



corporate  
counsel  
symposium

November 9, 2021

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## Program Schedule

**9:00 am – 9:25 am CT**      **EventMobi Log In and Virtual Pre-Event Lobby**

**9:25 am - 9:30 am CT**      **Welcome, Bill Stoeri, Managing Partner**

## First Breakout Session

**9:30 am – 10:30 am CT**      **Annuals & Perennials: The 2021 Ethics Potpourri for Corporate Counsel (*Ethics CLE Credit*)**

**Nadia Martyn**, Vice President, Deputy General Counsel & Privacy Officer, Delta Dental of Minnesota  
**Sarah Stroebel**, Senior Vice President & Deputy General Counsel, U.S. Bank National Association  
**Kenneth Jorgensen**, Dorsey & Whitney LLP

For lawyers, even the “old” ethics issues never really get old. In the context of 2021—with remote and hybrid workplaces front and center—this panel will tackle the slate of ethics issues that have arisen or resurfaced most recently: the ethics of long-term remote practice juxtaposed against unauthorized practice and lawyer licensing requirements; non-compete clauses in lawyer employment contracts; business transactions with corporate client employers; and attorney-client privilege in various scenarios, including internal investigations, sale or insolvency, common interest in Minnesota, and advice to affiliates and foreign affiliates.

**9:30 am – 10:30 am CT**      **Tensions, Trade and Tariffs: Globalization Revisited**

**Anne Murphy**, Director, International Business Relations | Government Relations, Cargill, Incorporated  
**Jennifer Okerlund**, Director Counsel | International Trade, Target Corporation  
**Christopher Bercaw, Nelson Dong and Kate Francis**, Dorsey & Whitney LLP

The interconnectedness of our world has become all the more apparent in the last 18 months. Across the globe, the United States is deeply reliant on the smooth transport of goods, ideas, people, and services in order to support our day-to-day lives and business operations—and, as we see time and time again, when international relations are not so smooth, the ripple effects are widespread. This experienced panel will explore recent global developments challenging legal and business leaders (as well as individual consumers) around the world:

- Trump era Section 301 tariffs and counter-tariffs in Europe and China
- The UK post-Brexit, the European Union and prospects for a US-UK Free Trade Agreement
- Trade sanctions, export controls and values-based trade: Cuba, China
- Evolving US and UK foreign direct investment restrictions

**10:30 am – 10:50 am CT**      **Break & Optional Virtual Networking**

## Second Breakout Session

### 10:50 am – 11:50 am CT      **Directors Under Pressure: So, What Else is New?**

**Peter Carter**, Executive Vice President, Chief Legal Officer and Corporate Secretary,  
Delta Air Lines, Inc.

**James Chosy**, Senior Executive Vice President and General Counsel, U.S. Bancorp

**Dannette Smith**, Secretary to the Board of Directors and Senior Deputy General Counsel,  
UnitedHealth Group Incorporated

**Robert Rosenbaum** and **Cam Hoang**, Dorsey & Whitney LLP

Advising boards of directors has never been more complex or high-stakes. Assisting directors in understanding and addressing issues of significance to investors and other interested parties is critical in today's fast-changing environment. This panel of experienced and savvy boardroom veterans will help you guide your boards through some of the most pressing issues of the day, including: Environmental, Social, and Governance (ESG) matters; Diversity, Equity, and Inclusion (DE&I) initiatives; cybersecurity; and pandemic protocols.

### 10:50 am – 11:50 am CT      **After-Effects: The Lasting Impact of COVID on Trials and Investigations**

**Hon. Toddrick Barnette**, Chief Judge, Hennepin County District Court, Minnesota, Fourth Judicial District

**Laura Hammargren**, Assistant General Counsel, Litigation, 3M Company

**Beth Forsythe** and **Andrea Wechter**, Dorsey & Whitney LLP

2020 upended seemingly everything, including the way trial and investigations lawyers do their jobs and how judges run courtrooms and manage dockets. 2021 has seen a return to something resembling "normal," but what will be COVID-19's lasting impacts on our work? Which activities need to take place in person, and which can (and perhaps should) happen virtually? What COVID-related claims, from employment to fraud, will we continue to see for years to come? How have in-house litigation managers changed and improved processes for hiring and oversight of outside counsel? This panel brings together perspectives from the judiciary, corporate counsel and law firm litigation practitioners to share insights on COVID's lasting impacts on trials and investigations.

### 11:50 am – 12:00 pm CT      **Break & Optional Viewing: Walter F. Mondale's CCS Legacy**

## Keynote

### 12:00 pm – 1:00 pm CT      **How to Have Better Conversations: Enter Every Conversation Assuming You Have Something to Learn**

**Celeste Headlee** is the author of the best-selling book *We Need to Talk: How to Have Conversations That Matter* and the recently released *Do Nothing: How to Break Away from Overworking, Overdoing, and Underliving*. Her TEDx Talk, *10 Ways to Have a Better Conversation*, has been viewed over 23 million times, making it one of the 10 most-watched talks posted on TED's homepage. In her 20-year career in public radio, Celeste has anchored programs including Talk of the Nation, All Things Considered, and Weekend Edition, covered presidential elections and much more. Through countless interviews of people from all walks of life, she has learned the true power of conversation and its ability to both bridge gaps or deepen wounds. In a time when conversations are often minimized to a few words in a text message and lack of meaningful communication and dialogue abounds, Celeste sheds a much-needed light on the lost and essential art of conversation. Focusing on the best research in neuro and social science, Celeste's expertise in communication and human nature helps us understand how to relate with one another and work together in our workplaces, neighborhoods, communities and homes. As a mixed-race journalist of black and Jewish descent, Celeste also speaks candidly about how to converse on race and other difficult subjects. Celeste connects the dots, explaining the "why" of our behavior in clear terms and providing actionable strategies for doing things differently.

## Guest and Dorsey Panelist Biographies



**Chief Judge Toddrick Barnette**  
Hennepin County Courthouse  
Fourth Judicial District  
Minneapolis, Minnesota

Chief Judge Barnette was elected as chief judge by his peers in 2020. Chief Judge Barnette oversees the busiest judicial district in Minnesota, with approximately 60 judges and nearly half a million cases annually. He appointed Judge Cahill to preside over the groundbreaking trial of Derek Chauvin for the murder of George Floyd, the first trial in Minnesota to allow cameras in the courtroom. Chief Judge Barnette, a former public defender and prosecutor, will discuss the lasting impacts of COVID and the Chauvin trial on pre-trial and trial procedures, how those changes will be communicated (judicial preferences, rules changes, etc.), and some of the equity considerations that play into these changes.



**C. Christopher Bercaw**  
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CHRIS REPRESENTS U.S. AND FOREIGN COMPANIES IN COMPLEX COMMERCIAL TRANSACTIONS AND THEIR DAY-TO-DAY LEGAL MATTERS.

Much of his work involves domestic and international mergers and acquisitions, joint ventures, strategic investments, business formation, overseas expansion, commercial contracts and corporate governance.

Chris also acts as primary outside counsel to companies without a legal department. Drawing on the expertise of legal professionals in Dorsey offices across the United States and abroad, Chris helps clients manage legal issues in virtually all areas of law relevant to their businesses. Chris also works with a network of trusted foreign counsel in jurisdictions where Dorsey & Whitney does not have an office.

Chris is a partner in Dorsey's Corporate Group and head of the firm's Corporate Group in Minneapolis. He has spent most of his career practicing law in the United States, but also lived and worked abroad, including in a law firm in Mexico City, Mexico, and in Dorsey offices in Brussels, Belgium and Tokyo, Japan.



**Peter Carter**  
Delta Air Lines, Inc.  
Executive Vice President, Chief  
Legal Officer & Corporate  
Secretary  
Atlanta, Georgia

Peter Carter has served as Delta's Executive Vice President, Chief Legal Officer and Corporate Secretary since July 2015. As Chief Legal Officer, Peter oversees Delta's legal, compliance and government affairs groups worldwide and serves on the Delta Leadership Committee.

Peter has worked to protect Delta's freedom to operate by advocating against market distortive subsidies in the industry to ensure fair and open skies. He regularly engages with government stakeholders in the U.S., Mexico, Korea, U.K., China, and the E.U. on matters relating to competition policy, alliances, privacy and compliance.

Before joining Delta, Peter was a partner at the international law firm of Dorsey & Whitney LLP. He chaired the firm's Policy Committee and the Securities Litigation and Enforcement practice group. He is a Fellow of the American College of Trial Lawyers and has been recognized by numerous organizations and publications including being honored with a Burton Award for public interest, and being named one of the Best Lawyers in America for Bet-the-Company and Commercial Litigation, one of "America's Leading Business Lawyers" by Chambers USA, and Antitrust Lawyer of the year in 2013 by Best Lawyers in America.

Before joining Dorsey, Peter clerked for Judge James B. Loken at the U.S. Court of Appeals for the Eighth Circuit.

Peter serves as a member of the Boards of the Delta Air Lines Foundation, the Alliance Theater, the Chick Fil-A Foundation, The United Way of Greater Atlanta, and the Georgia Chamber of Commerce. He was also appointed by Gov. Nathan Deal to serve on the State of Georgia Judicial Selection Commission.



**James L. Chosy**  
U.S. Bancorp  
Senior Executive Vice President  
and General Counsel  
Minneapolis, Minnesota

Jim is a senior executive vice president and general counsel of U.S. Bank. He joined our company in that role in 2013, previously serving as general counsel and corporate secretary of former U.S. Bancorp subsidiary Piper Jaffray. Under his leadership, our law division was recognized among the most innovative in the country by Corporate Counsel magazine. He also built out extensive pro bono and diversity initiatives in the division. Jim has a bachelor's degree from the University of Wisconsin-Madison and a law degree from the University of Minnesota.



**Nelson G. Dong**  
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Nelson Dong is a senior partner in the Seattle office of Dorsey & Whitney and heads its National Security Law Group and is co-head of its Asia Group. He advises companies, professional societies, universities and research organizations on export controls, economic sanctions, national security and international trade and investment matters. He is an author and teacher on international technology law issues and has been an adjunct professor of international law at the Seattle University Law School and a guest lecturer at the University of Washington Law School. Nelson was a White House Fellow and U.S. Department of Justice official in the Carter Administration responsible for international and national security matters, and a federal prosecutor in Boston. He is an Adjunct Senior Fellow at the East-West Center in Honolulu, a director of the National Committee on US-China Relations in New York City and the Washington State China Relations Council in Seattle, and an active member of the Council on Foreign Relations and the Committee of 100. Nelson is a graduate of Stanford University and the Yale Law School and has served as a trustee of Stanford University.



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BETH ADVISES AND REPRESENTS FIRMS AND INDIVIDUALS IN THEIR MOST SENSITIVE CRIMINAL AND CIVIL MATTERS. FROM FCPA INVESTIGATIONS TO GOVERNMENT LITIGATION TO COMPLEX COMMERCIAL DISPUTES, CLIENTS TRUST BETH TO APPLY GOOD JUDGMENT AND PURSUE THE BEST POSSIBLE OUTCOME FOR THEM.

In her white collar and corporate investigations practice, Beth plans and conducts effective internal investigations and represents those under investigation by federal or state authorities for securities fraud, health care fraud, mortgage fraud, public corruption, and Foreign Corrupt Practices Act ("FCPA") violations. Beth also routinely provides anti-corruption/FCPA due diligence and compliance advisory services, including program development, board presentations, and employee training. Beth's approach to investigations is to quickly and accurately define the scope of the issue; her goal is to help clients fully resolve the issue at hand without wasting their resources. In her civil practice, Beth focuses on complex commercial disputes and government litigation, drawing on her background as a certified public accountant (her license is on inactive status) to help clients resolve matters involving complex accounting, securities, and other financial issues.



**Kate Francis**

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KATE HAS EXTENSIVE EXPERIENCE IN BOTH EQUITY CAPITAL MARKETS TRANSACTIONS AND PUBLIC AND PRIVATE MERGERS AND ACQUISITIONS.

Kate acts for both listed and private companies based in the UK and overseas across a variety of sectors including healthcare, technology, media and real estate and also acts for investment banks on equity capital markets transactions. Kate's broad transactional experience also includes advising on complex reorganizations, joint ventures, private equity and general corporate law matters.



**Laura Hammargren**

Assistant General Counsel,  
Litigation  
3M Company  
St. Paul, Minnesota

Laura Hammargren is Assistant General Counsel, Litigation at 3M Company. Laura provides legal and strategic business advice to and oversees complex litigation and investigations for a large, multi-national company engaged in providing consumer and commercial goods in a variety of healthcare and industrial areas.



**Cam Hoang**

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CAM'S IN-HOUSE EXPERIENCE INFORMS HER ADVICE TO CLIENTS ON CORPORATE TRANSACTIONS AND REGULATORY MATTERS.

Cam helps clients with governance and SEC compliance, securities offerings, and M&A transactions. Prior to her return to Dorsey, Cam was Senior Counsel and Assistant Secretary at General Mills, Inc., where she worked with the board of directors, senior management and a broad range of corporate functions, including the compensation, finance, risk management and investor relations teams, as well as the corporate foundation. Cam has served on the board of directors of the Society for Corporate Governance and the advisory board of [TheCorporateCounsel.net](http://TheCorporateCounsel.net). She is also a co-editor of [Dorsey's Corporate Governance and Compliance blog](#). In 2017, she was named a Partner of the Year.



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KEN'S PRACTICE FOCUSES ON LEGAL ETHICS, LOSS PREVENTION AND MALPRACTICE.

Ken is a lawyer who counsels and represents other lawyers. He advises law firms and corporate legal departments on legal ethics, professional responsibility, loss prevention, legal malpractice, unauthorized practice of law, attorney-client privilege and lawyer trust account compliance. He also represents lawyers, law firms and judges in professional discipline matters, applicants in bar admission matters and provides expert opinions on legal malpractice, lawyer discipline, ethics compliance and the unauthorized practice of law. His extensive experience in Legal Ethics includes serving as the Director of the Minnesota Office of Lawyers Professional Responsibility where, during his more than 20 years with the lawyer discipline system, he handled hundreds of ethics investigations involving lawyer misconduct and issued ethics opinions to lawyers and judges.

Ken is the Ethics Partner at Dorsey & Whitney LLP. As Ethics Partner, he focuses on legal ethics and loss prevention, advising lawyers in Dorsey's offices in the U.S., Canada, Europe and Asia-Pacific. Before joining Dorsey, Ken was a state court trial judge presiding over all types of cases including civil and criminal matters. Ken is a frequent CLE lecturer and has written numerous articles concerning Professional Responsibility and Legal Ethics. He has served as an adjunct faculty member at the University of Minnesota Law School, Hamline Law School and William Mitchell College of Law and received the Minnesota State Bar Association's *Professional Excellence Award* in 2006.



**Nadia C. Martyn**  
Vice President, Deputy General  
Counsel & Privacy Officer  
Delta Dental of Minnesota  
Minneapolis, Minnesota

Nadia Martyn joined Delta Dental of Minnesota in 2015. Previously, she worked as a health care associate in the Minneapolis office of Dorsey & Whitney LLP.

As Vice President, Deputy General Counsel & Privacy Officer, Ms. Martyn is responsible for overseeing legal support for all aspects of the dental and vision insurance businesses of Stratacor and its affiliates, the parent company of Delta Dental of Minnesota and Delta Dental of Nebraska. She also oversees a team of lawyers and paralegals providing legal services to other enterprise functions including Human Resources, Finance, Marketing, and the Delta Dental of Minnesota Foundation.

In addition, Ms. Martyn serves as the enterprise Privacy Officer, overseeing the enterprise-wide privacy program and privacy law compliance, including HIPAA. She is also a Certified Information Privacy Professional with the International Association of Privacy Professionals, with an emphasis on US privacy law.

Ms. Martyn received her Juris Doctorate from the University of Minnesota Law School in 2012. She completed her undergraduate studies at Boston College in 2009.



**Anne Murphy**  
Director, International Business  
Relations  
Cargill, Incorporated  
Wayzata, Minnesota

Anne Murphy serves as Director of International Business Relations for Cargill in Washington, D.C., where she manages global trade policy issues and leads the company's Washington-based international government relations efforts with Latin America. Anne is responsible for engaging with key international and federal stakeholders in support of Cargill's work sourcing, producing and moving food and agricultural products around the world. Anne works across Cargill's global businesses to develop market opportunities, advance trade and investment strategies, and foster connections between Cargill, our stakeholders and government institutions globally.

During her time at Cargill, Anne has led strategic projects to advance Cargill's growth by advising and advocating on policy in the areas of international trade and investment, food security, food safety, animal health, and others. She has contributed to Cargill's trade and investment strategies in key markets, including in Latin America, Asia Pacific, Europe, and the Middle East.

Prior to joining Cargill in 2011, Anne served as Legislative Affairs and PAC Manager at the National Turkey Federation, an association representing the US turkey industry. At NTF, she represented the strategic policy interests of the association's 300+ turkey farmer, processor and supplier members, leading

the development and implementation of strategies to enhance the turkey industry's policy and political leadership.

Prior to joining NTF in 2008, Anne worked at a small lobbying organization that represented agricultural clients, and as an environmental policy intern at the U.S. Department of Agriculture. She graduated Magna Cum Laude from Texas A&M University in 2007 with her B.S. in Environmental Geosciences with a focus in human environment interaction. A Texas native, she, her husband and their two children live in Washington, D.C.



**Jennifer Okerlund**  
Director Counsel  
Target Corporation  
Minneapolis, Minnesota

Jen Okerlund serves as Director Counsel for Target Corporation, headquartered in Minneapolis Minnesota. Target is one of the country's largest importers and retailers, with over 1,900 stores across all 50 states, 46 domestic distribution centers, and over a dozen sourcing offices globally. Jen has been an attorney with Target for 15 years. She is also a licensed customs broker. Prior to coming to Target, Jen worked as an attorney in the business group at the law firm Robins Kaplan.

During her time at Target, she has provided legal support and counsel to several compliance functions and almost every business area including Merchandizing, Marketing, Property Development, Finance, International Logistics and Supply Chain, Sourcing, Community Relations, Global Investigations and Government Affairs. The areas of law in which she has provided expertise include international trade, customs, commercial transactions, real estate, licensing, investigations, sanctions, product safety and human rights. She currently serves as Target's principal legal advisor on all matters related to international trade, import and export compliance, as well as those focused on the company's responsible sourcing and sustainability commitments and supplier oversight program. In that capacity, she advises the company regarding merchandise classification, admissibility, valuation, country of origin, the applicability of partner government agency requirements, trade and human rights related sanctions, free trade agreements, and the spectrum of trade remedies. She provides primary legal support for Target's Global Trade Compliance and Responsible Sourcing & Sustainability teams at its headquarters and across its international sourcing offices. She also is the company's main litigation consultant and case manager for all matters before the Court of International Trade and trade and customs matters before the Court of Appeals for the Federal Circuit. Jen has also served as a longtime diversity champion within Legal Affairs, assisting in the design and implementation of several pipeline, inclusion acumen and supplier diversity initiatives, and serves as Target's liaison to the National LGBTQ Bar Association. Jen received her J.D., cum laude from Mitchell Hamline School of Law and her B.A., cum laude from St. Olaf College.



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**BOB HELPS CLIENTS, BOTH PUBLICLY AND PRIVATELY HELD, ACHIEVE THEIR STRATEGIC BUSINESS GOALS THROUGH MERGERS AND ACQUISITIONS.**

He also regularly advises clients with respect to corporate governance matters, public company disclosures, SEC compliance and executive compensation.

Bob is a member of the firm's Management Committee and is co-head of the firmwide Corporate Group. He has also previously served as head of the firm's Minneapolis office (2008-2012) and as co-chair of the firm's Corporate Group (2002-2005).

Bob is a frequent lecturer at legal seminars on topics related to mergers and acquisitions, corporate governance and public company securities law compliance.



**Dannette Smith, JD**  
Secretary to the Board and Senior  
Deputy General Counsel  
UnitedHealth Group Incorporated  
Minnetonka, Minnesota

Dannette Smith is Secretary to the Board of Directors of UnitedHealth Group Incorporated, a diversified health care company dedicated to helping people live healthier lives and making the health system work better for everyone. As Secretary to the Board, Ms. Smith supports the activities of UnitedHealth Group's Board of Directors and its standing Committees and coordinates their shareholder outreach program and the Company's annual shareholder meeting. Ms. Smith leads a multi-functional team in the areas of corporate governance, securities law compliance, subsidiary management and governance, treasury support, corporate foundation, legal operations, and enterprise physical security.

Prior to joining UnitedHealth Group in June 2004, Ms. Smith was a partner in the corporate department of Dorsey & Whitney LLP, practicing in the areas of securities law, corporate governance and mergers and acquisitions. Prior to joining Dorsey & Whitney in January 1998, Ms. Smith was an associate in the corporate department of Willkie Farr & Gallagher. Ms. Smith was a law clerk for the Hon. Frank Magill, U.S. Court of Appeals, 8th Circuit. She graduated from the University of California, Hastings College of the Law, magna cum laude, in 1994.

Ms. Smith serves on the NYSE Listed Company Advisory Board, is a fellow in the American College of Governance Counsel, is a past Chair of the Society for Corporate Governance and a past Board member of the Council of Institutional Investors.

AS DORSEY'S MANAGING PARTNER, BILL'S PRIORITIES INCLUDE MAINTAINING DORSEY'S STANDARD OF LEGAL EXCELLENCE WHILE ADVANCING THE FIRM CULTURE OF INNOVATION AND INCLUSIVITY, ALL TO THE BENEFIT OF OUR CLIENTS, OUR COMMUNITIES, AND OUR COLLEAGUES.

Bill practiced law at Dorsey for over 30 years before taking its helm. During that time, he served as litigation counsel to some of the world's most successful and innovative organizations. He credits those clients with teaching him valuable lessons about service and leadership, lessons he keeps at the forefront as he leads Dorsey-our clients are our top concern, teamwork and cooperation are essential to success, and an organization's people must be valued and provided with opportunities to succeed.

Bill is committed to continuing Dorsey's robust investment in diversity and inclusion and has supported the implementation of policies that further that cause, such as the firm's "Diversity Hours" policy which allows associates to count work and training that promotes diversity toward their billable hours requirements.

Innovation is also a top priority for Bill. As a member of the firm's Management Committee, he supported the addition of an Innovation and Knowledge Management Department, and as Managing Partner, he has appointed the firm's first Innovation Partner to lead the firm's efforts in developing better and faster ways to serve our clients and provide exceptional value.

Bill finds that one of the most rewarding parts of serving as Dorsey's Managing Partner is learning about our clients' businesses from the people who help run them. If you are one of those people, or have questions about Dorsey, he would welcome your call.

Sarah Stroebel is Senior Vice President and Deputy General Counsel at U.S. Bank. In this role, Sarah partners with her team to lead a variety of legal functions, including litigation; government investigations; employment law; financial crimes; political law; and internal investigations. Sarah engages with a variety of constituents concerning the work on her team, including outside counsel, senior Bank executives, auditors, regulators, and the Board of Directors. She is co-sponsor of the Law Division's Diversity, Equity and Inclusion Council and is active in non-profit board and pro bono work. Prior to joining U.S. Bank, Sarah was an attorney at the Minneapolis law firm of Lindquist & Vennum (now Ballard Spahr), focused on intellectual property and financial services litigation.



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**Sarah Stroebel**  
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**Andrea Ahn Wechter**

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A FORMER COLLEGIATE ATHLETE, ANDREA CHANNELS HER COMPETITIVE DRIVE AND TEAMWORK MENTALITY TO ACHIEVE RESULTS FOR HER CLIENTS.

Andrea Wechter is a Partner in Dorsey's Commercial Litigation Group. Andrea represents businesses and individuals in complex commercial litigation matters, focusing on business torts, partnership disputes and divorces, trade secret misappropriation, fiduciary duties, derivative claims, and other general contract claims. As a true trial attorney who thrives in the courtroom, Andrea has had numerous in-person and virtual trials during the pandemic. She will share her insights about which new discovery and trial processes have worked well and which have not, and how law firms' delivery of legal services has evolved and will continue to evolve.

Andrea is a participant in the U.S. District of Colorado Civil Pro Bono Program. In 2018, Andrea was selected for the Leadership Council on Legal Diversity (LCLD) Pathfinders Program for diverse, high-potential, early-career attorneys. She continues to be actively involved in LCLD's alumni groups and as a 2021 1L Mentor and 2021 Pathfinders Program Facilitator. In 2020, Andrea was selected for the Colorado General Counsel Mentor Program. Andrea is dedicated to paying forward the mentorship she has received throughout her career to other diverse attorneys. Outside of work, Andrea enjoys the Colorado playground with her husband, Mike, and their two kids.



THIRTY-SECOND ANNUAL  
CORPORATE COUNSEL SYMPOSIUM  
MINNEAPOLIS, MINNESOTA  
TUESDAY, NOVEMBER 9, 2021



## **Annuals & Perennials: The 2021 Ethics Potpourri for Corporate Counsel**

### **Guest and Dorsey Panelists**

**Nadia Martyn**, Vice President, Deputy General Counsel & Privacy Officer, Delta Dental of Minnesota

**Sarah Stroebel**, Senior Vice President & Deputy General Counsel, U.S. Bank National Association

**Kenneth Jorgensen**, Dorsey & Whitney LLP

### **Program Materials**

PowerPoint Presentation

**Materials are Available on [www.dorsey.com](http://www.dorsey.com) at**

**<https://www.dorsey.com/newsresources/events/event/2021/11/corporate-counsel-symposium-2021-materials>**

## Annals & Perennials: The 2021 Ethics Potpourri for Corporate Counsel

**Nadia Martyn**, *Vice President, Deputy General Counsel & Privacy Officer, Delta  
Dental of Minnesota*

**Sarah Stroebe**, *Senior Vice President & Deputy General Counsel, U.S. Bank  
National Association*

**Ken Jorgensen**, *Dorsey & Whitney LLP*

**November 9, 2021**

## Remote/Virtual Practice: Temporary Pandemic Fix or Here to Stay?

## **ABA Opinion 495 (12/16/20); *Lawyers Working Remotely***

- **Lawyers may practice remotely from a jurisdiction in which they are not licensed provided:**
  - They do not hold themselves out to the public as authorized to practice in the remote state.
  - They do not provide or offer legal services in the remote state.
  - They do not practice the law of the remote state.
  - The remote state has not taken the position that remote practice constitutes the Unauthorized Practice of Law (UPL).

## **Not Holding Oneself Out as Licensed**

- **No letterhead, website, business card or advertising reflecting the lawyer's presence in the remote state.**
- **No signature block reflecting the lawyer's presence in the remote state.**
- **What about phone numbers with a local area code?**
- **What about establishing an office?**
- **The goal is to be "invisible" in terms of your continuous presence in the remote state.**

## Some States Permitted Remote Practice Before COVID

- **Utah – “What interest does Utah have in regulating out-of-state lawyers for out-of-state clients simply because the lawyer has a home in Utah?”**
- **Maine Op #189 – Lawyer who lived in Maine and worked from home for law firm and clients in another state was not engaging in UPL.**
- **New Hampshire - New Hampshire’s modifications of ABA Rule 5.5 clarify that a lawyer licensed in another state, who does not practice New Hampshire law, need not obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire.**

## More States Approve Remote Practice After COVID

- **Florida – A state in which engaging in UPL is a felony – Florida Supreme Court upheld Florida Advisory Op 2019-4 that a New Jersey lawyer practicing remotely from Florida to his New Jersey law firm did not engage in UPL. The opinion is very detailed about what the New Jersey lawyer can and cannot do.**
- **Pennsylvania – Op #2021-100**
- **California Proposed Formal Opinion 2020-0004 – out for public comment until 11/12/21.**

## **ABA Opinion 498 (3/10/21) – *Virtual Practice***

- **Approves Virtual Practice addressing various risks of virtual practice including confidentiality, supervision and data security.**
- **Secure connections – Password protected Wi-Fi and VPN connections.**
- **Data – regular data back-up and use of reputable cloud platforms.**
- **Secure video-conferencing and virtual meeting platforms.**
- **BYOD policies, and ability to wipe devices if they are lost.**
- **Regular contact with inexperienced lawyers to ensure adequate supervision.**

## **With so many states approving remote practice is there any need to get licensed in the remote state?**

**Not if you know that: (1) you will never move to another state; (2) your company employer will never spin off your division or subsidiary; (3) the company will never merge with another out-of-state company; and (4) you never give any advice about the laws of the remote state.**

## Remote Practice Could Affect Getting Admitted or How You Get Admitted in Another State

**Example: I don't want to take the bar exam again to get admitted in another state.**

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## Ways to Get Admitted in Another State

- **Take and pass the bar exam “again” (unless your only license to practice is from Wisconsin – then you will be taking it for the first time).**
- **Apply to be admitted without taking the bar exam based upon your admission and years of practice in another state.**
- **Use your admission and UBE or MBE score from the bar exam to get admitted in another state without taking that state's bar exam (limited to only 2 or 3 years after you take the bar exam).**

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2021 ETHICS POTPOURRI FOR CORPORATE COUNSEL

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## Different Types of Available Law Licenses

- **Full Admission** – full authority to practice law without regard to who employs you – can appear in court and advise anyone.

**House Counsel Admission** – authority to practice is limited to only the employer you designate on your House Counsel Admission application. Authority expires if you change employment. Can appear in court only on behalf of your employer.

## Admission without Taking the Bar: The Technical Requirements

**The Devil is always in the details, and the details vary from state-to-state.**

## The “5 of 7 Rule”

- **Most require that 5 of the last 7 years preceding the application involved the active full-time practice of law.**
- **Some states, including Minnesota, have recently lowered the requirement to 3 of the last 5 years.**
- **The applicable rules are those of the state where you are applying for admission.**
- **Some states have shorter practice requirements for house counsel admission.**

## Practice Must be “Full-Time”

- **Most states consider full-time to be at least 30 hours/week.**
- **Remember billable time is not the only yardstick to measure whether practice is full-time. Lawyers rarely can bill all of their time when they practice law.**
- **For lawyers whose company title is something other than “legal” or “counsel,” bar admission authorities will more closely review whether the lawyer’s years of practice qualify as full-time legal practice or whether it tips more to business.**

## The Practice is NOT “Authorized” if:

- Your license during the time period is not in good standing (e.g., unpaid registration fees, bar dues in integrated bar states or CLE is delinquent).
- The most prevalent problem: Your years of practice occurred in a state where you did not have a license to practice law. Typically bar authorities look at where the applicant was physically located – the *continuous presence* standard.
- The federal law authorization exception: Since there is no federal licensing of lawyers, applicants whose practice is limited solely to federal law issues may be able to rely upon practice in state where they are not licensed, as long as they are licensed somewhere.

## Conclusion

The safest and most flexible solution is to get licensed “where your butt sits” and as soon as your “butt begins sitting there.” By waiting you expose yourself to not authorized practice time that counts against the “5 of 7” or “3 of 5” admission requirement. In addition, getting licensed prevents UPL exposure if you provide advice on the remote state’s law.

## Attorney-Client Privilege

**Does privilege extend from the parent's legal department to subsidiaries when the advice or representation does not directly involve the parent?**

## Privilege Exists Across the Corporate Family

- ***Restatement Third, The Law Governing Lawyers* § 73, Cmt. d states that, where a parent corporation owns controlling interest in a subsidiary, the agents of each entity who are responsible for the affairs of the others are within the circle of privilege.**
- ***United States v. AT&T*, 86 F.R.D. 603, 616 (D. D.C. 1979) (recognizing that “[t]he cases clearly hold that a corporate “client” includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations.**

## Extension of Privilege to Subsidiaries: It Can Also a Be a Problem

- *In re Teleglobe*, 493 F.3d (3<sup>rd</sup> Cir. 2007).
- BCE directed Teleglobe (wholly owned sub) to borrow \$2.4 billion, but a year later BCE ceased funding Teleglobe.
- Teleglobe files bankruptcy and brings adversary proceeding against BCE. Prior to bankruptcy Teleglobe has consulted with BCE house counsel on various matters. Teleglobe sought discovery of BCE's house counsel's files and BCE's outside counsel who had been retained by the parent regarding the bankruptcy.
- Circuit Court holds Teleglobe gets house counsel's files but only gets BCE's outside counsel files if lower court finds joint representation with Teleglobe.

## Anticipate Privilege Issues with Subsidiaries

What to watch out for.

## Situations Where the Interests Diverge

- **Bankruptcy of a subsidiary or affiliate.** The trustee will stand in the shoes of the subsidiary and control the attorney-client privilege for the subsidiary.
- **Zone of Insolvency** – where the subsidiary is insolvent but has not yet filed bankruptcy – the interests of the sub and the parent become adverse because of subsidiary obligations to creditors.
- **Sale of spin-off of the subsidiary.** Post closing the buyer will possess control of subsidiary. (Watch out for mail or data server transfer issues when selling a company.)

## Can In-House Counsel advise the Subsidiary in a State where In-House Counsel is not Licensed

Is the advice still protected by attorney-client privilege?

## Most Likely, But Not Always

- **Privilege is protected if an in-house lawyer provides legal advice to a subsidiary, even if the subsidiary is located in another state and the lawyer's advice would be an unauthorized practice of law in that state. E.g., *Le Bleu Corp. v. Fed. Mfg. LLC*, 2018 US Dist. LEXIS 56291 (E.D. Wis. 4/2/18).**
- **Rule 5.5, Rules of Professional Conduct, allows temporary transactional practice in most states provided the lawyer does not have a continuous presence (butt sitting) in the state.**

## Problems to Watch Out For

- **Rule 5.5 temporary practice exceptions or permissions may not apply if you are residing or have a continuous presence in a state where you are not licensed – *Get licensed where your butt sits.***
- ***Gucci America v. Guess?*, 2011 WL 9375 (S.D.N.Y 1/3/11) – Company's "reasonable belief" that in-house counsel was licensed was sufficient to preserve privilege. In-counsel's California license had lapsed after he began employment. However, what if the license had lapsed before he was employed?**
- **Some countries (e.g., EU countries, China) do not recognize attorney-client privilege for in-house counsel when advising foreign subsidiaries.**

## Internal Investigations: Privilege and Work-Product Protection

**Not all investigations are protected by attorney-client privilege or work product. Even in investigations protected by attorney-client privilege or work product, not all documents are protected from discovery.**

### Threshold Issue: Is the Investigation Business or Legal in Nature?

- *In re Vioxx Products Liability Litigation*, 501 F. Supp.2d 789 (Ed. La. 2007) – In-house counsel’s internal comments after reviewing technical, scientific, promotional and marketing materials were determined to be more business advice than legal.
- Is the investigation part of a regular business process or requirement v. one that is directed and organized by in-house counsel or outside counsel.

## Underlying Facts are Not Likely Protected Even in a Privileged Investigation

- **Two Types of Work Product protection; Fact Work Product and Opinion Work Product.**
- **Fact Work Product is discoverable upon a showing of substantial need by the plaintiff or the government. *Attorney General v. Facebook, Inc.*, No. SJC-12496 (March 24, 2021). This can include data compilations or data summaries prepared in an investigation.**
- **Opinion Work Product is typically not discoverable unless waived by other conduct (e.g., disclosure).**
- **Facts are not privileged just because they were disclosed to the lawyer running the investigation. The communications to the lawyer about the facts maybe privileged, but not the facts themselves.**

## Other Investigation Privilege Issues

- **The lawyer conducting the investigation cannot be the ultimate decision maker as to what action should be taken. Example: Counsel is directed to investigate and fire any found to have violated company policy.**
- **Disclosing legal advice to persons who are not in the company decision making process regarding the investigation may constitute waiver – the “Reply All” problem.**
- **Notes and summaries of investigation interviews are usually privileged but notes should not be verbatim.**
- **Reports should reflect legal advice, strategy, recommendations or mental impressions.**

## Good Investigation Process Hygiene

- **Clear documentation at the beginning that the purpose of the investigation is legal and in anticipation of litigation.**
- **All persons interviewed should be apprised of the confidential nature of the investigation.**
- **Corporate Miranda Warnings should be given to employees who appear to misunderstand counsel's role in the matter.**
- **Investigation report should be distributed only to those who fall within the control group test.**
- **Counsel should anticipate whether the investigation results may be disclosed to others (e.g., in defense of government investigation) and the effect of waiver as to others.**

## In-House Counsel and Non-Compete Agreements

**Where in-house counsel is both a lawyer “to” the company and an employee “of” the company?**

## Rule 5.6 (a) Rules of Professional Conduct

- **A lawyer shall not participate in offering or making:**
  - (a) a[n] ... employment .... agreement that**  
***“restricts the right of a lawyer to practice after termination of the relationship”.....***
- **Does this apply to house counsel employment agreements?**

## ABA Opinion 94-381 *Restrictions on Right to Practice*

- **Rule 5.6 (a) prohibits non-compete agreements for a lawyer employed by a company as in-house counsel.**
- **Non-compete agreements have the effect of prohibiting a lawyer from representing others in any matter adverse to the corporation, even if that matter were unrelated to any representation of the corporation in which the lawyers had been involved.**
- **Non-compete agreements are more restrictive than what is required under Rule 1.9(a) – *the former client conflict ethics rule* - thereby restricting the lawyer’s practice.**

## A Permissible Form of Non-Compete?

- Non-Competes with a savings clause.
- “Savings Clause” = the non-compete language acknowledges it is subject to requirements of Rule 5.6.
- Effect of saving clause is to prevent a lawyer from taking a business position at a competitor.
- See Washington Bar Op. 2100 (2005); Connecticut Bar Association Op. 02-05.
- See also, *Greissman v. Rawlings and Assoc., PLLC*, 571 S.W.3d 561 (Ky. 2019) (finding the non-solicitation agreement valid and enforceable where it contained a “savings clause” that carved out all legal work and applied only to non-legal business).

## Are Things Changing? Rule 5.6 does not apply?

- *Gaines v. Schneider Nat'l Inc.*, No. 18-C-898, 2018 WL 5282902 (E.D. Wis. Oct. 24, 2018) - “There are compelling reasons for treating in-house counsel differently under Rule 5.6(a), and the early history of the Rule suggests that it was designed for the law-firm context.”
- *DISH Network Corp. v. Shebar*, Case No. 2017-CV-31079 (Colo. Dist. Ct. May 9, 2017) (granting preliminary injunction in favor of employer against former general counsel who left to work for a direct competitor).

## **Probably Not, Unless Rule 5.6(a) is changed**

- **Besides the ABA, Washington and Connecticut Opinions, many states have issued ethics opinions holding that Rule 5.6(a) applies to employment agreements with house counsel.**
- **Other state or local bar associations with similar opinions include, Nevada, New Jersey, South Carolina, District of Columbia, Virginia, New Hampshire, Ohio and Philadelphia.**
- **The Minnesota Office of Lawyers Professional Responsibility concurs with ABA Opinion 94-381 and its position that Rule 5.6(a) applies to house counsel employment agreements.**

## Tensions, Trade and Tariffs: Globalization Revisited

### Guest and Dorsey Panelists

**Anne Murphy**, Director, International Business Relations | Government Relations, Cargill, Incorporated

**Jennifer Okerlund**, Director Counsel | International Trade, Target Corporation

**Christopher Bercaw, Nelson Dong** and **Kate Francis**, Dorsey & Whitney LLP

### Program Materials

PowerPoint Presentation

### Dorsey eUpdates

*U.S. Trade Representative to Weigh Reinstatement of Certain Section 301 Tariff Exclusions*, Nelson Dong, David Townsend & T. Augustine Lo (October 19, 2021)

<https://www.dorsey.com/newsresources/publications/client-alerts/2021/10/us-trade-rep-section-301-tariff-exclusions>

*PRC Companies in International Arbitration: Is third-party funding feasible?*, Katherine Cheung, Steven Nelson & Joshua Wong (September 8, 2021)

<https://www.dorsey.com/newsresources/publications/client-alerts/2021/09/prc-companies-in-intl-arbitration-series-6>

*U.S. Government Expands Restrictions on Exports to China, Iran, and Russia and Issues New Business Advisory Regarding Forced Labor in Xinjiang*, Nelson Dong, Lawrence Ward, David Townsend & T. Augustine Lo (July 20, 2021)

<https://www.dorsey.com/newsresources/publications/client-alerts/2021/07/us-govt-expands-restrictions-on-exports>

*Biden Administration Revises and Expands Restrictions on U.S. Person Investment in Chinese Companies and Releases New List of “Chinese Military Companies” Under 2021 NDAA Section 1260H*, Nelson Dong, Lawrence Ward, Catherine Pan-Giordano, Justin Huff, David Townsend & T. Augustine Lo (June 10, 2021)

<https://www.dorsey.com/newsresources/publications/client-alerts/2021/06/new-list-of-chinese-military-companies>

Materials are Available on [www.dorsey.com](http://www.dorsey.com) at

<https://www.dorsey.com/newsresources/events/event/2021/11/corporate-counsel-symposium-2021-materials>

*UK National Security and Investment Bill Receives Royal Assent*, Tim Maloney & Joseph Lewin  
(June 3, 2021)

<https://www.dorsey.com/newsresources/publications/client-alerts/2021/06/uk-bill-receives-royal-assent>

*U.S. Department of Commerce Sanctions Seven Chinese Supercomputer Firms*, Nelson Dong,  
Lawrence Ward, Justin Huff, David Townsend & T. Augustine Lo (April 23, 2021)

<https://www.dorsey.com/newsresources/publications/client-alerts/2021/04/bis-sanctions-seven-chinese-supercomputer-firms>

*New U.S. Government Review Process Effective March 22 for Information Communications Technology  
and Services from China, Russia and Other “Foreign Adversaries”*, Nelson Dong, Lawrence Ward,  
Rhona Schmidt, Justin Huff, David Townsend & T. Augustine Lo (March 25, 2021)

<https://www.dorsey.com/newsresources/publications/client-alerts/2021/03/new-us-government-review-process>

*It Has Taken A While But BREXIT Is Done!*, Alan Farkas (December 31, 2020)

<https://www.dorsey.com/newsresources/publications/client-alerts/2020/12/brexit-is-done>

## Tensions, Trade and Tariffs: Globalization Revisited

**Anne Murphy, Director, International Business Relations | Government Relations, Cargill, Incorporated**

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**November 9, 2021**

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### Topics

- **Trump era Section 301 tariffs and counter-tariffs in Europe and China**
- **The UK post-Brexit, the European Union and prospects for an US-UK Free Trade Agreement**
- **US trade sanctions, export and import controls and values-based trade**
- **Evolving US and UK foreign direct investment restrictions**

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TENSIONS, TRADE & TARIFFS: GLOBALIZATION REVISITED

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## Trump Era Section 301 Tariffs and Counter-Tariffs in Europe and China

- US Section 301 tariffs on imports from China
- Retaliation by US trade partners
- Agreement to relax US-Europe Tariffs



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TENSIONS, TRADE & TARIFFS: GLOBALIZATION REVISITED

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## UK Post-Brexit, European Union and Prospects for US-UK Free Trade Agreement

- Changes in UK business following separation from the EU
- How Brexit has impacted U.S. businesses
- Prospects for an US-UK free trade agreement



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TENSIONS, TRADE & TARIFFS: GLOBALIZATION REVISITED

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## Trade Sanctions, Export and Import Controls and Values-Based Trade

- US sanctions regimes
- US and international human rights concerns about forced labor in Xinjiang in China
- How US retail sector is adjusting to new regulatory issues



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TENSIONS, TRADE & TARIFFS: GLOBALIZATION REVISITED 5

## Evolving US and UK Foreign Direct Investment Restrictions

- Recent changes in US restrictions on foreign direct investment into the United States
- UK approach to foreign investment in sensitive sectors
- How FDI restrictions have affected business conditions



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TENSIONS, TRADE & TARIFFS: GLOBALIZATION REVISITED 6



THIRTY-SECOND ANNUAL  
CORPORATE COUNSEL SYMPOSIUM  
MINNEAPOLIS, MINNESOTA  
TUESDAY, NOVEMBER 9, 2021



## Directors Under Pressure: So, What Else is New?

### Guest and Dorsey Panelists

**Peter Carter**, Executive Vice President, Chief Legal Officer and Corporate Secretary, Delta Air Lines, Inc.

**James Chosy**, Senior Executive Vice President and General Counsel, U.S. Bancorp

**Dannette Smith**, Secretary to the Board of Directors and Senior Deputy General Counsel, UnitedHealth Group Incorporated

**Robert Rosenbaum** and **Cam Hoang**, Dorsey & Whitney LLP

### Program Materials

PowerPoint Presentation

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<https://www.dorsey.com/newsresources/events/event/2021/11/corporate-counsel-symposium-2021-materials>

## Directors Under Pressure: So, What Else is New?

*Peter Carter, Executive Vice President, Chief Legal Officer and Corporate Secretary, Delta Air Lines, Inc.*

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**November 9, 2021**

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## Agenda

- **ESG Moves to the Forefront**
- **DE&I at the Board and in the Workforce**
- **Emerging *Caremark* Board Oversight Risks**
- **Cybersecurity and “Cyber-Governance”**
- **COVID-19 (and Post COVID-19) Board Protocols**

## ESG Moves to the Forefront

- **Broadly speaking, ESG matters, particularly around climate change, are among the highest profile issues facing U.S. public companies**
- **Regulators, investors, proxy advisors, activists and others, including employees, are becoming more strident about the need for companies to address various ESG topics, with climate change a particular focus**
- **Ensuring that your Board is aware of the particular ESG topics of most interest to your shareholders is critical**

DIRECTORS UNDER PRESSURE <sup>3</sup>

## ESG Moves to the Forefront

- **High-profile director “vote no” campaigns**
  - **Three directors at Exxon were replaced by activist nominees based on climate change concerns**
  - **The Exxon campaign was led by a new, very small activist investing firm that garnered support from major institutional investors**
    - **Engine No. 1 itself held only 0.02% of Exxon’s outstanding shares**
    - **Normally passive investors, such as Blackrock and Vanguard, supported replacing the three directors**
    - **More active public pension funds, such as CalPERS, CalSTERS and NYS funds, also supported replacing those directors**

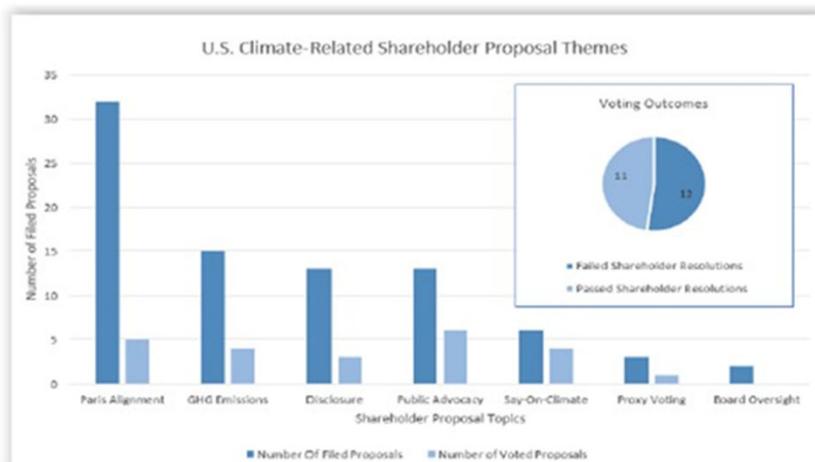
DIRECTORS UNDER PRESSURE <sup>4</sup>

## ESG Moves to the Forefront

- And, climate-related shareholder proposals achieved unprecedented success in the 2021 season
  - A proposal requesting an annual report on plastic pellet pollution at DuPont passed with 81% of the votes cast in support (management opposed)
  - GE’s shareholders strongly (98% of votes cast) supported a proposal to report on net-zero greenhouse emission strategies (which proposal had management support)
- Other ESG proposals also did well in 2021
  - DuPont also had a proposal for it to report its EEO-1 data passed with 84% of the votes cast

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## ESG Moves to the Forefront



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## ESG Moves to the Forefront

- On November 3, 2021, the SEC released new guidance on shareholder proposals rescinding prior guidance
- This relates to the application of the “ordinary business” exception and its “micro-management” consideration that enabled companies to reject numerous shareholder proposals raising E&S concerns
- The new guidance is designed to make it much harder to make use of this exception when “significant social policy” matters are included in proposals, whether or not there’s a nexus to the business
- Board analysis will no longer be expected in connection with a no-action request
- Public companies should expect to see more E&S-focused proposals designed to raise such public policy issues in the future

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## ESG Moves to the Forefront

- SEC Chair Gensler has publicly remarked multiple times about the importance of requiring uniform, mandatory disclosure around climate change (as well as human capital and board diversity)
  - The SEC Spring agenda includes climate risk disclosure on its proposed rulemaking activities
- His statement on mandatory climate change disclosure at the PRI event in July 2021 is telling:
  - “Investors today are asking for that ability to compare companies with each other. Generally, I believe it’s with mandatory disclosures that investors can benefit from that consistency and comparability. When disclosures remain voluntary, it can lead to a wide range of inconsistent disclosures.”
  - SEC Chair Gary Gensler on mandatory climate change disclosure Principles for Responsible Investment event in July 2021

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## ESG Moves to the Forefront

- Earlier this year, the SEC issued a “sample letter” and sent comment letters to dozens of public companies seeking more MD&A discussion of a number of climate-related topics that it deemed material to the registrant in question
- The SEC is also asking companies to consider adding or modifying risk factors to address the effects of climate change in various areas
- Earlier this year, the SEC’s Enforcement Division announced that it had created a task force focused on climate and ESG matters
  - Its initial focus is stated to be identification of “any material gaps or misstatements in issuer’s disclosure of climate risks under existing rules”

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## ESG Moves to the Forefront

The Conference Board asked a working group of over 300 executives from 150 companies about what approach to ESG disclosure regulation they would prefer to see:



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## DE&I at the Board and in the Workforce

- **Pressure to add diverse (particularly, racially diverse) board members is continuing to come from many sources: regulators, corporate community, institutional investors, proxy advisors, states and private litigants**
- **State statutes mandating or requiring disclosure of board diversity are proliferating**
  - Adopted in CA, CO, IL, MA, NY, PA and WA
  - Pending in other states
- **SEC approved new Nasdaq board diversity listing rules**
  - Board diversity matrix (effective for 2022)
  - “Comply or explain” board diversity requirements (transition periods beginning in 2023 and depending on listing tiers)

DIRECTORS UNDER PRESSURE  
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## DE&I at the Board and in the Workforce

- **Institutional investors have moved rapidly in the past few years to update their voting guidelines with respect to Board diversity**
  - Blackrock, Vanguard, State Street Global Advisors and Legal & General Investment Management, four of the largest asset managers in the world, all have adopted “vote against” policies
  - Pension funds, including funds under the supervision of the NYC Comptroller have led campaigns advocating diversity at Boards
- **Council of Institutional Investors has publicly supported proposed federal legislation mandating Public company disclosure of Board diversity**
- **Starting with the 2022 proxy season, ISS will recommend voting against at least governance committee chairs of boards with no racially or ethnically diverse members**

DIRECTORS UNDER PRESSURE  
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## DE&I at the Board and in the Workforce

- **Pressure from regulators, institutional investors and employees concerning human capital management issues has resulted in further disclosures**
- **According to Bloomberg, 76 S&P 100 companies have made EEO-1 data available this year, compared to only 25 in 2020**
  - **And, 10 additional companies have pledged to do so in 2022**

## DE&I at the Board and in the Workforce

- **As a result of all of the foregoing, companies should expect:**
  - **more demands for detailed diversity disclosures,**
  - **more demands for explanation of board process to improve diversity,**
  - **more shareholder votes against governance committee chairs at boards that lack any racial or ethnically diverse members, and**
  - **more litigation focused on companies not “walking the talk” (*i.e.*, their public reporting does reflect what is really occurring inside their companies)**

## Emerging *Caremark* Board Oversight Risks

- Delaware courts established a subsidiary fiduciary duty of directors of “oversight” in the *Caremark* line of cases
- Two kinds of potential *Caremark* oversight failures have developed
  - Failure to implement any board oversight policies
  - Failure to actively monitor policies adopted by the board
- Because these cases involve duty of loyalty claims, directors cannot be exculpated from personal liability, if found to be in breach
- Delaware judges have repeatedly stated that proving a *Caremark* claim is the most difficult fiduciary duty breach to find
  - Because it requires a showing of “bad faith” on the part of directors
- But, a disturbing trend has emerged over the past three years, with DE courts finding potential personal liability for directors

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## Emerging *Caremark* Board Oversight Risks

- *In re The Boeing Company Derivative Litig.*, (DE Ch. Ct. 9/21): *failure to develop meaningful oversight policies, and failure to monitor*
  - This is one of many cases coming out of the two Boeing 737 MAX crashes in 2018 and 2019
  - Excoriating, heavily detailed, fact-intensive, 100-pg opinion
  - Court found that plaintiffs had sufficiently pled a duty of loyalty breach (*i.e.*, lack of good faith) by directors
  - This was due to the Board’s complete failure to (i) establish an oversight system (and then monitor it) and (ii) their failure to respond to red flags regarding “mission-critical airplane safety”
  - The plaintiffs in the Boeing case drew upon thousands of internal Board documents such as meeting minutes and emails they accessed under Delaware state law

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## Emerging *Caremark* Board Oversight Risks

- **Key factors noted by the Court included:**
  - Meeting minutes (of both the Board and Audit Committee) did not indicate that directors engaged in rigorous discussions of safety issues in the years when the 737 MAX was being developed
  - The Board had not created a separate committee to monitor airplane safety *until after the 2nd crash*
  - The Board did not cause management to provide regular safety updates
    - Per the Court, the Board “passively” received them at management’s discretion
  - The Board publicly lied about whether and how it monitored 737 MAX’s safety
- The Court specifically found scienter on the part of the Board, based on a record of their knowledge of shortcomings around safety oversight and their false public statements
- 5<sup>th</sup> case in last 3 years to survive motion to dismiss

## Emerging *Caremark* Board Oversight Risks

- **Some take-aways from recent cases:**
  - Establishing a clear process for Board oversight (either at a specific Committee, or through regular and rigorous reporting and discussion at the full Board) of “mission-critical” company issues is fundamental to fulfilling director’s duties
  - Ignoring “red flags” about material risks reported up to the Board is dangerous
  - Maintaining accurate and well-drafted minutes of Board and relevant Committee meetings (and other records) is essential to demonstrate proper oversight and consideration of “red flags”
  - If the record reflects even a decent process, directors will still receive the benefit of the doubt (at least in DE)

## Emerging Caremark Board Oversight Risks

- **But, Delaware Court of Chancery recently dismissed Caremark claims rising from Marriott cybersecurity breach**
  - Hack of up to 500 million guests' personal data in the Starwood reservations system—one of the largest hacks ever
  - Court found that the allegations do not meet the high bar required to state a Caremark claim, ie, that:
    - the directors completely failed to undertake their oversight responsibilities,
    - turned a blind eye to known compliance violations, or
    - consciously failed to remediate cybersecurity failures
  - “With hindsight knowledge of the extent of the data breach,” the Board’s remediation plan was implemented “probably too slow.” But, “the difference between a flawed effort and a deliberate failure to act is one of extent and intent. A Caremark violation requires the plaintiff to demonstrate the latter”
  - The Court dismissed the plaintiff’s complaint

*Fire Ret. Sys. of St. Louis v. Sorenson, et al.*, 2021 WL 4593777 (Del. Ch. Oct. 5, 2021)

DIRECTORS UNDER PRESSURE

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## Cybersecurity and “Cyber-Governance”

- **In a Deloitte survey of 577 C-level executives:**
  - 98% of U.S. organizations experienced at least one cybersecurity event in the past year, compared with 84% among non-U.S. organizations
  - Disruption from COVID-19 led to an increase in cyber threats at 86% of organizations in the U.S., compared with only 63% of non-U.S. entities
  - Yet 14% of U.S. executives said their organization has no defense plan against cyber threats, compared with only 6% of non-U.S. executives
  - 28% of U.S. executives say their biggest concern is the unintended actions of a well-meaning employee, compared to 27% of those concerned with malicious attacks via phishing, malware or ransomware

DIRECTORS UNDER PRESSURE

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## Cybersecurity and “Cyber-Governance”

- **Ransomware and other attacks are a daily occurrence throughout Corporate America**
  - December 2020 *Solar Winds* hack had broad effects rippling through the economy, and has caused SEC to request information from 100’s of potentially affected public companies
- **SEC has been increasing its enforcement activity after establishing a separate cyber unit within its Enforcement Division**
  - SEC recently charged two companies related to alleged timely disclosure failures: First American Financial Corp. and others
  - SEC also recently charged 8 firms in 3 separate actions related to failures to develop and/or maintain adequate cybersecurity policies and procedures to protect PII: Cetera, Cambridge and KMS
- **SEC considering mandatory cyber disclosure**

## Cybersecurity and “Cyber-Governance”

- **Private lawsuits: alleged Board oversight failures (*i.e.*, *Caremark* claims) with respect to cybersecurity incidents are a ripe source of shareholder derivative actions, with the potential for personal liability of directors**
- **The best defense at the Board level is to have sound processes, policies and procedures that are carefully monitored, discussed, reviewed, updated and, most of all, followed**

## Cybersecurity and “Cyber-Governance”

- **Each Board should ensure that it:**
  - has proper Board-level oversight and monitoring procedure in place,
  - has a robust and effective enterprise-wide cybersecurity program (in writing),
  - receives periodic updates from management regarding updates to policies and procedures,
  - understands key risks and management proposed response plan (including potential disclosures and
  - has sufficient expertise at Board level to be effective in foregoing
- **Good documentation in minutes and supporting materials is critical**

## COVID-19 (and Post) Board Protocols

- **Managing risk through the Pandemic**
  - Human capital
  - Health and safety
  - Business strategy
  - Cybersecurity
- **Adapting Board processes for a Virtual World**
  - Meetings format and cadence
  - Onboarding of new directors
  - CEO/director evaluation process
  - Timing, structure, logistics of strategy “retreats”
- **Preparing for a return to the Boardroom**



THIRTY-SECOND ANNUAL  
CORPORATE COUNSEL SYMPOSIUM  
MINNEAPOLIS, MINNESOTA  
TUESDAY, NOVEMBER 9, 2021



## **After-Effects: The Lasting Impact of COVID on Trials and Investigations**

### **Guest and Dorsey Panelists**

**Hon. Toddrick Barnette**, Chief Judge, Hennepin County District Court, Minnesota,  
Fourth Judicial District

**Laura Hammargren**, Assistant General Counsel, Litigation, 3M Company

**Beth Forsythe** and **Andrea Wechter**, Dorsey & Whitney LLP

### **Program Materials**

PowerPoint Presentation

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## After-Effects: The Lasting Impact of COVID on Trials and Investigations

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November 9, 2021

**Scene illustrating the technological challenges posed by virtual court hearings, from Texas's 394<sup>th</sup> Judicial District Court (February 2021).**

## Agenda

- **Introductions**
- **Impacts of COVID on practice**
  - Substantive
  - Procedural and logistical
- **Near-term shifts**
- **Long-term/permanent impacts**
  - Redefining in-person versus virtual needs – finding balance
  - Technological advances
- **Adaptability is key**

## Pre-COVID Practice

- **Chief Judge Barnette**
- **Laura Hammargren**
- **Andrea Wechter**
- **Beth Forsythe**

## Impacts of COVID on Practice – *Substantive*

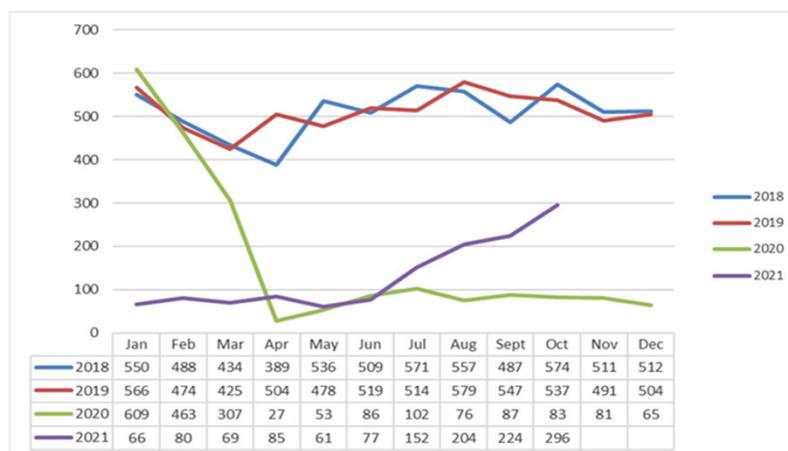
- **Fewer employment cases filed in 2020 (Lex Machina: federal court employment cases down 12% in first three quarters of 2020)**
  - Harassment: -22%, ADA: -20%, Discrimination: -17%
  - Trend may continue with more flexible work from wherever policies
  - But see COVID-related employment cases (FMLA, FLSA, vaccine req'ts)
- **Impact of eviction moratoria (residential and commercial)**
- **COVID-specific cases**
  - Vaccine mandates
  - Fraudulent medical supplies
- **State claims**
  - Hennepin County divisions: Civil, Criminal, Family, Probate, Juvenile

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THE LASTING IMPACT OF COVID ON TRIALS AND INVESTIGATIONS

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## Impacts of COVID on Practice – *Eviction Moratoria*



Courtesy: Fourth Judicial District Court, Minnesota

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## Impacts of COVID on Practice – *Substantive*

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## Fighting Respirator Fraud Globally. Every day.

3M Fraud Hotlines

Legal Actions

Trademark Takedowns

3M has dedicated teams to investigate fraud globally

Reports to date: **15,900+**

**39**

lawsuits filed to date

**55,300,000+**

**21** temporary restraining orders granted

counterfeit respirators seized

**16** preliminary injunctions granted

**24,800+**

false or deceptive social media posts removed

**26,500+**

fraudulent e-commerce offerings removed

**400+**

deceptive internet addresses or content removed

[https://www.3m.com/3M/en\\_US/worker-health-safety-us/covid19/covid-fraud](https://www.3m.com/3M/en_US/worker-health-safety-us/covid19/covid-fraud)

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## Impacts of COVID on Practice – *Substantive*

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## Impacts of COVID on Practice – *Procedural and logistical*

- **Initial delays in all aspects of litigation (depositions, hearings, trials)**
- **Making it work**
  - Discovery during COVID (depositions)
  - Trials during COVID (bench vs. jury, effectiveness)
- **Managing litigation through COVID**
- **Impact on corporate investigations**

## Near-term shifts (through 2022)

- **Default seems to be litigation activities will be remote where possible**
- **What is possible vs. what is most helpful to the case**
- **Discovery and Mediations**
  - cost savings vs. credibility (particularly in depositions)
  - value of shared downtime to case, relationships
- **Pre-trial hearings: interact with the judge live, see the courtroom**
- **Trial: connection with judge, jury, witnesses**

## Long-term or permanent impacts – *Finding Balance between Live & Virtual Litigation Activities*

- **Standardizing default settings for litigation activities**
  - Minnesota Judicial Council effort
  - Legal departments
  - Law firms
- **What weight, if any, should younger lawyer training and engagement carry in these considerations?**
- **How might long-term changes be implemented – Rules of Civil Procedure, judges' preference documents, etc.?**

## **Long-term or permanent impacts – *Technological Impacts***

- **Will digitization widen or narrow the gap between those who can and can't access the justice system?**
  - E-filing
  - Remote proceedings (arraignments, motions, pre-trials)
    - Saves court costs for governments and clients with lawyers
    - Increases transparency where jurisdictions stream proceedings online
      - But will expectation be that all proceedings, even live, will be streamed then?
  - Access to technology as equity issue – cuts both ways
- **Discovery obligations: Expectations for collection of text messages and app-based communications?**

## **Adaptability is key**

- **Judges, rulemakers, legislators – need to adapt rules to welcome new professionals, new processes, and new technologies**
- **Skills for new lawyers: project/process management, design thinking, data science**
- **Communication within and across organizations about what is working and what is not, and willingness to shift in response**