2 billion judgment against the directors of Southern Copper. There was just recently a $148 million judgment against the controlling shareholder and the General Counsel — that leads to shudders from some in the room — of Dole Food. Let's bear in mind — as I said at the outset — those are cases where there were clear and significant conflicts of interest. We get questions all the time from people about what this means for an independent director, and the answer is, it means almost nothing. Those cases do not apply to the legal regime that's going to apply to the review of conduct by an independent director.

There are probably people in the room who say, "I read more than just the *Wall Street Journal*; I've seen some things in recent cases that really have me worried." One case had a whole interesting topic I'm not going to talk about, relating to financial advisors. But in the course of addressing that subject, the Delaware Court of Chancery, the vice chancellor in that case identified a few things that directors did, and the vice chancellor didn't just disagree with them, but said, in effect, "If these directors hadn't settled, they might have committed bad faith or had conflicts of interest that made them be treated as non-independent. They might be in a position where they're personally liable."

Now that should make us all stop and pay close attention. We haven't yet seen a single case in Delaware where a director, on the basis of bad faith alone, has had to write a check. Now we've got a vice chancellor in the Court of Chancery saying, "Here's some things directors did that might put them in a position where they have to write a check. Let's pay close attention and see if we think these are serious enough that they exceed that standard that's set by *Lyondell*."

The board was selling the company. Their financial advisor did not make, until the day of approval of the deal, a presentation to the board about the value of the company. People who are experienced in

M&A would be surprised by that, to say the least. Keep in mind this board did have experienced advisors; they presumably were advised as to how to conduct the process. I doubt very much that they overruled their advisors and insisted that they not receive that advice until the end. Obviously, there is some blame to go around in this issue, and how the process got there. Probably the board and its advisors should have handled this differently. But should this be the thing that causes the board to, for the first time, have to write a check?

Let's think about the next case that you may have seen, the *Howard-Anderson* case. In the *Howard-Anderson* case, the Court of Chancery suggested a very director-favorable standard that I described in *Lyondell* might not apply if the plaintiff chooses to frame the allegation of bad faith differently. That would be a significant change in the law around director liability in Delaware, if it is true. There's the question of whether that's the right way to read that case, but some practitioners have suggested that's the right way to read it.

Finally, let's look at the *Comverge* case, where a company in financial distress sold the company with a high termination fee, and one that was outside of the bounds of what's normal, but there had been other cases before that were higher, and because they were out of money, had to borrow money from the buyer. The terms of that loan created an additional penalty to the buyer in the context of the loan that would arise if the company were sold to somebody else.

The Delaware court said, in effect, "We're going to look at those two consequences of the company being sold to somebody else as an aggregated termination fee, and say that it was a breach of fiduciary duty." We can all accept that. We know that in the M&A context, the courts are going to review board decisions closely. They might disagree with them; and they might change them. That's okay; that's the way it's supposed to work.

"We continue to work closely with the EPA to develop new methods and technologies that help industry achieve compliance in a cost-effective manner. Regulation can only be as good as the technology that's available for helping industry to comply."

– *Seth Hoogasian*

But the court went further and said, in effect, "This decision was so far beyond the bounds of reasonable judgment, that it seems essentially inexplicable on any grounds other than bad faith." Once again, we have a Delaware Court of Chancery, a vice chancellor in the Court of Chancery saying, "Here's some conduct that might be bad faith."

I'll mention one other: *PLX*. An activist got on the board, and the board was suggested to possibly have committed bad faith because they agreed to support that activist director's decision that a sale of the company was appropriate, essentially to accede to the wishes of stockholders expressed through their election of that director.

What's going on here? Is the law around independent director liability evolving? Are we seeing a reaction to the recent financial crisis, or is it something else? If you want to think about that, we can look at a couple of Delaware Supreme Court cases that really help to smooth the waters on this.

The first is a case called *Cornerstone Therapeutics*, which involves a controlling shareholder. There's a whole separate issue around that. A key thing in that case is that Chief Justice Strine, the Chief Justice of the Delaware Supreme Court, addressed the issue of what happens to the independent directors in this case where there are also people who have a conflict of interest. The vice chancellor in the Chancery Court had said, in effect, "I've got to follow those people on the case all the way until the end, because I have to figure out whether or not they engaged in bad faith." Chief Justice Strine said, in effect, "No, that's not right. Delaware presumes that independent directors acted with good faith. You don't have to build the record to prove that they acted in good faith; we assume they acted in good faith. If the plaintiff can articulate an argument that creates a reasonable inference they didn't, then maybe we have a case for litigation. But in the absence of that, the independent directors should be kicked out of the case at the beginning; they should be dismissed."

He goes on — which he didn't have to do, but perhaps, because of these other recent cases, he felt it was necessary to do it — to articulate a theory of the liability of independent directors in Delaware. He talks all about the policy issue of the importance of getting independent directors in a position where they aren't nervous that they will be stuck in endless litigation, where they aren't nervous about personal liability, because it is the policy of Delaware to want good independent directors to serve.

Very recently, in the *Corwin v. KKR* case, again, Chief Justice Strine addressed a similar issue, which is, "What is the liability of directors after the stockholder approval of a transaction?" Setting aside the technical aspects of that, he proceeds to articulate what he understands, or what he thinks that the law should be in Delaware, around court review of board decisions and personal liability. He says these heightened scrutiny standards that have been developed — *Revlon*, *Unocal*, etc. — those standards are great for dealing in real time with an M&A deal, and having the court make the decision to change a board's decision. But they aren't very good at dealing with issues of director liability. He articulates a view which seems to bring you right back to *Lyondell*, where he says, "Where an M&A deal is pending with independent directors who made a decision to approve it, the court should go in. They should review the decision closely; and if they're going to change a decision, that's okay. But after the stockholders approved the deal and the deal is over, those directors should have the confidence of knowing that they're going to be protected essentially completely from the risk of personal liability."

We've got those cases. How do we square those with the Chancery cases that I described? One glib way of doing it would be to say that the Supreme Court is the boss, so that's what we should consider the law to be. Of course, there's something to that, but there is more to it than that. One of my partners recently noted that there's been incredible turnover in the Delaware courts in the last two years. Of the five members of the Supreme Court in Delaware, four of them have been appointed in the last two years. On the Chancery Court, the chancellor himself was appointed in the last two years; and Vice Chancellor Parsons is being replaced by Tamika Montgomery-Reeves essentially as we speak. That's two out of five on the Chancery Court have turned over.

It's natural with that kind of change in the personnel of both the Supreme Court and the Court of Chancery that there might be some doctrinal inconsistency. Where does that leave us today if we're talking to a potential independent director who says, "Should I join this board? I've been offered a position to join a board; I'd like to do it, but is it too much risk? Do I want to risk my life's work, for doing this?" In answering that question, we can't ignore the cases we've seen recently in the Court of Chancery. They do create a moment to pause and worry that there's a risk that the law in this area is evolving. But these recent cases from the Delaware Supreme Court really should, in the end, give us confidence, particularly as articulated by the Chief Justice, that independent directors of Delaware corporations today, who make a real effort, who get good advisors and do try

to do a good job as independent directors, are essentially completely protected from the risk of personal liability.

JACK FRIEDMAN: Thank you. What are some examples of issues that could worry a director?

GRAHAM ROBINSON: I'll answer, but we should all answer, because these do actually cut across different legal regimes. It's incumbent on all practitioners to make sure we don't alarm independent directors about this risk. The reality is that independent directors generally do not have conflicts of interest that create a risk of personal financial liability.

There are certainly, in Dan's area, for example, situations where directors have had to write checks. Some of them are situations that are more deserving of blame than others, but we'll hear from Dan to what degree he thinks a well-intentioned, hard-working director faces a meaningful risk of having to ever write a check.

It's important for directors to remember that there are multiple legal regimes. I'm talking about fiduciary duty, but as we were talking about before we all came out here, a company in financial distress needs to think about the liability its directors may face for unpaid wages if the company runs out of money and can't afford to make a payroll to employees for a period, because everyone pays employees in arrears.

That's an area where, certainly, Lisa would weigh in. Of course, you've got a risk as directors of enforcement and of civil litigation and potentially criminal prosecution for violation of the securities laws, which is Dan's area. There are other areas.

JACK FRIEDMAN: Another area would be if the corporate taxes aren't paid?

GRAHAM ROBINSON: Taxes, yes. I'm not an expert in tax; it's unlikely that directors would have to write a check themselves in the absence of something deliberate.

SETH HOOGASIAN: I have the luxury of coming from a large company, where we have standard indemnification agreements with directors that are backed up by a substantial balance sheet. And then we've got D&O insurance that backstops that.

JACK FRIEDMAN: We had a program in New York once, where we asked the directors present if they ever had a presentation in a boardroom about their D&O coverage. Out of about 80 people, there were only two who had watched a presentation. Only one of the two felt he understood the presentation, so it can be a problem.

SETH HOOGASIAN: For us, it is not. I periodically review all of our insurance with the audit committee, and D&O is clearly part of that. I describe how it works and what the coverage amounts are, and we also have an insurance broker benchmark our coverage against peer companies so that the board can feel comfortable that we're doing what is appropriate for us.

JACK FRIEDMAN: I'm going to let Dan speak, and then we'll go to the employment area more generally. In the securities area, what are examples of insider trading?

DANIEL O'CONNOR: Directors face liability by and large when they've been involved in the acts that are at the center of what the issue is. Insider trading is a typical thing, that the companies are victims there and then a number of directors have gotten in trouble for that. There have been times when directors have been sued, but it's usually because they also have some other role within the company, as well.

There are a couple of cases where independent directors have gotten into difficulty with the SEC, but they are very rare. There was a case from the early 2000s involving a company called Chancellor where the audit committee avoided very clear red flags. A transaction was presented, and the accounting for it was going to be A, B, or C. The original outside audit firm said, "No, you can't do it because you're missing 1, 2, and 3." Management fired that outside auditing firm. They said, "We've got a new auditing firm, and we found 1, 2 and 3." The audit committee said, "Isn't that great! Let's recognize the transaction the way you want to." It was a very extreme, very rare example.

In order for a director to be involved in a securities disclosure or an accounting violation, they have to have a substantial involvement. Usually, it is recklessness, ignoring major red flags. Typically, the SEC sees the directors as people who were misled, people who didn't have the information that they needed. That's where things should be. It should be a rare situation that an outside director is actually sitting in a chair as a potential target of a securities enforcement action.

Where we've seen directors get into some difficulties is not in the public company space, but in the mutual funds space, where they have actual obligations to do more independent reviews and similar actions, and they're not following through on the activities they have.

In the public company space, you'll see an uptick every now and then of things like control personal liability, and were they aiding and abetting the misdeeds of management underneath it. There's a real need and a reason to be diligent, like there is generally because of the fiduciary duties there. It should be a very rare circumstance and it has been a very rare circumstance that independent directors, because of their activities on an audit committee or such, find themselves facing liability.

"A lot of what lawyers do is playing defense, trying to reduce risk and protect the company. Acquisitions are a great way for an in-house legal team to meaningfully contribute to actually growing the business." – *Seth Hoogasian*

JACK FRIEDMAN: Let's discuss employment with regard to directors.

LISA BURTON: On the employment side, there actually is a little bit of risk there, particularly on the wage side. It's going to be state law-driven, and many statutes have director/officer liability for making decisions with regard to the payment of wages.

The government always can come after whoever they want on the tax side! But on the wage side, it's the decision maker. It's when the board of directors are now stepping in and making the decision. For example, the board has to make the shutdown decision. You're continuing on certain reserves, and you're suddenly looking at cash flow because somebody has miscalculated. "We're not going to make payroll"; you're going to have to make a decision. Oftentimes, the question becomes, who's making that decision, how is it documented in the board minutes? Could there be liability to the extent you can't cover all of those? The statutes do provide for individual liability.

You have to think about these financially. You're not going to get insurance for that; generally, wage claims are not covered. It's something that boards need to be aware of. You see it more so when you've got directors in private companies who have a portfolio of companies, but that liability is there. I *have* seen board members write checks.

JACK FRIEDMAN: What happens if you're an owner of a business that is in trouble, and you know you're going to be short on cash flow? If you get a loan to pay wages, can you get in trouble?

GRAHAM ROBINSON: The courts, for the most part, look to creditors to protect themselves, because unlike stockholders, they have a contract with the company. There actually was a lot of uncertainty about that for a while. A very famous case in Delaware called *Crédit Lyonnais*, suggested that boards might have a stockholder-like fiduciary duty to creditors. A number of judges, when they're *not* sitting on the bench in Delaware, have, over the years, described that as the worst mistake that Delaware courts had ever made in their fiduciary duty. They clawed themselves back from that for a long time, and then essentially eliminated that doctrine about 10 years ago.

For the most part, the Delaware courts say, as a matter of fiduciary duty, they're going to look to lenders to protect themselves. But in your fact pattern, there may well be provisions of the loan agreement that could put the company in a position where it can't draw the loan at that point. Of course, if the company is actually insolvent, then the issue of the duties of directors can be more complicated.

To answer your question in practice, public companies — which is what we most often work with — which are in financial distress, typically pay incredibly close attention to this issue. We often say to them — I'm sure

Lisa would march in and say it even more loudly — one of the most important things to understand is, the employees who go to work every day are entitled to get paid for that, even though the pay is coming two weeks later. Somebody's got to be tracking that amount. You do not ever want to be in a position where there's not enough money in the bank to pay the employees. If you're getting close to that, then you've got to file for Chapter 11.

JACK FRIEDMAN: I want to discuss M&A deals. Can anyone give examples of some of the fascinating wrinkles you have encountered on a deal?

SETH HOOGASIAN: As we get bigger, and more globalized, the deals are much more likely to be cross-border, and you have a multitude of regimes that you have to understand. You sometimes need to do due diligence in many countries. The numerous antitrust filings require coordination, so that you hopefully can end up making the same presentation to many countries. That's the best way to minimize delays and differing interpretations. You may eventually clear in every country, but you can only close when you get the last approval. What we spend a lot more time on, now, is the choreography of making filings in all these different countries for larger transactions.

JACK FRIEDMAN: Do deals sometimes have an on-again, off-again quality?

SETH HOOGASIAN: Yes. In my experience, we are seeing many more deals going through an auction process, where you literally don't know until 11:59 p.m. whether you're going to get the deal or not. The bankers representing the seller will try to keep as many parties as possible interested in the transaction, and they can often play one off against the other to try to get the best deal for the seller. That's fair; that's what they're supposed to do. But from the buyer's side, you need to be prepared to follow a non-negotiable process, and you may lose out at the last second. As I said earlier, you spend all this time and energy and negotiate all the documents, and then you still might be a dollar a share short, and you lose.

JACK FRIEDMAN: Have you been on both the buying and selling side of the deals?

SETH HOOGASIAN: Yes.

JACK FRIEDMAN: What kinds of professionals do you assemble for your team?

SETH HOOGASIAN: It cuts across the entire organization. We include people from Business Development, Tax, H.R., Finance, Legal, and Accounting. Basically, this core team does much of the due diligence, but then the results often get handed off to the operating team, the people who are going to actually run the business going forward. They have to know what they're stepping into.

As an example the legal team will say, "Look, this is the list of distributors that this business has. Does that match up well with what we already have, or are we going to have overlapping distributors?" If you have an exclusive contract with a distributor in a particular country, and now you go buy somebody who also has an exclusive with somebody else in that country, then obviously you've got a conflict and you'll have to resolve that overlap. The legal department's job would be to flag the issue, but then we have to sit down with the operating people to figure out how we're going to resolve it.

JACK FRIEDMAN: How do you resolve it?

SETH HOOGASIAN: You try to negotiate your way out of one of them. Sometimes you wait for the contracts to expire.

JACK FRIEDMAN: Could Dan give us an example?

DANIEL O'CONNOR: We spend a lot of time, and one of the areas I focus on is anti-corruption and sanctions work. It's a little bit of the flavor of the day, but it doesn't seem to be going away. We have a very active practice in helping companies develop a risk-based approach to evaluation of corruption, sanctions, and export control risks as they're looking at targets, and figuring out how you phase that in the transactions. It is especially important when you're doing an auction process, where you might not get access to everything up front and you don't want to spend all the money that you can on these processes; because they can be very expensive.

Oftentimes there, especially when we're evaluating companies that have had historic issues, or in regions or industries with really significant historical problems, we'll team with outside experts, whether it's someone to do some reputational source background checks on individuals or, in very rare cases — but it is common when you're going into Africa or certain parts of Asia and maybe some places in South America — to do transaction testing. You're a little bit more proactively looking at how the company has operated in the areas that we know have historically posed risks for corruption and sanctions, and getting your hands on that.

JACK FRIEDMAN: Are the people who do the due diligence usually the accountants or the forensics consultants, combined with the company's people?

LISA BURTON: There are virtual deal rooms now that people are constantly populating. At least on the employment side, we're looking at what's getting disclosed; we're putting together lists of what we'd still like to see; and the lawyers are looking at it to flag it oftentimes for the client. Then you determine if you need to dig deeper.

JACK FRIEDMAN: Who physically does the deeper digging? Who do you hire to do the nitty-gritty?

LISA BURTON: There are lots of different people. It could be paralegals who are going in; it could be attorneys; there's a range of folks. It all depends on the deal. It could be the partner himself going in. I've gone in and looked at it, and looked at examples of different things, and then you make a call, and decide if you're going to go deeper. It's not a one-size-fits-all on who's doing it.

Your question on the M&A side, it's not usual that the employment issues are going to be the material issue that craters the deal; I've never had that happen. We are focusing more on the type of deal, national or international; the structure of the workforce; what are you going to assume and not; and how the timing of a deal dictates the process. Those are going to be the points that you need to look at, and then have the followup after, particularly if most of the workforce is independent contractors or other aspects, and what the company is really buying.

JACK FRIEDMAN: What is your strategy when you have deals in different countries? Do you hire multinational law firms with offices in each country?

SETH HOOGASIAN: We put a team together that we think has the best possibility of getting what we want to get done with as few people as possible. The more

> "It's often left to the scientists, the engineers and the business leaders to push the envelope of what's possible; to develop and deliver the tools that protect our health and well-being, the air we breathe and the food that we eat."
>
> – *Seth Hoogasian*

people you have to coordinate, the tougher it gets. At the same time, even the giant law firms can't be equally good in every country, so oftentimes we have a variety of firms working for us.

JACK FRIEDMAN: When your firm does classic M&A, what types of professionals are on the list of people you work with on deals?

GRAHAM ROBINSON: Internally, or externally?

JACK FRIEDMAN: Externally, and also a comment on how broad an examination "due diligence" means.

GRAHAM ROBINSON: Due diligence is an incredibly important part of representing a buyer in an M&A transaction, and in many cases, if you're on the buyer's side of a transaction, it is ultimately one of the most important things you're doing. As Seth described when he was talking about his career, one of the big trends that has affected the way due diligence gets done — much for the better — is that companies have built up substantial internal expertise on the legal side, and also in the case of a company like Thermo, in executing M&A transactions.

One of the important questions, if you think about the component of due diligence that relates to helping the buyer to figure out whether it wants to buy this company and how much to pay, that's one part of due diligence; only one part of it. There's always the question of who's best suited to do this piece of it. For some parts of it, there's no question that the due diligence is better executed by the in-house lawyer or business person who knows the business better than we could ever hope to, and so that's always an important point. There are other things where *we* might do it better, because we might have more resources in a particular area, or we might have expertise in an area that doesn't come up repeatedly internally. We're often figuring out, in really a bespoke way, what the right approach is to due diligence together with the client.

Some clients may lean on us to do a huge amount of it, and in some cases, we're really picking: this part will be done by this group at the company, this part will be done by us; and just as Seth suggested, lots of other firms, both legal and accounting, may help us.

JACK FRIEDMAN: What are some of the topics that come up on which you have to do due diligence?

GRAHAM ROBINSON: There are a lot of routine ones; they come up all the time, but aren't as interesting. Dan touched on anti-bribery and corruption. If you had to say there was only one area you are forced to do due diligence, it should be that. I had mentioned there are multiple benefits to due diligence. In that one, it's not just figuring out, "Is there a problem?" Are we willing to buy it? There's a very significant difference in the way that a regulator will treat the buyer if the buyer did a rigorous due diligence exercise, and there are specific things that you need to do if you uncover problems. If you buy a business operating in some parts of the world, some buyers might say that it is almost inconceivable that you won't wind up ultimately having either an historical or forward-looking anti-bribery corruption issue within the company. The question is, what do you do to try to identify it and remedy it? That diligence serves a purpose, not just of informing the buyer and making them understand what they're buying, but also creating an important part of dealing with issues as they come up later; the rigor of what you did is very important.

I'd say that's an area where, particularly for international, large transactions, the largest amount of resources and the largest amount of real thought go into structuring that piece of the due diligence.

DANIEL O'CONNOR: We've definitely seen an uptick in that area. There are many situations where you do a lot of work on private equity firms and also public companies. We're not doing the deal; we're not deal counsel; but we're brought in specifically on the anti-corruption issue. You're wondering if you are buying something that is going to pose you risk down the road. People are also recognizing, as they're trying to operate in a positive way, that it can affect the underlying value of the organization. If they're generating $100 million a year in sales, but half of those are because they're bribing, when you bring them into your organization, that hopefully will stop, and that *will* affect the ongoing value. As do many other issues that come up in bribery, in diligence. That is becoming an issue and figuring out how to approach that risk-based issue. It tells you where they are, but you also get a sense, too, of whether you are going to be able to actually change things going forward. When you're doing the interviews with the people in the organization, you understand their sensitivity to the problems, to the issues. You find out if they think they can actually adopt doing a couple of different things with that kind of diligence approach.

It's a place where there has been a real increase in specialty. I personally have been surprised how long this seems to be having legs, and it continues to have legs. In the '90s, I spent a lot of time doing environmental transaction testing in connection with things; that's kind of petered out; people figured it out. *This* doesn't seem to be going away. Thankfully, for lawyers and such, it is becoming a real big issue.

JACK FRIEDMAN: Is there someone in the audience who has a question?

Thank you.

[AUDIENCE MEMBER:] This is a great discussion, and important. My question goes to the buyouts. What would you say are the top three things that you've had to deal with in some of the most difficult buyouts?

GRAHAM ROBINSON: In M&A the top three most difficult issues to deal with are ones where we can't be specific, obviously. Generically speaking, let's take both sides of the transaction to make it more interesting. One issue which is pressing in some industries now, both because of consolidation and because of some of the volatility in the stock market recently, particularly in the pharmaceutical and biotechnology space, is the issue that a board of directors deals with when a buyer might be prepared to pay an enormous premium to their stock. The board and — perhaps most importantly, the management team, without which the company might be concerned it wouldn't be able to survive — might not be interested in accepting that bid. The board has a real issue thinking about what the right thing is to do for shareholders. As counsel, one of the roles we often try to play is helping the board figure out what its view is, because they are not always in a position where they can openly discuss their actual views. For example, if they generally believe and agree with management but think there are some risks to the company — not that they necessarily disagree with and don't trust management; simply, there are some risks that are a factor for them in thinking about whether to turn down a 100% premium offer — those discussions might be difficult to have when the CEO or founder is in the room; and yet they're incredibly critical to helping the board make the right decision; and as counsel to helping the board make a decision that will be defensible later, as having been a good, thoughtful exercise of the board's judgment and fiduciary duty.

From the sell side, particularly lately on the target side, that's an issue we've seen, and requires a lot of real nuance. On the buyer's side, anti-bribery and corruption issues are probably the most challenging and interesting issue. We've been seeing that, certainly, where the largest amount of our time and real thought goes into representing buyers in transactions. Without a doubt, an area that is both interesting and complex — probably one of the *most* interesting and complex — is a buyer attempting to get a target to agree to sell itself to you if they're otherwise unwilling, so-called "hostile acquisition." Almost every public company acquisition has some little flavor of that. Very few targets say, "Sure, we'd love to sell ourselves." It's not a very good strategy, even if you want to do it. But as a buyer, you don't know at the beginning where that's headed. Is this target really dug in, or is this just a negotiation? As a buyer, you have to pursue that, assuming that the target may truly be entrenched.

I don't know what views others have — everyone here is involved in M&A. Seth, you certainly would have views.

SETH HOOGASIAN: Yes, the only point I would add is that in public transactions, it took me a while to get used to having no remedy after the transaction closes if you discover something isn't as you were led to believe. In a private transaction, where you're buying a business from either a small number of shareholders or a division from a bigger company, you can get all these extensive protections. If you find something wrong a year later, you have at least the possiblility that you can go back and talk about it with the seller and try to get some kind of compensation for it.

In public deals, you're buying stock from thousands of people, and there's no real remedy. Therefore there is more urgency on understanding what you're acquiring, because there is no backup. I always talk to the team about really making sure you know everything before we sign, because there's no remedy afterwards.

JACK FRIEDMAN: There's no remedy because you'd have to go after each shareholder?

SETH HOOGASIAN: Yes, and you can't. It's not even possible because the shares trade all the time, and they don't make any personal representations to you, anyway. They're just passive investors. There's really nobody to sue.

GRAHAM ROBINSON: That's absolutely right!

JACK FRIEDMAN: Does anyone else have a question?

[AUDIENCE MEMBER:] My question is for Seth, and you may have actually included part of the answer in your last answer. What are the top three issues that keep you up at night?

SETH HOOGASIAN: The first thing is that when you're in charge of the legal affairs for a large, decentralized business, it's very tough to know everything, everywhere, all the time. I basically have had to get comfortable that there are going to be some things that I'm just not going to be on top of personally, and that's where I rely on the team. I've got a great group of lawyers, and they are my eyes and ears for lots of issues, because many of them are closer to the businesses.

The second thing would be: I share the sentiments on the panel about making sure that we're doing everything we can on acquisitions from a due diligence point of view, because we are a fairly acquisitive company. We've not had any significant issues missing anything in due diligence, so I think we're pretty good at it. But you're only as good as your last deal, and I want to never miss anything.

The third issue would be trying to anticipate every legal or regulatory issue before it surfaces. Aspiring for perfection is great, but it's tough to get there. So, we are constantly trying to do things better.

JACK FRIEDMAN: Another question?

[AUDIENCE MEMBER:] Thank you. Making the assumption that activist investors are here to stay, I'd be curious as to what the panel's reaction is: I've got a thesis that they're going to have an impact on the pool of directors that we have. It's either going to be a negative impact and drive away good people or a positive impact that improves the quality of the directors who want to be there.

GRAHAM ROBINSON: Actually, it's both, but let me articulate that. Activism, if you define it properly, is undoubtedly here to stay. It might become a larger or smaller asset class, but it has led to a real dramatic change in the way the companies interacts with significant investors, particularly institutional investors. No matter how you feel about particular activists or even the trend, that is probably a great thing. Companies connecting more with their shareholders — not just having meetings, but actually understanding what the specific concerns are that shareholders have; engaging them to a degree where a large shareholder might have an understanding of why a suggestion or thought they had for the company may not actually be the right thing to do; or at least where the company is actually taking that idea seriously, is better than a world where the companies and the people who own them, at least the larger institutions that own them, never talk to one another. That's a good thing that results from activism.

Also — without giving specific examples — there have been lots of companies which have adopted suggestions from activists because they turned out to be good suggestions. One thing we that we sometimes, not infrequently, see from a board perspective is that an activist comes with a list of ten complaints. When you get into the board room, particularly if you get with the independent directors, you will find that of those ten, maybe three are things with which they agree and have been trying to address with management and haven't achieved that yet.

So there are pieces of it which can inspire something good; of course, there is also a lot of negative. The activism playbook often involves simply leveraging companies, involves companies taking on more debt, and sending cash out to shareholders in a way that can increase the financial risk of the enterprise. As a general matter, to the extent particularly that activists do not have a company-specific view necessarily, but are approaching this wherever the opportunities exist, the trend overall can be a negative one. Even Moody's has weighed in on this and suggested that there is a negative aspect of activism that is on the whole increasing the risk of American companies. Without a doubt — and this is the most important thing — to the extent that independent directors (and almost all of the companies we work with have a majority of independent directors or all but one or two), would spend their time with management on making the company as successful as possible and are distracted by activists from that, it is a waste of their energy and a negative result.

JACK FRIEDMAN: I have a final question for our Guest of Honor. In the five minutes of free time that may be available to you each month, what do you like to do?

SETH HOOGASIAN: Whatever my twin boys like to do! They are ten years old and love to golf. So right now, I am the caddy.

JACK FRIEDMAN: I would like to thank our Guest of Honor and the Distinguished Panelists for sharing their wisdom with us today. I would also like to thank the audience for their participation. Thank you.

Daniel O'Connor

Partner, Ropes & Gray LLP

ROPES & GRAY

R. Daniel O'Connor focuses his practice on securities enforcement matters, internal investigations, related trial work, and compliance consulting. A former SEC enforcement attorney and experienced trial lawyer, Dan works with corporations and individuals involved in civil and criminal government enforcement matters, and represents entities in complex commercial disputes.

Dan also assists corporate management and directors in conducting internal investigations, addressing sensitive corporate governance issues, and establishing and evaluating regulatory compliance programs. Working with partners in the firm's corporate and investment practice groups, he has particular expertise in evaluating and establishing anticorruption programs, resolving matters involving financial reporting and disclosure at public companies, and fiduciary and regulatory compliance issues at investment management groups.

Prior to re-joining Ropes & Gray in 2008, Dan was Senior Trial Counsel at the SEC, where he handled prosecutions and investigations of corporate entities and individuals for civil and criminal violations of federal securities laws, including: various accounting and reporting fraud schemes, fraud by hedge funds and other investment advisers, FCPA issues, market manipulation, and broker-dealer fraud and failure to supervise.

Experience

- **Carter's Inc:** Lead counsel representing a large public company clothing retailer in DOJ and SEC investigations related to the company's reporting of margin support payments to wholesale customers in allegedly incorrect financial periods. Negotiated first-ever Non-Prosecution Agreement with SEC wherein no enforcement action was taken against company in light of its cooperation with regulators.
- **State Street Global Advisors:** Lead counsel representing unregistered and registered investment advisers in SEC and state regulator investigations related to the use and disclosure of complex subprime asset-backed securities in fixed income funds.
- **Deputy Controller of Fortune 500 Public Company:** Lead counsel of a team that successfully convinced SEC staff to withdraw Wells Notice and recommendation of an enforcement action related to revenue recognition issues associated with capital equipment sales.
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Graham Robinson

Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Graham Robinson is the head of the Boston Mergers and Acquisitions Group. He focuses his practice on mergers, acquisitions, and other transactions in the pharmaceutical, medical device, and technology industries in the U.S. and internationally. He regularly represents public and private companies, as well as private equity and venture capital funds in acquisitions and divestitures, both negotiated and contested. He has significant experience advising companies in preparing for and responding to unsolicited acquisition proposals.

Mr. Robinson also advises companies in pharmaceutical and medical device collaborations, and issuers and underwriters in connection with initial public offerings and other corporate finance transactions.

Mr. Robinson repeatedly has been listed in *Chambers USA: America's Leading Lawyers for Business* and *The Best Lawyers in America*. He also was named in Lawdragon 500 Leading Lawyers in America. In 2013, Mr. Robinson was named by *The M&A Advisor* as one of the top 40 M&A professionals under the age of 40 in the United States. In 2011, he was named by the *Boston Business Journal* as one of its "40 under 40" business and civic leaders in the city of Boston. Mr. Robinson is a member of the board of fellows of Harvard Medical School, an overseer of the Boston Symphony Orchestra and a former member of the board of directors of the Massachusetts Chapter of the March of Dimes.

Mr. Robinson also is a member of the board of directors of Project Step, a nonprofit organization that seeks to identify musically talented children from underrepresented Boston communities, provide them with comprehensive music and string instruction, and prepare them to compete and succeed as professionals in the world of classical music.

Prior to joining Skadden in 2012, Mr. Robinson served as the global chair of the corporate practice and was a member of the mergers and acquisitions group of another international law firm.

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Lisa Stephanian Burton

Partner, Morgan Lewis & Bockius LLP

Morgan Lewis

Lisa Stephanian Burton defends employers in litigation and counsels on labor and employment issues that include wage and hour, discrimination, leaves of absence, and other U.S. state and federal laws and regulations. Lisa also advises employers on business immigration matters. She works frequently with employers in the life sciences, healthcare, technology, retail, and financial services industries. Lisa is the leader of the Labor and Employment Practice in the Boston office.

Lisa's employment litigation practice includes representing clients before state and federal agencies, as well as before state and federal courts. She defends wage and hour class and collective actions involving claims under the Fair Labor Standards Act (FLSA) and state law. Lisa also defends clients in employment discrimination challenges, including claims of race, gender, age, and disability discrimination, retaliation, and wrongful termination cases.

In her labor and employment counseling practice, Lisa advises clients on employment practices and policies. She counsels employers on structuring the workforce, labor and employment implications of mergers and acquisitions, and hiring, firing, and reductions in force (RIF). She also guides companies in matters involving the U.S. Occupational Safety and Health Administration (OSHA).

Lisa's immigration practice includes helping employees of both large and small companies secure employment-based visas and permanent residency. She helps employers achieve immigration solutions for information technology professionals, executive and managerial employees, investors, medical professionals, and scientists and researchers in academia and in the biomedical and pharmaceutical industries. Lisa also represents clients facing government investigations related to immigration compliance and alleged abuses in immigration-related employment practices.

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