

Paramount v. QVC  
Wilmington, DE, October 17, 2019

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Panelists: Anne C. Foster  
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A. Gilchrist Sparks, III  
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Gordon, Fournaris, Mammarella, P.A.

#00:00:00# - #00:00:33#

1 MR. McBRIDE: Good morning! We have a wonderful  
2 panel here this morning to discuss the QVC case, which I think  
3 is one of the most important cases that the Delaware Court of  
4 Chancery and the Delaware Supreme Court ever decided. And our  
5 panel starts with former Chief Justice Veasey—

6 CHIEF JUSTICE VEASEY: Thank you.

7 MR. McBRIDE: -- who was the author of the opinion  
8 in the QVC case. Anne Foster of Richards, Layton & Finger, who  
9 represented Paramount in the case. And Gil Sparks of Morris,  
10 Nichols, Arsht & Tunnell, who represented Viacom in the case.  
11 And I am Dave McBride from Young, Conaway, Stargatt & Taylor,  
12 and we represented QVC along with Wachtell Lipton.

13 And Gil, I think you wanted to make a comment before  
14 we started our discussion.

15 MR. SPARKS: I do. Last week, the week before this  
16 taping, former Chancellor Bill Allen passed away. And on

1 behalf of all of those participating this morning, I would  
2 like to dedicate this videotaping to Bill's honor. He was a  
3 former partner of mine, but he was a distinguished judge  
4 during a very tense and important period in the development of  
5 Delaware corporate law.

6           And, as you will see as you go on, his opinions also  
7 played a part in the events that we are going to discuss  
8 today, although he was not a judge in the QVC case itself. I  
9 don't know if anyone else wants to add anything, but I do  
10 think that would be an appropriate thing to do, and we all  
11 discussed it beforehand, and I am speaking on behalf of  
12 everyone here. #00:02:17#

13           CHIEF JUSTICE VEASEY: Well, I would like to add  
14 that, when I was Chief Justice and he was Chancellor for five  
15 years or so, we got along very harmoniously, and it was a  
16 great honor for me to have the honor and opportunity to serve  
17 with Chancellor Allen.

18           MR. McBRIDE: And I will say that I think he changed  
19 the Delaware judiciary. He was, at least to my recollection,  
20 one of the first of what I will call scholar judges that have  
21 since populated our court. And he just set a high bar for the  
22 judiciary. And this case - this is an appropriate case to  
23 discuss in the context of former Chancellor Allen because, in  
24 a way, the Supreme Court decision, in this case, vindicated

1 his decision in the earlier Time Warner case. So, it's - he  
2 will be missed. And a very good guy, as well as a great  
3 jurist.

4           So, having mentioned Time Warner, let me just go  
5 back for a minute because I think any discussion of QVC has  
6 got to start with Time Warner, because the QVC transaction was  
7 built upon and attempted to use the Time Warner decision. And  
8 Time Warner was a case where, as everyone may remember, Time  
9 and Warner put together a merger, a stock-for-stock merger.  
10 Paramount came along and made an offer that was, from a cash  
11 perspective, substantially more valuable than the stock-for-  
12 stock merger. And then what happened in Time Warner is that  
13 Time and Warner converted their transaction from a merger into  
14 an offer by Time for Warner, and in the context of the  
15 Paramount challenge to that restructuring, the—both the Court  
16 of Chancery and the Supreme Court in Time Warner articulated a  
17 standard with respect to when Revlon is triggered, which  
18 became one of the key, if not the key, issue in this case.

19           And I guess to set the chronology for this case, on  
20 September 12, Paramount and Viacom, after some years of  
21 negotiation or discussions, at least, announced a merger that  
22 was largely a stock-for-stock merger, like the Time Warner  
23 merger. Ten percent of it was cash. And then, on September 20,  
24 QVC sent a letter to Paramount, making a cash and stock offer

1 for Paramount. There was some period of negotiation and  
2 discussions back and forth between September 20 and late  
3 October, but October 21, QVC turned its offer into a tender  
4 offer and filed litigation in the Delaware Court of Chancery,  
5 which created the case we're about to talk about.

6           So, my first question, and I guess it should be  
7 directed to probably Anne and Gil before the Chief Justice is,  
8 how did you first get involved in this matter? #00:05:43#

9           MS. FOSTER: So, as you said, we're representing  
10 Paramount and its directors, and I am sure I must have been  
11 signed up to take part in any litigation that was going to  
12 ensue. But I don't really have a memory in the September and  
13 early October time period of doing anything in particular  
14 about the case. I think the thing that I really remember as my  
15 first major memory of it is, the weekend after the case was  
16 filed and the tender offer was announced by QVC, I was out of  
17 town. And that weekend, as everyone knows from reading the  
18 opinions, it was a weekend where the Paramount board was  
19 meeting. Paramount and Viacom were talking about what to do in  
20 light of the events of QVC. And, because I was out of town at  
21 a time before we had, you know, email and cell phones and all  
22 that, I can remember standing at a phone booth on Duke of  
23 Gloucester Street in Williamsburg, calling the office and  
24 talking to Don Bussard about what was going on that weekend,

1 and, you know, what was going to be unfolding as the days and  
2 weeks went on. So, that's really my - I know I must have known  
3 I was involved with the case before that-- that's the first  
4 thing I really remember about my involvement. #00:06:58#

5 MR. McBRIDE: And Don was involved from a  
6 transactional point of view?

7 MS. FOSTER: Don was involved from a transactional  
8 standpoint. So, just a minute about Don, who is also someone  
9 we lost earlier this year. Don was someone who had been a  
10 litigator, and after about ten years of being a litigator,  
11 and, you know, at that time, at Richards, Layton and Finger,  
12 and the Chief Justice remembers this better than I do, you  
13 would do both. You would be an advisory lawyer and a  
14 litigator. And Don, after about ten years of being a  
15 litigator, decided he would be purely a transactional lawyer.  
16 And so, when I was a first-year associate, I was assigned to  
17 Don, and Don had just started being purely transactional.

18 So, yes, he was involved from a transactional  
19 standpoint. He was a guy with a very gruff voice, but he was  
20 very kind and very generous. And he knew really everything  
21 there was to know about the corporate law. And I can tell you,  
22 as an associate assigned to Don, if Don said, oh, I need you  
23 to research this. I am not aware of any case that says X,  
24 would you please go see if you can find one. That was really a

1 hopeless task, because you knew if Don didn't know about it,  
2 it didn't exist. And I know the three of you all worked with  
3 him on the corporate council over the years, but he was really  
4 - he was not someone who sought the limelight, but he was a  
5 giant of the bar. He just had such great insight into the  
6 cases and strategy and the analysis, and he was just  
7 fantastic. #00:08:24#

8 CHIEF JUSTICE VEASEY: May I add something? Because  
9 I was with Richards, Layton and Finger when Don was here and  
10 when Anne was here, and I had a lot of cases where Don was the  
11 transactional lawyer. And we would ask Don, what does the XYZ  
12 case stand for? And he would know it - encyclopedia - in an  
13 encyclopedic way.

14 So, all I wanted to say was, Don was a superb lawyer  
15 and a wonderful guy. If he was working with you, and you were  
16 a litigator, and he was doing the transactional work, you had  
17 great confidence that it was going to be good and there would  
18 be no mistakes.

19 MR. McBRIDE: And I'll say, since we are  
20 reminiscing, that in the years that I was, and still am on the  
21 corporate council, I used to say one of the great benefits of  
22 being on the council was getting to hear really intelligent,  
23 brilliant lawyers talk about the corporate law. And Don was  
24 always one of those people, so... #00:09:29#

1           MR. SPARKS: Turning to my role, but, first, let me  
2 just say that, from across the street or across the square  
3 from Morris Nichols' perspective, Don was always a highly  
4 respected counterparty in any transaction, where we were on  
5 the other side. And, of course, I had the same experience with  
6 him, as you recall, with respect to the corporate law council.

7           Insofar as this case is concerned, many of my cases,  
8 I was both on the transactional side and the litigation side,  
9 but not this one. I have no recollection of any of the  
10 transactional aspects of this. My co-counsel, Stu Baskin, and  
11 I worked closely on the litigation matters, but this would be  
12 one where I was purely a litigator.

13           I also have no recollection of the proceedings  
14 before the Court of Chancery. I did not participate in any of  
15 the depositions. And my first real recollection is in the  
16 period of time between the Chancery decision and the appeal.  
17 And I do have some pretty firm recollections in that time  
18 period, and, of course, of the appeal itself.

19           MR. McBRIDE: Who was taking the lead at Morris  
20 Nichols? I should - I have the opinion somewhere at hand,  
21 but... #00:10:38#

22           MR. SPARKS: Well, I was the lead - I was the lead  
23 lawyer at Morris Nichols. I just don't remember anything about  
24 the Court of Chancery proceeding.

1 CHIEF JUSTICE VEASEY: It was 25 years ago.

2 MR. SPARKS: Yeah, but I have some very firm  
3 recollections about the - about some of the things that we  
4 were thinking about in the period between the Chancery Court  
5 decision and the Supreme Court decision, and I have some very  
6 distinct recollections of the argument in the Supreme Court.

7 MR. McBRIDE: Well, I got - I guess, I was probably  
8 involved before either of you, because I was involved for QVC.  
9 And my recollection is, I got a call from Wachtell Lipton, and  
10 the first thing that struck me, they told me that they were -  
11 they were representing QVC, and it would involve a hostile  
12 tender offer. And, I think this is an accurate recollection,  
13 is that Wachtell Lipton had built its reputation as one of the  
14 preeminent M&A firms in the country in the nineteen-eighties  
15 and seventies, at least, as a defender of corporations against  
16 hostile bids.

17 So, when Wachtell Lipton called me and said that  
18 they were going to be representing QVC, who was going to be  
19 making a hostile bid, I thought, and still think, that their  
20 involvement was a material development that may have made our  
21 prospects better. And, specifically, to the extent we all knew  
22 that Time Warner was going to become the critical precedent,  
23 who better to argue that Time Warner didn't mean what  
24 Paramount was going to argue it meant than Wachtell Lipton,

1 who had been on the defense side of the Time Warner case. So,  
2 I was impressed by that.

3 Do you - when the - Anne, do you remember once the  
4 litigation started, you were involved in - were you involved  
5 in the discovery? #00:12:47#

6 MS. FOSTER: So, whereas the other three of you had  
7 a higher level and - you had involvement at a kind of higher  
8 level than I did, I was, at the time, a brand-new partner. I  
9 had just become a partner a couple of months before that. So,  
10 I was working in the trenches doing day-to-day-

11 MR. McBRIDE: The real work.

12 MS. FOSTER: -- a lot of work. I mean, I do remember  
13 that I worked more hours that November of 1993 than any other  
14 month in my career. So, I have a lot of memories about that  
15 time. But I was doing, for example, research in the library  
16 because - and, again, I remember discussing things with Don  
17 Bussard. At that time, just to talk about how you did research  
18 at that time. You know, in 1993, you could still read all the  
19 cases from the takeover era when you were looking at  
20 something. And there was something that Don had in mind that  
21 he wanted to have looked for in nooks and crannies of these  
22 opinions. And you couldn't still do that today; there are just  
23 too many.

1           So, you know, and I came as a summer associate in  
2 1985, and then as an associate in 1986, we had all these  
3 unreported binders, which we still had in 1993. And they  
4 weren't online until, you know, I don't know when they went  
5 online. But you would sit there with the binders and just flip  
6 through the binders and look at all these cases to see if you  
7 could find something.

8           So, I can remember, early in this period, during the  
9 discovery and briefing, spending about three days straight in  
10 the library looking - reading all these takeover cases for  
11 some point that escapes me at the moment, you know, even if I  
12 were free to disclose what it was, and doing a lot of that  
13 reading because it was so nuanced that it wasn't something I  
14 could have an associate take a look at. So, I remember that.

15           I also remember going to Philippe Dauman's  
16 deposition. He was, obviously, later at Viacom, but at the  
17 time, he was still a partner at Shearman and Sterling. And it  
18 was all hands on deck, so I got sent to that deposition.

19 #00:14:49#

20           I also remember that we went to see Vice Chancellor  
21 Jacobs almost every day for about a week on discovery  
22 disputes. There were lots of - there were lots of things going  
23 on in terms of discovery disputes; I don't remember what they  
24 were about, but I remember that we had to bother His Honor, it

1 seemed like, on a daily basis plus endless calls with, you  
2 know, a cast of thousands of counsel on both sides, so...

3           Those are all the things I remember. I mean, I have  
4 other memories about the briefing, but that sort of gives you  
5 a sense, for the moment, about what I was doing.

6           MR. McBRIDE: Were you up in New York for most of  
7 that time? #00:15:25#

8           MS. FOSTER: I was in Wilmington for most of the  
9 time. And for the deposition, I just went up for the day. Not  
10 to skip ahead, but I can tell you about the briefing.

11           So, we had one brief to put in. So, I guess,  
12 Thursday, November 11, we got their brief. So, I had gone up  
13 to Simpson Thacher that day because I had stayed, basically,  
14 almost entirely at their offices from that Thursday 'til that  
15 Sunday morning, you know, three all-nighters, working on the  
16 brief and doing all the things. And I had three associates  
17 with me, and there were, of course, a lot of Simpson Thacher  
18 people. And Charlie Richards was there - up there. And the  
19 brief-

20           MR. McBRIDE: I take it Charlie was - the senior  
21 person from Richards on the case-

22           MS. FOSTER: He was, yes. And very involved, as he-  
23 any case Charlie worked on, you know, like Gil, he was - he

1 was as involved as anybody, and he knew the case as well as  
2 anybody did. That was always the way Charlie litigated cases.

3           But the brief was due on Sunday morning at 8  
4 o'clock. And we thought we had plenty of time. But back then,  
5 you know, nothing was electronic, everything was paper, and,  
6 so, you had to turn everything in in hard copy. And we thought  
7 we had enough time. We had, you know, everything arranged in  
8 terms of transportation to get the briefs back to Wilmington.  
9 But then, there were some delays with getting the brief  
10 finalized. So, we had so many exhibits that we had three town  
11 cars full of bankers' boxes that got sent back. So, I had  
12 three first-year associates with me. One is Ray DiCamillo, who  
13 has, you know, gone on to have, you know, a great career as a  
14 corporate litigator. And so, I sent them in the cars back with  
15 all of our exhibits, the affidavits, and everything else to  
16 make sure that got there in time. #00:17:15#

17           And then, the clock kept ticking and, at some point  
18 during the night, we realized we're not going to make it to  
19 turn the brief in by car. And so, someone came up with the  
20 idea to helicopter. And Viacom had a helicopter. And so,  
21 Viacom's brief was also due Sunday morning at 8 o'clock, and  
22 they were running into similar issues. And so, I went to the  
23 heliport, you know, Manhattan, around 34<sup>th</sup> Street, and arrived  
24 with the brief. And I remember the helicopter was there, and

1 the Viacom lawyers weren't there yet. And I was getting some  
2 pressure from others to just, you know, you got to get the  
3 brief in on time. Well, it's not my helicopter. It's the  
4 Viacom helicopter. We're not going anywhere till they arrive.

5           So, they arrive. We traveled to Delaware because we  
6 were later than we were supposed to be. There was a delay and  
7 I remember we had to go into a holding pattern over New Jersey  
8 as the New Castle Airport couldn't receive us quite yet. So,  
9 we were late. I remember that the brief was late after all  
10 that-

11           MR. McBRIDE: And then we didn't move to have your  
12 brief stricken or anything-

13           MS. FOSTER: You didn't, and I remember trying to  
14 have somebody who could call the Vice Chancellor. Eew! Do you  
15 want to call him at home on a Sunday morning at 7 o'clock?

16           CHIEF JUSTICE VEASEY: This is before cell phones.

17           MS. FOSTER: This was before cell phones. And so, it  
18 was all very dramatic and-

19           MR. McBRIDE: Where did you land in Wilmington?

20 #00:18:38#

21           MS. FOSTER: We landed at the New Castle Airport.  
22 And so that - the brief, then, I think I took it over myself  
23 to the courthouse, so it was maybe, I think, a half-hour late

1 or something, but that is all very vivid in my mind from the  
2 briefing.

3 MR. McBRIDE: I wanted to ask the Chief Justice, I  
4 guess, two questions. One is, I have always assumed that when  
5 these big takeover battles are occurring, the Supreme Court is  
6 not oblivious to the fact that they are going on. But was the  
7 Supreme Court paying - sort of watching the case in the  
8 Chancery Court in the sense of knowing what was going on? And  
9 to anticipate when you might get an appeal, or? #00:19:22#

10 CHIEF JUSTICE VEASEY: Not at this stage. But we  
11 certainly heard about Vice Chancellor Jacobs' ruling, and we  
12 knew that was coming our way quickly. And I could say  
13 something about this quickly business because Delaware courts  
14 are known for expeditious treatment of cases. And the  
15 chronology of this case, which you have in your papers, was  
16 just amazing that how long it took for the Court of Chancery  
17 to decide the case and how long it took the lawyers to brief  
18 before the Court of Chancery, and how long it took the briefs  
19 in the Supreme Court, which was just a matter of days-

20 MR. McBRIDE: Yeah, it was.

21 CHIEF JUSTICE VEASEY: Because, well, there was  
22 urgency to this case.

23 MR. McBRIDE: Well, the October - the litigation  
24 started on October 21. QVC put in its opening brief on

1 November 11. Revlon and Paramount came back on November 14.  
2 And this part I remember, we filed a reply on November 15, and  
3 I think the argument was November 16. #00:20:29#

4 MS. FOSTER: It was.

5 MR. McBRIDE: And I remember the all-nighter doing  
6 that reply brief. And one - I was going to ask the Chief  
7 Justice this also. The Paramount - I thought the Paramount and  
8 Viacom briefs were excellent. And you put in eight affidavits,  
9 and it was - I mean, we had written our brief and this entire  
10 different universe comes over the transom when you filed your  
11 brief with eight affidavits and hundreds of exhibits - all  
12 attached - many were attached to Anne's affidavit-

13 MS. FOSTER: Oh, was it my affidavit?

14 MR. McBRIDE: Yeah, yeah.

15 MS. FOSTER: I can't even remember doing it - okay.

16 MR. McBRIDE: Yeah, it was one of your "attached  
17 hereto are" affidavits. And I remember, we had 24 hours and,  
18 at first, it seemed pretty daunting to try to respond to all  
19 of that. And then, we - I actually had the responsibility for  
20 writing the reply part of the brief - came to the conclusion  
21 that we need to come back and say these are the undisputed  
22 facts, and we went on these undisputed facts. And they go on.  
23 And we had a little section called on what we called "the

1 facts that shouldn't be disputed but are." And then added some  
2 additional color. #00:21:47#

3 But one thing that always amazed me, particularly  
4 looking back at this case, is we produced a huge volume of a  
5 factual record. But, at the end, I'm not sure how much  
6 difference it made because the Revlon issue - the major thing  
7 that the Paramount Board did that was a problem was not  
8 accepting that Revlon had been triggered. So, I often wondered  
9 whether - and I wanted to ask the Chief Justice, when you get  
10 that kind of huge record that comes in, how do you - how do  
11 you deal with that? How do you figure out what you think are  
12 the most important parts of it? Or is it just try to master  
13 all of it?

14 CHIEF JUSTICE VEASEY: We have law clerks.

15 MR. McBRIDE: Yeah.

16 CHIEF JUSTICE VEASEY: And let me say, you know,  
17 looking back on the time when I was a practicing lawyer, we  
18 got involved in all of these all-nighters and all of this  
19 paperwork and all this getting material to the Court of  
20 Chancery in a hurry. And the Court of Chancery would have  
21 piles and piles of paper to deal with. And the Court of  
22 Chancery dealt with those piles of paper and wrote opinions in  
23 a hurry for many pages. And Delaware is very famous for that.  
24 And that's what we did as practicing lawyers is served it up

1 to the Court of Chancery and they had their clerks to help  
2 them.

3           When it got to the Supreme Court, it was not that  
4 much paper, not all of those bank boxes full of paper-

5           MS. FOSTER: You wouldn't have liked that.

6           CHIEF JUSTICE VEASEY: But it was a lot; we had a  
7 lot of paper. And I remember - you all remember from the  
8 argument -- that we had a cart behind us with all these  
9 volumes, and every now and then we would go look at one of  
10 them or another. And it was a lot of paper for us. And as you  
11 know, from the timetable before the Supreme Court, it was just  
12 a matter of days between all these briefs coming in and the  
13 final argument, which was on December 9. And it was all in  
14 real time. And the decision was December 9; the opinion came  
15 later.

16           So, that's what Delaware does - still does that, and  
17 it still does that a lot. I don't do that anymore.

18           MR. McBRIDE: I try not to-

19           CHIEF JUSTICE VEASEY: I'm too old.

20           MR. McBRIDE: I'm trying to remember the last time I  
21 did an all-nighter. Speaking of discovery disputes, we had a  
22 famous deposition that occurred in this case that was of a  
23 Paramount director, Hugh Liedtke, who was defended by a Texas  
24 lawyer by the name of Joe Jamail. And Jamail's defense of

1 Liedtke became a source of an addendum to the Supreme Court's  
2 opinion. But I'm wondering, either Anne or Gil, do you have  
3 any recollection of any issues about that deposition as it was  
4 happening or? #00:24:53#

5 MS. FOSTER: I don't. In fact, the first that I  
6 heard of what happened at that deposition was as the Chief  
7 Justice said, you know, December 9 was the hearing, and they  
8 gave an oral ruling that day. But the written opinion was  
9 following a couple of months later. And I can remember, I  
10 think it was in January, a friend of mine who was at another  
11 New York firm, called me up and said, I was just at a  
12 luncheon. It was some kind of New York bar-related luncheon  
13 where, it might have been you - someone from the Supreme Court  
14 was speaking and said that an opinion was going to be coming  
15 out that was going to be talking about lawyer conduct at a  
16 deposition and the expectations of what lawyers should be  
17 doing. And I remembered thinking, what could that be?

18 And then, when the opinion came out, and I read it,  
19 the language was pretty memorable, so I know that if I had  
20 heard it, been aware of it before, I would have said, "oh,  
21 yes, I already read that." So, because again, you know, to put  
22 it back in perspective, you had quite a few depositions, you'd  
23 have quite a few people working on it, and so you would have -  
24 you would be assigned to say - this is before manuscripts,

1 and, you know, online everything. Okay, you were in charge of  
2 the So-and-so deposition, what are the snippets of information  
3 we need to know? What are the page numbers? And so, you  
4 wouldn't have everybody able to read in that compressed time  
5 period all of the depositions. So, I didn't know anything  
6 about it until I got that call that something was coming. I  
7 knew something was coming; didn't know what it would be. And  
8 then, when I read the opinion - I don 't know about you, Gil-  
9 #00:26:30#

10 MR. SPARKS: I don't think I knew about it until I  
11 read the addendum. It just it wasn't - it was below the radar  
12 screen as far as what I was trying to do, which was a fairly  
13 high-level, how do we win this case and what is the legal  
14 issue here and how do we express that to the court?

15 CHIEF JUSTICE VEASEY: Well, I could tell you how it  
16 came about. Do you want me to?

17 MR. McBRIDE: Yeah, well... Let me just add - let me  
18 just add this - tell this story because I was the one that  
19 sent - Bill Johnston in my office was taking the deposition.

20 CHIEF JUSTICE VEASEY: Right.

21 MR. McBRIDE: And I asked Bill if he would - I asked  
22 Bill if he would go down and take the deposition. I am sure  
23 glad I didn't have to do it. And during the deposition, Bill  
24 calls me. And he says, there's this lawyer down here, Joe

1 Jamail, and he is absolutely abusive. He is obstructing  
2 everything. He won't let the witness answer. He's coaching the  
3 witness. He is being abusive to me. He says, do you think I  
4 should call the court? And I said, Bill, we've only got three  
5 hours with this witness. I said, we don't have time to go to  
6 the court. This is all a distraction. Just ignore everything  
7 Jamail says and just keep asking questions. Just keep asking  
8 questions. Bill did that. And that's why it didn't become an  
9 issue. And then, until the Supreme Court got involved in it.  
10 #00:27:41#

11 CHIEF JUSTICE VEASEY: Well, I thank Justice Moore  
12 for that because, as you know from the chronology, we decided  
13 the case with a little order the day of the argument, December  
14 9, and we wrote the opinion some time in February. And trying  
15 to keep within the 90-day rule. And while we were working on  
16 the opinion, the deposition never came to my attention until  
17 Justice Moore said, Norm, have you read this? And he showed me  
18 these pages, and I said, I was there and very much involved in  
19 ethics and professionalism at that time because I was on the  
20 Conference of Chief Justices and doing the model rules and all  
21 that. And I said, oh, my god...we've got to say something  
22 about this. Delaware has a reputation for civility among its  
23 members of its bar. And this was very uncivil, to say the  
24 least.

1           And so, I looked at it, and I said, I think we need  
2 to put a footnote in it. And so, I started trying to write the  
3 footnote. It became so long, it became the addendum - and  
4 quoted, as you said, this infamous language.

5           MR. McBRIDE: Well, and we made a conscious decision  
6 not to make an issue of the deposition. I frankly don't  
7 remember why other than maybe it was just, you know,  
8 professional courtesy - we weren't going to make an issue out  
9 of it-

10           CHIEF JUSTICE VEASEY: A distraction.

11           MR. McBRIDE: But that addendum, I think, really  
12 changed the way discovery was conducted in Delaware, n two  
13 ways that I could think of. Well, not only did it change how  
14 lawyers could behave during a deposition, but it gave Delaware  
15 lawyers much greater responsibility for the conduct of the  
16 deposition and the conduct of their corresponding counsel.

17 #00:29:27#

18           MS. FOSTER: Well, up to that time, we would move  
19 people's admission pro hac, you know, in advance of some court  
20 proceeding. But you never moved someone's admission for  
21 deposition proceedings. And starting then, we had to do that.  
22 That changed that aspect, too.

23           MR. SPARKS: And, of course, the rules, as they  
24 existed, actually beforehand, but weren't enforced in the

1 deposition context, in effect, required that the Delaware  
2 lawyer vouch for the person who was being admitted pro hac  
3 vice and that, in and of itself - I can remember numerous  
4 times, before I would sign off, if you will, on a pro hac vice  
5 admission of somebody - sending them the rules that are called  
6 for in this opinion, and saying, have you read them? Just to  
7 make sure that that had occurred. And, of course, that didn't  
8 happen until - in that way - until after this opinion had come  
9 out.

10 MR. McBRIDE: Well, to get back to the substance of  
11 the transaction, QVC made its tender offer, or at least  
12 announced it, on October 21. And on October 24, Paramount and  
13 Viacom responded. And they responded by essentially entering  
14 into a merger agreement that had two steps, a tender offer  
15 followed by a back-end merger. And Viacom matched the cash  
16 portion of QVC's offer and then offered securities on the back  
17 end. And it was - that was the point, it seemed to me, where  
18 this matter transactionally diverged from Time Warner.  
19 Because, I think what was happening here, and you guys can  
20 correct me if I am wrong, but our perception was that, once  
21 QVC had made its offer, the Paramount stockholders were never  
22 going to approve the merger on its then existing terms.

23 The same thing happened in Time Warner. The Time  
24 stockholders were not going to approve the merger on its then

1 existing terms. The only difference was, in Time Warner, the  
2 approval of the stockholders was only required because of  
3 stock exchange rules, whereas, in this case, it was required  
4 by Delaware law.

5           So, when Time and Warner responded by creating the  
6 Time tender offer for Warner, which took Time out of the role  
7 of being the target, and now was an offeror, the Viacom-  
8 Paramount restructuring put Viacom in a role that it was now  
9 bidding against QVC. And they bid on October 24; they made a -  
10 they made the \$80 offer. And then, on November 6, increased it  
11 to 85, so they had the larger - or greater offer.

12           My perception at the time was that once Viacom was  
13 involved in a bidding contest with QVC, it was going to be  
14 very difficult to argue to the court that the low bidder  
15 should win in that contest if Viacom ended up not being the  
16 low bidder. So, I thought, at that point, that our case had  
17 dramatically improved, but I don't know whether there was any  
18 perception on your side about that.

19           Do you guys remember the argument before Vice  
20 Chancellor Jacobs? The oral argument? #00:33:17#

21           MS. FOSTER: I do.

22           MR. McBRIDE: Yeah.

23           MS. FOSTER: I remember the argument. I remember,  
24 you know, how many people were there and how it all went. I

1 guess it was on the 16<sup>th</sup>. And I remember it was the usual cast  
2 of thousands with, you know, not even enough seats in the  
3 courtroom for everybody to be in there. And lots of interest.  
4 Now, that argument was not televised. The Supreme Court  
5 argument was-

6 CHIEF JUSTICE VEASEY: It was, yeah.

7 MS. FOSTER: -- actually televised. But I think this  
8 - I think the preliminary injunction argument was also in the  
9 old Courtroom One. I think they both were. So, I remember that  
10 day and everything. Of course, I had much more pedestrian  
11 responsibilities for things like boxes and, you know, that  
12 kind of thing and ordering the transcript from the court  
13 reporter and all that. So, but I remember it all.

14 MR. McBRIDE: And I remember, Herb Wachtell argued  
15 it from our side. I guess, did Stu argue for-

16 MR. SPARKS: Stu must have argued this - I don't-

17 MS. FOSTER: Yes, he did.

18 MR. SPARKS: -- I have no recollection of it, but I  
19 am sure Stu argued it.

20 MS. FOSTER: Yeah, Stu Baskin argued, and then Barry  
21 Ostrager argued for Paramount. #00:34:18#

22 MR. McBRIDE: I remember being disappointed that I  
23 didn't feel like the Vice Chancellor was as much in our corner  
24 as I had expected him to be. He seemed, perhaps appropriately,

1 given the state of the law, very cautious about what the law  
2 was. But the other thing I remember is we put in - QVC put in  
3 its last offer on November 12, which was the day after our  
4 last brief was filed, I think. Or shortly before our last  
5 brief was filed. And after discovery had concluded. So, most  
6 of the briefing and all of the discovery, none of it addressed  
7 the current state of affairs, which was now QVC had a \$90  
8 offer, and Viacom was at 85. And so, I remember, much to my  
9 disappointment, Vice Chancellor Jacobs said, I think we need  
10 to supplement the record. And I thought, oh, my god! We have  
11 just been through ten days of expedited depositions and  
12 discovery, and now we got to do it - or much of it all over  
13 again. And we did before the opinion came down. I,  
14 fortunately, wasn't involved in that process because I had a  
15 family - my father had a bypass surgery out in Arizona, so I  
16 had to go out for that. But I remember the disappointment we  
17 all had that we had to go through that - steps again.

18           So, then the Supreme - the Court of Chancery opinion  
19 comes out-

20           MS. FOSTER: On Wednesday, the 24<sup>th</sup>.

21           MR. McBRIDE: Any recollection of a reaction?

22 #00:36:06#

23           MS. FOSTER: I do...well, I remember, again, I  
24 remember a lot about that because it was the day before

1 Thanksgiving we got the opinion. And then, I remember we had  
2 to go back to see the Vice Chancellor - maybe it was about the  
3 bond. But we - I remember we went over to the courthouse for  
4 something, to talk to him, that afternoon. And we came back,  
5 and we already had a letter from you all. The Supreme Court  
6 had said we would like to see you on Friday morning at 10  
7 o'clock. And so, we - you know, we sort of finished up with  
8 everything on the Chancery side that day before Thanksgiving,  
9 and then we were in front of the Supreme Court on Friday, the  
10 day after Thanksgiving, and then we were-

11 CHIEF JUSTICE VEASEY: For scheduling.

12 MS. FOSTER: -- we were off and the schedule just to  
13 - I have it - I don't - I wrote this down, I didn't have this  
14 in my memory necessarily, although I did remember the day  
15 before and the day after Thanksgiving. November 30 was our  
16 opening brief due. And then, December 7, our reply brief was  
17 due, so yours was due some time in between. And I was back up  
18 to New York to Simpson Thacher for some of that as well. And  
19 so, Gil, I know you were very involved in that time period as  
20 well. #00:37:16#

21 MR. SPARKS: Well, the main thing I recall is,  
22 shortly after the opinion, I recall a number of conversations  
23 that we had among ourselves. By that, I mean generally Stu  
24 Baskin and I. And we understood, at a fairly early point in

1 time, that it was the intention of the Paramount people to  
2 have Barry Ostrager make the oral arguments-

3 MR. McBRIDE: Before the Supreme Court.

4 MR. SPARKS: Before the Supreme Court. And we were  
5 [obscured] the Supreme Court, and we now had a pretty good  
6 idea of what the issues were going to be here. There was going  
7 to be a policy question, and there was going to be how do you  
8 deal with the fuzziness that had been created in the Supreme  
9 Court's opinion in Time Warner? And we both felt pretty  
10 strongly that it would be a great advantage if Charlie  
11 Richards could make the argument because we thought he was one  
12 of the people - or knew he was one of the people -- who had  
13 lived all the development of this case law from Unocal and  
14 Household, and it was going to take a nuanced and persuasive  
15 argument, we thought, by someone who had lived the development  
16 of this law to get us home in this context.

17 We had the greatest respect for Barry Ostrager. I  
18 mean he was - he had a tremendous reputation as a litigator in  
19 New York, primarily, as I recall, in the insurance litigation  
20 area. But - and he may have had some peripheral role in the  
21 Time-Warner case, but so far as I know, he had never argued  
22 before the Delaware Supreme Court before. And certainly,  
23 wouldn't have been viewed as one of the people who had been  
24 sort of right on top of all this from-

1 MR. McBRIDE: At the creation [overlapping]-

2 #00:38:58#

3 MR. SPARKS: At the creation [overlapping]. We were  
4 unsuccessful in that, and Barry made the argument, and he did  
5 a - he did a, you know, I don't think he made any real  
6 mistakes in the argument. But, to this day, I would have  
7 enjoyed seeing Charlie make this argument. We might have still  
8 lost, but I think it would have - it would have been - it  
9 would have given us maybe a little bit of a better chance.

10 I remember that, and I remember - I remember having  
11 an impression at the time. I think there is actually some - I  
12 think you guys actually took some law review article or  
13 something that I had written and quoted it against me. But I  
14 had a pretty firm view at the time that, you know, that change  
15 of control was a test and that putting yourself in play was a  
16 test. And I don't know if I ever really even understood what  
17 this breakup thing that's talked about in the - it was alluded  
18 to in Revlon, but it became the big issue after Time Warner,  
19 and, of course, the issue is what that meant and where did  
20 that fit into the trigger hierarchy in QVC.

21 And I was frankly puzzled by what that language  
22 meant in the first place. But it was - and it made it  
23 particularly important to think about what the policy was  
24 behind that and how that applied in this context. And what was

1 a little bit different about this context was that we had  
2 other cases that were cash-out mergers. This one was a hybrid.  
3 There would be a five-billion-dollar residual minority  
4 interest in the former stockholders of Paramount in the  
5 combined Viacom-Paramount entity. Although Sumner Redstone  
6 controlled Viacom, would continue to control the surviving  
7 entity, and, therefore, it was a change of control, but was it  
8 exactly the same kind of change kind of control as you had in  
9 a cash-out merger.

10           And the policy argument that I think we were  
11 developing-- I know we made it in the oral argument, and there  
12 were others-- But one was - one would be sort of this was  
13 different because it was - it had such a large stock  
14 component. And the second was that, if you were to come out  
15 the way the court would, it would have the effect of taking a  
16 whole universe of buyers in the telecom industry out of play  
17 because there were other companies like Viacom that had a  
18 controlling stockholder.

19           And so, in the big picture, what are you really  
20 doing? Are you really saying - I mean, what - we're only going  
21 to have public company bidders that can enter into strategic  
22 transactions. And Paramount's board was consistent in viewing  
23 this as a strategic transaction, and we can talk about how the  
24 Supreme Court dealt with that. I'm not being critical at all

1 about where the Supreme Court came out. But those were the  
2 issues. And I guess I always thought that Charlie might have  
3 been able to - might have been able to-

4 MR. McBRIDE: Make a policy argument? #00:42:14#

5 MR. SPARKS: Make a better policy argument. The  
6 other thing I remember to jump ahead is - well, I'll give you  
7 - two other things I really remember about this case, and then  
8 you will have it all from me.

9 I remember the Chief Justice over and over and over,  
10 saying talk to me about policy. Talk to us about policy-

11 MR. McBRIDE: During the oral argument.

12 MR. SPARKS: During the oral argument. Over and over  
13 again. And the other thing I remember, which was unusual was  
14 during - and now he's Judge Ostrager's argument, there was,  
15 what I now understand was a younger partner. I thought it  
16 might have been an associate but - who continually crawled  
17 across the floor and stuck yellow stick-it pads on the podium  
18 while he was making his argument. And I just found that to be  
19 - I thought it to be extraordinarily distracting and saying,  
20 well, you know, and it sort of reinforced my idea that I could  
21 have never imagined somebody crawling up and putting a stick-  
22 um on Charlie Richards' podium; he would have slapped them  
23 away.

1 MR. McBRIDE: It's sort of vote of no confidence -  
2 #00:43:32#

3 MR. SPARKS: Well, that's exactly...that's exactly  
4 the reaction I had in the courtroom. Those are my major, you  
5 know, things that where I can flash back and say I actually  
6 recall these events. And those were the - those were the, I  
7 mean, all the things that you have talked about here in terms  
8 of helicopters and papers just, you know, already twist my  
9 stomach, I could even remember what those days were like. But  
10 I don't think I was - I wasn't anywhere near the helicopter,  
11 so we're-

12 MS. FOSTER: You were not on the helicopter.

13 [Overlapping/unintelligible]

14 MS. FOSTER: Bill Lafferty was on the helicopter.

15 MR. SPARKS: Bill Lafferty was probably the one who  
16 suffered through that, but-

17 MR. McBRIDE: Well, just to make sure whoever is  
18 watching this video understands where we are. The passage in  
19 the Time Warner case - in the Time Warner case, the Court of  
20 Chancery had said Revlon did not apply to the Time Warner  
21 transaction, because there was no change of control in the  
22 combined entity. Either the stock-for-stock merger or Time's  
23 acquisition of Warner would not result in there being a  
24 controlling stockholder. And the Time stockholders weren't

1 being cashed out at all under either transaction. So, the two-  
2 having been on the plaintiffs' side in Revlon, the biggest -  
3 the best argument we had in Revlon was you're cashing out the  
4 stockholders, what consideration can be - what could possibly  
5 considered other than the price and the prospect of it being  
6 consummated?

7           But Time Warner said change of control - no change  
8 of control doesn't trigger Revlon. The Chancellor said that.  
9 The Supreme Court, in Time Warner said, the Chancellor was  
10 right in his finding on change of control; it is correct as a  
11 matter of fact and law. But then went on and said, but we're  
12 deciding the Revlon issue on different grounds. And then - and  
13 said, we premise our rejection of plaintiffs' Revlon claim on  
14 different grounds. Namely, the absence of any substantial  
15 evidence to conclude that Time's board, in negotiating with  
16 Warner, made the dissolution or breakup of the corporate  
17 entity inevitable, as was the case in Revlon. So- #00:45:43#

18           MR. SPARKS: Well, wait...then they went on - they  
19 went on. If they had stopped there, it may not have been quite  
20 as much of a problem, because then you would have had - you  
21 would have had a better argument that - well, you affirmed the  
22 Chancellor, and, so, that was change of control. And now  
23 you're saying breakup, and those are the two tests. But they  
24 went on on that. And they said, under Delaware law there are,

1 generally speaking, without excluding other possibilities, two  
2 circumstances, not three, two circumstances which may  
3 implicate Revlon. The first, and the clearer one is when a  
4 corporation initiates an active bidding process seeking to  
5 sell itself, or to affect a business reorganization involving  
6 a clear breakup of the company.

7           However, Revlon duties may also be triggered where a  
8 responsible bidder's offer, a target abandoned its long-term  
9 strategy, and seeks an alternative transaction involving a  
10 breakup of the company. So, they - instead of saying three  
11 circumstances, they went out of their way in the opinion to  
12 say two circumstances-

13           MR. McBRIDE: And change of control wasn't one of  
14 them. #00:46:44#

15           MR. SPARKS: And change of control wasn't one of  
16 them. And clearly, this was the test of whether either on  
17 October - or September 12, or October 24, you had what we have  
18 come to call Revlon obligations or Revlon duties, or not,  
19 depended on whether or not there was a change of control  
20 within the meaning of Revlon and all the cases that followed  
21 it.

22           And by, arguably, and I say that because that's what  
23 we're talking about, that's what we were arguing, arguably,  
24 the Supreme Court, in Time, backed off that and took change of

1 control off the table. And probably, that's the right time for  
2 me - that's what we faced, and those were the - and both  
3 Paramount and Viacom made the take off the table argument. And  
4 then, when it came to policy, they had some arguments. Our  
5 argument was basically, look, you're going to discourage bids  
6 from entities like Viacom, who happen to have a controlling  
7 stockholder. And, by the way, there is a huge equity surviving  
8 component here. So, maybe this is more like a stock-for-stock  
9 and Time Warner than it is a pure cash-out merger. Those were  
10 our policy positions. They didn't carry the day, but that was  
11 what we were talking about.

12 I mean, maybe the Chief Justice can add some thought  
13 as to how the Supreme Court wrestled with this because I think  
14 that they had a very delicate job to perform here and I think  
15 what they came up with was a rather statesman-like approach  
16 rather than flat out saying, well, we maybe made a mistake in  
17 how we affirmed Time Warner. I think the world would have been  
18 - let me put it this way, the world would have better off, and  
19 life would have been easier if the Supreme Court had had a  
20 one-line opinion after hearing oral argument in Time Warner  
21 and said, we affirm for the reasons stated by the Chancellor.  
22 But that's my personal opinion.

23 MR. McBRIDE: Well, Chief Justice, when this matter  
24 fell into your lap, did the Supreme Court have the view that

1 in order to find the change of control, that Revlon was  
2 triggered by a change of control, they would need to reverse  
3 Time Warner? Or, in other words, you can—

4 CHIEF JUSTICE VEASEY: You mean overrule...yeah.

5 MR. McBRIDE: Or by...overrule. Or, and that would  
6 have required an en banc court, correct? #00:49:15#

7 CHIEF JUSTICE VEASEY: Yes.

8 MR. McBRIDE: Did you ever consider an en banc  
9 court?

10 CHIEF JUSTICE VEASEY: Yes. We talked about it. But  
11 we considered that that was not appropriate for two reasons.  
12 One, time. Urgency is what I mean - meaning to say. The  
13 urgency of this case would require that. And if somebody  
14 wanted to move for a re-argument, that could be down the road.  
15 But, ab initio, we did not feel it was necessary to go en  
16 banc.

17 The Time Warner panel in the Supreme Court was  
18 Justice Horsey, Justice Moore, and Justice Holland—

19 MR. McBRIDE: And you were not on the Supreme Court  
20 then.

21 CHIEF JUSTICE VEASEY: I was not. I was not even in  
22 the Supreme Court. And then, the Paramount versus QVC panel  
23 was me, and then Justice Moore and Justice Holland. So, there  
24 were two justices on each of these three-judge panels—

1           MR. McBRIDE: And Justice Horsey was the author of  
2 the Time Warner decision- #00:50:21#

3           CHIEF JUSTICE VEASEY: He was the author of the Time  
4 Warner case.

5           MR. McBRIDE: Was he still on the court then?

6           CHIEF JUSTICE VEASEY: He was still on the court,  
7 but he was talking about retiring. But he was still on the  
8 court. And so, we decided, the three of us, in the QVC case,  
9 that we didn't need to overrule Time Warner. We decided that  
10 ab initio. And that we could deal with this with more finesse.  
11 And Gil talks about the policy, that's - one of the policy  
12 arguments that we were wondering about was Vice Chancellor  
13 Jacobs had done such a super job in navigating this Court of  
14 Chancery decision, and it was just highly nuanced, and very  
15 sophisticated, but we sensed that he would like to have a  
16 sweeping ruling that says change of control is Revlon. End of  
17 story.

18           And so, we decided, as a matter of policy, we needed  
19 to do that because that had to be the result. And we did deal  
20 with this language about breakup. It's not, we said, it can't  
21 be that you have to have a change of control and a breakup;  
22 you could have one or the other. And here is what we said. The  
23 Paramount defendants' position that both a change of control  
24 and a breakup are require must be rejected. Such a holding

1 would unduly restrict the application of Revlon, is consistent  
2 with this court's decisions in Barkan and MacMillan, and has  
3 no basis in policy.

4           So, that - I hope I didn't say it too many times,  
5 like a broken record. But we started out the argument - we  
6 started out the argument saying, we want to hear policy.

7 #00:52:13#

8           MR. SPARKS: Policy, yeah. And you reinforced that a  
9 couple times.

10           CHIEF JUSTICE VEASEY: But that - those were among  
11 the topics. And also, Gil spoke about some other policy  
12 arguments that were on our minds. So, we didn't need to go en  
13 banc. We were able to finesse the earlier decision. I think we  
14 came out with the right result. And that there is a-

15           MR. McBRIDE: Obviously, I thought you came out with  
16 the right result.

17           CHIEF JUSTICE VEASEY: Yeah. By the way, your Herb  
18 Wachtell argued a beautiful case in that.

19           MR. McBRIDE: He sure did. And there was a team of  
20 us that spent days with Herb. In fact, working with Herb  
21 preparing for oral arguments is an experience because I think  
22 this is still the case but, then, he used a manual typewriter.  
23 Not an electric typewriter, not a computer, but a manual. And  
24 he put his sheet of paper, typing paper into the typewriter.

1 He'd start typing out his argument and discussing it with us.  
2 And when you came up with a point that he wanted to add to his  
3 argument, he'd either have to go back and white out or more  
4 often, take a stick-um and stick a stick-um on his... So, it  
5 was fascinating.

6           And I remember, as we were preparing for the  
7 argument, Herb kept asking me - there were two issues in the  
8 case, Revlon and Unocal. And he kept asking me, well, are we  
9 saying they're violating Revlon? Or what are we exactly  
10 saying? I said we're saying they violated everything.

11           CHIEF JUSTICE VEASEY: Everything.

12           MR. McBRIDE: Unocal, Revlon-

13           CHIEF JUSTICE VEASEY: Everything that's holy.

14           MR. McBRIDE: And he did that, and he made that  
15 argument that way, I think, during the oral argument. But he  
16 kept getting pressed about - but specifically, what is it that  
17 you want us to - how do you want us to rule, basically, is-

18           But there was another issue in the context of that  
19 opinion because, after basically telling Paramount that it's  
20 going to have to go back and conduct some form of competitive  
21 auction, if not an auction, at least competition between the  
22 bidders and let the best bid prevail, but in the Supreme Court  
23 opinion, you also indicated that the measure of the best bid  
24 didn't necessarily have to be the immediate market value or

1 that that would be the exclusive measure. And you indicated  
2 clearly that the company, in evaluating the two bids, could  
3 take into account the long-term strategic value of one option  
4 over the other.

5           So, when we got the opinion, we were concerned that  
6 Viacom would - or that Paramount would take that and decide,  
7 okay, we're going to conduct an auction where we're the  
8 auctioneers. The board that we didn't trust was going to be  
9 the auctioneers, and we were going to lose the auction  
10 nonetheless by having them declare that our higher offer was  
11 still not superior because of the strategic value of Viacom.

12           But what, and I just remember this because an  
13 article that the Chief Justice circulated to us yesterday, I  
14 remembered that the auction that Paramount conducted was more  
15 evenhanded than we were fearful it might be. But I didn't  
16 realize quite how extraordinary it was. Not only did the  
17 Paramount board decide that immediate market value would be  
18 the determinative factor, but it actually let the stockholders  
19 make the decision because the bids came in as competing tender  
20 offers that were both pending and whoever got 60-percent -  
21 there were all sorts of rules about how you could manage your  
22 tender offer, but whoever got - first got 60-percent of  
23 tendered shares, won the contest. So, the stockholders were -  
24 not only was immediate market value going to control, but the

1 stockholders were going to make the decision. So, I thought  
2 that was quite extraordinary. #00:56:13#

3 And the article that you sent us, Chief Justice,  
4 attributes that to the Paramount board having lost Time Warner  
5 and then having lost this case, decided no more. We're just  
6 going to let the stockholders decide on this. But I thought it  
7 was a pretty interesting - and then, of course, Viacom outbid  
8 QVC in the end. #00:56:36#

9 MS. FOSTER: So, I've remembered something else  
10 about the Supreme Court argument, which is I remember Justice  
11 Moore asking either the Paramount lawyer, or the Viacom  
12 lawyer, I don't remember which one, how Wilmington Trust v.  
13 Coulter should apply-

14 MR. SPARKS: That was addressed to Barry, to Barry  
15 Ostrager, yeah.

16 MS. FOSTER: Oh, yeah. Okay. And as I recall, that  
17 was not a case that was cited in any brief submitted by any  
18 party. And I can remember sitting in the courtroom thinking,  
19 oh, this is really unfortunate. If you weren't familiar with  
20 the case, and it wasn't a case in the corporate takeover  
21 context. And I can remember having a moment where I thought it  
22 was - I felt sorry for whoever it was who was a recipient of  
23 that question because I gathered probably the person had not  
24 had any occasion to have read the case and be familiar with

1 it. So, that's a memory that just came back on, you know, the  
2 whole business of the auction and what are your  
3 responsibilities. #00:57:36#

4 MR. McBRIDE: And I can tell you where that case  
5 came from, because I wrote the brief in Revlon from the  
6 plaintiffs' side, and Wilmington Trust was the case we relied  
7 upon. That was a case that your firm won, as a plaintiff,  
8 challenging - it was a sale of assets by a corporation. And  
9 the ruling in the case was, when you're selling an asset, you  
10 got to sell it for the best price you can get. And we said,  
11 hey, that's the same rule that should apply in the takeover  
12 context. And I think that's where - I don't know who asked the  
13 question.

14 MS. FOSTER: I think it was Justice Moore.

15 MR. SPARKS: It was Justice Moore, and he asked it  
16 of Barry Ostrager.

17 MR. McBRIDE: Yeah.

18 CHIEF JUSTICE VEASEY: At the very beginning-

19 MR. SPARKS: Early on in the argument, yeah. And  
20 Barry wasn't - not surprisingly, not familiar with the-

21 MR. McBRIDE: And that's why I thought once QVC and  
22 Viacom were in a bidding contest, it was going to be awfully  
23 hard to write an opinion that would say you can sell the

1 company to the low bidder, even if it's not the best price  
2 reasonably available at the time. #00:58:35#

3 MR. SPARKS: The other thing to think about, and we  
4 will never know the answer, although we do know the answer, I  
5 think we do know the answer based on the clarity that we got  
6 as a result of the QVC opinion. But the original Viacom  
7 proposal, if you recall, was 90-percent stock and 10-percent  
8 cash. When - by the time it got up to the court, it was 51-  
9 percent cash and 49-percent stock. The argument, the policy  
10 argument that there is a large continuing interest, and this  
11 should be not dealt with the same way you deal with a cash-out  
12 merger. This is much closer to a non-Revlon transaction. That  
13 would have been much more powerful if the September 12 deal  
14 was the one that was on the table. It would have, under the  
15 reasoning of the Supreme Court, it would have still lost, but  
16 it would have-

17 MR. McBRIDE: Yeah, because it would have been  
18 change of control, still. #00:59:21#

19 MR. SPARKS: -- change of control, but it would have  
20 been - it would have been a lot - it would have been a harder  
21 argument or a harder result to reach.

22 The other thing that passed - I know you thought  
23 about it. I know I have thought about it since is I suppose  
24 there were things that could have been done to, if you will,

1 mitigate the control power of Sumner Redstone in the combined  
2 entity. I don't remember the details, but one of my cases was  
3 the Ivanhoe Goldfields case-

4 MR. McBRIDE: That was before this-

5 MR. SPARKS: It was before this-

6 MS. FOSTER: Eighty-seven.

7 MR. SPARKS: And we had done something - we had done  
8 something like that. We had put - we had contractual or other  
9 provisions that, in effect, meant that control didn't pass  
10 even though-

11 MR. McBRIDE: It was 49-percent.

12 MR. SPARKS: 49-percent and done that. Whether  
13 anything like that would have been possible in this context, I  
14 don't know, but it was - it certainly is something that one  
15 might have - one might have thought about. I mean it was still  
16 the argument, which, that look, if Sumner Redstone was - was  
17 in charge, and he ever decided to cash out this very  
18 substantial minority, he would have been subject to our ever-  
19 increasing body of case law dealing with cash-out mergers by  
20 controlling stockholders, plus appraisal. Well, the argument  
21 that you had that protection wasn't a bad one, it just - it's  
22 just - it - and I thought it was interesting that the Supreme  
23 Court didn't so much go off on that. There was a lot of  
24 discussion in the opinion, but hadn't been much at all in the

1 oral argument or the briefing about voting rights. About how  
2 you were taking away voting power, not necessarily freeze-out  
3 power, but voting power in - by - and that's what you needed  
4 to be compensated for. That's why you had to go get the best  
5 price reasonably available-

6 MR. McBRIDE: The argument that made the most sense  
7 to me was -- and I think the Supreme Court used this. It used  
8 both. It used the you can be cashed-out argument, and you lose  
9 your voting rights. But it also made the point which, I think,  
10 QVC's investment banker - I mean Paramount's investment banker  
11 made in a deposition I took where he agreed that you can only  
12 sell control once. And once control passed in this transaction  
13 - when you sell control, it always, or should always command a  
14 premium. Once you sell control in this transaction, or allow  
15 it to pass, you can never sell it again. And that is an asset  
16 - a monetizable asset that will be lost to you if you don't  
17 get the best value- #01:02:20#

18 CHIEF JUSTICE VEASEY: That was an important feature  
19 of our decision-

20 MR. McBRIDE: Yeah-

21 CHIEF JUSTICE VEASEY: Absolutely.

22 MR. McBRIDE: -- I thought that was the most-

23 CHIEF JUSTICE VEASEY: Yeah.

1           MR. McBRIDE: -- telling part of your decision. The  
2 other - talking about unresolved issues. I was a big proponent  
3 of the Unocal argument in this case. Consider this  
4 hypothetical. What if all the facts had been the same except  
5 there had been no change of control on the closing of the  
6 Viacom - Paramount merger? But you've got two bidders, and  
7 you've got 51-percent cash bids. And the company structures  
8 the situation so that you've got a coercive tender offer by  
9 Viacom and a preclusive—you're precluding another bid. I  
10 thought that violated Unocal, but neither the Court of  
11 Chancery nor the Supreme Court made that ruling because they  
12 didn't need to. And I am not sure that it's even been decided  
13 to this day if you ever ended up in that- #01:03:28#

14           MR. SPARKS: Well, you know, the stock option here.  
15 We haven't talked much about the stock option. If you go back  
16 and read our briefs, the first thing we argued about was the  
17 stock option, and the second thing we argued about was the no-  
18 shop and the pill.

19           The stock option was one that had a number of  
20 features and I know, in particular, the Vice Chancellor was  
21 concerned about the ability to pay with a note. The fact that  
22 it was keyed to the original transaction price of \$69, and by  
23 the time it got to the court, it was 90, and you had the

1 ability to cash in the note for the difference, and that had  
2 arisen to a very large, what the Vice Chancellor-

3 MR. McBRIDE: 500 million, I think. #01:04:02#

4 MR. SPARKS: What the Vice Chancellor described as  
5 draconian amounts. But, there was no record that that would  
6 have been a showstopper. It was a 19.9-percent option, and you  
7 could have, theoretically bought through it. I thought the  
8 Supreme Court - I mean it was one of these things where once  
9 the big issue is decided, then, as courts sometimes do, let's  
10 get this over with, and we're going to affirm everything else,  
11 also. So, it didn't get the type of scrutiny in the Supreme  
12 Court that it might have gotten if it had stood in isolation  
13 under a Unocal-type circumstance. But it - you know, it was  
14 just one more thing that flavored the - I mean, it fell - it  
15 fell because the mindset of the directors, on September 12 and  
16 October 24 was wrong. They were in a defensive mindset or a  
17 strategic merger mindset-

18 MR. McBRIDE: Protect the deal. Yeah. #01:04:57#

19 MR. SPARKS: -- as distinguished from a Revlon  
20 mindset. And that's what killed it. The court never really got  
21 into a discussion - the Supreme Court - of the merits of this  
22 and if it had come up in the context that you mentioned about.  
23 I'm not so sure that it would have fallen, necessarily, under  
24 a Unocal circumstance if it were - you know, if the right

1 attention had been given to it, if it had - because - and  
2 subsequent events, you know, look how much higher the price  
3 ended up going in terms of the ultimate transaction. It - we  
4 won't really know the answer to that, but you didn't have a  
5 very good - there was not a good showstopper record on the  
6 facts in this case, which on that particular point.

7 CHIEF JUSTICE VEASEY: Well, we were concerned about  
8 the option, as we said in the opinion. And, in itself, it  
9 wasn't really a pivotal point, but, in combination with all  
10 the other deal protection measures, it certainly was.

11 MR. McBRIDE: Yeah. And it was six percent of the  
12 deal-

13 CHIEF JUSTICE VEASEY: Yeah.

14 MR. McBRIDE: -- value. So, I think under, even  
15 under current law, if you had a breakup fee of six-percent,  
16 I'm not - I think that would be, at least the last time I  
17 studied breakup fees, I think six-percent was pretty - at the  
18 high end of, if not outside the range. #01:06:17#

19 MR. SPARKS: Right. But this wasn't a - this wasn't  
20 a termination fee. I mean, that actually passed. That actually  
21 survived-

22 MR. McBRIDE: survived, yeah.

1           MR. SPARKS: -- it survived, yeah. But of course,  
2 then again, you've got the termination fee plus the option,  
3 then you would, and adding them together, you've got even-

4           CHIEF JUSTICE VEASEY: Yeah.

5           MR. SPARKS: I think it came up...

6           CHIEF JUSTICE VEASEY: I don't know how much time  
7 you have left, but I'd like to say something about Chancellor  
8 Allen. Gil properly began this as a tribute to Chancellor  
9 Allen, who just passed away. He was a giant of the judiciary.  
10 And his opinions have resonance today, as always. But I think  
11 we relied on him in the Supreme Court opinion for the point  
12 that change of control triggers Revlon. And we quoted his  
13 trial decision in the Time case - not the Supreme Court  
14 opinion - as being correct, as a matter of law, which the  
15 Supreme Court did say in Time. And that was unlocking a key in  
16 the jurisprudence that we had. So, that opinion survived as a  
17 Court of Chancery opinion. And I remember talking with  
18 Chancellor Allen after that - he appreciated that very much.

19           MR. McBRIDE: I am sure he did. And I would say the  
20 same of your QVC decision. I think when you ask the question,  
21 what decisions have won the test of time, it has. I think the  
22 QVC decision in one sense was-- I'm not sure there was after  
23 that - certainly, it cleared up the Revlon issue -- but I'm  
24 not sure after that there was another great decision that

1 shaped the M&A market in quite the way Unocal, Revlon, Time  
2 Warner, or QVC did.

3 But your decision - I just - going back and re-  
4 reading it in preparation for this, I was impressed on just  
5 how well-written and well-reasoned it was-

6 CHIEF JUSTICE VEASEY: Well, thank you. But the law  
7 was unsettled, and we felt it needed help ... #01:08:19#

8 MR. McBRIDE: I agree with you. In fact, I thought  
9 that the Court of Chancery's opinion was so timid, he - he -  
10 Vice Chancellor Jacobs didn't rule that a change of control  
11 triggered Revlon, but he ruled that *this* change of control  
12 triggered Revlon. And he didn't rule on the Unocal argument.  
13 And so, I think, you were absolutely right that - that if you  
14 had left the law where, in the state of uncertainty that it  
15 was in - even after the Chancery Court ruled, it would - it  
16 would have been a disservice to the corporate bar and the  
17 corporate transactions. It needed to be clarified, and you did  
18 a beautiful job in doing it.

19 CHIEF JUSTICE VEASEY: Thank you.

20 MR. McBRIDE: Does anybody. I know everybody has  
21 time constraints. Does anyone have anything they'd like to add  
22 before we call it a day?

23 MR. SPARKS: Not here.

24 MS. FOSTER: No...thank you.

