

Session 4B

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Emily C. & John E. Hansen Intellectual Property Institute**TWENTY-SEVENTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

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SESSION 4: THREE CONCURRENT SESSIONS**4B. *In-House Counsel******Moderator:*****Andrew Trask***Williams & Connolly LLP, Washington, D.C.****Panelists:*****Melissa Moriarty***VaynerMedia, LLC, New York***John Colgan***Google, San Francisco***Lynda Nguyen***Regeneron Pharmaceuticals, Inc., Tarrytown***Cheryl Wang***David Yurman Enterprises LLC, New York*

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MR. TRASK: Thanks, everyone, for coming and attending the in-house counsel panel. My name is Andrew Trask. I work at Williams & Connolly in Washington, D.C. I mainly do patent litigation, sometimes other types of IP as well.

I suspect I was invited to moderate this panel not because of my work as outside counsel but because six months ago I became in-house counsel at Google in Silicon Valley, so I do have a bit of relevant experience.

I am certainly looking forward to learning more from our four stellar panelists, so thanks to the conference organizers for arranging such an interesting and diverse group of panelists: John Colgan is Senior Litigation Counsel at Google; Cheryl Wang is Counsel, IP and Brand Enforcement, at David Yurman; Lynda Nguyen is Senior Director, Dispute Resolution, at Regeneron Pharmaceuticals; and Melissa Moriarty is Assistant General Coun-

sel of VaynerX. We have a diverse group of panelists from a range of industries; no two are from the same industry, so I think this should lead to an interesting set of discussion topics among our panelists.

In case you are not familiar with any of the companies that these panelists work for, I think it's worth starting off with a brief introduction to their company, at least to the extent that the company you work for is not a household name, and your role as in-house counsel, and then we can get into some of the substantive questions.

Melissa, do you want to start?

MS. MORIARTY: Sure. I think I fall into the "not a household name" category. VaynerX is essentially a holding company or a modern-day media company with a bunch of different businesses.

Probably the one that is most relevant here is VaynerMedia, which is primarily a digital advertising agency focused on everything having to do with content production, from scale as large as Super Bowl commercials to as small as a tweet. We do the full range of content creation, primarily focused anywhere that you spend your time and give your attention.

We are not too focused on any one particular area, however. We are largely focused on the Internet and the digital space as well as social media. We also do a lot of media buying in addition to the creative content, and we deal with a lot of data privacy issues there.

We are the intermediary, we're the advertising agency, so we work with companies having one-to-three million dollars in revenue in our small business division, to the Fortune 100 companies, all the way up to global conglomerates like AB InBev and Kraft Heinz.

MR. TRASK: How big is the legal team?

MS. MORIARTY: The legal team is five lawyers. The agency itself has around eight hundred and fifty people in five offices.

MR. TRASK: Great.

Lynda?

MS. NGUYEN: Thanks, Andrew.

Hi, everyone. Good afternoon. My name is Lynda Nguyen. I'm In-House Dispute Resolution Counsel at Regeneron Pharmaceuticals, which is a science-driven company first and foremost with the intent to develop the best first-in-class medicines for patients. We make biologics, antibodies, and other types of biologics.

Everything is invented in Tarrytown, New York. We manufacture our own drugs. We have currently seven marketed drugs ranging from treating eye diseases to oncology drugs.

In-house at Regeneron there are five of us. When I joined Regeneron in July 2015, there were about 3500 employees, and now there are over 7000, so we have seen a massive amount of growth within a short period of time.

There are five litigators managing all types of litigation. Even though I have a patent litigation background, I work on contracts cases, slip-and-falls, product liability, securities litigation, and shareholder matters.

It has been a wonderful experience. We get a broad range of cases and advise clients across the board in terms of the business. It has been a really great experience so far.

MR. TRASK: Thanks.

Cheryl, do you want to tell us a bit about David Yurman?

MS. WANG: I don't know how much of a household name we might be, depending on the group. We make luxury fine jewelry. I have been IP Counsel for five years. I started there as an intern.

The General Counsel Department has a total of three attorneys for the entire company. We are pretty global at this point, so there is no end to the range of topics that I will be asked to review. For the most part I stick with IP, so copyrights, trademarks, patents. I manage the portfolio. I also work on brand enforcement, which is my way of being a little detective and going after counterfeits and knock-offs. I have also worked on corporate governance. Compliance is a big issue. A range of matters.

MR. TRASK: Thanks.

John, what is this company Google?

MR. COLGAN: I'm John. I'm at Google. I'm on the patent litigation team. Google does a lot, but I tend to focus on areas related to smartphone technology, so Android apps, now more hardware.

I'm not actually sure how many lawyers Google has, but we have fifteen patent litigators, which gives you a sense of the size, given that we have so many just focused in one area.

I have been there for eight years. I've gone through the smartphone wars, where I was able to ship off to Germany quite often, so I got a fair amount of international legal work, and I was thrust into the FRAND debates over the years as well. Although it is generally specialized, Google keeps it interesting, and I get to see new legal areas, even though my focus is more defined in the patent litigation space.

MR. TRASK: Before we dive in, part of the point behind the Fordham Conference is that it be an interactive experience, so to the extent possible that you speak up and ask questions or offer insights, that would be great.

How many folks in the audience are in-house counsel?

[Show of hands]

Quite a few. Okay, great.

Folks who are in private practice, outside counsel?

[Show of hands]

Quite a few as well. Okay, super. Feel free to chime in at any point.

The first topic I want to cover is communicating risk. To me a big part of working in-house, perhaps one of the most important parts of working in-house, is effectively communicating risk to the business. When I think of a corporation, I think of the legal department and everyone else I consider to be "the business." I realize that's a vast oversimplification, but I'll be using those terms throughout this panel.

What are effective strategies for communicating risk to the business? Are there instances where you have had to instruct the business that they need to change course because of, for example, a particular IP risk that is on the horizon? What tends to work and what doesn't when you are communicating with your management?

Lynda, do you want to start?

MS. NGUYEN: I have an interesting dynamic within the legal department in that we have a lot of exposure to senior management. As I mentioned, the company is science-driven. It is run by two MD/PhDs, and it's no secret that our CEO always says, "Science drives our company, not lawyers." He makes that very clear. Notwithstanding that, part of our job is to advise of the risks.

I learn as much about the risks and the legal ramifications as I can internally, and then I consult with outside counsel to learn as much about the subject matter as I can, including all the case law, because the CEO will read the case law, and we advise the client. I don't think there is anything else we can do. We give them the best information we have, advise on the risks, and then they make the business decision. That's usually how we do it.

MR. TRASK: Are you involved in weighing the risks against the business decision, or do you hand off the legal analysis and then they take it from there?

MS. NGUYEN: That's generally something above my pay grade.

MR. TRASK: Melissa, does that match up with your experience?

MS. MORIARTY: I was with you right up until the point of the CEO. Our CEO is Gary Vaynerchuk, who some people here may have heard of. He's a serial entrepreneur, a media personality, a Mark Cuban type. I was saying I was with you up until the point of reading the case law. He won't even read an e-mail we write. We can only communicate through text messages.

MS. NGUYEN: I'll be in an elevator and he'll say, "Have you read the latest Federal Circuit case?"

MR. TRASK: Wow!

MS. NGUYEN: And I better hope that I have.

MS. MORIARTY: That will not typically happen to me. But the legal department at Vayner interfaces a lot with senior management overall. I think that's because our general counsel was previously outside counsel to our CEO and was one of the earliest employees, so he's one of the most trusted advisors of the company. Therefore, the stature of the legal department and our advice is often taken as gospel, which is great as a lawyer.

However, we took it very far in one direction, where people are constantly, still to this day, coming to legal counsel just for sign-off — "Yes/no, whatever you say, I'm going to do whatever you say" — which, again, is a great problem to have.

However, because of the business that we're in, we are doing more risk analysis these days. I didn't mention this in my introduction, but probably the biggest thing I focus on is making sure we are not infringing anyone else's copyrights or trademarks for the most part in the creation of our advertising content.

In the world we live in today, with the really short news cycle, really quick hits trying to get attention, there is a lot of desire for many brands and advertisers to make culturally referential content. That's a nice way to say use other people's IP.

If *Game of Thrones* is aired on Sunday, they want to tweet about "Winter's coming" every week. I'm like, "Why is this a surprise?" May fourth is coming. I'm going to be reviewing *Star Wars* posts. That's what's going to be happening in our business. Every brand is interested in being that topical, relevant, going viral. That's what people are looking for in their advertising.

MR. TRASK: That's great. Actually, that makes me think the questions you have to deal with sound like they're very quick hits. You need to turn around advice on a very quick basis because the meme is no longer going to be relevant twenty-four hours from now. How do you deal with that?

MS. MORIARTY: Where this has become more and more popular, we've tried to transition more to an environment where the businesspeople are empowered to decide and feel empowered to decide how much risk they would like to take. We've done that through extensive training.

I spend a lot of my time developing training materials and traveling to our different offices to educate them a very small bit about the rights that are implicated in our work— copyright, trademark, right of publicity, basically — only in the sense that we try to empower everyone in our company.

I think the average age of our employees might be around twenty-six years old. Those are the people coming up with the ideas. Those are the people on the ground. We try to make basically everyone an issue spotter and have them understand at least the issues and give them an idea about where on the risk continuum this might fall.

We were talking about this a little before the panel began. In the social media space, one of the very few litigations that came to a settlement verdict — I feel very out of my pay grade here when it comes to talking about any case law, so I apologize to everyone

— was a very famous case in that area where everyone in social media was talking about Katherine Heigl.

You may or may not have seen this. The background is, Katherine Heigl was snapped coming out of a Duane Reade by a paparazzi. Duane Reade copied the photo without a license as an editorial image and reposted it on its social media site, saying “Glad Katherine Heigl loves shopping at Duane Reade.”¹ Literally, if I had to come up with an example of what not to do, that would be what not to do. That is the riskiest version of this.

So we educate them on the factors that play into this. What makes this riskier? How long is it going to be up? Who is likely to see it? Is it a litigious celebrity? Is the underlying image licensed? Does the celebrity look good or bad? That all goes into the risk calculus.

We are talking many times about a tweet; we are not talking about “bet the company”-type litigation. In an individual instance nothing is the riskiest, but we do work really hard to educate. We are in a little bit different situation than David Yurman, for example, where we are working on behalf of someone else’s brand to promote their brand. So, if Duane Reade does the Katherine Heigl tweet, but it was VaynerMedia, it’s still Duane Reade that’s in the headline.

Oftentimes we are working with the businesspeople to help them speak to their clients so they understand their tolerance for risk, in addition to weighing what is our contractual exposure vis-à-vis us and this client in any particular instance. We are also fortunate to have a CEO who likes some risk, so I have the luxury of not having to worry about that as much.

MR. TRASK: That sounds nice. It sounds like you don’t have to write many long memos either, which is great.

MS. MORIARTY: Absolutely not. If you write a long memo, you get the e-mail: “I need three minutes for you to explain this to me.” “Okay, sure. We can do that.”

MS. WANG: No long memos.

MR. TRASK: Cheryl, in the luxury retail space what are the risks you are dealing with on a day-to-day basis, and how do you communicate those in-house to the business?

MS. WANG: We also have a pretty active social media team. A lot of the issues center around right of publicity and design infringement. It’s a bit difficult for a copyright infringement analysis because you don’t get to see the deposit material, so you’re like, “I think they have something, but I don’t know.”

Similar to what you mentioned, I have to know my audience. They don’t like long words. I’ve learned that bullets are the best. Bullets longer than one word are not great.

Also, always come up with a solution. They are not going to like it when you’re like, “Um, that’s not going to work. You can’t be tweeting about” — who was it recently? — “Keira Knightley.”

“Do you have an agreement?”

“No. We’re going to tweet about it anyway.”

“Great. Well, you need to understand the risks at least.”

The takeaway for them was: “What, we’re going to get a cease-and-desist? That’s great. We’ll just answer the letter. It’s fine.”

That’s where you let the team understand what the risks are. If you take down the tweet, then there is no harm at that point. And we’re not necessarily selling a product along with that item, so it is not like you can calculate damages.

¹ See Complaint at 7, Heigl v. Duane Reade, Inc., No. 14-CV-2502 (S.D.N.Y. Apr. 9, 2014).

It sounds like they've gotten that so far. The difficulty with media companies is I often hear our business team say, "Well, they said it's totally okay."

I'm like, "Well, *Elle* does not have the same kind of risks as we do, and also we are the ones who will be posting and we have the deep pockets."

MR. TRASK: John, is your client reading Federal Circuit decisions on a daily basis?

MR. COLGAN: They're not. I'd say each client is different, so there have been a number of senior managers that I've had to interface with over the years, and each has their own particular style. I agree you have to know your audience and how they want to have information delivered.

From a litigation perspective, our senior leadership is relatively hands-off and lets the litigators litigate. But when there is an issue that rises to the level of something that is closely connected to the business — for instance, a potential threat of an injunction, a judgment that might affect their profit and loss in a significant way — that is the type of risk where I'll need to come in and try to explain it to them.

As far as preparation, you have to be incredibly well versed in every aspect because you never know what they are going to ask. Even though they may not deal on a day-to-day basis with legal issues, they have been in the industry for quite some time, so they know all the questions to ask.

I also might be in that meeting with another senior member of Legal who may also be dealing with the issue for the first time, so I may also get more pointed legal questions in those meetings. The process of evaluating that risk really involves knowing the risks cold and understanding the legal framework that is going to apply.

A lot of times it might be international. I am not trained in international law, so I need to rely on outside counsel to educate me and make sure that I am asking them the right questions. I also need to make sure that I come into that meeting not just with a verbal legal memo, but I have to come in having prepared my recommendations for contingency plans, show them that I actually have evaluated the things that I think are important, that I have worked with members of the engineering team or business team, to make sure that I have talked to everyone that I need to, so that I understand the issues.

For instance, how are we going to manage an injunction? Are we going to take the risk that we're enjoined? Do we need to do some sort of design-around or product change? I make sure I talk to everyone and make sure I fully understand what that's going to take so I am able to go into that meeting and address it both from a legal perspective and also have an understanding of what it is going to take business resource-wise to be able to mitigate that risk.

MR. TRASK: In the example of a threatened injunction, you are obviously delivering the legal advice, but are you also part of the conversation in terms of making the business decision, or is it more of a handoff?

MR. COLGAN: They definitely make the business decision, but I feel like I need to present them with the options as it see them, having fully vetted it. For instance, I'm not going to go them and say, "We've got a patent related to this area that we might need to design around. How do you want to handle it?"

I'll go in and say, "Here are the three areas that I think we can change our product. Here's what it is going to take from an engineering resource standpoint. I've checked with X, Y, and Z. What do you want to do?"

I give them the ability — hopefully in an e-mail, if that's how they like to have information delivered — to make a decision in that e-mail string, so they fully understand it; or, if it's in person, make sure that it is very concisely delivered so they can make a decision.

For the most part, unless it's going to be an issue that is going to majorly affect the product or their business, they have thirty minutes for me, and it may even be hard for me to get that thirty minutes. I may have had to work two weeks for that thirty minutes. So I've got to make sure that it is presented so they can make the decision right there, as opposed to having a verbal legal memo which they are really not interested in. I have learned through eight years of experience that they do not want that.

MR. TRASK: I've found that memos aren't nearly as commonplace in-house as they tend to be at the law firms.

You mentioned relying on outside counsel, and obviously that's a topic that's near and dear to a number of folks here in the audience. I'd like to talk a bit about hiring outside counsel, ways that outside counsel can make life easier or more difficult for you working in-house. To the extent that your outside counsel is here in the audience, feel free to name and shame.

Lynda, when you hire outside counsel, what qualities are you looking for? How do you like them to interact with you in a way that makes your job of communicating with the business as efficient as possible?

MS. NGUYEN: First of all, I'll say that I don't litigate and tell, Andrew.

MR. TRASK: That's fair.

MS. NGUYEN: I am very happy with my counsel, who are in the audience.

First and foremost, I think it's incredibly important for our outside counsel to understand our business and our technology. That's sort of 101, but you'd be surprised at how many times I have been to pitches where they really don't understand the company. So that's first and foremost.

Because I'm a litigator, we are mostly vetting litigation firms. For our business it is important that they understand not only the technology but how to convey the complex scientific concepts as well as patent concepts to a lay jury because many of our cases do go to trial. We don't want patent attorneys dressing up as litigators. We actually really do value trial experience.

Those are the two most important things when I look at outside counsel.

Also, being able to converse with senior management in a way where our senior management feel that they are heard. They are not legal experts, but they are experts in their field and, as John says, they know what questions to ask. So they want to be heard. They don't want to be told, "We've been doing this for thirty years; we know what we're doing," and then turn around and lose a case. That never goes well. It also makes us really look bad as in-house counsel.

MR. TRASK: That's right. I'm sure that's the case.

When do you make the decision that it makes sense to have outside counsel interface directly with the business? In a way, you're a gatekeeper, right? You're the one who is communicating with outside counsel on a daily basis.

MS. NGUYEN: Yes. The way it works, especially for our major cases — I wouldn't say bet-the-company litigations but pretty close to it — is they get vetted by our senior management first. Then, on a day-to-day basis running the litigation where we have legal questions that we need to ask our internal clients' experts in the various departments, I am the person who figures out who we should speak to. I make the introductions; I set up the issues; I try to succinctly explain why we are talking, because they are very busy and we very much appreciate their time and help.

MR. TRASK: Cheryl, what about you? You're not like Lynda, focused exclusively on litigation, so I imagine it's maybe a little less clear-cut as to whether you need to bring in outside counsel on a particular issue. If you need someone to stand up and argue for you in court, that's maybe one thing. But how do you decide when an issue percolates up

through the business to where you say, “Okay, it’s time to pull the trigger and hire outside counsel for this?”

MS. WANG: Usually we try to manage everything in-house, and we definitely don’t like when outside counsel speaks with our senior management team. David Yurman is not a fan of attorneys, to begin with. His first jewelry show was at Woodstock, so lawyers are “the man” to him, and he’s not a fan. So we try not to engage outside counsel unless we definitely have to. He is pretty scrupulous about our invoicing and bills. We’ve definitely gotten calls from David asking, “Why did this call take so long and why did it cost so much?”

We tend to keep things that are manageable in-house. For example, U.S.-based matters tend to be managed in-house. For foreign jurisdictions, for example, China, where there might be a language barrier, or the Middle East, we will use local counsel because having local knowledge is very helpful. For corporate matters that have to do with compliance or that have a larger implication, we will at least have outside counsel vet what we’ve worked on.

MR. TRASK: John, what factors do you consider when you are looking to hire outside counsel for, let’s say, a new patent litigation?

MR. COLGAN: I think there’s hiring and there’s also retaining. From a hiring perspective, the lead counsel you hire is going to be an extension of your company in court, so you need to be comfortable that they will represent the Google brand well in court. Sometimes it’s hard to tell right away, which is why I mention retention versus hiring. I think it is more about retention. We have used a lot of attorneys over the years. I’ve had circumstance where I’ve had to fire attorneys.

MR. TRASK: Can we hear a bit more about that, please?

MR. COLGAN: There are issues. How does your counsel operate under pressure? How do they operate under pressure when they are in front of a judge when they have the worst of the issue or when they know that the judge consents? How are they going to react to that?

I have had some counsel that are just combative by nature, and they start to really raise the tension of the room, which is not how you want to be handling these situations. I think you have to evaluate the demeanor and really, first and foremost, look at who you hire as an extension not only of your legal department but of your company’s brand in the first place. That’s something that we look at and try to evaluate. Then, over time, beyond that counsel and how he represents the brand, does he show good judgment ultimately? I need to hire a lawyer who is going to show excellent judgment.

I agree with Lynda. We hire trial attorneys for our cases because we are preparing every case as if it will go to trial. We need to be comfortable with the lead trial attorney first and foremost, but then, beyond that, you look at the team. You need to have a very strong day-to-day manager of the case with whom I’m going to be interacting more often, who is going to make my life easy hopefully, keep things organized, and keep things moving forward.

As in-house counsel, with litigation or other issues, I may have to put the litigation out of my mind for two weeks. I may have something else come up. I had my head down looking at five different technical reports over the last week. I don’t have time to deal with making sure everything is moving forward. So, is that day-to-day manager moving the case forward? Do I have comfort that they are going to do that?

Third, looking at the technical bench, understanding the technology, and being able to deal with the technical issues that come up in the case is important.

Increasingly, we look at the diversity of our outside counsel. I think, at least in the patent space, you have to be more proactive about that, and you have to sometimes question

why. The way you do it is you have to look at the teams that are presented to you and ask, “Is this a diverse team? Are there other candidates? Is there a reason why we’re not working with another person in your firm who also seems well-equipped to handle this case?” We look at hiring not only individual attorneys but also the teams.

MR. TRASK: The diversity subject is one I wanted to get to anyway, so maybe it would make sense to address that now.

I sense that there is a growing focus on diversity, especially among outside counsel, also hiring in-house in the profession, in general trying to strive for more diverse teams. For example, if you are trying a case to a jury, the jury is made up of a diverse group of individuals from the community. All things being equal, it would be nice to have a diverse group of individuals presenting the case to that jury.

I’m curious to hear what type of initiatives you might have or are thinking internally about in terms of the role of diversity in the selection of outside counsel and mechanisms by which you try to push outside counsel or your own in-house hiring processes in one direction or another. I’m happy to hear from anyone.

MR. COLGAN: I agree that in litigation you are going to have a diverse panel of jurors, and so different perspectives are welcome and you need to build a team based on that.

On the micro level, what I try to do in-house when the pitch comes in is look at the team: you have to see who has presented, and you then have to evaluate it. Things are going quickly at the beginning of the case, and a lot of times you are focused on matching up lead counsel with the case and not necessarily everyone else involved in the case, so I think you have to look at it at that level. I’ve also had the situation where associates may come and go during the case and there are proposals for substituting counsel. You have to then look at it again at that level.

I am not as involved in the macro level, but I know Google is involved in working with our vendors and with our law firms, making sure that they are committed to diversity. There’s a conversation at a higher level than me to make sure that counsel has that as a goal and that they are making strides toward having a more diverse workforce that they can then present to us for staffing our cases.

MR. TRASK: Melissa, is this a topic that comes across your desk at all in terms of your legal department?

MS. MORIARTY: Not frequently. We, like other non-litigation panelists, do not hire outside counsel with much regularity. However, we do company-wide have initiatives in terms of maintaining a diverse workforce, and that is reflected not only company-wide but also on the legal team.

In terms of recruiting for our own teams, there is always an emphasis with our internal as well as external recruiters that we want to be presented with a diverse slate of candidates.

MR. TRASK: Any other practices with respect to diversity?

MS. NGUYEN: I’ll just say that everyone wins with diversity because of not only the different points of view but, as you mentioned, in court I don’t like to have counsel’s table represented by a certain gender and race (which I won’t say which one) and to have a female judge, which I had two years ago, and also six jurors who were women and one male juror.

It is incredibly important to promote diversity. In fact, I play a large role in selecting outside counsel for our cases, selecting the firms, vetting the teams, and conferring with our general counsel, who also looks at that very carefully. That informs who we choose, not only the skills — everyone has to be good — but whoever is on the team, not just

because they are of a certain background or gender. All things being equal, diversity wins when we select.

MR. TRASK: In my mind another topic somewhat related to diversity is next generation. There seems to be an increasing emphasis and focus on finding opportunities for the next generation of lawyers to grow into leadership roles within the profession.

I know a number of judges across the United States — and I can't speak to outside the United States, although I'd be curious to hear if anyone has this perspective — who have issued orders in cases that are intended to push teams of outside counsel, or even in-house counsel, in the direction of giving stand-up opportunities for junior lawyers.

There is a judge in Delaware, for example, who for a type of motion that he normally might not hear oral argument on has a standing order says: "If you agree that a lawyer with I think it's either less than eight or less than six years of experience out of law school will argue this motion, then I'll hear argument on it." That is an incentive for the parties and counsel to have someone working on the case who is capable of making those arguments and having those opportunities that might not otherwise arise.

Clearly, the judiciary to some extent seems to be moving in this direction, or at least is beginning to recognize the issue. I think there is a role for outside counsel to play as well in terms of having the more junior members of their team be in a position so they can argue in court, stand up, take depositions, or whatever it is.

But I do think in-house counsel can play a role in that equation as well. I'm curious to know if this is something that you have considered or whether it is something that factors into assembling a team, for example, when you are working with other in-house lawyers or outside counsel.

MR. COLGAN: I haven't actively thought about it, but when you proposed this and we were preparing for this program, I was actually thinking that probably I should do it more. I have had judges who have said, "Okay, we're going to argue this motion. After lead counsel presents the argument, I want the associate to also argue it." It was great. It's actually really great.

Having a bit more international experience, I have seen when I'm in Germany there are smaller teams, and not only lead counsel speaks up but other associates will speak up and argue in court. It is much more common there. I don't know if it's because of their longer legal training that they feel more comfortable or if it's smaller teams, where you're dealing with more substantive issues rather than a lot of discovery and other issues that associates have to deal with in the United States. I think there are opportunities and it is important.

I think from an in-house perspective you have to be comfortable that they are going to take and defend depositions. We are involved in all the depositions of our employees and I am there to evaluate whether I think they can handle it. We at least give them the opportunity to do that.

Trial is a great opportunity as well to feel comfortable that when there are issues to argue at seven-thirty in the morning and where your lead counsel is going to prepare for the actual substance of the day, that's a great opportunity for associates to get involved.

From an in-house perspective, I think you have to be comfortable with that and you have to encourage your outside lead counsel to give those opportunities. I think what may be a bit more practical is asking the associates in the room what they think about the issues, which I don't always do, but I think it's probably a good practice, because they might actually be closer to the issues, and acknowledging them in the room, not just talking to the lead counsel, trying to get their perspective as well, I think is important to help their development.

Also, it makes them more engaged in working with the company. I remember as an associate feeling disconnected sometimes from what the company we were representing was doing, and there's a certain satisfaction that comes with knowing that you are helping out a business that you believe in and want to support their goals. So I think there is a lot at the micro level that you can do.

MS. NGUYEN: I'll give a real-world example. We took a risk in having a first-year junior partner argue Markman in our case. The judge in the Central District of California pointedly said that he was very impressed by counsel's level of preparation and advocacy. I don't think that he was just giving us lip service. She did a fantastic job.

We took a second risk and had her argue our inter partes review oral argument, and we ended up winning. The PTAB panel was blown away by her performance; it was just so clear, and she killed it. She made a very senior partner look silly on the other side.

A lot of times the associates and the junior partners are doing the day-to-day work. They know the subject matter. They just need a chance to make the argument.

MR. TRASK: That's funny. I was moderating a webcast with a panel of judges and we were talking about this topic. A judge who is also from the Central District of California said he is a big proponent of giving the next generation experience, and at times he will just simply ask the partner to sit down and ask the associate to stand up and argue instead at the hearing. That's a little terrifying to me, but in the example he gave he said the woman he asked to argue did a phenomenal job and was very impressive. That's probably not the ideal way to go about it, but I think getting these types of opportunities is important.

Hugh Hansen asked Sir Robin Jacob this morning, "You've had all of these interesting positions over the years; what is your favorite part of your career?" Sir Robin said, "It was when I first started working as a barrister and realized that I could stand up and argue in court and actually do this job that I picked."

I fear that sometimes junior professionals in our field don't necessarily get that experience because they are kept behind the scene. It's interesting to see that there are initiatives that are working to get those types of experiences.

MR. COLGAN: Practically, if you give a junior associate that opportunity, they will remember it and I think they will work harder.

I also think if you want to develop a long-term relationship with the firm or the attorney, you want to see them sooner rather than later on their feet, whether they can handle anyone, to help them with their development, because ideally you're entering into long-term relationships with law firms and teams. So I think there should be a vested interest in their development as well.

MR. TRASK: A few of you have touched on the issue of international law and addressing the issues that come up internationally. I think you're all U.S.-trained lawyers. Can you explain how it works, advising the business on a law that you don't necessarily have broad training on?

First of all, what types of international issues come up in each of your industries; and, second, how do you go about addressing those issues in a way to satisfy the business' needs?

Melissa, do you have any international issues that come up?

MS. MORIARTY: They are very similar to the U.S. issues that come up. We are typically dealing with the same type of copyright; not right of publicity, which is one issue that we don't worry quite as much about in the United Kingdom. We have a London-based office as well with a number of U.K.-based clients there. When we're giving advice, generally the concept of copyright is roughly the same, so we can give them the same advice in terms of seeking clearance, etc.

One thing I have run into very recently in this round of training was cultural differences around appetite for risk or how risk would be accepted in the culture. The U.S. example of using all of these *Game of Thrones* referential posts — there's a lot of copying in the United States. There has recently been a lot of hubbub in social media and digital around certain Instagram accounts that have been stealing content and then selling advertising on those same accounts and bringing in hundreds of thousands of dollars essentially off the back of stolen content.

In the United States there's a little bit more tolerance from the user and consumer perspective. From the Instagram user, for example, who follows these accounts there's not so much of a backlash. They look at it, they laugh, they think it's funny, ha ha. The content owners take issue, naturally.

But when I was in our U.K. office talking about the ability to take risks, I said, "You can make some of this referential content; you're just taking a risk." They said, "Oh well, people here would think that's stupid. If you put this up on a billboard without clearing it, people here would say, 'That's not cool, man.'"

In addition to the legal issues, there's also cultural differences in terms of what would be effective advertising for our business that we take into consideration more than the differences in law.

When it comes to data privacy, that's a whole other ball of wax that I won't get into. We really do have to deal with data privacy in a more serious fashion.

But, yes, the same kinds of issues come up.

MR. TRASK: Cheryl, what about you? What types of issues cross your desk that involve knowledge of intellectual property law or international law in general?

MS. WANG: We do have manufacturing and production in Thailand. We source in India. We are getting into China. We are also in the European Union, mainly in the United Kingdom and France, and they have very different ways of doing things.

For example, just hallmarking—all of your pieces of jewelry should have a fineness marking that tells you the metal content and also the source, so a maker's mark or something. The United Kingdom and France have different systems. They are supposed to play nicely with each other, but then, once you get through the customs area, they're like, "No, no, no. We're going to have to stop this. This doesn't have this lion mark."

Getting to understand the differences is important. For example, the way the French tend to allow trademarks on the register, so clearance for a lot of the collection names or the marks that we would like is a little bit different. It's difficult to assess risk when it's a system where they let you register and then they let the brands sort of fight it out.

The question that the client will always ask is, "Well, what are the chances that they'll care?" That's harder to assess.

A lot of cultural issues do come up in marketing. I think my favorite was right before the Chinese New Year. This was the Year of the Rooster, so we had made a pendant that was a rooster. At the last minute, the CEO of the company ran around asking people, "Would you wear this?" She asked someone in the shop who was Chinese, and she said, "No, I would never wear that. It says 'hooker.'"

The very first thing was, "Legal, why didn't you tell us this said hooker?"

We said, "First of all, you showed us a pendant that had a rooster on it. I don't know when you added the Chinese character for 'rooster' on the back. This is brand-new information to me, and this is the ninth hour, and also that is the character for 'rooster.' Whether or not it's slang for another term, there's nothing we can do about that. If you want to use the word for rooster, that is the word."

I've never had to write an e-mail to outside counsel that said, "Hey, how many of your female partners would wear a pendant with this word that might or might not mean hooker or prostitute?" You definitely don't want to have to pay that counsel to poll their wives, and it's very expensive.

At the end of the day, understanding whether or not culturally people would wear that should have come up much earlier as part of the marketing process in developing products, and not necessarily last-minute. So, it was a lesson for the design team to clear things earlier with legal.

Luckily, I do read and write Chinese, so I would have been able to point it out. At the last minute, it's a little bit harder, and they had already developed all of the material. So I'm sitting there waiting for jury duty and looking for characters that say "hooker" while I'm waiting to be called. [Laughter]

MR. TRASK: I think it's a great example of the random issues that can cross your desk as in-house counsel.

Lynda, what about you? Is international work a fair amount of your day-to-day business?

MS. NGUYEN: Yes, I would say very much so. We do not sell our pharmaceuticals only in the United States. We do rely heavily on outside counsel in the various jurisdictions because the patent laws can be quite different in various respects. I learn it by just doing it in practice. I also spend a lot of my time doing defensive reading. I find it fascinating, and I really like working with the different teams from the various countries. It's like one big, happy, global family.

MR. TRASK: John, I know you do a fair amount of international work. Can you explain the issues you handle and how you go about addressing those?

MR. COLGAN: It's typically international patent litigation. I've also done litigation in the United States, the United Kingdom, and Germany on FRAND issues. The law can vary quite greatly across jurisdictions.

I actually find the best way to handle that is just to ask a lot of really, really dumb questions consistently until the differences are in my head. I want to make sure that I understand it.

Just to hearken back to what I said earlier, I may be in the position, especially in Europe where injunctions are more likely for patents, where I am going to have to explain perhaps some of the intricacies of German substantive or procedural law that might be relevant to a decision we make on risk mitigation. I try to ask a lot of really dumb questions and do defensive reading to try to understand as much as I can. I really rely on outside counsel to educate me.

I will also quote the other panelists. I think cultural issues matter. Risk aversion of counsel in certain countries also is something to have to calibrate against. When I'm assessing a legal analysis, I know certain counsel in certain countries are more risk-averse than others and I may need to mitigate that. But you have to just learn that over time.

One great thing about Google being so large is actually I have a lot of colleagues who work domestically who are foreign-trained. They may not be patent litigators, but I can also ask them, "Hey, does this sound right?" to try to help calibrate that. But really, it's a lot of just trying to understand and learn over time.

It actually is one of the more interesting parts of the in-house job. I would never have gotten the opportunity as outside counsel in the United States to be able to deal with the comparative legal issues, and it has been really a rewarding part of in-house work.

MS. NGUYEN: I will add that the issue of injunctions, especially in countries such as Germany, is very real and scary, and navigating that is one of the most challenging aspects of my job and the job of my colleagues. Talk about risk: you're talking about taking

in some cases life-saving medicines away from patients. It's not taking down a website or shutting down a tweet. It's scary.

MR. TRASK: Some might be scared shutting down a tweet, but life-saving medicines is another story for sure.

We have about four minutes left. Are there questions from the audience that anyone wants to raise?

QUESTION [Gordon Humphreys, EUIPO, Alicante]: I have a question on assessment of risk and how it spills over to outside counsel. I read yesterday that, according to an American Psychological Association study conducted in 2010, lawyers across the United States generally are overconfident in their predictions of the chances of success in litigation and that calibration didn't increase with years of experience. But on the issue of diversity, apparently female lawyers do better than the men.²

My question is: How do you take into consideration this risk that I think is probably not limited to the United States? I believe it's a phenomenon that people are quite familiar with, certainly in the European Union. How do you mitigate this sort of risk given that there is a tendency for outside counsel to have this overconfidence, because otherwise why are they involving you in costly litigation?

MR. COLGAN: I have the luxury of being very involved in the cases that I'm in, so hopefully I can have some independent judgment and learn the right questions to ask along the way to figure out whether I'm being sold a false bill of goods in my cases.

Internally, my range of percentage of winning is 25-75%, never less or more, just given the uncertainties. I once suggested that we had a 50% chance of winning to our general counsel, and he said, "Well, coming from a litigator I'd say it's more like a 33% chance." There is some recognition that sometimes even the closer you are to a case, the worse your judgement can get.

I somewhat combat that by just being a pessimist when it comes to all of my cases, assume I'm going to lose, and then try to calibrate that appropriately, if I have to educate the client on the risk, and give ranges and understand all of the things that are out of my control in understanding whether we're going to win or lose.

I do think it is important to recognize that this is the case and calibrate yourself appropriately and not just feel like your years of experience or your outside counsel's years of experience will somehow give you an inside track on a decision that ultimately has a lot of uncertainty to it.

MS. NGUYEN: I'll add that data helps a lot. If you're before a particular judge, how has he or she ruled on the issue of inventive step or obviousness, and how many times has the judge ruled on summary judgment? That is more real to me than someone's arbitrary likelihood of success percentage. That really means nothing to me because you could be the other 50%, so that's not helpful.

MR. TRASK: Please join me in thanking our phenomenal panelists.

² Jane Goodman-Delahunty, Maria Hartwig, Pär Anders Granhag & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 137 (2010).