THE THEODORE ROOSEVELT INN OF COURT

PRESENTS

BAD LAWYERING/AIN'T MISBEHAVING?

Nassau County Bar Association

February 11, 2016

5:30-8:00 p.m.

Presenters:

Hon. Ira B. Warshawsky
Michael Cardello III, Esq.
Joanna Matuza
Michael Lynch
Samantha Chasworth
Amanda Hoffman

Inn of Court-February 11, 2016 – Program Outline

Nassau County Bar Association, Mineola, New York.

Introduction/Prologue

Act I

The Forged Judgment

Act II

Overheard in the Hallway-1992

Act III

Overheard in the Hallway-1978.

Act IV

Act V

Depositions and Bad Lawyering

Act VI

Threats and Adverse Publicity

Skit-followed by question to participants questions to the audience as to the parties actions, the district court ruling and the second circuit ruling.

Act VII

A Threat of Physical Violence

Act VIII

Baseless Claims-Groundless Accusations and Name-Calling

Act IX

When You're Malpractice Policy Doesn't Help or a New Spin on the Dog Ate My Homework

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200

RULES OF PROFESSIONAL CONDUCT

Dated: May 1, 2013

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

RULE 3.1.

Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

RULE 3.2.

Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

RULE 3.3.

Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

RULE 3.4.

Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) *(1)* suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.5.

Maintaining and Preserving the Impartiality of Tribunals and Jurors

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

RULE 3.6.

Trial Publicity

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 3.7.

Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 15. Attorneys and Counsellors (Refs & Annos)

McKinney's Judiciary Law § 487

§ 487. Misconduct by attorneys

Currentness

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Credits

(Added L.1965, c. 1031, § 123.)

Notes of Decisions (249)

McKinney's Judiciary Law § 487, NY JUD § 487
Current through L.2015, chapters 1 to 589.

End of Document

New York State Standards of Civility for the Legal Profession.

STANDARDS OF CIVILITY

Preamble

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules, or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course. The Standards are divided into four parts: lawyers' duties to other lawyers, litigants and witnesses; lawyers' duties to the court and court personnel; court's duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants.

As lawyers, judges and court employees, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

LAWYERS' DUTIES TO OTHER LAWYERS, LITIGANTS AND WITNESSES

I. Lawyers should be courteous and civil in all professional dealings with other persons.

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing,lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

C. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court or otherpersons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. A lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.

B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.

C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

A.A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences, and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.

C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.

D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead other persons involved in the litigation process.

A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.

LAWYERS' DUTIES TO THE COURT AND COURT PERSONNEL

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.

B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

D. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

JUDGES' DUTIES TO LAWYERS, PARTIES AND WITNESSES

I. A Judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A Judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

DUTIES OF COURT PERSONNEL TO THE COURT, LAWYERS AND LITIGANTS

I. Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

STATEMENT OF CLIENT'S RIGHTS

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.

2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).

3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.

4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory.

5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.

6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.

7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).

8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.

9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability

KeyCite Yellow Flag - Negative Treatment
Distinguished by McMullin v. Beran, Del.Supr., November 20, 2000

637 A.2d 34
Supreme Court of Delaware.

PARAMOUNT COMMUNICATIONS INC., Viacom Inc., Martin S. Davis, Grace J. Fippinger, Irving R. Fischer, Benjamin L. Hooks, Franz J. Lutolf, James A. Pattison, Irwin Schloss, Samuel J. Silberman, Lawrence M. Small, and George Weissman, Defendants Below, Appellants,
v.
QVC NETWORK INC., Plaintiff Below, Appellee.
In re PARAMOUNT COMMUNICATIONS INC. SHAREHOLDERS' LITIGATION.

Submitted: Dec. 9, 1993.
Decided by Order: Dec. 9, 1993.
Opinion: Feb. 4, 1994.

Following corporation's announcement of merger, competing tender offeror brought suit for injunctive relief. The Court of Chancery, —— A.2d ——, granted preliminary injunction. The Supreme Court, Veasey, C.J., held that: (1) sale of control implicated enhanced judicial scrutiny, and (2) directors violated their fiduciary duties.

Affirmed and remanded.

West Headnotes (17)

[1] **Appeal and Error**
⇐Provisional remedies

Supreme Court's standard and scope of review as to facts on appeal from preliminary injunction entered by Court of Chancery is whether, after independently reviewing entire record, Supreme Court can conclude that findings of Court of Chancery are sufficiently supported by the record and are product of orderly and logical deductive process.

3 Cases that cite this headnote

[2] **Corporations and Business Organizations**
⇐Actions by minority shareholders; judicial scrutiny

Directors' conduct is subject to enhanced scrutiny in situations involving approval of transaction resulting in sale of control, and adoption of defensive measures in response to threat to corporate control.

7 Cases that cite this headnote

[3] **Corporations and Business Organizations**
⇐Actions by minority shareholders; judicial scrutiny

Enhanced judicial scrutiny was mandated in sale or change of control transaction, by threatened diminution of current shareholders' voting power, fact that control premium was being sold, and traditional concern of courts for actions which impair or impede shareholder voting rights.

22 Cases that cite this headnote

[4] **Corporations and Business Organizations**
⇐Duties to, rights and remedies of, and actions by, dissenting shareholders

Key features of enhanced judicial scrutiny applied to sale or change of control transaction are: judicial determination regarding adequacy of decision-making process employed by directors, including information on which directors based their decision; and judicial examination of reasonableness of directors' action in light of circumstances then existing.

24 Cases that cite this headnote

[5] **Corporations and Business Organizations**
⇐Rights and remedies of, and actions by, dissenting shareholders

In sale or change of control situation, directors have burden of proving that they were adequately informed and acted reasonably.

15 Cases that cite this headnote

[6] **Corporations and Business Organizations**
⇐Business judgment rule in general

In cases where traditional business judgment rule is applicable and board of directors acted with due care, in good faith and in honest belief that they were acting in best interests of shareholder, court gives great deference to substance of directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute its views for those of the board if latter's decision can be attributed to any rational business purpose.

27 Cases that cite this headnote

[7] **Corporations and Business Organizations**
⇐Fiduciary Duties as to Management of Corporate Affairs in General

In applying enhanced scrutiny to sale or change of control transaction, courts will not substitute its business judgment for that of directors, but will determine if directors' decision was, on balance, within range of reasonableness.

50 Cases that cite this headnote

[8] **Corporations and Business Organizations**
⇐Duties to, rights and remedies of, and actions by, dissenting shareholders

In sale or change of control transaction, enhanced judicial scrutiny is applied, and directors are obligated to seek best value reasonably available for stockholders, regardless of whether there is to be breakup of the corporation.

37 Cases that cite this headnote

[9] **Corporations and Business Organizations**
⇐Fiduciary Duties as to Management of Corporate Affairs in General

When corporation undertakes transaction which will cause change in corporate control or breakup of corporate entity, directors' obligation is to seek best value reasonably available to stockholders.

30 Cases that cite this headnote

[10] **Corporations and Business Organizations**
⇐Good faith
Corporations and Business Organizations
⇐Duty to inquire; knowledge or notice
Corporations and Business Organizations
⇐Degree of care required and negligence

Having decided to sell control of corporation and faced with two tender offers, directors had obligation: to be diligent and vigilant in critically examining proposed transaction and competing offers; to act in good faith; to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide best value reasonably available to stockholders; and to negotiate actively and in good faith with both prospective purchasers to that end.

37 Cases that cite this headnote

[11] **Corporations and Business Organizations**
⇐Duties of directors and officers in general; business judgment rule

Enhanced judicial scrutiny of directors' action was implicated by defensive provisions of merger agreement, coupled with sale of control and subsequent disparate treatment of competing bidders.

8 Cases that cite this headnote

[12] **Corporations and Business Organizations**
⇐Duties of directors and officers in general; business judgment rule

Having entered merger agreement with one corporation, directors violated their fiduciary duties by failing to modify improper defensive provisions of agreement or improve economic terms of agreement when faced with competing higher offer.

4 Cases that cite this headnote

[13] **Corporations and Business Organizations**
⇐Requisites and validity

Provision of merger agreement, whereby board of selling corporation agreed that it would not solicit, encourage, discuss, negotiate or endorse any competing transaction unless certain conditions were met, was unenforceable, to extent provision was inconsistent with directors' fiduciary duties.

17 Cases that cite this headnote

[14] **Corporations and Business Organizations**
⇐Fiduciary Duties as to Management of Corporate Affairs in General

To extent that contract, or provision thereof, purports to require board to act or not act in such a fashion as to limit exercise of fiduciary duties, it is invalid and unenforceable.

14 Cases that cite this headnote

[15] **Corporations and Business Organizations**
⇐Construction, operation, and effect

Defensive provision of merger agreement, which granted buyer an option to purchase percentage of seller's outstanding common stock at a fixed price if seller terminated agreement because of competing transaction, if seller's stockholders did not approve merger or if seller's board recommended competing transaction, and which permitted buyer to pay for shares with senior subordinated note of questionable marketability and allowed buyer to elect to require seller to pay seller in cash a sum equal to difference between purchase price and market price of seller's stock, was invalid, insofar as provisions were inconsistent with directors' fiduciary duties.

8 Cases that cite this headnote

[16] **Attorney and Client**
⇐Admission of practitioners in different jurisdiction

Although there is no clear mechanism for Supreme Court to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts, consideration will be given to whether it is appropriate and fair to take into account attorney's behavior in event application is made by him in the future to appear pro hac vice in any proceeding in the state. Rules of Prof.Conduct, Rule 3.5(c), Del.C.Ann.

12 Cases that cite this headnote

[17] **Attorney and Client**

Admission of practitioners in different jurisdiction

Out-of-state attorney must be admitted pro hac vice before participating in deposition in proceeding pending in state courts.

6 Cases that cite this headnote

*35 Upon appeal from the Court of Chancery. AFFIRMED.

Attorneys and Law Firms

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A. Gilchrist Sparks, III and William M. Lafferty of Morris, Nichols, Arsht & Tunnell, Wilmington, Stuart J. Baskin (argued), *36 Jeremy G. Epstein, Alan S. Goudiss and Seth J. Lapidow of Shearman & Sterling, New York City, for appellant Viacom Inc.

Bruce M. Stargatt, David C. McBride, Josy W. Ingersoll, William D. Johnston, Bruce L. Silverstein and James P. Hughes, Jr. of Young, Conaway, Stargatt & Taylor, Wilmington, Herbert M. Wachtell (argued), Michael W. Schwartz, Theodore N. Mirvis, Paul K. Rowe and George T. Conway, III of Wachtell, Lipton, Rosen & Katz, New York City, for appellee QVC Network Inc.

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Before VEASEY, C.J., MOORE and HOLLAND, JJ.

Opinion

VEASEY, Chief Justice.

In this appeal we review an order of the Court of Chancery dated November 24, 1993 (the "November 24 Order"), preliminarily enjoining certain defensive measures designed to facilitate a so-called strategic alliance between Viacom Inc. ("Viacom") and Paramount Communications Inc. ("Paramount") approved by the board of directors of Paramount (the "Paramount Board" or the "Paramount directors") and to thwart an unsolicited, more valuable, tender offer by QVC Network Inc. ("QVC"). In affirming, we hold that the sale of control in this case, which is at the heart of the proposed strategic alliance, implicates enhanced judicial scrutiny of the conduct of the Paramount Board under *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173 (1986). We further hold that the conduct of the Paramount Board was not reasonable as to process or result.

QVC and certain stockholders of Paramount commenced separate actions (later consolidated) in the Court of Chancery seeking preliminary and permanent injunctive relief against Paramount, certain members of the Paramount Board, and Viacom. This action arises out of a proposed acquisition of Paramount by Viacom through a tender offer followed by a second-step merger (the "Paramount–Viacom transaction"), and a competing unsolicited tender offer by QVC. The Court of Chancery granted a preliminary injunction. *QVC Network, Inc. v. Paramount Communications Inc.*, Del.Ch., 635 A.2d 1245, Jacobs, V.C. (1993), (the "Court of Chancery Opinion"). We affirmed by order dated December 9, 1993. *Paramount Communications Inc. v. QVC Network Inc.*, Del.Supr., Nos. 427 and 428, 1993, 637 A.2d 828, Veasey, C.J. (Dec. 9, 1993) (the "December 9 Order").[1]

The Court of Chancery found that the Paramount directors violated their fiduciary duties by favoring the Paramount–Viacom transaction over the more valuable unsolicited offer of QVC. The Court of Chancery preliminarily enjoined Paramount and the individual defendants (the "Paramount defendants") from amending or modifying Paramount's stockholder rights agreement (the "Rights Agreement"), including the redemption of the Rights, or taking other action to facilitate the consummation of the pending tender offer by Viacom or any proposed second-step merger, including the Merger Agreement between Paramount and Viacom dated September 12, 1993 (the "Original Merger Agreement"), as amended on October 24, 1993 (the "Amended Merger Agreement"). Viacom and the Paramount defendants were enjoined from taking any action *37 to exercise any provision of the Stock Option Agreement between

Paramount and Viacom dated September 12, 1993 (the "Stock Option Agreement"), as amended on October 24, 1993. The Court of Chancery did not grant preliminary injunctive relief as to the termination fee provided for the benefit of Viacom in Section 8.05 of the Original Merger Agreement and the Amended Merger Agreement (the "Termination Fee").

Under the circumstances of this case, the pending sale of control implicated in the Paramount–Viacom transaction required the Paramount Board to act on an informed basis to secure the best value reasonably available to the stockholders. Since we agree with the Court of Chancery that the Paramount directors violated their fiduciary duties, we have AFFIRMED the entry of the order of the Vice Chancellor granting the preliminary injunction and have REMANDED these proceedings to the Court of Chancery for proceedings consistent herewith.

We also have attached an Addendum to this opinion addressing serious deposition misconduct by counsel who appeared on behalf of a Paramount director at the time that director's deposition was taken by a lawyer representing QVC.[2]

I. FACTS

[1] The Court of Chancery Opinion contains a detailed recitation of its factual findings in this matter. Court of Chancery Opinion, 635 A.2d 1245, 1246–1259. Only a brief summary of the facts is necessary for purposes of this opinion. The following summary is drawn from the findings of fact set forth in the Court of Chancery Opinion and our independent review of the record.[3]

Paramount is a Delaware corporation with its principal offices in New York City. Approximately 118 million shares of Paramount's common stock are outstanding and traded on the New York Stock Exchange. The majority of Paramount's stock is publicly held by numerous unaffiliated investors. Paramount owns and operates a diverse group of entertainment businesses, including motion picture and television studios, book publishers, professional sports teams, and amusement parks.

There are 15 persons serving on the Paramount Board. Four directors are officer-employees of Paramount: Martin S. Davis ("Davis"), Paramount's Chairman and Chief Executive Officer since 1983; Donald Oresman ("Oresman"), Executive Vice–President, Chief Administrative Officer, and General Counsel; Stanley R. Jaffe, President and Chief Operating Officer; and Ronald L. Nelson, Executive Vice President and Chief Financial Officer. Paramount's 11 outside directors are distinguished and experienced business persons who are present or former senior executives of public corporations or financial institutions.[4]

*38 Viacom is a Delaware corporation with its headquarters in Massachusetts. Viacom is controlled by Sumner M. Redstone ("Redstone"), its Chairman and Chief Executive Officer, who owns indirectly approximately 85.2 percent of Viacom's voting Class A stock and approximately 69.2 percent of Viacom's nonvoting Class B stock through National Amusements, Inc. ("NAI"), an entity 91.7 percent owned by Redstone. Viacom has a wide range of entertainment operations, including a number of well-known cable television channels such as MTV, Nickelodeon, Showtime, and The Movie Channel. Viacom's equity co-investors in the Paramount–Viacom transaction include NYNEX Corporation and Blockbuster Entertainment Corporation.

QVC is a Delaware corporation with its headquarters in West Chester, Pennsylvania. QVC has several large stockholders, including Liberty Media Corporation, Comcast Corporation, Advance Publications, Inc., and Cox Enterprises Inc. Barry Diller ("Diller"), the Chairman and Chief Executive Officer of QVC, is also a substantial stockholder. QVC sells a variety of merchandise through a televised shopping channel. QVC has several equity co-investors in its proposed combination with Paramount including BellSouth Corporation and Comcast Corporation.

Beginning in the late 1980s, Paramount investigated the possibility of acquiring or merging with other companies in the entertainment, media, or communications industry. Paramount considered such transactions to be desirable, and perhaps necessary, in order to keep pace with competitors in the rapidly evolving field of entertainment and communications. Consistent with its goal of strategic expansion, Paramount made a tender offer for Time Inc. in 1989, but was ultimately unsuccessful. *See Paramount Communications, Inc. v. Time Inc.*, Del.Supr., 571 A.2d 1140 (1990) ("*Time–Warner* ").

Although Paramount had considered a possible combination of Paramount and Viacom as early as 1990, recent efforts to explore such a transaction began at a dinner meeting between Redstone and Davis on April 20, 1993. Robert Greenhill ("Greenhill"), Chairman of Smith Barney Shearson Inc. ("Smith Barney"), attended and helped facilitate this meeting. After several more meetings between Redstone and Davis, serious negotiations began taking place in early July.

It was tentatively agreed that Davis would be the chief

executive officer and Redstone would be the controlling stockholder of the combined company, but the parties could not reach agreement on the merger price and the terms of a stock option to be granted to Viacom. With respect to price, Viacom offered a package of cash and stock (primarily Viacom Class B nonvoting stock) with a market value of approximately $61 per share, but Paramount wanted at least $70 per share.

Shortly after negotiations broke down in July 1993, two notable events occurred. First, Davis apparently learned of QVC's potential interest in Paramount, and told Diller over lunch on July 21, 1993, that Paramount was not for sale. Second, the market value of Viacom's Class B nonvoting stock increased from $46.875 on July 6 to $57.25 on August 20. QVC claims (and Viacom disputes) that this price increase was caused by open market purchases of such stock by Redstone or entities controlled by him.

*39 On August 20, 1993, discussions between Paramount and Viacom resumed when Greenhill arranged another meeting between Davis and Redstone. After a short hiatus, the parties negotiated in earnest in early September, and performed due diligence with the assistance of their financial advisors, Lazard Freres & Co. ("Lazard") for Paramount and Smith Barney for Viacom. On September 9, 1993, the Paramount Board was informed about the status of the negotiations and was provided information by Lazard, including an analysis of the proposed transaction.

On September 12, 1993, the Paramount Board met again and unanimously approved the Original Merger Agreement whereby Paramount would merge with and into Viacom. The terms of the merger provided that each share of Paramount common stock would be converted into 0.10 shares of Viacom Class A voting stock, 0.90 shares of Viacom Class B nonvoting stock, and $9.10 in cash. In addition, the Paramount Board agreed to amend its "poison pill" Rights Agreement to exempt the proposed merger with Viacom. The Original Merger Agreement also contained several provisions designed to make it more difficult for a potential competing bid to succeed. We focus, as did the Court of Chancery, on three of these defensive provisions: a "no-shop" provision (the "No–Shop Provision"), the Termination Fee, and the Stock Option Agreement.

First, under the No–Shop Provision, the Paramount Board agreed that Paramount would not solicit, encourage, discuss, negotiate, or endorse any competing transaction unless: (a) a third party "makes an unsolicited written, bona fide proposal, which is not subject to any material contingencies relating to financing"; and (b) the Paramount Board determines that discussions or negotiations with the third party are necessary for the Paramount Board to comply with its fiduciary duties.

Second, under the Termination Fee provision, Viacom would receive a $100 million termination fee if: (a) Paramount terminated the Original Merger Agreement because of a competing transaction; (b) Paramount's stockholders did not approve the merger; or (c) the Paramount Board recommended a competing transaction.

The third and most significant deterrent device was the Stock Option Agreement, which granted to Viacom an option to purchase approximately 19.9 percent (23,699,000 shares) of Paramount's outstanding common stock at $69.14 per share if any of the triggering events for the Termination Fee occurred. In addition to the customary terms that are normally associated with a stock option, the Stock Option Agreement contained two provisions that were both unusual and highly beneficial to Viacom: (a) Viacom was permitted to pay for the shares with a senior subordinated note of questionable marketability instead of cash, thereby avoiding the need to raise the $1.6 billion purchase price (the "Note Feature"); and (b) Viacom could elect to require Paramount to pay Viacom in cash a sum equal to the difference between the purchase price and the market price of Paramount's stock (the "Put Feature"). Because the Stock Option Agreement was not "capped" to limit its maximum dollar value, it had the potential to reach (and in this case did reach) unreasonable levels.

After the execution of the Original Merger Agreement and the Stock Option Agreement on September 12, 1993, Paramount and Viacom announced their proposed merger. In a number of public statements, the parties indicated that the pending transaction was a virtual certainty. Redstone described it as a "marriage" that would "never be torn asunder" and stated that only a "nuclear attack" could break the deal. Redstone also called Diller and John Malone of Tele–Communications Inc., a major stockholder of QVC, to dissuade them from making a competing bid.

Despite these attempts to discourage a competing bid, Diller sent a letter to Davis on September 20, 1993, proposing a merger in which QVC would acquire Paramount for approximately $80 per share, consisting of 0.893 shares of QVC common stock and $30 in cash. QVC also expressed its eagerness to meet with Paramount to negotiate the details of a transaction. When the Paramount Board met on September 27, it was advised by Davis that the Original Merger *40 Agreement prohibited

Paramount from having discussions with QVC (or anyone else) unless certain conditions were satisfied. In particular, QVC had to supply evidence that its proposal was not subject to financing contingencies. The Paramount Board was also provided information from Lazard describing QVC and its proposal.

On October 5, 1993, QVC provided Paramount with evidence of QVC's financing. The Paramount Board then held another meeting on October 11, and decided to authorize management to meet with QVC. Davis also informed the Paramount Board that Booz–Allen & Hamilton ("Booz–Allen"), a management consulting firm, had been retained to assess, *inter alia*, the incremental earnings potential from a Paramount–Viacom merger and a Paramount–QVC merger. Discussions proceeded slowly, however, due to a delay in Paramount signing a confidentiality agreement. In response to Paramount's request for information, QVC provided two binders of documents to Paramount on October 20.

On October 21, 1993, QVC filed this action and publicly announced an $80 cash tender offer for 51 percent of Paramount's outstanding shares (the "QVC tender offer"). Each remaining share of Paramount common stock would be converted into 1.42857 shares of QVC common stock in a second-step merger. The tender offer was conditioned on, among other things, the invalidation of the Stock Option Agreement, which was worth over $200 million by that point.[5] QVC contends that it had to commence a tender offer because of the slow pace of the merger discussions and the need to begin seeking clearance under federal antitrust laws.

Confronted by QVC's hostile bid, which on its face offered over $10 per share more than the consideration provided by the Original Merger Agreement, Viacom realized that it would need to raise its bid in order to remain competitive. Within hours after QVC's tender offer was announced, Viacom entered into discussions with Paramount concerning a revised transaction. These discussions led to serious negotiations concerning a comprehensive amendment to the original Paramount–Viacom transaction. In effect, the opportunity for a "new deal" with Viacom was at hand for the Paramount Board. With the QVC hostile bid offering greater value to the Paramount stockholders, the Paramount Board had considerable leverage with Viacom.

At a special meeting on October 24, 1993, the Paramount Board approved the Amended Merger Agreement and an amendment to the Stock Option Agreement. The Amended Merger Agreement was, however, essentially the same as the Original Merger Agreement, except that it included a few new provisions. One provision related to an $80 per share cash tender offer by Viacom for 51 percent of Paramount's stock, and another changed the merger consideration so that each share of Paramount would be converted into 0.20408 shares of Viacom Class A voting stock, 1.08317 shares of Viacom Class B nonvoting stock, and 0.20408 shares of a new series of Viacom convertible preferred stock. The Amended Merger Agreement also added a provision giving Paramount the right not to amend its Rights Agreement to exempt Viacom if the Paramount Board determined that such an amendment would be inconsistent with its fiduciary duties because another offer constituted a "better alternative."[6] Finally, the Paramount Board was given the power to terminate the Amended Merger Agreement if it withdrew its recommendation of the Viacom transaction or recommended a competing transaction.

Although the Amended Merger Agreement offered more consideration to the Paramount stockholders and somewhat more flexibility to the Paramount Board than did the Original Merger Agreement, the defensive measures designed to make a competing bid more difficult were not removed or modified. *41 In particular, there is no evidence in the record that Paramount sought to use its newly-acquired leverage to eliminate or modify the No–Shop Provision, the Termination Fee, or the Stock Option Agreement when the subject of amending the Original Merger Agreement was on the table.

Viacom's tender offer commenced on October 25, 1993, and QVC's tender offer was formally launched on October 27, 1993. Diller sent a letter to the Paramount Board on October 28 requesting an opportunity to negotiate with Paramount, and Oresman responded the following day by agreeing to meet. The meeting, held on November 1, was not very fruitful, however, after QVC's proposed guidelines for a "fair bidding process" were rejected by Paramount on the ground that "auction procedures" were inappropriate and contrary to Paramount's contractual obligations to Viacom.

On November 6, 1993, Viacom unilaterally raised its tender offer price to $85 per share in cash and offered a comparable increase in the value of the securities being proposed in the second-step merger. At a telephonic meeting held later that day, the Paramount Board agreed to recommend Viacom's higher bid to Paramount's stockholders.

QVC responded to Viacom's higher bid on November 12 by increasing its tender offer to $90 per share and by increasing the securities for its second-step merger by a

similar amount. In response to QVC's latest offer, the Paramount Board scheduled a meeting for November 15, 1993. Prior to the meeting, Oresman sent the members of the Paramount Board a document summarizing the "conditions and uncertainties" of QVC's offer. One director testified that this document gave him a very negative impression of the QVC bid.

At its meeting on November 15, 1993, the Paramount Board determined that the new QVC offer was not in the best interests of the stockholders. The purported basis for this conclusion was that QVC's bid was excessively conditional. The Paramount Board did not communicate with QVC regarding the status of the conditions because it believed that the No–Shop Provision prevented such communication in the absence of firm financing. Several Paramount directors also testified that they believed the Viacom transaction would be more advantageous to Paramount's future business prospects than a QVC transaction.[7] Although a number of materials were distributed to the Paramount Board describing the Viacom and QVC transactions, the only quantitative analysis of the consideration to be received by the stockholders under each proposal was based on then-current market prices of the securities involved, not on the anticipated value of such securities at the time when the stockholders would receive them.[8]

The preliminary injunction hearing in this case took place on November 16, 1993. On November 19, Diller wrote to the Paramount Board to inform it that QVC had obtained financing commitments for its tender offer and that there was no antitrust obstacle to the offer. On November 24, 1993, the Court of Chancery issued its decision granting a preliminary injunction in favor of QVC and the plaintiff stockholders. This appeal followed.

II. APPLICABLE PRINCIPLES OF ESTABLISHED DELAWARE LAW

The General Corporation Law of the State of Delaware (the "General Corporation Law") and the decisions of this Court have repeatedly recognized the fundamental principle that the management of the business and affairs of a Delaware corporation is entrusted to its directors, who are the duly elected and authorized representatives of the ***42** stockholders. 8 *Del.C.* § 141(a); *Aronson v. Lewis,* Del.Supr., 473 A.2d 805, 811–12 (1984); *Pogostin v. Rice,* Del.Supr., 480 A.2d 619, 624 (1984). Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors. The business judgment rule embodies the deference to which such decisions are entitled. *Aronson,* 473 A.2d at 812.

[2] Nevertheless, there are rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable.[9] The decisions of this Court have clearly established the circumstances where such enhanced scrutiny will be applied. *E.g., Unocal,* 493 A.2d 946; *Moran v. Household Int'l, Inc.,* Del.Supr., 500 A.2d 1346 (1985); *Revlon,* 506 A.2d 173; *Mills Acquisition Co. v. Macmillan, Inc.,* Del.Supr., 559 A.2d 1261 (1989); *Gilbert v. El Paso Co.,* Del.Supr., 575 A.2d 1131 (1990). The case at bar implicates two such circumstances: (1) the approval of a transaction resulting in a sale of control, and (2) the adoption of defensive measures in response to a threat to corporate control.

A. The Significance of a Sale or Change[10] of Control

When a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders. Under the statutory framework of the General Corporation Law, many of the most fundamental corporate changes can be implemented only if they are approved by a majority vote of the stockholders. Such actions include elections of directors, amendments to the certificate of incorporation, mergers, consolidations, sales of all or substantially all of the assets of the corporation, and dissolution. 8 *Del.C.* §§ 211, 242, 251–258, 263, 271, 275. Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights.[11]

In the absence of devices protecting the minority stockholders,[12] stockholder votes are likely to become mere formalities where there is a majority stockholder. For example, minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger. *Weinberger,* ***43** 457 A.2d at 703. Absent effective protective provisions, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot. The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting

power.

In the case before us, the public stockholders (in the aggregate) currently own a majority of Paramount's voting stock. Control of the corporation is not vested in a single person, entity, or group, but vested in the fluid aggregation of unaffiliated stockholders. In the event the Paramount–Viacom transaction is consummated, the public stockholders will receive cash and a minority equity voting position in the surviving corporation. Following such consummation, there will be a controlling stockholder who will have the voting power to: (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests. Irrespective of the present Paramount Board's vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision.

Because of the intended sale of control, the Paramount–Viacom transaction has economic consequences of considerable significance to the Paramount stockholders. Once control has shifted, the current Paramount stockholders will have no leverage in the future to demand another control premium. As a result, the Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value. There being no such protective provisions in the Viacom–Paramount transaction, the Paramount directors had an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available.

B. The Obligations of Directors in a Sale or Change of Control Transaction

The consequences of a sale of control impose special obligations on the directors of a corporation.[13] In particular, they have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders. The courts will apply enhanced scrutiny to ensure that the directors have acted reasonably. The obligations of the directors and the enhanced scrutiny of the courts are well-established by the decisions of this Court. The directors' fiduciary duties in a sale of control context are those which generally attach. In short, "the directors must act in accordance with their fundamental duties of care and loyalty." *Barkan v. Amsted Indus., Inc.,* Del.Supr., 567 A.2d 1279, 1286 (1989). As we held in *Macmillan:*

> It is basic to our law that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. **This unremitting obligation extends equally to board conduct in a sale of corporate control.**
> *44 559 A.2d at 1280 (emphasis supplied) (citations omitted).

In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end. The decisions of this Court have consistently emphasized this goal. *Revlon,* 506 A.2d at 182 ("The duty of the board ... [is] the maximization of the company's value at a sale for the stockholders' benefit."); *Macmillan,* 559 A.2d at 1288 ("[I]n a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders."); *Barkan,* 567 A.2d at 1286 ("[T]he board must act in a neutral manner to encourage the highest possible price for shareholders."). *See also Wilmington Trust Co. v. Coulter,* Del.Supr., 200 A.2d 441, 448 (1964) (in the context of the duty of a trustee, "[w]hen all is equal ... it is plain that the Trustee is bound to obtain the best price obtainable").

In pursuing this objective, the directors must be especially diligent. *See Citron v. Fairchild Camera and Instrument Corp.,* Del.Supr., 569 A.2d 53, 66 (1989) (discussing "a board's active and direct role in the sale process"). In particular, this Court has stressed the importance of the board being adequately informed in negotiating a sale of control: "The need for adequate information is central to the enlightened evaluation of a transaction that a board must make." *Barkan,* 567 A.2d at 1287. This requirement is consistent with the general principle that "directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them." *Aronson,* 473 A.2d at 812. *See also Cede & Co. v. Technicolor, Inc.,* Del.Supr., 634 A.2d 345, 367 (1993); *Smith v. Van Gorkom,* Del.Supr., 488 A.2d 858, 872 (1985). Moreover, the role of outside, independent directors becomes particularly important because of the magnitude of a sale of control transaction and the possibility, in certain cases, that management may not necessarily be impartial. *See Macmillan,* 559 A.2d at 1285 (requiring "the intense scrutiny and participation of the independent directors").

Barkan teaches some of the methods by which a board

can fulfill its obligation to seek the best value reasonably available to the stockholders. 567 A.2d at 1286–87. These methods are designed to determine the existence and viability of possible alternatives. They include conducting an auction, canvassing the market, etc. Delaware law recognizes that there is "no single blueprint" that directors must follow. *Id.* at 1286–87; *Citron* 569 A.2d at 68; *Macmillan,* 559 A.2d at 1287.

In determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance. *See Macmillan,* 559 A.2d at 1282 n. 29. Instead, the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives.[14] In addition, the board may assess a variety of practical considerations relating to each alternative, including:

> [an offer's] fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; ... the risk of non-consum[m]ation; ... the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.
> *Macmillan,* 559 A.2d at 1282 n. 29. These considerations are important because the selection of one alternative may permanently foreclose other opportunities. While the assessment of these factors may be complex, *45 the board's goal is straightforward: Having informed themselves of all material information reasonably available, the directors must decide which alternative is most likely to offer the best value reasonably available to the stockholders.

C. Enhanced Judicial Scrutiny of a Sale or Change of Control Transaction

[3] Board action in the circumstances presented here is subject to enhanced scrutiny. Such scrutiny is mandated by: (a) the threatened diminution of the current stockholders' voting power; (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again; and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights (see *supra* note 11). In *Macmillan,* this Court held:

> When *Revlon* duties devolve upon directors, this Court will continue to exact an enhanced judicial scrutiny at the threshold, as in *Unocal,* before the normal presumptions of the business judgment rule will apply.[15]

559 A.2d at 1288. The *Macmillan* decision articulates a specific two-part test for analyzing board action where competing bidders are not treated equally:[16]

> In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.
> *Id. See also Roberts v. General Instrument Corp.,* Del.Ch., C.A. No. 11639, 1990 WL 118356, Allen, C. (Aug. 13, 1990), reprinted at 16 Del.J.Corp.L. 1540, 1554 ("This enhanced test requires a judicial judgment of reasonableness in the circumstances.").

[4] [5] The key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

[6] [7] Although an enhanced scrutiny test involves a review of the reasonableness of the substantive merits of a board's actions,[17] a court should not ignore the complexity of the directors' task in a sale of control. There are many business and financial considerations implicated in investigating and selecting the best value reasonably available. The board of directors is the corporate decisionmaking body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made **a reasonable** decision, not **a perfect** decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness. *46 *See Unocal,* 493 A.2d at 955–56; *Macmillan,* 559 A.2d at 1288; *Nixon,* 626 A.2d at 1378.

D. *Revlon* and *Time–Warner* Distinguished

The Paramount defendants and Viacom assert that the fiduciary obligations and the enhanced judicial scrutiny discussed above are not implicated in this case in the absence of a "break-up" of the corporation, and that the order granting the preliminary injunction should be reversed. This argument is based on their erroneous interpretation of our decisions in *Revlon* and *Time–Warner*.

In *Revlon*, we reviewed the actions of the board of directors of Revlon, Inc. ("Revlon"), which had rebuffed the overtures of Pantry Pride, Inc. and had instead entered into an agreement with Forstmann Little & Co. ("Forstmann") providing for the acquisition of 100 percent of Revlon's outstanding stock by Forstmann and the subsequent break-up of Revlon. Based on the facts and circumstances present in *Revlon*, we held that "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182. We further held that "when a board ends an intense bidding contest on an insubstantial basis, ... [that] action cannot withstand the enhanced scrutiny which *Unocal* requires of director conduct." *Id.* at 184.

It is true that one of the circumstances bearing on these holdings was the fact that "the break-up of the company ... had become a reality which even the directors embraced." *Id.* at 182. It does not follow, however, that a "break-up" must be present and "inevitable" before directors are subject to enhanced judicial scrutiny and are required to pursue a transaction that is calculated to produce the best value reasonably available to the stockholders. In fact, we stated in *Revlon* that "when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions." *Id.* at 184 (emphasis added). *Revlon* thus does not hold that an inevitable dissolution or "break-up" is necessary.

[8] The decisions of this Court following *Revlon* reinforced the applicability of enhanced scrutiny and the directors' obligation to seek the best value reasonably available for the stockholders where there is a pending sale of control, regardless of whether or not there is to be a break-up of the corporation. In *Macmillan*, this Court held:

> We stated in *Revlon*, and again here, that **in a sale of corporate control** the responsibility of the directors is to get the highest value reasonably attainable for the shareholders.

559 A.2d at 1288 (emphasis added). In *Barkan*, we observed further:

> We believe that the general principles announced in *Revlon*, in *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and in *Moran v. Household International, Inc.*, Del.Supr., 500 A.2d 1346 (1985) govern this case and every case in which a **fundamental change of corporate control** occurs or is contemplated.

567 A.2d at 1286 (emphasis added).

Although *Macmillan* and *Barkan* are clear in holding that a change of control imposes on directors the obligation to obtain the best value reasonably available to the stockholders, the Paramount defendants have interpreted our decision in *Time–Warner* as requiring a corporate break-up in order for that obligation to apply. The facts in *Time–Warner*, however, were quite different from the facts of this case, and refute Paramount's position here. In *Time–Warner*, the Chancellor held that there was no change of control in the original stock-for-stock merger between Time and Warner because Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger:

> If the appropriate inquiry is whether a change in control is contemplated, the answer must be sought in the specific circumstances surrounding the transaction. Surely under some circumstances a stock for stock merger could reflect a transfer of corporate control. That would, for example, plainly be the case here if Warner were a private company. But where, as *47 here, the shares of both constituent corporations are widely held, corporate control can be expected to remain unaffected by a stock for stock merger. This in my judgment was the situation with respect to the original merger agreement. When the specifics of that situation are reviewed, it is seen that, aside from legal technicalities and aside from arrangements thought to enhance the prospect for the ultimate succession of [Nicholas J. Nicholas, Jr., president of Time], neither corporation could be said to be acquiring the other. **Control of both remained in a large, fluid, changeable and changing market.**

The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each

> other does have real consequences to the financial value of "minority" stock. The law offers some protection to such shares through the imposition of a fiduciary duty upon controlling shareholders. **But here, effectuation of the merger would not have subjected Time shareholders to the risks and consequences of holders of minority shares. This is a reflection of the fact that no control passed to anyone in the transaction contemplated.** The shareholders of Time would have "suffered" dilution, of course, but they would suffer the same type of dilution upon the public distribution of new stock.

Paramount Communications Inc. v. Time Inc., Del.Ch., No. 10866, 1989 WL 79880, Allen, C. (July 17, 1989), reprinted at 15 Del.J.Corp.L. 700, 739 (emphasis added). Moreover, the transaction actually consummated in *Time–Warner* was not a merger, as originally planned, but a sale of Warner's stock to Time.

In our affirmance of the Court of Chancery's well-reasoned decision, this Court held that "The Chancellor's findings of fact are supported by the record and **his conclusion is correct as a matter of law.**" 571 A.2d at 1150 (emphasis added). Nevertheless, the Paramount defendants here have argued that a break-up is a requirement and have focused on the following language in our *Time–Warner* decision:

> However, we premise our rejection of plaintiffs' *Revlon* claim on different grounds, namely, the absence of any substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable, as was the case in *Revlon*.
>
> Under Delaware law there are, generally speaking and **without excluding other possibilities,** two circumstances which may implicate *Revlon* duties. The first, and clearer one, is when a corporation **initiates an active bidding process seeking to sell itself** or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.

Id. at 1150 (emphasis added) (citation and footnote omitted).

The Paramount defendants have misread the holding of *Time–Warner*. Contrary to their argument, our decision in *Time–Warner* expressly states that the two general scenarios discussed in the above-quoted paragraph are not the **only** instances where "*Revlon* duties" may be implicated. The Paramount defendants' argument totally ignores the phrase "without excluding other possibilities." Moreover, the instant case is clearly within the first general scenario set forth in *Time–Warner*. The Paramount Board, albeit unintentionally, had "initiate[d] an active bidding process seeking to sell itself" by agreeing to sell control of the corporation to Viacom in circumstances where another potential acquiror (QVC) was equally interested in being a bidder.

The Paramount defendants' position that **both** a change of control **and** a break-up are **required** must be rejected. Such a holding would unduly restrict the application of *Revlon*, is inconsistent with this Court's decisions in *Barkan* and *Macmillan*, and has no basis in policy. There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental *48 (and perhaps irrevocable) change in the nature of the corporate enterprise from a practical standpoint. It is the significance of **each** of these events that justifies: (a) focusing on the directors' obligation to seek the best value reasonably available to the stockholders; and (b) requiring a close scrutiny of board action which could be contrary to the stockholders' interests.

[9] Accordingly, when a corporation undertakes a transaction which will cause: (a) a change in corporate control; **or** (b) a break-up of the corporate entity, the directors' obligation is to seek the best value reasonably available to the stockholders. This obligation arises because the effect of the Viacom–Paramount transaction, if consummated, is to shift control of Paramount from the public stockholders to a controlling stockholder, Viacom. Neither *Time–Warner* nor any other decision of this Court holds that a "break-up" of the company is essential to give rise to this obligation where there is a sale of control.

III. BREACH OF FIDUCIARY DUTIES BY PARAMOUNT BOARD

We now turn to duties of the Paramount Board under the facts of this case and our conclusions as to the breaches of those duties which warrant injunctive relief.

A. The Specific Obligations of the Paramount Board

[10] Under the facts of this case, the Paramount directors had the obligation: (a) to be diligent and vigilant in examining critically the Paramount–Viacom transaction and the QVC tender offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information

reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide the best value reasonably available to the stockholders; and (d) to negotiate actively and in good faith with both Viacom and QVC to that end.

Having decided to sell control of the corporation, the Paramount directors were required to evaluate critically whether or not all material aspects of the Paramount–Viacom transaction (separately and in the aggregate) were reasonable and in the best interests of the Paramount stockholders in light of current circumstances, including: the change of control premium, the Stock Option Agreement, the Termination Fee, the coercive nature of both the Viacom and QVC tender offers,[18] the No–Shop Provision, and the proposed disparate use of the Rights Agreement as to the Viacom and QVC tender offers, respectively.

These obligations necessarily implicated various issues, including the questions of whether or not those provisions and other aspects of the Paramount–Viacom transaction (separately and in the aggregate): (a) adversely affected the value provided to the Paramount stockholders; (b) inhibited or encouraged alternative bids; (c) were enforceable contractual obligations in light of the directors' fiduciary duties; and (d) in the end would advance or retard the Paramount directors' obligation to secure for the Paramount stockholders the best value reasonably available under the circumstances.

The Paramount defendants contend that they were precluded by certain contractual provisions, including the No–Shop Provision, from negotiating with QVC or seeking alternatives. Such provisions, whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the Paramount directors from carrying out their fiduciary duties under Delaware law. To the extent such provisions are inconsistent with those duties, they are invalid and unenforceable. *See Revlon,* 506 A.2d at 184–85.

Since the Paramount directors had already decided to sell control, they had an obligation ***49** to continue their search for the best value reasonably available to the stockholders. This continuing obligation included the responsibility, at the October 24 board meeting and thereafter, to evaluate critically both the QVC tender offers and the Paramount–Viacom transaction to determine if: (a) the QVC tender offer was, or would continue to be, conditional; (b) the QVC tender offer could be improved; (c) the Viacom tender offer or other aspects of the Paramount–Viacom transaction could be improved; (d) each of the respective offers would be reasonably likely to come to closure, and under what circumstances; (e) other material information was reasonably available for consideration by the Paramount directors; (f) there were viable and realistic alternative courses of action; and (g) the timing constraints could be managed so the directors could consider these matters carefully and deliberately.

B. The Breaches of Fiduciary Duty by the Paramount Board

[11] [12] The Paramount directors made the decision on September 12, 1993, that, in their judgment, a strategic merger with Viacom on the economic terms of the Original Merger Agreement was in the best interests of Paramount and its stockholders. Those terms provided a modest change of control premium to the stockholders. The directors also decided at that time that it was appropriate to agree to certain defensive measures (the Stock Option Agreement, the Termination Fee, and the No–Shop Provision) insisted upon by Viacom as part of that economic transaction. Those defensive measures, coupled with the sale of control and subsequent disparate treatment of competing bidders, implicated the judicial scrutiny of *Unocal, Revlon, Macmillan,* and their progeny. We conclude that the Paramount directors' process was not reasonable, and the result achieved for the stockholders was not reasonable under the circumstances.

When entering into the Original Merger Agreement, and thereafter, the Paramount Board clearly gave insufficient attention to the potential consequences of the defensive measures demanded by Viacom. The Stock Option Agreement had a number of unusual and potentially "draconian"[19] provisions, including the Note Feature and the Put Feature. Furthermore, the Termination Fee, whether or not unreasonable by itself, clearly made Paramount less attractive to other bidders, when coupled with the Stock Option Agreement. Finally, the No–Shop Provision inhibited the Paramount Board's ability to negotiate with other potential bidders, particularly QVC which had already expressed an interest in Paramount.[20]

Throughout the applicable time period, and especially from the first QVC merger proposal on September 20 through the Paramount Board meeting on November 15, QVC's interest in Paramount provided the opportunity for the Paramount Board to seek significantly higher value for the Paramount stockholders than that being offered by Viacom. QVC persistently demonstrated its intention to meet and exceed the Viacom offers, and ***50**

frequently expressed its willingness to negotiate possible further increases.

The Paramount directors had the opportunity in the October 23–24 time frame, when the Original Merger Agreement was renegotiated, to take appropriate action to modify the improper defensive measures as well as to improve the economic terms of the Paramount–Viacom transaction. Under the circumstances existing at that time, it should have been clear to the Paramount Board that the Stock Option Agreement, coupled with the Termination Fee and the No–Shop Clause, were impeding the realization of the best value reasonably available to the Paramount stockholders. Nevertheless, the Paramount Board made no effort to eliminate or modify these counterproductive devices, and instead continued to cling to its vision of a strategic alliance with Viacom. Moreover, based on advice from the Paramount management, the Paramount directors considered the QVC offer to be "conditional" and asserted that they were precluded by the No–Shop Provision from seeking more information from, or negotiating with, QVC.

By November 12, 1993, the value of the revised QVC offer on its face exceeded that of the Viacom offer by over $1 billion at then current values. This significant disparity of value cannot be justified on the basis of the directors' vision of future strategy, primarily because the change of control would supplant the authority of the current Paramount Board to continue to hold and implement their strategic vision in any meaningful way. Moreover, their uninformed process had deprived their strategic vision of much of its credibility. *See Van Gorkom,* 488 A.2d at 872; *Cede v. Technicolor,* 634 A.2d at 367; *Hanson Trust PLC v. ML SCM Acquisition Inc.,* 2d Cir., 781 F.2d 264, 274 (1986).

When the Paramount directors met on November 15 to consider QVC's increased tender offer, they remained prisoners of their own misconceptions and missed opportunities to eliminate the restrictions they had imposed on themselves. Yet, it was not "too late" to reconsider negotiating with QVC. The circumstances existing on November 15 made it clear that the defensive measures, taken as a whole, were problematic: (a) the No–Shop Provision could not define or limit their fiduciary duties; (b) the Stock Option Agreement had become "draconian"; and (c) the Termination Fee, in context with all the circumstances, was similarly deterring the realization of possibly higher bids. Nevertheless, the Paramount directors remained paralyzed by their uninformed belief that the QVC offer was "illusory." This final opportunity to negotiate on the stockholders' behalf and to fulfill their obligation to seek the best value reasonably available was thereby squandered.[21]

IV. VIACOM'S CLAIM OF VESTED CONTRACT RIGHTS

Viacom argues that it had certain "vested" contract rights with respect to the No–Shop Provision and the Stock Option Agreement.[22] In effect, Viacom's argument is that the Paramount directors could enter into an agreement in violation of their fiduciary duties and then render Paramount, and ultimately its stockholders, liable for failing to carry out an agreement in violation of those duties. Viacom's protestations about vested rights are without merit. This Court has found that those defensive measures were improperly designed to deter potential bidders, and that ***51** such measures do not meet the reasonableness test to which they must be subjected. They are consequently invalid and unenforceable under the facts of this case.

[13] [14] The No–Shop Provision could not validly define or limit the fiduciary duties of the Paramount directors. To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable. *Cf. Wilmington Trust v. Coulter,* 200 A.2d at 452–54. Despite the arguments of Paramount and Viacom to the contrary, the Paramount directors could not contract away their fiduciary obligations. Since the No–Shop Provision was invalid, Viacom never had any vested contract rights in the provision.

[15] As discussed previously, the Stock Option Agreement contained several "draconian" aspects, including the Note Feature and the Put Feature. While we have held that lock-up options are not *per se* illegal, *see Revlon,* 506 A.2d at 183, no options with similar features have ever been upheld by this Court. Under the circumstances of this case, the Stock Option Agreement clearly is invalid. Accordingly, Viacom never had any vested contract rights in that Agreement.

Viacom, a sophisticated party with experienced legal and financial advisors, knew of (and in fact demanded) the unreasonable features of the Stock Option Agreement. It cannot be now heard to argue that it obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties. As the Nebraska Supreme Court said in rejecting a similar argument in *ConAgra, Inc. v. Cargill, Inc.,* 222 Neb. 136, 382 N.W.2d 576, 587–88 (1986), "To so hold, it would seem, would be to get the shareholders coming and going." Likewise, we reject Viacom's arguments and hold that its fate must rise or fall, and in this instance fall,

with the determination that the actions of the Paramount Board were invalid.

V. CONCLUSION

The realization of the best value reasonably available to the stockholders became the Paramount directors' primary obligation under these facts in light of the change of control. That obligation was not satisfied, and the Paramount Board's process was deficient. The directors' initial hope and expectation for a strategic alliance with Viacom was allowed to dominate their decisionmaking process to the point where the arsenal of defensive measures established at the outset was perpetuated (not modified or eliminated) when the situation was dramatically altered. QVC's unsolicited bid presented the opportunity for significantly greater value for the stockholders and enhanced negotiating leverage for the directors. Rather than seizing those opportunities, the Paramount directors chose to wall themselves off from material information which was reasonably available and to hide behind the defensive measures as a rationalization for refusing to negotiate with QVC or seeking other alternatives. Their view of the strategic alliance likewise became an empty rationalization as the opportunities for higher value for the stockholders continued to develop.

It is the nature of the judicial process that we decide only the case before us—a case which, on its facts, is clearly controlled by established Delaware law. Here, the proposed change of control and the implications thereof were crystal clear. In other cases they may be less clear. The holding of this case on its facts, coupled with the holdings of the principal cases discussed herein where the issue of sale of control is implicated, should provide a workable precedent against which to measure future cases.

For the reasons set forth herein, the November 24, 1993, Order of the Court of Chancery has been AFFIRMED, and this matter has been REMANDED for proceedings consistent herewith, as set forth in the December 9, 1993, Order of this Court.

ADDENDUM

The record in this case is extensive. The appendix filed in this Court comprises 15 volumes, totalling some 7251 pages. It includes ***52** substantial deposition testimony which forms part of the factual record before the Court of Chancery and before this Court. The members of this Court have read and considered the appendix, including the deposition testimony, in reaching its decision, preparing the Order of December 9, 1993, and this opinion. Likewise, the Vice Chancellor's opinion revealed that he was thoroughly familiar with the entire record, including the deposition testimony. As noted, *supra* p. 37 note 2, the Court has commended the parties for their professionalism in conducting expedited discovery, assembling and organizing the record, and preparing and presenting very helpful briefs, a joint appendix, and oral argument.

The Court is constrained, however, to add this Addendum. Although this Addendum has no bearing on the outcome of the case, it relates to a serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts.[23]

[16] The issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation.[24] One particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future—a lesson of conduct not to be tolerated or repeated.

On November 10, 1993, an expedited deposition of Paramount, through one of its directors, J. Hugh Liedtke,[25] was taken in the state of Texas. The deposition was taken by Delaware counsel for QVC. Mr. Liedtke was individually represented at this deposition by Joseph D. Jamail, Esquire, of the Texas Bar. Peter C. Thomas, Esquire, of the New York Bar appeared and defended on behalf of the Paramount defendants. It does not appear that any member of the Delaware bar was present at the deposition representing any of the defendants or the stockholder plaintiffs.

Mr. Jamail did not otherwise appear in this Delaware proceeding representing any party, and he was not admitted *pro hac vice*.[26] ***53** Under the rules of the Court of Chancery and this Court,[27] lawyers who are admitted *pro hac vice* to represent a party in Delaware proceedings are subject to Delaware Disciplinary Rules,[28] and are required to review the Delaware State Bar Association Statement of Principles of Lawyer Conduct (the "Statement of Principles").[29] During the Liedtke deposition, Mr. Jamail abused the privilege of representing a witness in a Delaware proceeding, in that he: (a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner

to elicit testimony to assist the Court in this matter.

To illustrate, a few excerpts from the latter stages of the Liedtke deposition follow:

A. [Mr. Liedtke] I vaguely recall [Mr. Oresman's letter].... I think I did read it, probably.

....

Q. (By Mr. Johnston [Delaware counsel for QVC]) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

MR. JAMAIL: Don't answer that.

How would he know what was going on in Mr. Oresman's mind?

Don't answer it.

Go on to your next question.

MR. JOHNSTON: No, Joe—

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

*54 MR. JOHNSTON: No. Joe, Joe—

MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

MR. JOHNSTON: Let's just take it easy.

MR. JAMAIL: No, we're not going to take it easy. Get done with this.

MR. JOHNSTON: We will go on to the next question.

MR. JAMAIL: Do it now.

MR. JOHNSTON: We will go on to the next question. We're not trying to excite anyone.

MR. JAMAIL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.

MR. JOHNSTON: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.

MR. JAMAIL: Well, go on and shut up.

MR. JOHNSTON: Are you finished?

MR. JAMAIL: Yeah, you—

MR. JOHNSTON: Are you finished?

MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing.

Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.

MR. JOHNSTON: Are you finished?

MR. THOMAS: Come on, Mr. Johnston, move it.

MR. JOHNSTON: I don't need this kind of abuse.

MR. THOMAS: Then just ask the next question.

Q. (By Mr. Johnston) All right. To try to move forward, Mr. Liedtke, ... I'll show you what's been marked as Liedtke 14 and it is a covering letter dated October 29 from Steven Cohen of Wachtell, Lipton, Rosen & Katz including QVC's Amendment Number 1 to its Schedule 14D–1, and my question—

A. No.

Q. —to you, sir, is whether you've seen that?

A. No. Look, I don't know what your intent in asking all these questions is, but, my God, I am not going to play boy lawyer.

Q. Mr. Liedtke—

A. Okay. Go ahead and ask your question.

Q. —I'm trying to move forward in this deposition that we are entitled to take. I'm trying to streamline it.

MR. JAMAIL: Come on with your next question. Don't even talk with this witness.

MR. JOHNSTON: I'm trying to move forward with it.

MR. JAMAIL: You understand me? Don't talk to this witness except by question. Did you hear me?

MR. JOHNSTON: I heard you fine.

> MR. JAMAIL: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.

(JA 6002–06).[30]

Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by Mr. Jamail on the record of the Liedtke deposition is not properly representing his client, and the client's cause is not advanced by a lawyer who engages in unprofessional conduct of this nature. It happens that in this case there was no application to the Court, and the parties and the witness do not *55 appear to have been prejudiced by this misconduct.[31]

Nevertheless, the Court finds this unprofessional behavior to be outrageous and unacceptable. If a Delaware lawyer had engaged in the kind of misconduct committed by Mr. Jamail on this record, that lawyer would have been subject to censure or more serious sanctions.[32] While the specter of disciplinary proceedings should not be used by the parties as a litigation tactic,[33] conduct such as that involved here goes to the heart of the trial court proceedings themselves. As such, it cries out for relief under the trial court's rules, including Ch. Ct. R. 37. Under some circumstances, the use of the trial court's inherent summary contempt powers may be appropriate. *See In re Butler,* Del.Supr., 609 A.2d 1080, 1082 (1992).

Although busy and overburdened, Delaware trial courts are "but a phone call away" and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct.[34] It is not appropriate for this Court to prescribe in the abstract any particular remedy or to provide an exclusive list of remedies under such circumstances. We assume that the trial courts of this State would consider protective orders and the sanctions permitted by the discovery rules. Sanctions could include exclusion of obstreperous counsel from attending the deposition (whether or not he or she has been admitted *pro hac vice*), ordering the deposition recessed and reconvened promptly in Delaware, or the appointment of a master to preside at the deposition. Costs and counsel fees should follow.

[17] As noted, this was a deposition of Paramount through one of its directors. Mr. Liedtke was a Paramount witness in every respect. He was not there either as an individual defendant or as a third party witness. Pursuant to Ch. Ct. R. 170(d), the Paramount defendants should have been represented at the deposition by a Delaware lawyer or a lawyer admitted *pro hac vice.* A Delaware lawyer who moves the admission *pro hac vice* of an out-of-state lawyer is not relieved of responsibility, is required to appear at all court proceedings (except depositions when a lawyer admitted *pro hac vice* is present), shall certify that the lawyer appearing *56 *pro hac vice* is reputable and competent, and that the Delaware lawyer is in a position to recommend the out-of-state lawyer.[35] Thus, one of the principal purposes of the *pro hac vice* rules is to assure that, if a Delaware lawyer is not to be present at a deposition, the lawyer admitted *pro hac vice* will be there. As such, he is an officer of the Delaware Court, subject to control of the Court to ensure the integrity of the proceeding.

Counsel attending the Liedtke deposition on behalf of the Paramount defendants had an obligation to ensure the integrity of that proceeding. The record of the deposition as a whole (JA 5916–6054) demonstrates that, not only Mr. Jamail, but also Mr. Thomas (representing the Paramount defendants), continually interrupted the questioning, engaged in colloquies and objections which sometimes suggested answers to questions,[36] and constantly pressed the questioner for time throughout the deposition.[37] As to Mr. Jamail's tactics quoted above, Mr. Thomas passively let matters proceed as they did, and at times even added his own voice to support the behavior of Mr. Jamail. A Delaware lawyer or a lawyer admitted *pro hac vice* would have been expected to put an end to the misconduct in the Liedtke deposition.

This kind of misconduct is not to be tolerated in any Delaware court proceeding, including depositions taken in other states in which witnesses appear represented by their own counsel other than counsel for a party in the proceeding. Yet, there is no clear mechanism for this Court to deal with this matter in terms of sanctions or disciplinary remedies at this time in the context of this case. Nevertheless, consideration will be given to the following issues for the future: (a) whether or not it is appropriate and fair to take into account the behavior of Mr. Jamail in this case in the event application is made by him in the future to appear *pro hac vice* in any Delaware proceeding;[38] and (b) what rules or standards should be adopted to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts.

As to (a), this Court will welcome a voluntary appearance by Mr. Jamail if a request is received from him by the

Clerk of this Court within thirty days of the date of this Opinion and Addendum. The purpose of such voluntary appearance will be to explain the questioned conduct and to show cause why such conduct should not be considered as a bar to any future appearance by Mr. Jamail in a Delaware proceeding. As to (b), this Court and the trial courts of this State will undertake to strengthen the existing mechanisms for dealing with the type of misconduct referred *57 to in this Addendum and the practices relating to admissions *pro hac vice*.

All Citations

637 A.2d 34, 62 USLW 2530, Fed. Sec. L. Rep. P 98,063

Footnotes

1 We accepted this expedited interlocutory appeal on November 29, 1993. After briefing and oral argument in this Court held on December 9, 1993, we issued our December 9 Order affirming the November 24 Order of the Court of Chancery. In our December 9 Order, we stated, "It is not feasible, because of the exigencies of time, for this Court to complete an opinion setting forth more comprehensively the rationale of the Court's decision. Unless otherwise ordered by the Court, such an opinion will follow in due course." December 9 Order at 3. This is the opinion referred to therein.

2 It is important to put the Addendum in perspective. This Court notes and has noted its appreciation of the outstanding judicial workmanship of the Vice Chancellor and the professionalism of counsel in this matter in handling this expedited litigation with the expertise and skill which characterize Delaware proceedings of this nature. The misconduct noted in the Addendum is an aberration which is not to be tolerated in any Delaware proceeding.

3 This Court's standard and scope of review as to facts on appeal from a preliminary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process. *Ivanhoe Partners v. Newmont Mining Corp.*, Del.Supr., 535 A.2d 1334, 1342–41 (1987).

4 Grace J. Fippinger, a former Vice President, Secretary and Treasurer of NYNEX Corporation, and director of Pfizer, Inc., Connecticut Mutual Life Insurance Company, and The Bear Stearns Companies, Inc.
Irving R. Fischer, Chairman and Chief Executive Officer of HRH Construction Corporation, Vice Chairman of the New York City Chapter of the National Multiple Sclerosis Society, a member of the New York City Holocaust Memorial Commission, and an Adjunct Professor of Urban Planning at Columbia University
Benjamin L. Hooks, Senior Vice President of the Chapman Company and director of Maxima Corporation
J. Hugh Liedtke, Chairman of Pennzoil Company
Franz J. Lutolf, former General Manager and a member of the Executive Board of Swiss Bank Corporation, and director of Grapha Holding AG, Hergiswil (Switzerland), Banco Santander (Suisse) S.A., Geneva, Diawa Securities Bank (Switzerland), Zurich, Cheak Coast Helarb European Acquisitions S.A., Luxembourg Internationale Nederlanden Bank (Switzerland), Zurich
James A. Pattison, Chairman and Chief Executive Officer of the Jim Pattison Group, and director of the Toronto–Dominion Bank, Canadian Pacific Ltd., and Toyota's Canadian subsidiary
Lester Pollack, General Partner of Lazard Freres & Co., Chief Executive Officer of Center Partners, and Senior Managing Director of Corporate Partners, investment affiliates of Lazard Freres, director of Loews Corp., CNA Financial Corp., Sunamerica Corp., Kaufman & Broad Home Corp., Parlex Corp., Transco Energy Company, Polaroid Corp., Continental Cablevision, Inc., and Tidewater Inc., and Trustee of New York University
Irwin Schloss, Senior Advisor, Marcus Schloss & Company, Inc.
Samuel J. Silberman, Retired Chairman of Consolidated Cigar Corporation
Lawrence M. Small, President and Chief Operating Officer of the Federal National Mortgage Association, director of Fannie Mae and the Chubb Corporation, and trustee of Morehouse College and New York University Medical Center
George Weissman, retired Chairman and Consultant of Philip Morris Companies, Inc., director of Avnet, Incorporated, and Chairman of Lincoln Center for the Performing Arts, Inc.

5 By November 15, 1993, the value of the Stock Option Agreement had increased to nearly $500 million based on the $90 QVC bid. *See* Court of Chancery Opinion, 635 A.2d 1245, 1271.

6 Under the Amended Merger Agreement and the Paramount Board's resolutions approving it, no further action of the Paramount Board would be required in order for Paramount's Rights Agreement to be amended. As a result, the proper officers of the company were authorized to implement the amendment unless they were instructed otherwise by the Paramount Board.

7 This belief may have been based on a report prepared by Booz–Allen and distributed to the Paramount Board at its October 24 meeting. The report, which relied on public information regarding QVC, concluded that the synergies of a Paramount–Viacom merger were significantly superior to those of a Paramount–QVC merger. QVC has labelled the Booz–Allen report as a "joke."

8 The market prices of Viacom's and QVC's stock were poor measures of their actual values because such prices constantly fluctuated depending upon which company was perceived to be the more likely to acquire Paramount.

9 Where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders. *E.g., Weinberger v. UOP, Inc.*, Del.Supr., 457 A.2d 701, 710–11 (1983); *Nixon v. Blackwell,* Del.Supr., 626 A.2d 1366, 1376 (1993).

10 For purposes of our December 9 Order and this Opinion, we have used the terms "sale of control" and "change of control" interchangeably without intending any doctrinal distinction.

11 *See Schnell v. Chris–Craft Indus., Inc.,* Del.Supr., 285 A.2d 437, 439 (1971) (holding that actions taken by management to manipulate corporate machinery "for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management" were "contrary to established principles of corporate democracy" and therefore invalid); *Giuricich v. Emtrol Corp.,* Del.Supr., 449 A.2d 232, 239 (1982) (holding that "careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated"); *Centaur Partners, IV v. Nat'l Intergroup,* Del.Supr., 582 A.2d 923 (1990) (holding that supermajority voting provisions must be clear and unambiguous because they have the effect of disenfranchising the majority); *Stroud v. Grace,* Del.Supr., 606 A.2d 75, 84 (1992) (directors' duty of disclosure is premised on the importance of stockholders being fully informed when voting on a specific matter); *Blasius Indus., Inc. v. Atlas Corp.,* Del.Ch., 564 A.2d 651, 659 n. 2 (1988) ("Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.").

12 Examples of such protective provisions are supermajority voting provisions, majority of the minority requirements, etc. Although we express no opinion on what effect the inclusion of any such stockholder protective devices would have had in this case, we note that this Court has upheld, under different circumstances, the reasonableness of a standstill agreement which limited a 49.9 percent stockholder to 40 percent board representation. *Ivanhoe,* 535 A.2d at 1343.

13 We express no opinion on any scenario except the actual facts before the Court, and our precise holding herein. Unsolicited tender offers in other contexts may be governed by different precedent. For example, where a potential sale of control by a corporation is not the consequence of a board's action, this Court has recognized the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer. *See Pogostin,* 480 A.2d at 627; *Time–Warner,* 571 A.2d at 1152; *Bershad v. Curtiss–Wright Corp.,* Del.Supr., 535 A.2d 840, 845 (1987); *Macmillan,* 559 A.2d at 1285 n. 35. The decision of a board to resist such an acquisition, like all decisions of a properly-functioning board, must be informed, *Unocal,* 493 A.2d at 954–55, and the circumstances of each particular case will determine the steps that a board must take to inform itself, and what other action, if any, is required as a matter of fiduciary duty.

14 When assessing the value of non-cash consideration, a board should focus on its value as of the date it will be received by the stockholders. Normally, such value will be determined with the assistance of experts using generally accepted methods of valuation. *See In re RJR Nabisco, Inc. Shareholders Litig.,* Del.Ch., C.A. No. 10389, 1989 WL 7036, Allen, C. (Jan. 31, 1989), reprinted at 14 Del.J.Corp.L. 1132, 1161.

15 Because the Paramount Board acted unreasonably as to process and result in this sale of control situation, the business judgment rule did not become operative.

16 Before this test is invoked, "the plaintiff must show, and the trial court must find, that the directors of the target company treated one or more of the respective bidders on unequal terms." *Macmillan,* 559 A.2d at 1288.

17 It is to be remembered that, in cases where the traditional business judgment rule is applicable and the board acted with due care, in good faith, and in the honest belief that they are acting in the best interests of the stockholders (which is not this case), the Court gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and "will not substitute our views for those of the board if the latter's decision can be 'attributed to any rational business purpose.' " *Unocal,* 493 A.2d at 949 (*quoting Sinclair Oil Corp. v. Levien,* Del.Supr., 280 A.2d 717, 720 (1971)). *See Aronson,* 473 A.2d at 812.

18 Both the Viacom and the QVC tender offers were for 51 percent cash and a "back-end" of various securities, the value of each of which depended on the fluctuating value of Viacom and QVC stock at any given time. Thus, both tender offers were two-tiered, front-end loaded, and coercive. Such coercive offers are inherently problematic and should be expected to receive particularly careful analysis by a target board. *See Unocal,* 493 A.2d at 956.

19 The Vice Chancellor so characterized the Stock Option Agreement. Court of Chancery Opinion, 635 A.2d 1245, 1272. We express no opinion whether a stock option agreement of essentially this magnitude, but with a reasonable "cap" and without the Note and Put Features, would be valid or invalid under other circumstances. *See Hecco Ventures v. Sea–Land Corp.,* Del.Ch., C.A. No. 8486, 1986 WL 5840, Jacobs, V.C. (May 19, 1986) (21.7 percent stock option); *In re Vitalink Communications Corp. Shareholders Litig.,* Del.Ch., C.A. No. 12085, Chandler, V.C. (May 16, 1990) (19.9 percent stock option).

20 We express no opinion whether certain aspects of the No–Shop Provision here could be valid in another context. Whether or not it could validly have operated here at an early stage solely to prevent Paramount from actively "shopping" the company, it could not prevent the Paramount directors from carrying out their fiduciary duties in considering unsolicited bids or in negotiating for the best value reasonably available to the stockholders. *Macmillan,* 559 A.2d at 1287. As we said in *Barkan:* "Where a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids." 567 A.2d at 1288. *See also Revlon,* 506 A.2d at 184 (holding that "[t]he no-shop provision, like the lock-up option, while not *per se* illegal, is impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder").

21 The Paramount defendants argue that the Court of Chancery erred by assuming that the Rights Agreement was "pulled" at the November 15 meeting of the Paramount Board. The problem with this argument is that, under the Amended Merger Agreement and the resolutions of the Paramount Board related thereto, Viacom would be exempted from the Rights Agreement in the absence of further action of the Paramount Board and no further meeting had been scheduled or even contemplated prior to the closing of the Viacom tender offer. This failure to schedule and hold a meeting shortly before the closing date in order to make a final decision, based on all of the information and circumstances then existing, whether to exempt Viacom from the Rights Agreement was inconsistent with the Paramount Board's responsibilities and does not provide a basis to challenge the Court of Chancery's decision.

22 Presumably this argument would have included the Termination Fee had the Vice Chancellor invalidated that provision or if appellees had cross-appealed from the Vice Chancellor's refusal to invalidate that provision.

23 We raise this matter *sua sponte* as part of our exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings. *See In re Infotechnology, Inc. Shareholder Litig.,* Del.Supr., 582 A.2d 215 (1990); *In re Nenno,* Del.Supr., 472 A.2d 815, 819 (1983); *In re Green,* Del.Supr., 464 A.2d 881, 885 (1983); *Delaware Optometric Corp. v. Sherwood,* 36 Del.Ch. 223, 128 A.2d 812 (1957); *Darling Apartment Co. v. Springer,* 25 Del.Ch. 420, 22 A.2d 397 (1941). Normally our supervision relates to the conduct of members of the Delaware Bar and those admitted *pro hac vice.* Our responsibility for supervision is not confined to lawyers who are members of the Delaware Bar and those admitted *pro hac vice,* however. *See In re Metviner,* Del.Supr., Misc. No. 256, 1989 WL 226135, Christie, C.J. (July 7, 1989 and Aug. 22, 1989) (ORDERS). Our concern, and our duty to insist on appropriate conduct in any Delaware proceeding, including out-of-state depositions taken in Delaware litigation, extends to all lawyers, litigants, witnesses, and others.

24 Justice Sandra Day O'Connor recently highlighted the national concern about the deterioration in civility in a speech delivered on December 14, 1993, to an American Bar Association group on "Civil Justice Improvements."

> I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
>
> ....
>
> ... In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.

The Honorable Sandra Day O'Connor, "Civil Justice System Improvements," ABA at 5 (Dec. 14, 1993) (footnotes omitted).

25 The docket entries in the Court of Chancery show a November 2, 1993, "Notice of Deposition of Paramount Board" (Dkt 65). Presumably, this included Mr. Liedtke, a director of Paramount. Under Ch. Ct. R. 32(a)(2), a deposition is admissible against a party if the deposition is of an officer, director, or managing agent. From the docket entries, it appears that depositions of third party witnesses (persons who were not directors or officers) were taken pursuant to

the issuance of commissions.

26 It does not appear from the docket entries that Mr. Thomas was admitted *pro hac vice* in the Court of Chancery. In fact, no member of his firm appears from the docket entries to have been so admitted until Barry R. Ostrager, Esquire, who presented the oral argument on behalf of the Paramount defendants, was admitted on the day of the argument before the Vice Chancellor, November 16, 1993.

27 Ch.Ct.R. 170; Supr.Ct.R. 71. There was no Delaware lawyer and no lawyer admitted *pro hac vice* present at the deposition representing any party, except that Mr. Johnston, a Delaware lawyer, took the deposition on behalf of QVC. The Court is aware that the general practice has not been to view as a requirement that a Delaware lawyer or a lawyer already admitted *pro hac vice* must be present at all depositions. Although it is not as explicit as perhaps it should be, we believe that Ch.Ct.R. 170(d), fairly read, requires such presence:

> (d) Delaware counsel for any party shall appear in the action in which the motion for admission pro hac vice is filed and shall sign or receive service of all notices, orders, pleadings or other papers filed in the action, and shall attend all proceedings before the Court, Clerk of the Court, or other officers of the Court, unless excused by the Court. Attendance of Delaware Counsel at depositions shall not be required unless ordered by the Court.

See also Hoechst Celanese Corp. v. National Union Fire Ins. Co., Del.Super., 623 A.2d 1099, 1114 (1991). (Super.Ct.Civ.R. 90.1, which corresponds to Ch.Ct.R. 170, "merely excuses attendance of local counsel at depositions, but does not excuse non-Delaware counsel from compliance with the *pro hac vice* requirement.... A deposition conducted pursuant to Court rules is a proceeding."). We believe that these shortcomings in the enforcement of proper lawyer conduct can and should be remedied consistent with the nature of expedited proceedings.

28 It appears that at least Rule 3.5(c) of the Delaware Lawyer's Rules of Professional Conduct is implicated here. It provides: "A lawyer shall not ... (c) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct which is degrading to a tribunal."

29 The following are a few pertinent excerpts from the Statement of Principles:

> The Delaware State Bar Association, for the Guidance of Delaware lawyers, **and those lawyers from other jurisdictions who may be associated with them,** adopted the following Statement of Principles of Lawyer Conduct on [November 15, 1991].... The purpose of adopting these Principles is to promote and foster the ideals of **professional courtesy, conduct and cooperation....** A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession.... [A] lawyer ... **should treat** all persons, including **adverse lawyers** and parties, **fairly and equitably.... Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice....** Respect for the court requires ... emotional self-control; [and] the absence of scorn and superiority in words of demeanor.... A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial. **No pre-trial procedure should be used to harass an opponent or delay a case.... Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge....** Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such investigation as is required to form an informed conviction that the lawyer to be admitted is ethical and competent, and should furnish the candidate for admission with a copy of this Statement.

(Emphasis supplied.)

30 Joint Appendix of the parties on appeal.

31 We recognize the practicalities of litigation practice in our trial courts, particularly in expedited proceedings such as this preliminary injunction motion, where simultaneous depositions are often taken in far-flung locations, and counsel have only a few hours to question each witness. Understandably, counsel may be reluctant to take the time to stop a deposition and call the trial judge for relief. Trial courts are extremely busy and overburdened. Avoidance of this kind of misconduct is essential. If such misconduct should occur, the aggrieved party should recess the deposition and engage in a dialogue with the offending lawyer to obviate the need to call the trial judge. If all else fails and it is necessary to call the trial judge, sanctions may be appropriate against the offending lawyer or party, or against the complaining lawyer or party if the request for court relief is unjustified. *See* Ch.Ct.R. 37. It should also be noted that discovery abuse sometimes is the fault of the questioner, not the lawyer defending the deposition. These admonitions should be read as applying to both sides.

32 *See In re Ramunno,* Del.Supr., 625 A.2d 248, 250 (1993) (Delaware lawyer held to have violated Rule 3.5 of the Rules of Professional Conduct, and therefore subject to public reprimand and warning for use of profanity similar to that

involved here and "insulting conduct toward opposing counsel [found] ... unacceptable by any standard").

33 *See Infotechnology,* 582 A.2d at 220 ("In Delaware there is the fundamental constitutional principle that [the Supreme] Court, alone, has the sole and exclusive responsibility over all matters affecting governance of the Bar.... The Rules are to be enforced by a disciplinary agency, and are not to be subverted as procedural weapons.").

34 *See Hall v. Clifton Precision,* E.D.Pa., 150 F.R.D. 525 (1993) (ruling on "coaching," conferences between deposed witnesses and their lawyers, and obstructive tactics):

> Depositions are the factual battleground where the vast majority of litigation actually takes place.... Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.

150 F.R.D. at 531.

35 *See, e.g.,* Ch.Ct.R. 170(b), (d), and (h).

36 Rule 30(d)(1) of the revised Federal Rules of Civil Procedure, which became effective on December 1, 1993, requires objections during depositions to be "stated concisely and in a non-argumentative and non-suggestive manner." *See Hall,* 150 F.R.D. at 530. *See also Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.,* D.Del., C.A. No. 79–182, Steel, J. (Dec. 12, 1980); *Cascella v. GDV, Inc.,* Del.Ch., C.A. No. 5899, 1981 WL 15129, Brown, V.C. (Jan. 15, 1981); *In re Asbestos Litig.,* Del.Super., 492 A.2d 256 (1985); *Deutschman v. Beneficial Corp.,* D.Del., C.A. No. 86–595 MMS, Schwartz, J. (Feb. 20, 1990). The Delaware trial courts and this Court are evaluating the desirability of adopting certain of the new Federal Rules, or modifications thereof, and other possible rule changes.

37 While we do not necessarily endorse everything set forth in the *Hall* case, we share Judge Gawthrop's view not only of the impropriety of coaching witnesses on and off the record of the deposition (*see supra* note 34), but also the impropriety of objections and colloquy which "tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony." *See* 150 F.R.D. at 530. To be sure, there are also occasions when the questioner is abusive or otherwise acts improperly and should be sanctioned. *See supra* note 31. Although the questioning in the Liedtke deposition could have proceeded more crisply, this was not a case where it was the questioner who abused the process.

38 The Court does not condone the conduct of Mr. Thomas in this deposition. Although the Court does not view his conduct with the gravity and revulsion with which it views Mr. Jamail's conduct, in the future the Court expects that counsel in Mr. Thomas's position will have been admitted *pro hac vice* before participating in a deposition. As an officer of the Delaware Court, counsel admitted *pro hac vice* are now clearly on notice that they are expected to put an end to conduct such as that perpetrated by Mr. Jamail on this record.

End of Document

Justice Ira B. Warshawsky (rtd)

Justice Warshawsky started his career in public service as a Legal Aid attorney in 1970 when he was Assistant Chief of the Family Court branch in Queens County. He served as a Nassau County Assistant District Attorney in the District and County Court trial bureaus from 1972 to 1974. Following these four years of prosecution and defense work he became a law secretary, serving judges of the New York State Court of Claims and County Court of Nassau County. In 1987 he was elected to the District Court and served there until 1997. He was elected in 1997 to the Supreme Court of the State of New York where he presided in a Dedicated Matrimonial Part, a Differentiated Case Management Part and sat in one of the county's three Dedicated Commercial Parts. The judge retired at the end of 2011.

In 2012 he joined the law firm of Meyer, Suozzi English & Klein, PC and is Of Counsel in the firm's Garden City, NY office in their Litigation & Alternative Dispute Resolution sections, serving not only as an advocate but as a mediator, arbitrator, litigator, private judge and referee, especially in the area of business disputes and the resolution of electronic discovery (E-Discovery) issues. He also currently serves as a mediator and arbitrator for NAM (National Arbitration and Mediation) and is a member of the Nassau County Bar Association's Mediation and Arbitration panel.

The Judge received his undergraduate education at Rutgers University (B.A., 1966) and his J.D. degree from Brooklyn Law School (1969).

He has been active in numerous legal, educational and charitable organizations during his career. He is a former director of the Nassau County Bar Association, has served as chair of its Community Relations and Public Education Committee and is a former dean of the Nassau Academy of Law. He is a past president of the Nassau County District Court Judge's Association and the Former Assistant District Attorneys Association of Nassau County. Judge Warshawsky is also a member of the American Bar Association, the New York State Bar Association, the Jewish Lawyers Association and the Theodore Roosevelt American Inn of Court of which he is a past president. He is also past President of the American College of Business Court Judges, of which

he is a founding member. He currently serves as a member of the Judicial Advisory Board of the Sedona Conference.

The Judge has served as a lecturer in various areas of commercial, criminal and civil law. He frequently lectures for the Trial Advocacy Program at Hofstra and Widener Law Schools. He has lectured for the American, New York State and Nassau bar associations, and private corporate forums, most recently in the area of electronic discovery. The Judge currently serves as a contributing editor of the Benchbook for Trial Judges published by the Supreme Court Justices Association of the State of New York.

In 1996 the Judge was the recipient of EAC's (Education Assistance Corporation) Humanitarian of the Year Award, in 1997 he received the Nassau County Bar Association President's Award, in 2000 he received the Former Assistant District Attorneys Association's Frank A. Gulotta Criminal Justice Award and in 2004 he received the Nassau Bar Association's Director's Award. Most recently, 2013, he was the recipient of the Jewish Lawyers Association of Nassau County's Paul J. Widlitz Award for service to the Judiciary and the Jewish Community of Nassau County.

1. # Michael Cardello III

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Michael Cardello III is a partner with the firm and serves as Co-Chair of the firm's Litigation practice group. Mr. Cardello concentrates his practice in business and commercial litigation. Prior to joining the firm in 1997, Michael served as a Law Clerk to the Honorable Arthur D. Spatt, United States District Court for the Eastern District of New York.

Michael represents large and small businesses, financial institutions and individuals in Federal and State Courts in complex commercial matters. He has a wide-range of experience that includes trials and appellate work in the areas of corporate disputes, shareholder derivative actions, dissolutions, construction disputes, equipment and vehicle leasing disputes and other complex commercial and business disputes.

Michael is often appointed as a Discovery Referee and Special Referee by various courts to oversee all aspects of the discovery process in complex commercial cases. From 2005 through 2008, Michael oversaw all aspects of discovery in Delta Financial Corp. v. Morrison, in which he rendered many written decision related to discovery e-discovery and privilege issues and presided over sixty-five depositions. Michael is currently appointed to a number of cases as Discovery Referee and Special Referee by Justices of the Supreme Court for the State of New York. Michael is also approved by the Officer of Court Administration in the State of New York to serve as a Receiver and has been

appointed by the Court as Receiver to oversee the dissolution and wind up of the affairs of a business and for the collection of rent for commercial property. Michael also mediates complex commercial litigation matters for cases pending in the Commercial Division of the Supreme Court of the State of New York

Michael is the former Chairman of the Commercial Litigation Committee of the Nassau County Bar Association and is also a member of its Alternative Dispute Resolution, Federal Court and Judiciary Committees. In addition, he is a participant at the Sedona Conference and also frequently lectures on mediation, discovery, trial practice, equipment and vehicle leasing issues and e-discovery.

2. Education

Hofstra University, J.D. 1996
Associate Editor, Hofstra Law Review
Hofstra University, M.B.A. 1988 (Finance)
Hofstra University, B.A. 1986 (Marketing)

3. Admissions

Mr. Cardello is admitted to practice in New York. He is also admitted to practice in the Eastern and Southern Districts of New York and the United States Court of Appeals for the Second Circuit.

4. Affiliations

Michael serves on the Committee for Civil Litigation of The United States District Court for the Eastern District of New York. In addition, he also serves as Chair of the Board of Directors for the Metro New York/Connecticut Chapter of the National Vehicle Leasing Association. Michael is also a member of the Catholic Lawyers Guild of Nassau County and the Theodore Roosevelt American Inn of Court. He serves as a fellow and on the Board of the Academy of Court-Appointed Masters, as well as on the Board of Directors for Long Island Counsel for Alcohol and Drug Dependence.

5. Recognitions

2015 ALM Top-Rated LI Lawyer *Annual Legal Leaders Guide*

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EDUCATION

St. John's University School of Law, Queens, NY
Candidate for J.D., June 2016
Academics: G.P.A. 3.51; Rank: 47/203
Activities: Polestino Trial Advocacy Institute (*Externals Member*), Consumer Justice for the Elderly Litigation Clinic (Fall 2014), Nassau County Bar Association's Theodore Roosevelt American Inn of Court (*Student Representative*), Christian Legal Society (*VP*)
Honors: Irene V. and James C. Diver Scholarship, Charles H. Revson Law Student Public Interest Fellowship, Dean's List (Fall 2014), Dean's Award for Excellence in Street Law, JCRED Best Notes Competition (1st Place)
Journal: Executive Notes and Comments Editor, Journal of Civil Rights and Economic Development
Published Work: SAVING STUDENTS FROM INEFFECTIVE TEACHERS: THE *VERGARA* DECISION AND ITS POTENTIAL CONSTITUTIONAL IMPLICATIONS (Journal of Civil Rights and Economic Development, Spring 2016)

New York University, New York, NY
B.A., *cum laude*, Dramatic Literature, May 2011 (completed in 3 years)
Academics: G.P.A. 3.51; Minor, Italian Language
Honors: Academic Scholarship, Dean's List (3/6 semesters), Honors Scholar

EXPERIENCE

Nassau County Legislature, Mineola, NY
Legislative Assistant (District 19), April 2015- Present
Address constituent concerns on matters related to quality of life, policing, and government agencies and procedures. Read and research legislation and reports conducted by various government agencies. Facilitate and process inter-municipal agreements between Nassau County and district entities.

St. John's University School of Law, Jamaica, NY
Teaching Assistant/ Student Ambassador, January 2015- Present
Assist in preparing and teaching a first-year course on practical legal skills. Grade assignments and provide feedback on student performance. Speak about legal skills at Admitted Students Day and other university events.

United States Attorney's Office (E.D.N.Y.), Central Islip, NY
Extern, January 2015- April 2015
Researched legal issues for trial and motion practice, wrote memoranda of law, and assisted with trial preparation.

Nassau County District Attorney's Office, Hempstead, NY
District Court Intern, June 2014 to August 2014
In court activities included: arraigning defendants, conferencing cases with defense attorneys and judges, and disposing of cases on the record. In office activities included: compiling voluntary disclosure forms, interviewing victims and witnesses, developing offers for defendants, and writing motions and reply briefs.

Glen Cove Center for Nursing and Rehab, Glen Cove, NY
Guest Relations Associate, August 2013 to October 2014
Organized patient activities and addressed non-medical concerns. Coordinated between facility departments.

Manhattist, Inc, New York, NY
NYS Licensed Real Estate Salesperson, May 2011 to August 2013
Facilitated real estate transactions throughout Manhattan, Queens, and Brooklyn. Provided excellent customer service with the utmost integrity. Negotiated terms of leases and purchase contracts. Trained and mentored new associates.

ACTIVITIES

Town of Hempstead VITA Program, Nassau County, NY
IRS Certified Tax Preparer, February- April 2013/ 2014/ 2015
Provided free federal and state tax preparation to elderly and low-to-moderate income individuals at local libraries and senior centers.

CenterPoint Church, Massapequa, NY
Children's Ministry Group Leader, July 2015- Present
Lead elementary students in religious instruction. Assist with children events sponsored by the church.

Sons of Italy (Giovanni Caboto Lodge), Seaford, NY
Commissioner of Arbitration, September 2013- Present

Plan and participate in community fundraisers and events. Arbitrate disputes between lodge members.

SAMANTHA CHASWORTH

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EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., June 2017
Academics: G.P.A.: 3.08
Honors: *Recipient,* Public Interest Fellowship (Summer 2015)
Staff Member, Journal of Civil Rights and Economic Development
Activities: *Student Representative*, Nassau County Bar Association's Theodore Roosevelt American Inn of Court
Member, Public Interest Law Student Association
Participant, Multilingual Legal Advocates

STATE UNIVERSITY OF NEW YORK AT BUFFALO, Buffalo, NY
B.A., *cum laude,* Political Science and Spanish (double major), May 2014
Academics: G.P.A.: 3.28
Honors: Sigma Delta Pi (National Collegiate Spanish Honor Society)
Activities: *President and Events Coordinator,* Phi Alpha Delta Pre-Law Fraternity
Team Captain, Relay for Life
Study Abroad: Academia Latinoamericana, Cusco Peru, Summer 2013

LEGAL EXPERIENCE

CATHOLIC MIGRATION SERVICES, Brooklyn, NY
Extern, January 2016 – Present

CHILD ADVOCACY CLINIC, Queens, NY
Student Lawyer, August 2015 – December 2015
Worked with the Unaccompanied Alien Children's Project in representing children in all phases of their custody, guardianship, and immigration proceedings in Suffolk County Family Court and New York County Immigration Court. Conducted client and witness interviews, client counseling, fact investigation, and prepared client for testimony.

NEW YORK STATE COURTS ACCESS TO JUSTICE PROGRAM, New York, NY
Summer Intern, June 2015 – August 2015
Assisted in the Uncontested Divorce, Consumer Debt Volunteer Lawyer for the Day, and Family Court Programs. Helped unrepresented litigants by appearing before judges, negotiating with opposing counsel, providing legal information.

LEGAL INFORMATION FOR FAMILIES TODAY (LIFT), Brooklyn, NY
Volunteer, September 2014 – May 2015
Provided legal information to participants regarding questions about family law and family court via e-mail hotline.

OTHER WORK EXPERIENCE

UNIVERSITY AT BUFFALO ENGLISH LANGUAGE INSTITUTE, Buffalo, NY
Chat Room Assistant, December 2012 – April 2014
Improved English speaking of international students while creating a safe-zone for them to discuss problems both with learning English and adapting to U.S. customs. Coordinated appointments and ensured that students benefitted from their experience.

CVS/PHARMACY, Jericho, NY and Buffalo, NY
Sales Clerk, March 2009 – August 2014 (part time)
Provided customer service on the sales floor and the register. Assisted in training new employees. Maintained inventory control.

LANGUAGE & COMPUTER SKILLS

Conversant in Spanish. LexisNexis certified. Proficient in Microsoft Office.

INTERESTS

Global travel; avid baseball fan.

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EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., June 2017

Honors:	St. Thomas More Scholarship (full tuition scholarship); Dean's List
Academics:	3.39; Ranking: 53/173 (Top 31%)
Activities:	American Bankruptcy Institute Law Review; Polestino Trial Advocacy Institute; Public Interest Law Students Association; Legal Information for Families Today (LIFT Email Hotline); Civil Procedure Teaching Assistant for Professor Jeff Sovern
Study Abroad:	St. John's University/Rome Study Abroad Program/Rome, Italy, Summer 2015

FORDHAM UNIVERSITY, Bronx, NY
B.A., Philosophy, May 2014

GPA:	3.6
Honors:	Phi Sigma Tau; Dean's List (5/8 Semesters); Fordham University Club of Long Island Scholarship

LEGAL EXPERIENCE

STAGG, TERENZI, CONFUSIONE & WABNIK, Garden City, NY
Law Clerk, August 2015 - Present
Assist attorneys with research for complex commercial litigation cases, draft court documents, such as motions and letters to the court, respond to discovery demands and observe depositions.

NASSAU COUNTY DISTRICT ATTORNEY, Mineola, NY
Intern, July 2015-August 2015
Assisted assigned Assistant District Attorney with preparation for cases and investigations by researching relevant case law and writing memorandum.

PROFESSOR JEFF SOVERN, ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Research Assistant, Summer 2015
Researched case precedent and gathered statistical data for a published work on consumer protection law.

LEVITON MANUFACTURING, Melville, NY
Intern-Legal Department, June 2011-August 2011
Coordinated with internal counsel in identifying key client documents needed for attorney review regarding client product liability cases. Created client database in Excel to merge clients' financial and legal documentation. Provided general secretarial support.

NASSAU COUNTY POLICE DEPARTMENT, Mineola, NY
Intern-Legal Bureau, June 2009-August 2009
Responded to and filed Freedom of Information Requests. Coordinated with attorneys to provide proof of evidence pertaining to active court cases including police reports, medical records and pictures. Provided daily status reports to management of pending and completed requests.

OTHER WORK EXPERIENCE

CONCIERGE CHOICE PHYSICIANS, Rockville Centre, NY
Marketing/Customer Service Representative, May 2013-August 2014
Developed marketing strategies for both doctors that already had an existing program, as well as those interested in implementing a concierge program. Sold program to patients calling to inquire about membership. Assisted in the implementation of new doctors, which entailed obtaining, cleaning and screening data and running demographic reports.

SKILLS AND INTERESTS

Lexis Advanced Legal Training Certification. Westlaw Training Certification. Proficient in Microsoft Office. Interests include: Food connoisseur; Running; Traveling.

Suspensions/Disbarment as reported in the New York Law Journal
7/28/15-12/31/15

Date	Offense	Punishment
12/29/15	Paid personal Amex from escrow check book	Resigned
12/24/15	Gross negligence	Suspended 1 year based on notice for reciprocal discipline
12/18/15	Sentenced to federal prison for defrauding former business partners	Disbarred
12/14/15	Theft of 5,000 escrow and subsequently lied about its receipt, failure to re-register as attorney	Suspended
12/7/15	Neglect of a legal matter, failure to cooperate	Disbarred
12/4/15	Failure to disburse settlement funds from escrow account	Disbarred
12/3/15	Neglect of legal matter, failure to cooperate	Disbarred
11/23/15	Plead guilty to criminal tax fraud	Disbarred
11/19/15	Plead guilty to felony stemming from bribes he paid to get client referred	Disbarred
11/19/15	Felony connection for second offense DWI	Disbarred
11/19/15	Felony conviction: criminal Tax fraud	Disbarred
11/17/15	Felony conviction: bribery	Disbarred
11/17/15	Misappropriate claim funds, falsified bank records	Suspended: 3 years
11/16/15	Misappropriated $486,553 of client funds	Resignation
11/17/15	Disbarred in California	Disbarred/ reciprocal
11/12/15	Engaged in a conflict of interest by entering into business transaction with client; neglected legal matter	Suspended-2 years
11/9/15	Felony conviction-residential mortgage fraud	Disbarred

Date	Offense	Punishment
11/9/15	Mental licenses	Suspended indefinitely
11/4/15	Misappropriation of client funds	Disbarred/ reciprocal
11/4/15	Felony conviction: residential mortgage fraud	Disbarred
11/4/15	Felony conviction: residential mortgage fraud	Disbarred
10/29/15	Felony conviction: conspiracy to defraud file false statements	Disbarred
10/28/15	Failure to cooperate	Disbarred
10/28/15	Felony conviction: conspiracy to commence wire fraud	Disbarred
10/15/15	Felony conviction: filing false mortgage document	Disbarred
10/13/15	Failure to cooperate	Disbarred/ reciprocal
9/29/15	Converted claim escrow funds	Disbarred
9/25/15	Felony conviction: falsifying securities document	Disbarred
9/24/15	Dishonored escrow checks	Suspension
9/23/15	Felony conviction: conspiracy to falsify books and record of a broker dealer	Disbarred
9/23/15	Failure to cooperate	Disbarred
9/21/15	Failure to cooperate	Suspended
9/17/15	Felony conviction: more fraud	Disbarred
9/17/15	Michael Grimm: felony conviction upon plea: felony false tax returns	Suspended pending further order
9/16/15	Misappropriation of client funds	Disbarred
9/16/15	David Denenberg: felony conviction upon plea-mail fraud	Disbarred
9/16/15	Failure to cooperate	Disbarred

Date	Offense	Punishment
9/16/15	Felony conviction: conspiracy incident	Disbarred
9/16/15	Various incident of misconduct	Suspended: one year
9/4/15	Theft of client funds	Disbarred
9/2/15	Felony conviction: grand larceny	Disbarred
9/2/15	Felony conviction: grand larceny	Disbarred
9/1/15	Theft of escrow fund	Suspended pending further order
8/24/15	Felony conviction: grand larceny	Disbarred
8/24/15	Misuse of client funds	Resignation
8/20/15	Felony conviction: theft from a charity	Disbarred
8/18/15	Falsified legal billings including lack of remorse	Disbarred
8/20/15	Felony conviction: fraud	Disbarred
8/19/15	Misappropriating deed funds	Suspended pending further order
8/18/15	Misuse of escrow funds	Disbarred
8/18/15	16 complaints of misconduct	Resignation
8/13/15	Failure to cooperate	Disbarred
8/11/15	Failure to cooperate	Disbarred
8/6/15	Felony conviction: mail and wire fraud	Disbarred
8/6/15	Failure to cooperate	Disbarred
7/30/15	Variety of client related offenses	Disbarred/ reciprocal
7/29/15	Failing to cooperate	Disbarred
7/28/15	Bounced escrow checks	Disbarred

AMANDA E. HOFFMAN

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EDUCATION

St. John's University School of Law, Queens, NY
Candidate for J.D., June 2017

Honors:	Staff Member, *American Bankruptcy Institute Law Review*
	St. Thomas More Scholarship (full tuition)
	Intellectual Property Honors Scholar
	Dean's List (Fall 2014)
Activities:	Treasurer, Intellectual Property Law Society
	Vice President, Jewish Law Student Association
	Product Advocate, Bloomberg BNA
Publication:	*Bankruptcy Court Enforces 20-Year Old Orders Barring Asbestos Claims Against Insurance Company*, ABI BANKR. CASE BLOG, http://www.abi.org/member-resources/blog/bankruptcy-court-enforced-20-year-old-orders-barring-asbestos-claims-against (Dec. 29, 2015).
Patent Bar:	Achieved eligibility requirements to sit for the Patent Bar Examination

Syracuse University, Graduate School, Syracuse, NY
Ph.D., Chemistry, June 2014
M. Phil., Chemistry, May 2011

G.P.A.:	3.77
Honors:	People's Choice Award Winner, 3 Minute Thesis Competition
	Certificate of Achievement for Exemplary Participation in Women in Science and Engineering Future Professionals Program
	Second Place in Recognition of Excellence in Student Research Presentation, Biotechnology Symposium (Syracuse, NY)
	William D. Johnson Award for Outstanding Graduate Teaching Assistant
	Scholarship winner to the American Crystallographic Association Summer School
Activities:	Women in Science and Engineering Associate
	Graduate Student Organization University Senator

Binghamton University, College of Arts and Sciences, Binghamton, NY
B.S., *cum laude*, Chemistry, May 2009

G.P.A.:	3.56
Honors:	Thesis honors with distinction
	Dean's List (five of eight semesters)
Activities:	Resident Assistant
	Hinman College Counsel Financial Vice President

LEGAL EXPERIENCE

Prof. Marc DeGirolami, St. John's University School of Law, Queens, NY
Teaching Assistant, Constitutional Law, Fall 2015 – Spring 2016
Assist the professor by conducting study sessions, holding office hours, reviewing practice problems submitted by students, and serving as a resource for incoming students.

Prof. Ann Goldweber, St. John's University School of Law, Queens, NY
Teaching Assistant, Lawyering, Spring 2016
Developed practical lawyering skills of first year law students through conducting client interviews and negotiations, drafting settlement terms and agreements, and highlighted professional responsibility requirements.

Consumer Justice for the Elderly: Litigation Clinic, Queens, NY
Student Intern, Fall 2015
Represented elderly Queens residents in mortgage foreclosure defense, consumer debt defense, and consumer fraud cases. Represented a client with co-counsel in a deposition, negotiated with opposing counsel for global settlement of a mortgage foreclosure, advocated for a client in consumer debt before a judge in the New York State Civil Court, drafted a settlement stipulation agreement, collaborated with two other student team members.

Prof. Anita Krishnakumar, St. John's University School of Law, Queens, NY
Teaching Assistant, Introduction to Law, August 2015
Oriented incoming first year students to law school, graded written assignments, and conducted individual meetings with students to discuss questions and concerns.

Hon. Joanna Seybert, United States District Court, Eastern District of New York, Central Islip, NY
Judicial Intern, May 2015 – August 2015
Performed legal research and drafted responses to motions regarding issues before the court. Read briefs and observe oral arguments. Drafted a response to a motion to dismiss based on an employment discrimination case and drafted a response to a motion for judgment on the pleadings for a social security appeal.

WORK EXPERIENCE

Syracuse University, Syracuse, NY
Doctoral Student, August 2009 – June 2014
Synthesized transition metal based complexes featuring pyrophosphate and characterized compounds through a number of techniques, including X-ray crystallography. Designed, cultured, and performed biological assays in mammalian cancer cell lines, Gram-negative bacteria and Gram-positive bacteria, fungus, and biohazard level 3 *M. tuberculosis* at the Veterans Affairs Medical Center, Syracuse, NY. Investigated the compound mechanism of actions via circular dichroism, flow cytometry, confocal microscopy, gel electrophoresis, mass spectrometry, and *in vivo* in BALB/c mice.

Patent Experience, August 2013 – May 2014
Trained in preparing technical documents and publications for use by patent attorneys**.** Provided technical expertise in collaborative discussions between the office of technology transfer and patent firms.

Teaching Experience, Chemistry Department, August 2009 – June 2014
Composed syllabi, quizzes, and lecture materials, as well as graded quizzes, homework, conducted office hours, and answered student questions for about 75 students. Developed the laboratory skills and fostered experience of undergraduate students through mentorship, training, teaching sessions, and hands-on learning.

PUBLICATIONS

Greenfield, T.J.; **Hoffman, A. E.**; Marino, N.; Goos, A. G.; Lloret, F.; Julve, M.; Doyle, R. P. Ferromagnetic Coupling in "Double-Bridged" Dihydrogenpyrophosphate Complexes of Cobalt (II) and Nickel (II). *Inorg. Chem.* 2015, 54: 6537-6546.

Hoffman, A. E.; Miles, L. H.; Greenfield, T. J.; Shoen, C.; DeStefano, M.; Cynamon, M.; Doyle, R. P. Clinical isolates of *Candida albicans*, *Candida tropicalis*, and *Candida krusei* have different susceptibilities to Co(II) and Cu(II) complexes. *Biometals*, 2015, 28: 415-423.

Hoffman, A. E.; DeStefano, M.; Shoen, C.; Gopinath, K.; Warner, D. F.; Cynamon, M.; Doyle, R. P. Co(II) and Cu(II) pyrophosphate complexes have selectivity and potency against *Mycobacteria* including *Mycobacterium tuberculosis*. *Eur. J. Med. Chem.*, 2013, 70: 589-593.

Hoffman, A. E.; Marino, N.; Lloret, F.; Julve, M.; Doyle, R. P. Synthesis, structural, thermal, and magnetic investigations of Co(II), Ni(II), and Mn(II) pyrophosphate chains. *InorganicaChimicaActa*, 2012, 389: 151-158.

Odago, M. O.; **Hoffman, A. E.**; Carpenter, R. L.; Tse, D. C. T.; Sun, S. S.; Lees, A. J. Thioamide, urea, and thiourea bridged rhenium(I) complexes as luminescent anion receptors. *InorganicaChimicaActa*, 2011, 374: 558-565.

Marino, N.; Vortherms, A. R.; **Hoffman, A. E.**; Doyle, R. P. Expanding monomeric pyrophosphate complexes beyond platinum. *Inorg. Chem.*, 2010, 49: 6790-6792.

SKILLS

LEGAL: Certified in LexisNexis professional and legal research

SCIENTIFIC: Organometallic drug design and development; mammalian, bacterial, and fungal cell culture; cytotoxicity assays; *in vivo* mouse work; confocal microscopy; gel electrophoresis; X-ray crystallography; MALDI-MS; ICP-MS; circular dichroism; flow cytometry; inorganic/organometallic complex synthesis; NMR characterization; infrared (IR) characterization; fluorescence analysis; Thermal Gravimetric Analysis (TGA); electron absorbance spectroscopy; elemental analysis; western blot.