



DIRECTORS  
ROUNDTABLE

# WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

**Cornelis 'Kees' van Ophem**

Executive Vice President & Global General Counsel,  
Fresenius Medical Care



## THE SPEAKERS



**Cornelis 'Kees' van Ophem**  
*Executive Vice President &  
Global General Counsel,  
Fresenius Medical Care*



**Dr. Ulf Wauschkuhn**  
*Partner, Baker & McKenzie*



**Joseph 'Joe' Andrew**  
*Global Chairman, Dentons*



**Michael Florey**  
*Principal, Fish & Richardson*



**Scott Sonnenblick**  
*Partner, Linklaters LLP*



**Graham Robinson**  
*Partner, Skadden, Arps, Slate,  
Meagher & Flom LLP*

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, [www.directorsroundtable.com](http://www.directorsroundtable.com).)

## TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments in his career and his leadership in the profession, we are honoring Cornelis "Kees" van Ophem, General Counsel of Fresenius Medical Care, with the leading global honor for General Counsel. Fresenius Medical Care is a leading global provider of vertically integrated solutions, including products and services for people with chronic kidney failure and other chronic diseases. His address focused on key issues facing the General Counsel of a global medical products and services corporation with a dual stock exchange listing at NYSE and the DAX in Frankfurt. The panelists' additional topics included business and regulatory globalization; intellectual property; trade and commerce; and mergers and acquisitions.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel.

Jack Friedman  
Directors Roundtable Chairman & Moderator



**Cornelis 'Kees' van Ophem**  
*Executive Vice President &  
Global General Counsel*



Cornelis "Kees" van Ophem, originally from The Netherlands, joined Fresenius Medical Care as of January 2015 as EVP & Global General Counsel.

Kees studied law at University of Amsterdam and New York University (LL.M; Fulbright scholar).

He started his career at international law firms both in the USA and Europe. His in-house career as General Counsel led him through a complete cycle in the telecoms' industry over a period of almost 15 years (from a monopoly player, KPN, an international joint venture of Swisscom, KPN, Telia, and Telefonica, a Pan-European start-up [including IPO] to a global public restructuring in London at FLAG Telecom).

In 2005, he switched to the Life Sciences industry and became International General Counsel at Medtronic at its international

headquarters in the Lausanne area in Switzerland. From July 2010 until January 2015, he was General Counsel at Leica. As head of the General Counsel function, he was responsible for all risk management matters of the Leica Group, including Legal, Compliance/Integrity, IP, and EHS, and was member of its global executive management team. As Leica also had a significant and diversified healthcare business, Kees has experience with the complete spectrum of research, analysis, diagnosis, therapy/treatment, and surgical solutions, covering devices, bio/pharmaceuticals, services, software, and consumables, covering a wide range of Science & Technology businesses.

He is married to Karina and has two boys, who share his passion for football, and he lives with them in Switzerland.

## Fresenius Medical Care

Fresenius Medical Care is the world's leading vertically integrated provider of products and services for people with chronic kidney failure and other chronic diseases. Around 2.8 million patients with this disease worldwide regularly undergo dialysis treatment. Dialysis is a vital blood cleansing procedure that substitutes the function of the kidney in case of kidney failure.

We care for more than 300,000 patients in our global network of more than 3,500 dialysis clinics. At the same time, we operate ~40 production sites on all continents, to

provide dialysis products such as dialysis machines, dialyzers, and related disposables.

Our strategy is geared toward sustainable growth. We aim to continuously improve the quality of life of patients with kidney disease and other chronic diseases by offering innovative products and treatment concepts of the highest quality.

Fresenius Medical Care's corporate headquarters are in Bad Homburg v.d.H., Germany. The headquarters of North America is in Waltham, Massachusetts, the headquarters of Latin America is in Rio de Janeiro; and the headquarters of Asia-Pacific is located in Hong Kong.

### Fresenius Medical Care in numbers

- We offer dialysis services and products in more than 120 countries.
- Every 0.7 seconds we provide a dialysis treatment somewhere on the globe.
- We employ over 108,000 employees in more than 50 countries.
- In 2015, 50% of the dialysis machines sold worldwide were produced by Fresenius Medical Care.
- In 2015, Fresenius Medical Care generated revenues of more than 16.7 billion U.S. dollars.
- Fresenius Medical Care has been developing and producing dialysis products for more than four decades.



**RICK WILLIAMS:** Good morning! My name is Rick Williams, and on behalf of the Directors Roundtable, I want to welcome you to this terrific event that they have organized.

This program is a unique opportunity for Boston-based professionals to hear from the senior leadership of an EU-based global medical technology company, in conjunction with its quarterly board meeting here in Boston. The Directors Roundtable is hosting this program for the Global General Counsel, Kees van Ophem, who is our Guest of Honor.

Jack Friedman is here from Los Angeles and, as the Chairman of Directors Roundtable, gets interesting, talented people to share their very important insights with us as well as the broader business communities all over the world. I'm now going to turn the podium over to Jack.

**JACK FRIEDMAN:** Thank you. I want to thank you all for coming. Many of you have been to our events before, but some of you may be new. Just to give a brief summary; we are a *pro bono* civic group whose mission is fine programming for Boards of Directors and their advisors globally. We've never charged the audience in 800 events for 25 years, so we truly are *pro bono*.

Boston means a lot to me. I was the youngest in my class at Harvard Business School in 1969; I started when I was twenty. It has great sentimental significance that I enjoyed many years here in Boston. Earlier this week, I was visiting the Harvard Faculty Club, and the cab driver said that he had picked up thirty Nobel prizewinners in his time in Cambridge. I don't think that there's any place in the world except Boston that has the intellectual firepower to impress a taxi driver so much. [LAUGHTER]

This series that we do with global leadership is intended not only to educate the leadership of business and their advisors, including counsel, but also to create more understanding about corporations and their



efforts to bring goods and services of great benefit to humanity. Fresenius is an epic example of a leader in its field.

Kees will begin with his opening remarks, followed by the expertise and comments on a variety of different topics by the Distinguished Panelists. Each one will introduce his own topic and then we'll have a roundtable including some Q&A at the end.

Let me introduce the Distinguished Panelists. The one who's travelled farthest is Dr. Ulf Wauschkuhn of Baker & McKenzie, coming all the way from Germany; thank you very much. Joe Andrew is the Global Chair of Dentons, a legal boutique of 7,000 lawyers, the largest law firm in the world. Mike Florey is a principal of Fish & Richardson here, and we want to thank all his staff who did the work to make the program successful. Scott Sonnenblick is a partner at Linklaters, which works not only here in the States with Fresenius, but also in Germany. Finally, we have Graham Robinson, who is a partner at Skadden in Boston.

Our Guest of Honor has global responsibility for the legal department in countries all over the world. He will be talking about his activities and also about the company in a moment. Kees is originally from the Netherlands, living now in Switzerland. He has a distinguished career in-house in the

fields of telecom, life sciences, and health-care. His J.D. degree is from the University of Amsterdam and he also has an LLM degree from NYU. He truly has a global insight.

Without further ado, I would like to congratulate and welcome our Guest of Honor.

**CORNELIS "KEES" VAN OPHEM:**

Thank you all for coming. I would like to thank the Directors Roundtable and Jack Friedman for selecting me to receive this honor and his staff for organizing this. I'd also like to thank the company I work with, Fresenius Medical Care, who enabled this to happen, and I'll come back to that a little bit later on. I would also like to thank all the law firms sitting around the table here, as well as in the audience, for supporting this program. Thank you very much for that. Especially, of course, Fish & Richardson and their staff for hosting us here in such a beautiful facility with a great view near the airport.

I'm looking around the audience and there is actually one participant who goes back with me almost 30 years; he was my roommate at NYU – Tom Evans – and we're getting old! [LAUGHTER]

Actually, another old friend on the right side is Don, here with his wife Lisa, who was at the first law firm I worked with, Reed Smith. Thanks for coming; I really appreciate it.

We also have a lot of people here from Fresenius Medical Care, from the global legal function, the North American legal function, and the IP team. That's fantastic; and from the management board of Fresenius Medical Care, we've got Ron Kuerbitz, the CEO for North America, and Kent Wanzek, who is our Global Manufacturing and Quality Leader; and Mike Brosnan, our CFO, is here.

I don't want to fall in the trap of false self-modesty, but I do think that this award is not only about me; it's also about the wonderful company I work with. I want to talk a little bit about that and reflect back on all the companies that I have had the privilege to work with — the law firms in the U.S. and Europe, and as an in-house counsel. I started with a public telecoms operator, which was a governmental organization and was in the process of privatization; and from that, I took my first General Counsel job more than twenty years ago in a joint venture of four leading telecom operators in Europe and from there as co-founder of a start-up.

As part of that whole telecoms hype in the late nineties, we started with only a business plan and \$60 million venture capital on the bank and we did an IPO of that start-up three years later, in 2000. It was a great experience and I learned a lot from that. I'll talk about the power of disclosure for public companies later on in my speech, and the fascinating process of leading the legal and governance aspects of a public company.

As it goes with hypes, of course, it turned into the opposite, so I ended up doing a global public restructuring and relisting of another company, a telecoms company which is known for having the lowest sea cable on the Earth, from the U.K. to Japan. It is still functioning, by the way. And we turned the company around with a Chapter 11 in the Southern District of New York. There were so many conflicting priorities and interests of suppliers, employees, customers, government, and insurance companies — everybody wants to get out.

On the way down, you learn the most. We managed to turn it around, take it public again and the company is still doing well, which is encouraging to see.

After that, having done a full telecom cycle, and of course, as I was getting older and the kids were getting older, it was good to go into healthcare for a long-term run. [LAUGHTER]

First, I went to Medtronic — a great company with great products. I was the International General Counsel there, so I had a regional role. It was a good learning experience. Still, I missed working in the global general counsel role and having a corporate role. So I went to Leica, a great brand and a great company. It is a truly global company and very competitive with fascinating products. They have an efficient lean system and cut out all inefficiencies and redundancies in a systematic way. However, I became convinced that to be competitive in the long run, one needs a certain measured redundancy. Creativity and risk management are a challenge in a lean environment. It is for good reason that even *nature*, an ultra-competitive system, has nonetheless redundancy. To survive, one lung or one kidney will do, so a lean system would cut it out, but your risk profile system just went up. [LAUGHTER]

This brings me to Fresenius Medical Care. It is a global, public company, a DAX 30 — so, a big company in Germany — and is also on the New York Stock Exchange. It's a unique company: it is fully integrated. Most healthcare companies sell pills, they sell medical devices, they sell services, but they don't do all three. We're selling products, hardware, consumables and, most importantly, services in about 120 markets across the globe. That vertically integrated aspect makes us really different from many other companies. Every day we serve patients, because we have thousands of clinics all over the world with more than 100,000 employees. So, we're much more of a "B to C" type of company than a "B to B"



type company. That's also a reflection of this award, because Fresenius is a brand that gets more well-known because of the activities it is doing, and the impact it has on customers, healthcare systems, shareholders and, most importantly, patients.

We're taking care of patients with renal or other chronic diseases in a holistic way — pretty much all their needs from the beginning to the end. There's something that we call "Care Coordination." It's a very data-rich and services-rich effort with a lot of health management outcomes, a lot of reimbursement data that we use to get paid, and a lot of day-to-day analytics. If you do a business plan, it's very important to figure out from a real estate perspective where we should put the next clinic. There are a lot of analytics that go into that.

On the reimbursement side, you really see the changes towards an outcome-based, result-based system, as opposed to fee-for-service or fee-per-pill. It's a big change. That's why so many other healthcare companies are now looking to be fully integrated, because only when you're integrated, can you really guarantee the outcome. Do the patients really do better? Did the patients really get better? If yes, we get paid; if not, we don't get paid. With that, the risk profile goes up, too. By being integrated, management is better able to track and guarantee outcomes.



By treating patients better in an earlier stage, we are also working to prevent people from getting into dialysis, and we handle those who do. It is really a privilege to be able to help them with life-saving therapies.

So, what did I learn from the last more than twenty years as a General Counsel? What's my "best of" of lessons learned for a successful global legal function, or a successful risk management on the legal side? In one word, it's all about prevention. That's easy to say, and people in the audience who know me, know I always say, "When it comes to legal and compliance, boring is good." [LAUGHTER]

It is a difficult discussion with the CEO, because he wants to know what you did. "Nothing happened," so we did a good job. Prevention is difficult to sell, but I believe in it and that's why I'm really convinced to be in-house. I really enjoy being in-house; it's the best way to work on prevention.

The question on your minds, hopefully, is: "How do you do prevention and be a success?" Let me take you on a journey to give you ten pointers that I think could work in every global company from a prevention point of view.

First, how do you prevent problems? You've got to understand the business in detail. You've got to understand the value chain, the margins, the cash flow, and what the return on the investment is. I have hired many people and do weekly interviews for new candidates. Yes, we talk about legal skills, but I also talk about those other things. If I detect no interest in the underlying business drivers, that person is unlikely to be hired. To be multi-disciplinary is a really important criteria.

There are questions that I expect in-house counsel to ask, in order to counsel and guide our business professionals. For example, they might say, "We want to set up this distributor in Russia, and we need you to make a contract and negotiate it." And they come to the terms

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and conditions that they want, such as giving them a 50% discount. Is that half of the list price or the street price, and you go into those details. I want our in-house counsel *not* to go there yet. They should first ask why a 50% discount – isn't that a bit high? What does it do for our margins? Can you get a 30% discount? Why are we doing that at all? Why not go direct? That's the kind of questions that I expect in-house counsel to ask. Very different than a traditional in-house counsel that is much more execution-based. The same with agent commissions; there are many questions to be asked here.

Secondly, you also have to understand strategy. Where are we going to be in the next five to ten years with the company? What are the external factors we face from a global perspective?

You also have to understand R&D. What are the future products? Do we design for quality? Many times when there is litigation or a governmental investigation, something needs to be improved with the process, whether that is in the design or manufacturing, but it could also be in contracting. It could be in client relationships. Or, even worse, it could be the ethics, compliance side. You've got to already know at the R&D phase what we are doing to try to get into the prevention phase. [Product] litigation, even if successful, always reflects some defect in the value chain.

The idea of prevention also applies to your organization and the processes of the company. Understand each business unit; how is it organized? Each country organization; how are the processes run? A decentralized organization needs more "checks and balances"

than a centralized one. It is the same for a complex one vs. a simple one. This also has to fit the culture of the company.

You have to understand business cases. When you do an M&A in a very corrupt market, a question that a good in-house counsel should ask is, "Why are we assuming a 100% addressable market in a corrupt market?" If 80% of the business is corrupt, our addressable market is only 20%. Otherwise, it is likely there is going to be a compliance issue. Let's only assume 20% is addressable. This is a complete different business case. That's the kind of question, before you go into execution mode, I expect in-house counsel to ask.

From an HR perspective, you also have to understand incentives; are we incentivizing sales on margins or only on revenue? I guarantee you, if you incentivize only on revenue, you are likely to have a compliance issue.

You also have to understand the accounting side also. For example, research agreements with doctors. Are we accounting these for expenses in marketing or as an R&D expense? It is a very interesting question that has compliance and legal implications.

That's about understanding the business. I'm coming up to Point 3, so I have seven more points on prevention. [LAUGHTER]

You have to be physically close to business; you can't do this from an ivory tower. You have to travel; you have to be there; and the legal team also has to be decentralized physically; you can't have lawyers at headquarters only. You need to put them into places close to businesses, but always under a central reporting line. You also have to make sure

that those local attorneys — especially in difficult markets where the appreciation of the legal in-house counsel isn't always that high — are part of the local management team, i.e., sit on the front seat.

You also need a global budget for all in-house counsel and outside counsel costs anywhere in the world. It is very important to have that responsibility and be able to be accountable for it.

Which leads me to the key point of all of this, even though it's only Point 4: our in-house counsels are not only advisory; you may think of them as support; you think of maybe special expertise. It's all true, but it's also about decision-making. When it comes to legal standards, compliance, ethics, I expect the attorneys to speak up and make sure we help the business to make the right decision. Tell them, "No, we're not going to do it this way; we're going to do it that way. We're not going to do only execution, but also we are ensuring to implement the right thing to do. As in-house counsels, we should ask: does it make sense for next quarter, but does it also make sense for the next generation? If both are true, then it's probably good to do.

Not only doing the right execution, but also changing the course — drawing the map, if necessary — getting the best result. Close to business, but separate from the business.

Another key point is: hire the best people that are available. When you hire, hire for diversity: diverse in background, in perspectives, development, career, and skills. It's really critical to do that to better manage risks. You need a really diverse group to manage a global company in 120 countries.

If you mainly hire bald men in their fifties, your risk profile just went up. [LAUGHTER]

When selecting talent, the acquisition process is very, very important. Each and every attorney, each and every legal team member that we hire, I interview them personally. You'll also make sure you have a proper



retention, development plan, and succession plans. We have a little bit more than 120 people in our global legal team who chose to work there. But doing those interviews yourself at the end of the day sends a message. You can see whether there's a cultural fit or whether there's a values fit, also for the candidate, and you can ensure we hire in a diverse manner for complementary experiences and perspectives. Well, again, if you want to do proper prevention, hiring for diversity is the key.

Another key lesson: the client is *never* the individual, *never* your boss. The client is always the company, the shareholders, the patients, the paying customer. But it's *never* an individual; you *never* work for a boss. We have people in my team telling me, "I work for you." "No; you don't work for me; you work for the company." A very important lesson if you want to make sure you stay always on the straight and narrow.

Also do "lessons learned" in terms of post-mortems to find the root cause. When we had a governmental investigation or litigation, what went wrong? Also be part of other post-mortems; for example, when we don't get our expected return on investment from an acquisition, it may have been something with the in-house counsel. Maybe it was the wrong price. Maybe the contract was negotiated in

the wrong way with the wrong reps and warranties or we didn't do the due diligence right. The same for an accounts receivable problem; maybe our payment clauses were suboptimal? Maybe we didn't charge interest, or we didn't have something else right. It's very important to get the details right. You have to go to the root cause; you have to ask five times, "Why?" Don't take as an answer that people say, "Well, this is the reason." Don't stop asking until you find the real, underlying reason, because if you *know* the root cause, you can set up your organization and implement the processes to do prevention for the future. It's a very proven lean technique, and it works.

You also need to make sure that the business globally *and* the global legal team work with one simple set of global standards when it comes to ensuring legal quality, and on when and how to involve the Legal Function. This should happen early on: when we were about to make the first commitment with an external party.

It is very important, also, for a global legal team, to be balanced. You need to balance between attorneys, the paralegals and, of course, the other support that you need in the global legal team — e.g., admin support, what have you. It is very important. You have to make sure that you're part of one team, and I'll come back to that.

I'm also a firm believer, having worked in different sizes of companies, especially the size that we are, that you need a matrix within your global legal team between the functional experts — whether that's the head of litigation, labor laws, data protection, corporate governance, regulatory, M&A on one hand and the regional and local counsels on the other hand. So we have that, really a mix of functional experts and more regional and local counsel with general expertise. At Fresenius Medical Care, we're getting there.

Of course, you've got to make sure you mirror the company organization; you can't just design a legal team out of whack with the company organization.



I'm a big fan — coming to the end, now — of the pitch for prevention, to work with Centers of Competence, in cases where full-time global experts are not yet justified. We have about ten of them, and every member in the global legal team is asked to join one or two. So our lawyers from Argentina are part of one global team, the same for the lawyer in Ecuador or the lawyer in the Phillipines. They're all part of one single team, and they usually rotate after one or two years within the Centers of Competence. It's a great way to see talent; and that's also a great way to get cross-learning and best practices through the organization from a legal point of view, and get really global minimum standards that feel like, "Ah! This is the global legal function."

I expect lawyers who want to be successful, in order to be successful in prevention, also to be very practical, very solution-oriented. You have to be, on the one hand, a problem spotter; you need to be skeptical — lawyers tend to be very good at that — but you also need to be a problem solver; you need to be creative, which is not necessarily our strength. So not only listen to what people say — it's especially important to listen to what people *don't* say. That's where you need to start out with questions. It's very important to do that.

In the same vein, we are here, as in-house counsel at the global legal function, to optimize the company, *not our* legal function; not our legal specialties. And so, yes, sometimes there's a legal solution which is optimal, but sometimes we need to compromise in that, as the company's issues are bigger than that. So, a lot of work in that context.

And my final point — and it's a lesson learned from all these companies I worked with — if you want to prevent issues at the end of the day, make sure you disclose wisely. Disclose early; in the case of doubt, disclose it. I've never seen a company get into trouble by proper disclosure. You probably won't get away with murder if you disclose it, but it comes close to that! [LAUGHTER] Transparency is a key preventer.

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So, in conclusion, the global legal function should not only act as lawyers, but you also have to make sure you collectively, with the business, do the right things in the right way. You need lawyers with a backbone; you need lawyers with good judgment. They need to be courageous and they need to be smart, and personally, I've switched a couple of times between companies, I always look at a company's culture and what the values of the company are, what are the values of the management team, because they have to be aligned with your values. If that is not the case, then you're setting yourself up for failure, and so is the company. You have to have a fit there. You spend a lot of time on that when you do talent acquisition.

It feels a bit like I opened doors on all those things, when I wrote them down, but I can guarantee you there are a lot of practical details. I mentioned a couple of them, and they are really important. Apart from those details, I always expect lawyers also to have an ability to keep seeing the big picture. Which reminds me of my favorite sport, soccer — what most people call “football” — where you need to keep an eye on the ball, and you need to be able to control the ball. But at the same time, you have to see all 22 moving pieces, and you have to see the whole field and beyond. It's probably the same for American sports, that have a proper ball involved, but that ability, to see the details and control the little things and still see the big things, that is incredibly critical. Aligned with that, you've got to create a teamwork that's fun to work together with. Of course, that kind of spirit helps creativity, a learning organization, which, again, helps to prevent legal issues from coming up.

It's a real privilege to be in-house counsel at Fresenius Medical Care, and I've come to the end of the journey of lessons learned when it comes to prevention. At the end of the day, if I could sum it up in one sentence: you have done a good job when you look at prevention, when you made yourself redundant. That's always what I'm trying to do, and I'll let you know when that happens! [LAUGHTER]

Thank you for your attention. [APPLAUSE]

**JACK FRIEDMAN:** I would like to ask our Guest of Honor a couple of questions and then move on to the other Distinguished Panelists.

I wanted, first of all, to get a sense of the scope of the company. I understand that you employ in your company as many as 60,000 Americans?

**CORNELIS “KEES” VAN OPHEM:** That is our North American organization. That includes factories, sales, technicians, nurses, and doctors.

**JACK FRIEDMAN:** That is rather incredible. If you had a huge auto manufacturing company, it would be believable — but to have a healthcare company with that type of employment is amazing. External to the company, what are some of the constituencies you have to work with?

**CORNELIS “KEES” VAN OPHEM:** It's a great question, because one of the questions I usually do during interviews for new legal counsel to be hired, I give them a list of constituencies. They include patients, [paying] customers, healthcare professionals (decision-makers), governmental and



regulatory authorities, shareholders, and employees. I ask a new legal counsel, “Which one would you put first, if there’s a conflict of interest between them; which one is the most important?” I always tell them, “It doesn’t matter which one you put first — it’s how you get to the answer, that counts to me.”

Clearly, you always put patients first, so that’s definitely the right answer for anybody who is going to be interviewed! [LAUGHTER]

What happens after that really depends on the circumstances. But it’s very important for us, especially as you move to a more and more result-based, outcome-based reimbursement system, as governments started to do. Our business model will fluctuate with positions by governments on reimbursement of products and services. Where it goes up, like it happened in India, it goes up to a level that becomes sustainable for us to move into those markets with our full set of services. We start with the products, and then we go into services. We see that in other markets, too, and so there’s a lot of growth, especially in the Asian market.

You’re really dealing with a wide gamut of stakeholders; healthcare professionals, patients, reimbursement authorities, shareholders, suppliers, customers, employees, etc.

**JACK FRIEDMAN:** In Europe, is it entirely government reimbursement?

**CORNELIS “KEES” VAN OPHEM:** There is also private insurance, but many systems, like in the U.K. would be the National Health Service, a public system funded by tax or obligatory insurance. You also see a similar situation in Canada, for example. You work with them, but there is usually not much to negotiate.

**JACK FRIEDMAN:** Can you comment on the challenges of working with the business side of the company? We once had the world head of intellectual property for a major movie studio. He said that he was gung ho, in a

responsible manner, to help the business be successful. One day, he was sitting in his office and a business person came in and said, “We have a new product line, with a new website that we told customers we are launching. I was told that I need your review to make sure that we’re legally okay.” The IP counsel said, “I’m very glad to help. When did you announce that you would be launching?” And he said, “In an hour.” [LAUGHTER]

In the daily operations of your company, how do you encourage a sense of cooperation and mutual support so that people are positive about working with the legal department? Also tell us if a German world headquartered company has different operations than Americans might be familiar with?

**CORNELIS “KEES” VAN OPHEM:** Yes, that same sentiment of legal being blockers and naysayers, it’s even stronger in Europe, Asia/Pacific, and Latin America.

That’s one of the reasons why you really have to be close to business and also be part of the local management team, because then you are familiar with the business plan. I want every attorney that we have working in the region, working in the country, to really go to each and every local management team meeting, because then we’ll hear about new products or new websites or developments or new sales. Then we’re ready to ask, “Oh, I heard you were looking at the new distribution model for XYZ — what are you planning to do?”

Sometimes lawyers could say, referring to the person you mentioned, where somebody says, “They only blame us for delays and they don’t take us seriously.” I would tell them, “What could you learn, yourself? Is there anything you did or did not do to cause that to happen?”

“Were you at the management team meeting? Were you at the kick-off? I want you to go to kick-offs.” If you’ve got sales kick-offs, people are very surprised that you show up as a lawyer. “What are you doing here?” [LAUGHTER]



Then you hear they’re at a regional level and you see what’s going on, and then you can really talk to them and talk about organization, processes, incentives, etc. The best way of prevention is to understand the business.

You’ve got to demand business to come up early, but we also need to *force* ourselves to be involved early. Usually, when companies have [latent] legal or compliance issues, you usually see the business resisting legal to get involved. That would not be in the end, my place to be.

**JACK FRIEDMAN:** Tell us a little bit about the difference in how boards operate in Germany from the U.S.

**CORNELIS “KEES” VAN OPHEM:** We are in a very interesting corporate governance situation; I could probably do a whole speech around that, because we are a public company — more than 69% of our shareholders are public — but we have one principal shareholder, Fresenius, which owns a little more than 30% of our shares. The way the whole structure works, and it’s all been disclosed and you can read about it, is that they have, in effect, a controlling interest, provided the right process is followed. We also have a two-tier board where you really have a management board, responsible for operations and execution, separate from the supervisory board, responsible for supervision, and there’s no

overlap between the two, so it's a real supervisory board where the CEO is not part of the supervisory board.

**JACK FRIEDMAN:** And that's the German system?

**CORNELIS "KEES" VAN OPHEM:** Indeed, a two-tiered system for public companies is normal in Germany and many other European countries.

**JACK FRIEDMAN:** When the two boards disagree on something, is there one which legally is the ultimate head?

**CORNELIS "KEES" VAN OPHEM:** We have majority voting but, overall, with healthy discussion, people sometimes disagree, evolve their opinions, and come to a consensus.

**JACK FRIEDMAN:** So, it's not a question of fighting for dominance; it's trying to figure out a common solution.

**CORNELIS "KEES" VAN OPHEM:** Indeed, the advantage of the two-tiered system is that the management board is execution strategy and operational performance, where the supervisory board is supervisory and advisory also, to a large extent. In the end, of course, certain decisions need to go there. It is following the right process that counts and brings the right result in the end.

**DR. ULF WAUSCHKUHN:** Perhaps it's easier for me to answer that question than for Kees, because I can say, really from the legal point of view, the company is run by the managing board, but the supervisory board can throw out the members of the managing board. The main decisions are done by the management board.

**CORNELIS "KEES" VAN OPHEM:** Right. The shareholder meetings can, of course, overrule the supervisory board.

**JACK FRIEDMAN:** Thank you very much. I would like to have Joe Andrew, the Global Chair of Dentons, introduce his topic.



**JOSEPH "JOE" ANDREW:** Thank you very much. I was asked to set up the broad context of the conversation that we're going to have here about the law and Fresenius Medical Care. I'd like to start that conversation by giving a slightly different perspective on the complexity that Fresenius has to deal with on an hour-by-hour basis. I note we're joined by the CEO of North America, Ron Kuerbitz, who also is a former General Counsel, and by Senior Vice President, Doug Kott, also a former General Counsel. This is a company that has executives throughout it who also, like Kees, have a legal background. For all of us on this roundtable — there are a lot of distinguished lawyers here — Fresenius is a company that knows what we do. They can see through the fog that comes throughout the entire process of hiring and working with lawyers a little bit better than others — and so it's really important to keep this in the context here.

You've heard about the size of Fresenius, but if you go to their website, there's a wonderful story about the 17,150-mile journey from a dialysis plant in Germany that builds equipment to putting that dialysis equipment into place in the Australian Outback. What's fascinating about that story, for all of us in this room, is understanding the complexity of the process. What it brings up is, ultimately, a conflict that all of us, as counsel and as executives, have to deal with around the globe, which is the inherent conflict between globalization and cultural identity. People's traditions, people's

cultures, their religion, the aspects of culture that they care about in each community — that Fresenius uniquely, among many other companies, has to deal with, because it deals, often, with very personal, individual services. Kidney dialysis, in and of itself, is a service that is obviously unique; it's not like serving a hamburger or providing a cup of coffee.

In that 17,000-mile journey, if you look at it from a lawyer's perspective, it took at least forty different substantive areas of the law to get that dialysis machine built in Germany, let alone delivered to the Australian Outback. Tax, corporate, litigation, labor — go down the list of all of them. If you look at the type of businesses that Kees has to manage in that process, of the 902 standard industry classifications the World Bank puts on a list, I'd guess — and you can tally them up, it's about half of them — about 450 different types of business. The numbers of cities that that includes is more than 1,216 just inside the Fresenius world.

So do the quick math here. Forty x 450 x 1,216, and you get a number that's a little over 22.5 million. Now, at first, that's exactly the number of lawyers, Mike, as CFO, thinks that Kees needs to have around the world. [LAUGHTER]

To have a lawyer for the individual expertise of each one of those areas, you'd need 22 million lawyers. Obviously, Kees doesn't have 22 million lawyers, despite what the CFO thinks. [LAUGHTER]

But it shows you what is being managed and handled here, at a level of complexity that is different than it might be in many other companies, and what Kees has to do on a daily basis, is so informative for all of us who are involved on Boards of Directors, who are involved in the management of companies, advising companies of what to do.

Along that route, because you don't have 22.5 million lawyers to be able to help you — there are clashes all over the world. So our friend, Thomas Friedman, talks about





how the world is flat, and while that is true economically, we recognize that the more flat it becomes economically, the more walls get built up in the law. The law itself protects those cultures, those traditions, the religious issues that arise from people rebelling against that Starbucks coffee or creating terrorism in different places.

You see that happening every day throughout the life of Fresenius. I happened to be in the airport in Oman recently with some of my younger colleagues. There was a group of women who were standing about five feet from us, who were dressed in full burkas. One of them happened to be a friend of one of the lawyers who worked in my firm. The first thing my colleague pointed out is they all had one thing in common: the five women who I was never allowed to meet shared one husband. In addition to the fact that they were all wearing the same burkas, they were all surrounding a cell phone. An iPhone, a big 6s, just like this, and they were watching a show and passing it to each other. It was a show that I am proud to say I had no idea what it was, but I could see, on the phone, women in bikinis around a swimming pool.

I learned it was “Keeping Up With the Kardashians.” [LAUGHTER]

So *that’s* what Thomas Friedman talked about when he talks about a clash between globalization and cultural identity. Women in full burkas all sharing one husband, watching the Kardashians. Imagine all of the misunderstandings that we, from the West, would have about their culture, and clearly they would have, about the United States, if they think the United States is the Kardashians dancing around a swimming pool. Then inevitably we get conflict, the kinds of challenges that Fresenius has to deal with every single day of the week, unlike even some of the other global brands.

So what happens in that conflict becomes key to all the legal issues that we’re going to talk about, and it’s the context of all those legal issues.

Before the fall of the Berlin Wall, the whole world could be divided up in many ways between “free states” and “not free states.” Most of us on this panel grew up with that context, whereas today, the division is not “free” and “not free”; it really is between those who push and promote and fight for their cultural identity versus those who believe that there are positive attributes to globalization. You see that fight in Brexit. You see that fight in the nationalist, nativist governments that have been elected, particularly throughout Eastern Europe, and mayoral races that are happening in Italy. You see that fight in the campaign for President of the United States, the anti-refugee movement, this fear of immigrants of many countries all across the world that were built by immigrants.

It’s that clash that all of us, as lawyers, but also as executives in companies around the world, find ourselves involved in every day. How to deal with that is often the principal role of the General Counsel, because lawyers are canaries in the coal mine, right? The General Counsel will field that challenge in a regulatory environment; will field it in an enforcement mechanism. How do you get something done in places where getting something done will violate the norms and standards of how things are done in another country? The FCPA, the

U.K. Bribery Act, challenges when you have that clash of cultures, when people wearing full burkas are watching the Kardashians on their cell phones.

That is the challenge that all of us have in global practice. Now, we recognize that there are more than 2.5 million people around the world who would literally die if they did not have dialysis services in a machine from Fresenius. It’s a life-and-death question that Ron Kuerbitz, Kees, Doug, and Mike deal with every single day of the week. In order to get that machine through a regulatory environment in our country, to get it unloaded off a ship, to be able to put it in the back of a pickup truck to drive it somewhere, is a regulatory problem. This is globalization — why we are allowed at home to have a cup of coffee here today that was probably planted and grown in Costa Rica and had to jump through regulatory hoops before it was dried and put together and processed and sent off to another company and eventually ends up at Starbucks — that complexity is something that people are focused on, because, ultimately, that’s about the rule of law. How you operate in a circumstance to make sure that judges can judge without undue influence, that regulators will regulate without undue influence, that the people at the port authority will put something in that truck without having to be bribed in order to do it.

That complexity is inevitably wrapped up in that clash of cultures that we see, where people believe that global brand of Starbucks or that global brand of Fresenius is somehow imposing upon them, and set a standard that they, themselves, do not know.

So we recognize the upside of that, and thank, obviously, the entire crew at Fresenius for literally saving 2.2 million lives today. They estimate by 2020, it’s way over three million people’s lives. What globalization has also brought is bad diets around the globe, and that itself is going to change those numbers, but it can also bring a whole set of joy and opportunity for all those who are involved.

I'm also reminded of when I had just returned from Africa where I met a young woman living in sub-Saharan Africa in a hut with a dirt floor. She lived exactly the same way as her mother did, her grandmother did, and her great-grandmother did. But the difference is, she *does* have one of these iPhones. Because she has a smartphone, we will know — like we did not know for her grandmother — if she's the next Einstein because she has access, online, to the libraries here at Harvard, and Oxford, and Cambridge, and around the world. That ability, based on the democratization of information, that Fresenius has allowed to happen around the world, is a force for good around the world. It also allows those of us who are lawyers who are helping and working with Kees, through all those legal hurdles, to at least see the upside of what we ultimately are doing. Because now — courtesy of Fresenius — opportunities are literally anywhere in the world, and the challenges are just a small hurdle that you'll need to meet for those 22.5 million lawyers that help get through.

I hope that provides a little context for the bigger issues that all of our colleagues at Fresenius are dealing with, and how appreciative we are of what they are able to do. Thank you. [APPLAUSE]

**CORNELIS "KEES" VAN OPHEM:** Joe, I have a bunch of budget meetings next week with Mike — can I invite you to join? [LAUGHTER]

**JOSEPH "JOE" ANDREW:** Absolutely — we want to start very large at 22 million and work our way down! [LAUGHTER]

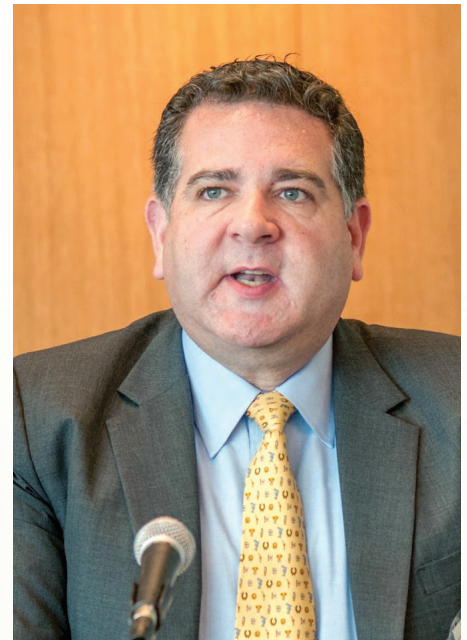
**JACK FRIEDMAN:** Our next speaker is Scott Sonnenblick of Linklaters, and he will also introduce his topic.

**SCOTT SONNENBLICK:** My name is Scott Sonnenblick. I'm the head of U.S. M&A for Linklaters, which is a global law firm. In some sense, I'm going to pick up on some of your themes, Joe, just because

they're global, and they relate to an organization like Fresenius, as well as probably some of our other participants. You'll get a dose of this perspective, because a few of our other panelists are going to be touching on similar topics. But what I'm going to report back on today is what we are seeing in the global dealmaking world right now, because I would say this has been a very weird year.

Last year and the year before were great years in M&A. There is a lot of dealmaking going around this year, and we've seen a noticeable downturn in both volume and transaction size. The question is, what is driving some of that? Just to give a statistic, announced deal value is off 26% from last year, and this year it has set the record for the number of flawed deals. People like me search for reasons, because we like when there are more deals, all things considered.

Generally speaking, the explanation that seems to be going around is that there's deal fatigue from the prior two years — which is one that I reject and others have rejected — as a result of big deals. The most interesting from this year is probably Monsanto from Bayer, which no doubt you have seen. SABMiller, which is a deal we're in the process of closing now, is another big one that's coming off. But the activity levels don't reflect what they should, and there are three things that make me think we should be seeing more than we are. Number one, organic growth opportunities are still limited. That may be something you're finding in your own business; acquisition is a much better route right now to build in scale. Number two, there is actually still a lot of financing available, especially in the U.S., if you have good credit and particularly if you're corporate. There's cheap money around to go buy stuff with. That usually draws some activity. Lastly, the IPO market, I would just hazard a guess there is somebody in this room who's in an organization who is trying to get to an IPO and is probably not getting there right now, in light of where the markets are. The IPO markets have dried up considerably in the



U.S. Everything that has been going to IPO seems to be a dual-track process in heading towards a sale.

So I asked around internally why people thought we were having things like this, which is it's been an unpredictable year for development. There have been a number of things that have happened that people really didn't foresee. The poster child for this — this is not the only thing I'll talk about — has been Brexit. Nobody quite understands what Brexit is yet, but people do appreciate that it was unexpected in the weeks leading up to it. Anybody you asked, any poll you checked, would have said there will be no Brexit. As it turns out, there was a Brexit. People signed up for something, they don't know what it means. It raises very broad implications, not just in the U.K., but for Europe and the U.S., as well.

There has been a small flow of opportunistic dealmaking on the back of it, where, for instance, we have a company called Poundland, which is the equivalent of the Dollar Tree of U.K., largely driven by the fact that the pound was a cheap currency and acquisition was easier there. But that hasn't been enough to drive activity.





I have watched, with some interest, the troubles Brazil has gone through in the last couple of years. It was shaping up to be a great economy, it stumbled, the *real* tumbled below four to the dollar. It was assumed that there were a lot of good assets on sale previously unattainable due to valuations, but really not a lot of activity has come back into Brazil, now that the *real* has strengthened and stuff is more expensive. Still, the only activity I'm seeing is U.S. companies disposing of Brazilian businesses. It's not a currency-driven thing. It comes back to being an uncertainty-driven thing. If you're buying a U.K. business, you don't know what the implications of Brexit are for that business, particularly in the financial community, but also in other industries. You're going to have to deal with an uncertain tax and regulatory landscape. We'll see what that works out to, watch this developing in the next couple of months, depending on what Theresa May does.

We thought Chinese base deal activity would be shaping up. Syngenta was the big deal in that base. And then we had Anbang bidding for Starwood Hotels and then suddenly pulling out, and now the word is the regulators have given out guidance to Chinese companies that approvals for outbound M&As will be difficult if they are "perceived as risky deals." And that chokes activity. Inbound activity in China comes with its own interesting challenges; I won't touch on that, because there's nothing new this year.

On the continent, we're seeing some other difficulties. The most recent example is one that's gotten a lot of press – the Apple tax bill situation, which Tim Cook, himself, has been out there with some very pointed comments about how that came out of the U.S., and that most Americans were surprised that a ruling on a tax bill can come out from a competition regulator.

But generally, the competitive landscape has been more challenging, both there and in the U.S. We had to restructure a deal earlier this year based on some commission objections which were unprecedented, really out of left field. We'll talk more about commission concerns, so I won't go more into that, but in the U.S., also, we're seeing considerable movement on a number of deals. In the healthcare space, we see two big insurance deals that are in interesting stages: Anthem and WellPoint; and the Humana deals seem to be on hold for now.

Then we see the political climate just in the last week. You really couldn't rattle this off from one week of congressional hearings, but we have Wells Fargo, and great sound bites come out of that one. We have Mylan and Heather Bresch, also great sound bites for a company that's made rational economic pricing decisions and is being raked over the coals (at least in my perspective). You don't have to go back too far to find others – you can pick on London Whale, you can pick on Martin Shkreli. Actually, that one's too easy to pick on; don't pick on him.

What it comes down to is, we're having a lot of unexpected effects. You saw Pfizer abandon its deal after some new tax regulations came out which nobody expected. People have thought that what the IRS had were dummy tax regulations that had the effect of killing the deal.

It is unpredictability that is creating uncertainty in a climate in which it is difficult for a manager of a business to go and make a long-term investment decision based on what the future is.

I'd temper that a bit with two things, which are, number one, the U.S. still remains the most attractive jurisdiction for investment. Despite our looming presidential election, which I will call a big uncertainty at this point – we don't know who will win, and we don't know what the impact will be, at least on one side and possibly on the other – factoring even that out, we have a stable system and a stable tax system, and we have attractive assets. So the U.S. has seen a lot of interest pick up, particularly from Europe, from U.K. acquirers, and also even from African and South Asian money.

So, it looks like we'll have good inbound investment as it picks up later this year. But at the end of the day, navigating across these global issues is becoming more uncertain and more unpredictable. My thought is, the uncertainty today is probably less than the uncertainty we're going to have tomorrow, and waiting for some of these things to pass may not make anything more certain, so maybe now is the time to work on some acquisitions.

Thank you. [APPLAUSE]

**JACK FRIEDMAN:** Moving ahead, our next speaker is Graham Robinson, who is a partner at Skadden, Arps.

**GRAHAM ROBINSON:** Thanks, everyone. Thanks, Dave. Jack. I am Graham Robinson, and I lead the M&A practice at the Boston office of Skadden. I'm going to

talk for a few minutes about the changing relationships between boards of directors and stockholders of public companies.

When I started practicing 17 years ago — it still seems a long time to me, but I know it's not a long time, relative to probably some others in the room — companies were very cautious about engaging with shareholders. A big part of that was the development, which was pretty new at that time, of the regulation scene in the United States, which was really intended to and had the effect of really restricting public company directors and executives from speaking privately with outside constituencies generally. It was directed at analyst communications. If you go back and look at what was said at the time of the adoption of Regulation FD, that was clearly the focus. But it was perceived, and had the actual effect, of restricting and limiting the extent to which public company officials — directors and officers — were willing to speak privately, in a non-public setting, with any constituency, whether it was a stockholder, an analyst, or someone else.

At the time, there was a phrase that was used that was quoted by lawyers. I heard it quoted by people that I worked with, which was this crazy idea that the director and officer take on, this is the quote, “A high degree of risk when speaking privately with analysts about earnings estimates.”

If you go back and look at those words and you think about it, it's actually pretty limited, really. It was even striking to me, going back and looking at it, thinking about what people did with that concept at the time and what those words actually say. It says, “When you are speaking to analysts who are seeking guidance on earnings estimates.”

It was a pretty limited statement, but that wasn't how it felt. In fact, companies were very restrictive, and lawyers were deeply discouraging of executives and Boards of Directors having private meetings with stockholders.

Flash forward to today, to late in 2016, and of course this is a completely different world



— there is not a public company that I'm aware of whose position is that the company in one form or another, whether it's management or members of the Board — I'll talk a little bit more about that — should not, because of Regulation FD or any other legal reason — have private meetings with stockholders of the company. That would be considered a radical and unacceptable position today.

The question is, how did we get from there to here, why did it happen? I'm going to talk a little bit about what some of the tactics are for dealing with the current environment, which is a change which has really accelerated over the last five years or so.

First, how did we get there? If you go back to 1999, and you think about the environment where lawyers were telling clients, “Don't go meeting privately with your stockholders or analysts or with anyone else,” part of the reason that advice was accepted was that there wasn't all that much pressure on companies to do otherwise. There was tremendous pressure on companies to meet privately with analysts. That's why the SEC had their focus in that direction. But there wasn't that much pressure on companies to meet privately with stockholders. It was not the expectation of institutional investors, for the most part, that they were going to have that audience. They didn't have the machinery that they have internally right now to go meet privately with companies and to seek to make that part of their investment strategy.

You had on the one hand the SEC's guidance in Regulation FD; you had the role of lawyers, which, in the absence of some pushback, has often been referenced by others here, to — maybe regrettably — extend their limits for not taking that risk. You had an absence of any meaningful pushback.

That all added up to, essentially, an environment where the companies, whether through their executives or through the Board, didn't meet with stockholders, and that wasn't a terribly controversial issue at the time.

Of course, the idea of shareholder activism isn't new; it goes back decades. But shareholder activism really picks up steam as we get into the last five years. The acceleration in it from 2011 to 2012, and in particular, 2012 to 2013, was extreme. What happened over that period of time was Boards started to see that shareholders — I'm going to generalize from the concept of shareholder activism — shareholders could go buy a stake in a company. Maybe a big one, but maybe not; maybe a small one relative to the overall size of the company. And then go make publicly a case that something at the company should change. Maybe it was a particular policy, maybe it was a capital allocation issue; or maybe it was something more about the individuals who were running the company.

They would make that case publicly, and in a lot of circumstances, find that they could actually put the Board in a position where it was unable to resist the pressure of that public case. That, of course, focused the mind, for some directors. Directors, in some cases, were leaving boards; or executives leaving their positions at companies; or, at the very least, having policy positions that they didn't initially embrace, pushed on them — made them realize that they were eager to seek a change. The pressure that I described not existing in 1999, existed quite strongly. You started to see companies, Directors and executives, really push with their counsel on the question of, “Why can't I go meet with these stockholders,



attempt to build a relationship and some credibility with them, and maybe lead to a different result, when this happens?"

Hopefully, some of the advisors working with those companies had the same feeling. They recognized this trend, and said, "We need to help our client strategically think about how to deal with it and get to a different result." Of course, that's exactly what happened.

Companies have shifted the way that they interact with stockholders to a situation that now is quite a bit different from what I remember when I first started practice. What does that look like? I'm not describing anything that is new to anyone in the room, but what it looks like is: every public company of any size at all — even mid-cap or small to mid-cap company — has some degree of strategy about how to engage their shareholders. It's hard to imagine a public company CEO who couldn't stand up and say, "Here's our shareholder engagement strategy."

What it is would vary a lot by company, but it would include at least a few things. One is some degree of communication with shareholders. There is often — in writing — so they're thinking about routine disclosures, but sometimes there also are other written disclosures that are made, in particular, to institutional investors as a class. "Investor days" are now a very common thing, where companies invite their large investors into meetings co-actively, as a group. This is not quite at the private one-on-one stage yet, but those are very common. Of course, most public companies reach out actively for their large investors and seek to arrange periodic — annual sometimes even more common — private meetings with those stockholders. This would give a heart attack to the corporate lawyers in 1999 who were reading the FCC's release in Regulation FD.

But it doesn't today, because, like a lot of things, what we found is that those meetings really did change, for the better, the interaction between companies and their stockholders. It turns out that when those meetings occur,

**“You have to be physically close to business; you can't do this from an ivory tower. You have to travel; you have to be there; and the legal team also has to be decentralized physically; you can't have lawyers at headquarters only.”**  
— Cornelis “Kees” van Ophem

companies sometimes learn something from stockholders. Notwithstanding all the vilification of activism that you sometimes read in the press, there are many companies — companies we see and observe in the marketplace — other companies, who had positive changes in their strategy because of an interaction with a stockholder who might, in some circumstances, have had a good idea.

Now, the flip side of that, and the other way in which I think that engagement becomes positive, is that there are stockholders who come with ideas that they'd like to push on the company, that the company believes are wrong. The board, maybe an independent board, has looked at before or looked at in response to a large stockholder advocating a particular policy position. The board looks at it and says, "You may think that, but we don't agree."

The Board does typically have access to quite a bit of information that the outside stockholder doesn't, so there may often be circumstances where it's likely that the board is more able to, after careful consideration, make a decision about whether a stockholder suggestion is right or wrong.

There is also the issue, which has been discussed a lot academically, of whether the investment timeframe of some institutional stockholders could be out of sync with the investment timeframe of investors more broadly, and it's a question of whether that matters.

But if you add all of that up, you have to keep in mind that there is also the situation where these institutional investors are going to come in and say, "We'd like you to do 'X'," and the Board's going to look at it and say, "We don't agree."

This shareholder engagement is very important in that context, as well, because what that is going to mean, in a lot of cases, is that that shareholder with that big idea is going to go take it to the public. They're going to go say, "Other stockholders, listen to me, I've got a great idea. I can make this company better. I think you should do this," and maybe in the extreme, they're going to go wage a proxy fight. Even if they don't, they're capable of putting extraordinary pressure on a Board of Directors to respond substantively to their critique.

What that gets down to is a battle for hearts and minds of investors. When that happens, if the other investors, the ones who weren't part of that initial dialog, have never heard from the company, they may be inherently skeptical of the motives of management and Boards of companies, particularly those they've never met with. If that's the dynamic, it's an uphill battle to convince those people to listen to the company and disregard the suggestion of this large investor, maybe one even who has had successful experience in other cases, making suggestions for policy changes in the company.

If instead, when that investor shows up, those investors have met regularly with the Board, have made suggestions to the Board, and consider the Board to be constructive in going and thinking about them, and sometimes even coming back with some sort of a response about how they've evaluated the consideration. If the Board looks thoughtful, engaged, independent, and seems to have taken an idea seriously and rejected it. You see in the marketplace scores of examples where even very well-respected — I'll call them "activist investors" — have made

policy suggestions that a Board has carefully considered. A Board that has really worked to build trust and credibility with stockholders, the stockholder base at large has sided with the Board and said, “We will defer to your judgment.” That is the most valuable thing for a company that comes out of this kind of stockholder engagement.

The interesting question is not, in this day, whether or not companies should engage with stockholders — we don’t get that question much anymore. We did five years ago; at this point, that’s not really a live question. The question really is how to do it well. So I’m going to offer a few thoughts about that.

The first — and this question has come up a little bit in passing among the panelists — is, “Who should be meeting with the stockholders?” Should it be the CEO? Should it be somebody on the Board? Of course, the answer is, “It depends.” A great lawyer’s answer, but it is the answer — that it depends. But I believe, and our firm believes, that the answer is, in most cases, that the CEO should be the person meeting, on most topics, with institutional investors. The CEO is the spokesperson for the company. The CEO is the person most able to accurately represent the company’s position, to stay consistent with other messaging, which is very important, and — and this is no small thing — to have an interaction with an institutional investor in private. I’m going to say, in a moment, someone else should be in the room — but in private, is also a situation where we do have to hearken back to the SEC in 1999. I’m not going to say there is a great deal of risk, but there are some risks, for sure. It is extremely important that that discussion *not* involve the sharing of any material non-public information, and that is a hard thing to do. It is not easy for someone to sit down with a stockholder, be polite, be constructive, listen, take thoughts, show that you will be reactive and thoughtful about it, and take it back to the Board, without inadvertently sharing material non-public information. That type of discussion is one of the things that public company CEOs do for a living.

Now, there are public company CEOs on Boards, in some cases ones who are so connected to their company that they can do that well, but that’s a very tall order for an outside Director of a public company, whereas that is in fitting with the job description of a CEO of that company.

For the most part, we think that the CEO should be the actual spokesperson for the company meeting with these investors on those topics.

Now, there are some topics where that would be clearly unacceptable. A meeting with an institutional investor about whether executive compensation is appropriate at the company, or in the worst case, whether the CEO’s compensation is appropriate. Of course, having the CEO show up to make the company’s proposal in that meeting probably isn’t a good idea. In that context, clearly you have to look at the board, you have to think about who could be a spokesperson; you have to really work on a narrow agenda that would be appropriate, and it’s going to have to be someone from the Board, probably the compensation committee, who is going to have that meeting.

Similarly, if the topic of discussion is management succession, the CEO is probably not the right person.

The third category that I would put in where we sometimes think that Board engagement directly with shareholders is not a good idea is where you have no choice. If an activist has arrived and is arguing that management is not the right group to lead the company, the Board will obviously make a decision. If the Board disagrees, the Board may well say, “The CEO is going to be the person principally interacting with that activist, because we don’t agree.” But if the Board wants that activist to at least believe that they’re being taken seriously, the Board’s probably going to have to allow at least one meeting with someone — the Chair of the Board or someone else — to show that they are, of course, involved. The CEO is not operating alone in that environment. Those are the three exceptions to the general rule that it should be the CEO.



The other issue is, of course, you’ve got a meeting — it’s the CEO, for the most part, and these institutional investors — how do you make that meeting effective? What we suggest to companies first is, “Listen more than talk.” Your goal is to allow the investor to give the company feedback, but no one person, including even the CEO, should be independently deciding what the response is. The idea should be that you’re going to take the feedback, you’re going to show that you’re open to it, but you’re going to bring it back for further consideration.

The second issue — and this gets back to selective disclosure — is a very sensitive thing to think about: How you can respond to an institutional investor in a non-public way, which is, for the most part, what you’re going to be talking about, in response to a policy critique from that investor — without sharing material non-public information. There’s no real way to do that, in my view, other than deciding what it is that you’re going to say and then working closely with your lawyers to think about what kind of a script or response could be delivered that would be safely and securely delivered under the security clause.

You can’t do that, live, in the meeting, no matter how good you are. Your goal is listen, take it back, show that you’ll be constructive, and that you’ll respond.

The second step is to be prepared. If your goal is principally to build credibility with this group of investors, the very last thing that you want



to do is walk into the room and be surprised by attacks that they have. You really need to understand the company well. That's one of the reasons the CEO is such an ideal person to do this. You also need to understand the investor. What have they done before? Do they tend to be the type of investor who's done a lot of research? They may be. Have they said anything publicly? Your advisors may be able to help you find any materials, like white papers, the investor has been off distributing privately to small groups of other investors. Reading that ahead of time could significantly improve your positioning in that meeting. That's the second topic, is to be informed, work with advisors who can help you be prepared.

The third is — and this is really extremely important — don't be defensive; have an open mind. Your goal is to convey, even if the investor is saying something that you know you couldn't disagree with more, your goal is not to convince them that they're wrong at that meeting. Your goal is to show that you're open to their suggestions; you'll take them back, you'll take them seriously. You'll think about them and figure out how you can respond.

So those are our suggestions for how to make those meetings go well. [APPLAUSE]

**JACK FRIEDMAN:** How do you pick which director or directors meet one-on-one, in response to requests? How can you do that and not get in trouble?

**GRAHAM ROBINSON:** The answer, Jack, from an investor's perspective, is you would like to get as much information as you can. As an investor, if you were able to insist on everything you would like, you would have private meetings with each director, maybe one at a time, and the mid-level management would be part of that also.

From a company's perspective, there has to be a balance here. It would be to take the way that it was framed earlier. It would be clearly irresponsible to allow an unprepared director to meet privately, even with the General Counsel sitting next to them.

“As in-house counsels, we should ask: does it make sense for next quarter, but does it also make sense for the next generation? If both are true, then it's probably good to do.”  
— Cornelis “Kees” van Ophem

**JACK FRIEDMAN:** Is it possible to have a prepared director, even with the General Counsel next to him?

**GRAHAM ROBINSON:** You can have a well-prepared director, but your skepticism is well-placed. That's the reason that we so strongly feel that the CEO should be the person having these meetings. Notwithstanding that there will be a lot of pressure from the investors to go more broadly. An investor may say, “I need to meet with you; it's extremely important; I want to meet with the company and the Chair of the Board.” You don't have to give them everything they want. “We'll give you the meeting with the CEO. The CEO will get the feedback from the Board. We're giving you a lot of what you want — just not everything that you want.”

In general, I agree with you; it should be, just for the reasons we're describing, the CEO and not any person on the Board. But there are circumstances where that won't work, and in those circumstances, you work very hard to prepare someone. We don't just say, “Give us whoever the investor wants and we'll make it work.” We think hard about who is on the Board. They may have asked for this person. We're going to tell you if there is another person on the Board with the right experience. Or one the Board believes to be more appropriately a spokesperson. Then we're going to prepare that person very vigilantly. We do that, and it can be done when it's necessary, but you should only do it when absolutely necessary.

**JACK FRIEDMAN:** Would anyone else like to comment?

**SCOTT SONNENBLICK:** I agree fully with your statement. Where we've gotten into an issue before is where an activist was

concerned about the management team, and they didn't want to say that, and insisted on meeting with the Chairman. That's ultimately what happened and how we learned of those concerns, but that goes to your point, which is that there are some people who won't take your proposed route here; in those cases, you need to adjust, and in this case, the chairman was a former CEO, very well-prepared already, and it worked out okay.

**CORNELIS “KEES” VAN OPHEM:** We don't have that kind of situation, yet, but usually in our company, it would be the CEO or the CFO who would meet with investors.

**[AUDIENCE MEMBER]:** On that point, who is the right person to meet, along with the CEO or the Chairman, with an investor, one-on-one, or two-on-one?

**GRAHAM ROBINSON:** My favorite answer is it doesn't happen. [LAUGHTER]

**JACK FRIEDMAN:** How much do you charge for that advice? [LAUGHTER]

**GRAHAM ROBINSON:** The starting point would be the General Counsel. The General Counsel is a great person to have sitting with the executive, the CEO, the CFO, depending on the context of the meeting. It's within the CEO's job description and experience to really successfully manage that discussion. The General Counsel is the person in the company most attuned to, and most experienced with, sitting up with the CEO and occasionally being able to give a little signal or jump in and offer a little extra color, if necessary, to keep things within boundaries. Of course, a big part of the role of that second person in the room is to later be able to say, as a second witness, what



happened in the room. General Counsel is a wonderful person to be in that position to take good notes and to be that witness.

But I said “it depends” because every company is different culturally, and if, for whatever reason, that isn’t the right answer, then there can be circumstances where it’s another executive in the company, like the CFO or COO. There are a whole bunch of reasons that’s harder and not as good, but in a small number of cases, that turns out to be a better answer.

**JACK FRIEDMAN:** Go ahead and introduce yourself.

**[AUDIENCE MEMBER:]** I have a question for Graham and also for Scott. I used to work as an asset manager here in Boston, and I would be one of those people who would meet with the CFOs and CEOs on a six-month basis. Just as we were going into the crisis in 2008, my team started a push for corporate governance to put pressure on companies to see mostly Directors. One of the requests was to see a good representation from the different committees of the Board of Directors.

As a key point on risk, shareholders want a feel for how well-managed any company is, from the outside. We don’t get any clarity or visibility, in terms of how hard a CEO is pushing to do certain things, and how

well-controlled that overall company is, and that the company is not just working for the CEO’s interests.

Is there any way that the industry could change to convince Boards to be a little bit more counter-cyclical in the mindset of making acquisitions: making acquisitions when nobody wants or dares to make acquisitions, and few acquisitions when everybody’s worried?

**SCOTT SONNENBLICK:** Your question really goes to timing and sometimes the life of the deal as it takes on a life of its own. How can a proper investor company dynamic, and also a proper Board dynamic, make sure those transactions are happening appropriately and creating value?

The upshot is there are a lot of transactions done for a lot of reasons, and the record is mixed on which of them actually achieve value and which of them don’t. What I have seen very often, particularly since the global financial crisis, is a much more active Board process of interrogating both management and advisors in connection with it.

It is an active board process, which has been challenging for both management and advisors; we’ve seen an increasing scrutiny and especially on the legal side, brought on advisors, in terms of conflicts and the integrity in the advice that’s been given. We do

see outreach to key investors, usually not in advance of a transaction, for confidentiality reasons. Although in a case where you have a controlling shareholder, that would not be offlimits, but after the fact, to justify the transaction and make the case for it. That has proven to bring some discipline to some of the acquisitions that we’ve seen lately. A number of them have been much more well-received in the last five years than the hindsight look at the deals that were done from 2002 to 2006.

**GRAHAM ROBINSON:** I’d like to jump into that one. Most of the conversation we’re having here is in the context of a corporation in a publicly held company trying to manage the information to be given to an activist shareholder — someone who is looking to find out whether or not the CEO and the management of the company are pushing the stated goals that they had set out for the company, that investors have cared about.

The reality is we see the opposite issue more and more inside, particularly for their non-U.S. states, where there is an interest in the CEO and the management of trying to make sure that investors do understand exactly what management is doing. So rather than it being a circumstance where activist investors are pushing to have a conversation with a Board member, the CEO *wants* there to be a conversation with the Board member. Turning that around and picking the context up, for technology companies and





fast-moving companies that have exponential growth, becomes an almost more complex question for both the Board and certainly for the General Counsel. They have an interest in trying to present independent directors and put them in a format in order to demonstrate that management, at large, is actually following through and pushing the agenda that they know the investors want to have.

So this is coming out in two issues. It's not always in the context which is most of what we're talking about now, which is, "How does a company keep this from happening in management?" The more complex thing is, "How does the company actually further that; how do they prepare independent directors in order to push what, frankly, every CEO wants, which is the investor world to understand exactly how hard they're working to accomplish the goals that they've stated they're going to?"

**SCOTT SONNENBLICK:** There's also a class of activist which shows up with a few packaged acquisitions and divestitures, and that's more than half the cases I've been involved with. With what I'll call, "string institutional investors," they want to meet regularly, and they do want to meet with directors. Obviously there are lots of different strategies on this. I do still think that it is not advisable for a company to have its outside directors regularly meeting with institutional investors, whether they are activists or someone else, simply because

the risk is too high and the burden would be overwhelming in preparing them. I'm sure it would be helpful to the investor, but I think getting the CEO is 90% as good and much more likely to leave the company in a good place at the end of the day.

**JACK FRIEDMAN:** I would like to direct a question to Mike Florey: You'll be speaking in a little while on intellectual property. I can't imagine any other subject where people are pushing more for even the smallest clue about where testing is going, or patents approved, or the FDA approval. Everybody wants that little margin of advantage for investing, even if not "insider information" in a formal sense. How do you respond to Boards or management with those questions?

**MICHAEL FLOREY:** We primarily do what I would refer to as technology law. The issue at the Board level relating to investor inquiries typically comes up in two contexts. First is what I would call "looking for good news" about products that are still in development. This often involves investors seeking information or comment about ongoing clinical trials, or predictions of FDA approval timelines. Second is what I would call "asking about bad news." You've had someone who's made an allegation that there's a problem with your technology, and everybody — especially shareholders — wants an instant answer: "Is there a problem or not?" So you get inquiries looking for hints of good news, as well as early warning about bad news.

What we see, to be clear, is there are absolutely times where you have to say, "No, we can't tell you that. We cannot tell you the preliminary results for clinical trials. It just isn't going to work."

What well-managed companies are able to do, though, is accurately and factually describe what they are doing, and provide details about what their plans are based on the information that's available to them. So without revealing precisely what that information is, the company can give everyone a fair picture of management and the Board's view of that

information. So you can say, "We're conducting a clinical trial, and we're also in the process of hiring a field sales force." That is a good summary of the company's view of how the clinical trial is proceeding. But there is definitely a line. If you have a hundred patients in a trial and you've got data for twenty, with eighty patients still in the trial, you shouldn't selectively release data for those twenty.

**JACK FRIEDMAN:** In a prior event, one of our panelists gave the advice for dealing with the investment community on Wall Street to never, *ever* give partial information to people. If you made a mistake or you have a crisis and you're trying to clean it up, the last thing you want is for people to think that this partial information you gave them, an interim report, would turn out to be another mistake.

**CORNELIS "KEES" VAN OPHEM:** That's even true for internal investigation. You're really talking about the right process to follow.

**SCOTT SONNENBLICK:** Real quick, I'm going to add on, for a global company like Fresenius, that is absolutely critical. Joe was talking about the machine going from Germany to the Australian Outback. When you're looking at an investigation as to whether there's a problem with your technology, you may talk to people in one location and get some of the information, but you may need to go all over the world within the organization to get the full picture. It would not be good to start reporting information based on discussion about one piece of the puzzle.

**JACK FRIEDMAN:** Thank you. I'm going to take a couple more questions at this point from the audience, and then we can get back to our final speakers.

**[AUDIENCE MEMBER:]** I have a question for Kees. In dealing with small, innovative companies, can you talk a little about how your company negotiates deals with them? I've been on the other side of

the table, dealing with large providers and medical device companies, and lots of times the legal department becomes almost the white blood cell. It comes out to contain the infection that comes from an innovative partner in a deal or collaboration. How do you make your attorneys more like business partners in the team?

**CORNELIS “KEES” VAN OPHEM:**

First, there is the idea that the legal team is bureaucratic and stops the business. What we do at Fresenius Medical Care, we have actually a venture fund separate from the company, but that's owned by the company, and they're dealing with those new, innovative ideas. Also, from a legal point of view, we try to narrow that to a very dedicated, business-oriented lawyer. Otherwise, we may overpower the small company with all kinds of corporate contracts. Of course, at the end of the day — especially when it comes to integration — there *are* minimum standards. Compliance and ethics is one of them. So there, we *do* lay down the line. But for the rest, we usually run those companies separately from the normal organization. We have a CEO that's reporting at sufficient levels to avoid too much operational interference and we usually earmark lawyers that we know can look for the minimum that we need, from a legal point of view, without all the excess. We try to mirror the culture approach of the business people, and of a start-up. It helps to have lawyers who worked at start-ups or other entrepreneurial environments.

**JACK FRIEDMAN:** We have two more speakers to hear from today. Next, Dr. Ulf Wauschkuhn of Baker McKenzie will speak.

**DR. ULF WAUSCHKUHN:** Good morning. More importantly, I am coming from the beautiful city of Munich. We celebrate the Oktoberfest at the moment. I came here, of course, because I would like to honor Kees, whom I have known for quite a long time. Also because my wife said I need a break. So I will go on Monday again. [LAUGHTER]



I will throw some light on EU competition law, because I understand most of you are U.S. lawyers or businessmen here, although Kees is also a lawyer qualified in Europe. And I will cast some light — although I am not an English lawyer — about Brexit, on which we had a lot of discussion here. Different viewpoints, I guess.

The highest fines imposed on companies are imposed by the European Commission on antitrust violations. I would like to cast some light on how you distribute products in Europe without violating the EU antitrust laws (this is when the European Commission steps in).

The main provision, and this is a little bit legal now, regarding the EU competition law, is Article 101 of the Treaty on the Functioning of the European Union. Whether or not the European Union is still functioning is, of course, another question, and we'll come to that later.

*“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may **affect trade between Member States** and which **have as their object or effect the prevention, restriction, or distortion of competition** within the internal market.”*

The main part of the agreement of the European Union is really free trade. So if you read that, everything which restricts trade is forbidden. Of course, there are exemptions, and in the area of vertical agreements, so distribution would go from the producer to the distributor to the end customer, the most important exception is this so-called Block Exemption Regulation for Vertical Agreements.

This provision exempts certain restrictions in vertical agreements from competition law scrutiny. The block exemption is directly applicable in all member states of the European Economic Area. These are the 28 member states of the European Union, at the moment, still with the U.K., Iceland, Norway, and Liechtenstein. Similar provisions apply for Switzerland.

The most important vertical restrictions, which are sometimes allowed in the U.S. but not in Europe, are resale price maintenance, territorial and customer restrictions, and non-compete obligations.

Let's start with the most important one, which European competition law does not like at all, which is resale price maintenance. The basic rule is if I sell products of Fresenius Medical Care as a buy/sell distributor, I must be free to set all retail prices for my customers. Resale price maintenance is strictly prohibited under European competition law. Also indirect forms of resale price maintenance are not allowed, such as threatening distributors to terminate their contract if they do not comply with the prices, stopping the supply, or making conditions less favorable.

Maximum resale prices and recommended resale prices are, however, permissible, but with regard to recommended resale prices, this must really only be recommended with no strings attached.

Second, territorial restrictions are not allowed in order to achieve the aim of a functioning free EU internal market. The basic rule is



that no restriction can be imposed on the territory in which or customers to whom the distributor may sell or resell a product in the EEA and Switzerland. Only the prohibition of active sales may be possible, but this is only possible if the principal, such as Fresenius Medical Care, has allocated the territory or customer group exclusively to another distributor or exclusively reserved the territory or customer group to itself.

Passive sales, such as sales over the Internet, can never be prohibited. For example, you cannot forbid a distributor located in Germany to sell products via the Internet to France.

The third restriction are non-compete obligations; i.e., you forbid your distributor to work for a competitor.

Non-compete obligations infringe EU competition law and are thus invalid if their term exceeds five years. That means an indefinite or an automatically renewable non-compete clause must be avoided. In any case, a non-compete obligation in a contract should always be limited to the term of the agreement and to a maximum term of five years.

Something which you also see quite often in U.S. contracts is a post-contractual non-compete obligation, which under EU competition law is permitted under very limited circumstances only. So as a general rule, you can say when the distribution contract is terminated, there is no possibility, or nearly no possibility, to oppose that your former distributor works for a competitor.

What are the consequences of the competition law infringement? Well, the first and most important one: risk of fines by the EU Commission. The fines may amount to up to 10% of the annual group turnover — so not only the turnover in Europe but the group turnover worldwide. Number two: the risk of damage claims if the third party can establish that it has lost profit due to a restrictive agreement. This is a little bit more difficult in Europe to prove because we do

not have discovery. We really have to prove that lost profit occurred and this was caused by the antitrust breach. The third one is in the invalidity of the respective provision and perhaps of the whole contract.

With regard to the fines, it is important to know what amount 10% of your annual group turnover is. We've had fines which are more than one billion; but normally, they are significantly lower. The amount of the fines imposed depends on the gravity of the infringement, the duration of, and the turnover achieved under the respective agreement. In many instances, the fines imposed by the European Commission are overruled and a little bit lower if you go to the European Court of Justice to appeal the EU Commission's decision.

Secondly, we had a lot of discussion on Brexit here — and again, I'm not a U.K. lawyer — but what is happening now in the U.K.? What is clear, and this is clearly described in the EU treaty, whenever the British government files the application, an agreement must be found after 24 months. If no agreement is found, the relationship between the U.K. and the European Union will be the same, like between the European Union and, for example, Fiji. An agreement must be concluded. This is also why, so far, this application has not been filed, because first of all, the English government has to have a plan how to deal with that. There are a lot of options, and nobody was expecting that. But first, the Parliament has to cast its vote and then instruct the government. It's very important to know that within these 24 months — and this is why the British government is waiting to file this application — they must make this decision.

If you ask me what the decision will be, the EU is in a very difficult situation at the moment. I'm not so sure whether it will be possible for the U.K. to do cherry picking, because they want to have the nice parts of free trade, but they want to have some restrictions on the refugees coming to the U.K. I'm not sure how this will work out.



At least the German government is very restrictive and says, "Either you take it all or nothing." Thank you. [APPLAUSE]

**JACK FRIEDMAN:** Our final speaker is Michael Florey from Fish & Richardson.

**MICHAEL FLOREY:** Thank you. My name is Michael Florey and I'm a principal in the Minneapolis office of Fish & Richardson. Welcome to our Boston office and congratulations to Kees! We'd very much like to thank Kelly Largey, one of our senior directors, who organized and has put on this wonderful event.

I practice in the area of technology litigation, and over the last 11 years, I've had the privilege of representing Fresenius in many new areas of technology litigation, primarily patent litigation, products liability litigation, and whistleblower issues related to technology.

This morning, my topic is, "How do you strengthen your intellectual property in an era of weakened patents?" I think there is a perception right now that Congress and the courts have weakened patents around the world, and I believe there is an element of truth to that perception.

Why has this shift occurred? I believe the first reason was the advent of business method patents. Someone with a generic idea would file a patent and say, “Well, perform this generic idea on the Internet,” or, “Do it with a personal computer.” The validity of those patents was very suspect. Then second, you have patent trolls who came along and would buy patents and assert them against entire industries without really doing any infringement due diligence. Those cases would have really questionable infringement evidence. So you had problems with validity, you had problems with infringement, and the courts and Congress weighed in. The courts imposed very strict readings of patent eligibility requirements, very strict readings of claim scope, put in place strict limitations on the recovery of damages, and to top it off created new limitations on injunctions prohibiting patent infringement. Then Congress passed the AIA, the America Invents Act, which brought in *inter partes* review, which allows potential defendants to try and invalidate a patent in the Patent Office before it gets litigated.

In light of that, we have Boards and senior management at our clients asking us, “Should we be spending money on getting patents? Should we be enforcing patents? They don’t seem to be what they used to be.” My answer is, “Absolutely, yes. You still should be getting patents; you still should be enforcing your intellectual property.” But in this environment, you have to be much more strategic about how you go about doing it. I’m going to talk about that a little bit.

First off, I’d like to talk about why, in this environment, is it still important to protect your intellectual property and obtain patent protection where you can. Good patents are still very powerful. We do more patent trials than any law firm in the United States, and as a result we do extensive jury research. Our jury research absolutely still shows that juries are pro-patent. If you have a good patent, you can win at trial. Injunctions are still available in competitor cases. Big damages awards are still out there if you know the law



and have the right evidence. If you have a well-presented case, you can get a big damage award. More and more, claims are emerging from *inter partes* review at the Patent Office. You may have to change your claim a little bit to get through the process. But claims are surviving IPR, and then they become super-claims – they’ve been blessed twice by the Patent Office. So that’s an important reason.

Another reason to put a stake in the ground is freedom to operate. Now, having a patent does not, in and of itself, allow you to sell a product free from others’ patents. However, it is great evidence of when you first had an idea.

We often have the case where a client is sued for patent infringement and they say, “We had that idea first.” Finding the evidence to prove you were first can often be very difficult. I’ve spent time in Bad Homburg researching the development history of the Sleep Safe™ product, which we were subsequently able to use as prior art to defend his case in the United States. We were luckily able to show that the early SleepSafe™ work qualified as prior art, but it took substantial diligence to find it and get it into evidence. If you have a patent filing, that is a gold standard in terms of evidence – the fact that you filed and that your idea was published leaves no doubt as to when you had that idea.

Cross-licensing is still critical. Traditional cross-licensing with a competitor is useful, but I would suggest more and more that cross-licensing and partnering in a context of technological convergence is going to be critical.

I was doing a case for a company called Nest, which develops smart home thermostats. Halfway through the case, they were bought by Google. The idea that a search engine company would buy a thermostat company, if you had said that five years ago, people would have laughed at you.

More and more, we see our client’s products, services, and technology converging into areas they never dreamt that they would be in. Often, convergence leads to a need to enter partnerships. If you are peanut butter company and the market is converging with jelly, you want to be positioned to enter a successful partnership. The companies that are going to be best positioned to get the best partnerships in these convergence situations are the ones that have the best IP protection in their area of technical expertise. They are going to be attractive partners when the convergence happens.

We’ve heard a lot today about corporate acquisitions. Often much of the value of a corporate acquisition rests in the technology, and yet the due diligence into the target company’s IP portfolio is actually quite limited and superficial. The diligence teams typically don’t have the attorneys with the background to really analyze and assess the value of the patent portfolios of the company they are seeking to acquire.

On the flip side, if you are the target, the company being acquired, there are things you can do to clean up problems with your patent estate before you put your company up for sale, thereby substantially enhancing your value in the process.

Having a strong focus on patenting technology within your organization is still critical. How do you do that successfully?



Lawyers, first off, have to look to the future products and services of the business. Everybody knows what your current products and services are. To get your IP protection right, you need to know where the company is going, what is coming down the road ahead. To accomplish that, your IP lawyers have to understand how the company will drive revenue, drive market share, and what your critical going forward freedom to operate needs are.

To get there, your technology lawyers have to be highly integrated into the business. We are specialists in technology law. People's first instinct is to pigeonhole the specialist. We sometimes have clients say, "You can talk to the Chief IP Counsel and the Head of R&D and that is it." They simply don't appreciate the business acumen we already bring to the table. I have been practicing technology law for over 25 years. I have worked on cases involving very successful products, and also products and business that were not successful for many, varied reasons. You're not getting anywhere near the full benefit of your technology lawyer's experience and analysis if you don't involve them in the business discussion early on.

Fresenius has just been exemplary in this regard. I've had the privilege of working with the R&D team in Walnut Creek, CA; the legal team and the corporate executives in Waltham, MA; the manufacturing folks in Ogden, UT; and the European team in Bad Homburg, Germany. I have worked across all of the technology platforms — dialyzers, blood lines, peritoneal dialysis, hemodialysis — to get a very comprehensive view of the company.

It is absolutely critical to have that integrated business understanding to maximize the value of your intellectual property. Once you've done that, then you have to strategically allocate your resources.

Every innovation is not a breakthrough. Some innovations truly are breakthroughs. We are operating in an era of limited budgets, everybody knows that. So if you have a

“...We are here, as in-house counsel at the global legal function, to optimize the company, *not our* legal function; not our legal specialties. And so, yes, sometimes there's a legal solution which is optimal, but sometimes we need to compromise in that, as the company's issues are bigger than that.”  
— Cornelis “Kees” van Ophem

small improvement, you need to, in my view, capture that with narrow claims and a robust disclosure that will allow you to protect your freedom to operate and protect that feature. But don't try to stretch it, or spend a lot of money stretching it, because that's where you create problems for your patents. On the other hand, if you create core technology that embodies the future of your business, then you need to spend the money to broadly claim and protect that technology.

Good patents don't happen by accident, they happen with a lot of effort and coordination between your patent counsel, business team, and technical team. You have to be honest with yourself about how far you've moved the ball forward. Is this a small improvement, or is this core technology? Being able to conduct a rational triage process is critical to developing a cost-effective IP portfolio.

Finally, at the end of the day you need to understand the goals, the culture, and the priorities of the organization. I will never forget the very first time we did a witness prep with Rice Powell, who is now the worldwide CEO of Fresenius. We were reviewing documents relating to a business deal that occurred with our opponent before the litigation. A lot of things about the situation didn't make sense to me.

We asked Rice what was going on. He said, “You have to understand, everything we do, the patient comes first. That explains what we did here. We had to put the patient first. That's our corporate culture, and that's why this deal unfolded the way it did, even though as a pure business matter it wasn't great for us.” So then the legal team

understood the transaction, and was able to align our presentation of the evidence with that enhanced understanding.

If you put that kind of thought and effort into managing your patent portfolio, even though other people's patents may be weakened, your patents will be strong and valuable. Thank you. [APPLAUSE]

**JACK FRIEDMAN:** Thank you. I have one last question for Kees. In the five minutes each month that you have free, what do you like to do?

**CORNELIS “KEES” VAN OPHEM:** Of course, this kind of job, for large global public companies requires commitment and availability 365 days a year, but it is a little bit more than five minutes. We have a great legal team with a lot of hardworking people, so I actually do get more time. So for me, it is really spending time with the family. With my sons and my wife, I like to watch a movie or play a pool game together, or go with them to the outdoors and into the wild; that is what I really like to do.

**JACK FRIEDMAN:** Thank you. I want to thank everyone for coming and the Speakers for sharing their wisdom with us today. Thanks to Fresenius, we now have a wonderful view of the people side and what they are doing to help humanity.



**Dr. Ulf Wauschkuhn**  
Partner

**BAKER & MCKENZIE**

#### Practice description

Ulf Wauschkuhn advises companies on all aspects of commercial law in particular with regard to the set-up and restructuring of distribution systems, the termination of distribution contracts, and with regard to supply, logistics, and commercial lease agreements. He furthermore represents companies in litigious commercial law disputes in and out of court. He is a member of the Steering Committee of the Global International Commercial & Trade Practice Group of Baker & McKenzie. According to *Chambers Europe*, Ulf Wauschkuhn is one of the three top-rated notable practitioners in Commercial Contracts in Germany.

#### Representative clients, cases or matters

- Advised Allianz Deutschland AG on distribution law matters.
- Advised Amazon on the conclusion of logistics and transport agreements.
- Advised Porsche on distribution and contract law matters.

- Represented Procter & Gamble in litigation and arbitration proceedings regarding the termination of distribution contracts.

#### Publications, presentations and articles

- Co-publisher of the legal commentary Flohr/Wauschkuhn on all aspects of distribution law, published by C. H. Beck, the leading German legal publishing house.
- Co-publisher of the German Journal on Distribution Law.

#### Education and Bar admission

Mr. Wauschkuhn was admitted to the German Bar in 1992 and joined Baker & McKenzie in the same year. In 1995, he was seconded to Baker & McKenzie's San Francisco office. He studied at the universities of Hamburg and Tuebingen and received his doctorate degree from the University of Tuebingen in 1990.

## Baker & McKenzie

#### Firm Facts

Baker & McKenzie has provided sophisticated legal advice and services to many of the world's most dynamic and global organizations since our founding in 1949. With a network of more than 4,200+ locally qualified, internationally experienced lawyers in 47 countries, we have the knowledge and resources to deliver the broad scope of quality legal services required to respond effectively to international and local needs — consistently, confidently, and with sensitivity for cultural, social, and legal practice differences. Our lawyers and other professionals

are citizens of more than 60 countries. We are admitted to practice in nearly 250 jurisdictions and have been educated at more than 1,200 institutions, including nearly all of the world's leading law schools. English is our common language, but we fluently speak more than 75 languages. We support our clients via the most advanced technologies and sophisticated management systems, as well as practice standards, a quality audit program, and a worldwide conflicts policy based on the standards of the American Bar Association.

#### Areas of practice

Antitrust & competition; automotive; banking & finance; corporate compliance; dispute resolution; employment, energy,

chemicals, mining & infrastructure; environmental; financial institutions; insurance; intellectual property; information technology & communications; mergers & acquisitions; healthcare; private equity; real estate; securities; tax; and trade & commerce.

#### Awards

Among many other national, regional and global recognitions, Baker & McKenzie has more leading lawyers in more countries in the *Chambers Global Directory* than any other global Top 20 law firm. *Chambers* lists 23 of our practices in its global rankings of the world's leading practices.





**Joseph "Joe" Andrew**  
Global Chairman

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Joe Andrew is the Global Chairman of Dentons, the largest law firm in the world with more than 7,500 lawyers in 140 locations across 57 countries. An accomplished and highly regarded corporate lawyer, Mr. Andrew may be best known for his role as chairman of the Democratic National Committee (DNC) in the U.S. from 1999 to 2001.

As Global Chairman of Dentons, Mr. Andrew is the architect of Dentons' global strategy. He represents Dentons with clients around the world, key strategic partners, business and government leaders, and other external groups. Central to his work has been his vision for the law firm of the future, which includes Dentons' growth, integration, and reinvention, such as Nextlaw Labs and the Nextlaw Global Referral Network.

Mr. Andrew has practiced corporate law for nearly 30 years, focusing on mergers and acquisitions of regulated companies. He has

represented many Fortune 1000 companies in negotiating acquisitions, spinoffs, financings, and corporate governance disputes.

Mr. Andrew is also an entrepreneur, a published author, a frequent speaker on political and demographic trends, and a current and former leader of several non-profit organizations. He is the founder of a socially responsible mutual fund, a biotech consulting firm, a cleantech company, and numerous nonprofit organizations. In addition to his corporate legal background, he is a leader and speaker on the future, focusing on rule of law, corporate social responsibility, socially conscious investing, historic preservation, and architecture.

Mr. Andrew is a graduate of Yale University, where he was a Scholar of the House, and the Yale Law School. He is married to former U.S. Ambassador Anne Slaughter Andrew and has two college-age children.

## Dentons

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.

Driven to provide clients a competitive edge, and connected to the communities where its clients want to do business, Dentons knows

that understanding local cultures is crucial to successfully completing a deal, resolving a dispute, or solving a business challenge.

Dentons' global team builds agile, tailored solutions to meet the local, national, and global needs of private and public clients of any size in more than 125 locations serving 50-plus countries.

The legal profession is changing rapidly and Dentons is leading the way in advancing change for the benefit of clients. We are driven to challenge the status quo, delivering consistent and uncompromising quality and value to our clients in new and innovative ways.

### What makes Dentons different?

We're *polycentric*. Dentons has no single headquarters and no dominant national

culture. Diverse in terms of geography, language, and nationalities, we proudly offer clients talent from diverse backgrounds and countries, with deep experience in every legal tradition in the world.

*We offer business solutions.* Rather than offering theoretical legal analysis, we provide the specific advice required to get a deal done, resolve a dispute, or solve a business challenge.

*We measure our success by the service we provide.* Regardless of the scale and scope of your business needs, you get the individual attention you need and deserve. Whether the matter is big or small, if it is important to you, then it is important to us.

[www.dentons.com](http://www.dentons.com)



**Michael Florey**  
Principal

**FISH.**  
FISH & RICHARDSON

Michael Florey is a Principal in the Twin Cities office of Fish & Richardson. A member of the award-winning intellectual property litigation group, his practice emphasizes complex technology litigation and business counseling. He has substantial trial experience including jury and bench trials, *Markman* and Preliminary Injunction hearings with live witnesses, and trial before the American Arbitration Association. Mr. Florey is a leading national expert in the area of patent damages. He has extensive experience in intellectual property and product liability cases involving products regulated by FDA. Mr. Florey is highly skilled at cases that rest in large part on expert analyses, testing, and testimony.

Mr. Florey was named a 2016 “IP Client Service All-Star” in *BTI Consulting Group’s* survey of general counsel from the world’s largest corporations. He was one of only 30

intellectual property (IP) attorneys selected nationwide for the Client Service All-Star list, which highlights lawyers who deliver superior dedication to client service. Mr. Florey was selected for inclusion in 2015 and 2016 editions of *Chambers USA: America’s Leading Lawyers of Business* as a leader in his practice area, and has been named to the 2010-2016 lists of Best Lawyers® in America. He was selected as a *Minnesota Lawyer* “Attorney of the Year” in 2013.

Mr. Florey is active in efforts to promote diversity in the legal profession. He is a member of the firm’s Diversity Committee, and is the firm’s Member Representative for *Twin Cities Diversity In Practice*. Mr. Florey represented Fish & Richardson at the inaugural *Women In Law Hackathon* competition sponsored by Diversity Lab, Stanford Law School, and Bloomberg Law.

## Fish & Richardson

Fish & Richardson is one of the largest law firms in the U.S., practicing intellectual property and technology litigation. The firm currently has over 365 attorneys in 12 offices: Atlanta, Austin, Dallas, Boston, Delaware, New York, Houston, Redwood City, Southern California, Twin Cities, Washington, D.C., and Munich, Germany. Fish’s team includes 25 former clerks at the U.S. Court of Appeals for the Federal Circuit, as well as 89 legal professionals with PhDs in scientific fields.

Fish’s experience and resources in the litigation area are broad, extending to all areas of technology litigation in federal district courts and appellate courts (especially the Court of Appeals for the Federal Circuit), proceedings before the International Trade Commission (ITC), proceedings in the U.S. Patent & Trademark Office, and coordination of global litigation.

Since September 2011, Fish has entered appearances in over 1,700 patent infringement cases, in more than 51 federal district courts and the ITC. Fish handles more patent litigation than any other law firm and is among the top firms for handling Section 337 investigations at the ITC.

Fish has been the most frequently hired patent litigation firm in the country for 13 straight years (*Corporate Counsel*, 2004–2016). In its recent “Patent Litigation Year In Review,” legal analytics firm Lex Machina named Fish the top patent litigation defense firm, noting that Fish’s 287 federal district court patent cases in 2015 were more than triple the cases handled by the second-place firm. Fish has also been named the “Busiest Patent Defense Firm” by *Law360* (2015) and an “IP Litigation Powerhouse” by *BTI Consulting Group* (2011, 2015).

If you have complex problems at the intersection of law and technology, Fish is ready to help solve those problems.





**Scott Sonnenblick**  
Partner

## Linklaters

Scott focuses his practice on corporate transactions. He has extensive experience in mergers and acquisitions across a wide range of transactions, representing buyers, sellers, special committees, financial advisors, and investors in public and private mergers, acquisitions, tender offers, hostile contests, leveraged buyouts, spin-offs, and venture capital transactions. Scott's M&A practice has spanned a variety of industries, with a particular emphasis on cross-border transactions and complex joint ventures. He advises clients on corporate and securities laws, governance issues and U.S. Securities and Exchange Commission compliance, and reporting matters. Scott also co-heads the U.S. executive compensation and benefits group at Linklaters.

He has recently represented:

- Visa Europe Limited on the sale of 100% of its share capital to Visa Inc.
- Steinhoff on its acquisition of U.S. mattress retailer, Mattress Firm
- Triton on the acquisition of ALSTOM's auxiliary components business for thermal power plants
- ThyssenKrupp on the sale of its U.S. steel plant to ArcelorMittal and Nippon Steel & Sumitomo Metal Corp.
- E-Land World Ltd. on its acquisition of K-Swiss, Inc., a US athletic shoe manufacturer

- ASSA ABLOY AB on its acquisition of 4Front Engineered Solutions, Inc.
- Deutsche Börse AG in its proposed merger with NYSE Euronext (not consummated)
- Standard Chartered Private Equity on its acquisition of Smoothie King Systems, Inc.
- a consortium of investors in their US\$1.8bn investment in Banco BTG Pactual SA, the leading investment bank in Brazil (named 2011 Private Equity Deal of the Year by LatinFinance)

Scott is ranked as a Leading Lawyer in the M&A field in the 2017 edition of *IFLR1000*, recognized in the 2016 edition of *Legal 500 U.S.* and has been ranked in *Super Lawyers* 2014.

### Education

The University of Michigan Law School, J.D., *cum laude*

Cornell University, M.H.A. & B.S.

### Publications

Co-author, "Contrast In MAC Clauses," *New York Law Journal*, 25 October 2010

Co-author, "Disclosure Requirements for Cash-Settled Equity Total Return Swaps – A Multi-Jurisdictional Survey," *Wall Street Lawyer*, October 2008

## Linklaters LLP

Linklaters is a leading global law firm, supporting clients in achieving their strategies wherever they do business. We use our experience and resources to help clients pursue opportunities and manage risk across emerging and developed markets around the world.

Our vision is to be the leading global law firm, advising the most prominent global corporations and financial institutions on their most important and challenging transactions and assignments. Our focus is on consistently delivering integrated, global solutions, built on

our strong local capability. We have advised on significant deals in over 100 countries, and in addition to serving clients from our 29 offices and via our alliances with Allens and Webber Wentzel, our lawyers have experience in key jurisdictions across Asia, emerging Europe, the Middle East, and Africa.

We build lasting relationships to support clients as they adjust to changes in their markets and the regulatory landscape. Discipline, teamwork and agility are at the core of all that we do for our clients and enable us to help them navigate important business challenges successfully.

Our aim is to be the leading global law firm, building relationships that endure through business cycles to ensure that top companies and financial institutions instinctively turn to us for support on their most important and challenging assignments.

Doing this requires a constant focus on our clients, a deep understanding of our markets, globally minded and committed people, and responsibility and integrity in the way we interact with our communities and manage our impact on the environment.



**Graham Robinson**  
Partner



Graham Robinson is the head of the Boston Mergers and Acquisitions Group. He also serves as a member of the Policy Committee, Skadden's governing body. He focuses his practice on mergers, acquisitions, and other transactions in the pharmaceutical, medical device and technology industries in the U.S. and internationally. He regularly represents public and private companies, as well as private equity and venture capital funds in acquisitions and divestitures, both negotiated and contested. He has significant experience advising companies in preparing for and responding to unsolicited acquisition proposals, as well as advising companies in dealing with activist investors. Mr. Robinson also advises companies in pharmaceutical and medical device collaborations, and issuers and underwriters in connection with initial public offerings and other corporate finance transactions.

Mr. Robinson repeatedly has been listed in *Chambers USA: America's Leading Lawyers for*

*Business* and *The Best Lawyers in America*. He is the only corporate lawyer based in New England listed in *Lawdragon 500 Leading Lawyers in America*. In 2013, Mr. Robinson was named by *The M&A Advisor* as one of the top 40 M&A professionals under the age of 40 in the United States. In 2011, he was named by the *Boston Business Journal* as one of its "40 under 40" business and civic leaders in the city of Boston. Mr. Robinson is a member of the board of fellows of Harvard Medical School, an overseer of the Boston Symphony Orchestra, and a former member of the board of directors of the Massachusetts Chapter of the March of Dimes.

Mr. Robinson also is a member of the board of directors of Project Step, a nonprofit organization that seeks to identify musically talented children from underrepresented Boston communities, provide them with comprehensive music and string instruction, and prepare them to compete and succeed as professionals in the world of classical music.

## Skadden, Arps, Slate, Meagher & Flom LLP

Skadden provides legal services to the business, financial, and governmental communities around the world in a wide range of high-profile transactions, regulatory matters, and litigation and controversy issues. Our clients range from a variety of small, entrepreneurial companies to a substantial number of the 500 largest U.S. corporations, and many of the leading global companies.

Skadden is a global leader among law firms involved in mergers and acquisitions and other corporate transactions. The transactional experience of Skadden's lawyers, the breadth of our practice and the geographical reach of our offices worldwide have allowed us to maintain our leadership position, representing a broad array of public and private companies, private equity firms and financial sponsors, investment

banks, governmental entities, and other institutions and individuals in almost every type of M&A situation.

In 2015, Skadden became the first law firm to handle more than \$1 trillion in global announced M&A deals in a single year, ranking first by value globally and in the U.S. according to Bloomberg, mergermarket and Thomson Reuters. We were ranked in the top tier by *IFLR1000 2017*, *U.S. News – Best Lawyers "Best Law Firms" 2017*. We were one of seven firms to top *Chambers USA 2016's* M&A Elite rankings and received the 2016 *Chambers USA* Award for Excellence for having the nation's top M&A practice. We also were one of only four firms ranked in *Chambers Global 2016's* top tier for Global M&A, and we were named Corporate/M&A Law Firm of the Year by *Chambers Global 2014*. Additionally, we were ranked in the top tier by *Legal 500 2015* for large deals (\$1 billion-plus). Skadden was recognized, for the third consecutive year, as M&A Team of

the Year at the 2014 *IFLR Americas Awards* and named among *Law360's* Mergers & Acquisitions Groups of 2015. For 16 consecutive years, Skadden has been named the top corporate law firm in the United States in *Corporate Board Member* magazine's annual survey of "America's Best Corporate Law Firms" (May 2016), which asked directors of publicly traded companies to select the firms they would "most likely retain to handle a variety of corporate legal matters."

We recognize that every transaction, regardless of size, is important to our clients. While we advise many of the world's largest companies, investment banks and other regular participants in the M&A market – often on their most high-profile transactions – Skadden also represents numerous smaller clients that are not regularly engaged in M&A transactions. Our lawyers strive to bring the same practical approach, creativity and commitment to excellence to each matter in which we are engaged.