Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

SPRING 2015

The Perfect Storm

Primerus Firms Do Big Things with Technology

+

Current Legal Topics:

North America

Europe, Middle East & Africa

Latin America & Caribbean

Asia Pacific

Every lawyer in Primerus shares a commitment to a set of common values known as the Six Pillars:

Integrity
Excellent Work Product
Reasonable Fees
Continuing Legal Education
Civility
Community Service

For a full description of these values, please visit www.primerus.com.

About our cover

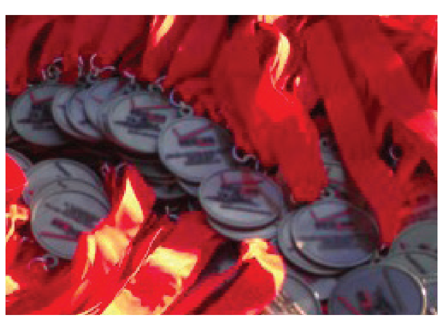
In a tumultuous legal market, law firms are turning to technology for solutions to better meet the needs of their clients. Primerus firms are doing big things with technology.

Scan this with your smartphone to learn more about Primerus.

Primerus
The World's Finest Law Firms

Publisher & Editor in Chief: **John C. Buchanan**
Managing Editor: **Chad Sluss**

The Primerus Paradigm – Spring 2015



President's Podium

John C. Buchanan

The Perfect Storm

Greetings. It's impossible for me to read any legal or technology news today without feeling like we are living in exciting times for small and mid-sized law firms and their clients. The legal profession continues to go through a revolution in the cost and delivery of legal services across the globe. Two powerful forces are at work in creating the law firm of the future – or as Primerus calls it, the law firm of the 21st century.

Those two forces are often looked at and discussed independently, as if they are totally unrelated to each other, instead of being integral parts of the "perfect storm" that is revolutionizing the legal profession. They are:

1. The decline of the large law firm, with more and more clients looking to small and mid-sized firms for quality service and greater value. According to Altman Weil's 15th annual Chief Legal Officer Survey, only four percent of general counsel are pleased with how law firms provide legal services. *Four percent*. Among the changes they would like to see: greater cost reductions, more efficient project management and better budget forecasting.
2. The explosion in law firm-related technology that levels the playing field between the large and small law firms.

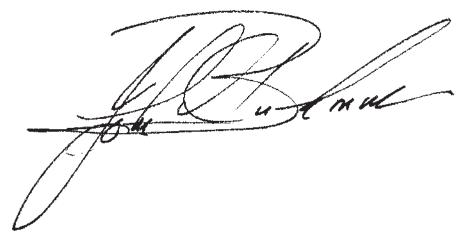
The experts call this "disruptive innovation," which Wikipedia defines as "innovation that helps create a new market and value network and eventually disrupts an existing market and value network (over time), displacing an earlier technology."

At Primerus, we're embracing these times. As a society of independent, boutique law firms around the world – currently with 180 law firms with 3,000 lawyers in 40 countries – our firms are perfectly suited to give clients what they're demanding in this new economy. Each Primerus firm operates independently from one another, avoiding the high overhead and bureaucracy of big law.

But our firms and by extension, our clients, enjoy the benefits of a global alliance, including assurance that all members have met stringent quality standards for membership, and shared commitment to values reflected in the Six Pillars (integrity, excellent work product, reasonable fees, continuing legal education, civility and community service).

Primerus firms work together as one unit, partnering with clients to offer them enhanced value and high quality legal services at low costs anywhere in the world.

We invite you to join us as we harness technology and revolutionize the future of the legal industry.



The legal profession continues to go through a revolution in the cost and delivery of legal services across the globe. Two powerful forces are at work in creating the law firm of the future – or as Primerus calls it, the law firm of the 21st century.

Primerus Firms Do Big Things with Technology

Following the seismic shift in the legal market with the economic downturn of 2008, law firms faced increased pressure to provide their clients with better value. Clients are now in control, and they're demanding better efficiency, higher quality service and more reasonable fees from their law firms.

Where is one place those law firms turn for solutions to better meet the needs of their clients? Technology.

"The outcome is that law firms are now having to be much more efficient," according to Dan Safran, executive vice president of Project Leadership's management consulting practice group. Project Leadership is the largest technology consulting services provider to the U.S. legal industry. "They need to take more cost out of the model, and they're using technology to do it."

It's a trend that presents an advantage for high-quality small to mid-sized firms like Primerus firms – and for their clients, too. "Technology is a great market leveler," Safran said. "Smaller firms can do it cheaper and faster."

According to Mike Moore, in his 2011 column "The Changing Definition of 'The Small Law Firm'" on legalproductivity.com, "Today, a good lawyer practicing alone or with a handful of colleagues can accomplish far more than that same lawyer or team could've several years ago. The difference today between working with a smart lawyer at a large firm and working with a smart lawyer at a smaller firm just isn't nearly what it once was. It's not even close. Technology can democratize virtually anything, and the practice of law isn't exempt," he wrote. "In many situations, a large M&A (mergers and acquisitions) transaction or a piece of complex litigation can be handled equally well, if not better and more efficiently, by an experienced, technology savvy lawyer than by engaging a big firm."

So, how are small and mid-sized firms doing big things with technology? How are Primerus firms using technology to add to the value and quality service they're delivering to clients around the world?

In the Cloud

One way is taking advantage of cloud computing – storing and accessing data and programs via the Internet instead of your computer's hard drive or servers. In fact, Safran advises small law firms, if they have not already, to "run, don't walk" to the cloud for everything from document production, like Microsoft 365, and document management to file sharing in 2015.

"We have helped many small firms move to the cloud very quickly," he said. It can be a more complicated, time consuming process for larger firms, which have huge investments in technology infrastructure. "It's a hard internal sell to just throw that all away," he said. "Small firms will be big benefactors in the long run."

According to the 2013 and 2014 American Bar Association Legal Technology Survey Reports, the percentage of lawyers who say they use cloud-based software and services jumped from 21 percent in 2012 to 31 percent in 2013. It stayed level in 2014, though solos and small firms continued to lead the way.

> Many law firms are still concerned that using the cloud exposes their clients' confidential records to cyberspace, and it's safer to keep it all in house under lock and key. But Safran assures clients the cloud is probably a more secure location for confidential records than the law office.

According to the 2013 report, 40 percent of solo lawyers used the cloud, compared to 29 percent in 2012 and 23 percent in 2011. Of lawyers at firms of two to nine members, 36 percent use the cloud, followed by 30 percent at firms of 10 to 49 attorneys and 19 percent at firms of 100 or more attorneys.

Safran said he often hears clients question security and confidentiality when exploring a move to the cloud. Many law firms are still concerned that using the cloud exposes their clients' confidential records to cyberspace, and it's safer to keep it all in house under lock and key. But Safran assures clients the cloud is probably a more secure location for confidential records than the law office. "I understand the fact that law firms are concerned about security, but sometimes I think they lose perspective over this," Safran said. "They have to ask themselves, 'Who's going to do security better? Them or Microsoft?' You're never going to be able to match the security capabilities that the large global cloud providers can."

According to Barry Miller of Primerus member firm Fowler Bell in Lexington and Louisville, Kentucky, his firm moved to the cloud before it was popular. Miller, a past chair and current member of the firm's technology committee, said, "One of the best decisions our technology committee ever made was, before the term cloud was ever used, to move to NetDocuments.®"

The firm moved to the cloud-based document management system seven years ago to replace its hardware-based document management system, which needed three servers to operate, Miller said. The firm faced the decision of whether to replace some servers, and add more for a total of five. "I thought, 'I don't need a server for every five attorneys.' That's absurd," Miller said.

That forward-thinking choice has saved the firm a lot of money. "At the time (of the switch), based on the price we were paying, it would have taken 10 years to get to the price the physical solution was going to cost us," Miller said. A few years later, members of the firm saw Microsoft commercials about the cloud and asked Miller if it was something the firm should consider. "I said, 'You have been in the cloud for two years, you just didn't know it.'"

Miller's firm also made a progressive choice in December 2011 to give each of its 20 attorneys iPads, a decision Miller called "perhaps the only universally-welcomed tech committee decision in firm history."

Four years later, he still considers the iPads a good investment. Attorneys use them primarily to stay on top of email when they're out of the office, some light word processing, editing briefs and taking documents into court.

E-discovery

Another major technology initiative for Miller's firm in 2014, and many other smaller firms like his, was becoming better equipped to handle electronic discovery, or e-discovery. (Discovery is the initial phase of litigation when parties are required to provide each other relevant information and records, as well as all other evidence relating to the case. E-discovery deals with the exchange of information in electronic format such as emails, instant messaging chats, documents, accounting databases, websites, etc.)

Miller's firm has not invested in one e-discovery platform because they have found the needs of clients differ in each case. Again, they have gone to the cloud, using Nextpoint, an on-demand evidence management, for some cases. It's another example of how the firm can be nimble, saving money by catering the technology to exactly what the client needs, without investing in expensive hardware.

According to Bradley Nahrstadt of Primerus member firm Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd., in Chicago, Illinois, recent trends in the area of e-discovery also present advantages to small to mid-sized firms and their clients.

A hot button topic in e-discovery now is the idea of proportionality, he said. With the high volume of information that's electronic today, e-discovery can quickly get out of hand with requests that go far beyond what's proportional to the amount in dispute in a case. Also a hot topic is the idea of cooperation, whereby opposing counsel can work together to streamline discovery, rather than use it as an opportunity to antagonize, Nahrstadt said.

The courts have weighed in on proportionality and cooperation in what Nahrstadt called a "game changer," especially for smaller law firms and their clients. Amendments to the Federal Rules of Civil Procedure, which are expected to go to Congress by May 2015 and be effective as new law as of December 1, 2015, promote proportionality in e-discovery. One amendment revises the scope of discovery, stating discovery must be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its benefit."

Courts are also calling upon parties and their counsel to cooperate on e-discovery issues. In July 2008, the Sedona Conference, an e-discovery think-tank, started the movement by publishing its "Cooperation Proclamation." Since then, some judges and courts have endorsed the proclamation and stressed the importance of cooperation in the e-discovery process.

This directly benefits Primerus firms and their clients, Nahrstadt said.

"I think that we, as smaller firms, as a general rule are more collaborative than the bigger firms. We have better relationships with the attorneys that we face simply because we actually do the work. We are actually doing the work rather than a first year associate, who goes to a third year associate, who goes to a junior partner, who goes to a senior partner," he said. "We're not built with that kind of bureaucracy. We tend to be the people on the front lines dealing with the other side, so we need to have civil relationships with them. I think those of us in small firms have been pushing proportionality before the rules changed."

Another e-discovery trend – predictive coding – also levels the playing field among small and bigger firms. Predictive coding is technology that uses keyword searches, filtering and sampling to automate portions of an e-discovery document review, all with the goal of reducing the number of documents that need to be reviewed manually. Nahrstadt likened it to the same technology Netflix uses to pick movies users would like, as well as grocery stores to print coupons based on a customer's purchases.

"I think that people are starting to realize the gold standard is no longer a lawyer looking at every piece of paper," Nahrstadt said.

He cited a 2012 RAND study which showed that document review makes up 73 percent of discovery costs, representing an exorbitant cost to clients.

"This has the potential to be a real game-changer when we're talking about cost," Nahrstadt said. "This is not only good for us, it's good for our clients."

Serving Clients Better

According to Jim Calloway, director of the Oklahoma Bar Association Management Assistance Program, lawyers today must embrace technology that helps them and their clients. In his article "It's Time to Love Technology" in the January/February 2015 issue of *Law Practice*, he points out that in 2012, the American Bar Association Rules of Professional Conduct were amended to state that lawyers must have knowledge of "the benefits and risks associated with relevant technology."

"The long history of our profession is dealing with a lot of information with paper," Calloway said. "We were experts on paper client files and 3-by-5 index cards and all sorts of methods that allowed us to manage client information very effectively. Now that the world has changed and paper is almost always not the most efficient way to handle information, it's a matter of law firms undertaking a shift in the way they operate."

In his article, Calloway tells the story of Casey Flaherty, Kia America's in-house counsel, who was very pleased with their outside counsel's legal work, but not so pleased with their efficiency in administrative matters. He worked with professor Andrew Perlman of the Suffolk University Law School's Institute on Law Practice Technology Information and Innovation to create the Legal Tech Audit, released in August 2014.

> "Primerus firms are embracing new technologies that allow them to accomplish things that would not have been possible a short time ago," ... "It allows them to offer better services at less cost, as well as collaborate more closely with their fellow Primerus members around the world."

Calloway states in his article, "Examples of poor uses of technology that cost the client money included printing documents to paper and then scanning them to create a PDF file rather than creating the PDF directly on the computer, and an associate billing for hours to manually make mathematical calculations that could be done with a spreadsheet."

Calloway said Flaherty and others decided this was a major differentiator in law firms. As he wrote in his article,

Top Three Technology Tips for Smaller Law Firms in 2015

By Dan Safran
Executive Vice President
Project Leadership

1. **Run, don't walk, to cloud-based technology solutions.**
2. **Recognize the competitive advantage that technology tools offer your firm. The price points have dropped significantly and smaller firms have the ability to leverage these tools faster and easier than large law firms.**
3. **Review all the major functions of your firm, looking for processes you can automate.**

"If you are billing a client for four hours to do something that could be done in 20 minutes, you are not doing right by your law practice or your client."

Primerus firms work hard to do right by their clients in all arenas, including the use of technology, according to Primerus President and Founder John C. Buchanan.

"Primerus firms are embracing new technologies that allow them to accomplish things that would not have been possible a short time ago," he said. "It allows them to offer better services at less cost, as well as collaborate more closely with their fellow Primerus members around the world."

Buchanan pointed out two examples, among many. The first is V-Rooms Virtual Data Rooms, which provides attorney client extranets and secure document sharing platforms. Buchanan said he has used it extensively in major lawsuits.

"Instead of copying, for discovery, tens of thousands of documents for opposing counsel, the documents are scanned into the Internet V-Room that all interested and authorized parties may review at their leisure without the heavy cost of copying and handling thousands of paper documents to multiple parties," Buchanan said.

Dan R. Bradbary, founder and CEO of V-Rooms, describes it this way: "A client extranet, sometimes referred to as a 'client portal' or 'client login' feature, is a cloud-based network that allows controlled document sharing outside an organization's firewall. A client extranet can be viewed as a secure extension of an organization's internal computer network to external users, such as clients, experts, accountants and other attorneys. In essence, using computer security terms, the extranet is a Demilitarized Zone (DMZ) that adds additional layers of security to an organization's internal network when sharing and collaborating with external parties."

Buchanan also cited the example of videoconferencing (with tools such as WebEx,™ GoToMeeting® and Skype™ and similar internet visual and document communication tools) as revolutionizing communication between lawyer and lawyer, as well as lawyer and client.

"It now makes true collaboration between lawyers in a tightly knit organization such as Primerus work much more effectively and economically for the best interest of their mutual clients," Buchanan said. "Since Primerus has very high quality law firms all over the world, and all must speak English, clients with multi-national legal matters can really benefit from this combination of communication technology and collaboration within the Primerus organization."

It's one more way Primerus, and its small to mid-sized member firms, can do big things with technology.

"Where the mega law firms had an exclusive on handling gigantic matters requiring hundreds of lawyers, this is also going the way of the horse and buggy," Buchanan said. "Using the latest technology, networks like Primerus are now able to provide that kind of work with high quality lawyers at a fraction of the fees now charged by larger firms." P

Using Environmental Insurance to Close Real Estate and Commercial Transactions

Insurance can be used to manage environmental risks in real estate and commercial transactions, so that the insurer assumes the risks that the parties to the transaction would prefer to avoid. This may allow the parties to overcome issues that are sometimes significant obstacles to entering a contract or closing the transaction.

Unlike most insurance policies, which are usually contracts of adhesion, environmental insurance policies are routinely negotiated with the insurer. To obtain coverage that best meets the needs of the parties, someone familiar with the transaction, the environmental condition of the insured property and the language of environmental insurance policies needs to negotiate the language of the endorsements to ensure that the policy will cover the risks that impede the transaction.

To seek environmental insurance, one needs an insurance broker, as insurers typically will not communicate with potential insureds unless they have a broker. The selection of a broker with significant environmental insurance experience can save time and money. An experienced broker can help select the companies from which to pursue coverage (i.e., the least risk averse), choose the right coverage for the matter at hand, and preliminarily negotiate the language of the policy in an attempt to obtain the coverage sought by the parties. While the broker works for, and represents the interests of, the insured, as compensation she receives a percentage of the premium from the insurer. Active environmental insurance brokers include Sterling Risk, Marsh and Willis Group.

Pollution Legal Liability Coverage

Pollution Legal Liability (PLL) policies are the policies most often used to manage transactional environmental risks. They can provide coverage for certain cleanup costs, third-party claims and other environmental risks, discussed below. A number of large insurance companies issue such PLL coverage, including ACE, AIG, Beazley, Ironshore, XL and Zurich. An experienced broker can help select the insurer or insurers from which coverage should be sought in a particular situation.

Cleanup Costs

PLL policies provide two types of cleanup coverage for pollution occurring at the insured property: coverage for new discoveries of pre-existing conditions and coverage for new conditions.

1. **Discoveries of Pre-Existing Conditions.** Coverage for the discovery of pre-existing pollution conditions is for conditions in existence, *but not known to the insured*, prior to the inception of the policy period. Coverage for pre-existing pollution conditions known to the insured prior to the inception of the policy period are typically excluded from coverage under a PLL policy, but may be covered by cost cap coverage, discussed on the next page. Sometimes it is possible to negotiate pre-existing pollution

Gordon C. Duus

Gordon C. Duus is a shareholder and chairman of the environmental law department at Mandelbaum Salsburg. He has negotiated the environmental aspects of thousands of real estate and commercial transactions. On behalf of clients, he has negotiated environmental insurance policies for over 200 properties, including dozens of cost cap policies.

Mandelbaum Salsburg P.C.
3 Becker Farm Road, Suite 105
Roseland, New Jersey 07068

973.821.4172 Phone
973.325.7467 Fax

gduus@msgld.com
msgld.com

conditions coverage for conditions known to exist on the site which either have been the subject of regulatory closure (i.e., written confirmation they have been cleaned up) or have little risk of giving rise to a cleanup obligation exceeding the deductible. If those pollution conditions somehow later require further cleanup, then those costs would be covered. Further, some policies provide that known pollution conditions that are excluded from coverage at policy inception will be covered upon regulatory closure during the policy period in the event those issues are later reopened and further remediation is required.

2. **New Conditions**. New conditions coverage is for pollution first arising during the policy period. Typically, this is coverage for the risk that current operations on the insured property may cause pollution conditions. The insurer will ordinarily prepare a policy endorsement describing the types of operations that will be covered, which may exclude coverage if the operations change. Even if the main transactional concern is the risk of discovering pre-existing pollution conditions, by purchasing new conditions coverage the insured can avoid future disputes with the insurer over the timing of the discharge for which coverage is sought.

Third-Party Claims for Bodily Injury or Property Damage

PLL policies ordinarily provide coverage for property damage and bodily injury to third parties arising from pollution conditions on, or migrating from, the insured property.

Property damage includes the "tangible" property of a third party, including real and personal property, as well as diminution of property value, stigma damages, loss of use and natural resource damages. Cleanup costs are not included in the definition of third-party property damage because they are insured, if at all, under the cleanup coverage discussed above. Property damage coverage usually excludes damage to the insured property.

Bodily injury often includes disease, mental injury or death resulting from a pollution condition. Third parties are often defined to exclude the employees of any named insured. While the employees of a named insured would ordinarily be covered by workers' compensation, the exclusion may result in one named insured having no insurance for claims by the employees of another named insured (which would not be covered by the workers' compensation policy of the insured who is not their employer). Care must be taken during policy negotiation to avoid or minimize coverage gaps.

Although the cleanup of pollution conditions known to exist at policy inception are generally excluded from coverage under a PLL policy, typically coverage can be negotiated for third-party claims for property damage and bodily injury arising from all types of pollution conditions, including those that are known.

Other PLL Coverage

PLL coverage is also available for business interruption or loss of rent at the insured property. To obtain this coverage, the insurer often requires significant amounts of information concerning the covered business. Unless the business is established, the uncertainty often makes underwriting difficult and premiums uneconomical. Many clients conclude this coverage is more trouble than it is worth, especially given how rare it is for environmental remediation to cause a significant business interruption.

PLL policies cover legal costs to defend claims covered by the policy. For example, the policy would provide coverage for legal fees incurred overseeing the remediation of pollution conditions on, or migrating from, the insured property. Generally, the insurer has the right and obligation to defend the claim, usually with counsel chosen by the insured where permitted by law. Even where no such law applies, some insurers will consent to using the insured's counsel if they accept the legal fee rates ordinarily paid by the insurer in that locale.

Cost Cap Coverage

Cost Cap policies are sometimes used, along with PLL policies, in contaminated property transactions to cover the risk that the cost to clean up the contamination known to exist at the inception of the policy exceeded expectations. Coverage is not provided until such costs exceed both the self-insured retention ("SIR," similar to a deductible) and any co-insurance layer above the SIR that must be paid before coverage attaches. Generally, the SIR is based upon the price under a guaranteed cleanup cost contract (sometimes referred to as a fixed price contract) entered into by an environmental consultant and the insured. The consultant under the guaranteed cleanup cost contract agrees to pay all costs in excess of the guaranteed cost, which would usually include any co-insurance layer and claims in excess of the Cost Cap coverage. Today, an approved cleanup plan is routinely required to obtain Cost Cap coverage.

Few insurers are willing to provide such coverage these days, including Beazley and Axis, as excessive claims made Cost Cap coverage unprofitable. Recently, insurers' engineering and underwriting for Cost Cap coverage have become problematic. The co-insurance layers have gotten larger, the coverage limits are capped (e.g., not exceeding the amount of the cleanup cost) and the premiums have gotten larger. The few insurers issuing Cost Cap coverage have come to view it as catastrophic coverage. For these reasons, many of those involved with environmental insurance have concluded that, for most intents and purposes, Cost Cap coverage is not available.

Practitioners whose clients are involved in real estate or commercial transactions where environmental contamination is an issue should advise them to consider environmental insurance coverage.

Although the cleanup of pollution conditions known to exist at policy inception are generally excluded from coverage under a PLL policy, typically coverage can be negotiated for third-party claims for property damage and bodily injury arising from all types of pollution conditions, including those that are known.

Ten Things Companies Should Look for in Litigation Counsel

Attorneys value a great relationship with a company that is loyal to our firms and rewards our efforts by continually providing us with new assignments and cases to handle. And clients value finding an attorney and/or law firm they can trust. After nearly 30 years of practicing law, my experience has shown there are some characteristics that a client should look for in selecting their litigation counsel. These are my top ten:

1. Setting Realistic Expectations
2. Results
3. Creativity
4. No Fear
5. Passion and Compassion
6. Honesty About Whether to Try a Case or Settle
7. Not Churning the File
8. Great Advocacy
9. Litigation Experience and Industry Knowledge
10. Polished Shoes

These top ten are by no means the only things that companies can or should look for, as every company has specific guidelines that they require their counsel to follow. Please feel free to take some or none of this advice as you apply it to your situation.

1. Setting Realistic Expectations

One of the most important things is honesty in stating the chance of success and the expected cost of litigating the case. At the very inception of the case or when a lawyer has developed enough facts, it is critical to fully analyze the case and give a fair and honest assessment of what it will cost to litigate the case. Just about every company or insurance carrier our firm works with requires that we set forth a detailed budget of the cost of litigation. At times, the chance of success or the budget may change, so constant vigilance is required to make certain that the initial assessment and budget are accurate and reflective of what has transpired in the litigation. No one likes surprises when it comes to litigation.

2. Results

At the end of the day, law firms and lawyers will be judged by the results they obtain. Will the results be outstanding or just mediocre? Law firms and lawyers are in the service business. Thus, they must make a conscious effort to deliver outstanding service to clients on a consistent basis.

3. Creativity

It is not enough to be just a great writer or just a great trial lawyer. All great organizations thrive and grow because of creativity. Clients should value innovative thinking. They should look for counsel who "think outside the box" and who can anticipate how opposing counsel will come at them.

4. No Fear

Companies deserve to know the truth and nothing but the truth. Lawyers should not fear that the company or the carrier doesn't want to hear bad news. If the case is one that should be settled, your lawyer should tell you. If a case is

Thomas Paschos

Thomas Paschos is a partner of the law firm of Thomas Paschos & Associates, PC. He practices in the fields of professional liability, employment litigation, insurance coverage, products liability and complex commercial litigation.

Thomas Paschos & Associates, PC
30 North Haddon Avenue, Suite 200
Haddonfield, New Jersey 08033

856.528.9811 Phone
856.354.6040 Fax

tpaschos@paschoslaw.com
paschoslaw.com

one that has a very high verdict value, your lawyer should tell you. If the case has turned against the client halfway into discovery, or if some witness has testified in a manner that was totally unforeseen, to the detriment of the theory of the case, your lawyer should tell you. And if reasonable settlement efforts have been unsuccessful, your lawyer should not be afraid to try the case. Fear has no place in successful legal relationships.

5. Passion and Compassion

We have all seen lawyers who just don't care about the work they do. When a lawyer is passionate about what they do, it shows. It shows in the way their file is organized, it shows in their writing and their demeanor with opposing counsel and their clients. Even more importantly, I believe that it is critical that attorneys and law firms have compassion. I have seen many serious cases in my practice and been involved in cases that we won that could have gone the other way. By being compassionate, it allows one to see beyond one's point of view and at times leads to a favorable compromise that is a win-win for everyone involved.

6. Honesty About Whether to Try a Case or Settle

Companies cannot have confidence and trust in their chosen counsel if they are told, on a consistent basis, that a case should be tried and then counsel switches gears at the courthouse steps or as the case is on the eve of trial and begins to advocate for a settlement. We all know, and companies know, that change in strategy in some cases is inevitable. But it is also fair to say that this change can be anticipated. Clear and constant communication in a matter with a company will lead to avoiding any last minute change in strategy.

7. Not Churning the File

A lawyer or law firm should never churn any file or case, or just "bill the file." Companies and executives know when and which law firms are just churning the cases or doing tasks just to get more billable time on a file. A lawyer should be accountable and have a clear goal with everything that he or she does on the case, making sure it furthers the theory of the case.

8. Great Advocacy

Companies hire lawyers to be their advocate or the advocate for their insureds. Being a great advocate requires great advocacy in every facet or task of the matter assigned, not just in the courtroom. Great advocacy should be displayed in all of a law firm's communications with opposing counsel, with the client and with the court.

9. Litigation Experience and Industry Knowledge

Actual litigation experience within the topic or issues at hand is a very important factor in selecting counsel. It is important for companies to know that the attorney they are hiring has actual experience on a topic which would make them or their firm more efficient at arriving at an acceptable solution. Another key is for counsel to have knowledge of the particular industry. If counsel knows the industry, they can anticipate the discovery process and better pinpoint the information that will be needed to be successful in the litigation.

10. Polished Shoes

Let's face it. Appearance matters. Companies should seek out counsel who are polished. That requires your intended counsel to be the best version of themselves. When I obtained my LLM in Trial Advocacy degree many years ago, one of the best defense trial lawyers in the country teaching the course emphasized that 80 percent of all communication is nonverbal. A lawyer's appearance matters; especially with clients, companies and the court.

These are the standards our firm, and other Primerus firms, hold, and I believe clients should demand this from any litigation counsel representing them. P

The Affordable Care Act's Look-Back Measurement Method: Do You Know Who Your Full-Time Employees Are?

Compliance, Inc. (a fictional company) is a large employer with 2,000 employees. Its health plan year runs from October 1 through September 30 with open enrollment occurring each September. Compliance executives have of course heard of the Affordable Care Act ("ACA") and the Employer Mandate, but have taken a "wait-and-see" attitude toward implementation. It's now past January 1, 2015, the effective date of the Employer Mandate for employers of its size, and Compliance needs to know what it must do to satisfy the ACA's requirement that it offer coverage to its full-time employees.

Lucky for Compliance, it's not too late.[1] Transitional guidance published by the Internal Revenue Service provides that so long as certain conditions are met, the sponsor of a non-calendar year health plan may wait until the first day of the plan year following the effective date of the Employer Mandate to offer its full-time employees coverage.[2] Under this guidance, Compliance must offer coverage to its full-time employees by October 1, 2015, the first day of the plan year following January 1, 2015.

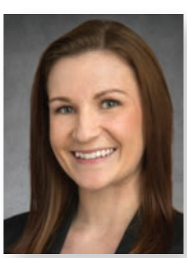
So, now that Compliance has some additional time, how does its human resources department determine which employees are entitled to coverage?

Under the ACA, employees hired full-time (expected to average at least 30 hours a week) must be offered health coverage by the first day of the fourth calendar month of employment.[3] Compliance currently has 1,775 of these employees who are already participating in the plan.

Most other employees are known as "variable hour employees." These are employees who are not reasonably expected to work an average of 30 hours per week. However, regardless of expectations, some variable hour employees may surpass this threshold on occasion. For this reason, the ACA provides a system of measurement and stability periods to determine which variable hour employees qualify as full-time and must be offered coverage.

Under the look-back measurement method, an employee's status as full-time or part-time is based on a designated measurement period and governs the employee's status for a subsequent stability period.[4] There are two types of measurement periods that an employer is responsible for choosing: the "Standard Measurement Period" and the "Initial Measurement Period."

The Standard Measurement Period is applied to "Ongoing Employees." These are employees who have been employed for a complete Standard Measurement Period. The Standard Measurement Period can be three to 12 months in length, with a subsequent stability period that can be six to 12 months in length.[5] An Administrative Period may be scheduled at the end of the Standard Measurement Period to allow the employer time to process the data collected and to offer coverage to



Ashley Trotto

Ashley Trotto is a member of the employee benefits practice group at Kennerly, Montgomery & Finley. She assists private and governmental clients in the design, implementation and maintenance of their employee benefit plans. Ashley focuses much of her time on assisting clients with issues related to the Affordable Care Act and is a frequent speaker on such issues.

Kennerly, Montgomery & Finley, P.C.
550 Main Street, W
Knoxville, Tennessee 37902

865.312.8814 Phone
865.524.1773 Fax

atrotto@kmfpc.com
kmfpc.com

eligible employees. The Administrative Period may not be longer than 90 days.[6]

For example, Compliance wants the longest measurement and stability periods possible and thinks it will take 60 days to process data and complete the open enrollment process for newly eligible employees. Compliance might choose a 12-month look-back measurement period from August 1 to July 30, a 60-day Administrative Period from the following August 1 to September 30, and a Stability Period from October 1 to September 30.

Under this example, the Administrative Period would take place during the regularly scheduled open enrollment period and the Stability Period would coincide with the plan year, providing the greatest amount of administrative simplicity possible.

The Initial Measurement Period, on the other hand, is used for new Variable Hour Employees. Each new employee will have his or her own Initial Measurement and Stability Period. Therefore, at any given time, a large employer will have a Standard Measurement, Administrative and Stability Period and separate and distinct Initial Measurement, Administrative and Stability Periods likely ending in each calendar month. Compliance's conclusion that this is an administrative nightmare is reasonable.

The Initial Measurement Period can be three to 12 months in length, with a subsequent stability period that must be the same length as the Stability Period for Ongoing Employees.[7] An Administrative Period may also be scheduled at the end of the Initial Measurement Period which may not exceed 90 days. However, the combined length of the Initial Measurement Period and the associated Administrative Period may not extend beyond the last day of the first calendar month after the first anniversary of the employee's start date (approximately 13 months).[8]

For example, if Compliance wants the longest measurement period possible and thinks it will take two months to process data and complete the open enrollment process for newly eligible employees, it may decide to implement an 11-month Initial Measurement Period with a 60-day Administrative period.

The Initial Measurement Period must begin on the employee's start date or on any date up to and including the first day of the first calendar month following the employee's start date.[9]

For instance, if an individual is hired on February 15, 2016, Compliance may choose to begin the Initial Measurement Period on March 1, 2016, for administrative simplicity. The Initial Measurement Period would then run from March 1, 2016, through January 31, 2017, and would be followed by an Administrative Period from February 1, 2017, through April 30, 2017. The subsequent Stability Period would run from May 1, 2017, through April 30, 2018.

Once a new Variable Hour Employee has been employed for an entire Standard Measurement Period, he or she becomes an ongoing employee and is thereafter measured based on the Standard Measurement Period. Continuing our example, Compliance would measure the new employee on the Standard Measurement Period beginning August 1, 2016, so long as he or she remains an employee for that entire Standard Measurement Period.

Determining who an employer's full-time employees are is no simple task and will likely require substantial administrative preparation. A company like Compliance or a company for whom the Employer Mandate is not effective until January 1, 2016, should begin preparation immediately.[10] If an employer is ill prepared and incorrectly identifies its full-time employees, the resulting penalties may be substantial. P

1 An employer in this situation would likely have missed some ACA deadlines. For example, by January 1, 2015, an employer of this size should generally have been paying PCORI fees, Transitional Reinsurance fees, and should have applied for a Health Plan Identification Number. However, for purposes of this article, we will focus on the required offer of coverage to full-time employees.

2 Shared Responsibility for Employers Regarding Health Coverage, 79 FR 8544-01 (providing that so long as an applicable large employer maintains a non-calendar year plan as of December 27, 2012, and the plan year was not modified after December 27, 2012 to begin at a later calendar date, no section 4980H penalty will be due for the period prior to the first day of the 2015 plan year).

3 26 C.F.R. § 54.4980H-3(d)(2)(iii).

4 The Measurement Period governs the entirety of the subsequent Stability Period even if an employee's hours increase or decrease during the Stability Period.

5 26 C.F.R. § 54.4980H-3(d)(1).

6 26 C.F.R. § 54.4980H-3(d)(1)(vi). This regulation uses actual days. 3 months is not the equivalent of 90 days.

7 26 C.F.R. § 54.4980H-3(d)(3).

8 26 C.F.R. § 54.4980H-3(d)(3)(vi)(B).

9 26 C.F.R. § 54.4980H-3(d)(1).

10 The Employer Mandate becomes effective January 1, 2016, for employers with 50-99 employees.

Inoculate Your Company Against Sick Leave Claims Before the Newest Category of Class Actions Spreads

On September 10, 2014, California Governor Jerry Brown signed into law the Healthy Workplaces, Healthy Families Act of 2014, making California the second state to require its employers to provide paid sick leave to employees. Under this new and complex law, which takes effect on July 1, 2015, most employers of employees who work in California for 30 or more days within a year from the start of their employment will be required to provide up to 24 hours or three days of paid sick leave per year to their employees. Employers in Long Beach, San Diego and San Francisco, which already have their own sick leave laws, will find it challenging to comply with their multiple obligations. The full text of the law can be found at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1501-1550/ab_1522_bill_20140904_enrolled.pdf.

Who Are Covered Employers?

The law applies to most employers that have even one California employee who works 30 or more days in a year. This includes domestics, part-time, temporary and seasonal employees who may not have been previously eligible for paid sick leave under an employer's policies.

Which Employees Are Excluded From Coverage?

The only exceptions to the obligation to provide these sick leave benefits are:

1. when employees are covered by a valid collective bargaining agreement that provides for paid sick leave and has other required provisions;

2. when certain employees in the construction industry are covered by valid collective bargaining agreements;

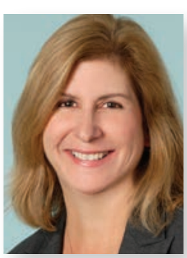
3. when employees are providers of certain in-home supportive services; and

4. when individuals are employed by an air carrier as a flight deck or cabin crew member and are covered by the federal Railway Labor Act, provided they receive compensated time off.

How Does Sick Leave Accrue?

Beginning on July 1, 2015, employees who work in California 30 or more days within a year from commencement of employment are entitled to paid sick days, to be accrued at a rate of no less than one hour for every 30 hours worked (inclusive of overtime). However, employees will not begin to accrue sick days until they have worked for 30 days from July 1, 2015 or from the commencement of hire, whichever is later. Exempt employees are deemed to work the lesser of 40 hours per workweek or the hours that reflect their normal workweek.

Employers must allow employees to carry over all accrued, unused sick days to the following year of employment. However, employers may limit the use of paid sick leave to 24 hours, or three days, in each year of employment. Employers may cap the accrual rate to a maximum bank of 48 hours, or six days, of paid sick time. This limit appears intended to ensure the employee has



Nancy A. Bertrando

Nancy A. Bertrando exclusively represents employers in all aspects of employment law and employer relations.

Greenberg Glusker
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067

310.734.1965 Phone
310.553.0687 Fax

nbertrando@greenbergglusker.com
greenbergglusker.com

full sick leave rights for both the instant year and the beginning of the next year. Finally, employers have the option of avoiding calculating accrual and carry over by frontloading the amount of sick leave that can be used at the beginning of each year to 24 hours or three days.

How Is Sick Leave Compensated?

Sick leave is paid at the employee's hourly wage. For situations involving varying pay rates, such as different hourly pay, commission or piece rate compensation or for non-exempt salaried employees, the employer must divide the employee's total wages (excluding overtime) by the employee's total hours worked in the full pay periods for the prior 90 days of employment to determine the appropriate "hourly wage" for the employee's paid sick leave. Sick leave must be paid by the payday for the next regular payroll period after the sick leave was taken.

When Can Sick Leave Be Utilized?

Employees are entitled to use accrued paid sick days beginning on the 90th day of employment, after which they may use paid sick days as they are accrued. Employers have discretion to lend paid sick days in advance of accrual. Employers may not require employees to locate a replacement worker to cover the dates on which the employee uses paid sick days.

Employees are entitled to use paid sick time for preventative care for themselves or a family member, as well as for the diagnosis, care or treatment of their or their family member's existing health condition. Employers must also permit employees to use paid sick days if they are victims of domestic violence, sexual assault or stalking.

What Notice to Employers by Employees Does the Law Require?

Employees are expected to provide employers with "reasonable" advance notice if the need for paid sick leave is foreseeable. Where it is unforeseeable, employees must provide notice as soon as practicable.

What Posting and Record Retention Obligations Does the Employer Have?

On or before January 1, 2015, or at the time of hire, whichever is later, employers are required to provide written information to the employee about the right to accrue and use paid sick leave, the right to be free from retaliation, and the right to file a complaint with the Labor Commissioner.

Employers are also required to display in a conspicuous space in each workplace a poster notifying employees of their paid sick leave rights.

Employers are required to provide employees with written information identifying the amount of paid sick leave they currently have available, or paid time off they currently have available if an employer provides paid time off in lieu of sick leave, on either the employee's itemized wage statement pursuant to requirements of Labor Code Section 226, or in a separate writing provided on each designated pay date to accompany the employee's payment of wages.

Finally, employers are required to retain, for at least three years, records documenting hours worked, paid sick days accrued, and paid sick days used by each employee.

What Are the Consequences of Retaliatory Actions by the Employer?

Employees may file discrimination or retaliation claims against their employers for any sick leave violation either with the Labor Commissioner or in a court of law.

The Labor Commissioner may enforce violations of this new law by awarding reinstatement, back pay, and payment of sick days unlawfully withheld, plus the payment of an additional sum in the form of an administrative penalty, to an employee whose rights were violated.

In order to encourage reporting of violations, employees or other persons may report specific violations to the Labor Commissioner and the Labor Commissioner may keep the reporting employee's identifying information confidential.

Finally, employers are advised that this new law establishes "minimum" requirements for sick days and does not preempt, limit or otherwise affect the applicability of any other law or ordinance that provides greater accrual of use of paid sick days. California employers must already consider slightly different variations in San Francisco, San Diego and Long Beach.

What Are Our Recommendations to Employers?

- Review and revise all paid sick leave and/or PTO policies and procedures to ensure they are compliant with the new law.
- Review and revise all offer letters and contracts with employees to ensure they are compliant with the new law.
- Establish sick leave policies in compliance with this new law if this benefit hasn't been offered previously.
- Monitor the Labor Commissioner's website for updated template notices to employees and workplace posters.
- Ensure that timekeeping, payroll and benefits systems properly calculate, track and detail accrued and used sick time.
- Ensure that itemized wage statements include the amount of paid sick leave available to the employee.
- If a third party payroll processor is used, ensure that they are complying with the new law's requirements.
- Train HR and managerial employees on requirements of the new law.
- Ensure compliance with local laws which may be applicable to your places of business to ensure that the greatest benefits are afforded to affected workers. P

Small, Medium-Sized Businesses Not Immune From Cyber Attacks and Data Breaches

Target, Home Depot, Chase Bank and now Sony Pictures Entertainment. Not a week goes by when news headlines aren't filled with announcements that another American-based company is the victim of a data breach or cyber attack. While larger companies are grabbing the most attention, small and medium-sized businesses (SMBs) are also at risk of having their sensitive customer (and even employee) data breached. Though less publicized, these breaches have occurred throughout the country and can have substantial impacts on "mom and pop" companies with limited resources.

Depending on the motives, SMBs may make more attractive targets for cyber-thieves. Because SMBs typically have fewer resources to combat these threats, cyber-thieves see SMB customer data as "low-hanging fruit." Hackers and other data thieves know these smaller companies often possess valuable customer information and may not be appropriately protecting this data from theft or inappropriate disclosure.

A data breach can be far more devastating for an SMB than a larger company. Although SMBs typically hold less customer data, hackers and data thieves who target SMBs are most likely motivated solely to use the customer data in an inappropriate manner. In contrast, hackers or data thieves who attack large corporations may have different motivations that are not solely for financial gain. For instance, some of the international hackers who have breached large corporations' data were politically motivated. Some are merely chasing the thrill of breaching large corporations' IT security systems and the resulting publicity, possibly never using or selling the stolen data.

The motivation to use customer data is particularly important. In consumer lawsuits dealing with data breaches, one of the key issues is whether the consumer's data has been used in an inappropriate or criminal manner. Financially-motivated hackers and data thieves typically sell the customer information they acquire or use it themselves to create fraudulent accounts or access existing accounts. Whether customers actually suffer economic losses from the misuse of their stolen information during a data breach could be paramount in determining the level of a company's potential financial exposure in litigation following a data breach. *Remijas v. The Neiman Marcus Group, LLC, 2014 U.S. Dist. LEXIS 129574 (N.D. Ill. 2014).*

While data breaches for large companies may not always be financially motivated (and therefore may not result in the misuse of stolen customer data), if a cyber attack occurs against a SMB, it can be presumed that the hackers/criminals targeted the business in order to misuse the customer data for their

Jonathan W. Macklem

J. Paul Zimmerman

Richard E. Smith

Jonathan W. Macklem represents and advises clients on a broad range of matters. He is a member of the firm's cyber and data breach liability, business and commercial litigation, insurance, labor and employment, and technology and emerging growth companies practice groups.

J. Paul Zimmerman's practice primarily focuses on business and commercial litigation in the areas of cyber and data breach liability, technology and emerging growth companies, trade secrets, insurance, and class action and complex litigation. He is a member of The Sedona Conference Working Group 1 and co-chair of CLM's eDiscovery and ESI Committee.

Richard E. Smith is one of Christian & Small's founding partners and has been an integral member of the firm's litigation group his entire legal career. His practice focuses primarily on complex and corporate litigation for clients in the financial services, health care and construction industries, as well as corporate entities in other industries.

Christian & Small LLP
505 North 20th Street
Suite 1800 Financial Center
Birmingham, Alabama 35203

205.545.7456 Phone
205.328.7234 Fax

jwmacklem@csattorneys.com
jpz@csattorneys.com
resmith@csattorneys.com
csattorneys.com

own financial gain. This means an increased risk for SMBs in terms of the damages to their clients/customers affected by the data breach. Under many applicable statutes and regulations, companies face exposure simply for the breach, even absent evidence of identity theft.

In addition to the potential for consumer lawsuits, other costs can be devastating for an SMB resulting from a data breach:

- **Determining the scope of the breach** – Companies will incur expenses in their efforts to identify and determine the scope of the data breach. This may involve costs to hire a computer forensic company and legal fees associated with this process.

- **Reputational harm** – SMBs can lose business if the community thinks the company has not taken appropriate measures to protect client information.

- **Business interruption** – It isn't uncommon for SMBs to have to shut down immediately following a data breach until the attack can be remediated. While a company's operational system is down, it could lose valuable revenue.

- **Notification requirements** – Myriad federal rules and regulations require companies in certain industries to provide notifications to customers affected by a data breach, and approximately 47 states have passed some form of a data breach notification law.

- **Regulatory proceedings** – Federal and even many state agencies are becoming increasingly active in investigating SMBs following data breaches. Many of these agencies are self-funded – their budgets consist of funds obtained through fines they impose. A government agency (or agencies) with jurisdiction over the SMB or the type of data involved may investigate whether a failure to meet a regulatory or statutory requirement was a factor in the data breach or theft. Additionally, credit card companies whose cards the SMB accepts as payment impose stringent data security and notification requirements – the violation of which can lead to fines, increased fees and even the termination of the ability to accept credit card payments.

There is also the threat that a data breach could occur from within the company, whether as retribution for perceived wrongs, financial gain, or both. It is important for SMBs to not only evaluate the security of their customers' information, but also evaluate who has access to that information within the company itself. Just as a company restricts its employees' access to checks and financial information, companies must also evaluate the appropriate limits for employee access to information such as customer or employee personal information and account information.

SMBs must particularly guard against two primary mechanisms for data breaches. First, hackers often target point-of-sale systems to access customers' financial information. It is imperative for companies that receive customer financial information to ensure their point-of-sale systems' security measures are compliant with the credit card industry's requirements.

Second, companies often find themselves in data breach situations because of a lack of precautions regarding technology (e.g., personal laptops/computers, employee cell phones, etc.). Human behavior and errors still account for about one-third of data breaches. Companies must evaluate the different devices where customer information is stored. Customer and employee information on portable devices should be encrypted, and a company should restrict employees' ability to store customer information on their own individual devices, such as personal computers, cell phones and tablets. The company should also have the ability to remotely wipe portable devices.

In light of the emerging data breach risks and their resulting costs, SMBs should work with their insurance agents or brokers to obtain appropriate insurance products to protect the company from a cyber attack or data breach. Over the last couple of years, the number of insurance companies writing cyber-liability policies has grown drastically. The protections and pricing for these policies can vary greatly, but policies can cover the costs associated with hiring a security firm to fix and contain the breach, in sending notification to affected customers, and providing defense and indemnity in the event lawsuits or regulatory investigations result from the breach. Some policies also provide coverage for public relations costs and business interruption coverage. Companies should not make the mistake of assuming their commercial general liability policy (CGL) will provide coverage for damages resulting from a data breach. SMBs should proactively work to protect against coverage gaps, ensuring appropriate insurance is in place.

SMBs must also evaluate their vendor contracts. Credit card companies and other financial institutions are now allocating the risk of loss upon vendors and companies whose lax data security led to a data breach. Lawsuits have been filed by credit card companies and banks seeking reimbursement of costs resulting from a company's alleged failure to act appropriately in the protection of customer information.

The costs of a data breach can be devastating for SMBs, so it is important for them to evaluate and utilize their data security practices and processes. A number of different companies provide security audits, although their qualifications vary greatly. These companies can develop strategies and evaluate security procedures on how best to minimize their data breach risk.

Overall, identity theft is the fastest-growing crime in the U.S. and, despite technological advancements, data breaches and cyber attacks are showing no signs of weakening in their frequency and sheer magnitude. SMBs should learn from recent headlines about major national and international companies by evaluating their own internal practices and procedures to minimize these risks.

The New World of Patent Post-Grant Proceedings: Positioning Your Company to Win

The phone rings. When you answer, your boss is on the line. She tells you that your company has been served with a complaint of patent infringement. She's concerned about a possible lengthy trial and the accompanying large expenses. Your boss asks for strategies for dealing with the issue. What do you say?

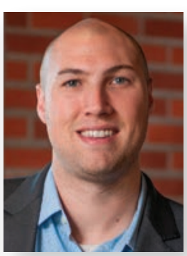
Did your answer include using patent post-grant proceedings at the United States Patent and Trademark Office (USPTO)? More and more companies are choosing to use post-grant proceedings, especially *Inter Partes* Review, as a weapon in their arsenal against patent infringement claims. A general understanding of these proceedings is a necessary component of doing business in our technology-driven economy, whether you are defending against an infringement complaint or enforcing your ever-more valuable patent assets.

Basics of Patent Post-Grant Proceedings

In late 2012, the USPTO, authorized by the America Invents Act, implemented new patent litigation alternatives, including Post Grant Review ("PGR"), Covered Business Method Patents Review ("CBMP"), and *Inter Partes* Review ("IPR"). These proceedings are adjudicated by panels composed of three administrative judges. The judges are selected from a pool of several hundred members of the USPTO Patent Trial and Appeal Board ("the Board"). The proceedings have some similarities to aspects of litigation, including trial-like elements such as discovery, depositions and a final oral hearing. However, discovery is extremely limited, live witnesses at the oral hearing are rare, and motions for extensions of time, additional discovery, or additional briefing to the Board are unlikely to be granted. If a proceeding is instituted, a relatively short timeline is set for conclusion – typically one year, but no longer than 18 months.

IPR was created, in part, to reduce the number of court-filed patent cases and to speed up the finality of patent validity decisions. The rules governing IPR reflect those goals by creating restrictions for parties involved in litigation of the patent.[1] For example, there is a one-year time restriction to filing a petition for IPR if you are either (a) sued for infringement or (b) if you instigate litigation to invalidate the patent at issue in civil court. The time restriction may also apply to you depending on your company's relationship with a party who has been sued for infringement or who has tried to invalidate the patent in civil court.[2] Examples of pertinent relationships include co-defendants, subsidiaries/parents, suppliers/customers and funders/petitioners.


Ann Robl


Lewis Craft

Ann Robl focuses her practice in the areas of patent post-grant proceedings, patent drafting, patent prosecution, patentability analyses, infringement analyses, prior art searching and technology licensing.

Lewis Craft concentrates his practice in the areas of drafting and prosecuting patent applications, patentability analyses, prior art searching, invalidity opinions, freedom-to-operate opinions, post-grant proceedings and technology licensing.

Dunlap Codding P.C.
The Film Row District
609 W. Sheridan Avenue
Oklahoma City, Oklahoma 73102

405.445.6243 Phone
405.607.8686 Fax

arobl@dunlapcodding.com
lcraft@dunlapcodding.com
dunlapcodding.com

Party joinder is available after the one-year time restriction if the joinder does not conflict with the interests of a speedy and just proceeding. Filing for joinder later in the proceedings (more than one month after institution of the IPR) may result in the denial of the request for joinder.[3] Issue joinder may also be restricted. Therefore, you may not be able to use joinder to fix errors by filing a new petition after the one-year time limit has expired.

Rising Popularity of IPR

Since their implementation a little over two years ago, these proceedings, particularly IPR, have become popular tools for invalidating patent claims before or after the initiation of a lawsuit in federal court. The rate of IPR petitions filed has steadily increased, reaching an average of six per day in December 2014. As of January 1, 2015, a total of 2,299 requests for IPR have been filed.[4] Those filing the requests are also notable. IPR has been utilized as an invalidation tool by such companies as Apple, Samsung, Google, Medtronic, Microsoft and Ford.[5]

The shorter timeframe and lower cost when compared to civil litigation makes IPR attractive to many. Plus, a stay of concurrent litigation may be available, especially if an IPR request has been granted. The current rate of granted stay requests is 82 percent. The results of IPR proceedings also make IPR attractive to many patent challengers. According to a recent study, the Board has granted 84 percent of requests for IPR. Strikingly, of those IPRs that have reached a final decision on the merits, more than 77 percent of the time all claims under review have been invalidated or disclaimed.[6] This rate of claim invalidation makes IPR a significant weapon for patent challengers.

Pitfalls of Patent Post-Grant Proceedings

Patent post-grant proceedings are, however, procedurally complicated. They are administrative proceedings, and thus, subject to different procedural rules, standards of review, and pleading standards, than those applied in traditional patent litigation. For example, to institute an IPR, the requester must show a reasonable likelihood that they will prevail with respect to at least one of the challenged claims.[7] Further, for non-expired patents, the claim construction standard of review is the same as that applied during patent prosecution – i.e., the broadest reasonable construction of the terms of the claim – which substantially differs from the standard used in litigation.[8]

The rules of procedure are geared toward facilitating the Board's statutory mandate for speed and efficiency. Length limitations of briefs are strict, discovery is extremely limited, and the Board must give permission before any motion may be filed. Early indications are that the Board will strictly adhere to its procedural rules regarding IPR, and reject requests and filings that fail to comply with its rules. For example, the Board has denied requests for IPR on purely procedural grounds, such as poor drafting of the request. In light of these procedural hurdles, it is important to retain counsel familiar with post-grant proceedings.

Post-grant proceedings are not without risks or consequences. For example, prior art references used in an IPR that reaches a final determination cannot be used by the requester in later civil litigation of the same patent.[9] Unlike civil litigation, challenged patent claims may be amended during the proceedings (though with some difficulty). Additionally, if the USPTO holds the challenged claims valid, this may have an impact on concurrent civil litigation.

Since these patent post-grant proceedings are still relatively new, procedures and interpretations by the Board continue to change as cases make their way through the USPTO and the Federal Circuit Court of Appeals. Although the Board has begun to issue informative opinions, at the time of this writing, it has not issued precedential opinions regarding many key issues surrounding IPR.

In light of the continuing gains in popularity of patent post-grant proceedings, it is important to take the time to prepare for the use of, and defense against, this new patent invalidity strategy. P

1 1. See 35 U.S.C. §§ 312(a)(2), 315(a)(1), 315(b); USPTO Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756 (Aug. 14, 2012) (codified at 37 CFR Part 42); Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 Fed. Reg. 48,612 (Aug. 14, 2012) (codified at 37 CFR Parts 1, 42, 90); and Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48,680 (Aug. 14, 2012) (codified at 37 CFR Part 42).

2. Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48,680, 48,688 (Aug. 14, 2012) (codified at 37 CFR Part 42).

3. Id. at 48,690.

4. Available from the USPTO at http://www.uspto.gov/ip/boards/bpai/stats/aia_statistics_1_1_2015.pdf.

5. Michelle Carniaux and Michael E. Sander, "PTAB Warriors: The Top 10 Petitioners for Inter Partes and Covered Business Method Review," Published July 3, 2014, available at http://interpartesreviewblog.com/ptab-warriors-top-10-petitioners-inter-partes-covered-business-method-review/.

6. Brian J. Love and Shawn Ambwani, Inter Partes Review: An Early Look at the Numbers, 81 U Chi L Rev Dialogue 93 (2014) [Essay].

7. 35 U.S.C. § 314(a).

8. Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48,680, 48,688 (Aug. 14, 2012) (codified at 37 CFR Part 42).

9. Id. at 48,683.

Five Important Considerations for Maximizing the Examination Under Oath

When an insurance claim is made, the insurer gathers information from a variety of sources to determine the insurer's rights and obligations under the policy. The insurer may obtain information from the insured through informal conversations, recorded statements, document requests and examinations under oath. An examination under oath ("EUO") is a formal proceeding during which an insured, under oath, is questioned by an insurance company representative. This article will address five important considerations that go into taking an effective EUO.

1. Know Your Policy

Virtually all insurance policies provide an insurance company with the authority to investigate an insured's claim by means of an EUO and require that the insured submit themselves for an EUO. If the insured fails to comply with an insurer's demand for an EUO, this is generally considered a material breach of the insurance policy which may alleviate the requirement that the insurer pay for the claim.

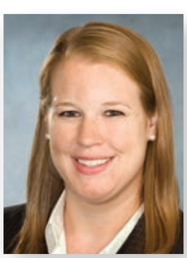
It is important for an insurer who intends to conduct an EUO to understand the distinction between a recorded statement and an EUO. Recorded statements are typically a recorded oral statement given by an insured to the insurer's representative. Recorded statements may be used to gather information by insurance companies at the outset of a claim. Most are taken informally, over the telephone. An EUO is a more thorough examination by a lawyer for the insurance company which is conducted under oath and is transcribed by a court reporter.

Many policies do not require an insured to submit for a recorded statement. As such, unless the policy requires both a recorded statement and an EUO, it is important to not advise insureds that they have failed in their duty to cooperate if they refuse to give a recorded statement. If the insured gives a recorded statement, the insurer's representative should advise the insured that the insurer is not waiving its rights to require EUO testimony at a later date. It is not uncommon for the insured's attorneys to claim that if a recorded statement is taken that is not specifically mandated by the policy, the insurer has elected to proceed with that route, thereby waiving its right to an EUO. Placing a statement on the record at the outset of the EUO, like the one noted above, will aid in opposing any such argument.

2. Choose the Right Counsel

Insurers should have specific counsel identified for taking EUO testimony. Simply because an insurer has panel counsel identified to handle its litigation, does not mean that that attorney will be competent in handling an EUO. The attorney taking the EUO must have an understanding of the differences between an EUO and the general

Bradley C. Nahrstadt



Ryan A. Kelly

Bradley C. Nahrstadt is a founding partner of the Chicago litigation firm of Lipe Lyons Murphy Nahrstadt & Pontikis Ltd. He concentrates his practice on the defense of complex products liability, mass tort and professional liability matters in state and federal courts around the country.

Ryan A. Kelly is an associate of the firm who concentrates her practice in the defense of construction litigation, complex products liability, mass tort, professional liability and commercial automobile matters.

Lipe Lyons Murphy Nahrstadt & Pontikis Ltd.
230 West Monroe Street
Suite 2260
Chicago, Illinois 60606

312.279.6914 Phone
312.726.2273 Fax

bcn@lipelyons.com
rak@lipelyons.com
lipelyons.com

investigation that accompanies litigation. For example, although the witness may have an attorney present during the EUO, he or she cannot participate in the examination. Additionally, the insured cannot plead the 5th amendment in failing to answer questions – that is grounds for voiding the policy. The attorney should be able to lead the insurer through the investigation process and obtain all necessary information to properly and fairly investigate the claim. They should not be wholly focused on providing a "win" to the insurer by proving a claim is fraudulent as such an aggressive one-sided approach may ultimately subject the insurer to a bad faith claim.

3. Prepare for the EUO

A formal written notice of the EUO should be sent to the insured. The letter should cite the policy requirement for giving testimony, advise of the insured's right to be represented by legal counsel, note the time and place of the examination, request a list of necessary documents and should reserve the company's right to designate additional individuals to sit for an EUO. The date, time and location of the examination should be reasonable and convenient to the insured. The insurer should make every effort to cooperate in rescheduling the EUO, if the insured requests this, to avoid any potential bad faith claims if the insurer ultimately decides to deny coverage. If the insured does ultimately refuse to submit themselves for an EUO, this may form a valid basis for denying his/her claim.

An attorney cannot take an effective EUO if an insured arrives at the examination with hundreds of pages of documents that the attorney has never seen before. As such, the attorney should request documents well in advance of the examinations and thoroughly review them prior to the EUO. If the insured refuses to comply with a document request that is material and relevant to the insurer's investigation, this can also serve as a legitimate basis for denial of a claim.

Preparing for the examination also requires formulating effective topics and questions in advance of the EUO. This may include comparing the insured's claim with documents and expert's reports. Discrepancies should be noted for further explanation during the examination.

4. Properly Take the EUO

Prior to conducting the EUO, it is important to discuss the examination with the claims adjuster and the special investigation unit ("SIU")'s investigator (if any) and obtain their complete files. The claims adjuster and SIU representative will likely have information invaluable to the attorney who is conducting the EUO. It may also be appropriate to have a claims adjuster or SIU representative present during the examination.

During an EUO, all questions considered material and relevant to the claim must be answered by the insured. Courts have given a broad interpretation to what an EUO may encompass. The only limitation placed on the EUO is that the information requested must be "material." Thus, the EUO may include anything considered material for purposes of determining the insurer's liability for a claim and to protect against fraudulent claims.

It is important for the attorney to set the proper tone in an EUO. Remember, the primary purpose of the EUO is to gather information so that the insurer can make an informed decision regarding coverage. While it is important to be aggressive enough to test the veracity of the insured's claim, it is not a time to badger a witness. The attorney should explain that the company has concerns about the claim while stating clearly that the company has made no final decision regarding coverage, but will base that decision upon the information and documents provided by the insured and the topics discussed at the EUO. Further, the EUO transcript may be discoverable in subsequent litigation. Thus, it is important for the attorney to keep in mind, during the examination, the potential ramifications of any questions asked on future litigation, including a potential bad faith claim against the insurer.

5. Let the Insured Know the Purpose of the EUO

At the outset of the EUO, it is important to advise the insured regarding the purpose of the examination. The attorney should remind the insured that the EUO is used to gather information so that the insurer can make an informed and correct decision regarding coverage – which has not yet been made. Advise the insured that you will not conclude the EUO until the insured is satisfied that he has been afforded the opportunity to provide the insurer all information necessary to substantiate his claim. If it is clear on the record that both of these issues are understood by the insured, it may be sufficient for the insurer to win a summary judgment or jury verdict on the question of whether an insurer acted in bad faith.

An EUO, effectively conducted, is a useful and expedient method for assisting the insurer in reaching its coverage decision with respect to a claim. If an EUO is properly conducted, the result should lead the insurer to a correct and proper decision to either extend or deny coverage as the evidence warrants. P

Seven Things to Consider Before Filing a Lawsuit

Here are three common scenarios encountered by small and medium-sized businesses:

- Your company entered into a consulting agreement with Company XYZ for you to perform a complete marketing analysis, re-branding campaign and build a website, but Company XYZ refuses to pay the full amount on the contract because it claims your services did not deliver the results you promised.

- Your former top salesman was recently hired by your main competitor, and you have begun to suspect that he may be giving your competitor some of your confidential business information and soliciting his former customers, in violation of his non-compete and non-disclosure agreement.

- For the last several months, your business partner has been making extravagant personal purchases using company money. You have repeatedly asked to see the company's books, but he refuses or provides excuses on why they are not available.

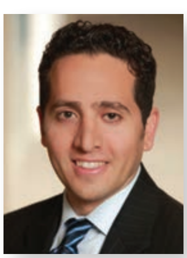
What do you do if you are thinking of suing someone? Many lawsuits are necessary. A large number are not. Sometimes suits are necessary to preserve rights, such as stopping someone from infringing on your copyright, stealing your business ideas and trade secrets, or escaping with your money. Some disputes can be resolved before litigation through mediation or even a letter from an attorney, while on some occasions, there is just a misunderstanding between the parties. Even when neither is the case, it is important to understand all that is involved before you take the step of filing a lawsuit. These are seven things to consider before deciding whether to file a lawsuit.

1. Cost

This is obviously the number one concern clients have, and the number one question attorneys are asked by clients and potential clients: "How much is this going to cost me?" Litigation is incredibly unpredictable, because you cannot control what the other side does or how the court rules. Litigation can also be very expensive. As business transactions become more complex, and with the heavy reliance on email, even relatively simple cases can involve hundreds or thousands of documents and emails, all of which will need to be reviewed by your attorney. A typical business dispute can cost tens or even hundreds of thousands of dollars to litigate from the filing of the complaint through a trial and appeal.

2. Likelihood of Success

Notwithstanding their egos, attorneys do not actually have divine powers to see the future or control events or the actions of the other side or the court. There are no guarantees in litigation, and any attorney who tells you that he or she can guarantee a particular result or outcome should be avoided. Nevertheless, an experienced and knowledgeable attorney can and



Michael A. Boutros

Michael A. Boutros is a senior associate at Krevolin & Horst. He handles a wide variety of business and complex litigation in the areas of business torts, shareholder disputes, restrictive covenants (including non-compete, non-solicit and non-disclosure agreements), contract, intellectual property (including copyright and trademark protection), corporate governance, securities, trade secrets and appeals.

Krevolin & Horst, LLC
1201 West Peachtree Street
One Atlantic Center, Suite 3250
Atlanta, Georgia 30309

404.585.3657 Phone
404.888.9577 Fax

boutros@khlawfirm.com
khlawfirm.com

should be able to give you an assessment of the strengths and weaknesses of your case, the necessary steps to work toward a successful resolution, and outcomes of past similar cases.

3. Likelihood of Recovery

This is entirely separate – but just as important – as likelihood of success. Many clients are surprised to learn that collecting on a judgment is not an automatic given following a victory. Be sure you are not left in a situation where you have expended tens or even hundreds of thousands of dollars, only to be left with a judgment "that isn't worth the paper it's printed on." The defendant may be a fly-by-night company or have little to no assets. You may obtain a judgment against a company, but later discover that the CEO has transferred all the company's assets to his wife or another entity he controls. Unless a defendant is an established, reputable company or some equivalent, collection may be as big or even a bigger battle than the underlying lawsuit itself.

4. Time

Most cases last months, if not years, when measured from the filing of the complaint through a trial. That is not even counting an appeal or even multiple appeals. During all this time, you are meeting with and paying for attorneys, gathering and reviewing documents, responding to inquiries, and attending depositions and hearings. All that is valuable time away from growing and working on your business, not to mention added personal and professional stress.

5. Opportunity Costs

What opportunities are you and your business missing out on because your time, money and efforts are tied up bringing a lawsuit? If you are a small or medium-sized business, the money and time you spend bringing a lawsuit is money you can't spend to hire a new sales manager, invest in a new project or product, or pay out as profit at the end of the year.

6. Publicity

"There's no such thing as bad publicity" may be true for celebrities, but it definitely is not true for businesses. When you file a lawsuit, understand that the defendant can then assert counterclaims against you or attempt to bad-mouth you in the media or your industry. This is actually what happened in the case of Donald Sterling, former owner of the Los Angeles Clippers professional basketball franchise. His wife sued V. Stiviano, a female friend of Sterling's, for the return of expensive gifts Sterling gave to Stiviano. A tape recording of Sterling making racist comments came out soon after that, resulting in Sterling being banned from the National Basketball Association for life and being fined $2.5 million by the league. If your company is the subject of negative comments or headlines, or develops a reputation in your industry for being litigious, this could significantly jeopardize your business and your relationships with your business partners and employees.

7. Risk vs. Reward

Ultimately, litigation is a cost-benefit scenario where you must evaluate risk vs. reward, i.e., the risk of filing and spending money on a lawsuit with an uncertain outcome vs. the reward of winning damages and possibly stopping the wrongdoer from continuing to harm you. Make sure litigation does not become a Pyrrhic victory, i.e., that the cost of winning exceeds or negates any benefit gained. In most cases, each side is responsible for paying its own attorneys' fees. Thus, even a "successful" verdict or judgment must be viewed with an eye toward the cost of getting there. Moreover, most lawsuits settle, frequently after months of litigation and tens of thousands of dollars expended, if not more. While not always the case, the results achieved by settling after months or years of litigating can frequently be reached early in litigation or even before a lawsuit is filed, which can mean a savings of tremendous time and money.

So where does all of this leave you? Talk to several lawyers before making a final decision on whether to file suit or not. Many, if not most, business litigation attorneys do not charge for the initial consultation. During your initial meeting, you should look for the attorney to be honest and candid with you regarding cost, the merits of your case, and the likelihood of success and recovery. Sometimes litigation is a painful but necessary process, and sometimes it can and should be avoided. Once you have evaluated these seven factors, you can make an informed, educated decision about whether filing a lawsuit is the right decision for your company.

Using Subpoenas to Obtain Medical Records

At least one reason why third-party bodily injury claims often end up in litigation, and on my desk, is that the claimants (and their attorneys) failed to provide the insurance company with sufficient records detailing their treatment. Frequently requests are sent that the claimant execute an authorization allowing the company to obtain medical records directly from the providers. However, the scope of these authorizations are often limited by claimants' attorneys to only records and/or providers related to the subject accident. Thus, legitimate inquiries into preexisting conditions are thwarted.

Once a claim enters litigation, plaintiffs must disclose the medical records and bills that support their claims, but absent a local rule or practice dictating otherwise, records predating the subject accident are rarely produced. Thankfully, courts have almost universally upheld the idea that "parties are permitted to conduct full, wide-ranging discovery as long as it is aimed at obtaining material which will be relevant to the ultimate disposition of the case."[1] Nevertheless, there is disagreement among federal district courts as to whether a plaintiff can be compelled to provide a medical records authorization via Rules 34 and 37 of the Federal Rules of Civil Procedure.[2] In light of that, the most direct path is for defense counsel to serve a subpoena for the records on the medical provider(s) pursuant to FRCP 45.

Care must be taken to ensure the subpoena complies with the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) which governs the disclosure and security of personal health information. Under 45 C.F.R. § 164.512(e)(1)(ii), a "covered entity" may disclose protected health information in the course of any judicial or administrative proceeding "in response to a subpoena, … , that is not accompanied by an order of a court or administrative tribunal" so as long as the entity receives "satisfactory assurances" that the individual whose protected health information is being sought has received notice of the subpoena.

The "satisfactory assurances" requirement is met where:

> a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
>
> (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);
>
> (B) The notice included sufficient information about the litigation or proceeding in which the protected

Joshua A. Sliker

Joshua A. Sliker's practice is focused on defending insurers and their insureds in bad faith, auto accidents, premises liability, products liability and construction defect (subcontractor) cases.

Barron & Pruitt, LLP
3890 West Ann Road
Las Vegas, Nevada 89031

702.331.8900 Phone
702.870.3950 Fax

jsliker@lvnvlaw.com
barronpruitt.com

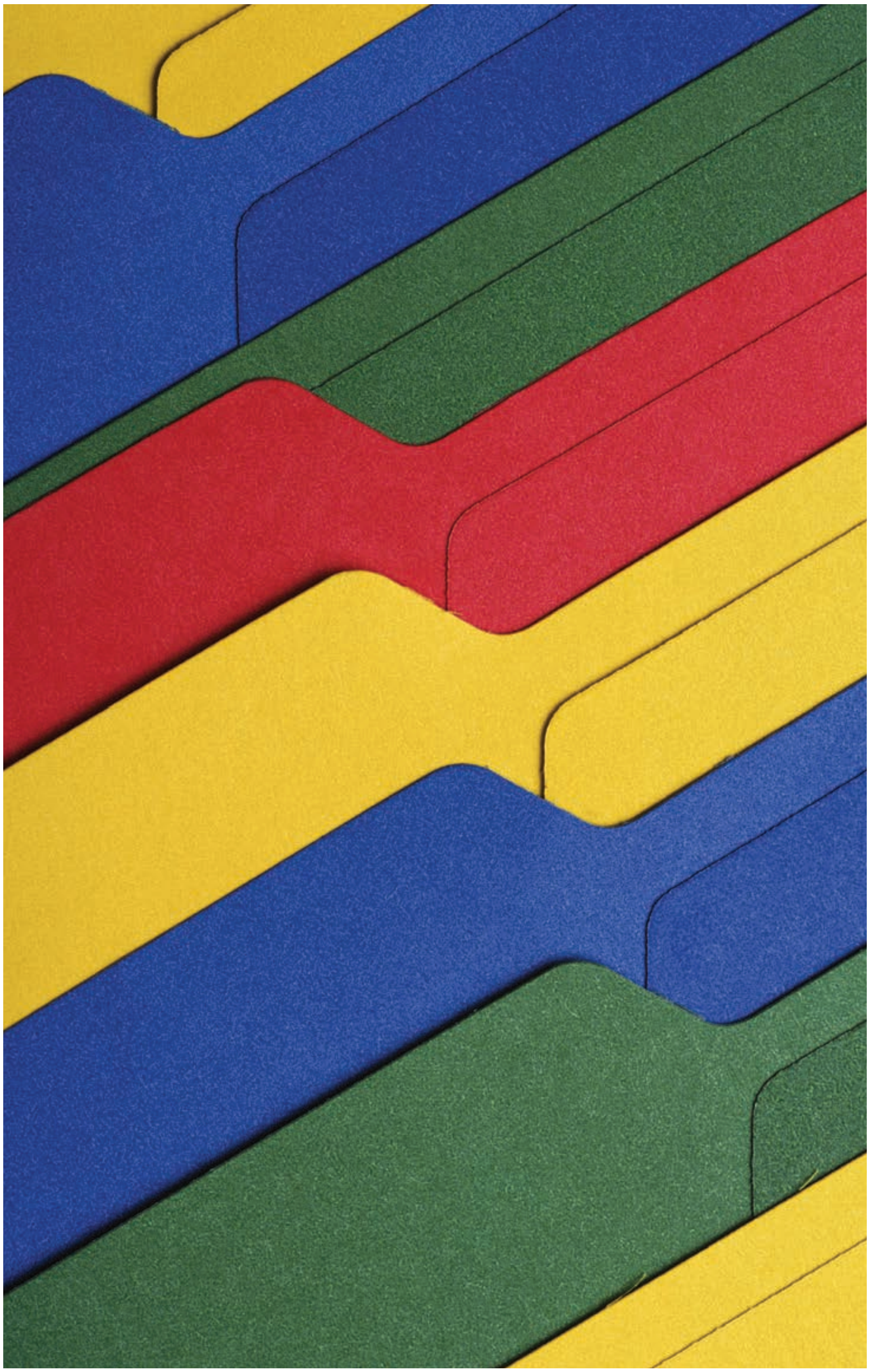
health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

In practice, defense counsel must provide a copy of the subpoena to plaintiff's counsel before it is served upon the healthcare provider. Under FRCP 45(d)(2)(B), the provider and plaintiff have 14 days following service of the subpoena to tender any written objections. Once that period expires (and assuming no objections have been lodged), defense counsel should dispatch written correspondence to the provider enclosing the certificate of service showing that the plaintiff received notice; noting the expiration of the objection period; and stating that there have been no objections. In doing this, defense counsel should be sure to carbon copy plaintiff's counsel so as not to run afoul of any rule prohibiting defense counsel's ex-parte contact with the treatment providers of a plaintiff.[3]



In a bodily injury case, the plaintiff's medical records and history are the foundation upon which the entire case is built. Strategic considerations aside, obtaining the information as early as possible is crucial for adjusters and risk managers to set reserves, assess overall exposure and evaluate settlement versus taking the case to trial. For those cases where the plaintiff's attorney refuses to provide medical authorizations or otherwise permit reasonable inquiry into her client's medical history, utilizing subpoenas is a viable way to diligently move the case forward. P

1 Factor v. Mall Airways, Inc., 131 F.R.D. 52, 54 (S.D.N.Y.1990).

2. See, generally, J.J.C. v. Fridell, 165 F.R.D. 513, 517 (D.Minn.1995) ("Requests for authorizations for the release of medical records can be properly ordered pursuant to Rule 34 but authorizations are not mandated."); Arnold v. ADT Sec. Servs., Inc., No. 05–0607–cv, 2009 WL 1086949, at *3 (W.D.Mo. Apr.22, 2009) (denying plaintiffs' motion for reconsideration of order compelling them to provide authorizations on the basis of Fed.R.Civ.P. 37(a)(5) (A)); Lischka v. Tidewater Servs., Inc., Civ. A. No. 96–296, 1997 WL 27066, at *2 (E.D.La. Jan.22, 1997) ("The cases almost universally hold, explicitly or implicitly, that Rule 34, along with Rule 37, empowers federal courts to compel parties to sign written authorizations consenting to the production of various documents."). The United States Court of Appeals for the Fifth Circuit has suggested in dicta that Rule 34 may be an appropriate mechanism by which to require a party to sign an authorization release. See McKnight v. Blanchard, 667 F.2d 477, 481–82 (5th Cir.1982) (suggesting that, when a party puts his or her physical condition at issue, a court can, upon proper motion, order him or her to sign a medical authorization); cf. Butler v. Louisiana Dept. of Public Safety and Corrections, 3:12–cv–00420, 2013 WL 2407567, at *9 (M.D.La. May 29, 2013); E.E .O.C. v. Resources for Human Development, No. 10–03322, 2011 WL 3841066, at *1 (E.D.La. Aug. 31, 2011).

3. *See Leavitt v. Siems*, 130 Nev. Adv. Op. 54, 330 P.3d 1 (2014).

Be Careful What You Type: The Evolving Role of Emails in Contract Litigation

With a few swift clicks of the keyboard, you just landed the deal of your career – a multi-year, multi-million dollar contract. The accomplishment feels electric, and congratulations from your coworkers abound. Unfortunately, the person on the other end of that email chain did not intend for you to land the deal, much to your dismay. The two of you had been negotiating via email for several weeks, and it seemed natural to seal the deal that way. But have you? Will your emails hold up under scrutiny from the board or, worse, a judge? And how could you have ensured your intent to contract was clear and that both of you were agreeable to contracting via email in the first place?

Contracting by email is nothing new to most general counsel. The E-Signature Act, applicable to interstate dealings, has been in effect since 2000, and many states and countries followed soon thereafter. What is new, however, is the increasing willingness with which courts are finding validity in contracts formed via email, often with parol evidence, from employees charged with the task to negotiate, but not necessarily sign, them.

Without proper checks and measures in place, you could find your company in court litigating over not just who meant what in an email, but whether a contract exists at all.

Signatures: From Pen and Paper to Keystrokes and Inboxes

The contract signature requirement is older than our U.S. common law. Beginning in 1677, and by some accounts earlier, with an act of English parliament, certain contracts were required to be in writing and signed by the party against whom enforcement was sought, in order to be enforceable.[1] These included contracts for marriage, for services that by their terms required performance for more than one year, agreements to transfer interests in real estate, wills and executor contracts, sureties and contracts for the sale of goods over a certain value, to name a few. Many states codified the rule.[2]

However, over time, a number of exceptions developed. In most states, only the material terms of a contract must be in writing. For the sale of goods, later codified in the Uniform Commercial Code, this means quantity, as all other terms can be determined using a reasonable "gap filler."[3] For services, this means the identification of the parties, the service and timing sufficient for a court to determine the parties' intent.[4] Thus, not all terms need be in writing or, if in writing, signed by either party.

A number of legal defenses also developed to match commercial realities. These include admission by the party opponent,[5] partial performance consistent with the terms of the alleged contract and promissory estoppel.[6] Additionally, between merchants – that is, parties charged with specialized knowledge and/or regularly dealing in the goods at issue – a letter of confirmation from one merchant to which the other, having reason to know of its contents, fails to object within a reasonable time (typically ten days).[8]

With the advancement of electronic communication, it was only natural for


Thomas G. Cardelli


Jennifer M. Paine

Thomas G. Cardelli is a board certified civil trial lawyer with the National Board of Trial Advocacy. He is a founding member of Cardelli Lanfear. His practice focuses on complex civil trials, personal injury, product liability, employment, malpractice/professional liability, commercial, and school, auto and truck litigation.

Jennifer M. Paine is a civil and domestic litigation attorney with the firm. Her practice focuses on commercial and insurance litigation, high asset divorce litigation and all areas of family law. She has been a featured author on Huff Post, USA Today and the Associated Press.

Cardelli Lanfear P.C.
322 West Lincoln
Royal Oak, Michigan 48067

248.850.2179 Phone
248.544.1191 Fax

tcardelli@cardellilaw.com
jpaine@cardellilaw.com
cardellilaw.com

contract communication to advance electronically, as well. There is, interestingly, a long history of contracting electronically in the U.S. In fact, one of the very first means of negotiating was by morse code, another was via telegraph and telegram, and, when phone lines laced the country, it was only a matter of time before fax lines, and faxed signatures, were to follow.[9]

It seemed uncontroversial to the National Conference of Commissioners of Uniform State Laws, then, to codify what had been assumed – electronic signatures, like faxed signatures, are a mark intended to identify the sender and, thus, should be given the same effect.[10] E-SIGN went into effect in October 2000 to affirm that contracts with electronic signatures may not be denied legal effect.[11] The substantive contract law applies to the case, and the Act renders electronic signatures as good as ink ones.

The Conference proposed the UETA for states to enact, so that e-signature laws on the state level would be uniform. It works in unison with E-SIGN to bring contract formation into the modern area of transacting business by email. Perhaps this is why 47 states adopted the proposed law without significant changes, and the three that did not – New York, Washington and Illinois – adopted similar laws within a few years of E-SIGN's enactment.

Internationally, the United Nations Convention on Contracts for the International Sale of Goods (CISG), though eliminating the merchant's unilateral contract rule and certain parts of the "knockout" rule for contract formation, is largely in accord and exists between 83 countries, at least 56 of them without any changes.[12]

In all three of these Acts, the traditional signature is replaced with any mark, symbol or sound intended to identify the sender.[13]

Where terms are not in writing, the court can glean the parties' intent, objectively, from the parties' course of dealings, course of conduct and course of performance, as well as the term's common usage in the parties' trade or industry. What is not stated explicitly, the court can find implicitly – and therein lies the problem.

While an email signature may not have been controversial, what has become controversial is the sometimes slippery slope to contract formation with a click of "SEND."

Contract Formation: E-Mails, Ambiguities and the Court

The swiftness with which contracts form via email can come as a surprise to parties who negotiate via email – even more for companies that hold employees out as having the authority to negotiate but not necessarily "seal the deal." And even more when they commit to an agreement but disagree upon unstated, or nonessential, terms. Here enters the court.

- ***No Physical Writing? No Problem:*** *Alliance Laundry Systems, LLC v. Thyssenkrupp Materials, NA.*[14] In this case, a buyer and a seller negotiated for the sale of steel by email. When the company failed to deliver the product, the buyer sued. The seller claimed no contract had been formed because the parties had no physical writing and did not agree to transact business electronically, as they must under the UETA. The court viewed the parties' emails and concluded that, as a "practical matter," if "the parties reached an agreement electronically, they will likely also show that the parties agreed to conduct the transaction by electronic means." The UETA "authorizes parties 'to agree' to conduct transactions by email and directs courts determining whether parties have so agreed to consider the 'surrounding circumstances, including the parties' conduct." Thus, the court can view email negotiations to determine whether parties, by their conduct, agree to contract electronically and, if so, what they agreed to do.

- ***Interpreting Emails:*** *Dana Limited v Grede Holdings*, CI 14-3963, Lucas County Court of Common Pleas, Ohio. In this automotive case, the buyer and the seller disagreed whether they contracted for the sale of certain parts to build axles, despite an email confirmation between them stating simply that the buyer agreed to the seller's attached, unsigned, proposal. In addition to arguing their email exchanges were not a "signed writing," an argument the court quickly rejected, the seller claimed the email exchanges lacked essential terms one would typically find in an automotive supply agreement. In turning to the email chains, spanning several months, the court concluded the parties contracted. The court also used their email discussion to interpret terms, such as payment productivity, that the seller alleged were ambiguous in their email confirmation. While the parol evidence rule would preclude evidence of a contemporaneous or prior oral agreement, the rule did not preclude parol and unsigned evidence to establish the parties' intent.

Similarly, UCC §2-202 ("Final Written Expression: Parol or Extrinsic Evidence") states that agreed terms may not be contradicted by evidence or any prior agreement or of a contemporaneous oral agreement, but they may be explained or supplemented (a) by course of dealing or usage of trade[15] or by course of performance[16] and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement. Those, too, the court can glean from emails.

- ***"Subscribed" Writings: Kloian v. Domino's Pizza***.[17] A cautionary case, here the applicable substantive law required agreements to settle lawsuits to be "subscribed," meaning signed at the bottom. While the court found the parties had signed their settlement electronically, because the purported agreement lacked a signature at the bottom of the document for the party against whom enforcement was sought, the agreement was unenforceable. This case serves as a reminder that the substantive law of contracts controls – the E-SIGN Act, the UETA and its counterparts merely render electronic marks signatures for substantive law purposes.

Tips to Avoid Litigation

There are a number of things companies can do to avoid an unwanted result.

- First, appoint a project champion. This person's job is to oversee all aspects of contract formation, from negotiation to documentation to gathering the appropriate signatures. This person may be a member of the legal group, who works behind the scenes or out in front, or a member of the business group, who leads negotiations. The point is to make one person responsible for speaking on behalf of the company when it comes to the particular contract at hand – rather than a number of people, any one of whom may incidentally contract.

- Review your Standard Terms and Conditions. Many of these are carry-overs from years past, and they may not specify whether an electronic signature constitutes a signature. If they are silent, then emails suffice.

- Require counter-signed documents to avoid the merchant's confirmation rule.

- Similarly, recite in each and every offer and counter-offer the UCC "mirror image" acceptance rule.

- If you desire formality, opt out of electronic signature contracts and require ink signatures. Parties are free to do so.

- If ink signatures are too cumbersome and time consuming, consider a verification software, such as cryptography, that requires use of passwords and unique identifiers to affirm the person electronically signing is, in fact, that person. Cryptography is the science of securing information. It is most commonly associated with systems that scramble information and then unscramble it.[18]

- And, finally, issue a litigation hold letter immediately upon notice of a potential contract dispute.

Many of those emails can be used to prove the existence of a contract, if signed, or the meaning of terms otherwise ambiguous, signed or unsigned. As the Second Circuit said in *Apex Oil Co. v. Vanguard Oil & Service Co.*,[19] a fax signature case equally applicable to email signatures, "[W]e recognize that we are permitting a substantial transaction to be consummated on fragmentary conversation and documentation. However, it is the practice in many fields to transact business quickly and with a minimum of documentation… Parties doing business with each other in such circumstances take the risk that their conflicting versions of conversations will be resolved to their disfavor by a fact-finder whose findings, even if incorrect, are immune from appellate revision." The more thorough your saved evidence in support of your contract, the less risk your company takes of an unfavorable ruling.

Otherwise, what seemed to be an easy and efficient way to land that deal could turn into a cumbersome, laborious court battle arguing who meant what in an email. P

1 'Charles II, 1677: An Act for prevention of Frauds and Perjuryes.', Statutes of the Realm: volume 5: 1628-80 (1819), pp. 839-42.

2 Cosgigan Jr., George P. (1913). "The Date and Authorship of Statute of Frauds". *Harvard Law Review* 26: 329 at 334–42.

3 See, e.g., ORC 1302.07.

4 See, e.g., *Jag Imperial, LLC v. Literski*, 2012-Ohio-2863 (Ohio Ct. App., Hamilton County, June 27, 2012).

5 Restatement (Second) of Contracts § 128.

6 Restatement (Second) of Contracts § 129.

7 Restatement (Second) of Contracts § 139.

8 UCC 2-201(2).

9 Singleton, S. (March 17, 1999). *Privacy Issues In Federal Systems: A Constitutional Perspective*.

10 *Alliance Laundry Systems, LLC v. Thyssenkrupp Materials*, NA, 2008 U.S. Dist. LEXIS 58985 (E.D. Wisc. Aug. 5, 2008).

11 Public Law 106-229, June 30, 2000 .

12 See full text at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

13 See, e.g., *International Casings Group, Inc. v. Premium Standard Farms, Inc.* (2005).

14 2008 U.S. Dist. LEXIS 58985 (E.D. Wisc. Aug. 5, 2008).

15 See also UCC § 1-205.

16 See also UCC § 2-208.

17 733 NW2d 766 (2006).

18 You can learn more at www.w3.org/Signature.

19 760 F.2d 417 (2d Cir. 1985).

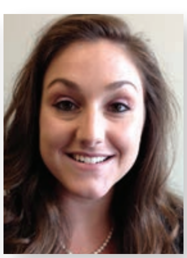
Families of Children with Special Needs and the Importance of Securing an Appropriate Education

In 2014, the Individuals with Disabilities Education Act (also known as the IDEA) celebrated a decade as a federal law codifying the services and rights guaranteed to children with disabilities in the United States.[1] Implemented in 2004, its effectiveness continues today ensuring legal protections for special needs children and their families. The concept of this law was born out of the many Civil Rights laws of the 1960s and in the spirit of the decision in *Brown v. Board of Education* and its progeny. All children with disabilities (regardless of wealth or status) have the same opportunity to receive a free and appropriate public education (FAPE), and states must endow educators with the tools necessary to provide students with effective educational programs that recognize their unique needs. This article focuses on school-aged children (ages 4-21) in the United States. Children facing problems with cognitive, physical, adaptive, language, social and/or emotional development, and other delays must not be ignored or overlooked in our education system and must be afforded an education tailored to help them reach their educational goals, and prepare them for further education, employment and independent living.[2]

Obtaining education services is critically important for special needs children. Studies have shown that the earlier these services are provided, the more beneficial the services will be to the growth, improvement and overall development of the child. Early intervention services such as speech therapy, reading and writing interventions, occupational therapy and behavioral therapy, to name a few, should be offered as soon as possible and are important in child development. Both parents and school districts can expect that starting services later in childhood will end up being more costly than if services began at an early age. As recognized by the Center on the Developing Child at Harvard University, "[w]hen we do not make wise investments in the *earliest* years, we will all pay the considerable costs of greater numbers of school-aged children who need special education and more adults who are under-employable, unemployable, or incarcerated."[3]

The first step is identifying whether a child has special needs and could qualify for services under the IDEA. It is important that parents and school districts play active roles in identifying a student's disability. Within the IDEA, the *Child Find* mandate places responsibility on schools to identify, locate and evaluate children with disabilities within their jurisdiction (even children in private or parochial schools, non-domiciled children, children in foster care or in hospital settings).[4] Even if the school district may not have a program tailored to the unique needs of the special needs student, it is still the responsibility of the educators to recognize the student's difficulties and

Jennifer M. Frankola



Julie C. Ruggieri

Jennifer M. Frankola is an associate at Lewis Johs Avallone and Aviles, LLP, where she co-founded the education practice group in the spring of 2010. A former full time public school teacher, she represents children of all ages with special needs and their families throughout the administrative, state and federal due process proceedings. She counsels parents and negotiates with school districts throughout the New York metro area.

Julie C. Ruggieri is an associate in the litigation department at the firm. She handles general liability cases and assists the education practice group in preparing briefs and appeals.

Lewis Johs Avallone Aviles LLP
61 Broadway, Suite 2000
New York, New York 10006

212.233.7195 Phone
212.233.7196 Fax

jmfrankola@lewisjohs.com
jcruggieri@lewisjohs.com
lewisjohs.com

need for educational services. The *Child Find* mandate continues throughout the school years and does not release a school from this requirement even if the student is nearing graduation but already experienced years of academic struggle because he or she lacked necessary educational services.

The next step is evaluating. Many learning disabilities go unseen, unheard or undetected. If a parent suspects their child may have a learning disability, they have the right to request their school district to evaluate their child in *all* areas of suspected disability. And they should do so – *in writing*. For example, if a child is struggling in reading or writing, but has not been otherwise diagnosed, a parent should write to their school indicating their concerns and requesting an evaluation to be conducted by their school district. This is free to the parent. Depending on the age of the student and their medical and educational history, this evaluation could be conducted by a number of professionals including a psychologist, a neuropsychologist, a speech pathologist, occupational therapist or psychiatrist. Should a parent disagree with the results of the school's evaluation, they may ask for a second opinion in the form of an *independent* educational evaluation (IEE). And they should do so – *in writing*. This evaluation should also be provided at no cost to the parent. In certain situations, it would behoove parents to obtain their own private evaluations and share them with the school district.

The next step is meeting and planning. Once a child has been identified and evaluated as a student with special needs, the parents will meet with their school district and create a plan that will incorporate goals and services. This may be a stressful time for parents. An Individual Education Plan (IEP), or a plan providing a specialized program designed by team members is prepared and discussed. This is a legal document. Parents are encouraged to bring any professionals, reports or evaluations to help describe their child's needs. Should a parent disagree with the

IEP, they must speak up and make their dissenting opinion known. A follow-up letter to the school district describing their concerns is often recommended. At this meeting or any time during the school year, parents may inquire about the different kinds of services and educational settings that could be offered to their child within the school district or outside of the school district. One of the most helpful tips for parents navigating the special education process is to be knowledgeable and assertive. Seek out and explore all different kinds of programs and settings. This will help to identify what is appropriate for the child and what programs can be ruled out. Go to the IEP meeting with an open mind and take notes. Send a letter to the school district with your impressions: the plans you agree with and the decisions with which you disagree. Keep a record of everything.

The next step is action. When a parent disagrees with the school district's decision regarding their child's needs, the services offered or the school setting, they have the right to challenge the school district and file a due process proceeding (in some states known as an impartial hearing). An administrative law judge will preside and both sides (school district and parent) will have the opportunity to present evidence and witnesses and cross examine. A decision is rendered and can be appealed to either a state appellate body or a federal court depending on the jurisdiction.

Note, a special needs child is entitled to an education tailored to meet their unique needs, but the child is actually *not* entitled to the "best" possible placement. It may seem contrary to rational thinking, but according to case law out of the Federal Sixth Circuit Court of Appeals, the IDEA "requires that the [school district] provide the educational equivalent of a serviceable Chevrolet to every handicapped student. [The parent], however, demands that the…school system provide a Cadillac solely for [their child's] use…we hold that the Board is not required to provide a Cadillac…"[5] A special needs student is entitled to FAPE. FAPE means the education is *free* to the parent, the services offered are appropriate and will advance the student toward meeting set goals, the *public* school directs the placement and services, and *education* is in the *least-restrictive environment*, where the student is accommodated with opportunities to be learning and interacting with general education students.

A parent is a child's first advocate. No one knows their lovable son or daughter like a parent. But building a team of knowledgeable and caring professionals is key to understanding a special needs child. Sharing this information with the school district is imperative in designing the most appropriate plan for the child. And where a dispute arises, voicing concerns and exercising due process rights is equally as important to continued educational success, building skills that will follow the child into adulthood.

1 20 U.S.C. § 1400 (2004).

2 *Ibid.*

3 *The Science of Early Childhood Development*. (2007) National Scientific Counsel on the Developing Child. http://www.developingchild.net. (emphasis added)

4 20 U.S.C. A. § 1412(a)(3)(A).

5 *Doe v. Board of Education*, 9 F.3d 455, 459-60 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994).

National Labor Relations Board Mandates That Employers Allow Employees Use of Work Email for Union Organizing and Related Activities

In a much anticipated decision, the National Labor Relations Board (NLRB) ruled in December 2014 that employers must permit employees the right to use work email systems for union organizing and other concerted activities relating to terms and conditions of employment. As is typical, the Board was divided and issued the ruling on a 3 to 2 vote.

This decision overrules prior NLRB precedent holding that employers could prohibit employees this type of access to their work email systems. In Purple Communications, Inc., 361 NLRB No. 126 (Dec. 11, 2014), the NLRB held that email has become a critical means of communication and that therefore, the Board's previous position on this issue undervalued employees' rights to communicate in the workplace about their terms and conditions of employment and gave too much weight to employers' property rights.

The NLRB has now adopted "a presumption that employees who have been given access to the employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on non-working time." The NLRB's ruling included a finding that employees should generally be entitled to use the work email systems during non-work time for the purpose of trying to gain support for union representation. The NLRB gave a preview of possible rulings in the future as it not only minimized an employer's property right to its email system, but further suggested that the Board may in the future disregard the property interests of employers in their phone systems and bulletin boards.

We expect that the NLRB's ruling will be challenged in the federal courts. However, unless the courts reject the NLRB's decision, employers should be aware of the following:

- The NLRB does not require employers to provide employees with email access generally. Therefore, employers should evaluate whether an employee needs email access to perform his or her job. If email is not needed, an employer may want to eliminate email access generally.
- Employers do not need to allow non-employees access to its email system.
- Employers may limit access to the email system for non-job related communications to non-working time. However, employers must enforce this type of restriction in a uniform, consistent manner. A failure to do so will expose employers to unfair labor practice charges.
- Employers may continue to monitor computers and email systems for legitimate management purposes, such as ensuring productivity and


Peter Bennett


Rick Finberg

Peter Bennett is president of The Bennett Law Firm, where he focuses on labor and employment relations law and litigation. He is active with the American Bar Association, where he currently serves as special advisor on the Standing Committee on the American Judicial System. He is also a trustee of the National Judicial College.

Rick Finberg is a shareholder and director of The Bennett Law Firm, where he represents clients throughout the Northeast in matters of labor and employment law and litigation.

The Bennett Law Firm, P.A.
P.O. Box 7799
Portland, Maine 04112

207.517.6021 Phone
207.774.2366 Fax

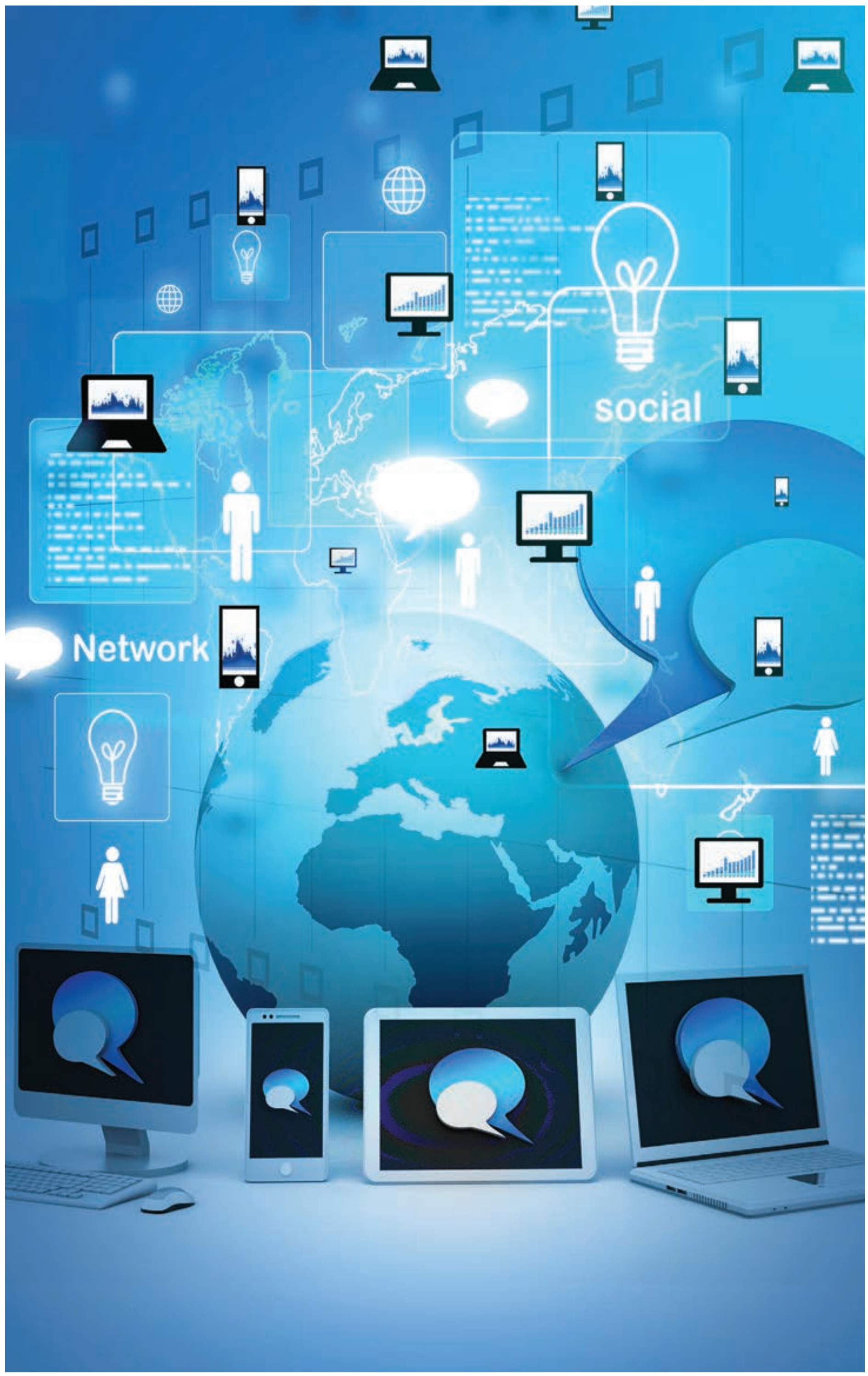
pbennett@thebennettlawfirm.com
rfinberg@thebennettlawfirm.com
thebennettlawfirm.com

preventing use of email for the purposes of harassing others or for purposes that could create liability for the employer.

- Employers may still maintain uniform and consistently enforced restrictions such as prohibiting large attachments or audio/video segments, provided the employer can demonstrate that allowing such attachments would interfere with the employer's email system's efficient functioning.

- Finally, employers are entitled to rebut the NLRB's established presumption that employees should be able to use work email for organizing and related activity provided the employer can demonstrate the existence of special circumstances. It is not clear what an employer will need to show to establish special circumstances. The NLRB provided little guidance on this point and further indicated that a finding of special circumstances will be a rare occurrence.

Some employers may delay any modification of their email policies until the federal courts have ruled on this issue. However, doing so will expose employers to unfair labor practice charges. The more conservative approach is to revise your email policies. P



Buying or Selling a Business in Ontario? Don’t Forget About Employees

The sale of a business will almost always involve the transfer of employees. Accordingly, it is important for each party to the sale to understand which employees will or will not be retained, whether termination pay is owed, if new employment contracts are necessary, and what tax or statutory obligations the purchaser may be assuming.

The conclusions drawn in the above issues will depend on whether the purchaser is purchasing the shares or the assets of the vendor. Regardless of the type of transaction, proper due diligence with respect to employees is necessary to avoid unwanted surprises.

Understanding the Differences Between a Share Purchase and an Asset Purchase

In Ontario, the rules governing the obligations to employees on the sale of a business largely stem from the Employment Standards Act, 2000 (the “Act”), the Agreement of Purchase and Sale, any existing employment contracts and the common law.

Share Purchase

In a share purchase, because the corporate employer is unchanged, there will be no change in the obligations and liabilities attached to the business, including obligations to employees. If an employee is terminated as part of the share purchase transaction, termination obligations will remain with the *employer*, except to the extent these obligations are assumed and satisfied by the vendor pursuant to the Agreement of Purchase and Sale. Indemnity provisions are typically a matter for negotiation between the vendor and purchaser.

(In Ontario, termination pay cannot be less than the amount specified in the Act. If termination pay is not limited by contract, the courts may determine the termination pay owed to an employee based on the common law requirement of reasonable notice of termination or pay in lieu of reasonable notice. Courts typically award far higher amounts of termination pay than the minimum amount set out in the Act.)

Asset Purchase

Subject to the Agreement of Purchase and Sale, in an asset purchase the purchaser can choose whether or not to offer employment to some or all of the vendor’s employees.

The Act provides that if an employer sells a business and the purchaser employs an employee of the vendor employer, the employment of the employee will be deemed to be continuous for the purposes of the Act.

This means that if a transaction is considered a “sale of a business” under the Act, that the purchaser inherits the prior service of the employee. Depending on the employee’s length of service, this may significantly increase termination pay entitlements of the employee.

It is not always a given that an asset purchase qualifies as a “sale of a business.” Some key factors in determining if a sale of a business took place includes analyzing: the value of the assets sold as a percentage of the

Alexander Levy

Alexander Levy is an associate at Houser Henry & Syron LLP, a boutique corporate law firm in Toronto, Ontario. His practice focuses on advising private companies and their owners in a range of corporate matters with a particular emphasis on mergers and acquisitions. His other areas of expertise include employment law and wills and estates.

Houser Henry & Syron LLP
Suite 2701 (27th Floor)
145 King Street West
Toronto, Ontario M5H 1J8 Canada

647.694.1180 Phone
416.362.3757 Fax

alevy@houserhenry.com
houserhenry.com

business; whether the purchaser continues the same type of operation as the vendor; and whether the purchaser continues at the same location as the vendor.

Do Employees Need to Sign New Employment Contracts?

In a *share transaction*, the employees will continue under the same employment contracts unless new contracts are entered into. A purchaser should be aware that it will need to provide fresh consideration to an employee in order for a new employment contract to be enforceable. The promise of continued employment does not qualify as consideration.

Changes made to an existing employment contract should be done with caution. If the changes are material, an employee may claim that he or she has been constructively dismissed and is owed termination pay. Fresh consideration is also necessary for any changes to an employment contract to be enforceable.

In an *asset purchase*, employees who are offered employment will usually sign new employment contracts. A purchaser should be careful if it chooses to hire some employees and not others, to ensure it does not choose not to hire someone for reasons contrary to Ontario human rights legislation. Choosing not to hire someone due to a disability or another prohibited ground may give rise to a human rights claim by the employee.

As stated previously, if the transaction constitutes a sale of a business under the Act, the employee's employment will be deemed to be continuous and uninterrupted by the sale. The purchaser will be required to recognize the employee's length of service with the vendor under the Act.

What If an Employee Is Not Offered Employment or Refuses Employment?

If an employee is not offered employment, the vendor will be liable for termination pay owed unless reasonable notice of termination has been provided. For this reason, vendors negotiate for the inclusion of a term in the Agreement of Purchase and Sale requiring the purchaser to offer employment to all employees on substantially similar terms and conditions.

If a purchaser knows that it will not hire certain employees, it will want an indemnity or some allocation of costs for termination from the vendor.

If the employee refuses an offer of employment by the purchaser and the term and conditions of the offer were substantially similar to those provided by the vendor, the purchaser would likely have no common law claim for termination pay against the vendor or the purchaser. This is because the employee will likely be deemed to have failed to mitigate his or her damages by accepting alternative employment. However, the employee will still be owed his or her minimum termination pay under the Act.

General Employment Considerations:

As part of the due diligence process, a purchaser should consider the following items early in negotiations:

1. What employees, if any, will the purchaser wish to retain? Are there enforceable employment contracts in place and if so what are the terms of employment? It is prudent to gather a full list of all employees with their compensation, job title, length of service and status clearly outlined.

2. What party will bear the costs of termination of any employees? This will largely depend on whether the transaction is a share or an asset purchase. This issue can have a major financial impact.

3. Is there any accrued and unpaid vacation pay owing by the vendor to the employees? Will this be adjusted on closing?

4. Are there any outstanding employment liabilities of the vendor? This would require investigating if there are claims under various statutes such as the *Pay Equity Act*, the *Occupational Health and Safety Act*, the *Employment Standards Act, 2000* and the *Workplace Safety and Insurance Act, 1997*.

Purchasing a business is a complex transaction. This article has only addressed some of the issues that need to be taken into consideration from an employment perspective. When considering selling or purchasing a business in Ontario, we recommend engaging legal counsel early in the process. This will help avoid unwanted surprises that may result in increased costs or unnecessary delay. P

The New Regulatory Framework on Natural Gas Infrastructure in Mexico

In 1995, a few activities of the Mexican energy sector were opened for private participation, including transportation, storage and distribution of natural gas. Since then, Mexico has received significant investments from transnational companies that provide natural gas midstream services. This has been most evident in two areas. First, in gas distribution, where the Energy Regulatory Commission (Comisión Reguladora de Energía, "CRE"), the federal regulatory agency, has granted more than 20 permits covering several geographic areas throughout the country. Second, in storage and regasification of liquefied natural gas, which takes place at the import terminals of Altamira on the Gulf coast, and Ensenada and Manzanillo, both located on the Pacific coast. Also, some Mexican distribution companies have operated in several cities in northern Mexico, and others have taken advantage of the niche market created by the self-supply scheme.

Although substantial foreign and domestic investments have been made in the transportation of natural gas, Petróleos Mexicanos ("Pemex"), through its subsidiary organism, Pemex Gas y Petroquímica Básica ("PGPB"), has continued to be an extremely dominant player. Until last year, PGPB was still the owner of approximately 90% of all natural gas transportation infrastructure, including the National Pipeline System (Sistema Nacional de Gasoductos, "SNG") and the Naco-Hermosillo system. This scenario was deplorable, given that PGPB was the sole supplier of natural gas of domestic origin, without the law requiring the creation of "Chinese walls" for unbundling transportation and commercialization activities, without real capacity reservation in place, and with a widespread "at the door" gas delivery scheme for large consumers. For years, the CRE attempted to implement the so-called "permanent regime" of first-hand sales of natural gas, which implied the capacity reservation in the transportation system, but it was never able to achieve its aim, due to a deficiency of effective regulatory tools, and a lack of political will by successive government administrations then in power.

The absence of adequate incentives for the construction of infrastructure, especially in the northern and western parts of the country, and the supply shortages from the southeast, gave rise to the "critical alerts" of 2011 and 2012, operative imbalances that made clear that the "timid" opening model had reached its limit. Attention to this crisis forced the federal government to promote the importation of liquefied natural gas utilizing the available capacity of the Manzanillo terminal. The regulatory impact of such was reflected in the increase of the SNG rates and, ultimately, in higher costs for end users.

Since the end of 2011, it became clear that there was an urgent need to construct a huge gas pipeline that would connect the enormous production of natural gas in south Texas with the increasing demand in northern Mexico

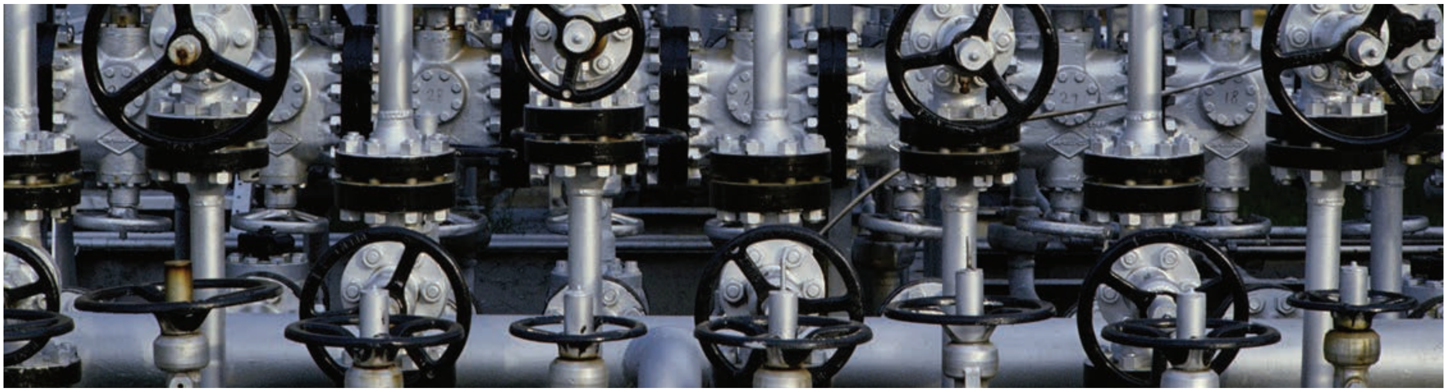
José María Lujambio

José María Lujambio coordinates the energy practice at Cacheaux, Cavazos & Newton from its office in Austin, Texas. Previously, he worked for many years in the Mexican government. From 2009 to 2012, he served as General Counsel of the Mexican Energy Regulatory Commission, leading the implementation of Mexico's 2008 energy reform in the gas and the renewable energy sectors.

Cacheaux Cavazos & Newton
Torre Metrocorp, Avenida Tecamachalco
No. 14-502
Colonia Lomas de Chapultepec
Mexico City, Mexico C.P. 11010

+52 55 5093 9700 Phone

jmlujambio@ccn-law.com
ccn-law.com



and in the Bajío region of central Mexico. As a result, the Los Ramones pipeline project was conceived. In spite of its magnitude, however, one single project seemed insufficient if it would play with the existing rules. With a new federal administration by the end of 2012, the favorable political environment for a major energy reform was the opportunity to modify the regulatory foundations of the infrastructure that connects natural gas supply and demand.

In December 2013, the Mexican Constitution was amended in order to change the paradigm of the Mexican energy sector towards a free market model with strong regulation where needed. In August 2014, the new Hydrocarbons Law was published, and on November 1, 2014, the presidential Rules for the Activities referred to by the Third Title of the Hydrocarbons Law (midstream and downstream activities) became effective.

The principal innovation of these legal bodies is the creation of the National Center for Control of Natural Gas (Centro Nacional de Control del Gas Natural, "CENAGAS"), mandated by the transitory constitutional articles and materialized by a presidential decree issued last September. The CENAGAS has a double mandate: (a) it will inherit and administer all the infrastructure that PGPB owned for rendering gas transportation services, and the corresponding contracts, and (b) it will serve as the operator of the natural gas transportation and storage national integrated system, made up by its own infrastructure and other interconnected infrastructure that offers systemic benefits. Thus, the CENAGAS is not itself an independent system operator but a "Transco," following the Anglo-Saxon terminology. While this is not an ideal world, it is better than what we had in the past.

The Hydrocarbons Law further provides that other integrated systems may be formed with the purpose of expanding coverage or offering benefits in terms of improvements in security, continuity, quality and efficiency in the rendering of services. Each of these systems shall have an independent operator, which will coordinate the different transporters and ensure open access, subject to a CRE permit.

On this point, the new legal framework is very clear: open access that is not unduly discriminatory is the cornerstone of the regulation of natural gas networks. To ensure such, rules exist detailing the posting of available capacity, secondary capacity markets, "Chinese walls" and unbundling, users' investments for interconnection purposes, rate regulation, and strict constraints (although the extent of such is still uncertain) on self-supply.

In addition, first-hand sales by productive State companies (Pemex and the Federal Electricity Commission, "CFE"), or any corporate entity on behalf of the State, must be carried out at the origin of the product and are subject to asymmetric regulation, with which one should expect an orderly and transparent use of system capacity and, hopefully, the flourishing of commercialization by agents other than Pemex, under a permits regime.

The CRE is now also responsible for granting permits for the compression, decompression, liquefaction and regasification activities that began to develop independently in the past decade; the first two, particularly regarding the supply of natural gas for vehicles, and the second two being fundamentally linked to ground transportation in regions without pipelines.

All of these changes occur in an institutional context in which the CRE will be a stronger, more independent, transparent and accountable economic regulator, which will transfer the authority for technical regulation of this entire infrastructure to the National Agency for Industrial Safety and Environmental Protection in the Hydrocarbons Sector.

In the meantime, the federal government has launched an ambitious expansion plan of the pipelines' network. This includes the Los Ramones system with its 1,000s kilometer tract and 42-inch diameter, whose first segment was recently opened, as well as the Pacific corridor, anchored through bidding by the CFE in order to supply U.S. gas to combined cycle power plants in northwestern Mexico and to industrial and residential consumers in that region. Consequently, before there is a boom in shale gas production in Mexico utilizing fracking techniques, we will see more and more importations.

There is no doubt that Mexico is betting heavily on natural gas to be the fuel of the present and the future. P

Legal Risk Management

Running a business means taking risks. The biggest risk an entrepreneur can take is not to think about risks at all. It is therefore wise to identify the risks that a company is exposed to in order to control them where possible, also known as risk management. In this way, costs can be saved and more profit generated. After all, prevention is always better than cure. Risk management is an ongoing process that requires in-depth knowledge not only of a business, but also of the environment in which the business operates. This includes legal risks, as well as legal solutions to other kinds of risks. Therefore, apart from a CEO (Chief Executive Officer) and a CFO (Chief Financial Officer), an increasing number of organizations also have a CRO (Chief Risk Officer), often a former lawyer.

What Is the Best Way to Deal With Risks?

There are four different ways to deal with risks:

1. A business owner can decide to bear the risk himself.

2. He can transfer the risk to others, for instance by taking out insurance. It's very important, however, that an insurance policy include the risk that needs to be covered.

3. He can decide to avoid the risk. However, that means certain activities will not be performed because the risk is too big.

4. The fourth way of dealing with risks is more attractive. It's trying to control the risk. Any available opportunities can be taken while any potential negative effects will be limited as far as possible. Legal means play an important role in this, as the following overview of different types of risks will show.

Risks

What are the risks for your business? And what opportunities are there to limit these risks by legal means? Some obvious risks include changes in the global market, unprofitable investments, fire, liability, defective product liability claims or wrong advice damage claims, defaulting suppliers and customers. The different types of risks are generally divided into five categories: (1) strategic risks, (2) operational risks, (3) financial risks, (4) risks in the area of knowledge management and (5) compliance.

Strategic Risks

Strategic risks include risks to reputation, badly executed mergers and acquisitions, not having the right or most recent software, and major changes in regulations. An entrepreneur who is aware of imminent safety and environmental requirements can anticipate risks and thus stay one step ahead of competition.

An important tool to limit strategic risks is the corporate structure. How do you prevent a poorly performing business unit from dragging along the entire business? Establishing subsidiaries is one way to prevent this. A business owner who intends to determine a corporate strategy is well-advised to consult his outside corporate counsel.

Reinier W.L. Russell

Reinier W.L. Russell is managing partner of the law firm of Russell Advocaten B.V. He is an experienced outside corporate counsel to both domestic and foreign businesses in the Netherlands. He deals with business formation and reorganization, corporate governance, insolvency law, employment issues, real estate issues and all aspects of liability and contract law.

Russell Advocaten B.V.
Reimersbeek 2
1082 AG Amsterdam
Netherlands

+31 20 301 55 55 Phone
+31 20 301 56 78 Fax

reinier.russell@russell.nl
russell.nl

Operational Risks

Operational risks result from the production process, for instance: changes in prices of semi-manufactured products or materials, availability of personnel, bad suppliers, weather, theft or fire, and availability and reliability of information technology. Many of these risks can be covered by concluding good contracts with personnel and suppliers. These contracts must contain provisions on retention of title, warranties, pledge and mortgage, joint and several liability, compensation for default, etc. An important tool in risk management is the use of General Terms & Conditions, so that your liability will be limited in each contract.

Financial Risks

This refers to the effective control of finances, including debtors, while taking account of exchange rates, interest rate, liquidity and solvency. This type of risk will generally be discussed with and covered by an accountant, but it's also closely connected to General Terms & Conditions and the contracts a business concludes. Clear contracts with debtors can simplify collection and thus increase the liquidity of a company.

Knowledge Management

Especially knowledge-intensive organizations, such as consultancy and information and communications technology, face this risk. It is very important to control sources of information effectively, to protect knowledge, and to limit the risk of key staff leaving. Patents, trademark protection, and confidentiality and non-compete clauses in employment contracts are important tools for retaining and protecting knowledge in your organization.

Compliance

Compliance means that a business acts according to the effective legislation. This applies to all business departments. Thus, compliance is not just a field reserved to the legal department, but it is also important for the purchasing and sales department, human resources, accounts department and the manufacturing department. Does your accounting department comply with the regulations on administration and annual reports? Are the terms of employment correct? Are you dealing with consumer complaints the right way? Do you have all the permits required? Are your products and the manufacturing process in line with the safety requirements? It is therefore important to check (or have checked) the management in all departments for the aforementioned risks. Ultimately, non-compliance can lead to criminal prosecution of the management.

Internationally operating businesses will be confronted with the fact that regulations on compliance may differ from country to country. In Europe there are, for instance, far-reaching regulations on the protection of data of employees, customers and citizens in general. In other parts of the world, privacy regulations are less important. If your business sells goods to European customers directly through an online store, the complaint handlings system containing customer data has to comply with these regulations on data protection.

The Outside Corporate Counsel, Your Risk Manager

Legal risks can be alleviated or avoided by consulting an outside corporate counsel. Just as you readily take out insurance and pay a small monthly fee to prevent financial disasters, so should you consult your outside corporate counsel on a regular basis at a low cost. This approach is cheaper and less stressful than unwanted expensive litigation. After all, your outside corporate counsel knows your business and your market well and can quickly provide you with sound legal advice, so that you will be aware of potential risks in time and deal with them, if desired.

Recent Discussion on Employees' Inventions

Under Article 35 of the current Patent Law of Japan (the "Law"), an invention made by an employee through performance of his duties to the employer belongs to the employee. Thus, the employee has the right to obtain a patent for such an invention. The employer obtains only non-exclusive license to the invention subject to certain conditions. This system has been criticized for years mainly by employer corporations as it is disadvantageous to the development of industries. The Patent System Subcommittee (the "Subcommittee") of the Intellectual Property Committee of the Industrial Structural Council has reviewed this issue since last year. At the meeting of the subcommittee held in November 2014, a draft of the summary report (the "Draft Report") was intensively discussed. Based on the Draft Report and the minutes of this meeting (which are available to the public), we will briefly explain the recent discussion on employees' invention system.

Current System

Article 35 of the Law

Article 35 of the Law provides the rules for the "Employee Invention" (as defined below). The general rule is as follows:

Right to Obtain a Patent

The employee who achieves an invention shall have the right to obtain a patent for the invention (the "Right").

Non-Exclusive License

When the invention made by an employee (i) falls within the scope of the business of the employer by its nature, and, (ii) has been achieved by an act categorized as a present or past duty of the employee, the employer shall have a royalty-free non-exclusive license to the patent for the invention. Such invention is called "Employee Invention."

Employee's Right to Receive Compensation

When an employee assigns to the employer the Right or the patent for Employee Invention, or grants an exclusive license to the employer, the employee shall have the right to receive "reasonable compensation."

Rules for Compensation

When the employer intends to adopt rules for compensation for assignment or exclusive license described above, payment of the compensation calculated in accordance with such rules shall not be considered unreasonable in light of such facts as the adoption process and the disclosure status of the rules to the employees.

Criticism of the Current System

The biggest issue surrounding Employee Invention is what "reasonable compensation" is. The current Article

Yukako Wagatsuma

Yukako Wagatsuma has more than 20 years' experience practicing law. Her practice involves a broad range of corporate and intellectual property matters related to cross-border transactions. Her corporate practice includes experience in mergers and acquisitions, strategic business alliance and various regulatory compliance activities and privacy.

Hayabusa Asuka
4th Floor, Kasumigaseki Building 3-2-5
Kasumigaseki, Chiyoda-ku
Tokyo, Japan 100-6004

+81 3 3595 7070 Phone
+81 3 3595 7105 Fax

yukako.wagatsuma@halaw.jp
halaw.jp

35 was created through the amendment in 2004 for the purpose of increasing the predictability of the amount of "reasonable compensation." Since then, there has been few litigations concerning Employee Invention. Nonetheless, some people have claimed that this system disturbed global business activities and industrial competitiveness. Particularly, those have claimed that under Article 35 the court would ultimately determine "reasonable compensation." In June 2013, the cabinet determined, as a part of the "Basic Policy Concerning Intellectual Property Policy" that the Employee Invention system should be reviewed to make it contribute to enhancing industrial competitiveness.

Discussion at the Subcommittee

Issues Under the Current System

In the Draft Report, the following three points are identified as problems in the current system for Employee Invention (the "Current System").

1. **Unpredictability of "Reasonable Compensation"**

   The current Law does not provide a calculation method or standard for "reasonable compensation" for Employee Invention. The Law requires "due process" for adopting rules for compensation. Many employers, particularly large manufacturers, seem to have adopted internal rules for Employee Inventions and paid compensation in accordance with the rules. In the Report, it is said that it becomes more difficult for an employer to calculate "reasonable compensation" for each inventor and a litigation risk is getting higher. In a company, many inventors as well as non-inventors are involved in the process of creating a particular invention. In addition, due to the complexity of recent products, one product is often manufactured using hundreds or thousands of patents. As a result, it becomes more difficult and costly for an employer to calculate reasonable compensation for an employee who has made one invention. Moreover, the inventor employee might not accept the compensation which the employer considers reasonable.

2. **Assignment to a Third Party**

   Despite the agreement between the employee and the employer for transfer of the Right for future Employee Invention, the employee may transfer Employee Invention to a third party. The employer cannot obtain the Right once the third party files an application for a patent for the relevant Employee Invention. There is no way for the employer to have the third party return the patent or patent application.

3. **Jointly-Made Invention**

   Even in the case where an invention is made in accordance with a joint research and development project of two parties, the inventor employees of the respective parties who actually make the invention will have the Right jointly. Thus, in order for one party to have its inventor employee transfer the Right, the employee must obtain a consent from the inventor employee of the other party, i.e., the co-owner of the Right. This makes the situation complicated and unstable.

Suggested Amendment to the Current System

In light of the problems described above, the Draft Report suggests that the Current System should be revised in the following direction:

Employer's Obligation to Employee

The employer should be obliged to adopt incentive plans for the inventor employees in accordance with the process set forth in the guidelines to be published by the government (see subsection c below). It is explicitly stated that by this requirement, the inventor employee would be secured the right substantially equal to the inventor's right under the current Article 35.

Right Belongs to Employer

The Right should belong to the employer. As exception to this rule, such entity that desires to make the Right belong to the inventor employee (such as a university and a research institute) should be allowed to do so. For an entity having no internal rules for Employee Invention, appropriate measures should be adopted so that the inventor employee's right should not be unfairly treated.

Guidelines for Adoption of Incentive Scheme

The Draft Report suggests that the government should issue guidelines for procedures in accordance with which the employer should accommodate discussions with the employees on incentive scheme. At the Subcommittee meeting, it was confirmed that so long as the rule is adopted through the process which is noncompliance with the guidelines, the rules should be considered reasonable and thus, the compensation calculated in accordance therewith should be considered reasonable.

The most controversial point was who should have the Right, particularly in the case where an employer does not adopt any internal rules on this point. The Subcommittee's opinion on this point seems to be undecided despite the language in the Draft Report. Some committee members still strongly claim that the Right should belong to the employees in this case to protect their interests.

The Draft Report was finalized along with the discussion at the Subcommittee meeting in November 2014 and published in January 2015. P

Voluntary Disclosure of Income for Tax Defaulters

The current international environment is strongly putting pressure on individuals and companies that hold financial businesses and properties undeclared to their own countries. In October 2014, at the Organisation for Economic Co-operation and Development (OECD) Global Forum on Transparency and Exchange of Information for Tax purposes in Berlin, 51 countries signed for the adoption of a new global standard that will allow an automatic exchange of information about taxpayers' positions starting in 2017.

This initiative is focused on the fight against tax havens, granting at the same time the possibility of recovering resources held abroad, thus not available for internal and legal investments. This aim is a main interest of Italy, since it is estimated that businesses in the amount of 150 billion euros are currently illegally held abroad by Italian taxpayers.

Italy, with this aim and on the basis of the legislative experience of other countries (i.e., the United States, the United Kingdom, Germany and France), approved a Voluntary Disclosure procedure in December 2014.

As per other countries' similar laws, the Italian Voluntary Disclosure procedure will not allow any reduction on unpaid taxes, but will grant reduced administrative penalties and the exclusion from a quite extensive list of criminal liabilities. The Voluntary Disclosure will apply to undeclared financial activities and properties up to September 2014.

Together with the Voluntary Disclosure procedure and in order to increase its attractiveness, Italy is entering international agreements with main tax havens in order to grant a full exchange of tax and financial information with regard to the businesses held by Italian taxpayers in such tax havens. Furthermore, Italy has introduced the new crime of self-laundering. Pursuant to this new crime, individuals who use money or goods originating from an illegal activity that they contributed to committing (such as tax crimes) shall be punishable with a fine and from two to eight years of imprisonment.

Voluntary Disclosure is possible for individuals, entities, partnerships and corporations, with tax residence in Italy. It is therefore available also for foreign corporations with a subsidiary or a branch in Italy in order to legalize the position of the Italian entity with regard to businesses illegally held abroad, but most of all, in order to free the managers (possibly foreigners) of criminal liability. In addition, according to the draft form prepared by the Italian Tax Authority, it seems that Voluntary Disclosure will also apply to undeclared businesses held in Italy and not only abroad.

It is mandatory that the taxpayer (or any jointly liable person) is not aware of any tax audit pending with regard to the assets subject to disclosure. Moreover the procedure can be implemented only once for each taxpayer.

The taxpayer will have to submit to the Italian Tax Authority all the

Francesco Luigi De Luca

Marco Salvatore

Francesco Luigi De Luca is a partner of the firm. He has broad experience in tax law, with a strong focus on tax litigation and cross-border tax issues. He has successfully assisted many Italian and international groups and corporations in their tax litigation and restructuring issues.

Marco Salvatore joined the firm as a partner in 2014. While practicing as a qualified chartered accountant, he mainly advised industrial and financial companies on corporate and tax matters. He actively dealt with purchase and transfer of shares, direct and indirect mergers, transfers and divisions of going concerns. He performed appraisals for several industrial and financial companies.

Studio Legale e Tributario F. De Luca
Piazza Borromeo
Milan, Italy 12-20123

+39 02 721 4921 Phone
+39 02 805 2565 Fax

deluca@deluca1974.it
m.salvatore@deluca1974.it
deluca1974.it

documentation and the information necessary for the determination of the undeclared income and activities (and this, for all the tax periods still auditable).

The Voluntary Disclosure procedure will reduce the administrative penalties to half of the minimum amount provided by law if the following conditions are fulfilled:

- The businesses are transferred to Italy or to any other country of the European Economic Area (i.e., any country of the E.U., plus Iceland, Lichtenstein and Norway);
- The transferred businesses are or were held in any country of European Economic Area;
- The taxpayer allows the foreign intermediary to transmit to the Italian Tax Authority all the information regarding the assets held abroad.

Should one of the above mentioned conditions not be met, the administrative penalties are reduced to three-quarters of the minimum amount provided by law. Further to the administrative penalties, the taxpayer will have to pay the full amount of the unpaid taxes, which will be calculated by applying the ordinary rates on the undeclared income to be determined according to the usual methods of determination.

For assets amounting to less than an average of 2 million euros, with regard to the tax years to be covered by the Voluntary Procedure, the taxpayer may choose to determine the taxable income in a simplified way, as 5 percent of the overall amount of the assets and then applying a tax rate of 27 percent on this lump sum taxable income.

A main difference between Voluntary Disclosure and the previous three Italian tax amnesties is that Voluntary Disclosure provides for the full payment of the taxes due (and not of only a lump sum amount) and that the taxpayer will have to fully disclose all the relevant information and documentation. Should the disclosure be partial or untrue, the taxpayer can be charged with a crime punished with 18 months to six years of imprisonment.

Moreover, Voluntary Disclosure will not ensure the taxpayer any benefit of anonymity (as was granted by previous Italian tax amnesties).

A further consequence of Voluntary Disclosure, however, is that the taxpayer (or the legal representative of the corporation) will be free of liability for a wide range of criminal offenses. Namely, the taxpayer will no longer be punishable for the following crimes:

- Fraudulent and false income tax return filing;
- Omitted income tax return;
- Omitted VAT and withholding tax payments;
- Money-laundering;
- Self-laundering.

Ultimately, by Voluntary Disclosure, Italy aims to obtain the disclosure of € 30 billion (thus available for investments in Italy) and € 6.5 billion in cash by the end of 2015. Whether this is a realistic estimation or not will be judged by posterity. P

Turkey's Journey: From Ratification of the Convention to Participation in the Cape Town Discount List

The Cape Town Convention on International Interests in Mobile Equipment ("CTC") is a multinational convention intending to harmonize and standardize transactions, involving certain movable assets. The CTC establishes global requirements and standards in terms of registration of sales contracts, leases, security interests as well as setting out legal remedies for events of defaults.

As of today, 74 states are parties to the CTC, yet the CTC has been ratified/accepted or approved by 62 of them.

Exciting History of Turkey Becoming a Party to the CTC

Turkey signed the CTC and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ("Protocol") on November 16, 2001, and after about 10 years following the execution, the Turkish Council of Ministers ratified the CTC and the Protocol with a decree as published in the Official Gazette on July 4, 2011, and numbered 2011/1926.

The subject Decree of the Turkish Council of Ministers set out that the CTC and the Protocol would come into effect in Turkey as of December 1, 2011, and that had been the case for Turkey.

Upon CTC and the Protocol's entering into force as of December 1, 2011, in Turkey, several steps have been taken by different parties in order to ensure their full implementation in the Turkish territory.

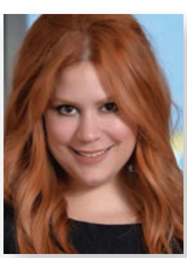
Given the existence of substantial conflicts between Turkish laws and the provisions of the CTC/Protocol, Turkey had to spend considerable effort to incorporate the CTC/Protocol into its local laws. As a matter of fact, the general principle under Turkish law is that in case of a conflict between a piece of law and a regular international treaty, they are both deemed to be at the same level in terms of hierarchy of laws. On the other hand, the Turkish Constitution provides that international treaties in the area of fundamental rights and freedoms will have primacy over any conflicting Turkish laws. Nonetheless, Turkey's efforts to harmonize its local laws in order for them to comply with the CTC/Protocol terms have helped all the parties interested in Turkey to understand and honor the terms of the CTC/Protocol.

Inspiring Actions of Turkey to Standardize Its Local Laws

With its outstanding motivation to harmonize the local laws and the terms of the CTC/Protocol, Turkey has made significant changes in its then existing legislation which are outlined below.

As an initial step, a new article has been introduced into the Turkish Civil Aviation Law ("CAL") on July 12, 2012. Its purpose was to bring further clarification that the CTC/Protocol would have primacy over the local laws in case of any conflict between the provisions of the CTC/Protocol and the existing Turkish legislations. This newly added article was a repetition of Article 90/4 of the Constitution, yet it helped to put third parties on notice that the CTC and the Protocol have duly been ratified and their

Serap Zuvin



Melis Oget Koc

Serap Zuvin is the founding partner of Serap Zuvin Law Offices. She has been extensively involved in various cross-border joint ventures and mergers and acquisitions. She has represented numerous multinational companies in connection with their agency, licensing, distribution and technology transfer agreements. She also is widely recognized for her expertise in aviation law.

Melis Oget Koc has participated in a range of mergers and acquisitions deals and conducted due diligence reviews on target companies from a variety of sectors including aviation, pharmaceutical, agricultural products, parking lot services and water distribution. She has drafted and negotiated share purchase agreements, asset transfer agreements, shareholders and share pledge agreements and other security agreements.

Serap Zuvin Law Offices
Beybi Giz Plaza, Maslak Mahallesi, Meydan Sokak
No: 1 Kat: 31 Daire: 121, Maslak, Sisli
Istanbul, Turkey 34398

+90 212 2807433 Phone
+90 212 2781911 Fax

szuvin@zuvinlaw.com.tr
mkoc@zuvinlaw.com.tr
zuvinlaw.com.tr

terms will prevail if there are any conflicts between their terms and existing Turkish laws.

Following such amendment on the CAL, on April 1, 2013, a Directive on implementation and enforcement of the Irrevocable De-registration and Export Request Auhtorization ("IDERA") was introduced by the Flight Operation Directorate of the Civil Aviation General Directorate of the Ministry of Transportation, Maritime Affairs and Communication ("CAD") which was then published in the CAD's official website. Obviously, the issuance of this directive was quite an important step taken on the implementation of the provisions of the CTC, given the fact that IDERA is the essential tool for the interest holders to exercise their remedies under the CTC. As a result of Turkey's continuous efforts to ensure the full implementation of the CTC/Protocol and eliminate the practical problems that the parties face during this process, a brand new and updated IDERA Directive entered into force on July 7, 2014, the purpose of which was to provide further clarity for the CAD on how to honor the duly issued IDERA forms.

Furthermore, a Circular came into effect in Turkey on July 31, 2013, as issued by the Association of Financial Leasing, Factoring and Financing Companies (who is the current competent legal authority for the registration of cross-border financial lease agreements) ("Association") and this Circular regulates the registration methods and principles of cross border financial lease agreements under Turkish Law. While doing so, the Circular provides for a specific provision on implementation of the CTC by stating that the Association will de-register the lease agreements from its records, in the event that the applying party provides a certificate as issued by the CAD stating that in case a lessor attempts to exercise its remedies under the CTC, the Association will not be able to refrain from de-registration of the financial lease agreement from its records.

This year, the Omnibus Bill[1] ("Omnibus Bill") *(Torba Yasa)* dated February 6, 2014, clarified on how claims of the interest holders should be executed at the execution and bankruptcy offices in Turkey. The Additional Article 2 *(Ek Madde 2)* as introduced by the Omnibus Bill to the Law on Execution and Bankruptcy[2] *(Icra ve Iflas Kanunu)* now clearly states that the claims arising from Article 8/1(a) and Article 10/1(a) of the CTC can be raised by the interest holders before the Ankara Execution Offices *(Ankara Icra Daireleri)* only. Consequently, (i) the creditors can take possession or control of any object charged to the same in the event of a default of the debtor pursuant to Article 8/1 (a) of the Convention and (ii) the Conditional Seller or the Lessor can re-possess or control of any object related to a title reservation agreement or a leasing agreement in the event of default pursuant to Article 10/1(a) of the Convention but in any case through Ankara Execution Offices.

Accordingly, the authority for the execution of claims of the interest holders have been assigned to only one particular execution office in Turkey, in Ankara, the capital city of the country, in which the CAD is located as well, for cases when the contract provides that the terms of the CTC/Protocol will apply. Obviously, because the implementation of CTC is quite a unique practice, the Turkish legislator felt the necessity to structure a one-stop agency for a repossession in order to facilitate the process and eliminate most of the arguments made by certain practitioners in the sector that enforcement of CTC terms would not be understood and possibly made by the execution authorities in Turkey.

All these major changes in the local laws of Turkey are the results of a substantial progress on recognition/implementation of the CTC/Protocol in Turkey by other governmental/quasi-governmental authorities other than the CAD.

Current Status: Very Important Achievement

On October 20, 2014, Turkey was added to the list of states ("Cape Town List") as defined under the Sector Understanding on Export Credits for Civil Aircraft ("ASU"), which stands for the states qualifying for the reduction of the minimum premium rates and consequently whose airlines are eligible to enjoy the Cape Town Treaty discount. In order to deserve this, Turkey has made the declarations which it must have made under the CTC/Protocol and did not make the declarations which it should not have made. On the other hand, Turkey's making or not making the necessary declarations under the CTC/Protocol was not enough for participating in the Cape Town List and enjoying the Cape Town Treaty discounts. Turkey's implementing the terms of the CTC and the Protocol without exception has led Turkey's success to participate in the Cape Town List.

Regarding the procedures in this respect: ASU provides for the framework of predictable, consistent and transparent use of officially supported export credits for the sale or lease of aircraft and other aircraft engines and spare parts. Therefore, the terms and conditions for being listed in the Cape Town List are set out under the ASU, together with the procedures to be pursued for participation of a state in the Cape Town List. Because Turkey is included in the Cape Town List of countries as of October 20, 2014, now the airlines in Turkey, desiring to obtain financing for aircraft with the involvement of export credit agencies will enjoy a discounted rate to the applicable fee as required to be charged by the export credit agencies under the terms of the ASU.

Turkey's entrance into this Cape Town List is obviously a big success given the fact that only 21 countries have accomplished participation in this list so far. This success will noticeably affect the aviation sector in Turkey in a very positive way, since obtaining finance with the assistance of export agencies is a preferred financing method for the airline companies from all around the world. Furthermore, for the financings to be obtained from the capital markets, Turkey's inclusion on the Cape Town List will have a positive effect in increasing ratings from the rating agencies. P

1 Omnibus Bill numbered 6562, published in the Official Gazette dated February 19, 2014 and numbered 28918.

2 Law on Execution and Bankruptcy dated June 6, 1932 and numbered 2004 published in the Official Gazette dated June 19, 1932 and numbered 2128.

Incorporation of a Branch of a Foreign Entity in UAE and its Benefits

Many foreign companies wish to expand their business to the Middle East. Dubai serves as a safe haven for these companies in light of the many advantages they get in terms of tax benefits, convenient labor laws and infrastructure. Dubai is a well-respected pathway to the East, and since it became a financial hub, companies that engage in all types of business activities are now looking to establish a presence here. Dubai has free zones, which provide international investors with the opportunity to expand into the Middle East and beyond. Free zones are basically economic zones created by the Government of Dubai to provide investors an opportunity to incorporate a wholly owned company, as opposed to obligating them to have a United Arab Emirates (UAE) national shareholder.

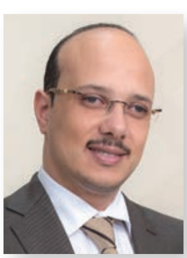
With a wide range of options available for free zone company incorporation, you can select one which reflects the nature of your business. Whether it is the location, the brand or the facilities of the free zone which attract you, you can find the best solutions based upon your legal and business preferences. As each free zone is set up to facilitate certain types of business activity or transactions, it is important to receive legal advice about which suits the needs of your business.

With 100 percent foreign ownership of a company in the UAE and the ability to trade or operate within the free zone, a free zone entity can provide great benefits to those wishing to expand their operations to the Middle East. In addition, with visa facilities available, you may even opt to move to the UAE with your business. While expanding your operations and developing a well-respected international presence, why not do this in the most economically efficient way possible, too? With 0 percent import and export tax, 100 percent repatriation of capital and profits, no corporate taxes for 15 years (renewable for an additional 15 years) and no personal income taxes, you are set up to have even more success and profitability.

Free zones themselves are also extremely helpful when it comes to setting up in the UAE as they provide excellent assistance with labor recruitment, sponsorship and housing. Furthermore, the free zone areas themselves are well equipped with amenities, facilities and communication infrastructures required to set up a business. The increased number of free zones operating in the country is serving to offer a wider range of options to potential investors, and allow a real existence in the UAE through offices or warehouses.

Branch Company vs. Representative Office

The Commercial Company Law covers the formation and regulation of branches and representative offices of foreign companies in the UAE, and stipulates that they may be 100 percent foreign owned, provided that a local service agent is appointed. Appointment of a local service agent is an absolute



Hassan Mohsen Elhais

Hassan Mohsen Elhais is senior partner at Al Rowaad Advocates, where he specializes in the drafting of all statement of claims, memos and consultation with regard to various kinds of litigation.

Al Rowaad Advocates & Legal Consultants
Monarch Office Tower, 6th floor 602
One Sheikh Zayed Road, PO Box 40073
Dubai, United Arab Emirates

+971 4 325 4000 Phone
+971 4 358 9494 Fax

hassan@professionallawyer.me
awf.ae

requirement under the commercial company law.

There is a difference between the corporate structures of a branch company and representative office of a parent company (based abroad). A branch fffice that is legally part of its parent company is permitted to enter into legally binding contracts or carry out activities that are specified in its commercial license and are similar to those of its parent company. Each branch can have several sub-branches, with the same licensing and registration procedures. On the other hand, a representative office is limited to promoting its parent company's activities, i.e., gathering information and soliciting orders and projects to be performed by the company's head office. In addition, representative offices are also limited to the number of employees they may use. In other words, activities are limited to promotion and enhancing business of the parent company.

Businesses in Dubai do not pay direct taxes on corporate profits or personal income except for oil companies that pay a flat rate of 55 percent and branches of foreign banks that pay a flat rate of 20 percent on net profit generated within Dubai. Customs duties are low at 4 percent with many exemptions. A branch office is not otherwise subject to any direct or indirect taxes.

Businesses can avail 100 percent repatriation of capital and profits. There are no foreign exchange controls, trade quotas or barriers. A stable exchange rate exists between the US Dollar and the UAE Dirham (US $1.00 = AED 3.678). Liberal visa policies permit easy import of expatriate labour with various skills and expertise.

Incorporation and Requirements

In order to incorporate either a branch or a representative office, a license application must be submitted to the Ministry of Economy. If the application is approved, it is then sent to the Economic Department of the emirate in which the application is filed. The time required to form a branch/representative office of a foreign company is approximately four weeks.

Documents such as board resolution of shareholders of parent company, articles of association, memorandum of association, commercial license must be submitted to the Economic Department. Authorized representative of parent company must file these documents at the appropriate department. It is advisable to appoint a law firm to ensure that all documents are filed properly at an appropriate department to avoid delays.

Legal Aspects of Intellectual Property Protection in Poland

In comparison to other European countries, Poland has a relatively short history of legislation regulating legal aspects of intellectual property. After over 120 years without its statehood entity, Poland could only form its own, modern legal regulation after the end of World War I in 1918. However, after regaining independence, in Poland, the measures aimed at the settlement of the legal status (and, consequently, providing legal protection) of broadly defined creative activity were quickly undertaken. Already in 1920, Poland ratified the Berne Convention for the Protection of Literary and Artistic Works. In 1926, the Parliament of the Republic of Poland passed the first act on copyright protection. In the communist period in Poland, a new act on copyright was implemented (1952), which was in force until 1994, when the current Copyright and Related Rights Act was passed, which was adjusted to the requirement of the European Union with the amendment of April 1, 2004.

With regard to copyright and related rights, apart from the above-mentioned act, Poland is bound by all the European Union regulations in this respect, and also by international conventions such as: the Berne Convention (1886), the Rome Convention (1961), the TRIPS Agreement (1994) and the WIPO Treaty (1996). The characteristic feature of the Polish regulation in reference to managing copyrights is strong administrative supervision over the execution of the so-called collective management.

Collective management of copyright and related rights is exercised by Collective Management of Copyright and Related Rights Agencies (OZZ). However, in order to be able to perform their functions, they must obtain administrative decision issued by the Minister of Culture. The control function of the minister is based on general prerequisite defining their competencies with regard to management, and stating whether Collective Management Agency "appropriately performs its responsibilities." One must admit that such a general control category gives rise to the danger of misuse of power by public administration authorities. Detailed control competencies are concentrated around financial reporting aspects of OZZ. At the same time, the entity entitled to execute financial rates control with regard to collective management of intellectual property copyright is the Copyright Committee appointed by the Minister of Culture. It is a specific entity formed by an administrative body, but operating within arbitration whose resolutions are controlled by common court.

With regard to industrial property right, in Poland the Act of 2000 is in force, and since the accession of Poland to the European Union (May 1, 2004) Poland also has been bound by appropriate union regulations in this respect. Furthermore, Poland joined several international agreements referring to industrial property, including: the Paris Convention (1883),

Krzysztof A. Wasowski

Krzysztof A. Wasowski, a founding partner of Elzanowski, Cherka & Wasowski, focuses his practice on complex civil and administrative litigation and intellectual property law.

Elzanowski, Cherka & Wasowski Law Firm
8 Kruczkowskiego Street
Nordic Park Building, 7th Floor
00-380 Warsaw Poland

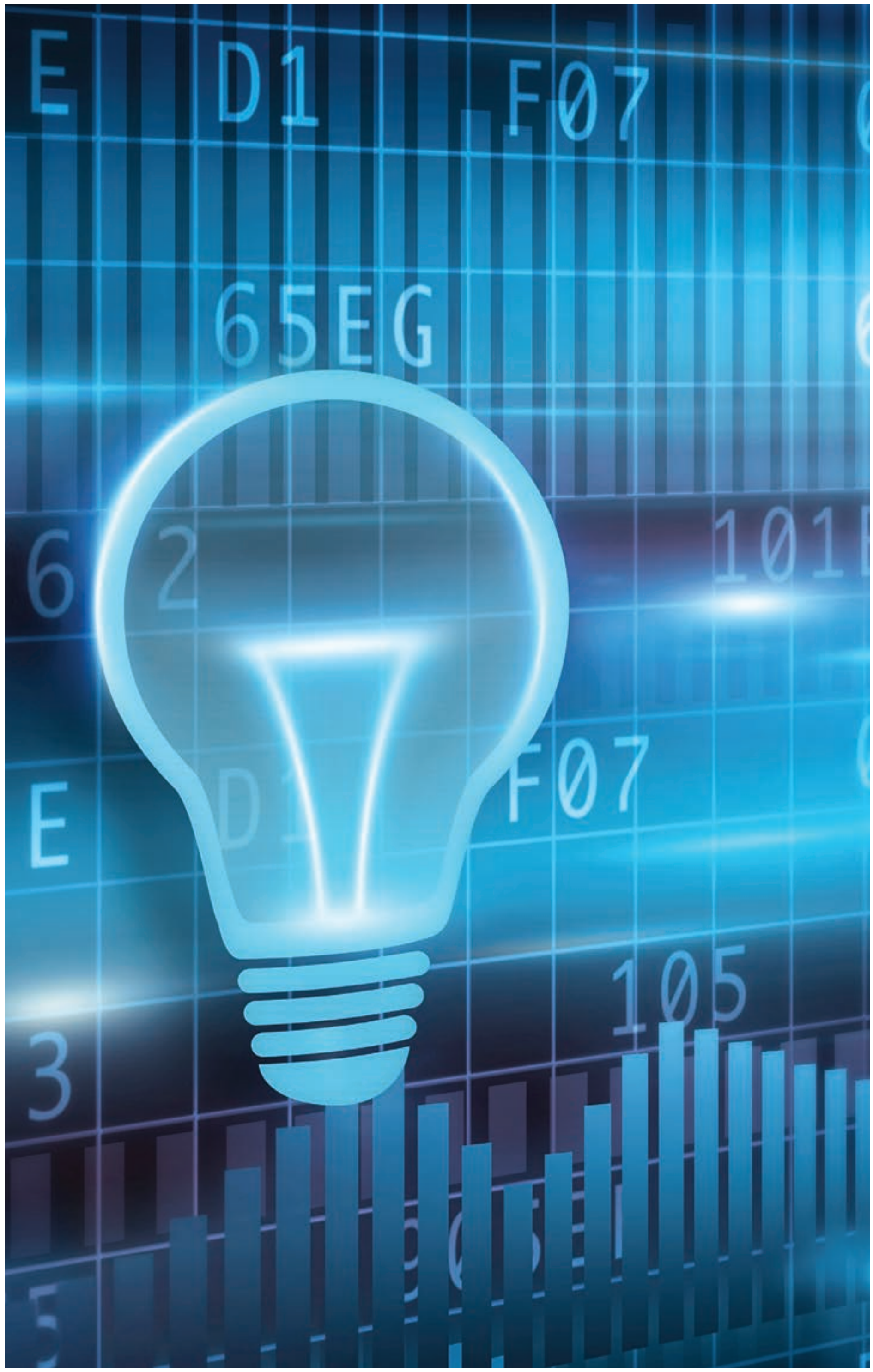
+48 22 745 32 35 Phone
+48 22 621 21 32 Fax

krzysztof.wasowski@echw.pl
echw.pl

the Washington Treaty (1970), the Madrid Agreement (1891) and the Singapore Convention (2006). The regulations protecting industrial property underwent far more considerable administrative regulations than in reference to copyright and related rights, and the Patent Office became the central public administration authority appointed for protection of industrial property.

The primary responsibilities of the Patent Office, apart from registering patents and marks, include resolving disputes arising in the context of registration. Interestingly enough, in the proceedings before the Patent Office, representing its participants by lawyers and counsellors has been excluded and the only authorized plenipotentiaries are patents attorneys. An amendment to the Act enabling all professional plenipotentiaries representing their clients before the Patent Office was submitted in the Parliament only in 2014. The Patent Office decisions with regard to industrial property are not controlled by civil courts (contrary to disputes concerning copyright and related rights), but by administrative courts, which constitutes another characteristic feature of the system of protection of these rights.

The novelty that made the development of intellectual property copyright protection in Poland more dynamic was implementing in 2010 the system of financing science, in which the principal role belonged to financing the so-called commercialization of scientific achievements of Polish higher education institutions. The authority of public administration that possesses statutory competencies regarding “national” financing of scientific achievements of Polish higher education institutions which could be implemented within the scope of the activities of Polish entrepreneurs operating on the territory of the Republic of Poland is the Minister of Science, on behalf of whom a special government agency called the National Centre for Research and Development (NCBiR) operates. Apart from the budget resources, NCBiR (since September 1, 2011) has obtained the rights of Intermediary Institution with regard to three European Union operational programmes (Human Resources Development, Innovative Economy and Infrastructure and Development), within which it operates with the amount of ca. EUR 4bn in the nearest settlement period, for commercialization of science.



In spite of almost a hundred years of tradition related to intellectual property in the Polish legal system, the opportunity for adequate financing of creative achievements of Polish scientists has existed only for a few years, within the scope of adopting the results of their activities for commercial needs. There is no doubt that the inflow of such a considerable amount of funds has increased the demand for legal service related to the said process. P

Due Diligence: An Australian Perspective

Why Do Due Diligence?

Every purchaser wants to know that they will get what they are paying for.

The Australian Perspective

The importance of warranties and due diligence is demonstrated by the 2004 Australian High Court decision in *Woolcock Street Investment Pty Limited v CDG Pty Limited* [2004] HCA 16.

> Woolcock purchased a commercial building and offices in Townsville (Complex) from the trustee of a property trust some years after the complex was built. There was no warranty in the sale contract that the complex was free of defects, and there was no assignment of the trustee's right against those responsible for any such defects. About a year after the purchase, the Complex showed signs of structural distress due to subsidence either of the foundations or the soil upon which they were built. CDG was the structural engineer employed by the trustee in 1987 to assist with design of the Complex. There was evidence that CDG had recommended to the trustee that a geotechnical report be obtained as to the load bearing capacity of the structure, and the trustee had refused to incur the expense. It was likely that the subsidence was unlikely to cause any physical harm to anyone and that the only loss was economic.
>
> The High Court by a majority found that CDG did not owe a duty to Woolcock. Woolcock's vulnerability to risk and its ability to protect itself from that risk was a key factor in determining whether CDG owed it a duty of care to avoid economic loss. The court found that Woolcock as a commercial investor was able to protect itself from the risk of subsidence. It could for example have obtained an expert's report before purchase or negotiated appropriate terms into the sale contract. It did neither and this was sufficient to negate any liability.

The decision makes the point that a failure to conduct due diligence or obtain suitable warranties may deny access to other relief. When taken with the provisions of the *Competition and Consumer Act 2010* which give effect to proportional liability (rather than simple joint and several liability, and reductions for loss due to a claimant's failure to take reasonable care), it is clear that a buyer in Australia who cuts corners with their due diligence, largely does so at their own risk.

Due Diligence on What

The starting point for any proper due diligence exercise should be to ask the prospective purchaser for:

1. a copy of any marketing material including offering documents, advertisements, communications from the agent etc., which have induced

Selwyn Black

Selwyn Black leads the Business Lawyers Group at Carroll & O'Dea. His practice includes advising on a variety of issues for businesses including acquisitions and disposals, joint ventures, contracts and employment arrangements, international supply and distributorship arrangements and associated disputes and regulatory issues.

Carroll & O'Dea
Level 18, St. James Centre
111 Elizabeth Street
Sydney, Australia 2000

+61 2 9291 7100 Phone
+61 2 9221 1117 Fax

sblack@codea.com.au
codea.com.au

the purchaser to put in an offer (Marketing Material);

2. a written list of those features which the purchaser regards as important in their decision to proceed (Assumptions); and

3. details of any proposals the purchaser has in mind for the business (Proposals).

Accordingly, and subject to special circumstances and the limitations mentioned below, the due diligence exercise then becomes a task in testing out whether:

1. the key statements and representations in the Marketing Material are reasonably based;

2. the Assumptions are reasonably based; and

3. there are any business or regulatory impediments to achieving the Proposals, as these may be an integral part in the decision to buy.

Cost Efficient Due Diligence Exercises

After price, the next most negotiated term at the outset of a deal seems to be the length of the due diligence period. The vendor will wish to limit this because they don't want to waste time with a party who may not sign, particularly if there are other potential purchasers.

This time factor, together with cost, leads to the need to limit the extent of a due diligence exercise.

The process of cutting down the exercise should be undertaken in consultation with the client, and documented so that the prospective purchaser accepts that some corners are being cut, with consequential risks.

The whole magic about the exercise is trying to work out which corners you can safely cut.

A review of the Marketing Material, Assumptions and the Proposals will readily indicate some areas which can be ignored because:

1. They are irrelevant – e.g. if a business is being purchased to obtain its freehold land for another use, the purchaser would not be concerned with the past trading performance of the business;

2. Some of the material may be covered by a particular consultant or a client's own in-house expertise – e.g. much of the Marketing Material may be devoted to analysis of the market, comparable sales, discussion on capitalization rates etc. If the purchaser is retaining a valuer, or is sufficiently confident of their in-house valuation expertise, this area is covered and needs no further external due diligence. However it is important that the due diligence team provides feedback to the valuer or those looking at the issue in-house, so that the valuation is not based on assumptions which may be incorrect;

3. They lack materiality – how significant is each particular aspect issue or assumption to the business or the purchase?

Workplace, Health and Safety – an Australian Statutory Example

Each country will have a variety of specific statutory provisions that create local due diligence issues. The following is one example, of many found in the Australian context. Other examples include local tax, stamp duty, employment, zoning, privacy and land laws.

Apart from Victoria and Western Australia, each Australian state and territory has implemented variants of the model workplace, health and safety laws developed by Safe Work Australia. These new laws impose duties on persons conducting business or undertakings to ensure the health and safety of workers, among others. One duty imposed requires officers of a person conducting a business or undertaking to exercise due diligence to ensure the person is compliant with the workplace, health and safety laws (see for example, section 27 of the *Work Health and Safety Act 2011* (NSW)). Therefore in Australian jurisdictions where this or a similar provision has been enacted, if the purchaser of a business is a company, due diligence in relation to occupational health and safety (OHS) must be conducted by its officers if that business is to be carried on by the company after completion.

While a vendor may give warranties in relation to OHS issues up to the date of completion, that may be insufficient to discharge the purchaser's statutory due diligence obligations. The laws impose duties on the person conducting the business or undertaking. Accordingly, immediately on completion, a purchaser is required to be complaint with those laws and will be liable for any breaches. A prudent approach would be to obtain an expert OHS report ahead of purchase, for the following purposes:

1. determine which areas of OHS may need to be strengthened or whether new procedures and controls may need to be implemented (and seek an adjustment to the purchase price or warranties as appropriate);

2. determine what level of insurance cover is appropriate for the business given the OHS risks involved;

3. comply with workplace, health and safety laws.

The Goal

People only make money by taking a risk, so the aim of the advisor in a due diligence exercise is not to stop the client taking all risks. Rather, it is to assist the client to make an informed decision on whether to buy and, if so, on what terms. Local legal input is essential for this purpose. P

Some New Policies Impacting Foreign Investment in China

Since President Xi Jin Ping took office in November 2012, a series of new policies have been implemented and many new measures have been taken which have greatly impacted foreign investment in China. Here are some of them.

Complete End of Super-Preferential Tax Policies

Early on in the days of China's reform and opening to foreign enterprises, China launched super-preferential tax policies for foreign investors in a bid to speed up its economic growth. For example, before the year 2008, enterprise income tax rate was normally 15 percent for foreign investment enterprises (FIEs), but 33 percent for domestic companies. Some qualified FIEs could even enjoy two years exemption and three years 50 percent exemption from enterprise income tax, while domestic companies couldn't. On top of national level super-preferential tax policies, provincial governments then issued further preferential tax policies, one after another, in order to compete with other provinces in attracting more foreign investment into their area. On top of national and provincial level super-preferential tax policies, county governments issued further tax preferential policies, one after another, in order to compete with other counties, and so on. Such kinds of local preferential tax policies normally included giving more tax exemptions, tax refunds, etc. Many of those local policies were beyond the local governments' authority, and were actually illegal. Domestic companies have long been complaining of these kinds of unfairly biased treatments.

On January 1, 2008, China's unified Enterprise Income Tax Law finally took effect. National level super-preferential tax policies for FIEs were ended. But local policies continued to exist.

Then, on December 9, 2014, the State Council issued a Circular of the State Council on Reviewing and Regulating Tax Preferential Policies, which requires:

- All local tax policies which are in violation of national laws cease to be carried out from December 1, 2014, and must be abolished;
- All local tax policies, which are not against national laws, must be reported to State Council for approval. If not approved, they must also be abolished.

With the promulgation of this remarkable Circular, local governments are now expected to compete with one another in attracting investment (including foreign investment) based on the quality of their services and their overall business environments, rather than using tax incentives.

Edward Sun

Dr. Edward Sun is managing partner of Hengtai Law Offices. He has more than 20 years' experience in private practice. His main practice areas include real estate, foreign investment, corporate advisory, mergers & acquisitions and commercial litigation/arbitration.

Hengtai Law Offices
1118 West YanAn Road
Suites 1103-1105, Cloud Nine Plaza,
Shanghai, China 200052

+86 21 62262625 Phone
+86 21 32200273 Fax

edward.sun@hengtai-law.com
hengtai-law.com

Anti-Monopoly Campaign

China's Anti-Monopoly Law (AML) went into effect on August 1, 2008. But until the end of 2012, this law seemed dormant. No single defendant had been convicted of violating Anti-Monopoly Law. In fact, the only monetary penalty levied by any Anti-Monopoly Law enforcement agencies was made against two small trading companies for their monopolizing a raw material. They were fined a total sum of RMB7 million in November 2011.

Starting from early 2013, the enforcement of the AML tightened sharply. Well-known cases include:

- January 2013, six foreign LED panel suppliers, including the two South Korean companies (Samsung and LG), and four Taiwan companies, were fined a total sum of RMB353 million for their horizontal monopoly agreement;
- February 2013, two liquor suppliers were fined a total sum of RMB449 million for their respective vertical monopoly agreements;
- July 2013, Shanghai Association of Gold Jewelry and five Shanghai local retailers were fined a total sum of RMB1.05 million for their horizontal monopoly agreement;
- and August 2013, six foreign milk powder suppliers were fined a total sum of RMB668 million for their respective vertical monopolistic conducts.

The list continues. Coming into 2014, Anti-Monopoly Law enforcement agencies have been even busier. Big brands such as Microsoft, Qualcomm, Tetra Pak, Sumitomo, Seiko, Mercedes, BMW and AUDI were investigated and/or fined for their monopolistic activities. Sumitomo and seven other auto parts manufacturers were fined a total of RMB830 million and Seiko and three other bearing manufacturers were fined a total of RMB400 million.

Not only big companies were targeted for their monopolistic conducts; some small and medium-sized companies were targeted by AM law enforcement. For example, in July 2014, the State Administration of Industry & Commerce announced that they had closed 12 cases, all involving small and medium-sized companies.

Although more domestic companies have been investigated for monopolistic activities, most of the penalties were imposed on FIEs. This phenomenon has led to several foreign governments expressing their concerns to the Chinese government.

In my presentation titled "China's Anti-Monopoly Law and its Impact on Distribution of Goods in China," which I presented at the Association of Corporate Counsel 2013 Annual Conference, I urged corporate counsel to pay more attention to compliance with China's AML to ensure smooth, hassle-free business activities. Now, on high alert, due to Anti-Monopoly enforcement pressure, some FIEs have already started to review their sales policies and legal documents, and to train their sales staff on how to be compliant with China's AML.

Anti-Corruption Storm

Before President Xi took office, China's corruption was nearly out of control, in both political and commercial activities. Many foreign businessmen had adapted themselves to this corrupt business environment and had even found it more lucrative for doing business than in less corrupt countries.

President Xi, and his colleague Mr. Wang Qishan, secretary of the Chinese Communist Party Commission for Discipline Inspection, has significantly improved the corruption situation. From November 2012 to the end of 2014, 58 ministry level high officials (and retired high officials) have been investigated and/or arrested for corruption. Numerous lower level officials have been sent to jail. Dozens of officials have been frightened into committing suicide. An anti-corruption storm is sweeping over China!

This storm has so far been stronger in the political realm than in the commercial. But I believe that this imbalance should not be interpreted to mean that China would continue as before to tolerate commercial corruption. In my opinion, this imbalance is just expediency of implementing the anti-corruption storm. President Xi and Wang Qishan know well that they need to tackle political corruption first before tackling commercial corruption. This is the reason why most bribers were freed after confessing to bribery activities. Bribers' testimony is needed for prosecuting corrupt officials. Once President Xi and Mr. Wang find that government officials are clean enough, the anti-corruption storm will surely blow stronger through the commercial sector. Several signs already show President Xi and Wang Qishan's hatred towards commercial corruption. For example, a large number of high officials of state-owned companies, including CNPC, China Resources, China Unicom, China Shenhua's high officials, have been sent to prison. Another example occurred in September 2014 when a record-high fine of RMB3 billion was imposed on the GSKCI for its corruption and GSKCI's chairman Mark Reilly was sentenced to three years imprisonment!

I see no coincidence that the above three new policies/measures have all occurred since President Xi took office. Xi's concept of governance is clear to the public now. In the political field, he expects a clean, transparent and efficient government. Regarding commerce, he seeks to build a fair, transparent, hassle-free market. Such outcomes would, of course, be beneficial for foreign investors in general. But for those who are used to doing business in China's pre-Xi business environment, I suggest that they ought to take measures soon to prepare for the impending storm that is potentially coming their way. P

Customs Law: Business Traveler Under the Oversight of Customs

Consider this experience of the former soccer striker Karl-Heinz Rummenigge: In 2013, the president of FC Bayern was stopped by customs at Munich Airport when arriving in Germany from Qatar. He had two luxury watches in his possession that he had failed to register as in free circulation and to pay customs duty on. He was fined a handsome sum of EUR 249,000, plus an entry relating to tax evasion was made in his certificate of conduct.

What happens, however, if an expensive watch is already on its owner's wrist when leaving the country, and it is in fact not a souvenir from a trip? Customs law, which applies to the same extent in all 28 European Member States, stipulates that any goods that leave Community territory without specifically being registered to do so, are given the status of non-Community goods. When re-entering Community territory, non-Community goods must once again be subjected to a customs clearance procedure, which typically involves registering the goods for transfer into free intra-Community traffic. According to customs law, these goods would constitute return goods, which are generally exempt from customs duty.

Business travelers carry valuable objects, often unknowingly – laptops, company cell phones or product samples, just to name a few. Upon re-entering the country, customs typically asks where the goods in fact originated. Because only very few travelers carry purchase receipts with them for their personal luggage, it becomes impossible to provide receipt evidence during a customs check. This might result in import duty notices and penal proceedings.

The solution to this problem is to register with customs any objects the traveler carries prior to leaving the country and to have "identification measures" performed. The traveler will then be given a written confirmation about the goods being exported with a detailed description of their quality or with serial numbers. When returning, the traveler then once again registers the goods presenting the certificate. The goods are then exempt from customs as return goods.

Please note: When carrying cash amounts of EUR 10,000 or more (or the amount of U.S. dollars equal to that), the process is similar. Though importing cash is always duty free, registering serves to combat international money laundering. Offenses against the registration obligation usually result in penalties of 25% of the amount carried if the irregular transfer was deliberate. Even if this was a negligent action, the penalty rate is still 12.5%. This is a significant penalty, which could easily be avoided.

Dirk Pohl

Dirk Pohl, an attorney and certified tax law specialist, focuses on tax law, fiscal offenses and tax frauds. He assists clients in creating reports for tax authorities concerning false or incomplete tax declarations. He also advises individuals, businesses and nonprofit organizations on all aspects of the German sales tax law, income tax law, corporate tax law, commercial tax law, estate tax law, the tax code and the customs code.

WINHELLER Attorneys at Law & Tax Advisors
Europa-Allee 22
Frankfurt am Main, Germany D-60327

+49 69 76 75 77 80 Phone
+49 69 76 75 77 810 Fax

info@winheller.com
winheller.com

Business travelers carry valuable objects, often unknowingly – laptops, company cell phones or product samples, just to name a few. Upon re-entering the country, customs typically asks where the goods in fact originated. Because only very few travelers carry purchase receipts with them for their personal luggage, it becomes impossible to provide receipt evidence during a customs check.

Two Primerus Personal Injury Lawyers Take Bench

Primerus is proud to announce two members of the Primerus Personal Injury Institute were named judges in late 2014.

Jeff Crabtree, a consumer protection and personal injury attorney in Honolulu, Hawaii, representing brain injury victims, was nominated by the Governor of Hawaii to serve a 10-year term as a state circuit court judge, effective November 25, 2014.

According to Primerus President John C. Buchanan, Crabtree and Lewis exemplify the high caliber of Primerus attorneys, who share a commitment to common values Primerus calls the Six Pillars.

James C. Lewis, a personal injury lawyer with Shapiro, Lewis, Appleton & Duffan in Virginia Beach, Virginia, was elected by the Virginia General Assembly to serve an eight-year term as a Circuit Court judge for the 2nd Judicial Court, effective January 1, 2015.

According to Primerus President John C. Buchanan, Crabtree and Lewis exemplify the high caliber of Primerus attorneys, who share a commitment to common values Primerus calls the Six Pillars. They are integrity, excellent work product, continuing legal education, civility and community service.

"This demonstrates that Primerus does indeed have the finest attorneys," Buchanan said.


Jeff Crabtree


James C. Lewis

Crabtree was selected from a pool of 19 applicants, after review from a nine-member Judicial Selection Commission which sent a list of six finalists to the Governor of Hawaii. The Governor then conducted his own review, including interviews, before choosing Crabtree as his nominee. Crabtree then went through a confirmation process with the state Senate and the Senate Judiciary Committee, including public hearings. Crabtree was confirmed on November 25, 2014, five months after his application.

During the first weeks of his judgeship, Crabtree said, "I am greatly enjoying doing something new and different and challenging, but which also allows me to use my 30 years of litigation experience. I miss helping my clients, but I find myself helping many people in my new job as well."

Lewis's appointment required approval from a simple majority of the 100-member State House and the 40-member State Senate. About three years ago, he entered his name as a willing candidate if a position on the bench became available.

"I am looking forward to an end to what has been a 15-year grind of traveling all over the United States deposing witnesses and trying cases," Lewis said. "I think I am going to enjoy no more airports and airport food."

Both Lewis and Crabtree plan to maintain their connections with the people they met through Primerus.

"I greatly enjoyed getting to know my fellow Primerus members, and I expect those relationships to continue," Crabtree said. "If anyone from Primerus ever needs anything in Honolulu, whether it be a restaurant recommendation or an attorney referral, you are welcome to contact me. If I can't help you, I'll be glad to steer you to someone who can."

Lewis said he, too, plans to maintain his Primerus relationships. "Primerus was a very convenient vehicle through which I got to know some absolutely wonderful lawyers all over the country," he said. "I have no intention of sacrificing those relationships in any way."

2015 Law Firm Locations – International Society of Primerus Law Firms

United States

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Iowa
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
South Carolina
Tennessee
Texas
Utah
Virginia
Washington
West Virginia
Wisconsin
Wyoming

Argentina
Australia
Austria
Belize
Botswana
Brazil
British Virgin Islands
Canada
China
Colombia
Costa Rica
Cuba
Dominican Republic
Egypt
France
Germany
Greece
Hong Kong
Hungary
India
Italy
Japan
Kenya
Malta
Mexico
Netherlands
Nigeria
Panama
Poland
Portugal
Puerto Rico
Singapore
South Africa
South Korea
Spain
Switzerland
Taiwan
Turkey
United Arab Emirates
United Kingdom

Primerus Law Firm Directory - Listed by Region and Alphabetically by State/Country

Law Firm Name	Location	Key Contact	Telephone
North America - United States			
Christian & Small LLP	Birmingham, Alabama	Duncan Y. Manley	205.545.7456
Matthews & Zahare, P.C.	Anchorage, Alaska	Thomas A. Matthews	888.796.2925
Burch & Cracchiolo, P.A.	Phoenix, Arizona	David M. Villadolid	602.842.7418
Atchley, Russell, Waldrop & Hlavinka, L.L.P.	Texarkana, Arkansas	Alan Harrel	903.255.7079
Watts, Donovan & Tilley, P.A.	Little Rock, Arkansas	Richard N. Watts	501.708.4764
Brayton Purcell LLP	Novato, California	James Nevin	415.878.5730
Buchman Provine Brothers Smith LLP	Walnut Creek, California	Roger J. Brothers	925.289.7812
Coleman & Horowitt, LLP	Fresno, California	Darryl J. Horowitt	559.389.7559
Demler, Armstrong & Rowland, LLP	San Francisco, California	John Brydon	415.757.3488
Ferris & Britton, A Professional Corporation	San Diego, California	Michael Weinstein	619.754.8477
Greenberg Glusker	Los Angeles, California	Brian L. Davidoff	310.734.1965
McElfish Law Firm	West Hollywood, California	Raymond D. McElfish	310.734.0276
Neil, Dymott, Frank, McFall & Trexler APLC	San Diego, California	Hugh McCabe	619.754.8462
Wilke, Fleury, Hoffelt, Gould & Birney, LLP	Sacramento, California	David Frenznick/Stephen Marmaduke	916.228.7755
Ogborn Mihm LLP	Denver, Colorado	Michael Mihm	303.515.7280
Timmins LLC	Denver, Colorado	Edward P. Timmins	303.928.1778
Zupkus & Angell, P.C.	Denver, Colorado	Dina Bernadelli	303.357.0202
Brody Wilkinson PC	Southport, Connecticut	Thomas J. Walsh, Jr.	203.916.6289
Mayo Crowe LLC	Hartford, Connecticut	David S. Hoopes	860.218.9099
Szilagyi & Daly	Hartford, Connecticut	Frank J. Szilagyi	860.967.0038
Rosenthal, Monhait & Goddess, P.A.	Wilmington, Delaware	Norman Monhait	302.656.4433
Price Benowitz, LLP	Washington, District of Columbia	Seth Price	202.417.6000
The Law Offices of Stewart and Stewart	Washington, District of Columbia	Terence P. Stewart	202.315.0765
Bivins & Hemenway, P.A.	Tampa, Florida	Robert W. Bivins	813.280.6233
Fuller, Mitchell, Hood & Stephens, LLC	Tallahassee, Florida	S. William Fuller, Jr.	850.222.0770
Garbett, Stiphany, Allen & Roza, P.A.	Miami, Florida	Gary Stiphany	305.440.1800
Mateer & Harbert, P.A.	Orlando, Florida	Kurt Thalwitzer	407.374.0861
Nicklaus & Associates, P.A.	Coral Gables, Florida	Edward R. Nicklaus	305.460.9888
Ogden & Sullivan, P.A.	Tampa, Florida	Timon V. Sullivan	813.223.5111
Padula Hodkin, PLLC	Boca Raton, Florida	Adam Hodkin	561.922.8660
Saalfield, Shad, Stokes, Inclan, Stoudemire & Stone, P.A.	Jacksonville, Florida	Clemente Inclan/Richard Stoudemire	904.638.4142
Vaka Law Group	Tampa, Florida	George A. Vaka	813.280.6235
Widerman Malek	Melbourne, Florida	Mark F. Warzecha	321.255.2332
Fain, Major & Brennan, P.C.	Atlanta, Georgia	Thomas E. Brennan	404.448.4929
Hull Barrett, PC	Evans, Georgia	George Hall	706.955.4820
Hull Barrett, PC	Augusta, Georgia	George Hall	706.955.4820
Krevolin & Horst, LLC	Atlanta, Georgia	Douglas P. Krevolin	404.585.3657
Tate Law Group, LLC	Savannah, Georgia	Mark A. Tate	912.480.6595
Roeca Luria Hiraoka LLP	Honolulu, Hawaii	Arthur Roeca	808.426.5995
Stewart Taylor & Morris PLLC	Boise, Idaho	Tom Morris/Amber Smith	208.473.7403
Kubasiak, Fylstra, Thorpe & Rotunno, P.C.	Chicago, Illinois	Steven J. Rotunno	312.279.6912
Lane & Lane, LLC	Chicago, Illinois	Stephen I. Lane	312.279.6913
Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.	Chicago, Illinois	Ray Lyons, Jr/Brad Nahrstadt	312.279.6914
Ayres Carr & Sullivan, P.C.	Indianapolis, Indiana	Bret S. Clement	317.495.9438
Price Waicukauski & Riley, LLC	Indianapolis, Indiana	Ronald Waicukauski	317.608.2067
Whitten Law Office	Indianapolis, Indiana	Christopher Whitten	317.215.5768
Carney Appleby Law	Des Moines, Iowa	George Appleby	515.282.6803
Fowler Bell PLLC	Lexington, Kentucky	John E. Hinkel, Jr.	859.759.2519
Fowler Bell PLLC	Louisville, Kentucky	John E. Hinkel, Jr.	859.759.2519
Gary C. Johnson, PSC	Pikeville, Kentucky	Gary C. Johnson	606.393.4071
Degan, Blanchard & Nash, PLC	Baton Rouge, Louisiana	Sidney W. Degan, III	225.330.7863
Degan, Blanchard & Nash, PLC	New Orleans, Louisiana	Sidney W. Degan, III	504.708.5217

Law Firm Name	Location	Key Contact	Telephone
Montgomery Barnett, L.L.P.	New Orleans, Louisiana	John Y. Pearce	504.708.4517
Montgomery Barnett, L.L.P.	Baton Rouge, Louisiana	John Y. Pearce	225.330.7852
The Bennett Law Firm, P.A.	Portland, Maine	Peter Bennett	207.517.6021
Dugan, Babij & Tolley, LLC	Timonium, Maryland	Henry E. Dugan, Jr.	410.690.7246
Rudolph Friedmann LLP	Boston, Massachusetts	James L. Rudolph	617.606.3120
Bos & Glazier, P.L.C.	Grand Rapids, Michigan	Carole D. Bos	616.818.1836
Buchanan & Buchanan, PLC	Grand Rapids, Michigan	Robert J. Buchanan	616.818.0037
Cardelli Lanfear P.C.	Royal Oak, Michigan	Thomas G. Cardelli	248.850.2179
Demorest Law Firm, PLLC	Dearborn, Michigan	Mark S. Demorest	248.850.2167
Demorest Law Firm, PLLC	Royal Oak, Michigan	Mark S. Demorest	248.850.2167
McKeen & Associates, P.C.	Detroit, Michigan	Brian McKeen	313.769.2572
O'Meara, Leer, Wagner & Kohl, P.A.	Minneapolis, Minnesota	Dale O. Thornsjo	952.679.7475
Oppegard & Quinton	Moorhead, Minnesota	Paul R. Oppegard	218.282.7931
Robert P. Christensen, P.A.	Minneapolis (St. Louis Park), Minnesota	Robert P. Christensen	612.315.8411
Merkel & Cocke	Clarksdale, Mississippi	Ted Connell	662.268.1008
Foland, Wickens, Eisfelder, Roper & Hofer, P.C.	Kansas City, Missouri	Clay Crawford/Scott Hofer	816.521.6287
Rosenblum Goldenhersh	St. Louis, Missouri	Carl C. Lang	314.685.8169
The Sader Law Firm	Kansas City, Missouri	Neil Sader	816.561.1818
Wuestling & James, L.C.	St. Louis, Missouri	Richard C. Wuestling	314.685.8163
Barron & Pruitt, LLP	North Las Vegas, Nevada	David Barron/Bill Pruitt	702.331.8900
Laxalt & Nomura, LTD.	Reno, Nevada	Robert A. Dotson	775.322.1170
The Bennett Law Firm, P.A.	New Hampshire (Mail to Portland, ME)	Peter Bennett	207.517.6021
Earp Cohn, P.C.	Cherry Hill, New Jersey	Richard B. Cohn	856.409.5295
Lesnevich & Marzano-Lesnevich, LLC	Hackensack, New Jersey	Walter A. Lesnevich	201.580.4179
Mandelbaum Salsburg	Roseland, New Jersey	Robin Lewis	973.821.4172
Thomas Paschos & Associates, P.C.	Haddonfield, New Jersey	Thomas Paschos	856.528.9811
Gallagher, Casados & Mann, P.C.	Albuquerque, New Mexico	Nathan H. Mann	505.240.8884
Coughlin & Gerhart, LLP	Binghamton, New York	James P. O'Brien	607.821.4368
Ganfer & Shore, LLP	New York, New York	Mark A. Berman	917.746.6796
Iseman, Cunningham, Riester & Hyde, LLP	Albany, New York	James P. Lagios	518.621.0140
Iseman, Cunningham, Riester & Hyde, LLP	Poughkeepsie, New York	James P. Lagios	845.232.2294
Lewis Johs Avallone Aviles L.L.P.	Islandia, New York	Robert J. Avallone	631.240.0486
Lewis Johs Avallone Aviles L.L.P.	New York, New York	Robert J. Avallone	212.574.7856
Charles G. Monnett III & Associates	Charlotte, North Carolina	Charles Monnett	704.997.2027
Horack, Talley, Pharr & Lowndes, P.A.	Charlotte, North Carolina	Smithy Curry	704.469.4424
Smith Debnam Narron Drake Saintsing & Myers, LLP	Raleigh, North Carolina	Byron Saintsing	919.926.1991
Oppegard & Quinton	Fargo, North Dakota	Paul R. Oppegard	218.282.7931
The Mellino Law Firm LLC	Cleveland, Ohio	Christopher M. Mellino	440.863.0845
Norchi Forbes, LLC	Cleveland, Ohio	Kevin Norchi	216.539.7950
Rohrbachers Cron Manahan Trimble & Zimmerman Co., LPA	Toledo, Ohio	Nick Cron	419.419.3280
Schneider, Smeltz, Ranney & LaFond P.L.L.	Cleveland, Ohio	James D. Vail	216.539.8374
Dunlap Codding	Oklahoma City, Oklahoma	Doug Sorocco/Linda Hazelton	405.445.6243
Fogg Law Firm	El Reno, Oklahoma	Richard M. Fogg	405.445.6271
The Handley Law Center	El Reno, Oklahoma	Fletcher D. Handley, Jr.	405.494.8621
James, Potts & Wulfers, Inc.	Tulsa, Oklahoma	David W. Wulfers	918.770.0197
Smiling Law Firm	Tulsa, Oklahoma	A. Mark Smiling	918.921.1100
Haglund Kelley	Portland, Oregon	Michael E. Haglund	503.419.9288
Earp Cohn P.C.	Philadelphia, Pennsylvania	Richard B. Cohn	215.600.2293
Grogan Graffam, P.C.	Pittsburgh, Pennsylvania	Dennis Watson	412.564.4646
Rothman Gordon	Pittsburgh, Pennsylvania	William Lestitian/Anne Parys	412.564.2787
Law Offices of Thomas J. Wagner, LLC	Philadelphia, Pennsylvania	Tom Wagner	215.600.2322
Barnes, Alford, Stork & Johnson, L.L.P.	Columbia, South Carolina	David G. Wolff	803.381.9934
Collins & Lacy, P.C.	Columbia, South Carolina	Joel Collins/Christian Stegmaier	803.381.9933

Law Firm Name	Location	Key Contact	Telephone
Hull Barrett, PC	Aiken, South Carolina	George Hall	803.335.2599
Roe Cassidy Coates & Price, P.A.	Greenville, South Carolina	D. Randle "Randy" Moody II	864.607.9649
Rosen Hagood	Charleston, South Carolina	Alice F. Paylor	843.737.6550
Kennerly, Montgomery & Finley, P.C.	Knoxville, Tennessee	Jack M. Tallent, II	865.312.8814
Kinnard, Clayton & Beveridge	Nashville, Tennessee	Mark S. Beveridge	615.997.1197
Spicer Rudstrom, PLLC	Chattanooga, Tennessee	Rob Uhorchuk	423.635.7141
Spicer Rudstrom, PLLC	Memphis, Tennessee	Newton Anderson	901.523.1333
Spicer Rudstrom, PLLC	Nashville, Tennessee	Marc Dedman	615.823.6137
Atchley, Russell, Waldrop & Hlavinka, L.L.P.	Texarkana, Texas	Alan Harrel	903.255.7079
Donato, Minx, Brown & Pool, P.C.	Houston, Texas	Robert D. Brown	713.877.1112
Downs♦Stanford, P.C.	Dallas, Texas	Jay R. Downs	214.572.2254
Downs♦Stanford, P.C.	West Lake Hills, Texas	Jay R. Downs	512.549.4816
Moses, Palmer & Howell, L.L.P.	Fort Worth, Texas	David Palmer	817.458.3535
O'Donnell, Ferebee & Frazer, P.C.	Houston, Texas	Jason Frazer	281.875.8200
Peterson Farris Byrd & Parker, A Professional Corporation	Amarillo, Texas	Barry D. Peterson	806.589.1466
The Talaska Law Firm, PLLC	Houston, Texas	Robert J. Talaska	713.292.0766
Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C.	McAllen, Texas	Tim K. Singley	956.616.4221
Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C.	San Antonio, Texas	Richard J. Reynolds, III	210.468.1901
Prince Yeates	Salt Lake City, Utah	Roger McConkie	801.416.2119
Winder & Counsel, P.C.	Salt Lake City, Utah	Donald J. Winder	801.416.2429
Goodman Allen & Filetti, PLLC	Glen Allen, Virginia	Charles M. Allen	804.322.1902
Shapiro, Appleton & Duffan, P.C.	Virginia Beach, Virginia	Kevin Duffan	757.214.6946
Thompson O'Donnell, LLP	Arlington, Virginia	Matthew W. Carlson	202.289.1133
Wharton Aldhizer & Weaver, PLC	Harrisonburg, Virginia	Humes "Tripp" Franklin III	540.434.0316
Beresford Booth PLLC	Edmonds, Washington	David Tingstad	425.939.2838
Johnson, Graffe, Keay, Moniz & Wick, LLP	Seattle, Washington	John Graffe	206.681.9872
Johnson, Graffe, Keay, Moniz & Wick, LLP	Tacoma, Washington	A. Clarke Johnson/Glen Boyer	253.878.7137
The Masters Law Firm, L.C.	Charleston, West Virginia	Marvin W. Masters	304.982.7501
Kohner, Mann & Kailas, S.C.	Milwaukee, Wisconsin	Steve Kailas/Stephen D.R. Taylor	414.255.3659
Gary L. Shockey, PC	Jackson, Wyoming	Gary Shockey	307.733.5974

North America - Canada

Houser Henry & Syron LLP	Toronto, Canada	Michael R. Henry	647.694.1180
Koffman Kalef LLP	Vancouver, Canada	Jim Alam	604.891.3688

North America - Mexico

Cacheaux Cavazos & Newton	Mexico City, Mexico Ciudad Juarez, Matamoros, Queretaro, Reynosa, San Pedro Garza Garcia and Tijuana	Felipe Chapula	+52 55 5093 9700

Law Firm Name	Location	Key Contact	Telephone
Asia Pacific			
Carroll & O'Dea	Sydney, Australia	Howard Harrison	+61 2 9291 7100
HHG Legal Group	West Perth, Australia	Simon Creek	+61 8 9322 1966
Mullins Lawyers	Brisbane, Australia	John Mullins	+61 7 3224 0333
Hengtai Law Offices	Shanghai, China	Edward Sun	+86 21 6226 2625
HJM Asia Law & Co LLC	Guangzhou, Guangdong, China	Caroline Berube	+8620 8121 6605
ONC Lawyers	Hong Kong, Hong Kong	Ludwig Ng	852.2810.1212
Advani & Co.	Mumbai, India	Aradhana Prabhakar	+91 22 22818380
JustLaw	Bangalore, India	S. S. Naganand	+91 80 22266002
S Eshwar Consultants House of Corporate & IPR Laws	Chennai, India	S Eshwar	+91 44 42048235
Seth Dua & Associates	New Delhi, India	Atul Dua	+91 11 41644400
Hayabusa Asuka Law Offices	Tokyo, Japan	Kaoru Takamatsu/Shinji Itoh	+81 3 3595 7070
HJM Asia Law & Co LLC	Singapore, Singapore	Caroline Berube	+65 6755 9019
Hanol Law Offices	Seoul, South Korea	Yun-Jae Baek	+82 2 6004 2500
Formosan Brothers	Taipei, Taiwan	Li-Pu Lee	+886 2 2705 8086
Europe, Middle East & Africa			
Frieders, Tassul & Partner	Vienna, Austria	Dr. Christian Tassul	+43 1 401 84 0
Luke & Associates	Gaborone, Botswana	Edward Fashole-Luke II	+267 3919345
Tahoun Law Office & Consultations	Cairo, Egypt	Nermine Tahoun	+2 (02) 33369838
Vatier & Associés	Paris, France	Pascal Le Dai/Amelie Vatier	+33 1 53 43 15 55
Broedermann Jahn	Hamburg, Germany	Prof. Dr. Eckart Broedermann	+49 40 37 09 05 0
WINHELLER Attorneys at Law & Tax Advisors	Frankfurt, Germany	Stefan Winheller	+49 69 76 75 77 80
Karagounis & Partners	Athens, Greece	Constantinos Karagounis	+30 21 30 390 000
Fusthy & Manyai & Hargittay Law Office	Budapest, Hungary	Dr. Zsolt Fusthy	+36 1 454 1766
Studio Legale e Tributario F. De Luca	Milan, Italy	Giuseppe Cattani	+39 02 721 4921
Njoroge Regeru & Company	Nairobi, Kenya	Njoroge Regeru	+254 020-3586592
Refalo & Zammit Pace Advocates	Valletta, Malta	John Refalo	+356 2122 3515
Russell Advocaten B.V.	Amsterdam, Netherlands	Reinier Russell	+31 20 301 55 55
Giwa-Osagie & Company	Lagos, Nigeria	Osayaba Giwa-Osagie	+234 1 2707433
Elzanowski Cherka & Wasowski Law Office	Warsaw, Poland	Robert Nowakowski	+48 22 745 32 35
Athayde de Tavares, Pereira da Rosa & Associados	Lisbon, Portugal	José de Athayde de Tavares	+351 21 3827580
Read Hope Phillips	Johannesburg, South Africa	PJ Hope	+27 11 344 7800
1961 Abogados y Economistas	Barcelona, Spain	Carlos Jiménez	+34 93 366 39 90
Dr. Fruhbeck Abogados S.L.P.	Madrid, Spain	Dr. Guillermo Fruhbeck Olmedo	(+34) 91 700 43 50
MME Partners	Zurich, Switzerland	Dr. Balz Hoesly	+41 44 254 99 66
Serap Zuvin Law Offices	Maslak Sisli/Istanbul, Turkey	Serap Zuvin/Melis Öget Koç	90 212 2807433
Al Rowaad Advocates & Legal Consultants	Dubai, United Arab Emirates	Hassan Mohsen Elhais	+971 4 325 4000
Marriott Harrison LLP	London, United Kingdom	Jonathan Pearce	+44 20 7209 2000
Latin America & Caribbean			
Badeni, Cantilo, Laplacette & Carricart	Buenos Aires, Argentina	Mariano E. Carricart	+54 011 4515 4800
Quijano & Associates	Belize City, Belize	Julio A. Quijano Berbey	+501-227-0490
Barcellos Tucunduva Advogados	Sao Paulo, Brazil	Patricia Hermont Barcellos	+55 11 3069 9080
Quijano & Associates	Road Town Tortola, British Virgin Islands	Julio A. Quijano Berbey	284.494.3638
Pinilla González & Prieto Abogados	Bogota, Colombia	Felipe Pinilla	+57 1 210 10 00
Guardia Montes & Asociados	San Jose, Costa Rica	Luis A. Montes	+506 2280 1718
Dr. Fruhbeck Abogados	Havana, Cuba	Maria Elena Pubillons Marin / Dr. Guillermo Fruhbeck Olmeds	+537 204 5126
Marra & Conde	Santo Domingo, Dominican Republic	Xavier Marra	809.472.0035
Cacheaux Cavazos & Newton	Mexico City, Mexico Ciudad Juarez, Matamoros, Queretaro, Reynosa, San Pedro Garza Garcia and Tijuana	Felipe Chapula	+52 55 5093 9700
Quijano & Associates	Panama City, Panama	Julio A. Quijano Berbey	507.269.2641
Estrella, LLC	San Juan, Puerto Rico	Alberto G. Estrella	787.977.5050

Primerus Names 2014 Community Service Award Winner and Finalists

Whether they're raising money for non-profits that help sick children and their families, or providing school supplies for students who might not otherwise have any, or donating business clothes to women seeking jobs, the attorneys of Primerus member firm Mandelbaum Salsburg P.C. waste no time in serving their community.

The Roseland, New Jersey, firm, won the 2014 Primerus Community Service Award, as announced at the Primerus Global Conference in October. Primerus names award finalists in addition to the winner. This year's finalists are Broedermann Jahn of Hamburg, Germany; Cardelli Lanfear of Detroit, Michigan; Carroll & O'Dea of Sydney, Australia; and Kinnard, Clayton & Beveridge of Nashville, Tennessee.

Mandelbaum Salsburg P.C.

"Our philosophy is quite simple – we are very fortunate, and we want to give back to those who are not as lucky as we are," the winning firm said in their award application.

The example of community service comes from the top at Mandelbaum Salsburg, starting with Managing Partner Barry Mandelbaum. His fundraising efforts in the past for Cerebral Palsy of North Jersey have resulted in donations of more than $550,000. In his capacity as a trustee of the Steven & Beverly Rubenstein Foundation, he has also facilitated donations including a $450,000 grant to the Valerie Fund, which assists children with cancer and blood disorders; a $500,000 gift to St. Jude's Hospital to fund a parents' waiting and hospitality center next to the pediatric ICU; and a $100,000 gift to a Morris County ARC association assisting challenged adults to live independently.

The firm's community service efforts are guided by a charity committee, which seeks input from all attorneys and employees in selecting the organizations that will benefit from the firm's efforts. "As a result, there is a personal connection to virtually all of the firm's charitable efforts, which helps inspire participation and enthusiasm," the firm's application said.

The firm hosts Denim Days every other month, when all firm employees can wear denim to work in exchange for a small donation to a selected charity. This summer, the firm supported Project Backpack, which provides school supplies for children who otherwise may not have what they need for school.

For each quarterly networking event of the firm's Women's Initiative, the women of the firm ask their attendees to support a charity by bringing items to donate. In 2014, the women collected and donated thousands of dollars of clothing to Morris County Dress for Success, hundreds of pounds of food to the Community Food Bank of New Jersey, as well as an entire car full of donations and supplies for a local animal shelter.

Broedermann Jahn

The community service work of attorneys from Broedermann Jahn includes efforts from academic teaching and practical training to pro bono work.

The partners of Broedermann Jahn have, for many years, taught at different universities and training centers in areas including of the art of contract drafting, company law, international arbitration, mediation, antitrust law and international private law.

Employees of Mandelbaum Salsburg participate in the Verizon Corporate Challenge to benefit the Valerie Fund in 2014.

From left, Attorney Casey Gocel, Legal Assistant Shenoa Scullin, Paralegal Lindsey Priolo and Attorney Constantina Koulosousas.

Prof. Dr. Eckart Broedermann works voluntarily as the managing director of the Chinese European Arbitration Centre. Since 2004, Broedermann Jahn has actively contributed to the founding and development of CEAC, which was opened in Hamburg in September 2008.

Other attorneys' efforts include:

- Philipp von Dietze is member of the board of a foundation, established in Hamburg more than 100 years ago, operating a residence for elderly people with little income.

Mandelbaum Salsburg P.C. won the 2014 Primerus Community Service Award. This year's finalists are Broedermann Jahn of Hamburg, Germany; Cardelli Lanfear of Detroit, Michigan; Carroll & O'Dea of Sydney, Australia; and Kinnard, Clayton & Beveridge of Nashville, Tennessee.

- Tina Denso is continuously involved in the parent's delegation of a local school and member of the board of a kinder garden.

- Justus Jansen is member of the Board of AIJA (Association Internationale des Jeunes Avocats).

- Eckard von Bodenhausen and Philipp von Dietze are supporting various social national and international projects in their capacity as member of the board of local Rotary clubs.

- Eckard von Bodenhausen is member of a group giving free counsel and advice to founders in the IT area.

- Eckart Broedermann serves as President of the Harvard Club Hamburg and Secretary of the Harvard Law School Association of Germany. In both capacities he organizes numerous discussion circles and (partial) stipends for students at the Harvard University.

In addition, the firm's pro bono works includes assisting a local dealer in a dispute with his new landlord on refurbishment work and related costs; representing the widow of an insolvent entrepreneur to the insolvency administrator; and representing an inventor without income against his licensee, a big machine construction company.

Cardelli Lanfear

At Cardelii Lanfear, community service goes beyond monetary donations to giving time and talent. For four years, the firm has sponsored Detroit Cristo Rey High School's work study program with an annual contribution of $28,000. This Catholic, co-ed college-preparatory high school on Detroit's southwest side offers a private school education to mostly minority students who could not otherwise afford one. Seventy-five percent of Cristo Rey's population tests behind grade level in reading and math when they enter the school. The centerpiece of the Cristo Rey model is that each student is part of a team of four students who together fill a single, full-time entry level position at a sponsoring employer. Through the support of business, Cristo Rey has been able to send 100 percent of its graduating seniors on to college.

In addition to providing the educational opportunity, the employees at Cardelli Lanfear interact with the students on a daily basis by mentoring, training and providing life skills advice to students who might not ever be given access to positive role models. At the end of her second year with Cardelli Lanfear, one student wrote, "Working at Cardelli has been a second home and another family to me. Even though I won't be coming back here to work next year, I hope we can still stay in touch. I need strong women I can look up to, so I can achieve my dreams, and not struggle like my family has in the past."

Carroll & O'Dea

The list of organizations that have benefited from the generosity of the law firm of Carroll & O'Dea and its attorneys is long. They include:

- Reform organizations including the Human Rights Committee for the Australian Lawyers Alliance, the Injury Compensation Committee of the Law Society and the Australian Labour Law Association.

- The MOSAIC program, which provides free legal advice to refugees, asylum seekers and recently settled migrants in the community.

- The PILCH Offshore Asylum Seeker Project, which assists individuals in immigration detention throughout Australia, who have been refused refugee status and have the right to judicial review.
- Life for Koori Kids, a program for disadvantaged Indigenous children in inner city Sydney.
- The Clemente Australia program, which involves mentoring disadvantaged young adults and assisting them obtain a university education.
- Community legal centers, providing advice to those who cannot otherwise afford access to justice
- The Australian Legal Sector Alliance and the Sustainability Advantage Program, run by the New South Wales State Government (Office of Environment and Heritage). The firm is committed to implementing and monitoring sustainability initiatives, to reducing our environmental impact and promoting sustainable practices across our offices.

Many of the firm's lawyers are involved as honorary directors, voluntary members, committee members and/or honorary advisors for a large number of not-for-profits, welfare agencies, schools, universities, aged care facilities, hospitals, family welfare centers, local parish bodies, sports clubs, community clubs and charitable trusts and foundations. In fact, three of their lawyers have been made a member of the Order of Australia for their service to the community.

Kinnard, Clayton & Beveridge

As a personal injury law firm, Kinnard, Clayton & Beveridge represents dozens of children. But the firm's mission to help children extends beyond the courtroom and into the community.

Kinnard, Clayton & Beveridge volunteers in community service efforts that help protect, benefit and lift up children. Each year, the firm sponsors two main events that encompass this mission: the firm's annual RESPECT Contest and the Music City Christmas Run.

The RESPECT Contest was created by the firm's founding partner, Randy Kinnard. As a trial lawyer for over 30 years, Randy noticed a decline in respectful behavior within the legal community. In order to do its part to stop the downward trend and to spread awareness about the importance of respect, the firm started the RESPECT Contest. The firm asks fifth graders across the Middle Tennessee area what respect is and what it means to them. They are asked to draw a picture illustrating their point. Each year the top entries are recognized at a special celebration at the courthouse, attended by teachers, principals, students, families and friends. The response to the RESPECT Contest has been so overwhelming that a book, compiling some of the most thoughtful and touching responses, will soon be published. Profits from the sale of the book, *Respect: Through the Eyes of Children*, will benefit charitable organizations whose missions are to help children.

Kinnard, Clayton & Beveridge for the past several years also has been the presenting sponsor of the Music City Christmas Run to benefit Prevent Child Abuse Tennessee. The annual event, a holiday-themed 5K walk and run, has raised thousands of dollars to help fund Prevent Child Abuse Tennessee. P

Mandelbaum Salsburg's community service efforts are guided by a charity committee, which seeks input from all attorneys and employees in selecting the organizations that will benefit from the firm's efforts. "As a result, there is a personal connection to virtually all of the firm's charitable efforts, which helps inspire participation and enthusiasm," the firm's application said.

2015 Calendar of Events

March 18-20, 2015 – Primerus Young Lawyers Section Boot Camp
San Diego, California

April 1-2, 2015 – Primerus Asia Pacific Institute & Canadian Chamber of Commerce Singapore Legal Seminar
Singapore

April 23-26, 2015 – Primerus Defense Institute Convocation
Amelia Island, Florida

May 13-14, 2015 – Primerus Latin America & Caribbean Institute & Association of Corporate Counsel Brazil Networking Group Legal Seminar
Sao Paulo, Brazil

May 14, 2015 – Primerus Business Law Institute North America Regional Symposium
Fort Worth, Texas

May 15, 2015 – Primerus South Central Regional Meeting
Fort Worth, Texas

June 5, 2015 – Primerus Northeast Regional Meeting
New York, New York

June 12, 2015 – Primerus Southeast Regional Meeting
Charleston, South Carolina

October 1-4, 2015 – Primerus Global Conference
Amsterdam, Netherlands

October 18-21, 2015 – Association of Corporate Counsel Annual Meeting
Boston, Massachusetts – *Primerus will be a corporate sponsor.*

Scan this with your smartphone to learn more about Primerus.

There are other events for 2015 still being planned which do not appear on this list. For updates please visit the Primerus events calendar at www.primerus.com/events.

For additional information, please contact Chad Sluss, Senior Vice President of Services, at 800.968.2211 or csluss@primerus.com.

Primerus
The World's Finest Law Firms

International Society of Primerus Law Firms

171 Monroe Avenue NW, Suite 750
Grand Rapids, Michigan 49503

Toll-free Phone: 800.968.2211
Fax: 616.458.7099
primerus.com