Case: Disney Derivative

Taping Date: June 20th, 2017
Participants:
Gregory P Williams, Richards, Layton & Finger P.A.
Anne C Foster, Richards, Layton & Finger P.A.
David C McBride, Young, Conaway, Stargatt & Taylor LLP
Williams: We're here today to discuss the Disney litigation. I'm Gregory Williams from Richards, Layton & Finger. Dave McBride from Young Conaway is here. Young Conaway represented Mr. Ovitz. Anne Foster, my partner, is here. We represented the outside directors just for sort of an easy label. And I want to ask both of you because you have the unique experience of having been involved in the case from the very outset. Many folks, like me, came on board as the case progressed. When this case came to your desks, did you have any inkling that it would become one of the most celebrated cases in Delaware corporate litigation history? Anne?
Foster: [00:01:17] I would say no, because yes, it involved a very famous company, but those of us who practice law in Delaware often work on cases that have to do with famous companies, and in many of those cases you never meet any of the people who run the companies or board members. The case might go away for whatever reason or it might be resolved at the pleading stage. There was nothing about this when it came in that made me think oh this is going to be something that's really going to be a famous case. I never thought it.
Williams: Dave?
McBride: I guess I don't think I thought or realized that it would quite have the trial that would get the attention that this trial got. It was a little different in the sense that our client, Michael Ovitz, was alleged, I guess inaccurately, that he had come away from his termination at Disney with something like 144 million. And that got quite a bit of press coverage at the time that it happened.
Williams: And he had only worked there for a little more than a year?
McBride: Right. [00:02:21] And so the case had more press coverage in terms of the events that a derivative case usually or technically has, with much more press coverage of his termination and what he got. But I never expected it would turn into, what? A five month trial or something close to it. In fact, I remember it was filed here, and then the plaintiffs also filed parallel actions in California?

Foster: Yes
McBride: And they decided for tactical reasons, because they wanted to try the case in California, and for either we promptly, when we got wind of that, or we had already filed answers, so they couldn't dismiss it as a matter of right. Cause they couldn't dismiss as a matter of right anyway because it was a derivative action. So the first fight was the case couldn't stay in Delaware.
Foster: We had, when the case got filed, we were very worried that they would end up in California in front of a jury, which none of the defendants wanted. [00:03:29] So we filed answers to the complaint because we were all cognizant of the fact that there was a famous case involving Texaco where a very large verdict had been obtained in Texas. So we filed answers so they couldn't dismiss as of right. And then the first opinion we got was from the Chancellor about whether they could voluntarily dismiss in Delaware and go to California.
McBride: And the case that Anne is talking about is the Pennzoil case, where Pennzoil, I guess, sued to--and now I'm trying to remember who the parties were. In any event
[00:04:05 crosstalk]
Foster: Texaco-Pennzoil.
McBride: Yeah, I guess it was for Getty. Getty was the target, Pennzoil wanted it, Texaco wanted it. Texaco won it. Pennzoil brought a preliminary injunction action, and Delaware went through and litigated the preliminary injunction action where the court found that they had a problem proving success on the merits but wouldn't award them the relief they wanted, which was to enforce their right to acquire Getty. I remember sitting in the jury box during the argument with Larry and discussing some of the issues. So the court basically said--
Williams: You're referring to Professor Hamermesh? [00:04:41]
McBride: Yes
Williams: --as off stage here.
McBride: And so the plaintiffs certainly after the court ruled on the preliminary injunction action, dismissed the action in Delaware and promptly filed in Texas, which ultimately led

to a tremendous jury verdict for them. So everybody... now that wasn't a derivative case, but everybody was acutely aware of that maneuver.

Williams: And it really focused, that event, focused the Delaware defense bar on filing answers with respect to cases that you didn't want to drift off elsewhere. So, Anne, if you could just--I think you had more involvement in this case than anybody, knew it better than anybody. Can you just give us a 30,000 foot level summary of the factual context?

Foster: Sure. [00:05:32] So this company was run, at the time, by Michael Eisner. The second in command at Disney was a fellow named Frank Wells. Frank Wells had tragically died in an accident and Michael Eisner had about a year later decided to bring in Michael Ovitz as the number two at Disney. He got the approvals that he needed, Michael Ovitz came and was hired. And as Dave said, Michael Ovitz was somebody who was very familiar to the press. There was press coverage around his whole career at Disney. And it all ended in December of 1996, which was only fifteen months after he started, with a non-fault termination, which was a term under his contract that meant he was going to get the benefits of the contract. And the lawsuit was filed the first weekend of January in 1997, so just a few weeks after the non-fault termination. So it was very fresh when it was filed.

Williams: The thing about Eisner that some younger folks wouldn't know is that by the time this litigation came about is he was really a public figure. There was a classic television show that Walt Disney started called the Wonderful World of Disney. And Walt Disney used to introduce the show. This was when I was growing up in the '60's. When Michael Eisner became the CEO he started doing the same. And so he would introduce the hour long show, the Wonderful World of Disney, with a little statement about what the viewers were about to see. So he was, even though he was a CEO and not a performer, he had become a celebrity in his own right, which I think was one of the reasons that the case became so famous. But let me ask you this, before we go through the detailed chronology... Ok, so it was a media company, and it was more than 100 million dollars. But there are lots of high profile cases, as you say, Anne, that come across our desks here in Delaware. How did this become, you know, the sort of trial of the century, to use a trite phrase in Chancery. How did it become such a big event?

McBride: [00:07:47] Sidney Poitier

Williams: What do you mean by that?

McBride: Well he was a director of Disney, and he was going to be examined at the trial. He was deposed, and I remember everybody was just focused on when was he going to

testify, because everyone wanted to see him testify. And as I recall he was a star in the courtroom.

Williams: Anne, what's your thought?

Foster: You know, there were so many people that were public figures, as you say, who were involved with this, and so it wasn't just Michael Eisner who was a public figure. Michael Ovitz was said by the media to be the most powerful man in Hollywood when he was hired by Disney. And he enjoyed a relationship with the press, I think it's fair to say. [00:08:37] He had quite a relationship with a lot of members of the press. So that probably whetted their appetite. And then you had so many other people who were themselves well known. Roy Disney, Walt Disney's nephew, was on the board. George Mitchell, who was famous for his political life--

Williams: Negotiated peace in northern Ireland.

Foster: Yes. A lot of other people who were each in their own area very well known people. And so I think when you put all those things together, for whatever reason, the media just became very fascinated by the narrative.

Williams: And my perception also is that legally, it actually was a very important case at the time. Because it hadn't been long since 102(b)(7) had been enacted. And corporations were able to insulate their directors from liability for violations of the duty of care. And the question of whether or not a director was acting in bad, faith, as opposed to grossly negligent, and therefore could be found liable, was a question that I think was unanswered. And so I do think there was some doctrinal importance to the case, that above and beyond the celebrity aspect of it, really did interest practitioners and legal scholars. [00:09:58] Well let's move to sort of a chronology through the case. Anne, the complaint is filed and a decision was made to move to dismiss a pursuant to rule 23.1. Do you remember the discussion? Was there anything controversial about that decision?

Foster: So we're talking about the first complaint?

Williams: Exactly, yeah.

Foster: So we, because we had answered and then they amended. And then one just procedural thing, when the case was filed, our firm represented the company. And a different law firm was representing the individual defendants other than Michael Ovitz. There was a change made later that year, so that we substituted in for the individuals, and another firm came in for the company. And so by the time the new complaint was

filed, we were representing the individuals. I think we thought, look, this is a board that's got a lot of outside directors. It seemed to be a complaint that would be appropriate for a 23.1 motion to dismiss. We thought we would go ahead and file and see how that would go. And I assume you guys came up with the same theory on your own?

McBride: Absolutely, sure. And it succeeded. The case was dismissed on that first go around.

Williams: Motion was granted in a pretty routine decision from Chancellor Chandler. It had the memorable introduction about the size of the Disney cruise ship, that regardless of size, referring the size of Ovitz's termination package, if an object can float, it can float. So he drew an analogy there to the size of the Ovitz payment, and said that the fact that it's a big payment doesn't mean that we're somehow going to change our jurisprudence. We're going to protect directors. And he granted the motion to dismiss. Now one aspect of the granting of that motion to dismiss that became a little controversial was that the amended complaint spoke in terms of the board approving the no fault termination. [00:12:13] And Chancellor Chandler wrote his opinion stating that the board had approved the no fault termination. It turned out later, of course, we all learned that there had been no actual formal board approval of the no fault termination. So for practitioners, this raises a little bit of a practice question or point. When you file the motion to dismiss and you're moving to dismiss a complaint that challenges board action in approving the no fault termination, had you done any factual investigation to learn that in fact the allegation of the complaint wasn't true?

Foster: So this is where this many years having gone by I can't remember exactly what we had done in terms of that point. I know that it is, as you say, a practice point that's always difficult because you have to accept the allegations of the complaint as true for purposes of a motion to dismiss. And on the other hand, judges don't like it, as this judge did not later on when he realized that factually that wasn't right. So it was, I can't remember exactly in terms of the facts because this is back now 1998, I can't remember what we had done in terms of the facts then.

Williams: And I would say in my practice, anyway, not at all atypical to move to dismiss a complaint based on the allegations stated therein. That's what you're supposed to do under rule 12, without, certainly, vouching for the allegations of the complaint or making your factual case. And yet it did create a little bit of discomfort. Anne, why don't you walk us through that. Eventually the Chancellor felt that maybe he hadn't been told the whole story when he learned subsequently that the board, in fact, really hadn't acted to approve the termination.

Foster: [00:14:08] That's true. He was pretty irritated about that. And in fact, a couple of times said I want to hear witnesses about this, I don't want to hear from the lawyers any more on certain factual points.

McBride: I was before him on a pretrial motion. I can't remember what it was now, but maybe it was a motion in limine. But he made the point, and this was probably three, four weeks before the trial, that he felt like, you know, he had heard before that the board had approved this and he found out that they hadn't. Now the way... mainly it's [00:14:39] a lesson for plaintiffs here as well because the way it came to light was that the initial complaint was dismissed. But I think it was--

Williams: Let me interrupt you there, Dave. So let's go through the chronology... So the amended complaint is dismissed, there's an appeal taken. And it was an unusual decision from my perspective, at the Supreme Court level. And we'll talk to Chief Justice Veasey about it. The court largely agreed with the reasoning of the court below, but decided to give the plaintiffs the ability to re-plead and directly encouraged them to use, quote, all of the tools at hand, which we know refers to the ability to seek books and records under Section 220. What was your reaction to this decision from the Supreme Court, which seems to agree with the dismissal but then says we think that these plaintiffs deserve another day in court?

Foster: [00:15:38] So the whole Supreme Court process, whereas the Chancery process had been pretty straight forward in terms of briefing and argument, the Supreme Court proceeded in a little bit different way, because, number one, we had the Council of Institutional Investors came in and filed papers because one of the things about the Chancellor's opinion was his discussion about different defendants. And the Council of Institutional Investors was annoyed with the fact that some people might be viewed as independent for certain purposes. So they wanted to come in and file a brief, and the Supreme Court allowed them to do that. So we had that additional aspect of things. And then we also had two oral arguments. We had an initial argument which was in June of 1999, and then they decided to go en banc and we had another argument in September of 1999. So when the decision came out we already had a little bit different of a path than usual. When he said--when the Supreme Court said we're affirming but we're giving them the ability to re-plead, I think it was only in part. [00:16:46] I think maybe there were certain aspects of it that the Supreme Court said this part's with prejudice, this part you can try to re-plead. I guess we thought--

Williams: [00:16:56 inaudible]

Foster: We thought well, we're going to be seeing a books and records demand from them to ask us for materials, and we did.

Williams: And we should say that our late partner, really, recently deceased, legendary Delaware litigator Frank Balotti did those arguments. And I think they may have been among the very last major arguments Frank did in his career.

Foster: Frank, I believe, never went to court again after 1999. Later in the year he, I think, did some arguments in the Pfizer Lambert litigation. But I don't know that he had another Supreme Court argument after the September of 1999 Disney argument.

Williams: So tell us about the 220. Was the production extensive?

Foster: No. So that was probably the rest of 2000 and into 2001. We got a 220 demand, looked for documents. And you know, this was really a time before email had really exploded anywhere near it has now. So you had paper files. I think maybe there were two emails produced in the whole case, maybe three. And so there were paper records that the Walt Disney Company had-- very careful, very complete records. So in terms of meetings and that sort of thing, there were materials. But if I remember correctly, the production was maybe about a foot or so of materials that got produced.

Williams: But they were informative in the sense that they formed the basis for a new complaint which was much more detailed. When you folks read this new complaint, you're now dealing with a whole different kettle of fish. What was your reaction?

[00:18:40] Foster: So I can't remember... We had some settlement discussions, and I can remember being in New York at the Milberg Weiss offices in October of 2001. So we must have gotten to a point where we were getting pretty serious about settlement discussions. I can't remember if they had given us a draft. They may have given us a draft complaint at that point. And I should just mention, because it's a derivative case, of course, you can't settle it by having a payment from the company. So the two sources were from the individuals or from the insurance company if you were going to settle it. Obviously, the individuals, your client included, didn't think that they had done anything wrong and didn't want to contribute to a settlement. So the insurance company was a primary source for any funds then. And we were not able to get them to contribute to get it settled then. When we saw the complaint we could see that there was a lot more detail, but again, we thought we would move to dismiss to see whether we could at least try to get some of it dismissed if not the whole thing.

Williams: And nowadays, I think it's fair to say, that as the law has evolved, defense counsel are maybe more thoughtful than we were twenty years ago, about whether to move to dismiss cases because of decisions like the one we're going to discuss in a second, where you lose the motion to dismiss and the judge says things or paints a picture in that opinion that you fear will make it difficult for you to settle the case or prevail at trial. When I first read the decision from Chancellor Chandler in 2003 on the second motion to dismiss, my feeling was that it read with a very sharp edge, and that it seemed to me to almost be a decision on summary judgment or after trial. Do you folks--

McBride: There were actually two decisions [00:20:43] if my memory's correct. On that second motion to dismiss. The first decision was a letter, a decision, basically denying the motion to dismiss and suggesting that some... I think the way the court put it was some targeted discovery be taken on certain issues. And the issue arose well, should we move for reargument? And we had quite a debate as to whether we should move for reargument. And I think we made the mistake of moving for reargument. And it was that motion for reargument that produced the second opinion that was much more hurtful to the defendants' position than the first opinion was. Because the first opinion made it sound like oh we just need some more facts here, why don't you go out and get the facts for me?

Williams: There was a bench ruling, I believe. The first one was a bench ruling as he refers to in his second opinion, a bench ruling of March 6th, 2003. And then you get the May 28th, 2003 opinion, which was stinging in my opinion. Were you guys--and I wasn't on the team.

McBride: And we did move for reargument on the bench ruling--

Williams: You're right, and it led to this 2003 opinion. What was your reaction as litigators on the team?

[00:22:14] Foster: So what happened was we had in the course of our motion to dismiss briefing, included some documents that we thought had been incorporated by reference in the complaint. And the plaintiffs disagreed with that, and they moved to strike. And it really was that motion to strike that resulted in this opinion, the later ruling that said I'm not going to dismiss this because he looked at that material and he said I think this is outside what was incorporated by reference, I'm not going to consider it as... If you'd like you can convert this into summary judgment but I'm cancelling the motion to dismiss argument. And somewhere in there we had an oral conference with him which might have been on the motion for reargument, I just don't remember, where we had, we got a very clear message from the Chancellor about what he thought about the status of the case.

And it was pretty clear to us that we were going to be going forward to discovery. And then things happened very quickly over the course of the next few weeks. It was sort of almost every few days something new happened where: were we going to be doing summary judgment, were we going to be having targeted discovery, you know, what exactly would be happening? And I remember that we were before him here and there every other week. And all of the sudden I think we had a discovery cutoff of June 15th. [00:23:39] Now this is going from in February thinking we were going to have a motion to dismiss oral argument coming up, to then no more motion to dismiss argument, we're off to the races and we have a discovery cutoff of June 15th. And I can tell you at the time we were representing all the individual defendants other than Ovitz. Because of the motion to dismiss stage, you could do that, and in many cases that's happened. And all of a sudden I had to go get everybody's documents, respond to the discovery, start preparing everybody for depositions. And so I can remember pretty vividly, March, April, May, June, all the months of that year.

Williams: And a really unusual aspect of the opinion, that to me, reflects just how unhappy the Chancellor was with how things had progressed... at the end of this opinion on re-argument denying the motion to dismiss, he writes as follows: “The practical effect of this ruling is that defendants must answer the new complaint and plaintiffs may proceed to take appropriate discovery on the merits of their claims. To that end a case scheduling order has been entered that will promptly bring this matter before the court on a fully developed factual record.” He had entered that order [00:24:55 inaudible] which set a very prompt discovery and trial schedule. I don't think I've ever seen that before and I think it reflected the court's attitude. And I was struck by when I came to read the opinion--and I read it a couple of times. Once just as a casual observer, once much more carefully as I was about to join the team. But I was struck by some of the language. Just read a little bit. It summarizes the allegations of the complaint and says: “These facts, if true, do more than portray directors who, in a negligent or grossly negligent manner, merely fail to inform themselves or to deliberate adequately about an issue of material importance to their corporations. Instead the facts alleged in the new complaint suggests that the director, defendants”--and he italicizes this—“consciously and intentionally disregarded their responsibilities, adopting a we don't care about the risks, attitude, concerning a material corporate decision.” And the opinion is chock full of that type of language. So as you go about discovery, do you have a sense of foreboding or just general uncertainty?

Foster: [00:26:11] So I'll tell you, it's funny, when... and we'll get to this... When we won the case, all these people said to us oh I knew you guys would win, I knew your clients would win. But a lot of those same people in May of 2003 and June and so on, were saying oh you're really in a jam, that opinion, that was pretty brutal, you're really really in a jam. And I'll tell you, the language of that was, as you said, pretty stinging. And so I just

kind of put my head down and started preparing witnesses and defending their depositions because that's the only way to get through it is to just do what you need to do to represent people. But I always had that in the back of my mind. And it made everybody much more interested in overseeing how it was all going, everybody from every corner.

Williams: Dave?

McBride: Yeah, I guess my reaction was I had one sort of central question after the opinion came out and as the discovery was starting. And in a sense I thought this was the jugular of the case. The case had been presented in the media, and largely presented in the complaint, as if Ovitz had wanted to leave. And so we was being paid 144 million or whatever the exact amount was in terms of stock option value, he was being paid all this money for having worked eighteen months, and he wanted to leave. And if you believe that those were the facts and the board in fact hadn't acted on this termination, it was just Eisner and Ovitz working it out, then I thought you had a pretty difficult situation. [00:27:56] On the other hand, if Ovitz didn't want to leave, if he wanted to stay, and he was being terminated against his will, then all he was getting was what he was due under the contract. And I never thought under the contract itself, I never thought... there were two claims. One was a claim that it was a breach of fiduciary duty to enter into the contract, and a claim was breach of fiduciary duty to terminate him without and not for cause. I never thought much of that first claim on the contract, because from our perspective it was arm's length negotiation. And we knew how much money he had made before he was at Disney, and we knew how much he was going to make at Disney was largely offset of what he was giving up.

Williams: This guy was the most successful agent in Hollywood by leaps and bounds.

McBride: I mean he was probably making more in his agency. Not only was he an agent for stars, he was actually producing movies. So he was quite wealthy. I think he went to Disney thinking this was a one in a lifetime chance to become ultimately, perhaps, CEO of a major American corporation, an iconic corporation. So I never thought much of the claim it was a breach of fiduciary duty when they entered into the contract. And my big question was did Ovitz want to leave or did he want to stay and was he forced out? And subsequently I learned through the discovery process and through consulting that he wanted to stay. And to me that changed the complexion of the case completely, in that it affected our trial strategy as well. And I'll tell you about that later.

Williams: Well let's skip to trial. And I will just share with you my impression when I got involved. Our partner Jesse Finkelstein came to me and said hey, would you get involved in the Disney case because we need more experienced trial lawyers. And I didn't really

know much about it, I just had a passing knowledge of the case. And I sat down and read the second motion to dismiss opinion very carefully and I thought this is going to be a bloodbath. Chancellor Chandler has already decided in this case that these directors acted, in his mind, he's decided these guys acted in bad faith and I don't like the looks of this. And I agreed to do it. And I went to a meeting that was at Morris Nichols as I recall. And trial was coming, maybe trial was three or four months off, or something, I can't remember. But it was a big group. It was the entire defense team. Mark Epstein had come in from California, Bob Payson was now representing Sandy Litvack, the general counsel. Gary Naftalis, one of the most prominent white collar litigators was representing Michael Eisner. Gil, of course, great Delaware lawyer, was there representing Roy Disney and Stanley Gold. [00:31:11] Frank Balotti, another legendary litigator. And then great people like Anne and Dave, and others. And I was struck by the camaraderie in the room and how everybody was joking and their spirits were high. And I remember thinking don't these people understand what's about to happen here. And it was a lesson to me in experienced lawyers, you know, taking on a challenge in good spirits and with a good attitude, and everyone seemed to be really working together. And I think that ultimately was really important to the success of the defense. So let's talk a little bit about trial and trial strategy. Dave, you guys had a really interesting position in that your client had not been involved in the board's decisions. It was certainly foreseeable that the non-Ovitz directors could lose and Ovitz could be exonerated. How did you look at the case, you and the Ovitz team? Did you have a we're all in this together, we're all in the same boat, let's all paddle in the same direction, or was it something a little more nuanced?

McBride: [00:32:30] I think on that, what to me was the critical issue is did Ovitz want to go or was he forced out against his will? I always thought that if the court concluded that Michael Ovitz was forced out against his will and all he received was the contractual compensation he was entitled to if he was forced out early, that it would be... That at a gut level, if a court wasn't going to hold Michael Ovitz accountable for this alleged overpayment, that it was unlikely the court was going to hold directors who were disinterested in the decision, liable for any part of the payment. So my attitude was if we can convince the court, and I thought we could, cause I thought it was true, that Ovitz didn't want to be terminated. And it really had a, I don't want to say a devastating effect on his life, but it was very hurtful to him, both at a personal level, professional level, and a monetary level. I don't have any doubt that he would have much prefered to stay on at Disney. And if we could prove that then it would be difficult for the court to hold anyone else responsible for what Ovitz got. For that reason when my recollection is when the other defendants called us and said we've been talking and we think the first witness ought to be Michael Ovitz--

Williams: Let me back you up a little bit.

McBride: Ok

Williams: Before, let's talk about their depositions, the Ovitz and the Eisner depositions. Now these guys had had lots of one on one communications, and you certainly could foresee they were each going to be asked about the same conversations. So before the depositions, did you coordinate with each other, with counsel, saying hey, just want you to know counsel for Mr. Eisner, this is how Mr. Ovitz recalls this conversation, and this is what his testimony would be, and we're wondering if that's consistent with Mr. Eisner's recollection? Was it that type of coordination?

McBride: [00:34:41] I didn't do that. I wasn't involved in that. I frankly don't know. I presume there was some effort of the defendants to inform themselves as to what each other would testify to, certainly it was that case and the trial.

Williams: Anne, were you involved in that at all?

Foster: No, because by that point we were no longer representing Michael Eisner. I'm not sure that there really was much coordination about that. Because the feelings were still pretty--

McBride: Pretty raw.

Foster: Pretty raw.

McBride: All through the trial. And I think--

Foster: But even more so still in the deposition phase.

McBride: And I think in a way that helped us. Because we were... our biggest problem was that Eisner had written all sorts of memos that impugned the work of Ovitz. Now frankly, I think Eisner had written those memos because he previously had had, after Frank Wells died, my recollection is he had difficulty working with second in command. My recollection is he went through a couple of other, at least one other person. And there was some criticism of him in the media for not being able to work with people. And so I thought that he was running these memos not so much because he wanted to make a case for the plaintiffs, but because he was trying to justify why he was now getting rid of yet another person, a second in command. [00:36:14] Now those memos created problems for us, but we never really believed that anybody would, we didn't believe those memos were true, and we didn't believe that the plaintiff would be able to prove cause for

termination. But for us the animosity between Eisner and Ovitz support the story that Ovitz didn't want to leave. But it also supported the story that Eisner was after Ovitz, that what Eisner was saying about Ovitz wasn't really true.

Williams: The documents you reference, there was a number of them. And they were fascinating documents, the likes of which I've not seen in my practice since. It's just highly unusual. Just as an example, I have in front of me a letter that Michael Eisner wrote to Michael Ovitz the first week that Michael Ovitz had been on the job. And it is a five-page single spaced letter that talks about all types of things as Ovitz is coming on. How we at Disney tried to avoid mediocrity, how we run our operations, his view on acquisitions, his view of corporate governance. Laid out in great detail. I've never seen anything like it. He ends the letter with those are my thoughts, let's have fun, this is basically your first week on the job, and I can already see how well it is all going to work, let's find some time to discuss the future. So that's October 10, 1995. How quickly things changed.

McBride: Or did they?

Williams: Or did they. Well that's an interesting perspective.

McBride: Because that letter is a two-edged sword. [00:38:14] If you were someone who wanted to lay a foundation for terminating someone later, you might write a letter that had within it certain themes that you would then later use, while at the same time saying oh I'm sure this is all going to work out, etc, etc.

Foster: Or if you were an experienced corporate executive, you might know that motivating someone with positive comments was more effective than criticism and might be a way of reinforcing what message you want to bring but also trying to be positive to get the benefit of what you had just signed up for. You can see this is what we went through in trial.

Williams: We then have a letter, 10.1.96, so it's a year later. This is from Michael Eisner to Irwin Russell about whom we'll have a long discussion, and Ray Watson, two key members of the board. And he describes Ovitz as being a huge mistake for the company, that Ovitz has quote, pathological problems. And Eisner goes on to say, quote, and I hate saying that. And basically says Ovitz doesn't know truth from fiction. There's a line in here that I remember thinking well how are we going to deal with this in the trial? Quote, the biggest problem is that no one trusts him for he cannot tell the truth. So this is from the CEO to two directors, and remember that the company paid Ovitz this 140 million dollars because the company did not attempt to fire him for cause. [00:39:57] And I always thought that the best claim that the stockholders had was that if in fact this guy was a

pathological liar, which is the import of this letter from the CEO to two directors, why wouldn't you fire him for cause and save all that money?

McBride: That's Eisner's letter, right?

Williams: Eisner letter to Irwin Russell and Ray Watson. And then there is a draft letter that Eisner never sent to Ovitz. Am I right about that, Anne? I think he never sent it. And it's a letter written at about the same time that confronts Ovitz with all of his failings in the eyes of Eisner. And Eisner wrote this on a plane, decided that he would not send the letter, and shortly thereafter, Ovitz was terminated. So these documents are at least in my experience, unique documents for a defense team to have to deal with because, you know, you knew that Michael Eisner was going to have some very tough cross examination to have to deal with. So Dave, you were getting ready to say about the sequence of witnesses at trial. Tell us about that conversation.

McBride: Well the defendant, the other defendants called us and said we think Michael Ovitz ought to go first. And our first reaction was oh yeah because none of your people want to stand up there initially. And our... at least one person on the team, their initial reaction was we don't want Ovitz to be upfront right at the beginning. But then someone suggested maybe it was critical that Ovitz be upfront right at the beginning. [00:41:42] And that was because we didn't want the court to be hearing evidence like this letter about what a terrible person Michael Ovitz is, and sit through what we then thought would be weeks, but it turned out to be months, of testimony, of people who were criticizing Ovitz. So we thought it was going to be important to get Ovitz on the stand and to establish roughly three things. One, he didn't want to be terminated, two, that none of the criticism leveled at him in these letters were true, and three, and this was the most delicate part, that Eisner had a reason to mislead about Ovitz's performance. And we had a thread that was, given all the relationships, was really more art than science, for sure. But part of it was the fact that these were two strong personalities, two very ambitious people, and they just didn't get along. And we wanted to convince the court, and I think we did, that Eisner's criticism of Ovitz really wasn't credible because it was these were criticisms born out of an animosity that arose between them for other reasons.

Williams: Let me ask you this question that maybe you can answer, maybe you can't. Obviously, the goal of the Ovitz team was for Ovitz to win. Were you indifferent as to whether the other directors won or were you also hoping that there would be complete and total defense victory?

McBride: [00:43:35] I don't think we were indifferent because we didn't, for a variety of reasons, I don't remember if I can disclose this part, but as anyone knows in a litigation,

there's always the possibility of cross claims or indemnification claims or contribution claims being made. So I don't think any defendant can be indifferent to what happens to co-defendants when you're accused of having acted together in doing something wrong. On the other hand, like I said before, I thought that if he could convince the court not to require Ovitz's to disgorge any of the compensation that he received because after all it was only what he was entitled to under the contract, that no one else likely would be held responsible for that. And I'll tell you a little trial story is, Ovitz was on the stand, I forget--

Foster: Couple days?

Williams: Several days, yeah.

McBride: And at the end of the last day I happen to be in the back of the courtroom and the bailiff was there, Rocky Justice was the bailiff's name. It was a name of quite notoriety.

Williams: His actual name was Rocky Justice?

McBride: And I was standing in the back of the courtroom as we were, I think because I used to occasionally go out to where the reporters were in the lobby of the courthouse. There was a room where the reporters sat and they watched the trial on a TV screen. And every now and then one of us would go out there and make sure they understood what was being testified to. And I think it was part of the examination we were talking about stock options. So I went out to where the reporters were to sort of explain to them what was going on. And they did not understand it at all. I'm not sure if after I was done they understood it either. So anyway, in the back of the courtroom. And as the examination was about to come to an end, Rocky Justice turns to me and he goes, I tell you something. I never in a million years thought I'd feel sorry for that guy, referring to Michael Ovitz. And when he said that to me, I thought, we are going to win this case because that to me was what it was all about.

Williams: Well I remember my role during his testimony was to object on behalf of our clients, the outside directors as they called it. And I remember listening to Ovitz's testimony and thinking this guy believes till this day that he can come back to this company, ten years later, and make it work. That he really thinks it could have worked. And he thinks today that he can come back and work at the company and be successful. And that may have been all what he was trying to sell. I don't know. [00:46:35] But it did convince me.

McBride: No, I think it was true. I think it was very true.

Williams: Yeah. After I heard his testimony and Eisner's testimony, I thought I can see exactly why they hired him, why they believed it might well have been a great thing. I can also see, having seen both men testify, that it was never going to work and that he had to leave. And so I felt good about the case at that point, too. And let's talk about the order of the other witnesses because we had a lot of discussions about that. We had some witnesses who were elderly, who did not have strong recollections, who hadn't remembered a lot in their depositions. We'd decided to bring them all to trial, everybody who could testify. Talk about that decision.

Foster: Sure. So we had seventeen, I guess there were seventeen individual defendants. We had thirteen clients. We had one client who was, had medical issues and just was not going to be able to testify. But we thought if you had people who were potentially going to have a judgment for 140 million dollars entered against them, plus interest, and it had been going on for a while, we wanted those people to all be able to come in and have their say. [00:47:52] Because we thought that when the Chancellor heard them talk he would not be able to conclude that they had violated their fiduciary duties, that he would conclude that each one of them had a different background and different approach to this. And so we wanted them all to come and testify. And when we were talking about the order of witnesses, it was tough because since you have a judge who's going to be making the decision, you want the judge to get the whole chronology in his mind, but you don't want to do it in a scattered way. So it wouldn't make sense to have someone peripheral start. You wanted a major player. So really it would mean Eisner or Ovitz. And you know, Eisner, it would be helpful to have him later so that if there were other things that needed to be addressed he would be able to do that. So it made sense for a lot of reasons to have Ovitz go first. But then in terms of the other witnesses, we originally thought it was going to be a four week trial, it ended up going over pieces of four months. So part of it then became more about people's schedules than anything because we originally thought they were all coming in October and November and then that ended up not being the case. Some people were testifying in December, so we didn't have total control over the order of the witnesses as we went on because people had other commitments in life. But we did remarkably manage to get everybody on the stand. [00:49:18] And actually one thing that really helped was we had rented this house down the street that we used as an area where witnesses were standing by. And because we had a TV feed there we could see how it was going with the prior witness. And so we never had breaks, which was remarkable when you think about all the trials we've done, usually you'd have to get up and say oh I'm really sorry, this witness won't be able to be here till tomorrow, or this witness needs to come over. We were at a location that was a half hour drive from the hotel. We always had people on deck. So we never had a break because of witness unavailability. And that really made things move a lot more quickly. It was convenient for

the court, it was convenient for the witnesses. Made for long trial days for everybody, though.

Williams: I remember well, and this I think goes to what you were saying, the decision to call everyone to give them their chance. We thought they were good people and we thought that if the Chancellor looked them in the eyes that it would be much harder for him to conclude that they had acted in bad faith. [00:50:22] Because we knew in our hearts that they had not acted in bad faith, that they had done what they thought was right. And I thought it was an education to me as a still relatively young lawyer that some of these peripheral witnesses could actually teach you great lessons. Because we're just trial lawyers and we read these cases in the abstract, but one of the major issues was should the board have acted as a board to approve the no fault termination. And one of the defendants was a very successful business person who was advanced in age but very lucid, a very smart and experienced man. And he was almost disdainful of that theory. He said no no no, you don't understand, Michael Eisner was the CEO, he reports to us. As to the people below him, I want him to fire them if they're not working out with him. And I don't really care the basis. If they're not on his team and he doesn't want them on his team, then they need to go and he needs to take care of that. And so you know, he brought a perspective that I think, and other witnesses did as well, to the judge, some of these issues that we litigators and corporate governance folks were a little squeamish about. Some of the real world business people were not so squeamish. And so let's talk about Irwin Russell. Because Irwin became really the key witness in the case, and we knew he would be. He was the chairman of the comp committee, he had negotiated Ovitz's agreement, he was a close family friend of the Eisner's. And he was an unusual person with voluminous notes. And Anne did a masterful job in putting Irwin on and using Irwin, to, as lawyers like to say sometimes, to carry the water. He carried the water of the entire chronology of the transaction, both aspects, the coming in and the going out, so that these other witnesses who maybe weren't quite too strong in recollection, didn't have to carry water. They could just come in and make their point about why they did what they did and why they thought it was all appropriate and then get off the stand. So Anne, what was your strategy with Irwin and his hundreds of pages of handwritten notes?

[00:52:45] Foster: So Irwin was a really great guy. He had a really interesting background. He had been a lawyer for quite a long time. He'd done some work in the Eisenhower administration with the wage stabilization board. Then he had gone to New York and worked in private practice and then he'd worked as general counsel for I think Elektra records. He'd done work for Bob Banner Productions. He was involved in setting up some of the things to do with Roots being a television program. I mean, he had had quite an extensive background in the entertainment industry. He knew the music business well, he knew the television business, he'd done some things. I think he had a consulting

contract with Warner Bros at one point. So he had this very deep entertainment background experience which made him a terrific lawyer for Michael Eisner.

And he was a notetaker. He and I spoke the same language, we both did that kind of thing. And we loved to try to work together to figure out exactly what happened when. So when I first met him to review his documents to produce them, I saw that he had hundreds of pages of handwritten notes. And I defended his deposition, we went through all of those to try to remember exactly what happened when and refresh his recollection. And then put him on at trial. And as you say, we had met all these people, we knew they were good people who had intended to do the right thing and it was a matter of telling their story. But Irwin had a special ability to put it all together in terms of context and chronology.

Williams: And his notes gave him a contemporary road map.

Foster: [00:54:29] Yes. And he... So his notes were really quite something, but then there were also things like we would sit there and look through his files and we would find that something was on bond paper, and so we were like, ok this probably means this was the copy you were taking to the meeting. And so then that would give you a little piece of evidence. We don't really have that anymore now that everything's electronic, the significance of whether something's on bond paper or not is lost to time.

McBride: It's all metadata.

Foster: He had a lot of records. And Ray Watson also had some very important records. I'll just say they had done something I never heard of directors doing before, or since. They had on their own generated these spreadsheets that tried to calculate the value of the options that Michael Ovitz was getting. So yes, they hired a compensation expert, but they also had done this. Ray had generated spreadsheets. He and Irwin had worked together on those. And so people can say whatever they want to say about, oh yes, we considered this that, and the other thing. But nothing really says we really looked at this like coming up with your own spreadsheets. And the compensation expert even said I've never seen any--

McBride: Long before created spreadsheets was common.

Foster: Absolutely

McBride: I mean, this was in the mid-90's.

Foster: Yes, 1995. [00:55:44] So we knew we wanted to just tell the whole story as thoroughly as we could and Irwin was on the stand for several days as a result of that to just explain how carefully this all was done. Because you know, the narrative that the plaintiffs had painted in the complaint, and then the press had the complaint to look at, was oh these directors didn't really pay attention, Eisner sort of put all these people on the board who didn't know or care or anything, about the entertainment business. And they were really very hurtful in terms of some of the things they said about some of our clients. And so we were trying to explain, no that's not really the way it was at all. These are all substantial, careful people who might have different backgrounds, and we wanted to explain what we did. But Irwin luckily had these amazing notes. Another thing that he did was … another one of the defendants was Sidney Poitier who just happened to have been on a friend's yacht when he was called to ask about the hiring of Michael Ovitz.

Williams: Crucial [00:56:53 inaudible crosstalk]

Foster: It was a very, very crucial time. And the plaintiffs as you can imagine, and the press, had a lot to say about that. And there was some suggestion that maybe the phone call never happened or you know, or if it did it was a thirty second phone call. And I can still remember you know, Irwin of course, always said it was a long phone call, there's no question, it was a long phone call. And we were a few weeks before trial and I was in his offices. And he said, yeah, it was a long phone call, I know it was a long phone call. In fact, it was such a long phone call, that when I got the bill, I sent the bill to the Walt Disney Company to be reimbursed. I usually don't do that, but he said it was a really long, really expensive ship to shore phone call. He said I might still have a copy of that receipt. Now we had searched his records that were the Disney records, but his office administrative records, there wasn't any reason to search those because we didn't know they would contain anything. He went off and he looked and he came back. And he found a cover letter that he had sent to the right person at Disney with a copy of the phone bill. And it had the date and it had the time that the phone call started, and it had the time the phone call ended. And it was something like a 51 minute phone call.

McBride: I was going to say, about an hour.

[00:58:08] Foster: And you know, so we produced it that day to the plaintiffs who weren't happy to see it. But again, the contemporaneous record that Irwin had. And that was a really crucial thing because you can think as a judge, oh somebody was on a yacht, how much was he paying attention. Well he paid attention for 51 minutes. That's a pretty long call.

Williams: Off the coast of Sardinia as I recall.

Foster: Yes

McBride: Yeah and I want to give Anne a shoutout because I thought that her direct examination of Irwin in particular was some of the best direct examination I've ever seen. Not only in terms of the preparation that went into it, but I don't think people realize how difficult a good direct examination can be. Because the lawyer's supposed to step back. You don't want to make it look like it's the lawyer testifying and the witness is there to say whatever the lawyer wants. The lawyer needs to step back and give the witness the opportunity to tell the story. And that takes a lot of preparation, and it takes some real skill. And it was, you were just excellent.

Foster: Thank you

Williams: And part of it was that there were so many notes that you couldn't go through all of them. And so Anne needed to figure out with Irwin which ones we were going to use. And I agree she did an amazing job. And by the time it was over, Irwin's testimony, it felt to me like I don't know how we can possibly lose this case. Because whatever this fellow did, maybe the judge might disagree with it, but it was careful and it was not undertaken in bad faith. And they had been unable to exploit the relationship between Irwin Russell and Michael Eisner to really discredit Irwin. And so I agree with you, Dave, it was crucial. [01:00:04] Let me ask this, so we often as defense lawyers give our clients the sort of standard advice, be careful with what you write down, follow your normal practice, but I kind of hope your normal practice is not to take notes because they well may be the subject of extensive questioning in depositions and trial, and people may take things out of context. And you may write something and then when you come to more fully understand the situation realize that what you wrote really isn't quite an accurate reflection of your thoughts. So lots of defense lawyers give that type of advice without ever telling anybody don't create notes, we certainly don't encourage it. But where would we have been without Irwin's notes? And so it's an interesting little tension there, isn't it? You like notes if they're good notes.

Foster: We would have been, we would have been in a real jam. And also, by the time we had the trial this was October of 2004. So these events happened in 1995 and 1996. And one of the other things that happened was not our friend... well for everybody, nobody's memory can be that good that many years later as it was when it happened. But Sandy Litvack, the general counsel, had called an outside lawyer to ask him... you know, Sandy had thought about it and he said I don't think we have grounds to terminate him for cause. But let me talk to somebody outside about it. And he called an outside lawyer and he spoke to him about it. Well unfortunately several years later by the time that person

was deposed he didn't remember that conversation. And so we didn't have the benefit of that. And so that was something that worked against us to have so many years pass.

Williams: And it would have been a much easier case had there been a legal memo from somebody saying you don't have grounds in our view to fire him for cause. And if that memo had existed and been shared with the board, some of the issues that we dealt with might not have been so pressing. So in trial, Dave we had the sensitive issue of defense witnesses being crossed not only by the plaintiffs but also by counsel for other defendants, particularly Mr. Ovitz who was in a slightly different situation than the rest of the directors. Tell me about how difficult that was.

McBride: Well I think we had a protocol that basically we shared with one another the questions we anticipated.

Williams: I don't think we did at first. I think that protocol came in after maybe some cross that people weren't happy with.

McBride: Ok. I don't remember, and I don't remember what cross they were unhappy with. Although I remember that I had some... I hate to say cross, but I had some examination of a defendant who caused Eisner's counsel to get upset. But for us the biggest problem was that Ovitz and Eisner still had, even all these years later, still had a tremendous animosity toward one another. Ovitz because I think he generally felt that Eisner had sort of ambushed him and hurt his career profoundly. And I'm not sure what the source of Eisner's great animosity was, but I tell a story that may be out... [01:03:52] Remember the hotel room story that we can share that?

Williams: Sure

McBride: Ovitz and Eisner had so much animosity for one another that they were never at the trial at the same time. And I think they made it a point that neither of them wanted to be in the same town as one another. But the animosity was so great that the hotel that we were all staying at had one really fabulous suite and I think Ovitz stayed in it at the beginning of the trial and Eisner was upset when he found out that we would be in the same room that Ovitz had even been in weeks before. There was that much animosity. And like I say, we were in a difficult, as I said earlier, a difficult position of needing to impeach Eisner's description of Ovitz’s job performance while at the same time not alienating Eisner to the point where he would attack Ovitz. So--

Williams: I must say I don't recall well all these years later the cross of Eisner by I'm guessing it was Mark Epstein. Do you recall much of that?

McBride: No, I don't remember that, no.

Williams: Yeah. I don't remember it being an event anyway.

McBride: No, I don't either.

Williams: Why did this trial take so long?

Foster: It's a good question. [01:05:19] I guess as we say we were scheduled for four weeks. It may have just been because the length of the cross. I mean, the cross was pretty long, sometimes longer than the direct. There were a couple of days that we didn't have trial because of Election Day, Return Day, Veterans Day. So we lost a few days in November and Thanksgiving.

Williams: But we started October 16th and we went, with exception of holidays, we went through mid to late December, broke before Christmas. All the fact witnesses were done by then, I believe. And then when we came back in January. There were a few experts, I think.

Foster: Yeah, maybe a week and a half, two weeks in January.

Williams: I mean I think the shortest answer to why it went so long is that the Chancellor was just determined to give the plaintiffs as much time as they wanted, and he did. And I think appropriately. I think very appropriately, particularly given the earlier opinion by the court, he wanted to make sure all the facts had come out, whatever the plaintiffs wanted to put on. But I remember, and you two will probably remember this better than I do, we were in chambers at some point and we were talking about the trial getting extended, maybe into December, maybe into January. And plaintiff's counsel was discussing a particular line of questioning, I can't remember what it was. But he thought it was critically important and it was taking a long time to cover this. And the Chancellor said well to tell the truth, Mr. Schulman, I don't find this line of questioning to be particularly enlightening. And he said oh well, but this is the key to the case. And I thought, oh, boy, we must be doing really well if the plaintiff's counsel thinks the key to the case is something the Chancellor doesn't think is particularly enlightening.

Williams: Well plaintiff's and defense counsel obviously have different perspectives. There were many cross days that I thought we spent a lot of time on things that weren't in any way going to really affect the outcome of the case. There was something about an airplane or a helicopter or something and all kinds of things about Ovitz's expenses.

McBride: Oh, I remember a question, that Schulman was cross-examining Ovitz. [01:07:45] And I wish I could remember it all, but he was cross-examining him about a use of a helicopter and he was going you took the helicopter on such and such a day and you went from there to there. And he said does the helicopter use fuel. And Ovitz goes, Mr. Schulman, he says, this must be a trick question because I think that the answer's obvious, and someone as smart as you wouldn't ask me that question if it weren't a trick question. But tell you what, I'm going with yes.

Williams: Well it was very clear that the Chancellor as the trial wore on wasn't angry with us but had no desire to see this case come back to him again. And I believe that motivated him similar to what you said, Dave and Anne, to let people take as much time as they wanted. He just didn't want anybody to have a complaint about the manner in which the trial was conducted and ultimately there really wasn't any such complaint. Let's talk about a couple sort of peripheral things. So before we leave trial, Anne, let's talk a little bit about the biggest celebrity in the trial, Sidney Poitier. The courtroom had started, it was packed at the beginning of the trial for the first couple of weeks, and then it started to thin out. [01:09:12] And then when news came that Portier was going to testify it packed up again. So tell me about putting him on?

Foster: Sure. So I'm a believer when you put a witness on the stand that you have the person tell his or her story. It doesn't do any good to try to have somebody tell somebody else's story because, you know, just like when you train young people to do something, when you're under stress or you're in a difficult situation, you always revert back to what you really are. And so with every witness, the witness tells his or her background the way it is. And with him there had been a lot of criticism that he was in the entertainment business but didn't necessarily have a business background. What I wanted to do is explain that he had a business background in the entertainment business, and give his story so that maybe he wasn't used to contracts like Michael Ovitz's in the corporate world, but he had the equivalent in the entertainment world. So for example, there was a situation where he was making a picture and the director was hired and had a contract which was very common in Hollywood, that was you get the whole contract even if we fire you. And very early on, I think maybe two or three days into filming, it was clear that his vision for the film was really not the right one and he was going to have to go. [01:10:34] And he got fired, and he got paid his whole contract. And so part of the direct that I did for Sidney Poitier was to tell his life story. And again, with that, I wanted the judge to understand that... because good faith was really going to be an issue here, I wanted him to understand who he was as a person, what his background was, and how hard he had worked in so many ways, to get to the point that he had gotten. And I knew if the judge had heard all that he would understand that there's no way that this man would have done something

that wasn't in good faith. So I had him tell his whole background which is incredible. And then his entertainment career, including stories such as the one where the director had been fired and had gotten his whole contract. And the plaintiffs were complaining about why I was going through all of this. And I know that they thought that I was just doing it to try to dazzle the judge. That wasn't it at all, it was part of his whole story. And I'll tell you, in the Chancellor's cross-examination he asked him some questions himself, which doesn't happen much during the trial. The Chancellor was pretty much letting the lawyers be the ones to do it. But Chancellor Chandler had several questions for Sidney Poitier. And when he excused him from the stand I remember thinking to myself there's no way that Chancellor Chandler is going to find that Sidney Poitier breached his fiduciary duties. [01:11:52] I just knew it right at that moment.

Williams: We had a similar moment with one of my witnesses, Tom Murphy, who had been the chairman of Cap Cities. He basically built ABC from a UHF station in upstate NY and built this Cap Cities company, which then became ABC. And Murphy was an elderly gentleman but full of charisma. And he was the international chairman of Save the Children. I think it's Save the Children. And so in just meeting with him I said well what do you do for Save the Children, Tom? And his office was of course in midtown Manhattan and he was a big executive. And I thought he probably supported fundraising for the organization, whatever. And he said well I do fundraising, etc, and run the board. And he said I also spend, I can't remember what number of weeks a year it was, but it was something significant like six weeks a year traveling around the world to our various sites. And I said oh what sites are you talking about? And he gave the list of the places that he would go every year. Of course, when you think about it, Save the Children works in places where there are children who are starving. So these were the most downtrodden places on the face of the earth. And he explained, and Tom had thick steel braces on his legs to support him. But he said I stay there, I stay in the camps, I sleep in the tents because when I do that it really motivates our young volunteers who work for Save the Children. And he gave that testimony as part of his background. And it was the same as Sidney Poitier, where like, ok, who is ever going to decide that this man acted for some bad motive or in bad faith? So there are a lot of wonderful stories like that. [01:13:48] Talk about the press, Dave. I was really surprised to hear you went out and talked to the press, I don't think we ever did. Our team, I don't think we had any, to my knowledge, intentional interaction with the press.

McBride: Yeah, we had, I think at the end of every trial day, the Eisner team and our team... and maybe not every day, but not infrequently, we would talk to the reporters and try to highlight to them the testimony. And they often had questions cause they didn't understand some of the testimony, certainly about the stock options. I was glad I went out in the room when that testimony was coming in because nobody understood stock option

analysis and didn't understand the difference between 144 million and what the options were really worth, which was a lot less. But we used to talk with, I remember, the Washington Post, the Wall Street Journal, and the New York Times. And it was a little bit of an education for me because we would talk to the reporters and then wait to read the paper the next morning to see what they reported.

Williams: [01:15:09] Were you quoted in the papers or was it not for attribution?

McBride: It was just not for attribution, it was background. And they wouldn't have cared to quote us in any event. But I came away with the impression that the New York Times had a tendency to print anything bad about the defendants. And usually ignored our exculpatory evidence. The Wall Street Journal printed mostly the exculpatory stuff and didn't seem to focus much on what the plaintiff's proof was. And I thought the Washington Post had pretty evenhanded. Now, I'll probably get in trouble for saying that.

Williams: It was a unique experience, at least for me, to read in the morning when you woke up, a press report of the day before. And I remember one day... I can't remember what witness it was, but it was one of our clients. And the witness had done fine, he had exactly told the story that we wanted him to tell. And I read in the paper the next morning some professor who I had never heard of, saying oh this was devastating testimony for the defendants, and this is the kind of testimony you can build a case around from the plaintiffs. And I thought boy, I hope they're wrong. I don't think they're right. [01:16:31] But you do have to take with a grain of salt sometimes the things that you read, because a lot of times people don't quite understand sort of the nuances of the trial. How about all the local folks? I don't know how many local people that there were at trial, but it was, there were maybe six or seven folks who came regularly? I remember there were a group of ladies that invited some member of the defense team over to their home for dinner, Anne? You used to interact with those folks a little bit.

Foster: Yes, there were a lot of people, as you say, more at the very beginning. And then there were some people who came throughout a lot. And I think it was enjoyable and entertaining for them. Because actually another part about the media coverage that we hadn't mentioned yet is that Dominick Dunne was there for the first maybe six weeks. And he stayed in our hotel. And I remember one morning when I was reading the News Journal and Dominick Dunne was sitting at the next table at breakfast, and I said oh, there's something about you in here. And he said what is it? And I read it to him, which was kind of funny. But there was one day-- so Dominick Dunne would come every Sunday night, I think, stay for the week, and then go back Friday night. There's one memorable picture where-- there's a reporter named Kim Masters who's a really, well-known entertainment reporter in the Los Angeles area. And she's written a lot about Michael Eisner over the

years. She might have even written a book about him. And Dominick Dunne was obviously very well known. And Michael Eisner posed for a picture with his arms around each one of them, and all the people who were there from the press took a picture of it and all had a good laugh about it. [01:18:14] How improbable that was as a photograph.

Williams: It was certainly a unique experience. There were so many photographers, particularly in the beginning. But there were some that stayed there throughout the whole trial. When we got off we had a bus the first day that took us over or like a van that took us over to the courthouse, the defense teams, at least a lot of us. There had to be twenty-five photographers, as if we were celebrities as we got off of this shuttle. And I remember thinking why is this so newsworthy? But it was, and it was all the celebrities. And it was also, there was a hot issue at the time in the financial press, in the academic world about executive comp. Had executive comp just gotten out of hand? And this case really sort of served as the poster child for that issue. Dave, do you remember that time?

McBride: Actually, when the case was first filed, even back then, there was so much publicity about Ovitz and I think it was because at that time executive comp was becoming a major issue.

Williams: Did you ever, either during the trial or after, either of you, think about how the plaintiffs might have done things differently and possibly gotten to a different place?

[01:19:38] Foster: Yes, I've had a number of people over the years talk to me about how they might have tried the case differently if they were on the plaintiff's side. I think one of the things that happens is you've got, we ended up with how many sets of defense counsel? Because we had Michael Eisner's counsel.

Williams: Sandy Litvack

Foster: Sandy Litvack

Williams: Roy and Stan

Foster: Ovitz, Roy and Stan and us. So we had five different sets of defense lawyers.

Williams: Plus the company’s.

Foster: Plus the company's, sorry. And so you've got all these people who were there all playing different roles. And if you remove some of those people from the equation, if some of the directors are just trial witnesses but not defendants, you know the amount of time

that they spend getting ready for trial is going to be quite different. I spent a staggering amount of time preparing Irwin Russell for trial. If he had just been a witness, I would have still spent plenty of time, but I spent really all of my waking hours preparing for that trial. So I think a lot of people have talked about how maybe they would have dismissed some of the people out so that they wouldn't be there coming to trial. Because then you would have probably had, I guess probably would have just had their deposition testimony, they wouldn't have even necessarily been coming to trial. I think that's a big thing people focused on, or because we were focused on getting hired and getting fired, you end up lumping it all together into one big story, and some people have talked about how they might have just focused on one or the other instead of both of them. [01:21:16] And some have said maybe they wouldn't even have included Michael Ovitz as a defendant because having him there to tell his story, as you say, helped really explain. I mean, the short one sentence version of this whole case is: Michael Ovitz was hired to be the president of Disney and his tenure didn't work out as hoped for and expected. That's really the short, one sentence summary of it, and it was all about trying to explain that.

McBride: Yeah, I think, I don't know. The plaintiffs tried their case on the theory that Michael Ovitz was the bad guy. And one of the reasons we wanted to put him on first is we felt we needed to dispel that. Whether there was anybody else that they could have picked as their bad guy, I sort of doubt it. I mean, I think this was a case, I think about every case that we win. But I think this is a case we should have won. I'm not sure there was anything they could have done to have it turn out differently. I will tell you one story, though, the first day of trial, I think it was the first day of trial. That night I was jogging along the boardwalk in Rehoboth. And I was going past the hotel where the plaintiff's lawyers were staying. And they were all outside on the patio, and I think they had a few drinks, and I remember they were smoking cigars. And as I jogged by they said hey, Dave! And I said hey, guys. And they go you're going down! You're going down! And I thought this is a different perception of the case than I have.

Williams: Well we often walked past their hotel because people would take walks at night, and their hotel was right on the boardwalk, ours was a couple blocks off. And I think also it was a long trial for them as it wore on and it was very hard on them because they had to cross all these people. [01:23:11] One theory I thought they might have tried to exploit, and one where I thought, you know, maybe there was some vulnerability. I'm not suggesting in any way that anybody acted in bad faith, but I might have tried going after just Michael Eisner and maybe Sandy Litvack as the general counsel of the company on a theory that while you can't fault some of these outside directors for the governance procedures that were followed, you're an outside director, it's not really expected that you will convene a meeting of the board or insist that a meeting occur. I thought that they might have been able to do something with the fact that Michael Eisner presumably

counselled by Mr. Litvack, instead of convening a meeting to discuss the termination and whether not the company should pay Ovitz's entire contractual benefit, he talked to each director one on one. And he had short conversations with them telling them what was happening and certainly allowing them to express a view. But I thought that from a corporate governance perspective, one could weave a tale that someone should know that that was not consistent with fiduciary duties, that this is something that the entire board should focus on. But they didn't, and the result is history. So let's talk a little bit about the assessment after trial. Were you both optimistic in the period between trial and receiving the decision?

[01:24:49] Foster: I would say that I was optimistic, although, again, very worried because the amount of money that they were seeking, you know, joint and several liability, there were some defendants who might have been able to absorb that. But the vast majority didn't have anywhere near that kind of personal resources, and it was going to be personally devastating. So I was very worried about them, even though I felt good about how the trial had gone.

McBride: I felt really good about how the trial went, and I felt like we were going to win. My biggest concern, and I was refreshing my recollection when I read our post-trial brief, was plaintiffs were arguing that Michael Ovitz's termination and the payment of his compensation was a self-dealing transaction, that entire fairness applied to. And I had some concern, if that frame of reference was accepted by the court. And the court, in the pre-trial decision, seemed to accept that frame of reference. And we persuaded them in the post-trial arguments that it was wrong, and I think it was wrong. That was my biggest concern. And what we argued is it was a unilateral transaction. We said this wasn't self-dealing on Ovitz's part, he didn't want to be terminated. This was a decision that they made, he didn't make it, and he wasn't asking for anything other than what his contract entitled him to. If the legal analysis had changed and it had been an entire fairness case, it's possible it might have come out very differently.

[01:26:29] Williams: They're a very different case then, yeah. I remember feeling some vulnerability, not so much that we would lose the case, although, I thought we would win. But it was very clear that we weren't going to get an A+ report card in terms of corporate governance and process and procedure. And I worried that in ruling for the defendants, the Chancellor might have enough negative language, enough bad findings in there that it might make it hard for us on appeal. And in fact there was some of that. But I felt I just couldn't see the Chancellor's ruling against the defendants. And I remember feeling, of course you want to win every case that you try. I remember feeling, as Anne was hinting at earlier, this isn't a case where you can walk away as a litigator and feel good about the fact that you gave it your all. You had to win this case, you had to win this case. It was

going to be important to, not only our clients, but I felt to all of us who were on that team. And so, anyway, so we got the favorable decision post trial and it did have some critical language and findings. The issue on appeal became really bad faith. What is bad faith? We didn't have a clear articulation at that time. [01:27:58] And so it was to some extent uncertain what the Supreme Court might do. How did you view our chances on appeal?

Foster: So I can remember having people looking at every single nook and cranny of the Delaware law of anything that might go to what is good faith, what is the absence of good faith, what is bad faith?

Williams: In different areas of the law.

Foster: You have sort of now brought back memories for me of that whole process. You know, I still felt good about it. One thing that was a little unusual is we never had a post-trial argument, if you remember.

Williams: Reflecting his distaste for the case at that point.

Foster: So we didn't have, there hadn't been that give and take that sometimes gives you a hint of things that you might want to focus on for appeal. So we had the opinion. I can remember having endless conversations among the different sets of defense counsel about how we were going to pursue the appeal. And we had had to do a joint brief post-trial, and we were dealing with that again. That was itself a little bit of a challenge, because you have different people who had different levels of participation. You had people who were still on the board, people who were off the board, people who were on for the going in but not the going out. And so it was, sometimes just getting the negotiation on your own side of what pages needed to be said about different people--

Williams: I'm trying to remember [01:29:22] did Ovitz have a separate appeal brief?

Foster: [gesturing to Dave] You, I think, always were able to have a separate brief. [cross talk] But on our side, all the others, Eisner, Litvack, Gold, Disney... I mean, in the middle of all this, we haven't talked about this, there was this whole campaign that Roy Disney and Stanley Gold had where they were trying to drive Michael Eisner out of the Walt Disney Company. That resolved. That had its own little sideshow in the midst of all this that had to do with some records. So negotiating the briefing was a challenge. I still felt good about it on appeal, although, again, as you say, it wasn't as if it was going to be an A+ where you knew you were going to win. But I felt good about it.

Williams: I made the primary argument on behalf of the defendants on appeal, and Mark Epstein, we had twenty-five minutes. I think Mark took a few minutes. Gary Naftalis took a few, and I ended up with like seventeen or eighteen or something of the twenty-five. And I remember I had never felt, and I haven't since then, frankly, really felt so much pressure because there were so many people senior to me who were in the case. And yet it was decided because we had all these clients that we should take the lead.

McBride: And you did a great argument.

Williams: Well, thank you.

McBride: Except you forgot my name.

Williams: I did forget your name. I'm going to tell that story. But before we get to the argument, I believe it was literally the day before argument we had a huge meeting in our conference room, our large conference room. And by then everybody had come in from out of town. The west coasters had come in, New York folks came in. And so there must have been 25 people in the room. And of course I had been preparing for weeks and had my outline, and you had people like the great Gil Sparks, Frank Balotti was sitting in on that, although Frank had not participated in the trial. Gary Naftalis, lots of great great lawyers, saying, Bob Payson, here's what I would do. [01:31:36] Here's what I would do. And I just remember sitting there thinking, ok, I don't want to make these people unhappy, but I have to do what I want to do at ten o'clock in the morning, and it's now 3:30, 4 in the afternoon. And so, somehow, we resolved all that. We went down, the setting. I'm sure you recall the setting was, I don't remember the number of that room, but it was a superior court, large ceremonial courtroom that looks like where they might have tried the Scopes monkey trial, with columns in the middle of it, and it was jam packed with people. And just before the argument, the clerk came out and said to me that the Chief Justice would like you to introduce all of the lawyers on the defense team. And I thought, ok, and you know, of course I was a little nervous and I stood up and I kind of went around the room. And there were a lot of lawyers, I mean, maybe twenty lawyers just on the defense team in front of the bar. And Anne and our partner, Lisa Schmidt, who had worked on the case, and I don't know if you remember this, Anne, but they were kind of giving me a look like, you know...

McBride: [01:32:49 inaudible]

Williams: Oh, he's right behind you. And you guys were sort of behind me. And I looked and I'd known you for twenty years at that point, and my mind blanked and I couldn't

remember Dave McBride. And I sort of stumbled through something, counsel for Mr. Ovitz. Anyway, it was a very embarrassing moment for me.

Foster: And you know, it's funny--

McBride: Well it's very understandable from my perspective.

Foster: It's funny. Another little just unusual thing about that was, so you made the argument which was, you did a spectacular job. It was the first time that someone had made a legal argument in that case on behalf of our client since September of 1999. Haven't really thought about that until this moment.

McBride: Yeah

Foster: We had had different opinions. We talked to the Chancellor on the phone about different things. The summary judgment argument, we hadn't moved for summary judgment. So we went all the way from September of 1999 until what was that early 2006? All those years no legal argument was made.

[01:33:50 crosstalk]

Foster: Lots of factual argument--

McBride: Before Chancellor Chandler, right before the trial.

Foster: Well, you had the motion to compel that we were not a party to, there was the motion for summary judgment we weren't a party to. So--

McBride: The summary judgment motion, I tell you, I learned something from that summary judgment motion that I never thought about before. We were not optimistic we're going to get summary judgments truly before the trial. But we decided to file the summary judgment motion because we wanted the plaintiffs to put a stake down on what they were going to prove at the trial. And they did. And when we did the post-trial briefing we came back to the summary judgment briefing, they said they were going to prove this and they haven't done it. And I learned that summary judgment can have some value even if perhaps you don't think you're going to prevail on the motion. And I had never thought about that before.

Foster: I should mention about our own summary judgment. There was a date, as you always have in these scheduling orders about the deadline for moving for summary

judgment. And we had decided not to move for summary judgment. But we didn't know whether the plaintiffs would move, because they had actually been making noise that they might move for summary judgment before trial. And this is such a Delaware story. So I went out to dinner the night before the summary judgment briefs would have been due. [01:35:04] And I saw Seth Rigrodsky at the same place, and I thought, well, now I know he's not moving for summary judgment, and he knows I'm not moving for summary judgment. So it's kind of a typical Delaware story.

Williams: It reminds me of when Morris Nichols was in the building, the I M Pei building, and there were times when we would look over to the building and see that the lights were on in the Morris Nichols floors, and realize ok, they're up there working, so something must be coming the next day. So one thing I do remember Steve Schulman saying during argument which I thought was a really good thing for us during the argument. In response to a question he said something to the effect of, well, Your Honors, you can reverse on any ground. I don't really care what basis you reverse on, but just please reverse and give us something. Something to that effect. And I remember thinking, well, that's not going to be too persuasive. Well I think that brings us to the end of our discussion of the Disney case. Let me just ask you this final question, since the trial which I think was in 2004, I think the appeal was in '5, here we are in 2017. Have you done anything since that was quite as interesting or fascinating as the Disney trial professionally?

McBride: Well there were some other cases that were interesting, but, and fascinating, including one I lost. So it still bothers me. Yucaipa. [01:36:37] But nothing that was this big, this much attention.

Foster: I think that it's fair to say for whatever reason this case just captured the attention of the media in a way that I've not really seen happen since. I've had cases with well-known companies and people, and there'd be some media coverage, but nothing like this.

Williams: And it did feel at the time and I think it's proven to be true that it was a bit of a once in a career opportunity for Delaware litigators. Thanks very much.

McBride: Thank you

[01:37:20 end of audio]