DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Michael Ray

Executive Vice President, Chief Legal Officer & Secretary, Western Digital

THE SPEAKERS

Michael Ray
Executive Vice President, Chief Legal Officer & Secretary, Western Digital

George Cary
Partner, Cleary Gottlieb Steen & Hamilton LLP

Douglas Dixon
Partner, Hueston Hennigan LLP

Michele Johnson
Partner, Latham & Watkins LLP

Mark Peterson
Partner, O'Melveny & Myers LLP

Denise Amantea
Partner, Woodruff Sawyer & Co.

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

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of the achievements of our distinguished Guest of Honor and his colleagues, we are presenting Michael Ray and the Legal Department of Western Digital with the leading global honor for General Counsel and law departments. Western Digital is a leading global provider of digital storage solutions. His address focused on key issues facing the General Counsel of an international technology corporation. The panelists' additional topics included M&A; antitrust; and governance.

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

Jack Friedman
Directors Roundtable Chairman

Michael Ray

Executive Vice President,
Chief Legal Officer and Secretary

Western Digital.

Michael Ray was appointed as executive vice president, chief legal officer and secretary in November 2015. Prior to that, he served as senior vice president, General Counsel, and secretary since October 2010. He has held a number of positions at Western Digital Corporation since joining the company in 2000, including Senior Counsel, Assistant General Counsel and Vice President, Legal Services.

Currently, Ray is responsible for the company's worldwide legal, risk management, compliance, and government relations functions. He serves as a member of the company's executive management team and provides strategic advice to the team and the members of the company's Board of Directors. He oversees teams responsible for supporting the company's efforts to develop, manufacture, market, and sell storage products globally through the company's independent subsidiaries. He also leads teams responsible for protecting the company's significant intellectual property, strengthening and defending the company's brands worldwide, and complying with regulatory and public-company obligations.

Prior to joining Western Digital, Ray was corporate counsel for Wynn's International, Inc., an NYSE-listed manufacturer of automotive parts and chemicals; served the U.S. District Court, Central District of California as judicial clerk; and practiced trial law, law and motion, and labor/employment law at O'Melveny & Myers, LLP.

Ray holds a bachelor's degree, with honors, from Harvard College; and a law degree, with honors, from Harvard Law School. Ray has received numerous awards and citations, including being honored as the *Orange County Business Journal*'s Public Company General Counsel of the Year for 2012.

Ray has served since 2001 as a director of Mercy House Transitional Living Center, based in Santa Ana, California, one of California's largest providers of services and housing for homeless men, women, and children. He is also a director of the United Way of Orange County, and has co-chaired the Orange County United Way Tocqueville Society Bench & Bar affinity group since 2013.

Western Digital

Western Digital Corporation (NASDAQ: WDC) is an industry-leading provider of storage technologies and solutions that enable people to create, leverage, experience, and preserve data. The company addresses ever-changing market needs by providing a full portfolio of compelling, high-quality storage solutions with customer-focused innovation, high efficiency, flexibility, and speed. Our products are marketed under the HGST, SanDisk and WD brands to OEMs, distributors, resellers, cloud infrastructure providers and consumers.

AUDREY WISHNICK GREENBERG: I want to welcome you. I am Audrey Wishnick Greenberg, senior advisor to the chairman of the Directors Roundtable, and a member of the California Bar.

We are a civic group whose mission is to organize the finest programming nationally and globally for boards of directors and their advisors, including General Counsel. We have organized over 800 programs in the last 26 years, and have never charged anyone to attend.

Today, the Directors Roundtable is presenting the world's leading honor for General Counsel and their legal departments to Michael Ray – he is the executive vice president, chief legal officer and secretary of Western Digital – and to his outstanding legal department, for their achievements and leadership. He is a graduate of Harvard and Harvard Law School, and is active with the Mercy House Transitional Living Center [Mercy House Living Centers] and the United Way. Our chairman, Jack Friedman, is joining the audience today.

Our Guest of Honor will make his opening remarks and lead the discussion of the panelists. The full-color transcript for this event will be made available electronically to 100,000 leaders globally. As a special surprise, we have a letter for Michael from the dean of Harvard Law School. I will read it and then give it to him.

> I am pleased to hear that Michael C. Ray is being honored as the global honoree for distinguished General Counsel along with Western Digital Corporation's legal department, which he leads. What a terrific choice for this great honor!
>
> Mr. Ray is a loyal asset of one of the most well-established technology companies, serving the Western Digital Corporation in various roles for over seventeen years. Nearly two years ago, he was appointed as Executive Vice President, Chief Legal Officer, and Secretary. While he is being honored as a distinguished General Counsel, Mr. Ray is so much more than that. As Western Digital's Chief Legal Officer, Mr. Ray is responsible for not only advising the company's leaders on legal matters, but participating in steering the company into the future. In his own words, Mr. Ray and his team make sure that "the urgent doesn't overwhelm the important." A myopic General Counsel can be detrimentally inefficient, but a proactive leader who can anticipate trends as well as risks is one in which worth investing. Western Digital has had the good sense to do just that.
>
> In addition to Mr. Ray's business prowess, he is a pillar of the community. He has been the Director of the Mercy House Transitional Living Center in Santa Ana since 2001. The Center is a key provider of housing and services for the homeless in the state of California. He is also a director of the United Way of Orange County and has co-chaired the Orange County United Way Tocqueville Society Bench & Bar affinity group since 2013.
>
> On behalf of the Harvard Law School, I congratulate our esteemed alumnus as he is presented with this award.
>
> Best Regards,
>
> John F. Manning, Morgan & Helen Chu
> Dean and Professor

I will now ask Michael to begin the discussion with his remarks. [APPLAUSE]

MICHAEL RAY: Thank you very much. I suspect that a letter from the Harvard Law School Development Office is already on its way to complement this one from the Dean. [LAUGHTER]

I'd like to start by thanking the Directors Roundtable and Jack Friedman for sponsoring this evening's event. It's a tremendous honor to be selected, and it's wonderful to have our team recognized. There are so many lawyers from Western Digital here tonight, that it feels a little bit like a staff meeting. [LAUGHTER]

This event is a fantastic platform for us to share with the membership of the Directors Roundtable some of the really exciting things happening at Western Digital and within our legal department.

I'd like to thank UCI for hosting us tonight. UCI, as you know, has one of the finest law schools in the region, so I think it's especially appropriate that we're gathering here tonight. And I *really* want to thank the members of our panel who have joined us this evening. Each member of the panel is a great friend, not just to Western Digital but to me personally, and each is an exceptional practitioner in his or her own right.

George Cary, a partner at Cleary Gottlieb, based in Washington, D.C., a former senior official with the Federal Trade Commission, and one of this nation's preeminent antitrust lawyers.

Mark Peterson, a great friend, a partner at O'Melveny & Myers, a corporate transaction practitioner based in Orange County, and prior General Counsel at Meade Instruments, Targus International, and Conexant Systems.

Michele Johnson, litigation partner at Latham & Watkins. A member of the firm's nine-person executive committee,

and my past co-chair of the Orange County United Way Tocqueville Society Bench & Bar affinity group.

Denise Amantea, principal with Woodruff Sawyer & Co., previously a partner at Wilson Sonsini, focusing on securities litigation and an advisor to boards throughout the country, especially in the technology space.

And Doug Dixon, partner at the highly regarded litigation boutique, Hueston Hennigan, with a practice specializing in commercial and I.P. litigation.

Thank you all.

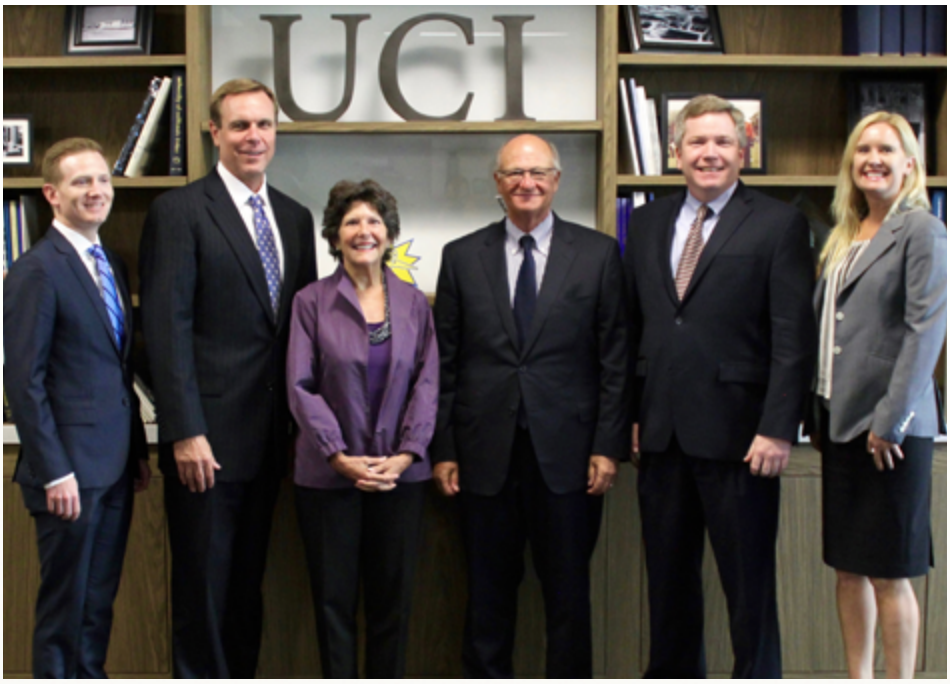
My remarks tonight will be divided into four sections. First, I want to talk about Western Digital's transformation, as well as the accompanying scaling and maturing that we have done within our legal department to help enable that transformation.

Second, I'll talk about how we position the legal department within Western Digital, and the qualities that we want our clients to associate with our team members.

Third, I'll talk about how we built and how we sustain the department by seeking to attract, retain, and engage exceptional talent

And, finally, I'm going to talk briefly about some of the challenges that we are currently working on in our continuing efforts to keep getting better.

First, Western Digital, for those not familiar with the company, is the world's largest data storage company, with revenues of more than $19 billion; 65,000 employees spread throughout the world; and major facilities in California, Thailand, Malaysia, China, Japan, Israel, and India. We sell products under the WD, HGST, GTech, and SanDisk brands, and individuals and corporations throughout the world keep their most important information — their photos, music, home movies, as well as their financial records, commercial transactions



documents, tax information, and countless other categories of data — on our hard drive and solid-state drive products.

We provide the foundation on which many of the most exciting innovations of the future will be built. Think autonomous cars, smart cities, machine learning, artificial intelligence, virtual reality — all of these are now possible because there is an infrastructure capable of storing and allowing analysis on data sets that are so large that doing anything with them a decade ago was inconceivable.

Some observers have estimated that in three years' time, all connected devices throughout the world will produce an exabyte of data a day — that's 1 billion gigabytes of data a day. Data scientists will be able to mine this data and extract information from it so that we can make better, faster, more informed decisions, that will transform industries such as security, healthcare, transportation, and energy.

As we say in our aspirational mission statement, we make "possible" happen.

Things were different back in 2000, when I started with Western Digital. Back then, the company manufactured one product: 3½-inch hard disk drives primarily for desktop computers. The highest-capacity hard drive we manufactured in 2000 ranged from 4 to 40 gigabytes, and annual revenues at the time were just under $2 billion.

The company's transformation began a few years after that, under the leadership of our then-CEO and now board chairman, Matt Massengill. In the first phase, from 2001 to 2007, the company focused on operational excellence and vertical integration. The company acquired a recording head company, Read-Rite, out of bankruptcy in 2003. We acquired a magnetic media company, Komag, in 2007. These acquisitions improved the company's cost structure, and allowed the company's engineers to innovate on how data was written onto, and retrieved from the magnetic media in each hard drive. As a result, areal density — the amount of data you can store on a hard drive — increased steadily over the next several years.

The company expanded its product portfolio during this period, introducing 2½-inch hard drives for notebook computers, 3½-inch capacity enterprise hard drives for

data centers; and an expanded range of backup storage offerings, under the WD Passport and WD My Book product lines.

Throughout this period, the hard drive industry continued to consolidate, as Quantum's hard drive business was acquired by Maxtor; Maxtor was, in turn, acquired by Seagate; and Toshiba acquired Fujitsu's hard drive business. By 2009, eight hard drive companies had been reduced to five.

The second phase of the company's transformation began in 2008 and lasted through 2015. During this period, Western Digital focused on technology diversification. In 2011, we completed our largest acquisition to date when we acquired Hitachi's hard drive business. Hitachi had itself acquired IBM's hard drive business in 2003, and because of IBM's technological legacy — IBM, after all, *invented* the hard drive — the Hitachi acquisition deepened our development expertise, especially for traditional enterprise hard drives. Western Digital also made its first forays into flash memory during this period, with acquisitions of companies such as sTec, Silicon Systems, and Virident. In addition, the company began a very successful joint venture with Intel, which still exists today, and produces solid state drives for enterprise applications.

Hard drive industry consolidation continued apace, and by 2012, three companies remained: Western Digital — the largest — followed by Seagate, and then Toshiba.

The final phase of the company's transformation began in late 2015 and continues today under the leadership of our current CEO, Steve Milligan. Last year, we completed the biggest acquisition in our history — the $16 billion acquisition of SanDisk. With its acquisition of SanDisk, Western Digital became a true global leader in storage technology. The company doubled its addressable market and enhanced its position in higher growth segments. It broadened its product portfolio to address rapidly evolving storage trends.

> "We provide the foundation on which many of the most exciting innovations of the future will be built. Think autonomous cars, smart cities, machine learning, artificial intelligence, virtual reality — all of these are now possible because there is an infrastructure capable of storing and allowing analysis on data sets that are so large that doing anything with them a decade ago was inconceivable."
>
> — *Michael Ray*

It positioned itself as a technology leader with a captive supply of NAND memory. It improved its already strong employee population and IP assets with the addition of thousands of engineers and thousands of issued patents.

Whereas 17 years ago, we produced 3½-inch hard drives that stored between 4 and 40 gigabytes of data, today we ship 3½-inch capacity enterprise hard drives that store 10 terabytes of data. That's 10,000 gigabytes. We ship solid state drives that store 400 gigabytes of data that are the size of my fingernail.

Now what about the legal department? In 2000, when I joined Western Digital, I was the fourth lawyer in the department. Today, we have more than 100 lawyers and 160 members in all, in a department that includes legal, compliance, regulatory, risk management, and stock plans administration. We have lawyers working in facilities in Irvine, San Jose, Milpitas, Salt Lake and Dallas, China, Japan, Singapore, Malaysia, Israel, Italy, and the U.K. We are organized by function, shadowing the primary functions represented on our company's executive leadership team. Our lawyers — and they are an extraordinary group — are deeply embedded within the business. Our lawyers attend their clients' staff meetings. Our lawyers participate in their clients' off-sites. Our lawyers are available and are consulted, day and night, by their clients. Our lawyers are regarded as people who should be, to quote the musical *Hamilton*, "in the room where it happens."

The second portion of my remarks addresses how we — the members of the legal department — have positioned ourselves within the company. As we considered how we wanted to scale the department to help enable the company's growth, we started thinking about who we wanted to be. We asked ourselves, "What do clients most want from us, and what is the most important work that we do?" We realized that more than a form agreement, more than a signature, more than permission to do something that they had actually done already — what our clients really wanted from us was help solving problems. Our clients may have come to us asking for a nondisclosure agreement, but what they were really saying to us was, "I have a problem, and I need help." We decided, consciously, to position ourselves as problem-solvers within the organization, and we decided that we would not limit ourselves to only legal problems; we made the commitment to help any client with any problem at any time.

We wanted our clients to invite us in early, because if they did, we were more likely to prevent a problem from becoming a crisis. Once our clients were comfortable reaching out to us for help, we wanted them to invite us in even earlier so that rather than solving problems, we were actually helping to prevent problems. That was our goal then, it is our goal today, and it will always be our goal. We are here to enable the business. I say "enable," not "support." We don't want to be a roadblock, but we also don't want to be merely an echo. We want to

be a value-added contributor to the business, by taking advantage of the things we bring to the table, including the ability to assess risk, knowledge of the law, and analytical prowess.

You will hear me, and my team has heard me, talk about the importance of building a brand internally. The idea behind that came from something that we often heard our clients say. Our clients said, "Legal is recommending we do this," or "I talked to Legal and here's what they said." It was really an important data point, because what it emphasized for us is that every single one of us is a representative of our team. Each of us is, and maybe always will be, in our clients' eyes, "Legal," and the implications of that are critical. Every interaction with a client is an opportunity to build or diminish our brand. If one of our lawyers has a positive interaction with a client, we all benefit. Our brand becomes stronger, and the next interaction any of us have with that client becomes easier.

Having positioned ourselves as problem-solvers within the company, having decided we wanted to build a brand, we then asked, "What were the qualities we wanted our clients to associate with us?" We chose four.

First, excellence. Everything we do — *everything* — written work product, legal and business analysis, briefings for any client — will be of outstanding quality. One of our imperatives is that we will deliver work product that is consistently excellent. Why is that so important to us? Because at Western Digital, operational excellence has always been core to the company's success. Quality is a language that everybody speaks internally. Everybody understands it; everybody values it; everybody tries his or her best to deliver it. If everyone else — our supply chain managers, our process engineers, our financial reporting group, our EH&S teams — believes that their work has to be the best, we would be an outlier if we thought the quality of our work didn't matter. Excellence is what gives us the credibility to do what we do internally.

Second, we are about results, not activity. One of the most valued characteristics in an organization is the ability to drive results. Many people are about activity. Ask them if they've closed out a project, and you might hear them say: "I sent an email!" or "I attended that meeting!" or "I left her a message!" But there are far fewer people who are willing to invest in the details, think about how to get to the right answer, and do the hard work necessary to produce results. For clients, that means figuring out what they need, and holding ourselves accountable for delivering it. It's not enough to have a meeting with a client; we have to make sure that we're meeting the client's goals.

Third, we bring light, not heat. We will seek to be the coolest head in every room that we're in. When a problem hits, we will be the ones gathering facts. We will be the ones asking questions. We will figure out who else needs to be involved, and we will figure out what information is important. Others may have the luxury of acting out. Others may even lose their tempers. We won't. If we aren't the ones working a problem, there's no guarantee anybody else is.

Finally, we serve, and I mean *serve* our clients. Clients are people, and they come to us because they have problems. People with problems want to be listened to, and they don't want to be judged. They want someone to prioritize their issues, and they want someone to care. We want our lawyers emotionally invested in solving the problems that our clients bring to us. That means, more often than not, we will listen more than we talk, and we will seek to understand rather than be understood.

Let me now turn to the third portion of my remarks. We've talked about positioning the department within the company. We've talked about what we wanted our brand to be. The next critical question is, "How do you build a team that delivers on that?" First and foremost, hire the best talent. The key to delivering excellent analysis, excellent briefing, excellent risk assessment, is hiring the best talent — the smartest, most curious, most dedicated lawyers, period. Many people believe that the talent on your team should resemble a bell curve. We disagree. If you compile a team of "A" players, "B" players, and "C" players, your "C" players will define your brand for two reasons. First, it's very difficult to pull great performance out of "B" and "C" players, and if you try, your management bandwidth will be consumed with the task with nothing left over for anything else. Second, the memory of a bad interaction with a lawyer lasts longer than memory of a good interaction with a lawyer, so you need a stable of "A" players consistently reinforcing your department's brand by delivering exceptional service. If you want to scale your organization, and excellence is part of your brand, you need the best talent. We will take on the challenge of keeping great lawyers engaged rather than take on the burden of pulling great performance out of mediocre players.

Second, emphasize collective success. We make clear that we will rise or fall together. Every time someone has a good interaction with a member of our team, we all benefit. Unfortunately, we also all suffer when a

member of our team has a bad interaction with a client, because in the end, we are all "Legal." If we have an investment in each other's success, then we need to help each other be as successful as possible. That means collaboration and cooperation. Collaboration means that we are humble enough to ask for help, because we believe that issues are better off when more than one person thinks about them. Cooperation means that we make the time to help each other become better because that is the promise we make to each other. I also think it's critical to look at compensation policies and accept that compensation drives behavior. If your compensation policies are zero sum, if someone's higher bonus is a product of someone's lower bonus, there will be an impact on team members' willingness to collaborate. Leaders can preach collaboration all day, but if they *pay* for individual differentiation, *money*, not words, will drive the outcome.

Third, hire those who want to get better. We believe that what we have to offer is unique. We operate in an industry that is changing every day. We have the scale and the business model to do amazing things. That means we see some of the most novel and interesting legal and regulatory challenges every day, *and* we have the opportunity to work with some of the most talented individuals practicing law in the world today. If you come to work for us, you have no excuse not to get better. When you come to work for us, we want you to get deeper and grow your subject matter expertise. We also want you to get broader as the range of issues that you take on proliferates. We want you to work with, model, interact with, watch and ask questions of the practitioners you'll work with. We want people who are curious, and we want people whose drive to learn is relentless. That means people who understand that even the hardest days are opportunities to get better.

Fourth, we think it's important to understand that most people are wary of lawyers. Many people interact with lawyers because, (1) they've been sued; (2) they've been in an accident; or (3) they've had to deal with a family-related issue, such as a will or a medical consent. All of these situations involve stress, and a few involve pain. So when a lawyer enters the picture, many people are on edge. Nearly twenty-five years after passing the bar exam, I am yet to walk into a room and hear, "Thank God — the lawyer is here!" [LAUGHTER]

> "Whereas seventeen years ago, we produced 3½-inch hard drives that stored between 4 and 40 gigabytes of data, today we ship 3½-inch capacity enterprise hard drives that store 10 terabytes of data. That's 10,000 gigabytes. We ship solid state drives that store 400 gigabytes of data that are the size of my fingernail."
>
> — *Michael Ray*

We think it's critical to counter-program against this. We want people who have emotional intelligence, who are polite, who smile, who are reassuring, and who inspire confidence. Said another way, we will move away from those who judge, who are self-involved, who are rude, who are patronizing, and who are arrogant. You may say, "You're hiring lawyers — you are really limiting your applicant pool!" [LAUGHTER]

We disagree. We don't want clients coming to us as a last resort. The earlier we're involved, the more likely we can prevent a problem. If we're viewed as unhelpful or difficult to deal with, we will be brought in — if at all — at the last minute. That benefits no one.

Finally, we maintain intimacy with our clients. If we're invited into the business by our clients, we understand that's a privileged position. We want to stay close to our clients so that we can get a better understanding of the kinds of resources we need in order to become even more effective.

For instance, five years ago, we saw that our Corporate Development team was staffing up and the Company's strategy would involve more acquisitions. Under the leadership of one of my direct reports, Brent Triff, who heads up our department's M&A group, we added several experienced M&A lawyers to our team so that we could handle this work internally. We wanted to make faster and more cost-effective decisions, and we wanted to build a storehouse of institutional knowledge that we could use in subsequent acquisitions in the storage space. Today, I'm really proud of how highly regarded that group is in the company.

Another example: Four years ago, we saw a significant challenge with the counterfeiting of our consumer products, especially in Asia. We built a trademark and brand enforcement team under the leadership of another of my direct reports, Cynthia Tregillis, to work with law enforcement and customs officials worldwide to crack down on counterfeiters, and to work with our clients to make it easier for our returns group, customs officials, and our customers to spot fake products.

We look annually at what our goals for the next year will be, and we select them based on what's most important to our clients. Our priorities need to be closely aligned with the company's strategic goals, and our hiring should be consistent with our client's needs.

In the last portion of my remarks, I note that as a self-critical organization, we're always trying to get better. Let me then talk briefly about some of the challenges we're looking at in the years ahead.

First is project management. As our business and our team continues to scale, project management takes on more and more

importance, and project management skills are increasingly critical, especially for those assuming leadership positions in our department. We lawyers are very good at addressing tasks, but the ability to see a problem that's coming, identify a solution, create an internal consensus for what needs to get done, get buy-in from critical stakeholders around a solution or a budget, and then break down the work that has to happen over the course of several months — that's something that lawyers are not typically trained to do in law school or at law firms. Gantt charts are the tools of engineers, but seldom the tools of lawyers. We are, though, increasingly asked to spot trends and identify risks to the business, and develop preventative measures to address them. Project management, then, will be a *key* skill set that we'll look to add and enhance in the future.

Communications and messaging are also an important focus for us. We are now a large group, spread out over many countries and many time zones. We're working on finding ways to effectively communicate messages consistently throughout the organization, so we can keep everybody engaged and connected, and ensure that we maintain the high standards for our work product that is so critical to our brand.

If you work at our Great Oaks San Jose corporate headquarters, you probably feel pretty connected, because that's where many of our executives and their teams sit. If you work at our Irvine facility, where a plurality of our lawyers sit, you also probably feel pretty connected. But if you're one of our three lawyers in Singapore, or one of our three lawyers in Israel, or you're our sole lawyer in the U.K., you may feel less connected to the company as a whole or to the department. We're thinking about how to make sure we keep in mind the perspectives of those lawyers working outside of California, because they're just as important to the organization, and just as important to our department's success.

Metrics are an area we're spending a lot of time on as well. We are consistently

evaluating the metrics we use to gauge our effectiveness. Many lawyers maintain that we are different than every other group in the company, and as a profession, our work is *uniquely* immune to being measured. Well, it's not, and if something's going to be managed, it is going to have to be measured. We have to get comfortable subjecting our work to standards that we may miss today if we're really serious about getting better tomorrow.

Some of our functions have done really well with metrics. Our compliance team can now measure things such as the length of time it takes to disposition a call received via our Ethics Hotline, as well how many reminders it takes before all employees have completed their online training. Our brand enforcement team sets goals for takedowns of online sites selling counterfeit products, and they're looking at setting revenue targets as we sue counterfeiters and attach their assets in the United States. Our patent development team has metrics for the number of invention disclosures received by function, the cost of each patent application we file, and the length of time it takes to complete an office action.

This all very good work and we're building on it every quarter. We haven't perfected our metrics yet, but we are trying to stay focused on the right things, and we are always, always trying to get better.

In conclusion, let me again thank the Directors Roundtable for honoring me and my team tonight. Thank you for providing this forum to share thoughts about our company and about our department. I want to thank UCI for allowing us to gather here tonight. I want to thank our panel, from whom we're going to be hearing shortly. And I want to thank all of you, because when I look out, I see many people who have been colleagues and friends for many years, and it's enormously moving to me that you took the time to come here and be with me tonight. Thank you. [APPLAUSE]

We have a tremendous panel here tonight so I want to get right to our discussion. Here's how the program will work: I have several questions that I'm going to ask each of our panelists. Then, if we have time remaining, we'll take questions from any of you in the audience.

I'm going to start with George. George has been a *tremendous* adviser to WD, has been a mentor to me and is someone I respect greatly. In fact, many of the transactions I discussed when recounting the company's transformation were enabled because of the tremendous antitrust work that George and his colleagues at Cleary performed.

With that as a backdrop, I want to ask George the following question: How has the M&A antitrust environment changed during the time span that you've worked with Western Digital, and what are some of the antitrust considerations that we should be aware of as we look to continue our growth.

GEORGE CARY: First, Michael, I want to say that I want you to come into my office and give that speech to my colleagues, because it's a model that I think law firms, as well as in-house legal departments, could employ — that was brilliant!

MICHAEL RAY: Thank you.

GEORGE CARY: Antitrust has really gone through a remarkable transformation since the Read-Rite deal that we did with WD fifteen years ago or so. At that time, for a big transaction, you had to file with the Department of Justice and the FTC. You perhaps would file with the European Commission. You might have one or two filings in the U.K. or in Germany if the deal wasn't big enough for the European Union. But that was about all you really had to worry about. If you had a strategy to deal with those agencies, you were in pretty good shape.

Today, there are over 100 agencies around the world that claim the right to approve a big multinational deal. You have to file in Uzbekistan and the Ukraine, and you have to file with COMESA in Africa, you have to file in China and Korea. The list of countries is just amazing.

That creates tremendous complexities, both on the substantive side and the procedural side. We have seen an evolution of the process even in the established jurisdictions. Fifteen or twenty years ago, the Europeans set up a system that was supposed to be streamlined; you were supposed to tell them what they needed to know in a substantively comprehensive but relatively short filing; you would then have set periods of time where they had to approve the deal, and at the end of that time, you got to close your deal.

> "As we considered how we wanted to scale the department to help enable the company's growth, we started thinking about who we wanted to be.... We realized that more than a form agreement, more than a signature, more than permission to do something that they had actually done already — what our clients really wanted from us was help solving problems."
>
> — *Michael Ray*

The U.S., on the other hand, was a litigation model. You filed a simple notification form with just the basics about the transaction and without substantive advocacy; the agency then sent you a blockbuster subpoena asking you for every relevant document and data in the company. Parties would produce literally millions of documents in the big deals, and the agency would take its time reviewing all of that information. Routinely, the agency would insist on extending the 30-day deadline after substantial compliance for months. And during this time, you couldn't close your deal.

You had two different models in those days. Those models are now, unfortunately, converging. The Europeans, who designed a streamlined system with a front-loaded substantive analysis — very few documents, very little data — are now routinely issuing Requests for Information (RFI) that encompass hundreds of thousands of documents — maybe not quite the scope of the U.S. Second Request — but lots of documents, lots of data. And instead of a predictable timeline, every time the EU issues a RFI, they stop the clock until you comply. What was supposed to be a predictable 90-day now could go on for six, eight, ten, twelve months or even longer. The EU staff also *insist* that you pre-clear your initial filing with them before you file it, so that the clock doesn't start running until they've said it can start running. This typically adds weeks or months to the front end of the process.

All the while, the business environment is changing, and other companies are looking at deals of their own, as we faced in the HTSD deal. And it can matter quite a bit when the EU staff tells you that you are free to file, because if there are other transactions in the industry, whoever gets on file first, will have their deal considered ahead of your deal, which can change the industry structure and affect the substantive review of your transaction.

MICHAEL RAY: Getting on file first matters a lot! [LAUGHTER]

GEORGE CARY: In short, the dynamics have changed tremendously; the process has become much more internationalized; and the importance of thinking this through in advance has gone up exponentially.

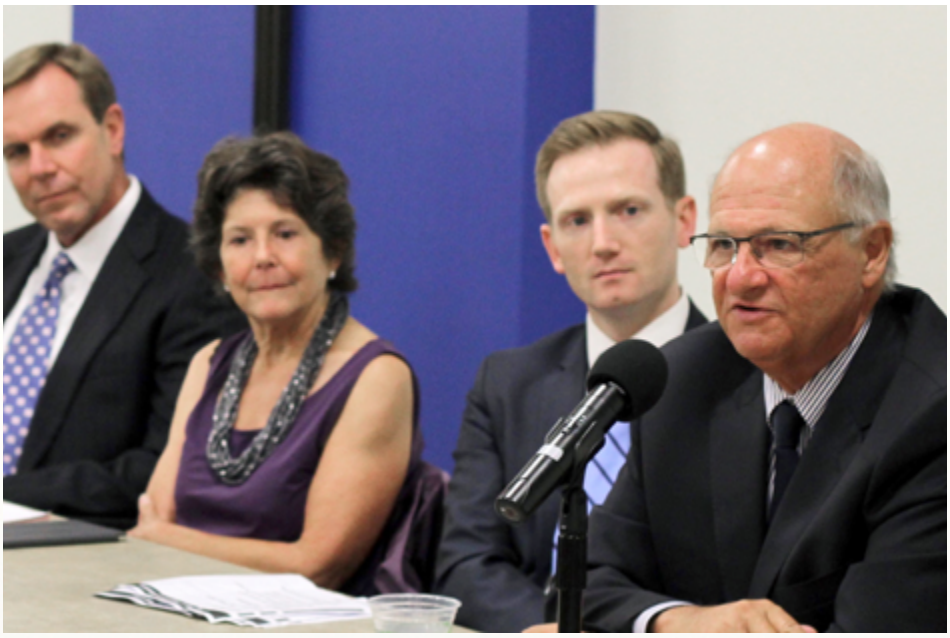
MICHAEL RAY: Given that complexity, one of the key challenges in-house lawyers face is setting expectations around the process.

It's really helpful to have someone like George available to speak to our executive team or to our board and lay out what the process is likely to entail. When you've made the decision to sign up a transaction, you've done so because you've determined that the deal will create value and will be important to your future, and it can be frustrating to wait for the regulatory process to run its course.

GEORGE CARY: Yes, that's exactly right, and adding to the timing uncertainty, there's another element that certain countries have adopted which also complicates

making accurate predictions on timing. A little background might be helpful here. The proliferation of antitrust internationally was originally driven by the U.S. as a proselytizer for antitrust. The idea was to use antitrust to open markets all over the world, as an adjunct to free trade. Countries were urged to adopt an antitrust law as a condition to becoming part of the World Trade Organization. The antitrust laws were intended to create the conditions for free and open competition and allow foreign companies, including U.S. companies, to go into countries like India and China and compete. The notion was to overcome protectionism through antitrust.

Countries like China passed antitrust laws and were in fact admitted into the WTO. But the Chinese, for example, put a provision in their law that says that among the factors that their antitrust authorities can consider is how the transaction would "affect their national economy" — that is, they were not limited to just the competition issues. That kind of provision is a real wildcard. Essentially, it allows the antitrust agency to do whatever it wants in terms of blocking the deal or insisting on remedies that have nothing to do with competition concerns. It gives them wide discretion to interfere with multinational mergers. In that kind of an environment, I can sit and look at a deal, I can assess its competitive impact in every product and geographic market, and I can assess the probability that a particular agency is going to have a problem with that deal recognizing that some agencies are more aggressive and some are less, some want to preserve competition more, some want to create efficiency more. All of that, I can handle. But if you ask me to predict how the reaction of a rice farmer in southwest China might affect substantive review and timing, or how that might affect approval politically, or how it might influence the Chinese government in terms of remedies where there is no competition concern — that's virtually impossible to predict. We're seeing that crop up in China, in India, in South Africa, and in other countries



all over the world, where people have local, parochial agendas that they're trying to vindicate through the merger control law, which really should be limited to competition concerns.

MICHAEL RAY: Do you think it will get worse? Is there any hope that agencies may start regressing back to some universally accepted mean?

GEORGE CARY: It ebbs and flows. There was a big movement for substantive convergence a couple of decades ago. The U.S. agencies and the Europeans created the "International Competition Network," where they all get together and promote convergence. There are now 119 members of the International Competition Network of agency officials in countries that have antitrust laws. They invite practitioners to their meetings, as well, to advise them. The idea was, "Let's agree on some principles that we can apply globally so as to create some predictability; let's promote best practices."

That's good, and it's all moved in the right direction. Lately, though, we've been seeing, an increase in divergence — especially on the part of some of the newer agencies that are still developing their antirust tradition and have not abandoned some of the non-competition agendas that don't really belong.

Yes, the big ten — the big 20, now — are significantly converged. In China, we're seeing a move back to the mean in terms of the egregiousness of some of the non-antitrust issues that they took into account. But at the same time, we're seeing South Africa become more prominent. We're seeing Brazil, now, pass a law that says you can't merge until we've cleared you. (It used to be you filed in Brazil but you could go ahead and close your deal while they were reviewing it; now the filing is "suspensory"; that is, you cannot close until they have completed their review.)

On the one hand, you're seeing some convergence on substance among many countries; on the other hand, you're seeing some disparity increasing given the number of international players we now have to contend with.

MICHAEL RAY: Given the increasing disparity, what pitfalls do you see for in-house legal departments when they are thinking through and planning for an action?

GEORGE CARY: There's a bunch. I'll give a couple.

Number one, I think it's remarkable how little regard the European Commission is showing for legal privilege. In Europe, in-house lawyers do not qualify for attorney-client privilege or work product privilege. The European Union expects that their files will be produced. It wasn't so big a problem five years ago, because they didn't ask for many documents. Today, when they're asking for hundreds of thousands of documents on a major deal, you can bet the law department was involved — you gave us some good stories about the involvement of the WD Law Department. They're going to be in the room when the business is discussing the transaction. Most in-house lawyers are going to assume that whatever they write down in those meetings is privileged and doesn't have to be produced. True in the U.S.; *not* true in Europe.

To add another wrinkle to that, in a recent transaction, the European Union has *insisted*, at the pain of stopping the clock yet again, that the *client* produce documents where the in-house lawyer is memorializing advice from outside lawyers who are not EU-licensed. Notes of take, by the General Counsel talking to a U.S. lawyer advising on the deal, they say, are not privileged, even though the issues are the same in Europe as they are in other countries. The basic statutory framework is the same across countries, and the strategy is global. Unless there is an EU-licensed lawyer in that conversation, the notes are not privileged.

Timing is another big issue. What used to be relatively predictable is now anything but. When you write your M&A documents, you'd better leave in enough time for some of these outlying jurisdictions who decide, after an eleven-month investigation, that they now have an issue they hadn't worried about until then because they noticed that some other jurisdiction had identified the issue. You need to build in enough time on that.

> "We don't want to be a roadblock, but we also don't want to be merely an echo. We want to be a value-added contributor to the business, by taking advantage of the things we bring to the table, including the ability to assess risk, knowledge of the law, and analytical prowess." – *Michael Ray*

Another important consideration is how much integration planning to allow. We have seen the EU, for example, stop the clock to compel production of integration planning documents which they consider relevant to the substantive review of a transaction. Legitimate synergies have been taken to be evidence of anticompetitive effects, with materials generated in the integration planning process used as evidence — even materials that are privileged in the U.S.

MICHAEL RAY: We've learned a lot about documentary evidence and the importance of thinking through what you'd like your written record to look like when you actually have the ability to craft it.

GEORGE CARY: Again, this is another place where the internationalization has become much, much more important. It used to be you could have a strategy in the U.S. The U.S. government had a particular view about how to consider efficiencies from a transaction: if the merging parties can show that the efficiencies will flow through to benefit consumers, the U.S. may conclude that the savings may be worth sacrificing the rivalry between the two companies that are merging. The Europeans never really accepted that notion. In fact, they had a notion that an efficiency that gives the merging firm a competitive advantage is bad for competition, because other competitors won't be able to compete.

It used to be you could advocate for the efficiencies in the U.S., and leave them out of the advocacy in Europe. But now the agencies are talking to each other routinely and constantly. They are asking for access to any materials supplied to other international agencies, and are comparing representations across jurisdictions. And it's not just the U.S. and Europe; it's the U.S. and China and Brazil and South Africa. If you've got the same issue in those jurisdictions, they're going to all talk to each other. It's a real problem in terms of what you write down, because something that sounds good to a U.S. lawyer may sound horrible to a South African judge or a tribunal. That needs to be coordinated up front.

The other issue is that some of the jurisdictions, like Europe, require you to take positions up front: What is the product market? Who are the competitors? What influences pricing? They want you to take those positions before counsel can know what's in the company's documents. The documents then come back to haunt you. It's really important that somebody have an overview of the whole thing with an eye toward that global clearance.

MICHAEL RAY: We work together primarily in the M&A context. What other antitrust issues are you seeing that you think a company like ours should be thinking about?

GEORGE CARY: IP is a big issue internationally. Again, the Chinese are very interested in intellectual property as it relates to antitrust. They've taken positions with respect to standard-essential patents that have been pretty aggressive in terms of what a licensee can demand from a licensor. Intellectual property and its confluence with antitrust is going to be a big issue going forward. To what extent can a patent holder use IP to exclude competition? What obligations does an IP holder have if it participates in standard-setting bodies? And

what obligations does a patent holder have when it licenses a patent out of a portfolio of multiple patents?

MICHAEL RAY: I'm going to stop there and come back to you. I want to head to Mark on the topic of China.

What's your recent experience in cross-border transactions, Mark, especially involving China, and what are you seeing in terms of the regulatory environment?

MARK PETERSON: Just as George mentioned, one of the most important issues for an M&A lawyer to focus on is to try to create a situation where you can actually get a deal closed, and closed within a reasonable period of time. Just as you're seeing all kinds of delays nowadays with antitrust reviews in various foreign jurisdictions, another potential delay we run into a lot here in the U.S., especially when you're dealing with China, is CFIUS [Committee on Foreign Investment in the United States]. Don't worry, it's not a contagious disease! [LAUGHTER]

It's the Committee for Foreign Investment in the United States. For those who aren't familiar with CFIUS, if you think about the U.S. economy essentially since the founding fathers, we've generally had a very open economy. The two places where we put some limits on this approach are first, export controls — when U.S. companies sell products or technologies abroad — and second when a foreign buyer comes into the U.S. to acquire a U.S. company or technology. This second prong is what CFIUS tries to monitor and oversee. CFIUS is a group of government agencies interested in protecting our national security; it is led by Treasury but up to sixteen agencies can be involved. A CFIUS analysis focuses on whether or not a transaction will result in any "control" held by a foreign-led enterprise. This phrase "control" is not specifically defined as it might be in other regulatory frameworks, and is often one of the main subjects of the CFIUS analysis.

If there is a Chinese component to any potential investor or acquiror of a U.S. company or technology, and it may result in "control" being held by such entity (which is not well defined), then that investment or transaction could result in a CFIUS issue. CFIUS filings are actually voluntary, although CFIUS has the opportunity to review any transaction (so really, it is only quasi-voluntary). If it's a significant transaction transferring control to a foreign-owned enterprise, then typically any M&A or regulatory practitioner will advise that you should make a filing.

CFIUS is primarily concerned with national security risk. This is particularly true in China with what's been going on there over the last decade. If you consider the way China has moved over the last number of years, there's been a concerted effort to make sure that they try to bring in technologies and industries that China feels will be important over the next 50 years. There's a special interest in what they call "foundational technology" — things like autonomous cars, artificial intelligence, robotics, enhanced or virtual reality — which plays out a lot with high-technology companies, semiconductor companies, and companies like WD. Some of these investments or acquisitions are even subsidized by Chinese government and quasi-government agencies.

The transfer of certain technologies from the U.S. to China has brought with it a great deal of anxiety from certain areas of our government and some private organizations. There are a growing number in Washington, and in other places, that are starting to get very worried. You've got the Department of Defense, Congress, think tanks back in Washington, and others, all concerned with the direction of certain technologies. Just lately, there was a report from DIUx [Defense Innovation Unit Experimental] highlighting this concern. DIUx is a little like the venture capital arm of the Department of Defense. They make investments in upcoming technologies. What they tried to look at was, how well is CFIUS working? Is CFIUS putting the right limits on foreign investments coming into the United States? Remember, CFIUS is really only focused on national security right now. The DIUx report, along with certain members of Congress and others, have been saying that maybe we ought to be looking at this in a much broader way. From an M&A perspective, focusing on trying to get deals done on a timely basis, broadening the scope of a CFIUS review, especially when the transaction involves a Chinese investor, it is going to result in greater delays and significantly less deal certainly.

Another focus of many insiders is what "control" in a CFIUS analysis should mean. The concept of control has changed over the last number of years and is much more restrictive today than in the past. If you looked at the way CFIUS viewed control maybe five years ago, it would be something that all of us might think of as control: a significant ownership percentage, multiple members on the board, things like that. Nowadays, what the regulators might

say constitutes control could be as low as ten percent ownership, or even if you have one board member — Michael, when WD was involved in the Unisplendor transaction, what was it — 15 percent and one board seat?

MICHAEL RAY: One board member with very strict governance limitations on that individual.

MARK PETERSON: And the board member actually had very significant limitations as I remember, yet CFIUS took a significant interest in that investment.

The threshold for what constitutes control has dropped dramatically to where they're getting involved in a lot more cases. And now, certain think tanks and government agencies are looking at the current state of play and saying: we need to look at things other than just control situations; we need to look at licenses, JVs, LP interests, any meaningful commercial activity; really anything that takes place that could possibly transfer technology — especially important technology — offshore.

In other words, we should not focus just on M&A deal or a traditional M&A activity, but instead whenever you've got any meaningful corporate transaction in the future there should be a potential analysis by CFIUS. At the end of the day, this increased focus and any future increase in the level of CFIUS activity, will result in a likely slowdown in the transaction or investment process. In some cases, it may even cause the termination of certain deals.

This increase in CFIUS activity is taking place at the same time — which is interesting — as you see an increase in scrutiny in China, by an organization called "SAFE" [State Administration of Foreign Exchange]. As you all know, there are a number of different agencies in China that have some control over investments abroad, including MOFCOM [Ministry of Commerce], which I know, Michael, you're very

familiar with, and the NDRC [National Development and Reform Commission]. But you've also got SAFE, with a significant influence on the timing of Chinese investments abroad. What SAFE focuses on is any time you've got money flowing out of China — to do an acquisition or to do any investment abroad — it has to go through a SAFE analysis.

Several years ago, this was really just a "check the box"; it was not typically very difficult to get through the SAFE approval process. But because China has had so much investment activity in the last few years, that approval process has been subject to increased scrutiny. At the same time, there continues to be push to increase technology and healthcare investments by Chinese entities; the Chinese government wants those capabilities brought into China. However, in addition to investments in technology and healthcare, there has been significant investment and acquisition activity in other areas that are not necessarily a focus in China. Industries such as movie studios, entertainment, media, real estate, and others have seen significant activity recently. Chinese firms have been very active, and you've seen a tremendous outflow of funds from China to make these acquisitions.

As a result, SAFE has taken a much harder line recently. If you're trying to get a deal done where money has to flow out of China, it's no longer just a rubber stamp. In fact, SAFE can potentially cause a significant problem, or at least a pretty significant delay.

We worked on a transaction recently where it was a two-step transaction, the first step took place about a year and a half ago, and in dealing with SAFE at that time, there was a three- to four-week delay in the closing just trying to get the funds out of China. Nowadays, if we tried to approach SAFE in the same way, it could have been months or more. What we actually did in the second part of this particular transaction was we required the Chinese entity to have funds offshore that were not subject to SAFE before we would go forward with the transaction. This approach, or something similar to it, is what you're seeing a lot in M&A deals now. Essentially, if your transaction involves a Chinese investor, U.S. companies are asking them to either get the money offshore before the transaction or to put up some type of a guarantee outside of China. This may be a loan or other source of funds, but something not subject to the Chinese regulatory requirements. That way, if there is a delay due to SAFE, you can draw the funds from another source to allow the transaction to go forward.

MICHAEL RAY: We do a lot of M&A and your clients do a lot of M&A. We often hear talk about representation and warranty insurance. Is that a real thing? How do you see clients use it? Is that something that we ought to be thinking more about?

MARK PETERSON: Rep and warranty insurance is one of these things that you hear a lot about, from wonderful firms like Denise's. [LAUGHTER]

There are places where it can be very, very valuable. However, I will be perfectly honest: in *my* practice, there has been limited applications where it's actually worked, because it's still fairly expensive. But there

are *some* applications that have worked very well. Just recently, we worked on a transaction where we were able to offload some environmental liability to insurance to allow the deal to go forward. Other times, we've been able to transfer other particular liabilities that would have caused a significant problem in the transaction.

We worked on a transaction about a year ago where rep and warranty insurance worked *very* well. It was an auction process and we basically told all of the bidders to assume a very small escrow amount from the sellers and the bulk of the buyer's protection was to come from rep and warranty insurance. We also told all the bidders that the buyers would be responsible to pay for the insurance so they should consider that cost in making any offer to purchase the company. Since it was a very interesting company, this requirement did not negatively impact the process.

This was not a huge transaction (something in the $100–$500 million range, just to give you a sense of the size). A lot of the shareholders were not very sophisticated, and there was no shareholders' agreement with drag rights or any mechanism to force a sale, so we needed to craft something that all the shareholders would be comfortable with from an indemnity standpoint (or use a different structure). For those of you that are not familiar with M&A transactions, there are indemnification obligations that can come into play post-closing, and depending on how those indemnification obligations are structured, the sellers may have to pay significant amounts. Rep and warranty insurance can step into the shoes of the sellers in certain situations to make good on those indemnification obligations.

In this transaction we wanted a very small indemnification escrow. We talked to Woodruff-Sawyer to get some advice as to who might be able to provide rep and warranty insurance for this company. WS then got us in touch with a couple of underwriters, and confirmed the minimum amount the shareholders would need to be on the hook for so as to have appropriate skin in the game. Obviously, if you take the shareholders completely out of any indemnification obligations the insurance companies get very nervous. The underwriters said, "As long as there's two percent, the pricing will be favorable." We actually got a policy ready and supplied it to each of the bidders. It turns out that the eventual buyer went on and got their own policy, but we were able to get a deal done with a two percent escrow and that was all the potential recourse anybody had against the shareholders. We essentially forced the buyers to all come in with their own rep and warranty insurance.

> "If you want to scale your organization, and excellence is part of your brand, you need the best talent. We will take on the challenge of keeping great lawyers engaged rather than take on the burden of pulling great performance out of mediocre players."
>
> – *Michael Ray*

I'll tell you — there's no way to prove this — but because it was a competitive process, the fact that they had to bring their rep and warranty insurance to the table, I don't think it really affected the deal price as much as you might think. It worked out flawlessly in this particular example.

While I don't see it very often, rep and warranty insurance can be a very useful product.

MICHAEL RAY: I want to stay with M&A transactions, but I want to go to Michele. As a litigator, when do you think it's important, or when have you seen companies think it was important, to loop in a litigator or a litigation team during the life of a transaction?

MICHELE JOHNSON: Given that I'm an M&A litigator, it will shock you to hear that my answer is, "At the beginning, Immediately. All the time." [LAUGHTER]

As you may know, every time a public deal is announced, and if there's any aspect of the deal that involves a U.S. public company, there is someone who's going to sue you.

MICHAEL RAY: It's almost impolite if they don't. [LAUGHTER]

MICHELE JOHNSON: You wonder! We ask ourselves, are the plaintiffs' lawyers not paying attention? Is our deal not big enough for you? [LAUGHTER]

We have to expect M&A litigation every time a deal is announced. The litigators will then have to defend the transaction record. Bring in the litigators at the beginning, when you create the record. The question you were asking earlier — when is it important to loop in a litigator? — the reason for my answer is that the record, of course, is going to be comprised of what is done in the transaction, board minutes, committee minutes, bankers' books — all the aspects of your transaction. The litigator will then stand up in court and defend the transaction, saying, "This deal should not be enjoined; there was nothing wrong with the process; there were no disabling conflicts; the directors satisfied their fiduciary duties." The court is going to make that decision based on the record.

Bringing the litigators in at the very beginning is therefore very important. There have been changes in Delaware that many thought might lead to less of this type of litigation. Do I *really* have to bring the litigators in at the beginning, when Delaware has now said, "We are not going to approve these disclosure-only settlements." What has been happening for many years is that every time a deal is announced, the

shareholders sue, driven by a cadre of plaintiffs' lawyers who do this for a living. The reason they seek an injunction is because it's leverage; often their *clients* don't really want the deal enjoined. The plaintiffs' lawyers just pressure the company to issue a few more disclosures, talk a little bit more about the bankers' process and the deal price, and minutia regarding what went on behind the scenes. For that wonderful benefit, the company pays the plaintiffs' lawyers a fee, and then the parties settle the case, and the defendants obtain a dismissal and a broad release for the directors. While a company would rather not be sued over a transaction, the process can result in something of a win for the directors, because they get a release for any claims that could have been alleged in the litigation.

Delaware courts began to signal the demise of these types of disclosure-only settlements beginning in 2015. In January of 2016, the seminal *Trulia* decision came out, saying, in essence: We're not going to play this game anymore. We're not going to approve a broad release based on minimal litigation and a settlement that is not particularly contentious or adversarial. We're not going to grant the directors a broad release. Therefore, we're not going to approve the settlement, so the plaintiffs' lawyers don't get their fee.

In the wake of *Trulia*, the question was, if the Delaware courts are not going to give these plaintiffs' lawyers an easy fee, are plaintiffs going to stop actually filing these types of cases? They continued to file cases *outside* of Delaware; in, for example, the place of incorporation of a company, and companies were able to address *that* problem by adopting forum-selection bylaws. Even concurrent with the announcement of the deal, Mark will advise his client to adopt a forum-selection bylaw that says that any breach of fiduciary duty claim or other state law-type claim *has* to be brought in the state of incorporation. Companies have been able to get all these cases filed outside of Delaware dismissed based on the adoption of the bylaw. What the same plaintiffs' bar has now done instead is to file in federal court. They're taking the same complaints — which actually doesn't make much sense, because they still include all of the fiduciary duty allegations about how the process was flawed, which is not a federal claim — but they seem not to take the time to change their form complaints. Instead of alleging that there was a disclosure problem under state law within the fiduciary duty regime, they are alleging that there was a disclosure problem in violation of the federal securities laws. They bring the same motions for preliminary injunction; they seek to put pressure on the board at the same inflection point, which is the shareholder vote or the expiration of the tender.

These cases are still being filed; it's yet to be seen whether something can be done at the federal level to curtail the trend, but so far, the answer is, "Bring your litigators in immediately."

MICHAEL RAY: Now, you said something that is very important to those of us who are General Counsel and advising boards, and that's the increasing focus on potential conflicts or actual conflicts. We're seeing a lot being written about this by academics and shareholder analysts. We had one of George's partners present to us on this topic earlier this year. What kind of board process do you like to see followed when you have a controlled shareholder or an otherwise conflicted situation?

MICHELE JOHNSON: The line is changing on that issue, as well, and becoming a little bit more favorable for boards and companies, which is the good news. For many years, in a conflicted transaction, meaning that there is a controlling shareholder — which was not completely defined — but some sort of conflicted transaction, the defendants would be stuck with the entire fairness standard, which is the highest standard under Delaware law. A judge would not defer to the business judgment of the directors, but rather would evaluate whether the process was fair and the price was fair under the strict entire fairness standard.

That means the defendants may not get out on a motion to dismiss, and probably not even on summary judgment, and instead will go to trial, which is, of course, very expensive and encourages companies to settle.

In 2014, the *M&F Worldwide* decision was issued, which said, at summary judgment, if the directors have put in place and have followed a particular process, then they can get away from the entire fairness standard and back down into the lower standard, which is of course more deferential to the directors. What that process involves is an unwaivable condition of a vote of the majority of the minority shareholders, and a special committee that is properly authorized and independent, that hires independent advisors, and that has the ability to say "no" to the controller. And the vote has to be untainted, uncoerced, and informed.

If you follow all of those procedures, you should be able to get out of that higher standard. Well, the question that *MFW* left open was whether, at a motion to dismiss stage, if there are nevertheless allegations that the special committee didn't do its job properly, that there was a higher price out there — is that enough to get discovery? If it is, then the MFW process may not really

do you a *whole* lot of good at the pleading stage, because the plaintiffs may be able to allege enough to get past the pleadings stage and into discovery, and the directors are still going to have to go through all of that expense and uncertainty.

In a recent case that was decided by the Delaware Supreme Court a couple of months ago, *Books-A-Million*, the issue was evaluated specifically at the motion to dismiss stage. The good news is that the court found that if those procedures are followed, *even if* the plaintiffs allege that there was something wrong with what the special committee did, or that they didn't get the highest price, *that's not enough* to take the case back out of the business judgment rule. If you have an unwaivable majority of the minority vote requirement, *and* a properly authorized and functioning special committee who has the ability to say "no," if you follow those procedures, you should get out on a motion to dismiss, because the directors will have the benefit of the business judgment rule.

It's easy to say in the context of this discussion that we are having; it's harder to do in practice. One of the deals that Mark mentioned — we worked on it together, where he had the special committee and I had the company — and it worked brilliantly. It was a good process. We should get out at the pleadings stage!

MARK PETERSON: But it really did make a big difference getting Michele and her colleagues involved at the beginning, and you do that a fair amount in public company work, but in this one, it was really an opportunity for us to work very closely. I think it made a difference; it made us come up with a much better process; we were able to make sure that we dotted the i's and crossed the t's. In talking with the litigators that would have to fight this fight later on, on the front end, it helped us craft a much better product.

MICHAEL RAY: I fully appreciate the importance of having outside lawyers available and eventually becoming involved in situations like the ones Michele identified. At the same time, it can be difficult for in-house counsel to figure out where we fit in to all of this. I want to go to Denise, because no one's seen the inside of more boardrooms than Denise. We've benefitted from her wise counsel, and she's been in front of our board several times over the years.

Denise, I want to get your take on the following: what makes for the best relationship between a General Counsel and a board? A GC very often reports to the CEO, who may think that the GC is his or her lawyer. But the GC has obligations beyond those to the CEO. When you see the relationship between the GC and board work well, what do you see?

DENISE AMANTEA: I picked this topic because I think Michael and his team exemplify all the right things you need to do to develop a trusted relationship with the board. It can be a juggling act to find that delicate balance between interests of management and interests of the board. The GC is this pivotal person. On the one hand, he is a strategic partner on the executive team; on the other, he represents the company. I can't tell you — and I've counseled hundreds of boards over the decades — how often the board needs to be reminded that the GC is *not* the CEO's lawyer; that the GC is the *company's* lawyer, and the

board is the representative of the *company*. There is this mutual goal that both the GC and the board share — to serve in the interest of the company.

Now, what I also counsel the board to do — because it's difficult for the GC to just inveigle himself or herself into the board's trust and confidence — *board members* need to reach out to the GC. It's in their best interest. The GC should be their go-to lawyer. The GC is their bodyguard. It is the GC who can make sure that the Board follows a process that will avail them of the business judgment rule. As Michele said, it is the most potent affirmative defense in a derivative suit; it is the best legal prophylactic for board members.

What boards have said to me over the years — those who have achieved a very good working relationship with their GC — is that there are three attributes that they value: First, legal acumen — and by that, they mean, we want our GC to be a generalist; not an IP nerd. But someone who can zig or zag depending on what the problem is, and actually help them understand the legal framework.

Second of all, they want a GC who has emotional intelligence. When you ask them, what do you mean by that? Essentially they want a therapist. They want somebody in the boardroom who can facilitate discussion. Oftentimes, you have board members that are more reserved and don't speak up, or you find that the same two board members do all the talking. They want their GC to facilitate robust discussion among all the board members. When I counsel board members on the importance of meaningful participation by all board members in order to reach a defensible decision, I take a page out of Andy Groves' playbook. He was Chairman and CEO of Intel for many years. He encouraged the following mantra in all meetings at Intel: free discussion, clear decision, full support. If there is free discussion in which each Board member feels comfortable expressing differing views, then there is less likelihood to drift into groupthink; or worse, not feel heard at all. Robust discussion will lead to a clear decision by the Board with full support from the Board.

The third attribute valued by the Board is a GC's strong moral compass. Board members who rave about their GCs — and Michael is one of those "ravees" — say, "We love somebody who not only tells us what's legal, but what's the right thing to do." Because frankly, the GC is the guardian of the company's culture, its brand, its reputation. The GC is the conscience of the company.

MICHAEL RAY: Let me ask this: we are increasingly asked to spot trends, see a problem before it materializes, and do something about it. Tell me some things that you think we should be watching for.

DENISE AMANTEA: This is hard. GCs don't have crystal balls. Even Michele and I, as litigators, have a hard time — when we peek around the corner — to know what's coming. Who could have predicted the backdating of stock options? I didn't even know what my client was talking about when I first got called. Then suddenly, it's a scandal that reverberates throughout the country, and who would have guessed that a high-profile CEO would end up prosecuted and spend a couple of years in jail over backdating of stock options. GCs will always be challenged to predict what's next but they need to be vigilant. It's their job to learn about it before their board members have to educate them.

If I had to guess what is the next big thing — and it usually starts in the Silicon Valley — it is going to be diversity and/or sexual harassment in the workplace. Boards will be called on the carpet to answer to their shareholders if the company becomes embroiled in a workplace scandal. The Board will not only need to understand the legal liability, but also the options and their respective impact on the company's reputation, culture and employees. This issue will put the GC in the spotlight. The Board will look to the GC as its trusted advisor to help the Board navigate through the process and come to the right decision.

MICHAEL RAY: I'm going to turn to our IP expert, Doug, next. We're a company that has a lot of IP, and technology is critical to us, with our thousands and thousands of engineers worldwide innovating daily. Talk to me about threats to a company's trade secrets — how do you think about that, and how do you prioritize where you start?

DOUGLAS DIXON: I'll keep it brief, because I'm sitting next to Denise, here, and I know how much she loves talking about IP stuff! But there are four areas of intellectual property law: patents, copyrights, trademarks, and trade secrets. I'm just going to focus briefly on the last one, trade secrets.

We're seeing companies increasingly turning to trade secrets. Whereas they may have had some form of intellectual property that perhaps was patentable — and still may be patentable — they are, for one reason or another, electing *not* to seek a patent on that particular IP, but seeking to protect it as a trade secret. Along with that, we're seeing that there are, of course, many threats to a company's trade secrets.

I have to just say that second only to a company's people, the company's intellectual property is probably its most valuable asset. Protecting its intellectual property is really protecting the lifeblood of a company.

We see two types of threats to trade secrets: we see the external threats — those are the sexy threats that movies are made of, right? You've got hacking; you've got cybersecurity threats; you've got threats from foreign entities; you've got corporate espionage — those are the things that movies are made of. What we see more often from clients calling us are, of course, the internal threats to trade secrets, and those come from employees — both those who are current employees who are leaving, as well as incoming employees.

We recently had a client call us and say, "Doug, we think we have a problem. An employee just left to join one of our competitors, and we think she took some trade secrets."

"Okay, why do you think that?"

"In the month before she left, we discovered that she emailed herself about 200 different files from our servers. She tried to access other white papers on our competitor, and now she's gone to that competitor."

And I said, "That looks pretty bad. What else did she do?"

"Well, she took customer lists, things like that."

"Okay. Anything else?"

"Well, yes. We have these policies in place where some of our trade secrets — some of our most highly guarded trade secrets — we don't even allow our employees to download those files; we don't allow them to print them out or anything like that."

"What did she do?" This is probably the world's smartest trade secret theft here. What did she do? She took her phone out, and she put that document up on a screen, and she would take pictures of the document. Then she would use her phone to email that picture from her work account to her gmail account. [LAUGHTER]

Now, why didn't she just email it, maybe, from her gmail account to her gmail account on her phone, I don't know. But she did that at least a hundred times, as well. We have all of this evidence here that this employee had taken all of these trade secrets and gone to our client's biggest competitor. That's an example of an outgoing employee who poses a major threat.

Now, you have to also think about it from the side of the company where that employee went — the competitor. As soon as we notified the competitor, "You may have a problem on your hands — your new employee has taken lots of documents that we consider to be trade secrets." That new company, instead of having this great new hire who they thought had all of this wonderful experience, ended up having to suspend the employee immediately while they investigated what may have happened. Ultimately, unfortunately for that company, they had to let that employee go, because it turned out she had, indeed, taken trade secrets.

We see that those are the two big threats. You have to think about external threats, but increasingly and more often what we see are the internal threats coming from employees.

MICHAEL RAY: How is the law keeping pace with trade secrets, such as new developments we ought to be thinking about?

DOUGLAS DIXON: Just last year, Congress passed, and President Obama signed, a new law called the "Defend Trade Secrets Act" (DTSA). Up until then, there was no federal private civil action for trade secret misappropriation. It was a crime to steal trade secrets at the federal level, but there was no federal private civil right of action until the DTSA. Instead, you had 50 states, most of whom had adopted the Uniform Trade Secrets Act. But that word "uniform" is a little misleading, because each state may have had a different interpretation of what is a trade secret and what constituted trade secret misappropriation. You had different bodies of law all over the United States.

The DTSA has been hailed as probably one of the biggest advancements in federal IP law in over seventy years. The last time they did something of that scale was when Congress passed the Lanham Act [Trademark Act of 1946] 70 years earlier. The DTSA was a major development and it does a few things. First, it brings a uniform definition of "trade secrets" to federal law. Second, it brings a uniform definition of "misappropriation." Third, it creates original jurisdiction for theft of trade secrets in federal court, so you no longer have to rely upon diversity jurisdiction in order to get into federal court; instead, you can bring a federal claim. Fourth, it provides

for nationwide service of process and nationwide execution of judgment. Finally, it also creates, in very rare circumstances, an opportunity for *ex parte* seizure if you believe that the theft of the trade secret presents such a danger to your company that you can actually go *ex parte* and seize the trade secrets that may have been stolen.

The DTSA has been around for about a year, and it has certainly been hailed as a significant advance in the area of trade secret law.

MICHAEL RAY: You do a lot of work for us, and let's say we call you — maybe we have a trade secret stolen by a former employee — and we ask you, "What do we do now — should we file in state or federal court? What should we be thinking?"

DOUGLAS DIXON: There are many things one should consider when deciding where to bring a trade secret claim. There are several practical considerations. For example, one should consider the experience of the bench with intellectual property cases. Federal judges are likely to have more experience with IP matters than state court judges. You should also consider: docket speed, rules regarding dispositive motions, discovery and e-discovery obligations, and even whether a unanimous jury verdict is required.

In addition, there are specific hurdles a trade secret plaintiff may have to overcome before getting discovery in state court that may not exist in federal court. Most Uniform Trade Secret Act states protect defendants from discovery in trade secret cases until the plaintiff identifies the trade secret at issue with reasonable particularity. Under the DTSA, there is no explicit obligation to actually identify the trade secret before you can engage in discovery. As the plaintiff, if you want to get discovery right away, it may be better to file your trade secret claim in federal court.

Another thing to keep in mind when deciding where to file suit is preemption. The DTSA does not preempt other torts based on the same conduct alleged in the DTSA claim. In states that have adopted the Uniform Trade Secrets Act, torts arising from the same nucleus of facts as those giving rise to the trade secret claim are explicitly preempted. Thus, you cannot assert a breach of fiduciary duty claim based on the theft of trade secrets in UTSA jurisdiction.

MICHAEL RAY: Now I want to have a little fun with the panel. I'm going to do a lightning round, starting with George and then continuing down the table. I'm going to ask you a series of questions. Since this is the unrehearsed part, you can pass if you want, but I am confident that the panel can handle this and it'll be fun. [LAUGHTER]

Here's the first question: I'm on panels often, and I'm asked, "What do you like and what don't you like about outside counsel?" We're going to do the reverse.

I want you to think about your experiences with in-house lawyers. I don't want you to think about any receivables that we might have with your firms right now — I want you to be honest. [LAUGHTER]

This is important for many of us here — what are some of the things that you think make the outside lawyer–in-house lawyer relationship work well? Then take this opportunity

and let us know what gets on your nerves or what are the things that in-house lawyers do that make it *harder* for you to do your job?

GEORGE CARY: On the first part — what is key to a great relationship — it is in-house lawyers who are partners with us. In-house lawyers that view us as part of the team to serve the client. I also greatly enjoy working with lawyers that are at the top of their game, who know their field very well, and who put us through our paces. Lawyers who don't accept the first answer, but press us and require us to be at the top of our game. In fact, the better the in-house lawyers know the field, the more fun it is for us because they become partners and colleagues in the exercise. While we never forget who the client is, it is a more rewarding experience for us the less it feels like a client–outside lawyer relationship and the more it feels like, "We've got a team working on this problem; some are employed by the company, some by the law firm; but we're all in it together as a single team solving the client's problem."

A close second in terms of what makes the relationship enjoyable is when the in-house team are people that you can have a little bit of fun with — people that you enjoy the back-and-forth with. It's not *all* seriousness even when dealing with the most difficult and consequential problems.

On the flip side, the thing that makes the job unenjoyable is when dealing with second-guessers; people who are looking for an opportunity to assign blame; people who are not looking at it as a common enterprise where we're all trying to get to a goal, but are looking to cover their own advice if things go in a way that you hope they would not go.

MICHAEL RAY: Doug? Same question.

DOUGLAS DIXON: Okay.

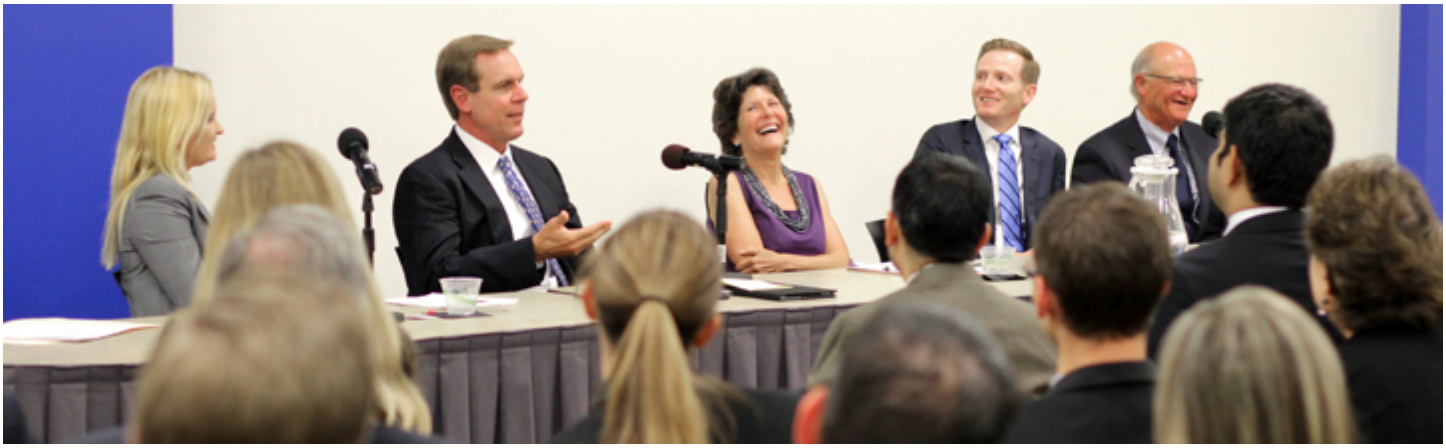
MICHAEL RAY: Michele, I'm going to start with you next time, so if everyone says everything you were thinking of saying, I'm going to give you the first question in the next round. [LAUGHTER]

MICHELE JOHNSON: Thank you so much!

DOUGLAS DIXON: I would just echo everything that George has said, and there's not too much to add. I would say one thing that I have definitely learned in working with Michael and some of the others at Western Digital, and Denise mentioned this a little bit, is the important role of the GC is to be deliberative, looking at things from every angle. What I found is because working with in-house, they had a bigger picture, they're more familiar with the business, they're able to help identify issues, identify things that may help us as we try and solve the problems that get brought to our attention as outside counsel.

One question that Michael often asks whenever I work with him and some of his colleagues here from Western Digital is one that I've been trying to use more often in my practice and even with other clients. Hopefully this isn't a trade secret for Western Digital! [LAUGHTER]

The question that I've really appreciated is sometimes Michael will turn to us and say, "Okay, let's change things for a moment. I want you to think, Doug, that you are actually representing our adversary now,



and you're needing to give legal advice to our adversary. What legal advice would you give to our adversary in that situation?" That's an incredibly important perspective. It helps us get at the right result and see things from a new way and represent and serve our clients even better. Trying to think of things from a different perspective has just been invaluable, and certainly it's something where the Western Digital legal team does a great job. Thank you.

DENISE AMANTEA: What I love about all of you [gesturing to the Western Digital legal team] is how inquisitive you are, curious, not afraid to ask questions. We all view ourselves as having an expertise, and you're calling us for that expertise. It's just wonderful to work with such smart, caring lawyers. I love that about the WD team.

Fortunately, you don't have the kind of lawyer I just can't abide.

DOUGLAS DIXON: Uh-oh, here we go! [LAUGHTER]

DENISE AMANTEA: No, Doug, you've changed my opinion — I like your stories, so you've kept my interest! [LAUGHTER]

It's the GC, typically, who has to always be right, just can't absorb what you're telling him or her. I think to myself sometimes, "Why the hell did you call me, then? If you've already made up your mind, what do you need me for?" [LAUGHTER]

MARK PETERSON: I should first say that for any of the clients that I have the opportunity to work with, you do nothing wrong! [LAUGHTER]

I'm thrilled with everything that you do! [LAUGHTER]

I've had friends tell me [LAUGHTER] that every once in a while, they run into difficulties. The biggest difficulty that I've seen — and for those of you who don't know, I was actually in-house for many years, and I just came back to a law firm a little over five years ago. What I have noticed, coming back to this side, is communication is very important.

What was that thing in *Cool Hand Luke*, "What we have here is a failure to communicate"? Most of the problems that I see result from a failure to communicate. Usually I'll put that on us; we should communicate with you, we should ask you the questions. But sometimes there are expectations from in-house counsel that they don't do a very good job communicating, and it's tough for us to read minds; whether that's how much something's going to cost, how quickly it's going to get done, how it's going to get done, some of those types of things.

Communication is really important, and over time, as you develop relationships with in-house counsel, and you get all the benefits of all the things you've heard, that can be overcome. But especially with a new client, it's incumbent upon outside counsel to really push this. It helps when in-house counsel does, too, to try to really make sure that everyone understands what the expectations are — that comes up a lot with fees. Everybody wants to save money; lawyers are expensive, we all know that. If someone wanted to try to save fees, what I would *love* to hear from a client is, "I really want to try to do this in a way so that we can save some money. Here's an idea I have; how do you think that would work?" Because sometimes the ideas in-house counsel have are brilliant, and they would work in a wonderful way. Other times, they're not, and to be candid, it's going to cost you more money, it's going to be much less effective, and it's probably going to delay the process.

But some people come in with a mandate, "This is how we're doing it," and it's tough to get them pulled away from that. I would love to have a conversation with any client about how to make things less expensive, because I'd much rather have the next transaction and the next transaction or the next case and the next case, as opposed to making ten percent more on this case and then not have you for a client any more. There, again, it's more communication.

The one other thing that would be helpful from time to time is to help us manage your internal clients. Sometimes you work with GCs that are very effective at working with their internal clients and setting appropriate expectations. Or when the CEO or a board member, when you're in a board

meeting, comes up with the dumbest idea you have ever heard, and the GC just kind of sits there and [LAUGHTER], "Well, what do you think?" They don't – and they know it's a stupid idea! [LAUGHTER]

But they don't say anything, and they don't help you, and you're trying to be very deferential, and maybe they have a much different relationship – probably a better relationship – with the CFO or CEO or whoever it is you're talking to. A lot of times, they can really play a critical role there, so you can move the process on and get to what you need to do. Some are much more willing to do that than others.

MICHELE JOHNSON: Mine was "communication," too. [LAUGHTER]

It's true, and in what we do, a lot of it is in a crisis mode – not all, but a lot. It's a very fast-moving M&A matter and certainly M&A litigation and corporate control those situations.

We always, from an outside counsel perspective, try to be respectful of your time. But when we're asking for something, it's because it's *really important*, and the responsiveness and communication issue is critical. That comes with relationships; that comes with understanding each other and time together. But going both ways, to be responsive to each other so that we're making decisions with all of the information in real time, which can lead – the difference can be between success and failure, really understanding what you know so that we can give you what we know. I think that's it.

MICHAEL RAY: I think it's interesting that a lot of the things that you shared are the very same things we would say about working with outside counsel. I really agree with one of the points that George made – the smarter and more talented the practitioners we work with, the more enjoyable and more meaningful the work is. I think back to some late nights working with George and his colleagues in a conference room in D.C. thinking through the relevant market and areas of overlap in a proposed transaction, and it was stimulating, rewarding and a lot of fun.

Going back to Michele. I'd like you to share with us a good piece of advice, maybe the best piece of advice, or at least a good piece of advice that you received from a mentor, a role model or someone else, that had an impact on your career and how you progressed.

MICHELE JOHNSON: Believe in yourself. We all start out with certain ideas on how this job's going to go and our place in it and get out of your own way – believe in yourself, trust your instincts, and relax.

MICHAEL RAY: Excellent. I'm going to go right down the table. Mark?

MARK PETERSON: Your reputation is your most important asset – especially in a place like Orange County, which is surprisingly small when you get to be as old as I am.

DENISE AMANTEA: I was mentored by Andy Grove at Intel. He said, "Don't wait around for a promotion; *ask* for one." He said he had to *ask* for every promotion that he got.

DOUGLAS DIXON: It would be, don't be a potted plant; don't just sit around – be proactive, get things done, seize the opportunity.

GEORGE CARY: It comes back to teamwork, the notion that the better the work that anybody on the team can do is good for everybody – it's not a zero sum game where someone else's success somehow subtracts from other members of the team.

MICHAEL RAY: Okay. I'm going to pause right now and see if there are questions from the audience, and if so, we'll take those!

[Question on trade secrets from the audience.]

DOUG DIXON: I thought it was a great question for Denise, actually! [LAUGHTER] In part, the answer to your question, to just keep it very brief, would be, I talked a little bit about protecting trade secrets; bringing a potential claim for theft of trade secrets. If that's what you see going on there; you could bring a claim under state law, you could

bring a claim under federal law. That's one potential avenue; there are probably other claims; it would depend on everything that's going on. It sounds like you're thinking about a very specific situation.

There certainly are already laws that protect against hacking, cyber threats and those kinds of things. Again, that gets back to trade secrets. But in terms of things on the horizon, I'm not aware of anything specifically that, say, Congress is currently considering.

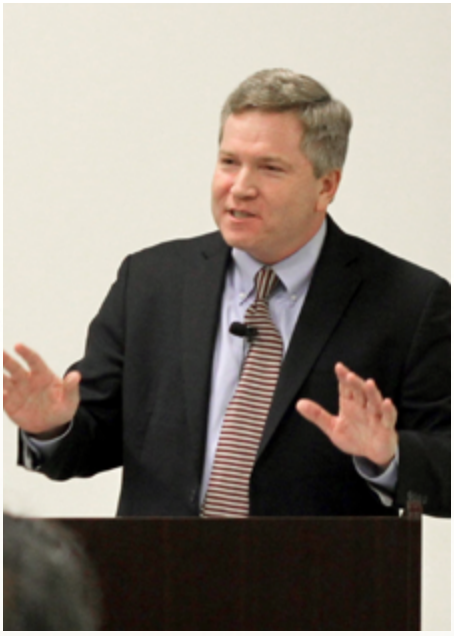
MICHAEL RAY: Other questions from the floor?

[AUDIENCE MEMBER]: When you counsel your boards, do they perceive that America's role in the world has changed, and if it has changed, are there discussions in the boardrooms about how they're going to deal with the changed view of America's policies and the world?

For example, if we get out of some of these trade agreements that we're in, and the companies that we, for lack of a better term, have abandoned, and they decide to join together in their own trade consortiums and leave the United States out, is that an issue for the boards?

DENISE AMANTEA: It really depends on the industry, and the boards are very aware of the political repercussions in their business. Most boards have very experienced CEOs and CFOs who came from an industry that's at least complementary with the board they're sitting on, and they discuss among each other all the time how the industry is changing and how it's affected by geopolitical events all over the world. Yes, it's a *very* sophisticated discussion, in my experience, that I've witnessed across the swath of boards that I counsel.

MICHAEL RAY: One way we see these issues is through our enterprise risk assessment process, overseen by our board, driven by the audit committee, and facilitated by our



internal audit and finance teams. Among the enterprise risks we identify are geopolitical ones, which can include the physical security of our locations, trade barriers, and disruptions to our supply chain or our go-to market networks. All global companies were likely looking at these issues prior to January, but likely are looking more closely at them at present given an increased level of uncertainty that seems to prevail in the world at this moment. We have both a top-down and a bottom-up process, which is designed to take into account the different perspectives of those who operate at the top of the organization and those who see things at a more transactional level.

I have no wish to be political, but I do think we are heading into an era where geopolitical risks become more profound, uncertainties become more pronounced, and the need to scenario plan becomes more critical.

Jack, did you have a question?

JACK FRIEDMAN: Michael, whether you and the other panelists might discuss a bit about the difference between operating in some different countries — China, Israel, Japan, or others — there must be interesting differences.

MICHAEL RAY: I think the expansion of the regulatory state is fascinating, and an example of that is in China which proudly deploys a state capitalism model, where the government partners closely with industry and often directs where resources are deployed. It feels sometimes as if this model is gaining momentum and is pulling the rest of the world along with it. To the extent that government actors become more involved in markets, companies have to think about who are the key stakeholders in those markets and what are the strategies needed to engage them effectively.

We'll be watching the choices that policymakers make in the next several years. Will they adopt even more rules around who can access which markets and on what terms? It does appear at times that policy makers have less confidence in markets' ability to deploy capital efficiently, and so they are formulating rules which, while well-intentioned, can have effects that are both far-reaching and difficult to predict.

Any other questions?

[AUDIENCE MEMBER]: We've been talking a little bit here about cybersecurity, and in the M&A context, how do you deal with cybersecurity in terms of looking at an acquisition and their diligence in that area and the drafting of legal documents to safeguard any potential issues?

MICHAEL RAY: How do you look at that, Mark?

MARK PETERSON: Cybersecurity has become a much bigger issue for M&A, and you mentioned, how it plays out, and that's in the diligence. Whether it's bringing in internal experts or outside experts — but to really dig in, several years ago, that was not something you had to spend a lot of time focusing on. Now, you actually do spend a fair amount of time. You see the reps and warranties in an M&A document change a lot now, and you get pushed a lot more than you used to, depending on the industry that

you're talking about, where you could have had a certain set of reps or a certain type of rep before, you really end up getting pushed more to get more comprehensive reps. Also, sometimes in the indemnification section, you'll get pushed there, too — higher limits, longer time periods, longer survival of the reps. It's always a negotiation as to what you're going to give, because obviously the buyers want very comprehensive reps, and the sellers don't want to give anything. But at least in my experience, these sellers are willing to give a little more now, because buyers are demanding it.

MICHAEL RAY: Other questions? If not, then I'll make an observation before we bring the evening to a close. GCs are under a lot of pressure to reduce costs, and this is an important and appropriate challenge that we are asked to take on. We should ensure that we are maximizing the value of every dollar entrusted to us, including those we spend with outside counsel. However, I have some concern that in our drive to commodify legal services and drive down costs, we risk forgetting that great lawyering is an enormously valuable service that cannot be reduced to the merely transactional. Trusting, intimate

relationships between lawyers and clients who are invested in their respective success over time are among the most effective strategies GCs can deploy to control and reduce costs. Thoughtfully availing oneself of the expertise represented by those on tonight's panel can prevent problems before they become full-blown billing matters. I have spent 30 minutes on the phone with George and been able to steer a client toward a less risky, but no less effective path. I've thought through an issue with Denise over the phone and been able to formulate an approach that allows us to quickly respond to inquiries without the need for additional outside counsel involvement. Those are a few examples of the benefits that come from investing in long-term relationships with those who represent the best in our profession. Not every issue requires the input of the lawyers on our panel tonight. But for those that do, we benefit from recognizing the very real value derived from expertise, wise counsel and hard-earned judgment.

I want to again thank everybody on the panel, because each has been a tremendous source of support, and has helped Western Digital and me throughout my career. I want to thank all of you for joining us tonight, and I want to thank the Directors Roundtable for sponsoring this wonderful event. Thanks very much. [APPLAUSE]

AUDREY WISHNICK GREENBERG: Thank you, Michael, and all the panelists. We've enjoyed receiving your valuable wisdom. [APPLAUSE]

George S. Cary
Partner

CLEARY GOTTLIEB

George S. Cary is a partner based in the Washington, D.C. office of Cleary Gottlieb Steen & Hamilton LLP. He has decades of experience in sophisticated antitrust matters, representing companies on industry-transforming transactions and complex monopolization litigation.

In addition to representing Western Digital in its $17 billion acquisition of SanDisk and its previous $4.8 billion acquisition of Hitachi's hard drive business, George has represented companies in many complex transactions including most recently: Dow Chemical/DuPont, Abbott Laboratories/St. Jude Medical, GlaxoSmithKline/Novartis, and Medtronic/Covidien. His recent litigation highlights include defending Sanofi US, Keurig Green Mountain, and Sabre Holdings in closely watched monopolization cases, and he won a landmark preliminary injunction for Teladoc against the Texas Medical Board, enjoining a Board rule that would have ended telehealth in Texas.

Before joining the firm in 1998, George served as Deputy Director of the U.S. Federal Trade Commission's Bureau of Competition, where he oversaw a record number of merger transactions and served as lead trial counsel for the FTC in its successful challenge of the Staples/Office Depot merger, considered the most significant merger case in a decade.

Chambers and Partners has consistently ranked George in its top tier of global antitrust lawyers and he was one of only two antitrust lawyers named to *The Legal 500*'s inaugural U.S. Hall of Fame for merger control. *Benchmark Litigation* named him "Antitrust Litigator of the Year" consecutively in 2016 and 2017. He has been named *The National Law Journal* antitrust "Trailblazer" in 2015; *Law360* MVP in competition in 2014; and *The Best Lawyers in America's Washington*, DC "Antitrust Lawyer of the Year" in 2016 and 2011 and "Antitrust Litigation Lawyer of the Year" in 2014.

George received his J.D. degree from the University of California — Berkeley School of Law and his A.B. (with Honors) from the University of California — Santa Cruz.

Cleary Gottlieb Steen & Hamilton LLP

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Douglas Dixon

Partner

HUESTON HENNIGAN LLP

Douglas J. Dixon is a partner in Hueston Hennigan's Newport Beach office. His practice spans a wide range of litigation in federal and state courts at the trial and appellate levels. His ability to help clients navigate highly complex technological, regulatory, and business matters is the unifying thread through a practice covering multiple areas of the law. In recent years, Mr. Dixon has focused on intellectual property litigation, securities litigation, shareholder derivative litigation, and general commercial litigation.

Mr. Dixon also has extensive experience representing companies in internal and government investigations, and regularly counsels entertainment clients on a variety of intellectual property and contract issues. Representative clients include Amgen, Allergan, Glaukos, T-Mobile, Waste Management, and Bagdasarian Productions.

In 2014, 2015 and 2016, *Super Lawyers* magazine named Mr. Dixon a Southern California "Rising Star."

Mr. Dixon earned his J.D. from Georgetown University Law Center and served as a law clerk to the Honorable Edward Rafeedie of the U.S. District Court for the Central District of California. After clerking, Mr. Dixon was an associate at Cravath, Swaine & Moore LLP, and then Irell & Manella LLP, where he was elected to the partnership of the firm. During law school, Mr. Dixon externed at the U.S. Department of Justice, Antitrust Division.

In addition to his practice, Mr. Dixon serves on the board of the Public Law Center, a pro bono organization that provides legal services to low-income and vulnerable residents of Orange County.

Hueston Hennigan LLP

Hueston Hennigan LLP is a trial and litigation boutique specializing in complex commercial disputes and white-collar defense. The firm is nationally recognized for achieving successful results in high-stakes litigation, and its clients include Fortune 500 companies, municipalities, universities, individuals, and entrepreneurs in the health, technology, media, and entertainment industries. With a commitment to intensive client advocacy, Hueston Hennigan, which has offices in Downtown Los Angeles and Newport Beach, takes a rigorous approach to trial readiness from the outset of a case.

As plaintiffs' counsel, the firm's attorneys have secured verdicts, summary judgments, and settlements totaling billions of dollars. As defense counsel, the firm has helped clients avoid billions of dollars in exposure, through dispositive motion practice, favorable settlements and verdicts, and by convincing federal and state regulators to drop charges against our clients. Rigorous analysis and scrutiny of federal indictments has led to a withdrawal or aversion of charges and indictments. Through aggressive advocacy and motions practice, the firm frequently succeeds in having charges entirely dismissed. In all instances, the firm seeks creative and effective solutions to our clients' unique problems, and aggressively pursues their interests.

Key to its success is the firm's approach to associate training. Hueston Hennigan selects the most talented attorneys and trains them like no other firm by affording them early responsibility, meaningful work and formal training. By this means, Hueston Hennigan offers clients the strongest litigation teams from top to bottom. Attorneys hail from the top law schools in the country, and more than half have served as judicial clerks for federal judges. Every associate is guaranteed at least one trial in the first two years, with a goal of at least five trials by fifth year.

With its dual commitment to client service and trial advocacy, Hueston Hennigan occupies a unique position in the landscape of boutique firms; it is a 40-lawyer firm that gets 400-lawyer results.

Michele Johnson

Partner

LATHAM & WATKINS LLP

Michele Johnson, a member of the firm's Executive Committee and the former Managing Partner of the Orange County office, is consistently recognized as a leading California litigator. She represents financial institutions, Fortune 500 companies, boards of directors and individuals in securities, M&A and other complex commercial litigation.

Ms. Johnson's practice focuses on securities and professional liability litigation, and she represents industry-leading companies, officers and directors, special committees and financial institutions in connection with:

- Securities class actions
- Shareholder derivative litigation
- Mergers and acquisitions litigation
- Proxy contests
- SEC enforcement actions
- Internal investigations
- Other complex, high-exposure litigation

Ms. Johnson's recent representations include multi-jurisdictional litigation arising out of solicited and hostile takeover attempts and investigations and litigation on behalf of special committees and boards of directors related to public company crises. In a widely publicized matter that began in 2014, she represented Allergan in defending against the US$54.6 billion hostile takeover attempt by Valeant Pharmaceuticals assisted by Pershing Square. She has had significant trial experience involving product liability, unfair business practices, tax, trusts and estates, and insurance bad faith trials.

Ms. Johnson was recognized as a "recommended" lawyer for M&A Litigation by *Legal 500 US* 2015. Recently, she was named to the "25 Most Influential Women in Securities Law" by *Law360*, the "Top Women Lawyers" list in California by the *Daily Journal*, and the *Profiles in Diversity Journal's* list of "Women Worth Watching."

Ms. Johnson has served on the firm's Pro Bono, Associates and Diversity Committees. She serves on the boards of the Public Law Center, the Orange County Bar Foundation and the Orange County chapter of the Association of Business Trial Lawyers.

Latham & Watkins LLP

Latham is dedicated to working with clients to help them achieve their business goals and overcome legal challenges anywhere in the world. From a global platform of more than 30 offices, the firm's lawyers help clients succeed.

Latham is committed to helping clients achieve their business strategies and providing outstanding legal services around the world. Clients depend on the firm's ability to find innovative solutions to complex business issues, and Latham's lawyers use the firm's experience and resources to help clients handle these challenges.

Latham's global platform is composed of a single, integrated partnership focused on providing the most collaborative approach to client service. The firm offers:

- Deep experience in successful enterprise-transforming transactions and in defending bet-the-company controversies
- A solutions-based approach, providing innovative and sound commercial advice
- Optimally sized teams that provide cost-effective and high-quality services
- A culture geared toward establishing and nurturing long-term client relationships
- More than 2,400 lawyers in 31 offices located in 14 countries; Latham lawyers speak more than 60 languages
- Truly a "one-firm" firm — Latham has no headquarters, and firm management is spread throughout the world, allowing Latham to service clients with the best-suited teams regardless of location
- More than 60 international practice groups and industry teams
- Consistently ranked in the top tier by leading legal and business publications such as *The American Lawyer*, *Financial Times*, *mergermarket*, *Chambers and Partners*, *The Legal 500* and *Asia Legal Business*.
- Latham lawyers and professional staff performed approximately 173,000 hours of pro bono work in 2011 and more than 1.8 million hours in the past decade, valued in excess of US$675 million
- Latham's global program to reduce its environmental impact, conserve natural resources and energy, and operate in a sustainable and cost-effective manner

Mark Peterson
Partner

Mark Peterson assists a broad range of clients whenever they are exploring complex acquisitions, dealing with board-level issues, or for practical, business-savvy legal advice, because few understand the market and business pressures of the GC role like Mark.

Mark began his legal career at O'Melveny in 1991, focusing on mergers and acquisitions, equity and debt offerings, SEC compliance and disclosure requirements, as well as other general corporate advice. He then spent 14 years in-house, serving as General Counsel and chief legal officer of several public and private equity owned companies. In those roles, Mark had primary responsibility for all legal affairs, including mergers and acquisitions, capital raising, SEC and exchange reporting and compliance, intellectual property, litigation management and strategy, labor and employment, risk management, and corporate governance.

In 2011, Mark returned to O'Melveny as a corporate and securities partner, advising senior executives and boards of directors on matters ranging from corporate governance to strategic transactions, capital-raising transactions, and day-to-day business and legal issues. His clients comprise a diverse group of public and private companies in industries including consumer products, healthcare, medical devices, technology, and data analytics.

O'Melveny

O'Melveny & Myers LLP

O'Melveny's clients shape markets, set precedents, and break boundaries. They are stalwarts and innovators, the names you know and trust. And for more than 130 years, O'Melveny has been right beside them helping them achieve their most important goals.

Whether it's connecting clients to new business opportunities, collaborating on strategies to push through their obstacles, or trading ideas for maximizing value, O'Melveny's clients' business objectives are what set the firm's agenda. With approximately 700 lawyers on three continents, and strong cultural ties to all its locations, O'Melveny is both local and global — an international law firm experienced in everything from the fine print of a municipal zoning law to the intricacies of an international infrastructure deal.

Collaboration thrives among the firm's offices. Whether a cross-border merger requires U.S., U.K., and Chinese tax advice, or a multijurisdictional dispute involves tracking down witnesses and documents in different countries and languages, O'Melveny's worldwide reach ensures that nothing gets lost in translation.

O'Melveny's commitment starts with great legal results, but doesn't end there. It also includes dedicating itself to its clients' goals, businesses, and cultures, and delivering excellent results efficiently.

Denise Amantea
Partner

WOODRUFF SAWYER & COMPANY

Denise Amantea is a Partner at Woodruff-Sawyer & Co., a full-service international insurance brokerage firm headquartered in San Francisco. She is a recognized industry leader in the field of Directors & Officers Liability coverage and speaks nationally on the topic. She counsels public company boards and senior management on securities disclosure issues, SEC investigations, insider trading, and corporate governance.

While a former securities litigation partner at Wilson Sonsini Goodrich & Rosati in Palo Alto, CA, Ms. Amantea defended dozens of public companies and their directors and officers in securities class actions and SEC enforcement actions. As a result of her experience as a securities litigator, Ms. Amantea is uniquely qualified to understand directors' and officers' exposure and design a loss control program that will protect them.

Ms. Amantea received her B.A. from the University of California, San Diego and her J.D. from Santa Clara University's School of Law. She served as a law clerk to the Honorable William A. Newsom, California Courts of Appeal, First District.

Woodruff-Sawyer & Co.

Woodruff-Sawyer is one of the largest independent insurance brokerage firms in the nation, and an active partner of Assurex Global and International Benefits Network. For nearly 100 years, we have been partnering with clients to deliver effective insurance, employee benefits and risk management solutions, both nationally and abroad. Headquartered in San Francisco, Woodruff-Sawyer has offices throughout California and in Oregon, Washington, Colorado, Hawaii, and New England.