DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Sarah O'Dowd

& The Legal Department of Lam Research

THE SPEAKERS

Sarah O'Dowd
Senior Vice President, Chief Legal Officer & Secretary, Lam Research

Ryan Murr
Partner, Gibson, Dunn & Crutcher LLP

Timothy Hoxie
Partner, Jones Day

Stephen Tedesco
Shareholder, Littler, Mendelson P.C.

Piers Blewett
Principal, Schwegman Lundberg & Woessner PA

Ken Kumayama
Counsel, Skadden, Arps, Slade, Meagher & Flom, LLP

Michael Charlson
Partner, Vinson & Elkins 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 her colleagues, we are presenting Sarah O'Dowd and the Legal Department of Lam Research with the leading global honor for General Counsel and Law Departments. Lam Research is a leading provider of innovative technology and productivity solutions to the semiconductor industry.

Sarah's address focused on key issues in corporate governance facing the General Counsel of an international technology corporation. Karen Todd, Executive Director and Chief Operating Officer of the Directors Roundtable, moderated the program. The program consisted of two panel discussions, "How Tech Boards should handle Securities Compliance, Corporate Governance and M&A" and "Board Strategies for Competition, International Trade and IP."

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.

Sarah O'Dowd

Senior Vice President, Chief Legal Officer & Secretary

Sarah A. O'Dowd is our senior vice president, chief legal officer and secretary. She joined us in September 2008 as group vice president and chief legal officer, responsible for general legal matters, intellectual property and ethics, and compliance. In addition to her Legal function, in April 2009 she was appointed vice president of Human Resources and served in this dual capacity through May 2012. Prior to joining us, she was vice president and general counsel for FibroGen, Inc., from February 2007 until September 2008. Until February 2007, Ms. O'Dowd was a shareholder in the law firm of Heller Ehrman LLP for more than 20 years, practicing in the areas of corporate securities, governance, and mergers and acquisitions for a variety of clients, principally publicly traded high-technology companies. She served in a variety of leadership and management roles at Heller Ehrman, including managing partner of the Silicon Valley and San Diego offices, member of the firm's Policy Committee, and, as head of the firm's business practice groups, a member of the firm's Executive Committee. Ms. O'Dowd earned her J.D. and M.A. degrees in communications from Stanford Law School and Stanford University, respectively, and her B.A. degree in mathematics from Immaculata College.

Lam® RESEARCH

Lam Research

Advanced microchips are in many of the familiar products we use every day – from mobile phones and computing devices to entertainment systems and increasingly "smart" cars. Electronic products are everywhere, and life without them is unimaginable.

Creating the tiny, complex chips used in these devices involves the repetition of a core set of processes and includes hundreds of individual steps. For successful production, semiconductor manufacturers require sophisticated processes and fabrication equipment.

Lam Research works closely with customers to deliver the products and technologies needed to enable their success. By offering critical chip-processing capabilities, our products provide a vital link between the visionary designs for the latest electronic devices and the companies that produce them.

Market demand for faster, smaller, more powerful, and energy-efficient electronics is driving the development of new fabrication strategies that enable producing advanced devices with fine, closely packed features and complex 3D structures. Creating the cutting-edge microprocessors, memory devices, and numerous other product types in demand today is extremely challenging and requires continuous innovation to deliver capable processing solutions.

Through collaboration and drawing on multiple areas of expertise, Lam continues to develop the new capabilities required to manufacture these increasingly challenging devices. Our innovative technology and productivity solutions deliver a wide range of wafer processing capabilities needed to create the latest chips and applications – from transistor, interconnect, patterning, advanced memory, and packaging to sensors and transducers, analog and mixed signal, discretes and power devices, and optoelectronics and photonics.

KAREN TODD: Good morning, and welcome!

AUDIENCE: Good morning!

KAREN TODD: Thank you! My name is Karen Todd, and I'm the Executive Director and Chief Operating Officer of Directors Roundtable. I'd like to thank everyone who is here today for taking time from your busy schedules to attend this program.

I want to especially thank the people of Lam Research and the law firms that support your legal team for their help with this event. I'd also like to welcome the people who are here from other law firms, universities and professional organizations, and I'd like to give a special acknowledgement to Skadden, Arps, Slade, Meagher & Flom for providing the event space today. Let's give that a hand, because I really want to acknowledge them. [APPLAUSE]

The Directors Roundtable is a civic group that operates globally to organize the finest programming for Boards of Directors and their trusted advisors, especially General Counsel, and their Legal Departments. Since 1991 – that's almost 30 years now – we have never charged the audience to attend any one of our more than 800 events on six continents.

Our Chairman, Jack Friedman, created this series after speaking with corporate directors, who were concerned that their corporations did not get acknowledgement for their good citizenship. He wanted to give executives and corporate counsel a forum to speak about their companies, the actions that give them pride, and their successful strategies in navigating a constantly changing business world.

We honor General Counsel and their Legal Departments so that they can share this information with the Directors Roundtable community via today's program and the full-color transcript document that will be made after the event and provided to more than 100,000 leaders worldwide.

Today, we are very pleased to honor Sarah O'Dowd, Senior Vice President, Chief Legal Officer and Secretary, and the Legal Department of Lam Research – many of whom are here today – let's acknowledge them. [APPLAUSE]

I would also like to introduce our Distinguished Panelists. Unfortunately, John McKenzie of Baker & McKenzie is not able to be here today, so we have Nick Bougopoulos, who is the Vice President of Ethics, Compliance & Foreign Trade of Lam Research, who will be standing in for him in the second panel. We have Ryan Murr of Gibson, Dunn & Crutcher; Timothy Hoxie with Jones Day; Stephen Tedesco from Littler, Mendelson; Piers Blewett of Schwegman Lundberg & Woessner; Ken Kumayama from Skadden, Arps, Slade, Meagher & Flom; and Michael Charlson with Vinson & Elkins.

As a special surprise, I have a letter from the Dean of the Stanford University School of Law that I would like to read.

SARAH O'DOWD: Oh, no – I'm in trouble again! [LAUGHTER]

KAREN TODD: Luckily, this letter is very complimentary!

> Dear Sarah:
>
> Congratulations! I was thrilled to learn that you are being presented with the Directors Roundtable World Recognition of Distinguished General Counsel. This honor recognizes your outstanding work and leadership at Lam Research in the field of corporate operations, compliance, and financial and business strategy. We are proud of your achievement.
>
> On behalf of all of us at Stanford Law School, I join the Directors Roundtable community in congratulating you on this special award. Please accept my warm wishes on this memorable occasion.
>
> Sincerely,
>
> Jenny Martinez
>
> Dean of Stanford Law

[APPLAUSE]

As part of this honor, I'm going to present a certificate to Sarah for the Legal Department and her work with the letter included. [APPLAUSE]

SARAH O'DOWD: I really do want to thank Directors Roundtable for this. I don't want to make this like the Academy Awards. [LAUGHTER]

We didn't anticipate getting this, but we are honored to have it. I want to thank the Legal Team – everybody who's in the Lam Legal Team, raise your hand, because this is really your award. [APPLAUSE]

Thank you very much! Also, the many law firms and other service providers that we work with, because we're a small team, and

we rely very much, as members of our team, on our extended network of law firms and other service providers. Thank you guys, very much, and this is an honor for all of you, too, so thank you. [APPLAUSE]

KAREN TODD: You are very welcome. I'm now going to turn it over to Sarah for her presentation.

SARAH O'DOWD: Directors Roundtable graciously said I could speak on any topic that I would like, and I selected corporate governance. In part, because I really like corporate governance; I think I know something about it; and it's very topical today. But I realize everyone in the room is not as familiar with corporate governance, so I will take just a moment in the beginning to say *what is corporate governance*. In fact, we could start with *what is governance*. In any complex organization, you need to have a way of making decisions and allocating power to make those decisions, and that's really what a governance system is.

We could start with something we're all familiar with, the United States. The United States has a Constitution that actually writes down what our governance system is, and it starts with the words, "We, the people." "We, the people ... do ordain and establish this Constitution for the United States of America." That establishes the principle that the people in this country have the power. Obviously, it's a little hard to exercise decision-making for, what are we now, 350 million or more individuals. The Constitution says we'll delegate some of those powers – and we're all familiar with this from grammar school – the Legislative Branch, the Executive Branch and the Judicial Branch. The Constitution specifies what their powers are, and what their constraints on those powers are. For example, Congress can make laws, but the President can veto them. It goes like that throughout.

You have *who are we doing this all for* – the people; *who are the institutions that hold some powers*, and *what are the constraints on those powers*; and then there's a ton of processes in the Constitution: How do you decide how many representatives each state gets; how do you amend the Constitution; how do you appoint a judge to the Supreme Court. That's really a governance system.

Corporations have the same type of governance system. Most corporations in the United States, and certain public ones, are incorporated in the State of Delaware. You get your choice of what state you'd like to be in, and Delaware has two pretty big advantages: one is, it's relatively cheap; and two is, it has a well-established body of law that has set out the way things are supposed to work since 1899, when the General Corporation Law of the State of Delaware was adopted. It's very clear under Delaware law that the power belongs to the shareholders, the owners of the business. The company comes together and issues stock; people pay for that stock; they own the company. The duty of the entire company is to act in the best interests of the shareholders.

There are a couple of governance bodies that are delegated powers to do things: one is the management team that runs the business day-to-day; the other is the Board of Directors that oversees the management team. They have certain powers, and they have certain constraints. The biggest constraint is everything they do has to be for the benefit of the shareholders.

This is actually something that seems established – it's been around for more than 100 years – but it's actually very controversial and has been since at least the New Deal. There have been voices in society – sometimes economists, public figures, public pundits – who say corporations are very important, so they can't just act in the interests of their stockholders; they need to have a larger social purpose. This has been going on, as I say, for a very long time, but it's quite topical right now. Many people dismiss what's happening now as not important. I actually think it's going to be very important. So, I thought I should talk about that.

We should start by asking ourselves, who are these shareholders that we're supposed to run the company for?

Now, if I asked you to guess – and I will give you four numbers, and you can raise your hand – about how many shareholders do you think a public S&P 500 company has? Here are the four numbers: 100; 1,000; a million; and 100 million. How many people think 100? Nobody. How many people think a thousand? Okay. How many people think a million? And how many people think 100 million?

There are actually two answers to this. The first answer is, it's probably more than 100 million. I just heard the other day on TV – so, who knows if it's true – that 55% of the people in America have an interest in a stock plan. I actually believe it's true, because I've seen government data that says 52% of American households have a 401(k) plan in connection with their retirement planning. How many people here have a 401(k) plan? Yes, and how many of you have it invested in a stock fund, or part of it, at least? Okay.

Here we have these boards and management teams that are supposed to act in the best interests of about 100 million people. They don't really know what those 100 million people think, but that is one answer to the question, "How many stockholders are there?"

The other answer is probably closer to 100. That's because you all put your money in stock funds; it turns out that institutional investors manage or hold more than 80% of the stock in publicly held companies. If you look at any individual company, probably something like 50 of those institutions vote 80% of the stock in those companies. I'm just guessing at that number, but it's certainly not over 100 to get to 80%. If you want to tell me it's over 100, it's not over a thousand; it's a small number. The good news is they tend to be highly vocal about what they want.

Now, the largest of those is a company called BlackRock, and they control $7 trillion of invested funds. If you're on a board and you want to get elected – because one of the processes that the Delaware Code has in it is that you elect a board, usually every year – you're going to be voted on by maybe 50 people, and you want to know what those 50 people think. They are very important. You *could* say you've got 50 shareholders, not 100 million. That's a wide range.

How do we know what the stockholders really think? For the 100 million, we don't. For the 50 or 100, or maybe 200, stockholders who matter in any company, we do know. They tell the companies in two ways how well they think they're doing in representing the stockholders' interests. The two ways they do that is they buy and sell stock – they take actions – and the other way is, they're willing to write down, or talk to you about, what they think.

Now, here's the interesting part to me. More than half of that stock that's held in these institutions is held in what are called passive investment funds. When you put your money into a stock fund that says it will be invested in the S&P 500, it's going to be invested in the S&P 500, and that fund manager will not buy or sell the stock. He's got the S&P 500, or she has, and until the next time the S&P changes, that is what is in that stock fund. You get no signals from more than half of these stockholders from the way they behave and the things that they do. The other less than half, but still a large portion, actively trades the stock all the time.

> "...these institutional investors who tell us they love corporate social responsibility, 80% of the time, they vote against environmental interest groups that put shareholder proposals onto the ballot." – *Sarah O'Dowd*

Now, these institutions, as I say, will tell you what they think. Lately, what they've been telling everyone is they care a whole lot about corporate social responsibility. They think that the obligation and the duties of the companies are to something broader than just shareholder interests.

That's very interesting. That's what they say. What they do – the half of them that's actually trading – they're making very short-term decisions mostly based on how well your stock performs in your quarterly earnings call. They're very responsive to the quarter that's just passed, and your outlook, which usually covers maybe a quarter, maybe two quarters.

On the one hand, you have the same groups managing active funds and passive funds saying out of one side of their mouths, "We really care about corporate social responsibility," and then taking actions that say, "Yes, but not so much – we really are going to sell your stock today, because you had a bad quarter." It's a little unclear if what they say is what they mean.

Also, these institutional investors who tell us they love corporate social responsibility, 80% of the time, they vote against environmental interest groups that put shareholder proposals onto the ballot.

It's very difficult to know what your shareholders want you to do. It seems like half the time, they're telling you, "We want you to make money for us, and we mean every single quarter," and the other half of the time, they're telling you, "You need to build a long-term, sustainable business; you need to be interested in these other things."

This has been going on since the New Deal, so why do I think it's important now? Because it has changed in the last 10 years. Three or four years ago, there was a bill introduced in the United States Senate that if a company reaches a certain size, it should no longer be incorporated in Delaware; instead, it should be chartered federally, under laws and rules that Congress and administrative agencies would adopt, and it should have a broader set of duties, not just to the stockholders, but to workers, to the environment, to a bunch of different things.

Now, this bill went nowhere. However, it was introduced by a senator named Elizabeth Warren. Should she become president, it's very likely that at least some version of this will move forward in some fashion. That may happen even if she's not elected but there's a change in control of the Senate.

That would be a very dramatic legislative change.

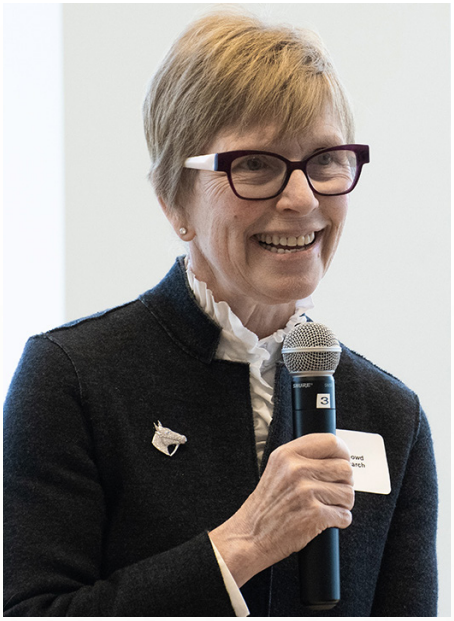
Beyond that, the Rock Center [for Corporate Governance] at Stanford – which is a consortium of the Business School and the Law School focused on corporate governance issues – did a survey of S&P 500 CEOs. They sampled 200 CEOs of S&P 500 companies. Eighty-nine percent of them said they think their duty is not just to the stockholders, but more broadly to society. You've got management teams thinking that's their duty; you've got Congress looking at this issue. Then this past summer, in August, a group called "The Business Roundtable" – which is a group of 200 CEOs of very prominent

corporations and financial institutions – came out with a little one-page document that's created a *lot* of activity for everybody to talk about. It's called "Statement of the Purpose of a Corporation." They specifically say, "Corporations are very important institutions of society, and they have responsibilities for their companies, their communities, and the country," which is pretty awesome for us little companies trying to do our jobs! But then they said, "The way you do that is you have to pay attention and have responsibility towards your customers, your employees, your suppliers, your community" – and they focused particularly there on the environment as a community issue – "and, finally, your shareholders." This has generated more heat than light, I suppose. All sorts of people are commenting on it including, for example, the Chief Justice of the Delaware Supreme Court, who wrote a *Law Review* article within the last couple of months that said, "We really mean it, the duty of corporations is to their shareholders. That's what we said; that's what we mean." He went on to say, "If you want them to do something else, deal with it by passing other laws. Companies have to comply with the labor laws; they have to comply with the environmental laws; they have to comply with the securities laws. You guys handle it. In Delaware, we're all about shareholders." That's his opinion.

We have the Counsel of Institutional Investors, which represents a lot of these institutional investors – they came out and said, "These are great things! We love them all! But shareholders first; everything else in the context of building shareholder value." That was their opinion.

Then we have people like law firms and others who jump in and say, "This is great – we need a new paradigm; we need to get moving so that corporations can actually help America to grow and do better."

A lot of people say this doesn't really matter, because if 89% of the CEOs out there are already saying, "I'm doing this stuff," it's



not going to make any difference. But I don't think that's what's going to happen. As the first step of why I really think that's not going to happen, last week, BlackRock's CEO sent a letter to the CEOs of publicly traded companies. He said, "We own more stock in your company than anybody else, and this is what we want. Our biggest, #1 issue is climate change. We expect every company in America to be focused on climate change."

At one level, every company in America *does* have environmental initiatives and different things going on, so, again, some people say, "No big deal."

But he went on to say, "Not only do you have to do this step, but you have to report on it if you want our votes. By the end of 2020, we want to see your regular financial statements, but we also want to see your reports under the SASB [Sustainable Accounting Standards Board] guidelines and the Task Force on Climate-Related Financial Disclosures [TCFD]." I don't know what's in that last one.

As a member of a management team, I fondly believe that you get what you measure. Now that everybody's going to start measuring this stuff, you're going to see more attention paid to it. I take no position here as this is good or bad; I'm just saying it's going to be a change.

Where do I see this changing, especially for the corporate lawyers in the group? Three things: One is, the board agenda. Most corporate legal departments are fairly responsible for the board agenda, together with the Chairman of the Board. Board agendas, if you go back 10 years, 15 years, what they tend to focus on is innovation and financial performance. How is the company really doing now, and how is it going to do in the future? A lot of time is invested in those issues.

Increasingly, in the last few years, there's been a much bigger focus from boards on paying attention to corporate culture. They're responsible for overseeing what the management team does.

Set apart these philosophical disputes, like "what's the purpose of a corporation," if you go back 20 years and you look at corporate America, it's been one series of crises after another. You can go back to financial crises with Enron; then we had options backdating scandals; more recently, there are cultural issues in terms of the #MeToo movement; there's gender pay equity issues. Are boards really in touch with the companies' culture? Everybody says they have a great culture. Boards are supposed to be overseeing this on behalf of their stockholders. I don't care whether they are the stockholders who want short-term returns or they are the stockholders who want sustainability, none of them want scandals, and none of them want problems like those.

Boards are spending more of their time on overseeing culture. Now, they should be spending more of their time on overseeing the companies' efforts on climate change issues.

To me, this is a big issue because, while all these new topics have come onto the boards' agenda, the basic time for boards to meet

has not really changed in a substantive sort of way. Maybe boards are having more meetings; maybe their meetings are getting longer; but this is a huge agenda. It's really incumbent on every board, and every corporate legal team that supports them, to figure out what are the important drivers of how we see value for our shareholders, and ask: are we spending our time on those things?

I would say that's a huge topic for all the corporate lawyers in this room.

The second thing is that, what the shareholders say in a short letter, or many of the bigger ones publish voting guidelines, is black-and-white and cut-and-dried. You can read them, and I encourage you to do that – if you know who your top 25 or 30 shareholders are, you should be reading their voting guidelines, and know what they think. Most of them will give you an opportunity to speak with them (maybe only every couple of years), and to speak with them in person. Even if you don't have that opportunity, you have a proxy statement, and, increasingly, companies have corporate social responsibility reports. You need to talk back to these shareholders. You need to use every opportunity you have – written or oral – to explain, in some cases, why you're doing what you think they want you to do, and "please note, we did all these things, this is all good, please give us credit for that!" Especially, if you can, speak with them where you differ from what they want you to do. I have found that, increasingly – they're called the proxy voting section of your institutional investors – these folks are very dug in on some issues, but very open-minded on others. They don't believe they have all the answers. If they think you should turn right and your board wants to turn left, if you don't explain to them why, that's a problem. If you take the time to talk with them, and you explain why, and you try to hear their reasons, you can very often get them at least to admit, "We're not going to change our basic view, but we understand in your case why you're doing it, and we're okay with that." That's really a critical conversation to have, if they will let you have it. If they won't let you have it, put it in your proxy statement.

> "As a member of a management team, I fondly believe that you get what you measure. Now that everybody's going to start measuring this stuff, you're going to see more attention paid to it."
> – *Sarah O'Dowd*

The thing we all need to be focused on really hard is our communication back to them – whether we're talking to 150 million people, or 50 people – we need to be talking to them and winning their confidence and explaining our position.

The third thing that I think corporate lawyers and boards need to focus on are board evaluations.

When we evaluate employees, we give them a set of objectives at the beginning of the year, and then we track whether they've met those objectives. Board evaluations haven't gotten to that level of discipline, and, increasingly, to make these other things work, they're going to have to. Boards are going to have to seriously decide, "What are the things we want to accomplish long-term, and what are the things we want to accomplish this year," and then evaluate themselves as to whether they're actually making progress towards those things – whether they have the right people on the board who *can* make progress towards those objectives, and how are they thinking long-term about their board as the needs of the company change.

If I have three takeaways for all the corporate lawyers in the room, I would say, focus on your board agenda, particularly how the board is spending its time – and, by the way, this would apply to the management team, too; focus on your communications – you can't over-explain when you're talking, whether it's 50 or 150 million people, because just a simple sentence will not convey what you're thinking; and the third thing is look at those board evaluations and see how good they really are. By the way, you *will* be asked, when you talk to institutional investors, what does your nominating and governance committee really do? What do they do with their board evaluations? How do they conduct those board evaluations? How does that fit into what they expect to see as changes in the board? What can they look to see going forward?

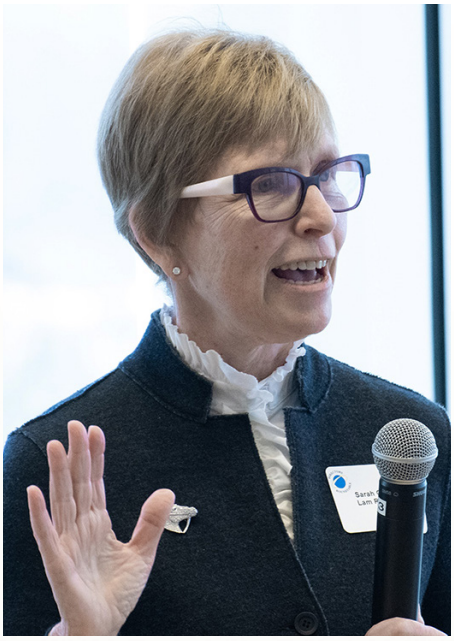
Thank you for your attention! [APPLAUSE]

KAREN TODD: Can you tell us about some of the areas that Lam Research is working on with respect to ESG [environmental, social and governance]?

SARAH O'DOWD: I would love to do that! [LAUGHTER]

We have a Corporate Social Responsibility Report that actually lays all that out. *Newsweek* recently did a survey of 1,000 or 2,000 public companies, and we came in 11th! We were very pleased to see that, although internally, we gave a lot of jazz to the Corporate Communications Team about not making the top 10. [LAUGHTER]

Some people here from Lam will help me out with this if I get it wrong – we have four pillars that we're looking at. One is community, and another is environmental, another is employees, and the fourth is slipping my mind right now, but we are very engaged with STEM [science, technology, engineering and mathematics] education efforts. We are very engaged with inclusion and diversity programs. For people who don't really know much about Lam, we're a very high-technical company; we're in the semiconductor industry. The people we hire, typically, to carry on our innovative activities, are Ph.D. engineers



or whatever degrees those guys get. Chemists. There are not a lot of women in these fields; there's not necessarily a lot of some ethnic groups who are getting these degrees out of major universities. We have efforts to improve our inclusion and diversity. At the same time, those things are hard for us, we are a very global business. Most of our customers are in Asia, and half of our employees are in Asia. From an inclusion point of view, every day, we are dealing with how we include all of these different cultures. How do you hold a meeting when some people from one culture are reluctant to speak, and from another culture, are very anxious to speak? How do you even hold meetings when you're in different time zones from Europe to the United States to Asia and be sure that you're hearing all the voices that are out there to be included. Inclusion and diversity are big initiatives.

On the environmental front, we've already met the goals that we had set five years ago, and we're now in the process of establishing our next five-year goals. I noticed that Microsoft came out and they've picked a goal that is for 2050, which is cheating – ours will probably be a little nearer-term, so that we'll be able to measure and see if we're getting there – but it's good. They are going to be carbon-negative by 2050, and I'm sure nobody at Microsoft is terribly concerned about their being around to see if they get there! [LAUGHTER]

KAREN TODD: Thank you! As the head of Legal for a tech company, do you see more job applicants for the Legal Department that have an engineering background?

SARAH O'DOWD: We have quite a few people who have engineering backgrounds. Some of them are in our IP group; one of them is Jinping here, working on corporate governance. So, yes, we do. Engineering is a great background for any in-house position in a tech company. It just makes it easier. You have to understand the business, and having that background is helpful, but it's not the only way to get familiar with the company's business and get to understand it. But, yes, there's a great deal of interest.

KAREN TODD: Okay, we're going to move on to our first panel, which, this morning, is "How Tech Boards Should Handle Securities Compliance, Corporate Governance and M&A." Our panelists are Ryan Murr with Gibson Dunn & Crutcher; Tim Hoxie from Jones Day; and Michael Charlson of Vinson & Elkins.

We're going to start with this question, "How does a board manage risk in a world of instant decision-making?" Any of you are welcome to answer that.

TIMOTHY HOXIE: Particularly after Sarah, that is a really tough act to follow. This is a Heller Ehrman reunion panel, so this is a very significant thing for all of us. [LAUGHTER]

RYAN MURR: In the Heller Ehrman space.

TIMOTHY HOXIE: We are in the old Heller Ehrman space, with other Heller Ehrman alumni out there. If you see us faltering, just come up.

KAREN TODD: How many people are here that were at Heller Ehrman? (More than a dozen hands went up.) Wow!

TIMOTHY HOXIE: There are a lot. I know I speak for all of them when I say that anything quasi-intelligent that Ryan or I or Michael say, we owe to Sarah, who trained us all. Anything we say that is breathtakingly stupid, we clearly weren't listening to her! [LAUGHTER]

With that, we can jump in and maybe take a swipe at the first question. At least from my perspective, if you think about corporate law, and one of the things – going back to Smith and Van Gorkom [*Smith v. Van Gorkom*], which I seem to remember from law school – take time to think. I juxtapose that with, "We've got to get this out in an hour, or someone's going to tweet about it."

How do you reconcile these two things? It seems like it puts you in an impossible situation, and in many ways, it does. The only thing that at some level you can do is anticipate, plan and prepare. That's one of the things I think all of us in the legal world, in-house and out-house, at some point, help. Out-house. [LAUGHTER]

RYAN MURR: It's interesting.

TIMOTHY HOXIE: Outside! [LAUGHTER]

Yes, I guess, what can I say? Alright! First stupid one – there you go! [LAUGHTER]

But, inside and outside, we're all thinking about the same things. How to plan, how to structure processes, what to think about when the crisis comes, who is on the team, who do we call? It all benefits from a sense of what our values are, so that when you're rushing out the press release, you're thinking about, "What are we trying to say?" It's not completely reactive; it's more to reflect what you have thought about your situation and message.

I was just last week with a CEO, and we were talking about this. We were talking about their thinking about what to do in a crisis if their company were hauled up in

front of Congress or whatever, and she was saying that they've been working for several years on the kinds of things Sarah talked about with the "pillars." What are the core competencies of our company? What is it that we value? How will that be communicated when and if you're in a crisis mode? How will we emphasize the things that are important to us, and how will that be received? Does that get you all the way? Maybe not. But it's trying to think about things from both a planning perspective of what we think is important, and then a messaging perspective about how we're going to talk about it, when and if we ever have to. I thought that was a good perspective on one of the ways in which to deal with this crisis culture in which we seem to find ourselves.

RYAN MURR: That's right, and the key is that when the crisis hits, we don't want that to be the first time that you've thought about that issue or that problem – that, at a minimum, it should fit into a framework of how you think about issues generally. That goes back to Sarah's three points at the end around board agenda and communications plan, risk planning and risk management, the whole ERM [enterprise risk management] structure, which should be part of what the board and the committees are talking about. Whether that's through a "heat map" or whatever, coming up with some sort of mechanism to identify and think about what the risks are. Then on a communications plan, thinking about how you will talk about those things, both now, prospectively, and in response to something actually happening.

I do think that having a perspective on key issues – before these issues become critical – is an important part of what you're getting at.

MICHAEL CHARLSON: From my perspective – I'm a litigator, not a corporate lawyer – and so my perspective is informed by what people get sued for. Getting sued when a crisis hits is going to happen; you may as well deal with it. The question is, how are you going to respond to the lawsuit? From my perspective, the best response to most kinds of breach of fiduciary duty or even shareholder lawsuits under Section 10(b) (of the Securities Exchange Act of 1934) or other securities laws is to be able to demonstrate that the board and management have considered the issues that came up, in a proactive way, in an engaged way, and in a way that reflected an understanding of the business and of the risk profile that the business has.

Then I'm big on process. Process is sometimes denigrated because people think it's just a check-the-box exercise that is used to try to make people happy. There is an aspect of that to it, but from a litigator's perspective, it's much more. Indeed, I would say that process exists because it actually does enhance better decision-making; it does in my view, anyway. What you want to do is to be able to point to a record, presumably reflected in the board minutes, or the board packages or other materials of the board thinking about the issue, long before it actually hit, and of developing contingency plans and thinking about how to put in place initiatives that try to mitigate the risks. You can't eliminate all risks, obviously, but you can mitigate risk – and have a plan in place to respond when risks resolve negatively. That's the kind of record I like to go into a litigation with.

There are some circumstances – for example, in an M&A context – where you're going to get sued. Because obviously every company is going to sell itself too cheaply, or omit the most important details of the transaction from its proxy statement, right? So, you're going to get sued. The question is, how are you going to respond to that lawsuit, and are there things that are out there that are going to make the lawsuit more difficult or less difficult to respond to?

These process points are, to me, very critical. Tim and Sarah and Ryan all mentioned understanding the business. It seems almost trite to say that, but if you understand your business, and you're putting together meaningful risk disclosures in your 10-Q and your 10-K filings, you can identify areas that ought to be the focus of these kinds of proactive thinking. You can deal with them.

For example, if you are a healthcare provider, it doesn't take a rocket scientist to understand that you're sitting on a lot of personal information that, if it's hacked, is going to cause a big problem for the company. Are you going to wait until you're hacked to have in place a contingency plan, a communications plan, a reporting plan to appropriate government authorities? I would say if you're a well-managed company, you've got that nailed. It's not unusual for companies to be able to look at their situation and assess: what are the serious risks that we can foresee? You can look at competitors, see what they've encountered – whether it's missing a quarter or having their computer systems hacked, having a product that starts mysteriously killing people – whatever it might be – and you can plan ahead.

TIM HOXIE: You're absolutely right. In fact, just out of curiosity, how many people are in or represent organizations that have been hacked? (Many hands go up) [LAUGHTER]

That's my point! It is that Michael is correct. Having been through several of those scenarios for clients, preparation makes all the difference. First of all, they always hack you going into a long weekend or something like that. They always shut down your systems in some remote part of the world where you're not even sure you can call when everything's working, let alone when it's not. You have to figure out how have we been affected, what is affected, including internal controls, all of these kinds of things – and you need

to determine who needs to be involved, as Sarah said, in decision-making? Is somebody talking to the audit committee, for example, if you've been hacked? Do you have outside consultants lined up? Do you have a Cylance [cybersecurity software company] or somebody who will come in and help you get to the bottom of what happened? Not only to fix it, but what does it mean about your systems generally if this could happen today, can it happen tomorrow?

> "It's really incumbent on every board, and every corporate legal team that supports them, to figure out what are the important drivers of how we see value for our shareholders, and ask: are we spending our time on those things?"
>
> – *Sarah O'Dowd*

SARAH O'DOWD: Actually, the more interesting question about hacking is: What are your suppliers doing – are they getting hacked? For all the in-house lawyers in here, you can ask your law firms how they take care of your data.

TIM HOXIE: Which you do! [LAUGHTER]

Thankfully, I had somebody who could tell you! [LAUGHTER]

MICHAEL CHARLSON: Again, the word is "carefully." [LAUGHTER]

RYAN MURR: I wanted to follow up on something that you said, Mike, about process and the documentation, regarding recording the minutes, which ultimately reflect the deliberative process that you went through. That record serves as your safe harbor, which is to say the documentation of the good, rigorous process that you went through.

Sometimes there's a temptation to not put bad facts in the minutes – to not acknowledge the fact that the board considered downsides and possible bad outcomes. That's a mistake. I think that you need to document the fact that the board did acknowledge that these risks existed, and did acknowledge that notwithstanding these risks, the path chosen was the right thing to do.

Of course, minute-keeping practices have evolved, over the past 10 or 20 years, from the old days of, "A discussion ensued." [LAUGHTER]

That's now sufficiently behind us, and so there is a sweet spot in terms of putting enough detail in the minutes to actually have substance and content and context in the event that there is a subsequent challenge to the action that you took in order to be able to demonstrate that you did satisfy your duty of care. Delaware case law has evolved to where there is now an expectation around that level of documentation.

TIM HOXIE: I agree with that, because I think you get credit or leeway – that's how you get slack if, in hindsight, you're wrong.

RYAN MURR: Sure.

TIM HOXIE: You get less slack if the plaintiff can show you didn't think about it at all. Then they can say, "Where's the judgment?"

MICHAEL CHARLSON: That's right.

TIM HOXIE: Documenting the thought process showing that you considered as many things as possible is a good approach.

RYAN MURR: Another point that I just wanted to touch on, Mike, that you'd mentioned about risks and risk factors and so on, is making sure that you are being specific in those, and not talking just in abstract terms. There was a recent SEC enforcement action against Mylan Pharmaceuticals where it had language in its risk factors that said something to the effect of: "There is a pending False Claims Act claim and the government *may* disagree with us." Well, it's not that the government *may* disagree – they *did* disagree! [LAUGHTER]

That had already happened! And yet Mylan kept talking about the issue in the context of what might happen, and when it turned out that they got hit with a large fine from the government, the SEC piled on top. I think it was $30 million fine on top of the False Claims Act action, because the disclosures weren't completely accurate when made. The risk of the disagreement wasn't in the abstract and these weren't theoretical risks – they were real. So, when you're considering risk factor disclosures, make sure that you're going back and really being thoughtful about how complete your risk factor disclosure is. It's something that's really critical.

MICHAEL CHARLSON: It's critical for more than that. This SEC action was, frankly, a little bit startling for many of us in the business, because the SEC, while giving a lot of lip service to risk disclosures in the past, hasn't actually come down on companies very often for failing to disclose them. But where it does come in is when your stock price takes a dive for some reason, and the plaintiffs tell you that you're not entitled to the benefits, to the extent any exist, of the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act [PSLRA]. One of the antecedents to that safe harbor actually applying, you have to have made meaningful disclosure of the risks that your company is facing. There are times when you can cross-reference the 10-K, and you don't have to have every single risk and every single press release, etc., but if you look at the enforcement of the PSLRA safe harbor, and you didn't happen to catch the risk that resolved the wrong way, a lot of courts have been unwilling to allow the safe harbor to be implemented, because those risk disclosures were incomplete or not meaningful. There wasn't meaningful cautionary language. Even if the safe harbor doesn't apply, you have older doctrines, like the Bespeaks Caution Doctrine, which have the same kind of antecedents. Another

favorite of the plaintiffs' Bar is to allege that, "Yes, you disclosed that there was a risk to your business because of climate change, but you didn't disclose the fact that your primary facility was five-and-a-half inches above the mean high tide line, and that you've been inundated for each of the last six years. So, it's not sufficiently meaningful."

These are tough things, but, again, when you're going to try to defend these cases, the better a record of deliberation and having considered them, the easier is it to defeat, for example, the scienter element of a 10(b) action – did you *intend* to mislead people or not – or the prongs of the fiduciaries duties under Delaware law. Specifically, there is the duty of care, which would mean that you need to have fully informed yourself and acted in good faith, among other things. Those prongs are critically important.

TIM HOXIE: Right. It seems like there's two themes in these risk factors disclosures. One is understanding what is unique or particular to your company, so you are accurately stating the risk – you're not just generically throwing out something. The other is understanding the distinction between a risk and a fact or reality. [LAUGHTER]

A lot of people will put something in risk factors and no one will get upset, but it's really a thing that has already happened – it's a contingency that's already out there. It's a loss contingency that maybe we should be discussing in a footnote to financials, instead of (or in addition to) risk factors. There are different places to put things, and they have different significances.

One of the things that always bothers me about risk factors, in listening to all of us talk, including me, is, "Put it in so you'll get the benefit of the protection." But where is that really leading us? It's leading us, in some ways, to forty pages of risk factors, and I would submit that that's not helpful. [LAUGHTER]

MICHAEL CHARLSON: And I would submit it is! [LAUGHTER]

TIM HOXIE: And I agree with you, from the litigation perspective. My thinking on this is longer-term.

MICHAEL CHARLSON: What are the risk factors? [LAUGHTER]

TIM HOXIE: How about communication? Telling your shareholders so they can actually find it! [LAUGHTER]

SARAH O'DOWD: I don't think the shareholders – now, I don't know whether it's the 150 million, I'm pretty sure they're not reading the risk factors – but even the hundred are expecting the other parts of the document to give them more information. [LAUGHTER]

TIM HOXIE: There was a company, this was about 20 years ago, it had a whole bunch of Z's in the name.

RYAN MURR: Zbast [a video gaming name]. [LAUGHTER]

TIM HOXIE: Yes, *The Wall Street Journal*, or maybe it was "Heard on the Street" or another column picked it up and said, "Clearly, no one reads these risk factors, because somewhere it said, 'We have no idea what we're doing; we shouldn't be going public.'" [LAUGHTER]

If you're reading this stuff, then why would you buy their stock? [LAUGHTER]

RYAN MURR: Well, I do have quite a few clients who will get calls from institutional investors as they run redlines of the risk factors. When you put in that new sentence, or modify that clause, it may not be perfectly clear what you're getting at – it may be a little bit opaque, and I've absolutely had clients receive phone calls from investors saying, "I saw the change on page 42 in the middle of that sentence, what does that mean? Can you give me any more insight into what that risk is?"

MICHAEL CHARLSON: Yes.

RYAN MURR: People do read them.

MICHAEL CHARLSON: Absolutely – that's good.

RYAN MURR: They're in a windowless room somewhere in New York, but they do read them. [LAUGHTER]

MICHAEL CHARLSON: Well, because of the fact that we have pages of an outline that we're supposed to try to address here, I wanted to just suggest a couple of things that follow on actually to some points that Sarah made, and that are germane to the issue of thinking ahead and trying to do some planning. One of them has to do with board composition and board evaluation.

Sarah mentioned board evals as a critical factor. I'm a big believer in these evaluations, although I've always been perplexed by companies that have their board evaluated by non-lawyers. Not because lawyers have a particularly specialized instinct or a bit of wisdom to bring to the process – though some of us do have some relevant experience – but because there's often information in there that you might want to have within the attorney-client privilege. You can get more candid information that way. A number of law firms that represent companies – public companies in particular – do board evaluations.

One of the things that I haven't seen as much of is nominating, nomination and governance committees actually thinking proactively about who might be a good director three, four, five years down the road. It is often the case – and this is maybe more in the context of activist demands – that companies are more or less forced to make changes to the board. From having litigated a few of these things, it would be a nice idea if instead of having to accept the activist's nominees for two of your board spots, that you actually say, "We've done a pretty serious evaluation of the range of expertise and skills that we think would enhance our board, and we've actually been trying to identify people, and we have the following six individuals who have no affiliation with the company, who we think would merit consideration, as well." That can factor into a negotiation to try to get an activist off your back. More than that, it can actually lead to smoother board transitions. It does force you to continue to update your thinking about what expertise would help round out your board a bit better – what kinds of characteristics would be good for you to have in a new director.

That's one thing that can assist in a number of areas, is actually trying to think ahead. Ryan and Tim are in the boardroom much more often than I, but that would be a beneficial thing for boards to be doing on a regular basis.

RYAN MURR: Yes, I actually do see boards having a skills inventory, where they identify core competencies that need to be represented in the boardroom. They will have an assessment of how well that is currently covered. If there are holes there, then there will either be a search that's initiated or an expectation that the next person who they bring on would help fill that. It is something – and at least on an annual basis, if the Nominating and Governance Committee is doing its work leading up to the nomination or the re-nomination of the directors who are up for election that year – normally, that skills inventory would be assessed in connection with that process.

TIM HOXIE: That's right, that's consistent.

SARAH O'DOWD: Yes, most companies are doing that now, with a skills inventory. A question we get asked a lot by stockholders is, "Are you really using it? How is that used in the process?" And they're anxious to hear, "What does your board do with that? How often does it look at it? How often does it change it?" You need to be able to address those questions.

You will also be asked, "Do you have a roadmap for your board?" "Looking ahead to some period of time – four years, six years, whatever – what skills are you looking to bring on later? How are you feeling about your committee chairmanships? How long do you keep people in those roles? Are you building a bench, if you will, to take on those responsibilities?" They will ask you all those questions.

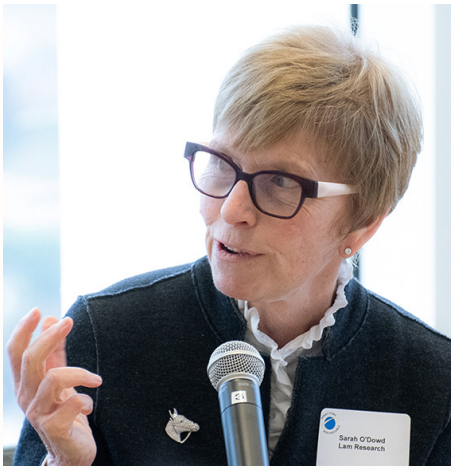
What is interesting is there are a lot of skills and experience matrices, and they're unique to companies, but they have a lot of overlaps. Companies publish them. But there seems to be a trend going that skills and experiences are great, but what's turning out to be really good in the boardroom are things like judgment. And you can have all those skills.

TIM HOXIE: And you do! [LAUGHTER]

SARAH O'DOWD: I would just throw out that one example is Royal Bank of Canada. If you go to their website, they're starting to think about "How do we assess our directors on these softer skills and make that part of the board evaluation? We might have all the right skills and experiences covered, but are we getting the different thoughts we need to really reach good judgments?"

It's much harder, and it's certainly harder to identify candidates on that basis, but it is what makes the board work well. An honest board evaluation on these issues is really a critical thing.

TIM HOXIE: Yes, I would think that that's hard enough to evaluate when you're



doing a board evaluation, as opposed to trying to bring somebody in and figure out what you are looking for.

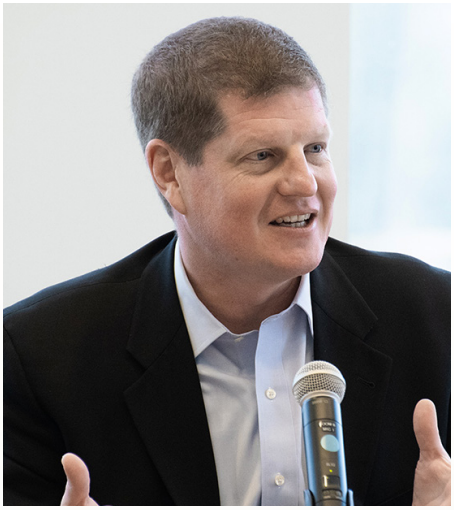
SARAH O'DOWD: Right.

TIM HOXIE: Are there particular areas, Ryan, that you think present risks that boards should be aware of or be figuring out how to address?

RYAN MURR: Sarah touched on a number of things. Climate change is a big one, in terms of how you address the increased focus and mandate on that from investors. Another piece is the political climate, and that has to do also, Sarah, with what you're talking about of a shift in terms of the expectations of who is the ultimate beneficiary of the efforts and duties of the board. On that, we wanted to touch on the Business Roundtable statement.

MICHAEL CHARLSON: That's obviously what you were telegraphing, because that's one of the good things. [LAUGHTER]

RYAN MURR: On that point, I'll just say that to the extent that a board concludes that it wants to or it needs to address the needs of a broader group of stakeholders – whether that's customers, employees, suppliers, communities – I'll save shareholders for last, because that goes without saying – from the fiduciary perspective, in terms of being an advisor and being mindful of what



continues to be the view out of Delaware. That's fine, and you can do that, but it needs to be channeled through the ultimate lens or conclusion of, "And, this is best for shareholders."

For example, if you want to make sure that you are focused on the community, or you're focused on your suppliers, that's fine, because that conclusion may be consistent with your duty of care, we are paying attention to that and we are changing our behavior because we think that ultimately inures to the benefit of the shareholders in the long-term. There is this tension between long-term planning and viability and value creation, and the short-termism of the quarterly results, and that's been spoken about and written about extensively. It is completely consistent with the board's fiduciary duties, if they conclude, in the exercise of their due care, that paying attention to these constituencies and trying to make sure that those are being attended to is consistent with building and preserving long-term shareholder value. But that needs to be the lens through which that decision is made.

TIM HOXIE: I think that's right. Michael, would you agree with that?

MICHAEL CHARLSON: I completely agree with that. I don't necessarily see there being an inconsistency between focus on stockholder value and focusing on the community or on employees. That doesn't mean that any one of these trumps; it just means that all these constituencies are appropriate. The ALI [American Law Institute], in their Principles of Corporate Governance documents that go back to the '90s, has acknowledged that the concerns of community, of employees, of customers, are legitimate and indeed important areas for a board to consider as part of its discharge of its fiduciary obligations, because they have an impact on stockholder value, at least in the long-term, if not in the short-term.

It's a little bit difficult for me – I've never quite understood how it could be otherwise. In terms of particular areas where risk management focus is important. I've been doing this for a long time, 34 years this year.

TIM HOXIE: One month more than me! [LAUGHTER]

MICHAEL CHARLSON: Yes. One thing that continues to confound me, perhaps because of my age, is cyber security risk, data security risk, but more generally, the integrity of computer systems and their ability to do what they're supposed to do. That's an area that people have talked about for quite a while, and it's a routine part of your annual audit. Any time there's a system changeover, you're going to have one of the Big Four accounting firms come in and do this massive audit to make sure that when the computer says 1+1=2, it actually is true, that 1+1=2. But the complexity of systems is such, and the ability to infiltrate these systems is such that I just don't know how any company doesn't have its board focused on that particular issue on a regular basis.

Reputational interests are another one. There are many companies in the last couple of decades that have faced the prospect of reputational injury – because a lot of corporate defalcation has an immediate reputational risk. It causes failures of companies. They simply can't do their business. Again, this is another illustration of why attention to these other constituencies and areas of focus, "other" meaning: community, employees, business ethics, corporate environment and the culture of the institution – directly affect, or indirectly affect, shareholder value.

TIM HOXIE: That's right. If you look at case law going back a hundred years, into the early cases on charitable giving, the courts have recognized exactly the broader view of what goes to shareholder value.

What is interesting, though, is there are still going to be areas where, in the real world, there's going to be tension at best. Just think about Revlon duty [an affirmative legal obligation to conduct a fair auction for the company and to sell it to the highest bidder], for example. Is that going to change when somebody walks into the boardroom and says, "We can't sell to the person with the best price reasonably available, because they're going to lay off X number of people."

That just puts it in a very stark way that when you get to that point, you are still looking at the more traditional Delaware analysis.

RYAN MURR: That's right.

TIM HOXIE: Now, to get there, you have to have gone through an M&A process. You've probably thought about those issues at an earlier stage. Where are we going as a company, why are we thinking of selling, what are the other options? In most discussions, all of the broad considerations are relevant.

RYAN MURR: If you already have a signed deal at $50 a share, and you're happy with that, and someone comes in with a topping bid at $55, and you know that you're going to have these adverse consequences to other constituencies, how do you conclude, in a manner consistent with your fiduciary duties, that you turn down the offer of $55, the topping bid?

TIM HOXIE: I think it's pretty difficult!

SARAH O'DOWD: This is an interesting area. And you are right, and that's why I think boards and management teams need

to start thinking about this. If the rules of the road change, and what we're hearing from our shareholders is they want something other than pure financial return, what does that mean? You can please some of the people all of the time and all of the people some of the time? When you've got five groups you're looking after instead of one, there will be conflicts. It's naïve to think there won't. Right now, Delaware law tells you shareholders are first. But that can change, and if there is a federal statute on this, that's not what it's going to say. It's just an interesting world right now. Everybody wants to do the right thing, and that's easy on the day-to-day stuff; but there are going to be pain points. It's going to be very interesting to see how our shareholders, whoever they really are, are going to react, if we say, "We heard what you said; we're focused on climate change; we're not going to sell to this company to who's going to give us the best price, because they're not going to focus on climate change. We're going to turn down that bid and take another bid for less money." Then we'll find out what BlackRock really thinks! [LAUGHTER]

TIM HOXIE: That is it exactly.

MICHAEL CHARLSON: That, of course, assumes that $55 is the only change to the deal, and, in my experience, that topping bid is often not just, "We'll give you five bucks more a share." It's got all kinds of other terms and conditions associated with it, including the fact that, "We don't actually *have* $55 a share to give you!" [LAUGHTER]

"We've got to go out and float bonds that may or may not be accepted by the markets," while the other deal's all cash and it's all cash tomorrow. There are a lot of variations.

TIM HOXIE: You're fighting the hypothetical. [LAUGHTER]

Just saying there's going to be a way out of Sarah's dilemma many times doesn't make it true all of the time.

RYAN MURR: That wasn't the question I asked, Mike. [LAUGHTER]

TIM HOXIE: It won't always be true.

MICHAEL CHARLSON: No, I recognize that.

RYAN MURR: He must be a litigator.

MICHAEL CHARLSON: You've got a signed deal at $50, and here's a topper.

TIM HOXIE: Darth Vader offers you $60. [LAUGHTER]

That's the hypothetical. [LAUGHTER] And he's got the black hat on. [LAUGHTER]

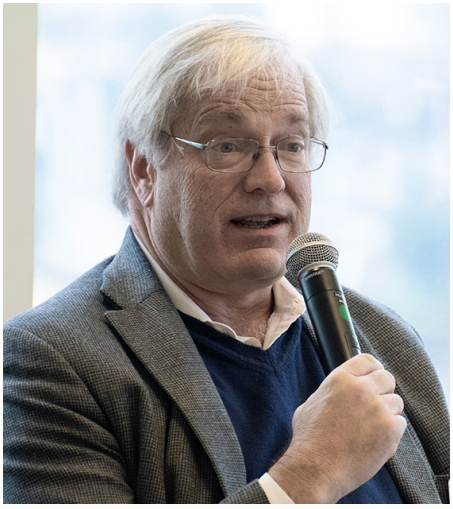
MICHAEL CHARLSON: You know what your break-up fee's going to be. Yes, Delaware law is pretty clear – you're going down in flames in the litigation if you say no to the $60.

TIM HOXIE: It always makes me feel good that the litigator and I are not completely divorced on this.

MICHAEL CHARLSON: And I'm saying it's not quite as simple as that in most cases.

RYAN MURR: And that's a duty of loyalty issue in that context. That's not a duty of care claim that can be dealt with through exculpation in the charter; that is a duty of loyalty claim in that context.

MICHAEL CHARLSON: It can be. It depends on what the totality of the circumstances are. What are the advantages to the CEO in terms of side agreements, for example, in the $50 offer? Those don't seem to exist in the $60 offer. Now, are there conflicts? Sure. There are all these different kinds of permutations that can influence the way the situation is considered. A lot of those can be cured by disclosure, especially if the stockholders have a say, which would normally be the case if you're being bought out. Delaware law continues to say that if



the stockholders approve, this cleanses many sins. [LAUGHTER]

TIM HOXIE: If it is disclosed, and the only thing we hold back in the proxy are the few things that you will need to settle the case.

MICHAEL CHARLSON: Yes. [LAUGHTER]

There's still a spate of lawsuits over M&A deals about why the disclosures in the proxy statement are incomplete. I remember having this discussion with Dan Teitelbaum, actually, one of our former partners who suggested we might reserve a couple of disclosure items just so we could settle the case, like the contingent portion of the banker's fee. The courts have been pretty clear that that's material, if we hold it back, then we can just offer that up. [LAUGHTER]

I don't recommend that approach. It was an interesting musing.

RYAN MURR: The other problem with that, of course, is that Delaware is now no longer being supportive of disclosure-only settlements.

TIM HOXIE: That's right.

MICHAEL CHARLSON: Nowadays, they've become quite jaded about these lawsuits generally. That's why what you need

to be doing as a board, if you're looking at a deal is to ask: Are there other things about this deal that are likely to trigger some duty of loyalty more than a duty of care kind of claim? Wide differential compensation to senior executives who are going to stick around or not stick around; different classes of shareholders being treated differently; controlling shareholders running the show without the protections of a special committee; or no majority or the minority vote; things of this nature. It's a deal that comes together in the context of a shareholder activist breathing down your back, those are always fun.

But if you've got these other kinds of situations that go beyond, "you only disclose three different evaluation scenarios that the bankers went through, although there have to be two others, why aren't they in the disclosure?" – those are still being filed, but they're not nearly as useful or interesting.

TIM HOXIE: There are M&A contracts or corporate restructurings, things like that. This is another one of these areas where the emphasis in the law is moving more and more to advance planning, thinking ahead, getting your special committee involved early on, when it really has the ability to affect what happens. The old notion that we'll just have a special committee at the end to check what we did, and then maybe get a majority of a minority vote, is not going to fly any more under Delaware law. You've got to get people involved really early. That's great to say; your litigators will tell you that. Then Ryan and I have to figure out when that really happens. Sarah, when does that really happen? Do we have a special committee do everything when we're thinking about strategic planning? Clearly not. At some point, you have to be sensitive to the fact that conflicts are emerging, or that a controlling shareholder won't be involved in this in the same way that everybody else is; now we'd better get somebody involved today to look out for shareholder interests. Where that line pops up is not clear. The pressure is to do it earlier, now, than we would have even five years ago.

MICHAEL CHARLSON: That's where process and documentation are so critical, because it doesn't matter if you decide on January 23rd that the possibility of conflicts is such that we need to bring a special committee in place. You can be quite assured that the plaintiffs will come up with some reason why it should have been on January 13th or December 15th or last September. The point is that the board minutes should reflect the fact that there's been an overture and that depending on the structure of the deal, the board can see that there may be a need for a special committee. But the board, having considered the situation, doesn't think the need exists. Those kinds of things are hugely helpful down the road, and then when you do act, explain what has changed, to make the conflict potential is more real. Those are very simple things to say in the abstract. One of the things that I like about the M&A context or the activist context is that you know that litigation is likely. I urge engagement of a litigator on your deal team early for this reason. I've no self-interest in saying that. [LAUGHTER]

Especially because my shop is an all-litigation shop in San Francisco, and I don't have any corporate people who are on the team, anyway. [LAUGHTER]

I welcome a call. [LAUGHTER]

In any event, having a litigator on the team to help with creation of your record reflecting actual board process is important, because you're creating a record in real time, and there's an opportunity to obviously make that record helpful, within the bounds of truth. Of course, you're not going to make it up out of whole cloth. [LAUGHTER]

TIM HOXIE: You're shaping the facts, which is what I always tell people is the difference between corporate lawyers and litigators. With litigators, you usually have to take the facts as-is. For corporate lawyers the law is nice, but we're making the facts – that's what we're doing. [LAUGHTER]

We're actually trying to help shape the process. That's vitally important. Getting that process shaped early on is critical, because it is one of the biggest things that have changed in the 35 years that I've been doing this.

MICHAEL CHARLSON: It's only 34.

TIM HOXIE: Thirty-four; I'm sorry! [LAUGHTER]

Take off one year for clerking. Now you can assert with certainty that you're going to get sued. I remember when, Sarah, we were doing deals in the '80s, I would have gotten sick to my stomach if we'd been sued in a deal that didn't involve an interested party. The first thing that would come to my mind was, "I must have screwed up somehow. How did this happen?" But now, of course, it's just routine. [LAUGHTER]

MICHAEL CHARLSON: I can't imagine it.

TIM HOXIE: There you go. [LAUGHTER]

It is a completely different world. Again, coming all the way back to the very first thing that you talked about: planning, thinking ahead as best you can, and trying in some way to create that space for deliberation and judgment, that the modern world increasingly tries to take away from you at every turn, is really the key thing to try to pull off. It is never easy.

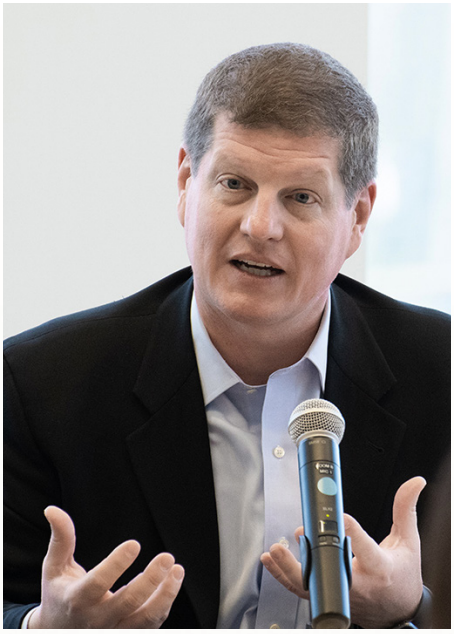
MICHAEL CHARLSON: I also urge buying a really good D&O [directors and officers] insurance policy and having it reviewed in advance by counsel. Because you can get good D&O terms and conditions, and these are – even though the pricing these days is ridiculous – Ts&Cs [terms and conditions] remain fairly negotiable, and a little tweak here and there can mean a great deal in terms of help if the worst occurs.

KAREN TODD: Before we wrap up this panel, I was hoping you could comment a little bit on some of the innovations in M&A.

TIM HOXIE: There are a lot of things that have happened in M&A. We just talked about the presence of litigation. I've had discussions in the last decade with people, "Yes, we have to plan that we're going to be sued." That is a change at least in the time that I have practiced. We all knew we were going to get sued if we were doing a 13e3 transaction, that was a given, but not in the run-of-the-mill deal.

The other thing that, at least in recent years, is changing the face of M&A in deals involving acquisitions of private companies – is the growth of rep & warranty insurance. Here is something that all of us corporate lawyers grew up fighting about, reps and warranties, and where are we going to put the word "material" and where are we going to put "material adverse effect" [MAE], and what kind of indemnity provision are we going to have, and how much exposure, and are we going to scrape the materiality out of representations for purposes of our indemnification provisions? That was 75% of the effort. Even though, in a rational world, you would spend all that time on price and covenants.

Now you've got insurance that's increasingly available and being used. It changes the process. First of all, many times it can help a process. You can get insurance that takes some of the wrangling about exposure off the table – for a price, because



all insurance has a price – but it will take some issues off the table. It will change the negotiation of other issues. At least in my experience, it tends to lead to cleaner representations, because if the primary way of recovering on reps is, "After the deductible, we're going to go to insurance," maybe I don't spend my last breath fighting about materiality or "MAE" on this particular rep. Maybe I give the buyer what he or she is looking for. I've noticed that that dynamic definitely is changing.

We're seeing this in areas where you represent sellers. I do some private equity work and represent private equity sellers from time to time, and they all want to be done. They say, "I want a public-style deal. I keep my money, I distribute it to my fund. Nobody can call me again and say I have to cough up." Rep & warranty insurance is helping that, because before rep & warranty insurance, that was a huge fight. How much are you going to hold back? The biggest private equity funds could get away with very little, but now, in a sense, it can be win-win. You can have buyers who have coverage, and you can have sellers who get the certainty of keeping most of their consideration. You've got to have some sharing of the deductible risk. I love rep & warranty insurance, because it brings you back to first principles of why are we doing reps and diligence and things like that. Everything that I've said to this point talks about liability and recourse. Fundamentally, we're doing diligence and getting representations not to get claims but because we actually like to learn what we're buying, and we would actually like to not have a problem. What a surprise! I do think it's important, even in this insurance world, to keep enough skin in the game on the part of sellers – and the tool is the deductible – to have real disclosure. That's hard, because the sellers fight you on the size of that and the amount of that, and depending on how competitive the situation is, you may or may not get a lot, but it's still important to discipline a process that is supposed to lead to elucidation and understanding of what you're getting, not claims after the fact.

RYAN MURR: One reason why it should matter to all of you is on competitive sell-side deals, where they're running a process. The sellers may say in the bid process letter, "We assume that the buyer's going to be buying the rep & warranty policy," which forces you, if you want to be competitive, to engage on that and at least determine your willingness to go with that. It is increasing; it's a trend. In deals with PE [private equity] sponsors as the buyers, it's about 34% of the deals in the most recent survey. With tech companies as the buyer, it's 16%. In life sciences, interestingly, it's 3%. The use of rep & warranties insurance varies by industry, but you're definitely seeing an uptick in this. It is something where, if you're participating in a sale process, looking at a particular private company, it may well be something that you are expected to have a view on. It often requires socializing it internally with the management team. I just ran a sell-side process where we pushed very hard to force the buyers to get rep & warranty insurance, for the reason Tim mentioned. We wanted to distribute the proceeds and be done. We had a difficult time with a couple of the strategic bidders who weren't familiar with it. We really wanted them to be familiar,

because they were going to be the high bidder, and it was this point of tension. But their bid, although it was the high bid, was flawed from our perspective, because it did have this continued downside of an 18-month indemnity or an escrow of 10% of the proceeds. It's something that you should be familiar with, because it's likely to come up if you're on the buy side.

TIM HOXIE: The $60 topping bid is not equivalent. [LAUGHTER]

MICHAEL CHARLSON: You're fighting the hypothetical again. I just wanted to point out that, rep & warranty insurance is certainly becoming more common, and Tim describes it as a win-win. I would actually say it's a lose-lose-win, and the winner is the insurance company, you'll be shocked to hear. [LAUGHTER]

The premiums on this stuff are gigantic. They are measured by the size of the deal, not the size of the particular rep or warranty that might end up being breached. Anything that's actually a known risk has to be disclosed in these applications, and you'll be shocked to hear that those disclosed risks are typically excluded from coverage.

TIM HOXIE: Of course.

MICHAEL CHARLSON: I've been quite dubious. I understand the ability to get your cash today. My firm does a lot of deals in the energy space, where there are a lot of master limited partnerships and other structures where prompt distribution of the proceeds is useful. But I have been a skeptic about the value of these policies for anybody but Chubb and the other large insurers that write the covers.

I will say that there are circumstances where it makes some sense to me. For example, Chubb has a product that if there's some big tax contingency that's out there, they are sometimes willing to write a policy that will limit the downside of that tax issue being resolved later against the company.

> "Boards are going to have to seriously decide, What are the things we want to accomplish long-term, and what are the things we want to accomplish this year, and then evaluate themselves as to whether they're actually making progress towards those things..." – *Sarah O'Dowd*

AIG for a time – although I don't think they're writing it any more – would take the top of the risk on an existing litigation, especially securities litigation. If you had a class action pending against your target and you were worried about the downside of that lawsuit, AIG would be happy to take it off your hands – for a huge premium. [LAUGHTER]

Maybe in some of those specific instances there's some value in it, and if somebody wants rep & warranty insurance, it's fine by me. I just think that it's a phenomenon that's strange, and the better approach, from a corporate governance perspective, as I see it, would be for people to actually expose the risks they know about, assess them and try to value them, and build that into the price. My simple-minded view is apparently not winning the day. [LAUGHTER]

TIM HOXIE: The only other thing I can say is that the market is working a little bit in this area, and that premiums are coming down as demand for this product has gone up. I know that violates the first law of economics. [LAUGHTER]

The supply is going up, too.

MICHAEL CHARLSON: The supply is going up because of the astronomical premiums. [LAUGHTER]

TIM HOXIE: I will only say that it's been an honor and a privilege to sit up here with Sarah and do this, and we thank you for that opportunity, all of us.

KAREN TODD: Well, let's give the first panel a hand! [APPLAUSE]

KAREN TODD: Our second panel this morning is on Board Strategies for Competition, International Trade, and IP. Our panelists for this one are going to be Steve Tedesco from Littler, and Piers Blewett from Schwegman, Ken Kumayama from Skadden, and then, unfortunately, John McKenzie wasn't able to join us this morning, so we've got someone from Lam who's agreed to step in and help. [LAUGHTER]

That's Nick Bougopoulos who is Vice President of Ethics, Compliance & Foreign Trade. Thank you for joining the panel this morning. [APPLAUSE]

I'm going to start with Nick. Can you tell us what's been happening with respect to Lam and some of the things that are changing with China and all these trade deals?

NICK BOUGOPOULOS: Sure. I've been doing trade for close to 20 years, and unquestionably, this is the most interesting time I've seen with respect to trade. If you look at the tariffs that have gone into effect, Brexit, China, and the trade war going on. There's technology controls; there are companies getting placed on sanctions lists, like Huawei. People have heard about Huawei as on the list; ZTE [a phone manufacturer] was on the list, and the last time I checked, they were the official sponsor of the GoldenState Warriors for phones. Jinhua is another company that is on the list. At Lam, we're dealing with that to the extent it impacts our business.

China is coming out with their own export controls; they've come out with new encryption laws; they're coming up with new export control laws that we're taking a look at to see if it impacts our business.

They've been talking about coming out with an Unreliable Entities Blacklist, which is maybe in retaliation for companies in China getting placed on the entity list.

Also, in Japan and Korea, for a while, there were trade tensions that were requiring licenses for semiconductor-type materials going to places like Korea.

We've been very busy. On the Lam side, we, fortunately within the last year or so, established a Government Affairs function that's been doing a lot of advocacy work for us in this area. We've gone back to Washington quite a bit to meet with trade associations, to meet with the government directly, to see what we can do to take a temperature on what's happening.

The biggest thing that we're challenged with today is just the overall uncertainty. We don't know what's going to happen. We're looking at that. We're talking with our people in the government to see what they can tell us, but we are really preparing for the unknown, is what we've been doing. We're looking at lots of different contingency plans that we have to put in place if things go into effect, so it's been certainly an interesting time for trade. Fortunately, we have a really good trade team at Lam that helps support us to get ready for that, but I've never seen anything like this. It's certainly interesting, but can be challenging and frustrating at the same time.

KAREN TODD: Thank you.

SARAH O'DOWD: Nick, when you think about that like the role of national security in all of these things, do you see that fundamentally changing?

NICK BOUGOPOULOS: Yes. In the past, there were efforts by the Department of Defense and other agencies focused on national security. Now, we're seeing a trend into economic security, and trade is being used in that area. That's certainly a new frontier for us, in figuring out how we want to deal with new controls that could come into place that could impact places like China.

The other piece I didn't mention is we have to be concerned about China, if new controls come into place. We have employees working in China, we have Chinese nationals that are working in the U.S. and other places, and we have to make sure we're ready to get any deemed export licenses or other licenses we need to share technology with folks that are Chinese nationals.

KAREN TODD: Thank you. Ken, do you want to address that from an IP perspective?

KEN KUMAYAMA: Sure. I'll take IP broadly to pick up all kinds of ancillary things like privacy. We talked about cyber in the last panel, as well. I'm not a national security expert by any stretch, but it comes up all the time now, especially in the semiconductor space, and especially when we're talking about China, so that's a theme.

The last panel was talking about M&A and strategic transactions; another key factor and theme that we're seeing all the time is CFIUS [Committee on Foreign Investment in the United States] and national security. Even more broadly now, over the past five years or so, especially data. Personal data has been announced as a national security concern.

Economics, sure, but also what kind of movies do you like to watch? At that level. Which is surprising, but maybe not irrational, because we do know that the Chinese government is developing, and has been developing with their key technology partners, the capabilities to develop very granular dossiers on their nationals, their citizens. If they can use that technology aimed at their own people, they can use it aimed at us. That's the concern that's been stated, rightly or wrongly. That results in a lot of challenges in terms of just trying to do business with your business partners. You may trust them, but the U.S. government may have a different view.

KAREN TODD: Thanks. Piers, do you want to talk about maximizing IP protection in that space?

PIERS BLEWETT: Yes, absolutely. Thank you. And may I say, Sarah, thank you for this opportunity and congratulations on your award.

SARAH O'DOWD: Thank you.

PIERS BLEWETT: China sometimes gets viewed as a risky jurisdiction, with some degree of fear and trepidation. But, on a lighter side, one of the few key things people may not be aware of is that prison sentences for inventors are reduced. So, if you're thinking of carrying out a crime in China, please do a lot of inventing beforehand. [LAUGHTER]

SARAH O'DOWD: You heard it here first. [LAUGHTER]

PIERS BLEWETT: More seriously, there are opportunities out there for filing patents in China, and I brought some notes along so I could give you exact numbers. For example, if you're a multinational corporation and you have affiliates in that jurisdiction, there are incentives to apply for patents and, in fact, quite handsome

incentives – for example, $28,000 per foreign patent. Each jurisdiction in some of the bigger cities offers these grants to enable a Chinese corporation or affiliate to file for patents in China and around the world. In fact, you can fund your entire patent portfolio by using these incentives.

There's also an expedited regulatory approval of medical devices if you have a patent, and that can be important in some instances. Reduced corporate taxes may apply if you qualify as a "high-tech" enterprise.

Inventor remuneration is required; so, in that sense, it is similar to the U.S., being either a certain percent of profits or royalties.

We're learning increasingly, as patent filers there, to learn some of the tricks and the tips. For example, China does apply excess patent claim fees, when you file a patent application. But if you make a preliminary amendment after that, there are no excess claim fees. What you do therefore is you initially file with ten claims and, if necessary, file a preliminary amendment to include the extra claims you need afterwards. This is just an example.

The other key thing I would say about China, in particular, relates to utility models. Let's say you invent a golf ball with an extra dimple or something. In most countries, this "minor" invention would be regarded either as a utility model or a patent. In China, you can get both kinds of protection. We're finding that very helpful for most of our clients. These are some of the tips.

KAREN TODD: Great. Steve, let's talk about China's policies in dealing with the U.S., and how can a company prevent its most important asset, its employees, from stealing confidential information, trade secrets and other IP?

STEPHEN TEDESCO: By way of introduction on that, as an employment lawyer, how I usually deal with these issues is I get a call from a client who's had people leave, they've left yesterday, the day before, three months, four months later. Now, they're panicking, concerned, angry, because they realized they're starting to compete with them, and maybe they've taken data. The good news I can see from all of these calls is I'm not seeing any difference or any sort of thing where I can say it has anything to do with China at all.

The other preface I do want to make is, as an employment lawyer, is, of course, when you have employees, because they are ethnic Chinese or Chinese nationals, you can't treat them any differently. That would be discrimination, and it would be wrong to think that because someone is of that group, that they are more likely to go steal your stuff anymore than anyone else is. I think the facts bear that out, by the way. People are people, and certain people steal.

The other good news is, from the employment perspective, the things that work for everybody will work in that situation, too. I think everyone has an NDA; I think that's the bare minimum, you know; a non-disclosure agreement should have an assignment of inventions covering patents. Again, bare minimum. Those who are dead set to steal your stuff, that is not going to stop them particularly.

To me, robust policies and practices, including with the practice of strong IT security, is really important. When you get into litigation, how much you can prove is important, and you need to be able to prove what they've taken.

I also think exit policies are good; going through things with employees when they leave is always important. Again, the person who is dead set on leaving and trying to compete with you, they'll lie to you, but at least you get the lie on record. You may find out other things that would be helpful.

I mean, to me, those are the basic things in this. Competition is you just want to prevent them from walking off with your materials.

KEN KUMAYAMA: I have a quick question, actually.

STEPHEN TEDESCO: Sure!

KEN KUMAYAMA: When you said we shouldn't discriminate; I agree with that, by the way. I'm curious to know, and maybe this is more of a Lam-specific question for Nick, in terms of uncertainty and export controls, how much practical headache/heartache do you get from the uncertainty of at some point in the near future, some of our technology may suddenly require an export license? You have all these deemed export issues because you have a lot of people who are Chinese nationals, whether they're in the United States or not. Is that a practical challenge, or is that just one of many things you can stay on top of and not lose track of?

NICK BOUGOPOULOS: We have a pretty robust trade team, so we do a good job of staying on top of it. Things that we've struggled with over the years is when do we ask candidates their citizenship. If you ask it too late in the process, the business unit wants to hire them and you need a license, there could be a significant delay before they're onboarded.

If you ask too early, are you potentially setting yourself up for a potential claim? That's

what we've been focusing on dealing with over the last few years and coming up with a process to handle the regulations changing. Can we flip a switch and make sure we have all the people identified in the company that would be impacted, and are able to lock down applications where there is technology that they may not be able to access without a license?

KEN KUMAYAMA: Right. Are you seeing maybe where there are some proposed regulations, where they've described certain categories of technology that may or may not ultimately get regulated? Then you're having to decide, "Do I want to either hire this person or do I hire this person and put them on this team or that other team because although today, it might be okay, in half a year, there may be risk?" Then you may need to ship them off, which is hugely destructive.

NICK BOUGOPOULOS: That's right. In the past, one of our technologies that was controlled which was Etch, and other semiconductor manufacturing technologies were not. For example, we could have Chinese nationals working on Deposition technology without a license, but not Etch. It can be a moving ball.

PIERS BLEWETT: I think there is a patent-related issue to that, for example, where you employ cross-border teams in R&D located, say, in China, and an R&D team in the U.S., with a whole bunch of different inventors working on the same thing. Depending on where the inventor citizenships lie and where the invention was, in fact, made – for instance, was it in China or in the U.S. – may affect where you file first.

These kinds of global challenges, we're finding increasingly prevalent.

KAREN TODD: Steve, can you talk about when a company is most vulnerable to theft of its information?

STEPHEN TEDESCO: I'd say just broadly, there are two areas. One right now

– because it's a booming economy – people leave; there are a lot more opportunities. When employees want to leave, there are places to go. I've dealt with very few of these trade secret issues. I've dealt with thousands of calls on these things, probably, over the years, but in 2009, '10, '11, it was all cricketts. There weren't many then. Now, almost every week.

This is always a good time for that, because the barriers to entry are lower; the low cost of capital; people can move and take things with them. Your competitors can hire people easily and are more than happy to do so. That's one area.

Then the other main one that I've seen, which has been a plentiful source of litigation, is after a merger and acquisition. The clashing of two cultures, the people from the merged or acquired company decide to leave.

Those, to me, are the two biggest areas. Any time you have an acquisition, you should be thinking about what's going to happen with these people six months, a year down the line, and what they may or may not be taking with them.

KAREN TODD: Okay. Ken, can we address the recent trade deal with China and how that's going to affect things from an IP perspective?

KEN KUMAYAMA: Sure, I actually even brought a copy in case people have very specific questions, but I doubt it's going to be necessary. Long story short, the recent trade deal is almost 100 pages and it has very little legal effect is the practical reality. There's a lot in there about IP; a lot of nice stuff to have. But it's very questionable, at this point, how much of that will actually be implemented, and on what timeline.

Certainly it's better to have it than not, and certainly, if you're in some of the industries, like pharma or some others, where they're specifically referenced, maybe it's low-hanging fruit. It's good to know how those things may come in to being in the law in China in the relatively near future. Most of the concepts in here, it's just not clear if and when they'll be implemented, and if they're not, not clear what the consequences are. We may just go back to the way it was two weeks ago.

KAREN TODD: Thank you. Nick, what about from the semiconductor industry perspective – do you see any challenges coming as a result of the recent trade deal?

NICK BOUGOPOULOS: I don't think there's much in the most recent one. There's a slight impact from a tariff perspective that touches on the foreign trade world, but in terms of the deal that was just signed, there's not much that really impacts Lam, from my perspective, at least.

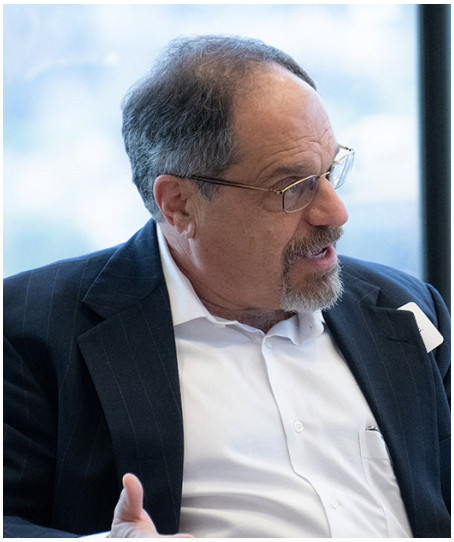
KAREN TODD: What about the upcoming deals that are being proposed?

[AUDIENCE MEMBER]: They're going to be great! [LAUGHTER]

NICK BOUGOPOULOS: Again, what he said. [LAUGHTER]

STEPHEN TEDESCO: The best, yes. [LAUGHTER]

NICK BOUGOPOULOS: We haven't been as focused on the trade deals – certainly the tariff angle – but we're more focused on the proposals that are being floated around in Washington, D.C., related to foundational and emerging technologies and the de



minimis rule and the foreign Direct Product Rule, and how those regulations, if they go into effect, could impact us or our customers.

KAREN TODD: Can you talk a little bit more about that, then?

NICK BOUGOPOULOS: Sure. I had mentioned earlier that four or five years ago, one of our products, Etch, was controlled by the government, and it required us to get licenses when we shipped our products to China, to our customers there. It's certainly something that we'll be keeping an eye on, if there are any changes in the regulations that could make that licensing requirement come back.

We're certainly keeping an eye on the entity lists and checking to see if any of our business partners are placed on that list. We have to think about what we would have to do, from a regulatory perspective.

The point I mentioned earlier was that technology controls, if those go back into effect, and it does require us to get licenses for Chinese foreign nationals working in the U.S. or outside the U.S., that's something that we would have to address.

KAREN TODD: Alright! Piers, are there any steps that you can recommend to maximize or protect the value of your patent portfolio?

PIERS BLEWETT: Yes, there are. Thanks, Karen. In fact, Steve mentioned a touchstone for one of them – departing employees.

Two areas – and there's no magic bullet or whatever – one is ownership, and I'll explain a bit about that. The second area relates to what I call directed prosecution, and I'm happy to say that under both areas, under Craig's leadership at Lam, these are being fully addressed.

Let's go to ownership. My view has been you can have the best technology in the world and sue who you want, but if you can't show you own the technology, it's pretty pointless. Aspects such as making sure you get assignments from the inventors before you file the case; making sure there's a trigger when an inventor employee leaves, for example, establishing a link between HR and Legal. This person is going; have they signed all the forms? Making sure, before you pay an inventor any remuneration, that they have signed all their forms. These kinds of things to protect ownership are important.

Recording all of this is key; whether you get IP in, or if you transfer it out.

"Directed prosecution" is a term not many people have heard, but I'll start with a traditional patent prosecution approach. That is, you file your patent; it gets examined; the examiner raises prior art, and you try to distinguish or amend your claims over the prior art to arrive at something novel and inventive. Directed prosecution puts another guardrail in there and really requires that you look at your own product, or a competitor's product, to make sure whatever amendment you're contemplating maps onto something in real life. You're not just amending, willy-nilly in the light of the prior art; you're also factoring in the real-life world.

So, ownership and directed prosecution can help to maximize and protect the value of your IP portfolio.

KEN KUMAYAMA: Can I ask a follow–up question?

KAREN TODD: Sure.

KEN KUMAYAMA: I deal with all kinds of transactional IP issues. One of the provisions that we often put in the invention assignment agreements contemplates when somebody leaves six months or a year after they leave, if they come up with a new invention, they have to go back to their former employer and say, "By the way, I came up with this invention; I think it's patentable; but it's not yours. Please confirm." We ask for that. We don't always get it. Have you ever seen that come into play in practice, or is it just a lawyer's dream that, practically speaking, has no basis in reality? [LAUGHTER]

PIERS BLEWETT: No, Ken, two things I saw most when I was in-house counsel included a situation where the inventor would want to tell us about some new tech arguably developed in a prior job, and we'd say, "No, don't tell us."

KEN KUMAYAMA: Interesting.

PIERS BLEWETT: The other situation would occur when an outside inventor would come and say, "I've got the next best thing to sliced bread," an unsolicited submission, and you say to that person again, "Stop. Go and patent it; put it in a patent document, and then we can talk."

KEN KUMAYAMA: That's a non-employee you're talking about.

PIERS BLEWETT: That's a non-employee.

KEN KUMAYAMA: Yes.

PIERS BLEWETT: The first one was the employee, and the second wasn't.

STEPHEN TEDESCO: Those are extremely common clauses. I, myself, don't put the six-month or a year in; I do

remember, years ago, there was a district court decision by Judge Ware, if anybody wants to look, this is going back in the sands of time. He took that clause as a de facto non-compete and broke it. Now, the clause had something a little more unusual about it, in the way they had to do it, that he did that.

I remember that, because from a drafter's perspective, it's one more thing to watch out for, but those clauses are very common. Since I'm not a patent lawyer and I always stay within my lanes on things, I don't know what happens after all this. I have a question for the patent lawyers, again, because I don't deal with that a great deal. What I deal with is the trade secret issues, and of course, the main defenses for trade secrets claims is that it's not a trade secret, or that it is independent means: "I just came up with it on my own; I didn't need your stuff." Usually the litigation – particularly in California – is mind-numbing on what they took when, and then trying to chase what they've taken to what they're doing now. I can remember sitting at one point, looking at every time someone accessed a document where you got to their computer at work, one of our documents, and then trying to see what they were doing in the two or three weeks after that.

I don't think you guys have to do that, because isn't it mostly just they can't copy the designs once you've protected the trade secret?

PIERS BLEWETT: There is a best practice in handling trade secrets, I would say. I found, in my in-house career, that if you say to an inventor, "Your invention disclosure has been denied," that's really bad news for them. But we could couch it another way and say, "But it's been added to our register of trade secrets." The message still feels very positive, and the action establishes a register, if you will, of what trade secrets exist. If the inventor were to leave, you would have something to look at as a record.

STEPHEN TEDESCO: Thank you. That's an interesting idea, and I might start putting that into things to suggest to employers.

KEN KUMAYAMA: Some of my clients do exactly that. They're trying to implement that as a best practice. I'm sure sometimes you have a discussion with your clients of "maybe this is patentable, but should we consider keeping it a trade secret?"

PIERS BLEWETT: Absolutely. One policy consideration on the software side relates to encryption stuff, and a question of why we should patent – and hence publish – something only to tell the baddie how to get around it. [LAUGHTER]

You're absolutely right.

KAREN TODD: Okay. Piers, can you tell us a little bit more in terms of setting up a patent portfolio for defensive purposes?

PIERS BLEWETT: Yes, I can. Many companies, I've found, file patents and sit on them, and that's all they do. Thinking that one fine day "if we get sued, we may be able to shoot back." Increasingly, though, I'm finding that even if you file on the defensive side, companies are at least preparing claim charts that map their patent features onto a competitive product, or even their own product.

The other end of the scale includes extremely aggressive companies that threaten people left and right; for example, companies such as "patent trolls." Some are in the middle, and I found it very useful in my in-house career, to license our friends or affiliates, as it were, especially if, as a patentee, you're a multinational with international affiliates. Licensing to your Chinese affiliate, for example, the global brand, the U.S.-based technology, or the applicable national patents can be an effective way to maximize royalty-based remuneration.

A big issue however that we encountered when seeking to do this was basing the royalty on "sales" levels. The tax offices in licensor countries, such as the U.S., would say, adverse to what a tax office in China might say, is that same figure – i.e. royalty of four percent on sales or some other amount – was deemed to be too high and an overstatement of tax deductions in China, and yet an understatement of income in the U.S. So, you have this horrible double-taxation issue going on and a dispute arising over the same royalty number, even though both parties seem happy to use that royalty number.

What we created was a much better model, in my view, and got through all the tax office issues that we had to deal with. The approach was based on a profit split basis which – and I'll get to it – had an implementation or transitional period. Theoretically, the profit split worked on the basis that if you used a percentage of "profit" as opposed to "sales" as the royalty basis, you're getting a much better sense of how truly valuable your IP is, when it's exposed to market forces.

We set up a decision tree that went along these lines that said, firstly: Licensee, are you an entrepreneur? And that really means, are you exposing yourself to market risk and demand? If you're just a contract supplier, there's no market risk, no exposure. The next question was, do you use any IP? I mean, because obviously that would only be applicable if you're using it. The third

question was, are you making a profit? Because, if you weren't making a profit, the theory would be, the IP's no good or of too little value to pay a royalty for.

What you could do to assess the value of the IP is to use benchmark figures available in the country of interest – let's say China – analogous to a royalty, for example, weighted average cost of capital or ROIC (return on investment capital) – in other words, an amount returned on an amount that you invest. You could get a benchmark and, depending on where, let's say, your affiliate in China came out against this benchmark, you could say, "Okay, zero profit made, therefore no royalty applicable. Or profit is below the threshold, therefore split the profit nominally. Or profit is above the threshold, therefore split it 50/50." So it was a profit split approach as opposed to a percentage of sales.

Now, the implementation, if you live in the real world, when you try to change something that big overnight, a licensee affiliate might be seriously taken aback if you said, "Ok, going forward, you have to pay me half your profits instead of four percent of sales." That's a big number. So, what you could do is to build in a floor or use transitional terms, for example, "in no event will the royalty be less than, say, one percent of an amount equivalent to sales, and in no event would it be more than six." You can get the parties close to each other on that type of basis.

KAREN TODD: Great! Sarah, can you comment on Lam's strategy with respect to its patent portfolio? I don't know if you can tell us.

SARAH O'DOWD: No. [LAUGHTER]

I would just say that Craig, who is here, who is our Chief IP Officer, is very creative. We have multiple strategies of an offensive and a defensive nature. We have strategies related to certain target opportunities or certain targeted risks. I don't really want to get into the details, but anything I should add to that, Craig? Okay! [LAUGHTER]

KAREN TODD: Thank you. [LAUGHTER]

Ken, let's move on to some hot topics or challenges that companies that do business in multiple jurisdictions are currently facing and should keep on their radar.

KEN KUMAYAMA: Sure. One interesting trend – I'm sure everyone's aware of the fact that privacy is a hot topic – if you take a step back and look at why these new laws and regulations, GDPR [General Data Protection Regulation] in the EU and, more recently, CCPA [California Consumer Privacy Act] here, why did we create these laws? It's to protect us individual citizens from big companies collecting all of our data. That's pretty clear.

What is ironic is you have these regulators – a lot of them are also antitrust regulators – and they're looking at the data and saying, "You can't have all this data. This gives you a massive benefit and advantage over all of our up-and-coming competitors that are trying to take you out of having market control in Europe or other places." They create GDPR and these other rules.

The way that GDPR works, though, is there are some things that you just can't do, unless you get consent. You can't get consent unless you have a direct relationship with each individual. There are only two or maybe three companies in the world that have a direct relationship with a significant number of people, and those are the companies that you're trying to protect us against! It's this odd situation where the regulators are actually giving these companies more power, through these regulations, and they're coming to realize that. One of the messages to think about is these regulations make it more expensive and more difficult for everyone, big and small. But at the end of the day, are there some major benefits that big companies are getting, if they can get it right, that give them a big advantage, because these laws effectively create a barrier

to entry that, rightly or wrongly, is to their benefit? Food for thought.

KAREN TODD: Steve?

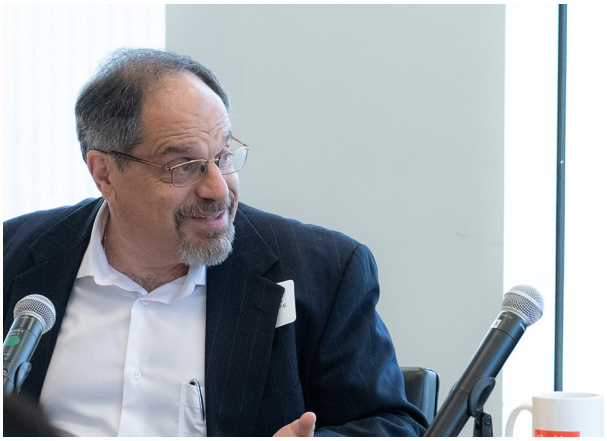
STEPHEN TEDESCO: The hot topic, and at least in unfair competition and labor or employment law, that's multi-jurisdictional, that I've been running into is, of course, restrictive covenants. I'm an expert in California law on restrictive covenants; I can summarize it and the laws are all void. Full stop. [LAUGHTER]

But there are companies – even California companies – that have employees in New York and everywhere else. They could put non-competes on them; there are companies from London that I've dealt with, that have non-competes. One thing that people are doing now – both I've done it and had it done to one of my clients – is you take someone under a non-compete and you move them over here to San Francisco. Then, you try to get the non-compete voided. What you face is a lot of just multi-jurisdictional litigation. From the lawyer's perspective, it's a dream, because it goes on. but, sooner or later it ends, because people just resolve it.

KEN KUMAYAMA: That's not why they pay you.

STEPHEN TEDESCO: Yes. [LAUGHTER]

It's basically a few bills and then they realize it's just going to keep on going, with no end in sight, and then it gets resolved somehow.



Those are hot topics now. Another one that is overlooked, which may be coming into the forefront, there was a recent case that came down on term employment agreements as a way to prevent people from leaving and taking things, or at least having some orderly way of doing it. At executive levels, it's fairly common to have someone sign a one-, two-, three-year employment agreement. Most companies – and I've suggested this many times over many years, and most people balk at them – are clinging to the doctrine of at-will employment, which is a corpse that's been eaten by all the exceptions at this stage, but nonetheless there it is. Everybody points to it.

It would be a useful tool, and it can be, because it raises the ante to take someone, or for them to leave, and it adds claims if you're suing. Putting aside patent claims, the one that you usually have to file in these unfair competition matters when someone leaves and takes something is, you're really stuck with trade secrets, and if you don't have good computer evidence, you're not going anywhere. Theoretically, someone can take the trade secret and have it in their head – good luck with that at trial.

Those are the types of things that we are looking at and should be looked at over the next two, three, four, five years.

KAREN TODD: What about employees replicating a business model?

STEPHEN TEDESCO: The employment agreement and the other part is all part of that. From my perspective, what I've seen is there are employees who just leave to start their own business and there are employees who leave to go to a competitor. To give you an example – I have an extreme one once that I worked on a long time ago, a situation where the head of a department of a very large piece of business left on a Friday night. We were employed and at a hotel here in Palo Alto. Once that person announced on Friday afternoon that he was gone, a roomful of everybody who worked in that work group – about 200 people – were just milling around that hotel room. We asked, "Do you want to sign a contract? Here it is." By the end of that weekend, we had two or three hundred people signed to a contract. The Monday after that Friday afternoon, the business had moved from here to there, it was an extreme situation.

How do you stop that? You don't, if someone is that good. A cease and desist letter is not going to stop them on those kinds of things. It depends on that business, one way they got more relationships than trade secrets or patents or anything else. Again, it was a huge business.

The thing to do is just protect your trade secrets. The most under-looked things are the IT issues. A robust IT department that knows what it's doing has IT security that's good. It's amazing to me how many people, even in high-tech companies, allow employees to stick a thumb drive into their computer and copy everything. It's amazing to me how many companies, even high-tech ones, have people throwing everything onto Dropbox, and once it's on Dropbox, it's gone. Those technological ones are as important, if not more important, than the agreements. The people who are going to violate the agreement of the group and go to start a competitive company, they've crossed the Rubicon. They're going forward. There's really no way to prevent it.

PIERS BLEWETT: We've found that you can have all the NDAs that you like, and all the agreement wording you like, but if someone's going to breach it, they're going to breach it. We were talking about China moments ago, but this could happen in any jurisdiction. The company I was working for at the same time of my in-house career makes diapers. We put in a huge diaper factory in China, 30 years ago, only to find an exact replica being built on the other side of the road. The next time we did it, no technical person who went to China from the U.S. to build a new factory knew how to build the whole thing. They only knew a little bit – each person only knew their little bit, because we split up the technology. It had to get to such practical measures before we saw an improvement.

STEPHEN TEDESCO: That's an important thing I've noticed with a lot of companies. Maybe it's the idea that you're supposed to collaborate and not silo off the information. Sometimes people can take it who had nothing to do with it. It's an interesting thing. I have seen some instances where customers, vendors or third-party people who you help, then try to replicate your business. They just decide to cut out the middleman and, of course, you're the middleman. [LAUGHTER]

KAREN TODD: Anyone else want to comment on that?

KEN KUMAYAMA: I'll just add that sometimes you can't stop someone from

replicating a business, and sometimes you're not allowed to stop it. Especially in California, competition is encouraged, and the laws here intentionally have a clear policy against stopping people from having non-competes in most circumstances. The idea is we want to encourage innovation and competition. The answer sometimes is there's nothing to do, and that's the way it's supposed to be.

I completely agree, trade secrets and protecting them is one key way to handle. Of course, independent development is a way to circumvent that. If you can come up with it on your own, that's fair game, too. What you're left with is patents. Then you come to a question of how strong the patent is and the patent laws in the relevant country.

In China, we are seeing, more than 30 years ago, that the patent laws there are much stronger. Setting aside this trade deal, we've seen a trend towards real enforcement and enforceability of patents in China, and injunctive relief, which we meaningfully don't even have in this country anymore. That's a really important thing, if you can get a patent that's strong and enforceable in the relevant jurisdictions, that may be your only way to stop someone from replicating.

PIERS BLEWETT: Increasingly, it's not so much an issue for Lam, but let's say software companies, to your point about strong patent laws. That's also well and good, but increasingly, we're being asked to draft claims that are detectable. By that, I mean you can visibly see the infringing feature.

SARAH O'DOWD: I do think – a lot of people have spoken to it – there are practical things to do that maybe are more important than the legal things to do, like having good IT systems. Your culture is really important. How collaborative are you? It sounds great, but I take the point that everybody knowing everything is just an exposure. You don't have to do that, and you can still have a good culture.

Also, we outsource a lot and are careful with what we share with different outsourcing partners. These are the practical things. They're not like "what's a trade secret" or "what's a patent" or even "win a lawsuit." I am never thrilled with the idea that I'm going to "win a lawsuit," because that is years and dollars and a lot that goes on in the middle. Anything you can do to not be in a vulnerable position, that's what you should focus on.

KAREN TODD: Thank you. With that, we have concluded our program. I'd like to thank our Panel 2. [APPLAUSE]

I would like to thank all of our Distinguished Panelists for sharing their wisdom with us today. Congratulations to Lam Research and thank you, Sarah, for accepting our invitation.

SARAH O'DOWD: Thank you, Karen! [APPLAUSE]

John McKenzie
Partner

Baker McKenzie.

John McKenzie joined Baker McKenzie in 1976 and has since worked in Baker McKenzie offices in Caracas, Venezuela and Taipei, Taiwan. He is a member of the International Section of the American Bar Association, the Legislative Council of the California Council for International Trade and the District Export Council for Northern California. Mr. McKenzie also serves as an associate member of the Northern California Chapter of the Association of Freight Forwarders and Customs Brokers.

Mr. McKenzie's practice is focused on cross-border transactions and international trade regulation. His practice also covers planning and structuring international investments, international mergers, acquisitions, consolidation and reorganization transactions, international commercial and technology development and transfer transactions, as well as customs and import regulations, export controls and international corporate compliance.

Publications
Frequent author and speaker on United States export controls, import trade regulation, anti-boycott regulation, international antitrust matters, the Foreign Corrupt Practices Act and the international distribution and protection of computer software.

Published work in the proceedings of the University of Southern California Tax Institute, the *Vanderbilt Journal of Transnational Law*, the *Boycott Law Bulletin*, the proceedings of the Arizona State University Computer Law Institute, the proceedings of the University of Southern California Computer Law Institute, the *Computer Lawyer* and the *International Lawyer*.

"New Military Controls Put a Burden on U.S. Exports to China" in the *San Francisco Journal* and the *Los Angeles Daily Journal*

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Ryan Murr
Partner

GIBSON DUNN

Ryan Murr is a partner in the San Francisco office of Gibson, Dunn & Crutcher, where he serves as a member of the firm's Corporate Transactions Department, with a practice focused on representing leading companies and investors in the life sciences and technology space. Mr. Murr currently serves as a Co-Chair of the firm's Life Sciences Practice Group and previously served as a member of the firm's Executive Committee and Management Committee.

Mr. Murr represents public and private companies and investors in the biotechnology, pharmaceutical, technology, medical device and diagnostics industries in connection with securities offerings and business combination transactions. In addition, Mr. Murr regularly serves as principal outside counsel for publicly traded companies and private venture-backed companies, advising management teams and boards of directors on corporate law matters, SEC reporting, corporate governance, licensing transactions, and mergers & acquisitions.

Mr. Murr has served as a member of the American Bar Association's Mergers and Acquisitions Subcommittee and is active in advising various not-for-profit entities in the San Francisco Bay Area.

Mr. Murr regularly represents issuers in a range of capital markets transactions, including initial public offerings, private placements (ranging from early-stage investments to crossover rounds and PIPEs), follow-on equity financings and debt financings. Mr. Murr has deep experience with a range of financing transaction structures beyond traditional underwritten offerings, including at-the-market offerings, rights offerings, PIPEs, and equity lines. Over the past decade, Mr. Murr has filed over 70 registration statements with the U.S. Securities and Exchange Commission, registering securities for offerings by issuers in the life sciences industry.

Mr. Murr also regularly represents investors in the life sciences and technology space, including private equity funds, hedge funds, and venture capital funds. Financing transactions have included public and private offerings ranging from passive investments to bespoke control structures and spin-outs.

Mr. Murr regularly advises pharmaceutical, biotechnology, technology, and medical device and diagnostic companies in connection with significant strategic transactions, including tender offers, public and private mergers, stock and asset purchases, and licensing transactions.

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Timothy Hoxie

Partner

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Tim Hoxie has more than 30 years of experience counseling public and private clients on matters of corporate governance, securities law compliance, mergers and acquisitions, joint ventures, and public and private debt and equity financing transactions. He represents clients in a variety of industries, including semiconductor equipment manufacturers, private equity investors (and in particular sovereign investors), health care enterprises, solar power companies, and professional services firms.

Tim's recent transactional experience includes public and private acquisitions, both domestic and cross border. He has represented clients in creating substantial joint ventures and has counseled them in managing disputes with partners. His private equity representations involve work with or opposite leading private equity players throughout the country and overseas.

Tim is a member of the State Bar of California and the American Bar Association, and he has chaired numerous business law committees within each organization. He is a past chair of the California State Bar's Business Law Section and of its Corporations Committee, has served as co-chair of the section's Opinions Committee, is the immediate past chair of the ABA Business Law Section Opinions Committee, and is a member of the Tri-Bar Opinions Committee. He is a director of the Working Group on Legal Opinions Foundation and is a past chair of the ABA Business Law Section's Committee on State and Local Bar Relations. He is a member of the Council of the ABA Business Law Section and a Fellow of the American Bar Foundation.

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Stephen Tedesco

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- Wrongful discharge
- Employment discrimination
- Sexual harassment claims
- Breach of contract actions

He has tried cases in federal and state courts and before the National Labor Relations Board, the California Department of Fair Employment and Housing and the California Division of Labor Standards Enforcement.

Additionally, Stephen counsels employers on a wide range of issues, including:

- Compliance with wage and hour, EEO, and disability and leave laws
- Discipline and termination
- Employment agreements
- Confidentiality agreements
- Measures to avoid litigation

Mr. Tedesco has received recognition and been named:

- Client Service All-Star, BTI Consulting Group, 2019
- Super Lawyer, Northern California, Super Lawyers, 2004, 2011-2019
- AV® Peer Review Rating, Martindale-Hubbell

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Piers Blewett
Principal

SCHWEGMAN LUNDBERG • WOESSNER

Piers Blewett is a patent attorney and principal at Schwegman Lundberg & Woessner. He is a Global Patent Fellow at the Federal Circuit Bar Association, and a former Chief Patent Counsel, General Counsel, and Vice President at Kimberly Clark Corporation. Piers' practice includes strategic IP counseling, patent prosecution (U.S. and foreign), patent validity, infringement analysis and opinions, risk assessment, global patent litigation, and IP due diligence work.

Piers decided to pursue patent law after working as a mechanical engineer at a platinum mine in South Africa. He explains, "I'm an engineer at heart and have always had an interest in new technology." He continues, "As a patent attorney, I see lots of new tech. By definition, an invention has to be 'new' in order to be patentable, so this puts us at the leading edge of technology – and I like that." Piers enjoys working with inventors and engineers. "They are positive, creative people who think about their world and want to make it a better place."

In addition to technology, Piers is interested in music and extreme sports. "When I was younger, I played violin semi-professionally." He can recount many adventures: "I have a sailing skipper's ticket and was selected for Youth Worlds and Olympic Games (LA, 1984), was a rescue scuba diver, once bungee-jumped, once sky-dived, ran an ultramarathon, and now love going fast downhill on my mountain bike. New tech fits in with all of this!"

Education
University of Cape Town

South Africa, Bachelor of Engineering, 1986

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Schwegman Lundberg & Woessner PA

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Trademarks

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Ken Kumayama is a counsel in Skadden's Palo Alto, California office. He concentrates his practice on transactional matters in intellectual property and technology and privacy.

Mr. Kumayama is fluent in Japanese and worked for more than four years in Japan, both as an attorney at a Japanese law firm and for a Japanese company. Mr. Kumayama was recognized in *The Daily Journal* as one of California's Top Artificial Intelligence Lawyers in 2019.

He represents clients in a range of technology and commercial transactions relating to the ownership, protection and exploitation of intellectual property, including IP monetization strategies, development and license agreements, co-development agreements, pharmaceutical collaboration agreements, patent and other technology license agreements, trademark and copyright license agreements, and patent and other intellectual property asset sales and acquisitions. He also counsels clients in a broad range of industries on privacy-related matters.

In addition to his transactional work, Mr. Kumayama has experience in many other types of patent- and IP-related matters, including investigating and rendering freedom-to-operate, validity and non-infringement opinions; engaging in patent landscape analyses and assessing patent infringement risk; evaluating the strength of, and encumbrances on, patent portfolios; and counseling clients on patent and other strategic IP issues. He is a thought leader in patent analytics and regularly presents on the topic. He also regularly speaks on topics such as patent acquisition and M&A due diligence.

Mr. Kumayama's pre-law studies and academic research included theoretical chemistry, geophysics and bioinformatics, requiring a comprehensive knowledge of mathematics, computer programming, and the sciences. He has written about patent monetization and Internet privacy issues and has spoken, in Japanese and English, on topics such as trends in e-discovery and patent exhaustion.

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With more than 1,700 attorneys in 22 offices on four continents, Skadden serves clients in every major financial center. Our strategically positioned U.S. and international locations allow us proximity to our clients and their operations and ensure a seamless and unified approach at all times.

For more than 70 years, Skadden has provided legal services to the business, financial and governmental communities around the world in a wide range of high-profile transactions, regulatory matters, and litigation and controversy issues. Our clients range from a variety of small, entrepreneurial companies to a substantial number of the 500 largest U.S. corporations and many of the leading global companies. We have represented numerous governments, many of the largest banks — including virtually all of the leading investment banks — and major insurance and financial services companies. The firm has more than 50 practice areas and advises clients in matters involving, among others, mergers and acquisitions, litigation and arbitration, corporate finance, corporate restructuring, securities law, banking, project finance, energy, antitrust, tax and intellectual property.

Skadden has been named the top corporate law firm in the U.S. in *Corporate Board Member*'s annual survey of "America's Best Corporate Law Firms" more times than any other law firm.

We have more matters recognized for innovation than any other law firm in the history of the *Financial Times*' U.S./North America "Innovative Lawyers" report.

Skadden was recognized among the top firms for "client service excellence" according to the BTI Consulting Group's 2020 "BTI Client Service A-Team Survey of Law Firm Client Service Performance."

The firm earned 76 practice and attorney Band 1 rankings in the 2019 edition of *Chambers USA*. Additionally, in *Chambers Global 2020*, Skadden garnered 41 Band 1 practice and attorney rankings.

Michael Charlson

Partner

Vinson&Elkins LLP

Michael Charlson handles complex litigation matters across a range of substantive areas, although he focuses his practice on securities class action, corporate governance and shareholder derivative litigation and related counseling. For more than 30 years, Michael has represented corporations, officers, directors and other constituencies, usually in lawsuits and investigations related to allegations that they have issued false and misleading statements or mismanaged the company. His clients span industries, from the most cutting-edge biotech innovators to gravel pit operators, and everything in between. And they are often facing billions of dollars of damages and serious threats to the enterprise's continued existence. Michael also co-led the team that secured a jury verdict for defendants (including his client, the former CEO) in *In re JDS Uniphase Securities Litigation*, one of only a handful of securities class actions that have gone to trial.

Michael has also represented companies and individuals on a range of matters before the Securities and Exchange Commission, including SEC investigations and enforcement proceedings involving allegations of insider trading (including tipper and tippee allegations), improper accounting, inadequate disclosure, improper supervision and books-and-records violations. In SEC matters, Michael has prepared Wells or pre-Wells submissions on behalf of some 20 clients; none has been charged.

Michael serves as Co-Chair of V&E's Securities Litigation practice as well as Talent and Diversity Lead and Hiring Partner in the firm's San Francisco office. Again in 2019, Michael was recognized by Chambers USA for his "exceedingly deep knowledge base" in securities litigation. He has also been recognized in Legal 500 and as a Northern California SuperLawyer for many years.

Vinson & Elkins LLP

At Vinson & Elkins, our people are our strongest asset. Collaborating seamlessly across 13 offices worldwide, we provide outstanding client service. Our lawyers are committed to excellence, offering clients experience in handling their transactions, investments, projects and disputes across the globe.

Established in Houston in 1917 by William A. Vinson and James A. Elkins, the firm's time-tested role as trusted advisor has made V&E a go-to law firm for many of the world's leading businesses, especially in the energy and finance industries. We bring competitive strength, insight and know-how to guide our clients through their most complex transactions and litigation.

We also believe in the value of giving back. At V&E, we are deeply committed to empowering our communities through pro bono work for the underserved, devoting significant time and resources to those who cannot afford legal services. We also support the communities in which we live and serve through hundreds of local charitable, educational and cultural organizations.

For 100 years, V&E's innovative and entrepreneurial spirit has helped attract the diverse talent necessary to shape the face of business across the globe. Our rich heritage and inclusive culture inspires us, and gives us an adept understanding of your most sophisticated legal issues.

Connecting with our communities is an important aspect of our firm culture. Vinson & Elkins lawyers and staff across the globe volunteer at charitable organizations and contribute their time, finances, and personal efforts to make a positive impact on those in need.

Whether it is sponsoring fun runs benefiting cancer research, supporting the opera, contributing to the United Way, or mentoring underserved youth, Vinson & Elkins touches a number of vital areas in our communities. V&E lawyers and firm personnel also serve on boards and in leadership roles of more than 200 charitable, educational, religious, arts, minority, children's, governmental, and professional organizations.

We are passionate about using our talents and resources to give back.