Directors Roundtable

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

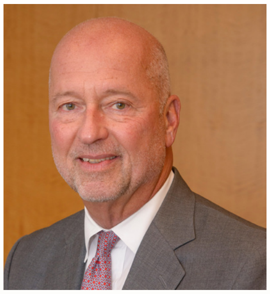
GUEST OF HONOR:

David Levine

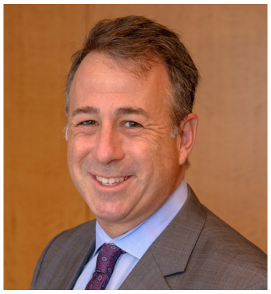
Chief Legal Officer, Executive Managing Director & Member of Partner Management Committee, Sculptor Capital

THE SPEAKERS

David Levine
Chief Legal Officer, Executive Managing Director & Member of Partner Management Committee, Sculptor Capital

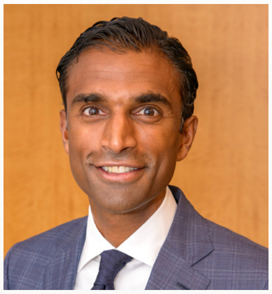


Richard Walker
Partner, King & Spalding LLP



David Hennes
Partner, Ropes & Gray LLP

Jennifer Dunn
Partner, Schulte Roth & Zabel LLP



Lona Nallengara
Partner, Shearman & Sterling LLP

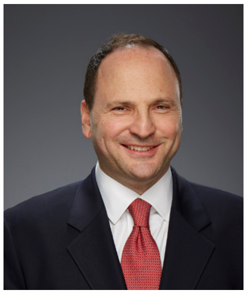
(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, directorsroundtable.com.)

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 David Levine and the Legal Department of Sculptor Capital Management with the leading global honor for General Counsel and law departments. Sculptor Capital Management is a global, diversified alternative asset management firm with a range of fully integrated platforms across multi-strategy, credit, and real estate.

David's address focuses on key issues facing the general counsel of an international asset management firm. The panelists' additional topics include government regulation, Delaware trends, conflicts of interest, and cyber security.

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.



David Levine

Chief Legal Officer, Executive Managing Director & Member of Partner Management Committee

Sculptor
CAPITAL MANAGEMENT

David Levine is the Chief Legal Officer of Sculptor Capital Management Inc. (formerly known as Oz Capital Management Inc.), a global alternative asset management firm. He is also an Executive Managing Director and a member of the Firm's Partner Management Committee. Prior to joining Oz Capital Management Inc. in January 2017, Mr. Levine spent 15 years at Deutsche Bank AG, where he most recently served as Global Head of Litigation and Regulatory Enforcement. From 1993 through 2001, Mr. Levine worked at the U.S. Securities and Exchange Commission in both New York and Washington, DC. During this time, he served in a variety of roles including as the agency's Chief of Staff, as well as Senior Adviser to the Director of Enforcement.

Mr. Levine was a member of SIFMA's Compliance and Legal Society Executive Committee and Legal Subcommittee from 2011-2017. Previously, he served on FINRA's Membership Committee (2003-2005), including as Chair in 2005. In 2006, Mr. Levine was appointed by FINRA's Board of Governors to the National Adjudicatory Council (the appellate court for FINRA enforcement actions) and served as Vice Chairman (2008) and Chairman (2009). Mr. Levine also served on FINRA's Statutory Disqualification Subcommittee from 2010 to 2016.

Mr. Levine is the author of: *Research Analyst Conflict Disclosures – Less Would Be More*, BNA's Securities Regulation & Law Report (Vol. 41, No. 6) at 217 (Feb. 9, 2009); and co-author of: "*You've Got Jail:" Current Trends in Civil and Criminal Enforcement of Internet Securities Fraud*, 38 Georgetown American Crim. L. Rev. 405 (2001); *Insider Trading Redux*, Nat'l L.J. at B6 (Oct. 18, 1999); *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 Bus. Law. 1 (1998); *The New Securities Class Action: Federal Obstacles, State Detours*, 39 Ariz. L. Rev. 641 (1997); *The Limits of Central Bank's Textualist Approach: Attempts to Overdraw the Bank Prove Unsuccessful*, 26 Hofstra L. Rev. (1997).

Mr. Levine holds a J.D. Degree from Hofstra University School of Law where he was valedictorian and an editor of the law review.

Sculptor Capital

Sculptor Capital is a global diversified alternative asset management firm providing a range of investment products across Multi-Strategy, Credit, Arbitrage and Real Estate. The firm manages both hedge funds and private equity funds, with over $33 billion in assets.

Sculptor was formerly known as Oz Capital Management Inc., which was formed in 1994. The firm has offices in New York, London, Hong Kong, and Shangai. Sculptor IPO'd in 2007 and trades on the NYSE under the ticker "SCU." Sculptor's client base is comprised of pension plans, foundation, endowments and other institutional investors.

The firm has approximately 400 employees and is led by a seasoned and deep team of 23 Executive Managing Directors (EMDs). Sculptor's 14 investment professional EMDs have worked together for an average of over 12 years.

KAREN TODD: Good morning and welcome! My name is Karen Todd, and I'm the Executive Director and Chief Operating Officer of Directors Roundtable. We're very pleased that you're here today.

I want to especially thank the people of Sculptor Capital Management, and the outside law firms who came to the program today. We are also very appreciative that Ropes & Gray is hosting this event at their New York office. I'd like to give Ropes & Gray a hand. [APPLAUSE]

The Directors Roundtable is a civic group whose mission is to organize the finest programming on a national and global basis for Boards of Directors and their advisors, which, of course, include General Counsel and their legal departments. Over the last 28 years, this has resulted in more than 800 programs on six continents. Our Chairman, Jack Friedman, started this series after speaking with corporate leaders, who told him that it was rare for a large corporation to receive validation for the good work that they do. He decided to provide a forum for executives and corporate counsel to talk about their companies, the accomplishments in which they take pride, and how they have overcome the obstacles of running a business in today's changing world.

We honor General Counsel and their law departments so they may share their successful actions and strategies with the Directors Roundtable community, via today's program and a full-color transcript which will be made available to about 100,000 leaders worldwide.

Today, it is our pleasure to honor David Levine, Chief Legal Officer, and the Law Department of Sculptor Capital Management, many of whom are here today. I would like to acknowledge them at this point. [APPLAUSE]

I would also like to introduce our Distinguished Panelists. Jennifer Dunn of Schulte Roth & Zabel; Richard Walker from King & Spalding; David Hennes of Ropes & Gray; and Lona Nallengara from Shearman & Sterling.

I have a special surprise for David, which is a letter from the Dean of Hofstra University School of Law, Judge Gail Prudenti, that I'd like to read to you.

Dear David:

I want to offer my heartfelt congratulations to you on your being selected, together with the Oz Management [which is now Sculptor Capital] Law Department, as this year's esteemed honoree of the Directors Roundtable World Recognition of Distinguished General Counsel. I couldn't be more thrilled that you are receiving this most prestigious accolade, which is the leading global honor for General Counsel and law departments all over the world.

Your over 15 years at Deutsche Bank, which culminated in your serving as the Global Head of Litigation in Regulatory Enforcement, and your many years at the SEC serving in such vital roles as the agency's Chief of Staff and Senior Advisor to the Director of Enforcement, together with your having been the chair of numerous influential committees of SIFMA [Securities Industry and Financial Markets Association] and FINRA [Financial Industry Regulatory Authority] prepared you well for your current position as the Chief Legal Officer at Oz, one of the largest global diversified alternative asset management firms in the world.

The expert knowledge and understanding of the international legal landscape that you possess, combined with your many years of dedicated experience in top leadership roles at the world's largest financial institutions, makes you the perfect choice for this very special privilege.

As valedictorian of your graduating class, and an editor of the *Hofstra Law Review*, we knew that you would go far, but you have surpassed even our greatest hopes and expectations. It is so rewarding when a Hofstra Law alumnus like yourself achieves so very much and reaches the pinnacle of professional success. We are so very proud of you and all of your amazing accomplishments, and we are ecstatic that you are receiving this well-deserved honor.

Wishing you health, happiness and continued success always,

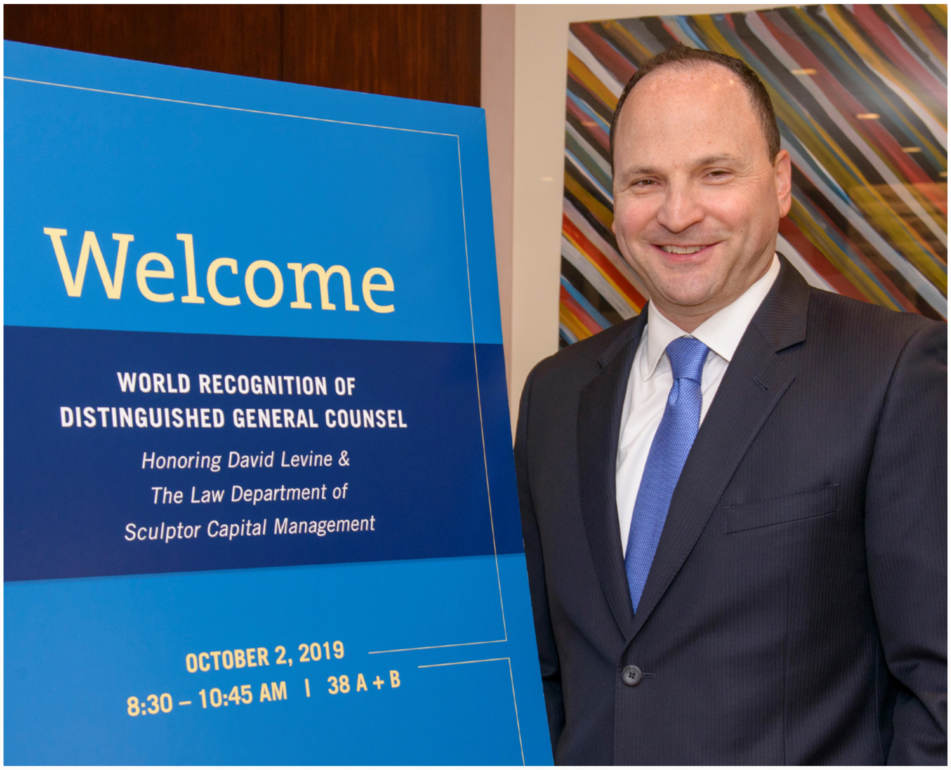
With warmest regards.

[APPLAUSE]

DAVID LEVINE: Thank you very much.

KAREN TODD: At this point, I'm going to turn it over to David for his presentation.

DAVID LEVINE: Great! Thank you, Karen. It's a pleasure to be here today, and I'm grateful on behalf of my team and myself to receive this honor. The day is made all the more special being in the presence of



so many friends. There are many thank yous to go around, and I'd like to start with David and with Dick.

It certainly is no surprise to me that David Hennes is a prime supporter of today's event, and that is because David has been supporting me for 15 years, since he first had my back in 2004 as my outside counsel on the *Eliot Spitzer Research Analyst* matter, when I, along with Dick, was at Deutsche Bank. We have been in the trenches together many times, and his great work has saved me from several battle scars.

The 15 years I have known David is eclipsed by the now 27 that I have known Dick Walker. I first met Dick as a 1992 summer intern in the SEC's New York office, which he then led. Through later roles as the SEC's General Counsel and Enforcement Director, and then as Deutsche Bank's Global General Counsel, Dick has set the bar for being an A+ lawyer and leader. Strong odds are that any insightful comments I may make today truly are sourced to him.

Next comes Jenny and Lona, my partners. That term is used deliberately. The best support in-house counsel receive comes from law firms that are there for you 24/7 and live your issues as if they were their own – in other words, those who function as partners. That is the support my firm receives from Jenny and all of Schulte Roth & Zabel, and Lona and all of Shearman & Sterling. You have my sincere thanks.

My hat is also off to Karen and Jack and the Directors Roundtable; I thank you for this award, and I commend you for the work you do providing valuable forums for Directors and their advisors to discuss the important issues of the day.

Lastly, and most importantly, I thank those who richly share in this award today – my team, located here in the front row, and these are the ones that are here today; others are back manning the shop, but *all* own an equal piece of this honor. I am fortunate to work with such a talented and committed group. You come early, you stay late, and you give it your all daily to address an endless stream of complex issues. I am appreciative.

For those not familiar with my firm, let me say a quick word about Oz Capital Management, which, as of three weeks ago, has been rebranded as Sculptor Capital Management. We are a global alternative asset manager with offices in New York, London and Hong Kong, and we manage over $33 billion in assets belonging mainly to institutional investors such as pension plans and foundations. The word "alternative" means management of hedge funds or private equity funds. We manage both.

Hedge funds offer investors regular liquidity. They look to limit volatility and downside risk, and they typically invest in equities (either long or short), credit products, and various types of arbitrage.

Private equity funds, by contrast, lock up investor capital for longer periods of time and have narrower mandates than hedge funds. At Sculptor, our PE funds focus on real estate.

And with that, it's time to get to the program, which notes that I will address key issues facing general counsel, particularly of an international asset management firm. Given the nature of today's event, I want to come at it from the perspective of the Board of Directors – specifically, what should Boards expect from their GC? The question is synonymous with what is the proper role of the GC? What seems like such a simple question is anything but.

For anyone accepting an offer to be GC for the first time, the common reaction is likely two-fold: first, joy, given that demand typically outstrips supply for these roles. But the joy can quickly give way to thoughts of, "What do I do now?" The role of the GC is perpetually evolving and increasingly complex, particularly given globalization and ever-changing regulation. There is definitely no playbook, and no two GCs do the job the same way.

I see six key pillars, and Boards have the right to expect their GCs will build their practices around each. They are laid out in a slide in your materials, and they are as follows:

1. The heart of the legal role, which is the advisory or the counseling function.
2. Enforcement and litigation management.
3. Key constituent management, which centers on the Board, senior management and regulators.
4. Team management. This includes talent development, succession planning, morale, and ensuring connectivity with overseas staff.
5. Expense management, which really means framing your business model and setting the right balance of in-house staff near and offshore providers and use of external counsel.
6. And lastly, helping manage corporate strategic actions and priorities.

Let me circle back and cover each of these in a bit more detail, offering my perspectives.

On the advisory front, it is critical to ensure coverage of both staples and current regulatory priorities. This requires an expert understanding of your business and industry, as well as closely monitoring your key regulators globally, to understand their current focus.

Bringing this closer to home, for an asset management business, three staples command much time from me and my team. The first is conflict management. As reaffirmed by the SEC earlier this year in an interpretative release focused on the standard of conduct for investment advisors that accompanied its high-profile Regulation Best Interest release, the Commission confirmed that investment advisors are, indeed, fiduciaries. As such, advisors have a duty to do three things: 1) act in the best interests of their clients; 2) provide clients with full and fair disclosure of material facts; and 3) manage conflicts of interest.

Conflict management should be a healthy part of the plate of any asset management GC, and Boards should spend much time understanding how the company manages the same.

> "The role of the GC is perpetually evolving and increasingly complex, particularly given globalization and ever-changing regulation. There is definitely no playbook, and no two GCs do the job the same way." – *David Levine*

Potential conflicts come in numerous shapes and sizes. Three that have borne regular enforcement attention are expense allocation, trade allocation, and valuation of illiquid securities.

As to expenses: advisors must ensure that advisory clients bear *only* those expenses that are authorized and properly disclosed to clients. For example, passing on the costs of an advisor's rent or tax preparation to a fund client would be an invitation for an SEC enforcement action.

On trade allocation, an age-old abuse to guard against is cherry-picking, where advisors allocate profitable trades to favored or more lucrative accounts. A newer variant is to favor some investors over others in co-investment opportunities, which are opportunities to invest alongside a private fund and not within that fund.

As for valuation, conflict pressures can exist to improperly inflate the value of assets, since an advisor's revenue is directly tied to total assets under management. The risk is particularly acute with so-called Level 3 assets, which are highly illiquid and marketed to a model and not the market.

In the U.S., advisors are still safe managing conflicts, including the ones I just mentioned, principally through disclosure. As stated by Justice Louis Brandeis in 1914, and as many in this room, I'm sure, often repeat, "sunlight is said to be the best of disinfectants." At Sculptor, we spend much time making sure our fund documents are clear on our practices here, and then much time making sure we do as we say. But conflict management is a prime example showing how a GC's job is complicated by globalization and the potential for conflicting regulatory schemes.

The EU is becoming less enamored with sunlight. As per major reform legislation in the EU known as MIFID II, or the Markets in Financial Instruments Directive Part II, disclosure is now the *last* resort option. The *first* resort is to take steps to *actively* manage the conflict, up to and including exiting certain businesses if necessary.

In turning back to the U.S., the disclosure reins are tightening. In particular, use of the word "may" provides little to no comfort. As noticed in the SEC's recent 12b1 fee sweep, firms were sued when saying they *may* receive certain distribution fees that they, in fact, were receiving.

Relatedly, the SEC expects conflict disclosures to be increasingly more detailed and comprehensive. For example, your expense allocation disclosure should be *granular* as to what exact expenses can properly be billed to the funds without *any* painting in broad strokes.

A second staple – one where my firm had an unfortunate misstep – is the management of anti-corruption risk that arises under the Foreign Corrupt Practices Act of 1977 and related laws. The SEC and DOJ have amped up efforts here. They each have dedicated FCPA units manned by approximately 30 lawyers, and the number of cases they have brought over the last decade has shot up. From 2009 to 2018, they have averaged a combined 38 FCPA cases per year. By contrast, from the FCPA's inception in 1977 through 2008, they averaged a mere six per year. While historically focused on other sectors, such as oil & gas and pharmaceuticals, the focus has migrated to financial services over the last decade, with regulators zeroed in on matters such as the hiring of sons and daughters of Asian government officials, as well as activities by sovereign wealth funds, such as 1MDB in Malaysia.

The bottom line is that all asset managers need a robust anti-corruption program, and GCs and Boards should spend much time assessing the vibrancy of the same.

My one pointer for today would be to scrutinize any third-party intermediaries used to help win business. A Stanford Law study found that 89% of all FCPA enforcement actions feature use of such actors. We ban use of intermediaries unless they are regulated and receive clean background reports, and, even then, approval is required by our Business Risk Committee, which is essentially a reputational risk committee with great power, as any member can veto any proposed transaction.

The last staple issue I'll touch on in the asset management business is guarding against market abuse, mainly insider trading and market manipulation.

On insider trading, the safeguards really haven't changed over time. Companies need unequivocal policies banning the misuse of material non-public information, regular training on the same, and strong information barriers.

On the manipulation front, recent years have seen this mainly manifest itself in the form of collusion, where traders acted in concert to manipulate the LIBOR [London Interbank Offered Rate] benchmark interest rates and a number of foreign exchange fixing rates, amongst other abuses.

A prime lesson here is beware of chat rooms, where most of this conduct took place. Firms need to have processes to surveil such rooms and, where possible, should ban participation in group chats, which inherently raise the risk of collusion.

Staples aside, another core part of the advisory function is staying on top of regulatory priorities of the day. It's not that hard. Any asset management firm or financial services lawyer should regularly visit the SEC website and peruse the press releases and speeches daily; and, to widen the lens, these efforts should be coupled with daily reading of financial news clips. Doing so today would squarely put two topics on the radar screen of any GC: cyber security, and #MeToo harassment-type issues.

On cyber security, SEC Chair Jay Clayton and other regulators have been crystal clear in deeming this a top priority. The Commission has issued much recent guidance making clear that it expects companies to take all reasonable steps to safeguard its systems, particularly those housing client data, to have disclosure controls up front that both speak to the risk of a breach, as well as controls that quickly analyze breaches for materiality and ensure disclosure of the same; and you must also ban insider trading based on knowledge of any cyber breaches.

Of particular note for today, February 2018 Commission Guidance states that Boards must oversee cyber risks the same as all other material risks, and a description of these efforts must be provided in the company's annual proxy statement.

To help comply, I am proud of Sculptor's efforts to create a cross-disciplinary Cybersecurity Risk Oversight Committee, or "C-ROC," as we call it, which I co-chair. The C-ROC coordinates all of the firm's cyber efforts, providing a hub that can speak to *all* of the varied issues. It helps to ensure state-of-the-art controls and consideration of all new regulatory guidance. It also helps make our disclosure control framework more concrete as a standing agenda item in consideration of any breaches since the last meeting. This, of course, supplements

policies calling for real-time analysis and disclosure. The C-ROC provides regular reports to the Board, helping the Board to tangibly fulfill its duties here.

Next are #MeToo-type issues. Plain and simple: if any GC or Board has not seriously kicked the tires on anti-harassment policies and procedures in the wake of all the headlines over the last two years, they would be derelict. The risks are immense and include, obviously, any action brought by those believing they were harassed, but also class action lawsuits alleging violations due to failure to disclose cultural problems.

But the biggest risk is reputational. Claims quickly tarnish otherwise-reputable brands. This means that if you find yourself defending a claim, you have already lost – no matter the outcome. The best way to protect the franchise is prevention. My one tip here is to Google a March 2018 Counsel of Institutional Investor report entitled *How Corporate Boards Can Combat Sexual Harassment*, which provides a smart checklist of building blocks, including policies and procedures covering a range of issues, including romantic relationships in the workplace; ensuring qualified HR staff to address issues and concerns; use of anonymous, well-publicized hotlines; and regular interactive training.

I'm going to be much quicker on the remaining five pillars.

The second is management of enforcement and litigation matters. It is firmly on the GC's shoulders to quarterback these matters. I'd offer two thoughts to keep in mind when doing so: one, proper outside counsel selection is *critical*. I've slept well at night knowing that I had the right counsel, and I've stayed up at night knowing that I might not. Be very deliberate, and select strategic, experienced counsel with strong track records, particularly on the issues or before the regulator that you are facing; and two, no one likes surprises. Keep the Board and management timely informed of new matters, material developments, and risks of these matters.

The third pillar is key constituent management. Working at a publicly traded asset manager, I deem it a core part of my job to support our Board, our CEO and the rest of senior management, and to ensure good relations with our key regulators – which, for us, similar to many others these days, includes a settlement monitor.

Given time constraints, I'm just going to say a word about dealing with the Board and with the settlement monitor. My philosophy with respect to the Board is simple: make sure they receive proper information, and that they receive it in a timely fashion so that they can discharge their duties, including their *Caremark* duties. These duties stem from a 1996 Delaware Chancery Court Opinion requiring a system to assure the Board that appropriate information concerning material risks facing the company will come to its attention and will come in a timely manner. The importance of these duties was underscored by an important Delaware Supreme Court ruling this June involving the Blue Bell Ice Cream Company. The Delaware Supreme Court concluded that the Directors may have breached their *Caremark* duties by failing to take *any* steps to establish a Board-level system to monitor a key risk facing the company – the safety of its products in the face of a *Listeria* outbreak that resulted in the death of three customers. Our Directors do not work under our roof every day, or even every month. I view it as a key part of my job to get them the information that they need and ensure that the minutes of Board meetings accurately reflect consideration of key issues and risks facing the company.

> "The bottom line is that all asset managers need a robust anti-corruption program, and GCs and Boards should spend much time assessing the vibrancy of the same.
>
> My one pointer for today would be to scrutinize any third-party intermediaries used to help win business."
>
> *– David Levine*

With respect to monitors, you're going to spend much time with them, so it's in everyone's interest to make it a harmonious relationship. Above all else, respect the independence of the monitor, and pledge full cooperation. Do that on day one and do it throughout.

That said, protect your client by guarding against scope creep, safeguarding privilege, managing costs; and be sure to bring to the monitor's attention all the *good* things the company is doing, as opposed to solely flagging issues.

The fourth pillar is team management. This involves everything from clarity of roles to ensuring proper expertise, to efforts to build morale and team connectivity – particularly for overseas staff. My one pointer here: manage with your door open, and cascade information. I view my weekly team meeting as my single most important meeting, *period*. I do everything possible to not postpone or cancel.

The fifth pillar is expense management. A penny saved by the advisor is another penny in investors' pockets. It is incumbent upon the GC to manage expenses, particularly with respect to outside counsel. This one is sourced directly to my learning from Dick, who similarly obsessed about this at Deutsche Bank. I put a preferred provider program in place at Oz within months of arrival. We have a set limited number of providers, and we expect discounts and top talent in exchange for value. For those working at asset managers, these discounts must be applied equally to fund work as to management company work, or else you have committed an SEC violation, and for that, see the *Blackstone* case.

We also manage costs by sending routinized tasks, such as email review and NDA [non-disclosure agreement] drafting, to lower-cost outsourced providers.

The sixth and final pillar is management of corporate strategic actions and priorities. GCs never have enough time and knowing how to prioritize is the key to successful clock management. The key projects and initiatives put in place by the Board and senior management should *always* be high up on that list.

On December 6th of last year, Oz announced a suite of strategic actions that basically rebuilt the firm. It essentially accomplished a generational transfer from Dan Och and the founding partners to the current active partners; it creatively leveraged our balance sheet, implemented a number of corporate governance changes, converted the company from a partnership to a corporation, and resulted in our recent rebranding. It was a huge lift and the culmination of a multi-month intensive effort.

Turning back to my team, I applaud them for the long hours worked, always with determination and a true sense of the importance to get this over the goal line. In my book, this award is deserved for that work alone.

I've covered a lot of ground, but I've only touched some, and by no means all, of the issues facing the GC of an international asset management firm. And that's what I love most about this job – no two days are the same, and you can never be sure of the twists and turns that will arise on any given day.

For those that are assuming the job and are having that "what do I do now" moment, I hope these six pillars help navigate.

I thank you for your time, and I thank you for your recognition of the Sculptor Capital legal team.

[APPLAUSE]

KAREN TODD: Before we move on to our other distinguished panelists, I just wanted to ask a few questions of David. The first one is, on the FCP enforcement action that you had in 2016 that received a fair amount of press; what steps did your Board and senior management take to help rebound from that?

DAVID LEVINE: It's an excellent question. I'll state it in a nutshell, then I'll step back; but basically, we beefed up compliance resources; we significantly enhanced our governance framework; and we enhanced our compliance procedures. That's half the game. The other half of the game is marketing your program, so that your key regulators and your clients are well aware of all your efforts and thereby have renewed confidence in you. We did many a road show to market those efforts.

On the compliance front, we're a firm that has 388 employees now. Of that, approximately 20 sit in the Compliance Department. That's a pretty healthy percentage, and I applaud the Board and senior management for making that sort of investment.

On the governance front, we greatly enhanced our Board oversight. We're a public company. We have a Board of Directors. We created a new Board-level committee called the Committee on Corporate Responsibility and Compliance. Its sole function is to oversee the work of the Legal and Compliance departments, and efforts to improve the overall ethical culture of the firm. We didn't play games. We brought in a heavy-hitter to run that committee – we have Rick Ketchum. He's a legendary regulator, formerly the CEO of FINRA, who's the chair of that committee.

We enhanced committee governance. I mentioned in my remarks the Business Risk Committee – it's a committee of which we're very proud. I call it a "Reputational Risk Committee," which most firms have these days – but ours is on steroids. Why is that? Two features: one, any deal that hits certain triggers, including having unusual reputational risk – and other triggers that are more concrete, such as the use of intermediaries, if it's an anti-corruption-type setting – come before the committee, and it requires unanimity of every committee member for the proposed transaction to move forward. Which means any member, myself included, can veto a deal and it dies on the vine right there – and there is no appeal. You cannot appeal to management or the Board.

Lastly, we took a look at our compliance policies and procedures, and beefed up as possible – but the main comment I would make there, we really invested in technology. I *do* think we're at the fore here.

We have two systems in particular worth noting, although I could flag many. We created something called the "Deal Manager System," which is fully automated. Any time we're going to do a proposed private transaction, an off-exchange transaction (and that's where FCPA risk is the greatest), in the early stages of that idea, it's entered into the Deal Manager System. Details are transmitted across to a dedicated FCPA compliance expert, who evaluates the proposal, ranks the risk involved, and based on the ranking, a diligence plan is created, and the system tracks it going forward.

We automated a second system called the "Foreign Official Pre-Clearance App." We log and get preapproval on *any* meeting that *anyone* has with a foreign official – whether or not anything of value was given at that meeting. Even if you were not providing a cup of coffee, we require that meeting to be logged and approved by the Compliance Department. Pretty conservative, but we think that's the right place to be.

As noted, we have had many conversations with regulators and clients, walking through decks that lay this all out, to show them that what happened was, indeed, an anomaly.

KAREN TODD: Thank you. Regulators tend to focus on tone at the top. Can you give us any concrete advice on how to handle that?

DAVID LEVINE: I'm smiling only because, for some people here, we had a session a few weeks back at King & Spalding

– an excellent session; I thank them for that – where we went through this. For them, they might hear some of the things that were mentioned there a second time.

Tone at the top is clearly critical. To me, it's a topic that can be squishy, and it requires efforts to make it a bit more concrete. What can Boards do to really improve a culture? I see it as a four-step process at every firm. One is you have to be sure that you have values that are set and are concrete. Two, you have to message and broadcast your values. Three, you have to live by your values; and four, you have to self-assess.

At Sculptor, we have five core principles: honesty; investors first – we're fiduciaries, we work as fiduciaries; compliance – we follow the letter and the spirit of the law; four, respect – we treat our clients and each other with respect; five, transparency – we provide timely, accurate and complete info to our investors. Those are our core principles. Our Code of Business Conduct and our policies were built around these principles.

Two, how do we message and broadcast them? In many ways. We did something within the last two months or so that is pretty innovative. We plaster them on everyone's login screens, so it's the first thing everybody sees in the morning. The same principles reappear as your screen saver; so, throughout the day, you are constantly reminded of them whenever you don't key something for a minute or so, and it pops back up. We obviously blast out emails from senior management and the Board, including recently in connection with the name change, stating that while our name has changed, our principles haven't, and above all else, we live by these principles. Lastly, of course, town halls and staff meetings, where we encourage every speaker to regularly bang this drum.

Live by the values. People are economic creatures – incentives matter. So, we look very closely at compensation systems and promotion systems, and make sure people are being paid and promoted not just on contribution to the bottom line, but efforts they have taken to ensure compliance with all of our policies and the ethical culture that we expect, and that means at the end of the year, when these decisions are made, each manager checks in with Compliance and checks in with HR to get a report on any potential missteps that might have taken place during the year – but we also try to tally good acts, as well. Don't just penalize with the stick but try to reward with the carrot.

> "Plain and simple: if any GC or Board has not seriously kicked the tires on anti-harassment policies and procedures in the wake of all the headlines over the last two years, they would be derelict."
> – *David Levine*

Lastly, you need to self-assess and that's not the simplest thing to do. It can be accomplished by things such as culture surveys, which we've done; exit interviews of every single employee walking out the door – a great source of honest dialogue as to what's working right and what could be working better. Firms should also track level of turnover; a high level of turnover is an indicia that perhaps the culture is not where it should be.

KAREN TODD: Thank you. The last question is on whistleblowers. They've obviously been in the news recently. How do you handle and prepare for a whistleblower?

DAVID LEVINE: Another good question. Certainly, a hot topic – has been for a few years. Maybe hotter now with the events of the last week or two, given political events – which I won't comment on any which way other than to say it's *entirely* wrong to try to seek out the identity of a whistleblower. I want to bake that into my response.

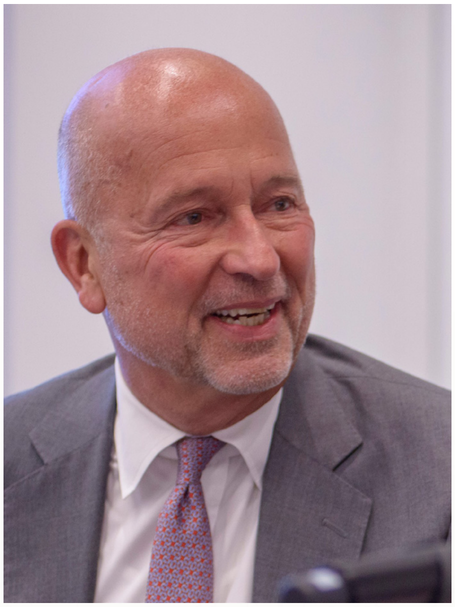
The first thing is you need to be receptive to all whistleblower complaints. You never turn your back on one. Get the issue on the table. You give a voice to the concerned employee. Two, you actually investigate. Whether or not you think the person is happy or disgruntled, which is a common fact pattern – you investigate every complaint that is raised. Three, you take remedial action as required; and then four, you have to close that loop. You need to go back to the whistleblower, and you need to inform the whistleblower on the efforts you have taken, the findings of your work, and your landing spot.

The importance here is underscored by a recent case – I'm sure everybody here knows from the recent past Supreme Court docket – the *Digital Realty* case. Dodd-Frank basically states you can't retaliate against a whistleblower – it's illegal to retaliate against a whistleblower. In *Digital Realty*, the Supreme Court held you only get that protection if you blow the whistle to the SEC and not just internally. That, of course, isn't great for in-house folks. We'd rather people come to us first and tell us about their issues so we could address them and try to nip them in the bud before somebody runs to a regulator.

If you don't circle back to the whistleblower, if you do not show respect, if you do not show that you are taking their complaint seriously, you are fostering an environment where people will, indeed, run to the SEC, and they will not run to you first or at all. They will only come to you if they trust you will do the right thing. It's important to do that, and to do that in a very visible way.

KAREN TODD: Thank you! Our next speaker is Dick Walker with King & Spalding.

RICHARD WALKER: Thank you very much. David, thank you for hosting today's event, and Karen, thank you and the Directors Roundtable for your *excellent* judgment in selecting David and his team for today's honor.



As David mentioned, we've known each other for more than 25 years, since David was a second-year law school intern at the SEC's northeast regional office. For most of those 25 years, our offices have been adjoining, sometimes with a door in between, so that we could just call to each other back and forth.

DAVID LEVINE: This is a very familiar setting! [LAUGHTER]

RICHARD WALKER: That's exactly right! I feel like we're reunited up here after the last four years.

I can say that I've worked with many superb lawyers during this period of time; several of them are here today – Carmen and Bill, my partners over here in the front row – but I can also say, without qualification or reservation, that David is the single most talented lawyer I have ever had the privilege of working with. There are so many reasons why I say this but let me just give you a few: first is his knowledge and expertise. He doesn't come in at 500 feet and talk big picture; he sweats details; he knows his facts; he rolls his sleeves up, and he's a doer. He gets involved in his cases and knows all about them. What he doesn't already know, he learns, and he learns it fast.

He has one of the most amazing "can do" attitudes I've ever seen in a lawyer. We all know how you get to a meeting with four or five lawyers and discuss things that need to be done, and you walk out of the meeting and nobody knows who's doing what. That's not the case with David. He takes the ball, oftentimes goes into his office, closes the door and just powers through it and gets it done. He knows how to get things across the finish line better than anyone I've ever met.

He has excellent judgment, and he's a strategic thinker, so he knows when to fight; he knows when to cut; he knows what to give up, because he's always got his eye on the ultimate prize and the ultimate objective. That sometimes means making some concessions, and you don't get everything you want to get to the ultimate prize, but he never loses sight of what the real, most serious objectives are.

He's very skilled at bringing people with diverse views together into a room and driving a consensus. We all know how difficult it is when you've got people – particularly lawyers – with lots of different views and positions, but David is brilliant at getting everybody together, hashing out an issue, and having everybody leave the room with a clear view of what direction.

He's a terrific leader whose staff is always inspired by the example that he sets. He doesn't ask from anyone things that he's not willing to do for himself, and that's a lot.

But, more important than anything else is his unwavering moral compass. I say this very, very sincerely. He doesn't play games with the truth; he is on the straight and narrow the whole time. He's honest, never veers from the path of absolute candor and honesty, and that's a terrific compliment. David, congratulations to you and your team for a tribute to a career built on one success after another with a lot of chapters still to be written.

DAVID LEVINE: Thank you.

RICHARD WALKER: My remarks this morning are going to amplify some of the points that David made in his remarks on his very topical description of the role of a General Counsel and some of the challenges that a General Counsel faces.

In particular, I'd like to focus on probably one of the greatest challenges that a General Counsel faces when he discovers some evidence of wrongdoing at his or her firm. This is a "what do I do now?", in terms of David's words, that a General Counsel has to focus on.

The playbook is often pretty well established for General Counsels, but there have been some pretty significant changes on the government side, and I would like to spend a few minutes talking about it today, because it also influences, in turn, how General Counsels think about some of these things.

Let's start with the situation that, unfortunately, is altogether too common in a multinational company that's got operations and businesses all around the world.

The problem starts with, let's say, a very suspicious request for a reimbursement of a business expense, nominally for a client who's not easily identifiable. Secondly, a request to hire a consultant or a third party to help win or facilitate new business, particularly in an area of the world where the government plays a very large role in both the public and the private sectors.

Let's assume that questions are flagged about the identity of the client that the reimbursement chit is being submitted on, and/or about the consultant, and whether that consultant is impermissibly linked to some government official.

Now, under David's six pillars, there are a lot of opportunities to minimize this kind of situation before it even occurs. Obviously, well-developed controls, compliance policies, regular training, a careful scrutiny of consultants and payments for entertainment expenses, as David describes that his firm does, and, of course, robust supervision, all play a very important role in either preventing or nipping this kind of situation in the bud.

But let's assume, for the moment, that despite the best of precautionary efforts up front, something slips between the cracks and the improper payment is made.

The first thing you do, of course, is you have to kick the tires to scope the situation, to figure out the magnitude of the problem that you may have. That requires an internal investigation: it could be done by your in-house staff; at some point, you may bring in outside counsel, depending upon the complexity of the matter. It may start and end with in-house counsel, but sometimes external counsel is involved, as well.

Ten years ago, assuming that you came up with some evidence that there was some kind of a problem – an improper gift or a payment – you would, after some initial vetting, be confronted with a pretty important question. The question was, do I self-report this to the SEC, the DOJ (and potentially, others), or do I not? As probably many of you know, SEC's and DOJ's position has been pretty crystal-clear for many, many years, and in their views, the appropriate act *is* to self-report, and to self-report quickly. They would both say, "Look, there are many benefits that you get if you're a self-reporter, in terms of lenient treatment that we're prepared to give you." In fact, at one point, the SEC staff took the position: self-report immediately, before you even look into the facts and before you kick the tires at all. It's advice that not too many counsel ever followed, but that was at least expressed by one staff member of the SEC.

From the government's point of view, "lenient treatment" could mean dropping off an individual; it could mean lesser charges; it could mean a lesser penalty; it could mean improved or negotiated language in the charging documents so that it didn't sound so bad when the document was published.

"I've slept well at night knowing that I had the right counsel, and I've stayed up at night knowing that I might not. Be very deliberate, and select strategic, experienced counsel with strong track records, particularly on the issues or before the regulator that you are facing; and two, no one likes surprises. Keep the Board and management timely informed of new matters, material developments, and risks of these matters."

– *David Levine*

The government's professed policy of rewarding cooperators proved not very satisfying to cooperators. I've heard many CEOs and even *more* general counsels who have come forward, who have self-reported, done all the things the government has said in terms of cooperation, and still faced charges and very significant penalties, and all of that led many to feel cheated and sometimes even punished rather than rewarded for cooperation.

As a result, in the face of the situation that I've described involving a payment for a consultant 10 years ago, before automatically self-reporting and bringing all these cascading problems down upon you, companies and their general counsels would consider a number of factors before they made the self-report. They'd figure how extensive is this violation; where did it occur – is it in some remote part of the world with language barriers and other mitigating circumstances? Were there any senior people involved in this thing, or was it just a rogue actor? Were there likely to be other violations? And the hardest one is, what do we think the likelihood is that the SEC will ever figure this out in a far place of the world? And *if* the violation was, in fact, isolated and in some part of the world where it's unlikely that the SEC would have access to it, and this was before social media and the chances increased through online chatter; and if you punished the wrongdoers, if you tidied things up, remediated and did all of those kinds of things, you might be tempted not to self-report, in the hope that this would never come to the SEC's attention.

This is what I call the "Dirty Harry conundrum." You can just, as a GC, imagine Clint Eastwood standing with a gun pointed at you and saying to you, "You've got to ask yourself one question: 'Do I feel lucky?'" That was the conundrum that a general counsel was faced with in terms of the self-reporting question.

A turning point of sorts occurred in April of 2012, when both the Department of Justice and the SEC announced their first-ever declination in an FCPA case against Morgan Stanley, in which they did bring up a case against a rogue employee in that particular case.

As I mentioned, this was really the first. This was the first time ever that the promise of rewards for cooperation hit at the zenith – an actual declination. In the charging decision and the release by the DOJ, the DOJ specifically cited Morgan Stanley's robust anti-corruption compliance program; its cooperation with the investigation; they singled out training, they singled out the fact that Morgan Stanley had dedicated compliance officers and anti-corruption specialists – which they had increased in number when these violations were discovered. They talked about the anti-corruption notices and reminders *by dates* – and Morgan Stanley had a long list of the dates on which these had been issued. There were annual certifications of employees, where they all certified to compliance with the FCPA. There was a two-step payment approval process, so any payments, before they went out, were looked at by at least four eyes. It was very robust transactional due diligence.

The granularity of what was described by the Department of Justice in effect provided a template for general counsels to reverse engineer with the hope that they could match Morgan Stanley's good works and maybe themselves be able to achieve a declination.

At the same time, some GCs shrugged their shoulders and said, "Wow – this is what we do already; we have all of these things in place, and we've never received this kind of treatment. It doesn't seem particularly fair or even-handed."

For those who had hoped that Morgan Stanley would launch a brand-new era where the positive benefits of cooperation would be more widespread and evident, there was widespread disappointment. Morgan Stanley proved to be more of a one-off than a sea change. Post-Morgan Stanley, the same concerns about the limited value of cooperation and the benefits of self-reporting continued.

Moreover, actually in a reverse way, the requirements to achieve cooperation kept increasing. For every case like Morgan Stanley, which is described what were deemed to be extraordinary efforts by the firm, which merited rewards for cooperation, those extraordinary efforts became the minimum, not the maximum. The bar kept on going up.

It wasn't really until four years later that the Fraud Section of the DOJ announced a pilot program designed to better motivate companies to self-disclose and cooperate by providing greater transparency about what DOJ was, in a very concrete fashion, prepared to offer to cooperators.

The pilot program was quickly expanded and it was made permanent in the form of what's now called the "Corporate Enforcement Policy." That happened in 2017. The headline of this new policy is that, for the first

time ever, DOJ said that there would be a specific and explicit presumption that a company who satisfied the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, would be entitled to a declination. This was a big, big step forward – a huge carrot for companies faced with this kind of problem.

Now, there was a catch – that's important to note – and the catch is that the presumption of a declination could be overcome by what the government described as aggravating circumstances, which were a little bit fuzzy around the contours (and still are), but were clearly meant to cover things like involvement by executive management; widespread, pervasive misconduct; criminal recidivism; or significant profits to the company from that kind of conduct.

But even if there were aggravating circumstances and the company didn't achieve a declination, still, the guidance and the policy provided that U.S. attorneys were mandated to recommend a fifty-percent reduction off the lowest end of the U.S. sentencing guidelines in terms of the penalty, and also to forego appointment of a corporate monitor. There were still a lot of benefits, even if you didn't get a declination.

Whether the Corporate Enforcement Policy proves to be a real game-changer or just an empty promise, still remains to be seen. More than likely, it'll probably fall somewhere between the two poles. But given the customary lengthy lifespan of an FCPA action – they usually go for a couple of years – and given the fact that this policy is just two years old, there's really not too much meaningful data at the present time as to exactly how this is going to be applied, as to whether the aggravating circumstances hook exception is going to overcome the rule. But I have to say in DOJ's favor, there have been a couple of resolutions, in a very visible way, in which there have been declinations in FCPA cases. There's hope and there's promise that this is going to really make a very significant difference.

But for general counsel that are confronted with the Dirty Harry question of, "Do I self-report or not?", the Corporate Enforcement Policy is a definite game-changer. It clearly moves the needle in favor of self-reporting and, in discussions with a company's Board or management, the company would agree, too – there's just too much at stake if you don't. The promises of lenience are now much more concrete than they were before.

This is, of course, important because hope springs eternal that FCPA enforcement is going to be deprioritized, particularly after Chairman Clayton was appointed – but, in fact, there's really no letup – as David said, if anything, FCPA enforcement is increasing despite some year on ebbs and flows.

Many of you may remember that before Chairman Clayton was confirmed, he had written about what he described as, quote, "regulatory asymmetry created by U.S. zealous enforcement compared to other countries, and the resulting cost to businesses." This fanned the flames that Clayton was not a big supporter of the FCPA.

But in a speech just within the last month, Chairman Clayton made crystal clear that FCPA enforcement was extremely important, and that he, quote, "Did not intend to change the SEC enforcement posture." For those of you who are SEC followers, you will have seen the chess book in the last month – the SEC cranked out three recent FCPA actions in closing out its fiscal year.

Back to the Corporate Enforcement Policy just for a second. It appears – in another piece of good news – that some of the principles of the Corporate Enforcement Policy are actually being extended and considered in other areas of Department of Justice enforcement, as well. This was announced in an ABA meeting that the Criminal Division will use the Corporate Enforcement Policy as, quote, "non-binding guidance" in other criminal cases outside of FCPA. Again, there have been a few cases that have trickled through where there have been actual declinations of companies not in FCPA. Barclays got one recently, and one or two others. So, there is hope that we're moving in a new direction.

We've been talking about the DOJ policies because, of course, DOJ is the one with the biggest stick in this area, but we should spend some time talking about the SEC, as well.

SEC policy on cooperation is spelled out in a report on investigation involving SeaBoard Company that was issued back in 2001, and that same guidance exists today. Like the Department of Justice, the SEC has always dangled carrots to cooperators, but oftentimes applied sticks rather than giving carrots.

From this side of the table, I can tell you that too often, cooperation seemed to be measured not by all the things that a company did, but by the things they failed to do. You could do 15 things and you'd say, "I'm a cooperator," and then the staff would say, "Yes, but you didn't do the following...." It's fair, as I said earlier, to say that the bar for cooperation has continued to increase over the years, leading to a situation where only the most extraordinary cooperation was rewarded. The methodology used by the SEC over the years was also lacking in transparency and frustrating to people, particularly because cases could come from a regional office; they could come from the Division of Enforcement in Washington; and you wondered if everybody was applying the same standards. Senior SEC staff said, "Yes, we have a central clearinghouse where we consider cooperation across the Boards from all of the offices," but, I have to say, the results really left one wondering about that; there seemed to be questionable variations in the way this was applied.

> "Our Directors do not work under our roof every day, or even every month. I view it as a key part of my job to get them the information that they need and ensure that the minutes of Board meetings accurately reflect consideration of key issues and risks facing the company." – *David Levine*

Good news – under Chairman Clayton, first, the Commission has been much more liberal in citing cooperation in its resolution with companies. This may not sound like a lot if you're paying millions of dollars in penalty. What's the value of having a line in an order saying that the company was a cooperator? In my experience, there's a lot of value to that. It's important to the companies; it's important to Boards; it's important to shareholders. David, in your case, I'm sure it's important to investors, too, to read that you've actually been a cooperator, even though you've had to pay the piper and resolve. It *is* important.

The current Enforcement co-Directors, Stephanie Avakian and Steve Peikin, have also been much more transparent about the type of cooperation that the Division of Enforcement in the Commission is looking for, and that received the greatest attention – they were very open about that. Basically, it's cooperation that saves the Commission's staff time or expedites their investigations. Among other things, it's things like compilations of extensive data that would take the staff a long time to do, or translations of foreign documents, efforts to solve data privacy blocking restrictions which are so prevalent in European and other countries. People that can get around those and help find ways to get evidence to the Commission, it's a real time-saver.

Finally, locating and securing cooperation of witnesses is the final thing that's mentioned.

We've also seen that SEC orders now are much more granular about the specific facts that the SEC recognizes when it recognizes cooperation – a detailed list of all the things that the company has – sometimes the positives and sometimes the negatives, as well.

Really quickly, let me turn to just two other issues to touch on that are front of mind to general counsels, particularly in the FCPA context under the circumstances I've described earlier.

The first of these arises from the fact that in at least a third of all criminal resolutions, and probably more in FCPA cases, the government often applies a signature remedy, which is the appointment of a monitor. Monitors are typically appointed for two to three years, but sometimes for a longer period. The monitor-ships can be extended, and you have to watch out for that. Without doubt, many GCs will freely admit – and I am certainly one of them – that monitors are susceptible to serious abuse. They're intrusive; sometimes they're not very well-informed about your company or your business. Many times, a monitor is completely unnecessary and tasked with looking at businesses or areas of a company long since discontinued. You scratch your head and say, "What's the purpose to be served here?"

They are also susceptible to scope creep. A monitor starts looking at one thing and then says, "I've got to expand my zone of what I'm looking at." In each and every case, they're time-consuming, they divert attention from other matters, and they're costly – they cost you a lot of money.

What are the benefits? In fairness, monitors are sometimes necessary to provide a missing or inadequate compliance framework, or to make sure that a company that has remediated and changed policies and procedures to prevent violations, has procedures that really work – all for the purpose of reducing the risk of a recurrence of violations. That's a very legitimate function.

But the standards for selecting and overseeing monitor-ships have, until very recently, been very loose. Given the enormous power that a monitor has, there really is not much oversight of the process, or there hasn't been.

The DOJ first presented a series of principles for U.S. attorneys to draft provisions relating to the use of monitors back in 2008 in what was called the "Morford Memo." But it was not until last October that the DOJ really provided detailed, substantive guidance, at least with respect to the selection of monitors. The whole process was laid out to follow.

But putting aside the procedures for selecting a monitor, what about the oversight of the monitor by DOJ, once the monitor has been selected and put in place? Most monitor-ships require the submission of a couple of periodic reports at different levels. But on a day-to-day basis, there is very little oversight and supervision. Monitors have pretty much free rein and *you* have very little recourse, as general counsel, for relief, if, for example, you think the monitor has exceeded or enlarged the scope of what the monitor is supposed to be doing, or if the monitor is staffing too many people on the matter and costing you too much money.

In rare instances, this has even led to court battles. Most of you are probably familiar with Apple's challenge to, not a DOJ, but a court-appointed monitor, who Apple described as being engaged in a broad and amorphous inquisition.

The DOJ's latest word on monitors is positive. It comes in the form of a memo and a speech by the DOJ's new Criminal Division head, Brian Benczkowski. The new guidance supplements the 2008 Morford Memo, and it's designed to establish standards – that's what it *says* it's supposed to do – policy and procedures for the selection of monitors in matters being handled by the DOJ. It sets forth a series of factors for DOJ lawyers to consider in conducting a cost-benefit analysis as to whether a monitor is required.

Even more importantly, in a speech that accompanied the issuance of this memo, Benczkowski really gave a breath of fresh air when he said, "I want to make very clear that once a monitor is selected and installed, our work at the department is far from over," and that DOJ is available to hear from companies with non-frivolous concerns about the authorized scope of the monitor-ship, cost or team size. This is very welcome to GCs who have issues that they can't resolve with the monitor – there is a place to go and people that will now listen.

We've actually seen some recent resolutions, as well, in cases which typically you would have expected a monitor – some FCPA cases where there has been no monitor. This is a relaxation of the kind of knee-jerk application or use of a monitor in resolving cases.

One final issue to mention briefly as we consider some of the challenges that a GC faces, is the current application of the so-called "Yates Memorandum" on cooperation. You will recall, in 2015, then-Deputy Attorney General Sally Yates (who is now one of my partners) issued guidance designed to strengthen the DOJ's pursuit of individuals and define what needed to be done for companies to achieve cooperation credit and help the DOJ in its pursuit. The key takeaway of the Yates Memo was that to be eligible for *any* cooperation whatsoever, corporations had to provide DOJ with *all* relevant facts about *all* individuals involved in corporate misconduct. That was a precondition; it wasn't that you get less cooperation if you talk about less than all of the individuals – it's all or nothing. This created, obviously, a very high bar, and raised a number of thorny issues for general counsels.

For example, what if you failed to report on an individual who, after investigation, you concluded wasn't involved in the investigation and wasn't culpable, but the DOJ disagreed with your assessment? Were you at peril or were you at risk, because your assessment was different from theirs? In most situations, the DOJ would say, "No, you're not at peril if you disagree with us, just report the facts." It was wary and, given the high stakes, no GC wanted to make a mistake. There were some very tough calls with this "all or nothing" approach.

I'm happy to say that the general counsel's challenge of trying to align itself with the requirements of the Yates Memo is now at least a little bit easier. A year ago, in November, Deputy Attorney General Rod Rosenstein announced changes to the Yates Memo to make clear that cooperation credit was available to companies who identified individuals *substantially* involved in or responsible for criminal misconduct, even if they didn't talk about each and every individual in the company that had in some way touched or was involved in the matter.

My perspective is probably not perfect on this; I'm not really aware of *any* situation where the government has denied cooperation credit because of a failure to report on each and every responsible individual. It's hopefully being administered in a fair and even-handed manner.

With that glimmer of good news and a few positive developments, it's a good time to end and turn it over to the next speaker.

KAREN TODD: Thank you very much! [APPLAUSE] We're going to move on to David Hennes from Ropes & Gray.

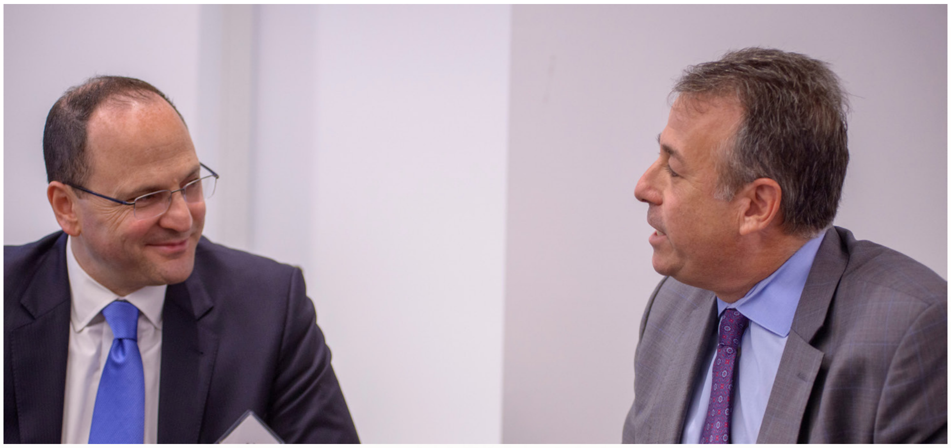
DAVID HENNES: Great. Thank you, Karen and Dick. You had wonderful remarks. David, at the outset, while I don't quite have Dick's 27-years of experience with you – only 17 – I will say that you have been very fortunate to have Dick as both a mentor, a friend and a colleague. It's an incredible relationship that the two of you have, and you are blessed to have had Dick as your mentor and as your friend over these years.

DAVID LEVINE: I agree and thank you for saying that.

DAVID HENNES: What I will also say, in echoing some of Dick's comments, is that, having worked together for 17 years, there's no one with whom I have worked who brings the judgment, the expertise and the wisdom to bear on behalf of you and your firm and your legal department that you do. And, more than anything, your defining characteristic, that could probably be a seventh pillar in the six pillars, is the dedication that you bring to the job. What's the expression – ninety percent of life is just showing up? Well, when you show up a hundred and ten percent of the time, you are really ahead of the game. There is no in-house legal officer who is constantly thinking about his firm, his issues, how to grapple with them, 24/7. That's what I would say.

DAVID LEVINE: Thank you very much.

DAVID HENNES: It is well-deserved. I'm going to touch briefly on two of David's pillars – one is litigation management, and the other is constituent management. One of the risks that Boards face, and to which David is keenly attuned, is the risk of litigation from transactions that the Board and the firm may enter into. One of the best ways to assess litigation risk is through an examination of trends in Delaware law,



which is the nation's preeminent source of business law, and through which many of the other states model their corporate policies and laws.

We're going to touch briefly on one or two of the trends that we are seeing coming out of the Delaware Court of Chancery and Supreme Court. What we're seeing is that there have been meaningful changes in Delaware law concerning Director liability over the last few years. These developments have shifted the types of litigation that plaintiffs file and the corresponding risk to Delaware corporations and their fiduciaries.

There have been a series of decisions from the Delaware courts that have meaningfully enhanced the defenses for the Boards of Directors, making it easier to obtain dismissal prior to discovery. At the same time, we're seeing a counter-balancing trend that has come forth in the last year or two in response to those decisions. For every reaction, there is an equal and swift reaction.

The trends we're seeing recently arise out of a series of decisions, the first of which was called *Trulia*, issued by the Court of Chancery by Chancellor Bouchard, which drastically reduced the number of stockholder suits that are filed in the Court of Chancery. Cases had previously settled for what we would call "disclosure-only settlements" – the issuance of disclosure-related changes to a proxy or a tender offer document in exchange for the payment of an attorney's fee. *Trulia* curtailed these settlements. We view this as a positive trend in general – not every transaction deserved litigation; not every transaction was the result of a breach of fiduciary duty. That meant that far fewer cases were being filed against Boards, and when you have fewer cases being filed, there is less risk of liability.

At the same time, because these cases can no longer be settled pre-transaction and can no longer be settled through the issuance of disclosures prior to the closing of transactions, it means that the cases get litigated after the transaction has closed. The effect of this increase in *post*-litigation claims, even though the number of claims overall declined, is an increase in expense and an increase in risk. The only way to settle a claim after the closing of a transaction is typically through the payment of money from the corporation, from an insurance policy or the like. That's obviously something that Directors, companies and counsel are reluctant to do, but if you can't settle, then the only alternative is a dispositive motion or a trial.

This emphasis on post-closing litigation has reemphasized the importance of the motion to dismiss in the context of post-closing litigation. We have seen two key cases come out of the Delaware Supreme Court in the motion to dismiss context. Obviously, with a motion to dismiss, if you win at that point, the case ends, and everybody goes home; if you lose, you proceed to costly discovery.

The two decisions coming out of the Delaware Supreme Court in the last two or three years are called *Corwin* and *Cornerstone*. This pair of Delaware Supreme Court decisions have a very powerful effect on the litigation landscape. The cases involve, at the outset, a review of Director independence, controlling stockholders, and the disclosures that are made in the context of a transaction.

Corwin holds, from the Delaware Supreme Court, that if there has been full and fair disclosure of the transaction at issue, then there is an irrebuttable presumption that the transaction will be subject to what's called "business judgment review." Business judgment review provides tremendous protection for Boards. It, in essence, says that unless you've acted for a personal purpose, a non-firm purpose, a purpose unique to yourself, such as to line your own pockets or for a motivation that is not shared by the stockholders, that litigation will be dismissed.

That is a very powerful tool, a *Corwin* dismissal or a *Corwin* motion, as we might call it.

The second key decision that came out of the Delaware Supreme Court is a decision called *Cornerstone*, which, basically, said that on a motion to dismiss, a Director can be dismissed if there is an exculpation clause in the corporate charter under Section 102(b)(7) of the Delaware General Corporate Law, which says that no breach of care claim can be brought on behalf of stockholders; only claims for breach of the duty of loyalty can survive.

If a corporation has an exculpation clause, it will be the presumption that the Director will be dismissed at the outset, unless there is a pleading of a breach of the duty of loyalty, which involves some non-corporate benefit or the like.

With those three decisions – *Trulia*, from the Court of Chancery; *Cornerstone* and *Corwin*, from the Supreme Court – corporate defendants used these decisions to great effect. The Delaware Courts of Chancery dismissed a number of cases involving stockholder claims after these decisions were issued.

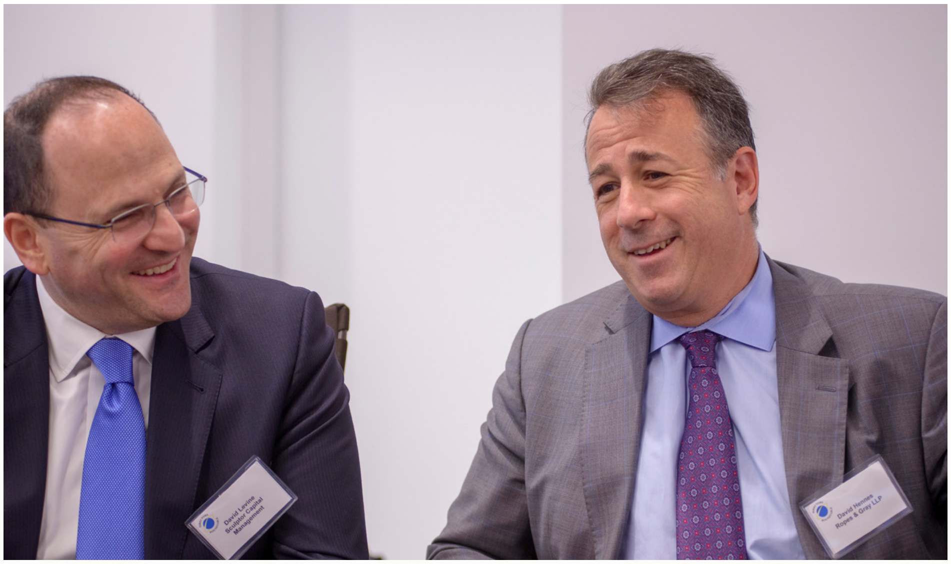
> "Turning back to my team, I applaud them for the long hours worked, always with determination and a true sense of the importance to get this over the goal line. In my book, this award is deserved for that work alone." – *David Levine*

What was the equal reaction on the other side? The plaintiffs' bar, which is a very powerful voice, was dismayed with these decisions and these holdings, so they pushed back very vigorously on the courts and on the judges in making their arguments. That has caused a trend, in our analysis and our view, that has seen an increase in denials of motions to dismiss in what I'll call "special situations" transactions involving unique situations, such as controlling stockholders or private equity firms invested in or affiliated with companies on both sides of the transaction. We're seeing an increase in those cases surviving motions to dismiss, proceeding to discovery, and then to trial.

We are seeing those cases running through a number of decisions involving prominent controllers. One is a case called *Oracle*, which is obviously run by Larry Ellison, and that involved the acquisition of another company that he controlled or had a substantial relationship in, called NetSuite. There was another important decision involving Tesla, run by Elon Musk, which entered into a transaction with a company he was also affiliated with, called SolarCity. In those cases – I'll give you an example of the *Tesla* case, just so you can get an understanding of what those facts are. Musk, in *Tesla*, owned 22% of Tesla's stock, making him the company's largest stockholder. But as a 22% holder, he's certainly not a controlling stockholder, by any stretch of the imagination, from a numeric perspective. Tesla proposed an acquisition of SolarCity, of which Musk was the chairman of the Board, and SolarCity had been going through a liquidity crisis. When Tesla proposed to acquire SolarCity for close to $3 billion, Tesla's stockholders stepped back and said, "Wait a second – you might be doing this for a purpose other than the best interests of Tesla; it might be to preserve your interests in preserving SolarCity's value for your own benefit." As you would expect, the Directors filed a motion to dismiss under the circumstances, and the key issue that the court had to face at the outset was whether Musk was a controlling stockholder of Tesla, notwithstanding the fact that he held only a 22% interest in the company. In looking at the situation holistically, the Court of Chancery concluded that Musk was, in fact, a controlling stockholder. The Court didn't just look at the 22%, but it looked and said, "What was his ability to appoint Directors? How did the company view him?" It called him the "visionary" of the company. It also looked at its proxy disclosures, in which it said that he was a controlling stockholder of the company, notwithstanding his only 22% stake in the company.

In taking all those holistic factors into account, the Court of Chancery, under those circumstances, decided to deny the motion to dismiss. Concluding that the entire fairness standard would apply, and not business judgment – meaning that it is up to the defendants in that circumstance to go through the litigation and ultimately prove that the transaction was fair both from a process perspective and from a price perspective to Tesla stockholders. Now, that is just on a motion to dismiss based on allegations; the facts remain to be proven.

That, to us, is a decision that is a reaction coming from the Delaware Supreme Court's



decisions granting motions to dismiss but now swinging back and allowing certain of these cases to proceed.

As I mentioned, other examples of that are the *Oracle* decision, and there's another decision called *Pilgrim's Pride*, which also involves a controlling stockholder.

The second trend that we have seen recently is a case that David touched on (stole my thunder a little bit on it!) [LAUGHTER]

DAVID LEVINE: *Blue Bell*!

DAVID HENNES: On the *Blue Bell* decision – you tossed it up – I'll try to hit it a little bit! *Blue Bell* involved what's called a *Caremark* claim, to which David referred. *Caremark* was a 1996 decision coming out of the Delaware Court of Chancery, and it has been considered the most difficult theory of the law to prevail on. We don't often see *Caremark* claims which either proceed past the motion to dismiss or go to trial. But the *Blue Bell* decision out of the Supreme Court just a couple of months ago breathed a little bit of life into that doctrine. Although, when you take a close look at the facts, it doesn't seem all that difficult of a decision to comprehend. As David mentioned, *Blue Bell* was an ice cream company, and you might think that one of the risks facing a food company or ice cream company would be food safety. If you were a Board of Directors, you might think that you'd get some reporting on food safety once in a while; you might have a committee that dealt with food safety; you might get reports from management on food safety; you might hear an occasional tidbit or two from management about how we're handling food safety. Well, in the *Blue Bell* situation, as David said, Blue Bell had a *Listeria* outbreak that was attributed to its ice cream. Three of its customers died; a number who survived were severely sickened; and the consequence of that from a *corporate* law perspective – put aside the personal perspective – is that the company needed a liquidity infusion, given that it couldn't sell its ice cream for a while. It received, ultimately, a dilutive private equity investment from an affiliated entity, or someone who knew a Director, and the Blue Bell stockholders brought suit and said, "Wait a second, Directors, you, by failing to have a reporting structure in place, by not looking over the corporation, by not monitoring management, by not making sure that Blue Bell had appropriate reporting structures in place – caused this outbreak to occur."

That case was brought and the Court of Chancery dismissed the litigation and said, "No – that doesn't state a *Caremark* claim, because the Board *did* receive reports of operational matters from management." So, from time to time, the Board *had* a process in place; it got operational reports – it might not have gotten a report about food safety, but it did have a reporting structure. Dismissal makes sense under those circumstances. Directors are not managers. They only supervise.

The plaintiffs appealed that decision to the Supreme Court and, two months ago, the Supreme Court reversed and said it's not enough just to have *a* reporting structure in place. In that particular case, the company needed to have a reporting structure *specific to the risk* that the corporation faced, which was food safety (given that Blue Bell was, in essence, a one-trick pony – a food company). If you didn't have any reporting structure in place at that point in time, that could subject the Directors to personal liability under the circumstances.

Now, these are only allegations – the Court's only reviewing this case based on the facts pled by the stockholder plaintiffs. And reasonable minds can differ on what type of reporting structure is sufficient. But, based on the diligence the stockholder plaintiffs were able to uncover, they found no Board meetings where food safety was discussed; no committee meetings to discuss food safety; and no reports of food safety issues at the Board level.

It will be the burden of the Directors to prove, now, in discovery and at trial, that they did, in fact, have these types of reporting structures in place.

DAVID LEVINE: It carries over to the FCPA to me, very clearly. If you're on the Board of a company that operates in high-risk jurisdictions, emerging markets and the like, jurisdictions where there are a lot of stand-alone enterprises like China, if your Board minutes do not reflect, and your Board materials do not reflect a consideration of the risks arising from corruption, you're going to trip over your duties here in a heartbeat.

DAVID HENNES: That's exactly right, David. It's what business are you in, and how should you specifically tailor your reporting at the Board level to that business. Obviously, Sculptor is an asset management company or firm. It doesn't need a food safety committee. It certainly needs a foreign transactions committee or a committee to look at investor issues or a committee to look at other issues that are pertinent in the asset management field.

The standard under *Caremark* is that a Director may be held liable if she acts in bad faith in the sense she made *no* good faith effort to ensure that the company had in place any systems and controls. That's a tough standard, but it's a standard that may see more application in Delaware in the next few months and years.

KAREN TODD: Thank you! [APPLAUSE]

In the interest of time, we're going to move on to Jennifer Dunn from Schulte Roth & Zabel.

JENNIFER DUNN: Thank you, Karen. First of all, I wanted to congratulate David and the entire Sculptor legal department on this incredible honor. I have seen first-hand some of these challenges you have faced recently.

DAVID LEVINE: We've been together a lot!

JENNIFER DUNN: I, frankly, can't think of a more deserving group of people. I'm honored to have been asked to speak here today, and I want to thank you, Jack and Karen for this opportunity to share the dais with such distinguished attorneys.

I'm going to expand upon one of the topics that David touched upon – conflicts of interest – because it's an important topic. It's probably one of the most important issues that an asset management firm faces these days. It's certainly the one that gets the most attention from both regulators and investors.

Investment allocations, expense allocations, valuations, cross trades, differing liquidity

rates across clients. These issues are all fundamentally ones of conflict. The focus on conflicts of interest is not new; the SEC has been focusing on allocation and valuation issues in exams for years.

Now, earlier this year, the SEC charged a private fund manager *and* the former chief operating officer with manipulating the price of an asset that was sold by one client to another in a cross-trade scenario. The asset was sold at a price that benefited the purchaser, who later sold that asset for substantial profit. Of course, it didn't help the fact that the COO put in a personal investment into one of those clients immediately prior to that sale. The SEC's orders found that the manager and the COO had violated Section 206(2) – the Anti-Fraud provision of the Advisers Act.

Now, these types of actions have become commonplace. But this year, the SEC went a step further. Not only has OCIE [Office of Compliance Inspections and Examinations] flagged conflicts of interest as a priority in their 2019 examinations, but the SEC even issued related guidance.

A breach of fiduciary duties, whether real or perceived, is generally at the heart of most conflicts of interest issues. The SEC has always taken the position that the Advisers Act unambiguously establishes a federal fiduciary duty for investment advisors. Now, as David mentioned, the Commission actually sought to *further* codify this, this year, by publishing the Commission Interpretation Regarding Standard of Conduct for Investment Advisers, which was published in June. Part of the goal of the so-called "fiduciary interpretation" was to emphasize the SEC's position that the fiduciary duty exists, but it exists for *all* categories of clients, and that it cannot be categorically waived.

Now, fortunately, the final interpretation ended up being a bit tamer than the proposal, which went so far as to say that disclosure alone cannot cure a conflict of interest in all circumstances, and that an advisor must affirmatively seek to avoid conflicts of interest with its clients.

How would an investment advisor even manage money for different clients if it has to affirmatively seek to avoid conflicts in the first place? The current business model certainly wouldn't work under that and, frankly, my job would be a lot less interesting.

Fortunately, cooler heads prevailed and, rather than adopting the proposal's language that would require advisors to seek to avoid conflicts of interest, the Fiduciary Interpretation set forth a position requiring advisors to either eliminate all conflicts of interest altogether, or to make full and fair disclosure of all conflicts of interest which may cause an investment advisor – whether consciously or unconsciously – to render advice which is not disinterested. Now you have a choice: you can either eliminate the conflict (which, frankly, may not be feasible), or you can use disclosure instead. If you're going to use the disclosure, it needs to be thorough enough so that a client can provide informed consent to the conflict. Whether the disclosure meets the full and fair requirement will depend upon, among other things, the nature of the client, the scope of the services, and the material fact or conflict at issue. What is full and fair disclosure for an institutional investor is not going to be the same as what is full and fair disclosure for a retail investor.

In the Fiduciary Interpretation, the SEC stated that an advisor's fiduciary duties encompassed both the duty of care, as well as a duty of loyalty. According to this interpretation, that duty of care encompasses the obligation to seek best execution; a requirement to monitor performance over the course of the relationship; and the duty to provide advice that is in the best interests of the client. The duty of loyalty requires that an advisor not place its own interest ahead of those of its client.

The Fiduciary Interpretation specifically notes that overbroad waivers will not be permitted, so you cannot have a contractual provision that purports to waive an advisor's federal fiduciary duty generally, or a statement that the advisor is not a fiduciary at all. Similarly, a blanket waiver of all conflicts of interest, or a waiver of a specific obligation under the Advisers Act, is not going to work.

With all this focus on conflicts of interest, what is an advisor to do? The first order of business should be to identify all possible conflicts of interest relating to the business, and then to review your disclosures to see if that disclosure meets the full and fair requirement. Have you disclosed all material facts? Do you say you *may* have a potential conflict when, in fact, you actually *do* have the conflict? If that's the case, you need to be revising that disclosure.

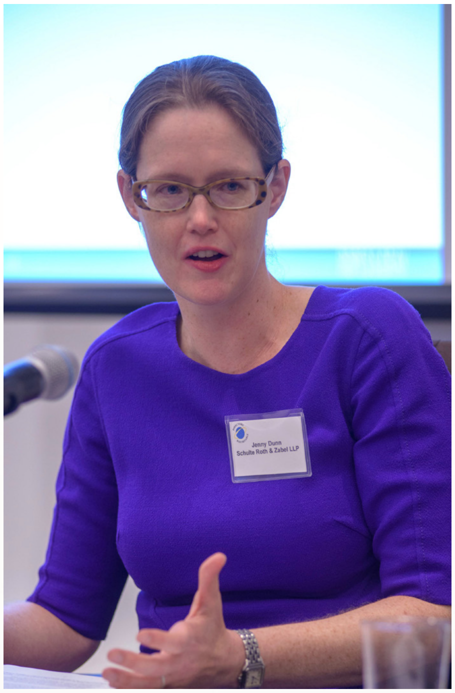
The SEC actually specifically addressed the use of contingent disclosure in the Fiduciary Interpretation. You can't say that you *may* have a conflict when you actually have it. It doesn't matter whether you have that conflict generally, or only with respect to some, but not all, of your clients. Now, this doesn't necessarily mean you have to go search and replace every instance of "may" in the conflicts disclosure; it still may be appropriate – but only when it is used regarding potential conflicts of interest that don't *currently* exist but might reasonably occur in the future.

You should also review your policies and procedures. Do you have the necessary policies and procedures in place to address various conflicts of interest? More importantly, are you actually following those policies and procedures?

It is great to disclose to investors how you handle conflicts of interest, but you need to actually practice what you preach, because if you don't, there will be consequences. The review of both the disclosure and the policies and procedures should be a periodic occurrence. It should be done at least once a year and, frankly, it should probably occur more frequently – especially when you onboard a new client, or there are other changes to your business that give rise to a new actual or potential conflict.

Now, on a side note, investment advisors are not the only ones that the SEC has been focused on when it comes to conflict issues. As David mentioned, at the same time that the SEC adopted the Fiduciary Interpretation, it also adopted Regulation Best Interest, or Reg BI. Now, Reg BI applies to broker-dealers, and requires a heightened standard of conduct. Specifically, broker-dealers need to act in the best interests of retail customers when recommending a securities transaction or an investment program involving securities. Reg BI also requires broker-dealers to establish policies and procedures reasonably designed to identify and disclose conflicts of interest and, again, where necessary, to mitigate or even eliminate such conflicts.

I only mention Reg BI because it illustrates a common theme of acting in the best interests of clients, and disclosing conflicts of interest. Now, clearly, the SEC is very focused on conflicts of interest and fiduciary duties. I don't see this changing anytime in the near future or perhaps ever. At least we now know that full and fair disclosure, and



a client's *informed* consent, may prevent the mere existence of a conflict from violating an advisor's fiduciary duty.

Of course, this opens the door to the difference of opinion as to what is full and fair, but at least you don't have to go out of the way to avoid a conflict in the first place.

Thank you. [APPLAUSE]

KAREN TODD: We are now going to move on to Lona Nallengara, who is with Shearman & Sterling.

LONA NALLENGARA: Thanks, Karen, and thank you to the Directors Roundtable for including me. David, congratulations, and congratulations to your whole team. Sculptor is an important client of our firm, and a great partner to us, and, David, you are a great friend to our firm.

My connection with David isn't as personal as Dick's and David's; mine is a little more ephemeral, I would say. We both shared the same job at the SEC at different times. David was Chief of Staff of the SEC, as was I. The job of a Chief of Staff is a great one.

My colleagues at my firm are here; so, I'll say it's the *second* best job I've ever had. [LAUGHTER]

I'm going to also pull from something that David spoke about, as well. David talked about cyber security and the importance of cyber security for public companies and any regulated entity. David indicated the SEC is focused on it, the Chair of the SEC has been focused on it, and each of the SEC divisions. But it's not limited to SEC focus; Congress has been intensely focused on cyber security, too. State governments have been active, as well, and it's not just California. You can expect some leading legislation from California, but you're also seeing it in New York and other states, as well.

I thought today I would give you a list of eight things that you need to do, as a General Counsel or as a Board member, to ensure you are keeping focused on cyber security issues.

The first one, accept reality – that no matter how good or how robust or how rigorous your cyber security and information security controls are, you're going to have a breach. You're going to have some kind of incident. There's going to be someone who's going to click on an email they shouldn't have clicked on, and things are going to happen. It's important to appreciate that, because it keeps you on your toes. My son plays baseball, and I always tell him, "You've got to be in ready position." That applies to cyber–security preparedness too. If you think your systems are capable and rigorous and, as a result, you lessen your focus off preparedness and responsiveness, you have exposed your company to a real structural vulnerability. It's important to accept the reality that there may be an incident, and you should be prepared for that incident.

The second thing is ensure you consider cyber security as a whole company issue. People use the word "enterprise risk management issue"; and people say that, but I'm not sure everyone knows what it means. Of course cyber security can affect your whole business, but what I think an "enterprise risk" means is you've got to bring people and experts from all parts of your company together to address cyber security; it's not just people in the information technology department. You need to draw from different parts of the organization. You should be considering not just legal and compliance, but you should be looking at your disclosure control processes; your financial reporting people, Communications and Investor Relations should be part of the plan too – leverage your internal people to ensure your response is a whole company one. These are the people you will need when something happens, and you should work with to game out how you're going to respond to it when it does.

The third thing: you should understand what your weaknesses and your risks are – where are you vulnerable, and who may be interested in coming and creating havoc at your company? On vulnerabilities, think about the kind of information you're collecting; think about where you're collecting the information from; who could be interested in accessing your systems? It could be competitors, it could be foreign governments, it could be simply someone who wants to prove he or she can do it. Anyone or anything could be interested in accessing your system, and you should be understanding both the risks you have and *who* could be interested in accessing your system.

As a Board member, you should understand what management is doing in terms of making those assessments of what risks exist and what risks need to be defended. Often, companies look at the risks they're facing in cyber security and identify a level of acceptable risk – based on the likelihood of a breach and the costs associated with protection – ultimately making a decision as to a level of acceptable risk. As a Board member, you need to understand how management is going about determining what is acceptable risk – what are best practices, what *should* this company be doing in terms of addressing those vulnerabilities.

The fourth thing: do you have the right people? Do you have the right people in your organization as part of your technology and your communications and your legal and compliance functions? Also, do you have the right people on the Board? Oftentimes, the technology discussion is well over the heads of Board members. When you think about the average age of a Director on a public company, it is not surprising that Boards do not understand the technology used by the companies they serve – does the Board understand the risks the company is facing, and do they have the right information to understand it? A question to consider is, do you have the right people, and are those people able to communicate that information to the Board in a clear way? Sometimes the response is, because of the nature and the profile of the company, you can hire or "rent" that experience – you can have people advise the Board directly. For other companies, for other Boards, it's important to have individuals with direct experience in the industry or dealing with cyber security or data or information risks.

The fifth thing is staying connected. You should be aware of what's happening. Make sure that you have the right, what I like to refer to as "plumbing," within your organization; that the information that needs to bubble up to management and the Board has a process by which it bubbles up. Oftentimes, these cyber security or information breaches, the first person that learns of it is someone who's focused on technology or information security. What they don't have is knowledge of what is material for the company, how that information should get disclosed, who it should be disclosed to, and when it should be disclosed. These individuals also do not appreciate the regulatory compliance requirements, both at the federal level and state level, and, importantly, the time frames for reporting an incident. Under some state jurisdictions, if there's client or personal information disclosed, you may have 48 to 72 hours to disclose that information. If that is not bubbled up to the right people, that can be disastrous for your response to the event.

Number six: you've got to be wary about things outside of your company that you do not control, as well. If you're looking at acquiring a company or creating a new product or entering a new jurisdiction, you should be concerned about information security and regulatory compliance. You should be concerned about cyber security issues at a company you're buying or the product you are creating or planning to offer.

Putting aside the business interruption that could result from a cyber security breach at your third-party provider, the reputational damage would be far more severe. You should be bringing the same rigor to your cyber security testing within your company to your third parties, as well.

Number seven: practice and plan, and practice again. Make sure that management has a plan on how they're going to respond to a cyber event or an information security lapse. Make sure the Board also has a plan. Oftentimes, companies and Boards run tabletop exercises, where they game out what's going to happen. Some Board members will react and feel like it's play-acting, but what it does is it brings some real control mechanisms to the process and makes sure you understand what needs to be done and when it needs to be done. A 12- or 15-person Board is really hard to get together on an emergency basis, and part of that planning would determine whether there's a small subset of the Board that can be tasked with reacting to these incidents on a real-time basis.

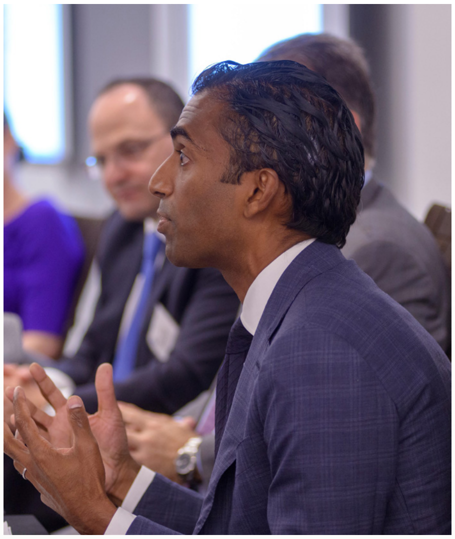
Number eight: the last item on the list is creating an environment for cyber security awareness within your organization. Make sure everybody understands the importance of it. Oftentimes, the underbelly of your risk is those individuals within your organization that may not be as connected to them. It's responding to the emails, it's the phishing attacks, it's leaving a device around or some papers around that create a trail that allow a cyber security event to occur.

The last thing I would say is that whatever you do, you still have to follow the rules. I can give you all the checklists and numbers, but you still have to follow the rules. In the cyber security area, the rules are a little bit squishy. There aren't a lot of direct rules that we can point to that have the word "cyber security" in them, but what we have to do is assess cyber security in the same way you do other risks. If you consider cyber security in the same way you do your other risks, you look at it from a disclosure controls perspective. If you look at it from an internal controls over reporting question; from a communications and investor relations matter; and you bring an enterprise-wide approach to it, you will likely be in compliance with the rules.

[APPLAUSE]

KAREN TODD: I'm going to throw out a question to the entire panel. We're going to start with Jennifer. I want you to tell us, from your own practice area and with respect to David from your position as General Counsel, what are the top-priority issues that you're talking with Boards about?

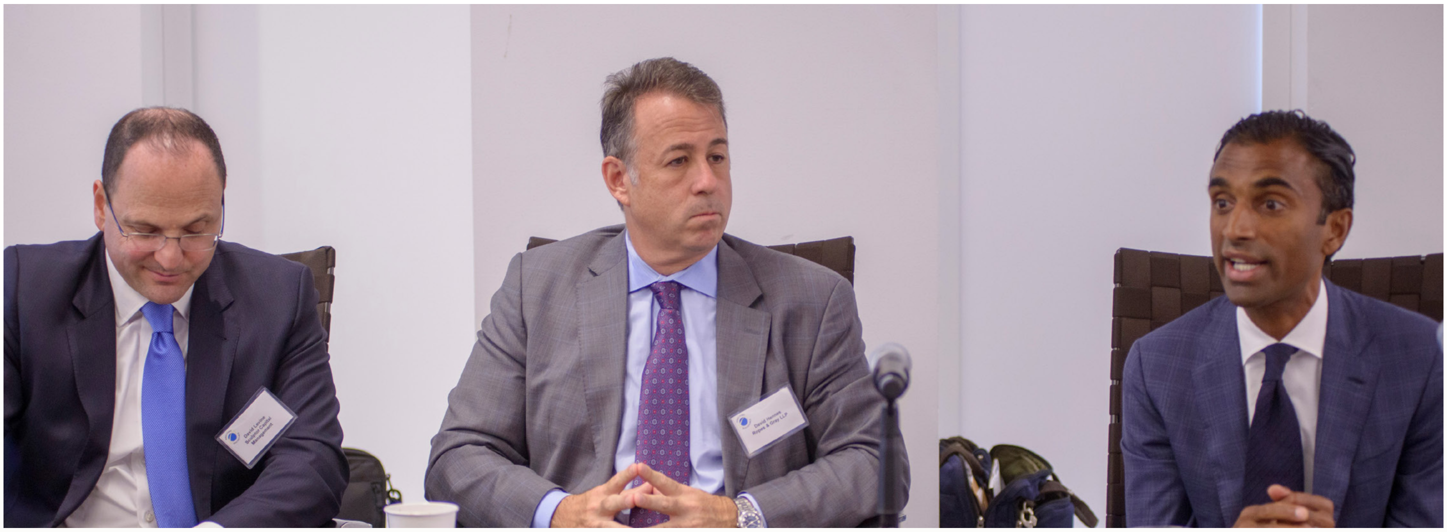
JENNIFER DUNN: There is actually not that many of my clients who have Boards.



DAVID LEVINE: We're one of the few. [LAUGHTER]

JENNIFER DUNN: Yes, Sculptor is one of the very few investment advisors – frankly, I actually can count them on one hand. But many of our clients have advisory committees and the types of issues that management faces are all the ones that have been touched upon here today – cyber security, #MeToo, FCPA, general compliance, and conflicts. We have a lot of conversations about conflicts, because we're building those documents and those disclosures, as well as seeing what's coming back on examinations. What is the SEC focusing on? Where are they finding holes? When I alluded to the fact that the new thing is now going to be the fight over whether or not the disclosure was full and fair, we're already seeing that.

DAVID LEVINE: Yes. First of all, that's an excellent list. Based on our real-world experience at our shop, you've hit a few of our nails on the head. We've certainly spent some recent Board meetings talking in depth on the #MeToo issues, on cyber security in depth. The one thing I would underscore, that Lona said, that we get into regularly – but including with our Board – when you *do* house data with third parties, it's not enough, by a long shot, to simply have in your contract with that third party,



reps and warranties that they'll have certain manner of safeguards in place. Your IT folks really need to get out and make site visits and kick the tires and do real onsite audits, and we report that back to the Board.

The one I would add to your list that's very hot these days is ESG – environmental social governance-type investing. For a publicly traded asset manager, it's actually a two-sided coin. On one side of the coin is when we make investments in our funds, are we looking to be as ESG-compliant as we can be. We've recently promulgated policies there and posted them on the web, and we're far along.

We're trying to be, as far as we can be in this area. Then for a publicly traded company, are we as ESG-compliant as we can be? The "E" obviously doesn't matter as much to an asset manager – we're not in the coal-burning business – but the "S" and the "G" matter a whole lot.

On the governance front, I've talked about our big restructuring as a firm, and that went a long way to enhancing our governance. We were formerly controlled by a proxy. Our founder had a proxy that controlled the vote, and that's perhaps the biggest strike in the "G" category. We need to be a true democracy – one shareholder, one vote – which we are now.

On the social front, we take a lot of steps to just make it a better place to work – to do things with staff engagement – and our Board is deeply caring there, and has received some in-depth briefings.

RICHARD WALKER: If I could just add something on that. I am in complete agreement with David that ESG issues are really front and center. You've got the *BlackRock* position on this, which is driving a lot of the interest and attention. Our firm used to participate in something called the "Lead Director Network," which would meet two or three times a year with lead Directors. We tried to get an agenda of things that were interesting to them, and with the cyber, they'd always say, "We've heard so much about that." Not that they shouldn't hear more about it, because we see repeatedly that this is an issue that just doesn't go away. A little bit the same with #MeToo, because they don't want to just tell one-off stories, but ESG is of paramount interest. Coupled with that, Jamie Dimon and the Business RoundTable's recent remarks that for the first time, public companies in the U.S. – it's been long the case outside the U.S. – need to be thinking and focusing on more than just the interests of their shareholders. This is something new and a bit revolutionary for U.S. companies, the thought that stakeholders or employees or the communities are important stakeholders. This is a new concept; it's always been shareholder value and shareholders. This is really beginning to catch on here and is the subject of a lot of discussion at Board level.

DAVID HENNES: It is and remains to be seen where that's going to end up, because it's in the eye of the beholder, as is an appropriate stakeholder beyond those who've invested their money with the concern. Look, it's not necessarily new in the sense that many states have constituent laws which say you can take into account things other than stockholder value and the best interests of the corporation. I agree with David – it's a debate that's going to be happening over the next five years. Let's put it that way.

KAREN TODD: Thank you. Lona?

LONA NALLENGARA: I've got just a couple of other points – obviously, everything everyone said, those are current issues. The one I dig a little deeper on is the "S" of the ESG: Board composition has historically been the focus of the "G" part of that ESG. It's been really considered a governance matter. But, increasingly, it's shifting as an "S" matter. It's ensuring that you've got the right Board diversity, it is no longer one that's focused on your traditional governance focus advocates. It's now a social policy question of whether you have the right composition

on your Board. You have increasing calls for gender diversity and broader diversity on Boards, so that's an important driver.

How you'll see that is you'll see that change in proxy disclosure, in how companies are either being forced to, or choosing to, describe their Board members. It's no longer simply you can just put a name and their background. There are photos being added; some companies are including a bullet that identifies ethnic diversity; and they are putting pie charts that indicate how diverse or how "un-diverse" their Boards are.

KAREN TODD: Thank you. I can tell you that even Directors Roundtable faces criticism if we don't have a diverse panel, so it affects everybody.

The next question that I want the panel to put their attention on is in dealing with David's legal department, can you tell us from your own experience, what you see them doing right, that you can share with us?

JENNIFER DUNN: One of the things that I've always admired about the Sculptor Legal Department is that it is very much a team. They're very engaged; they're not afraid to reach out and ask advice from outside counsel; and they don't function within the bubble. There are obviously a lot of pressures on expenses, and that can cut against seeking out advice from the people who are outside your firm who could, perhaps, best provide it. But as much as there is that internal pressure, there isn't a tone from the top that says, "Just do it yourself; do it internally; let's cut corners here" – they want to do it right. I think that's very important.

DAVID HENNES: I would say that – we touched on it earlier – David's attention to detail and doggedness flows through to those whom he's hired and works with, because I see it. I admire actions with them – every client is different; some will turn things over to you and say, "Let me know how it goes," and others will be involved every step of the way. I certainly think the Sculptor Legal Department follows David's lead in being hands-on and attentive.

RICHARD WALKER: They have impressive product knowledge and expertise, too, particularly since Sculptor does not just sell plain vanilla products. They are complex products and, frankly, outside counsel is assisted greatly by in-house people that can explain how these products are developed, and how they perform.

DAVID LEVINE: Having worked at a large organization, and now working at a smaller one, my view is certainly, when you're at a larger organization with an expansive legal department – the one, we had a Deutsche Bank rivals some large law firms – you can have a weak link in the chain somewhere, and you can get by. When you have a smaller legal department, you'd better interview very intently, do reference checks, and the whole nine yards to make sure you're getting top talent. There's really no room for error when you have a small staff. You're going to feel that, and you're going to feel it deeply if you make an error. I'm blessed in that I do feel that I have a team that is rock-solid every step of the way, every link in the chain. Against that, what I tell them is, with the cost pressures, I have great confidence in this team.

A lot of what we do is make judgment calls. It's not always a "yes" or a "no"; it's a judgment call. You're in the gray. Make the call – we'll stand behind you.

The times that you should call outside counsel are principally two-fold: if it's an area of expertise and we don't feel that we have that direct expertise; or a bandwidth issue. Whenever you do that, again, I'll get your back. But what I don't like to see is when people feel that they have the answer and they have the expertise, but it's a "cover yourself" situation whether to call outside counsel, and I don't think this team does that. They step up and do a whole lot themselves.

KAREN TODD: Lona, you wanted to add something?

LONA NALLENGARA: What we've noticed is a couple of things: one, to have a team that works, it seems like everybody knows what everyone's doing, and particularly David does, as well. What I've noticed in speaking with David is the pride that he takes in the success of his team. It feels that their successes are sweeter because they're doing them together, and that's great to be around a team like that.

KAREN TODD: Thank you. I'm now going to ask for any questions from the audience.

[AUDIENCE MEMBER]: Assume you are a Board member and your general counsel's office discovers that your CEO has an Adam Neumann-type of problem, i.e., drug use, and you didn't know that. What's your responsibility?

DAVID LEVINE: I know the first thing *I* would do: I would call my Board into an executive session, obviously without the CEO present, and immediately notify the Board of the situation. For something as extreme as laid out there, that's something, if founded, it's going to call for pretty serious and pretty immediate action.

KAREN TODD: Does anybody else on the panel want to respond?

RICHARD WALKER: It's a tough question – is this immediate dismissal, or is there any comeback from something like that? Is there rehab or some interim solution? There are a lot of facts and considerations, that would drive the right response.

[AUDIENCE MEMBER]: I was wondering if you might want to keep it within the family initially and do an internal handling, or would you want to go directly to the government. Would it depend if you're a public company or a private company, would that vary where you might do the investigation?

LONA NALLENGARA: I certainly think you need to assess the scope of what you're dealing with and get more information. You need to consider that the CEO is still an employee of the company and has rights as an employee, as well. You need to understand that their drug use may be a medical condition that you need to manage through. Dismissal or non-dismissal, those are questions that come later. Understanding the scope and the information around it, understanding the extent of the problem, is certainly the first thing you do. You do that with the Board, and the Board then will need to charge somebody within the organization. Maybe because it's the CEO, someone externally, someone that they retain, whether it's a law firm or somebody else, to address it.

DAVID HENNES: Stepping back for a second, as a Director, what have you done in the past? What systems do you have in place to make sure you know what's going on with the CEO? I would hope that as a Director, it wouldn't come out of the blue that there is some issue with the CEO, that you're doing performance reviews. You're engaging with the CEO, you're doing things to make sure you're discharging your duties to be informed, so that you can exercise your business judgment. Of course, there are going to be surprises and circumstances change, but you would want to make sure that you, as a Director, have a quarterly meeting with the CEO outside of a Board meeting. That you are doing a review annually or biannually as a Director; you're getting feedback from his reports about how he or she is doing, and not only their job performance, but their non-job attributes, as well.

In addition to waiting for that to happen and having the general counsel bring it to your attention, what, as a Board, are *you* doing to make sure that you have structures in place to get any information that you might want to know about?

RICHARD WALKER: Maybe the single, most important thing is that you have got to have ready communications people and a strategy, because it's very unlikely that something like this is going to be contained. People are going to find out about this; it's going to leak. There will be tweets or communication and you've got to have somebody with a very strong communication strategy, because, once the thing leaks out into the public domain, you are "tail between your legs" running behind. Proper communication is extremely important.

DAVID LEVINE: To even build on that, when you're a public company, and an executive officer of the firm departs, be it the CEO or the CFO, you have to file an 8K within four days stating the reasons why. You're going to have a pretty serious disclosure issue if you do decide to part ways with the CEO there. Obviously, your disclosure is going to need to be accurate.

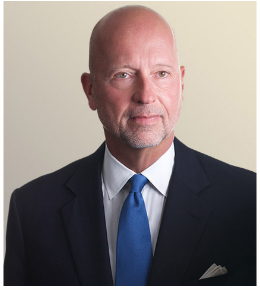
DAVID HENNES: You're going to have to make the disclosure no matter what, because the reality is, whether that person stays or goes, there would be a leave undoubtedly involved, and you're going to have to figure out how to manage that in the course of this handling.

KAREN TODD: Thank you. Anyone else?

[AUDIENCE MEMBER]: David, one thing many GCs and Boards are facing these days are the continually evolving privacy laws. First, you had the GDPR [EU General Data Protection Regulation], and now you have the California Consumer Privacy Act [CCPR]. Can you talk a little bit about how you as a GC and your Board have been working on these issues?

DAVID LEVINE: We get a little bit of a reprieve with the CCPR. There is a carve out if you are already subject to Gramm-Leach-Bliley – we're a financial institution, and that's what we're subject to. But, obviously within Gramm-Leach-Bliley, there's a number of requirements that you have to take to safeguard client "PII" (personally identifiable information). This leads over into a cyber security discussion. You have to have all your technological safeguards around any system that houses PII, and then you need to send annual notices and the like to your clients, warning them of the uses that you might make of their information, and they get certain rights to opt out or to opt in. That's my educational-sounding answer. My real-world one is compliance gets a lot more deeply involved, actually, on a day-to-day basis. But that's the gist; those are the main points.

KAREN TODD: I would like to thank the audience for their participation. Thank you so much for coming and thank you again to our Guest of Honor and Distinguished Panelists for sharing their wisdom this morning. [APPLAUSE]



Richard Walker

Partner

Former SEC Enforcement Director and General Counsel Dick Walker is a Partner in the firm's Special Matters & Government Investigations practice group, twice named "White Collar Practice Group of the Year" by *Law360*. As part of the firm's Securities Regulation and Enforcement practice, Dick specializes in crisis management, government and internal investigations (including cross-border), complex financial litigation matters, including litigation assessment, corporate governance, and compliance issues. Dick represents banks, law firms, accounting firms, regulated entities and public companies who benefit from his ten years as a high-ranking SEC official and almost fourteen years as Global General Counsel for Deutsche Bank, a large international financial institution.

While at Deutsche Bank, Dick held a number of senior positions, which included at various times serving as Vice Chairman, a member of the Bank's Global Executive Committee, Global General Counsel and Global Head of Compliance. He oversaw the Bank's legal and compliance departments worldwide. He was responsible for international and U.S. banking, securities, commodities, and other financial regulations as well as government investigations, transactional matters, corporate governance and related matters, data privacy, and litigation.

Prior to joining Deutsche Bank, Dick served as the Director of the Division of Enforcement and prior to that, as General Counsel of the Securities and Exchange Commission after starting his career as Regional Director of the Northeast Regional Office. He is the only person in history who has served the SEC as both Enforcement Director and General Counsel.

In addition to his government and in-house experiences, Dick was a litigation partner at a top AmLaw 100 law firm earlier in his career. Upon graduating from law school, he clerked for Chief Judge Collins J. Seitz of the U.S. Court of Appeals for the Third Circuit.

Dick is an adjunct professor at the University of Pennsylvania Law School.

King & Spalding LLP

King & Spalding helps leading companies advance complex business interests in more than 160 countries. Working across a highly integrated platform of more than 1,100 lawyers in 21 offices globally, the firm delivers tailored commercial solutions through world-class offerings and an uncompromising approach to quality and service.

From railroads to banking, energy projects to life sciences, King & Spalding has served leading commercial industries in each decade since the late 1800s. A Global 50 law firm today, it has grown in close relationship with its clients' interests and market dynamics, coordinating now across global hubs to best serve its clients' complex, often cross-border, objectives.

The firm was born of a combination of legal brilliance and empathic counsel, in the business eye of 1890s Atlanta. In each decade since, it has grown by understanding industry and advancing its interests – and by upholding a culture of personal service.

It's high-performing culture is founded on a drive for uncompromising quality, a dedication to service and genuine respect for others. Clients tell us that our culture sets us apart, leads to beneficial outcomes and is a consistent experience across its offices in the U.S., Europe, the Middle East and Asia.

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The firm's goal is to deliver a world-class work product to solve complicated business issues. It takes pride in its uncompromising approach to quality, recognizes that everything it does or produces is a measure of its commitment to quality, and gives 100% the first time and every time. No exceptions.

David Hennes
Partner

David, co-chair of both the firm's corporate and securities litigation practice and investment banking industry group, is a partner resident in Ropes & Gray's New York office. David has over 20 years of experience litigating a broad array of corporate disputes, with an emphasis on complex corporate litigation, securities cases, corporate-control disputes, and enforcement litigation.

He regularly represents buyers, sellers, and financial advisors in all forms of litigation arising out of transactional matters, including breach of duty litigation, breach of contract and business tort cases, and post-closing disputes. He frequently handles complicated federal securities class actions and state law derivative actions, and advises Boards and Board Committees (including Special Litigation Committees) on their responses to these litigations. David has represented corporate and individual clients in all aspects of these matters at the trial and appellate levels in federal and state courts throughout the United States, as well as in non-public SEC, FINRA and state securities investigations.

David has been consistently recognized by *Chambers USA: America's Leading Lawyers for Business* as a leading individual in General Commercial Litigation. *The Legal 500* has named David as a 'Leading Lawyer' for M&A Litigation: Defense. In its 2019 edition, *Chambers* described David as "an outstanding lawyer who has excellent judgment, is responsive 24/7 and gives excellent, thoughtful and practical business-oriented advice."

He is also described as "smart and savvy," and is praised for his "practical and commercial approach" to cases. *Chambers* noted David's "ability to handle a wide range of corporate and white-collar criminal litigation," with a "great ability to argue and convince regulators of his position." Sources commend David for his "great balance between aggressive advocacy and the ability to close on a compromise" and fellow practitioners offer praise for his "judgment and strategic thinking." *Legal 500* calls him a "first-rate litigator" and "solution-oriented." David has also been recognized by *Benchmark: Litigation* as a New York Litigation Star.

Ropes & Gray LLP

Ropes & Gray is one of the world's premier law firms. Client by client, it has built a reputation for high-quality work, a pragmatic approach, and impeccable standards of service and ethics. It counts many of the world's most respected companies and institutions as longtime clients, and serves organizations at all stages of development, as well as investors and individuals. Clients trust the firm with their most important matters because they know we understand their businesses and deliver the results they need.

Ropes & Gray attorneys focus on the most critical business needs of its clients, across a range of leading legal practices. The firm's collaborative approach means that its clients have ready access to corporate, litigation, transactional and regulatory attorneys whose knowledge and experience span industries and geographies.

The firm's understanding of market dynamics and deep relationships in the financing community allow clients to focus on the upside case of their business plans. In asset management, the breadth and depth of knowledge uniquely positions it to advise asset managers and investors worldwide on the complete spectrum of fund products and strategies, and all aspects of their business. Its clients get unsurpassed counsel on private equity throughout the transaction life cycle from one of the world's largest and most sophisticated private equity practices.

The firm represents public and private companies in M&A transactions ranging from the straightforward to the complex, many involving industry-specific considerations and cross-border and multi-jurisdictional issues. With more than 100 lawyers and technical advisors, our team can tackle any IP challenge, anywhere in the world.

Global business leaders across industries turn to the firm's experienced litigators for creative and successful solutions to sensitive matters and critical disputes. Ropes & Gray attorneys understand business and regulation and help its clients preempt, resolve or mitigate the impact of government investigations and enforcement actions. The firm helps clients navigate the complex legal landscape surrounding litigation and regulatory investigations stemming from data security breaches and alleged data privacy violations.

Jennifer Dunn
Partner

Schulte Roth & Zabel

Jennifer M. Dunn is a partner in the Investment Management Group at Schulte Roth & Zabel LLP in its New York office. She focuses her practice on advising hedge funds, private equity funds (including mezzanine and distressed funds), hybrid funds, funds of funds and investment advisers in connection with their structuring, formation and ongoing operational needs, general securities laws matters, and regulatory and compliance issues. Her experience includes structuring and negotiating seed and strategic investments, advising investment managers regarding the structure and sale of their investment management businesses and the structure of their compensation arrangements, and representing investment managers in connection with managed accounts and single investor funds.

She has co-authored or been quoted in the following publications:

Hedge Funds: Formation, Operation and Regulation (ALM Law Journal Press)

"Succession Planning with SRZ's Leading Fund Formation Group," *The Hedge Fund Journal*, March 2016 (quoted)

"SEC Updates Form PF Frequently Asked Questions," *SRZ Alert*, July 20, 2012

She is a member of the Board of Directors for 100 Women in Finance as well as receiving the following recognitions:

- *Expert Guide to the World's Leading Banking, Finance and Transactional Law Lawyers* (Investment Funds)
- *Expert Guide to the World's Leading Women in Business Law* (Investment Funds)
- *IFLR1000* – Rising Star (Investment Funds)
- *The Hedge Fund Journal*'s 50 Leading Women in Hedge Funds
- *The Legal 500 US*

Jennifer received her J.D. from Columbia Law School and her B.A., *cum laude*, from University of Pennsylvania.

Schulte Roth & Zabel LLP

As one of the leading law firms serving the financial services industry, Schulte Roth & Zabel LLP serves clients from strategically located offices in New York, Washington, DC and London. SRZ regularly advises on corporate and transactional matters, as well as provides counsel on regulatory, compliance, enforcement and investigative issues. The firm takes a cross-disciplinary approach to client service by employing the expertise of multiple practice groups, and SRZ lawyers are recognized for their ability to develop cutting-edge solutions for their clients' most complex legal and business challenges.

Founded in 1969, Schulte Roth & Zabel is a multidisciplinary firm with international clientele. Over time, we have become known for two things: doing great work in the financial services sector — and many related industries — and doing things a little differently than many of our peers.

For one, our philosophy is distinct, and our specialties more finely honed. Instead of trying to be everything to everybody, we've grown organically and in ways that make sense for our clients' industry demands and evolving needs. Today, we regularly advise clients on investment management, corporate, and transactional matters. We also provide counsel on securities regulatory compliance, enforcement, and investigative issues, as well as targeted specialty areas that we have developed over time.

More important, though, than *what* we do is *how* we work: in a team-oriented environment that yields efficient, effective solutions to our clients' most complex matters. We're truly collaborative with you and with each other — anywhere in the world.

Our lawyers have wide-ranging capabilities and experience in their fields, which gives us the technical ability and experience we need to see matters through to the end. But we also know how to really work together — across practice areas and industry groups — to unpack complicated matters and find the most straightforward solutions for our clients.

Additionally, because our practices are so well integrated, we can assemble a multidisciplinary team at a moment's notice — and ensure our clients get targeted expertise when and where they need it.

Lona Nallengara
Partner

Lona Nallengara is a partner in the Capital Markets practice.

He focuses on advising companies, financial institutions and their boards on corporate governance, disclosure, and securities law compliance matters and on the financial regulatory process. He also advises companies and financial institutions on all aspects of public and private offerings of equity, equity-linked, high-yield debt and investment-grade debt securities.

Prior to returning to the firm in 2017, Lona served in senior positions at the Securities and Exchange Commission for over four years. From 2013 to 2015, he served as Chief of Staff to SEC Chair Mary Jo White, where he was the top advisor to the Chair on all issues, including policy development, rulemaking, strategy and management. During this time, he led the rulemaking and implementation efforts related to all mandates under the Dodd-Frank and JOBS Acts and directed the SEC's asset management, market structure, public company disclosure effectiveness and private offering reform programs. He also served as the SEC deputy to the Financial Stability Oversight Council and was the primary SEC liaison with other financial regulators. Lona joined the SEC in 2011 as Deputy Director of the Division of Corporation Finance and later became its Acting Director. In this role, he was responsible for the division's overall activities and operations, including rulemaking, interpretive guidance and the public company filing review program. Following his SEC tenure, Lona joined Bridgewater Associates LP, where he was the Chief Governance Officer and a senior advisor to founder Ray Dalio.

Shearman & Sterling LLP

The firm's success is built on its clients' success. It has a long and distinguished history of supporting its clients wherever they do business, from major financial centers to emerging and growth markets. The firm represents many of the world's leading corporations and major financial institutions, as well as emerging growth companies, governments and state-owned enterprises, often working on ground-breaking, precedent-setting matters. With a deep understanding of its clients' businesses and the industries they operate in, its work is driven by a need for outstanding legal and commercial advice.

The firm has over 850 lawyers around the world speaking more than 60 languages and practicing U.S., English, French, German, Italian, Hong Kong, OHADA and Saudi law. Nearly half of its lawyers practice outside the United States. Combining legal knowledge with industry expertise, its lawyers provide commercial advice that helps clients achieve their ambitions.

The firm is committed to forging long-term relationships with its clients, providing them with genuine insight and practical advice, and supporting them as they navigate the challenges of the 21st century global economy.

Shearman & Sterling is committed to attracting, retaining and advancing a diverse population of top lawyers and professionals. The firm understands the importance of embracing cultural and personal differences in order to work successfully in today's global marketplace. It encourages its lawyers and business services professionals to bring their diverse backgrounds – of different cultures, ethnicities, orientations and beliefs – to Shearman & Sterling and to leverage their unique viewpoints to help tackle the most sophisticated legal matters.

The firm believes that by providing opportunities for every individual to thrive, it creates an environment at Shearman & Sterling where people feel valued, engaged and eager to contribute to the success of the business. As it works to recognize, foster and develop talent at all levels, it enhances the firm and creates the strongest possible global platform.

Equal access to justice is vital for a fair society, especially for indigent individuals and nonprofit organizations that have limited resources for legal services. At Shearman & Sterling, it is believed that engaging in pro bono work is an essential aspect of every lawyer's practice. In that spirit, we encourage our lawyers to work together to effect change for those who need it most.

Our pro bono practice is multi-jurisdictional, working to address issues around the world. The firm's lawyers work successfully in settings ranging from a legal clinic for low-income entrepreneurs in San Francisco to Tanzania, they we supported the efforts of the Office of the Prosecutor at the International Criminal Tribunal for Rwanda (ICTR).