

**JOURNAL  
OF THE  
NEW YORK STATE  
JUDICIAL INSTITUTE  
ON PROFESSIONALISM  
IN THE LAW**



**A CONVOCATION ON LAWYER  
INDEPENDENCE AND IN-HOUSE  
CORPORATE COUNSEL**

**WHITE PLAINS, NEW YORK**

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JUDGES OF THE  
NEW YORK STATE COURT OF APPEALS

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HON. JONATHAN LIPPMAN, CHIEF JUDGE

HON. CARMEN BEAUCHAMP CIPARICK

HON. VICTORIA A. GRAFFEO

HON. SUSAN P. READ

HON. ROBERT S. SMITH

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HON. THEODORE T. JONES

# NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

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# JOURNAL OF THE NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

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## **CONVOCATION PROGRAM**

### **OPENING SESSION AND KEYNOTE ADDRESS**

Paul C. Saunders

Honorable Alan D. Scheinkman

President Stephen J. Friedman

Robert C. Weber

### **PANEL I – ROLE OF THE CHIEF LEGAL OFFICER: CHALLENGES TO INDEPENDENCE**

Moderator:

Professor John C. Coates

Panelists:

Louis J. Briskman

Flor M. Colón

Jennifer M. Daniels

Gary G. Lynch

Lesley Friedman Rosenthal

### **AFTERNOON SPEAKER**

Christine T. Diguglielmo

**PANEL II – NAVIGATING THE ETHICAL LANDSCAPE**

Moderator:

Catherine O’Hagan Wolfe

Panelists:

Robert F. Cusumano

Honorable Randall T. Eng

Louise R. Firestone

James J. Mangan

Jane C. Sherburne

**A CONVOCATION ON LAWYER  
INDEPENDENCE AND  
IN-HOUSE CORPORATE COUNSEL**

**OPENING SESSION AND KEYNOTE ADDRESS**

**PAUL C. SAUNDERS**

CHAIR, NEW YORK STATE JUDICIAL INSTITUTE  
ON PROFESSIONALISM IN THE LAW;  
CRAVATH, SWAINE & MOORE LLP

Good morning and welcome. My name is Paul Saunders and I am the Chair of the New York State Judicial Institute on Professionalism.

I often say to Judge Newton that our Institute is not the Institute in which you are sitting. That's another Judicial Institute. That's the one with the building. We don't have a building.

But our Institute was created by then Chief Judge Kaye about 15 or 20 years ago following a report that had been made by the Craco Commission. The Craco Commission was a commission established by Judge Kaye to examine issues of lawyer professionalism in New York State and find out, in effect, what was the state of the legal profession.

Lou Craco, who was then the managing partner of Willkie Farr & Gallagher, a large New York City law firm, became a Chair of that Commission which was then known colloquially as the Craco Commission.

One of the things that the Craco Commission recommended after a year or two of study and travel around New York State was the creation of a permanent institute in New York State appointed by the Chief Judge to study issues relating to lawyer professionalism and that recommendation then turned into what is now the Judicial Institute on Professionalism in the Law. That's our Institute.

And for many years Lou Craco was the Chair of our Judicial Institute and he is now our Chair Emeritus.

Many of the people who were on the original Craco Commission continued as members of this Judicial Institute. We are a group of about 20 people; we are all appointed by the Chief Judge. We have a very broad mandate from the Court to study and speak out on issues relating to lawyer professionalism. We are required by mandate to have at least one non-lawyer as a member of our Institute and we do.

So, what do we do? One of the things that we do is to hold series of convocations like this one on different topics relating to lawyer professionalism.

Several years ago, Lou Craco was asked to speak here at the Pace Law School and he spoke on the subject of lawyer independence and why lawyer independence is probably the most fundamental hallmark of what it means to be a professional. It is one of the most essential characteristics of our profession.

We start with the Code of Professional Responsibility, of course, that requires lawyers in New York State to exercise independent professional judgment when advising their clients.

So what exactly does that mean? Let me quote Lou Craco. He said, “We lawyers use the word “independence” in two senses. We refer first to our collective autonomy from supervision by others and second, we refer to our ability to give disinterested legal advice to our clients.” And here is the key. He says, “We are an independent autonomous profession precisely because and only because we are called upon to give our best disinterested advice free from other exterior interference or other pressures.”

The Judicial Institute decided to take up Lou’s call and study the issue of lawyer independence from different perspectives. Several years ago, we began a series of convocations held around New York State on this topic.

We began in New York City at the Fordham Law School studying the issue of lawyer independence and big firm practice. In particular, we looked at the new phenomenon of law firm general counsel.

We then held a convocation in Albany at the New York State Bar Association headquarters and we studied the issue of lawyer independence and government lawyers. That was, as you can imagine, a very lively discussion.

Our third convocation was held at Hofstra Law School and we studied the topic of lawyer independence and solo practitioners and small firm practitioners; it was a very, very different perspective from the ones that we had heard earlier.

This is now our fourth convocation in this series and this is, as you all know, a convocation that will study the issue of lawyer independence and corporate counsel.

It is only fitting that we hold this convocation in White Plains in Westchester County because there are, as you know, many corporations that have their headquarters here. We thought that this was the right place to do this study.

So, we look forward to a very lively and interesting discussion with some audience participation, I hope, on this general topic. In time, we will publish the proceedings of this convocation. I say “in time,” because given budget constraints in the State of New York and the judicial system in particular, it takes us longer than it used to for us to publish the proceedings of our convocations but we will do that and share those proceedings with other similar institutes on lawyer professionalism around the United States.

As I was thinking about the topic we are going to discuss today I ran into something that Professor Jeffrey Hazard said. Hazard said that “the role

of corporate counsel is among the most complex and difficult of those functions performed by lawyers.”

Professor Hazard usually knows what he’s talking about and for that reason among many others, I really look forward to today’s discussion.

Before we begin, some thanks are in order. First, I would like to thank our host, the New York State Judicial Institute whose Dean Justice Juanita Bing Newton is a good friend of our Institute. I want to thank her for welcoming us to her Institute. Unfortunately, she has been called out of town; she is not going to be here with us today but she is a good friend of ours and I want to thank her and her Institute.

Second, I would like to thank our other host today, Pace University Law School and its Dean, Michelle Simon, for supporting the work of our Institute and, incidentally, providing lunch for us today. Thank you to the Pace University Law School.

Third, I would like to thank Chief Judge Jonathan Lippman for his continuing support of our Institute and the work that we do and I want to express my condolences to Judge Lippman and to his other colleagues on the Court of Appeals for the very untimely loss of one of their stalwart colleagues and members, Judge Theodore Jones, who died this week very unexpectedly.

Fourth, I would like to thank our Chair Emeritus, Lou Craco for giving us the inspiration for this series of Convocations. Lou has had some medical procedures and is not able to be with us today but I know he’s with us in spirit. I spoke with him just yesterday and he’s very interested in the work of this Institute and today’s Convocation.

As I mentioned earlier, Judge Newton is not able to be with us today but she has graciously asked Justice Alan Scheinkman, who is the Administrative Justice for the Ninth and Tenth Judicial Districts, to say a few words of welcome in her place and we are delighted to have him here with us today.

Justice Scheinkman, as many of you know, is a Justice of the Supreme Court. He was elected to the Supreme Court in 2006 after many years of private practice and after eight years on the faculty of Saint Johns Law School. He is a prolific writer and lecturer, he attended George Washington University and Saint Johns Law School where he was the editor of the Law Review and in addition to being the Administrative Judge for the Ninth and Tenth Districts, he has also served on the Appellate Term for those districts.

Please welcome Justice Scheinkman.

**HON. ALAN D. SCHEINKMAN**

ADMINISTRATIVE JUDGE  
NINTH JUDICIAL DISTRICT

Thank you very much, Paul. Thank you very much, distinguished and honored guests.

I speak today on behalf of the other Judicial Institute. Regrettably, Judge Juanita Bing Newton could not be here so I am pinch hitting for her and I am trying to present what I think she would want me to say to you all.

It is delightful to see people in this building. A number of years ago Chief Judge Kaye, another one of her inspirations along with Judge Lippman, decided to enhance judicial education by eliminating the previous itinerant road tours of programs for judges by trying to provide an organized base for judicial education and judicial programs. She was able to form with then Dean Ottinger and Pace Law School this magnificent facility here in White Plains.

As Paul alluded to, times are a little difficult in the court system these days. We don't have quite the same number of people coming through the building as we used to have. But Judge Newton has done a terrific job with doing even more with less and I would probably say that this is sort of Broadcast Central; the number of webcast programs that go out to judges and to non-judicial personnel on important topics is really impressive and this place continues to be a really innovative and dynamic place for judicial thought and judicial innovation. It is so wonderful to have a partnership with Pace, with the Bar and with other like minded, if not like named, Institutes to share thoughts and comments on the practice of law and on topics of interest to all lawyers.

This has been, as you may know, a difficult week in the court system for a number of reasons. We had a hurricane and some of our courts in this area have been closed and especially hard hit as have been our colleagues in Nassau, Suffolk and New York City and Staten Island and we have been trying to work our way through that.

We just had a snowstorm, which I guess was sort of minor in comparison and then as Paul also alluded to, we lost another distinguished Judge this week, Judge Ted Jones, who we like to claim in the Ninth District, although he was elected to the Supreme Court from Brooklyn. He resided in Rockland County and he had his office over here at 140 Grand Street just above where Judge Lippman had his office and we like to claim him as one of our own and truly a stalwart individual, a person of great intellect, of grace, compassion and charm and he will most definitely be missed.

For those reasons, Judge Lippman was not able to be here either so I sort of feel like third choice. But, it is our great pleasure to have this Judicial Institute here in White Plains, which is part of the Ninth Judicial District, and to see so many of you.

I invite you to look around the building to see what we offer, to experience a little bit of what we can do and envision what we can be again and I thank you so much for coming and participating. Thank you very much.

**MR. SAUNDERS**

Thank you, Judge. Thank you very much.

I would next like to introduce someone who needs very little introduction to this audience, the president of Pace University, Steve Freidman.

President Freidman is well known to those of us in the Judicial Institute on Professionalism. In fact, he was the keynote speaker at one of our convocations a couple of years ago in Albany when we studied what we then called *The Face of the Legal Profession*. It was the longitudinal study of the practice of law from the beginning days in law school all the way through to becoming a very senior and more mature lawyer in the profession. We studied that topic for a couple of years and President Freidman was our keynote speaker for one of those convocations so we feel like he's part of our family.

President Freidman graduated magna cum laude from Princeton and magna cum laude from Harvard Law School where he was a member of the Law Review.

After clerking in the Supreme Court he began practicing at Debevoise & Plimpton, where he sort of came and went periodically.

He was the Deputy Assistant Secretary in the Treasury Department.

He was a Commissioner of the Securities and Exchange Commission.

He was General Counsel at EF Hutton, his corporate law experience.

He was Chairman and CEO of the Practicing Law Institute, Dean of the Pace Law School and now president of Pace University.

Please join me in welcoming the President of Pace University and our good friend, Stephen Friedman.

**STEPHEN J. FRIEDMAN**

PRESIDENT, PACE UNIVERSITY

Thanks so much, Paul. Welcome, everyone.

You know, I was very flattered when I was asked to present the keynote address a few years ago and I assumed it was because I was so smart and good looking and then I discovered the reason was that the Institute was studying why lawyers in their fifties and sixties were struggling with psychological crises of various sorts and I was the poster child for that.

The past two weeks have been a real challenge for Pace as they had been for everyone in New York. It really brought life to a standstill. So, it's particularly nice to be here at this discussion and resume what is really the basic mission of the Institute on Professionalism and the basic mission of Pace Law School, which is to examine the conventional wisdom with a critical eye and seek new insights and new ideas.

I have a really special affection for this gathering because it was the brainchild of Chief Judge Kaye, who is a friend of mine and someone I admire enormously, and Chief Judge Lippman has carried that mission into the future.

I was fascinated by the topic of this discussion because, as Paul said, I've sat in both chairs. I was both a partner in a large law firm and — actually, he left out one of my jobs which is general counsel at two financial institutions

— I've been on all sides of this issue and I hope you'll forgive me if I leverage, I know you are dying to hear more welcoming remarks but I want to express a view on this topic because I think, like so many things, the evolution of events has overtaken the conventional wisdom.

The conventional wisdom in this area is really that it's much easier to be independent if you are not an employee of a company and if you were asked the question of where the rubber hits the road on many independence issues, it hits the road on the issue of bringing an ethical question or potential liability question to a higher level.

One of the things that I think the evolution of events has done is to attenuate the relationship of most outside lawyers with senior management and the board of particularly large companies and I would say that most outside lawyers who handle litigation, who handle transactions, have little or no relationship with the senior management of the company and less with the board.

So when one of those issues arises, outside counsel may be fully independent, but they really don't have the access necessary to deal with these issues. And, of course, the kind of financial pressures that law firms have been under for the past few years has put tremendous pressure on partners to retain large clients, which has made the independence issue even more pointed.

In contrast, general counsel and other senior lawyers in companies typically have close relationships with the senior management and direct access to the board and often, just simply the fact of the presence of general counsel at board meetings or chief of compliance or the chief of internal audit at audit committee meetings is enough to surface issues that would otherwise be pushed under the rug.

So I think certain things have changed. I think you have a tremendously impressive group of panelists today and they are clearly my betters on all these issues so as much as I would like to speak about this issue for hours, I am not going to do it.

In closing, we are delighted to be a junior partner with the Institute of Professionalism. We are delighted to welcome you to the Judicial Institute here on the Pace Law School campus and I know it's going to be a fascinating day. Thank you very much.

#### **MR. SAUNDERS**

Now it is my distinct pleasure and privilege to welcome our keynote speaker, Bob Weber, who is the Senior Vice President for Legal and Regulatory Affairs and general counsel of IBM.

He is no stranger to issues of lawyer independence, both from the perspective of corporate counsel, which he now holds, but also from the perspective of a lawyer in private practice, which he held for almost 30 years before joining IBM.

Bob was a partner in the Cleveland law firm of Jones Day where he was one of their most effective trial lawyers. He was consistently ranked as one of the Best Lawyers in America.

He's a Fellow of the American College of Trial Lawyers and while he was in Cleveland, he was President of the Cleveland Bar Association. In fact, he received the Ohio State Bar Association's highest award for public service.

At IBM, his law department was the very first recipient of the Financial Times Award as the most innovative in-house law department in the United States. One of the reasons for that, I suspect, is that his law department has been widely recognized by the New York State Bar Association, by the American Bar Association and others for its pro bono program. In fact, his law department was only the second corporate law department ever to receive the ABA's National Public Service Award.

At IBM, pro bono legal services have become a priority for Bob and that is something that we can all applaud. Bob is a graduate of the Yale College and a 1976 graduate of Duke Law School.

Please welcome our keynote speaker, Bob Weber.

**ROBERT C. WEBER**

SENIOR VICE PRESIDENT, LEGAL AND REGULATORY AFFAIRS AND  
GENERAL COUNSEL, IBM

Thank you very much. When my assistant was typing my remarks up I asked her to get font big enough that I could read without the reading glasses and unfortunately, we couldn't do that. The fonts don't go that big. So I'll be using these today.

Good morning. Thank you very much so much for inviting me to be here. It's a distinct privilege to address such a distinguished group on such an important topic.

Before I begin, just let me spend a moment to acknowledge and thank the public servants who are here today, public servants who dedicated their working lives to improving the justice system here in New York. I won't attempt to recognize any one person by name for fear of overlooking someone else. But to all of you who work for justice in New York, thank you for your professionalism and your commitment. Thank you for being with us today and rest assured, you do make a difference in the lives of so many people across this state.

A special thanks to Paul Saunders, Chair of the Judicial Institute on Professionalism. Thank you for the invitation. I really have nothing to say about Paul since he's had such a distinguished career and since his work on behalf of the Institute is so well known. I want to note that after all Paul has done for IBM over the years I would have been an ingrate, indeed, had I not accepted that invitation.

Having accepted that invitation, however, I would confess that I worried for a time that I had said yes in a moment of temporary insanity

because only someone bereft of his senses could think he could bring new and fresh insight on this topic to the Institute so I'll leave it to you to determine how much of my senses I have retained but I do hope that some small part of what I say today will assist our thinking about these critical issues of lawyer independence, professional responsibility and the role of corporate counsel.

As I begin, let me paraphrase the Second Circuit's own Learned Hand, the effect that, as firmly as I believe in the points I am about to set forth, I also readily acknowledge that I could well be mistaken and I'm sure there will be some vigorous back and forth as the day goes on.

Before I set forth my observations on this point about independence, I do want to make a slight semantic point so we distinguish between the terms independence and objectivity. We often confuse them in our common parlance, as they have common attributes and important differences, as well. We New York lawyers know that our advice must be independent in the sense that it must be given to our client free of improper influence or inappropriate external considerations, including, perhaps especially, personal considerations.

On the other hand, we do know that we are really not independent from our client in the sense that we are obliged to represent our client's interest as fully as the law permits.

And on the third hand, as it were, and here is a difference that makes the difference, we know that lawyers have a special responsibility, if not an obligation, to maintain a sense of professional objectivity in what we do so that we don't become intoxicated or misled by the enthusiasm of our clients for a certain result.

So with that in mind, let me set forth the four basic propositions that I plan to address today:

First, I do not find persuasive the argument that in-house counsel are under greater threats to independence than lawyers at outside firms. I do not believe there is objective data to support that notion, nor do I think that claim withstands the cool eye of real world scrutiny.

Threats to a lawyer's independence appear in a great many places, regardless of where one practices; whether in-house or as we jokingly say, out-house; whether in a big firm, in a big city or as a solo practitioner in a small town.

Second, one very real threat to the perception of in-house counsel's independence sometimes comes from in-house counsel themselves, by too quickly referring controversial or high profile matters to outside counsel. Indeed, there are times I worry that referral to an outside lawyer is less because independent counsel is needed and more because someone in-house doesn't want to bear the heat of making tough and controversial decisions.

My third point is, I do believe the general counsel has a unique role to play in the C-suite. I'll offer a few thoughts on what general counsel or any senior in-house lawyer should do to demonstrate that he deserves to be a full

participant in the company's senior deliberations, whether the topics are strictly legal ones or not.

And finally, I will set forth my objections to the assertion often recited these days that in-house lawyers are to serve as the "conscience" of the corporation. I believe this to be a pernicious concept; a concept that detracts from what does make general counsel's voice unique and a concept in the practical world of the executive suite, seems designed to undermine the effectiveness of the corporation's chief legal officer.

As Paul mentioned, we are all shaped by our own experiences. My experience, 30 years trying lawsuits, 7 years now with IBM, a good deal of time working on professionalism over my years in private practice. I had two appearances as lead counsel, in cases that went to the Ohio Supreme Court on disciplinary matters, the last one which I lost by a 4 to 3 vote which still stings me greatly today. But lawyer responsibility and professionalism have been issues that I thought about, worked on and considered for a great many years. That doesn't make me the world's foremost authority but it does tell you I'm not a parvenu.

So with the recognition that I'm a little bit prisoner of my experience let's turn to the issue of lawyer independence, the focus of today's convocation and let me address the first of the four points I mentioned. And that first point is, I do reject the notion that in-house counsel are under greater threats to independence than other lawyers.

In saying this I'm not minimizing the threats to the in-house lawyer's obligation to render independent legal advice. Those threats are real and they lurk in many places we can all describe but rather, I'm rejecting the notion that the threats presented to those who practice in-house are demonstrably greater than those presented to other lawyers.

In fact, these concerns about lawyer independence are neither limited to in-house counsel, nor are they new. To illustrate both these points I want to call upon the voice of yet another New York lawyer, himself a contemporary of Judge Hand and here I refer to Felix Frankfurter, who penned a memoir over 50 years ago that included a richly descriptively portrait of how a lawyer can use his professional soul in service to a demanding client. The quote deals with observations of Frankfurter made early in his career regarding a New York railroad tycoon and his cadre of lawyers and here is what Felix Frankfurter had to say: "The way Mr. Harriman spoke to his lawyers and the bootlicking deference they paid to him!" My observation of this interplay between the great man, the really powerful dominating tycoon, Harriman and his servitors, the lawyers, led me to say to myself, 'If it means that you should be that be kind of subservient creature to have the most desirable clients, the biggest clients in the country, if that's what it means to be a leader of the bar then I never want to be a leader of the bar. The price of admission is too high. To my poor little eyes way down in the valley, it was very influential in making me think how one wants to spend his life, what the profession of the law is and

what it isn't, what one is ready to do and what one is ready not to do. That's the story of how I decided not to become a leader of the bar."

As we know, the private bar's loss eventually turned into gain for academia and the judiciary, but Frankfurter's broader point is perfectly valid today although the situation he observed occurred close to 100 years ago.

The most commonly cited argument about the particular threat to independence of the in-house lawyer is also what I believe to be the least critically analyzed argument and that's the claim that the in-house lawyer cannot be independent or objective because he's employed by one and only one client, with his livelihood dependent on this one client. This is a theme one sees again and again. It is, in fact, the argument adopted by the European Court of Justice in the Akzo Nobel Chemical case where that Court held that Europe's version of the attorney-client privilege did not apply to in-house counsel because independence was lacking; a neat, if unpersuasive example of *ipse dixit* legal reasoning.

Here in the United States the claim is more often found in the literature, unaccompanied by empirical evidence and rhetorical comparisons to the outside lawyer who, it is said, is in a meaningfully different position because she can better spread her employment risk across multiple clients.

Here I disagree.

Let's first look at outside lawyers and start with those in larger firms. In the large law firms of today, where lawyers have so-called books of transportable business, they auction among bidding law firms, the financial future of many of these lawyers depends upon their ability to retain that book of business for that client. That book of business directly affects their compensation in the firm, their significance and power within the firm and it's their vehicle for driving off from one firm to another in search of a higher pay out or in the euphemism adopted by so many, as they search for "a better platform for my practice." So at least for these lawyers, and they are far more common than one might think, their employment risk is not at all diversified. It's highly contingent on their ability to retain the work of a core group of clients.

The burgeoning literature on the business of law makes this point in spades. Firms of all sizes now employ metrics against partners based on how much revenue the partner brings to the firm, how much profit the partner generates, how much new work the partner brings in.

Many of today's law partnerships are far cries from true professional partnerships. Instead they have become what I call commercial commitments contingent upon convenience, ready to be jettisoned from the firm's side when a partner's billings decrease or she becomes less competitive or from the lawyer's side when she decides to trade in her old partners for a new group of partners who promise her more recognition and compensation. This is not to lament the state of modern day practice, that's a topic for another day, but rather simply to say that the notion that we in-house lawyers face a greater

threat to independence over this issue of client diversification is both anachronistic and unrealistic.

Nor is my point limited to the big firms with the headline making laterals. It applies to the less publicized partners, so-called, “service partners,” yet another interesting term from today’s legal literature and it applies also to practitioners in the small towns across America. No one wants to lose a client once gained and few partners who are not in possession of their own book of business wish to antagonize law firm management, particularly in the current environment, where at least as far as paying clients are concerned it appears we have too many lawyers seeking work from too few opportunities.

Now, we who are in-house are in no way immune from threats to independence and I hope I’ve made that clear but these threats come not from who employs us. The real threat to independence, whether we are speaking of independence on the advice we render, independence to tell the CEO she is wrong, independence to mediate disputes in the executive ranks or independence to halt the wrongdoing, whatever the context of the exercise of independence, the real threat comes from within the lawyer herself.

Is our in-house lawyer so concerned about her position, her executive status or her compensation that she dare not even venture a contrary opinion and she becomes in Justice Frankfurter’s vivid term, a “subservient creature”?

Is our outside lawyer in a firm, large or small, so concerned about her client and partners in the law firm that she does not risk giving them unwelcome advice.

Is the senior associate on track to make partner prepared to or willing to say no to the partner?

Is the solo practitioner in a small town prepared to bear the town’s opprobrium for a controversial representation?

Is our hypothetical lawyer’s financial situation, no matter where employed or by whom, such that being terminated, or losing a big client to another lawyer, or not making partner would not only be embarrassing but financially disruptive, if not ruinous.

These and countless similar questions make plain, at least to me, that it’s not the employer or the partnership or the size of the law firm that affects the independence of the lawyers advice. It is, instead, more mundane motives of the type laid bare for us centuries ago by the likes of Sophocles and Shakespeare, motives such as human pride, hubris and selfishness.

These observations are certainly not original and new and they are not limited to those who practice law. We can quote any of the great philosophers or religious leaders. I’ll only quote two of my favorites starting with the Roman poet Horace who wrote, “He will always be a slave who does not know how to live upon a little.” Or from a more modern perspective, let’s look to Upton Sinclair who said, “It’s difficult to get a man to understand something when his salary depends on his not understanding it.”

These quotes, one rather lyrical and the other darker and cynical, make the point crystal clear. We can lose whatever independence we may have in our judgment and our conduct because we fear losing monies, status or livelihood, not because of where we work.

Sadly, some of our professional colleagues have again, regardless of where they work, lost sight of who we are as lawyers and why we do what we do. Or, as Justice Frankfurter noted, they stopped thinking about what the profession of law is or isn't, what one is ready to do and what one is not ready to do.

Here I'm saying that regardless of where we work our bulwark against the loss of independence must be our sense of professionalism in who we are and what we are ready to do and what we are ready not to do.

We are and must remain a profession; a profession that in its roots is engaged in a public service, that as Dean Pound said many years ago, "is no less a public service because it may incidentally be a means of livelihood." That word, "incidentally," is pregnant with meaning for all of us.

Now, perhaps because I had good mentors who gave me more attention than I deserved way back when I began to practice law, I was taught that lawyers always needed to be prepared to be fired. I was told that in any long legal career there would inevitably be times when a client would fire me and I should always be prepared to give my best advice and bear whatever the consequences would be.

Over time, in those many years, there were indeed occasions when clients didn't like my advice, some few occasions where they just chose not to follow my advice, sometimes where I never knew why and they just switched lawyers. But in every one of those situations I always went back to the definition of what it meant to be an attorney and that very word, attorney, is rooted in the concept of agency, with the lawyer being a special kind of agent in the areas defined by our professional rules.

As a matter of agency, it was always clear to me then and now that the client is the principal and the lawyer is the agent and the principal is free to discharge the lawyer for good reason, bad reason or no reason all because the client should always have the right to discharge the lawyer apart from some circumstances, particularly in criminal law.

The corollary to this principle from the lawyer's standpoint is that we need to have the mindset of a baseball manager, always prepared to be fired. This may be my only original contribution to the discussion of the independence of in-house lawyers, although I hesitate to claim it as original since someone probably said it somewhere else but I wanted to share with you an experience.

When I first came to IBM I explicitly confirmed to my CEO that my client was the company and that as CEO of the client he had the client's prerogative to fire me for good reason or without notice at any time he decided he wanted a different lawyer and I should add here just to be clear, this wasn't

an empty promise since at IBM senior executives do not have contracts, nor do we have parachutes.

During my time at IBM, I've had the privilege to work with two extraordinary CEOs, Sam Palmisano and now Ginni Romety and I had this conversation with each of them as we began our CEO/General Counsel work. To them, it communicated that I clearly understood who was the principal and for me it was a declaration of independence of sorts, demonstrating that I had no expectation other than I would give them my best effort and advice and I would be fully prepared for whatever the consequences might be.

In neither case did we ever touch on the topic again but we do understand each other on this important point.

Let me turn now to my second point that at times in-house lawyers themselves act as if they don't believe they have independent judgment. Everyday we see examples where an allegation, issue or claim arises regarding an institution and the first thing we see is that either in-house counsel, the board or management retain external counsel, quote unquote, to do an independent investigation. Now there are certainly times when outside counsel, it may make sense to retain outside counsel for an independent investigation, sometimes it's even necessary, perhaps, because the regularity or because of issues of perception or where the board or management find the in-house staff or general counsel to be feckless. In those cases and there are many, perhaps even in most cases where the general counsel should be fully prepared to manage the inquiry herself to make the tough calls herself and most importantly, to take on the responsibility herself.

I analogize this in a way in my mind to the judicial doctrine of the Court's duty to sit and while we can't stretch the analogy too far, I think we general counsel have a duty to sit and do our jobs in highly charged and controversial matters. Indeed, in these highly charged and controversial times our responsibilities and obligations may be at their greatest.

There have been any number of high profile issues about questionable CEO behavior in recent years, too many to be sure, and while in many cases the legal or fact finding tasks were outsourced to external counsel there were also a good number where a courageous general counsel managed the situation herself and let the facts determine the results, as well they should and in those matters those general counsel gave credit to their independence and professionalism.

It is, of course, the long-term best interest of the client that should provide the guiding principle for how matters of this type are handled. Obviously, if the general counsel herself were implicated or involved in any way or where a cynical or distrustful, regulator demanded an external referral, the decision to go outside would surely be clear.

But too often we see an immediate referral to outside counsel when allegations arise regarding someone in management or when allegations of corruption are made. In those situations I give a respectful salute to those

general counsel who does not reflexively conclude that an outside voice is needed but rather take a sober, mature and fact based approach in deciding what is the best interest of the company, whether it should best be handled by the general counsel herself, by her with the assistance of an outside firm or by a total referral for an independent review.

It is on this point, in summary, sometimes easy to say that a task demands an outside voice when what it really needs is a courageous voice, one prepared to grapple with the difficult issue and to live with the consequences of doing so.

While on this topic of referrals to so-called independent counsel, I would like at some point to see some meaningful analysis from someone about some of these instances where referrals have been made. I think fair questions can be asked, for example, as to whether external counsel operate as efficiently and productively when retained as independent counsel as they do when retained and managed by knowledgeable inside counsel and also, is it in the shareholders' best interest to ask outsiders with none of the relevant background to come in and educate themselves at the shareholders' expense when there are respected professionals inside who could do that work? Again, these and many related questions deserve more disciplined analysis that I believe has yet been provided by the literature, the regulatory community or the courts.

Let me move now to the third of my four points and describe what I think are some of the traits that make for successful in-house lawyering and a good place to start that discussion is by recognizing the body of literature, a body both thoughtful and substantive that has arisen in the past few years regarding in-house lawyers in general and the role of general counsel, in particular.

We now have, if you can believe it, magazines, blogs and social media sites devoted to those who practice law on the inside of institutions and some of this and I do mean some, is actually quite valuable.

No one source aspires to present as comprehensive and formal a review of this situation as does the volume entitled "Indispensable Counsel," co-authored by Christine DiGuglielmo, one of our participants here today and she will be presenting after the lunch break. Christine's book takes the reader on a soup to nuts tour of the in-house landscape.

We must also acknowledge a debt to the legal thought leaders and thought provokers who have so capably brought these issues of in-house professionalism to the forefront. Here we have to note the work of Ben Heineman, a body of work almost by itself that forced business leaders and their lawyers to acknowledge the special characteristics of the role of the in-house counsel and to undertake a thoughtful analysis of the implications of that role. These thought provokers, a term I much prefer to thought leaders, have argued quite rightly for a broad acceptance of the general counsel as a full partner at the leadership table in public companies. Ben Heineman's

arguments in this regard need not be repeated and all I would say is his fundamental thesis is best captured by the assertion that the first question a general counsel must ask is, is it legal and that thereafter she needs to be a full participant in the follow on discussion of if it's legal, is it right.

These notions are instructive, fundamentally right minded and I fully endorse them. Indeed, based on my interactions with many other general counsel, both individually and in groups, there is no dispute whatsoever about this and it's now the accepted model at practically all significant companies and institutions.

To be sure, there are still some oddities where the legal function is marginalized or in today's vocabulary, disrespected as in some few companies where the general counsel doesn't report to the CEO but actually reports to an administrator or financial officer. But oddities of this type are so out of step to the mainstream that they only seem to prove the validity of the broader rule.

So, if general counsel are, indeed, to take their place with senior people, how do they get there and here again I go back to basics. Like everything else in the profession of lawyering, we take our place at the senior table by earning trust day in, day out just like outside lawyers in law firms earn their trust of their clients, day in and day out and quite frankly, just like lawyers earned the trust of their client for centuries. This topic of how we earn that trust is another rich one worthy of another discussion on another day. But let me offer up just for thought on what I think are critical factors to becoming the essential advisor to your company.

First, never lose your discipline or your willingness to get your fingernails dirty. So very much of what we do and render advice about lies in what I call the world of "it depends." It depends on this fact or that fact or this context or that context, or this regularity or that regularity and it can be very tempting for a general counsel to stay at a level of 30,000 feet and live in this world of it depends. Tempting, but surely wrong.

A modern general counsel must be prepared to be the master of pertinent facts and to do that requires discipline more than anything else. If you have as good a grasp on the facts as is possible in the context, you can leave that world of it depends and using your maturity and judgment to give your client meaningful advice.

Second, always make sure to separate your legal advice from your business advice or what I call your prudential advice. The client deserves your very best legal advice, in crisp fashion and with only so much detail as-is necessary to make that advice comprehensible and able to be executed by a sophisticated business person acting in good faith. Then go ahead and offer your non-legal advice again in clear terms but take care never to conflate or confuse the two. When the two become intermixed, the legal advice moves from where it must be listened to, to another realm where your voice is robbed of its uniqueness and you are just one of many. Again, our clients deserve our

advice on these questions of is it legal, is it right but they deserve those answers in a way which makes it clear which question we are answering.

Third, always be objective in your analysis and don't confuse your objectivity with independence. And here I use independence in the sense that you are not independent because you are representing a client and you really want to work for the best outcome for your client. It's a point I touched on earlier.

As an in-house lawyer your opportunity to offer objective analytical advice may well be unique among your peers. You are, by training and position, especially able to examine an idea from all sides and to offer your support, criticism or modification. Your advice must always be cold blooded as regards the facts, accepting them for what they are and never assuming that they are what you wish them to be. You must maintain this objective, analytical foundation even though you are not independent in the sense that you are representing your client and you are obligated to do it with zeal.

Finally, always remember who is the client and be the best advocate for the long-term interests of your client. Just as the conflation of legal advice with business advice so easily entraps many in-house lawyers, so, too, do many lawyers cause themselves so much trouble by forgetting who the client is.

In my years of private practice and my years engaged in the lawyer discipline process I can say with absolute certainty that more trouble, more consternation and more ruined professional careers came from violating this one rule than any other and it's where some in-house lawyers go wrong, as well, thinking that the business unit in which they work is their client or the business leader with whom they work is the client or the project that they are working is their client.

From the perspective of this in-house manager, I can tell that you at IBM we continue to keep this issue in the forefront of our global team. I used the occasion of my first presentation to speak on this very topic — who is the client - and I emphasized who the client is not and then I emphasized the real client is IBM first, foremost and forever.

Now let me briefly touch on the fourth and final topic I said I would address, this new notion that the law department or the general counsel should be the conscience of the company. As I mentioned, everyone now accepts that the general counsel should be an essential advisor at the senior executive table and as with many good ideas, this description of the general counsel is both senior and legal counsel and full executive participant has become, for some, merely a launching point for a different and more expansive vision of what the general counsel does.

Like the proverbial frog in the pot of hot water who doesn't realize his peril until it's too late, I think that some of these new descriptions of the general counsel will, by increment, indicate a distorted set of expectations that may actually diminish the voice of the general counsel.

Let plea start with Ben Heineman's statement that the in-house counsel should be a lawyer/statesman. Now I will confess to being a little bit uncomfortable with that notion but I can accept it insofar as it attempts to capture the concept that the general counsel can play a special role as the executive suite's honest broker. After all, a trusted general counsel is very often the natural intersecting point for the resolution of disagreements among other senior executives or corporate functions not only because the CEO often view such intramural disputes with all the enthusiasm of a parent being asked to resolve a dispute with children about crayons but also because other executives come to the general counsel to raise these issues about what they believe is a protected and privileged context.

So, particularly because the statesman reference again hearkens in my mind to lawyer as agent, acknowledging that the general counsel has an agenda broader than her own, an agenda that allows her to be the honest broker in resolving the occasional fractious debates that arise in corporate headquarters.

My discomfort on these new and expanded descriptions of the role of general counsel increases considerably, however, with those who describe the modern general counsel as the guardian of corporate integrity, primarily because I have no idea what that really means and I explicitly part company with those who now assert, and there are many of them far more knowledgeable than I, but I explicitly part company with those who assert that general counsel should be described as the conscience of senior management or even more troubling, the conscience of the company.

Few concepts could be as destructive to the lawyer's right to sit at the senior table as it is to place around the lawyer's neck the millstone of being the company's conscience. And even more debilitating to the effectiveness would be the senior team's perception that the general counsel actually believed she was the conscience of the company or even worse, that she acted like it. I can't imagine what it would be like to act that way but it takes no imagination for me to say that if I did act that way, my tenure as general counsel would be short lived and justifiably so.

The notion of being the conscience of the company is flawed in so many respects it's hard to know where to start, but let me try. First, despite appearing to be the product of more modern thinking, this notion of the lawyer as conscience or guardian of integrity actually reflects more of the long rejected and hoary thinking of lawyers as some elite group of illuminati or philosopher kings, dispensing rules and prescriptions to the benighted. It reflects a lawyer-centric view that lawyers have a special insight into ethical rights and wrongs and again, I just fundamentally disagree. There is nothing in my training as a lawyer that makes me better or more suited in matters of conscience than any other senior leader at my company and for me to claim that position or better put, to pretend to take that role, would give rise to a pretty well founded resentment and criticism from my peers. At the senior table at my company there are a number of gifted men and women, each of

whom has among many other positive attributes, a well formed conscience and a personal compass relative to the companies values and beliefs. They may need me to be many things for many reasons, but serving as their conscience is definitely not one of them.

Viewed correctly, a company's ethical heartbeat, its governing ethos, should reside with no one person or any one function. The company's ethos, its moral compass should be engaged in every person as part of the corporate DNA. To say that the law department or the general counsel is the conscience of the company, allows the rest of the company to think that those issues are primarily the responsibility of other people, thereby obscuring what should otherwise be a thoroughly pellucid governing principle of institutional life: Everyone is part of the institution's moral construct and everyone is responsible for the observance and execution of the company's values, not only or even especially, the lawyers.

I want to be clear here on one subsidiary point. We lawyers are, of course, expert in legal ethics and in so many respects it's true that legal ethics and occasionally the law itself reflect broader ethical norms such as loyalty, discretion, honesty, transparency. I'm not eschewing that ethical responsibility. Rather, I'm only noting that when it comes to these issues of business ethics I am but one voice and not necessarily the authoritative voice.

Perhaps more fundamentally, however, the description of the general counsel as the conscience of the company leads to fuzzy thinking. We, as lawyers, are trained in a certain discipline and a certain way of thought on the question of is it legal, we have a special responsibility and authority to find the right answer, to explain it and others should and in many cases must listen to us in that regard.

But when we take on the role of conscience to the company, we abandon the disciplined confines of legal reasoning and become just another voice in the cacophony of modern day would be ethicists. The unique nature of our voice and opinion becomes diluted to the point of being unrecognizable and we will eventually, I predict, find ourselves reduced to the status of the chattering heads we see on television, arguing back and forth in today's version of hell.

So let me wrap up this topic with as clear a statement as I can on this point. I have never been, am not now, nor will I ever be IBM's Jiminy Cricket.

So with that and with the admonition that we should always let our conscience be our guide, let me wrap up by saying that these topics of independence for all lawyers, including general counsel and inside lawyers, are topics that call for our profession's best and brightest to analyze them, to explore their boundaries, to poke holes in them and to develop new prescriptions for the future. I am certain that over the course of today this convocation will play a meaningful role to that critical task and again, I'm privileged that you asked me to be here today and I thank you for your extraordinary patience in listening to me.

Thank you very much.

**MR. SAUNDERS**

That was such an extraordinary presentation that if we could prevail upon Bob just for a few minutes, I think this is a unique opportunity for us to take advantage of Bob's thinking to ask him some questions and I have one question I would like to ask and I invite all the rest of you to come up to one of the microphones and join in this exercise. If we can prevail on Bob just for a few more minutes?

My question, Bob, is this: I mentioned earlier Professor Hazard who has written a lot about the legal profession in general and corporate counsel in particular and one of the distinctions that Professor Hazard makes — I would like to ask you to comment on it — between corporate counsel, in-house corporate counsel on the one hand and outside counsel on the other hand is the unique advantage that he says in-house counsel have when they are giving legal advice.

You mentioned that it's important always to have access to the facts. We are professionally, ethically obligated to ascertain the facts before we give legal advice but he said that the advantage that in-house counsel have in that respect is what he calls "the water cooler effect", access to what he calls gossip, which he says is not to be rejected but that it's an important aspect, according to Professor Hazard, an important advantage that in-house counsel have over outside counsel when giving legal advice and I would like to ask to you comment on that.

**MR. WEBER**

Sure. It's a thoughtful question and let me come at it in a couple of different ways.

The big advantage, if you just took two perfectly comparable lawyers, one inside, one outside, identical twins, perfectly trained, some experience, social experience, they are both ready to deliver to you every bit as much value as the other.

The reason that the in-house lawyer would point to as to why he or she could especially deliver additional value revolves around two things, both of them fundamentally fact based. One is, the first one is a little bit different than the point you raised and it's the issue of, I'll call it, translation. When you live in a company and you get the e-mail, you go to the meetings and you hear this and you hear that, you understand that language. You understand the grammar of how they construct arguments and how they do analyses of various business propositions.

If you are outside, you are missing that. An important way of building communications in a company is understanding their grammar and how they build these arguments.

Then you take the point by living in that building, living in that ethos, understanding the language better than the outsiders do, you, by nature, have access to a lot more facts than they do. You, by nature, would know that we are examining an acquisition of this company as opposed to that company and we are looking at the different legal type issues. You know more about what the business plans are out in the future and that helps you formulate advice to get there and the outside counsel wouldn't have it.

What the outside counsel brings, on the other hand, to make their argument, I don't have the grammar, I don't understand, I don't speak in shorthand, I don't have access all the time, I'm not around the water cooler, I don't read all the e-mails and I don't know the business plans but damn it, you know what the Delaware Supreme Court did, I read the opinion and I have a couple of smart kids doing memos on it and that's nothing to sneeze at either and I think between them we have lots of value.

But I do think and I raised that point as one of the questions and I wish somebody academically would look at it. I do wonder about some of the costs and benefits of that because you have people in-house that may know so much of this already and facts matter.

There is one thing you know from trying lawsuits, and I know from trying lawsuits, inside, facts matter, facts matter and that's why you have to have dirty hands.

#### **MR. SAUNDERS**

If I could just put one more question and then invite the rest of you to do this. On your last topic of lawyers as the conscience of the corporation, I was reminded of a comment that Judge Sporkin made, I think it was in connection with the Lincoln Savings Bank scandal many years ago. Stanley Sporkin had been the Chairman of the SEC and then he went on the bench in the District of Columbia and he looked at that scandal and he said, in a comment that's been widely quoted ever since, "Where were the lawyers?" How does that square with your observation that the lawyers are not the conscience of the corporation?

#### **MR. WEBER**

Well, I think they are two fundamentally different issues. The Sporkin question and you are right, those of us who practiced law back then, we saw that editorials were written about it. It was a provocative way to phrase the question and I think that question went back to Justice Frankfurter's observation about some lawyers become subservient creatures and we saw that in the Enron era and we saw it back in the savings and loan era, both of which were fueled by lawyers writing opinions on whether things were true or not or synthetic leases or this or that and they established big practices about that and it was sloppy lawyering.

I think it was absolutely fair to ask the question, “Where were the lawyers on this? Didn’t they see what their client was up to, didn’t they have an obligation to say something,” and I agree that they did.

On the general issue of the lawyer not being the conscience of the company, it’s conceptualized in the sense that I think it detracts from the notion of what senior leadership at a company ought to be. I’m not their conscience. I’m one of the people, hopefully, with a well-formed conscience that sits at that table and we all understand the company’s values but for me to presume that I have some special role in speaking to that I think fundamentally weakens the role I have when I give them legal advice.

**MR. SAUNDERS**

True.

**A SPEAKER**

Thanks so much Bob, a question also on conscience and Jiminy Cricket.

**MR. WEBER**

I’m glad somebody remembers Jiminy Cricket.

**A SPEAKER**

In the materials and I think in my presentation later on, the audience might hear something that sounds an awful lot like a direct contradiction between the two of us and the question is intended to resolve that early.

If we assume that no lawyer should purport to have a monopoly on conscience, isn’t it fair to presume that lawyers, by their training, have a special role to play because we are, perhaps we should be, more skilled in dispute resolution, perhaps more open to different points of view. The very nature of our required mandated objectivity puts us in a different place from a chief financial officer.

All the things a lawyer in a law department bring to the conversation would strike me as being a major part of an institutional mission as long as we don’t go overboard and say we are the only conscience.

**MR. WEBER**

I fully agree with that and I also have to tell you when I put this together and I’ve done some reading, a lot of thinking over the years, I knew some people would fundamentally disagree with me on this conscience point because there has been so much written about it lately.

I’ll take it. I could have that debate. That’s a fair point.

The point you just made, I think goes to the issue that I made as maybe my second point, which is the general counsel earning the trust of

senior management so that her or his voice becomes an essential part of the company's fundamental deliberations. I fully agree with that. I think that's where we ought to be.

I think at most big companies that's where we are but you don't get it just by being called general counsel. You get it by earning it because otherwise you could just be a general counsel on the shelf who is there to ask a question or two once in a while but you are not really critical. So I'm totally for that.

Where I diverge is when you take that notion, which I think is unexceptional and well founded and right minded and very descriptive of what it takes to be in a company, today and let's say, let's push that envelope a little further. We'll get lawyer/statesman and guarding of integrity and pretty soon we are the conscience of the company. I don't get it.

I think it's a fundamental misconception of how we sit at the table and how we are perceived and how we can have our best impact and honest to goodness, I really do think that if somebody in a sophisticated company took on this level of conscience of the company she would be marginalizing the department, not consulted on critical issues and that would be bad for the institution no matter what it is.

So I think we probably have some disagreement on the margins but I think you are absolutely right with the corollary.

Yes, sir?

#### **A SPEAKER**

I would like to join the others and thank you for a very thoughtful and persuasive presentation.

My experience has been in the private sector yet I find myself very much involved right now in selecting general counsel for one of the top ten employers in the state and I've begun to think much more deeper about the role of the general counsel in the governance of a corporation and this one happens to be a not-for-profit so we don't have something to help you with in that respect and I would be very interested in hearing your observation as to the appropriate role of general counsel in the governance of the corporation.

#### **MR. WEBER**

I think general counsel is the, if not one of the, probably the critical player on insuring that an institution, nonprofit, profit, has sound governance.

Governance is this unique mixture, some law, not as much law as some people think but some law, some business and a whole lot of common sense about how you would like to be treated and how you would want shareholders to feel.

In the nonprofit sense it's a different constituency but a lot of nonprofits, they are not bound but they think a lot like that now in their governance and I think they are well advised to.

I think the general counsel is in a unique place in the company to be able to talk to the CEO about what's good governance and what isn't, about how you treat the Board, about how the Board would interact with the shareholders, whether they are employees, shareholders or whatever and I think when you are looking for your general counsel I think I would look for those three things I just mentioned: Some knowledge of the business or whatever activity it's in, a good knowledge of the law but knowledge of the law isn't the number one thing for a general counsel. Maybe I'm biased but certainly nobody would say I'm the world's greatest legal scholar. But I think the key thing is the judgment and practical common sense that a general counsel needs. Because it's not all about the general counsel.

The general counsel is there to make sure the institution gets its business done, profit, not-for-profit, it's there to make sure that all these divergent people aren't going to fight with each other and it doesn't get in the way of institution's goals and the CEO is busy as hell and all this money to get raised and this and that to make sure that she gets the advice she needs to get trained in once in a while or to get pushed a little bit. We are the only ones that can do that.

I've talked to a lot of people but when I was general counsel for the past few years, I think those are the things you look for and you also look for somebody who is not flustered because things happen everyday. Every morning I come in and something happens somewhere that some people would jump out the window over and your general counsel has to be someone that says okay, it's another day, I'll bust my tail but it's not the end of the world. So —

**MR. SAUNDERS**

You have about three minutes. One last question.

**A SPEAKER**

I'll be brief. I, like everyone else, have really enjoyed your comments and the question that I have —

**MR. WEBER**

You are too kind.

**A SPEAKER**

— it's more of a translation from the concepts you were mentioning, in practical — I'm in-house counsel. Could you just give us a few examples of how you translate into action to your in-house team the concepts that you've mentioned and how you reinforce that in your law department?

**MR. WEBER**

Okay. The first rule is you never ask anybody to do anything that you haven't done first, all right? So we don't, we made a really big effort at IBM. I'm not critical of people before me and I'm not saying it wasn't that way but what we've worked on to get rid of the sense of anybody being highly perfumed. Everybody is a worker. I don't want highly perfumed managers or presiders, I want people that are doing work and what we insist upon at the senior team is if you are supervising all the lawyers in our services business, that doesn't mean you are only supervising them, that means you are doing some of those deals, too. I watch them like a hawk because if you are going to be a leader in this department you are going to be a doer first.

So the first rule is never ask somebody to do anything you are not doing and make sure the leaders are doers.

The other thing is on this notion of how do we deliver really good value and how do we deliver opportunity. We move our people around the firm. I just took last year our chief litigator, who had been doing a great job and I recruited her in from an outside firm and now she is our chief corporate lawyer. People say I'm crazy maybe but it's working.

We've taken our head of one unit and made her the head of sales, the whole world moved, moved her to Shanghai. So also by the things you do you demonstrate what are the values that you are trying to inculcate.

Pro bono: Paul mentioned a little bit earlier, we've really worked hard on that. And we have our good partner up there that we work with on these matters and then continuing legal education. We've done a lot of that and so it's the types of management initiatives you do that communicate what are the values and our values are collaboration, responsibility, mutual support and total transparency. It's a no surprises environment.

If somebody brings me a surprise, I'm not going to be real happy. I don't know if that's at all helpful or not.

**A SPEAKER**

Very much. Thank you.

**MR. WEBER**

Thank you all very much. You've been very kind.

**MR. SAUNDERS**

I want to thank Bob Weber for one of the most thoughtful, thought-provoking presentations on the subject of lawyer independence that I've ever heard and with any luck, what I hope we will be able to do even before the proceedings of this Convocation are published, with Bob's permission, is to put that address up on our website so you can all have access to it as early as possible. So thanks again to Bob Weber for an extraordinary keynote address.

It's now time to present the first of our panel discussions on the subject of lawyer independence and in-house counsel. This discussion is going to be presided over by Professor John Coates from Harvard, who has spent his academic career studying the legal profession and before he went to Harvard was a partner at the Wachtell, Lipton firm in New York City.

Let me turn it over to Professor Coates and ask him to moderate our first panel. We have Louis Briskman, who is the General Counsel of CBS; we have Flor Colón, who is the Assistant General Counsel at Xerox and a member of the Judicial Institute on Professionalism. We have Lesley Rosenthal, who is the General Counsel at Lincoln Center and the author of a recent new book, which I think is mentioned in the program for this Convocation, on the subject of general counsel for nonprofit corporations; Jennifer Daniels who is the General Counsel of NCR Corporation and we have Gary Lynch, who is the Chief Legal Officer for Bank of America.

So without further ado, let me turn these proceedings over to Professor Coates.

## **PANEL I — ROLE OF THE CHIEF LEGAL OFFICER: CHALLENGES TO INDEPENDENCE**

### **JOHN C. COATES**

JOHN F. COGAN, JR. PROFESSOR OF LAW AND ECONOMICS,  
HARVARD LAW SCHOOL

Thank you. I'm delighted to be back in New York where I practiced law for many years before going into teaching. And particularly for the opportunity to talk and mostly listen to a very distinguished group of fellow panelists.

I feel more like a judge if I'm sitting over here than if I'm standing so I'm going to keep sitting.

So, to pick up on the suggested phrase from the prior remarks I'm going to try to do my best to provoke thoughts and panelists will have thoughts that will follow from my provocations. Mostly, I think I want to, as was suggested earlier, leave time for questions so we'll go for awhile. If I seem to forget just wave at me and we'll bring it to a close.

Let me start off the panel with a question that may seem a little bit distant from the question of independence but I fundamentally think is connected and just one word on why. The question is going to go to where and how general counsel and in-house counsel add value within the organization and more broadly, how lawyers add value to an organization and how that value is communicated to non-lawyers. Because without that it seems to me the kind of influence that the prior speaker suggested that lawyers ideally have, it just doesn't seem to get off the ground.

And so when lawyers internally are trying to articulate for both their own department and on behalf of the outside lawyers on whom they spend enormous amounts of money and the corporation is expected to pay those bills, often long before you need, clear value is recognized from those efforts.

How do you go about the challenge of communicating those interests, the interests of the company in having independent counsel play the role they do?

How do you convince a skeptical CFO that this more reputable but also more expensive lawyer is worth hiring for this matter?

Why is this level appropriate rather than this much cheaper legal process out-sourcing unit that will do the same work for a tenth the cost?

How is it that you overcome skepticism about the value of the legal judgment when — so, that's my lead off. Lou, would you like to take a first crack at that?

**LOUIS J. BRISKMAN**EXECUTIVE VICE PRESIDENT & GENERAL COUNSEL,  
CBS CORPORATION

I would do that in a number of different ways.

It's a great question because I think it's a question we face every single day of the week, whether it's through our CFO, Chairman or our Board. One is an easy way. Every once in a while we get to be plaintiffs. We'll bring home a big claim and we could show real value because just look how much money we recovered from the United States government over a clean up that dates back to World War II. They see value and that we get credit for.

Another one might be where we look at our legal fees. We have a monthly printout, a dashboard, it shows every dollar that we spend and we compare that against two things. One is our prior year and the second is our budget estimate. Sometimes you have interruptions with new cases that will obviously throw the numbers off but generally you should be on top with the numbers and you can generally show how you are doing with the numbers. And if it's a big case you move the numbers up but you can show your CFO that you are in tune with those numbers, you are watching those numbers. They are very careful with those numbers and that usually describes the value.

Another part that's a little bit farther away is our contract. You do a contract now and everyone is happy the contract is done but you really won't know if it's a good contract for five, six, seven years down the line and it could be that the champagne you are drinking now turns into scotch because it's a bad, bad contract if you have to either terminate or modify. So I think over time the company will see the value of the law department when the contract seems to work. You don't have any great fiascos as opposed to some contracts and that's where everyone is in a consensus where we get the best lawyer we can. We don't look if it's \$499 or \$504 an hour for that lawyer and that's probably ten cases that we have out of maybe 5,000. So very few bet your company cases overall.

But on the other cases we are looking for the best lawyer and the best geography with the best legal fees and the best counsel and I want everyone in my department asking that question. If I were building a house and I just got to the first contractor and give them the deal, no, the answer is no. We are always looking for the best value. I think our lawyers are able to exhibit that to our clients.

**PROFESSOR COATES**

Terrific.

**LESLEY FRIEDMAN ROSENTHAL**

VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY,  
LINCOLN CENTER FOR THE PERFORMING ARTS;

AUTHOR, "GOOD COUNSEL: MEETING THE LEGAL NEEDS OF NONPROFITS" (2012)

I'm really grateful to the organizers of this for including the nonprofit general counsel in the mix. Yes, Virginia, we do have legal issues and just because we are tax exempt doesn't mean that we are law exempt.

So, I would really just agree with everything that Lou has just said and add a couple of other flavorings from our perspective.

One is on the topic of managing the legal expenses. At Lincoln Center I have pioneered a new model for the procurement of legal services that has garnered for Lincoln Center approximately \$2 million a year in extremely generous in kind contributions from the legal community. It is a model that's been replicated at other nonprofits in New York and elsewhere and I would like to make sure that folks out there that may have relationships in the nonprofit sector, either professionally or in your personal lives, are aware that this is doable.

Then the second point to your question really is about being a legal educator and adding value to your organization as the general counsel by making sure that people really understand, people who are not lawyers, how the law impacts on their work, making sure they understand the contracts that they are negotiating, signing, administering, make sure they understand the obligations to trigger renewal rates or termination rates, make sure that the flow of funds is being properly invoiced and timely paid and really, making sure that people understand deeply the legal footprint of the organization, that trademarks aren't being violated, that copyrights aren't being overlooked and really empower our staff of 500 people, none of whom are lawyers, to be with [the] legal [department] in delivering value to the organization in fulfillment of its mission.

**PROFESSOR COATES**

Great. Flor?

**FLOR M. COLÓN**

ASSOCIATE GENERAL COUNSEL, XEROX CORPORATION;  
JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW, MEMBER

I think similar to the comments made already there is the dollars and cents value where legal departments, like any part of a business, are under pressure constantly to watch how money is being spent, to save money, to be smarter with the company's money and so we deal with that every single day whether it's bringing in lawyers because there are some services that are being provided that could actually be provided cheaper, if you had in-house counsel or in my case, I look at this in many different countries of the world so I'm

dealing with that issue a lot but often just making sure that your senior management understands that, in fact, legal services, in fact, can be provided in a way that does not sacrifice quality but is nevertheless conscious of the needs of the company on the financial side.

I think on the non-financial side, the greatest value in-house legal departments bring, I think was mentioned by Bob Weber, knowledge of the business and being able to provide legal advice to your clients day in and day out, knowing exactly what's important to them and more broadly, what's more important, what's the importance to the company as the whole and what the objectives are long-term and short term. And, in fact, that you can help your clients as they work their way through their day-to-day business issues by bringing to them legal advice that is helpful and furthers the objective that that client has.

**GARY G. LYNCH**

GLOBAL CHIEF OF LEGAL, COMPLIANCE AND REGULATORY RELATIONS,  
BANK OF AMERICA

I work for a financial institution so lawyers are essential to opening the doors everyday so I would break it down into three areas: Advisory, transactional (with the in-house lawyers to marshal in some instances the outside lawyers), then regulatory.

Obviously, regulatory has always been important. The last couple of years it's become even more important since 2008 so you have that group of lawyers and then finally, litigation where the last I looked I think we had something like 28,000 litigations that we were dealing with.

So, it's easy to make the case that you need lawyers and you need a lot of lawyers to handle all that. We have 700 lawyers full-time on our payroll. We have another 200 contract lawyers so basically it's a 900 lawyer law firm which would put it certainly in the top 50, if not top 20 of law firms. Then on top of that all last year we spent \$1.6 billion on outside law firms which is a number that's tough to fathom. So we are obviously very important. The way we give advice and the way we settle cases, is, frankly, very important to the next quarter, the quarter's results. We spent well over \$10 million last year just settling cases.

I don't have to reach very hard to make a compelling argument that we need good lawyers.

**JENNIFER M. DANIELS**

SENIOR VICE PRESIDENT, GENERAL COUNSEL AND CORPORATE SECRETARY,  
NCR CORPORATION

I would say the same. I don't think we have to reach very far either and I would echo what Paul said about the water cooler comments.

My folks who are integrated with their businesses spot legal issues that the clients don't even know they have. That happens very often. For an outside law firm to be called, someone has to surface a legal issue that we don't have the expertise in-house to deal with it, so I have my folks pretty tightly linked with their businesses.

The world is moving very quickly and I work in a technology company in which sometimes the business is even ahead of where the law is. Sometimes the business wants to go do something and there isn't an answer as to whether it's legal or not.

We are in 120 countries delivering software as a service where the law hasn't gotten where the business is so the lawyers bring some judgment to the business.

I agree with Bob, it's very clear when they are giving business advice and when they are giving legal advice but they do sort of have headlights to assess risk because they are so coupled and linked with the business.

I don't have a hard time making a case, particularly when we are going a business, either in an any substantive area or in a new geography that we need some dedicated legal support to help us navigate those issues because they come fast and furious.

### **PROFESSOR COATES**

Let me press you one more time because I hear what you are saying and it's compelling and I get that the overall pitch may not be hard but discounts have become a completely standard part of the in-house outside law firm relationship. It's expected, in fact, of most companies that most large law firms will knock off a phenomenal price.

There are increasing pressures, I know from many conversations with general counsel to employ non-lawyers in redesigning the way law gets done inside companies and that directly challenges the notion of independence that we are framing the day with and that's a cost driven pressure because \$1.9 billion is a lot and even if you move away from the financial sector the size of legal bills has been going up even as the rest of the organization has been able to cut costs in almost every other domain.

So if I'm a non-lawyer, if I'm the chief financial officer or one of his delegates thinking about the budget of a legal department, I hear you but can't we find better ways to do this and therefore, since lawyers haven't on their own been able to cut costs, traditionally, I'll just say if you just look at standard hourly rates per partner throughout the industry until the last downturn, they went up, up, up every year.

Starting salaries I know of our students, thank goodness, went up, up, up every year.

Since the legal profession as a whole, both in-house and in law firms haven't placed cost cutting at the top of their list, finding efficiencies, should we have non-lawyers heavily involved in helping lawyers do that, so I'll just

frame it like that. Why not? Let's have non-lawyers sitting at the table with lawyers making you focus on redesigning your legal departments.

#### **MS. DANIELS**

Let me speak to that. At NCR we have a very robust continuous improvement program. It cuts across all our businesses, including legal, so every year I'm given a target of ways to get more efficient. It's just a number. You have to take this much out of your budget and task that out to my team to say what can we do more efficiently. Sometimes that's on the outside spending and sometimes on the inside and you would be amazed at where you can, in fact, find efficiencies.

We have done what we call an "outside counsel menu project" where we went and looked at all the outside counsel that we were using, we set a target of the number, it was about, it started at about 300 lawyers across the globe, law firms that we were using. We got that down to about 180 right now and that was simply by looking at who are the firms we are using, what other capabilities do they have.

We went out to those firms and said, "Tell us what you can do and how you can make do more efficiently," what we are using someone else to do and we were able to cut the number of providers which cut the costs significantly.

In addition, this is going to sound ridiculous but we have a project that had simply to do with office supplies. We went to all the lawyers and we saved \$150,000 on office supplies in a year. It may seem like a small little number but putting that kind of culture in my department of "we all need to look at ways to be more efficient and figure out ways to do what we do better" worked.

The last example I'll give is we were spending a lot of time doing non-disclosure agreements, lots and lots, not particularly high value work, pretty easy to do. We established an extern program partnered with three law schools; one in New York, Brooklyn Law School and two in Georgia where our company is headquartered and they provide us students who are given course credit. We teach them to do contracts, they get a nice credential for their resume, it costs us nothing. My younger lawyers get some management experience in terms of managing those folks.

That's a small way to do something more efficiently that I think my business appreciates and it was a way for us to get work that was not high value work in a pretty creative way.

#### **PROFESSOR COATES**

Good examples. Does anyone else want to take on my challenge?

#### **MR. LYNCH**

I don't think any large company is paying 2012 legal rates if you have a lot of business. There are a lot of law firms complaining they haven't been

able to raise their rates in five years and we are discounting off of their standard schedule from five years ago. So, there is that.

If we didn't heavily negotiate for discounted rates or fixed rates instead of spending one and-a-half billion dollars on legal fees, outside counsel fees would have been like two and-a-half, so there is that.

I think, frankly, if the world ever returns to normal, at least for financial institutions in terms of the litigation we have to manage, you could certainly achieve huge savings by moving work in-house. You are not going to do, as Lou said, you are probably not going to do a bet-your-company kind of litigation in-house. You are not going to staff up enough that you could ever do that. You are still going to bring in outside counsel but I know at my former employer, we brought most of our customer arbitration in-house. Previously most of it was with law firms outside and even though it was heavily discounted because it's commodity type of work, we figured our costs were about one sixth of what they were by doing it in-house as opposed to bringing in outside counsel. You have to manage, to blend, and you have to heavily negotiate rates.

#### **MS. ROSENTHAL**

In the not-for-profit sector, after cutting our outside legal spending by 90 percent, this pro bono group that I referred to earlier, we are also trying to make a legal profit center and not just a cost center so we've been locating, for example, settlements that might be in need of a charity to receive the funds that were not able to be distributed in a settled class action where the plaintiffs had already been fully compensated.

Or we will locate a law firm that has a surplus of summer associates and not enough work to do for them and we will save up projects over the course of the year and set them to work on research memoranda that we can place right into action by the end of the summer.

We are constantly thinking of ways to improve the efficiency and even the P&L for legal.

#### **MR. BRISKMAN**

A couple of observations. One is I generally go to my in-house counsel, the people that are down the hall from me, particularly the litigator and I'll ask them that question, how much did we spend on this lawsuit, is this a case we are going to settle, is this a case we are going to try and if I don't get good answers to that, I know all is lost. I know we are going to spend a hundred thousand dollars on a 10,000 dollar case that we can settle.

That's one of the ways I hope to bring value to the company but I'm asking my people to be disciplined, to spend the company's money just as they would spend their own. So we are working with non-financial people because our CFO, our auditors are looking at our numbers but if I have somebody

writing blank checks, I don't need that individual. I could have somebody else come to the fray and that would be fine.

In terms of how you deal with the non-financial situation where you have not a lawyer working on it but you have a CFO perhaps working on an issue — I had my third CEO tell employees — I think he must have read Shakespeare — he said get rid of all the lawyers and I said why. He said the company I came from had one lawyer and he was outside so why do we need these massive number of lawyers in-house, we could save tons of money on it.

So I spent the first year of my tenure with that CEO trying to explain why we should have an existence. It was a very hotly debated issue, I might add, but we lived with and we have lived with people who are not lawyers, people who are watching the dollars, rightly so, rightly so. The moment you make a bad decision because of the dollars, then all is lost. So, hopefully, we are mature enough that we are not going to do that but also saying I'm not going to worry how much it cost, I am not going to look for a discount. All I'm going to look at is the result. That obviously is on the other end of the spectrum and is equally wrong.

#### **PROFESSOR COATES**

Let me pursue this in a slightly different vein, a comparative vein because it brings us back to some of the earlier remarks today. In-house counsel in other countries where companies are based in those other countries, let's pick continental Europe or even more extreme Asia, have a very different role and profile and status and it's changing a little, I think, over time but it's just striking actually to look at how different companies have organized themselves and even within the U.S. as you were just alluding to, Lou, you get a huge variation if you count how many lawyers are working for a company at a given point in time.

So I guess one question for you is, if you have any views on it, anybody on the panel, why it would be that American lawyers have been able to secure relatively important influential serious roles in their companies, many which operate across the borders, where their counterparts traditionally have not been able to do that and what lessons does that have for independence, if any?

Is there something about the American legal culture that's just so fundamentally different and if so, what is it and is it good or bad and as was alluded to earlier, the Europeans don't accord full privileges to in-house lawyers, they are not treated as full members of the bar and is that a consequence or a cause or both of the differences in the way lawyers function in the two worlds for those of you who operate across borders?

Do you meet up with your counterparts, the general counsel of, pick an organization that competes with you based in China or France or Germany?

**MR. LYNCH**

I do, certainly in Europe. I think I know more about Europe than I do about Asia.

I think the status of in-house lawyers in Europe generally is a little bit maybe like it was in the United States in the late seventies or early eighties. I think the competence and status of lawyers, inside lawyers within the institution has grown gradually over the years since certainly I got out of law school and if anything, has accelerated over the last ten to 15 years and frankly, I think it's because the level of regulation is greater in the U.S., the level of litigation is greater, the level of regulatory enforcement actions is greater.

And to go back to a point I made before, having good lawyering is absolutely essential to how a company performs. If you have bad lawyering you breed problems that come back to haunt you three or four years later. Bad lawyering, you pay too much to litigate or settle cases and I just think, frankly, the legal aspect of running a business is so much more important to American companies now than it was 30 years ago, that's the reason for the rise.

But in spite of the lack of attorney-client privilege in Europe, in Asia, I do think those companies are clearly getting more regulated, litigation hasn't taken off in Europe as it has in the U.S., but that may, too, happen in time. I just think there is about a 25 to 30-year lag behind what's happened in the U.S.

**MR. BRISKMAN**

I think some of the companies are much more advanced overseas and they are coming closer to our model. I'm not sure our model is the right one but they are coming closer. I've seen it recently at Siemens; they moved for good reason to a different type of model. I know my experience in dealing with European counsel is the lack of the privilege or the fact that it's not along the same lines as the privilege in the U.S. really creates a different animal over there and you'll see the general counsel often not reporting to the CEO but reporting to maybe the HR head or the head of administration, I've seen that in two different instances.

When you look at some of the general counsel's work you'll see that the e-mails or the memos where we have been in litigation much more of a business-like manner than legal advice. It's just a horse of a different color over there.

**MS. ROSENTHAL**

With respect to the two most populous countries in Asia, I think there are still issues with the development of the rule of law there so of course the status of the lawyers in the legal profession is going to be reflected accordingly and really, the power, the ability for lawyers to assist when the company finds itself in a situation is going to be a lot less than others that might have more, say, political persuasion.

**MS. DANIELS**

I think if we sat down 15 years ago, to Gary's point, regulation is increasing outside the U.S. and I think you'll see the role of lawyers outside the U.S. take a same or similar trajectory to what is happening in the States.

**PROFESSOR COATES**

One more round on that one, litigation versus regulation. So the U.S. is notoriously litigation intensive. It's one of the reasons that Europeans prefer not wanting to come here to do business if they are asked at a very high level.

When you are functioning as a member of the C-suite, providing the kind of advice that we were hearing about earlier this morning, how much of the attention and dedicated listening that you get from your CEO counterparts comes from litigation as opposed to regulation or transactional work.

Transactional work often is embedded with litigation. There is a risk in the U.S. so maybe it's impossible to detangle those things but one explanation for the lag or maybe the lag will endure if they even don't ever pick up their litigation system the way we have or conversely, maybe our system might change if litigation became a less dominant part of our legal culture.

How much of your influence, in other words, derives from litigation as opposed to other things lawyers do?

**MS. DANIELS**

I would say it depends —

**PROFESSOR COATES**

It always depends.

**MS. DANIELS**

— in this way. My time is spent with the CEO on the greatest legal risks to the company. We spend a lot of time on enterprise risk management and what those risks are. For instance, one of those largest risks happens to be a litigation matter but some of the others are completely unrelated and have to do with either regulatory change that might affect our business substantially, might have to do simply with our ability to gain share in a particular market that is important for us to gain share in so we identify those risks, both the pure play legal risks but also the risks to business and risks to performance. And if at any given time we have a lot of very important company litigation, you can bet I'm spending a lot of time with my CEO on that. If not, it's going to be the risks that our management team have identified are the risks to the company. I wouldn't say it's necessarily skewed towards litigation.

**PROFESSOR COATES**

Consensus on the panel on that?

**MS. COLÓN**

I think it depends, as well. I think there have been times where litigation and the impact it has on your contingencies and all that financial stuff bubbles to the top because it impacts the bottom line.

Maybe six or seven years ago, we had in Brazil 1600 labor law cases, Brazil being a very litigious country and labor law, in particular, being a big deal and we were looking at millions and millions of dollars in reserves for those cases. And it was the topic of quarterly conversations because of the impact it had on Brazil performance.

So I think that litigation can be something that becomes an issue sometimes just because of the pure dollars, sometimes because your company, where there is reputation and publicity and all those things involved.

But in my experience, it doesn't tend to be one of the kinds of the triggers for involvement or prominence in the relationship.

**MR. BRISKMAN**

It's interesting because it's a really good question you raise. I know for five years we had litigation of over ten billion dollars involving nuclear power and whenever I would report to the Board, the CEO would always say in some sarcastic manner, here comes the dark and gloomy topic.

One thing I've experienced, I think the CEO generally isn't that involved with the litigation. Not that they are absentee landlords, but they give you pretty much due deference in making the decisions. When it comes to a real fork in the road, they want to be involved but it's a transaction. When we did the NCAA basketball contract two years ago we had everyone involved in it. We had people who weren't even involved in our company working on that negotiation but everyone had an interest, everyone had an interest, an insight and whether we should have all the playoff games or share some of them with TBS, everyone had an opinion.

But on some of our antitrust litigation we don't have that many participants, but when you come to an important question, we try to bring them in.

**MS. ROSENTHAL**

Part of the difficulty we heard from Bob and others earlier when the lawyer is perceived as the messenger to be killed or the Jiminy Cricket or the Cassandra that speaks the truth is to really have a pro-active role, not just working with the CEO but with the head of operations, the head of finances, for example, to be taking a very pro-active role with respect to insurance coverage, what do we have, what can we learn from our past profile and we cannot only mitigate the repeat risk of litigations but also trumpet the steps that we've taken, legal hand in hand with others, to reduce those repeat litigations as a means of negotiating better rates with insurance carriers for the following year.

**MR. BRISKMAN**

Just an ancillary point on that, John, you could tune out your clients real quickly on litigation. I could tune out the client real quickly on just about anything.

But on litigation, I think one of the roles of the general counsel is to really break it down into easily understood chunks that they can get it and then they will participate and play.

But if you start throwing a lot of things at them with some acronyms and you are going real, real quickly through it, they don't care, they don't get it, they are too busy to really focus on it.

So I think one of the roles of the general counsel is to be a little bit of a traffic cop saying whoa, let's go through it, this is the way I would like to go, does that make sense. And if you do it in a good manner where you are really communicating they will participate and they will come up with something you haven't even thought of. But if you go quickly they are going to say it's for the lawyers, I'm not going to get involved.

**PROFESSOR COATES**

Let me switch topics a little bit in our last few minutes before opening up to questions and ask, trying to be provocative, the question of non-lawyer ownership of law firms has been debated forever and again in the last year and the New York Bar took a position.

In the work they did leading up to the position that they have taken against it basically, they surveyed lawyers and it was striking to me that in-house counsel were the most receptive. They were still against it, two thirds of them but it was much higher percentages against it when they surveyed lawyers based in law firms of any size. And I'd be interested in the panel's views on that topic but here is the provocative way I want to put it.

You all work for organizations that are owned by non-lawyers. Many large companies hire organizations like Axiom, which is a for profit venture capital-backed law firm depending upon who they are talking to or not a law firm depending on who they are talking to. They function within the ethical rules by billing themselves as a temp agency but they also blend legal work with non-lawyers in coming to their clients in ways that law firms could do but haven't traditionally done.

So my question, I guess, to react to is since you work for these organizations owned by non-lawyers and you are lawyers and I would assume that you all would say you are still independent. If anyone wants to confess that they are not, I'd be willing to hear that, too.

Why wouldn't we want to permit other organizations that hire lawyers, we could call them law firms if you want, to provide legal services to third parties? Why is it you can only provide legal services to one company owned by non-lawyers, why couldn't you provide it to multiple? How do you square the circle, in other words, between identifying as independent professionals in a

non-lawyer-owned organization with a general reluctance that I think even general counsel, as I say, two thirds of them are against the idea to sell even a non-controlling stake to the public or to outsiders.

This is genuinely a puzzle, I have no real views on this. I don't understand how the Bar could have this set of somewhat inconsistent structures in place and maintain it.

**MR. BRISKMAN**

Fortunately, I've never come up with that issue so I'll let the other people talk.

**MR. LYNCH**

I think what you are hearing is no one has any real views on this.

**PROFESSOR COATES**

Would you hire Cravath if Cravath sold 20 percent of its stock to a bunch of its investors?

**MR. BRISKMAN**

And they were permitted to do that.

**PROFESSOR COATES**

Legal, of course, yes.

**MR. LYNCH**

— and they continued to do quality work and you are happy with it, yes. Why not?

**MR. BRISKMAN**

Yes.

**MS. DANIELS**

Agreed.

**MS. COLÓN**

Me, too.

**PROFESSOR COATES**

No concerns? It's interesting. To put it in context, Australia now permits it, the UK, so far its plaintiff law firms but I do think the Axium model that I mentioned is increasingly going to be something — here is another question, do you use companies like Axium, do you use companies that are

formally structured to not be law firms but which are, nevertheless, helping you provide legal services?

**MR. LYNCH**

Sure, for document production and a number of other kinds of functions, sure. I don't know of any company that doesn't.

I will quickly say, I wouldn't want to be an investor in a law firm and not a lawyer in a law firm because it is like anything else, your assets leave at the end of every day and you could very well wake up one day and find your entire M & A Department has gone to another office.

But having said that, there is nothing about the ownership structure that necessarily has to affect the quality of life.

**MR. BRISKMAN**

There are, obviously, some issues about privilege and confidentiality and the background on these individuals who get very interested in, we try to focus on and we try to keep it to what I would consider to be non legal work, even though the lawyer is performing something that is closely legal so we are concerned about that and we have had problems in the past on that in a few instances. So that goes through our heads.

But I think the types of tasks that we are giving them would be such that it's not going to rise to a big problem for us.

**PROFESSOR COATES**

Maybe that's a good point. I see some hands in the audience going up, so I'm hoping this is a good point. Paul, should they come down to the mics?

**MR. SAUNDERS**

Yes, there is a mic on this side and one on the other side.

And on this last topic that you just mentioned, non-lawyer ownership of law firms, you know that the New York State Bar Association has commissioned a task force to study that very question and I have actually seen the report of the task force. I don't know whether it's public or not but the reason I saw it is because I was asked if I would speak to that task force on behalf of the Judicial Institute on Professionalism and I took the position then, and it's reflected in the report of the task force, that that was a bad idea, that non-lawyer ownership of law firms was a bad idea precisely because of the effect that it might have on lawyer independence.

That is, the lawyers might be incented to give advice for the purpose of maximizing the profit of the non-lawyer owner. It might compromise the constraints that we have in giving independent legal advice to our clients, advice that may affect our financial well-being, our own profits. There is a risk

that that might be compromised if we were owned by a non-lawyer organization.

I know that the ABA is also studying that very question, whether to permit non-lawyer organizations to have an interest, majority or minority, in law firms and my guess is that both the ABA and the New York Bar Association are going to come out against it. Our Institute certainly did come out against it.

**MR. BRISKMAN**

Does that mean I cannot invest in Cravath?

**MR. SAUNDERS**

I was very encouraged to hear that you would hire Cravath under any circumstances, so that made my heart sing, so thank you all very much for that.

**MR. LYNCH**

Paul, what's the difference, your incentive to maximize profits by giving less than independent advice to benefit lawyer partners as opposed to non-lawyer owners? You still have the incentive.

**MR. SAUNDERS**

But under the Code of Professional Responsibility, you are not supposed to be able to do that.

**MR. LYNCH**

I know that but the fact that the recipient is a lawyer as opposed to a non-lawyer —

**MR. SAUNDERS**

The non-lawyer doesn't have that ethical obligation, the lawyers do. That's the concern, the non-lawyers are not governed by the Code.

**MR. LYNCH**

You are assuming that the non-lawyer is going to have an effect on the advice that you give.

**MR. SAUNDERS**

That is a risk. I think in England the law firms can be owned, majority of the interest can be taken by non-lawyer organizations.

I think there is a chain of supermarkets in England that actually owns law firms and I think that's the risk that it might compromise the independent advice that lawyers are required to give.

**MR. BRISKMAN**

I think that's why the question was asked. If we are in a law department in a public corporation and that public corporation is owned by shareholders, how can we know the answers to these things. But the question would be how could we perform our duty on an independent basis, whereas this company that's 80/20 owned and 20 percent is non-lawyer owned, how can they not do it? Why does one work and the other not?

**PROFESSOR COATES**

Yes and that's exactly why we are here today talking about that very topic; can you be independent governed by a set of ethical obligations, ethical rules not written by your corporate employer or written by your profession and at the same time be employed by the client, can you do that?

We believe that you can do that. You all believe that you can do it. But that's exactly where the rubber meets the road. That's exactly where the issue is. You are the only people in your corporation, with the possible exception of some of the accountants, whose professional obligations are governed by a set of rules not written by your employer. Your employer has nothing to say about how those rules should be interpreted or applied. They control your professional obligations as a lawyer and the question is, can you be sufficiently independent as the rules require and work for an organization that is not owned by lawyers, that is a profit maximizing organization and again, I think you can but that was precisely the question that we are addressing and I've given a lot of thought to this issue, as you all know over the years and I think that the answers are not always obvious. I think it's a harder question than many people assume.

**MR. LYNCH**

What's your view on some of these companies, I guess I'll call them, that have been set up to finance litigation?

**MR. SAUNDERS**

It's interesting, again, the Judicial Institute on Professionalism has also begun to address that and we actually asked at least one of those companies, the one that was owned by Sean Coffey, we asked Sean to come in and speak to us and to tell us exactly what he did and how he did it and the ABA, I know, has looked at the way in which those companies do business and has concluded that although there were risks, that given certain guidelines that the ABA has set forth that they can continue to operate in the way that they do.

But we don't, as an Institute, we don't have a view on whether that's good, bad or indifferent but it certainly is an issue that we have addressed and thought about and will probably continue to address and think about.

**PROFESSOR COATES**

So we have another person who wants to ask a question, come on down.

**A SPEAKER**

Hi. Thank you for all your insights. I think Paul hit mostly what I was thinking but in terms of the precise question, if I'm understanding it correctly, is what's the difference between being in the law department of a company that is run by and has shareholders who are all non-lawyers versus a law firm that has a percentage or entirety of investors who are non-lawyers and I think the difference is the nature of the business.

I happen to be an IBM attorney so okay, my response and I'm trying to be independent still, will have an impact, theoretically, on IBM's success. So, IBM is in the business of computing and services, but if I were at a law firm which I once was, I think the business of the law firm is to get as enhanced a reputation [as possible] and get more clients all around.

I don't know if I'm articulating this correctly but from my point of view, I do feel like I have independence within the firm. But if I were within the corporation because I'm lending my thoughts and my legal expertise to helping them make good decisions that eventually will lead to more revenue or what have you, or not, but in the end, there is an obligation, et cetera.

Whereas, as a law firm, I just don't think there is enough rubber there because, theoretically, if you succeed for one client then that client recommends you to the next client, so there is less of an ability to be neutral with your advice.

**MR. BRISKMAN**

I think that's true. I think a lot of it depends upon the individual and our commitment to doing the right thing, maybe using the word conscience but I've seen situations in a law firm where they have done the wrong thing because they did not want to alienate the one client that was bringing in 20 percent of their business. Maybe a different individual would have reached a different result.

I've seen corporations where they are leaning on you that you've got to put this in the 10 Q, even though it wasn't exactly right and it comes back down to the individual. You are either going to be able to look in the mirror the next day and say I did the right thing, I may have cost myself a job or not.

My guess is although, Paul, I haven't really thought about it and you obviously have that the in situation of the company, it's owned by 20 percent of non-lawyers in the law firm, there is probably more opportunity to have abuse but it again comes down to the individual and how committed you are to doing the right thing under all circumstances.

**MS. COLÓN**

I agree. I would say that lawyer independence, at least in my view, is my individual, sole responsibility. So there are things that help me, I'm in a centralized office at Xerox.

My general counsel says to all of us at all times, your job is your job and you do it whether the answer is good or bad and I'm there to help you pass on the bad news and I'm happy to let you give the good news so there is that comfort you get from your general counsel.

But on a day-to-day basis I come to the office with the best that I could do for Xerox and I think that's my responsibility and for me being independent means that I have to be able to do that whether the news is good or bad, whether it requires us to do a voluntary disclosure to the federal government or not. So I think that whether the law firm is owned by non-lawyers or the corporation is owned by non-lawyers, you have to have, as a lawyer, the acceptance of your responsibility and you have to be able to come in everyday and you have to perform it whether that impacts your bonus or your salary or, frankly, your position.

**A SPEAKER**

I agree with you on that. The only difference I would say is when you are in-house you want to do the best, you want to do the right thing and you have a long-term relationship; so to me the right thing for IBM is the right thing knowing all the components.

If you want to be jaded at the law firm that's partly owned by the investor, the right thing for that firm is to get more clients and to keep those clients coming back. The relationship is much more temporary. I just think it doesn't mean if I went back to the law firm I would be a slime but I think that the tendency is greater in a situation where the success of the business is dependent upon getting more clients.

**A SPEAKER**

But you are not going to get more clients if you have a reputation lawyers that are not independent. The whole law firm's reputation rides on that. Their product absolutely depends on their lawyers embodying the highest ethical rules.

**A SPEAKER**

Don't you think sometimes a business client hires a firm because they want someone to figure out a way to make this transaction fit into legal —

**A SPEAKER**

It's very short term.

**A SPEAKER**

I just think that there is a greater risk with independent —

**MS. DANIELS**

I don't think I agree with that. If I'm a 20 percent owner in a law firm, what I'm going to care about most, as Gary said, are the assets and the associates. They have ethical obligations. They are written down. We all know what they are. If they violate those ethical obligations they will get maybe disbarred, maybe sanctioned. The value of the asset I've invested in goes down if they don't, in fact, comply with their ethical obligations.

So as that owner having those people still comply is going to be pretty paramount as I think about that investment. People are profit motivated. Somehow, something is going to be different and I would say for better or for worse law firms today are profit motivated but they care very much about their reputations. I'm not sure it's so terribly different.

**PROFESSOR COATES**

Are you waiting for a question? Come on down. I think I asked a good question. For what it's worth, very quickly on this last point, as an investment the firms that have sold stock so far have done quite well. They actually have done quite better, I benchmarked them against Goldman a few years ago because Goldman was doing well. Anyway, go ahead.

**A SPEAKER**

I would like to give you a hypothetical. You have a new CEO, a new management, you are the general counsel, CEO takes you into his inner sanctum, sits you down and says here is what we want to do, A, B and C. You are the lawyer, you figure it out. I don't want any sermons, I don't want any speeches, just get it done. I'll pay you a million dollars a year and if you can't get it done we'll get somebody else.

Now what?

**PROFESSOR COATES**

We are assuming, I assume, that A, B and C are not all entirely legal.

**A SPEAKER**

We'll assume that on the part of the person who has the power to continue your lifestyle, he doesn't care. Lawyers are supposed to find a way to do things. Whether they are legal or not is part of the process by which they have to figure things out.

**MR. BRISKMAN**

Actually, there is almost an easy response to that. If you know that B is illegal, if you know that B is going to hurt the reputation of your company, that becomes the easy one. You say no. You don't do it.

**A SPEAKER**

Your reputation is going to be hurt a lot more if you get fired within a week.

**MR. BRISKMAN**

Your living style may [suffer] but not your reputation.

**A SPEAKER**

That's not important.

**MR. BRISKMAN**

Sure it is but compared to other things such as your reputation, lifestyle is way down the list.

**A SPEAKER**

I don't know if it's a practical answer.

**MS. DANIELS**

I think it is.

**MR. BRISKMAN**

Do A, B and C, get it done? I don't want to hear any excuses. If A, B and C are totally legal, you can get it done in six months and the guy is jumping on you, it's got to be done or I'm going to get somebody else. That's actually the harder one. That's the one I come up with more often where B is illegal and I'm going to do it to keep my job.

**MS. ROSENTHAL**

Further to having the lawyer having a good reputation, if you have a working alliance with the C-suite managers who are going to have a — because you have been doing your job.

**A SPEAKER**

It was a hypothetical.

**MS. ROSENTHAL**

You made it a brand new CEO with whom you have not had the opportunity to do that.

One other point I wanted to make is what if it's a nonprofit or mission-related purpose that the CEO is trying to accomplish?

**A SPEAKER**

Then it's less likely that the CEO would make those demands.

**MS. ROSENTHAL**

Don't be so sure. These issues come up just as starkly in the nonprofit as they do in the for-profit sector and it's even more gut wrenching on the in-house counsel sometimes because so you so deeply want that mission to be carried out, so don't be fooled by the profit motive versus the mission driven motive. It's just as —

**PROFESSOR COATES**

Yes?

**A SPEAKER**

The question is along the same lines of what the panel is asking. An attorney needs to serve the best interest of her client but as outside counsel, it's more skewed toward getting the client to stay out of legal trouble. Maybe a little bit of maximizing profit.

But as an in-house counsel, maximizing profit as the best interest of your client is up front and center, inescapable. So it's easy, the situation is black and white, ethical, not ethical, profit maximizing, not profit maximizing. It's when the situation is gray, it may be ethical, maybe it won't then will it be profit maximizing?

So it's situations that go back to your initial question of how do you justify value.

As humans, we are so capable of self-deceiving even though we don't try to deceive others. So this basic definition in the defense of the best interests of the client can we draw a conclusion that in-house counsel maybe in a slightly different situation than outside counsel?

**PROFESSOR COATES**

Is the perception different, is that the premise, is there a difference in how readily outside lawyers can deceive themselves? No, that's not —

**A SPEAKER**

Is the independence more difficult for in-house counsel than outside counsel because of this fundamental difference that we cannot, we are condemned to deal with?

**MR. LYNCH**

Frankly, I think there are many situations where outside counsel is prepared to give more aggressive advice than inside counsel because the outside counsel doesn't have to live with it. You give the advice, they are gone.

With in-house counsel, the transaction blows up and six months later they blow up along with it.

I understand the point you are making but I think there is an assumption in there that the pressures are such that inside counsel is always going to reach to do the transaction and outside counsel is not and I don't think that's a valid assumption for the reasons identified.

Lawyers who get associated with a transaction, the transaction becomes something, no one wants to hear about it again two years later, generally don't do well in that organization.

In some ways, and this comes down to personality and approach to work and how weak or strong you are in dealing with a client and give them what you feel is good advice but it's not always true that the pressures are such on inside counsel just to give aggressive advice. The pressures can be greater on outside counsel sometimes.

**MR. SAUNDERS**

We are right at the time, in the interest of keeping this program on schedule. I want to thank this panel very much for very, very provocative suggestions.

**MR. SAUNDERS**

I suspect we haven't heard the end of these questions. We are now going to break for lunch which is on the third floor upstairs. The plan is to eat lunch upstairs and then we will come back here at one o'clock, 1:15, come back here at 1:15 and hear from our luncheon speaker, Christine DiGuglielmo.

So thank you very much and we'll see you upstairs at lunch.

## AFTERNOON SESSION

### MR. SAUNDERS

I hope you all enjoyed your lunch, and again, I want to thank Pace University and Pace University Law School for providing that lunch for us. We certainly appreciate all the support from Pace.

It is now my pleasure to introduce to you our luncheon speaker, Christine DiGuglielmo. She is a lawyer with Weil, Gotshal & Manges in the securities and corporate governance practice in Wilmington, Delaware. She graduated from Brown University and from the University of Pennsylvania Law School where she was executive editor of the law review, and she then worked as a clerk for Chief Judge Norman Veasey. You heard him referred to earlier today.

When I first met him, Norm Veasey was a practicing lawyer at Richards, Layton & Finger. A very, very able corporate lawyer. He then left the firm to go on the Delaware Supreme Court, where he ultimately became Chief Judge of the Delaware Supreme Court.

Christine worked for him as a law clerk when he was the Chief Judge. We've asked her to address us today because in addition to the things that she does at Weil, Gotshal & Manges, she and Judge Veasey have recently written a book — I'll hold up a copy of it — entitled, *Indispensable Counsel: The Chief Legal Officer in the New Reality*, which, as you can see, is right directly on the sweet spot of the topic that we are addressing today.

So, please join me in welcoming our luncheon speaker, Christine DiGuglielmo.

## LUNCHEON SPEAKER

### CHRISTINE T. DIGUGLIELMO

CO-AUTHOR WITH HON. E. NORMAN VEASEY,  
“INDISPENSABLE COUNSEL: THE CHIEF LEGAL  
OFFICER IN THE NEW REALITY” (2012);  
WEIL, GOTSHAL & MANGES LLP

Thanks for that introduction, Paul, and good afternoon, everyone. I'm honored to have been invited to join you today. I'm sorry that Justice Veasey couldn't be here.

You might have noticed the omission in Paul's introduction, and that is, he didn't mention my experience as general counsel. Well, he didn't miss that page of my resume; I never worked in-house, or as general counsel. That's true of Justice Veasey too. So, you might have wondered what qualified two

people who never worked in-house to write a book about general counsel. And that's a very good question.

I like to think of us as naturalists, going out to see what we can learn about general counsel in their natural habitat. Today, I'd like to talk about independence as an adaptive trait that's critical to the survival of the general counsel as a species. Much of what I say about general counsel can be said about in-house lawyers, generally.

Someone once quipped that a camel is a horse designed by a committee. Kind of meant to be unflattering to the camel. Some might make a similar allegation about general counsel. The ungainly camel is the evolutionary result of the many environmental pressures that the species faces. And like the ungainly camel, some see the modern general counsel as the awkward product of the influence of too many constituencies.

People who take this view might say that demands for short-term returns and making the numbers must tempt the general counsel to look the other way when business people seek a legal rubber stamp approval on a questionable deal. The camel's long snout sure looks like it would block its view, and that's before it's even out in the desert in a sandstorm.

Others see the general counsel as a naysayer, a bottleneck to getting deals done, and camels do have a reputation for having a nasty personality.

Others might say that it's impossible for the general counsel to navigate the multiplicity of roles that they are asked to fill in the modern corporation. Roles would include the business and legal advisor, manager of the legal department, promoter of an ethical culture, risk manager, problem solver, and it does look awfully difficult for a camel to get around with all those long spindly legs.

Finally, there's the most fundamental challenge; that's the iconic hump, so to speak. And that is whether, given all these pressures, it's impossible for the general counsel to fulfill the ultimate ideal of the independent legal professional. This might be summed up as the challenge of balancing independence on the one hand with compromise and the need to get along on the other. This independence challenge ties in with the tensions that general counsel faces in serving both the C.E.O. and the board, both the varying interests of shareholders and the collective interest of the corporation, and both the advocacy role as lawyer for the corporate client and the gatekeeper role as guardian of the public interest.

General counsel are buffeted by these demands, and it presents a serious challenge, and they have to find ways to deal with them. The variety of demands, along with changes in the environment in which the corporation and the general counsel operate, are reasons that the general counsel role evolved so rapidly in the past 20 years or so. Chief Justice Veasey and I interviewed quite a few general counsel while writing our book, and some of them are here today. They gave us great information, and it's probably one of the key values of the book. We use their quotes liberally throughout the text. One of my

favorites, which we used as the theme of one of the chapters, was a quote by Kim Rucker, who was then the general counsel at Avon, and she's now at Kraft. She compared being a general counsel to being a gymnast.

And I guess the general counsel role seems to be prone to metaphors. I listed a few here, and I added some this morning. I heard that general counsel have been called innkeepers, statesmen, gatekeepers, corporate lubricants, and now I've added baseball manager, frog in a pot of hot water, and Lou mentioned, traffic cop. But I'm going with the camel, and I'm going with the camel because I like the optimistic view, this adaptive view of in-house lawyers, especially with respect to their exercise of independence. The great majority of modern general counsel do adapt, and they find ways to harmonize the many tensions and challenges they face.

So, my camel metaphor offers an alternative picture of the general counsel. It replaces a view of the general counsel as ungainly and awkward, misshapen by too many environmental pressures, with a picture of the modern general counsel as a highly adaptable creature that has evolved to be a key participant in the corporate ecosystem.

The general counsel's ability to hone that independence trait is one of the key tools to achieving that adaptation. So, how do general counsel hone and adaptively exercise their professional independence?

One key step is making sure that she has the right tools in place to be able to exercise her independence. Camels have a special trait that allows them to function in the desert in a sandstorm with a third eyelid. This third eyelid is clear and camels can close it and still see through it, so it can get the information it needs to keep walking, even if the sand is blowing.

For general counsel, the third eyelid represents the critical role of information and exercising independence. Working within, rather than outside the company, general counsel are in a great position to get the information they need. I think this is something that was talked about this morning. They hear the murmurs and water cooler talk. They are well versed in the culture, politics and relationships. That goes to the translation issue. And they have the authority to impact and shape the channels of information flow. This ability to make sure she gets the right information empowers the general counsel to exercise her independence in several ways. So for example, hearing the rumors and water cooler talk enables her to assess when something is going on within the company that could be problematic but hasn't blown up into a crisis yet, look into it further, and take corrective or preventive measures, if necessary. That is, it empowers and perhaps even obligates her to be more proactive than an outsider.

As another example, being able to impact the channels of information and flow allows the general counsel to play an important role in shaping the information flow to the board. This is a critical part of helping the board fulfill its oversight function properly. Being able to shape the channels of information flow also helps the general counsel impact the information that

flows to the legal department to make sure that all relevant information is being given in order to appropriately define and answer legal questions. Enron observers have suggested that executives' overly narrow definition of legal problems and lawyers' lack of information about the bigger picture may have contributed to the downfall of the company. The general counsel who's creative and proactive in using her clear third eyelid can play a strong, independent role in looking out for and addressing unidentified problems and in making sure that issues that are presented, that the issues that are presented for legal review are properly and not overly narrowly defined.

Okay, so, back to the camel. What about that funny-looking hump? Some people think that camels store water in their humps, and that's why they can live in the desert, but that's not the case. The reason they drink so little water and they can live in the desert is because they're very good at conserving water. They have ways of cooling themselves other than sweating, and they can allow their body temperature to rise six degrees or more without sweating or harming tissues. I suggest that like the camel, the independent general counsel is a really good conserver as well. Instead of cleaning up spilled milk, they work really hard to keep the milk in the glass.

The general counsel's role as conserver-in-chief reflects her ability to state her position and her ability to prevent problems. One way the general counsel fulfills this role is by saying that a proposed course of conduct is legal, but foolish. Her ability to say that and be heard relies on her blended roll as both a business and legal advisor; in other words, having that additional role as a respective member of the business team allows her to not just stop at, it's legal, but to continue with, it's also foolish. Her many roles in the company beyond the legal roles, such as roles in managing risk, including risk to reputation, working with public policy and government relations, many other roles, give her the tools to make judgments about what's legal but foolish, and to convince others about the potential negative fallout.

That ability to convince others goes to the next trait, and for the camel, it's the nasty temperament. Camels are known to have a pretty tenuous relationship with their human partners. So what ties them together? In the desert where they live, most of the water is underground, so camels need humans to dig the wells and draw it up. They basically work for water. In fact, when the rare rainstorm comes up, they've been known to bolt. With all that water around, they don't need humans anymore.

Like camels, general counsel are sometimes painted as having a tenuous relationship with other executives and directors. It goes back to the naysayer image, that was sort of a historical view of the general counsel, and the general counsel's tension between being independent and wanting to keep her job.

Alan Braverman, the general counsel of Disney, taught us something in our interview with him that goes to this point about the tenuous relationship between the general counsel and other corporate constituents. He said, "The

trick and one of the real challenges of being a general counsel is maintaining independence without eroding trust.” So, how does general counsel do that?

The first step is building relationships with the other senior executives and give the general counsel an opportunity to show good judgment. President Friedman this morning, articulated how general counsel’s presence in-house allows her to develop relationships that get her a seat at the table and the ability to be heard. Building trust also requires that the general counsel develop and demonstrate a thorough understanding of the overall strategy and objectives of the company.

The strong, independent general counsel also knows when to speak up and when to listen, and doesn’t feel it’s necessary to say something about everything. Some of our interviewees describe this as picking your battles and suggest that taking this approach means that when she does speak up, people will recognize it must be important and will more likely listen and heed the advice. Similar characteristics of the independent general counsel is knowing when to put on the brakes; don’t necessarily say no, but say, let’s sleep on it. That goes to the traffic cop analogy. Taking a little extra time often goes far in keeping the company on course.

Finally, a general counsel maintains independence without eroding trust when she is secure enough in her role to suggest when the board might want a second, outside opinion. I fully agree with Bob Weber’s statement this morning that usually outside counsel is not needed. What is needed is courageous legal leadership within the company. And typically, if the general counsel is acting appropriately independently, the board or the independent directors do not need separate counsel as a general matter. But the general counsel should be prepared to recommend it when appropriate, and should not feel that doing so threatens her position.

When all these tools are used to develop a strong relationship of trust, then the C.E.O. and others will listen if it does become necessary for the general counsel to exercise her independence by counseling against a course of action. When that trust relationship is nurtured, the general counsel and other corporate leaders will be able to work together to make sure the caravan crosses the desert safely.

So, general counsel have developed a number of traits that enable them to adapt their obligation of professional independence to the corporate environment. Some of the ones that we talked about today include the fact that the general counsel has good access to information and the ability to share information channels, she’s in a strong position to prevent problems, and she can build strong relationships that promote trust and therefore improve her effectiveness in keeping the company on the right track.

But given all the pressures of their environment, how do general counsel resist that urge to bolt when it rains? There is a lot of discussion lately about the liability and reputational risks that general counsel face, and it keeps them up at night. One of the chapters of our book deals with liability risk, and

we've expanded that and updated it recently. It will be published as an article in this month's issue of *The Business Lawyer*. So, if you suffer from insomnia, or you know a general counsel who does, you can watch for that article and see if it includes anything that will help you fight the urge to run.

After all, general counsel are typically highly skilled, talented people who could choose a less risky or more lucrative role. Essentially, they can be a fish swimming the reef off the coast of Maui instead of a camel living in the Sahara. But corporations and the public interest rely on them to stay in-house, to remain in their roles as legal advisors, business partners, and among the ethical leaders within the corporation. So I hope everyone will think of the camel when pondering whether the general counsel can be independent and recognize that professional independence can be and frequently is well adapted to the corporate environment, and that allowing for those adaptations to professional independence can be beneficial and not detrimental to both the corporation and the public.

Again, I appreciate the opportunity to speak with you today, and I hope everyone else enjoys the rest of the connotation.

#### **MR. SAUNDERS**

Thank you very much, Christine. That was very, very, very helpful, and I would say inspiring. As an outside lawyer, I'm not sure that I would ever describe the general counsel, who is often our client, as a camel, but I understand and appreciate the metaphor. But I might actually choose a slightly different characterization than camel, although I'm sure the point is very well taken. So, thank you very much for doing that. I urge all of you to go out and buy her book, *Indispensable Counsel: The Chief Legal Officer in the New Reality*. Thank you very much.

Let me bring up our last panel which is going to be moderated by Catherine Wolfe, who is a member of the Judicial Institute and Clerk of Court of the Second Circuit United States Court of Appeals. And she has on her panel, if I can remember this without notes, Bob Cusumano, who is the general counsel of the ACE Group of Companies and with whom I've had the pleasure of working many, many years ago, at Cravath.

We have Louise Firestone, who is the general counsel of LVMH, the U.S. entity of LVMH.

We have Jane Sherburne, who is the general counsel of BNY Mellon, with whom I also had the pleasure of working very closely on a matter that we had together, also several years ago.

We have Jim Mangan, who is the head of U.S. litigation for Morgan Stanley, with whom I've also had the pleasure of working when Jim was at Cravath several years ago.

How could I forget Judge Randall Eng, who is the Presiding Justice of the Second Department of the Appellate Division. Just recently appointed as

the P.J. of the Second Department, and also a member of the Judicial Institute on Professionalism.

So, without further ado, let me introduce our moderator, Catherine O'Hagan Wolfe.

## PANEL II — NAVIGATING THE ETHICAL LANDSCAPE

### CATHERINE O'HAGAN WOLFE

CLERK OF COURT, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT;  
JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW, MEMBER

I have indeed been a member of the Judicial Institute since 1993 and its predecessor for many years, and it is true in my spare time I am the Clerk of the U.S. Court of Appeals for the Second Circuit, which is not as dissimilar to being a C.E.O. as you might think. I'm elected by a Board, 13 active judges. There's a C.E.O. he's called the Chief Judge. And there are multiple constituencies, not the least of which is the American people and the bar, so we do have some commonalities. One thing my resume does not say, and that is that I am sometimes a lyricist.

Panels that take place after lunch are notorious for the low blood sugar level that the people in the audience and the people on the panel experience, so I had enlisted one of my neighbors to record a song for me, but we're having technical problems.

On the other hand, the lyrics are so apt and I am so reluctant to let them go, that bear with me just for a moment.

*(Singing)*

Today the Board so loves me, the C.E.O. sings sweetly, committees and department heads agree, I am an asset to you. Is this a lasting treasure? My independent sought after? Can I believe you really want to know just where you shouldn't go? The plan you passed breaks laws, disclosures, waivers cannot cure. But will my options be forfeit when you say, my counsel thwarts too much? The model rules are clear, my news you wouldn't hear, a noisy out is all that's left to me, good-bye I'm headed to teach.

Now, this is a woman comfortable in her own skin. All right, back to business.

We heard from Bob Weber and Professor Coates, and Christine spoke of her and Norman Veasey's book, *The Indispensable Counsel*.

Within those insights now, I'd like to add some of those from Professor John Coffee of Columbia, the gatekeepers, the professional and corporate governance, which also, as it turns out, to put it in a historic context, really dates back to an article I found from 1997 or so from Sally Weaver, who is a law school professor at the University of Montana. And I think the reason that many of these issues remain persistent with us is the growth of in-house counsel in the last, well, 40 years or so. I've found some statistics that in 1960, 10 percent of the bar worked in-house. By 1980, that was 40 percent. And the

latest raw numbers I could find went back to 2002, and they put that number at 65,000. So, it's really for very good reason that there's been a proliferation of both writing and professional organizations that address concerns of corporate counsel. And if you go to the American Corporate Counsel Associations website, there are no fewer than 1,400 CLE articles that deal with some type of governance issues, and half of those address some kind of corporate ethics, conflicts, and the professional rules as they apply to in-house counsel. So, I think that places this discussion of independence in an appropriate context.

That being said, I thought that we would change up a little bit of this panel by having the members introduce themselves and their work with a particular view toward talking about how independence manifests itself in their day-to-day operations.

So, with that, I would also add that I think Justice Eng's perspective might be slightly different.

**HONORABLE RANDALL T. ENG**

NEW YORK STATE APPELLATE DIVISION, SECOND DEPARTMENT;  
JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW, MEMBER

Well, thank you very much. And indeed that is a hard act to follow. I have to thank our Chair for setting me up in that fashion. Also, as you might gather from my resume, I have not been in-house counsel. As a matter of fact, I've spent my entire career in the public sector.

In preparing some of my brief remarks this afternoon, it occurs to me that some of my experience has indeed been relevant to our discussion, and in fact, what I am presently doing now is even more relevant to the topic at hand. Let me explain myself; and that is, of course, that in-house counsel are counsel, first, last and always, in my view. And as such, they are under the constraints of what is now the Rules of Professional Conduct. And for those of us who were admitted to the bar in the 20th century, those are the successors to the disciplinary rules that we became accustomed to and which were superseded in 2009 and later amended in 2011 by the Rules of Professional Conduct, which track, in large measure, the rules of the A.B.A. in this area. And that's important too, because if we in New York, we are tracking the rules as laid down by the A.B.A., then everything then should be more coherent regarding a national perspective.

Before I neglect to mention it, there's an important requirement of in-house counsel, and that is to register, to register as in-house counsel if you are not a member of the New York Bar. That's something that I was not aware of for a long time, but there is such a requirement that if you're licensed as an attorney out of state, you must register as in-house counsel in order to participate in your work with the organization that you're counsel to.

I've been looking at some of the numbers, and it looks to me as though there may not be 100 percent compliance with that requirement, given

the large number of lawyers with what are probably out-of-state credentials employed in New York balanced against the numbers who have actually registered. So, for those of you who are in that situation or might have colleagues who are, I urge them to familiarize themselves with the rules and comply.

Now, my own background, of course, involves some ethical issues, and that is that I have been a member of the Advisory Committee on Judicial Ethics, which, of course, is an Office of Court Administration committee which is actively involved in making certain that judges are aware of and follow the ethical constraints that are found in the Rules of Judicial Conduct. And as the Presiding Justice of a court that has responsibility for the disciplinary process of all lawyers in our department, I, of course, have to be very sensitive to issues involving ethical rules and the disciplining of lawyers.

Now, what struck me about the latest incarnation of the disciplinary rules, Rules of Professional Conduct, is that there are more affirmative obligations placed upon lawyers now in in-house capacity. Previously, I think we had seen more rules that were, thou shalt not do this, thou shalt not do that. Of course, we have those rules now, but they're also combined with rules that require affirmative action on the part of counsel who find themselves in certain situations.

I call your attention to Rule 1.13 of the Rules of Professional Conduct. That speaks to the organization as client. And it begins by saying that a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interest may differ from those of the constituents with whom the lawyer's dealing.

The lawyers shall explain that the lawyer is the lawyer for the organization, and not for any of the constituents. Therefore, a primary obligation on the part of an attorney; and that is that the attorney shall explain that the lawyer has the organization as his client or her client; is the lawyer for the organization.

Now, in continuing with Rule 1.13, the lawyer has a further obligation in that if a lawyer becomes aware that an officer, employee or other person, etcetera, is intending to act or refusing to act in a manner related to the representation, that is, in violation of a legal obligation of the organization or a violation of law that recently might be imputed to the organization and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Again, another affirmative obligation.

If you know something or have reason to know something, then you have an obligation to act.

And then, of course, going on with the rule, it advises the lawyer who finds himself or herself in such a situation that they have a number of avenues here, a number of approaches they might take to the problem, including

seeking reconsideration of the matter, advising that a separate legal opinion on the matter be sought, and be presented to the appropriate authority in the organization, referring the matter to higher authority in the organization. And then it goes on to say that despite the lawyer's efforts in accordance with the above, that counsel is unable to remedy the situation, then the lawyer has certain obligations and responsibilities. And that is that in some cases, confidential information may be revealed in the furtherance of this effort if permitted by Rule 1.6, or the lawyer may have to resign pursuant to another rule 1.16.

My message is, is that lawyers who are acting in an in-house capacity have now a positive, affirmative obligation, and the failure, the failure to follow these mandates over here may very well put their licenses at risk. So, I think it's something that everyone has to be aware of in their thinking.

It's, of course, correct that navigating these waters is problematic, but it's not just problematic to your job, it's problematic, potentially, to your career. So with that, I yield. Thank you.

#### **MS. WOLFE**

What Judge Eng has to say is very on point and is one of the topics that I hope this panel will get to in more detail after we do a few other things.

Louise, tell us a little bit about yourself.

#### **LOUISE R. FIRESTONE**

SENIOR VICE PRESIDENT FOR LEGAL AFFAIRS AND GENERAL COUNSEL,  
LVMH MÖET HENNESSY LOUIS VUITTON INC.

So, I think I'm a little different from most of the speakers today in that, first of all, I work for the U.S. subsidiary of an international organization, and also, the U.S. subsidiary is rather small, so I have a relatively small legal group. But the way we're set up, I am the general counsel. I work at the holding company, and we also have a number of subsidiaries in the U.S. I have a lot of responsibility for the way the legal departments of these subsidiaries are structured and run, and I have no authority. So, it's a very difficult situation, but we laugh about LVMH, and we say that when we have our performance appraisals, this is true for everyone, legal and non-legal people, there's one factor that's on the form, the performance appraisal form, and you have to check off various things, is the person technically sound and how do they get along with others, etcetera. There is one category that's called, dealing with ambiguity, and at LVMH, this is probably the most important. You have to really do well at that in order to be successful, or at least to last, whether you're successful or not. And that's true no matter what your capacity.

So many of these issues of lawyer independence are actually heightened for me in some respects, although I'm also grateful to say that I've never been in a situation where I've had to confront someone about doing

something that was not appropriate or where I would have to withdraw. I've never been in that situation, and I certainly hope not to be. But I have colleagues, including my boss, who's the general counsel, global general counsel based in Paris, I have colleagues who are not considered lawyers, really, in terms of their own bar, as was said on the earlier panel. They're lawyers, but they are not really accorded, for example, attorney/client privilege because they're viewed as not being independent, and so there are sometimes machinations that we do go through when we have litigation or other matters, and we have to involve our colleagues and friends, we have to be very careful about how we structure conversations, and we're constantly thinking about how we can protect the privilege when we're dealing with a whole group of people who are not accorded the privilege in their own country.

My own background is that before I went to law school, I got a Masters Degree — actually, my Undergraduate Degree and also Masters Degree are both in international relations, and I think that that has served me just as importantly in my current function as my J.D., because I am often the translator, to a large extent, of the cultural differences between the French and the Americans, and this does have an impact on how legal issues are perceived. It took me a very, very long time to understand that some of our employee relations issues — by the way, my background is not litigation, but I'm the jack of all trades. I do have a staff, and I have a litigator on my staff, and I have an employment lawyer on my staff, but the reality is, I have to do a little bit of everything.

So, I've gotten involved in a lot of those issues, especially when we're dealing with senior executives, and for a long time it was very hard to understand why we have certain types of employee relations problems until I learned that in France, you can sexually harass someone — I'm being a little flip now — but you can't yell at them. I am being flip, but the reality is, you cannot treat people the way a lot of partners, I've heard that a lot of partners treat associates. That would be considered moral harassment. But you can indeed suggest that perhaps you go out for a nice dinner with an attractive member of your staff, and nothing can come of that, at least not in terms of an employment claim. And those are the kinds of things that create huge discrepancies in terms of the role of the lawyer in trying to educate the business people, who are of many, many different nationalities, not just French. We're a global conglomerate, and the issues that I have had to face often involve education. And that's true for my staff.

I spent a lot of time setting up and promoting continuing legal education, and we do a lot of ethics in the profession for this reason, because it is probably the single area that creates the most difficulty for all of my lawyers. And because we are a small organization, I am often the person that employees will come to when they want to disclose something confidentially. And I get a lot of, you won't tell anybody about this, will you? And I do spend a lot of

time explaining that my client is the corporation, and if what they tell me requires investigation or disclosure, I will investigate and disclose.

**MS. WOLFE**

Thank you. Bob.

**ROBERT F. CUSUMANO**

GENERAL COUNSEL, ACE GROUP OF COMPANIES

Hi, I'm Bob Cusumano, general counsel, ACE Group, which is not the hardware store, but the global insurance company. I am very happy to be here at this Convocation, not the least because I've never been to a Convocation before. It sounds vaguely religious. And so I thought I'd take another religious kind of tradition, bearing witness. Maybe we'll do this as a revival, if you will.

So, I have a story to tell you about independence and professionalism in a large organization, and I think I'm going to start, in deference to the rest of the panel, by telling you just the first half of that story and then circle back and talk about the good part.

I volunteered for this panel because I found in 2005 very quickly upon taking this job that just about everything we do revolves around professionalism and ethics. I was stunned by how often it came up. I spent 20 years as outside counsel and as a litigator in big New York firms. It just didn't come up every day, and now it comes up just about every day.

I don't propose to offer you an ultimate solution to these issues, but rather a narrative that maybe tells you how complicated and dense the issues are, and another narrative that talks about how intensely one has to address them. What it requires, at least in my view, is not that amenable to rule or procedure, but rather, to extend the religious metaphor, missionary work.

I came to this job at an unusual entry point. This was a large international company, but it was one that had been created by acquisition from a very small base in Bermuda, and that's, in essence, 200 employees in the Bermuda company, acquired 5,000 employees in 1998 and 1999, and then several thousand employees thereafter. Those companies were in difficult shapes. There was a huge amount of infrastructure breakage. There was, at best, a diffuse legal staff of about 60 or 80 that had been cut down by nearly half. There was field autonomy, there was no organization chart or reporting lines within legal when I arrived. We had an odd-lot collection of businesses spread all over the world. There was little or no common culture within the legal group. There was no integrated agenda for the management of that group, and our geographic spread at that time, about 25 countries and several dozen business lines, made it quite difficult.

What were the consequences of that as I came to see them in the months and couple of years where I was trying to digest this? Well, I would

say the lawyers were clearly owned by the businesses and not by each other. There was little supervision of lawyers by lawyers. There was no common legal method. There were no common performance standards. There was no compensation metrics, nor were lawyers' compensation decisions made by other lawyers, and there was very little even participation in that. There was huge delegation to outside counsel. Independence was random, based on the personality of the individual lawyer. There was internecine squabbling or worse. No fist fights, no violence, but it was loud. Large gaps in coverage of the legal issues that one might expect in a large public company, difficulty with the lawyer's breadth and issue spotting.

I would say there was little ability to deal with what I call hair balls. I've learned to love that little phrase. There was a high risk of fracture under stress because of the chaotic nature of their non-organization. There was what I call closet lawyering, which is where you open a closet, ask the lawyer a question and immediately close the door to the closet, and pass-through lawyering.

The personal consequences for the lawyers were an extreme need to please their local business client, absence of career paths, isolation and lack of development in their careers. Great deal of fear, leading to great deal of territoriality, which is human nature responding to fear. There was not a sense of partnership, really, at all, except in certain offices for personality reasons. There was only occasional collaboration across units. There were a few true experts or specialists. Everybody thought of themselves as general counsel, and actually most of them had the title. There was an absence of full candor through the legal group, and especially reporting upward, and of course, it was very difficult for people to even know how to report upward because we didn't have an organization chart.

The good parts in this chaotic organization was that it was very functional in the day-to-day. It had huge efficiency. People understood their local businesses. The routine work got done very well. We had competent practitioners who were almost all good-hearted people put in a tough culture. There was an honest desire to succeed, no overt intention that I ever saw to do anything but serve the corporation well, depending on how you define the corporation.

There was a long history with the business unit, and there was an enormous amount of practical wisdom that I could tap, that I learned to tap coming in from outside as not a person who is an insurance industry practitioner.

With that stage set, I'm going to stop now, and we'll come back to this.

**JAMES J. MANGAN**

MANAGING DIRECTOR AND HEAD OF U.S. LITIGATION,  
MORGAN STANLEY

My name is Jim Mangan. I'm the head of litigation in the United States for Morgan Stanley. I'm a bit different from, I think, everybody else on the panel in that I'm not a general counsel but have a more specific role within the organization. How did I get there?

As Paul mentioned, I worked with him at Cravath.

You probably don't know this, Paul, but I was interviewing for my job as a summer associate, and you saw that I was undecided as to whether or not I wanted to be a corporate lawyer or a litigator, and I was going to be interviewed by Tom Barr, and before I went into his office you told me, tell him that's a mistake. That you've decided, and that you want to be a litigator. So, I'm a litigator now.

Sure enough, Tom asked me a question. He said, it looks like you're undecided. I said, that's a mistake, no, I want to be a litigator. And from Cravath I went to the U.S. Litigation Group at Morgan Stanley and spent six years doing litigation work in-house for the firm and then went, had the opportunity, the rare opportunity as a U.S. litigator, to go to Hong Kong with my family and established the firm's litigation department in Asia, and for two and a half years was trying to practice within the confines of our ethics rules, which sort of traveled with me. I did that in Asia in multiple jurisdictions, which was interesting, and then came back, and I'm now head of U.S. Litigation. And most people think of the role of litigator as advocate, but in-house, I think it's really a blend of advocacy and also being an independent counselor. So, we're all ethically bound to follow the model rules and exercise independent professional judgment, provide candid advice, and to tell clients — particularly, in my position I often at times get the opportunity to tell clients what the law is, and I think my role as advisor and my role as advocate essentially go hand-in-hand. As an advocate, I'm attempting to resolve conflicts in favor of my client, and I've read a fair bit on this, on this topic, particularly in preparation for today, and there are some who say that the role of advocate is ethically distinct from the role of independent advisor, and I guess I just don't see it that way. I think that I'm educated as an advocate by my advisory role. In that independent advisory role and how far I can take my arguments, and how far my client might be willing to go with certain arguments in my advocacy role is going to be educated by the conversations I have with them as an independent counselor, telling them my sort of independent professional view and giving them my candid advice. And so you reach that understanding, I believe, you reach that understanding with your client, and frankly, internally to yourself, only by having fulfilled that role as an independent counselor.

Again, I think the opportunity comes up fairly often in-house as a litigator not just to be an advocate, litigate and have fights, but you're engaged

fairly often in pre-litigation counseling where clients come to you and say, can we do this, how will this be viewed by the outside, how will this be viewed by a regulator. And if you're just purely an advocate, it simply wouldn't work as an independent counselor. You need to be able to say to your client, "no" when it's right to say "no." But do it in a way that's reasoned and reasonable.

You might ask, well, why? And I think the answer to that is because as an in-house counsel, you need to exercise that independence to fulfill your ethical obligations and do what's right, but also, you have to maintain credibility. And I think it was Bob who mentioned earlier in his keynote address, maintaining that credibility, and building that credibility improves relationships and trust which are built up over time, and that's where the advisory role interfaces with your advocacy role.

In my role as a litigator, while it's different substantively, it might not be different from what everyone in the panel faces, and we're trying to balance the trust relationship that's necessary to do your job day in and day out and have an impact on a company against the independence to exercise your professional judgment.

**JANE C. SHERBURNE**

SENIOR EXECUTIVE VICE PRESIDENT, GENERAL COUNSEL  
AND CORPORATE SECRETARY,  
BNY MELLON

Hi, I'm Jane Sherburne, and I'm general counsel at BNY Mellon. I worked in various roles in three public companies, all financial institutions, all heavily regulated. I was general counsel at Wachovia for a short period and was at Citi for about ten years in various roles at the holding company, and then as general counsel at Citi's general consumer group. I've seen a number of different organizations and have been put in a number of different situations. I have to say I think working as an in-house counsel is a great job. It's great because it is so complicated.

I think navigating some of the issues that Christine was describing, all these different pressures and figuring out how to come up with the right kind of advice, the right kind of judgment, where your independence collides with, or is compatible with advocacy or maximizing the company's profits, I think those kinds of questions are intensely interesting to deal with, and fundamentally, I think it all comes down to judgment. I think that's what is at the heart of these jobs. There is no formula. There is no clear rule to follow. You get asked to do something or look at something, or you know something is a priority of the company, and you spend a lot of time trying to figure out how to enable the company to achieve what it wants to achieve. If there are issues that come up that make you uncomfortable, you need to figure out how to express those in a way that help people understand.

In my view there's always the ultimate weapon, but if you have to use it, I think you fail. But I think that can be best expressed as, don't make me

put this in writing. And I think, but I do think that if that's something that one needs to threaten, it means that you haven't established the right kind of relationship with the folks that you're dealing with. With your C.E.O., with your board. It has to be a relationship where they have confidence in your advice, or that they will listen to your explanations, where you're able to communicate clearly to them what the risks are and what the basis for the advice is.

Again, I think it comes down to judgment. I think one of the most difficult issues to wrestle with in this role is really what is a legal risk and what is a business risk. You can identify that there is a legal risk, but the business may want to take that risk and think that it's appropriate to move forward, and there are times when, when I think that's fine, as long as the business knows that something negative may result in litigation. There's a risk of some kind of backlash. If the business is aware of that, wants to take the risk, that's fine. At other times it's an unacceptable risk from a legal perspective, and drawing the line and making it clear to folks when, in fact, this isn't just a decision for the business people to make; that, in fact, it's a legal decision that has to be adopted or respected, can sometimes be, again, a pretty challenging way to have to explain or deal with your constituents.

I think of my role as, sometimes I describe it in thirds, although it rarely works out that way. But about a third of it, the role seems to be managing the legal department. At BNY Mellon, we've got about 430 or so folks in the legal department globally. About a little under two thirds of the staff is in the U.S., but we've got a lot of folks in other parts of the world. Managing that staff is not a legal job, it's a management job. Keeping people motivated, particularly, you know, when we've been through something like we've just been through these last few weeks in trying to keep, you know, a payment system operating globally at a time when most of your employees can't, don't have power and can't get to work, is a full-time job for everyone, including, trust me, the general counsel.

So it's a management job. It's a third care and feeding of the board. The relationship with the board is absolutely critical. Making sure, again, that the relationship is there, that if there ever is an occasion where the board has some question that they're concerned about and they're not really sure about management's position on something, that you've got the relationship that they can, can seek your advice and your point of view on that.

And then a third is working with senior management. Being that trusted advisor, being a person who has got a lot of good common sense, business sense as well as legal sense, a good feel for the strategic goals of the company, and being positioned in the right way with the right legal support throughout the company as the strategy is developed.

We've had lots of teachable moments. I love those teachable moments. I wish they didn't have to happen, but when they do, when someone's spent eight months trying to develop an idea for how to open a

corporate trust business in India, only to find out when they finally bring it to the legal department that, in fact, we can't do that — and a lot of resources go into that. And the moment is to say to the lawyer and to the business person, you've got to engage at the beginning, and really, the lawyer has to understand what the business objectives are so that they can participate in how something is shaped and enable, rather than just say no. That's a start.

**MS. WOLFE**

Thank you. I'd like to shift gears a little bit at this point, since we've got the introductions out of the way. Bob Weber this morning talked a little bit about the notion of lawyer statesman as being ineffective constraint upon general counsel, and I'd like to talk about that for a few minutes.

The notion for the lawyer, in-house lawyer as being the wise counselor for the benefit of the public and the corporation has long, historic roots. It goes back as far as Louis Brandeis, and a rather famous story that Brandeis used to tell when he was counsel for a corporation that manufactured shoes. The employees of the corporation had gone out on strike. It was that time of American history, and the corporate leadership's notion was to let the strikers tire themselves out, hire new people and proceed. But Brandeis prevailed in counseling them that they should negotiate with the strikers, amend some of their practices, and within a short period of time, they were back to running three shifts a day, and the moral of the story was that both the corporation and the public were well served.

John Coffee would agree with Bob Weber that that model of the lawyer as wise counselor was an anachronism, perhaps, even then and was able to occur because there was a limited period of time when the corporate structure was rather unsophisticated, and so the social sciences were rather undeveloped so that an individual such as Brandeis could easily serve that role. But that time has overcome that moment, and we can no longer have that expectation.

I think, though, Bob, that you alluded to having a different perspective that you'd be eager to share with us, I suspect.

**MR. CUSUMANO**

Sure. So, we're not going to pick up where we left off. I'm going to leave you hanging a little longer, but I will point you in the direction of the materials that were distributed, and there's a couple of documents in there that I plucked out of our files, both called mental model, part one, part two, and they're part of the story I wanted to narrate for you.

Part one is written in 2008 when I was about three years into this and found myself with an organization that had been organized and had decent proper reporting lines but still was unsatisfying to me, so we worked very, very, very hard to try to figure out why that was, and it occurred to me that it was because I just didn't like the way everyone used their brain. And it was that

grand a judgment, okay? I came to it not easily. And I think it was borne of the history, it was borne of a lack of attention to the institutional mission of lawyers, and I felt that we couldn't just tell them that. I felt that we had to do a demonstration. And so the demonstration was to create a three-day global legal conference, we spent about six months preparing, that reframed the view of legal ethics, of institutional mission, of the proper role of lawyers in a legal organization for a corporation entirely from scratch. We built it up from neuroscience, evolutionary psychology. We had scientists in to talk to us about navigating uncertainty, about how the mind works, about cognitive failures by lawyers, by clients. We built the whole thing.

And so the first of those two mental models comes to us right after that conference. It is proof to me, if I ever needed it, that short documents are harder to prepare than long documents. We actually fit it on a page. And that represented, I think, an articulation of what became a collective view of what lawyers are supposed to do in an organization, and that view is not that we are the only conscience of the corporation, but that, by virtue of our training in dispute resolution, by virtue of a liberal arts education or some form of college education combined with Socratic method or other legal education, a historical understanding of how law develops in understanding of the tensions that law resolves, a whole life spent in balancing differing interests that clash with each other, that lawyers were uniquely situated to speak in a very informed and wise way, to the very questions that every merger of a corporation has to address.

And so we embedded that deeply into our so-called mental model in phase one, and I have found in my seven years of doing this that not only does that model work, but it is actually what the client expects, and more importantly, I'm afraid, to totally disagree with our friends who have spoken earlier, I believe it's what society expects.

I think the pushback on that is largely driven by fear of liability, fear of exposure for being a bad conscience. The temptations say no, no, no, I'm not the conscience, that's the C.E.O. I'm just the guy doing legal. That's not how I feel about it. I feel that society has already imposed that on us. When things go bad, when balances are mis-struck, when bad judgments are made, society looks to the lawyers. Not that they don't look to anyone else, but they certainly look to the lawyers. We are the people who are experts in law, in rules, in certainty, in navigation, in general judgment. I would not build a model of lawyering for a large organization that dispelled the idea that we are, in fact, a major part of the conscience of the corporation, but I would certainly acknowledge we cannot be the only part.

#### **MS. WOLFE**

Anybody else on the panel have any views on the two competing models or have a third view that would be interesting to hear?

**MS. FIRESTONE**

I think maybe we take ourselves a little too seriously with respect to the moral conscience. I mean, in my organization I work very, very closely with the head of H.R. and our C.F.O. I have to say, I think they have, they often have a very different perspective because of where they're coming from, but they certainly have as much of a conscience or moral perspective as I do as a lawyer.

They have different training, but they have the same desire to do the right thing. And I don't think that lawyers, because of their training, have a special corner on the conscience market at all.

**MR. CUSUMANO**

I don't think we have a monopoly. We have a legalopoly.

**JUSTICE ENG**

Just piggybacking on what I had said when I spoke initially, we are, as lawyers, are different. That is that we have obligations placed upon us for saying something if we see something. So, I think that that, of course, gives us a greater responsibility in this area. Of course, there are highly qualified specialists in other areas, and we have to work with them and respect their views, but ultimately, in carrying out our responsibilities as lawyers, we have to do something about it in many instances. I think that's what makes us a little different.

**MS. FIRESTONE**

Accountants do too. They have rules as well, about saying something.

**JUSTICE ENG**

Yes, yes, yes, yes.

**MS. SHERBURNE**

I think the trick is, and I think Bob said it well, and I agree there's a special role here, but I think the trick is not creating an environment where colleagues push until you tell them they can't. And that's where it's a shared responsibility. You don't want to be thought of as the sole guardian, and I think, you know, I've been in situations where I realize that that's what's happening. Where somebody is just waiting to see, you know, how far they can go before I wake up and say, you know, whoa, wait a minute, you can't do that. And then the response is, yeah, I was wondering if, how soon you'd pull me back. That is not a healthy environment. You've got to have everybody take responsibility for it, but I do think that, that Bob said it well. There's a special role, we're expected to play that role, but we can't let others think that it's not their job too.

**MR. MANGAN**

I agree with that. It seems to me that, particularly in large organizations, you can't rest all of the conscience questions on general counsel, on one person. It's going to be a shared responsibility is exactly, I think, the right way to put it.

But to Justice Eng's point, there is, for us, there is this very special role, I think, you know, often times loses its meaning, but when you say we're a member of the bar, there's something, there's something that goes along with that. There's a public perception, and there's a responsibility that goes along with that. And I think, frankly, when you look at the model rules, and we've been talking about rendering independent, professional judgment and candid advice, that that's buried in a rule. That rule itself, when it talks about independent professional judgment and candid advice, there are, I think — and folks have written about this — I think there are probably two beneficiaries to that. One is, our direct client that knows they're going to get advice that's not going to be tainted by our personal biases. We can transcend personal biases or other external influences, but I think, frankly, there is probably a greater public benefit to that. And that in doing that, in rendering that kind of independent professional judgment and candid advice, and this is not a new idea, it's been written about, you're decreasing the risk of wrongful behavior. And in general, therefore, you've got another beneficiary, and that is the public, I think. And when you're fulfilling that obligation to render that advice, the public benefits from it. And I think that, in part, helps define what that special role is. And there are other, obviously — beyond the rules, there are other rules out there, sort of produce a public expectation of what that special role is. But just beyond the rules there is something, I think, in particular that, an obligation we have to fulfill. We tell our clients what the rules of law are, how they apply them to their business, how to do so in an expert way, help them be profitable, but at the same time, there's that, is that question, is it legal versus is it right. That question of, is it right, I think, benefits clients, and I think, a greater good.

**MS. O'HAGAN WOLFE**

Before we move on, is there anyone in the audience who has any questions for the panel members or comments they'd like to make on this particular topic?

**A SPEAKER**

I think just to return to your last point about, and what Bob spoke of in his opening remarks, is it legal and is it right, in each of the examples we've talked about today, whether it was linked in savings and loan or Enron, or more recently, the mortgage meltdown, it seems to me that the question, is it right, isn't being asked.

You know, in each one of those instances, the bad conducts took place, and the question after the fact was, where were the lawyers. And it seems to me they skipped the important question, which is, is it right, and I just wondered about your thoughts on that, if you think that's an accurate description and how we, as in-house counsel, can make sure that that question gets asked. Or maybe we're the ones who should be asking that.

**MR. CUSUMANO**

I've been saying to my lawyers for quite awhile that the accounting profession goes to jail because they don't know the law, and the legal profession goes to jail because they don't know the accounting. With Enron and with the options, the back-dated option, certainly true. I think there's some of them, mortgage fraud stuff, although most of that is backup, is compliance, robo-signing and bad sales practices, where the lawyers were not asked to approve on a range of behavior, the kinds of behaviors that were exceeded in the field. It was rather a lack of oversight.

I think in many ways those examples are inept to the crux of an ethical and professional legal group.

I'll give you a counter-example that's a little, you know, more mundane, but it popped up just this week, and so it's timely for me, and I think it kind of talks to conscience or not. The question of email privacy at a company is a great one for me to sort out the role of lawyers and others. In America, there is no legal requirement for any, right? Company can search anything they want at any time. Our company has a policy saying, anything you do on our systems is ours, not yours, so therefore, understand we can come and get it at any time. Management is fine with that. It's legal. It is totally empowering for them, and yet it irks me, and so I have started awhile back pushing back saying, no, the real world has passed this by, and let me ask you, when is the last time you sent your wife a private email on the company computer? Was it yesterday or today? So, you start to work it. Now, does that give me a special conscience? No. But it does mean that I approach these issues from the point of view of constructing a society that is the Ace Group of 18,000 people in ways that the C.E.O. will not do. He's constructing that society from another point of view. But my special expertise really is the social construction and interaction and the building of rule and regulation and policy. His special expertise is way broader than that. He knows the external community, knows how to make money, he knows the underwriting, the accounting.

So, we all have our roles to bear, to play, and we all interact, sort of overlap, but I do think that at the end of the day, on questions of right and wrong and morality, the lawyer is, you know, kind of first among equals, if you will.

**MS. FIRESTONE**

I'm kind of astonished by that. I think that's just so overreaching. I really do. It's funny, and I take a very different perspective on the email thing too. We're dealing with tense issues, and I don't want people to send anything over email that they would be embarrassed for their wife or mother to see. And we tell people, and I think rightly so, that they have no expectation of privacy, but that's not because we're going to be snooping. We're not snooping. We once had an employee who saw another employee accessing pornography, and we had a very real reason for wanting to go into his computer and see what he was doing. I don't think we've ever done it before or since, but to me, that's not really a morality issue. I think that's safeguarding the rights of our employees and also the rights of the corporation. I talk about the law, what we can or cannot do, that's my legal role. I wear a business hat too, and I'm asked my opinion on things that have nothing to do with the law, and I give them, but I don't pretend when I do that, that I have any kind of special knowledge. I'm one of a group on the management committee, and we make these decisions together. And hate to think that by right, my role should be more than that.

You started out saying convocation and the bearing witness —

**MR. CUSUMANO**

I haven't gotten to the missionary part.

**MS. FIRESTONE**

This is great, because I'm finding this very interesting.

**MR. CUSUMANO**

Let's follow-up on that. So you've not seen the tough question yet, but we're going to; a Fourth Amendment policy for my company about when search and seizures internally are valid. We've also decided, all of us, collective conscience, that there should be some limits in the company's ability to go snooping around. And I think you acknowledged that. You said, we don't snoop. So I would pose the question, if you don't snoop, how do you know that, and what rules of the road, and if you have the rules, wouldn't the lawyers be writing them?

**MS. FIRESTONE**

We do. First of all, most people can't get into the computer. It's really the I.T. people, and the I.T. people, there are rules that govern what they can and cannot do and how they can go into the computer. Can they do something against those rules? Of course they can. We know that a rule can always be broken by someone who wants to. But, you know — can I pose a question? I don't mean to hijack this here, but I have a question for you about

how employee disputes are resolved. Do you have arbitration clauses to resolve disputes?

**MR. CUSUMANO**

Yes, we do.

**MS. FIRESTONE**

I recently put that in place in our organization. I know in financial institutions that's been done for many, many, many years. I had a really hard time getting our company to agree to put them in because our French masters thought that I was taking away a fundamental right of the employees to go to court. And it's interesting, you're talking about email and rights and —

**MR. CUSUMANO**

I've never been called French before.

**MS. FIRESTONE**

But I'm finding it very interesting because, you don't see that there's a limitation of rights, thereby cutting back on the employees' ability to, the ultimate recourse, which is court, but you're very concerned about their privacy.

**MR. CUSUMANO**

You're asking me a substantive question of law and morality about the relationship between the company and the individual. So, we're not talking about institutional mission of the law group anymore.

On arbitrations, I am not offended by that for non-life-threatening things that people agree to have arbitrated. But I understand, and our company understands that in other countries, people do take offense. And one of the challenges of my job is with lawyers in 40 countries, I've got to roll up all that information about local law and culture. We're practicing law in civil law cultures, common-law cultures, and no law cultures. What do you do? It's one of the great, wonderful things about the jobs. You have to have a common standard but overlay on top of that all of this local variation; it is a fascinating ongoing project.

**MS. SHERBURNE**

I think, just to throw in another perspective here, I think that, I wouldn't go quite as far as Bob goes. I think I'm more aware — I think this is a shared responsibility. When I came to BNY Mellon, they already had in place something called, that they called the Sensitive Issues Oversight Committee, which many of you will quickly recognize must have been the result of a non-prosecution agreement, but it is a committee that was established, and I chair it

as the general counsel, but it includes folks from risk, finance, audit, compliance, and representatives from each of the major businesses, technology, and it meets every couple of weeks. And in fact, that is the place where we had the email discussion that you're describing. And it wasn't just — I led the discussion, but it was something where every constituent from the organization had a point of view that they expressed, and then the committee came to a resolution about how we wanted to proceed as a company. That felt like something — I manage that agenda. I figure out what those sensitive issues are, soliciting ideas from other folks. But it was something that really, you know, it enables a lot of investment and buy-in from the other constituents, so it's a nice way to engage everyone in the decision-making, but at the same time, feels like it's appropriately lodged with the group that's supposed to have special sensitivity to those kinds of issues.

**MS. WOLFE**

Thank you.

**MR. MANGAN**

Getting back to your question, your question, I think, was, I think that there's the very last part of your question that I thought was interesting. "Is it legal?" versus "is it right question?"

I think you asked, it sounds like in certain circumstances people weren't asking that question, "is it right", and I thought what you said was, should we be asking the question, as in-house counsel. I think the answer to that is clearly yes. I think that our role goes beyond purely what's the black letter of the law. And it's, you know, our ability to ask that question is limited to the matters that come before us. But in your spare time, you can have conversations with folks when you're building those relationships of trust that make them, make them sensitive and alive to the issue. Whether or not they should be asking that question. So, they get the answer to "is it legal?", and they, themselves, have to be asking, "is it right?"

**MS. WOLFE**

Okay, next chapter.

Quite literally, it's the fiction chapter. During the focus groups that we had, one of the questions that Paul posed was about the legal fiction of the lawyer who works for an organization, representing the organization because the constituents of that organization is, just as Justice Eng reminded us a few minutes ago, are the people who are part of that organization, whether they're the officers, the directors, the shareholders. They're all people. So, the question becomes for the general counsel, or the C.L.O., who then is the repository of this, of the attorney/client relationship that evolves on the ground, on the day-to-day basis, and then when issues arise, and how do you

individually minimize the confusion that your multiple roles and multiple constituents cause.

So, the fictional part in addition to — I'll put it in a context of a hypothetical, because Paul has been great on hypotheticals — this is the hypothetical where a respected subordinate presents credible evidence to you that the C.E.O. is engaged, actively engaged in some improprieties that, more likely than not, violate the law. And the subsidiary question would be, would you check that C.E.O.'s email or hard drive, and how would you go about that. So, it's a bundled question. Take your pick.

### **MR. CUSUMANO**

I'll take a crack at it, if you want. Maybe provoke some other comments. But in large breadth, we have a process for that. There's a lot of law about how to go about this, and there's always a lot of heartache in situations like that. But the basic rules of the road that we follow is that if such an allegation comes forward, A, keep it confidential until you can test it for basic credibility. If it passes what we call a probable cause test, then yes, you are in investigation mode, and at that point, you return to our soon-to-be-created email policy to determine whether your search is properly tailored to the problem you're searching for. And then you do the search.

And what we try to do, again, it's process combined with law, is take a very layered approach to try to protect all the different constituents, because you're dealing with explosive stuff here. If it's right, your company's in trouble. If it's wrong, it's defamation. If it gets out in a public company, there is terrible market damage, whether it's true or not. So, very explosive, and you have to be very careful.

The other checks and balances would be that at a minimum credibility point, this would be brought quietly to the attention of the board, and then at an appropriate point, a consensus point. It would be brought to the attention of the target of the allegation, i.e., in that case, the C.E.O. It's a heavy mix if it's the C.E.O. as opposed to the third level down in H.R. that's being accused. I'd highly recommend at that point that you retain outside counsel as a sounding board, at least. And at some point you may need to turn over the investigation, because even though I think I could be independent on that, it would be too heartbreaking, and no one would believe that I was independent, so you would have to respond to external constituencies and certainly give them the appearance of independence that they're looking for.

### **JUSTICE ENG**

The rules give us some guidance; that is, that we are instructed that the lawyer shall proceed as is reasonably necessary in the best interest of the organization. So, we have a rule of reason here, but we're not necessarily limited in the measures. Because in going on, we have the caveat that any measures taken shall be designed to minimize disruption of the organization

and the risk of revealing information relating to the reputation to persons outside the organization. And then it gives some possible measures to be taken. So, not only do you have a responsibility to get into it, but you have to, again, do it reasonably and with a balance. So, this is what some of our other panelists have been alluding to. That is, you just don't go diving in like G-men; you have to do it in a fashion that comports with this direction. So is it easy, no. Is it tricky, yes. I must say that the open-ended nature of this sort of disturbs me, but again, we are given these requirements, but also given constraints.

**MR. MANGAN**

I think Bob's answer in terms of the broad, the broadening of the rules, Bob's answer was sort of the textbook on how to approach it. It could not, I don't think it could be said better in terms of the layered approach and taking a measured and controlled response to something like that because it can, obviously, turn against you pretty quickly. But the sequence of what they described and when to engage external resources, when to tell people, when to look beyond, really, the allegation, it's exactly right. I think it works hand in hand with the very broad brush strokes —

**MS. SHERBURNE**

I think one of the key issues would be in that kind of a circumstance to engage outside counsel almost immediately. Every judgment call that you make in a situation like that is going to be second-guessed and scrutinized at some point in the process. And to really have the comfort, if you don't feel like you've got internal people who can or should be aware of the situation until you've got a better handle on it, it's really important to take some wise counsel from outside counsel immediately to help you navigate through that. That is one time when being a camel internally, I think, is so complicated that you really want to make sure that you've got a course check with somebody who's just a little bit removed from the situation.

**MS. WOLFE**

To circle back for a minute to the ultimate fiction itself, or the beginning fiction, which was the notion that the lawyer represents the organization when the organization is really comprised of all these constituencies, how do you manage the competing interests, say, between the C.E.O. and board as, you know, disputes or controversies might arise? Anybody?

**MR. CUSUMANO**

I'll try it again. I would say that life is pretty peaceful, mostly. And so that kind of tension doesn't come up in a difficult or hostile legal way very

often. The fiction that you represent an entity as opposed to a natural person is also very easily managed on a day-to-day basis at my level. Where I worry to death is out in the field where the distinction between the corporation and a third level down manager in a particular country or business is extreme, and where a lawyer, if isolated, would lose touch with the corporate interest in general. And so a lot of what we've done in terms of creating our organization, solving a lot of the, quote, loneliness problems that lawyers have when I started has been designed to create a fully functioning matrix where legal, as necessary, can speak as one. Where there's a lot of breadth and collaboration. And we talk about the clients a lot, we talk about the personalities a lot. We know them well, and they know us well. And so we try to merge all that together and create avenues or paths where you avoid a conflict between the individual and the corporation. But I think at this point with all the missionary work we've done, there is not a lawyer in my group that doesn't understand that they represent this corporation. And I would say more importantly, this is where I would recommend missionary work to everyone who's in this organization. What they're also coming to understand is that they represent the legal department first. They're a lawyer first, and the vice president second. That was the harder lesson to each them. I think we're just about there.

**MS. SHERBURNE**

With respect to the board versus the C.E.O. question, the way I look at it, Catherine, is that the, the board's key mission, one of the key missions, maybe the primary mission, is the hiring of the C.E.O. and performance reviews and managing the C.E.O. If there's a conflict between the board and the C.E.O., I think the general counsel is answerable to the board. And that that's how that ends it, having to evolve, unless there is some other extenuating circumstance or legal issue that interferes with that, but I think the general construct would be responding to the board.

**MS. WOLFE**

I have one other topic.  
Paul, do we have a little more time?

**MR. SAUNDERS**

Yes, we do.

**MS. WOLFE**

So, tension being a good thing, because without tension in the violin string, there is no music. There is also tension in another one of the model rules, and that's model rule 1.7 that talks about a lawyer's prohibition against representing a client with interests that are directly adverse to another client, and the points of intersection here are when you may be engaging in the

attorney/client relationship, when you may fall out of that attorney/client relationship because the legal advice that you have been giving suddenly morphs into something closer to business advice, and a question of whether the privilege attaches, and to until what point does that privilege attach.

Do any of you have any comments or views on that particular rubber-meets-the-road topic?

### JUSTICE ENG

Well, the Second Department may have taken care of the whole thing, so, and I refer everyone to a matter that we have from 2005, *Manchesky versus Gabelli Group Capital Partners* (phonetic), in which a former corporate counsel was not precluded from suing the corporation in his capacity as a shareholder, despite his fiduciary duty to preserve client confidences and secrets.

The point is, is that you can wear several hats, and those several hats are not necessarily incompatible with taking direct action. The point is, this is highly nuanced, but, and it is a fiction, of course, just as the corporation being an entity, a person is a necessary fiction. What I can say is that it is still, it is still evolving, in my mind. I've taken several different views of this, and I must say that in this discussion, I have been impressed by the dedication to examining the issue of, "is it legal, is it right?" And I have to say that in our own jurisprudence, I think that we cannot help but to be influenced by, by what is right. Particularly in some of the matters that we've been dealing with, such as in the mortgage foreclosure. And I shouldn't say too much more about that because these cases are still in litigation.

An interesting question, and that is rule 1.7, is something that should be examined carefully.

### MR. CUSUMANO

On the privilege, I would just say this is one of the densest areas in the law, in my experience, and if I have four or five lifetimes, I might devote them to trying to get this right. For corporations, it's very difficult, but I'll also say that corporations are our own worst enemies. There are materials where you'll see — I'm sort of rallying against any of our lawyers doing what's expedient for the corporation by taking a slice out of the law or the legal profession, and I think the privilege is a place where corporations constantly hurt themselves because they're trying to put non-legal functions under a legal privilege umbrella, and it wrecks the law, and it makes us look bad, and they don't get the privilege in the end anyway. And I see it all the time with the new focus on bureaucratic risk management. I say bureaucratic in a good way. Structured risk management process and people make arguments like, shouldn't this be under legal? I say no, this is managing your risk. You're not doing law here. But the idea is, we'll get to keep it secret so no one at the end of the day will pluck anything out of our risk management files to say you knew this was

coming. This is a role with privilege within a corporation, but I resist the over-expansion of the privilege to non-privileged business functions.

**MS. SHERBURNE**

Although sometimes it's difficult to tell when one stops and the other starts, and I think that you can get a little hung up on that. I think the way to address that is when the issue arises to be careful about what you're claiming privilege over and determine whether or not something is privileged in your waiving of privilege or whether you're going to treat it as not privileged at all. Those are, again, judgment calls, but if it's primarily business advice, this Sensitive Issues Oversight Committee that we chair, that's not privileged, that's just asking the question, is it right, not, is it legal? That's a different kind of analysis.

**MS. WOLFE**

Anyone in the audience have any thoughts or comments, questions?

**MR. SAUNDERS**

I have a question. I can't resist.

I think we've built in some time in this discussion for questions and answers from the group, and with any luck, we'll try to break a little bit earlier than we've earlier scheduled, but I do have a question along the lines, something Justice Eng suggested, and that is, that is this: The lawyer, I think, is ethically obligated to act in the best interest of his or her client. We heard that from what Justice Eng read. If the client is the corporation, how does the lawyer know what is in the best interest of your client? How do you know that? You're obligated to take that into consideration.

**MR. CUSUMANO**

Paul, let's parse it out. You don't come to any discussion knowing everything, clearly. And I'll go back to the terminology —

**MS. SHERBURNE**

Hey, speak for yourself.

**MR. CUSUMANO**

There's always an exploration phase, and then a deliberation phase, and then a conclusion phase. I think our job is to keep an open mind as a participant, so you are participating and also being open to other information as the nature of the corporate interest is explored.

I think the lawyer's special role is to have a little more of a lens on what's right and wrong, other than purely legal or illegal or profitable or not profitable, and this conversation develops at a point you're gravitating towards

a very specific decision. At that point the clarity with which you can make the judgment about what's in the corporate interest from a legal point of view or ethical or moral point of view, it's a lot easier. And I have to say in seven years of doing this, I've only had three or four situations where I got to that last phase, and I still had serious questions about where it was going.

**MR. SAUNDERS**

Take the hypothetical that Catherine gave you. The whistleblower who comes to you with credible evidence that the C.E.O. might have been engaged in wrongdoing. You have to decide whether it is in the interest of your client to investigate further or not. How do you know, how do you know what is in the best interest of your client? It may be in the best interest of your client not to investigate any further.

**MR. CUSUMANO**

Well, these now are chicken and egg moral questions that are sort of Thomas Aquinas-ian in their depth. So, while not being able to answer the metaphysical question of what is truth, I can answer the question on a day-to-day basis of, so far, what is the corporate interest.

I know we have an interest in making money, we have an interest in not being terribly controversial, we also have an interest in being moral. We have an interest in keeping our employees happy and making them think they work in a good place as opposed to a bad place. There's that whole swirl. In the whole thing, someone hands me an email, and this happens, okay? Take the C.E.O., C.F.O., whoever, you get an anonymous email from Thailand, and you translate it, and it says, in words or substance, chief financial officer doing bad, okay. What are we going to do with that? I'm sure not going to sue him, right? I'm going to try to figure out what this is. So, again, it's all practical in the weeds. We go back and shoot an email back to the anonymous person saying, please describe. And then you take it from there. At a point maybe you have a credible as opposed to a fanciful allegation, and that's hard. Then you say, okay, I've got to get audit involved, and now I do have to look at emails, I have to start talking to people.

The answer to these difficult questions, I found always is in the practical details around the hypothetical. And I haven't found one yet that wasn't answered.

**MR. SAUNDERS**

Let's take a real-world situation, not a hypothetical. In the Enron case, Sharon Watkins, who was a whistleblower, came to the general counsel and said, I don't remember the details of her allegation, but made allegations of wrongdoing of some kind or another. And the general counsel decided to retain outside counsel, and the general counsel said to the outside counsel, in writing, I want you to investigate this, but oh, by the way, we're not going to

look into the accounting decisions made by Arthur Andersen. That's not part of your assignment. Okay? I assume the general counsel concluded that that was in the best interest of the corporation, to limit the investigation and not to look into the accounting judgments that had been made by Arthur Andersen.

Now, we all know in hindsight what ultimately happened, all right? It was the accounting judgments made by Arthur Andersen, in large part, that were at the heart of what had happened at Enron. But the general counsel decided, for good or not, to limit the investigation in the way I just described. Is that in the best interest of the corporation?

**MR. CUSUMANO**

Not if it's a permanent situation. You would never do that on a permanent basis, in the middle of a morphing fact pattern. You might say, let's not go there yet, let's see what this is about before we go there, and that might express itself in a note to counsel, saying, don't look at the accountants, right? So, you know, but for me, every decision in an investigatory format is transient and is subject to being reopened from the ground up the next day based on new information.

**MR. MANGAN**

Paul, I think it gets back to what Jane said in the very beginning. It boils down to judgment. Take what Bob said earlier on issues that come up, sequencing the investigation. I obviously don't know the details as to why somebody would make a decision or exercise their judgments in a way that limited the investigation like that at the very beginning or foreclosed, but you're using your judgment, and you're using your judgment every day in these kinds of matters, but hopefully your judgment is such that you understand that in sequencing a review, the way Bob described it, you know when to spot issues, that you surround yourself with trusted people who are helping you, you can have conversations with them to understand, because sometimes you don't understand completely what is in the best interest of the company without talking to various constituents within the company, and sequencing in that way so that as information comes in, you can know whether or not to take the next step. It's all about judgment.

**MR. SAUNDERS**

Any other questions? Yes?

**A SPEAKER**

I was going to add that a lot of companies have, there are codes of conduct, and there are statements, I think — general counsel of I.B.M. earlier said there are four guiding principles, and those assist, I think, in determining what's in the best interest and help make that judgment calls. Also, looking

long term, you're looking at the viability of the company in the long term. Something could really be a huge speed bump for the company in the short term, but is the company going to survive, be in a better position than something that wasn't properly investigated.

**MR. SAUNDERS**

But the point of my earlier question was, under the code of professional responsibility, that is a personal obligation on the lawyer. Personal obligation, not an institutional obligation. It's a personal professional obligation on the lawyer.

**MR. SAUNDERS**

Yes?

**A SPEAKER**

Question, Paul. We've been talking a lot about what the limits are, what general counsel should be doing. And clearly, everyone agrees that when it comes to legal decisions, you should be giving advice that, this is the consequences of doing this, this is illegal, or this may be a breach of contract, we can do it but be sued. Then we've also been talking about taking the next step about whether this is the right thing to do, even if it doesn't violate the law. The example I would use is, Goldman Sachs, for example, assisting Greece in borrowing all this money which it couldn't repay, and doing various accounting. Doesn't seem to have violated any law, but was it really the right thing to have done that — suffer criticism afterwards, but it was legal. Should the lawyers have stepped in and said, look, and said, looking at the deal, yes, we can do it, but should we be taking the step, is this the right thing to do. My real question is different from that, which is, assuming you should say yes, the concern of counsel is that you want them to raise the questions with you, and how far does it impede your ability to have them asking a question that you absolutely want them to ask you, saying, is it legal and is it the, is it a breach of contract by pushing further into the other side, saying, is it the right thing to do if they think you're going to moralize and do these other things, does that stop them from coming to you and asking for the advice that they absolutely need to get, or does it encourage them to do that, or how do you do that.

And then my subsidiary question is, assuming that you're involved in answering those other things, how do you make clear to your client that these other discussions are not protected by the attorney/client privilege, which is another issue we just raised, that they think they're talking to you in confidence, but in fact, they are not, because it's not about legal issues.

**MR. MANGAN**

I think with respect to the first part of your question, it boils down to your relationship with the individual who you're advising and your approach. In terms of, you don't want to alienate them so much. They don't come back to you for the advice that's needed. That's really about building a personal relationship of trust with the individual and, you know, not getting up in the pulpit and explaining to them what you think the moral things to do are and sermonize. But I think, depending on the individual, there are ways to have those conversations so that you don't have the — that really boils down to personal relationship, in my mind.

**MS. SHERBURNE**

I think it actually has something to do with compensation systems. That if you're talking to somebody who's going to be compensated on the outcome of your answer, that's different. What you really want to appeal to is, we're all in this together, we're all trying to do the right thing for the company, we all want the company to be successful, and what's good for the company is good for all of us. If that's the spirit of the response, I think it works. But if you're talking to somebody whose individual compensation is dependent upon your answer, that's more troubling.

**MR. MANGAN**

You may need to have a conversation with somebody else.

**MR. CUSUMANO**

I would add a couple of thoughts to try to answer the question. So often those questions are posed as if it's a single time and single question —

**A SPEAKER**

Mine was meant to talk about culture. It's not one person; it's general in the legal department. They want them to come to you.

**MR. CUSUMANO**

And it's one person over time. One person would say to you, we're embarked in a series of relationships that are over extended periods of time. You win some and you lose some. It's a big, complicated negotiation in that, yes, we can go home at night and say, am I winning enough to make this valuable? Am I being hurt? When I lose, is it for a good reason?

Now, add to that these questions of, assume that lawyers are very strict, almost sporadic, and we're not. We're pretty facilitative. I'm not going to go out there and say something's wrong just because I think we're making too much money at it.

I do understand there is a role for lawyers that isn't to be the conscience on everything, and I don't find that most of the behaviors you see in the capitalistic world are wrong. So, I don't find myself whining a lot or being positioned in a place where, oh, that's the lawyer, he always says no. In fact, I like to be, and I think more often we, as a collective group, are in a position to say that is not such a great idea, but let me show you how to do it better, and that happens a lot more than anything.

**MS. FIRESTONE**

I think the only thing I would add to that is, first of all, I'm very lucky, the business that we're in, we make handbags, we make clothing, we're not dealing with undermining the Greek economy or anything like that, so I've never had to have those kinds of conversations.

**MR. CUSUMANO**

The Chinatown economy, maybe.

**MS. FIRESTONE**

I have been known to be very moralistic at my kids' schools when I see counterfeits; I will say that.

But you know, I recently was in a situation where we were involved in, we're trying to keep a valued employee. And the valued employee had a conversation with a very, very highly-placed person who led her to believe she would be given a team of 18 people, a lot of things that in reality we cannot do for her, because without going into the detail, we can't get visas, we don't have space and other things. We can't do what she wants. And I found myself asking questions to elicit what was the real goal here, because I heard from the people who are all trying to get this done, because this very highly-placed person said, we've got to keep her at all costs, and she's being sought after by another company, I found myself realizing that she was going to come to New York, and she was going to be very, very unhappy, because one person is promising her tons and tons of stuff, and the rest of the organization is trying to figure out how we can legitimately not give it to her. It's not a moral versus immoral issue at all. But by asking certain questions, I pointed out to people, your goal is to keep her here, so you want to actually make her happy, and guess what? Throwing more money at her doesn't sound like the thing that makes her happy. She's asking for other things. Let's figure out, can we really give them to her. If we can't, let's tell her honestly what's going on here. And I have to tell you, people were awfully surprised to hear that, because they had one thing that they had been told by this highly-placed person, which was, you just have to keep her. So, people are running around trying to rent space in a less desirable neighborhood and do all kinds of things that ultimately may or may not have made her happy. I felt good that I was able to contribute. Was that my legal hat? No, not at all. That was a pure business hat, and that's

purely by being in that corporation for 13 years and understanding how people work and understanding what motivates them, and a little bit about what motivates employees. That's a minor version of the kinds of dilemmas that get posed in my organization.

But to your point, you asked about the Greek thing, how many of us lawyers know enough about the economics of the global economy to really be able to offer insight as to whether what Goldman Sachs was doing was right or wrong at that point? I don't know. I don't know the answer to that.

**A SPEAKER**

The second piece of it, which is, assuming you're talking, Louise, about if the long term is going to work out, not the legal judgment, but let's think about the bigger picture, do you take the step of saying, okay, by the way, be careful now because we're going into an area where I'm offering you judgments which are not strictly legal, and therefore, this isn't a confidential communication anymore? Or do you find just, let it go, and that would impede them talking to you?

**MS. FIRESTONE**

Well, again, I haven't really faced those issues too often. It has come up in the area of employment claims, but in the case that I just gave to you, I view that as being totally a business discussion. At some point, I'm going to review the actual employment contract for this new person, and that's a different issue. But batting about the structure, how we're going to help her, what we're going to put in place for her, all of that, to me that was not a legal discussion. That was a pure business discussion.

**MS. SHERBURNE**

But the privilege doesn't belong to the person to whom you're speaking. I'm sure this will provoke Paul to ask another one of his out-of-body questions, but it's not something that should affect that particular conversation, since it's not something that the person that you're speaking to has control over.

**A SPEAKER**

Don't you think at the time they're not even caring about privilege?

**MS. SHERBURNE**

Frankly, if in my company they were, I'd be thrilled. I think you're right.

### A SPEAKER

Bob, you spoke before about, in your view as a lawyer, general counsel, that our upbringing as law students and legal practitioners gave us training that enabled us to be in a position to make, direct good decisions, and I was thinking when you were speaking that I think there's a lot of validity to the fact that lawyers make good participants in business team decision-making, because Socratic method, the ability to analyze in detail and to, even as Louise just mentioned, said it had nothing to do with her legal strength, but I think it did more than you realize, because it's just our training to sort of ask a lot of questions and get a lot of fact-gathering before we want to, we bring to the table a methodology of making good decisions. That's how I see it; rather than saying, our backgrounds as lawyers enable us to be kind of a conscience. I don't think there's anything that I ever got from my legal career — I think, if anything, it's from whatever my parents, my education instilled in me. My conscience comes from that. But what I would bring to the table with non-lawyers would come from my legal education skills in that you would enable people to open their eyes to various aspects of a decision and various people's perspectives, and that we would bring that to the table more readily than someone that was perhaps an accountant, or financial people that didn't have the Socratic method, didn't have all that analytical training.

### MR. CUSUMANO

The terminology gets in the way a little bit sometimes. Maybe we need to break down the word “conscience” and really truly understand what we mean as we throw it back and forth, but I would say a few things because I have made a little bit of a study.

Number one is that there is some science to support that the profession of law sort of self selects for people who are slightly more conservative and slightly more risk averse than the rest of society. The flip of that is, we come in second for psychopaths. And the worst news is that C.E.O.'s come in first.

Second, I think that we have a culture of surrounding a problem in doing all the fact-finding. Not that all of us are doing that every day, but we do have a methodology that is more open-minded and fact-oriented. We are answering to situations that are a little less economic. The C.E.O. is more adept at the quarterly earnings than I am. I like to make him think I don't care. But I do care; I recognize that. And then I think where the training comes in, if we are students of the common law, we have watched society develop answers to conflict situations that often involve balance of morality, right? And that doesn't give us the ultimate wisdom, but it does give us a seat at the table.

Lastly, I would not underestimate this at all. We're better with words. We are way better in communicating than even senior people in other disciplines, by and large and on average. I don't mean to dis everybody, but we

work with words. We have experience in writing in ways that accountants do not and often C.E.O.'s do not. We're able to make the case for both sides better than they can, sometimes.

**A SPEAKER**

We're facilitators, I think.

**MR. CUSUMANO**

That's a good word. I always get to the point of advocacy. It's usually light advocacy. It's right and wrong, it's 1,000 shades of gray. Facilitators too.

**A SPEAKER**

I have a question. We've used the terms common sense, judgment, conscience throughout the day, and one thing I'd like to get your thoughts on is whether or not anyone has seen any research that talks about how to spot impaired judgment by an attorney. When I say the term impaired, I don't mean necessarily alcohol abuse or anything like that, but maybe if someone is overworked or they just don't have the judgment, just wondering if you saw any research that would help companies sort of proactively look at that.

**MR. CUSUMANO**

There have been studies of lawyers, again, in a somewhat neuro scientific way, there is a book called Lawyer Know Thyself. I forget the author. There are studies that have been done to just sort of provide a personality profile on the lawyer on average relative to other things. But as far as person-spotting within an organization, I've never seen anything.

**A SPEAKER**

Not so much person-spotting, but I'm talking about in the law department or in the business where somebody makes a judgment that you think, okay, how do you recognize the signs of that, just sort of proactively —

**MR. CUSUMANO**

Whenever they tell me that the answer is outside counsel —

**JUSTICE ENG**

The issue of potentially impaired counsel does come up occasionally in attorney disciplinary matters. We have lawyer assistance programs. We happen to have the chief counsel for the grievance committee for this district, the Ninth District, right here, and perhaps Gary Casella might have some insight into this regarding spotting the impaired counsel and what the responsibilities, if any, are regarding the colleagues of this counsel.

**MR. CASELLA**

I don't know how you spot them, but we have lawyer assistance programs for the state bar, aid in the area of substance abuse, but also in other areas of disability and/or impairment. If you see a problem, you certainly can suggest to somebody to go for help. Those resources are available.

**A SPEAKER**

Thank you. I appreciate it. I wanted to clarify, I understand the alcohol part, but more the common sense part. Thank you.

**MR. SAUNDERS**

On behalf of the Judicial Institute, I want to thank the members of this panel for very, very engaging, highly professional, if I can use that word, and very interesting discussion. So thank you all for coming and for doing this, and thanks to all of you for participating in our discussion as well.

As I said at the outset, our plan is to publish the proceedings of this Convocation as with all the other Convocations on this general issue. Although I'm not entirely sure when we will be able to do that, we will try to do it as quickly as we can.

There is one other person I want to thank for today's program, and that's the person without whom we could not have put this program on, nor indeed any of the other programs that the Institute has put on over the last several years, and that is our Executive Director Lauren Kanfer. Lauren Kanfer was instrumental in putting the program together. As many of you may know, many of you may not know, we preceded this program with a series of focus groups in New York City and in upstate New York to explore the general topics that we discussed during the course of the day today. And Lauren also facilitated those focus groups. She facilitated the preparation of the bibliography, and she essentially did all of the work necessary to bring this program, which I personally found very, very interesting and fascinating, to fruition.

So, on behalf of all the members of the Institute, I want to thank Lauren Kanfer for all of her hard work.

And thank all of you for coming. Safe home.

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