



GIBSON DUNN

*Managing Internal Audit
and Investigations*

November 12, 2020

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance via email approximately four weeks following the webcast.
- Virginia Bar Association members should anticipate receiving their certificate of attendance six weeks following the webcast.
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

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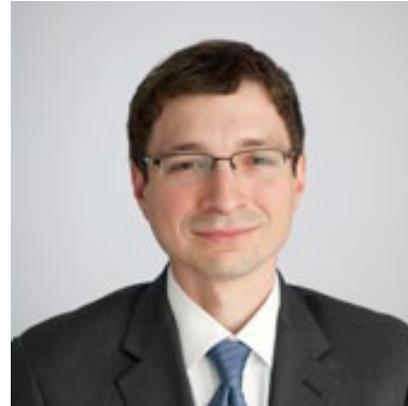
Today's Presenters



Michael S. Diamant



Patrick F. Stokes



Christopher W.H. Sullivan



Courtney M. Brown

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The Roles of Internal Audit and the Legal Department

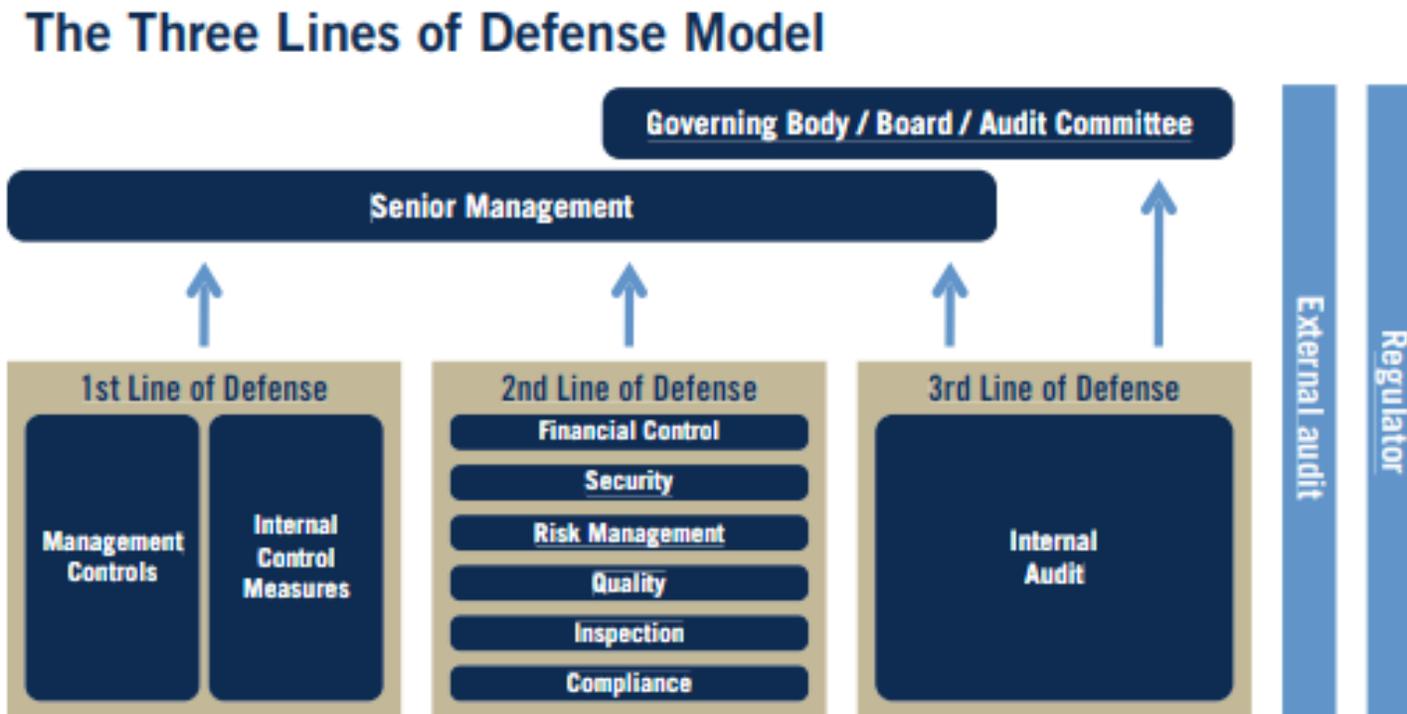
Complementary Objectives

Internal audit and legal departments have complementary objectives, which may intersect when an audit examines whether the company is in compliance with the law.

Internal Audit	Legal Department
Independent, objective assurance and advisory services provider.	Provides legal advice to the organization.
Conducts audits ranging from operational audits to those required by law. Audits may focus on a function, process, or control.	Including about regulatory expectations, the organization's approach to mitigating risk, and the adequacy of the organization's compliance programs.
May include individuals with legal background but focused on checking the organization's work and not interpreting legal requirements.	Interprets legal requirements relevant to an organization's work and processes.

The Importance of Internal Audit

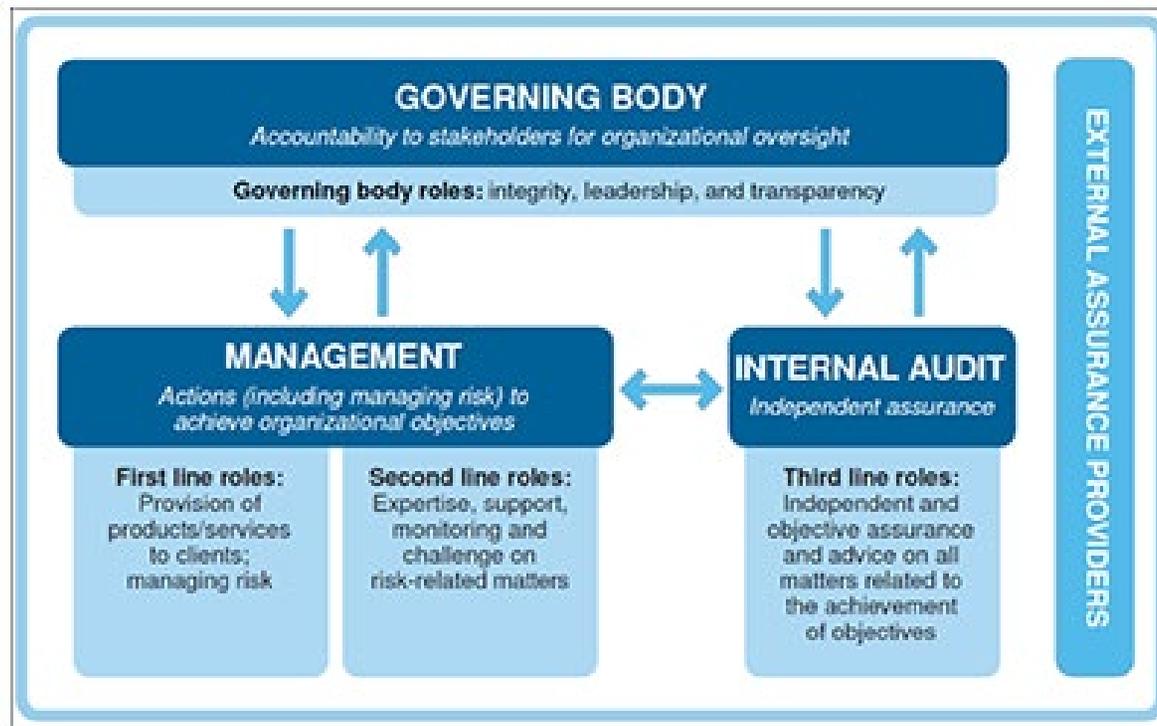
The Three Lines of Defense Model (2013)



IIA Position Paper: The Three Lines of Defense in Effective Risk Management and Control (Jan. 2013), adapted from ECIIA/FERMA Guidance on the 8th EU Company Law Directive, article 41.

The Importance of Internal Audit

The Three Lines of Defense Model (2020)



Press Release, IIA Issues Important Update to Three Lines Model (July 2020)

The Importance of Internal Audit

“Prosecutors should evaluate whether ‘internal audit functions [are] conducted at a level sufficient to ensure their independence and accuracy,’ as an indicator of whether compliance personnel are in fact empowered and positioned to ‘effectively detect and prevent misconduct.’” —DOJ Evaluation of Corporate Compliance Programs

“Voluntary audit programs play an important role in helping companies meet their obligation to comply with environmental requirements. Such assessments can be a critical link, not only to improved compliance, but also to improvements in other aspects of an organization’s performance.” —EPA

“[B]anks should have an internal audit function with sufficient authority, stature, independence, resources and access to the board of directors. Independent, competent and qualified internal auditors are vital to sound corporate governance.” —Basil Committee on Banking Supervision

“Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law . . . minimally require . . . [that the organization] take reasonable steps . . . to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct.”—U.S.S.G. §8B2.1(b)(5)(A)

“As a company’s risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits.”—DOJ/SEC FCPA Resource Guide

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Audit Activities Can Raise Complex Legal Issues

Privilege

Audit work is generally not privileged.

- Definition of legal professional privilege: the privilege (or right) of a client not to disclose confidential communications between client and attorney that were made for the purpose of seeking or providing legal assistance or advice.
 - Legal professional privilege protects communications, not facts.
- Generally speaking, internal audit reports and work papers are not protected by privilege:
 - Attorney-client privilege does not attach if the audit is not directed by counsel.
 - Work product protection does not apply if the audit was conducted in the ordinary course of business rather than “in anticipation of litigation.”
- Internal audit reports may be subject to discovery.

Privilege

“At bottom, the respondent’s claim to privilege appears to be premised on a gimmick: exclude counsel from conducting the internal investigation but retain them in a watered-down capacity to ‘consult’ on the investigation in order to cloak the investigation with privilege. Unfortunately for the respondent, this sort of ‘consultation lite’ does not qualify the Audit Report for the protections of the attorney-client privilege.”

United States v. ISS Marine Servs., Inc., 905 F. Supp. 2d 121, 129–30 (D.D.C. 2012)

“While the director of Internal Audit testified that he is an attorney, he is not an attorney for CUNY, and the report, which he wrote with a CUNY examiner who is not an attorney, contains nothing that reflects ‘legal research, analysis, conclusions, legal theory or strategy.’”

State ex rel. Murray v. Baumslag, 134 A.D.3d 451, 452, 21 N.Y.S.3d 51, 52 (2015)

A pharmaceutical company’s director of quality assurance’s “‘assessment’ and ensuing report . . . are responsive, at a minimum, to the discovery request seeking internal audits.”

In re Digitek Prod. Liab. Litig., 2010 WL 519860, at *3 (S.D. W. Va. Feb. 10, 2010)



Legal Interpretation

Audit work may require application of legal standards.

- Audit work may cover not only compliance with internal standards, but also compliance with legal standards.
- Legal standards may be complex or the interpretation thereof may have minimal or outdated guidance.
- A company's internal legal position may be different from the position it would take in an adversarial action or investigation.
- Auditors should be careful, therefore, not to reach legal conclusions, which may be incorrect or may differ from the legal department's conclusions.



Questions about Compliance



Audit work may result in findings that raise questions about legal compliance.

- An audit finding that a company is not in compliance with legal requirements could trigger mandatory disclosures or self-reporting.
- If provided to the government, audit findings that raise questions about legal compliance could be used as the basis of enforcement actions, particularly if remedial steps have not been taken.

Audit work may reveal deficiencies in compliance programs.

- Any deficiency needs to be addressed.
- The adequacy of a compliance program is a significant topic in government investigations and enforcement actions.

Ongoing Investigations and Remedial Actions

Audit work may implicate topics that are currently in the government's focus.

- Audits may concern topics under investigation.
 - This may include confidential topics not known outside of the legal department.
 - Audits of such topics could implicate witnesses or subjects of the investigation.
- Audits may concern government-mandated remedial actions.
 - If such actions are being taken pursuant to stipulated penalty provisions, audit findings could result in financial liability.



Internal Audit and Government Actions

Internal audit may identify potential illegal activity at early stages and strong audit programs may be credited in enforcement actions.



Fresenius Medical Care (2019): The resolution documents alleged that Fresenius's legal, compliance and Internal Audit functions failed to detect and prevent bribery in certain countries, particularly in West Africa, despite numerous red flags. However, the documents also noted that Internal Audit did identify certain issues relating to the company's dealings with foreign officials in Mexico and Spain.



Statoil (2006): Statoil's Internal Audit department identified potential violations of anti-bribery laws related to a consulting contract with an Iranian Official and raised concerns with senior management. It was in the process of finalizing a letter to the Board of Directors when the contract was disclosed by the media.

Internal Audit and Government Actions

On the other hand, internal audit reports are routinely requested in government investigations and audit findings or failures may be used to support charges.



Novartis (2020): The SEC highlighted internal audit findings of alleged control deficiencies in clinical trials carried out by one subsidiary, and in equipment placements by a former subsidiary



Herbalife Nutrition Limited (2020): The SEC quoted email exchanges between Board Members and IA regarding 2016 internal audit findings allegedly showing excessive hospitality expenses by Herbalife employees in China



Mobile TeleSystems (2019): The resolution documents cited MTS's failure to implement adequate internal accounting controls and to enforce the controls it had in place. Among other deficiencies, MTS was cited for lacking a sufficient internal audit function to ensure corporate assets were not used to bribe foreign officials, and failed to conduct adequate internal audits to detect and prevent criminal activity.

Internal Audit and Government Actions

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stryker[®]

Stryker Corp. (2018): The SEC alleged that the company's internal controls were insufficient to detect the *risk* of improper payments in India, China, and Kuwait. Among other issues, the SEC alleged that an internal forensic review of Stryker's Indian subsidiary identified no supporting documentation for many high-risk transactions, and that Stryker's Chinese subsidiary used sub-distributors that were not vetted, approved, or trained as required by company policy

Panasonic

Panasonic (2018): Internal audit identified risks from payments to government officials and third party providers.

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How to Get the Most out of Audit and Legal Working Together

Protecting Privilege

Consider whether audits should be conducted with legal oversight when sensitive topics are at issue.

- The audit concerns topics of an ongoing investigation or a likely forthcoming investigation.
- The audit concerns the implementation of legally mandated compliance measures.
- The audit concerns the interpretation of legal requirements, particularly when such interpretation is not settled.



In some areas, even privileged documents may be subject to review by regulators.

Best Practices for a Working Relationship



Consider implementing best practices for a working relationship between audit and legal.

- Coordinate with legal early in the process on topics such as scope and advisability of an audit, and later in the process to review draft reports and other work product.
 - Deconflict with legal in the event an investigation or remedial exercise is underway.
- Involve the legal department if an audit addresses compliance with the law.
 - Implement a policy with defined escalation steps, particularly if indicia of fraud, corruption, or some other legal violation is discovered.
 - Involve legal in the audit process or segregate particular issues for investigation.

Best Practices for a Working Relationship



Consider implementing best practices for a working relationship between audit and legal.

- Work with the legal department to avoid interpreting unclear legal standards.
- Focus on factual statements rather than subjective interpretations suggestive of misconduct.
- Use precise wording in audit reports.
 - Words on legal exposure, risk, and liability can be taken out of context.
 - Avoid sweeping or overly broad statements.
 - Be clear about if/when findings are limited.
- Ensure that remedial steps are practical and workable, and there is a process to follow through on any action items.

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Questions?

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Upcoming Webcasts & Contact Information

Upcoming Gibson Dunn Webcasts

- November 16 | Corporate Compliance and Sentencing Guidelines | 12:00 – 2:00 pm EST [REGISTER](#)
- November 18 | SEC Enforcement Focus on COVID-19 Issues and Key Areas of Risk | 12:00 – 1:15 pm EST [REGISTER](#)
- December 2 | What's next? The Legislative and Policy Landscape After the 2020 Election | 12:00 – 1:00 pm EST [REGISTER](#)
- December 8 | Congressional Investigations and Oversight Post-Election | 12:00 – 1:00 pm EST [REGISTER](#)
- December 10 | International Anti-Money Laundering and Sanctions Enforcement | 12:00 – 1:30 pm EST [REGISTER](#)

Publications and Recorded Webcasts

Recorded Webcasts (CLE credit available)

- [Spoofing What it is, where it's going](#)
- [The False Claims Act: Updates for Health Care Providers](#)
- [In-house Guidance for Managing Non-U.S. Antitrust Investigations](#)
- [The False Claims Act: Updates for Drug & Device Manufacturers](#)
- [Trends in Government Investigations into Foreign Influence in the Private Sector: A discussion of FARA and related provisions](#)
- [The False Claims Act: Updates for the Government Contracting Sector](#)
- [The False Claims Act: Updates for the Financial Services Sector](#)
- [Negotiating Closure of Government Investigations: NPAs, DPAs, and Beyond](#)

Publications

- Gibson Dunn COVID-19 Resources: <https://www.gibsondunn.com/category/publications/>
- Gibson Dunn White Collar Defense and Investigations: <https://www.gibsondunn.com/practice/white-collar-defense-and-investigations/>

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Michael S. Diamant is a partner in Gibson Dunn’s White Collar Defense and Investigations Practice Group. He is a leading FCPA practitioner, having represented clients in some of the highest-profile cases before the SEC and DOJ. Both *Chambers Global* and *Chambers USA* currently rank Mr. Diamant among the top FCPA specialists in the United States, commending his “incredible working knowledge of high-level investigations and incredible insight into how companies should respond.”

Mr. Diamant has handled FCPA investigations for a wide range of publicly traded corporations and has conducted fieldwork in nineteen countries on five continents. He has helped some of the world’s largest companies navigate their way through white collar, compliance and anti-corruption matters, including representing Petrobras before the SEC and DOJ in their FCPA investigations and successfully negotiating resolutions to both investigations. Additionally, he successfully represented infant nutrition company Mead Johnson in its 2015 FCPA resolution relating to medical marketing practices in China, which resulted in no admission of culpability in the SEC resolution, no independent compliance monitor, and a declination from DOJ.

Mr. Diamant also routinely advises corporations on the design and implementation of their FCPA compliance programs. Mr. Diamant has designed entire anti-bribery compliance programs, as well as guidance and payment approval materials, for Fortune 100 corporations. Notably, he helped to lead the court-mandated FCPA compliance monitorships of Statoil ASA and Siemens AG, the largest FCPA resolution in history.

Mr. Diamant clerked for the Honorable Fortunato P. Benavides of the U.S. Court of Appeals for the Fifth Circuit, and is a *magna cum laude* graduate of Georgetown Law and Georgetown’s School of Foreign Service.

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Patrick Stokes is a litigation partner and a member of the firm's White Collar Defense and Investigations, Securities Enforcement, and Litigation Practice Groups.

Mr. Stokes' practice focuses on internal corporate investigations, compliance reviews, government investigations, and enforcement actions regarding corruption, securities fraud, and financial institutions fraud. He has tried more than 30 federal jury trials as first chair, including high-profile white-collar cases, and handled 16 appeals before the U.S. Court of Appeals for the Fourth Circuit. Mr. Stokes is equally comfortable leading confidential internal investigations, negotiating with government enforcement authorities, or advocating in court proceedings. In 2020, Mr. Stokes was ranked nationally by *Chambers USA* as a leading attorney in FCPA.

Prior to joining Gibson Dunn, Mr. Stokes spent nearly 18 years with the U.S. Department of Justice (DOJ). From 2014 to 2016 he headed the FCPA Unit, managing the DOJ's FCPA enforcement program and all criminal FCPA matters throughout the United States, covering every significant business sector, and including investigations, trials, and the assessment of corporate anti-corruption compliance programs and monitorships. Mr. Stokes also served as the DOJ's principal representative at the OECD Working Group on Bribery working with law enforcement and policy setters from 41 signatory countries on anti-corruption enforcement policy issues.

From 2010 to 2014, he served as Co-Chief of the DOJ's Securities and Financial Fraud Unit. In this role, he oversaw investigations and prosecutions of financial fraud schemes involving accounting fraud, benchmark interest rate manipulations, insider trading, market manipulation, Troubled Asset Relief Program (TARP) fraud, government procurement fraud, and large-scale mortgage fraud, among others.

From 2002 to 2008, Mr. Stokes served as an Assistant United States Attorney in the Eastern District of Virginia, where he prosecuted a wide variety of financial fraud, immigration, and violent crime cases. From 1998 to 2002, he served in the DOJ's Tax Division as a trial attorney in the Western Criminal Enforcement Section.

Mr. Stokes received various awards while at the DOJ, including the Attorney General's Distinguished Service Award in 2013 and 2014 and the Assistant Attorney General's Exceptional Service Award (Criminal Division) in 2011 and 2014.

Mr. Stokes received his bachelor's degree and Juris Doctor from the University of Virginia, where he was an editorial board member of the *Virginia Journal of Social Policy and the Law*.

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Christopher W.H. Sullivan is of counsel in the Washington, D.C., office of Gibson, Dunn & Crutcher. He practices in the firm's Litigation Department and is a member of the White Collar Defense and Investigations Practice Group. His practice focuses on white collar criminal defense, internal investigations, and corporate compliance.

Mr. Sullivan has significant experience representing clients in government investigations and compliance monitorships. He has represented clients in a variety of areas, including False Claims Act, Foreign Corrupt Practices Act, and OFAC matters, before the Department of Justice, Securities and Exchange Commission, and other enforcement authorities. Mr. Sullivan has conducted internal investigations regarding potential corruption, False Claims Act, and other white collar issues. He regularly advises corporations on the structure and effectiveness of their anti-corruption compliance programs. Mr. Sullivan also has significant World Bank enforcement experience, working on behalf of clients under investigation by the World Bank Integrity Vice Presidency and assisting companies already subject to World Bank sanction. In addition to his work for clients, Mr. Sullivan has held a leadership role in a major FCPA compliance monitorship.

Mr. Sullivan clerked for the Honorable Deborah Cook of the U.S. Court of Appeals for the Sixth Circuit and for the Honorable Brent Dickson of the Indiana Supreme Court. Mr. Sullivan received his law degree from Washington University in 2007, where he served as an Executive Editor of the *Law Review*, was a legal writing teaching assistant, earned the Samuel M. Breckenridge Book Award for Excellence in Legal Writing, and was elected to the Order of the Coif. He is a 2003 *magna cum laude* graduate of Miami University.

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Courtney M. Brown is a senior associate in the Washington, D.C. office of Gibson, Dunn & Crutcher, where she practices primarily in the areas of white collar criminal defense and corporate compliance. Ms. Brown has experience representing and advising multinational corporate clients and boards of directors in internal and government investigations on a wide range of topics, including anti-corruption, anti-money laundering, sanctions, securities, tax, and “me too” matters.

Ms. Brown also counsels corporations on the effectiveness of their compliance programs and in connection with transactional due diligence, with a particular emphasis on compliance with anti-corruption laws, anti-money laundering regulations, and economic and trade sanctions administered by the U.S. Department of Treasury’s Office of Foreign Assets Control.

Ms. Brown has participated in two government-mandated FCPA compliance monitorships and conducted anti-corruption and compliance trainings for in-house counsel and employees. She also has experience advising companies on the application of the U.S. Sentencing Guidelines and, since 2014, has been a contributing author for the ABA’s treatise, “Practice Under the Federal Sentencing Guidelines.”

Ms. Brown completed a secondment at a Fortune 100 company, where she advised global legal and business teams on compliance with anti-corruption laws.

Ms. Brown received her law degree in 2008 from the University of Chicago Law School. Prior to law school, Ms. Brown worked for the Chairman of the U.S. Senate Health, Education, Labor and Pensions Committee. Ms. Brown earned her undergraduate degree from Harvard University, where she was co-captain of the NCAA Division I championship women’s crew team and an All-American selection in rowing.

Ms. Brown is a member of the bars of the District of Columbia and Virginia.

Gibson Dunn's Global Footprint

With approximately 1,300 attorneys in 20 offices, Gibson Dunn is committed to providing top-tier legal services – wherever your business may take you. Our team can leverage our network of global offices, located in leading business centers worldwide, to provide a true global practice with superior local execution capability. Where we don't have a local presence, we are able to partner with the top local firms to ensure the best quality of service to meet your needs.



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