An ALM Publication

CORPORATE COUNSEL

The Business Magazine For In-House Counsel

corpcounsel.com | September 2014

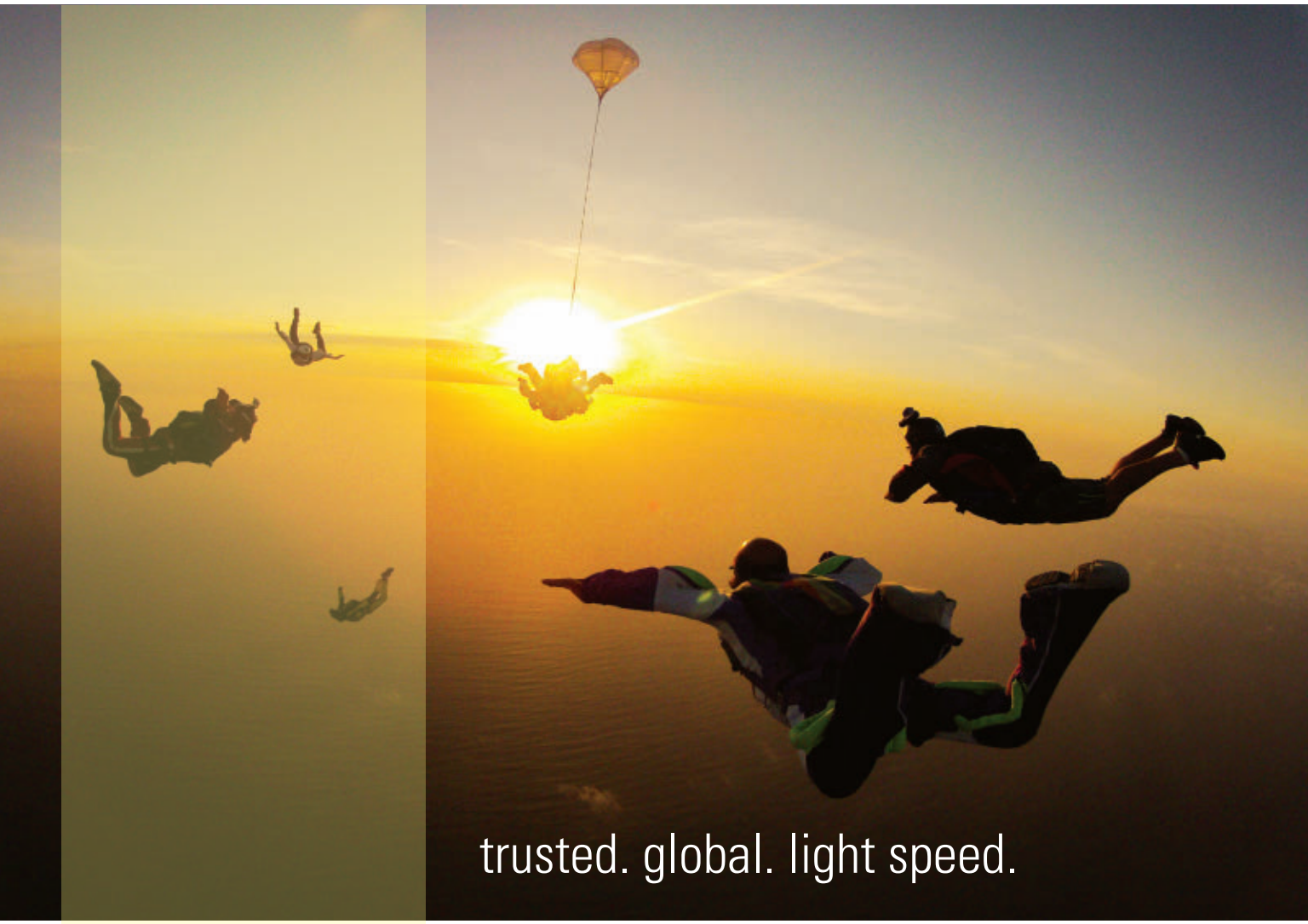
FORUM SHOPPER'S REVENGE

HOW CHEVRON TURNED THE TABLES ON THE PLAINTIFFS IN ECUADOR.

Lawyer Andrés Rivero

OmniVere

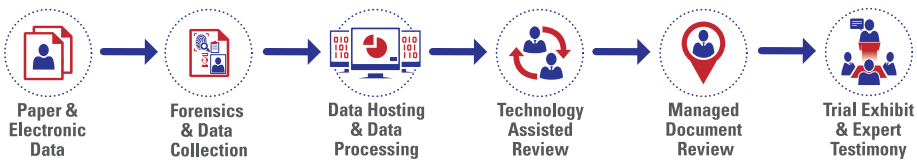
the litigator's answer to data free fall.



- Digital & Forensics Consulting
- Complex Data Collection
- Electronic Data Processing & Hosting
- Expert Witness Testimony
- Information Governance
- Intelligent Trial Exhibits
- Litigation Staffing: Attorney, Paralegal, Litigation Support & Compliance
- Managed & Shared Services
- Technology Assisted Review
- Translation Services

OmniVere is the litigator's trusted parachute for global eDiscovery, litigation support and compliance needs. From paper-to-paper, our proven team of experts remain dedicated to providing best-in-class documentation and process management services spanning across the litigation lifecycle. We leverage cutting-edge technology managed by OmniVere's in-house team of litigation experts to drive top quality, results-driven & cost-efficient work product to our customers. OmniVere can provide the people, the processes, and the technology that you need to accomplish any forensic, processing, hosting, or review task in a globally scalable and defensible manner. Fostering a nimble service approach, OmniVere's global reach is complimented with local execution by trusted professionals.

To learn more, please visit www.OmniVere.com or call (312) 583.9956.



CORPORATE LEGAL DEPARTMENTS | LAW FIRM | GOVERNMENT

Audio Review, Simplified

The complexity of searching and reviewing audio content can drive up costs, delay discovery and hinder production. And when you're responding to a regulatory request, discovery demand, or internal investigation, getting to the information you need as quickly as you can is critical. With Epiq, you can search, process and review multilingual audio data efficiently, cost-effectively and defensibly.

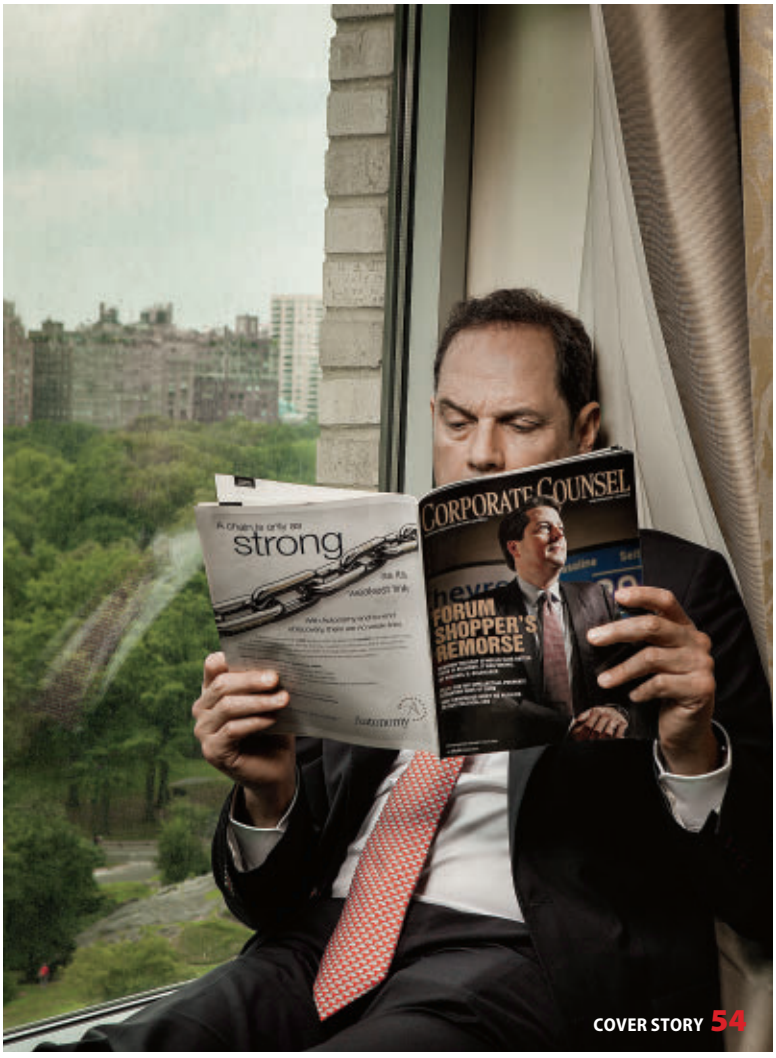
epiqsystems.com/audio-review

epiq SYSTEMS

MORE: corpcounsel.com

FEATURES

INBOX



COVER STORY 54

JORDAN HOLLENDER (RIVERO)

13

FACES IN THE NEWS THIS MONTH


14


14


15


16

CORRECTIONS: Statistics cited in August about women and minorities in Apache Corp.'s law department ("Best Legal Departments: The Finalists") referred to the entire global law department staff, not just the lawyers. In the Spring 2014 edition of ALM Supplement Focus Latin America (which was bundled with Corporate Counsel), two names were misspelled in "They All Went to Mexico": the first name of White & Case's Vicente Corta Fernández and, in one instance, the last name of Haynes and Boone's George Gonzalez.

MORE: corpcounsel.com

DEPARTMENTS

COLUMNS


78

ALSO

COVER PHOTO BY JORDAN HOLLENDER


49


23


23


28


32

Corporate Counsel (ISSN 1524-7597) is published monthly by ALM Media, LLC. Chief Executive Officer: Bill Carter. Main office: 120 Broadway, New York, NY 10271, (212) 457-9400; info@corpcounsel.com. Subscription rates: free to general counsel and staff attorneys upon direct request; all others $169 for one year (12 issues). For Canadian and foreign subscriptions, the rate is $245. The publisher reserves the right to determine qualification for free subscriptions. Periodicals postage paid at New York, NY, and additional mailing offices. POSTMASTER: Send address changes to: *Corporate Counsel,* Subscription Department, 4 Metrotech, Brooklyn NY 11201-3815. Please allow 4–6 weeks for address changes. Subscription inquiries: Subscription Department, (877) 256-2472 or customercare@alm.com. Advertising inquiries: Mike Medwig, mmedwig@alm.com; (212) 457-9470; fax (646) 822-5035. Current and back issues are available exclusively from this office.

MAGGIE SOLADAY (LILIEN)

CORPORATE COUNSEL

An ALM Publication

How To Reach *Corporate Counsel*

Letters to the Editor: To respond to an article, write: *Corporate Counsel,* 120 Broadway, Fifth Floor, New York, NY 10271; fax: (646) 822-5140; email: editorial@alm.com.
Press Releases: Send press releases to Editorial Assistant, *Corporate Counsel,* 120 Broadway, Fifth Floor, New York, NY 10271; fax: (646) 822-5140; email: editorial@alm.com.
Subscriptions: To subscribe or to inquire about your subscription, call (877) 256-2472;
write: *Corporate Counsel,* Subscription Department, 4 Metrotech, Brooklyn, NY 11201; email: customercare@alm.com.
Advertising/Media Kits/Calendars: To advertise or to receive information, call Scott Pierce at (212) 457-7930; fax: (646) 822-5109;
write: *Corporate Counsel,* Advertising Department, 120 Broadway, Fifth Floor, New York, NY 10271; email: spierce@alm.com.

Maybe you've noticed that legal disclaimers don't fit in 140 characters. So has the SEC.

The SEC has finally begun to embrace new technology for distributing material information on Twitter and Facebook. But it's clear that they—and your shareholders—are nervous about it, and it's clear that they're watching carefully. So before your company announces anything of substance on any form of social media, get legal advice from people who can point out both the opportunities and the risks. Visit **sandw.com/socialmedia**.

SULLIVAN & WORCESTER

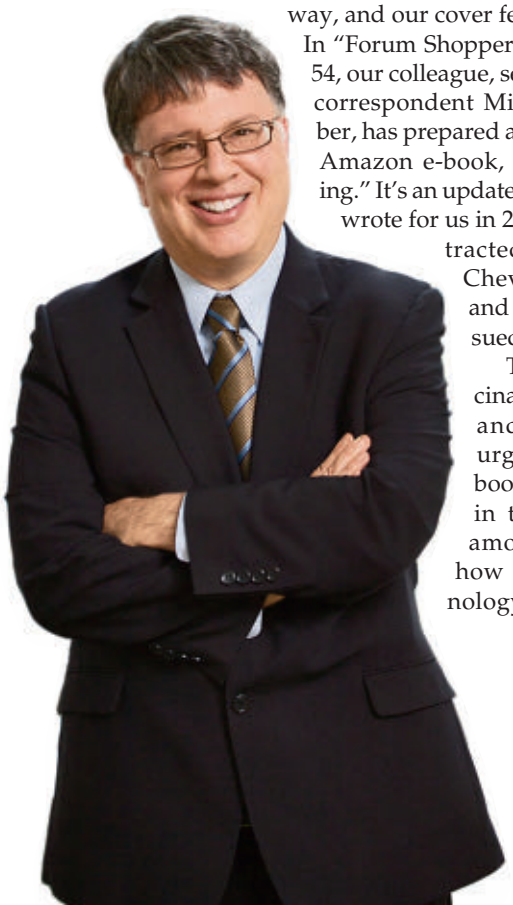
BOSTON LONDON NEW YORK WASHINGTON, D.C. sandw.com

THE HUMAN TOUCH

WE WRITE A FAIR AMOUNT ABOUT TECHNOLOGY HERE AT Corporate Counsel. We run a monthly column dedicated to how in-house counsel leverage it to do their jobs. We send out an e-newsletter featuring articles on technology that appear on CorpCounsel.com. It's an area of intense interest for our readers, whether it's personal use (Android phone or iPhone? Can you use Word on an iPad?) or liability issues surrounding bring-your-own-device practices.

We also frequently write about e-discovery—sifting through mountains of data to find the documents you're looking for. In the old days, attorneys would just sit in a room with big boxes full of documents. Later, they scanned computer files, and probably wrecked their eyesight in the process. More recently, robots have been doing the scanning in ways more sophisticated than simple keyword searches. There are two factors driving these advances: the need to rein in costs while increasing accuracy, and ramping up the speed.

Now comes columnist Dan Currell, who writes regularly for our website. In this month's In-House Tech, he tells you that you're doing it all wrong. Technology is difficult, and a herd mentality all too often leads legal departments and law firms to buy software and equipment that just doesn't work. Or lawyers and staff simply don't know what to do with the tools they have. He jokingly calls for a return to the quill.



But it doesn't always have to be that way, and our cover feature shows why. In "Forum Shopper's Revenge," page 54, our colleague, senior international correspondent Michael D. Goldhaber, has prepared an excerpt from his Amazon e-book, "Crude Awakening." It's an update of a cover story he wrote for us in 2010 about the protracted battle between Chevron Corporation and the plaintiffs who sued it in Ecuador.

There's a lot of fascinating stuff in here, and naturally, we urge you to buy the book. But the excerpt in this issue shows, among other things, how smarts and technology can combine to bring a desired result. What happened was this: Despite clear evidence of fraud on the part of the plaintiffs, Chevron was hit with a huge environmental judgment in Ecuador for allegedly damaging Amazon habitats. Despite appeals to courts in the United States and international forums, it looked as though Chevron would have to pay up.

The company's general counsel, R. Hewitt Pate, was determined not to let that happen. But he needed more proof of misdeeds by the other side. And he got it, through a combination of some old-fashioned analysis and technology. The Ecuadorean court's judgment and documents supporting it had striking similarities to documents found on the plaintiff side's computer hard drives. It took painstaking analysis to show that, indeed, the Ecuadorean court's judgment was in effect ghostwritten by the plaintiffs' side, and not the result of consideration by an unbiased court.

The matter is still playing out at press time. But the story provides a real-life look at how the machines we use (sorry, Dan) can actually be useful, if used properly and intelligently.

ANOTHER STORY WE'VE BEEN FOLLOWING, THE EXPERience of General Motors Co. and the defective ignition switch, brings to mind the last big automotive scandal, Toyota's battle with customers over unintended acceleration. Executive editor David Hechler followed the Toyota story closely and wrote an award-winning article about it last year. For his efforts, Hechler snagged a Neal Award, which is sort of like the Pulitzer of business media.

Now Hechler has to make room on his shelf for another award: The American Society of Business Publication Editors' Stephen Barr Award. It's the organization's highest honor, given to the writer "who best exemplifies inventiveness, insight, balance and depth of coverage," according to the group. We're proud of David and the work he's done. He reported intensely for the story while managing to do his day job of editing much of the magazine and working closely with our reporters and designers. Congratulations, Mr. Hechler.

TONY GALE

Anthony Paonita
apaonita@alm.com

K&L GATES

DO YOU HAVE THE REGULATORY EDGE?

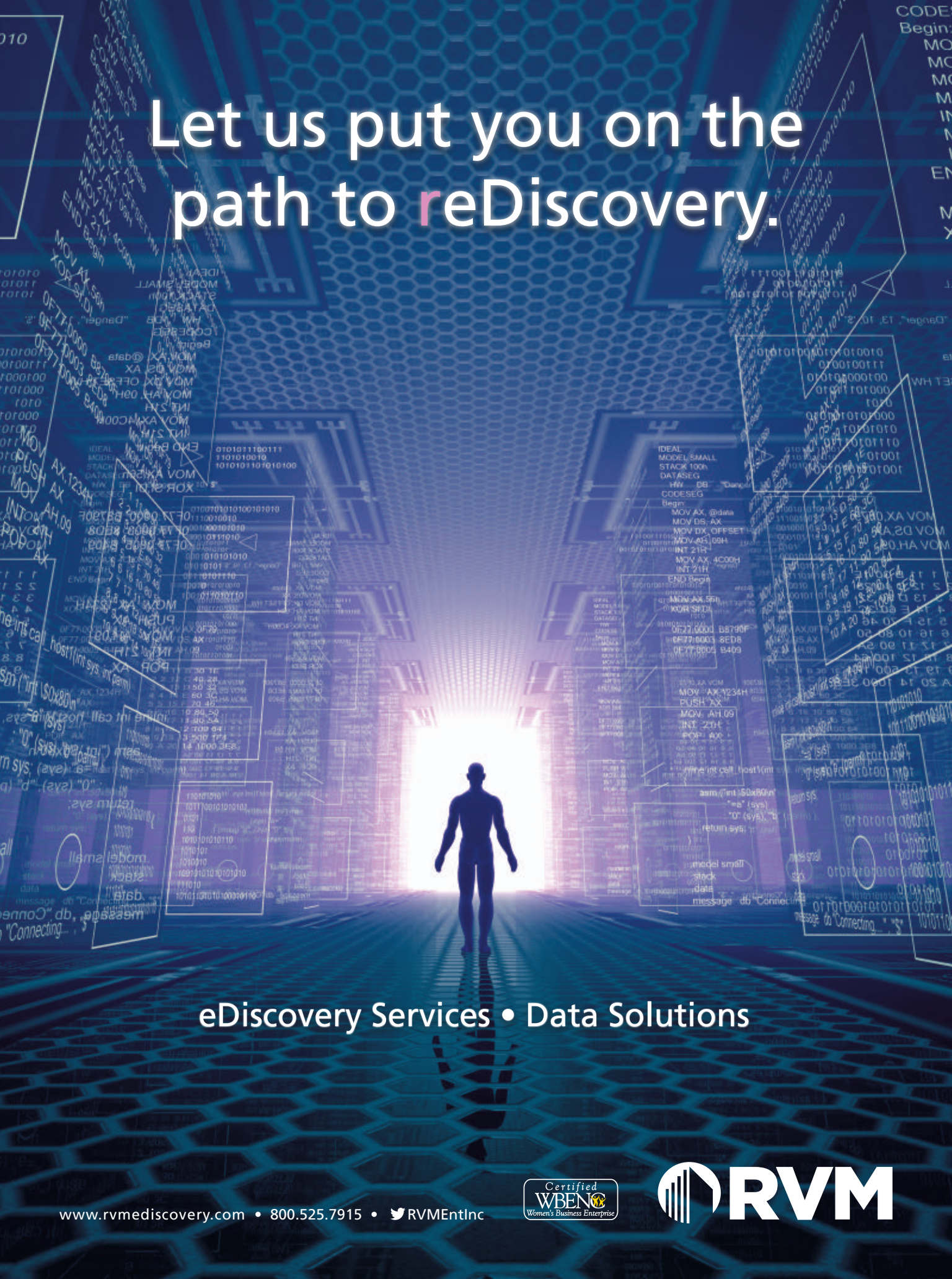
Fates, futures, and bottom lines often shift substantially as a result of government decisions. No wonder that a majority of in-house counsel consistently rates regulatory issues as a top concern.

Those who can shape decisions and navigate through changing regulations have a competitive edge. Our global platform comprises over 30 policy and regulatory disciplines and more than 500 alumni of governmental agencies around the world, and our firm has been ranked by multiple sources as a leading law firm in regulatory matters.

Get the edge in regulatory matters.

K&L Gates LLP. Global legal counsel on five continents. To learn more about our regulatory practice, scan the QR code.

klgates.com


Let us put you on the path to reDiscovery.
eDiscovery Services • Data Solutions
www.rvmediscovery.com • 800.525.7915 • RVMEntInc
Certified WBENC Women's Business Enterprise
RVM

DOJ'S NEW DUCK

Regulators have devised another penalty to avoid having to prosecute.

[BY SUE REISINGER]

STEVE PICA

WHAT WILL THE U.S. DEPARTMENT OF Justice come up with next to avoid prosecuting a corporation and its leaders for committing a crime?

First it was mostly civil fines and penalties. Then came deferred and nonprosecution agreements (DPAs and NPAs) that really took off in the past decade. Now there's a new development: the "restitution and remediation agreement" (which we'll call, ahem, R&R).

The first lucky recipient of an R&R was SunTrust Mortgage Inc., which agreed on July 2 to pay nearly $1 billion to state and federal agencies to avoid criminal prosecution in how it handled mortgage modifications using funds under the Troubled Assets Relief Program (TARP).

The settlement quacked like an NPA and walked like an NPA, with Justice stating that it would not criminally prosecute SunTrust. But neither Justice nor the mortgage company called it an NPA in their press releases. Instead, they gave it this new name. But the Office of Special Inspector General for TARP had no qualms in calling it as the office saw it. That press release announced SunTrust's "nonprosecution agreement" in its headline.

The deal clearly states on page 5 (of 11 pages) that unless SunTrust breaches the agreement, the government will not bring any charges against the mortgage company. But the government reserved the right to pursue charges against individuals, "including current and former officers, employees and agents of SunTrust."

Former federal prosecutor Joseph Warin, who now chairs Gibson, Dunn & Crutcher's litigation department in Washington, D.C., and cochairs the firm's white-collar defense and investigations practice group, suggests that it's a type of NPA. "The SunTrust resolution, which is the most unusual 2014 resolution, clearly resonates as an NPA and may serve as a road map template for other cooperating financial institutions facing criminal investigations," Warin says.

But some critics are hoping it goes away. A nonprosecution agreement by any other name is still a nonprosecution agreement, says Brandon Garrett, a professor at the University of Virginia School of Law. "Both the form and the substance of corporate prosecution agreements matter," he adds. Garrett is a criminal justice expert who has been compiling such agreements online to further research on—and public awareness of—white-collar crime. In his opinion, nonprosecution deals with companies are not "normally appropriate no matter what they are called."

NPAs provide less accountability because there is no judge supervising compliance with the deal, Garrett explains. "It sends the wrong message if companies that commit serious crimes are given nonprosecution deals," he says. "If crimes were committed, both the company and employees should be prosecuted."

Garrett isn't the only critic. Former federal prosecutor Ryan McConnell

says his problem with the SunTrust deal is the lack of consistency by the Justice Department. McConnell, who also writes an online column for Corporate Counsel and is cofounder of McConnell Sovany in Houston, says a company sentenced in New York and one sentenced in Florida in similar cases with similar facts should get the same deal. But no one is ensuring that they do.

The sentencing guidelines and corporate charging guidance are designed to achieve consistency, McConnell insists. But NPAs in any form pose "a risk of undermining the sentencing guidelines and intent of uniform charging guidance because there is no judicial oversight and little coordination between U.S. attorneys' offices on how to address these things consistently," he explains.

He says companies angle for better public images by trying to resolve criminal cases in the most favorable way. And that includes what they call the settlement. "I'm certain the lawyers negotiated the nicer name, and then went back to their client and said, 'We got you some novel deal,'" McConnell says. "But legally, it's the same impact" as an NPA, he adds.

Besides the Justice Department, SunTrust, a subsidiary of SunTrust Bank Inc., also reached its deal with the Department of Housing and Urban Development, the Consumer Financial Protection Bureau and 49 state attorneys general (along with the District of Columbia's). "SunTrust's conduct is a prime example of the widespread

BEST LEGAL DEPARTMENTS: THE FINALISTS

In June we recognized the lawyers at four companies as Corporate Counsel's Best Legal Departments. We also found much to admire in other nominees. This is the third and final installment of articles about 2014's finalists.

LONGTIME AMERICAN EXPRESS COMPANY general counsel Louise Parent retired at the end of 2013, after 37 years with the company—but not before leaving an impressive mark at a time of upheaval in the financial services industry.

Responding to new regulatory actions levied on financial services companies, Amex's global team of almost 200 lawyers completely restructured its compliance program last year. And it did this while contending with more than its normal share of litigation.

In addition to defending against antitrust class actions, merchant lawsuits and a case brought by the U.S. Department of Justice, Amex challenged a district court ruling at the U.S. Supreme Court—and won. The lawyers also settled a set of nationwide class actions challenging key provisions in the company's card acceptance agreements with merchants.

GC LOUISE PARENT RETIRED FROM AMEX LAST YEAR.

Amex lawyers also get points for working closely with various business departments to assist in new ventures. They played a key role, for example, in the launch of digital products and services that are essential to growth and competitiveness in financial services, including partnerships with Twitter, TripAdvisor and Facebook.

The team was able to accomplish all this at a time when strict cost-reduction goals were imposed—goals that required major cuts in the amount spent on outside counsel. The department responded by moving outside work in-house, leveraging existing fee relationships, requiring firms to bid for all major matters and coordinating more closely with the finance department. As a result, the legal department exceeded its savings target by 28 percent.

ADAM CIONGOLI, GENERAL COUNSEL OF LINCOLN FINANCIAL GROUP

American Express has also done a laudable job hiring women. The company says 46 percent of its U.S.-based attorneys are women, including six of the 11 most senior lawyers.

THE TOUGHER REGULATORY ENVIRON- ment also touched the 50-lawyer in-house legal team at financial services provider Lincoln Financial Group. And we were impressed with how Lincoln's lawyers have responded to the increased scrutiny.

In 2013 Lincoln's legal team, led by general counsel Adam Ciongoli, changed the way it managed compliance. Each business unit at the company now not only has its own chief counsel, but also its own chief compliance

SCOTT EELLS/GETTY (AMEX CARDS); CHRIS RICHARDS (LINCOLN)

underwriting failures that helped bring about the financial crisis," U.S. Attorney General Eric Holder said in a statement.

Part of the deal required SunTrust to provide $500 million in consumer relief for homeowners. And it demands that the mortgage company abide by certain terms and processes that will help to prevent the abuses from being repeated.

A NONPROSECUTION AGREEMENT, BY ANY OTHER NAME, HAS BECOME A **RESTITUTION AND REMEDIATION AGREEMENT,** WHICH HAS CRITICS ROLLING THEIR EYES AND SHAKING THEIR HEADS.

In a statement of facts, SunTrust admitted that between January 2006 and March 2012, it originated and underwrote FHA-insured mortgages that did not meet FHA requirements, that it failed to carry out an effective quality control program to identify noncompliant loans and that it failed to self-report the defective loans it did identify. Numerous audits and other reports "notified SunTrust management that as many as 50 percent or more of SunTrust's FHA-insured mortgages did not comply with FHA requirements," the Justice Department said.

From such stuff an R&R was born. ■

officer, enabling every business unit to obtain informed, timely advice from its lawyers.

We were also impressed by the legal department's success in controlling costs. It established a new position—chief operating officer—and a new operations team, which streamlined, upgraded and redesigned processes to help control spending. The legal team revamped its approach to outside counsel, reducing the number of approved firms and aggressively negotiating rates. These measures resulted in a 60 percent reduction of spending on outside counsel, Lincoln says.

Cutting legal spending did not mean sacrificing results. In 2013 the legal team won several big cases, including a high-profile appeals court dispute with the Oklahoma State University athletic club and T. Boone Pickens. The various successes, in fact, generated enough income to cover 27 percent of the department's overall costs—and allowed the team to add seven additional in-house lawyers in 2014.

Finally, Lincoln's attorneys impressed us with their commitment to pro bono work. Lawyers in various offices regularly provided advice and counsel to homeless mothers, worked at an immigration clinic and aided victims of domestic violence.

HERSHEY'S GENERAL COUNSEL, LESLIE TURNER

THE FIRST FULL YEAR OF LESLIE TURNER'S tenure as general counsel for the Hershey Company was a sweet one. The legal department supported the company's biggest overseas expansion in history, chalked up an important litigation victory and made important moves to protect its intellectual property. And it did this with a tiny staff. Over the course of the year, the staff doubled in size—to 20 lawyers!

The new hires were experts in such areas as labor and employment, mergers and acquisitions, intellectual property and global compliance—expertise that proved indispensable as the chocolate manufacturer undertook numerous major global initiatives. It launched a new candy brand in China, brought one of its brands to India, announced plans to build a manufacturing plant in Malaysia and agreed to acquire 80 percent of a well-known privately held confectionery company based in Shanghai.

Labor and employment and M&A lawyers weren't the only department members demonstrating their skills. Hershey's litigators obtained summary judgment for the company in antitrust litigation that had dragged on for six years. And Hershey's IP lawyers won an appeal at the Trademark Trial and Appeal Board, obtaining a trademark registration in the United States that protects the iconic shape of the Hershey's milk chocolate bar.

Finally, we were impressed with the department's diversity. In 2013, 44 percent of its U.S.-based lawyers were women—including its general counsel. Minorities were also well represented—26 percent of its U.S.-based lawyers, including 20 percent African-American and 6 percent Asian-American. —LISA SHUCHMAN

QUESTIONS & ANSWERS | YANA KRAVTSOVA

RECYCLE, RENEW, REFRESH

Google's head of renewable energy and alternative investments talks about her job.

AS LEGAL HEAD OF GOOGLE INC.'S $1.3 BILLION RENEWABLE energy and alternative investments portfolio, Yana Kravtsova has helped the tech giant pour money into solar and wind projects around the globe. Kravtsova came to the legal profession back in her home country of Russia in the 1990s. "At that time it was a very dynamic field. The country was going through many political and economic changes, and the legal system had to reform itself to meet the demands of a new society," she says. "I found that fascinating and wanted to be part of that change in the rules."

When she moved to the U.S. and began practicing in Washington, D.C., she wanted to focus on transactional work, where she was drawn to the tangible impact. After practicing at firms for nearly a decade, she went in-house, joining First Wind as associate general counsel in 2010. She left for Google a year and a half later. **Chelsea Allison** spoke to her about her experience there. An edited version of their conversation follows.

CORPORATE COUNSEL: What do you enjoy most about your work?

YANA KRAVTSOVA: I love that the renewable energy industry is constantly evolving. It's a very dynamic area that keeps me learning every day, both legal and industry issues. And that makes it interesting and intellectually challenging. On a personal note, I really enjoy working with our Google team—it's a smart and creative crew, people are very friendly and have a great sense of humor, so that makes your daily routine more fun.

CC: From a legal perspective, how are the alternative investments like those you ink unlike other types of investing?

YK: Our investment portfolio is quite diverse. We have invested in some of the largest projects in renewable energy, in projects that utilize new financing structures and can be built because of such structures; in projects that deploy new technology at the commercial scale; in projects that are very early in their development and need backing to become a reality. So we always look for factors to differentiate ourselves in the market.

CC: Clean technology and climate change law are still evolving. What are some of the developments that you think are most important?

YK: I think that we will see technological breakthroughs in renewable energy—for example, smart homes, reliable long-term storage, smart grids, new sources of renewable energy—which will challenge the existing laws and regulations and will force revising the rules of the game as we know them now, both at the regulatory and consumer level. I also think that the international political willpower will move eventually toward a carbon offset tax or other incentive regime to promote adoption of green sources of energy globally.

CC: How big is your department?

YK: Google's legal department is over 800 people; about half of them are lawyers. The transactional team is only a part of our global legal department.

CC: What work do you handle in-house, and when do you retain outside counsel?

YK: We retain outside counsel for deal negotiations and documentation drafting, while we focus on the earlier stages of the transaction and structuring and postclosing and portfolio management. We have preferred outside counsel, but that list seems to fluctuate, depending on the conflicts of interest that the firm or we may find ourselves in.

CC: What's one word or phrase others would use to describe you?

YK: Savvy. I had to do a survey of my business team for that one.

CC: Is there a recent book or movie you'd recommend?

YK: I am reading "The Art of Travel" by Alain de Botton, after watching his lecture, "How Art Can Save Your Soul." It's a wonderful read to remind us how and why we should travel, and it's timely before taking off on a summer vacation and submerging yourself in a travel experience. ■

JASON DOIY

Legal expertise. Business acumen. *Neutrals like no others.*

With a panel of nearly 300 full-time neutrals, we set the standard in mediation and arbitration. Impeccable credentials backed by a business mindset, and training in the use of cost-effective processes mean you have the best in the industry working on your dispute. Solving complex legal challenges isn't something we just happen to do—it is in our DNA and has been for 30+ years. That's the JAMS difference—one that's impossible to replicate.

Resolving Disputes Worldwide

800.352.5267

www.jamsadr.com

REMEMBERING LEHMAN

A lawyer recalls an event before the fall that, in retrospect, is haunting.

ON THE SIXTH ANNIVERSARY OF THE demise of Lehman Brothers Holdings Inc., lots of people will be thinking about that economy-shattering event—one that changed so many lives. Former Lehman employees can still tell you where they were and what they were thinking on Bloody Sunday—Sept. 14, 2008. (The official filing for bankruptcy was Monday morning, just past midnight.) Many say they can never forget.

One lawyer who has thought about it often also remembers a very different Lehman event—a happy one, though in retrospect it's haunting in what it foreshadowed. (The lawyer asked that his name be withheld—he's focused on moving on—but he was willing to share his memories and his notes.)

It was April 2006, and he'd been invited to attend a "vice president leadership and learning group" in upstate New York. It was a four-day training session, and all newly promoted senior VPs were invited. (Some hoped it was a step on the way to managing director.)

It was an exciting time in a beautiful, leafy retreat near a golf course. But the schedule was too packed for golf. And it was nothing if not eclectic. The days were filled with team-building group activities. One was led by a senior MD, another by a psychologist. The most challenging, the lawyer recalled, was one in which each team became a pit crew competing in a tire-changing competition—with real NASCAR autos as their props.

The group itself was diversified by race, gender, business divisions and even nationalities. The organizers strove to keep the deck shuffled. At the same table you had an IT expert, a client-relationship manager and a trader of esoteric financial products who confided he'd had a "rock-star year."

Two events stood out. He took special note of them in his pad, though he didn't have to. They're even more vivid in retrospect. The first was a message from a guest speaker, an eminent professor from a renowned university.

"You will fail!" he told his audience. It wasn't intended to be a prediction about Lehman Brothers. The lawyer is sure that such a thought never entered the mind of anyone in the room. It was directed at a group of relatively young managers who thought of themselves as "best in class"—the antithesis of failure, the epitome of success.

"You will fail," the speaker repeated, "and you will have to learn from that, because failure is not only part of daily life, but also of professional life." The lawyer wrote in his pad: "Good point. Never forget where we came from." It was particularly important for a lawyer to hear, he added, because a legal officer should always "trust but verify." But it wasn't always easy to remember, as the company piled up profits.

The second event was held early in the morning, when they were all fresh. Another eminent professor was the guest, and he showed the group a video in which five people dressed in white shirts continuously passed three basketballs among them. The assignment: Count how many times the balls were flung from one person to another.

Nobody got the right answer. Many weren't even close. But that wasn't the worst of it. Not a single person saw the individual dressed in a black gorilla costume stroll past the players. The professor had to run the tape in slow motion to show them what they'd missed.

Reality and what you think you see may be quite different. That seemed to be the lesson. The lawyer had another observation: "Nobody—and rightly so—raised a question that an ordinary person might tend to ask. 'Dear professor, you asked us to count the passes, not to look for gorillas.' The question was not asked because everybody was senior enough to know that in a professional setting, there are no advance warnings. You have to look for them."

In reviewing his notes years later, the lawyer couldn't help but notice that just below the "you will fail" lesson, he'd entered his takeaway from the video game. "Unusual events may happen when you least expect them," he wrote.

—DAVID HECHLER

JOE KOVACH

Transforming eDiscovery

Questio fundamentally alters the litigation landscape. Unlike any other current offering, Questio bridges the gap between the use of technology and the practice of law to provide litigation professionals with the insight needed to win at budget levels never before possible. Benefit from the game changing service that slashes litigation costs and provides legal intelligence to shape case strategy.

Intelligent Strategy. Unparalleled Savings.
For more information, please visit unitedlex.com

UnitedLex

THE TRUSTED ADVISOR IN LEGAL AND DATA SOLUTIONS

COMPARING THREE COMPANIES' ARBITRATION SERVICES

There are plenty of reasons to choose arbitration to solve a legal dispute. It tends to be cheaper and faster than litigation. The following chart compares services offered by the American Arbitration Association, JAMS and the International Institute for Conflict Prevention and Resolution (CPR). It should be noted that although the rules are outlined, the parties to the arbitration may agree to waive any of these provisions. —REBEKAH MINTZER

TOPIC	JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES (WWW.JAMSADR.COM)	AAA COMMERCIAL ARBITRATION RULES WWW.ADR.ORG	CPR ADMINISTERED ARBITRATION RULES WWW.CPRADR.ORG
EFFICIENCY			
Initiation of Arbitration	Filing with JAMS a Demand for Arbitration with arbitration agreement or court order and service on the opposing parties (Rule 5).	Filing demand for arbitration, with arbitration agreement or court order, either electronically or in hard copy (R-4).	Delivery of notice of arbitration by claimant to respondent, with electronic copy to CPR (Rule 3.1).
Communication with Institution	JAMS offers an electronic filing service (Rule 8) that provides parties and arbitrator with the ability to file case documents online. The arbitrator and parties can access case file at any time.	AAA WebFile offers online claim filing service, electronic document transfer and online case management; arbitrators can access online case management through AAA Neutrals eCenter.	Only electronic copies of filings, communications and other documents are to be sent to CPR; hard copies of filings or other documents sent only to tribunal and/or other party (Rule 9.6).
Emergency Relief (prior to constitution of tribunal)	Provisions for the appointment of emergency arbitrator where relief is needed prior to the appointment of an arbitrator. Parties may opt out of the Emergency Relief Procedures in their arbitration agreement or by subsequent agreement (Rule 2(c)).	Provisions for the appointment of emergency arbitrator where relief is needed prior to the constitution of tribunal (R-38(a)-(g)).	Provisions for the appointment of a special arbitrator when interim measures are needed prior to constitution of tribunal (Rule 14.1-14.15).
Overall Time Frame for Arbitration	No specific time frames for overall proceeding. The final award to be rendered within 30 days after the close of hearing, unless extended under the rules (Rule 24). JAMS also offers Expedited Rules (Rule 16.1 and 16.2), which provide for arbitration within an expedited time frame.	No specific time frames for overall proceeding. Award to be made promptly by arbitrator and, unless otherwise agreed or specified, no later than 30 days from closing of hearing (R-45). The Expedited Procedures require that a hearing take place within 30 calendar days of the arbitrator's appointment (E-7), and the award is due no later than 14 days from the closing of hearing (E-9).	In most circumstances, dispute to be submitted to tribunal for decision within 6 months after prehearing conference. Any extension resulting in final award being rendered more than 12 months after prehearing conference requires CPR approval. In most circumstances, award to be submitted by tribunal to CPR within 30 days after close of hearing (Rule 15.8). For more expedited procedures, refer to CPR's Fast Track Arbitration Rules online.
PROCESS			
Arbitrator Neutrality	Sole arbitrator/chair must be neutral. Presumption of neutrality for party-appointed arbitrator, but parties may agree otherwise. (Rules 7 and 15(j)).	Sole arbitrator/chair must be neutral. Presumption of neutrality for party-appointed arbitrator, but parties may agree otherwise (R-18).	ALL arbitrators, including party-appointed, are required to be independent and neutral (Rule 7).
"Screened" Appointment of Arbitrators	No express provision. JAMS can arrange for parties to jointly interview candidates being considered for neutral appointment; with respect to candidates being considered for appointment by one side, Rule 14(b) addresses additional permitted contact with the candidate for selection purposes.	Parties' agreement on appointment process is followed. For larger disputes, the AAA will provide additional appointment options including oral or written interviews, and prescreening for conflicts through the Enhanced Neutrals Selection Process.	"Screened" procedure available by agreement of parties for selection of party-appointed arbitrators who do not know which party appointed them through list procedure (Rule 5.4). CPR can also arrange for joint interviews.
Challenges to Arbitrator – Who decides?	JAMS makes final determination (Rule 15). Authority for such decisions may be delegated to JAMS National Arbitration Committee (NAC) or the Office of the General Counsel. The NAC is composed of experienced neutrals, the general counsel's office and members of JAMS senior management.	AAA determines arbitrator challenges (R-18). In large arbitrations, the AAA's Administrative Review Council, composed of experienced executives, decides arbitrator challenges.	Challenge decided in accordance with CPR Challenge Protocol, which provides for an outside pro bono challenge panel composed of practitioners and neutrals (Rule 7).
Confidentiality	Arbitrator and JAMS to maintain confidential nature of proceeding and award, except as otherwise required by law (Rule 26).	Arbitrators and AAA "shall maintain privacy of hearings," except as otherwise required by law (R-25).	Parties, arbitrators and CPR "shall treat" proceedings, discovery and decisions as "confidential," except as otherwise required by law (Rule 20).
Mediation	Arbitrators may propose mediation and parties may agree to mediation at any time (Rule 28). In addition, parties may agree to seek assistance of an arbitrator in reaching settlement (Rule 28(b)).	The AAA requires parties to consider mediation for all disputes with claims exceeding $75,000, subject to either party to opting out of mediation. To avoid delay, the mediation shall take place concurrently with the arbitration unless the parties agree otherwise (R-9).	Parties may agree to mediate at any time. Tribunal is authorized to suggest settlement at any stage. Tribunal also may request CPR to arrange for mediation with the parties' consent. Mediator shall be a person other than a member of the tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the CPR Mediation Procedure (Rule 21.2).
Review of Award	Rule 24 permits the parties to request a correction of any computational, typographical or similar errors within seven days after service of the award. The arbitrator may also propose corrections.	Arbitrators deliver award to AAA for delivery to parties. Award is reviewed prior to completion. AAA provides forum costs to panel for inclusion in award. Provisions for parties to review and request modification is for clerical, typographical or computational errors in the award.	Prior to the execution of any award, the tribunal shall send a copy of the draft award to CPR for limited review for format/clerical/ typographical/computational errors (Rule 15.4). Within three days of CPR's response, the tribunal shall deliver the award and any dissenting opinion to CPR for delivery to the parties (Rule 15.5).
COSTS			
Filing Fee	Initial nonrefundable case management fee of $400 per party for one arbitrator. There is no additional fee for use of JAMS facilities or JAMS administrative services.	Initial filing fee varies dependent on amount in dispute. Separate initial filing fee for counterclaims. AAA provides two fee schedules—Standard Fee Schedule and Flexible Fee Schedule with a lower filing fee.	Flat initial filing fee of $1,750 to commence arbitration; no separate fee for counterclaims.

TOPIC	JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES (WWW.JAMSADR.COM)	AAA COMMERCIAL ARBITRATION RULES WWW.ADR.ORG	CPR ADMINISTERED ARBITRATION RULES WWW.CPRADR.ORG
Administrative Fees and Costs	JAMS does not charge separate administrative fees and costs; these are included in the case management fee, which is $400 per party for each 10 hours of professional time up to three days/30 hours. Thereafter the fee is 10 percent of the professional fees billed split by the parties. No cap indicated.	Each party bears own costs and administrative fees until allocated by arbitrators in the award. Based on the amount of claim in accordance with the AAA Commercial Fee Schedule, subject to cap.	Administrative fees are fixed amounts (not percentages) based on amount in dispute categories. Total CPR fees are capped absent special circumstances (see Schedule of Administered Arbitration Costs) (Rule 18.1).

THE LID IS OFF

This is not the kind of story Yahoo! is exclaiming about.

JUSTIN SULLIVAN/GETTY

NOTHING ABOUT THE CASE HAS BEEN ordinary. It's a sexual harassment lawsuit, but it doesn't involve any men. A company executive was accused, yet the case hasn't quietly settled. And perhaps most unusual of all, the executive countersued with a defamation claim.

It began in April, when Yahoo Inc. software engineer Nan Shi claimed that her boss had pressured her to have sex. She further claimed that when she broke off the relationship, her boss retaliated with poor performance reviews that ultimately led to her termination.

In July the executive fired back in a countersuit, calling the harassment claims "outrageously false." Maria Zhang, the executive Shi accused in her suit, claimed in her cross-complaint that the two women never had sex. Zhang contends that Shi was a poor employee who made false sexual harassment accusations in an attempt to keep her job.

"Shi made false claims that [Zhang] coerced her into having sex so that Shi could extort [Yahoo] for money," Zhang's attorneys, led by O'Melveny & Myers partner Eric Amdursky, wrote. Shi is represented by Matthew Fisher, a partner at Da Vega Fisher Mechtenberg. Fisher and Yahoo declined to comment.

Zhang said the two women worked together at Zhang's Seattle startup. When Yahoo acquired it, they were transferred to Yahoo's mobile products division. According to Zhang's cross-complaint, Shi struggled to keep up with the workload and received negative feedback. Realizing her job was in jeopardy, she complained to HR that Zhang threatened to terminate her.

"Significantly, however," Zhang's lawsuit said, "Shi did not claim during her March 2014 meeting with Yahoo's human resources department that she had ever been sexually harassed." Yahoo found no evidence of wrongdoing and closed the case. The following month, Shi complained to HR that Zhang forced her to have sex in exchange for favorable treatment. Yet, Shi has not produced proof that the two ever had sex, Zhang's suit asserts.

Kelly Armstrong, a San Francisco attorney who specializes in sexual harassment cases, says that accusers often lack proof. It doesn't necessarily make a case weak, she adds. But the Zhang case *is* unusual, Armstrong says, because corporations rarely allow such claims against their executives to make it to court. They generally settle quietly instead. It's also odd that Zhang struck back with a defamation suit, Armstrong adds: "In the 10 years that I've been running this practice, I don't think I've ever seen the other side file a cross-complaint for defamation" in one of these cases.

That may be because California, which has favorable laws for plaintiffs in sexual harassment cases, protects allegations made in lawsuits as litigation privilege. So Zhang's claim has no merit unless she can prove Shi repeated the allegations in another forum.

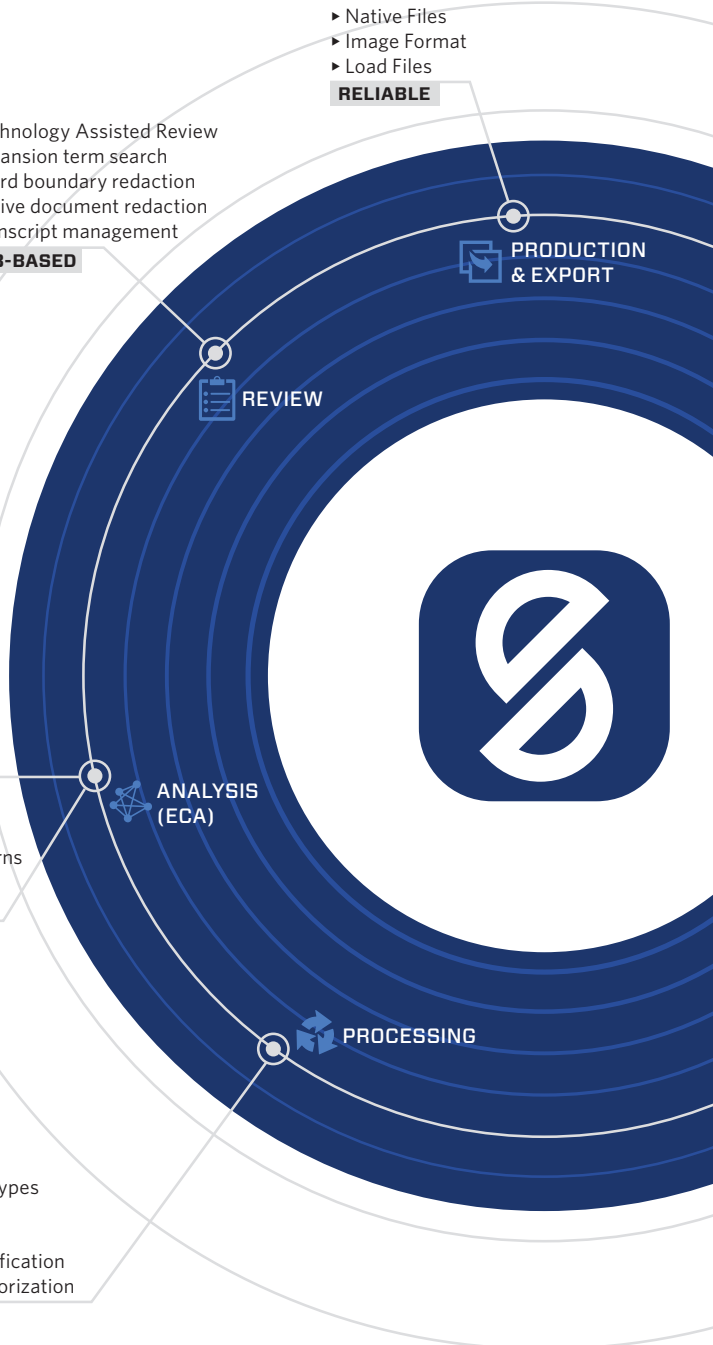
The cross-complaint alleges that she did: "Zhang alleges that Shi has falsely accused Zhang of sexual harassment to numerous third parties." On top of that, Zhang said that Shi has already profited from her sexual harassment claim to the tune of hundreds of thousands of dollars. Yahoo would have fired Shi for poor performance long ago, Zhang asserted, but it held off in order to investigate her allegations.

"In contrast to the windfall Shi received by making false claims of sexual harassment," the cross-complaint said, "Zhang has suffered severe hardship." —MARISA KENDALL

Summation

NextGen Legal Review

Summation® is the first and only e-discovery solution to combine full-strength data processing, early case assessment and final review features into a single mature platform—eliminating the need for iterative processing, data loading and multiple review cycles.



+DATA PROCESSING
+EARLY CASE ASSESSMENT
+FINAL REVIEW
+ **TOGETHER IN ONE**

Simple to use. Highly secure.
Request a demo today.
See Summation in action by requesting a demo at
www.accessdata.com/NGReview

AccessData®
@AccessDataGroup

MEDTRONIC COVIDIEN

Medical device maker **Medtronic Inc.** announced June 15 it would purchase Dublin-based **Covidien** in a $42.9 billion deal that would move the combined company to Ireland. The agreement calls for Medtronic to pay $35.19 in cash and 0.956 of a Medtronic share for each Covidien share—a 29 percent premium over the Irish medical device maker's closing price on June 13, the last day of trading before the announcement.

Upon the deal's completion, which is expected to happen in the last quarter of 2014 or in early 2015 pending approval by U.S. and European regulators as well as by shareholders at both companies, Covidien shareholders will hold 30 percent of the combined company. Medtronic plans to keep its headquarters in Minneapolis even though it will reincorporate in Ireland.

While **Omar Ishrak**, chairman and chief executive of Medtronic, denied that the company is entering the deal with Covidien as a way to reduce its tax obligations through what's known as a corporate inversion, it has called upon **Cleary Gottlieb Steen & Hamilton** and Irish firm **A&L Goodbody**—both of which are well versed in this type of structure—for legal advice. Likewise, Covidien has turned to **Wachtell, Lipton, Rosen & Katz; Skadden, Arps, Slate, Meagher & Flom;** and Irish firm **Arthur Cox**, all of which have done extensive work with corporate inversions. The deal is contingent on the merged company's ability to reincorporate outside the United States.

Cleary Gottlieb's team on the deal includes M&A partners **Victor Lewkow** and **Matthew Salerno**; antitrust partners **George Cary** and **Enrique González-Díaz**; employment partner **Arthur Kohn** and counsel **Caroline Hayday**; finance partners **Laurent Alpert** and **Meme Peponis**; and tax partners **Jason Factor** and **Yaron Reich**. Associates **Elaine Ewing, Corey Goodman, Matthew Mao, Neil Markel** and **Ruchit Patel** are also involved in the deal.

A&L Goodbody's team for Medtronic is led by M&A partners **Alan Casey, Cian McCourt** and **Mark Ward**. Corporate partner **James Grennan**, finance partner **Séamus Ó Cróinín** and tax partners **Paul Fahy** and **Peter Maher** are also involved.

In 2011, both Cleary Gottlieb and A&L Goodbody, along with Arthur Cox, advised on a different corporate inversion, this one involving a $960 million biotechnology merger between U.S.-based **Alkermes** and Ireland's **Elan Drug Technologies**. The newly merged company moved to Ireland, taking **Alkermes plc** as its name.

Advising Covidien is a Wachtell deal team headed by corporate partners **Adam Emmerich** and **Benjamin Roth**. It also includes antitrust partner **Nelson Fitts**, corporate partner **Victor Goldfeld**, executive compensation and benefits partner **Adam Shapiro**, litigation partner **Rachelle Silverberg**, restructuring and finance partner **Eric Rosof** and tax partner **Jodi Schwartz**. Associates **Franco Castelli, Tijana Dvornic, Emily Johnson, Andrew Kenny, Rohit Nafday, Michael Sabbah** and **Viktor Sapezhnikov** are also working on the deal.

In 2009 Wachtell advised Covidien on its relocation to Ireland from Bermuda after spinning off from **Tyco International Ltd.** two years earlier. The firm also represented Covidien in a $2 billion spinoff of pharmaceutical unit **Mallinckrodt Pharmaceuticals** in 2011.

Skadden advised Covidien on the tax aspects of the deal. Its team includes tax partners **Nathaniel Carden** and **Sally Thurston** and associates **Joseph Soltis** and **Chase Wink**. The team from Arthur Cox advising Covidien was led by **Brian O'Gorman** and includes corporate partners **Stephen Hegarty, Geoff Moore** and **Stephen Ranalow**, as well as tax partner **Fintan Clancy**.

Representing Medtronic's financial adviser, **Perella Weinberg Partners**, was **Freshfields Bruckhaus Deringer**, with a team led by New York-based corporate partner **Doug Bacon** and assistance from corporate partners **Matthew Herman** and **David Sonter**, finance partners **Neil Falconer, Martin Hutchings** and **Brian Rance**, and tax partner


Matthew Salerno
Cleary Gottlieb


Adam Emmerich
Wachtell


Rodd Schreiber
Skadden


Jay Fastow
Ballard Spahr


Theodore Grossman
Jones Day


Catherine Stetson
Hogan Lovells


Marcellus McRae
Gibson Dunn

Robert Scarborough. Covidien's financial adviser was **Goldman, Sachs & Co.**

—VINAYAK BALASUBRAMANIAN

* * * * * *

TYSON
HILLSHIRE

Tyson Foods Inc., one of the nation's largest chicken processors, bested **Pilgrim's Pride Corporation** on June 9 to acquire deli and packaged meat purveyor The **Hillshire Brands Company** with a sweetened offer of $7.7 billion, or $8.55 billion including debt.

In May, Hillshire, an offshoot of now-defunct consumer foods giant Sara Lee Corp., had been the target of a $6.4 billion takeover bid initiated by Pilgrim's, a unit of Brazilian beef and poultry giant **JBS**. But Tyson swooped in shortly after Memorial Day with a $6.8 billion bid for Hillshire, which in mid-May had made a $4.3 billion offer of its own to acquire another company, **Pinnacle Foods**.

George "Gar" Bason Jr., global cohead of **Davis Polk & Wardwell's** M&A group, is leading a team advising Tyson on the Hillshire deal. Other Davis Polk lawyers on the matter include senior corporate partner **Arthur Golden**, capital markets cohead **Richard Truesdell Jr.**, corporate partner **Marc Williams**, finance partner **Joseph Hadley**, antitrust partner **Ronan Harty**, executive compensation partner **Edmond FitzGerald**, tax partner **Neil Barr**, litigation counsel **Scott Luftglass** and associates **Harold Birnbaum, Derek Dostal** and **Lee Hochbaum**.

Skadden, Arps, Slate, Meagher & Flom, which advised on the breakup of **Sara Lee** three years ago, has taken the lead for Hillshire on its dealings with Tyson, Pilgrim's and Pinnacle. **Rodd Schreiber**, head of Skadden's corporate practice in Chicago, is leading the team. Other Skadden lawyers working on the deal include corporate partners **Michael Civale** and **Gregg Noel**, banking partner **Seth Jacobson**, North American antitrust head **Clifford Aronson**, employee benefits partner **Joseph Yaffe**, environmental and climate change head **Don Frost Jr.**, tax expert and global regulatory head **David Rievman** and IP partners **Bruce Goldner** and **Kenneth Plevan**.

Kent Magill is Hillshire's general counsel. Hillshire assistant general counsel **Alison Rhoten** is a former Skadden counsel in Chicago.

In its pursuit of Hillshire, Pilgrim's had turned to **Cravath, Swaine & Moore** corporate partners **Scott Barshay** and **Damien Zoubek** as outside counsel.

Pinnacle, which is 51 percent owned by **The Blackstone Group**, used **Simpson Thacher & Bartlett**, Blackstone's longtime outside counsel. Simpson Thacher's team included **Daniel Clivner**, managing partner of the Los Angeles office, along with employee benefits partner **Gregory Grogan**, capital markets partner **Richard Fenyes**, banking and credit partner **Alden Millard**, tax partner **Gary Mandel**, counsel **Justin Hoffman** and associates **Mimi Cheng, Jennifer Pepin, Robert Smith** and **Justin Yi**.

—BRIAN BAXTER

* * * * * *

MERITOR
V. EATON

Hours before a damages trial was scheduled to start on June 23, truck parts manufacturer **Eaton Corp.** agreed to pay rival **Meritor Inc.** $500 million to settle allegations that it squeezed them out of the market for truck transmissions. According to Meritor, the deal is one of the largest private antitrust settlement awards in a decade.

In 2009 Meritor convinced a jury in federal district court in Wilmington that Eaton was liable for anticompetitive behavior when it signed anticompetitive supply agreements with its truck transmission customers. A follow-up jury trial on damages was set to begin before **U.S. District Judge Sue Robinson**. Meritor had planned to seek $800 million—$2.4 billion after automatic trebling.

Meritor has long been represented in the case by antitrust litigators **Jay Fastow, R. Bruce Holcomb** and **Jennifer Hackett**. The trio worked together at **Dickstein Shapiro**, but Fastow left for **Ballard Spahr** in February, and Holcomb now runs the Washington, D.C.-based boutique **Adams Holcomb**. Hackett remains at Dickstein Shapiro. **Joseph Schoell** of **Drinker Biddle & Reath** was Meritor's local counsel in Wilmington.

Meritor sued Eaton in 2006, alleging that its joint venture with German company **ZF Friedrichshafen AG** was driven out of business by Eaton's allegedly anticompetitive practices. After winning the liability verdict in 2009, Meritor suffered a major setback two years later when Robinson ruled that it wasn't entitled to any damages. The U.S. Court of Appeals for the Third Circuit reversed Robinson's damages verdict and affirmed the underlying liability verdict. **Theodore Olson** of **Gibson Dunn & Crutcher** represented Eaton at the Third Circuit and filed an unsuccessful cert petition at the U.S. Supreme Court.

In addition to Gibson Dunn, Eaton has long been represented by **Robert Ruyak** and **Joseph Ostoyich**, formerly of **Howrey**. When Howrey folded, Ruyak headed to **Winston & Strawn**, and Ostoyich joined **Baker Botts**. After landing at **Winston & Strawn**, Ruyak brought Winston chairman **Dan Webb** onto the case. Eaton also hired **Al Pfeiffer Jr.** of **Latham & Watkins** for the damages phase and the anticipated trial.

—JAN WOLFE

* * * * * *

MACY'S
V. J.C. PENNEY

In a scathing decision released on June 16, **New York Supreme Court Justice Jeffrey Oing** in Manhattan found **J.C. Penney Co. Inc.** liable for interfering with a merchandising deal between **Macy's Inc.** and **Martha Stewart**'s namesake company, **Martha Stewart Living Omnimedia Inc.** But Oing found J.C. Penney not liable for punitive damages. At press time he had not yet set the damage award. (Penney appealed the ruling July 1, and Macy's said it would appeal the denial of punitive damages.)

After purchasing Covidien, **MEDTRONIC WOULD REINCORPORATE IN IRELAND** but keep its headquarters in Minneapolis.

Smart Resources.

Lex Mundi gives you preferred access to the resources of member firms around the world for your cross-border needs.

When you're handling mining rights across South America, do you have the right legal resources to get the job done?

With Lex Mundi you do.

Lex Mundi is your assurance of working with experienced, committed and deeply-resourced independent law firms wherever you need to operate.

It is your team of 21,000 lawyers with on-the-ground expertise connected across 100+ countries worldwide.

Get the resources you need to succeed with our World Ready network of 160 top-tier member firms.

Lex Mundi — the law firms that know your markets.*

Lex Mundi World Ready

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.

* The 160 selected member firms of Lex Mundi include: Chiomenti Studio Legale Gide Loyrette Nouel A.A.R.P.I. • Noerr LLP • Uría Menéndez • Bowman Gilfillan Amarchand & Mangaldas & Suresh A. Shroff & Co. • Clayton Utz • JunHe Nishimura & Asahi • Demarest Advogados • Alston & Bird LLP • Baker Botts L.L.P. McGuireWoods LLP • Morrison & Foerster LLP

Search our full listing of Lex Mundi Member Firms at: www.lexmundi.com/lexsearch2

In 2007 Macy's signed a deal with MSLO to sell a line of Stewart's home goods. The companies agreed that after five years, Macy's would have the option of renewing the contract. Unbeknownst to Macy's, J.C. Penney's then-CEO, **Ron Johnson**, met with Stewart in 2011 and persuaded her to sell her products, which had become a top seller for Macy's, at J.C. Penney as well. J.C. Penney would later argue that such an arrangement was permitted by MSLO's contract with Macy's. But the CEO's emails at the time, featured at trial, suggested that he saw the Macy's partnership as a major obstacle.

Instead of letting its partnership with Stewart lapse, Macy's renewed it and sued MSLO for breach of contract on a theory that MSLO tried to undermine the renewal right. Macy's also sued J.C. Penney for tortious interference with contract.

Oing consolidated the suits and held a bench trial last year. Stewart took the witness stand, as did Johnson. Macy's tapped **Jones Day** partner **Theodore Grossman**, who examined all the major witnesses, with assistance from Jones Day partners **Robert Faxon, Michael Platt** and **Louis Chaiten**. **Mark Epstein** of **Munger, Tolles & Olson** was lead counsel for J.C. Penney.

MSLO, which tapped **Eric Seiler** of **Friedman Kaplan Seiler & Adelman**, settled on terms favorable to Macy's after the trial, so it is not affected by the ruling. —J.W.

* * * * * *

GROCERY MANUFACTURERS ASSOCIATION V. SORRELL

Food industry trade groups have tapped **Hogan Lovells** to challenge a first-of-its-kind state law requiring the labeling of genetically engineered food. In a complaint filed June 12 in U.S. district court in Burlington, Vt., the trade groups argue that Vermont's government exceeded its constitutional authority by enacting the groundbreaking labeling law on May 8. They argue that the law, which goes into effect in 2016, violates the First Amendment as well as the Commerce Clause.

Four groups—the **Grocery Manufacturers Association**, the **Snack Food Association**, the **International Dairy Foods Association** and the **National Association of Manufacturers**—sued four Vermont officials, including **Attorney General William Sorrell** and **Gov. Peter Shumlin**. The groups have tapped **Catherine Stetson**, who codirects Hogan's appellate practice, and **E. Desmond Hogan**, as well as **Matthew Byrne**, a former partner at **Kirkland & Ellis** who is now a managing shareholder of the Burlington-based firm **Gravel & Shea**, as local counsel. Vermont Attorney General **William Sorrell** said his office would be defending the law.

Proponents of the law argue that GMOs may not be as safe as the U.S. Food and Drug Administration has asserted, and that consumers should be able to know what they're eating. But Hogan Lovells contends that Vermont's legislature has exempted dairy products and restaurant food from the bill to protect the state's tourism and dairy farming industries. The firm also maintains that to comply with the July 2016 deadline, some companies will have to change their labels throughout the entire United States.

On July 7, Sorrell said the state had negotiated a $1.5 million contract with **Robbins, Russell, Englert, Orseck, Untereiner & Sauber** to represent it. The state's response is due on Aug. 8. —J.W.

* * * * * *

VERGARA V. STATE OF CALIFORNIA

On June 10 a state trial judge in Los Angeles struck down five California statutes governing how the state's public school teachers are fired, laid off or granted tenure. The order came in a case brought by **Gibson, Dunn & Crutcher**'s **Theodore Boutrous Jr., Theodore Olson** and **Marcellus McRae** on behalf of nine public school children who claim that the state laws have protected thousands of "grossly ineffective" teachers across the state, thereby depriving the plaintiffs of equal access to a public education under the California Constitution. The suit, filed in 2012, alleged the statutes disproportionately hurt low-income and minority students.

Los Angeles County Superior Court **Judge Rolf Treu** found that all five statutes were unconstitutional. The evidence that the statutes harmed children was "compelling," he wrote, and "shocks the conscience." Treu stayed his decision pending an anticipated appeal.

The case had some heavy lifters on both sides. In addition to Boutrous, one of the lawyers who brought the case challenging the constitutionality of California's ban on same-sex marriage, the case had the financial backing of Silicon Valley entrepreneur **David Welch**'s nonprofit, **Students Matter**.

On the other side were California's largest teacher unions, the **California Teachers Association** and the **California Federation of Teachers**, which had intervened to defend the laws at issue.

The decision was stayed pending a near-certain appeal by union attorney **James Finberg** of **Altshuler Berzon**. **California Attorney General Kamala Harris**, representing officials named as defendants, was reviewing the tentative ruling at press time.

Treu ruled that a statute requiring administrators to make tenure decisions within two years or less didn't allow enough time to adequately assess a teacher's performance. Statutes governing the dismissal of ineffective teachers were "complex, time-consuming and expensive," he added. Treu also struck down another statute that protects senior teachers from getting laid off.

At trial, the defendants had blamed ineffective teachers on poor management at the districts. They insisted that the statutes provided adequate means for administrators to evaluate or dismiss teachers.

Treu, in his ruling, acknowledged the political ramifications of the case. "That this court's decision will and should result in political discourse is beyond question," he wrote. —AMANDA BRONSTAD

A decision striking down teacher tenure laws should trigger wider debate, **U.S. DISTRICT JUDGE TREU** wrote.

Some law firms sugarcoat their advice.

We don't.

There's a reason we've been named some of the best lawyers in America.

CLM Claims & Litigation Management Alliance

Best Lawyers Best Law Firms U.S.News 2014

Super Lawyers 2014

PEER REVIEWED by HFMA

AV Martindale-Hubbell PREEMINENT For Ethical Standards and Legal Ability 2014 Walter M. Jones III

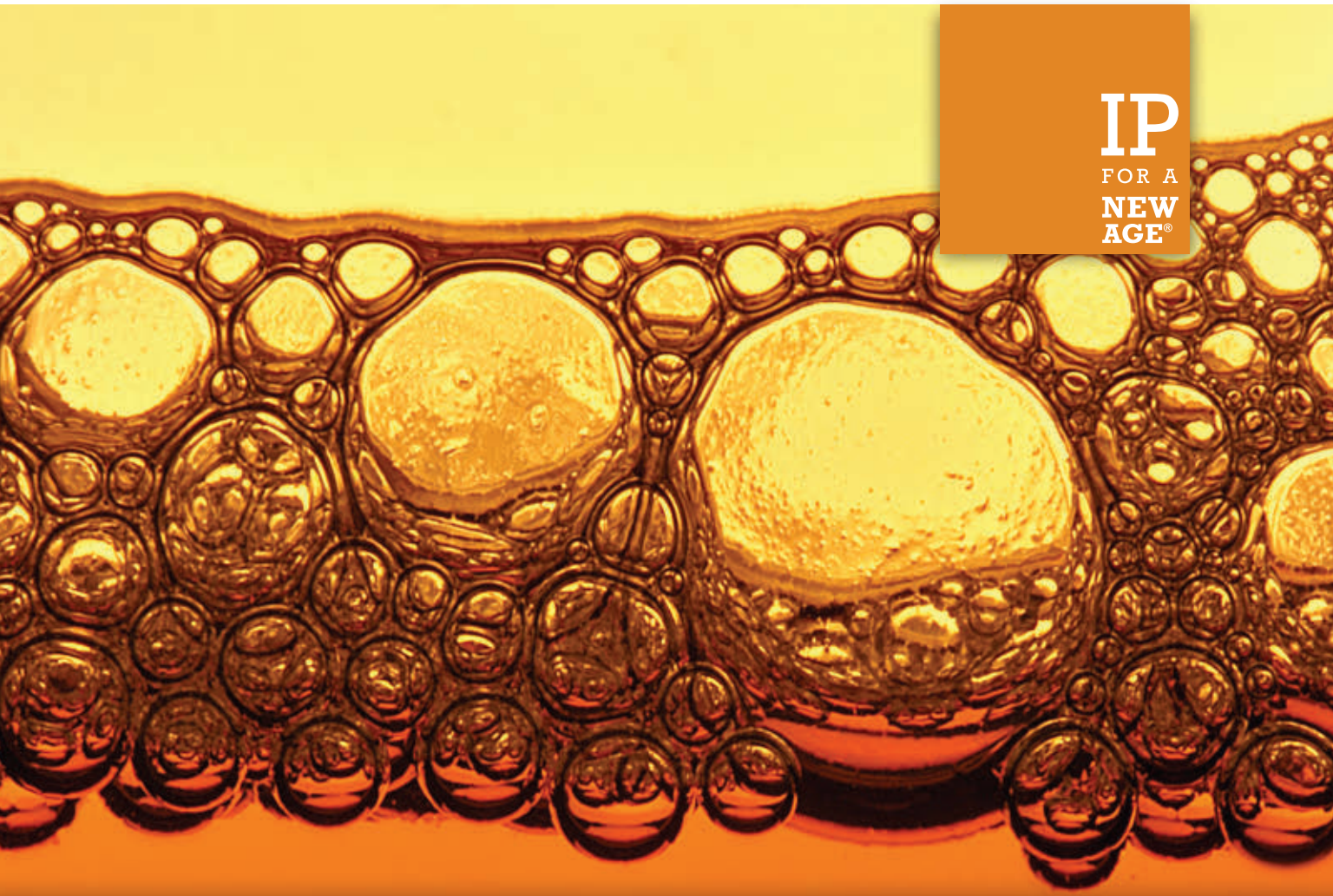
866.475.8629 | www.martinandseibert.com

M&S MARTIN & SEIBERT, L.C. ATTORNEYS AT LAW

Walter M. Jones, III, Managing Shareholder, responsible attorney.

Knobbe Martens
INTELLECTUAL PROPERTY LAW

IP FOR A NEW AGE®



it takes a certain skill to turn water into gold.

How do the people behind one of the world's most popular energy drinks keep their brand strong and their revenues flowing? They turn to Knobbe Martens. For 50 years, we've helped creative entrepreneurs secure and protect their essential IP assets—including trademarks, brands, trade dress, copyrights, packaging and product configuration. It's a blend of expertise and experience we think you'll find quite refreshing.

knobbe.com

MORE: corpcounsel.com

GOING UP

A new GC takes the American Express elevator to the top.

DURING A SUMMER THAT SAW A LOT OF career moves at prominent law departments, New York-based American Express Company hired accomplished in-house attorney **LAUREEN SEEGER** as its general counsel. Seeger left her job in June at McKesson Corporation, the largest health care services company in North America, to take the position at Amex.

Laureen Seeger

"Like McKesson, American Express is guided by a deep set of values, starting with a fundamental commitment to making a positive difference in people's lives through its products and services," Seeger said in a statement. "I look forward to helping American Express realize its vision to become the world's most respected service brand in my capacity as general counsel."

She replaced Tim Heine, who had served as acting general counsel since Louise Parent left as GC in 2013. Parent joined Cleary Gottlieb Steen & Hamilton in February, following 37 years at American Express. And she seems to have left a department that's in good shape. It earned a place last year as a finalist in Corporate Counsel's Best Legal Departments competition (and it's featured in a story on page 14).

Seeger, who is GC and corporate secretary, leads the company's legal, compliance and ethics departments. Next year she will add federal and state government affairs to that list.

Kenneth Chenault, chairman and CEO of Amex (and a lawyer himself), welcomed his new legal chief in a statement, calling her "one of the world's top legal leaders." He said, "Not only is Laureen a gifted legal strategist, litigator and an expert in managing compliance and regulatory affairs, throughout her career she has first and foremost been a catalyst for business growth."

JASON PARIS (AMEX TOWER)

Seeger joined McKesson in 2000 as general counsel of the corporation's technology division. She stepped up to general counsel and chief compliance officer in 2006. She helped build McKesson's law department, and led the company through complex M&A transactions and product evolutions.

In announcing her departure and the identity of her replacement, Lori Schechter, McKesson chairman and CEO John Hammergren lauded Seeger for "incredible character, integrity and heart." He added, "She has consistently provided expert legal and strategic guidance on the most important issues facing the company, while continually strengthening McKesson's general counsel organization by attracting and developing world-class talent."

—REBEKAH MINTZER

* * * * * *

BANKING'S SWEET SPOT

The Swiss have their chocolate, and now they have Barclays' managing director and general counsel for the Americas **MICHAEL CROWL**, who left the British bank to become UBS' general counsel for the Americas and for its wealth management unit.

Michael Crowl

The new GC started at the Swiss institution in July 1, replacing interim Ameri-

cas legal chief Brent Taylor, who returned to his role as head of legal for wealth management and investment solutions.

According to Crowl's LinkedIn profile, he spent four years in his last position at Barclays, where his responsibilities included coordinating and supervising their legal coverage in North and South America with a team of 170 attorneys and paralegals.

He has held other senior legal positions at Barclays and Goldman Sachs, and started his career as an associate at Cravath, Swaine & Moore. He holds a bachelor's degree in accounting from Penn State University and a law degree from New York University School of Law. —MARLISSE SILVER SWEENEY

* * * * * *

TO HEALTH—AND WEALTH

Health care consulting company Decision Resource Group announced in June that **KYLE BETTIGOLE** had joined the in-house team as its new general counsel and as a senior vice president.

Bettigole came to DRG from Princeton Review Inc. (now Education 1 Inc.), a $200 million global online and in-person education company, where he was senior vice president, general counsel and secretary. He also worked at Sapient Corp., a global integrated marketing and technology services company and digital advertising agency worldwide as assistant general counsel and vice president.

"His advice and guidance will be key in complex transactions and other company matters that propel our business strategy," says DRG CEO Jim Lang in a statement. "Kyle represents yet another key addition to our leadership team, where he will help support our rapid organic and acquisitive growth."

Bettigole says he's excited to join the in-house team that Lang assembled to help guide the company, and notes that "DRG's market position and ambitious growth plans are quite compelling." He earned his bachelor's degree from the University of Michigan and a law degree from Boston College Law School. Bettigole is replacing former general counsel Lori Silver, who had been with the company since 2008.

—KIERSTEN VERMEULEN

* * * * * *

BIG SHOES TO FILL

Chemical giant E.I. du Pont de Nemours and Company announced in June the appointment of a new general counsel. **STACY FOX** joined the Wilmington, Del.-based company, replacing longtime legal chief Thomas Sager, who retired after 37 years in DuPont's legal department.


Stacy Fox

"Stacy comes to us as a proven leader with exceptional experience as a lawyer

THE WRONG APPROACH CAN PUT YOU AT RISK.

Letting just anyone manage your IP portfolio can be dangerous. You need a partner you can trust, with the right tools and a plan to help you succeed. CPA Global is the world's leading IP management specialist, providing cutting-edge software and innovative service solutions to help corporations and law firms mitigate risk, optimise efficiency and reduce costs. We're positioned like no other to help you manage your assets across every stage of the IP lifecycle. Don't get burned by an ill-equipped IP management provider. Partner with a proven leader who's been serving the needs of clients for over 40 years.

IP MANAGEMENT SOFTWARE

PATENT &
TRADEMARK SERVICES

IP SUPPORT SERVICES

CPA GLOBAL®

FOR MORE INFORMATION, VISIT **WWW.CPAGLOBAL.COM**

and business executive," DuPont chair and CEO Ellen Kullman said in a statement announcing the new hire. "She will play an important role in supporting DuPont's growth, and I am pleased to welcome her to the company."

Fox arrives at DuPont with many years of in-house experience across several industries. Her most recent in-house position was at Sunoco Inc., where she was general counsel. Before Sunoco, she was executive vice president of corporate transactions and legal affairs for Visteon, a multinational automotive supplier, and general counsel of Collins & Aikman, a now-defunct manufacturer of automotive parts. After leaving Sunoco, she joined law firm Foley & Lardner as part of their automotive and energy industry team and in their transactional and securities practice.

Beyond her law firm and corporate roles, Fox is a founder and principal of the Roxbury Group, a real estate development and investment firm based in Detroit specializing in urban redevelopment projects. She also served as deputy emergency manager for the city of Detroit, working with Michigan's governor to help the city navigate through bankruptcy.

She will have some big shoes to fill at DuPont. Sager started there as an attorney in the labor and corporate security group in 1976 and worked his way up to reach the GC's office by 2008. He helped create the DuPont Convergence and Law Firm Partnering Program, a legal model for the company that has become a benchmark in the industry. —R.M.

* * * * * *

BACK TO THE FUTURE

It's a return to GE for **JASON HANSON**, who in June was appointed as vice president and general counsel for GE Healthcare. He had held GC roles with GE Healthcare Technologies, GE Healthcare Americas and GE Healthcare Services.

He came back to GE from Valeant Pharmaceuticals, which, according to Kathryn McCann in LegalBusiness.co.uk, is preparing a multibillion-dollar bid for Allergan, a Botox maker. He was group chairman and executive vice president there, and had been COO at Medicis Pharmaceutical Corp., according to his LinkedIn account.

Jason Hanson

Before going in-house, Hanson was with Arnold & Porter and a prosecutor for the Antitrust Division of the U.S. Department of Justice. He holds a bachelor's degree from Cornell University and a law degree from Duke University School of Law.

According to McCann, GE Healthcare is the first of the company's business segments to be headquartered in the U.K. It provides medical imaging, medical diagnostics, patient monitoring systems, drug discovery, biopharmaceutical manufacturing technologies and performance solution services, she says. —M.S.S.

UnitedLex

CONVERGE OR COLLIDE?
TIME FOR LEGAL AND COMPLIANCE STAFF TO TUNE IN TO CYBER RISK MANAGEMENT

Cyber risk is serious business, with broad implications for the health and viability of any enterprise. As the steady stream of high-profile data heists we've seen over the last several years demonstrate (the recent Target breach is only one example among many), we can no longer regard cyber risk management as the exclusive responsibility of the CIO or CISO. Corporate General Counsel, Chief Compliance Officers (CCOs) and other C-level executives should all be sensitive to the near- and long-term consequences of any data security incident, regardless of its technical origins, the perpetrators or the motivations behind it. Further, each stakeholder should recognize their respective role in managing cyber risks.

What can go wrong? Plenty. Business operations can be disrupted for days if critical web-based systems are affected, resulting in potential loss of significant revenues. Critical intellectual property and business trade secrets may be stolen undermining of the organization's competitive market position, which could have a direct and negative impact on stock prices and future business growth. An incident can also unleash an onslaught of expensive and damaging litigation and/or regulatory and statutory compliance actions. Recovering from a major information security incident can take years, and ill-prepared organizations may never again enjoy the level of trust and the positive brand perceptions they had before the breach took place.

THE BENEFITS—AND RISKS—OF TECHNOLOGICAL INNOVATION

Profitable business growth demands that companies increasingly seek and utilize every technological advantage to effectively compete. But along with the many benefits of technology transformation come a host of new business risks—the most serious of which is cyber security risk. An entire industry of cloud-based and on-premise security products and services has emerged to deal with this risk.

Unfortunately, too often these solutions are viewed as potential constraints on business growth, resulting in the widespread perception that enterprises must constantly engage in "trade-

offs" between being secure and being competitive. In our view, balancing security concerns against revenue generation is outmoded and based on too narrow a conception of enterprise security. Because cyber risk is an enterprise wide threat, not just an IT operational risk, an effective enterprise security program that is woven into the fabric of the business strategy can actually turn security management into a business growth enabler.

As data breaches and cyber threat responses continue to dominate newsrooms as well as board rooms, the pressure on attorneys and compliance staff to develop effective information security management programs has reached unprecedented levels. As a first step in getting a handle on information security risk, people from different enterprise domains— executive management, legal, compliance, IT and security staff, at minimum—need to be comfortable talking to each other. A culture of cooperation between business, legal and IT stakeholders is necessary to ensure that existing policies, procedures and everyday practices are sufficient to protect the company against the damage that can result from an incident. Beyond that, a formal risk management program incorporating practical and defensible approaches to internal security policies will help minimize the escalating legal and compliance risks associated with data privacy and security breaches.

INCIDENT RESPONSE: THE PRIME DIRECTIVE

The most important component of an information security management program is incident response. For many companies, a data breach forces legal and IT staff to come together to discuss cyber security. However, it is not unusual for legal to be in the dark about the incident until after IT has already conducted considerable investigative work to determine what happened and how. This tendency to delay the involvement of the legal department is a practice that can exacerbate the negative impacts of the incident down the road.

A lack of clear communication and cooperation between legal and IT from the very beginning can actually make the security event much worse in the long run. Even if IT staff and outside consultants have been trained in incident response, they may overlook or underestimate the importance of creating a clear and defensible record of response activities so that counsel can effectively address future legal or compliance challenges that may emerge after the incident. Also, IT may not fully comprehend the scope or ramifications of the breach based on the data that was compromised , whereas legal—which is involved in nearly all business matters throughout the enterprise—would instantly make such connections.

Thus, one of the primary objectives of a formal cyber risk management program is to foster a unified response between IT and legal for when an incident occurs—before it occurs. In a "converged" incident response model, legal considerations are given equal emphasis alongside technical investigation and remediation activities.

> An effective enterprise security program that is woven into the fabric of the business strategy can actually turn security management into a business growth enabler.

PROACTIVE CYBER RISK MANAGEMENT: AN EXERCISE TO GET STARTED

One way to get a sense of the alignment (or lack thereof) between legal and IT on the topic of cyber security and risk management is to sit down individually with professionals from both departments and pose a set of questions about information security risk. Key questions that will help you measure your organization's cyber security risk alignment include:

- What are the top three most significant information security and data privacy risks faced by your company?
- How is your information security framework tailored to defend against these threats?
- Who owns the information security and data privacy risk function in your organization—including managing insider threat risk?
- Are you familiar with your company's information security incident response plan, and can you describe your own role in the process?
- When did your organization last conduct an information security risk assessment and what were the results?

You may be surprised at the variety of answers provided within your organization. Remember, everyone's views and concerns are legitimate and should be considered and you must work

together to reconcile the gaps with the goal of developing a unified corporate response. At this point, outside expertise can often help the company unify its risk profile and response plan based on industry best practices, while squelching any opportunity for discord or acrimony that may emerge among different stakeholder groups.

Keep in mind there is no single benchmark to measure against, so a degree of subjectivity in reaching a unified view is not only acceptable, it is expected. The idea is to get IT staff to the point where they can articulate legal's primary concerns with respect to cyber risk and for legal to be able to articulate the primary concerns of IT. That will go a long way towards developing a more unified view of cyber risk and an effective, coherent strategy for responding to an incident.

One of the primary objectives of a formal cyber risk management program is to foster a unified response between IT and legal for when an incident occurs—before it occurs. In a "converged" incident response model, legal considerations are given equal emphasis alongside technical investigation and remediation activities.

THE CONSEQUENCES OF FALLING BEHIND

There is still time to get ahead of the curve, but the time to get started is now. As we've seen in recent years with the rapid evolution of case law and civil procedure rules in electronic discovery and electronic evidence spoliation, the "head in the sand" approach can only last so long before you risk slipping dangerously below the ever-rising bar that defines "reasonable" care. Indeed, the warning beacons are already flashing in the form of publicly disclosed document requests from the Federal Trade Commission (FTC) and even from congressional committees while other federal agencies like the Securities and Exchange Commission (SEC) and the Commodity Futures Trade Commission (CFTC)are extending their reach into cyber security as well.

In one recent case brought by the FTC involving an alleged violation of Section 5 of the FTC Act, the agency propounded the following document requests to enable its assessment of the sufficiency of the defendant's information security practices:

- "All communications . . . about any security incident at any point in time."
- "All forensic reports or analyses relating to any security incident."
- "All external vulnerability scans provided to the company."[1]

In the wake of the notorious incident in which 70 million records were stolen from Target in November and December 2013, the company's now ex-CEO Greg Steinhafel received from a letter from Rep. Waxman's House Committee on Energy and Commerce. Among other items, the letter gave Target eight days to produce the following:

- "All written policies or guidelines relating to threat monitoring, network security, or point-of-sale system protection . . . from January 1, 2012 to the present."
- "All e-mail correspondence, analyses, reports or any other communications relating to the Kaptoxa malware, or to point-of-sale system security or any other information security systems implicated in this breach. . . ."[2]

The SEC's Office of Compliance Inspections and Examinations (OCIE) recently published a cyber security initiative providing a sample list of "requests for information" the agency could use in conducting examinations of broker-dealers and registered investment advisers on cyber security issues. Among the specific sample requests are things like:

- A copy of the firm's written information security policy
- Documentation of periodic risk assessments, including responsible parties and findings
- Identification of "published cybersecurity risk management process standards" used to model the firm's information security architecture and processes
- Documentation of practices surrounding online account access by customers
- Documentation of cybersecurity risk assessments of vendors and business partners[3]

[1] *In re: the Matter of LabMD, Inc., Docket no. 9357, (FTC, Nov. 5, 2013): http://www.ftc.gov/sites/default/files/documents/cases/131105labmdmtn.pdf*

[2] *The complete text of the letter may be found here: http://democrats.energycommerce.house.gov/sites/default/files/documents/Steinhafel-Target-Data-Breach-2014-1-23.pdf*

[3] *National Exam Program Risk Alert: OCIE Cybersecurity Initiative, 15 April 2014: http://www.sec.gov/ocie/announcement/Cybersecurity+Risk+Alert++%2526+Appendix+-+4.15.14.pdf*

For its part, CFTC has recommended a set of "best practices" for developing, implementing and maintaining a written information security and privacy program. Among these practices are:

- Designating a specific employee "with privacy and security management oversight responsibilities"
- Designing and implementing policies and procedures for responding to an incident
- Identifying "all reasonably foreseeable internal and external risks to security, confidentiality, and integrity of personal information"
- Regularly testing the safeguards' "controls, systems, policies and procedures" and maintaining a written record of their effectiveness
- Having an independent party test the safeguards at least once every two years
- Providing the Board of Directors with an annual assessment of the program.[4]

CYBER SECURITY AS A DRIVER OF GROWTH

The process of developing a unified risk management is often a valuable opportunity for companies to assess more accurately and effectively the true risks—and ultimately, costs—involved in major initiatives. For example, alignment of legal and IT security functions can help organizations quickly assess the risks involved with releasing a new web-based service to improve speed to market and maximize profit opportunities. Early cooperation between legal and IT in assessing a potential merger or acquisition can identify cyber security considerations that could affect the value of the deal and the organization's ability to execute an effective integration. The two departments can also work together to provide decision-makers with actionable intelligence regarding the information security risks involved in operating in a new market, such as China, where data protection laws and controls aren't as robust.

Working closely together, legal and IT security professionals can often find a way to move the business in the direction it wants to go—and at the same time remain within acceptable risk parameters. Proper implementation of risk management planning will not only help your organization identify business strategies and tactics that are unreasonably risky, it will also position you to move ahead promptly and confidently with transactions or other initiatives that might otherwise have foundered under legal risk or cyber security risk analysis if performed independently.

CONCLUSION

Embracing a risk management philosophy based on convergence between IT and legal is a critical step in responding effectively to sophisticated cyber threats. The immediate fallout of a breach is certainly a considerable risk in itself. However, the less obvious but equally formidable risk that inaction will undermine your organization's ability to legally defend itself if the sufficiency of its information security controls comes under question.

It's also important to remember that convergence can serve as an enabler for business growth and a valuable differentiator to your clients or customers. Organizations equipped to assess risk efficiently and accurately can realize significant strategic advantages, in large part because they have put themselves in a position to act on opportunities as they arise without getting mired in legal or security restrictions or the indecision that can result from imperfect or incomplete information.

Don't wait for a breach before your IT and legal teams come together to develop a plan. The time to act is now.

— Jason Straight, Doug Goodall

FOR MORE INFORMATION, PLEASE CONTACT:

information@unitedlex.com

[4] *CFTC Staff Advisory Memo No. 14-21, 26 February 2014: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-21.pdf*

CLOUD COMPUTING:

A PRACTICAL APPROACH

"Cloud Computing" has been hailed as the newest and greatest model for enabling companies to obtain convenient, on-demand, scalable network access to the latest technology without the need to maintain expensive internal IT staff or continually refresh infrastructure. Unfortunately, in their desire to save costs and jump on the technology bandwagon, many companies are signing up to Cloud agreements without even understanding the technology risks, business concerns or their legal obligations. Our course will help separate the "buzz" from the Cloud and will offer a practical understanding of the technology, business and legal considerations of your organization's use of Cloud Computing technologies and providers.

Join us and the experts from law firms and industry who will help demystify the Cloud, answer your Cloud Computing questions and discuss both the strategic opportunities and risk management priorities surrounding your organization's use of Cloud Computing. Hear from in-house counsel and industry about what they really want and need from the Cloud. We will provide you with practical information and approaches that will help you harness the power of the Cloud without sacrificing your legal duties and business/fiduciary requirements.

This course is a must attend for Directors; Officers, Corporate Counsel and Risk Managers who need to understand how to harness the benefits and mitigate the risks of the Cloud and how to protect themselves and their companies.

Sponsored by
netdocuments®

HIGHLIGHTS

- The Cloud In 2014-Where Are We Now? Where Are We Going?
- Overview Of Legal Agreements And Key Clauses In Cloud Agreements - Understanding The Documentation
- Privacy/Data Security Issues In Cloud Computing
- Health Care Clouds/Clouds For Financial Service Providers
- Employment Implications And Cloud Computing
- Protecting Your Intellectual Property In The Cloud
- Litigation And The Cloud
- Insurance And The Cloud

Visit **www.westlegaledcenter.com**
for further information.
Or call 1-800-308-1700

COURSE LEADER

Lisa Lifshitz, Partner, Torkin Manes LLP

LOCATION

Thomson Reuters Building – Carnegie Hall
3 Times Square, 30th Floor
New York , NY 10036

WHEN

September 17, 2014 • 8:30 - 6:00

Current Price
$795.00

West LegalEdcenter®

THOMSON REUTERS

Comfortable in the Carolinas?

Well, yes… with 190 lawyers working in Charleston, Charlotte, Columbia, Greensboro, Greenville, Hilton Head, Myrtle Beach and Raleigh.

Companies large and small meet their challenges at the deal table, in court and in the halls of government with Nexsen Pruet.

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

4141 Parklake Avenue | Suite 200 | Raleigh, NC 27612
John Sowards | Board Chairman | 1.800.825.6757

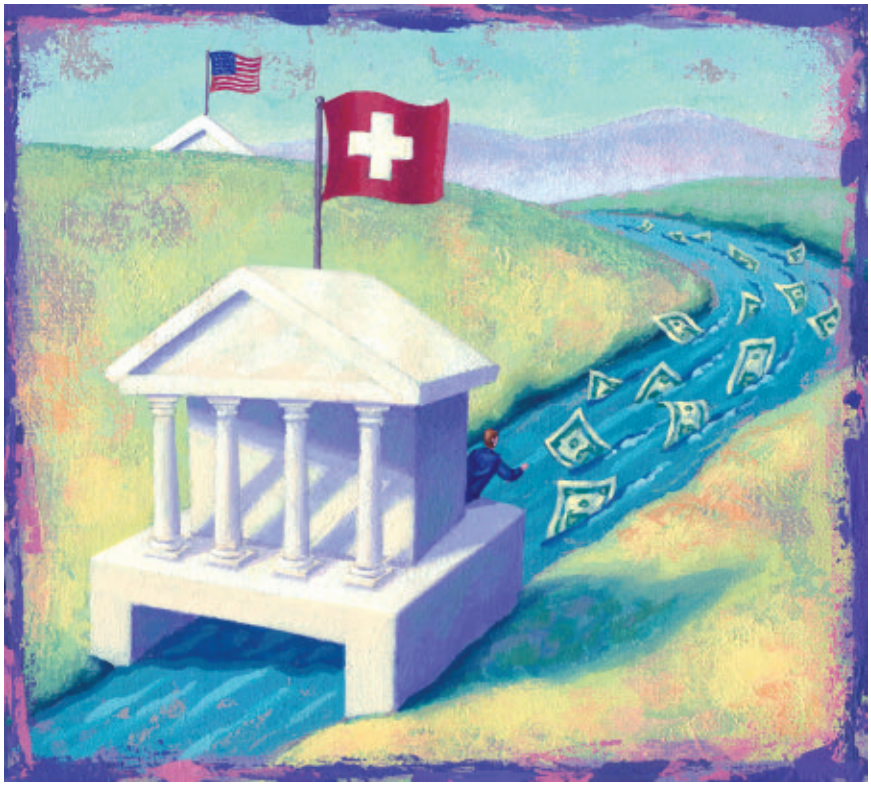
190 lawyers in Charleston, Charlotte, Columbia, Greensboro, Greenville, Hilton Head, Myrtle Beach and Raleigh. nexsenpruet.com

MORE: corpcounsel.com

IT'S NOT JUST THE SWISS

Banks far from Switzerland should know what institutions there disclose.

[BY JUSTIN S. WEDDLE]



ERIC WESTBROOK

FINANCIAL INSTITUTIONS OUTSIDE SWITZERLAND may be tempted to think that the U.S. Department of Justice's focus and pressure on Swiss banks in recent years leaves them in the clear. And, indeed, the DOJ has had great success in targeting these institutions far from U.S. shores. It has levied monetary penalties exceeding $3.3 billion to resolve criminal charges against two big Swiss banks, and has created a voluntary disclosure program that has so far attracted participation from more than 100.

But non-Swiss banks should also take heed. They would be well-advised to pay close attention to the information that the Swiss banks are disclosing because, in all likelihood, the Justice Department's aim is about to expand. And when it does, the department is likely to follow the flow of money from the Swiss banks to their non-Swiss counterparts.

All potential targets would be wise to begin preparing how they intend to respond.

DOJ'S RAMPED-UP ENFORCEMENT

The U.S. began cracking down on Swiss banks and bankers involved in facilitating U.S. tax evasion in 2008. These efforts have resulted in convictions of a number of individuals and institutions, including bankers, U.S. customers and even banks. By 2009, UBS had entered into a deferred prosecution agreement, admitted its participation in evading U.S. taxes and paid approximately $780 million in financial penalties and restitution. Most recently, Credit Suisse pled guilty in May and agreed to pay a total of approximately $2.6 billion to the DOJ and other regulators.

In the course of this effort, the department announced a "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks," in August 2013, The program is complicated, but in broad strokes it instituted a procedure for Swiss banks to obtain amnesty from prosecution. The price, however, is not cheap. It involves substantial fines that are calculated based on the high balances of U.S.-owned accounts. More important, participant banks must make extensive and detailed disclosures to the DOJ. The banks are not required to disclose the actual names of the beneficial owners of the disclosed accounts. But they have to reveal plenty of other data. Among other things, for each U.S. related account that was closed between Aug. 1, 2008, through 2014, section II.D.2(b)(vi)) of the program requires that banks disclose:

> *Information concerning the transfer of funds into and out of the account during the Applicable Period on a monthly basis, including (a) whether funds were deposited or withdrawn in cash; (b) whether funds were transferred through an intermediary (including, but not limited to, an asset manager, financial adviser, trustee, fiduciary, nominee, attorney, accountant or other third party functioning in a similar capacity) and the name and function of any such intermediary; (c) identification of any financial institution and domicile of any financial institution that transferred into or received funds from the account; and (d) any country to or from which funds were transferred.*

The program requires that all participating banks be in a position to produce this information for the roughly six-year period no later than June 30, 2014. According to public statements by DOJ officials, more than 100 Swiss banks (approximately a third of all that were eligible) have elected to participate. The ineligible banks include those that were under criminal investigation as of Aug.

29, 2013. Media reports indicate that 14 banks were subject to this exclusion. Even for excluded banks, substantial information has been disclosed, and more may be coming in the future as they resolve their investigations. For example, Credit Suisse's agreement expressly cross-references the program in defining the bank's required disclosures.

FATCA DISCLOSURES ARE DIFFERENT

An additional piece of the puzzle is, of course, the Foreign Account Tax Compliance Act (FATCA), which has forced the creation of a FATCA compliance structure at financial institutions worldwide. FATCA requires foreign financial institutions to disclose to the U.S. Internal Revenue Service information about their U.S. related accounts, or be subject to withholding on all U.S.-source income of 30 percent. FATCA went online July 1, 2014, and disclosures will begin in 2016.

These FATCA disclosures are different from those required of Swiss banks under the DOJ's program. First, FATCA disclosures will be massive—there are currently more than 80,000 registered foreign financial institutions, and each is required by FATCA to provide to the IRS the name, tax identification number, annual bank balance and gross receipts and withdrawals for all U.S.-related accounts. Second, the FATCA disclosures focus on the clients of the financial institutions, not the institutions themselves. In other words, the disclosures help the IRS identify Americans who should be reporting their overseas accounts and income, but they do not help identify foreign institutions that are holding those Americans' assets.

The Justice Department's interest in Swiss banks is likely to expand soon. Non-Swiss banks beware: **THE FLOW OF MONEY COULD LEAD TO YOU.**

WHAT COULD BE IN STORE FOR NON-SWISS INSTITUTIONS

The detailed monthly in- and outflow information that Swiss banks are prepared to provide in order to obtain amnesty will produce immediate leads for further investigations. Indeed, shortly after the program was announced, Kathryn Keneally, then-assistant attorney general in charge of the Tax Division, said, "We see this as a way to follow the money for account holders who chose to move their money to other jurisdictions. … This will let us know where the money went and where to look next." (Quoted in "ABA Meeting: U.S. Believes Swiss Bank Program Will Reveal Accounts in Other Jurisdictions," 2013 Tax Notes Today 185-8 [9/14/13].)

In other words, while the bulk of the attention to date has been focused on Switzerland, the completion of the program's nonprosecution agreements likely will provide an immediate means for the DOJ to pick its next targets elsewhere around the world. This is because

IP LAW

LEYDIG, VOIT & MAYER, LTD. **SINGULAR FOCUS. OUTSTANDING RESULTS.**

LEYDIG

Each attorney at Leydig has a singular focus: the practice of intellectual property law. For more than 115 years, the firm has met its clients' most demanding IP needs – from prosecution to litigation of IP rights worldwide.

Chicago · Frankfurt am Main · San Francisco Bay Area · Washington, DC **www.leydig.com**

a prosecutor on the receiving end of the Swiss bank disclosures can readily put the disclosures in a single database and sort the data to identify the non-Swiss financial institutions that are the biggest money-movers (either value-wise or frequency-wise) with these suspect Swiss accounts. Doing this is simple, predictable and likely to result in the immediate targeting of financial institutions that have sent or received money identified by Swiss banks.

So, what can financial institutions that may find themselves in the crosshairs due to prepare? A good place to start would be asking themselves the following questions:

1. "What is the DOJ learning from Swiss banks about my financial institution?"

It should be possible, with some effort, to reverse-engineer the information DOJ is receiving by compiling money flows that have traveled between your institution and Swiss banks over the period covered by the program (approximately 2008 to the present). Cross-referencing those money flows with any available information suggesting that the account-holders are U.S. persons should provide a good approximation of the information DOJ will be receiving. Financial institutions that are now FATCA-compliant are likely already tracking indications that accounts that are U.S.-related. Cross-referencing the money flows against these U.S. indicia provides an efficient way to perform this analysis.

2. "What will our answer be when the DOJ asks whether these money flows reflect accounts that are complying with, or violating, U.S. tax laws?"

If your institution's U.S. tax compliance systems are effective, there should be ready evidence that the financial institution is fully compliant with U.S. tax law and FATCA for the accounts involved in these money flows. If a review does not provide this evidence, your financial institution would be well-advised to seek immediate counsel to investigate and correct any issues, and to prepare for any contact from the DOJ. After all, if the Swiss banks' information can lead the DOJ to your institution's door, you don't want to let the knock take you by surprise.

JUSTIN S. WEDDLE

Justin S. Weddle, a former federal prosecutor in the Southern District of New York, is a partner in the white-collar defense and government investigations group at Brown Rudnick.

HOT STUFF

WEARY OF BLAND LEGAL ADVICE?

UNINSPIRED BY A STALE RELATIONSHIP?

With more than 150 attorneys in Louisiana, Kean Miller represents some of the hottest companies on the planet. From energy to technology, from healthcare to construction, from petrochemicals to transportation, we forge multi-disciplinary industry and client teams designed to help you bring the heat.

At Kean Miller, we're focused on delivering a lively service experience in addition to red-hot legal advice. So if you're ready for a dash of something different, contact us at keanmiller.com

KEAN | MILLER LLP
ATTORNEYS AT LAW

BATON ROUGE | NEW ORLEANS | SHREVEPORT | LAKE CHARLES
KEANMILLER.COM | *G. Blane Clark, Jr., Managing Partner*

ADVERSITY *is a* FACT *of* LIFE.

We must not merely endure,

WE MUST PREVAIL.

"THE LINE STORM" JOHN STEUART CURRY, 1934. LICENSED BY KIECHEL FINE ART, LINCOLN, NE.

Lathrop & Gage was founded in 1873 on the heartland principles of honor, service, trust and value. We work tirelessly to serve our clients in the same unwavering manner today. To find out more about Lathrop & Gage, contact us at (800) 476-4224.

LATHROP & GAGE LLP

NATIONAL FIRM. MIDWEST VALUE.℠

CALIFORNIA | COLORADO | ILLINOIS | KANSAS | MASSACHUSETTS | MISSOURI | NEW YORK

(800) 476-4224 | LATHROPGAGE.COM

MORE: corpcounsel.com

GET OUT YOUR QUILLS?

Technology is great—except when it isn't.

[BY DAN CURRELL]

MAYBE IT'S TIME FOR IN-HOUSE LAWYERS to ditch all the technology and dust off their fountain pens.

Our company, CEB, recently ran a full-scale study of in-house legal technology, interviewing corporate counsel and surveying 117 companies on the implementation and performance of their six most common technology systems (contract management, document management, e-billing, e-discovery, IP management and matter management). The study assessed such things as cost, efficiency and quality. We also asked corporate counsel about the biggest risks to successful implementation—and since a truly successful implementation is so hard, those risks are awfully important.

Our big conclusion is that legal technology is great—except when it isn't, which is most of the time. A thorough study of the sector produces a picture about as coherent as millennials' political views. Nearly every technology platform we assessed had some users so enthusiastic that they would highly recommend them to others. Meanwhile, most of those same technologies had a similar number of users who wouldn't wish them upon their enemies. Same technologies, different companies, radically different results.

What gives? When we looked into why this might be, we found that bigger legal departments are not more likely to be satisfied than small departments. Surprisingly, legal departments with the good fortune to have more IT support than others were not more likely to be satisfied with their results. So what's the difference-maker? It's not the technology—it's the people and process.

Over the last 20 years, economists have debated whether—and how—IT enhances economic productivity. For a while in the 1990s and early 2000s, there was a credible argument that all our investments in corporate IT had netted almost nothing in terms of true productivity. Since then, most economists have come to agree that IT investments really do pay off in the long run, but it's not a matter of spending money and then sitting back to enjoy the increased returns.

JAMES KACZMAN

The title of a study by EDS Innovation Research Programme and the London School of Economics & Political Science on this topic captures the overall conclusion well: "Information Technology and Productivity: It ain't what you do, it's how you do IT." In other words, the problem with corporate IT isn't the technology—it's how the humans implement and use it. With legal technology, we know that it's largely about how humans misuse, or fail to use, their expensive technologies that so often leads to disappointing results.

AND DISAPPOINTMENT IS THE NORM, though it's not quite universal. When surveyed on the effectiveness of different management strategies, projects and approaches to enhancing department productivity, corporate counsel clearly score technology investments lowest in effectiveness when compared to others. Paradoxically, these investments (even at $150,000 a pop) remain very common—indeed, they are more common than other, more effective, initiatives. So not only are we disappointed, but we keep coming back for more.

Legal technology failures are about our failure to carry implementation through to the finish line. And the finish line is not when the system is installed and working correctly. We've only hit the finish line when all the humans who need to use the platform are in fact using it—regularly and correctly.

Perhaps everyone already knows this. Nevertheless, the most common state of affairs for a legal technology platform is that the technology works reasonably well, but people use it incorrectly or infrequently. As a result, the platform is underpopulated with good data or overpopulated with bad data, and nobody trusts it. Technology that nobody trusts

is about as economically productive as a machine that everyone is afraid to use.

It's easy to see why this happens. Companies know that they need to first install the technology and then change the operating culture of the people who use it. But they only budget for installation. The second part is supposed to happen—somehow. It's an unfunded mandate. It mostly doesn't happen.

This is a big part of the "productivity paradox" of legal IT. Installing technology but not changing the operating culture of its users is like building half a bridge. In book value, you have half a bridge. In practice, you have a curious lump of concrete.

BUT LET'S NOT LOSE SIGHT OF THE FACT that there is great promise in IT systems—and, just as technology drove great global economic gains, legal technology will most likely drive productivity gains for corporate counsel once we get it right. Our study may show that this is not quite happening yet in 2014, but it also reveals some promising developments:

- Legal IT does solve complexity problems. In all product categories, bigger departments are much more likely to make technology investments. As we noted earlier, they aren't more satisfied, and implementation appears to be more difficult in bigger departments. However, if the basic economic value of these systems weren't there, we wouldn't see such ubiquitous implementation among big departments.
- E-billing works pretty well. The average user assessment of nearly every technology platform (on the basis of cost, efficiency and quality) was decidedly lackluster, but e-billing did better than the others. Of course it depends on the platform you're using—and how you use it. But on average, e-billing was the only technology for which the typical user thinks value delivery is "somewhat high" or better (58 percent of users rated their e-billing platform "high" or "somewhat high" on efficiency improvement; no other technology broke 50 percent on any of the three criteria).
- Configurable inputs and outputs help—a lot. We assessed the relationship between technology features and technology performance. Do some of the bells and whistles matter more than others? The answer is yes—and one clear theme is software providers making system inputs and outputs configurable by the user. Systems that are more user-configurable perform better in the experience of their users, so you don't have to go back to the programmers to make changes in how the system works.

Figuring out legal technology is difficult and time-consuming, but, at the risk of sounding patronizing, we're getting closer. In the end, we need a clearer vision of how new platforms will be used, we need to apply more pressure to our technology selection process to ensure that vision is possible, and we need better change management (and resources) to bring that vision to life. Only then will we be able to effect the change we intend our investments to make.

Dan Currell is an executive director at CEB in the legal, risk and compliance practice. He advises executives from Fortune 500 companies and other organizations across the globe on issues related to risk management, governance, enterprise risk, compliance and legal department management. He also writes the Business of Law column for CorpCounsel.com.

Atlanta Chicago Dallas Denver Kansas City Los Angeles New York Phoenix St. Louis San Francisco Washington, D.C. Wilmington

polsinelli.com

KOBRE & KIM LLP
THE GLOBAL LITIGATION BOUTIQUE

Market Leader

In Enforcing Judgments & Arbitration Awards

Winning your case is only half the battle. As the value of judgments and arbitration awards coming out of large-scale disputes continues to rise, so does the challenge of enforcing them when assets are spread across an international network of financial institutions and structures.

Kobre & Kim LLP combines proven experience with cutting edge alternative fee structures, delivering the full spectrum of asset recovery services for US $50 million~US $1 billion+ judgments or arbitration awards.

- Global Coverage
- Integrated team of U.S., English and Offshore Lawyers
- Innovative Fee Arrangements
- Advice on Sales of Judgments and Awards

NEW YORK | LONDON | HONG KONG | WASHINGTON DC | MIAMI | CAYMAN ISLANDS | BRITISH VIRGIN ISLANDS

MORE: corpcounsel.com

ON YOUR MARK

The Redskins lost a round in a trademark dispute, but where will it end? [BY TONY MAURO AND JENNA GREENE]

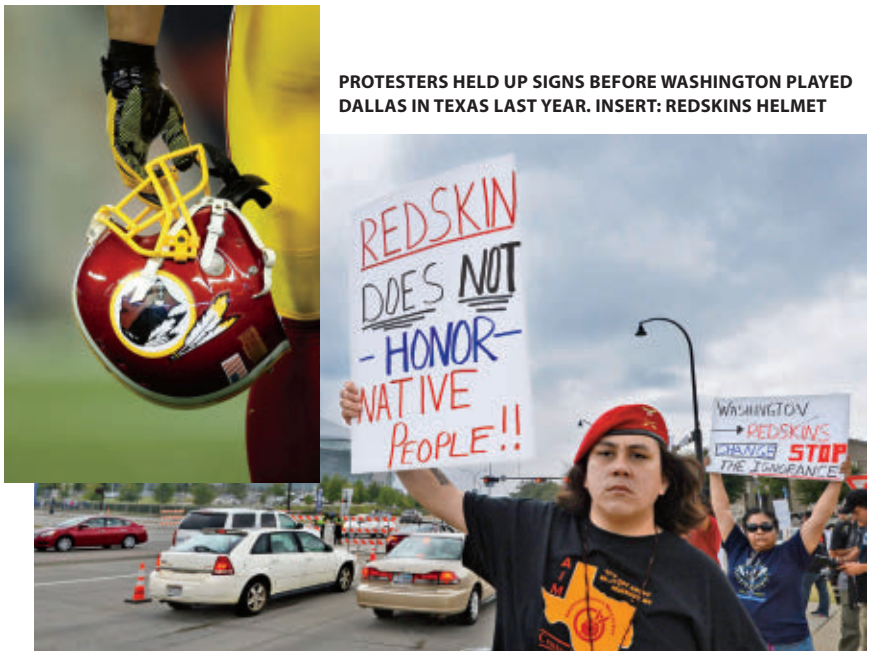
IF AND WHEN THE WASHINGTON REDskins trademark dispute gets to the U.S. Supreme Court, it is not certain that the justices would uphold a ruling in June canceling the team's marks as disparaging to Native Americans. A divided panel of three administrative law judges from the U.S. Patent and Trademark Office canceled six of the National Football League team's trademarks. The majority concluded that the trademark registrations "must be canceled" because a substantial number of Native Americans saw the term "redskin" as offensive as long ago as 1967, when the first of the trademarks was issued.

"This racial designation based on skin color is disparaging to Native Americans," wrote Administrative Trademark Judge Karen Kuhlke of the Trademark Trial and Appeal Board. She was joined by Peter Cataldo, while Marc Bergsman dissented.

The football team can appeal to the U.S. District Court for the Eastern District of Virginia, where it can further develop the record and introduce new evidence. Or it can turn to the U.S. Court of Appeals for the Federal Circuit, where the record will remain as is. Numerous other issues could form the basis of an appeal, including "laches"—the principle that those challenging the trademarks delayed doing so for too long.

Another possibility is a First Amendment claim. If the team frames the controversy as a violation of its owner's First Amendment rights, the high court could feel compelled to consider whether government agencies should decide which marks are "disparaging" and which are not.

One thing seems clear: The team will take some action. In the aftermath of June's decision, team officials pledged to appeal. And they have reason for confidence. A similar ruling in a 1999 predecessor case was overturned and, after a lengthy appeal, the Supreme Court denied review in 2009.



PROTESTERS HELD UP SIGNS BEFORE WASHINGTON PLAYED DALLAS IN TEXAS LAST YEAR. INSERT: REDSKINS HELMET

TOM SZCZERBOWSKI/GETTY (HELMET); LARRY W. SMITH/NEWSCOM (PROTEST)

The Supreme Court traditionally gives fewer First Amendment protections to commercial speech, although in recent years its value has risen among justices. According to First Amendment expert Erwin Chemerinsky, the court generally has not applied the First Amendment to trademark and copyright cases.

"The difficult underlying question is the extent to which the First Amendment limits decisions of the U.S. Patent and Trademark Office," says Chemerinsky, dean of University of California, Irvine School of Law. "All grants of intellectual property, such as copyrights and trademarks, limit speech. But the court has been unwilling to use the First Amendment as a limit in this area."

Nonetheless, Chemerinsky says, "this is different. This is the government making a decision on conferring a benefit based on the content of the speech. I think this raises a real basis for a First Amendment challenge."

The Roberts court has expanded the reach of the First Amendment in other contexts, such as campaign finance restrictions in which, critics say, the court seems eager to embrace the First Amendment when businesses claim their right to free expression is being infringed. "My tentative view is that the general exclusion of marks that disparage persons, institutions, beliefs or national symbols should be seen as unconstitutional," First Amendment scholar Eugene Volokh wrote on his Volokh Conspiracy blog. "An exclusion of marks that disparage groups while allowing marks that praise those groups strikes me as viewpoint discrimination."

Drinker Biddle & Reath spent more than 10 years, almost 9,000 billable hours and $3.5 million in pro bono services in the fight to cancel the Redskins' trademark. The firm, for its effort, missed out on potentially lucrative work related to the National Football League.

"We like the NFL; we'd like to be considered to work for the NFL, just like any other law firm," Drinker Biddle chairman Alfred Putnam Jr. says. "Obviously, given this case, that put us at a disadvantage. We understood that we were unable to take work from the NFL, and we have some regret about that. But although we might have some regret, our clients were our clients, so there was nothing to be done."

Jesse Witten, a Drinker Biddle partner who represented the five Native American petitioners, says that the trademark office should have never registered the marks in the first place. "We presented a wide variety of evidence—including dictionary definitions and other reference works, newspaper clippings, movie clips, scholarly articles, expert linguist testimony and evidence of the historic opposition by Native American groups—to demonstrate that the word 'redskin' is an ethnic slur," Witten said.

If the trademark board's decision stands, it won't bar the team, owned by Daniel Snyder, from using the trademark. But the team's ability to "stop others from using the name or to force licensing of the name in all situations would be severely curtailed, which would cut into both the team's profit margin and its ability to choose the products and services with which the team and its name are associated," Reed Smith trademark litigator Brad Newberg wrote in an email. ■

SUPREME COURT SMACKDOWN

An opinion in a patent case aims at the Federal Circuit, but boomerangs.

THE U.S. COURT OF APPEALS FOR THE FED-eral Circuit gets little respect from the U.S. Supreme Court. Witness its 1-5 win-loss record in the term just ended. But Justice Samuel Alito Jr.'s recent slap-down of those judges has some patent lawyers fuming. Alito, not the appellate court, made a basic mistake, these lawyers say.

It wasn't the outcome in *Limelight Networks v. Akamai Technologies* that spurred the subsequent rush of patent blog posts about Alito's decision for a unanimous court. It was his tone—and his mistaken reading of a key point in what the Federal Circuit actually said.

Akamai had accused Limelight of patent infringement after Limelight performed some of the steps of a patented method of delivering electronic data and allegedly encouraged its customers to take the remaining steps. The Federal Circuit, in more than 100 pages detailing differing views, held that Limelight could be held liable for inducing infringement.

The Supreme Court, in an 11-page ruling, reversed, holding that there must be direct infringement with all of the steps performed by one party. In his opinion, Alito wrote that the analysis by the Federal Circuit, which was specially created to bring uniformity to patent law, "fundamentally misunderstands what it means to infringe a method patent." He offered a hypothetical to demonstrate the circuit court's misunderstanding:

SAMUEL ALITO JR.

CHUCK KENNEDY/NEWSCOM

"What if a defendant pays another to perform just one step of a 12-step process, and no one performs the other steps, but that one step can be viewed as the most important step in the process? In that case, the defendant has not encouraged infringement, but no principled reason prevents him from being held liable for inducement under the Federal Circuit's reasoning, which permits inducement liability when fewer than all of a method's steps have been performed within the meaning of the patent."

But the en banc Federal Circuit majority said no such thing. It wrote: "To be clear, we hold that all the steps of a claimed method must be performed in order to find induced infringement, but that it is not necessary to prove that all the steps were committed by a single entity."

Reaction to Alito's analysis was swift. "The opinion is harsh toward the Federal Circuit, but somewhat poorly written," Dennis Crouch of the University of Missouri School of Law wrote on the Patently-O blog. "In particular, the Supreme Court seems to have misunderstood that the Federal Circuit holding actually does require all steps of the method to be carried out in order for a finding for inducement."

RUSSIA IS UNDER THE MICROSCOPE. **ARE YOU?**

OUR EMBEDDED THIRD-PARTY EXPERTS TURN COMPLIANCE INTO CONFIDENCE.

To successfully identify and mitigate corruption risks, you need compliance investigators and analysts who speak the language. Who know the business customs. And who can skillfully navigate in-country intelligence and data privacy regulations. STEELE's professionals are this rare breed. Our 800 specialists in 170 countries deliver a powerful compliance solution that stands up to DOJ and SEC scrutiny. Twenty years of industry leadership and one million investigations translate into an unmatched third-party compliance program. Let's talk about how to turn compliance into confidence.

Leverage STEELE's in-country expertise by downloading our new white paper;
Anatomy of a Bribe in Russia at steelecis.com/russia2.

STEELE®
COMPLIANCE & INVESTIGATION SERVICES

David Hricik of Mercer University School of Law wrote on the same blog: "What we need is judicial restraint by the Supreme Court. They do not understand the technology, the law or implications of what they do, and this is particularly true in 101 jurisprudence, where they simply can't seem to read the statute or harmonize their own cases (no one can)."

Although the infringement liability issues in *Limelight* were complex, Eric Guttag said on the IPwatchdog blog: "Nevertheless, that does not excuse the utter carelessness in Alito's opinion, as well as its disingenuous 'scolding' of the Federal Circuit's analysis of the situation in *Limelight Networks* as showing a 'fundamental … misunderstanding [of] what it means to infringe a method patent.' The Federal Circuit's mammoth opinion at least tried to 'analyze' the alleged infringement situation (as well as the relevant infringement statutes) in *Limelight Networks,* while Alito's miniscule opinion did nothing of the sort."

Jason Rantanen of the University of Iowa College of Law, who also blogged about Alito's mistake, said the Alito comment evidenced the high court's careless approach to patent cases, particularly during the just-ended term.

The court takes a large number of patent cases each term, Rantanen observed, but seems to be saying with its often cursory analyses that "it's not going to spend a tremendous amount of time being supercareful."

—MARCIA COYLE

FORGIVE THEM IF THEY CAN'T TAKE A JOKE

THE NEXT BEST THING TO SOLVING A problem, someone has said, is finding some humor in it. With a full plate of problems in its 2013 term, the U.S. Supreme Court still found humor in its pursuit of solutions, and sometimes at the expense of the lawyers appearing before it. Here are some lighter moments that provoked outright or nervous laughter—moments that some lawyers may prefer to forget.

Wishful thinking No. 1

In the campaign finance challenge, *McCutcheon v. FEC*, Justice Elena Kagan to Solicitor General Donald Verrilli Jr.: "And, General, I suppose that if this court is having second thoughts about its rulings that independent expenditures are not corrupting, we could change that part of the law."

Verrilli, seizing the moment: "And far be it from me to suggest that you don't, Your Honor."

A taxing memory

In *Sebelius v. Hobby Lobby*, Justice Sonia Sotomayor to Paul Clement of Bancroft, who called fines for not providing contraceptive insurance a "penalty": "It's not called a penalty. It's called a tax."

Roberts: "She's right about that."

You know you're losing when …

*Sotomayor to Hogan Lovell's Neal Katyal in *Kansas v. Cheever*: "Mr. Katyal, assuming the incredulity of my colleagues continues with your argument, which way would you rather lose?"

*Justice Anthony Kennedy to The Coca Cola Co.'s counsel, Kathleen Sullivan of Quinn Emanuel Urquhart & Sullivan, in *POM Wonderful v. Coca Cola*: "Is it part of Coke's narrow position that national uniformity consists in labels that cheat the consumers like this one did?" (Ouch.)

Don't even try …

Justice Antonin Scalia in *Paroline v. United States:* "This is subsequent legislative history? Is that what this is? Even those that like legislative history don't like subsequent legislative history."

Uh, duh

In *Atlantic Marine Construction v. U.S. District Court*, William Allensworth of Allensworth & Porter in Austin: "The only thing going in favor of this case going to Virginia is that forum-selection clause."

Chief Justice John Roberts Jr.: "Well, that's kind of a big thing, isn't it?"

Wishful thinking No. 2

Sotomayor in *Atlantic Marine*: "So they would be—the only people collecting that $160,000 are going to be the lawyers?"

Allensworth: "I—I wish."

Sotomayor: "You took a contingency case in a contract matter?"

Scalia: "I wish."

Under his hat?

Eric Schnapper of the University of Washington School of Law in the donning-and-doffing challenge, *Sandifer v. U.S. Steel*: "In ordinary parlance, not everything an individual wears would be referred to as clothes. There are examples of that in this courtroom: glasses, necklaces, earrings, wristwatches. There may be a toupee for all we know. Those things are not commonly referred to as clothes."

Scalia: "I resent that."

Score one for the lawyer

In the patent fee case *Highmark v. Allcare Health*, Donald Dunner of Finnegan, Henderson, Farabow, Garrett & Dunner: "The size of the fee involved in patent cases, as my daughters would say, is humongous. I've been in two cases where the legal fees were $30 million, and when you've got legal fees like that …"

Roberts: "Well, you've got to stop charging such outrageous fees."

Dunner: "That's the way it used to be with you, Your Honor."

—MARCIA COYLE

DIEGO M. RADZINSCHI (SOTOMAYOR; KENNEDY); JASON DOIY (SCALIA); STEVE PETTEWAY (ROBERTS)

Versions of these stories appeared in The National Law Journal, an affiliate of Corporate Counsel.

IN A JAM?
CALL NAM.

NAM ranked #1 ADR firm in the U.S. by the National Law Journal Reader Rankings Survey.

2014 BEST OF THE NATIONAL LAW JOURNAL
Winner | NAM | Best ADR Firm

NAM
NATIONAL ARBITRATION AND MEDIATION
The Better Solution®

Conference facilities located in major cities throughout the United States.
(800) 358-2550 | www.namadr.com

FORUM SHOPPER'S REVENGE

Hit by a historic judgment in Ecuador, Chevron used cloak and dagger to expose a historic fraud.

BY MICHAEL D. GOLDHABER

WHEN ECUADOREAN PLAINTIFFS FIRST SUED CHEVRON Corporation over oil pollution 21 years ago, R. Hewitt Pate was a recent U.S. Supreme Court clerk reviewing documents in the warehouses of Virginia. With the passage of time, antitrust document review became the province of humble contract attorneys. Pate ascended to Chevron general counsel. And the Ecuador case kept going, and going, shifting at Chevron's behest from courts in the United States to Ecuador and then back. There was no doubt that Chevron suffered from forum shopper's remorse, as we called it in our April 2010 cover story.

The question was: Could Chevron exact forum shopper's revenge?

As 2011 approached, the environmental trial was at last lurching to a close in the Amazon jungle town of Lago Agrio. Pate knew it was nearly certain to end with a multibillion-dollar judgment against Chevron. He believed the plaintiffs' case was laced with fraud. And through creative discovery in U.S. court, he was piling up proof. But the Amazonian plaintiffs were a historically determined foe. To fight them to the finish, Pate would need to commit over half a billion dollars, by our reckoning. For virtually any other company, this would be unthinkable. But for the world's third most profitable oil major, it was merely the cost of a few offshore platforms.

PHOTOGRAPHY BY JORDAN HOLLENDER

Pate's grand strategy was to tell the story of the plaintiffs' litigation fraud in two neutral forums. Gibson, Dunn & Crutcher would sue the plaintiffs team for racketeering and fraud in New York. King & Spalding would tell an arbitral panel, overseen by the Permanent Court of Arbitration in The Hague, that Ecuador had violated its treaty duty to treat foreign investors fairly. Chevron would ask both forums to halt the trial in Ecuador or, if they couldn't, to halt collection of the judgment. And although the power of either U.S. judges or international arbitrators to stop enforcement was (and is) uncertain, Chevron would produce such overwhelming evidence of corruption that no enforcing court could respect the judgment.

The dispute came to a furious head on Feb. 1, 2011. That was the day Gibson Dunn began reviewing the hard drives of their opponents' lead lawyer, Steven Donziger. They were the holy grail of discovery. Securing them was the result of 15 months of flailing away at Donziger's privilege. But a judgment was coming in Ecuador, and there was no time to waste.

ANDRÉS RIVERO WAS HIRED BY CHEVRON TO PIERCE THE FRAUD.

A "ghostwriter," Akerman said. Guerra didn't understand. A "phantom writer," explained Rivero. "The one standing behind."

On the very same day, Gibson Dunn filed its fraud counteraction—styled *Chevron v. Donziger*—and asked the New York court to halt the proceedings in Ecuador. A week later, U.S. District Judge Lewis Kaplan ordered Chevron's foes not to push forward with the Lago Agrio trial. And the next day, the arbitrators ordered Ecuador not to push forward. The wheels of justice were spinning. But it was no use. On Valentine's Day 2011, Ecuador's court handed down a sweetheart $19 billion judgment against Chevron (which would be reduced on appeal to $9.5 billion). On paper, Pate had just lost the largest non-U.S. verdict in history.

Then things got worse. The next January, the U.S. Court of Appeals for the Second Circuit vacated Kaplan's order, in a narrow statutory ruling that was wrapped in a broad invocation of respect for foreign courts. Chevron warned that the plaintiffs would try to collect on their judgment in a "red hot second." And indeed, the plaintiffs quickly filed enforcement actions in Argentina, Brazil and Canada. So what if they possibly committed fraud before the judgment, the plaintiffs argued; the judgment itself was pure. It was enough to make Pate feel nostalgic for his days doing antitrust document review in a musty warehouse.

But Pate stood by his strategy. He always knew that seeking an injunction was a bit of a flyer. In the end, the surest way for Chevron to prevail was by compiling so much evidence of fraud that no decision maker could deny it. And above all, it needed to find evidence of fraud in the judgment itself. In retrospect, Chevron's crucial move on the eve of the judgment was not its request for an injunction. What mattered more was imaging Donziger's hard drives.

THE DAY THE LAGO AGRIO JUDGMENT CAME OUT, CHEV-ron chief scientist Sara McMillen studied it until 4 a.m. Was it possible the plaintiffs had ghostwritten their own judgment? It seemed lunatic to do such a thing while U.S. courts were scrutinizing their every move. But the judgment could have been ghostwritten in Ecuador, where the plaintiffs believed they were beyond the reach of U.S. discovery. And if the plaintiffs thought they could get away with it, might they not try?

Before she went to bed, Chevron's Nancy Drew spotted two bush-league errors in the judgment that she had found earlier in the plaintiffs' own database of samples—which was not in the court record. First, the judgment repeated the plaintiffs' mistake of overstating certain results 1,000 times by using milligrams per kilogram instead of micrograms per kilogram. Second, the judgment repeated the plaintiffs' mistake of reporting the presence of mercury and aromatic hydrocarbons where none existed. The reason was that the plaintiffs' database systematically deleted the "less than" sign. For instance, if a chart marked the level of mercury as <7 mg/kg, meaning that mercury could not be detected at the minimum discernible level, then the plaintiffs and the judgment would say 7 mg/kg. McMillen went to sleep sure the judgment was ghostwritten, but not yet sure she could prove it to the world.

The next day she found the clincher. All 70-odd field samples cited in the judgment ended with the notation "sv." Selva Viva—meaning "the trees live"—was the entity formed by Donziger to pursue the Ecuadorean litigation. And the only other place sv showed up was in Selva Viva's proprietary database. It was almost as if the judge had put a plaintiffs lawyer's initials on every soil and water sample. By bedtime on Feb. 15, McMillen believed that she could prove that the plaintiffs wrote the judgment.

But she wasn't stopping there. Poring over the judgment, McMillen focused on the phrase "formation waters have hydrocarbon solvents." That was scientific nonsense, she thought. The only place she'd ever encountered it was in a report by the plaintiffs' expert Dick Clapp. She checked and found surrounding material lifted almost verbatim. Ding, ding. The Clapp report was not in the court record. It was only on Donziger's hard drives General Counsel.

Plagiarized documents from Donziger's hard drives would provide the most persuasive proof that the Lago Agrio judgment was ghostwritten. Chevron hired forensic linguists to match the judgment against the hard drives. They found seven documents with serious overlap. In early April 2011, Gibson associate Christopher Spiker ran the first document—the "Fusion memo"—through open source software designed to catch student plagiarism. Right off the bat, he found a string of more than 150 nearly identical words. Other passages drew from a memo by the plaintiffs' Australian legal intern, which would explain why the opinion relies on Australian law (incorrectly, according to an ex-chief justice of New South Wales) and even cites Australian sources for generic principles. All told, material drawn

ALBERTO GUERRA (ON THE STAND) TESTIFYING IN LAST YEAR'S TRIAL IN NEW YORK

ELIZABETH WILLIAMS

from plaintiffs' documents was found on about 60 pages of the 188-page judgment. A student plagiarist that obvious would be tossed out of college before midterms.

The plaintiffs' first reaction was to say that Chevron couldn't prove the material wasn't in the record. Then Chevron hired one expert who confirmed that it wasn't by reading, page by page, all 236,000 pages in the court record, and another who confirmed it electronically. The plaintiffs' other rejoinders smacked of conspiracy thinking. Larry Veselka, who briefly represented the Ecuadorean parties in New York, floated the idea at a discovery hearing that Chevron itself might have secretly "slipped" Donziger's files to the judge who handed down the $19 billion verdict, to discredit the final ruling. Judge Kaplan was bemused: "So they wrote parts of this decision hammering them as bad as anybody in world history has ever been hammered so that they could then attack it because the judge copied the bad stuff from them? Oh, please, Mr. Veselka. No. If I misunderstood you, please tell me … I have to give you credit for imagination on that, Mr. Veselka. I mean, really."

AS THE CASE WENDED ITS WAY TOWARD A FRAUD COUN-tertrial in New York, Chevron's lawyers felt that they had established the judgment fraud through unrefuted forensic evidence. But, lacking the power of discovery against the lawyers in Ecuador, they could not establish the details of the judgment fraud's execution. Then Alberto Guerra saw which way the wind was blowing, and asked for a chat.

Guerra had served as the judge at the outset of the trial in Lago Agrio. After rotating off the case under preset procedures, he lost an internal power struggle and was thrown off the bench, ostensibly because he prejudged some issues in favor of Chevron. Within the Lago Agrio legal community, he was widely known for his close connections with the judge who ultimately wrote the judgment, Nicolas Zambrano.

For the delicate job of flipping Guerra, Chevron sent a trusted lawyer who was used to the FBI doing the dirty work. Andrés Rivero was a former Miami corruption prosecutor who attended law school in Berkeley on a scholarship, and did well enough in private practice (he's a name partner at Rivero Mestre) to pay it forward by funding law scholarships at Berkeley for the next generation. The grandson of Cuba's last prime minister, Rivero had lost a Florida political race as a young man because his Spanish wasn't good enough, and studied hard to make sure he was never again at a disadvantage. Rivero was far from a stereotype—he told friends that he came from the most Prussian of Cuban families—but he found it useful to play to the Latin American image of Cubans as chummy jokesters.

Rivero first met Guerra at the Quito Marriott on June 5, 2012, alongside his partner in the operation, Yohir Akerman, who was a Colombian junior chess champion before he became a detective at Custom Information Services. Guerra began to spin tales, and to feel out how much his information was worth. Chevron's people were intrigued but cautious. As they scheduled their next meeting, Guerra's day planner fell open, and the investigators saw a nota-

tion about "Nicolas." What's this? they asked. Oh, that's a record of payment from Zambrano. Now they were convinced Guerra was for real. And they realized that corroborating his story with documents would be crucial.

The next two-and-a-half meetings were recorded. They are as cringe-worthy as any Mafia tapes for the crass banality of the crooked man being flipped, and the transparent flattery of the agents doing the flipping. As Guerra grew more comfortable, he spoke in the same breath of his infidelity to his wife and his devotion to his grandparents' "ethics, morals, principles, values." Then, moving toward the heart of matter, Guerra explained that he routinely wrote the opinions in Zambrano's civil cases, and Zambrano authorized him to throw each case to the highest bidder.

A "ghostwriter," Akerman said. Guerra didn't understand. A "phantom writer," explained Rivero. "The one standing behind." At trial Guerra preferred to call himself a "behind-the-scenes writer," perhaps displaying a touch of professional pride.

Guerra described Zambrano with fearful admiration as "a special guy": strong, strict, a bit cold, not expressive like Guerra, very mistrustful. When a man delivered a flash drive with the ghostwritten judgment in another case, Zambrano patted him down like a gangster. "Shit, I was about to faint because I had never gone through something [like that]. And the man was all seriousness," said Guerra. "Like a movie, like a movie," responded Rivero.

Zambrano knew his way around a criminal case, Guerra said. "But in the other matters, damn, a most elemental divorce proceeding or a late birth registration [laughter] … he would send me suits for uncontested divorce." In a later meeting, Guerra said of the plaintiffs: "I am completely certain that they [wrote the Chevron opinion]. Zambrano was, damn, incapable of doing that."

Guerra asserted that the plaintiffs' team did far more than pay him to ghostwrite interim orders. They ghostwrote their own final judgment, he said, with Guerra providing the finishing touches. And though he was vague about it, Guerra said he thought he had a draft of the final judgment on his computer.

At the end of their second meeting Chevron's representatives pressed Guerra to produce the goods.

"Did you bring any documents today, or nothing?" asked Akerman.

"Such wolves!" Guerra shot back.

So you'll bring them next time, pushed Rivero.

"A lesser crook than you."

The third meeting only got down to business after a long disquisition by Guerra on sexual endurance and tips for maintaining vigor by cleansing the blood and colon. Rivero provided encouragement.

"You take your vitamins, but above all else, this buddy's key—right?—keep your colon clean."

"Uh, eat well, right."

"No, the colon, the colon. Fiber."

"Uh fiber, very interesting."

"An enema."

"Makes sense, makes sense."

At last Rivero offered Guerra $18,000 for his first batch of physical evidence. "Couldn't you add a few zeros?" Guerra asked. Rivero then detoured with an uncomfortably apt joke. Have I told you the one about the crooked lawyer, he asked, "who would get drunk and would go withdraw [money from an ATM] with his attorney's card"?

By now Guerra knew Rivero well enough to finish the joke himself. Guerra delivered the punchline in shorthand: The ATM cried, "'Thief, thief!' And the lawyer said, 'Damn, I've put in my attorney's credential.'"

The transcript does not indicate whether the crooked attorney and the honest attorney playing a crooked attorney laughed as they nervously edged into the ritual bargaining portion of the program.

"Well, regarding the other issue …"

"Buddy, in cash," offered Rivero.

"Yes but," he laughs. "This is, this is very little."

"Well, the Americans have a saying that I believe is good also. They say 'Money talks.'"

"There's a saying here, and I think it's worldwide. For silver, the male dog dances. For gold, the male and female dog dance."

Rivero offered no comment on Guerra's pungent sociology. That afternoon they sealed a deal for $18,000 in return for his first batch of evidence. Guerra handed over daily planners in which he'd noted payments for 2012 and the

AND SO IT GOES, AND GOES …

What's the latest on the case that never ends?

On March 4, 2014, following a seven-week trial, U.S. District Judge Lewis Kaplan found Steven Donziger liable for leading a civil racketeering conspiracy in the guise of an Ecuadorean civil litigation against Chevron Corp. In an opinion that spanned nearly 500 pages, Kaplan also found Donziger and his clients liable for committing multiple civil frauds on the Ecuadorean trial court. Among these were the ghostwriting of a report by court expert Richard Cabrera, and the ghostwriting of the final judgment itself. Kaplan ordered that any judgment funds the plaintiffs might collect be held in trust for Chevron.

In July, Donziger and the plaintiffs spelled out their challenge to Kaplan's ruling in the U.S. Court of Appeals for the Second Circuit. Both were represented by new counsel: Deepak Gupta of Gupta Beck for Donziger and Burt Neuborne of New York University School of Law for the Ecuadorean parties. Among many other things, Gupta argued that the trial court in Ecuador did not rely on the Cabrera report, and that Kaplan's finding of

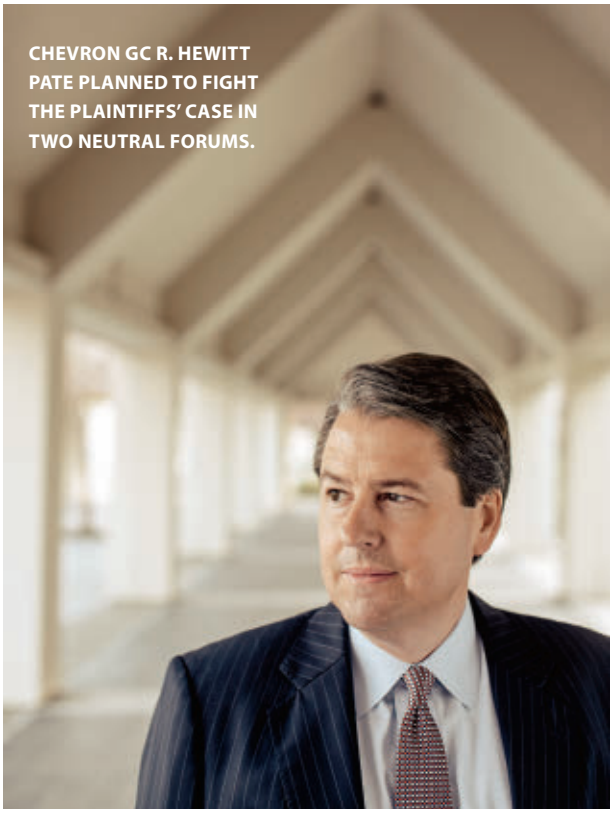
second half of 2011. (He said he lost his 2011 book midyear, and rather than waste money on a new one, scribbled his dates in an unused 2003 book.) Chevron's men eagerly took his computer and flash drives.

On these they found nine draft orders from the Chevron case during Zambrano's tenure, and opinions from over 100 of Zambrano's other cases. This confirmed the first parts of Guerra's story. But the ghostwritten Chevron judgment was nowhere to be found.

Rivero and Akerman came calling two weeks later at Guerra's 5,400- square-foot house in Quito, with stately wooden double doors in front and tacky neon lights in the guest room. There were enough new jokes and tips on personal hygiene to fill a down-market magazine for mature men. But with the tape recorder running, Guerra changed his story on one crucial point. The judgment, he now said, was on "Fajardo's laptop," referring to the plaintiffs lawyer Pablo Fajardo. That placed the draft in Ecuador, out of range of discovery.

Both Guerra and Chevron expected at first that Zambrano himself would strike a deal to testify for Chevron, but Zambrano ignored Rivero's overtures. With the allegedly ghostwritten draft itself out of reach, the Chevron camp needed to find whatever other corroboration it could, and if possible persuade Guerra to testify. In the ensuing weeks and months, Guerra handed over daily planners noting regular payments from "Nicolas" while he was on the court, and shipping records showing that they regularly exchanged packages during the same period. Usually Guerra took cash. But his bank account showed one $300 deposit from Zambrano, and two deposits of $1000 from an international woman of mystery named Ximena Centeno.

Within hours of Guerra's sharing the bank slips with its field investigators, Chevron struck gold again. Deskbound detectives from a second boutique that helped crack the case, Investigative Research Inc., recognized the name from a privilege log. Ximena Centeno was the plaintiffs' office administrator—and the signature and code on the slip matched her national ID card. Chevron filed a new discovery action against the plaintiffs' bank, and found that each of the Centeno deposits came exactly one day before $1,000 withdrawals from the plaintiffs' account.



CHEVRON GC R. HEWITT PATE PLANNED TO FIGHT THE PLAINTIFFS' CASE IN TWO NEUTRAL FORUMS.

TIMOTHY ARCHIBALD

Meanwhile, the detectives went back over their email trove and found powerful new meaning in a pair of coded emails about a puppet and puppeteer. On Oct. 27, 2009, Fajardo had written Donziger: "The puppeteer won't move his puppet until the audience pays him something." Two days later there was a $1,000 withdrawal from the plaintiffs' account and a $1,000 deposit to Guerra's account. On Nov. 27, 2009, another colleague emailed Donziger that "the budget is higher in relation to the previous months, since we are paying the puppeteer." Sure enough, there was a $1,000 withdrawal from the plaintiffs' account the day before, and a $1,000 deposit to Guerra's account the next day.

On a rooftop near the U.S. embassy in Quito in the late fall of 2012, Chevron's field investigators confronted Guerra. The toothpaste was out of the tube, they said. Once it became known that Guerra had given Chevron evidence, his safety in Ecuador could never be assured. It took some time for Guerra to absorb the idea and convince his family and work out the details. But having come this far, he had little choice. Chevron would relocate the Guerras, help them seek asylum and pay them $12,000 in monthly living expenses for at least two years. Judge Guerra would testify at Chevron's countertrial in New York.

Before the plaintiffs could collect their billions, Chevron would tell its story in a neutral court of law. Steven Donziger didn't attend the seven-week trial religiously. But Hew Pate sure did.

Adapted from the Kindle Single ebook "Crude Awakening," by Michael D. Goldhaber, available Aug. 20 on Amazon.com.

a judgment fraud was not supported by the evidence. Gupta contended that the affirmations of the Ecuadorean judgment should be respected. Further, he argued that Kaplan's injunction is incompatible with the Racketeer Influenced and Corrupt Organizations Act—not to mention the Second Circuit ruling in January 2012 that had vacated Kaplan's preliminary injunction of global enforcement. Theodore Olson of Gibson, Dunn & Crutcher has asked to file Chevron's appellate reply brief on Oct. 1. —M.D.G.

BY SUSAN HANSEN

Law Firm With a VIEW

Summit partners' leap from Big Law paid off. But they weren't always so sure it would.

BACK IN 1997, WHEN POLLY MCNEILL DECIDED TO QUIT Heller Ehrman White & McAuliffe to help launch Summit Law Group, it didn't seem like the smartest bet. Leaving Heller, after all, meant giving up her busy environmental law practice, not to mention a coveted partner slot in the Seattle office of one of San Francisco's oldest and most venerable firms.

Like her fellow Summit cofounders, McNeill was convinced that the standard law firm billing model was in desperate need of an overhaul. And she was excited by the idea of teaming up with Heller colleagues—including litigator Ralph Palumbo and employment partner Otto Klein—to build a different, more entrepreneurial kind of firm. But she'd also be leaving virtually all of her major matters behind at Heller, along with the relative stability and long-term job security that a big firm seemed to offer. Would Summit's value-billing-based model actually attract clients? Would the Seattle-based Summit even be able to hold together more than a couple of years? There was no guarantee. "It was a huge leap of faith," recalls McNeill, "and in more ways than one."

Funny the way things turn out. Indeed, McNeill and other Summit cofounders say they never would have imagined that 17 years later their firm would still be in business,

(FROM LEFT) SUMMIT PARTNERS SHANNON PHILLIPS, PHIL MCCUNE, RALPH PALUMBO AND POLLY MCNEILL

PHOTOGRAPHY BY RON WURZER

while Heller Ehrman, which disbanded in November 2008 after a rash of partner defections, would be gone.

In part, that's clearly a testament to the 33-lawyer Summit's reputation for excellence, and its ability to deliver high-quality legal work in the firm's four key practice areas: litigation, labor and employment, environment, and corporate and business law. Without those two things, obviously, no firm could last very long.

But Summit lawyers are convinced that the firm's decision to eschew the standard law firm management model has also been key to its staying power.

From the start, Summit opted for a nonhierarchical, nonleverage-based structure in which all Summit lawyers, including the most junior, were partners with at least a small equity stake in the firm. And not only did it pledge to staff matters leanly—and avoid passing along, much less marking up, basic overhead costs—it also offered a range of incentive- and results-based fees and flexible billing options instead of the straight hourly rate. Plus, for good measure, its invoices included a so-called value adjustment line that offered clients the right to reduce the amount they owed if they didn't believe the charges reflected fair value.

Considering that those sorts of policies were in place well before the Great Recession—and well before many in-house

POLLY MCNEILL, A SUMMIT COFOUNDER, SAYS STARTING THE FIRM WAS "A HUGE LEAP OF FAITH."

RON WURZER

departments began seriously clamping down on outside legal costs—it's fair to say that Summit's commitment to providing maximum value for clients put it far ahead of the pack.

Not surprisingly, the bigger-bang-for-the-buck approach has been a hit with Summit's clients (or customers, as the firm likes to call them), which range from tech startups to Fortune 500 stalwarts such as Waste Management, Inc., FMC Corporation, BP and Google Inc.

IF IMITATION IS THE HIGHEST FORM of flattery, Summit can also be proud. In recent years a handful of firms, including Valorem Law Group in Chicago and Sapienta Law Group in Minneapolis, have picked up key elements from the Summit playbook to build their own value-driven, customer-centric firms. "They're one of the firms we looked to for ideas," says Valorem cofounder Patrick Lamb, who recalls that he and his partners were so taken with Summit's value adjustment line that they asked if they could use it on Valorem's invoices. (Summit said yes.)

Of course, even a trendsetter like Summit continues to have its share of serious challenges. While firm founders believe being small has distinct advantages, they also concede that it has made it harder to compete, especially as more in-house departments have shifted their outside legal work to smaller numbers of preferred providers. Given that reality, they say that it's imperative that Summit, which recently added five new corporate partners from Seattle's Leibow McKean, not just rest on its laurels. "If we want to remain viable, we need to see what's happening in our customer community," says Summit cofounder Palumbo, and continue beefing up Summit's capabilities. "We've been successful in establishing our brand," adds Summit comanaging partner Mark Worthington. "But you have to keep finding ways to innovate, and we continue to do that."

No question, at least a bit of the early idealism of Summit's founders has been tempered. At the outset, the vision was that all Summit attorneys would help make management decisions, and the firm would be run by consensus. But that vision, as litigation partner Phil McCune recalls, almost immediately ran into reality. "Big surprise: Sometimes really good attorneys need more structure," says McCune, who notes that the firm quickly addressed the problem by creating a managing partner slot.

That said, the firm has managed to retain much of its original egalitarian ethos. There's still no partner-associate hierarchy, since all Summit lawyers are considered partners, with at least some equity. All of the firm's offices, including those for support staff, are still the same size, and all Summit staffers, from partners to paralegal to administrative assistants, are invited to attend the firm's annual retreats.

Over the years the firm, which launched with just 12 lawyers, has nearly tripled in size. Still, with fewer than three dozen attorneys today, it has no choice but to continue to staff matters leanly—and to handle the requisite legal tasks as efficiently as possible. Far from being a handicap, Summit's lawyers contend that the firm's compact size is a virtue. That's certainly been the experience of Summit's trial lawyers, according to litigation partner Palumbo. "I always think that the smallest trial team is the best," says Palumbo, who notes that because the entire team handles depositions, witness prepping and other pretrial work, all team members tend to know a given case cold. "Everybody has an in-depth understanding of all the issues," says Palumbo, adding that that helps ensure that Summit is fast on its feet at trial.

Judging from its standing in law firm rankings, Summit's litigators

must be doing something right. In one recent Washington state survey by Benchmark Litigation, the firm's litigation group was rated as "highly recommended," alongside litigators at Seattle's 950-lawyer Perkins Coie, whose litigation department is roughly eight times the size of Summit's.

Among other recent matters, this past spring Palumbo led the trial team for longtime client FMC in a dispute with the Idaho-based Shoshone Bannock tribe over permitting and for FMC's phosphate mining operations. (As expected, FMC lost at trial, which was held in the Shoshone Bannock tribal court, and now plans to challenge the tribe's jurisdiction in federal court.)

Likewise, Palumbo has served as lead counsel for BP, ExxonMobil and other oil giants in their long-running dispute with the state of Alaska over property valuations and taxes tied to the Trans-Alaska Pipeline.

YET PALUMBO AND OTHER SUMMIT litigators are probably best known as a go-to firm for companies doing battle with Microsoft Corporation. Since the firm's founding, Summit has assisted a series of Microsoft adversaries—including software maker Caldera Inc., RealNetworks Inc. and most recently Motorola Mobility and Google—in a series of high-profile antitrust and intellectual property-related disputes. Both the Caldera and RealNetworks litigation ultimately settled, while Motorola and Google, which acquired Motorola Mobility in 2011, lost at trial in federal court last September and are now appealing the verdict in the U.S. Court of Appeals for the Ninth Circuit.

Robert Kimball, former general counsel at RealNetworks, certainly isn't complaining about the $761 million settlement that Summit (along with cocounsel Bartlit Beck Herman Palenchar & Scott) helped it secure in its antitrust case against Microsoft in late 2005. "It was a very big win," says Kimball, who recalls that despite his initial concerns that Summit might be too small to handle such a high-complexity case, Palumbo and his partners came through. Plus, he adds that Summit lawyers got the job done with peak efficiency. "In litigation, it's so easy to default to the 'let's do everything' [mode]," says Kimball, who adds that Palumbo and his partners took a much more discriminating approach to the discovery process. "They knew what rocks to look under

"I always think that **the smallest trial team is the best."**

—RALPH PALUMBO

RON WURZER

and what rocks to pass by," says Kimball. "The question was always what will it take to tell our story to a jury."

Kimball, who also deployed Summit on a number of smaller litigation matters, says he also appreciated the firm's flexibility on fees, and its willingness to share in the risks. Because he felt the amount the firm charged for its work was consistently fair, he says he never asked for a fee reduction via Summit's value adjustment line. But he was glad the opportunity was available if needed. "Just having it there [as a recourse] gives you peace of mind," says Kimball.

Andrew Kenefick, senior legal counsel at Waste Management, a longtime Summit client, notes that as the legal market has gotten more competitive, more firms have scrambled to offer better value and service. And he says that it's now practically a given that clients can obtain fee reductions if they don't believe the amount they're being charged is fair. Still, Kenefick gives Summit credit for helping to pave the way. "They've been on the leading edge of the wave on a whole lot of things," says Kenefick, who deploys Summit for occasional litigation in the Northwest as well as on all of Waste Management's regulatory matters in Washington state. "The expertise they offer is invaluable," he adds.

New Summit client Andrew Scharenberg, founder and CEO of Seattle-based biotech startup Precision Genome Engineering Inc., says he was equally impressed with how Summit's corporate group handled the recent sale of his company to Bluebird Bio Inc. Scharenberg hadn't worked with the firm previously. But his longtime lawyers at Seattle's Leibow McKean had merged with Summit late last summer, and after speaking with Summit corporate finance specialist Mark Worthington, Scharenberg says he was confident that Summit's corporate team could do the job. Indeed, he says that Summit's work on the deal, which closed this past June, far exceeded his expectations. "What was impressive to me was the short time frame," says Scharenberg, recalling how Worthington and other lawyers "jumped right in and hammered out a close" in under six weeks. On top of that, he figures his legal costs were only about half of what they would have been if he had gone with a big firm—and he believes he got better service, too. "If I had a question, Mark

WHITLEY LEIBOW, WHOSE FIRM (LEIBOW MCKEAN) MERGED WITH SUMMIT

RON WURZER

LegalEdcenter

BRING COMPLIANCE TRAINING TO LIFE

INTERACTIVE COURSES TRANSFORM TRAINING INTO STRONGER POLICY AND REGULATORY ADHERENCE

Engage employees in policy and regulatory compliance training that ensures they understand the material and know how to apply what they've learned in real-world business situations.

Interactive game-based training from Thomson Reuters LegalEdcenter in partnership with True Office delivers this engaging experience to the legal market along with powerful analytics that confirm your team knows their responsibilities in preventing and reporting illegal or unethical behavior.

INTERACTIVE TECHNOLOGY

MEMORABLE TRAINING

MEASURABLE RESULTS

Game-based training immerses users in virtual storylines to boost comprehension and help manage risk.

Find out more | **westlegaledcenter.com/link/gamification** | **1-800-495-9378, option 3**

THOMSON REUTERS™

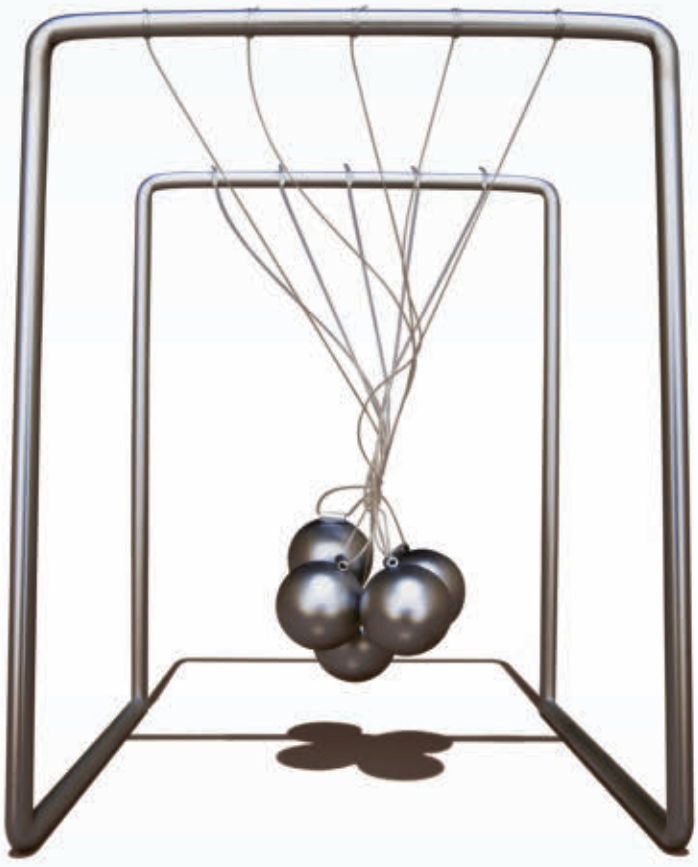
would respond in five to 10 minutes, no matter what time it was," recalls Scharenberg.

So far, anyway, the merger with Leibow McKean appears to have been a smart move for Summit. The group, headed by partner Whitney Leibow, has not only brought in new clients, including TripAdvisor and a range of technology startups, but with its strengths in IP licensing and outsourcing transactions, it will also increase Summit's ability to stay competitive, given that Wilson Sonsini, Cooley Godward and other Silicon Valley firms have recently moved into the Seattle legal market.

Still, navigating what's become an increasingly tough competitive landscape remains a big challenge. Indeed, Palumbo and other partners say that given recent trends in the legal market, it's becoming more difficult for small firms to remain viable. "It's a lot easier for [a GC] to pick an Am Law 50 firm than it is to pick a small group of litigators," says McCune. Case in point: Summit recently lost two key clients—The Boeing Company and Amazon.com Inc.—after they switched to a short list of preferred providers consisting of firms with national and international offices. While Amazon was a relatively small client, Boeing had regularly used Summit on employment and labor matters as well as some litigation matters and brought in close to $1 million in annual revenues, according to Palumbo. It was a major loss, he acknowledged.

Given that, he and other partners are convinced that Summit, and particularly the litigation group, will have to scale up—at least modestly—in order to compete.

Palumbo doesn't particularly relish the prospect of growth. On the bright side, he remembers worrying during Summit's initial growth phase, when the firm's lawyer count first topped 20. "I thought, if we get bigger, we'll be like every other firm," recalls Palumbo, who notes that Summit's culture and commitment to the way it does business survived then and should be able to withstand the next growth spurt. "One very good piece of news," says Palumbo, "is that our core values are strong." ■



Tangled up in new laws?

Don't lose momentum. Contact Littler today.

Littler

Employment & Labor Law Solutions Worldwide™

littler.com

NEW BOOK!

Social Media Law

by Lisa T. Oratz

The rise of social media has been one of the most dramatic developments in the information age over recent years, causing a seismic shift in the way people and businesses obtain information, communicate, and interact with one another. Although the benefits of social media can be great, its nature also presents certain inherent risks and significant legal challenges.

Companies generally have less control over social media than they do with traditional media as a result of the casual nature of social media. Therefore, the risk that social media content will create legal liability for the company or disclose confidential information is much greater than with traditional media.

AVAILABLE IN PRINT/ONLINE/eBOOK EDITIONS.

For more information or to order this book visit lawcatalog.com or call (877) 807-8076.

Use Promo Code 525614 when ordering to receive your discount.

LJP Law Journal Press

An ALM Publication

120 Broadway 5th Floor | New York, NY | 10271 | 877-807-8076

Table Of Contents

DIRECTORY OF LEGAL RECRUITERS

OUTSIDE PERSPECTIVES

I Can Read All My Employees' Emails, Right? Not Necessarily – Privilege May Limit A Company's Access

Julie Rodriguez Aldort
Robert Catmull

IT'S 3:00 PM ON A MONDAY AND AN employee needs a break from work. So the employee takes five minutes and sends some personal emails from the company email account. People usually believe these emails are private conversations. But in the workplace, they may be more public than one would expect and this can become an especially tricky issue when those communications are with the employee's attorney.

It is now commonplace for employers to have a technology policy that permits the employer to monitor an employee's inbox. Nevertheless, employees exchange what they believe to be privileged communications with their attorney over their work email. Those emails can be captured by discovery requests in litigation against the company, in subpoenas on the company by third parties or, more directly, in affirmative searches by the company for helpful information in its disputes against the employee. As a result, there is an increasing amount of litigation over who may legitimately access what would otherwise be privileged communications between an employee and her attorney.

I. Courts Typically Apply A Multi-Factor Test To Assess Whether An Employee Reasonably Believed Her Emails Would Remain Confidential.

Normally, a confidential communication loses its privileged status when either the attorney or client exposes the communication to a third party. An employer's right of access would seem to be the type of third party exposure that would extinguish privilege. However, courts addressing the issue have generally applied a more complex analysis, assessing whether an employee could reasonably believe her communication would remain confidential. The most common approach was articulated by the federal district court in New York in *In re Asia Global Crossing, Ltd.,* 322 B.R. 247 (Bankr. S.D.N.Y. 2005). In *Asia Global*, the employees sent emails over the work server to their personal attorneys. The company eventually filed for bankruptcy, and during discovery, the company's attorney subpoenaed emails related to employees' transactions. The employees asserted that these emails were privileged, and the court agreed, holding that merely using a work email account for attorney-client communication does not destroy privilege. *Id.* at 261–62. In its analysis, the court articulated four factors to consider when assessing whether the employee reasonably could expect the email to her attorney to remain confidential:

(1) does the corporation maintain a policy banning personal or other objectionable use;
(2) does the company monitor the use of the employee's computer or e-mail;
(3) do third parties have a right of access to the computer or e-mails; and
(4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Id. at 257. Answering yes to any of these questions does not necessarily defeat a claim of privilege, although one factor may weigh more heavily in the analysis than the others depending upon the particular issue at hand. *See id.* at 258 (comparing *Garrity v. John Hancock Mutual Life Ins. Co.,* No. Civ. A. 00–12143–RWZ, 2002 WL 974676, at *1–2 (D. Mass. May 7, 2002) ("no reasonable expectation of privacy where, despite the fact that the employee created a password to limit access, the company periodically reminded employees that the company e-mail policy prohibited certain uses, the e-mail system belonged to the company, although the company did not intentionally inspect e-mail usage, it might do so where there were business or legal reasons to do so, and the plaintiff assumed her e-mails might be forwarded to others"), with *Leventhal v. Knapek,* 266 F.3d 64, 74 (2d Cir. 2001) ("employee

had reasonable expectation of privacy in contents of workplace computer where the employee had a private office and exclusive use of his desk, filing cabinets and computers, the employer did not have a general practice of routinely searching office computers, and had not 'placed [the plaintiff] on notice that he should have no expectation of privacy in the contents of his office computer'")). As a general rule, however, the more affirmative responses, the more likely that the communications will *not* be found privileged.

The federal court for the Northern District of California applied the *Asia Global* factors to its analysis of whether an employee had waived privilege in work emails. *See, e.g., In re High-Tech Employee Antitrust Litig.,* No. 11-CV-2509-LHK-PSG, 2013 WL 772668 (N.D. Cal. Feb. 28, 2013). In *High-Tech,* two factors favored retaining privilege and two factors favored waiving privilege. The court ultimately held that the emails retained their confidentiality because of the importance of the attorney-client privilege and the lack of evidence that the employer in fact monitored emails. *Id.* Similarly, a California state appellate court, applying the *Asia Global* factors, held that an employee has an objectively reasonable expectation of confidentiality when the employee puts privileged documents in a password-protected folder—even if that folder is maintained on a work computer. *People v. Jiang,* 33 Cal. Rptr. 3d 184, 207–08 (Cal. Ct. App. 2005).

The federal district court for the Western District of Washington, however, has preferred a strict "no-waiver" rule over the *Asia Global* approach. *Sims v. Lakeside School,* No. C06-1412RSM, 2007 WL 2745367, at *1 (W.D. Wash. Sept. 20, 2007). Though the court ruled that the employee had no reasonable expectations of privacy in emails he sent and received on his email account provided by his employer, the court nevertheless held that web-based emails generated by the employee are protected by privilege, citing public policy concerns and the importance of encouraging free and candid communications between clients and their attorneys. The Washington federal court appears to be in the minority, as even Washington state courts seem to engage in a more nuanced analysis akin to the *Global Asia* test. *See, e.g., Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1110 (W.D. Wash. 2011) (citing Washington state law and stating that a non-waiver rule contradicts Washington's policy).

II. My Employee Wrote "Privileged" Emails at Work. Now What?

If the employer wants to use employee "privileged" emails itself, there are several steps an employer can take to increase the likelihood of full access to its employees' emails: (1) create a clear policy explaining that the employer will review its employees' emails and the employees should expect no privacy in those emails; (2) consistently apply this policy; and (3) keep a paper trail evidencing the employees' acceptance of the technology policy. Still, even if the employer takes these precautions, a court may uphold a claim of privilege and prevent the employer from disclosing or using the emails against the employee's wishes.

If a third-party seeks the employee emails through a subpoena, caution is advised. A Delaware court recently cautioned that a presumption of privilege might be even stronger where a third-party serves the employer with a subpoena for its employee's emails. *See In re Info. Mgmt. Servs., Inc. Derivative Litig.,* 81 A.3d 278, 296 (Del. Ch. 2013). This is not to say that an outsider can never access personal emails sent over a work server. But because of this presumption, the employer should think twice before simply handing over all of an employee's emails. A prudent course would be to notify the employee and her personal attorney of the third-party's request or to seek judicial review before providing privileged emails. *See, e.g., Stengart v. Loving Care Agency, Inc.,* 201 N.J. 300, 326, (N.J. 2010) (holding that the employer's counsel violated ethics rules by failing to alert the employee's attorneys that it possessed the employee's potentially privileged emails before reading them).

Julie Rodriguez Aldort is a partner at Butler Rubin Saltarelli & Boyd LLP, a national litigation boutique based in Chicago, where she arbitrates and litigates complex commerical disputes, including reinsurance. Robert Catmull is a third-year student at the University of Chicago Law School and was a summer associate at Butler Rubin. The views expressed are personal to the authors.

TOP RATED LAWYERS

2014 EDITION

THE DEFINITIVE GUIDE TO LEGAL REPRESENTATION

The following section features attorneys who have demonstrated leadership qualities and have achieved the AV Preeminent rating by Martindale-Hubbell®.

AV® PREEMINENT™ Martindale-Hubbell® Lawyer Ratings

Martindale-Hubbell®, the company that has long set the standard for lawyer ratings, has supplied ALM with a list of Top Rated Lawyers who have achieved an AV® Preeminent® Peer Review Rating, the highest rating in legal ability and ethical standards. To create this section, Martindale-Hubbell® tapped its comprehensive database of Martindale-Hubbell® Peer Review Ratings™ to identify lawyers who have been rated by their peers to be AV® Preeminent™.

Martindale Hubbell Peer Review Ratings are driven by the confidential opinions of lawyers and members of the judiciary who receive invitations from Martindale-Hubbell®, via an online survey or by mail, to provide reviews of lawyers of whom they have professional knowledge.

A complete directory of all AV® Preeminent™ lawyers can be found online at Lawyers.com® and Martindale.com, in the Martindale-Hubbell® Law Directory in print and CD-ROM formats, and online through the LexisNexis® services and at lexis.com. Attorneys shown do not constitute the full list of "Top Rated Lawyers"

CALIFORNIA OAKLAND

GEORGE D. YARON

George D. Yaron has practiced for over 25 years in defense and insurance coverage litigation, with an emphasis in the areas of personal injury, environmental, toxic torts, product liability, construction defect, bad faith and commercial litigation. After graduating from San Francisco State University in 1977, and graduating from Golden Gate University School of Law in 1980, Mr. Yaron assumed duties as a prosecuting attorney for the United States Marine Corps' Third Marine Aircraft Wing in Southern California. He quickly became its chief trial counsel, from 1981 through 1984, during which time Mr. Yaron (then Captain Yaron) tried over 100 felony and misdemeanor court-martials. Following his active duty with the U.S. Marine Corps, he has handled numerous trials and appeals in State and Federal Courts throughout California and Nevada in defense and coverage litigation. Mr. Yaron is admitted to practice law in all States and Federal Courts in California and Nevada. He is an AV-Rated attorney and is a member DRI's Insurance Law Section, as well as numerous Bar Associations, including the American Bar Association and the Association of Defense Counsel of Northern California and Nevada.

YARON & ASSOCIATES

1300 Clay Street, Suite 800, Oakland, CA 94612
p: 415.658.2929, Ext. 237, f: 415.658.2930
gyaron@yaronlaw.com • www.yaronlaw.com

ALABAMA MONTGOMERY

SHAWN JUNKINS COLE

Shawn J. Cole is a shareholder at Hill, Hill, Carter, Franco, Cole & Black, P.C., a minority owned law firm in Montgomery, Alabama, where she serves on the management committee. She graduated from The University of Alabama in 1990 and Cumberland School of Law of Samford University in 1993.

Virtually 100% of Shawn's practice involves workers' compensation matters. She represents insurance companies, Funds, corporations, and other businesses, both large and small, throughout Alabama in a variety of workers' compensation related legal matters including consultations on preventative measures to alleviate on the job injuries and to counsel businesses on handling work-related claims prior to litigation. She has worked in both private practice and as in-house counsel dealing with litigation and regulatory compliance matters for companies that underwrite workers' compensation and employers' liability coverage. Shawn is a frequent lecturer on various workers' compensation matters including specific legal issues as well as ethics, ethical billing practices, and cost saving measures for adjusters.

Shawn is a member of the Alabama State Bar Association, Alabama Defense Lawyers Association, Alabama Workers' Compensation Defense Lawyers Association, American Inns of Court, Hugh Maddox Chapter, and the Montgomery County Bar Association. She belongs to the Kiwanis Club of Montgomery and is an officer on the Alabama National Fair Board, both of which are dedicated to raising funds to support children and youth charities throughout Central Alabama.

Hill Hill Carter
Hill, Hill, Carter, Franco, Cole & Black, P.C.
Attorneys at Law

425 South Perry Street, Montgomery, AL 36104
p: 334.834.7600, f: 334.832.7419
scole@hillhillcarter.com • www.hillhillcarter.com

COLORADO DENVER

CHRISTINA L. DIXON

Christina Dixon is AV Peer Review Rated. Christina has extensive experience in insurance defense, insurance bad faith and insurance coverage litigation. She routinely advises claims personnel and insurance companies regarding day-to-day activities. Christina's current practice focuses on construction litigation, business torts, insurance bad faith litigation, personal injury defense and coverage analysis. She is actively involved in local and national bar associations. Christina is a Council member for the ABA Section of Litigation. Christina serves as a hearing officer for the Denver and Colorado Bar Associations' Legal Fee Committees. She is also a member of the Sam Cary Bar Association and the National Bar Association.

Christina studied law and obtained her undergraduate at the University of Denver, where she also received her law degree. She was admitted in 1996, with the State of Colorado, United States District Court for Colorado and the Tenth Circuit Court of Appeals.

In the past, Christina educated other professionals by teaching practical claims handling and professional development seminars. She had been a candidate for the Colorado State Legislature. Before her admittance to The Bar, she had helped develop policies and procedures for a City and County of Denver agency. She was also a Law Clerk for the Denver District Attorney's Office and prominent civil litigation firms.

DIXON LAW FIRM

1741 High Street, Denver, CO 80218-1320
p: 303.999.0118, direct: 303.305.5523, f: 303.900.1486
christina@strategicdefenselaw.com
www.strategicdefenselawblog.com

FLORIDA CORAL GABLES

LAUREN D. LEVY

Lauren D. Levy is an authority in the insurance industry. Ms. Levy is the founding member of Levy Law Group, P.A. The firm's experienced attorneys have built a global network of clients who all receive superior legal representation and personalized service. Ms. Levy has practiced for over fifteen years exclusively representing many of the largest domestic and international insurance companies in complex first and third party coverage disputes, insurance bad faith litigation, construction litigation, and first and third party liability matters. Throughout her career she has handled trials and appeals in the State and Federal Courts.

Ms. Levy has received the highest AV-Rating from Martindale-Hubbell for ethics and legal ability. In addition to authoring several publications, she is active in insurance related organizations including Loss Executives Association (LEA), Property & Liability Resource Bureau (PLRB) and Claims & Litigation Management Alliance (CLM). She is a member of The Florida Bar, the Bar of the United States District Courts for the Northern, Middle and Southern Districts of Florida, and the Bar for the United States District Court of Appeals for the Eleventh Circuit.

LEVY LAW GROUP

3399 Ponce de Leon Blvd., Suite 202, Coral Gables, FL 33134
p: 305.444.1500, f: 305.503.9295
lauren@LevyLawGroup.com • www.LevyLawGroup.com

FLORIDA JACKSONVILLE

MOSELEY, PRICHARD, PARRISH, KNIGHT & JONES

James F. Moseley, Sr.

Stanley M. Weston

James F. Moseley, Jr.

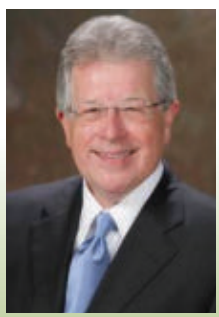
Congratulations to James F. Moseley, Sr., James F. Moseley, Jr. and Stanley M. Weston for their accomplishment as Top Rated Lawyers in the practice area of insurance law. The firm is actively engaged in litigation involving all types of issues regarding insurance including maritime/marine insurance. The firm applies the principles of prompt reporting, thorough preparation and cost effectiveness in representing clients. The firm practices in all State and Federal courts of Florida and South Georgia.

MOSELEY, PRICHARD, PARRISH, KNIGHT & JONES

501 West Bay Street, Jacksonville, FL 32202
p: 904.356.1306, f: 904.354.0194 • www.mppkj.com

MISSISSIPPI

RICHARD T. (FLIP) PHILLIPS



Richard (Flip) Phillips is a founding partner of Smith Phillips Mitchell Scott & Nowak, LLP. For over 40 years Flip has represented plaintiffs and insurance policyholders nationwide. He is Past President of both the Mississippi Trial Lawyers Association and the Mississippi Chapter of American Inns of Court. Flip's landmark cases have defined the rules of automobile insurance in Mississippi and expanded the role of extra-contractual and punitive damages in individual and class insurance litigation throughout the United States.

Flip's multi-million dollar jury verdicts have been recognized in the National Law Journal's "Top 100 Verdicts," the Wall Street Journal, LawyersUSA, and the Canadian press. He has served as Lead Class Counsel and a member of the Plaintiffs' Steering Committees in nationwide class actions and Multi-District litigation involving life and health insurance, supplemental cancer policies, and financial products.

The author of numerous Law Journal articles, a book on Insurance Law and chapters in two Matthew Bender multi-volume treatises, Flip is a member of the Board of Regents of the American College of Coverage and Extra-Contractual Counsel, where he serves as the representative of insurance policyholders.

Smith Phillips

Batesville Office
695 Shamrock Drive, Post Office
Box 1586, Batesville, MS 38606
p. 662.563.4613

Hernando Office
2545 Caffey Street, Post Office
Box 346, Hernando, MS 38632
p. 662.429.5041

www.smithphillips.com

FLORIDA MIAMI • ORLANDO

VER PLOEG & LUMPKIN, P.A.


Brenton Ver Ploeg


Eileen Parsons


George Carr


Hugh Lumpkin


Jason Mazer

Since its founding in 1995, Ver Ploeg & Lumpkin, PA has helped to protect policyholders faced with insurance coverage denials and bad faith insurance practices. With 25 attorneys and offices in Miami and Orlando, the firm has the capacity to handle coverage disputes for individuals, large and small businesses, municipalities, and bankruptcy trustees across a wide spectrum of insurance policy types and issues, including commercial, disaster, liability, disability, life, and property. The firm also handles third-party coverage issues, bankruptcy-related insurance disputes, and commercial litigation concerning healthcare billing and reimbursement.

The firm is unique in that it handles only cases dealing with insurance coverage. This singular focus has allowed the firm to become well versed in all aspects of insurance law, and its attorneys are capable of developing targeted strategies to resolve even the most specific insurance issues. "We have an academic interest in insurance that extends beyond our profession as advocates," says partner Hugh Lumpkin. "We are students of insurance."

Ver Ploeg notes that, above all, the attorneys at the firm pride themselves on their ability to deliver results in keeping with their clients' needs. "Our work makes a direct difference in the lives of both individuals and corporations, and that is very satisfying for me," he says.

Ver Ploeg & Lumpkin would like to congratulate its top rated lawyers in this year's edition-- Brenton Ver Ploeg, Hugh Lumpkin, Jason Mazer, Eileen Parsons and George Carr.

VER PLOEG & LUMPKIN, P.A.

Miami - 100 S.E. Second Street, 30th Floor, Miami, FL 33131 • p: 305.577.3996, f: 305.577.3558
Orlando - Capital Plaza Two, 301 East Pine Street, Suite 790, Orlando, FL 32801 • p: 407.380.9312

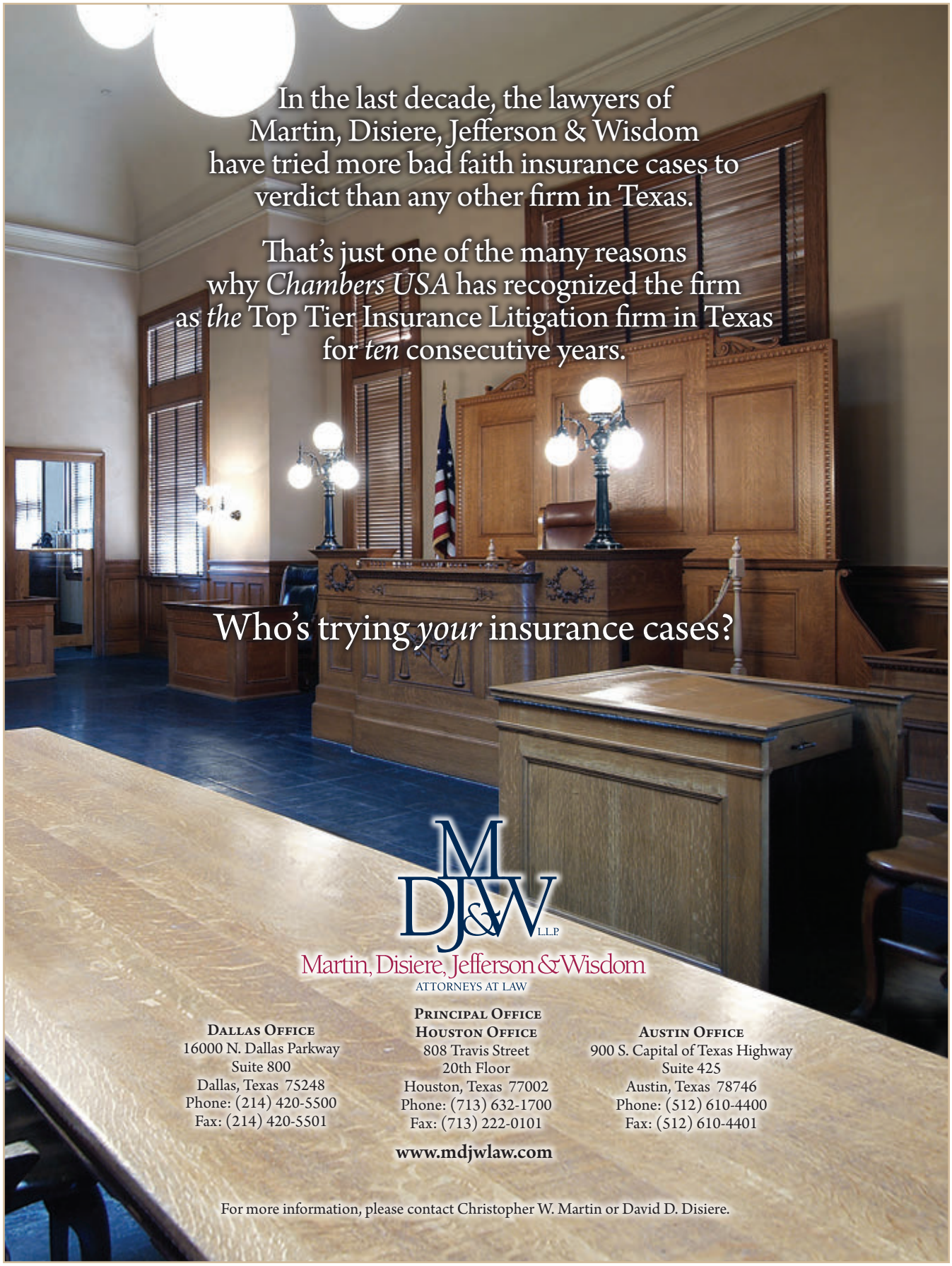
OKLAHOMA TULSA

NEAL E. STAUFFER

Neal Stauffer is known for his expertise in complex insurance litigation, trials and appeals. He has tried multiple jury cases involving insurance extra contractual issues from both the insurer's and insured's perspective. His hands-on, unique understanding of insurance law stems from his work as an insurance agent and adjuster for eleven years before attending law school. His previous work history is an advantage for both his insurance company clients and his plaintiff clients. In 2007, as lead plaintiff's counsel, he achieved a settlement of over $18 million. Mr. Stauffer is a life member of the Million Dollar & Multi-Million Dollar Advocates Forums, served as general counsel for the International Association of Arson Investigators (Oklahoma), and lectures on bad faith, insurance contracts and Examinations Under Oath. Mr. Stauffer is AV® rated and earned his J.D. at the University of Oklahoma and is admitted in Oklahoma and Arkansas, Eastern, Northern and Western Districts of Oklahoma, the Tenth and Eighth Circuits.

STAUFFER & NATHAN

P.O. Box 702860, Tulsa, Oklahoma 74170-2860
p: 918-592-7070, f: 918-592-7071
nstauffer@staufferlaw.com • www.staufferlaw.com


In the last decade, the lawyers of
Martin, Disiere, Jefferson & Wisdom
have tried more bad faith insurance cases to
verdict than any other firm in Texas.
That's just one of the many reasons
why Chambers USA has recognized the firm
as the Top Tier Insurance Litigation firm in Texas
for ten consecutive years.
Who's trying your insurance cases?
MDJW L.L.P.
Martin, Disiere, Jefferson & Wisdom
ATTORNEYS AT LAW
DALLAS OFFICE
16000 N. Dallas Parkway
Suite 800
Dallas, Texas 75248
Phone: (214) 420-5500
Fax: (214) 420-5501
PRINCIPAL OFFICE
HOUSTON OFFICE
808 Travis Street
20th Floor
Houston, Texas 77002
Phone: (713) 632-1700
Fax: (713) 222-0101
AUSTIN OFFICE
900 S. Capital of Texas Highway
Suite 425
Austin, Texas 78746
Phone: (512) 610-4400
Fax: (512) 610-4401
www.mdjwlaw.com
For more information, please contact Christopher W. Martin or David D. Disiere.

TEXAS DALLAS

R. BRENT COOPER

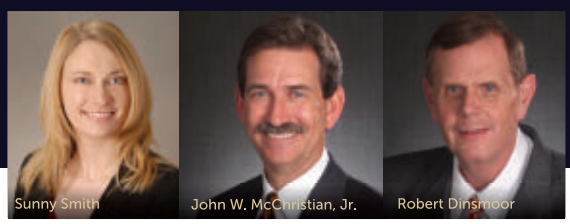
R. Brent Cooper, a named shareholder in the Dallas office of Cooper & Scully, P.C., focuses his practice on commercial litigation, insurance and appellate law. He has tried numerous cases covering areas of business litigation, construction litigation, catastrophic personal injuries, complex litigation, intellectual property, constitutional and business tort cases. In his 37 years of practice, he has been at the forefront of Texas law, particularly in the area of bad faith.

Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization, Mr. Cooper has been appellate counsel of record in over 300 published court opinions and honored by the State Bar of Texas Insurance Section as a "True Texas Legend." He has been recognized as a leading attorney in insurance law by Chambers USA for 2007-2014 and Texas Super Lawyers since it's inception in 2003.

Cooper & Scully
A Professional Corporation

900 Jackson, Suite 100, Dallas, TX 75202
p: 214.712.9500, f: 214.712.9540
brent.cooper@cooperscully.com

RMJ | LAW FIRM



Congratulations to Sunny Smith, John W. McChristian, Jr. & Robert Dinsmoor

for their accomplishments as Top Rated Lawyers in Insurance Law and their selection to the 2014 Texas Super Lawyers list.

Ray, McChristian & Jeans is a nationally recognized trial firm. The firm's primary trial lawyers, who are AV Preeminent Rated, have successfully defended clients in catastrophic Personal Injury, highly publicized/high exposure cases, and business litigation throughout Texas, New Mexico, Arizona, Arkansas and the Southwest. The firm's successes include defense verdicts in large cases involving pipeline explosions (reported by CNN and USA Today), product liability, catastrophic personal injury, and commercial litigation.

www.rmjfirm.com

ALBUQUERQUE (505) 855-6000 | EL PASO (915) 832-7200 | FT WORTH (817) 335-7201 | SAN ANTONIO (210) 341-3554

CALIFORNIA SAN FRANCISCO

MARY ALEXANDER

Mary Alexander doesn't only take on cases; she takes on causes. "My top priority is to fight for the just compensation my clients deserve," says the founder of Mary Alexander & Associates, a nationally recognized personal injury law firm. "My passion is to be a warrior for the injured."

She cites a case where a victim of faulty bicycle brakes was now a quadriplegic: "Because of the $13.3 million verdict we won on her behalf, she can live at home instead of in an institution. It means a great deal to make that much of a difference in someone's life."

Mary Alexander & Associates brings a quarter-century of expertise to the full range of plaintiff suits. "Whether it's a motor vehicle or workplace accident, traumatic injury, product liability or wrongful death case, we are tireless advocates for our clients," Alexander says.

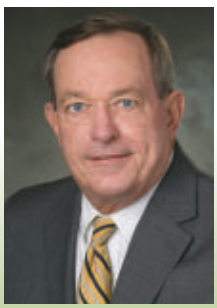
She was recently awarded the Leonard Ring Champion of Justice Award, given to "a person whose character and integrity are unmatched, who has contributed to the public good and welfare and whose life and law practice have helped the less fortunate," says Gary Paul, former president of the American Association for Justice. "On every single basis, Mary deserves this award."

MARY ALEXANDER & ASSOCIATES, P.C.

44 Montgomery Street, Suite 1303, San Francisco, CA 94104
p: 877.454.9315, f: 415.433.5440 • www.maryalexanderlaw.com

GEORGIA ATLANTA

WALTER B. MCCLELLAND



Walter McClelland is a native Atlantan and attended the University of Georgia for both undergraduate and law school. He has been a civil defense trial lawyer for over 40 years, and a member of the same law firm his entire career, serving as its Managing Partner for over 20 years. Mr. McClelland specializes in complex and catastrophic injury litigation, and has tried over 135 jury trials to verdict in State and Federal Courts in Georgia.

Mr. McClelland is a Past President, Executive Vice-President and Secretary/Treasurer of the Georgia Defense Lawyers Association. He has also served the organization as Chairman of the Judicial Relations Committee, and continues to serve on its Board of Directors. He is a member of the Atlanta Bar Association and has served on the Board of Directors of its Litigation Section, and on the Judicial Tenure and Qualifications Committee.

Mr. McClelland has been voted a Georgia "Super Lawyer" in Atlanta Magazine every year since 2004. He was named one of Georgia's Top Lawyers in 2008 by Georgia Trend Magazine, and has achieved the highest peer review rating (AV) from Martindale-Hubbell Law Directory.

Mr. McClelland is a former Field Artillery Officer in the United States Army, and retired as a Captain from the U.S. Army Reserves in 1976.

Mabry McClelland, LLP

CELEBRATING OVER 50 YEARS OF SERVICE

2200 Century Parkway NE, Suite 1000, Atlanta GA 30345
p: 404.325.4800, f: 404.325.0596
www.m-mlegal.com

Super Lawyers
2010, '11, '12, '13, '14

Marcos M. Garza is the founder of the Garza Law Firm, PLLC, located in Knoxville, Tennessee. Mr. Garza focuses his practice in the area of personal injury and criminal defense law, with a large portion of his casework devoted to driving-related offenses. Mr. Garza considers safeguarding his clients' futures as his foremost duty. To that end, Mr. Garza ensures that his clients are given the best possible representation. A lifelong learner, Mr. Garza regularly attends seminars on all aspects of personal injury, DUI and criminal defense tactics, and is thoroughly versed in the science behind his cases as well as a wide variety of trial skills tactics. His knowledge in these technical and scientific areas can give his clients a significant advantage. He was awarded the designation of Lawyer-Scientist by the American Chemistry Society for his mastery of the scientific issues and information underlying the identification and testing of drugs and alcohol. When he is investigating cases, Mr. Garza works with licensed private investigators who have more than 30 years of experience to ensure that he leaves no stone unturned. Mr. Garza also practices in the area of personal injury, where he represents many plaintiffs involved in automobile and motorcycle accidents. Mr. Garza also represents plaintiffs in other areas, such as premises liability and slip-and-fall cases. A native of Athens, Tennessee, Mr. Garza earned his bachelor's degree from Vanderbilt University, his master's degree in social work from the University of Tennessee, and his law degree from the University of Tennessee College of Law. Mr. Garza served as a Captain in the United States Marine Corps from 1999 until 2005. Mr. Garza is rated AV by Martindale-Hubbell, has been recognized by Super Lawyers® for the last five years, is a graduate of Gerry Spence's Trial Lawyers College, and the National Trial Lawyers Institute in Macon, Georgia. He is a life member of the National Association and Tennessee Association of Criminal Defense Lawyers, a Board Member of the Tennessee Association for Justice, and serves as Vice President of the national DUI Defense Lawyers Association.

GARZA LAW FIRM PLLC
TRIAL ATTORNEYS

Garza Law Firm, PLLC | 550 W. Main St., Suite 340 | Knoxville, TN 37902 | 1-888-540-8300 | garzalaw.com

MORE: corpcounsel.com

INTERVIEW | NOELLE LILIEN

NO MORE HARD HATS

General Counsel | The National September 11 Memorial and Museum

NOELLE LILIEN REMEMBERS WEARING A HARD HAT WHEN SHE walked where the World Trade Center used to stand. Today, now that the construction has been completed, she's gratified when she sees all the visitors who come to learn about, and pay tribute to, the victims of the 2001 terrorist attacks.

Having handled construction contracts, intellectual property matters and legal support for the museum's operations, Lilien has played a key role in developing one of the highest-profile projects of lower Manhattan. She joined the effort in 2007 as an assistant general counsel, and was tapped to lead the organization's legal department the following year.

After five years of construction, the memorial opened in 2011. The museum, which took four years to complete, opened in May. Now that they're up and running, Lilien's department handles legal issues surrounding general operations and upkeep. She spoke about her experience with summer intern **Vinayak Balasubramanian**. An edited version of their conversation follows.

CORPORATE COUNSEL: What types of legal work have you done as GC?

NOELLE LILIEN: I came in 2007 at the first foundation contract, and at the end of the day there were 70 base building contracts for the project. The project was the memorial plaza itself, the two pools that sit on the eight acres of the memorial, and then the actual building of the museum, which is a pavilion entryway, and a large museum underneath the footprints of the World Trade Center. Once we had the base building done, we needed to do the exhibition. For that we had to hire exhibition designers and exhibition fabricators. Then we had installation agreements and exhibition agreements to show specialty artwork and different photographers and artists—not to mention all of the loans for the artifacts from city and federal agencies. We've entered into well over 1,000 licenses for photographs.

In order to pay for everything, we had to enter into many pledge agreements. We had sponsorship agreements, we just recently started two years ago a 5K run. I did all of the legal support for those initiatives.

CC: What was the biggest challenge you faced?

NL: My legal department consists of me and a contracts administrator [who doubles as a project manager]. And I also have a part-time attorney, so it's an extremely small department. I think the biggest challenge in opening the museum was that at points the volume of the work was tremendous. It really required discipline on our part to do advance planning and to communicate with all the different departments.

MAGGIE SOLADAY

CC: What role has the emotional impact of the memorial and the museum had on your job and your legal department?

NL: For me, it's hard to hear audio transmissions of people who were leaving messages for their loved ones. We also have this other section [of the museum] where the family members were invited to say a few words that play on an audio loop in the memorial. Sometimes hearing the content really hits home. But most of my colleagues would say that this is why we work so hard to make the museum a meaningful place and a place where all of the victims can be remembered and honored for generations to come.

CC: What would you characterize as your biggest accomplishment as general counsel?

NL: The thing that I am most proud about is that the opening of the museum was such a success. When the dedication ceremony was over and President Obama was there, I just sat for a few minutes soaking it all in. I had been working on the project since 2007. And just to look around and see all of the things that you had a hand in completing, and all of the work that you did to try to make this a reality—it was just great to see it all come to fruition that day. ■

It can take years to develop a great idea, but only moments to lose one.

We know how deeply you value your ideas - the care and concern with which you've helped them grow. Which is why we dedicate ourselves to safeguarding your intellectual property.

Your job is to have ideas.
Ours is to preserve them.

cozen.com

COZEN O'CONNOR