DIRECTORS ROUNDTABLE

# WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

## Marc Mayo

& The Legal Department of FIS

## THE SPEAKERS

**Marc Mayo**
*Corporate Executive Vice President and Chief Legal Officer, FIS*

**John Flaim**
*Baker & McKenzie LLP*

**Alan Hoffman**
*Blank Rome LLP*

**Bard Brockman**
*Bryan Cave Leighton Paisner LLP*

**Jeffrey Berkowitz**
*Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*

**Erin Rodgers Schmidt**
*Morgan, Lewis & Bockius LLP*

**Robert Rachofsky**
*Willkie Farr & Gallagher, 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, 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 the achievements of our distinguished Guest of Honor and his colleagues, we are presenting Marc Mayo and the Legal Department of FIS with the leading global honor for General Counsel and Legal Departments. FIS (Fidelity National Information Services) is a leading global provider of technology solutions for merchants, banks and capital markets firms.

His address focuses on key issues facing the General Counsel of an international financial services corporation. Karen Todd, Executive Director and Chief Operating Officer of the Directors Roundtable, moderated the program.

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

## Marc Mayo

*Corporate Executive Vice President and Chief Legal Officer of FIS*

Marc Mayo is Corporate Executive Vice President and Chief Legal Officer of FIS. As CLO, he manages the provision of legal services and support to FIS and its subsidiaries worldwide. Previously, Mr. Mayo was Deputy General Counsel at FIS over corporate, mergers and acquisitions and employment law. Mr. Mayo joined FIS in 2012 and became CLO in 2015.

Before joining FIS, Mr. Mayo was a shareholder with the law firm of Rogers, Towers P.A., during which time his clients included FIS. Prior to that, Mr. Mayo was General Counsel and Senior Vice President of Human Resources of AccuStaff, a publicly traded staffing company that has since been purchased by Adecco.

Mr. Mayo holds a bachelor's degree from Georgetown University and a juris doctorate from the George Mason University School of Law, where he was a published member of the law review. A great believer in contributing to the community, Mr. Mayo has served as Chair of the Boards of OneJax, the Juvenile Diabetes Research Foundation (North Florida Chapter), the Center for Corporate and Family Health and the Jacksonville Bar Association.

## FIS

Fidelity National Information Services, Inc. ("FIS") is a leading provider of technology solutions for merchants, banks, capital markets firms and other companies around the world. Our 55,000 employees are dedicated to advancing the way the world pays, banks and invests by applying our scale, deep expertise and data-driven insights. We help our clients use technology in innovative ways to solve business-critical challenges and deliver superior experiences for their customers. For over 50 years, FIS has continued to drive growth for clients around the world by creating tomorrow's technology, solutions and services to modernize today's businesses and customer experiences.

Headquartered in Jacksonville, Florida, FIS is a Fortune 500® company and is a member of Standard & Poor's 500® Index. To learn more, visit www.fisglobal.com. Follow FIS on Facebook, LinkedIn and Twitter (@FISGlobal).

**KAREN TODD:** Good morning!

**AUDIENCE:** Good morning!

**KAREN TODD:** My name is Karen Todd, and I am the Executive Director of Directors Roundtable. Thank you for taking time out from your busy schedule to be here today. I want to especially thank the people of FIS and the law firms that support their legal department for their cooperation, especially Clifford Chance which flew people here from New York, and the many other outside law firms who are in the audience. Thank you so much for being here.

We're also appreciative of the Museum of Contemporary Art and being able to have this event in their theater today.

The Directors Roundtable is a civic group that has never charged the audience to attend over 800 events in six continents. It is our mission to organize the finest programming for Boards of Directors and their trusted advisors, especially General Counsel and their Legal Departments.

Our Chairman, Jack Friedman, has spoken to corporate directors, and they routinely express dismay that their corporations are not acknowledged for being good citizens. He started this series to give executives and corporate counsel an opportunity to speak about their companies, the actions that give them pride, and their successful strategies navigating a business world that is constantly changing. We honor General Counsel and their Legal Departments so that they can share this information with the Directors Roundtable community via today's program and the full-color transcript document that will be made after the event and is provided to more than 100,000 leaders worldwide.

Today, it's our pleasure to honor Marc Mayo, Corporate Executive Vice President and Chief Legal Officer, and the Legal Department of FIS, many of whom are here today, and let's acknowledge them. [APPLAUSE]

I would also like to introduce our Distinguished Panelists for today's program. John Flaim of Baker McKenzie; Alan Hoffman, Chair of Blank Rome, who is filling in today for Jim Smith, who got called away on a court case. Thank you, Alan, for being here. Bard Brockman with Bryan Cave Leighton Paisner; Jeff Berkowitz is here from Finnegan, Henderson, Farabow, Garrett & Dunner; Erin Rodgers Schmidt from Morgan, Lewis & Bockius; and Robert Rachofsky of Willkie Farr & Gallagher.

**KAREN TODD:** I have a special surprise for Marc, which is a letter from the Dean of George Mason University's Antonin Scalia Law School, that I would like to read to you.

> Dear Marc:
>
> Congratulations from all of us at George Mason University School of Law. As the Directors Roundtable honors you today with the leading world honor for General Counsel in Jacksonville, know that your Mason Law friends and colleagues are with you in spirit. Alumni like you make us all proud.
>
> From your bright start as a member of the *George Mason Law Review*, to your many achievements as General Counsel for FIS Global, you have always shown exemplary leadership. You set a high bar with your professional accomplishments and tireless devotion to worthy causes in the Jacksonville community.
>
> Thank you for showing the next generation that law is, indeed, a noble and worthy profession.
>
> Very sincerely,
> Henry Butler
>
> Allison and Dorothy Rouse Dean
> GMU Foundation Professor of Law
>
> Executive Director of Law &
> Economics Center

[APPLAUSE] I'm going to turn it over to Marc now for his presentation.

**MARC MAYO:** Good morning. Thank you all for being here. Thanks for the generous introduction, and my sincere thanks to Jack Friedman, Karen Todd and the Directors Roundtable for this honor.

I also wanted to thank the members of the panels who have generously given of their time to be with us today and have been great partners for FIS for many years. We appreciate you.

As I have said many times internally, it takes a village, in this case, to receive such an honor. I want to thank our CEO, Gary Norcross, who flew from San Jose yesterday to be with us – thank you, Gary – and our entire executive team, many of whom are here today, for your support.

I also want to thank, of course, the members of the best legal team in Fintech who

share this honor [APPLAUSE], and without whose constant hard work and support, none of this would be possible.

I was asked to speak today about what it is like to be GC in a Fintech company and, in fact, at the largest Fintech company in the world today.

For those of you who are here today and are not from FIS, you may be asking yourself, "What's Fintech?" So, I'll briefly start there.

It is what it sounds like. It is short for "financial technology," but examples of what we do may help. When you go into a bank, pull up to an ATM, pull out your credit or debit card, pull out your phone or get on your computer to move money or pay a bill, we process those financial transactions for our banking clients. When you move money to purchase stocks, we process those transactions for our capital markets clients. When you go to a store or get online and make a purchase from a merchant, we process those transactions for our merchant clients.

FIS likely has the broadest solution set of any Fintech company, with more than 450 software solutions for banks, capital markets firms and merchants, but any subset of these solutions provided by technology companies would be considered Fintech.

It is my distinct privilege to be part of a team that has participated in the dramatic growth of FIS, both organically and inorganically. Since I joined FIS in 2012, our revenue has more than doubled and our stock price has quadrupled. Today, FIS has annual revenue of $12.5 billion; a Market Cap of about $85 billion; and we have over 55,000 employees doing business in over 120 countries.

This has been a very exciting year for FIS, led by the largest deal ever in Fintech – the $43 billion acquisition of Worldpay. From a legal standpoint, any public company deal is a bit of a whirlwind, but where 90% of the deal consideration is your publicly traded stock, speed and confidentiality are even more important, because a leak can result in a run on the stock price which could effectively kill the deal. You also need a willing partner for such a deal to work at that speed, and Worldpay was a great partner in making that happen.

From signing a Confidentiality Agreement on Feb. 1, to the March 18 announcement of the Merger Agreement, to the July 31 closing, including various types of regulatory approvals around the world, it was certainly an exciting time for me and, indeed, for our entire team at FIS.

It is always an interesting anomaly to me, as a side note, that you can often get a multi-billion dollar deal done in less time than an acquisition of a "mom-and-pop" business, because of the sophistication of the teams on both sides of the deal.

What you learn, as a GC is that when the deal is over, there is not a lot of time to recover, although in this instance, I did tell Gary I was going to an island in the Caribbean with no Internet for a week – at least one of which was true! [LAUGHTER]

But after closing, especially for a deal of this size, you immediately begin to implement plans to integrate the two companies, including merging together two legal departments that cover a lot more territory. The excitement continues.

From a business standpoint, it was not hard to see why we transacted. Adding a top merchant and global eCom business to complement our banking and capital markets business on the right terms was a great addition of value for our shareholders, clients and employees. It allowed us to increase scale necessary to compete and lead in today's Fintech world, accelerated our growth trajectory and gave us additional opportunity to invest and innovate on a broader scale for our clients. It is indeed an exciting time to be at FIS.

Also, this year, we recently announced our new corporate headquarters, which will be built just blocks from where we currently reside on the river in Jacksonville. We have pledged to make it the greenest building in Jacksonville and will continue to make it our goal to be a good corporate citizen in Jacksonville and in the many communities in which we do business.

As an added bonus, and with all due respect to our panel members who work in larger cities and metropolitan areas, I am truly blessed to continue to have a job like this with the pleasure of a five-minute commute. [LAUGHTER]

So, in addition to the excitement of transformational M&A deals and building new corporate headquarters, what is it like to be General Counsel for the largest Fintech company in the world?

I could not imagine more exciting legal challenges than we get to tackle and solve every day. The lawyers in the audience recognize that we all have days where we feel like we walk around with a fire extinguisher on our backs, putting out fires all day, and this job is certainly no exception. We are a global

company operating in an environment where digitization and new IT developments are the norm, where new laws and regulations around the world on data privacy and cybersecurity are proliferating at a rapid rate, and where we constantly expand our own parameters to create new value for our shareholders, as well as our employees and our communities.

When I was elevated to this position, my CEO liked to tell me to stop practicing law so much. As a lawyer by training, there is no switch to turn off when a deal needs to get done or a problem needs to get solved and. while your tendency as a lawyer is to respond, in the words of Jack Nicholson, "You want me on that wall, you need me on that wall" [LAUGHTER] which is often true, but he was making a point that's made in Fortune 500 companies around the world – General Counsels are now expected to be business people as much as lawyers.

This point was confirmed in the just-released 2019 Chief Legal Officer Survey published by Altman Weil. The survey found that CLOs (which 99% of the time are the same thing as General Counsel) spend over 30% of their time on Advising Executives/ Corporate Strategy, and 18.6% of their time practicing law, with the remainder divided between Board and governance work, managing the legal department, and other corporate management responsibilities.

So, advice is sought from GCs not only to avoid legal pitfalls, but for different views of how to accomplish business goals. To do this well, you must be at the table when the strategy is taking hold, but you must also have the judgment as to the best way, and often the best time, to navigate the constant tension between purely legal responses and getting to business goals in a legally and ethically responsible manner.

Ben Heineman, former General Counsel of General Electric and a frequent author on inside counsel topics, has stated that the GC's obligation is to move beyond the first question, "Is it legal?," to the ultimate question, "Is it right?" Such a role involves leadership not only for the Company's legal matters but for its ethics, reputation, communications and corporate citizenship.

Heineman remarked recently that the GC operates between two trepidations: the anxiety of *not being invited* to the meeting, and the anxiety of *being invited*. That may account for the degree of insomnia many of us face. [LAUGHTER]

But to be successful, we must have the confidence to meet our professional duties, to support our business leaders and the best interests of the Company in a legally and ethically responsible manner.

So, with that as a general backdrop as to the GC role, what are the challenges in a global Fintech company?

First, I have over 200 people on my legal team in 20 countries. So, GLOBAL IS DIFFERENT. Not only time clocks are different, but local laws, practices and cultures. What makes sense under U.S. law may not make sense under law in China, India, Germany or Brazil. For example – entity rationalization, when we try to eliminate subsidiaries that are no longer needed and often merge them into other wholly owned subsidiaries. In the United States, it takes about a day to merge two companies together. In India last year, it took over a year, including a court proceeding, to accomplish the same result. It's just different. An archaic procurement law in Vietnam may leave you no choice but to bid in the name of a holding company parent – which may not make sense to many of us – instead of an operating company.

You absolutely have to have standards, practices and compliance requirements globally, but you often have to be flexible, where appropriate, to deal with different cultures and laws around the world.

You also have to realize that our global presence often dictates a 24-hour clock – gratefully not all the time – and we have a global team to deal with 99% of the issues, but sometimes things escalate. Recently, we had a situation where near-simultaneously at 3:00 a.m. Eastern Time, we were deciding whether to launch a $3 billion bond deal in London and executing on a matter in which I was involved in APAC [Asia-Pacific] at the same time. On days like those, you have to have a "sleep is overrated" philosophy [LAUGHTER], and a good team to execute all over the world. And I am not only talking about the legal team here, but partnering with all of our corporate functions – Finance, RISC, HR, Communications, Tax, IT, and with our business lines and leaders. As I said earlier, it truly takes a village.

One of our biggest challenges last year was coming into compliance with the many requirements of the General Data Protection Regulation (GDPR), the privacy regulation in the EU which went into effect in 2018. This included not only altering and setting up systems and practices but amending thousands of client and vendor contracts affected. It turned out to be good training for the similar laws that are now going into effect in 2020 in California and Brazil, as well as several other states and

countries. A key question for our Congress over the next year is whether a federal law will be enacted to replace various different state laws springing up on data privacy to bring some stability to this growing area of the law.

Data privacy is also an interesting issue, where statutory laws often do not keep up with the current digital environment. In this increasingly digital world, I've looked at an issue on more than one occasion where banking statutes deal with things like checks, which some of you in the audience are old enough to remember [LAUGHTER] – and make no allowance for where the world is today in Fintech. The risks we need to evaluate in such situations include the importance of considering reputational risk which can harm a company worse than a lawsuit if you do not take that into account as well as financial and statutory issues. Ask Facebook about the PR hit they took for using their customers' data, regardless of the permissions their customers may have given in the fine print of a click-through user contract.

In addition to privacy, an area of great importance to every Fintech company is the protection of data against the millions of hackers all over the world trying to steal everyone's banking or credit card information every day. Again, there are not only concerns about meeting the cybersecurity laws and regulations out there, but we must exercise great efforts to go beyond legal requirements to protect the confidential information of our 20,000 client banks and their customers, as well as the customers of more than a million merchant locations we serve.

We all read every day about breaches by an ever-sophisticated group of hackers around the world trying to get through numerous firewalls companies like us put in place to keep them out. It is a constant 24-hour-a-day, seven-day-a-week battle. We work with Homeland Security and government groups as well as industry groups and experts every day to keep the bad guys out. We

have tabletop exercises with our officers and trainings with our board to make sure everyone understands how we would react quickly in the event of a breach, and why we have put hundreds of millions of dollars into cybersecurity protection.

Again, the reputational risk of a breach often exceeds the risk of written laws and contracts on such matters, as our client banks, merchants and capital markets firms and their customers have to believe that we have their backs, or they will go elsewhere.

New regulatory agencies are also arising around the world to probe into proper protections in systems, processes and products. One of the busiest groups on our legal team are our Regulatory Compliance & Privacy group of lawyers, who work alongside our RISC Department to address these issues every day. Lots of government alphabet soup. The FBA [Federal Banking Agencies], formerly known as the FFIEC [Federal Financial Institutions Examination Council], which is made up of the OCC [Office of the Comptroller of the Currency], the FDIC [Federal Deposit Insurance Corporation] and the Fed [Federal Reserve System], as well as the CFPB [Consumer Financial Protection Bureau], regulate our systems and processes constantly in the U.S., as do others in the U.K., the Netherlands and around the world. It is simply a part of our daily life.

We also have a busy group of IP lawyers, as IP is the crown jewel of any technology company. One of the banes of any technology business these days are what we refer to as the Non-Practicing Entities (NPEs) or patent trolls, who buy up patents and never use them for business purposes except to sue businesses for patent infringement. We have been successful in winning these suits. We call our legal group the Patent Slayers, because they have been so successful, but the trolls have certainly not slowed down, and we have increased our patent filings as a defensive measure.

Our biggest group of lawyers deals with many thousands of client contracts each year all over the world, which range from small merchants to the largest global banks. We executed over 23,000 client contracts and amendments in 2018, and the Worldpay acquisition will greatly enhance that number in 2019. We have begun to automate portions of our contract process to make that process more efficient and will continue to work through that process as a priority for our team and business in 2020.

I have found it extremely helpful in my position to also have a litigation background, (which I admit is infrequent in my position). We often make our bones avoiding the potholes in the road, so when you are doing a transaction of any type, it is good to know where those potholes are, in order to avoid them while still getting the transaction done. While I also have an excellent litigation team, I always enjoy strategizing with them and challenging them to reach the right result for our business.

We also oversee corporate governance for over 300 entities around the world and a public company board. We are now engaged in "Project Less Is More 3.0" in trying to reduce our number of entities. In "Project Less Is More 2.0," we reduced the number

of entities by 100 after the 2015 SunGard acquisition, but then, we added back about that number in the Worldpay acquisition. [LAUGHTER]

It is a constant battle for us to get to a more manageable number of subsidiaries meeting differing jurisdictional standards around the world, but we're working on it.

Corporate governance is a constantly evolving area of interest as we need to not only protect our directors and executive management team and implement best practices that shareholders and shareholder advisory groups demand, but we must now also be on the cutting edge of environmental, social and governance issues (ESG), which are becoming more of a requirement than a request by shareholders in today's public company. It is a responsibility I am proud to say we have stepped up to and take steps every day to promote a workplace of which we can be proud. Our policies and practices reflect that commitment, from our pledge to drive an inclusive and diverse workforce, to best practice ethical standards and to community, financial and environment responsibilities in both word and deed. It is important, and part of our fabric as a company, to not only make profits for our shareholders, but to be good stewards of the communities in which we reside.

FIS and our Legal Department promote numerous good causes in Jacksonville and all of our communities every day. The company has set up and funded an FIS Foundation, which contributes to numerous good causes in our communities. We see it as a part of our responsibility, and I am very proud to work for a company that has giving back to our communities as one of our guiding principles. I have personally been proud to serve as the Chairman of the Boards of The Jacksonville Bar Association, OneJax, Juvenile Diabetes Research Foundation, the Center for Community and Family Health, and sat on boards of the Chamber of Commerce, the Mental Health Foundation and the Jacksonville Film Festival, and have supported many others. It is what I strongly feel is an obligation to the community in which we live.

In summary, you must be willing to continuously learn to serve as a General Counsel in any company, but particularly in a Fintech company in the digital age. To give you context on how quickly things change in technology, commercial Internet providers first began taking off in the 1990s. During that time, it took ATM banking 19 years to achieve mass adoption, eight years for online banking, and only four years for mobile banking. It was only in 2007, when Steve Jobs introduced the first iPhone, and within less than two years, mass adoption was underway. And now, everyone has a mobile device in their pockets, performing banking and merchant transactions, using the Internet, reading email and texts, and occasionally even making a phone call. [LAUGHTER]

With the age of digitization upon us, we are modernizing our platforms in the Cloud, developing new solutions using artificial intelligence, blockchain and robotics, and doing things we would not have even imagined just a decade earlier. To serve as GC of a company like FIS, you need to be able to move quickly, nimbly and stay ahead of the constantly evolving curve.

Having said that, as with any such job, you need to step back and exercise judgment and context. In the words of that famous legal scholar, Ferris Bueller, "Life moves pretty fast. If you don't stop and look around once in a while, you could miss it."

I take a great deal of pride in my legal team and our organization that focuses on staying ahead of the competition in a rapidly evolving industry. Together, we have built FIS into a global leader of Fintech. And, as a team, we are thankful and grateful for this honor today. Thank you. [APPLAUSE]

**KAREN TODD:** I'm now going to introduce our Distinguished Panelists for Panel 1, "Consumer disputes, Fintech,

#MeToo, and other issues facing the financial industry." They are Alan Hoffman from Blank Rome, Bard Brockman from Bryan Cave Leighton Paisner, and Erin Rodgers Schmidt from Morgan, Lewis & Bockius.

We're going to start with Erin today. How have companies responded to #MeToo headlines and claims?

**ERIN RODGERS SCHMIDT:** I'm going to start by picking up on something that Marc shared in his remarks, which is that what we've really seen is companies moving past the question of "what's legal" to the question of "what's right." As you think about things like culture and being a good corporate citizen, there is a lot of work involved in moving beyond "what are the litigation defenses I have" to thinking more about "what is my culture, what can I do, what are my opportunities" to prevent harassment, to identify and address things like unconscious bias, and to think more holistically about what factors contribute to harassment.

I am traditionally a white-collar lawyer and spent the first 12 years of my practice working with companies on compliance issues around fraud and abuse. One of the things that became rapidly apparent over that time was that the government really wasn't interested in what your paper policy said; the government wants to know, "Does it work?" It asks the same types of questions that good directors ask, that good executives ask. One of the things that I have found really interesting in the #MeToo space is that you started to see in the fall of 2018 that type of scrutiny for workplace culture.

**MARC MAYO:** And the message coming from the top is very important in those situations. Having the CEO and the CHRO [Chief of Human Resources Officer] stand up in front of the employees and tell them how important it is, and providing them hotlines and other avenues where they can report such issues, except through the manager which may, in any particular situation, be responsible for the harassment,

is essential in setting the culture. Not only where people can raise the issues, but where they can be resolved before you need the other two guys on this platform who are litigators to resolve them. That is very important.

**ERIN RODGERS SCHMIDT:** Right. It has been a couple of years since the #MeToo bubble really hit mainstream media, but there were a lot of studies done in the fall of last year and in this past year, looking at what companies have done. A lot of companies – about a third of them – at least did some kind of policy workup, looking at the policy, what does it prevent, what does it talk about, does it set a tone or does it merely keep you from engaging in severely harassing conduct of your colleagues, which is okay, but probably not the best standard.

Surprisingly, in the year after the biggest of the #MeToo allegations became public, there were still women at all levels of organizations, and people at all levels of organizations, that reported not only feeling harassed at work – maybe not to the level of reporting it; maybe not to the level of going to *The New York Times* – but feeling that they didn't work in a workplace that was safe, that was inclusive, that valued them as employees.

That's starting to change a little bit; at around the two-year mark, there were some additional studies that looked at what companies are doing. One of the other things we're looking at or working with a lot of clients on is thinking creatively about those access points; not just do folks know to go to their manager, but does it work when you go to your manager? We worked with an organization that found, through some focus group conversations with groups of people about their experiences, that the person they most needed to access to raise concerns in their organization sat behind the people that people had concerns about. You just couldn't walk in and even have that private conversation, because that was a barrier. We are thinking pretty creatively in working with folks on a lot of issues like that.

**KAREN TODD:** Great! Alan, obviously it's important for the client to understand how they can get into trouble, but how do you assess the value of a case, and what you're going to do about it?

**ALAN HOFFMAN:** Two things. First, you've got to be able to access the documents that are going to be involved in a case, in order to get a complete understanding of what is the paper trail, whether it's an electronic trail or paper, in order to understand your case.

Next is also interviewing and making sure you know all of the details from any employees, executives, anybody who's involved in the matter, in order to make the proper assessment.

You also then, have to look at what is the disruption that's going to be created to my client if this matter goes forward? Are we going to be a plaintiff? Are we going to be a defendant? If we're going to be a defendant, is there a way to file a counterclaim? I've always liked, in litigation, making sure that if you're a defendant, putting the other side at risk in some form or another – it's never fun just being the target of somebody shooting at you; it's much more fun to be able to shoot the other way a little bit. It is important to assess all of those factors – employee

interviews, document review, impact on the company, and whether or not the company has some claim against those who may be filing the claim against the company.

**MARC MAYO:** And in-house, before you get to that, it is important, number one, to have a document preservation system so you don't get blamed for destroying documents, but also assessing internally, where is this case? Is this a little case that we can handle in-house? Is this a bigger case that we have to get a certain amount of information so we can effectively bring in outside counsel? Or is this potentially a big case, where we need an independent third party or an outside counsel to come in right away and help us independently review the evidence and prepare for what's coming?

There's an in-house assessment that we usually do before we even get to outside counsel, that helps outside counsel when you get there.

**ALAN HOFFMAN:** Yes, the in-house assessment also helps with the value proposition. What is going to be the disruption to the company, to the client, in moving forward? What risks are there in moving forward? What other clients of the company or customers may be impacted as a result of moving forward?

Early on, a value proposition has to take place, and the only way to do that is with outside counsel working with the in-house team in order to assess that.

**MARC MAYO:** Also, in advising executives – anyone who's been involved in a litigation knows that there's often emotion involved in any dispute. Often, the emotion arises to the point of, "Let's fight this; let's do this; let's kill the other side" – that's the initial reaction. Then you have to be able to assess, "That's going to cost millions of dollars and a lot of your time being deposed and other things," and slowly, it ratchets back. Then you're able to weigh – whether it may still be a precedential matter that you have to take to the mat, or it's important for company strategy to take to the mat. We'll talk about how we've handled some of the IP cases on the second panel, to set a reputation in the industry, to not get sued, and to handle things appropriately.

Sometimes, there becomes a no-win situation that you have to be able to, as counsel, point out to your executives on how much of their time, money and interest it's going to take to get there because litigation is rarely an inexpensive endeavor.

**KAREN TODD:** Alright. Bard, can you give us the pros of arbitration, if that's where we end up going?

**BARD BROCKMAN:** Good morning. I'm afraid that this is a long answer, and so perhaps we can make it a little bit interactive with the audience. I would invite anybody who has an opinion on what they believe to be the pros of dispute resolution through arbitration. Anyone? Alright. Let me offer up a few, and then invite you to add to the list.

The pros that are most commonly perceived to be a big factor in favor of arbitration is the expedited nature of the proceedings, that litigation rarely is quick, and arbitration most certainly is going to be quicker. That is usually the case, but not always the case. One of the reasons it's not always the case is that in arbitration, you rarely have the opportunity to knock out a claim early at the pleading stage and a motion to dismiss. You rarely have an opportunity to get it disposed of through a summary judgment motion. Arbitrators prefer to allow the claimants to have their day in court (or in arbitration, in this instance), and therefore, even if you have a very solid defense that might dispose of a claim on the front end, the arbitrator is most likely to allow it to proceed to a hearing. It's not always quicker.

I had a claim early in my career that probably ought to have taken between four and six months from start to finish, and it lasted 11 years – the longest case I've ever had. It was

an arbitration from start to finish, with a couple of different judicial reviews and appeals.

The second factor that most people perceive is that it's more cost-effective. That is typically true, as well. Just by nature of the fact that it's expedited is most likely going to be cheaper. Clients oftentimes don't account for some of the costs that are inherent in arbitration. One is the arbitrator's fee, which is typically an hourly fee or a daily fee, which can run several thousand dollars a day, that you would not otherwise pay to a judge. Then you also have the fees charged by the ADR [alternative dispute resolution] service provider. AAA [American Arbitration Association], for instance, charges a sliding scale of fees based on the amount in dispute. If your dispute is worth millions of dollars, AAA is going to charge you tens of thousands of dollars just to administer that claim. Those are other expenses that are not going to be otherwise incurred.

So, it is usually quicker and it's usually cheaper, but not always the case.

One factor that is undersold and underappreciated in arbitration is the confidential nature of the proceedings. That is inherent in arbitration. If you were in a court case, obviously, the claim and everybody's dirty laundry is out there as a matter of public record. Not so in arbitration – or at least

it's not supposed to be. It is confidential by nature, and that is an underappreciated aspect of reasons to arbitrate.

**MARC MAYO:** I want to emphasize that point, especially for a public company. The advantage of arbitration is it's private. Hopefully, you have confidential arbitration in your contract language, but the confidentiality is important; because, otherwise, the press picks up on every time you file a motion sometimes in a case they take an interest in, and you end up trying to avoid trying the case in the press. Arbitration does add that advantage.

The shortness of arbitration, which everyone thought was the case years ago, has slowly diminished over time. We've got an arbitration in Hong Kong that's going to last a couple of years, and it may still be better than being in court in Shanghai. The nature of the beast has gotten longer, and whether you can build in protections in your contract language that there will be a limited number of depositions or whether you get into all that detail with a client or prefer to just get the deal done and deal with that later, is something we all have to deal with.

Also, the disadvantage of arbitration, I do want to mention, is that arbitrators can be arbitrary. [LAUGHTER]

**BARD BROCKMAN:** That's an area I will talk about next.

**MARC MAYO:** You can't appeal them when they're wrong.

**BARD BROCKMAN:** Right. Well, I'll hold off on that. But there are a couple other advantage points – and there are many – that I want to highlight is you have as a client and as a drafter of an arbitration provision, the opportunity to limit the scope of remedies that can be awarded. It has become much more common in commercial contracts now to specifically provide that the arbitrator (or arbitrators, if you have a panel) shall not have the authority to award any consequential

damages or punitive damages. You don't have that opportunity in shaping the remedies that a court can provide, although I suppose you can build that into your contract – that if you provide that on the front end as to the scope of the arbitrator's authority, that is very binding, and it really hamstrings the arbitrator, as well.

Lastly – and this goes to Marc's point – there is an extremely limited scope of judicial review. Most folks refer to this as "arbitration with no right of appeal." There's really no appeal in arbitration; it is the matter of whether a court can vacate the arbitration award. The Federal Arbitration Act – and each state has its own arbitration code – but all of them provide for a limited set of circumstances in which a court can vacate an arbitration award. Basically, a vacation can occur if there is evident partiality or corruption by the arbitrator, if there's been some misconduct by the arbitrator, or if the arbitrator has exceeded his or her powers. Now, that last point has been interpreted differently by different states. Some view it much more liberally, and most states relatively conservatively. Those that give an expansive reading basically say if the arbitrator got it wrong, then he or she has exceeded his powers. The case that I mentioned that went 11 years fell into that category, which is why it had its own lifecycle in the court system.

In most instances and most states that's an extremely difficult level of review. It's a real advantage if you *win* the case. We will return to this as a disadvantage if you lose the case, obviously. [LAUGHTER]

I think that's what Marc was doing.

**ERIN RODGERS SCHMIDT:** From a #MeToo perspective, the confidentiality of arbitrations is an interesting question. There was a lot of tension and a lot of efforts by different states and other localities to address whether the use of binding arbitration with employees, or mandatory arbitration to address claims of harassment was really the right way to be going about disputes in the employment context, because it can lend itself to an environment in which someone can be accused of misconduct multiple times, maybe in different companies. In a confidential arbitration proceeding, particularly if it's then coupled with a non-disclosure agreement attached to a settlement, what you ended up with, and what was causing such consternation in the press and in how people responded to it, was when you finally lifted back the peel of the onion, you found that there were certain people who had been accused of similar misconduct multiple times, and it just didn't get caught because of the confidentiality in those provisions.

It's not a reason not to do it, and it's still something to consider from the perspective of people who bring claims of harassment. Often, they don't want the public scrutiny that comes from being a whistleblower or didn't want the conduct in the first place and may not actually want a lot of attention to bringing the claims. There's still room for thinking about confidentiality, but there have been a number of state efforts to try to curtail it in the context of harassment matters.

**KAREN TODD:** Great. Alan, did you want to add something?

**ALAN HOFFMAN:** Yes. When the arbitration clause in contracts or under, *is* under attack in a number of different perspectives, as Chair of a law firm, I watch what happens

with claims against law firms, and which is going to lead to law that will affect all of our clients. Most law firms, in their partnership agreement or in any dispute with employees or partners, have a mandatory arbitration provision. And in the #MeToo movement against some of our competitor firms, there have been claims filed. A particular law firm, the Sanford Heisler firm, is going around the country now, challenging these arbitration clauses in law firm partner contracts – which is going to lead the law as to how it may impact arbitration clauses with our clients. It's something to keep an eye on – the #MeToo movement and arbitration clauses – as we move forward, and how enforceable they're going to be as we go forward.

**KAREN TODD:** Thanks. Bard, can you give us the potential negatives of arbitration?

**BARD BROCKMAN:** Circling back, to pick up where I left off before, which is the limited right of judicial review, is generally a good function of the arbitration process. But, if you lose that case, you'd really rather have that right of appeal which you also lose. In a litigation context, in most cases, the standard of appellate review is going to be a *de novo* review, which means that the appellate court's going to take a fresh look at the case to see if the district court got it right. Essentially, as long as you've preserved all your arguments and evidence below, you can get a fresh look at the case.

That really doesn't exist in arbitration, and that's okay, as long as your eyes are open with regard to that, going into the drafting of the arbitration provision. Everybody should be cognizant of the fact that the arbitration is likely to be your one shot and, if the arbitrator gets it wrong, that's going to be tough luck for the losing side. There's not much you can do about that.

The other negative perception on arbitration is that arbitrators typically find a way to do what?

**[AUDIENCE]:** Split the baby.

> "FIS likely has the broadest solution set of any Fintech company, with more than 450 software solutions for banks, capital markets firms and merchants, but any subset of these solutions provided by technology companies would be considered Fintech."
>
> – *Marc Mayo*

**BARD BROCKMAN:** Right. There are commentators who have written recently, who have expressed the opinion that with increased arbitrator training, that that is going by the wayside. I don't see that happening. The arbitrators, despite best intentions and, perhaps increased training, continue to try to give the claimants something, and continue to try to split the baby. Likewise, if you're drafting an arbitration provision, it's impossible to predict what the dispute is going to be about, but you should take that into consideration as a likely outcome.

We mentioned briefly that the lack of any summary disposition, you may provide in your arbitration provision that the arbitrator can rule on motions to dismiss, and the arbitrator can rule on summary judgment motions, but they are rarely ever granted. Why?

**ALAN HOFFMAN:** The arbitrator wants to be paid.

**BARD BROCKMAN:** The arbitrator wants and needs to be paid. Exactly, Alan. [LAUGHTER]

There is a self-interest in the arbitrator to *not* grant summary disposition of any case.

Now, I'm not quite as skeptical as Alan is. I think some of that is a function of the arbitrators being trained to allow the claimants to have their day in court, or, in this case, arbitration. But I do agree with you that that is perhaps an unconscious bias, that they want to be paid. It's almost impossible to knock out some or all of the case prior to the hearing.

There could be a potential negative, and that is, you may be providing for a more level playing field in arbitration than you would otherwise enjoy in court. FIS is a big corporation and, depending on whom you are arbitrating with on the other side, if you are involved in an expedited proceeding that's going to be quickly resolved with limited discovery, then you lose the opportunity to out-spend your opponent or outlast your opponent in litigation. That's a strategic decision that oftentimes is available to you. I'm not saying that as an outside counsel who litigates, but because I arbitrate almost as much, but you lose the ability to out-spend and outlast your opponent if they have fewer resources.

**MARC MAYO:** Bard, you were talking to me the other day about developing law on being able to stay out of class actions by having arbitration class action waiver clauses. Where's that?

**BARD BROCKMAN:** Right. This is a very burgeoning area of the law, and Marc's question about the enforceability of class action waivers in arbitration provisions, they are increasingly more common. In fact, if you sign a contract for your cell phone provider, or maybe even for your cable provider or what have you, there is likely to be an arbitration provision that provides for a class action waiver, that you may not sue that provider on a class action basis, and then going forward, if you arbitrate, it is your claim alone and you cannot do it on a representational basis.

Those types of provisions have been increasingly enforced at the Supreme Court level in many cases since about 2011. They are very hotly contested cases, almost always 5-4 decisions, with the conservative block of the Supreme Court taking the majority

view on this, and going out of its way to enforce class action arbitration waivers in arbitration provisions. The plaintiffs' bar is contesting this very vigorously, and I expect that they may very well try to amend the Federal Arbitration Act in order to invalidate class action waivers. This is a very hot issue. There have been a half a dozen court cases that have touched on this in one way or the other, and I don't expect the plaintiffs' bar to give up on this anytime soon.

**KAREN TODD:** Alright. Let's talk about some preventative measures. What are some proactive steps that companies can take right now to avoid #MeToo-type litigation and also bias in the workplace?

**ERIN RODGERS SCHMIDT:** We do a lot of work in this area to help companies think about these types of steps. Part of it comes from knowing their culture and actually just taking that first half-step to think about the culture you have and the culture you might want or need. Then there are a number of things that you can do; you can look at your policies and make sure your policies really espouse not just what keeps you from violating the law, but is it setting out some cultural expectations? Then there's some more obvious ones, like training. There's a lot of evolving thinking around training and what it means to have training that is effective at prevention and not just checking the box. I won't ask for audience participation, but you've all taken training, I'm sure, that is online, that is a little bit like you click through and you get it done. There's a lot of work being done to try to make sure training is more effective. In a company with 55,000 employees it is almost impossible to have live training for everything and there can be advantages to having online training that can set a corporate-wide standard and ensure you've communicated to everybody a similar message.

Then you can go beyond that, too. Policies and training are the minimum for how you set the culture. There's also how you live and exercise your values, like Marc

was saying, how leaders behave, how you hold people accountable for their conduct towards one another. We did a pretty big investigation with a media organization, and it was fascinating. I had 35 different employee interviews with people who had interpreted the company's culture, not through the policy statements, not through what the president of a division said in all-employee meetings, but in what they knew (or believed) had happened and what behavior was allowed to be okay.

One of the things that's really changing in how companies respond to harassment-type situations is being more accountable and transparent about what has happened. Not necessarily sharing the details of what someone has reported but trying to find a way to make sure that you've clearly communicated to the people who need to know, what happened and then what happened as a result of it. That is a way of ensuring that you're holding people accountable, in case there *is* misconduct that's reported that actually was something that was concerning.

The last thing is where you are assessing your organization and thinking about things you can do and setting goals from the perspective of diversity and inclusion and thinking about how you prevent harassment. A lot of times – and we may talk about some unconscious bias issues later – setting goals and targets helps to drive improvements. We are probably all familiar with some of the efforts to increase the participation of women or minorities on boards or at executive levels of the organization. There's some really interesting information out there in some recent McKinsey studies on women in the workplace, about how there's a broken first rung to get to management. That suggests the need to think not just about the top of your organizations, but about the bottom, entry-level positions, too. Who is making those decisions about hiring and promotion? Are they empowered with the right objective criteria that reflects your values about who should be promoted? Does it align to goals that you have for making your company more diverse?

**BARD BROCKMAN:** Just an observation, I read in *The New York Times* an article, probably within the last year or two, that one of the consequences of the #MeToo movement was that there are some male managers who are deliberately not assigning or putting female subordinates on their team, so they can avoid any prospect of being accused in the #MeToo movement. That seems to me, while highly inappropriate, an avoidance that they don't have to change their own behavior. It also seems to me that it probably is a ripe area for plaintiffs' counsel in employment discrimination cases to say, "You didn't even give me the first opportunity to be on that bottom rung, because of your wanting to avoid any potential accusation down the road."

**MARC MAYO:** That would not be unconscious bias.

**ERIN RODGERS SCHMIDT:** No, and it arguably moves you into having risk under Title VII, because you're not shooting yourself in the left foot; you're shooting yourself in the right foot, because you've moved to making a gender or other protected class-based decision about whom you're going to spend time with on a professional basis, all based on a hypothetical risk.

Conversations about workplace conduct can get tricky. It's not that #MeToo wasn't a shift, but some of this is really pretty basic. It's not talking about inappropriate conduct or content when you're on a work meeting; it's having the same conversation over a networking, mentoring dinner with your CEO or your GC that you would have in the office and making sure that you're aware of what the lines are.

I'm always a little bit surprised when people say that the lines have moved that much. I had two grandfathers that I revered and wouldn't *think* of having treated minorities or women in the way that some men, or some women, are accused of treating other people that they worked with. I'm not sure that it is as complicated, sometimes, as people make it.

At the same time, those are real issues. Lean In conducted the survey that *The New York Times* reported on, and it really presents a challenge. If it is a challenge in your own workplace, I would encourage you to think about it, and get ahead of it, because that can actually mean that people are struggling to figure out how they operate in your organization.

I talked about some of the surveys relating to concerns employees have about what they observe in the workplace, even if the employees didn't define the conduct as harassment or report it as harassment. The numbers are remarkably higher than you'd think. Some recent surveys report 20-30% of employees experience or witness harassing or inappropriate conduct in the workplace. I sometimes think about it like your computer systems. If you had data telling you that 20 to 30% of your computers wouldn't turn on every day that your employees came to work, you'd have to think about that and do something meaningful. Marc previously alluded to the reputational risks for Fintech with new data privacy standards and how that's such an imperative. With the #MeToo movement, it is the same imperative with companies

on the front page for these issues and stock price drops and litigation. That reputational risk is still there, and it's just a question of do you have a handle on the culture of your organization and what you're doing to be thoughtful about prevention.

**KAREN TODD:** Alan, do you want to add your perspective and also talk a little bit about documentation with respect to litigation?

**ALAN HOFFMAN:** In litigation, documents tell a huge story. If you don't know your documents backwards and forwards, what smoking guns are within the documents or smoking guns that you can point at the other side, that is hugely important. When we're representing a company in a litigation, the first thing you're going to do is access all of the documents that are relevant. You're going to make sure you study those documents, in addition to interviewing the employees that are involved, in order to advise your client on the risks or rewards of moving forward. Because the documents usually tell the story, and employees, then, are going to explain the documents. If you've got a smoking gun document that hurts your side, you need to be able to go to your client and say, "Here are the risks we're going to face going forward; here's the expense we're going to have in moving forward with the litigation; here's the business disruption costs to the company; in order to present all of the parameters of making a business decision, if you're the company, as to should we move forward with this litigation, should we be aggressive with it, should we be defensive? If I've got 23,000 contracts, and this is a dispute that involves a clause that may roll over into all of those contracts, is that the kind of dispute that one would call, a company matter that therefore now you've got to really litigate that matter and win it, because of the impact on the other 23,000 contracts? Or is that a matter that you take to arbitration, assuming that you want to make sure that you're 22,999 other contracts don't learn about the results of what took place with respect to this.

**KAREN TODD:** Are there some proactive steps that a business could take to make sure that it knows enough about a commercial relationship before the dispute arises?

**ALAN HOFFMAN:** Yes. A number of times with disputes, you have employees, officers, those involved, who may have been with the company at some prior time and are now gone, and therefore you're at a disadvantage. You need to make sure that your current employees, officers, those involved, management, memorialize, as much as possible, what went into decision making with respect to contracts or business decisions in that connection.

You also need to make sure that you're talking to your customers and, if you are a business, your clients and contacts, in order to get *their* understanding of what's at stake. Those are the kinds of things that one would do.

**KAREN TODD:** Great. Erin, in terms of the #MeToo challenge in organizations, what about global footprint? How does that factor in?

**ERIN RODGERS SCHMIDT:** It adds a wrinkle! Marc, you said in your remarks, global is different. That's also true here. We've worked with a couple of organizations that are trying to figure out how to imprint a corporate global culture about

what is expected in terms of inclusion, diversity, safety, having a respectful workplace, and trying to overlay that with some cross-cultural sensitivities. One that's not really about harassment but comes up a lot in global organizations is, what time is the call? Is the call at 8:00 a.m. East Coast time? Which means you're asking colleagues to be up late in Asia. Or is it 8:00 a.m. in Asia and you're asking folks here to be off schedule? It sounds like a little example, but it can actually cause a lot of friction and can end up having your global colleagues feel undervalued or imposed upon, because they're the ones always taking that late time slot. That's a basic example, but it can get a lot more complicated. Things like how you greet your business colleagues. Is it a kiss? Is it two kisses? Is it a handshake? Does that change based on how long you've known someone? And then things like joking. In an American conversation, it might be perfectly natural to joke, but it might be a lot different and might be perceived very differently in another culture. I don't even mean jokes that are borderline as in the Morgan, Lewis training framework,"green light, yellow light, red light." [LAUGHTER]

I mean how you engage with people. We see good companies are trying at least to be thoughtful about finding a way to set some cultural expectations across the company, even if that company spans the globe.

The other challenge to anchor this is what constitutes legal harassment is very different, depending on where you're operating, and the culture and what is perceived as harassment is also very different. If there's not a law against it, and you're trying to lift the company's culture, how do you make sure that folks are not just complying with the bare minimum, but also understanding what's at stake and your company's expectations.

**KAREN TODD:** Thank you. Bard, can you touch on some factors that clients should consider in drafting an arbitration agreement?

**BARD BROCKMAN:** Karen, that's probably the subject of a half-day seminar presentation. [LAUGHTER]

Let me touch on a few, and if there are others that those in the audience would like to include, I'd love to hear those, as well.

The arbitration provision always starts with the scope of the issues to be arbitrated. The most common type of provision is broad, and will probably say something to the effect of all disputes arising under this contract shall be arbitrated, but it can be broader. It can be all disputes arising from the business relationship between the parties.

When it comes to the drafting of the arbitration provision, you have a lot of latitude to draft it however you want, and it's likely going to be enforceable, with a few exceptions. You could put as many bells and whistles on it as you want. There is a danger of making it overly complicated, and I'll touch on that in just a second. You have a lot of latitude in how you want to draft it as it affects the nature of the proceedings, how quickly the proceedings are to take place, the scope of discovery, etc.

One of the things that I see more often now is arbitration provisions which include mandatory negotiations prior to the filing of an arbitration demand, particularly between sophisticated business clients. We'll say when there's a dispute, before anybody may file an arbitration demand, that the parties must negotiate in good faith. Perhaps leaders of the business units will be required to meet with each other to try to resolve this; they could even be required to mediate. You can draft your arbitration provision to obviously provide for particular service providers, JAMS [Judicial Arbitration & Mediation Services], AAA. If you don't provide for how the arbitrator is to be selected – that process and other details – then it's usually best to select an arbitration service provider, because they have a set of rules that will apply.

On that score, you can designate a certain set of rules. If you're going with AAA, they have a half a dozen set of rules that you can choose from. You would most likely choose the commercial rules that are then in effect, but there are variations on that. The commercial rules have a subset called the "expedited commercial rules," that you might want to consider, depending on the nature of the relationship.

The expedited commercial rules are essentially arbitration or arbitration by ambush. They provide that the arbitration shall occur within 30 days after the arbitrator is appointed. There shall be *no* discovery, and there will be an exchange of exhibits only two days before the arbitration is to take place.

Obviously, there are arbitrator qualifications. I see this a lot. This is one area that you can make overly complicated. You might see something that says, "We want a CPA who has experience in data privacy, but who also must be fluent in Mandarin." That person may not exist or may be very difficult to find.

Limits on discovery; the ability to provide for equitable relief, which is presumed, but you may also want the ability to go into court to seek a TRO, even if you have an arbitration provision. You may want parameters on the arbitration hearing – it shall last no longer than five days, or it shall take place within 90 days of the arbitration demand, or there

shall be no discovery, or there shall only be four depositions. You have a great deal of latitude to draft it however you want.

We already talked about limiting the arbitrator's authority to award consequential or punitive damages, which is important.

The last thing that I want to highlight is you may want to provide that the arbitrator *must* provide a reasoned award, which is a detailed explanation of his or her findings to support the award. If you do not provide that the arbitrator shall provide a reasoned award, the arbitrator may issue a one-line award: "I find for the claimant in the amount of $10 million," period. If you thought it was hard to overturn an arbitration award under the limited parameters under state code and the Federal Arbitration Act even with a reasoned award, it would be darned near impossible to do it without a reasoned award.

**ALAN HOFFMAN:** What about "loser pays"? I've been involved in representing four accounting firms, in which they have, in their fee agreement with clients, "loser pays," which have been upheld.

**BARD BROCKMAN:** That is obviously a variation on the American Rule. It is certainly something that you can provide for in your arbitration provision. It would be enforceable except in a couple different circumstances. If you're involved in a consumer dispute and you have a consumer who is up against a party with a lot more resources, then the courts will be reluctant to enforce a "loser pays" provision, because it will be viewed as unconscionable. Then it may also be unenforceable in the employment contracts, as well. Unless you put some real limits on it. In the employment context and in the consumer context, it's much more common to see some kind of a fee splitting, or even the employer, in the employment context, paying for all of the costs of arbitration.

**ALAN HOFFMAN:** Yes, I don't think it's enforceable in the employment context. This is basically malpractice cases filed against Big Four accounting firms in which they have in there, "loser pays."

The one thing about arbitration that I would really stress is the research that needs to be done on the arbitrators. I can give you two war stories of what can occur if that research isn't complete.

In one arbitration, we had, we thought the research was complete; one side chooses one arbitrator and the other side chooses the other arbitrator, and the two of them pick a neutral. The neutral was chosen and did *not* make all the disclosures that were necessary. This person was a former city officer in the city of Philadelphia, and therefore had a great reputation, and was a member of a law firm. Prior, but never disclosed, that he had once represented my client and been fired by my client and went to another law firm. Our client had changed hands a number of different times and, therefore, those that were in charge at that time weren't the ones that fired him. It took one of the other arbitrators to come forward and say, "This particular person is biased." Then it took us years in which to get with AAA and get that person removed and move forward.

In representing your client, it is *really* important to do the research concerning the arbitrators.

Also, there are many arbitration provisions in which it's we choose ours, you choose yours. Another one that I was involved in, one of the "you choose yours," what they chose was a litigator from a very prominent law firm as their arbitrator. That litigator basically took the place of the litigator who was representing the client, and therefore, every time we had a witness on the stand, the opposing lawyer would cross-examine that witness. Then, all of a sudden, you had the arbitrator now coming forward, doing the same thing.

Arbitration can be very beneficial, particularly if it is for all of the different reasons that Bard said, but it's *really* important to make sure you know your arbitrators.

**KAREN TODD:** Thank you. We've given everybody a lot to think about with regard to this, and we're going to bring the next panel up. Thank you. [APPLAUSE]

Our second panel is on intellectual property, patents, and their effects on mergers & acquisitions. Our Distinguished Panelists for Panel 2 are John Flaim, from Baker & McKenzie; Jeffrey Berkowitz, from Finnegan, Henderson, Farabow, Garrett & Dunner; and Robert Rachofsky, from Willkie Farr & Gallagher.

Jeff, can you tell us about the current challenges in the intellectual property area?

**JEFFREY BERKOWITZ:** Currently, there are a couple of different areas that we're going to touch on, but one of the most challenging areas, and certainly a challenging one for the financial services field in particular, is patent eligibility. It is what constitutes subject matter that can be patented. A number of years ago now, the Supreme Court issued a decision in the field. It's famously known by the name *Alice*, which was, of course, one of the parties. It set forth, if you will, a sea change in many ways, in terms of the consideration for patent eligibility.

What does this mean in the financial services area? One of the important things is, of course, financial services companies, not just an FIS kind of company, but more broadly in the financial services area. These are companies that are all looking at ways to protect their own innovations. This particular decision from the Supreme Court heightened the scrutiny for consideration of the subject matter of eligibility. It made it more difficult for companies to get patents in the financial services area. You saw a more substantial review in the Patent Office over patent applications that are directed to those innovations.

Likewise, the same decision made it more helpful, or strengthened the ability for the financial services companies and others to challenge the validity of patents. That's one of the most interesting areas right now in the patent area, which is going to court and challenging the eligibility of a patent.

What we saw, actually, over the course of maybe about two years, was an increase in the early filing of motions to dismiss on this eligibility issue. You saw an increase in judges all over the country, with maybe one exception in east Texas, but judges in most areas were really invalidating patents very quickly. That actually caught scrutiny, as well.

Then you had the federal circuit that handles all appeals in the patent area. Look a little bit more closely and raise the bar, in a sense, as to one aspect of the eligibility test, and so now you're seeing the pendulum go slightly the other way and it's more difficult to get motions to dismiss granted early on in these cases.

Again, it's not limited to the financial services area, but the financial services area certainly benefitted from this *Alice* case in the litigation context.

Now, I want to talk about one other context, and then I'll pass it over here to John. There is one other context that also increased since about 2012, which was the challenge of eligibility, as well as validity, of patents in the Patent Office. Congress decided that we needed yet another way to challenge the validity of patents. They came up with a more rigorous approach, mainly in terms of the timing, that would benefit companies to go to the Patent Office once they got sued and ask the Patent Office to review the patent again for its validity or eligibility. The financial services companies were a very big factor in the lobbying related to this particular change in the law originally, which actually started before 2012. They got a special provision in the law for the consideration of what was called "covered business method patents." These are patents that are really directed to financial services applications.

Now, as with anything else in the law, you saw companies tried to stretch what was considered to be covered business methods,

and then you saw the courts, over time, actually reign that in.

This is actually an area that has been very successful for financial services companies and FIS, in particular. For example, when this law was being considered, I mentioned the financial services companies that took part in the lobbying effort, and there was one company in particular at the time – DataTreasury, which had just gotten a victory – they had made over $300 million in licensing their patent, and there were a lot of big banks that ended up paying them a lot of money in connection with this.

FIS actually stepped in, in connection with related lawsuits that were filed against FIS customers, and was successful at the Patent Office in knocking out the validity of this patent.

Now, I want to close on one point with this, the legislative history specifically talked about the DataTreasury patents as being the Scrooge of the industry, essentially. After we filed the petitions for the CBM [covered business method] review, the DataTreasury attorneys were trying to convince the Patent Office that *no*, their patents weren't these covered business methods. The statute was *specifically* designed for those patents; yet, they still had the gall to go to the Patent Office and say, "Oh, no, they're not – these are not those kinds of patents!"

John, did you have anything else to say on that?

> "...you must be at the table when the strategy is taking hold, but you must also have the judgment as to the best way, and often the best time, to navigate the constant tension between purely legal responses and getting to business goals in a legally and ethically responsible manner." – *Marc Mayo*

**JOHN FLAIM:** In the United States, since *Alice* was enacted and the Patent Office became active in considering invalidity challenges by competitors to issued patents, we've seen that patent slaying that Marc referred to with many Fintech patents being invalidated. Now, the pendulum really has swung a bit, and it's quite remarkable, the number of new infringement actions that we've seen, particularly over the past 12 months. It seems like we had a bit of a pause in the action, but there is this resurgence.

To further answer the question on unique challenges, Karen, I would say, on a global basis, we are a bit spoiled in the U.S. We can walk down the street to federal district court or one of the state courts, and get relief for patent infringement, copyright infringement or other types of IP infringement, quite readily. Patent owners have a very good win rate in the U.S.; the success rate is better than 50% in many courts. In fact, you see many non-U.S. companies taking their IP disputes to the U.S. For example, in the semiconductor area in many Asian countries, companies are bringing suits against one another in the U.S. Why? Because they get a fair shake; the courts are quite accustomed to hearing these actions, and have no issue with enforcing the law.

That, however, is in stark contrast to many other jurisdictions. Now, to be clear, there are countries like Germany, for example, who also are very progressive and assert IP rights, but there are many other jurisdictions where there are laws on the books that have all the patent and IP laws, but the courts simply don't enforce those laws. Obviously, that's a real problem when you see someone violating your intellectual property in that jurisdiction.

There are a number of ways to deal with that. Obviously, if it's a global player, you can file suit in the U.S.; and typically, if the U.S. is taken away as a market, a global competitor won't continue with the infringing product. You have regional enforcement avenues. If something's happening in Asia, Singapore is a good place; they don't cane for infringement of IP rights, but it's still a good place to bring a suit. The problem is when things are limited to a single jurisdiction with no reputation for enforcement.

Now, things are changing and continue to evolve. I'll give the example of China, where there are Chinese entities filing a large number of patent applications in China. There are Chinese entities who deem themselves innovators within China. When they want to assert against another Chinese company, they obviously must go to a Chinese court. The Chinese courts have, slowly but surely, become better about enforcing IP rights due to domestic pressures in protecting local innovation.

Frankly, that's what happened in the U.S. U.S. innovation was why the U.S. patent laws were put into effect and then enforced. Until and unless one has a domestic industry, you really don't see that robust enforcement in a given jurisdiction.

I raise those points, particularly here, because I've had the pleasure now of working for FIS for 20 years. I started working for Alltel Information Systems way back when. And I've witnessed the growth throughout the U.S., but now also see the global growth. I would just underscore that for a global company, and particularly like FIS, this is becoming more and more of an everyday challenge of how to enforce your intellectual property on a global basis. That will definitively increase over time as FIS becomes even more global.

**KAREN TODD:** Marc, do you want to comment a little bit on the patent trolls?

**MARC MAYO:** DataTreasury was one large patent troll where we challenged their patents in a CBM petition and they were declared unpatentable and they appealed all the way to the Supreme Court, and their patents are now gone. The CBM petition that Jeff talked about has been a great tool for us to re-challenge patents brought by patent trolls or competitors.

Interestingly, that law expires in 2020. Unless Congress gets its act in gear and renews that law, we'll be back to the same footing as everyone else is, to try to defend against patent trolls and whatnot. It's a constant battle.

**ROBERT RACHOFSKY:** What's the prospect for Congress doing that? Do you have a sense at this point?

**MARC MAYO:** We were lobbying Congress last week to do that, and right now, they seem rather preoccupied. [LAUGHTER]

**ROBERT RACHOFSKY:** Why, what's happening? [LAUGHTER]

**MARC MAYO:** Should they get back to work on legislative matters, hopefully, they'll take it seriously and reup the law for a period of time, because it's been a very good avenue for us to be able to defend our clients, both through indemnity of the clients using our software, and in direct actions against us. Again, credit to Debbie Segers and her team, and our outside counsel, for being able to be so successful in defeating those actions.

**JEFFREY BERKOWITZ:** I just want to emphasize one point on this, which is, this is a particular way of challenging the validity of the patents in the Patent Office, and

there is no other way of challenging the validity of these patents in the Patent Office if we *don't* have this particular provision and petition process. That's number one.

Number two, there's an automatic stay of lawsuits once a petition is granted, as well. It's very valuable in terms of cost savings, potentially, on the litigation side.

Additionally, the process at the Patent Office for reviewing these patents is expedited, in the sense that it's a set time from the institution of 18 months. That's also cost savings.

There's a variety of reasons why it is really beneficial in the financial services area to continue to have this kind of a process. There is nothing else; otherwise, you end up going back to challenging the patents in the district court. As I already described, that was getting easier in one sense, and now it's getting harder at the same time. It's no longer going to be so easy to challenge the validity of business methods or any other patent, for that matter, in the Patent Office under this "eligibility" statute.

**ROBERT RACHOFSKY:** As an M&A lawyer, this has simplified the due diligence job that we do, as well. Ten years ago, we saw financial services companies patenting all kinds of crazy things as covered business methods, and then bringing claims against what I would consider to be perfectly law-abiding target companies. At that time, you didn't know how to evaluate those claims. They could be big. Every time somebody pressed a button, that could be a cost. It's taken a lot of the sweat off people's brows in worrying about those issues on the due diligence side.

**JEFFREY BERKOWITZ:** Yes, that's actually another good point, in that it's a narrower issue, and it can be reviewed and considered, number one. Perhaps more importantly to that point, the patents that were actually being examined and considered under the statute, the covered business

methods review, is that statistically the likelihood of being invalidated by the Patent Office was quite high. You could evaluate or value those kinds of challenges.

**MARC MAYO:** Most everybody knows that patent litigation is very expensive. It's very document-intensive; it goes back to prior art for many years. That's how patent trolls make their money, because they know not everyone can fight with them in court for years. Their modus operandi is to first send a royalty letter to many credit unions or small community banks, saying, "You've been infringing our patent, but here is the good news: you can license it for only $88,000 a year." What we decided after a point in time was that it's one of those places, precedentially, if we got the reputation of winning those cases, that we would get a little less litigation, or when someone sued us and found out we were moving to stay the case and taking them back to the Patent Office or take certain actions, certain cases have fallen away because they don't want to risk having their patents deemed unpatentable. We've gotten some very favorable rulings and settlements. One recently where, instead of appealing a favorable lower court decision we'd gotten, they said something like: How about if we just agree to give you and all your clients a license for free, and we'll move on. It's tough to say no to that.

Sometimes you have to pick your times and places to set some precedent, and this is one area we've chosen to try to do some of that.

**JOHN FLAIM:** I would say that FIS's reputation has been set. FIS is certainly recognized as someone who is not just going to lay down because a lawsuit is filed and someone argues that the complexity and expense associated with the suit justify a quick and small settlement payment. I know that companies think twice about FIS, based on the record of invalidating a number of patents, including the DataTreasury patents (which, by the way, were publicly said to have generated over $500 million in royalties). That reputation is definitely locked in.

**JEFFREY BERKOWITZ:** There's a related issue, Bard mentioned before, about review in the context of the arbitration clauses being a *de novo* review. While there are aspects of these challenges from the Patent Office that get reviewed by the Court of Appeals for the Federal Circuit, on a *de novo* review, for the most part, the review from these challenges that go to the Patent Office and the Patent, Trademark & Appeal Board get reviewed on a substantial evidence standard.

We had this one case, and the critical piece in this argument in the appeal, was just to be able to point to support in an expert report that supported the board's position on one statement in their finding.

**KAREN TODD:** Thanks. Bob, lots of tech companies do mergers these days. What are some other issues that they need to be aware of in terms of their due diligence before the merger?

**ROBERT RACHOFSKY:** It's a good question, and there are plenty of them. In fact, I have some notes which go on for a couple of pages – I'll try not to go that long. It really depends on what you're trying to get out of the merger. If it's a deal where the people are important, you're going to focus on issues around the people. If it's a deal where you're just buying the technology and they're going to shut down the operations, you've got to focus on the diligence around the technology. Quite often, you have to deal with both. From the people standpoint, the questions

relate to whether the people are coming or going or might do either. We will want to see what sorts of non-compete agreements or confidentiality agreements are in place.

**MARC MAYO:** Or invention assignment agreements.

**ROBERT RACHOFSKY:** On the technology side, yes. Just on the people side, we'll also look at how much money founders can walk away with. Sometimes we get involved in structuring deals and thinking about whether we can get folks to roll their equity, and on what terms; or whether an earn-out makes sense in a particular deal, to try to keep people motivated.

As Marc said, when you get to the technology side, invention assignment agreements are one of the key things that we look for in documenting a deal and, in fact, in some smaller deals, we've found that we've had to make them conditions to signing or conditions to closing. We sometimes face the whole issue of whether key people have signed a present assignment of inventions versus a future assignment. Probably you all know what that refers to, but sometimes companies have forms that say, "I *will* assign any ideas that I come up with to the company," and that sort of language hasn't always resulted in that invention being deemed *owned* by the company. You have to go through and document that into a present assignment.

You have the assignment side of it; also, particularly in a business like yours, Marc, you have to worry about open-source software. That leads to a whole cost-benefit analysis about whether or not you should have one or more source code scans done, in doing your acquisition.

There is a variety of factors that go into that decision. Are you making a minority investment? That's on one end of the spectrum. Are you just buying a piece of software or buying a company that just has one product? Those are on the other end of the spectrum. Are you buying a sophisticated company that has good processes and procedures in place, or that perhaps does source code scans *itself* as a matter of practice using third parties? Some companies have them on retainer. Or are you buying a riskier platform? These are the types of things that our clients have to weigh and that we have to help them weigh, in terms of the cost benefit.

> "...we must exercise great efforts to go beyond legal requirements to protect the confidential information of our 20,000 client banks and their customers, as well as the customers of more than a million merchant locations we serve."
>
> – *Marc Mayo*

**MARC MAYO:** With data privacy and cyber security being so important to a company like us, as we've talked about, not only doing source code scans, but vulnerability scans as part of diligence, and requiring the seller to fix and patch where appropriate has been important to us.

**ROBERT RACHOFSKY:** Absolutely. There are red flags, too. If someone has had a problem, or multiple problems and they assure you that it's all fixed, that kind of red flag can lead you to be very focused on cyber. Another thing that can lead you to be very focused on cyber is a new development that we're seeing in contract documentation for M&A around cyber. As you all know, a key provision in an M&A agreement is the "material adverse change" definition. If you have a MAC [material adverse change] at the target, the buyer doesn't have to close. There's a whole art to drafting the MAC clause, and usually, you will see about three-quarters of a page defining what a material adverse change is and, more importantly, *isn't*, with a long list of exclusions from the things that can ever be considered to result in a MAC.

We've seen, on a couple of occasions recently, people trying to slip "cyber-attack" into the list of things that does not constitute a MAC, only they do it in a sneaky way. Typically, there's a list of exclusions like your *force majeure* exclusions – the effects of war, riot, civil disorder, terrorism – then somebody will throw in "cyber-attack" right there. [LAUGHTER]

All of a sudden, you are sitting there, scratching your head and saying, "Wait a minute! I get 'war' and all this stuff, but 'cyber-attack'? [LAUGHTER]

**MARC MAYO:** It happens every day!

**ROBERT RACHOFSKY:** That could be one hacker coming at the company. You end up having these fraught conversations where you say, "Well, what are you trying to get away with? Cyber-attacks, no one can control them; it's like war!" [LAUGHTER]

On the buy side, of course, you want to say, "Is that *my* risk or *your* risk? You guys are supposed to have confidence in your defenses and in your ability to operate through an attack, more or less."

That's been an interesting discussion lately.

**MARC MAYO:** At least in M&A, they're more subtle. The big banks and the bond deals have taken to putting in a cyber security warranty about a page long that nobody in the world could possibly comply with.

**ROBERT RACHOFSKY:** Right.

**MARC MAYO:** We've taken to just crossing it out. [LAUGHTER]

Which has worked, so far. [LAUGHTER]

**ROBERT RACHOFSKY:** Yes, maybe it works forever, but that's in a lot of forms.

**JEFFREY BERKOWITZ:** Some things that you mentioned reminded me of the in-licensing of software as a vendor company also has in-licensed software that they then incorporate into products and there's this downstream use of that product that can result in additional liability for the indemnitor in those kinds of situations. We're seeing that quite a bit more, in that the originator of the particular software is looking at it and saying, "I can't possibly indemnify such a big company, or any company, for that matter," in some instances. It becomes this downstream of who's going to be responsible when you end up putting a product out and it ends up going to thousands of customers.

**KAREN TODD:** Okay. Let's talk about the unique challenges of operating internationally. Some companies have trade secrets, some have patents, and you have different laws in each country. I would guess that those present some problems.

**JOHN FLAIM:** Yes, there are varying degrees of protection in different jurisdictions. With patents, for the most part, the U.S. and Europe, are best known for enforcement. But it is extremely difficult to enforce patents in Latin America. Asia's a bit spottier with respect to that.

The strongest global enforcement across the board is trademarks. There is a respect and recognition and it's an easier analysis. Is this trademark being used? Particularly for counterfeit goods, there are robust abilities to protect them across the board, globally. Trade secret protection is more robust than patent protection. I would say they are globally recognized, but enforcement can vary from jurisdiction to jurisdiction. We've had a few very successful cases recently. One for a large U.S. pharmaceutical company asserting trade secret misappropriation against a Chinese entity in China. That was quite an achievement for a U.S. company to do that. You are seeing the trade secret recognition increase.

Copyrights are quite global as well. In a copyright infringement, somebody copied, so it's hard to argue against that. I would put copyrights up there with trademarks as two of the easier IP actions that you tend to look at in a jurisdiction that doesn't have a history of enforcement. You want to walk in with one of those actions, trade secrets next, patents are last on the list.

**MARC MAYO:** I can tell you, when we look at an international deal, we're a lot more focused on IP issues in the U.S. It doesn't mean we don't want to see what they've got around the world, but the risk of getting sued around the world is so much less than the risk of getting sued in the United States that it's part of the risk equation that you just analyze differently when you look at things in the culmination of the total deal.

**ROBERT RACHOFSKY:** Another issue that is relevant to your question, Karen, from the standpoint of due diligence, where we talked about assignment invention agreements. In some countries, employees just won't sign them, don't have to sign them, or are unable to sign them. You've got to know where you're protected, where you're not. In some countries, you've got local laws that are better than here, from that standpoint. It's an interesting mix.

**KAREN TODD:** Do you see more trade secrets in Asia, China in particular, than you do patents? Do they tend to go that route first?

**JOHN FLAIM:** Yes, in Asia, patents are not enforced as much as trade secrets. When U.S. companies are looking to Asia, and China in particular, to move some of their R&D, they're really focused on locking down the employees in terms of their confidentiality. The laws and their enforcement aren't perfect there and thus, many U.S. companies also significantly restrict the amount of information that would go into the jurisdiction.

It's not so much that you're looking at a legal action at the end; you are saying "That's the last one, and I hope I never get there." They will send certain technology over there that is dated, albeit not outdated. It's not the newest and coolest technology, which will be kept in other technology centers. There's a protocol that's followed where there are limitations on how valuable the information could be if leaked. It is actions for trade secret misappropriation or breach of a confidentiality agreement, particularly of an employee, that is really the only legal recourse in many jurisdictions that you would have.

**KAREN TODD:** Bob, what about employee integration in a merger, if you've got trade secrets involved?

**ROBERT RACHOFSKY:** I would say Marc is probably more of an expert on the *integration* side of things once you get to a merger.

**MARC MAYO:** An outside counsel just hands that over. [LAUGHTER]

"When it's done, it's all yours." [LAUGHTER]

Yes, when we bring new employees in, and there's often an onboarding process, we have them sign all of our documentation, which will include things like invention assignment agreements and non-solicitations and protections. You only have a chance to enter into such covenants without further consideration when the employees are hired, as many states would require further consideration to do so mid-employment. We try to do it as part of the onboarding, to get them onto our policies and programs and contracts and everything. Sometimes it works, sometimes things slip through the cracks at times. But that's certainly the intention, as part of the integration.

**KAREN TODD:** Okay. What do you see as emerging trends in this area?

**ROBERT RACHOFSKY:** Besides what people are doing with MAE [material

adverse effect] clauses? Another key thing that is out there is that the use of reps and warranties insurance has *really* begun cresting, especially in what I would consider middle-market deals – $500 million and below. Particularly where financial buyers are concerned, we're seeing them rely on reps and warranties insurance rather than any indemnities or other protections or rights back against selling companies. That's a big trend. But within the sphere of intellectual property, as it touches on reps and warranties insurance – I hope it's not a trend, but something we've seen three times in the last six months – is the rep and warranty insurers trying to exclude all coverage for the rep that says the target's intellectual property doesn't infringe the intellectual property of any third party. That's quite often the most important rep, particularly in a deal that's driven by technology, in the purchase agreement. Although we've been able to beat back the reps and warranties insurers in those situations, if that continues and finds traction in those policies, it's really going to go to the heart of the value proposition that reps and warranties insurance purports to provide.

**MARC MAYO:** Where we've seen reps and warranties insurance, it makes sense in cases often where PE [private equity] companies and investment companies own a big part of the enterprise, and when they get out, they just want to be out; they're not founders of the business, they don't have any special knowledge, they just want to be out. They'll buy an insurance policy so they can be out, as we take over. They've been big fans of that; that's where we've seen it a lot in those market-type deals.

**ROBERT RACHOFSKY:** Right. But, from the standpoint of strategic buyers, like FIS, there is also a little bit of a growing wave towards it. I know you have some skepticism about the value of reps and warranties insurance.

**MARC MAYO:** Yes, it just depends on what your diligence shows in some contexts, because, if you're doing a larger deal, the cost of it is probably so much more than your potential risk that it hasn't made sense for us in a number of those deals. But we have done it in some of the smaller deals.

**KAREN TODD:** Alright. We're going to move on to talking about strategies to address the challenges of integrating tech into the supply chain. Who wants to pick up on that one?

**JOHN FLAIM:** There's an old saying in patent law that nobody invents anything new; it's just a combination of old things. In Fintech, whenever you're rendering a product, typically there are pieces of that product that are brought in by third-party vendors. There is this need and ability to combine some third-party technologies into a larger product. When there's a suit on the technology, even one that's focused on the particular third-party vendor technology, the third party is very quick to say, "Well, it's *your* product, it's not really *my* product." That becomes a very complex discussion between the vendors as to who is responsible.

That's something that we see continuously and that we will continue to see, and it's something that we're pushing the third-party vendor to recognize that their product doesn't work in isolation; it is made to work together with other technology in

particular ways. And those vendors need to take responsibility for what their technology does, even to the extent that it interacts with other technology. We're not asking the third-party vendor to take responsibility for something outside of what was provided us, but we cannot pretend that their technology is acting in a vacuum.

That is a discussion that arises following the filing of a patent suit. There's a number of patent suits on authentication and encryption-type technologies. There's a limited number of companies who only work in this technical area. Those vendors should be responsible for patent suits focused on their encryption technologies.

That is one of the larger challenges that we've come across.

**MARC MAYO:** One of the things we do in meshing technologies together, because we feel good Fintech companies *can* make a piece of technology add to another piece of technology; we've created Code Connect for a lot of our banks out there that are APIs [application programming interface] that will reach out and incorporate our products; if they choose to go with another party's product, we'll be able to work together.

**KAREN TODD:** Now, is that a policy or is that an actual technology?

**MARC MAYO:** It's a technology.

**KAREN TODD:** Could you explain a little bit more about that?

**MARC MAYO:** I probably am not the technology expert to explain the detail of APIs and how they work. One of these guys could probably better do that.

**JEFFREY BERKOWITZ:** I was just going to add, actually, that, for context, for those, we deal with patents all the time, so for many of you, I suspect you don't. When you're looking at a patent, it's a combination, as John was describing, of several different parts, if you just

think of it that way. We are typically looking at situations where there are multiple different parts that are being used in combination. In-licensing, as I mentioned before, a particular piece of software, and using it, as John pointed out, as well, for its intended purpose. We're using it in that way. Nevertheless, when there is a lawsuit that involves a combination of elements like this, there's always this tension with the in-license software vendor over whether or not that particular software is actually the subject matter of the lawsuit. There are levels of that dispute, I would just add. There's the level of, "Well, that's not really what this invention is about; this invention is about doing something else." The fact is that we're using this particular licensed software in combination doesn't really matter. There's this tension back and forth with the discussion. We've seen some good successes in getting the in-license vendors to contribute in those matters, but it's still this tension. When you're looking at sometimes substantially smaller companies, they really don't look at it quite the same way. They're looking at a nuisance license of whatever thousands of dollars and saying, "That's too much and we can't afford it." Regardless of the fact that they may be making 10 times that or 100 times that, in licensing just to FIS, for example, it doesn't matter. In many instances, it's the scope of the use of their product. Sometimes it is in the context of an API or an SDK [software development kit] that's used on phones or something like that.

**KAREN TODD:** Alright. Is there any way that these issues can be controlled, either before a merger or in counseling a smaller company that's got some good piece of tech that people want to use, and would want to incorporate?

**JOHN FLAIM:** It's quite a challenge, and obviously, every situation is a bit different. Before one incorporates the technology of another, or before concluding an M&A transaction, to purchase technology, in addition to the representations and warranties, it's important to have a meeting of the minds of who's responsible for the technology. Because to Jeff's point, a number of the smaller vendors who initially say, "We're standing behind this technology." But then when there's a lawsuit they say, "We didn't realize that you had thousands of customers and that you were going to resell our technology to them." The response being, "Well, yes you did, that's why we paid you all that money."

You have to have that discussion up front, but it's more than a "discussion." Many of the contracts in the past have punted a bit on the issue, not necessarily getting into the details of the precise responsibility. We just find, more and more, that it's better to deal with that issue from the front end as opposed to the back end. Once you get into a litigation or a dispute, then it's too late, because an action is filed, there's a complaint in hand, an answer has to be filed, and it's just not the time to have the discussion at that point.

That is, a preemptive or proactive approach is the best way to deal with it.

**MARC MAYO:** And getting reps. Bob talked about earlier that you own the software you're selling us, that there are no claims against this. Extremely important where IP is the essence of the technology that you're getting. Then, unless it's a public company merger or something, you have an indemnity right going forward if there is a claim that didn't show up in the diligence,

because they've made that rep to you. It's very important to get those reps in any technology deal.

**JOHN FLAIM:** One of the interesting things to talk about is the relationship between a vendor and its customers which is changing over time. It used to be, particularly in the Fintech area, that customers would purchase the product and use the product. Financial institutions would distinguish themselves by service; it would be good interest rates, or even toasters back in the day. Now, it's more about technology. They are trying to distinguish themselves from one another through technology.

My daughter just graduated college, and she was ready for her first bank account. I said, "There is this great bank that we use. It's local; you can walk in; they're really friendly." And she says, "I don't want that. I don't want to walk into a bank. I just want to go online and use their technology. I want people to answer my call on Saturdays and Sundays." [LAUGHTER]

**ROBERT RACHOFSKY:** You still like the bank with the lollypops on the counter!

**JOHN FLAIM:** Exactly! [LAUGHTER]

You've been there, too.

**ROBERT RACHOFSKY:** And a toaster! [LAUGHTER]

> "You absolutely have to have standards, practices and compliance requirements globally, but you often have to be flexible, where appropriate, to deal with different cultures and laws around the world."
>
> – *Marc Mayo*

**JOHN FLAIM:** When you have banks like J.P. Morgan say that they're increasing their R&D significantly, we have this interesting situation where customers of vendors, like FIS, are now spending more on technology. Some of that spending is with vendors, but some banks are going out on their own to do things. It's not as expensive as it once was to generate software anymore. You can go to India – there are a number of places – and really get low-cost software that can be quickly put together. That has put some tension between the vendors and the customers, because some customers not only want these things customized for them, but they want to own the vendor-developed technology. From a vendor's perspective, it's simply not possible to do so.

That is a recurring challenge that we've started to see, and we're going to see a bit more over time. So, to your earlier question, that's another one where there has to be a meeting of the minds up front, because we see this deteriorating relationship sometimes happen, and it's because there wasn't a front-end discussion or agreements in place. Under the heading of "challenges," particularly in the Fintech area, I would add that to the list.

**MARC MAYO:** It's interesting, because when you mentioned J.P. Morgan, it comes to mind, more wide-scale matters. Now, J.P. Morgan is a client of ours; they're a banker of ours; but they also have created JP Chase Paymentech, which is one of the biggest competitors of our new Worldpay business in merchant solutions. A lot of the global banks are joining together or spinning off subsidiaries to get into Fintech in a bigger way.

**KAREN TODD:** Does anybody else have anything they want to add to that? Okay. That wraps up our second panel for today. I want to thank all of our panelists for sharing their wisdom and expertise with the audience. Thank you again to Marc Mayo and FIS. And to the audience, we appreciated your being here. [APPLAUSE]

## John Flaim

Baker McKenzie.

John Flaim is a member of the firm's Global Intellectual Property Group. His practice encompasses IP litigation, counseling, licensing and portfolio matters.

John is ranked by Chambers USA 2018 and described as "very intelligent and knows the subject matter and understands it. He's good at being able to deal with opposing counsel." John was also selected as an "IP Star" by *Managing IP* in 2018, as well as a "Leader" in patents and trademarks by *World IP Review*.

John's practice focuses on IP litigation. He has significant experience representing multinational clients, as both plaintiffs and defendants, in patent litigations throughout U.S. District Courts and before the U.S. International Trade Commission. Many of the patents litigated by John cover electrical and computer related technologies, such as software, voice messaging, semiconductor processing and circuitry, smart cards, wireless and wireline telecommunication systems, and digital image editing. In the course of his practice, John counsels clients regarding the infringement, validity and enforceability of patents, including the preparation of formal opinions concerning those issues. John is also experienced in licensing, acquisition, development, and co-development transactions and agreements involving various technologies. In addition, he also advises clients on copyright, patent and trademark matters, including the protection of intellectual property assets and infringement assessments.

**Admissions**

- U.S. District Court, Western District of Texas (1996)
- U.S. District Court, Northern District of Texas (1996)
- U.S. Court of Appeals, Federal Circuits (1995)
- U.S. District Court, Eastern District of Texas (1995)
- U.S. District Court, Northern District of California (1994)
- Texas (1993)
- New York (1993)
- U.S. Patent & Trademark Office (1993)

**Education**

- St. John's University (J.D. Honors) (1992)
- Manhattan College (B.S. Electrical Engineering magna cum laude) (1989)

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## Alan Hoffman

*Chairman*

BLANKROME

Alan J. Hoffman joined Blank Rome in 1992 and rose from Litigation Department Head, to Firm Co-Chair to Managing Partner, to Chairman and Managing Partner; and currently serves as Chairman. Under his leadership, Alan created a thriving national footprint for what was a regional firm for over 60 years. As the head of a successful AmLaw 100 firm, he has established himself as one of the most respected leaders in the industry. He is frequently called upon by media and industry events to speak about the business of law.

In recognition of his achievements, Alan has received numerous recognitions, including: "Influencer of Law: Lifetime Achievement" – *The Philadelphia Inquirer*; "Lifetime Achievement Winner" – *The Legal Intelligencer*; "Judge Learned Hand Award" – American Jewish Committee Philadelphia/Southern New Jersey; "Distinguished Leader" – *The Legal Intelligencer*; "Most Admired CEO" – *Philadelphia Business Journal*; "Power 76" recipient – *Philadelphia Business Journal*. Under his tutelage, Blank Rome was named a "Best Law Firm for Women," by *Working Mother* magazine, a "Pennsylvania Powerhouse" by *Law360*, a "Global 100" firm by *The American Lawyer*, and a "Best Place to Work for LGBTQ Equality" by the Human Rights Campaign.

Alan is a graduate of Temple University, where he earned his BBA, and of Villanova University School of Law where he served as associate editor of the *Villanova Law Review*. He began his career as a federal prosecutor with the U.S. Department of Justice, when he was recruited to serve as part of the Attorney General's Honors Program. He was a Supervising Assistant United States Attorney and, as a result of his trial achievements, received the prestigious Attorney General's Special Commendation Award.

## Blank Rome LLP

**Who We Are**

Blank Rome is an Am Law 100 firm with 14 offices and more than 600 attorneys and principals who provide comprehensive legal and advocacy services to clients operating in the United States and around the world. Our professionals have built a reputation for their leading knowledge and experience across a spectrum of industries, and are recognized for their commitment to pro bono work in their communities. Since our inception in 1946, our culture has been dedicated to providing top-level service to all of our clients, and has been rooted in the strength of our diversity and inclusion initiatives. We advise clients on all aspects of their businesses, including commercial and corporate litigation; consumer finance; corporate, M&A, and securities; environmental, energy, and natural resources; finance; restructuring & bankruptcy; government contracts; insurance coverage; intellectual property & technology; labor & employment; maritime; international trade; matrimonial; products liability; mass torts; policy & political law; real estate; tax, benefits, and private client; and white collar defense & investigations.

**What We Do**

AREAS OF PRACTICE: Bankruptcy/Restructuring, Compliance & Investigations, Corporate/M&A, Employee Benefits & Executive Compensation, Environmental, Finance, Government Contracts, Government Relations & Political Law, Insurance Recovery, Intellectual Property, International Trade & Sanctions, Labor & Employment, Litigation, Maritime, Matrimonial & Family Law, Tax, Trusts & Estates.

INDUSTRIES OF FOCUS: Aviation, Chemical, Consumer Financial Services, Energy, Financial Services, Gaming & Entertainment, Healthcare, Life Sciences, Maritime, Private Equity & Investment Funds, Real Estate, Technology.

## Bard Brockman

*Partner*

BRYAN CAVE LEIGHTON PAISNER LLP

Bard Brockman is a partner in the Atlanta office, and is the leader of the firm's ERISA Litigation practice. He typically represents employers, plan sponsors, plan administrators, individual fiduciaries, and independent trust companies. He has broad experience in handling class actions, fiduciary claims, prohibited transaction claims, benefits claims, ESOP and stock valuation disputes, subrogation claims, and government investigations.

Mr. Brockman also represents financial institutions in complex commercial and consumer disputes. On the consumer side, Mr. Brockman has handled cases involving alleged violations of the Truth in Lending Act (TILA), the Fair Credit Reporting Act (FCRA), the Real Estate Settlement Procedures Act (RESPA), and the Fair Debt Collection Practices Act (FDCPA), in addition to the other consumer lending statutes and regulations.

Mr. Brockman is a 1989 honors graduate of the University of Florida College of Law, and he is admitted to practice in Georgia and Florida.

**Civic Involvement & Honors**

- Georgia Super Lawyer (2007)
- Super Lawyer (Corporate Counsel Edition, 2008)
- Who's Who Legal (ERISA, 2007)
- Leadership DeKalb - Class of 2005
- University of Florida College of Law Alumni Council
- Florida Blue Key
- Glenn Memorial United Methodist Church

## Bryan Cave Leighton Paisner LLP

Companies – including 40% of the Fortune 500 – rely on Bryan Cave Leighton Paisner to protect their interests and make their business ambitions become business realities. We help clients overcome the complexity and challenges caused by competition, disputes, regulation, globalization and market disruption.

Whatever opportunity or problem a business faces, we bring to bear the combined experience of 1,400 respected M&A, real estate, financial services, litigation and corporate risk lawyers across 31 offices in North America, Europe, the Middle East and Asia. Our priority is applying legal excellence to help businesses find practical, executable solutions. Furthermore, having been named a leader in law firm innovation four times in the last decade, clients can expect us to do that efficiently, effectively, and to adapt quickly.

Distinctively for law firms, Bryan Cave Leighton Paisner is purposefully structured as a single, fully integrated international team, meaning clients can rely on clear, connected legal advice, wherever and whenever it's needed. We will work collaboratively to provide strategic value and build enduring relationships.

Our pioneering spirit is built upon a deep heritage in legal excellence, brought to life by a set of core values that define who we are and how we work.

We believe that when our lawyers work together across practice areas, offices and countries, our clients are the ones who benefit. Bryan Cave Leighton Paisner embraces a fully integrated, "one firm" structure that combines our strengths and offers a full range of capabilities to help expand opportunities for our clients.

We work with individuals and businesses and multinational corporations across the globe. Every client is important to us. We make it a priority to understand their needs and immerse ourselves in their industries in order to become a true partner, offering exceptional value, responsive service and results-oriented solutions and insights.

Whether we are working with a new or established client, we don't employ a one-size-fits-all approach. Our lawyers are groundbreakers and innovators, and our clients choose to work with us because we constantly look for new ways to optimize our workflow, collaborate more effectively and deliver legal services more efficiently.

## Jeffrey Berkowitz

*Partner*

FINNEGAN

Jeff Berkowitz, Managing Partner of Finnegan's Reston office, focuses on adversarial proceedings involving patents primarily involving the computer and telecommunication fields, as well as patent counseling and prosecution to assist clients in developing powerful patent portfolios designed to block competitors. For over 30 years, Jeff has represented clients, including Fortune 100 companies, in intellectual property matters, including disputes in U.S. District Courts and at the U.S. Court of Appeals for the Federal Circuit.

Jeff also provides opinions on patentability, infringement, and validity of patents. He has drafted and overseen the drafting of thousands of patent applications for electrical, electronics, telecommunications, and software-based technologies. Patent portfolios he has helped to develop and manage protect a range of technologies, including adaptive distributed systems; code mobility; remote network resource leasing; network self-healing; runtime service discovery mechanisms; transaction management services; features of set-top boxes and modems; mobile devices, including many standards essential patents; and software applications, including ecommerce, FinTech, cybersecurity, search, and social networking.

Jeff regularly speaks and writes on current topics in intellectual property law. He has published, presented, and taught classes on software patents, AIA post-grant proceedings, and section 101 patent eligibility at programs sponsored by various trade and academic organizations, including World Congress, IPR Resources, ACC Israel, Practicing Law Institute (former program chair), Glasser LegalWorks Seminars (former program chair), Patent Resources Group (PRG), IBC, and EuroForum. *Intellectual Asset Management* and *The Legal 500 U.S.* have recognized Jeff for his patent litigation practice. *Managing Intellectual Property* named him as an "IP Star" in Virginia, and he was recognized as a leading lawyer by *Who's Who Legal: Telecommunications Media & Technology*.

## Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

Established in 1965, Finnegan is one of the largest intellectual property law firms in the world. With offices in the United States, Asia, and Europe, Finnegan practices all aspects of patent, trademark, copyright, and trade secret law, representing clients on IP issues related to U.S. and European patent and trademark law, international trade, portfolio management, the Internet, cybersecurity, e-commerce, government contracts, antitrust, and unfair competition. Finnegan offers full-service IP legal and technical experience in virtually every industry and technology: biotechnology, pharmaceuticals, biologics and biosimilars, chemicals, electronics, semiconductors, computers and software, automotive, aerospace and aviation, industrial manufacturing, textiles, consumer products, medical devices, clean energy and renewables, robotics, and 3D printing.

We have over 350 professionals focused on intellectual property, plus 400 support staff, including legal assistants, and docketing, research, litigation support, and information technology specialists. Other notable aspects of our firm include:

- 300+ professionals with scientific degrees
- 70+ professionals with Ph.D.s
- 225+ professionals registered to practice before the USPTO
- 30+ professionals are former USPTO examiners

Our clients' businesses and IP assets are global, and protection of these assets is increasingly challenging. With offices around the world and decades of experience assisting multinational companies, Finnegan has the resources and experience to formulate and execute global strategies.

## Erin Rodgers Schmidt

Margaret Erin Rodgers Schmidt represents clients in complex civil and criminal government investigations, internal investigations – including investigations involving alleged harassment and workplace misconduct, and civil litigation.

Clients rely on Erin to represent them in internal investigations, government investigations, and litigation arising under the False Claims Act, the Anti-Kickback Statute, the Foreign Corrupt Practices Act, the Medicaid Rebate Statute, the Federal Food, Drug, and Cosmetic Act, and various U.S. federal and state civil and criminal fraud statutes. Erin also regularly counsels pharmaceutical, medical device and healthcare clients on compliance programs. Erin co-leads the firm's healthcare industry initiative.

Erin also regularly works with clients in the media, nonprofit, and healthcare industries to conduct independent internal investigations and workplace assessments and advise on remediation and litigation related to workplace issues.

Morgan Lewis

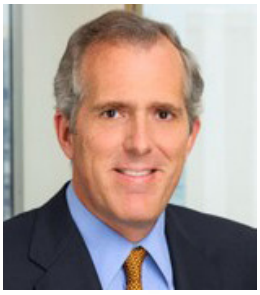
## Morgan, Lewis & Bockius LLP

At Morgan Lewis, we work in collaboration around the world – always ready to respond to the needs of our clients and craft powerful solutions for them. From our offices in strategic hubs of commerce, law, and government across North America, Asia, Europe, and the Middle East, we work with clients ranging from established, global Fortune 100 companies to enterprising startups.

Our team of more than 2,200 lawyers and specialists provides comprehensive corporate, transactional, litigation, and regulatory services in major industries, including energy, financial services, healthcare, life sciences, retail and ecommerce, sports, technology, and transportation. We focus on both immediate and long-term goals with our clients, helping them address and anticipate challenges across vast and rapidly changing landscapes.

We approach every representation with an equal commitment to first understanding, and then efficiently and effectively advancing, the interests of our clients and arriving at the best results. If a client has a question, we'll immediately find the person in our global network with the answer. If there's a shift in the legal landscape, we're on top of it, and our clients will be too.

Founded in 1873, we stand on the shoulders of nearly 150 years of achievement, but we never rest on our reputation.



## Robert Rachofsky

*Partner*

WILLKIE FARR & GALLAGHER LLP

Bob Rachofsky is a partner in the Corporate & Financial Services Department. He advises on mergers and acquisitions involving both public and private companies, private equity and other corporate transactions, as well as public and private offerings of securities, securities disclosure and corporate governance matters generally. A substantial portion of his practice consists of transactions and advice involving participants in the insurance and reinsurance industry.

A member of Willkie's *Chambers*-ranked Band 1 Insurance Transactional practice, Bob has also been recognized by *Who's Who Legal* and *Super Lawyers* as a leading practitioner. He is an adjunct professor at Fordham Law School in NYC, teaching M&A and other corporate deals.

**Selected M&A Representations**

- AIG in its sale of a 76.6% interest in Fortitude RE to The Carlyle Group and Tokyo-based T&D Holdings for approximately $1.8 billion;
- FIS in its $42 billion agreement to merge with Worldpay, Inc., a global leader in eCommerce and payments;
- Walter Investment in its agreement to sell its insurance operations to Assurant Inc.;
- Fidelity National Information Services, Inc. in its agreement to sell its Public Sector and Education businesses to Vista Equity Partners for $850 million;
- AIG in its sale of a 73% interest in NSM Insurance Group to an affiliate of ABRY Partners;
- AIG in its purchase of certain business lines from Ironshore Inc.;
- Fidelity National Information Services, Inc. in its acquisition of SunGard in a deal valued at $9.1 billion

## Willkie Farr & Gallagher, LLP

**The Firm**

For more than a century, Willkie has delivered unparalleled legal advice and dedicated client service to individuals and companies across a wide spectrum of business areas, industries, countries, and cultures. We are an elite international law firm that delivers superior client service and provides innovative, integrated legal and business solutions. We have a number of highly successful practices whose lawyers are stars in their field. Our experience spans a wide range of industries, most particularly financial services. Our lawyers, which number approximately 600 in eight offices located in the United States and Europe, share in the firm's tradition of skillful and creative legal representation. As a firm, we are collegial, collaborative, and client-focused.

Drawing on our more than 125 years of achievement and experience in the legal industry, our clients receive the highest level of advice and counsel. Willkie has a unique depth of business acumen and legal expertise that spans across almost all business areas and industries. Our holistic approach to advising clients on legal matters, business issues, and transactions yields comprehensive client service. Our commitment to excellence in client service and care cultivates longstanding relationships with our clients.

**Client Service**

Willkie's collaborative approach to client service is entrepreneurially inspired and client focused. Clients grow with us over time. They hire us because of our reputation and our expertise and then build longstanding allegiances based on results and the collegial process by which they are achieved. Our focus on client service includes:

- A pragmatic approach to the practice of law that puts the client first and forms the basis for longstanding relationships
- An attention to successful collaboration that encourage our bright and energetic lawyers to serve client needs while maintaining high ethical standards and treating others with respect
- Lawyers who not only possess the legal knowledge and experience to handle any transaction, but who also have the ability to communicateeffectively with clients

**Our Global Reach**

Willkie's international experience – including the representation of U.S. and international corporations and investment banking clients in mergers and acquisitions, securities offerings, joint ventures, and private equity transactions – is both deep and broad. Our ability to negotiate and close deals, coupled with significant knowledge of a region's particular rules and regulations, financial and political regimes, and customs and culture ensures that clients seeking to conduct cross border business get the maximum benefit from our expertise.

Appreciation is given to Clifford Chance LLP for their assistance with this event.