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The C-Suite in the Crosshairs – A Year After the Yates Memorandum

by Howard M. Privette & Wayne R. Gross, Partners, Greenberg Gross LLP

In September 2015, to great fanfare, the U.S. Department of Justice issued a policy directive entitled “Individual Accountability for Corporate Wrongdoing.” The so-called “Yates Memorandum,” in reference to its author Deputy Attorney General Sally Quillian Yates, declared that “one of the most effective ways to contain corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.” With this premise, DOJ instructed its criminal prosecutors and civil enforcement attorneys to “focus on individuals” in all cases involving allegations of “corporate fraud and misconduct.”

More than a year has now passed, and so far the impact of the Yates Memorandum has been mixed. Observers have questioned, for example, whether or not there has been a material change in the incidence of criminal prosecutions of individual corporate executives. The seeming lack of change led Deputy Attorney General Yates herself to take to the podium in May 2016 to give a speech explaining that while “it is critical to hold individuals accountable,” DOJ’s “intensified focus on individuals from the inception of an investigation is not expected to result in a flurry of individual indictments overnight.”

Certainly, the “individual responsibility” rhetoric coming from the highest echelons of DOJ leadership has continued unabated over the past year, including very recently in a speech by William J. Baer on September 27, 2016. Baer, the Assistant Attorney General for the Antitrust Division, emphasized that the DOJ’s focus on corporate executives’ culpability is at least as significant in the civil enforcement context as it is in criminal cases. Indeed, two recent DOJ civil settlements illustrate the potential for increased personal liability on those in the c-suite.

The Tuomey and NAHC False Claims Act Settlements

On the same day that Assistant Attorney General Baer gave his speech about civil liability of corporate executives, DOJ announced a \$1 million settlement with the former CEO of Tuomey Healthcare System. This followed closely on another settlement announced on September 19, 2016 involving North American Health Care Inc. (NAHC), in which the CEO and a senior vice president of the company agreed to pay \$1 million and \$500,000, respectively.

Tuomey, which ran a hospital, was informed by some specialty physician groups that they planned to perform surgical procedures in-office instead of at Tuomey’s hospital. In the face of losing this lucrative outpatient business, the CEO allegedly caused Tuomey to enter into contracts that required the physicians to refer their outpatient procedures to Tuomey. In exchange, Tuomey allegedly agreed to pay the physicians compensation far in excess of market value, including money received from Medicare.

After a trial against the company, the jury determined that Tuomey’s arrangements violated federal law prohibiting hospitals from engaging in kickback schemes. Specifically, the jury found that Tuomey had filed more than 21,000 false claims with Medicare, resulting in a judgment against the company under the False Claims Act for \$237.4 million. The DOJ later settled this judgment with the company for \$72.4 million, but did not agree to forego proceeding against the CEO. This is consistent with the Yates Memorandum, which instructs DOJ attorneys that no settlement or resolution with a corporation will be allowed to provide protection for any individuals from criminal or civil liability, except in “extraordinary circumstances.”

Not surprisingly, DOJ then turned its attention to Tuomey’s CEO, who ultimately agreed to pay \$1 million to settle the claims against him personally. The CEO also agreed to a prohibition from participating in federal health care programs for four years.

The NAHC case was based on allegations that the company’s CEO and senior vice president of reimbursement violated the False Claims Act by billing government health care programs for medically unnecessary rehabilitation therapy services. Not only did NAHC agree to pay \$28.5 million, its CEO paid an additional \$1 million, and its senior vice president paid \$500,000. The settlement ominously excluded any other individuals from the release of liability. Moreover, the company and both individuals agreed to cooperate fully with the DOJ in its continuing investigation of individuals and entities not released by the settlement. This echoes another aspect of the Yates Memorandum, which requires corporations to provide the government with “all relevant facts about the individuals involved in the corporate misconduct” in order to be eligible for “cooperation credit” when resolving a matter.

The Yates Effect on Internal Corporate Investigations

Although the Yates Memorandum may not have resulted – yet – in an appreciable increase in the number of actions taken by DOJ against corporate

executives, behind the scenes the impact of the memorandum has been felt by corporations confronting the necessity of an internal investigation of alleged misconduct.

The first steps in an investigation often include interviewing key executives and employees who potentially possess relevant information. In the past, preliminary interviews might be conducted by in-house counsel, or the company’s regular outside counsel, to assess the scope of the issues and consider next steps. The Yates Memorandum’s instruction pertaining to “cooperation credit,” however, raises the potential for conflicts between the company’s counsel and the individuals being interviewed. It has become increasingly important for counsel to consider these conflicts from the very beginning of an investigation and, where appropriate, consider independent counsel both for the company and for individuals.

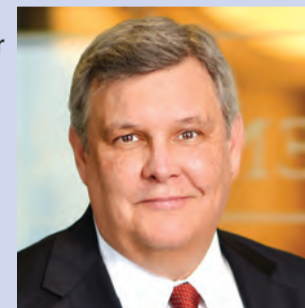
Indeed, recent guidance in DOJ speeches has served to bring lurking Constitutional concerns into sharper focus. In her May 2016 speech, Deputy Attorney General Yates tried to allay concerns that the DOJ’s policies will require expensive internal investigations into every potential issue, explaining that investigations should be “tailored to the scope of the wrongdoing.” She also said that a company will not be disqualified from receiving cooperation credit “simply because it didn’t have all the facts lined up on the first day it began talking with us.”

Yates’ explanation of DOJ’s expectations, however, raises the specter of turning the corporation into a “state actor,” i.e., effectively turning the corporation into an investigatory deputy of the government. In her May 2016 speech, Yates asserted that “we expect that cooperating companies will continue to turn over the information to the prosecutor as they receive it.” And, while the “determination of the appropriate scope and how to proceed is always case specific . . . if a company’s counsel has questions regarding scope, they should do what many defense lawyers do now – contact the prosecutor directly and talk about it.” Yates noted that “[a]lready, based on reports on the ground, firms are doing just that.”

Under the circumstances, corporate executives (and corporate counsel) should take no solace that a wave of prosecutions has not occurred in the year since the Yates Memorandum. The DOJ is actively following the directives set forth in the memorandum, and it is imperative that corporate executives and their counsel understand the potentially high-stakes ramifications of these directives in the day-to-day conduct of their business.

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Howard Privette is an experienced trial lawyer who consistently develops innovative strategies for resolving the most challenging cases. Clients look to Mr. Privette when they need sophisticated representation in high-stakes and bet-the-company cases, or when they need assistance with sensitive internal investigations and the threat of action by the SEC, DOJ, and other regulators. With more than 25 years of practice, Mr. Privette represents U.S. and global clients in a wide range of complex business disputes in courts across the United States. Contact him at 949.383.2770 or HPrivette@GGTrialLaw.com.



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Ninth Circuit Approves Neutral Time Clock Rounding Practice

by Christopher W. Olmsted, Shareholder, and Jaclyn A. Simi, Associate, Ogletree Deakins

Time clock rounding is a longstanding employer practice whereby employers round employee starting and stopping times to the nearest five minutes, or to the nearest one-tenth or quarter of an hour. Is the practice legal? For over 50 years, a federal regulation has authorized the practice, but until recently, no federal appellate court had endorsed the practice. In May of 2016, the Ninth Circuit Court of Appeals determined that an employer's time clock rounding procedures complied with federal law in *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership*, 821 F.3d 1069 (9th Cir. 2016).

Missing Pocket Change Fuels a Class Action

Time Warner Entertainment-Advance/Newhouse Partnership rounded employee time punches to the nearest quarter hour. For example, if an employee clocked in at 8:07 a.m., Time Warner would have rounded his or her time stamp to 8:00 a.m. Thus, the employee would benefit from rounding and be compensated for seven minutes that he or she was not actually working. Conversely, if an employee clocked out at 5:05 p.m., that time stamp would be rounded to 5:00 p.m., and the employee would not be compensated for five minutes that he or she actually worked.

The plaintiff, Andre Corbin, argued that the rounding practice short-changed him. Although the data showed that he gained or broke even under the rounding system for 58 percent of his shifts, over a span of several months he earned \$15.02 less than he would have had the company not rounded his time. Corbin also alleged that on one occasion, he had logged on to an auxiliary computer system before logging into the time system, resulting in a loss of one minute of compensable time that was not captured by the time clock.

Corbin filed a class action lawsuit alleging that the rounding practice violated state and federal wage and hour law because it denied him full compensation for time spent actually working.

Round and Round We Go

The court began its opinion by observing that "[t]his case turns on \$15.02 and one minute." That was the amount by which the plaintiff argued he was underpaid as a result of the rounding policy. The plaintiff argued that unless every employee gains or breaks even over every pay period, an employer's rounding policy violates the federal rounding regulation. The court rejected that contention.

The court analyzed a federal regulation allowing for time clock rounding. The regulation, found at 29 C.F.R. § 785.48(b), provides: It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

The court acknowledged that federal rounding rules had long been applied to federal claims pursuant to the Fair Labor Standards Act. The court also noted that California's Division of Labor Standards Enforcement—"the agency empowered to enforce California's labor laws"—has "adopted the federal regulation in its manual." In *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012), a California Court of Appeals, however, noted that the Supreme Court of California had not addressed whether rounding is permissible. Nevertheless, the *See's Candy Shops* court held that the federal rounding regulation described above applies to California state claims so long as the employer's "rounding-over-time policy is neutral, both facially and as applied."

The Ninth Circuit determined that the federal regulation could not be read to mean that an employee must always come out even or ahead. The court reasoned that a rounding policy will mean that some pay periods an employee may come out ahead and sometimes he or she may come out behind. However, in the end, rounding is meant to average out over the course of time. Corbin's rationale was faulty and impractical, according to the court, because it would essentially require the employer to "un-round" every employee's time stamps for each pay period to ensure that every employee benefitted from the rounding policy. The court rejected Corbin's argument given that obligating an employer to engage in this "mini actuarial process at the time of payroll" would defeat the purpose of rounding altogether.

Examining the company's rounding policy, the court determined that it passed muster. It was facially neutral because it rounded all employee time punches to the nearest quarter-hour without considering whether the employer was benefitting from the policy (i.e., the employer rounds down *and* up) and it did

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not depend on managerial oversight (i.e., the system is entirely electronic and cannot be manipulated by supervisors or others). In the end, Corbin failed to show that over a period of time, he was not properly compensated for his work.

Wait a Minute

Separately, the court addressed Corbin's claim that one day he lost one minute of compensable time by logging into an auxiliary system before logging into the time clock. Can an employee sue for as little as one minute of unpaid time?

The court dispensed with this claim by applying a longstanding judicial reality check in the realm of wage and hour law: the *de minimis* doctrine. This Latin phrase means "about minimal things." In the legal context, it means that a court may refuse to consider trifling matters. "[I]n light of the realities of the industrial world, a 'few seconds or minutes of work beyond the scheduled working hours . . . may be disregarded.'" The rule is concerned with "the practical administrative difficulty of recording small amounts of time for payroll purposes."

In this case, it would have been impractical for the company to cross-reference computer log in times with time clock punches for each employee on each day in the off chance that an employee accidentally started a computer program before punching in. Moreover, the amount of lost time here, one minute, was so small that it resulted in only pennies in lost wages. Furthermore, the lost minute was not a recurring problem, but instead one rare instance of off-the-clock time. Accordingly, the court concluded that the uncompensated time was *de minimis* and therefore not a valid legal claim.

Practical Application

This case reaffirms the legality of time clock rounding. However, it also highlights the importance of implementing a neutral practice that, on average, does not undercompensate employees.

Although rounding is legal, it can be challenging to properly implement. As this case makes obvious, even a proper system can be challenged in litigation. To verify that a system is properly balanced, it may be prudent for employers to conduct periodic audits to ensure that rounding does not lead to an average underpayment of wages.

The *de minimis* rule continues to be a topic of ongoing litigation. Although federal courts and some lower state courts have addressed the issue, the Supreme Court of California has yet to address application of the *de minimis* rule to state law. In June of 2016, the Supreme Court of California agreed to review federal Ninth Circuit Court of Appeals case *Troester v. Starbucks Corporation* (S234969). The court will determine whether the *de minimis* rule applies in the context of a store employee who, after clocking out, spent time setting an alarm and locking up the store. An opinion is expected to be released sometime during the next year.

For more information on this subject, please contact Christopher Olmsted directly at christopher.olmsted@ogletreedeakins.com or 858.652.3111.

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Is Your Website Privacy Policy Compliant?

An overview of California laws concerning website privacy policies and practices

by Chelsea Epps, Partner, Rutan & Tucker, LLP

In today's web-based world much of our daily interactions and information collection and sharing takes place online. In recent years, we have witnessed the proliferation of hyperlinks to privacy policies on the websites where we do business, conduct commercial transactions, and otherwise provide information to or interact with. Businesses often struggle with questions regarding whether a posted website privacy policy is necessary for their business model, what laws apply to website privacy policies, and what content must be included, particularly given California's stringent and comprehensive approach to regulating the collection, use, disclosure and safeguarding of consumers' personal information and protecting individual privacy rights. This article provides an overview of important California laws concerning website privacy policies and practices.

California Law Governing Website Privacy Policies

The landmark California Online Privacy Protection Act (CalOPPA) was the first law in the nation to impose broad requirements for privacy policies.¹ CalOPPA applies to operators of commercial websites and online services (including mobile apps) that collect personally identifiable information about Californians, regardless of where those operators are located, and requires them to conspicuously post a website privacy policy and comply with it.²

At a minimum, the website privacy policy must do the following:

1. identify the categories of personally identifiable information the operator collects about individual consumers and the categories of third parties with whom the operator may share that information;
2. describe the process, if the operator maintains one, by which consumers may review and request changes to their personally identifiable information;
3. describe the process by which the operator notifies consumers of material changes to the privacy policy;
4. identify the policy's effective date;
5. disclose how the operator responds to Web browser "Do Not Track" (DNT) signals or other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about the consumer's online activities over time and across third party websites or online services, if the operator engages in that collection;³ and
6. disclose whether third parties may collect personally identifiable information about an individual consumer's online activities over time and across different websites when a consumer uses the operator's website or service.

"Personally identifiable information" is defined broadly as information about a consumer collected online and maintained by the operator in an accessible form, and includes any of the following:

- ▶ first and last name;
- ▶ home or other physical address, including street name and name of a city or town;
- ▶ e-mail address;
- ▶ telephone number;
- ▶ Social Security number;
- ▶ any other identifier that permits the physical or online contacting of a specific individual; and
- ▶ information concerning a user that the website or online service collects online from the user and maintains in personally identifiable form in combination with an identifier described above.⁴

The privacy policy must be "conspicuously posted" and links to the privacy policy must comply with specific placement and formatting requirements.⁵

CalOPPA provides an operator with a 30-day grace period to post a policy after being notified of failure to do so. An operator can be in violation for failing to comply with CalOPPA's requirements for a website privacy policy or for failing to adhere to its own posted policy if it acts either knowingly and willfully or negligently and materially.⁶

CalOPPA can be enforced through California's Unfair Competition Law (UCL) (Cal. Bus. & Prof. Code, §§ 17200-17209). Under the UCL, the California Attorney General's Office, district and city attorneys, as well as private plaintiffs, can file suit against businesses for acts of "unfair competition," which is broadly defined as any act involving business that violates California law.

Operators who violate CalOPPA may also be subject to enforcement actions by the Federal Trade Commission (FTC) if their privacy policies are deceptive, i.e., the business fails to comply with its posted privacy policy.

California's "Shine the Light" Privacy-Related Law

California's "Shine the Light" law (Civil Code section 1798.83) regulates businesses that disclose customers' personal information to third parties for direct marketing purposes and requires that customers be informed of the disclosures. Violations under this statute are subject to civil penalties of \$500 or \$3,000 per violation, depending on whether the violation was willful, plus attorneys' fees, and have been the subject of putative class action lawsuits in recent years. A business must comply with this statute if it has an established relationship with a customer and has within the immediately preceding calendar year disclosed "personal information" (as defined in section 1798.83(e)(6)) to third parties, and the business knows or reasonably should know that the third parties used the personal information for direct marketing

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purposes. Certain financial institutions and businesses with fewer than 20 full-time or part-time employees are exempt from these requirements.

Businesses can comply with this statute in one of two ways. Either they can allow customers to opt-in or opt-out of information sharing with third parties for use in direct marketing if they provide the customer with a cost-free means to exercise that right.⁷ Or, alternatively, they must designate a mailing address, email, toll-free telephone number or facsimile number, to which customers may deliver a request for information concerning personal information collected and third parties that received the personal information for the third parties' direct marketing purposes during the preceding calendar year. A business who elects the latter option must comply with other notification, posting, reporting and disclosure requirements set forth in sections 1798.83(b)(1)(A), (B) and (C).

Special Considerations for Websites that Are Targeted to or Collect Personally Identifiable Information From Minors

Under the Privacy Rights for California Minors in the Digital World amendments to CalOPPA (known as the "Eraser Law")⁸, operators of websites, online services and mobile apps are prohibited from using personal information from a minor (under 18 years old), or allowing a third party to use a minor's personal information, to market or advertise certain prohibited products (such as alcohol, firearms, tobacco, aerosol paint containers, tattoos, lottery tickets, ultraviolet tanning devices, etc.).⁹ However, operators are deemed to be in compliance if they take reasonable actions in good faith to avoid marketing or advertising prohibited items to minors.¹⁰

In addition, if an operator has actual knowledge that a minor is using its website or online service, or if its website or online service is targeted to minors, the operator must provide minors with: (i) the ability to remove, or request and obtain removal of, content that the minor posted on the website or mobile app; (ii) notice and clear instructions on how to remove his or her information; and (iii) notice that removal may not remove all traces of the posting.¹¹

Businesses can comply with the removal requirements by making the original content invisible to other users and the public even if it remains on the operator's servers or if a third party has copied the content and made it available elsewhere.¹²

An operator may be exempt from the removal requirement if any of the following apply:

- ▶ federal or state law requires maintenance of the content or information;
- ▶ the content was stored or posted (or reposted) by a third party other than the minor;
- ▶ the content is anonymized in a way that the minor cannot be individually identified;
- ▶ the minor received compensation or other consideration for providing the content; or
- ▶ the minor does not follow the instructions provided to request content removal.¹³

¹ CalOPPA went into effect in 2004. It was amended in 2013 to require new privacy disclosures regarding tracking of online visits.

² See Cal. Bus. & Prof. Code, § 22575(a). In May 2014, the California Attorney General's Office issued "Recommendations on Developing a Meaningful Privacy Policy" and stated that CalOPPA "requires [operators of commercial web sites and online services that collect personally identifiable information about Californians] to say what they do and do what they say – to conspicuously post a privacy policy and to comply with it."

³ https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersecurity/making_your_privacy_practices_public.pdf
⁴ "An operator may satisfy the requirement of paragraph (5) by providing a clear and conspicuous hyperlink in the operator's privacy policy to an online location containing a description, including the effects, of any program or protocol the operator follows that offers the consumer that choice." (Cal. Bus. & Prof. Code, § 22575(b)(7).)

⁵ Cal. Bus. & Prof. Code, § 22577.

⁶ Cal. Bus. & Prof. Code, § 22575(b).

⁷ Cal. Bus. & Prof. Code, § 22576.

⁸ Cal. Civ. Code, § 1798.83(c)(2) ("If a business that is required to comply with this section adopts and discloses to the public, in its privacy policy, a policy of not disclosing personal information of customers to third parties for the third parties' direct marketing purposes unless the customer first affirmatively agrees to that disclosure, or of not disclosing the personal information of customers to third parties for the third parties' direct marketing purposes if the customer has exercised an option that prevents that information from being disclosed to third parties for those purposes, as long as the business maintains and discloses the policies, the business may comply with subdivision (a) by notifying the customer of his or her right to prevent disclosure of personal information, and providing the customer with a cost-free means to exercise that right.")

⁹ It is important to note that the federal Children's Online Privacy Protection Act of 1998 (COPPA) and the FTC's implementing regulations (15 U.S.C. §§ 6501-6506; 16 C.F.R. § 312) also govern the online collection, use, and disclosure of personal information from children under the age of 13, whereas California's Eraser Law applies to minors under the age of 18.

¹⁰ Cal. Bus. & Prof. Code, § 22580, et seq.

¹¹ Cal. Bus. & Prof. Code, § 22580(b)(2), (c).

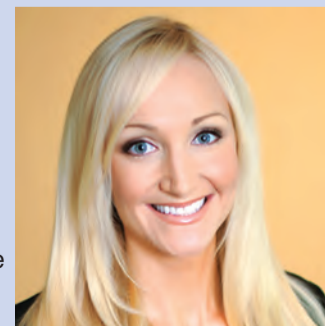
¹² Cal. Bus. & Prof. Code, § 22581(a).

¹³ Cal. Bus. & Prof. Code, § 22581(d).

¹⁴ Cal. Bus. & Prof. Code, § 22581(b).

Chelsea Epps

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Using Pop Culture References in Advertisements? Just Do It Right

by Jeffrey L. Van Hoosear & Catherine J. Holland, Partners, Knobbe Martens

In this age of smartphone cameras and hashtags, an impromptu remark or a right-place-at-the-right-time snapshot can “go viral” and create instant and immense goodwill. Businesses today use social media as a tool to promote and exploit their brands, and to reach an audience that is simultaneously bigger and better targeted. They should be wary, however, when seeking to appropriate or capitalize on pop culture references, and understand that there can be unintended consequences. The following cases are cautionary reminders that a business needs to be vigilant when adopting promotions or trademarks that incorporate words, slogans or images from pop culture. Trademarks, copyrights, right of publicity and public relations issues all must be cleared before filing a trademark application or kicking off a new advertising campaign.

Intellectual property issues have always posed a risk in advertising campaigns. The time, money and effort that it took to create and develop a traditional ad campaign usually meant that everything was reviewed and proper clearances were obtained. Content that arguably infringed the rights of another would usually be discovered and changed before publication. The use of social media in advertising, however, has dramatically shortened the time frame in which a company can review and clear the content of its message. It is crucial that companies develop a system for such review, because the risk of intellectual property infringement still exists and is perhaps even greater.

There have been many trademark, copyright and right of publicity claims filed against companies who have used and registered popular catchphrases and quotes. The greeting card company Hallmark used Paris Hilton’s caricature and signature phrase “That’s Hot” on a greeting card. Ms. Hilton promptly returned the greeting by sending a cease-and-desist letter. The letter alleged trademark infringement – Ms. Hilton had filed six applications to register the phrase THAT’S HOT in the US Patent and Trademark Office – and also alleged that the use of her caricature violated her right of publicity. Ms. Hilton’s case was eventually settled out of court, but not before it reached the Ninth Circuit Court of Appeals. Hallmark’s initial arguments that Ms. Hilton was a public figure (which would have been a defense to the right of publicity claim) and that the card should be deemed a parody (which would have been a defense to the trademark claim) were unsuccessful before the district court.

The use of the phrase “Nobody puts baby in a corner” in an advertisement has resulted in litigation in *Lion’s Gate Entertainment, Inc. v. TD Ameritrade Services Company, Inc.* The phrase originated in the 1987 Oscar-nominated film “Dirty Dancing.” Almost thirty years later, TD Ameritrade aired a commercial using the slogan “Nobody puts your old 401(k) in the corner” with a visual of a man lifting a piggy bank over his head. This visual was similar to a dance move from the movie’s climax, and the audio used the music to the song “(I’ve Had) the Time of My Life” which was also from the movie. Lion’s Gate Entertainment, the owner of the copyright to the movie and a registration for the trademark NOBODY PUTS BABY IN THE CORNER, sent a cease-and-desist letter to TD Ameritrade. TD Ameritrade agreed to stop running the ad, but refused to pay Lion’s Gate a “seven figure” number for damages. Lion’s Gate subsequently filed a lawsuit against both TD Ameritrade and Havas Worldwide New York, the advertising firm that created the ad campaign. The suit has had many twists and turns, but is still going on a year and half later.

A business needs to understand how attempting to protect or preempt rights to pop culture references can have unintended consequences. The Walt Disney Company and its related entities have provided several illustrative examples. A few years ago, Pixar, a Disney subsidiary, decided to produce a film relating to “Día de los Muertos” or “Day of the Dead.” Day of the Dead is a traditional Latin American holiday that dovetails with the American holiday Halloween, and is widely celebrated in parts of the US.

Disney is well-known for aggressively protecting movie-themed merchandise such as foods, toys and apparel. In preparation for the film, Disney filed ten separate trademark applications to register “Día de los Muertos” for an extensive list of consumer goods and services. A US trademark registration gives the owner of the registered trademark the presumption of an exclusive right to use the trademark, as well as the presumptive right to exclude others from using the trademark

without authorization. The filing of a US trademark application usually becomes public knowledge within 24 hours, and it was at that approximate moment that Disney discovered it had a public relations problem.

Social media went wild. A few of the milder Tweets include “Tell @Disney not to trademark Day of the Dead. Culture is NOT for sale!,” “Are we okay with @DisneyPixar commercializing our culture?” and “Disney to trademark Dia de Los Muertos, also your dead relatives.” A petition went up on the website Change.org – whose stated mission is to “empower people everywhere to create the change they want to see” – to stop Disney’s trademark efforts, stating that to trademark Día de los Muertos was “cultural appropriation and exploitation at its worst.” The petition garnered more than 20,000 signatures in just a few days, and it was clear that the negative publicity was only going to get worse.

Within a week of filing, Disney voluntarily withdrew all ten of its trademark applications. Disney did not comment directly on whether or not the social media reaction led to its decision to withdraw the trademark applications. A Disney spokesperson did indicate that Disney had decided to change the title of the film. To Disney’s credit, after the controversy subsided, it hired Lalo Alcaraz to be a consultant for the film. Mr. Alcaraz is a well-known political cartoonist and writer, and had been a very vocal critic of Disney during the short life of the trademark applications.

This wasn’t the first time Disney had sought to trademark a well-known phrase. A few years earlier, Disney filed three trademark applications for the trademark SEAL TEAM SIX. SEAL TEAM SIX refers to the US Navy SEAL team that is credited with the raid resulting in the elimination of Osama bin Laden. The Disney trademark applications were filed two days after the news became public. The three applications covered “entertainment and education” services, “clothing, footwear and headwear” and other consumer goods such as toys, games, Christmas tree decorations and snow globes.

The fallout from the Disney trademark filings was as swift and lethal as the Navy SEAL Team, and was overwhelming negative. The Navy filed its own trademark applications for the trademarks NAVY SEALS and SEAL TEAM a few days later, and Disney withdrew its applications shortly thereafter “out of deference to the Navy.”

As the above examples illustrate, it is crucial that a company carefully consider the potential ramifications of adopting a pop culture reference in connection with its business, and obtain the proper clearances before launching it into the world.

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Insurance Law: A Primer for In-House Counsel

by Edward Susolik, Partner in Charge of the Insurance Department, Callahan & Blaine

In-house counsel must have significant knowledge in a wide variety of legal specialties: litigation, corporate, regulatory, employment, real estate and property, just to name a few. Critically, one of the key areas where in-house counsel must acquire legal understanding is insurance law, especially if they handle any litigation.

Insurance law is the ultimate inter-disciplinary specialty. Insurance concepts and principles cut across virtually every field of litigation — business litigation, intellectual property, employment law, products liability, real estate, corporate disputes and a broad spectrum of other contexts.

An in-house counsel who has insurance expertise is a powerful asset for his corporate employer. For example, if in-house counsel is able to successfully trigger liability insurance coverage for a complex litigation lawsuit, it is like finding gold in the backyard.

In this article, I will summarize some of the insurance principles that arise in a wide variety of commercial litigation contexts. Properly applied by in-house counsel, these principles can bring his or her company millions of dollars in insurance benefits.

Fundamental Insurance Principles

There are numerous fundamentals of insurance law for commercial litigation.

First, through a variety of insurance rules and principles, general liability insurance policies provide coverage for an incredibly broad variety of business lawsuits. The full spectrum of commercial litigation that is potentially covered by insurance is frequently misunderstood by many in-house counsel and their corporate officers, many of whom view insurance policies in a very literal and one-dimensional manner.

The reality is that general liability policies can potentially provide coverage for virtually every type of commercial litigation lawsuit, through coverages such as advertising injury and personal injury. These include business litigation lawsuits such as copyright and trademark infringement, misappropriation of trade secrets, unfair competition and many others.

Even business lawsuits that center on allegations typically not covered by general liability policies — such as breach of contract, fraud, shareholder or partnership disputes and wrongful termination — nevertheless frequently involve secondary allegations of defamation, disparagement, invasion of privacy or related torts which do implicate insurance coverage. See *Buss v. Transamerica* (1997) 16 Cal.4th 35.

In addition, there is a wide plethora of specialized insurance policies that cover commercial litigation scenarios. These include Director & Officer, Error and Omission, Intellectual Property, Employment Practices Liability and numerous other types of policies.

The second fundamental principle of insurance coverage for business litigation is that corporations must aggressively pursue insurance benefits. Insurance companies are not Santa Claus. These are not the “good hands people” of marketing lore. These are multi-billion dollar, international corporations whose fundamental objective is to maximize profits for owners/shareholders — just like your company.

Thus, in-house counsel must be clear in understanding that a significant majority of insurance claims will be contested by their insurance carriers. While certain claims are either clearly covered or obviously not covered, the large majority of claims fall within the grey area. In that instance, insurance companies either typically deny such claims, or handle them pursuant to a comprehensive reservation of rights.

In order to obtain full coverage for these claims and maximize insurance benefits, a company must aggressively pursue such benefits with a highly experienced defense counsel who has significant expertise and experience for in maximizing insurance coverage. If a corporation does not aggressively pursue its insurance benefits, they will likely ultimately be denied or minimized.

Tender Early/Tender Often

It is black-letter law that an insurance company's duties to provide coverage for third party liability claims are not triggered until the policyholder tenders the claim to the insurer. Thus, it is absolutely critical that in-house tender all lawsuits, arbitration demands, regulatory complaints and other legal proceedings to all insurance companies. Even threats to sue or other contentious communications need to be reported to the insurance company as potential claims.

Ultimately, there are many negative things that occur because of a failure to tender, or a delayed tender.

First, the company will likely not be able to recover any defense fees incurred pre-tender.

Second, the policy may have “claims made and reported” deadlines which require notice within the policy periods or shortly thereafter.

Third, even if the policy does not have such reporting deadlines, a carrier may argue that it has been substantially prejudiced by late notice, and deny the claim.

Duty to Defend

The duty to defend is the most important concept in insurance. If there is one fundamental principle that corporate clients and their defense counsel must understand and appreciate, it is the duty to defend.

Black letter California law requires an insurer to immediately defend their insureds if the allegations in the complaint fall within, or may potentially fall within, the scope of coverage provided by the terms and definitions of the policy. *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263.

Triggering the duty to defend can result in a significant shift of power in litigation. It can provide a defendant significant leverage against a plaintiff, as suddenly a company's defense fees are being paid by an insurer. For complex cases, such a benefit can be worth millions of dollars.

In light of the critical importance of the duty to defend, this issue frequently becomes the first battlefield between insurer and insured. Insurers file declaratory relief actions seeking judicial resolution of difficult coverage issues, to try to terminate the duty to defend. Policyholders initiate bad faith complaints arising from the insurer's wrongful refusal to defend.

The Insurance Magic of the Cross-Complaint

Many defendants in business litigation cases file cross-complaints against the plaintiff, often in a knee-jerk or mirror-image fashion. Corporations and their counsel

continued on page B-55

Edward Susolik

Edward Susolik is the partner in charge of the Insurance Department at Callahan & Blaine, an Orange County boutique litigation firm with 30 attorneys. Mr. Susolik has handled over 1000 insurance law disputes in his 26 years of practice, and has recovered over \$1 billion in insurance benefits on behalf of his policyholder clients. He has been an adjunct professor at USC Law School, where he has teaches Insurance Law, and is an editor of the Rutter Guide on Insurance Litigation. Mr. Susolik has been named one of the “Top 100 Attorneys in Southern California” by Super Lawyers every year from 2010 to 2016. He can be reached at 714.241.4444. Callahan & Blaine's website is found at www.callahan-law.com, and its insurance website is at www.insurance-litigation.com.



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The Economy May Rise or Fall, But Employment Litigation Never Stops

The goal for businesses is to avoid becoming a target

by Todd R. Wulffson, Managing Partner, Orange County Office of Carothers DiSante & Freudenberger LLP

The concept that employment lawsuits increase when the economy is improving is one that may seem counter-intuitive - but it is often true. With 22 years in business, and with offices throughout California representing employers of all sizes, Carothers DiSante & Freudenberger LLP has seen small recessions, one big recession, and several alleged recoveries.



When the economy is perceived to be down, and companies are conducting reductions in force, employment-based lawsuits inevitably increase. Now that we are "allegedly" in a recovery and there are less layoffs, one would think that there would be less employment lawsuits. Not only has that not been the case over the last several years, but the litigation has been more difficult to predict and more difficult to resolve. One of the largest increases has been with respect to age discrimination claims. Since it can take 18-24 months for someone in their 50's to find new employment, at some point, even the most litigation-averse person gets frustrated and angry enough to sue a prospective employer; and quite frankly, some employers make themselves an easy target in this regard.

This is an area where we have found that our litigation (and particularly class-action defense) experience can add real value to our clients. Senior management often does not recognize the risk factors associated with a simple job posting, or with their hiring managers using social media to screen applicants; however, with some proactive counseling, training and A/C privileged self-audits, companies can go a long way toward avoiding becoming a target, and reducing their overall exposure to litigation that they might otherwise never have seen coming.

What Are the Litigation Risks Involved with Recruiting?

In a competitive job market (which can be based on the economy, the industry or even something like geography or weather), recruiting can lead to significant, unexpected liability for an employer, from something as seemingly innocuous as a job ad posted on the internet. That is because there are potentially hundreds of people - including the EEOC, state agencies, as well as applicants and their attorneys - waiting to analyze where the ad was placed, the language used, and every facet of the recruiting process, to determine whether the company acted inappropriately and/or should be sued. The potential lawsuits include (1) discrimination/failure to hire - the company decided against a candidate for an improper purpose, such as gender, age, race, orientation, disability, etc.; (2) negligent hiring - the company hired someone that a simple background check would have prevented; (3) breach of an implied contract - the company reneged on promises upon which the applicant detrimentally relied; and (4) invasion of privacy - the company did an improper background check or considered information to which the employee had not given consent.

In addition to the legal liability, there are also intangible costs involved in faulty recruiting, that can include time wasted digging through applications from unqualified persons, time and resources wasted on interviewing too many or the wrong individuals, and earning a bad reputation that perhaps drives good recruits away. In fact, a company's recruiting efforts can have a dramatic impact on its branding - and it can take years for companies to recover from negative press associated with its hiring practices.

The individuals involved in recruiting for a business need to be able to spot the potential problems before lawsuits are filed. Unfortunately, much of the liability and other problems involved in recruiting come from things one might never expect - such as where the ad was placed, the positive language the company includes about itself, and the feedback or other activities employees engage in (about which management likely has little knowledge) with applicants who follow up on the ad. To avoid liability, companies need competent counsel who are familiar with current litigation trends and on how to avoid becoming a litigation target.

Good Recruiting Involves a Good Plan

As with almost any business process, good recruiting starts with a plan involving all the stakeholders, including HR, legal, management, finance and marketing. What skills are required as opposed to preferred; what compensation and benefits does the company want to advertise; what should the applicant pool look like given the company's location and required skills; and how does the company want to attract what it considers to be the "ideal" candidate. It is important to make sure that all the stakeholders are involved, because at several stages during the recruiting process, the company may have to modify its activities, if, for example, it is not getting qualified applicants, or the applicant pool does not have the diversity one would expect. The EEOC and the California Department of Fair Employment and Housing, are particularly interested in perceived "class-based" discrimination, which they believe can be divined from an applicant pool that simply does not fit the

demographics for an employer's location. An area that has grown in perceived importance in the last several years for many businesses - and consequently, an area that has become more of a focal point of litigation - is the concept of finding the right "cultural fit" for the company. That can be an extremely risky proposition, since one person's "cultural fit" might be perceived as discrimination by another. If people involved in the hiring process are looking for a certain type of applicant, it may

be best to give them proper training early, and channel their desires legally and appropriately, before they say or do something that engenders liability. This can be a particularly important role for counsel, since the legal implications may be unknown or difficult to appreciate fully by hiring managers that simply want the "right fit" for the company. The sooner everyone involved in hiring recognizes that all recruiting and employment decisions need to be done consistently, and preferably, to flow through one point of contact - such as HR or the Recruiting Department - the less problems will likely arise in the future.

Proper Training Is Critical - and Using Social Media to Screen Applicants Will Lead to Spending More Time with Lawyers

Make sure hiring managers are all trained (*i.e.* scared) to use HR or the Recruiting Department for all communications. One errant email encouraging an applicant may become the basis of a lawsuit if a person who did not receive that level of encouragement also does not receive a job offer. Similarly, make sure hiring managers know that ALL employment verification and background checks are done only by HR. Although most companies do it to some extent, it is an extremely bad idea to screen applicants by looking at their social media sites. Most such sites are not created to be seen by employers, and there is likely a great deal of information on an applicant's personal social media sites that the company simply does not want to know when considering the individual as an applicant for employment. Even if it is truly public information, is the company doing the same level of scrutiny for all applicants - or just ones with certain types of last names or certain genders? Also, since one cannot unlearn what one learns on social media, does the company want to have to explain why it did not really consider what some of its managing agents found on Facebook or Instagram when the company decided not to call the applicant in for an interview?

A social media background check should only be done with other post-offer, pre-employment checks, and only when it is relevant to the position. If someone is going to be working in the marketing department, his/her social media savvy is likely an important skill. Similarly, if the applicant is going to be high profile, such as a senior executive, there also is likely a legitimate business interest in making sure that he or she does not have embarrassing things on personal social media pages that might reflect badly on the company. If, however, the person is going to be working in the warehouse or on maintenance duties, does the company really need to check out the applicant's Instagram or Twitter accounts?

Best Practices to Reduce Liability

To write a good job ad with minimal associated liability, start with a good job description that has been reviewed by competent employment counsel, HR and all relevant hiring managers. State the requirements concisely, clearly and in neutral terms. Post the ad in general circulation newspapers or on social media sites that have broad appeal (*e.g.* no advertising on religious dating sites). If the company wants to "sell" itself or the position to the applicant, include a link back to the company's website or press releases. The press releases and website are likely mildly biased - but they are much less likely to be the basis for a lawsuit. Let the company's marketing do its job. The job ad will be the document analyzed and dissected to determine liability - so keep it short, to the point and neutral. By combining these tips with properly-trained managers, a company can dramatically reduce its exposure to recruiting-based lawsuits, and can focus instead on its products and services.

Todd R. Wulffson

Todd R. Wulffson is managing partner of the Orange County office of Carothers DiSante & Freudenberger LLP, a leading California employment, labor and business immigration law firm providing litigation defense and counseling to California employers. Wulffson has 25 years of experience counseling and defending businesses in labor and employment issues, and is a former General Counsel for a nationwide company. To contact Wulffson, email him at twulffson@cdflaborlaw.com or call 949.622.1661.



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Proactivity and Problem Solving Are Keys to Avoiding Costly Litigation

by Scott P. Shaw, Shareholder, Call & Jensen

Litigation in California is booming. More companies are being hit with lawsuits and many companies are moving their headquarters out of California. Therefore, it makes sense to consider ways to avoid costly litigation in California.

Attorneys working in-house for California companies are often juggling a variety of tasks and the nature of the work can become reactive. To the extent that in-house counsel can be proactive in identifying potential legal issues and working with the business to resolve those issues, the companies will be in better shape to avoid costly litigation. Of course, the difficulty lies in the details. It is sometimes unclear where to focus efforts on being proactive and how to solve potential problems. The tips below are a helpful guide for in-house counsel.

1. Business Knowledge. It sounds simple enough, but understanding the company's business is critical. Not generally, but specifically understanding the inner workings of the business, the transactions, the corporate structure and hierarchy, the types of documents generated in the ordinary course of business, the types of communications within the company and with third parties, and contractual relationships that bind the company, are all important components that in-house counsel should learn. In addition, building genuine relationships with business folks and having an open door policy will allow employees to come to in-house counsel with issues, which will allow in-house counsel to proactively assess the issues from a legal perspective. Regular frank communications and interactions with employees will lead to deeper business knowledge. From there, in-house counsel may also consider holding regular meetings with other key departments involved in risk management, including Human Resources, so business information can be shared and discussed. It may seem daunting at first to become a quasi-business expert, but the benefits are well worth it, especially now with e-discovery and spoliation issues. Knowledge of the company's document storage, retention, and preservation is very helpful in attempting to minimize litigation costs.

2. Internal Policies, Protocols, and Contracts. The type of policies, protocols, and contracts will depend on the nature of the business and types of products or services. Without discussing all potential options, in California it is a hot bed for employment litigation, so updating employee handbooks, conducting training, and monitoring employment issues are critical. A company may also want to consider a "best practices" policy for internal and external communications by employees, including social media policies. This area of law is evolving, and staying ahead of the curve is important. Another important set of policies relate to confidentiality and trade secrets, which are now governed by California State and Federal law. Finally, the company should attempt to establish guidelines and consistent terms for contracts with third parties, and clear contracts with in-house legal prior to execution. Use of contractual provisions can save the money in the event of a dispute. For example, mediation/arbitration clauses, venue selection, attorneys' fees, limitations on liability, indemnity, right to cure, and other terms in a contract could result in avoiding litigation altogether.

3. Insurance. Most companies will maintain a commercial general liability policy, but often the policy will include various exclusions and endorsements so it is not always clear what claims are covered and to

what extent. Again, understanding the business, the contracts, and the employees will aid the in-house attorney in analyzing the policy for potential coverage gaps. Working closely with an experienced insurance broker and possibly outside counsel can pay dividends in selecting the most appropriate policy. In addition to general liability policies, the company will want to consider policies for errors and omissions, workers compensation, cyber and privacy, EPLI, and potentially other more industry-specific policies. Finally, the company should review the policies at least every year, and periodically as the business grows and/or changes over time.

4. Legal Knowledge. Staying current on laws that affect the company's business will allow in-house counsel to spot potential legal issues before they arise, suggest changes within the company to avoid legal issues, and/or help educate business folks. Legal publications, seminars, bar associations or legal organization memberships, "joint-defense" or legal strategy groups, and industry networking are all good sources for obtaining legal knowledge.

5. Outside Counsel With Expertise. Selecting the right outside counsel prior to litigation is advantageous if outside counsel already possesses expertise in the subject matter of the dispute and the relevant law. Many in-house attorneys have no choice but to wait and interview or hire outside counsel after a lawsuit is filed. However, a good practice is to vet potential outside counsel on various issues before litigation arises, and then outside counsel can assist in possibly curbing litigation before it explodes. Of course, selecting outside counsel with significant litigation experience is also crucial, because the litigator will have a unique perspective on ways to avoid costly litigation. Another important consideration is to ensure that outside counsel understands the business dynamics and company culture. Outside counsel who appreciate the culture can "bridge the gap" between legal and business conflicts and offer practical solutions.

These tips are general but practical. For more information, please contact Scott P. Shaw at Call & Jensen, sshaw@calljensen.com, 949.717.3000. Mr. Shaw is a Shareholder at Call & Jensen where he practices commercial litigation with an emphasis on intellectual property and employment.

Scott P. Shaw

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Chinese Companies Targeting Southern California for Growth Opportunities

by Tony Wang, Mark Peterson, and Michael Reynolds, O'Melveny & Myers LLP

In 2016, Orange County has been at the epicenter of numerous major deals between U.S. and Chinese entities involving technology, entertainment, healthcare, and real estate. Despite China's current political and macroeconomic murkiness, there are many factors that continue to drive Chinese interest in U.S. investments. One of these drivers is the higher valuations for many U.S. assets by Chinese stock markets compared to Wall Street, which has encouraged Chinese public companies to aggressively pursue overseas targets using funds raised in China. The deceleration of China's economy has further intensified the hunt by Chinese firms for foreign value to bolster sagging balance sheets and diversify revenue streams.

Another deal driver is the Chinese government's adoption of various economic programs that encourage overseas investment. The 13th Five-Year Plan, adopted in 2015, promotes moving toward a fully developed economy defined by high-end technological innovation and has prompted Chinese companies to seek out cutting-edge foreign targets. The trends outlined above, coupled with last year's devaluation of the yuan that weakened acquisitive companies' cash reserves, help explain the record US\$120 billion-plus of Chinese investments in the U.S. so far this year. Here are just a few examples of recent deals in 2016 that have a close nexus to Orange County:

- ▶ On February 17, Chinese shipping company Tianjin Tianhai announced that it would buy Ingram Micro, an Irvine-based wholesale provider of technology products and supply chain services, for US\$6 billion.
- ▶ On March 12, Chinese holding company Anbang Insurance Group agreed to purchase Strategic Hotels & Resorts' 16 U.S. luxury resorts and hotels, including the Ritz-Carlton Laguna Niguel and Montage Laguna Beach, from Blackstone Group for US\$6.5 billion.
- ▶ On March 28, Chinese investment holding company Fujian Thai Hot Investment completed its purchase of a majority stake in Alliance HealthCare Services, a Newport Beach-based medical imaging company, for approximately US\$103 million.
- ▶ On July 26, Chinese technology firm LeEco agreed to buy Vizio, an Irvine-based consumer electronics developer, for US\$2 billion.
- ▶ On August 9, NextVR, a Laguna Beach-based virtual reality startup, announced that it had raised US\$80 million in Series B funding from a consortium of venture capital investors, many of which are based in China.
- ▶ On August 22, the Anaheim Planning Commission approved plans, originally announced in 2015, by Hong Kong-based LT Global Investment to build a US\$450 million mixed-use project in Anaheim's Platinum Triangle.

Easing of Regulatory and Political Hurdles for Chinese Acquirers

While the dynamics described above will continue to lead Chinese companies to seek out investment targets overseas, regulatory, and political environments in the U.S. and China remain something to consider for cross-border deals. On the regulatory side, some acquisitions of U.S. businesses or assets by Chinese companies must clear both the Committee on Foreign Investment in the United States ("CFIUS") and an array of official approval processes in China. CFIUS is a U.S. government inter-agency committee, chaired by the U.S. Department of the Treasury, which determines whether particular foreign investment transactions raise potential national security concerns.

While CFIUS' review is not automatic, it reserves the right to investigate, as well as to block or even to unwind, any proposed foreign acquisition of control

of a U.S. business (including through minority investments) that raises national security concerns that cannot be resolved without taking that extreme action. Transactions may raise national security concerns for a variety of reasons, including defense-related technology or contracts held by the target, or acquisition of assets that are considered critical infrastructure. While CFIUS rarely blocks a transaction, it has taken this action occasionally. Nevertheless, CFIUS has cleared most acquisitions of U.S. businesses by Chinese entities, in some cases by resolving the national security issues through agreements with the parties to implement mitigation measures.

It is important to keep in mind that notifying CFIUS is a voluntary decision by the parties, and that not every transaction warrants notifying CFIUS. In some transactions, the U.S. target business clearly has no relation to national security. In many cases, however, the potential for CFIUS interest is not clear, and it is wise to notify CFIUS in order to obtain deal certainty, in a timely way. A benefit of CFIUS review is that once CFIUS clears a transaction, then it will not re-open the decision (unless the parties provided materially inaccurate information).

On the other hand, in China, new regulations have simplified matters somewhat in recent years, as outbound investments have generally been encouraged, not only by state-owned enterprises, but by large, medium, and small private companies. Most cross-border investment projects now only need to be filed, post-closing, with the National Development and Reform Commission ("NDRC"), which removes a precondition for converting Chinese currency into U.S. dollars. Also, Ministry of Commerce ("MOFCOM") approval is only required for deals involving sensitive countries or industries; all other deals only need to be filed for recording purposes. Registration with the State Administration of Foreign Exchange ("SAFE") for remittance of currency outside China has likewise been streamlined. However, given SAFE's concerns regarding the significant outflows of capital from China in recent months, the currency conversion and approval process has been restricted as SAFE takes more stringent steps to review transactions. In some cases, this has led to delays in funding for outbound investment transactions. Nevertheless, given the easing of some restrictions in acquiring assets in the U.S. by Chinese companies, more private sector companies are driving China's mergers and acquisitions activity in the U.S. This marks a significant shift from just a few years ago, when the private sector accounted for a much smaller fraction of Chinese outbound deals compared to state-owned enterprises. Unless and until the Chinese economy rebounds dramatically, this trend should continue as private Chinese investors look to the U.S. as a way to balance their investment risks.

Structural economic dynamics continue to favor increased interest in U.S. assets by investors in China. No less important, Orange County's diverse business landscape (particularly in the fields of technology, entertainment, healthcare and real estate) offers a plethora of appealing prospects for investment, acquisition or partnership, so this is a market dynamic to watch in 2017.

The opinions expressed in this article do not necessarily reflect the views of O'Melveny & Myers LLP or its clients, and should not be relied upon as legal advice. For questions, please contact Mark Peterson at mpeterson@omm.com, Tony Wang at tonywang@omm.com or Michael Reynolds at mreynolds2@omm.com.



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Protect Your Business: What You Need to Know About the Defend Trade Secrets Act

Businesses at every level – from Fortune 500 companies to solo-inventor enterprises – rely on trade secret protections to safeguard their intellectual property trade secrets. American companies and innovators now have additional protections for their valuable intellectual property assets in the newly enacted federal Defend Trade Secrets Act (DTSA). This legislation represents the most



significant trade secret reform legislation in years. Essentially, the DTSA extends the current Economic Espionage Act of 1996, which criminalizes certain trade secret misappropriations, and allows trade secret owners the opportunity to pursue claims in federal court under federal law, in addition to traditional state court claims. The new federal trade secrets law also presents some very important practical

considerations for businesses. First, the DTSA has a broad reach, and it will likely affect every aspect of a company's operations. Trade secret issues arise every time a company hires or fires an employee; every time a company enters into a contract containing a non-disclosure or confidentiality clause; and every time an employee discusses the company's business with a business partner, the public, or friends. All of these activities are now governed by the DTSA. Second, the DTSA will potentially increase the legal costs associated with protecting a company's trade secrets. Because of the overlap between the DTSA and state law, companies will need to incur additional costs in order to understand and conform their practices to accommodate both sets of laws. When dealing with trade secret litigation, companies will now have to prosecute or defend against both state and federal claims, adding to the already expensive cost of litigation. Finally, for better or for worse, the DTSA may create greater opportunities for trade secret owners to win more cases, and to file more lawsuits. By providing plaintiffs with another set of laws and another venue in which to litigate, the DTSA creates more strategic avenues to success. The increased odds of success could spur more litigation, some of which may be for illegitimate or anti-competitive

reasons. This, again, could increase litigation costs. For these reasons, companies would be wise to educate themselves on the DTSA in order to take advantage of, and protect themselves from, the important legal and business consequences of this new federal trade secret law.

For more information on this subject, please contact Sherry Bragg directly at 949.760.0204 or sbragg@weintraub.com.

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Jacob C. Gonzales is a shareholder with Weintraub Tobin and a member of the firm's Litigation Practice Group. He is an experienced and respected trial attorney with expertise in a broad variety of complex legal issues.

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First Across the Finish Line: Best Practices for Early Settlement

by Donald Hamman & Eve Brackmann, Partners, Stuart Kane LLP

"To finish first, you must first finish."
— Rick Mears

A few months ago, a business litigation case filed in March 2016 was set for trial in November 2017. The judge apologized for the delay, noting the court's log-jam resulting from longstanding, gross underfunding. It's a familiar refrain, as is "Justice delayed is justice denied." As a result, litigation costs are skyrocketing.

Done properly, early settlement saves money and energy better used elsewhere, creating a huge "win" for the company. Or as a client once aptly said, "The best lawyers get rid of the lawsuit before it is filed."

But to win, you need a game plan.

1. Contract Stage

When drafting a contract, imposing mediation as a condition for recovering attorney fees can get everyone to the table before budgets are busted. And although not a panacea, requiring binding arbitration may help, too. Commercial leases, for instance, routinely require mediation and then arbitration to resolve disputes.

2. Early Investigation and Claim Evaluation

Early, thorough investigation allows for proper claim evaluation. This in turn facilitates strategic planning, often leading directly to early settlement. Tolling the limitations period can help create more time for this. Also, it is important to distribute an internal litigation-hold memo at this early stage, often before any litigation has even been filed, so that important documents are not deleted or otherwise lost.

The investigation should gather not only the substantive facts (who, what, where, and when), but also the motivational facts (motives, fears, private agendas, etc.). For instance, in a construction-related dispute, a frank conversation at an early site inspection might reveal a plaintiff's strong preference for an aesthetically pristine headquarters now, rather than waiting two years for a damages award. A fast settlement for repair or product replacement could result, saving a relationship and avoiding hundreds of thousands of dollars in fees and countless hours of employee time.

Depending on the size of the dispute, the company may need to consider hiring an outside vendor to identify and garner key documents and other data (preserved as a result of the early litigation-hold memo). "A well-executed data analysis and search can help identify the smoking gun out of tens of thousands of documents and force an early settlement," says Chris Manderson, former public company general counsel, now COO of Franklin Data.

Also, providing the other side with a "free peek" at your evidence might entice a negotiated resolution, or at least evoke reciprocal sharing and discussion. It can also later help maximize recovery of attorney fees or even support a malicious prosecution action, if settlement efforts fail.

At this point, a frank assessment of the case and candid discussion between attorney and client is key. "An effective litigator and valued advisor will have this conversation with the client at the earliest juncture possible, and not at some late date after expensive discovery is concluded or on the eve of trial," notes Daniel Day, Vice President of Litigation and Regulatory Compliance at Albertsons Companies.

3. Litigation Planning

Once investigation and claim evaluation are complete, or at least well underway, it is time for strategic litigation planning.

- ▶ Can a prevailing party recover attorney fees?
- ▶ Should we send a message or is confidentiality important?
- ▶ Do the parties need each other in the future?
- ▶ What's the likelihood of success?
- ▶ Are there cash-flow issues or strategic business concerns?
- ▶ What are the adversary's motives, goals, and pressure points?

"Understanding the business objectives early is key, and also getting consensus from senior leaders in the company for the path forward," says Colleen Nissl, General Counsel of NetJets, a subsidiary of Berkshire Hathaway.

Identifying objectives then leads to determining the next steps, such as agreeing to mediation (privileged), arbitration (confidential), or instead litigating publicly, aggressively, and perhaps even racing to the courthouse to file first.

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4. Negotiation

Now it's time to come to the table. Experienced negotiators usually follow the same initial three steps for every negotiation: (1) identify both sides' leverage and objectives, (2) gather as much information as possible, (3) strategically

share key information.

Whether in mediation or less formal negotiations, both sides' leverage and objectives drive the outcome. Information is leverage. So this is where your thorough, early investigation pays off in spades.

In identifying leverage and objectives, pre-negotiation, spend sufficient time understanding what will result if either side walks away, and the various alternatives. "This helps calibrate negotiating teams so they don't overshoot or undershoot often based on emotion, when considering concessions and compromise," comments Gil Labrucherie, Senior Vice President & Chief Financial Officer for Nektar Therapeutics (Nasdaq: NKTR). "In preparing, I think this is where it helps to bring in as many different perspectives as possible to brainstorm creative solutions," Labrucherie adds.

Once you have gathered as much information as you can from your adversary (either directly or through the mediator) you can start strategically sharing key information, if it is likely to advance your objectives. This is where you display enough leverage and credibility to settle the case on advantageous terms. Here lies the art of negotiation and it takes practice, but the above basic steps provide a reliably good start.

Setting up a successful mediation also takes some practice and skill. There are a few fail-safe keys to keep in mind, however, particularly when negotiating in the context of early mediation or a settlement conference without the helpful pressure of a looming trial date:

- ▶ Success has a higher probability if both sides respect the mediator, so find one who comes highly recommended, and consider agreeing to the other side's suggestion.
- ▶ Take charge gracefully and gain early momentum by coming prepared with an agenda and a presentation.
- ▶ Make the mediator (or settlement judge) work. Ask for information to support the other side's position. If negotiations have stalled, ask for a mediator's proposal, or request a meeting with the neutral and only lawyers and/or experts. Make sure the mediator is relaying to the other side the key facts and other leverage items that you want disclosed.
- ▶ Avoid buyer's remorse by bringing a draft settlement agreement with you on a thumb drive. Once you settle, it can be edited, printed, and signed on the spot.
- ▶ Protect any progress. If you can't settle that day, at least consider a partial resolution, agreement on initial steps, exchange of key documents, setting key depositions to happen soon, or just finding some common ground.
- ▶ Do not be afraid to walk away from any negotiation, ideally before terminally offending anyone.

Overall, to be first across the finish line and achieve that early settlement requires moving early and fast. Building pre-litigation alternative dispute resolution (ADR) requirements into the contract is the earliest step the company can take, but parties can agree to mediation or arbitration at any time. If a dispute does occur, the company should immediately investigate, evaluate, and form a plan of action, paving the way for successful early settlement negotiations.

Donald Hamman

Mr. Hamman is a founding partner of Stuart Kane LLP. He has served clients as a trial and appellate attorney for more than 35 years with experience in mediation, binding and non-binding arbitrations, settling cases, and handling writ, jury and bench trials and appeals in complex business litigation, real estate litigation, employment litigation and environmental disputes. His clients are corporations and individual business owners in a variety of industries such as real estate, venture capital, banking, design professional firms and other professional service providers. Mr. Hamman can be reached at 949.791.5130 or dhamman@stuartkane.com.



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Clients Must Vet the eDiscovery Competency of Counsel

By MAREN HUFTON and KATHERINE HAMMERSLY

As technology advances and electronic communication becomes a way of modern business, discovery of electronically stored information ("ESI") has become common in matters of every size and type. Whether a matter involves securities litigation, a government and internal investigation, or a commercial dispute, counsel must meaningfully understand, and never neglect, the challenges, requirements, and obligations of managing electronic discovery. Indeed, an attorney's failure to recognize basic eDiscovery responsibilities exposes not just the attorney, but the client, to harsh sanctions. Clients need to know what to expect of outside counsel when entrusting them to execute an eDiscovery project.

A federal court recently ordered severe sanctions against a client and its counsel in connection with widespread discovery misconduct. In *HM Electronics v. R.F. Technologies Inc.*, 2015 U.S. Dist. LEXIS 104100; 2015 WL 4714908, the Court ordered multiple sanctions, including both monetary penalties and a recommendation of issue sanctions, finding that counsel's conduct "threatened to interfere with the rightful decision of the case."

The ruling focuses on several breakdowns in the eDiscovery process, but ultimately demonstrates that thorough lawyering during the discovery process is essential to the competency of counsel. The HM Court adopted a recent California ethics opinion regarding the basic skills attorneys must possess to demonstrate eDiscovery competence. California State Bar Formal Opinion No. 2015-193 categorizes an attorney's responsibility to assess his or her own skills and resources as part of the attorney's duty to provide the client with competent representation. Significantly, the HM Court did not just blame the lawyer for these deficiencies, but held the client responsible as well.

The California State Bar Opinion lists the specific tasks that attorneys handling eDiscovery should be able to perform. The list includes counsel's assessment of their ability to identify eDiscovery needs; implementation of appropriate preservation (i.e., initiating a legal hold); understanding a client's ESI systems and storage; advising on available options for collection and preservation; engaging in competent and meaningful meet and confer sessions with opposing counsel concerning an eDiscovery plan (as required by federal rules and many state cognates); performing data searches; collecting ESI in a manner that preserves the integrity of the ESI (including such metadata as may be relevant or necessary); and producing responsive and nonprivileged ESI in a recognized and appropriate manner (for example, including redaction or other special treatment of personal information).

The HM decision is an excellent reminder about the necessity of vetting counsel's eDiscovery competence.

There is no "typical" eDiscovery project, but before retaining counsel for any matter, clients should ask, first and foremost, whether the firm has the capability and capacity to handle ESI collection and production with in-house, state-of-the-art technologies, rather than forcing the client to incur the cost of hiring outside, non-lawyer vendors to store and produce the data. This approach may offer heightened attention to confidentiality and privilege issues, provide repeatable and defensible processes, as well as centralized quality control, resulting in a responsive, cost-effective handling of an eDiscovery project.

Other questions to ask include:

- What experience does the firm have with ESI, including specific matters in which there was a need to understand the client's use and storage of such information?
- Does the firm understand the need and implications of implementing a litigation hold early on, and in a manner that specifically addresses the client's unique infrastructure, including identifying appropriate storage methods, document retention policies, and custodians?
- Does the firm have experience collecting ESI in a way that ensures metadata is not altered or lost?

- What experience does the firm have designing collections based on the client's unique systems and data storage methods, identifying relevant or privileged material from the data collected, quality-checking, and defending the methodology used?
- How will the firm conduct early case assessment and evaluation to make critical data primary?
- Will the firm deploy key word searching and predictive coding or other forms of technology-assisted review to improve human review and save time and money, and does the firm understand the limitations of these tools?

Government and internal investigations require unique skills. Clients can assess a firm's competency by asking:

- Will the firm staff the matter with personnel with the specialized knowledge and experience required to quickly and efficiently find the "needle in the haystack"?
- What experience does the firm have with the eDiscovery requirements of the particular federal agency involved, which can be cryptic?
- Does the firm have experience with the faster timelines and requests for larger quantities of unfiltered data that can come from regulators?
- Does the firm understand the time pressures of an investigation as companies must sometimes self-report suspected issues within a particular timeframe, and meet deadlines for filing current or amended financial statements?
- How is the firm prepared to handle the matter if an investigation leads to additional complex litigation?

Lawsuits are not "one size fits all," and there are many potential pitfalls both during discovery and in the courtroom. Clients can protect themselves by asking:

- Is the firm familiar with methods for obtaining relevant information from an adverse party's ESI, including knowing how to detect deficiencies in a production?
- Does the firm know how to ask for the right ESI in order to reduce costs?
- Does the firm have knowledge regarding the standards for getting ESI into evidence, and has the lawyer succeeded in doing so?

Vetting counsel's eDiscovery competency provides better protection from consequences like those in the HM case, but it can be tedious and costly. As an alternative, many clients are using coordinating eDiscovery counsel. This approach offers the major benefits of avoiding the need to re-educate counsel for each matter, saving time and money, and the need to hire a vendor, resulting in further cost savings. The retention of coordinating eDiscovery counsel leads to greater efficiency, as the eDiscovery counsel achieves master knowledge of the client's business and types of information generated, and can more easily pinpoint and provide relevant information when needed, thus providing a level of competency required to best protect and advocate for their client.



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INSURANCE LAW: A PRIMER FOR IN-HOUSE COUNSEL

continued from page B-40

must understand the profound impact such a cross-complaint will have on the litigation. When a cross-complaint is filed by a defendant, the plaintiff must immediately tender the cross-complaint to its insurance company for coverage. An insurance company has duty to defend a cross-complaint if the allegations are potentially covered.

By obtaining insurance coverage for a cross-complaint filed against it, a plaintiff can pay for and subsidize much of the attorney's fees and costs it incurs for prosecuting its plaintiff's case, as such fees and costs are inextricably intertwined with purely defense related fees. Moreover, all of the defense fees for the cross-complaint are also paid for.

In fact, in many cases, a cross-complaint may not even be necessary to trigger the duty to defend of the plaintiff's insurance carrier. A critical but rarely appreciated California Supreme Court opinion entitled *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 C.4th 189, 126 Cal. Rptr. 2d 908, stands for the proposition that certain affirmative defenses whereby a defendant seeks an offset against the plaintiff's damages may constitute a claim under the plaintiff's insurance policies, thereby triggering the duty to defend even when no cross-complaint is filed.

Independent Counsel

One of the most important principles in California insurance law is the right to independent counsel. A corollary of the duty to defend, California Civil Code section 2860 imposes a mandatory duty upon insurers to provide independent counsel when the resolution of a third party claim bears directly on the outcome of the coverage dispute between the insurer and its insured. *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 364.

Corporate counsel must recognize the situations under which the right to independent counsel is triggered, as well as the practices and procedures which are required to demand and obtain Cumis counsel.

Further, after a company has successfully obtained the right to Cumis counsel, the real work begins. Outside counsel must act as both defense counsel and coverage counsel for the lawsuit. Having defense counsel with insurance law expertise is the very essence of the Cumis doctrine. Cumis counsel must provide an aggressive and comprehensive defense of the third party claims while at the same time maximizing the insurance benefits available to the client.

Corporate Plaintiff Strategies and Insurance

A company that is a plaintiff in commercial litigation must consciously manage the plaintiff's litigation such that the defendant's insurance coverage is maximized. This requires that the company's counsel have expertise in insurance law. By carefully focusing the plaintiff's cases toward covered claims, the plaintiff ensures that judgments are collectable against the insurance company and that carriers are forced to respond in settlement and mediation. It is also a truism that it is much easier to settle cases when insurance companies are involved in the settlement negotiations than when private companies are forced to dig into their own pockets.

In the alternative, in some cases the plaintiff does not wish to trigger insurance coverage so that the defendant must bear the cost of defense by itself. In that case, the claims must be carefully drafted by corporate litigation counsel to avoid triggering the duty to defend. Again, it is critical for counsel to have insurance expertise.

Mediation and Settlement

Many settlements involve insurance and insurance issues. In fact, the majority of settlements are paid by insurance money. Further, insurance coverage, bad faith, duty to defend and insurance defense issues are frequently the catalysts for settlement. The bottom line is that insurance controls the settlement dynamic and decisions regarding the timing and amount of settlements made by insurance companies.

A corollary to this fundamental axiom of insurance law is that lawyers with insurance law expertise will have a significant advantage over an adversary in settlement discussions. This expertise can take many forms. For example, an attorney could be a plaintiff's counsel seeking to maximize the amount of settlement to be paid by the defendant's insurance company. Conversely, an attorney can be defense counsel seeking to either settle a case using insurance company money or force the plaintiff to lower their demands or even drop the case completely because they have leveraged the duty to defend against the plaintiff.

Conclusion

As demonstrated above, expertise in insurance law is an extremely powerful weapon for in-house counsel and his or her outside counsel.

Insurance issues and principles arise in virtually every field of commercial litigation. An in-house counsel handling litigation matters for a corporate client who is also an expert in insurance law can bring millions of dollars of insurance benefits to their company.

For more information on this subject, please call Ed Susolik directly at 714.241.4444.

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Who Is the Arbiter of Arbitrability?

When the enforcement of an arbitration agreement is decided by the court or the arbitrator, and when parties' intentions must be clear

by Andrew Struve and Adrienne Marshack, Partners, Manatt, Phelps & Phillips, LLP

Contractual arbitration agreements are becoming increasingly common. Almost as common as arbitration agreements themselves are challenges to those agreements, as one party often seeks to avoid arbitration and instead litigate his or her dispute in court. A threshold question arises when the enforceability of an arbitration agreement is challenged—*who decides whether the arbitration provision is enforceable, a court or an arbitrator?* The answer, it turns out, is not always easy.

The FAA Presumption. The starting point of the “who decides” analysis is the expectation of the parties. To determine the parties’ expectations, courts look to the language of the arbitration agreement itself. If the agreement is silent regarding who decides the arbitrability issue, or if the agreement is ambiguous on this



Andrew Struve



Adrienne Marshack

point, the Federal Arbitration Act (“FAA”), which, in most cases, preempts contrary state law, presumes that the parties intended *courts*, not arbitrators, to decide whether there is a valid agreement to arbitrate and whether it covers the dispute at issue. *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206-07 (2014).

But Is There a “Delegation Clause?” The parties can, of course, elect to delegate the arbitrability decision to an arbitrator instead. Courts have appropriately referred to such a provision in an arbitration agreement as a “delegation clause.” To be effective, the delegation clause (1) must be “clear and unmistakable” that an arbitrator rather than a court is to decide arbitrability,

and (2) must not be revocable under state contract defenses to enforcement, such as unconscionability. *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal. App. 4th 227, 239-40 (2015).

Was the Delegation Clause Specifically Challenged? A party’s challenge to the enforceability of an arbitration agreement as a *whole* does not necessarily vitiate the effectiveness of the delegation clause. When a delegation clause exists, unless *it specifically* is challenged on grounds that are particular to the delegation clause (i.e., not the same arguments as to why the agreement as a whole is unenforceable), then the delegation clause will be treated as valid and any challenge to the enforceability of the arbitration agreement as a whole will be left for the arbitrator. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70-72 (2010).

And What About Class Action Waivers? Although it may seem logical to extend the “court decides” presumption to disputes about the validity of a class action waiver, this is not the case. Recently the California Supreme Court in *Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233 (2016), determined that there is no state law presumption, and that the FAA presumption is that *arbitrators* rather than courts decide whether a case, once it has been deemed arbitrable, can proceed in arbitration as a class action, or whether the class action mechanism was waived. *Id.* at 252-60.

Does a Severability Clause Change Anything? It can. For example, if an agreement has a severability clause that refers to a “court” determination about the unenforceability of any provision, and simultaneously has a delegation clause committing the arbitrability determination to an arbitrator, the delegation clause may not be considered a “clear and unmistakable” intent to have an arbitrator decide arbitrability issues. See *Pinela*, 238 Cal. App. 4th at 240. Similarly, if there is a provision stating that certain issues, such as the enforceability of a class action waiver, are not severable from the remainder of the agreement, then the typical presumptions of “who decides” may be affected.

The Takeaway? Companies should think carefully about whether they want a court or an arbitrator to decide threshold enforceability issues and take care to ensure that the intention is not only clear in any arbitration agreement, but also not potentially unwittingly undermined by any other broader provisions in the agreement.

Andrew Struve and Adrienne Marshack are litigation partners in the Orange County office of Manatt, Phelps & Phillips, LLP. For more information, please contact them at astruve@manatt.com or amarshack@manatt.com.

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Ms. Harrison brings more than 15 years of experience representing management in a broad range of employment and labor law issues, including wrongful termination, discrimination, sexual harassment and workplace violence. Ms. Harrison regularly leads all facets of the litigation process, from initial investigation and filing through trial and appeal, for her clients.

Ms. Harrison can be reached at Candace.Harrison@jacksonlewis.com or 949-885-5230



Mr. Thomas is a renowned trial lawyer with more than 25 years of experience litigating employment matters including complex commercial issues related to class actions, ERISA, Title VII, The Americans with Disabilities Act, The Age Discrimination in Employment Act, The Family and Medical Leave Act, and related state claims. He has 50 trials under his belt and a winning percentage of almost 85 percent on behalf of clients.

Mr. Thomas can be reached at Bren.Thomas@jacksonlewis.com or 949-885-5232

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What to Expect When You Are Expecting a Trial

by Bren K. Thomas, Principal, Jackson Lewis P.C.

For lawyers like me, who have tried many cases over the years, the rhythm and flow of a trial by jury is as normal as breathing. To litigants, the process may be confusing and intimidating. This article shows a practical timeline of a typical trial and why patience is a wonderful thing when you are sitting through a trial.

Day 1 will not resemble what is depicted in legal dramas on television and in the movies. Dramatic confrontations or, for that matter, much of anything interesting to the layperson is rare. The parties will take their places; plaintiffs normally sit at the table closest to the jury and defendants at the far table. Often, the court will have the parties' lawyers and sometimes the parties themselves meet in the judge's chambers (office) to make one last attempt to resolve the case through settlement and avoid a trial. If that fails, the court will discuss with counsel the housekeeping issues, such as what days the court will hear evidence, the way exhibits will be handled, and scheduling witnesses. Often, these preliminaries will use up the morning.

In many cases, the rest of first day will consist of the parties' lawyers asking the court to decide "motions in limine," motions to exclude or limit trial evidence.

Next comes the jury selection. Potential jurors will be questioned by the court and the parties' lawyers. The court may excuse some potential jurors because it would be an unreasonable "hardship" to place them on the jury. Other potential jurors may be excused because the parties' lawyers successfully made "for cause" or "preemptive" challenges. The jury selection process can take days or weeks, depending on the expected duration of the trial and the type of case.

Once the jury is selected, the court will read out instructions on what is expected of the jurors. The court will also give them the all-important break schedule and let them know the day of the week when the court is "dark" for trial (no evidence will be taken and the jurors are off).

Next, the parties' lawyers will give opening statements and present evidence to the jury. These may be interrupted by legal argument over evidence and testimony and breaks.

Then the parties' lawyers will make their closing arguments. This is the



real dramatic part. Your lawyer makes your case in the most impassioned way. Either before or after the closings the court will read the instructions of the law to the jury that they will use to decide the case. Those instructions are often the result of hard-fought arguments by the parties' lawyers as both sides want their interpretation of the law presented to the jury. Those arguments usually take place on an afternoon, evening, or dark day when the jury is not present.

Once the instructions have been read and the closing arguments made, the jury goes into the jury room to deliberate and you wait. Tom Petty was not wrong. The waiting is the hardest part. However, once that nerve-wracking process is over, the jury will give their decision. One side or the other then may "poll" the jury, asking each one how they voted.

And that is it. Until the appeal. But that is a topic for another day.



We congratulate our in-house Legal Team on their nomination for the 2016 Orange County Business Journal General Counsel Awards

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Bren K. Thomas

Bren K. Thomas is a principal in the Orange County, California, office of Jackson Lewis P.C. His practice focuses on representing employers in workplace law matters, including preventive advice and counseling. For more information on class and collective action waivers, contact Bren at Bren.Thomas@jacksonlewis.com or 949.885.1380.





Winter Fest at the OC Fair & Event Center

Winter Fest returns to the OC Fair & Event Center in Costa Mesa, CA from December 16 – January 1. Winter Fest is a celebration for the young and the young at heart, offering an unforgettable experience at an affordable price. Winter Fest invites guests to arrive early for an enchanted opening moment and stay long after the sunset for lively festivities and a nightly tree lighting ceremony with snowfall.

Tickets start at only \$15 online while they last and include unlimited tubing down a 130-foot, six-lane ice slide; time with Mr. & Mrs. Claus in their cabin; endless entry to the bounce houses; access to kids crafting and gaming area in the North Pole; daily meet and greets; and stage performances featuring magician, Jimmy H; and cartoon characters ranging from Thomas the Train to Dora the Explorer. Make the most of your Winter Fest experience with a stroll through the new 2-million-light “celebration of lights” experience and enjoy access to SoCal’s largest all-new snow play area, with real snow brought in daily, and so much more.



Throughout Winter Fest, snow-kissed characters and jolly carolers will help transform the fairgrounds into a wonderland of holiday charm. Guests can walk through the world’s largest ornament, take in performances from local bands, enjoy ice skating on a real ice rink adjacent to a 30-foot Christmas tree accompanied by a nightly tree lighting ceremony and snowfall.

Rink-side VIP cabanas are an ideal upgrade for holiday office parties, birthday parties, family functions or date nights, and can accommodate two to ten people starting at only \$69 per session, but adapt to fit parties of up to 100. Space for larger corporate parties are also available and can accommodate up to 2,000 guests.

Winter season has arrived in Orange County, don't miss the spirit and excitement of the Winter Fest OC. For holiday party and event information, visit www.WinterFestOC.com.

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IN HONOR OF

Shannon Dwyer and the St. Joseph Health Legal Team



(Pictured from left to right) Evette Johnson, Yemi Adeyanju, Debra Walters, Shannon Dwyer, Karen Ketchum, Nancy Tajimaroa, Abby Keenan, Tara Cowell and Jim Watson. (Not pictured) James Kelly, Kim Moore, Stephanie Laubacher, Jennifer Rieker and Hala Abduljalil.

St. Joseph Health congratulates Shannon Dwyer and our legal team on their nominations for the 2016 General Counsel of the Year and In-House Legal Team awards. Their strategic insights and values-focused leadership are a true asset to our organization and to those we serve.

Thank you, Shannon and team, for your expertise, your tireless dedication to our mission, and your spirit of collaboration and service. Your colleagues could not be more proud of you and your accomplishments.

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11 carat yellow radiant diamond flanked by two white 1 carat each collection good diamonds, mounted in 18k yellow gold and platinum



3 carat pink diamond encircled by .70 carats of white collection quality diamonds and mounted in platinum and 18k rose gold



13 carat white collection quality mounted in platinum and more than .75 carats of like color and clarity



7 carat emerald with more than 1 carat of white collection quality diamonds, mounted in platinum and 18k rose gold



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2016 General Counsel Award Nominees

Robert Bello, General Counsel

Hughes Marino, Irvine

Last year, Robert Bello played an integral role in spearheading SB 1171, a law conceived by Hughes Marino President and CEO Jason Hughes, which requires brokers to disclose whether they are acting as dual agents to prevent conflicts of interest and ensure transparency. This year, Bello continues to work to protect the underdog and uphold SB 1171 to lead the fight to level the playing field. Bello worked to file an amicus curiae brief with the California Supreme Court case of *Horiike v. Coldwell Banker*, a case regarding dual agent representation, which has the potential to transform how the real estate industry operates. He is constantly researching every angle of existing real estate law and industry practices, strategizing with Hughes Marino's outside lobbying firm, and is as responsive as possible when it comes to answering questions regarding SB 1171. As an attorney, he has extensive experience counseling and representing clients in all aspects of business law, including real estate, contractual and labor/employment issues. Hughes Marino is a commercial real estate firm exclusively representing tenants and buyers.



Brad Blanche, Associate General Counsel

Broadcom Limited, Irvine

Brad Blanche oversees intellectual property, corporate, transaction and M&A initiatives for Broadcom. His primary responsibilities include developing, managing and monetizing the company's patent portfolio of more than 30,000 patent assets, covering technologies such as all wired and wireless broadband communications, semiconductors, networking, computer hardware and software. He has managed a team of in-house patent counsel and IP paralegals while also supervising and overseeing quality control of team of 150+ outside counsel. Blanche led M&A efforts in 2016 to account for \$600+ million in revenue for Broadcom through the sale of numerous business units and technologies. Blanche was part of a two-person legal team that handled every aspect of the M&A transactions. In 2016, Avago Technologies acquired Broadcom Corp. for \$37 billion, making it the largest tech acquisition in history. Blanche played a leading role in integrating the two companies into the newly formed Broadcom Limited, including managing all efforts in initiating a worldwide rebranding campaign for the new company. Broadcom Limited is a designer, developer and global supplier of analog and digital semiconductor connectivity solutions.



Jennifer Bryant, VP, Deputy General Counsel

Pacific Dental Services LLC, Irvine

Jennifer Bryant joined Pacific Dental Services LLC (PDS) in 2002 to support management with critical legal guidance as the company emerged as an industry leader in providing business support services to dental practices. Bryant quickly became a key member of the team, advancing the privately held company in its rapid growth. PDS now supports more than 500 offices in 17 states. She currently supervises a team of 14, including Compliance and Government Relations. Bryant is one of the principals in a two-person team, including the CFO, working to structure, negotiate and close the company's multi-million dollar syndicated credit facility in 2007, with two subsequent restructures in 2010, 2011 and most recently in 2015.



Craig Bryson, Divisional VP & Associate General Counsel

Abbott Vision, Santa Ana

Craig Bryson is the head lawyer for the Vision Care Division of Abbott Laboratories (NYSE: ABT). He is responsible for managing all legal support for Abbott's global ophthalmology business. Bryson joined Abbott in 2007 and has served in a number of roles of increasing responsibility, including area counsel for Europe, Middle East and Africa, and senior counsel in the company's Licensing & Acquisitions and IP Strategy Groups. Prior to his Abbott career, Bryson was in private practice at law firms in New York and Ohio. He received a JD, with honors, from Ohio State University and a BA, cum laude, from Miami University in Oxford, Ohio. Bryson is licensed to practice in California (as Registered In-house Counsel), New York, Illinois and Ohio.



Bernadette Chala, SVP, General Counsel

Arbonne International LLC, Irvine

Bernadette Chala joined the Arbonne team in 2012, supporting the company's Legal and Compliance Teams, first as the corporate counsel and now as senior vice president, general counsel. Chala's responsibilities include overseeing Arbonne's day-to-day legal affairs and direct sales compliance, managing Arbonne's intellectual property estate, overseeing marketing compliance, and supporting the Regulatory Team, and global product distribution and expansion. Her accomplishments at Arbonne include successfully steering the organization through a major restructuring of its international subsidiaries, with less than 60 days to manage the restructuring of six subsidiary companies; spearheading patent review and filing of both design and utility patent applications for a new product category for the company – electronic consumer goods; and overseeing the company's ongoing international expansion into strategic markets, most recently New Zealand and now Taiwan. Before joining Arbonne, Chala served as the general counsel of American Sporting Goods/AVIA, where she oversaw legal affairs and compliance efforts. Arbonne International LLC creates personal skincare and wellness products.



Jeffrey Coyne, Former SVP & General Counsel

Newport Corp., Irvine

Jeff Coyne was the senior vice president, general counsel and corporate secretary of Newport Corp. for the last approximately 15 years. During his time as general counsel of Newport Corp., Coyne's industry and business knowledge, coupled with his financial acumen, made him the trusted go-to advisor for senior leaders of his company, including the CEO and the board of directors on laws and regulations, as well as overall business strategy. The company was acquired by MKS Instruments Inc. in late April 2016 for approximately \$980 million



in cash. At the time of acquisition, Newport Corp. had approximately 2,400 employees worldwide. In addition, Newport's annual revenue for fiscal year 2015 was approximately \$600 million. Newport Corp., a wholly owned subsidiary of MKS Instruments Inc. (NASDAQ: MKSI), is a leading global supplier of advanced technology products and systems to customers in the scientific research, microelectronics, life and health sciences, industrial manufacturing and defense/security markets.

Shannon Dwyer, EVP, General Counsel

Providence St. Joseph Health, Irvine

This past year, Shannon Dwyer provided legal and strategic expertise as general counsel to St. Joseph Health when it underwent one of the largest nonprofit transactions in state history. Dwyer was central to the union of St. Joseph Health and Providence Health & Services. The combination resulted in a new organization, Providence St. Joseph Health, which has 50 hospitals and 100,000 employees spanning the West Coast from Alaska to Southern California, and including parts of Montana, Texas and New Mexico. Dwyer worked with her Providence counterparts for more than a year. Both focused on attaining the best outcome for the communities served by the organization, as well as their employees and physicians. Although the transaction was certainly the most significant the organization had ever experienced, everyone confidently predicted a successful outcome because Dwyer was helping lead the effort. A values-driven professional, Dwyer was also instrumental in the organization's coming together with Hoag two years earlier. Each step of the way, Dwyer provided legal and strategic advice to senior management, the board of trustees and a board subcommittee dedicated to evaluating the transaction.



John Fitzgibbon, General Counsel

Passco Companies LLC, Irvine

While John Fitzgibbon has been at Passco for a relatively short period of time, his impact throughout the company can be described in one word: invaluable. Fitzgibbon handles all of the legal matters pertaining to the firm's acquisitions and dispositions of investment properties, one of the most integral parts of Passco's business. In addition, he manages the firm's general corporate matter, a tremendous undertaking, which he handles seamlessly. Fitzgibbon has also been instrumental in introducing the company to a number of his contacts, opening the door for new sources of equity and development projects. Passco Companies LLC is a national real estate investment firm specializing in the acquisition, development and management of commercial properties. Prior to joining Passco, Fitzgibbon served as general counsel and a principal of The PRES Companies, a full-service real estate company in Irvine.



Andres Gallardo, VP & Assistant General Counsel

Opus Bank, Irvine

Andres Gallardo joined Opus Bank, a California commercial bank (NASDAQ: OPB) in 2012 and serves as the bank's vice president and assistant general counsel, and as vice president and legal counsel of Opus Financial Partners LLC, Opus Bank's wholly owned broker-dealer subsidiary. Gallardo has legal management oversight over Opus Bank's corporate litigation, corporate development, special credits and troubled debt restructures, escrow and exchange, marketing, commercial depository services, and structuring C&I lending facilities. Gallardo also serves as lead counsel to Opus Bank's subsidiaries: Opus Financial Partners LLC, Opus Equity Partners LLC and PENSCO Trust Co. LLC. Gallardo joined Opus Bank when it was an institution of approximately \$2.4 billion in total assets. As of June 30, 2016, Opus Bank is \$7.5 billion of total assets, \$6.1 billion of total loans and \$6.2 billion in total deposits. Gallardo has been an integral part in the growth of Opus Bank. Gallardo was a contributing partner on the due diligence teams that led to the successful close of an acquisition of 10 banking offices and approximately \$125.1 million of related deposits from Pacific Western Bank.



Mark Goldzweig, Executive Director, Legal Department, Associate General Counsel

Kia Motors America Inc.

Mark Goldzweig joined Kia Motors America (KMA) in February 2003 initially to manage its product liability lawsuits and claims. During his 14+ years at KMA, Goldzweig has worked in all areas of the Legal Department, including warranty litigation, class actions, patent suits, dealer related litigation and advice, marketing and PR advice, employment claims and counseling, and many transactional matters, including significant sports-marketing deals in 2007 and 2010. During his tenure at KMA, the company has taken 19 products liability matters and three class actions to trial, and has one of the best trial records in the industry. The KMA Legal Department has modeled KMA corporate goals of collaborative and customer-centered problem solving, and continues to actively promote increased diversity among its outside counsel.



Miek Harbur, VP & General Counsel

New Home Co., Aliso Viejo

Miek Harbur became the general counsel of the New Home Co. in January 2016, after spending four and a half years as a corporate associate at Gibson, Dunn & Crutcher, making her one of the youngest general counsels of a public company in Orange County. As the company's first general counsel, she had full responsibility for establishing the Legal Department and all of its policies and procedures. She provides daily advice and counsel to executives who are many years her senior and have significantly more industry experience. Her willingness to work hard, her appreciation of the inevitable "cost benefit analysis" that occurs when legal issues arise and her ability to take initiative and advise with confidence has allowed her to excel during her short time as a general counsel. New Home Co. is a new generation homebuilder focused on the design, construction and sale of innovative and consumer-driven homes in major metropolitan areas within select growth markets in California and Arizona.



Victoria Harvey, SVP, Chief Legal Officer & Corporate Secretary

Smile Brands Group Inc., Irvine

Victoria Harvey joined Smile Brands in 2014 as associate general counsel and was



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2016 General Counsel Award Nominees

appointed senior vice president and chief legal officer in April 2015. In her capacity at Smile Brands, she oversees all legal affairs, including corporate governance, regulatory compliance, intellectual property, risk management, contracts, government affairs, insurance portfolio and strategic legal matters. She continues to manage the company's litigation portfolio involving employment, commercial, ADA, trademark, professional liability and lease disputes. She also oversees internal employment-related investigations, and provides day-to-day advice to management and HR on a wide variety of related issues. In the last 12 months, Harvey was part of the executive leadership team that participated in refinancing of the company's debt last fall, and subsequent sale/change of equity sponsors in August 2016. She led the internal due diligence and coordinated with every department and executive team. Smile Brands Group Inc. is one of the largest providers of support services to general and multi-specialty dental groups in the United States based on number of dental offices.



Monica Johnson, Assistant General Counsel & Assistant Corporate Secretary Ventura Foods LLC, Brea

Monica Johnson has helped to design, build and implement a world-class Legal Department at Ventura Foods. As the company has continued to grow, through expansion of operations into Singapore and the Philippines, the Legal Department continues to be an integral part of these key company initiatives. For Johnson, taking the time to get to know people and build relationships is pivotal to her success as an in-house lawyer. Also, her ability to think strategically and with an eye toward the big picture has enabled her to focus on ways to do things instead of all the reasons they cannot be done. Johnson has more than 15 years of experience in a broad range of industries, including food service, technology, manufacturing and supply chain/logistics. Immediately prior to joining Ventura Foods, she was senior counsel at Western Digital. Ventura Foods is a privately held manufacturer and distributor of branded and private-label food products, including dressings, oils, sauces, dips, shortening, margarine, butter blends, mayonnaises and flavor bases. The company has 2,600 employees in facilities across the nation and continues to expand through mergers and acquisitions and international growth.



James Kuan, VP - Legal Affairs Greenwave Systems Inc., Irvine

As VP of Legal Affairs for Greenwave, James Kuan has individually handled a diverse legal function in closing all high-profile transactions for the company, including two Series C rounds and a debt facility raising approximately \$60 million, closing strategic license agreements with domestic and international clients worth more than \$50 million in revenue, while also protecting key software source code IP development for Greenwave. Kuan also handled two M&A acquisitions involving key IP for Greenwave that have been incorporated into its industry-leading horizontal IOT Platform (Axon), while also prosecuting and consulting on the development of significant IP patent and trademark work in-house. Additionally, Kuan has negotiated and advocated on behalf of Greenwave to circumvent and avoid litigation involving certain IP, employment and contract disputes. Greenwave Systems Inc., the leading Internet of Things SaaS system provider enabling the world's connections, has experienced solid growth since its founding in 2008 led by ex-Cisco, Apple, Motorola and Google executives.



Richard LeBrun Jr., Managing Director & Deputy General Counsel PIMCO, Newport Beach

Richard LeBrun Jr. is a managing director and deputy general counsel in the Newport Beach office of PIMCO, primarily responsible for the firm's alternative funds and transactions. Prior to joining PIMCO in 2005, he was an associate with Ropes & Gray, focusing on investment management and private-equity-related matters. He has 16 years of legal experience and holds a JD from the University of Michigan Law School where he was admitted to the Order of the Coif. He received an undergraduate degree from Northwood University. He was admitted to the bar in Massachusetts and New York. PIMCO is a global investment management firm with a singular focus on preserving and enhancing investors' assets. The firm manages investments for institutions, financial advisors and individuals. The institutions PIMCO serves include corporations, central banks, universities, endowments and foundations, and public and private pension and retirement plans.



Ryan Lindsey, Senior IP Counsel Edwards Lifesciences Corp., Irvine

Ryan Lindsey started working at Edwards in April 2013 and became heavily involved in the ongoing multi-district, multi-country patent dispute with Medtronic. A few months after his start, Edwards General Counsel Aimee Weisner asked Lindsey to take on management of all litigation in North America, including product liability, securities and employment cases. The very next day, Edwards was hit with a class action securities suit, giving Lindsey a trial by fire with his new responsibilities. The case was ultimately dismissed for lack of merit. Since handing the litigation responsibilities to him, Edwards has favorably disposed of more than a dozen cases, many at the earliest stages of the case. Lindsey also remains heavily involved in Edwards' IP disputes. Lindsey worked with Knobbe Martens on the Cardiaq v. Neovasc trade secret theft suit that recently resulted in a \$70 million verdict for Cardiaq, which Edwards acquired last summer.



Christopher Magill, VP, Legal Affairs Viant Technology LLC, Irvine

Viant is a premier people-based advertising technology company, enabling marketers to plan, execute and measure their digital media investments through a cloud-based platform. Founded in 1999, Viant owns and operates several leading digital ad technology and media companies, including Vindico and Myspace, and the company is also a member of the Xumo joint venture. In 2016, Viant became a subsidiary of Time Inc. (NYSE:TIME). Chris Magill joined Viant's Legal Team in 2013 and became head of the department in 2015, shortly before Viant



began discussions with Time Inc. As the senior lawyer at Viant, Magill was responsible for managing the transaction with Time and supervising a team of outside lawyers. Following the transaction, he assumed responsibility for the successful integration of Viant into the Time Inc. group of companies. His role at Viant is serving as the lead in-house attorney, providing legal support for all commercial and corporate legal matters, as well as managing and overseeing the organization's global intellectual property, litigation and risk management initiatives.

John Marlo, General Counsel

Mobis Parts America, Fountain Valley

John Marlo III serves as general counsel and chief legal officer of Mobis Parts America LLC (Mobis). Mobis is one of the most profitable companies in Orange County, with \$1.6 billion in annual revenue, and is a U.S. affiliate of Hyundai Mobis, the world's fourth-largest automotive supplier, based in South Korea. Mobis's role as a consumer products distributor, its rapid growth, and the multinational nature of its business can present unique legal challenges to any in-house counsel. Since joining in January 2015, Marlo has effectively overcome the challenge of serving as the first general counsel of this multibillion-dollar company. His most significant accomplishments since joining Mobis have been to create systems and procedures to identify and reduce legal exposure of a U.S. company with multinational roots, and to better manage the company's litigation docket and e-discovery procedures. To increase coordination, he has organized a conference of in-house counsel and HR professionals of Hyundai Mobis, and works closely with the company's management and counterparts around the world.



Manisha Merchant, EVP & Division General Counsel

Banc of California, Irvine

Manisha Merchant most significant business accomplishments include assisting in creating a central process to streamline questions from Banc of California's branch networks. Across multiple organizations, Merchant ensured that all branch questions are centralized to a specific support unit. Only if the support unit is unable to respond to questions, is the question then escalated to the Legal Department for response. Centralization of these questions ensures consistent response to the branches, regardless of where it is located. If the same questions repeatedly arise, centralization also enables the bank to quickly identify areas of concern and allows for enhancements to policies and procedures. Most recently at Banc of California, she has provided legal guidance on complex deposit products, working side by side with the managing director of Institutional Banking. Together, they created an opportunity for the bank to bring in millions of dollars of core deposits, helping to bring down the overall costs of deposits. Banc of California Inc. (NYSE: BANC) provides comprehensive banking services to California's diverse businesses, entrepreneurs and communities. Banc of California operates more than 100 offices in California and the West.



Jeffrey Miller, SVP, General Counsel & Chief Compliance Officer

Western Dental Services Inc., Orange

Jeffrey Miller manages the entire panoply of work across Western Dental's Legal and Compliance Departments, including the supervision of the other staff attorneys. Miller also oversees the company's Human Resources function with more than 50 employees and also has Internal Audit and its nine employees reporting to him. One of Miller's greatest accomplishments since joining Western Dental was to establish a government relations function from scratch. With almost no presence in Sacramento, Miller led a statewide campaign that recently led to a rollback of previously imposed Medi-Cal rate cuts in California. These cuts had a deep and damaging impact upon many of California's poorest residents, particularly children. By working with key officials in Sacramento and throughout the state, as well as working with key legislators in Washington, D.C., Miller got this fixed. He also serves as a member of the senior management team at Western Dental, and is an integral part of all corporate planning and strategic initiatives.



Stephen Moran, SVP & General Counsel

CalAmp Corp., Irvine

CalAmp was incorporated in 1981 as California Amplifier Inc. and at that time, designed, manufactured and sold microwave components and subsystems. CalAmp has completely transformed itself and is no longer in the businesses it was involved in when it was founded. Today, CalAmp is a pure-play pioneer in the connected vehicle and broader Industrial Internet of Things marketplace. Steve Moran has been indispensable in the company's transformation. Moran joined CalAmp in 2013 as its first general counsel and has since made key acquisitions; made a strategic seed investment in SmartDriverClub, a technology and insurance startup; and with Gibson Dunn as outside counsel, completed a \$172.5 million convertible note offering raising unsecured debt at historically low interest rates. Another strategic growth opportunity spearheaded by Moran was the \$131 million acquisition of LoJack. As lead in-house counsel, with Gibson Dunn as outside counsel, after a public bear-hug that resulted in a negotiated deal, CalAmp completed the acquisition of this unrivaled leader in the telematics aftermarket for stolen vehicle recovery offerings.



Jesse Mulholland, Assistant General Counsel

Western Digital Corp., Irvine

Jesse Mulholland is an important part of Western Digital's transformation from a hard disk drive manufacturer to a leading comprehensive storage solutions provider. As the total available market for hard disk drives has contracted, the legal threats from Western Digital's suppliers has increased as these suppliers have attempted to use patents and trade secrets to gain a larger share of Western Digital's business in a shrinking market. Mulholland helped the company resolve many of these disputes, while avoiding supply disruptions and costly litigation by engaging with potential adversaries regarding the business realities faced by the entire industry and attempting to find solutions that benefit both companies. Mulholland's balanced approach recognizes the need for suppliers to make a sustainable profit while also recognizing the efficiencies, cost reductions and innovation demanded by the market.



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“Teamwork is the ability to work together toward a common vision. It is the fuel that allows common people to attain uncommon results.

– Andrew Carnegie



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We have always appreciated the collaboration and insight provided by a team, and we congratulate the Orange County Business Journal's first ever Legal Team of the Year nominees, as well as this year's Rising Star and General Counsel nominees!

2016 General Counsel Award Nominees

Guthrie Paterson, VP, General Counsel

Trace3, Irvine

Guthrie Paterson serves as vice president, general counsel for Trace3, a leading technology solutions provider serving Fortune 1000 clients. Paterson has broad responsibility covering legal and operational matters, as well as supporting sales efforts, managing distribution relationships and advising on strategic finance efforts. In this role, he helps to drive sales and scale a rapidly growing operational platform – while simultaneously reducing the company’s overall risk profile. During his five-year tenure, Trace3 has grown from \$100 million revenue and 100 employees to \$430 million revenue and 300 employees. Recent accomplishments include sourcing a new \$112-million working capital facility with Wells Fargo Capital Finance, partnering with sales leadership to drive increased revenue, and successfully obtaining a dismissal of Trace3 without liability from a three-year unfair competition litigation pursued by a competitor. Previously, he served as general counsel for Comtex News Network, a leading provider of online real-time news and finance content solutions.



Wade Pyun, VP & Senior Corporate Counsel

U.S. Bank, Irvine

Wade Pyun joined U.S. Bank in 2010 and specializes in financial regulatory compliance matters by providing guidance on the operational adjustments mandated by federal and state laws and regulations (Dodd-Frank, TILA, RESPA, state homeowners bills of rights, etc.). In performing this function, Pyun represents and advises the Home Mortgage Division in regulatory examinations conducted by the CFPB, FRB and OCC. Pyun regularly drafts audit and exam responses at the request of senior and executive management. As consumer regulatory counsel, he also advises affected lines of business across the enterprise to ensure that the necessary operational adjustments are made in response to applicable changes in the law. He is also frequently a featured speaker at regional and national conferences devoted to financial regulatory compliance matters. In addition, he participates on speaker panels organized by local trade groups and bar associations.



Jonathan Robertson, SVP, General Counsel, Corporate Secretary

RSI Home Products Inc., Anaheim

Jonathan Robertson began working for RSI Home Products Inc. in June of 2004. Over the past 12 years, he has been instrumental in planning, negotiating and documenting acquisitions, private equity transactions, and all financial transactions. Most importantly, in keeping with the company culture, Robertson has been unflinching in providing his honest advice, and in finding creative solutions to problems the business executives might have in response to that advice. He has worked on more than \$1.5 billion in acquisitions, financings and other transactions. He oversees RSI’s patent and



trademark portfolio, manages all legal issues relating to human resources and labor, and manages all legal issues relating to the organization’s stock option and benefit plans. RSI Home Products Inc. designs, manufactures and supplies kitchen, bath and home organization products.

Bryan Smith, Senior Counsel

Allergan Inc., Irvine

Bryan Smith serves as chief counsel to Allergan’s \$2-billion aesthetic and dermatology business. He is responsible for anti-counterfeiting and anti-diversion efforts around BOTOX®, Allergan’s flagship brand. Smith has worked closely with the FDA and the DOJ in issuing public alerts regarding BOTOX® and securing convictions of illegal organizations that counterfeit and/or divert BOTOX®. Smith has testified in front of FDA panel and is frequent lecturer on the subject of illegal counterfeiting and diversion of prescription drugs and devices. He serves as the lead lawyer responsible for the launch of several new products, including Juvederm Voluma, BOTOX® Cosmetic for crow’s feet, Aczone 7.5%, and Natrelle 410 breast implants, among others.



Sheniece Smith, Associate General Counsel

CHOC Children’s, Orange

Sheniece Smith has been with CHOC for almost eight years. Although Smith had her paralegal certificate, she entered the CHOC Legal Department as the administrative assistant to get her foot in the door. She was part of the first in-house legal team at CHOC. Smith quickly showed that she was capable of more by taking on substantive legal assignments and learning hospital compliance. She implemented a compliance program and was promoted to paralegal and compliance analyst before the first chief compliance officer was hired at CHOC. With encouragement from the CHOC team, Smith went to law school while continuing to work. After law school, Smith immediately took on the position of associate counsel. In this role, she successfully managed and hired other legal staff, developed the organization’s contracting policy, and started the legal summer clerk program where she trains and mentors one to two clerks each summer. In 2014, she was promoted to associate general counsel. CHOC is the first hospital devoted exclusively to caring for children in Orange County.



Libby Stockstill, Senior Corporate Counsel (US)

Billabong, Irvine

Billabong International Limited (Billabong) is one of the largest action sports and lifestyle companies in the world, with a portfolio of unique brands including Billabong, RVCA, Element, Von Zipper, Xcel, Honolua, Tigerlily and Kustom. Libby Stockstill joined Billabong in February 2014 to build and run the In-House Legal Department for Billabong’s North American operations. Traditionally, Billabong had used external legal counsel in the Americas and this new appointment was seen as an integral part of delivering on a new strategy, quickly and effectively. Since joining Billabong, Stockstill has grown the North American Legal Department to include a legal specialist/senior paralegal and a corporate counsel. Among her notable accomplishments, Stockstill has led the legal aspect of, and advised the company in connection with, the company’s move to a global omnichannel platform, one of the big four turnaround initiatives being prioritized globally and the most transformational. Stockstill also advised Billabong in its sale of its skate brand, Sector 9, to an affiliate of Bravo Sports, a portfolio company of Transom Capital Group – an important part of the company’s simplification strategy.



Robert Tennant, VP & General Counsel

Veros Credit, Santa Ana

Veros Credit is the benchmark in the world of automotive financing. The company acquires and services non-prime and sub-prime motor vehicle installment contracts, giving disadvantaged individuals an opportunity to build or reestablish credit. Robert Tennant has worked to elevate the role of counsel in the company by building the Legal Department from scratch – hiring attorneys and staff for the legal team; implementing an internal framework for handling litigation in-house, which has saved the company millions of dollars; and bringing other departments, such as bankruptcy and compliance under his oversight. He is helping to change the business by overseeing the purchase and implementation of new technology to assist with complex business transactions, the purchase of commercial properties, and he provides guidance to the company as it expands into a number of other states. Veros Credit operates in 18 states and continues to expand. In 2016, Tennant assisted with Veros Credit’s completion of asset-back and securitized financing transactions valued at more than \$205 million.



Cherrie Tsai, VP, Deputy General Counsel & Corporate Secretary

Kaiser Aluminum Corp., Foothill Ranch

Cherrie Tsai has always been involved in financing transactions, mergers and acquisitions, governance matters and ongoing securities law compliance at Kaiser Aluminum Corp. Ever since joining the company, Tsai has been working on projects to implement new compliance procedures to comply with new rules and regulations, and to enhance existing compliance programs. Kaiser’s compliance programs include in-person training, online courses and regular communication. In last 12 months, Tsai has been involved in the private placement of \$375 million of 5.875% senior notes due 2024, the adoption and shareholder approval of a shareholder rights plan designed to protect over \$500 million of tax assets, a \$300 million revolver financing, among many of her other responsibilities and transactions. Kaiser Aluminum Corp. is a leading producer of fabricated aluminum products for aerospace/high strength, general engineering, automotive and custom industrial applications.



Melissa Yoon, General Counsel

Ambry Genetics, Aliso Viejo

Melissa Yoon joined Ambry as its general counsel in March 2015, after serving as outside counsel to the company for several years. Yoon started Ambry’s Legal Department from scratch, as the company had been without in-house counsel since 2008, and grew from a



Abbott Laboratories congratulates the Abbott Vision Legal Team and Craig Bryson for being nominated as Legal Team and General Counsel of the Year.



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2016 General Counsel Award Nominees

department of one to a department of four. Yoon's accomplishments at Ambry over the past year include, but are not limited to, legal oversight of Ambry's ownership of Progeny, a genetics modeling software company, an acquisition that occurred right as Yoon began her tenure with Ambry; the construction and unveiling of one of the world's largest commercial genetics laboratories, a state-of-the art space that implements sophisticated robotics and technologies and significantly expands capacity; the launch of a cloud-based genetic and family history software to help clinicians and researchers better identify patients who should receive genetic testing; and the launching of AmbryShare, the largest disease-specific, free public database of sequenced genomes. Ambry, a 17-year-old privately held genetics testing company, has actively shared genomic data with the public, and is one of the biggest contributors to public variant interpretation databases, scientific presentations and peer-reviewed publications.



Christina Zabat-Fran, General Counsel
St. John Knits Inc., Irvine

Christina Zabat-Fran is general counsel for St. John, the American luxury house headquartered in Orange County. As a fashion executive for a brand known for its signature innovative knits and over 50+ year legacy dressing confident women, she leads legal and business affairs during a crucial era of the brand's evolution and global expansion. Prior to joining St. John, Zabat-Fran was tapped for the inaugural class of UC Irvine School of Law to build the institution, which has since made waves nationally for disrupting the traditional DNA of legal education. As one of the first stakeholders alongside Dean Erwin Chemerinsky, Zabat-Fran founded several key pillars for the school, including the student bar association and the law review, for which she was co-editor-in-chief. Zabat-Fran is chair of the Orange County Bar Association's Corporate Counsel Section, and serves on the board of directors and blue-ribbon Leadership Development Committee.



Megan Bern, Senior Corporate Counsel
Yianni Pantis, VP, Government & Public Records Counsel
Sarah Gillies, General Counsel International
Agrita Cliff, Head of Legal, New Zealand
Kirsty Edward, Corporate Counsel, New Zealand
Hannah Nimot, Corporate Counsel, New Zealand

CoreLogic's Legal Department has witnessed more challenges and handled more high-profile initiatives in the past few years than most departments see in two or three decades. Throughout this exceptionally active and intense period, the Legal Department has played a key role in each critical transaction, has prevented or avoided significant judgments or settlements despite several particularly challenging matters, and has generated legal recoveries in excess of \$30 million – all while employing innovative strategies to successfully reduce internal department staffing, enhance service levels and reduce external legal expense. The CoreLogic Legal Department is continuously recognized for its achievements and innovation; in 2011, General Counsel Terry Theologides was awarded OCBJ's General Counsel Award for a Public Company. Members of his team, including Rouz Tabaddor and Angela Grinstead, have been nominated for the Rising Star Award for their outstanding contribution to the CoreLogic Legal Department, with Tabaddor winning the award in 2014.



Edwards Lifesciences Corp., Irvine
Aimee Weisner, General Counsel
Denise Botticelli, VP, Associate General Counsel & Secretary
Keith Newbury, VP, Chief IP Counsel
Jay Wertheim, VP, Associate General Counsel, Commercial and International

In-House Legal Team Nominees



Abbott Vision, Santa Ana
Craig Bryson, Divisional VP & Associate General Counsel
Andy Pang, Division Counsel, Patents
Craig Virgil, Division Counsel, Commercial
Melissa Nunez, Counsel, Commercial
Tamara Yorita, Senior Counsel, Patents
Nicole Bradley, Senior Counsel, Patents
Roy Kim, Counsel, Patents
Sanjesh Sharma, Counsel, Patents

As a company of firsts, Abbott Vision's innovation drives its business. As a result, the Legal Team is regularly involved in cutting-edge projects and issues, helping the business to comply with laws, while providing the tools to continue to evolve and address the needs of the doctors and patients the company serves. For example, Abbott Vision recently launched a direct-to-consumer advertising campaign for its laser vision correction (LASIK) business, the first in the industry of its kind. Members of the legal team were integral in advising the business on this social media project, which can be fraught with potential risk. The team was also integral in the simultaneous integration of OptiMedica Corp.'s laser cataract surgery business and establishing direct sales operations in Brazil. Meanwhile, its intellectual property lawyers have been instrumental in developing strategies and ensuring freedom to operate for multiple new product launches over the last two years. Those attorneys have also led efforts to focus the organization to pursue long-term innovation projects that have the potential to transform ophthalmology.

CoreLogic, Irvine
Terry Theologides, SVP, General Counsel and Secretary
Angela Grinstead Ahmad, VP, Deputy General Counsel & Assistant Secretary
Arya Sadeghi, Associate Corporate Counsel
Merit Albaiahy, Senior Corporate Counsel
Ursula Guzman, VP, Employment Counsel
Rouz Tabaddor, VP and Chief Intellectual Property and Licensing Counsel
Thomas Graber, VP, Deputy General Counsel & Chief Litigation & Regulatory Counsel
Angela McGuire, VP, Associate General Counsel
Jeanette White, VP, Associate General Counsel Litigation
Matthew Rabe, Senior Corporate Counsel
Charles Philipsek, VP, Associate General Counsel
David Vences, Corporate Counsel Associate Senior

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In-House Legal Team Nominees

Ennio Marengo, VP, Counsel, Europe, Middle East, Africa, Canada, Latin America
 Michael Crapenhoft, IP Counsel
 David Hauser, IP Counsel
 Joe Ho, IP Counsel
 AnneMarie Kaiser, IP Counsel
 Ryan Lindsey, IP Counsel
 Jen Dibble, Labor and Employment Counsel
 Efi Protopappas, Corporate and Securities Counsel
 Steve Salvucci, Corporate and Strategic Transactions Counsel
 Sangmi (Kelly) Cha, Counsel, Asia Pacific
 Tao Huang, Counsel, China
 Kazunori (Kaz) Kiriara, Counsel, Japan
 Carolina Maluf, Counsel, Brazil
 Michal Proks, Counsel, Europe
 Celina Schwartz, Counsel, Europe

In 2014, the Edwards Lifesciences Corp. Legal Team achieved two litigation victories which led to a settlement of these matters, valued at more than \$1 billion to Edwards. The first was a jury award of \$394 million in damages for patent infringement. The second was the April 2014 award of a preliminary injunction, which followed a \$74 million patent infringement verdict against the same competitor in 2010, which was upheld through all levels of appeals. Both lawsuits related to a new breakthrough technology which the competitor was just beginning to launch in the U.S. The preliminary injunction was stayed on appeal and settlement discussions followed. The result was a one-time payment to Edwards of \$750 million and annual royalties of at least \$40 million per year for eight years, along with the dismissal of all litigation against Edwards. The Edwards Legal Department has also created a "Legal Boot Camp" series of training sessions to offer basic training, often globally, in the areas of intellectual property, contracts, and advertising and promotion. In a company that thrives on innovation, educating engineers on the role of patent protection is critical and has been well-received.



ITT Cannon LLC, Irvine

Suzy Lee, VP & General Counsel
 Raymond Ratnoff, Compliance Director & Empowered Official
 Lorraine Sedlak, Director, EHS&S
 Sarah Chung, Senior Contracts Manager
 Howard Esterman, Trade Compliance Manager
 Trinh Lam, Trade Compliance Manager
 Betsy Vela, Trade Compliance Specialist
 Juliene Ollivierre, EHS Manager

ITT Cannon LLC's Legal Department is a highly regarded and critical business partner that supports the execution of the company's strategy, goals and objectives. The team supports the company's three business units across multiple markets, which include aerospace and defense, oil and gas, and transportation and industrial/medical, with seven manufacturing facilities and 1,900 employees across the globe. The Legal Team has been recognized and praised by ITT Cannon's executive management for continuously driving results that positively impact the business. Highlights of the department's accomplishments include successfully negotiating key sales contracts contributing to approximately \$200+ million in revenue; developing a premier process to mitigate anti-corruption violation risk and ensuring compliance with the Foreign Corrupt Practices Act; and the successful and timely closure of all environmental requirements for 60-year-old plating operations – the project was completed on-time with no injuries and illnesses, which included 8,000 project man-hours in a high-risk demolition project.

Providence St. Joseph Health, Irvine

Shannon Dwyer, EVP, General Counsel
 Jim Watson, SVP, Ministry Integrity
 Tara Cowell, VP, Associate General Counsel
 Jennifer Rieker, VP, Senior Counsel
 James Kelly, VP, Associate General Counsel
 Yemi Adeyanju, VP, Associate General Counsel
 Stephanie Laubacher, Special Projects
 Debra Walters, Paralegal
 Abby Keenan, Paralegal
 Hala Abduljalil, Legal Data Analyst
 Karen Ketchum, Administrative Professional
 Nancy Tajimara, Administrative Professional
 Kim Moore, Administrative Professional
 Evette Johnson, Administrative Professional

Before this past year, the St. Joseph Health (SJH) Legal Team had already made a name for itself by handling an extensive workload in a fast-paced environment. The hallmark of this team was serving as strong partners guided by the organization's values – dignity,



excellence, service and justice for those who are most vulnerable. This year, the bar was raised when the team also took on the biggest nonprofit transaction hospital in the state. St. Joseph Health and Providence Health & Services came together as a new combined organization, and the SJH legal team went to work with their signature efficiency, expertise and focus on the health system's mission and values. Eleven months later, the new organization, Providence St. Joseph Health, became operational, announcing on its first day a \$100 million investment in mental health and wellness services. Throughout the year, the team also consistently earns high marks from their colleagues on any number of legal activities. In a survey of their internal clients, the St. Joseph Health Legal Team earned one of the highest marks for all corporate departments.



Quality Systems Inc., Irvine

Jocelyn A. Leavitt, General Counsel
 Shadi Bank, VP & Associate General Counsel
 James Sytsma, VP & Associate General Counsel

The last 12 months has been a particularly busy time for the Quality Systems Inc.'s (QSI) legal team in Orange County. The team had a record year of activity – handling the sale of one of the company's business units, a \$165 million acquisition of another company and securing a \$250 million credit agreement – all while assisting with the transformation of the company's reorganization and transformation of the executive team. In addition to the day-to-day activities of providing legal support to a publicly traded company with annual revenues of \$500 million, the team has a long track record of working together – both at QSI and in the Orange County office of Latham & Watkins. The team's accomplishments for the past year include selling one of the company's four business divisions (the Hospital Solutions division) in order to enable the company to focus on its core business areas; completing the \$165 million acquisition of HealthFusion, which offers a mobile, cloud-based software solution for physicians, hospitals and medical billing services; and entering into a \$250 million credit agreement to, among other things, provide financing for the HealthFusion acquisition.



Western Digital Corp., Irvine

Approximately 175 members in the Legal Department

Western Digital (WD) Legal Team is comprised of talent from top law firms who are known for their forward-thinking. WD's Legal Team had a particularly busy period between September – November 2015. During that time, the WD legal team was at the center of executing four large projects simultaneously: a \$3.775 billion equity investment by a Chinese entity, and although this transaction ultimately did not close, it required an incredible amount of work with U.S. and Chinese regulators, as well as negotiations with the counterparty; succeeding in getting MOFCOM to lift its prior hold-separate decision in relation to the Hitachi Global Storage Technologies acquisition; an agreement to acquire SanDisk for \$19 billion; and an agreement to form a joint venture with a Chinese entity. The acquisition of SanDisk is the largest in the company's history, and one of the largest transactions in Orange County history. The department's depth of expertise allowed them to handle and facilitate the complex aspects of such a large deal, including securing antitrust clearance in nine jurisdictions without any conditions, debt financing, managing executive compensation and employee benefits for the integration, and the integration of the SanDisk Intellectual Property portfolio management and licensing.



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Jennifer Bryant, Pacific Dental Services LLC
Craig Bryson, Abbott Vision
Bernadette Chala, Arbonne International LLC
Jeffrey Coyne, Newport Corp.
Shannon Dwyer, Providence St. Joseph Health
John Fitzgibbon, Passco Companies LLC
Andres Gallardo, Opus Bank
Mark Goldzweig, Kia Motors America Inc.
Miek Harbur, New Home Co.
Victoria Harvey, Smile Brands Group Inc.
Monica Johnson, Ventura Foods LLC
James Kuan, Greenwave Systems Inc.
Richard LeBrun Jr., PIMCO
Ryan Lindsey, Edwards Lifesciences Corp.
Christopher Magill, Viant Technology LLC
John Marlo, Mobis Parts America
Manisha Merchant, Banc of California
Jeffrey Miller, Western Dental Services Inc.

Stephen Moran, CalAmp Corp.
Jesse Mulholland, Western Digital Corp.
Guthrie Paterson, Trace3
Wade Pyun, U.S. Bank
Jonathan Robertson, RSI Home Products Inc.
Bryan Smith, Allergan
Sheniece Smith, CHOC Children's
Libby Stockstill, Billabong
Robert Tennant, Veros Credit
Cherrie Tsai, Kaiser Aluminum Corp.
Melissa Yoon, Ambry Genetics
Christina Zabat-Fran, St. John Knits Inc.

In-House Legal Teams:

Abbott Vision
CoreLogic
Edwards Lifesciences Corp.
ITT Cannon LLC
Providence St. Joseph Health
Quality Systems Inc.
Western Digital Corp.

Master of Ceremonies



Erwin Chemerinsky
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 University of California, Irvine
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