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Court of Law and Court of Public Opinion: Symbiotic Regulation of the Corporate Management Duty of Care

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Abstract: In *In re Walt Disney Co. Derivative Litigation* the Delaware court exonerated the defendants for their handling of the Ovitz Affair, and yet condemned them. It is a classic example of how a court of law can make law without making law. By an *obiter dictum,* the Chancellor established the facts of the case and footnoted the sources much like a treatise or a casebook, recounted the general principles of the law, used strong words to describe the defendants' behavior, delved into the moral and business judgment of the defendants, and assisted the market in judging and enforcing its best practices. The Disney decision is a political masterpiece. (1) It pleases management because it sets a legal standard that is admittedly lower than the market "best practices" standard and issues a judgment for the defendants. As to the duty of care, the court elevates market morals above legal morals. (2) It pleases the Delaware Bar and perhaps members of other bars, as well as the shareholders' advocates, because it lowers the standard of demand requirement and opens the door to class actions. Hence it does not reduce the number of cases against management. (3) It discloses and documents aspects of internal management, including the personalities and behavior of the actors, thus inviting critics, public opinion and the media to supervise management and influence management's business judgment. It maintains the courts' "hands off" approach and low standard of negligence in evaluating the business judgment of management and board of directors. (4) It allows the courts to establish the facts and offer their opinion without serious threat of being overruled by higher courts or the legislature. (5) The decision shifts the burden of chastising management in cases such as Disney to the market and the media. All in 120 pages. The issue is whether this is a good way to go about resolving situations such as Disney. I conclude that it is. Unlike criminal cases, in which the Court of Public Opinion may prejudice the jury, the Court of Public Opinion is more suitable than the Court of Law to judge excesses by corporate directors and management so long as those do not amount to violations of trust and honesty (the duty of loyalty).

INTRODUCTION

The story of the Disney Corporation, Michael Eisner and Michael Ovitz. On August 9, 2005, the Delaware Chancery Court handed down a decision that exonerated the defendant directors of Disney Company and its top management from liability for their

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handling of the Ovitz Affair.[1] The story is quite simple. Disney's president died in an accident, and the corporation's CEO, Michael Eisner, underwent a heart operation. Disney needed a successor president and immediate help to its ailing CEO. Eisner, who has been courting his friend, the famous Michael Ovitz, for years, approached him again. As this was an opportune time for Ovitz as well, the deal was struck, and Ovitz moved to Disney as its president .The new president did not work out. He did not merge into the Disney culture, had difficulties in being close to the very commanding and demanding Eisner, and to two top executives, who were resentful to Ovitz, continued to report to Eisner. After about one year, Ovitz's contract with Disney was terminated. The termination, after about a year of unsatisfactory service, cost Disney about $140 million. Disney's board approved both the employment contract with Ovitz, and its termination.

Disney's shareholders sued management and the board of directors for violating their fiduciary duty of care. The court initially held that the plaintiff-shareholders did not have to make demand on the board.[2] The decision opened the door to a full-fledged trial. At the conclusion of the trial the court held for the defendants-management and directors.

The story is not particularly unique, even though the amount that a departing president received after about a year's questionable performance can raise eyebrows. Disney is a large corporation and the payment to the departing president did not make a dent in its budget.[3] And, after all, before Ovitz joined Disney he was earning approximately $20-25 million a year.[4] He could be entitled to a severance fee of this magnitude.

In part, the public's interest in the case was due to the identity of Disney and reputation of defendants. Not only were Eisner and Ovitz well known but so were the board members, for example, the actor Sidney Poitier. Thus, a flurry of notes and articles has

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[1] *In re* Walt Disney Co. Deriv. Litig., 907 A.2d 693 (Del. Ch. 2005), *aff'd,* Brehm v. Eisner (*In re* Walt Disney Co. Deriv. Litig.), 906 A.2d 27 (Del. 2006).
[2] *See also* TAMAR FRANKEL, TRUST AND HONESTY, AMERICA'S BUSINESS CULTURE AT A CROSSROAD 126-27 (2006).
[3] *See Hoover's Company Records – Basic Record, The Walt Disney Company* (Dec. 26, 2006), LEXIS, Company Library, Hvrcap File (noting that as of fiscal year date September 2006 Disney had annual sales of $34.3 billion and net income of $3.4 billion).
[4] Walt Disney Co. Deriv. Litig., 907 A.2d at 702.

appeared during the trial and after the decision was delivered.[5] For the lawyer, the case is most interesting because it continues an illustrious history of cases that have had long-term impact for other than their ultimate legal holding. This case may set the form for later judicial decisions involving directors and top management's duty of care.

Some cases are continuously cited for their inspiring language, for example, Justice Cardozo's statement about the moral level of fiduciaries as compared to actors in the market.[6] Some cases are unique for their strategic decision, for example, the *Marbury v. Madison* decision of the Supreme Court [7] that avoided President Jefferson's refusal to enforce it, and yet maintained a positive outcome. That is because the decision did not require enforcement. That decision demonstrates a court's strategy to establish its power as against the President by producing an influential judgment that the President did not have to enforce, and therefore did not have the opportunity to deny enforcement. A number of features in the Disney case produce such extra-legal effects, which may be long-term. It is a classic example, and a somewhat novel one, of how a court of law can make law without making law by relegating the final judgment to the Court of Public Opinion.

Chancellor Chandler established the facts of the case and footnoted the sources much like a treatise or a casebook. Also, like a casebook or like the American Law Institute, the Chancellor recounted the general principles of the law.[8] The Chancellor used *obiter dictum* to say what he thought about the defendants without binding himself or other

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[5] Recent Case, In re Walt Disney Co. Derivative Litigation, *No. Civ. A. 15452, 2005 WL 2056651 (Del. Ch. Aug. 9, 2005)*, 119 HARV. L. REV. 923 (2006); John W. Anderson & Karen Pascale, *The Disney Case: A Virtual Roundtable Discussion*, DEL. LAW., Winter 2005/2006, at 26. The AALS has called for submission of papers to be discussed in the January 2007 annual meeting dedicated to the case. AALS, *Call for Papers*, http://www.aals.org/am2007/papers.html (last visited Dec. 28, 2006).

[6] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928):

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

[7] Marbury v. Madison, 5 U.S. 137 (1803). For a brief summary of the decision, see Mark Strasser, *Taking Exception to Traditional Exceptions Clause Jurisprudence: On Congress's Power to Limit the Court's Jurisdiction*, 2001 UTAH L. REV. 125, 131-36.

[8] *In re* Walt Disney Co. Deriv. Litig., 907 A.2d 693, 745-46 (Del. Ch. 2005), *aff'd*, Brehm v. Eisner (*In re* Walt Disney Co. Deriv. Litig.), 906 A.2d 27 (Del. 2006).

Delaware courts to his opinions. The Chancellor used strong words, close to disrespectful language, to describe the defendants' behavior, and damned the defendant Michael Ovitz's behavior by faint, and sometimes amazingly perplexing, praise.

The decision cast a shadow on, and perhaps reversed in part Justice Cardozo's view of fiduciary and market morals. While Justice Cardozo viewed the morals of the market place to be *lower* than the morals involved in the legal duties of fiduciaries, the Chancellor implied that "corporate best practices" (that is, the morals of the market place) may reach a *higher* level than the legal duties of care involved in such practices. Yet, in both cases, the nature of the behavior was not entirely clear. Both could be characterized as a breach of the duty of care or a violation of the duty of loyalty.

Most importantly, the Chancellor delved into the moral and business judgment of the defendants, and in fact, seems to have addressed the defendants through the media. The Delaware court left the final judgment in similar cases to the Court of Public Opinion. The court, however, was not passive. It also facilitated the ability of the Court of Public Opinion to reach a decision by providing it with facts that were verified under oath, and by adding to these facts the non-binding opinion of the judge. It is as if the court relegated the ultimate decision to the market, saying almost aloud: "In cases such as this one, let you, The Court of Public Opinion -- the market, with the help of the media -- decide!" Each of these features invites explanations. My explanations are speculative, since I have not spoken to the Chancellor. I offer them as possible and plausible, in the belief that they are very probable.

Thus, Part One of this Article describes some of the main features of the decision: The extensive establishment and citation of the facts; the establishment and citation of the law' and the use of the words and rhetoric. Part Two of this Article discusses the court's evaluation of moral behavior and business judgment. Part Three of the Article notes the court's signals to the defendants and the address to the media. This Part deals with law and the ideal corporate practice. It poses the question whether resorting to the Court of Public Opinion in such cases as the Disney case is a better way to manage corporate

governance. This Part discusses the advantages and disadvantages of the approach and concludes that the advantages to outweigh the disadvantages. This Part discusses the possibilities that the Court of Public Opinion will be a flawed decision-maker; that although management's behavior may be seriously flawed, it would not have the drawing interest that other cases, such as Disney, do; or that the media becomes an unfair prosecutor of management. This Part of the article also discusses the question of whether it is fair for judges to berate parties and witnesses I o*biter dicta* and the protection of judges who do that. I conclude that notwithstanding these possibilities the approach of the Disney Court is justified.

ONE. FACTS, LAW AND RHETORICS

Unlike most cases, the Disney decision lays-out and footnotes not only fact finding but also the precise testimonies and the transcript places in which these testimonies can be found. The Chancellor explained his motive for using his extensive authorities' substantiation: He tabulated these facts to help the Appeals Court. This explanation makes sense, although the form in which the Chancellor offered the materials is unusual. Therefore, additional explanations may lurk in the background. First, whatever findings the court makes, and whatever cites it offers, anyone who cites the facts is not exposed to the risk of defamation or libel claims by the persons or organizations that are subjects of these finding.[9] Defamation is worrisome to many authors of books that describe cases such as Disney. The decision constitutes an invitation to book and article writers. Second, the Court's materials are not sheltered by copyright.[10] They can be freely copied by anyone who would care to do so. Any writer about the characters and the stories in this case need not worry about defamation or copyright. That is quite a relief.[11]

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[9] *See* DAN B. DOBBS, THE LAW OF TORTS § 415, at 1162 (2000) (noting common law "qualified privilege to provide a fair and complete report of public proceedings and documents"; privilege not lost if reporter knows facts are false); RESTATEMENT (SECOND) OF TORTS § 611 (1965); *id.* cmt. d (reporting of governmental report is within scope of privilege).

[10] *See* Veeck v. S. Bldg. Code Cong. Int'l, 293 F.3d 791 (5th Cir. 2002) ("'[T]he law,' whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law."), *cert. denied, mot. granted*, 539 U.S. 969 (2003).

[11] Interestingly, the Chancellor does not explain why he believes some witnesses and not others. Consequently he dismisses, and sometimes dismisses very bluntly, expert witnesses that based their conclusions on a different interpretation of the facts. Walt Disney Co., 907 A.2d at 740-45.

The decision clearly states the facts the Chancellor believes, and those he does not believe. His main focus and contribution, however, is in the interpretation of these facts. Most importantly, he believes Michael Ovitz, whose story is rather difficult to understand. Here is a man who is famous and admired, arrogant and enormously demanding. This man does not like nor follow Disney's corporate culture, and is surrounded by people who do not like him.[12] The plaintiff's story was that Ovitz realized that Disney was not a good place for him and that he started looking for another employment very early on.[13] The Chancellor's understanding is that Ovitz wanted to try and be good, but did not succeed.[14] Ovitz was put in an untenable position. The two managers under him refused to report to him and continued to report to Michael Eisner.[15] Ovitz's proposed deals were rejected.[16] Moreover, Ovitz negotiated a position with another employer, but failed to reach an agreement. It is unclear whether he did so at the prodding of Eisner or on his own accord. It may have been both.[17]

Yet, the Chancellor finds that Ovitz had *no inkling* that he was close to termination, until it was spelled out for him in spades.[18] This powerful, famous and important man was weeping—had "tears in his voice"—when he finally realized that he is being terminated.[19] This finding makes Michael Ovitz look like an incredibly stupid man, who is inexperienced in the politics of corporate Hollywood. How realistic is this portrait?

Yet, this picture of Ovitz serves two purposes. It allows the Chancellor to reach the conclusion that Ovitz did not agree to termination and was terminated against his wishes. Therefore, he was entitled to the compensation under his employment contract. At the same time this description undermines Ovitz's reputation more than any berating of his

[12] *Id.*at 713-14.
[13] *Id.*at 714-22.
[14] *Id.*
[15] James B. Stewart, *Partners: Eisner, Ovitz, and the Disney Wars,* NEW YORKER, Jan. 10, 2005, at 46, 50 (both officers clearly refused to report to Ovitz).
[16] *Id.* at 53.
[17] Walt Disney Co., 907 A.2d at 725.
[18] *Id.* at 733.
[19] *Id.*

behavior would. This Machiavellian actor, who reigned over Hollywood for so long, was terminated against his will and could do nothing about it. He was the punished bad boy who found out that he reached the limit without knowing it. The punishment is also suggestive. In addition to the millions he received, Ovitz asked for some "small" concessions. The decision offers a meticulous list of the denial of all of Ovitz's requests, some picayune, some substantial.[20] Once Ovitz accepted his fate, what did he ask for? He asked for the company to buy his plane and his car. He asked for other small favors and compensations.[21] And here was Eisner saying No! No! No! Not only was Ovitz terminated. Now it is documented that he did not even get the Disney to buy back his plane and car! He was terminated with much money and much humiliation.

The hiring of Ovitz does not go unnoticed either. Before he entered into an employment agreement, the corporation prepared for him an office that sounds like the Taj Mahal.[22] And he was actively involved in the design and refurbishing of the office.[23] But, against the plaintiff's arguments, the Chancellor finds that Ovitz was not employed by the corporation at that time.[24] No matter how one interprets these facts, they are damning. If Ovitz was employed, as the Plaintiffs argued, he was employed without a contract. If he was not employed, why did the corporation spend thousands of dollars on this lavish office, according to his specifications and under his supervision? For a corporation that

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[20] *Id.* at 733 n.304.
[21] *Id.* at 733 & n.304.
[22] *In re* Walt Disney Co. Deriv. Litig., 825 A.2d 275, 283 (Del. Ch. 2003) (noting that other executives reportedly called it an "excessively lavish office"), *mot. granted*, No. 15452-NC, 2003 Del. Ch. LEXIS 109 (Del. Ch. Oct. 30, 2003), *summary judgment granted in part, summary judgment denied in part*, No. 15452, 2004 Del. Ch. LEXIS 132 (Del. Ch. Sept. 10, 2004); Bernard Weinraub, *Down, but Probably Not Out, in Hollywood; Despite His Defeat in Disneyland, Ovitz Remains a Force to Reckon With*, N.Y. TIMES, Dec. 14, 1996, at 35, LEXIS, News Library, Arcnws File (stating that other executives said that he had a "huge office and staff, even by Hollywood standards"). Diane Stafford, *Average Pay of Top Big Oil CEOs: $32.7 Million*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 31, 2006, at D5, LEXIS, News Library, Curnws File (noting report indicating that CEO-to-worker pay gap has increased from 107-to-1 to 411-to-1 from 1990 to 2005; report focused on oil company and defense contractor CEOs); Rik Kirkland, *The Real CEO Pay Problem*, FORTUNE, July 10, 2006, at 78, LEXIS, News Library, Curnws File (stating that "[c]orporate America's executive-compensation system is broken"; even "CEOs are concerned about the uproar over excessive executive compensation"); *Enron Convictions End of a Shabby Story*, NEWS TRIB. (Tacoma, Wash.), May 26, 2006, at B06, LEXIS, News Library, Curnws File (noting that "[e]xtravagantly excessive compensation and perks for CEOs are drawing increasing scrutiny" in the post-Enron era; Home Depot's CEO received $245 million over "a period when the company's stock fell 12 percent, compared to Lowe's gain of 173 percent").
[23] Walt Disney Co., 907 A.2d at 714.

does not provide its management with a limousine and requires its president and chairman to ride with the rank and file executives in a bus, for heaven's sake,[25] this behavior is quite surprising. And all these facts are documented.[26] Thus, the Court's decision provides authors, academics, psychologists and behavioral economists with rich materials to analyze and write about, to audiences' delight.

It seems that Ovitz's friendships were quite frail. One example is his relationship with Eisner. Eisner wanted Ovitz at Disney as much for what Ovitz could bring to Disney as for what he would not bring to a competitor.[27] Once Ovitz was there, Eisner expected him to fall in line and was furious when his friend failed to do so. Eisner's behavior could be interpreted as the desire to prevent Ovitz from succeeding in his job. Fury and perhaps envy could have enkindled the insistence on termination, notwithstanding Ovitz's entreaties, and blank refusal to grant small requests. No friendship there. Another example is Ovitz's relationship with Ron Meyer. "Ovitz discovered that his close friend and number two at CAA, Ron Meyer, was leaving for MCA. This revelation devastated Ovitz, who had no idea Meyer was interested in leaving CAA, let alone leaving without Ovitz."[28]

The Establishment and Citation of the Law

Many Chancellors recite the law and cite cases on which they base their decisions. Many Chancellors recite statutes, rules and the judicial precedents to be interpreted and followed. This approach is not unique. In fact, it is the norm. Precedents and authorities strengthen the decision.

However, in the *Disney* case the layout of the legal terrain is broader than the point on which the decision is to be based. It is far more an overall view and review of the duty of

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[24] *Id.*
[25] *Id.* at 713.
[26] *Id.* at 714-15.
[27] *Id.* at 702.
[28] *Id.* at 701.

care, with a side-interpretation of a famous case that stand in the way.[29] That case, however, was partially overruled by the legislature and is, as experienced lawyers believe, a dead letter.[30] In any event, this part of the decision resembles the Restatement of the Law by the American Law Institute, although it lacks as many examples. The judicial restatement includes reproduced and approved parts of law reviews as well.[31]

Who needs this overview of the law? After all, the overview is not necessary to reach the decision. It is *obiter dictum.* Why did the Chancellor toil to write it? And what is its impact? The Chancellor answers these queries. He states his purpose: It is to be cited, as the ALI would.[32] The very generality of the overview statements make them applicable to many different factual situations. Here is an exercise of legislation in the hope that this judicial Restatement will be interpreted and used as legislation. It is an expansion of the judicial function to generalized statements to be interpreted in the future by future generations of Chancellors.[33] In addition, this restatement of the law is addressed to the media and the public as well. It influences, if not guides them, to the final judgment. It points to the Court of Public Opinion.

The Use of the Words and Rhetoric

[29] *Id.* at 745-56; *id.* at 755 & n.460 (interpreting Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)).
[30] 65 Del. Laws 544 (1986), *codified at* DEL. CODE ANN. tit. 8, § 102(b)(7) (2001) (converting duty of care to default rule).
[31] *See, e.g.*, Walt Disney Co., 907 A.2d at 746 n.402 (long law review quotation on duties of due care and loyalty) (quoting Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. (forthcoming 2005) (manuscript of May 25, 2005 at 39-42 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=728431)).
[32] *Id.* at 698:

> I have tried to outline carefully the relevant facts and law, in a detailed manner and with abundant citations to the voluminous record. I do this, in part, because of the possibility that the Opinion may serve as guidance for future officers and directors -- not only of The Walt Disney Company, but of other Delaware corporations.

[33] *See* Tara L. Dunn, *The Developing Theory of Good Faith in Director Conduct: Are Delaware Courts Ready to Force Corporate Directors to Go Out-of-Pocket After Disney IV?*, 83 DENV. U.L. REV. 531, 575 (2005) (describing decision as "example of . . . a 'genre of Delaware opinion' that teaches without imposing liability") (quoting E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1406 (2005); Reza Dibadj, *Delayering Corporate Law*, 34 HOFSTRA L. REV. 469, 490-91 (stating that opinion "is interesting not so much for its predictable holding . . . but for its rhetoric" and that "the opinion unravels into a morality tale"); David Marcus, *Magic Kingdom of Delaware*, DAILY DEAL, June 16, 2006, LEXIS, News Library, Curnws File (contrasting "matter of fact" opinion issued on appeal with Chancery Court's "musing" about ideal corporate governance practices).

Chancellors have given us a rich, powerful, and sometimes beautiful literature. Court decisions can be poetic,[34] funny,[35] moving, and awe-inspiring.[36] The Disney decision is replete with colorful words and phrases. Here are a number of examples (footnotes omitted).

> As I will explain in painful detail hereafter, there are many aspects of defendants' conduct that fell significantly short of the best practices of ideal corporate governance. Recognizing the protean nature of ideal corporate governance practices, particularly over an era that has included the Enron and WorldCom debacles, and the resulting legislative focus on corporate governance, it is perhaps worth pointing out that the actions (and the failures to act) of the Disney board that gave rise to this lawsuit took place ten years ago, and that applying 21st century notions of best practices in analyzing whether those decisions were actionable would be misplaced. [37]

> This Court strongly encourages directors and officers to employ best practices, as those practices are understood at the time a corporate decision is taken. But Delaware law does not -- indeed, the common law cannot --

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[34] *See* Justice Cardozo's statement, *supra* note 6.

[35] *See, e.g.*, Sea-land Servs., Inc. v. Pepper Source, 941 F.2d 519, 519, 521 (7th Cir. 1991) (Bauer, Chief Judge):

> This spicy case finds its origin in several shipments of Jamaican sweet peppers. . . . PS then stiffed Sea-Land on the freight bill . . . .
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> . . . Marchese runs all of these corporations . . . out of the same, single office, with the same phone line, the same expense accounts, and the like. And how he does "run" the expense accounts! . . . Marchese has used the bank accounts of these corporations to pay . . . personal expenses, including alimony and child support payments to his ex-wife, education expenses for his children, maintenance of his personal automobiles, health care for his pet -- the list goes on and on. Marchese did not even have a personal bank account! With "corporate" accounts such as these, who needs a personal one?"

[36] United States v. The La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551) (opinion by Justice Story discussing evils of slavery); *see* A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 798 (1987) (describing opinion as "moving"). Marbury v. Madison, 5 U.S. 137 (1803); *see* Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1157 (2005) (noting *Marbury's* "awe-inspiring rhetoric").

hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices, any more than a common-law court deciding a medical malpractice dispute can impose a standard of liability based on ideal -- rather than competent or standard-medical treatment practices, lest the average medical practitioner be found inevitably derelict.[38]

[A] reasonably prudent CEO (that is to say, a reasonably prudent CEO with a board willing to think for itself and assert itself against the CEO when necessary) would not have acted in as unilateral a manner as did Eisner when essentially committing the corporation to hire a second-in-command, appoint that person to the board, and provide him with one of the largest and richest employment contracts ever enjoyed by a non-CEO. I write, "essentially committing," because although I conclude that legally, Ovitz's hiring was not a "done deal" as of the August 14 OLA, it was clear to Eisner, Ovitz, and the directors who were informed, that as a practical matter, it certainly was a "done deal."[39]

Eisner's actions in connection with Ovitz's hiring should not serve as a model for fellow executives and fiduciaries to follow. His lapses were many. He failed to keep the board as informed as he should have. He stretched the outer boundaries of his authority as CEO by acting without specific board direction or involvement. He prematurely issued a press release that placed significant pressure on the board to accept Ovitz and approve his compensation package in accordance with the press release. To my mind, these actions fall far short of what shareholders expect and demand from those entrusted with a fiduciary position. Eisner's failure to better involve the board in the process of Ovitz's hiring, usurping that role

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[37] Walt Disney Co., 907 A.2d at 697.
[38] *Id.*.
[39] *Id.* at 762 (footnote omitted).

> for himself, although not in violation of law, does not comport with how fiduciaries of Delaware corporations are expected to act.[40]

TWO. MORAL BEHAVIOR AND BUSINESS JUDGMENT

Perhaps the most powerful and important part of the decision is the denunciation of the defendants who are absolved from legal responsibility. Time and again the decision makes it clear that their behavior is unacceptable, although it is legal. For example:

> Despite all of the legitimate criticisms that may be leveled at Eisner, especially at having enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom, I nonetheless conclude, after carefully considering and weighing all the evidence, that Eisner's actions were taken in good faith.[41]

> Would the better course of action have been for Russell [legal counsel] to have objectively verified Ovitz's income from CAA? Undoubtedly, yes. Would it have been better if Russell had more rigorously investigated Ovitz's background in order to uncover his past troubles with the Department of Labor? Yes. Would the better course of action have been for someone other than Eisner's personal attorney to represent the Company in the negotiations with Ovitz? Again, yes. Have plaintiffs shown by a preponderance of the evidence that Russell's actions on behalf of the Company were *grossly* negligent (in that he failed to inform himself of all material information *reasonably* available in making decisions) or that he acted in bad faith? No. I conclude that Russell for the most part knew what he needed to know, did for the most part what he was required to do, and that he was doing the best he thought he could to advance the interests of the Company by facilitating a transaction that would provide a legitimate potential successor to Eisner and

[40] *Id.* at 762-63 (footnote omitted).
[41] *Id.* at 763.

provide the Company with one of the entertainment industry's most influential individuals.[42]

Negligence and Gross Negligence.

It is not clear whether the defendants violated their duty of care and whether the business judgment rule protected them from legal liability. Directors are liable for gross negligence in performing their duties but not for mere negligence. A question that has not been settled and perhaps deserves an examination is whether a continued negligent behavior that is ingrained in the corporate culture and relationship between the CEO and the board could reach the level of gross negligence by sheer repetition of such behavior. There are no clear precedents to this effect, but the events in *Disney* may indicate that at some point a culture of negligence can be judged as gross negligence. This case may just emit signals to boards that they ought to exercise their own judgment on important matters, and that choosing the president of the company may be such a matter. Yet, under the law, it seems that the culture of Disney did not reach the bottom of negligence to become gross negligence.

The Signals to the Defendants and Address to the Media

To whom is the Chancellor addressing his pejorative words and criticisms? The defendants are absolved from responsibility. Presumably, that is all they care about. Well . . . not quite. By telling the whole world what was happening within Disney the decision allows us to become somewhat of a peeping tom, unveiling the internal machinations of the defendants. Even though the defendants have not violated the law, the Chancellor condemns their behavior as lack of care. His harshest words are reserved for Eisner whom he calls an "imperial CEO."[43] He documents the fact that all members of the board were Eisner's long-term friends or closely related, such as an administrator of the school that Eisner's children went to, or his lawyer. He notes Eisner's erratic behavior. He noted twice Eisner's testimony that Ovitz would be a formidable competitor, and so it is better

[42] *Id.* at 764-65 (footnote omitted).

to have him in Disney's camp.[44] This statement explains that Ovitz was courted not so much for his contributions to Disney but more to avoid his contributions to competitors. If that is so, however, it is unclear why Eisner was so eager and persistent in trying to get rid of Ovitz against his wishes quickly and ruthlessly, as the Chancellor so well documents. Would not Ovitz then become an enemy and supporter of a competitor? Would $130 or more million change him from a fierce supporter of competitors to less fierce?

The reaction of news readers depends on the culture of their society. As Mark Roe has noted, Americans do not easily reach the level of "rage" at executive compensation.[45] It is curiosity that would draw readers more than anger. This case, however, unveils some of the behind-the-scene corporate management behavior and invites other sources of information to follow suit. Not "prospectus transparency" but "story transparency" may be powerful. This story is what investors would read. This information perhaps will invite them to make their judgment and induce them to act.

Law and the Ideal Corporate Practice

What did the Chancellor achieve by this judgment form? At the outset the Chancellor notes that the law is not as broad (or as demanding) as "ideal corporate governance."[46] The word "ideal" seems to suggest that the market "best practices" of corporate governance represent a higher standard than the legal standard. The "ideal" to which management should aspire is hovering far above the law. This is an interesting approach since many would have assumed that best practices in the market place follow the law rather than lead law and leaves it behind.

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[43] *Id.* at 760-63.
[44] *Id.* at 702.
[45] Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. CHI. L. REV. 1251, 1261 (2002) ("The average [person in France] hates the rich. Hate . . . . Not envy, as I might say would be the dominant American parallel trait. Not admiration, as might lace some of American culture.").
[46] Walt Disney Co., 907 A.2d at 697.

One possible result of this emphasis on "ideal" best practices is that the practices will become less "idealistic" and will follow the letter of the law. This directive would therefore meet the demands and wishes of corporate management.

However, if the Delaware courts will open the doors to similar cases, and if the courts do not allow these claims to be squashed by the demand requirement, then such cases would be given the wide publicity that they deserve. If the Delaware courts then berate a behavior that is unacceptable and then absolve the management or directors from liability, the results would be similar to those that have occurred in the Disney case. That is, the market will take over the punishment and enforcement. After all, Eisner was removed. Ovitz got his millions but his reputation must have been tarnished, perhaps for long.[47] His demands may diminish in the future, but the story of his behavior documented in the judicial decision may be too easy to read and harder to forget and dismiss. The result is to reduce the pressure of investors for stricter court decisions or for moving State regulation to the federal system.[48] To be sure, plaintiffs' lawyers may be more hesitant to bring cases. In which case the *Disney* case will spell the death or reduction of shareholders' suits. Not necessarily, however. If defendants expect an open court and a Disney-type decision they may settle before the hearings produce another meticulously documented insider story.

Perhaps the Chancellor has achieved what Justice Marshall achieved 200 years ago. That is, create a conservative decision that cannot be overruled easily, and at the same time offer a huge number of pages containing *obiter dicta* statements that are fodder for the public interest and curiosity in support market enforcement. *Disney's* judgment is unique in that it transfers the decision to the market, assisted by the media. The Chancellor is not shy to opine about the business judgment of Eisner. In fact, the Chancellor dwells on the business judgment more than many courts might. But there is no reason to appeal this intrusion into the business judgment of the management because management has been found not liable.

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[47] *E.g.*, Andy Serwer, *What if Eisner Had Listened to Ovitz?*, FORTUNE, July 25, 2005, at 55, LEXIS, News Library, Curnws File (noting that his reputation was "in tatters" and "ha[d] been destroyed").

Public opinion seems to count especially when attention is drawn to the case. The decision then carves out a process by which the media becomes aware of an issue and, regardless of the legal results, reads the Chancellor's opinion on a failed corporate practice.

If certain conservative corporate management and the lawyers look to the final Court's decision, they may begin to reduce their "ideal corporate practice." Yet, as much as the Court refuses to guide corporate practice in the *ratio decidendi* of his decision he may have achieved this purpose in his *obiter dicta*. The uncertainty will be lifted with the next case. If the Court reduces the barriers of demand and hears the case, and if upon hearing the case it points to the flaws in the corporate practice while exonerating the board and management, a new era of court guidance to "idealistic corporate practice" may emerge. The structure of this judgment seems to allow the Court to have its cake and eat it too: To induce corporate America to stay in the Delaware jurisdiction, to protect Delaware from intrusion of federal regulations, and to chastise management and corporate boards in the process.

In sum, the Disney decision can be viewed as a political masterpiece.

(1) It pleases management because it sets a standard that is admittedly lower than the market "best practices" standard.

(2) It discloses and documents aspects of internal management, including the personalities and behavior of the actors. Thus, it invites criticisms of management, rightly or wrongly. The decision invites public opinion and the media to supervise management and intrude on its business judgment while allowing the courts to establish the facts and even offer its opinion without the threat of being overruled by higher courts or the legislature.

(3) Finally, the decision shifts the burden of chastising management in such a case to the market with the help of the media. It unveils internal management dealings and creates the transparency that the market needs. It does not reduce the number of cases

[48] *See* Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491 (2005).

against management (if demand is not required in the shareholders' derivative suits) and yet retains Delaware's corporate business and holding on to its management clients (because the management is not found liable in such cases).

THREE. SIGNALS TO DEFENDANTS AND THE ADDRESS TO THE MEDIA

The question is whether this is a better way to manage and control corporate governance. I believe it is, for the following reasons.

First, I note that the Court of Public Opinion has been active for years in the area of public, political, and moral affairs.[49] It has also emerged strong in the area of securities acts violations [50] as well as corporate governance. Not surprisingly it has affected the lawyers' role as well. The media can be ruthless as well as supportive, and can harm corporate management as well as the plaintiffs. "While at least one ethics scholar has described the language in Justice Kennedy's opinion [to the effect that a lawyer may act to protect his client's reputation, and not confine his actions to the court] as 'remarkable,' the recent explosion of media attention to law has rekindled the debate over a lawyer's proper role as an advocate outside the courtroom." [51] Advocacy of lawyers in the Court of Public Opinion is now a fixture on the legal scene. The question is whether the rules that apply to the courtroom can also apply to the Court of Public Opinion.[52]

Second, reputation is crucial to most businesses and to their management. That is why managers and boards of directors pay close attention to how the media portrays

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[49] *See, e.g.,* the debate on abortion: Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion,* 83 AM. POL. SCI. REV. 751, 768 (1989); Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates,* 81 CHI.-KENT L. REV. 923, 929 n.22 (2006) (citing Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989)).

[50] Robert Prentice, *Whither Securities Regulaition? Some Behavioral Observations Regarding Proposals for Its Future,* 51 DUKE L. J. 1397 (2002).

[51] Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion,* 95 COLUM.L. REV. 1811 (1995).

[52] Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy,* 49 DUKE L.J. 1405, 1457 n.239 (2000) ("An attorney's duties do not begin inside the courtroom door . . . . An attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.") (quoting Gentile v. State Bar of Nev., 501 U.S. 1030, 1043 (1991).

themselves and their corporation. Reputation is not related merely to obedience to the law. It can be tarnished by personal misbehavior, poor judgment, and personality flaws. Such flaws may not reach the level of legal violation but can badly taint reputations. A media's potential and express exposure of these flaws can influence behavior. It is in these areas that may be outside the law, that the media can actually change behavior by exposure or even merely by the possibility of exposure.[53]

Third, today, in contrast to the media, which are trusted, there is hostility to law enforcement. Great hostility applies to what some consider overzealous prosecution, and is expressed by some courts as well. The Supreme Court exonerated the accounting firm Arthur Andersen that shredded documents, which could have been of help to prosecution.[54] A federal District Court chastised the prosecution for trying to prevent financial support to accused KPMG accounting firm partners. [55] Another example is the case of disqualification of the Chairman of Xerox. This gentleman settled with the SEC to pay a fine of $1 million and to be disqualified from serving on boards of corporations for 5 years.[56] So he remained the chairman of the Ford Foundation, which is a not-for-profit corporation. The Ford Foundation's board flaunted the SEC by declaring that this man was "an exemplary leader"![57]

Fourth, compare the Disney story to the situation at Hewlett-Packard where the CEO occupying the chair of the board of directors was involved in spying on other board members, suspected of leaking board information to the newspapers and spying on

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[53] *See, e.g.*, Carol B. Swanson, *Antitrust Excitement in the New Millenium: Microsoft, Mergers, and More*, 54 OKLA L. REV. 285, 312 n.199 (2001) ("In the court of public opinion antitrust law is judged on the basis of its big cases, and in this era the case is Microsoft. Whatever one thinks of the Microsoft case, it has enlivened popular interest in antitrust law like nothing else.") (quoting Richard M. Steuer, *Browsing the Microsoft Case,* ANTITRUST, Summer 1999, at 5)).

[54] Arthur Andersen LLP v. United States, 544 U.S. 696 (2005). For the story see Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U.L.Q. 917 (2003).

[55] United States v. Stein, 440 F..Supp. 2d 315 (S.D.N.Y. 2006); Lynnley Browning, *Judge's Rebuke Prompts New Rules for Prosecutors*, N.Y. TIMES, Dec. 16, 2006, at 4, LEXIS, News Library, Curnws File (a judge "issued a scathing criticism of the prosecution's tactics in a criminal case against former tax professionals of the accounting firm KPMG. The government, the judge said, 'let its zeal get in the way of its judgment.'"). There is less sympathy to prosecutors that are attempting to perform their duties under unequal circumstances with defendants that have far more resources.

[56] Paul A. Allaire, Litigation Release No. 18,174, 2003 SEC LEXIS 1352 (June 5, 2003); *see also* TAMAR FRANKEL, TRUST AND HONESTY, AMERICA'S BUSINESS CULTURE AT A CROSSROAD 178 (2006).

reporters. In some states this method was illegal and the justice department entered the scene.[58] In light of continued media coverage the face-saving exit of the CEO – by remaining a member of the board – was not sustained. She had to resign and leave within a few days. Ovitz opened his own firm again. He did not take positions in other corporations. Perhaps neither Ovitz nor Eisner wanted to become employee again. Perhaps they were not invited. In both cases and without announcing disqualification, it has become far effective through the media. Debates concerning top management's decisions (whether management has conflicts of interest or not), such as the decision of whether to fight a hostile takeover, are fought not only in the Courts of Law but also in the Court of Public Opinion.[59] In such cases it may be better for the markets rather than government to decide what is right. The media will lead to the Court of Public Opinion.

Fifth, reporters have strong incentives to discover "scoops." Their "snooping" is more sheltered than the fishing for information by police and government investigators. At the same time the supervisors and editors of the newspaper have a strong incentive to ensure the accuracy of the publication. "The *New York Times* reporter Jayson Blair resigned after the newspaper discovered that he had copied articles from other newspapers and made outright fabrications in others.[60] In August 1998, the *Boston Globe* suspended columnist Mike Barnicle for using a comedian's jokes without attribution and for allegedly making

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[57] *Verbatim*, TIME, July 31, 2003, at 15, LEXIS, News Library, Arcnws File.
[58] Damon Darlin, *Ex-Chairwoman Among 5 Charged in Hewlett Case,* N.Y. TIMES, Oct. 5, 2006, at 1, LEXIS, News Library, Curnws File (explaining the charges).
[59] Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 1021 (2002) ("Supporters of board veto have used claims about stakeholder interests in the political arena, in the courts, and in the court of public opinion."); Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1601 (2006) ("Litigation involving Google is high profile, and as the legal issues get resolved, Google must also win in the court of public opinion."); Stephanie Marcantonio, Case Note and Comment, *What is Commercial Speech?: An Analysis in Light of* Kasky v. Nike, 24 PACE L. REV. 357, 385 (2003) (speculating that "companies will risk a potential lawsuit in order to avoid being tried in the court of public opinion"); Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 206-07 (2006) (noting "hostile responses by the public"; "Public backlash can be explained by the idea that 'suing your customers is not a winning business strategy . . . and this sort of strategy does not play well in the court of public opinion.' The recording industry may look to the past experience of Henry Ford and his battle with the Association of Licensed Automobile Manufacturers and choose to exercise caution in proceeding with legal action against its customers.") (footnotes omitted).
[60] TAMAR FRANKEL, TRUST AND HONESTY, AMERICA'S BUSINESS CULTURE AT A CROSSROAD 16 (2006) (citing Dan Barry et al., *Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y.TIMES, May 11, 2003, at 1, LEXIS, News Library, Arcnws File).

up a story about two young cancer survivors. The *Globe* also asked for the resignation of Patricia Smith for fabricating characters and quotations in her articles.[61]" That is not so much because editors and publishers fear defamation claims as much as they are concerned about losing their public's trust.[62] Unlike money managers or government agents, whatever the newspaper publishes is immediately examined by a widespread readership. Mistakes are quickly noted and reported. And true disclosure is the lifeblood of the publication. The incentives of the media are aligned with true information and consequent enforcement aimed at reputation.

Disadvantages

However, these strengths and incentives may have disadvantages. What if management buys or controls a newspaper? The answer is that so long as there are different views expressed in different media people can get a balanced view. "The market for true information" might work in such cases.

What if the Court of Public Opinion is a flawed decision-maker?

Compare judging corporate management's duty of care with criminal cases. Public policy in the United States prohibits the Court of Public Opinion from intervention or influence in such cases. The danger of unfair justice and the magnitude of the consequences to the accused require another rule. In federal criminal procedure, the rule that governs transfer of the hearing for prejudice[63] "is intended for cases in which prejudice in the community

[61] *Id.* (citing Sinead O'Brien, *For Barnicle, One Controversy Too Many*, AM. JOURNALISM REV., Sept. 1998, at 11, LEXIS, News Library, Arcnws File).

[62] *Id.* (citing Elena Cherney & James Bandler, *Publishers Face Credibility Doubts; Inflated Circulation Data at Hollinger, Tribune Units Pose Issues for Advertisers*, WALL ST. J., June 21, 2004, at B3, LEXIS, Meganw Library, Wsjnl File).

[63] FED. R. CRIM. P. 21(a). Pretrial publicity may result in "a possible adverse impact upon the fairness of the criminal trial." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 23.1(a), at 1069 (4th ed. 2004) (safeguards to limit the effect of pretrial publicity include: (1) restricting public statements (restricting the release of information to the press), *id.* § 23.1(b), at 1069-70; (2) restricting the media (refusing to allow the media to print material; "seldom, if ever" used because of First Amendment concerns), *id.* § 23.1(c), at 1080-81; (3) closed proceedings, *id.* § 23.1(d), at 1081-86; (4) closing proceedings and placing documents under seal, *id.* § 23.1(e), at 1086-89; (5) change of venue (moving the trial to a different judicial district), *id.* § 23.2(a)-(b), at 1089-92; (6) change of venire (selecting a jury from another judicial district), *id.* § 23.2(c), at 1092-93; (7) continuance, *id.* § 23.2(d), at 1093; (8) severance, *id.* § 23.2(e), at 1093; (9) voir dire (examination of jurors for effect of pretrial publicity), *id.* § 23.2(f), at 1093-98; (10) admonishment (telling jurors not to read or listen to news coverage) or sequestration of the jury, *id.* § 23.2(g), at 1098-99; and (11) excusal of jurors who have been exposed to news coverage, *id.* § 23.2(h), at 1099).

will make it difficult or impossible to *select a fair and impartial jury*."[64] The Rule provides that "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." This definition itself begs the question – what is the type and extent of prejudice that triggers the rule? More specifically, what constitutes prejudicial *publicity*? What are the factors considered in determining the prejudicial effect of pretrial publicity?

In deciding Rule 21(a) motions, courts generally consider four factors. "First, it is necessary that the publicity be recent, widespread and highly damaging to the defendants."[65] "Second, it is an important consideration whether the government was responsible for the publication of the objectionable material, or if it emanated from independent sources."[66] Third, the court considers inconvenience to the government. However, its analysis on this point is informed by the second factor, that is, whether, and to what extent, the government is itself responsible for dissemination of the objectionable material.[67] "Last, [the court must consider] whether a substantially better panel can be sworn at another time or place."[68]

In addition to these four factors, another important inquiry is whether the nature of the publicity is factual or emotional. For instance, the Court in *Busby v. Dretke*[69] found it significant that, "[t]he two local papers' coverage of the killings was 'largely factual in nature,' tracing developments in the case rather than engaging in sensationalism." By focusing on the type of publicity, the court lends credence to the notion that sheer volume

[64] United States v. Gressett, 773 F. Supp. 270, 277 (D. Kan. 1991) (emphasis added).
[65] United States v. Bonanno, 177 F. Supp. 106, 122 (S.D.N.Y. 1959), *rev'd on other grounds*, United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).
[66] *Id.*
[67] *Id.*
[68] *Id*
[69] 359 F.3d 708 (5th Cir.), *cert. denied*, 541 U.S. 1087 (2004) (citation omitted) (citing Murphy v. Florida, 421 U.S. 794, 802 (1975)).

of publicity is not by itself prejudicial. Indeed, this idea is supported explicitly in other cases.[70]

The threshold evidence of prejudice is difficult to meet. It was stated that a Rule 21(a) motion should be granted "very rarely, and only in extreme cases."[71] "[P]re-trial motions for transfers to other Districts for trial under Rule 21(a) should be granted sparingly, in exceptional cases requiring such unusual action, and then only when it appears with fair certainty that it is unlikely that a fair trial can be had in the District where the indictment is returned." [72] One can conclude with some confidence that the Rule 21(a) motion exists as a remedy for a defendant's inability, due to prejudicial publicity, to secure a fair *jury trial* in a given district.

Different statutory remedies exist for situations when the defendant believes that the judge or the prosecutor is prejudiced. Because Rule 21(a) is a fairly extraordinary measure, courts generally prefer to wait until voir dire is completed before deciding on the motion. Presumably, they take the view that it is better to "wait and see" if a non-prejudiced jury can be selected. Accordingly, Rule 21(a) is generally available *after* voir dire, and apparently, not at all available prior to indictment.

Thus, the accused in criminal cases are sheltered from the Court of Public Opinion by the removal of their case to another jurisdiction. Why should a court encourage a judgment by public opinion, even after the accused stood trial (as Arthur Andersen was) and were held not liable? The answer is that the criminal cases are very different from the issue of corporate management's and boards' violation of their duty of care.

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[70] United States v. Mandel, 431 F. Supp. 90, 98-101 (D. Md. 1977).
[71] United States v. Means, 409 F. Supp. 115, 117 (D.N.D.1976).
[72] United States v. Kline, 205 F. Supp. 637, 639-40 (D. Minn.1962). The appropriate time for determining the effect of pretrial publicity on the availability to the defendant of a fair trial, is following voir dire. United States v. Bakker, 925 F.2d 728, 732 (4th Cir. 1991); *see* United States v. Bando, 244 F.2d 833, 838 (2d Cir. 1957). Occasionally, where the court finds that the publicity is inherently prejudicial, it must order a transfer prior to voir dire. Bakker, 925 F.2d at 732 (4th Cir. 1991). However, a pre-voir dire finding of inherently prejudicial publicity is extremely rare. Further, "[b]efore a court may presume prejudice, it must determine whether a jury substantially less subject to the publicity can be impanelled [sic] in another location." *Id.* at 733. Therefore, if a particular criminal defendant is subject to *nationwide* publicity, then a

There are indeed critics who have questioned the government's authority to threaten corporations with prosecution and thus expose management to the judgment of the Court of Public Opinion.[73] For our purpose and in our context, however, the Court has listened to the testimony and arguments, and its decision does not create a threat without a basis. Nonetheless, there are those who argue that bringing the case before the judicial court or trial by publicity requires a balance, as William Scott Croft has suggested. [74]

The Disney situation is not unique. Although the relationship between the CEO and the board of directors has been recently changing, there are many corporations in which the board does not exercise strong supervision over the CEO. There are some "imperial CEOs" around, and there are others that collect enormous compensations.[75] In these situations it may well be that courts should not interfere and that the Court of Public Opinion would be a more appropriate judge. Let the public determine how much management should collect in compensation and whether management has behaved properly; the final word could remain with the Courts of Law. They decide whether to interfere in the boards' decisions and whether to express their opinion about the management's behavior. Courts of Law can reduce legal enforcement costs and offer another powerful and effective form of enforcement through the media.[76]

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transfer of venue may not serve the purpose of obtaining a more fair trial, and the Rule 21(a) motion would be, accordingly, denied.

[73] John F. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution,* 89 CORNELL L. REV. 310, 351 n.259 (2004) (criticizing the rules of the Sentencing Commission) (citing Tim Dahlberg, *Kobe Leads in Court of Public Opinion* (Aug. 6, 2003), http://www.msnbc.com/news/949356.asp ("When it comes down to deciding Kobe Bryant's innocence or guilt, the court of public opinion may be the most important court of all. If that's the case, Bryant could be well on his way to acquittal."); Rob Reynolds, *'What a Farce': Simpson Trial Draws Jeers 'Round the World* (Oct. 3, 1995), http://www.cnn.com/US/OJ/verdict/world ; Julia Hood, *'No Comment' Won't Cut It,* PR WK., Aug. 5, 2002, at 3 ("65% of American's [sic] believe Enron executives did something illegal.").

[74] William Scott Croft, Case Comment, *Free Speech & Fair Trials -- Striking the Balance: A Case Comment and Analysis of the Maryland Trial Publicity Rule as Applied in* Attorney Grievance Commission of Maryland v. Douglas F. Gansler, 19 GEO. J. LEGAL ETHICS 345 (2006).

[75] *See, e.g., Investors Can Learn Which Firms Care For Them,* CHATTANOOGA TIMES FREE PRESS, Feb. 15, 2006, at C1, LEXIS, News Library, Curnws File (stating that "the era of the imperial CEO is not over"; noting that CEO compensation is increasing and that boards of directors are "likely to defer" to them).

[76] Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest,* 80 N.Y.U. L. REV. 733 (2005) (suggesting that managers need discretion to sacrifice profits because social and moral sanctions provide an important part of the overall regime for sanctioning bad behavior that is additional to that provided by economic and legal sanctions).

What if the relationships and behavior of the management are seriously flawed but do not have the drawing interest that other cases do, such as "Disney?" The answer is that the media need not cover all cases. Media is suitable for some cases, especially when they are of interest to the public. These include mainly the powerful corporations and their boards and management. These are the cases in which the additional support of the media is most effective and desirable.

What if the media becomes the unfair prosecutor of management? The answer is that in such a case the corporate board is free to resist following the media's judgment. The board has and can seek to tell its story. The media usually invites management to tell its side of the story. Ken Lay went to the newspapers, even in the shadow of criminal prosecution.[77] H-P management was invited to do the same and took advantage of the invitation.[78] In fact, the management member who has been charged is terminally ill. She emphasized her desire to clear her name and reputation. She did not seem to care about the criminal charges against her but aimed at reestablishing her good reputation in the Court of Public Opinion.[79]

The Judge's use of *obiter dicta* should be considered. Is it fair for a judge to berate the parties or witnesses in part of the decision that is not subject to appeal? Is the judge protected from berating the witnesses or the parties in *obiter dicta*? The judge is protected from any civil liability. In 1872, the Supreme Court held that, unless judicial acts are

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[77] *E.g.*, Carolyn Susman, *What Ken Lay's Death Can Teach Us About Heart Health*, PALM BEACH POST, July 7, 2006, at 1E, LEXIS, News Library, Curnws File (noting that Lay "had been furiously defending himself in the media").

[78] Don Clark & Peter Waldman, *H-P's Hurd Answers House Panel on Probe, Sheds Little New Light*, WALL ST. J., Nov. 2, 2006, at B4, LEXIS, Meganw Library, Wsjnl File (questions about the facts); Patricia Dunn, *The H-P Investigation*, WALL ST. J., Oct. 11, 2006, at A14, LEXIS, Meganw Library, Wsjnl File (telling her story). *See generally* George Anders, *A Healthy Boardroom Is United and Focused on Lending a Hand*, WALL ST. J., Oct. 23, 2006, at B1, LEXIS, Meganw Library, Wsjnl File (describing the boardroom process; "Have we entered an era in which directors routinely clash, pitting governance headlocks against special-investigation slams? Boardroom experts hope that isn't so. They don't always agree on how to avoid future debacles, but one theme is constant: Unity among directors is crucial."); Karen Richardson, *Buffett Says to Avoid Scandals, Managers Must Not Follow Herd*, WALL ST. J., Oct. 10, 2006, at A9, LEXIS, Meganw Library, Wsjnl File.

done in clear absence of subject matter jurisdiction, "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."[80] However, a judge who makes public statements outside the courtroom and judicial proceedings may be subject to an action for defamation.[81]

Judges have rarely been disciplined under the Code of Judicial Conduct, for negative statements about a litigant in a judicial opinion.[82] However, there are few cases that disciplined judges for negative verbal statements in conjunction with judicial proceedings,[83] and for public statements outside the courtroom.[84] In *In re Rome*[85] a judge had filed a "Memorandum Decision" for a proceeding in which a woman found guilty of prostitution was placed on probation. The opinion was written in poetic form and intended to be humorous. It led to widespread publicity and a complaint from a feminist group that the defendant "had been held up to public ridicule."[86] The court held that while "a judge is not subject to discipline for exercising his discretion in performing a judicial act."[87] Judges are prohibited "from the use of humor at the expense of the litigants before them" and "should not 'wisecrack' at the expense of anyone connected with a judicial proceeding who is not in a position to reply"[88] and censured the judge.[89]

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[79] Patricia Dunn, *The H-P Investigation*, WALL ST. J., Oct. 11, 2006, at A14, LEXIS, Meganw Library, Wsjnl File (telling her story)*; see also* Roger B. Myerson, *Justice, Institutions, and Multiple Equilibria*, 5 CHI. J. INT'L L. 91 (2004) (setting forth a theoretical discussion that supports this assumption).
[80] Bradley v. Fisher, 80 U.S. 335 (1872) (Headnotes by Mr. Justice Field).
[81] *See* Roush v. Hey, 475 S.E.2d 299 (W. Va. 1996) (holding that comments made by judge on national television program are not shielded by common law doctrine of judicial immunity for acts in exercise of judicial duty).
[82] A LEXIS search of state court decisions with search terms from the appropriate disciplinary rule on January 17, 2007 retrieved only one such case.
[83] *See, e.g., In re* Ross, 428 A.2d 858 (Me. 1981); *In re* Del Rio, 256 N.W.2d 727 (Mich. 1977), *appeal dismissed*, 434 U.S. 1029 (1978); *In re* Jordan, 622 P.2d 297 (Or. 1980).
[84] *See, e.g., In re* Hey, 425 S.E.2d 221 (W. Va. 1992).
[85] 542 P.2d 676 (Kan. 1975).
[86] *Id.* at 681.
[87] *Id.* at 684. The manner of exercising this discretion is governed by what is now Canon 3 B. (4) of the ABA Model Code of Judicial Conduct, which provides that "[a] judge should be patient, dignified, and courteous to litigants." Id. AM. BAR ASS'N CENTER FOR PROFESSIONAL RESPONSIBILITY, ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3 B. (4) (1990).
[88] 542 P.2d at 685.
[89] *Id.* at 686.

To what extent may judges use decisions to express their opinions in *obiter dicta*? *"Obiter dictum" (or "dictum")* has been defined as "A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive." [90] An argument could be made that judges should avoid *dicta*.[91] After all, if the role of a court is to rule only on questions of law on appeal, the court should not only refuse to comment on other legal issues but also should avoid other comment. Yet, this view has not been widespread. In general, judges have used dicta to express their opinions and have exercised self-control in them manner and substance of their expressions. The Disney decision is clear about the judge's opinion of the management's behavior, but draws on the evidence and the defendants' own testimony.

The Court of Law and the Court of Public Opinion have a symbiotic relationship. There is a reciprocal relationship between them and each affects the other. Courts have been accused of being an unelected governing body.[92] The relationships between the Court of Law and the Court of Public Opinion can reduce the severity of this criticism. Disney Court indirectly spoke to, and accommodated, the media but was also affected by the information and judgment of the media. This is especially important in relation to corporate governance that does not amount to clear violation of the law.

Mark Roe suggests that an economic model of corporate law is constrained by public "outrage." Outrage can

> constrain executive pay from going even higher. If the internal outrage constraint to executive pay were low, not high (that is, if the constraint were not as weak as it is in the United States), the boundary for the

[90] BLACK'S LAW DICTIONARY 1100 (7th ed. 1999)

[91] *See* Crouchley v, Pambianchi, 182 A.2d 11, 14 (Conn. 1962) ("We should confine our comments to matters that are germane to the questions of law presented on the appeal and not digress into areas where we are trespassers.") (quoting Styles v. Tyler, 30 A. 165, 179 (Conn. 1894) ("[T]he Supreme Court of Errors is not a supreme court for all purposes, but a supreme court only for the correction of errors in law.")).

[92] *See, e.g.*, Amy Mayron, *Judges Are on Trial in the Court of Public Opinion Hennepin County is the 1st in the U.S. to Survey its "Customers," Including Criminals, on Their Court Experience,* ST. PAUL PIONEER PRESS, Jan. 12, 2003, at 1A, Westlaw, SP-PPD Database.

> economic model would be drawn differently. The Coasean bargain that keeps takeovers going in the face of hostile laws, structures, and court decisions would be less easily reversed, or not reversed at all. Takeovers would be less frequent. If other tools of making managers loyal to shareholders were much more imperfect, then performance of the large public firm would degrade, and presumably ownership structures would change: There would be a comparative advantage for closely-held corporations over public firms.[93]

Thus, in the area of corporate governance that does not involve conflicts of interest and disloyalty, judicial support to disclosure and publication by the news media may be what we need in this day and age. While the court did not change the positive law, [94] it did offer unusual advice to corporate management in *obiter dictum.* In addition, it has provided proven material for publication. In this respect it has broken new ground. We will never know whether this approach is better than the one we have had until now, because we cannot turn the clock back to experiment. It may well be that the most brilliant corporate managers will flee the Court of Public Opinion to manage non-public corporations, or escape abroad to manage non-U.S. corporations. It may well be that the results of such flight will be that the United States will fall behind other countries that offer more shelter to their corporate managers. Whether non-public corporations and foreign countries offer these managers better terms and freedom remains to be seen. The shareholders of non-public corporations may exercise far more control over the corporate managers. Foreign governments may do the same by law or rules or informally.

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[93] Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. CHI. L. REV. 1251, 1268 (2002).

[94] Edward B. Micheletti & T. Victor Clark, *Recent Developments in Corporate Law*, 8 DEL. L. REV. 17 (2005) (noting that the Delaware court has not changed much of its jurisprudence).

In the United States, in the area of corporate governance of public corporations, the courts of law and the courts of public opinion may complement each other to produce greater, more flexible, and more effective ways to ensure the accountability of those who control very large and powerful public corporations.