The Commercial Law Connection

The National Bar Association Commercial Law Section

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CONNECTING PEOPLE, IDEAS AND OPPORTUNITIES

INSIDE THIS ISSUE:

Message from the Chair

Kimberly R. Phillips, Chair

Greetings Commercial Law Section Members and Friends! I trust that you are enthusiastically anticipating the 84th Annual National Bar Association Convention that will take place August 1-8, 2009, at The Hilton San Diego Bayfront Hotel. As we have in the past, the Section will host several events at this year's Convention. The events will take place on Thursday, August 6th and will commence with the Annual Section Meeting and Election of Officers, and will be followed by the General Counsel Summit, where we will hear from five General Counsels of major corporations, and the Annual Section Reception. I hope that you are planning to participate in the Convention and all of the Section's activities.

This year will mark my last as your Chair. I have enjoyed the privilege of serving you over the last two years and am proud of what we have accomplished together. During our 2008 and 2009 Corporate Counsel Conferences, respectively, we helped revitalize the homes of three families in New Orleans whose lives were devastated by Hurricane Katrina and funded the creation of a lbrary at a charter school for underserved elementary school children in Las Vegas. Over the past two years, we continued our leadership role as we again served as a lead sponsor for the Crump Law Camp, which hosts 32 high school students at Howard University for a two-week law camp. We made contributions to the philanthropic arm of the National Bar, the National Bar Institute, to fund scholarships and fellowships for 3L law students, and we were proud sponsors of the National Bar Inaugural Ball for President Obama. Our community outreach efforts would not be possible without your continued support—our Section members and Conference attendees, and our law firm and corporate sponsors. You are to be commended for your efforts!

If these accomplishments were not enough, we have continued our good work in fostering relationships between our members and major corporations for mutually beneficial business relationships. Over the past two years, these efforts have led to the creation of important business opportunities for many firms, including: Parks Knowlton; MehaffyWeber; Cairncross & Hempelmann; Booker and White; Gonzalez, Saggio & Harlan; Bricker & Eckler; Kuchler, Polk, Schell, Weiner & Richeson; Weil

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Surviving the E-Discovery Adventure: Ethical Challenges Shared by In-House and Outside Counsel

By Robert R. Simpson and Leander A. Dolphin[1]

With even seasoned litigators just plain flummoxed by the e-discovery quagmire, there are serious ethical implications which must be understood, lest we place our clients, and our licenses, in jeopardy. Given the ever-growing body of law dealing with one ethical failure or another in the e-discovery context, it is crucial that in-house and outside counsel develop a firm grasp of the potential pitfalls in e-discovery and the best strategies for how such hazards can be avoided.

After the barrage of e-discovery seminars and articles, we assume the reader has a basic understanding of the e-discovery rules;[2] therefore, this article focuses on best practices in three areas where in-house and outside counsel may find themselves at odds: The initial hold letter, review and retrieval responsibilities, and escalating costs for privilege reviews. A common thread throughout these issues is the need for communication and cooperation between in-house and outside counsel to prevail over some of the ethical challenges they face in managing e-discovery.

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2009 Corporate Counsel Conference Offers Something for Everyone

By Antoinette N. Morgan, Esq.[1]

True to tradition, the 2009 Corporate Counsel Conference provided attendees with the opportunity to participate in a number of relevant and timely roundtable discussions and CLE seminars. With the backdrop of Lake Las Vegas, this year's Conference offered an especially diverse array of opportunities for professional development. On the first day of the Conference, attendees gathered at one of the first two roundtables offered, the Outside Counsel Roundtable and the In-House Counsel Roundtable. In each of these roundtable discussions, panelists shared their respective experiences and advice with their colleagues. The discussion was especially lively at the Outside Counsel Roundtable, as the panelists and attendees shared advice on various topics through the use of hypothetical fact patterns, including maintaining client relationships and taking control of your career path.

The Managing Relationships Forum brought together in-house and outside counsel to discuss how to make their working relationships more productive. Both in-house and outside counsel served as panelists. The topics of discussion included negotiating fees, effective communication between in-house and outside counsel, soliciting new engagements and implementing diversity initiatives. The panelists' candid discussions opened the dialogue between in-house and outside counsel to discuss ways to better manage their relationships.

On the second and third days of the Conference, attendees had the opportunity to choose between four concurrent CLE seminars. CLEs were led by experienced practitioners who discussed current and evolving laws in the areas of business and employment law, intellectual property and general litigation. The CLEs presented were particularly relevant and timely, given the new challenges faced by practitioners in the current economic climate.

The First Round of CLEs

The first round of CLEs featured four hot topics. The CLE "What You Need to Know about Doing Business Abroad" addressed key issues routinely faced by domestic companies when doing business with foreign entities, including legal, regulatory, compliance and logistical matters. The panelists used a hypothetical fact pattern to examine issues that may arise as a result of the Foreign Corrupt Practices Act.

In "Navigating the Credit Crises, Stock Options and Other Corporate Headaches," the panelists examined the current state of the credit crisis and explained the bailout plan and its ramifications on the financial services sector.

"Current Developments in e-Discovery and Outsourcing" highlighted the legal developments in e-discovery, best practices in handling e-discovery issues and outsourcing as a means to maximize cost savings associated with e-discovery.

Finally, in "Prepare Your Company for The New Legal Horizon: ADA, FMLA, EFCA, Title VII, And Other Workplace Changes in the Obama Administration," the panelists discussed current and anticipated developments in the landscape of labor and employment laws under the Obama administration.

The Second Round of CLEs

The second round of concurrent CLEs continued the lively discussion of pressing legal issues. "Business Ethics During Distressed Times" focused on a variety of ethical issues faced by practitioners in the current economic downturn as well as how to determine ethical obligations when representing clients in multiple jurisdictions.

In "Protecting Your Company's IP & New Media Rights: What Every In-House Counsel Should Know," the panelists discussed copyright basics, registration and infringement issues, how to acquire and protect trademark rights and other product development and patent related issues.

"The Credit Crises-A Financial Restructuring Perspective" CLE examined the impact of the current credit crisis on in-house counsel and methods for limiting corporate exposure in business relationships. The CLE also included an overview of global markets, the effects of bankruptcy filings on existing business relationships and tips for evaluating existing and prospective business.

The CLE entitled "To Sue or Not Be Sued: Litigation Issues & Strategies for In-House Counsel" addressed developments in business litigation, practical tips for in-house counsel for managing large scale litigation, and an update on class action practice and alternative dispute resolution techniques.

The broad range of topics addressed during the roundtable discussions and CLE seminars during this year's Corporate Counsel Conference provided unparalleled opportunities for professional development for in-house and outside counsel alike. Each attendee not only had the opportunity to become more knowledgeable about the legal, ethical and social issues that directly impact their practice, but also the opportunity to network with counsel across the nation who face similar issues. Next year's Conference is sure to bring even more opportunities to address relevant and timely issues facing the legal profession.

[1]*Ms. Morgan is an associate at LeClairRyan in Richmond, Virginia. She focuses her practice on defending product designers, manufacturers and sellers against alleged product defects. Ms. Morgan also defends physicians, nursing homes and other health care providers in medical malpractice actions. She can be contacted at (804) 783-7544 or Antoinette.Morgan@leclairryan.com.*

Panelists Deliver Updates on New Case Law Effecting eDiscovery

By Craig Smith, Esq.[1]

On Friday, February 20, 2009, the Corporate Law Section presented a CLE course entitled "Current Developments in eDiscovery and Outsourcing." The seminar addressed legal developments in eDiscovery including new case law on key federal rules and new evidentiary rules on privilege. The panelists shared best practices and practical applications for handling eDiscovery issues. They gave tips on how to identify and effectively use eDiscovery companies and avoid typical pitfalls. A main focal point of the seminar was how to maximize cost savings in eDiscovery via outsourcing with a focus on using offshoring as a possible strategy.

The speakers shared a wealth of information with the audience during their presentation and the question and answer session that followed. The diverse panel of experts included a federal judge, outside counsel, an in-house representative and a consultant. Each panelist had several years of experience directly involving eDiscovery issues and management.

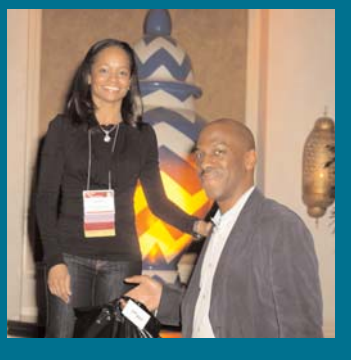
The seminar was coordinated by Bob Rowe who is a Managing Director at Huron Consulting Group in Rock Hill, South Carolina. Bob counsels companies on cost-effective e-discovery strategies and also supervises Huron's V3locity (pronounced "velocity") eDiscovery solution – an unprecedented, comprehensive fixed-per-page-priced eDiscovery service involving processing, hosting, review and production.

The panelists included:

- Hon. George B. Daniels, who was nominated by President Clinton to the United States District Court for the Southern District of New York on August 6, 1999 and confirmed by the United States Senate on February 24, 2000.
- Dave Deppe, the President of Litigation Services with UnitedLex in Atlanta, Georgia. He has traveled the world managing complex litigation cases and testifying as a 30(b)(6) deposition witness for Global 100 companies and, previously, for the DOJ and the FTC.
- Ronke Ekwensi, the Senior Director of Discovery Operations and Records & Information Management at Pfizer Inc. in New York. Prior to joining Pfizer, Ronke was a Senior Consultant providing complex, large scale program risk advisory services at Ernst and Young (E&Y). She also served as E&Y's Director of Document Retention/Records Information Management.
- Tom Hill is the Senior Executive Counsel – Environmental Litigation & Legal Policy for GE where he is responsible for all environmental regulatory litigation, risk management, and mass torts on a worldwide basis. He also leads GE's public policy efforts on litigation and tort reform and their Product Safety Compliance Oversight Project.
- Kwamina Williford, an Associate with Holland & Knight's Litigation Department in Washington, D.C. and a member of the firm's national Compliance Services Team. She advises clients on the design and implementation of comprehensive compliance programs and cost-effective electronic discovery practices.

[1]Craig Smith is a Director with Huron Consulting Group. Craig provides project management and comprehensive attorney review solutions for large and complex matters to Fortune 500 corporations and law firms. Craig manages a wide range of projects in Huron's customized document review facilities. His particular expertise includes litigation and regulatory matters affecting financial institutions. If Huron can be of assistance to you, please contact Craig at 803-323-1804 or Bob Rowe at 646-520-0130. Craig's email address is csmith@huronconsultinggroup.com and Bob's is browe@huronconsultinggroup.com.

Highlights from the 2009 Corporate Counsel Conference



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The NBA's Health Law Section Hosted Its First Health Care Law Summit

By Sharon Bridges, Esq., R.N.[1]

The NBA's Health Law Section convened its inaugural Healthcare Law Summit on May 7-8, 2009, at the Walter E. Washington Convention Center in the nation's capital. The Summit provided a venue to gather leaders in the healthcare industry to discuss emerging issues in healthcare policy and practice. The event was a great success. Participants included corporate counsel, government representatives, and practitioners.

The Opening Day Featured Panel Discussions and an Awards Ceremony

The summit opened on Thursday, May 7th, with greetings from Congressman Kendrick Meeks of South Florida. Congressman Meeks acknowledged that healthcare is a key concern of the current administration. He applauded the Health Law Section's vision to host a healthcare summit focusing on issues related to healthcare policy and practice.

Seminar topics included: Health Information Technology; Medical Staffing and Peer Review; ERISA; and the FDA Regulatory Process. The last session of the day concluded with a wide-ranging panel discussion of emerging healthcare issues. Denise E. Hanna, the Health Law Section's treasurer, moderated the panel discussion. The panelists were Brian Ellis, GE Healthcare; Marcea Lloyd, Amylin Pharmaceuticals, Inc.; Michael Clarke, EBI, LLC; J. Eugene Grisby, National Health Foundation; and Angela Scott, U.S. Department of Health and Human Services.

The first day of the Summit ended with an awards reception at which Summit attendees and special guests enjoyed a relaxing evening of live jazz, food and fellowship. Sadarie Holston served as the Mistress of Ceremonies. The section presented its first distinguished leadership award to Congresswoman Donna M. Christensen of the United States Virgin Islands for her work in connection with the CBC Healthcare brain trust and her advocacy work related to healthcare disparities.

The section also presented its first diversity trailblazer award to Jerry Bradford, Associate General Counsel, Alcon Laboratories, Inc., for his support for providing opportunities for diverse outside counsel to do legal work for his company.

Day Two Featured Additional Panel Discussions and a Networking Reception

The second day of the Summit began with greetings by NBA President Rodney G. Moore. Andiswa Ndoni, the first female President of the Black Lawyers Association of South Africa, also provided greetings.

The seminars presented that day were: Governance Issues; The Retail Healthcare Model; and Pursuing Daubert Challenges. Ascunion Hostin moderated a panel discussion that ended the day's substantive events. The panelists were: Shirell Gross, Bayer Healthcare; Monique Hunt McWilliams, Eli Lilly and Company; Jo An Rochez, U.S. Department of Health and Human Services; Jerry Bradford, Alcon Laboratories, Inc.; Elicia Spearman, Aetna Health Insurance Company; and Monique Morris, NAACP. At the conclusion of the Summit, the section hosted a networking reception at the Renaissance Hotel in downtown Washington, D.C.

Plans are underway for the second annual NBA Healthcare Summit next year in Washington, D.C. Expectations are high given the success of the inaugural Summit.

[1]Sharon Bridges serves as Co-Chair of the Health Law Section, Deputy Chief of Staff to NBA President Rodney G. Moore and Board Member At Large. She is a Partner at Brunini, Grantham, Grower & Hewes in Jackson, Mississippi.

Highlights from the NBA Health Care Law Summit

The Case For Keeping Legal Process Outsourcing "On Shore"

By Herbert A. Igbanugo, Esq.[1]

Legal Process Outsourcing Is on the Rise

In an effort to reduce the costs associated with performing legal work, some American law firms and multinational corporations are turning to "Legal Process Outsourcing" (LPO), which involves the contracting of legal-related services to an outside law firm or a legal support services company.[2] When the outsourced entity is based in another country, the practice is sometimes called "off shoring," although "outsourcing" is still the more typical term. Similarly, when the outsourced entity is located in another part of the United States, the term "on shoring" is often used. The outsourcing of legal processes across the globe, particularly to India, ranges from simple tasks, such as data entry, legal coding, legal transcription and pre-litigation document review, to more complex projects, such as legal research, brief drafting, due diligence, contract management and intellectual property services.

This growing trend is not merely a cost-cutting fad, but is a legal service delivery model that will continue to have significant and often detrimental (when "off shored") effects on the legal profession in the United States. While LPO is usually reserved for routine, low-level legal work, it is becoming an important issue that American lawyers are considering, particularly in these harsh economic times. LPO has become increasingly popular among large law firms and multinational corporations looking to cut costs, increase flexibility, and expand their legal services. Even small and mid-size law firms that lack the staff and resources may tap into overseas markets for a specific case or project.

Foreign "Off Shoring" vs. Domestic "On Shoring"

While outsourcing in general is a hot-button political issue, the shipping of legal jobs overseas is a relatively new and less talked-about concept. Since 2005, when it first began to receive widespread attention, this industry has expanded to include over 100 LPO companies providing legal services to large law firms, in-house legal departments, and corporations.[3] In a July 2007 report, an independent research company, ValueNotes, stated that revenues from legal services off shoring is expected to grow from $146 million in 2006 to $640 million by the end of 2010.[4] According to a recent Forrester Research report, $4 billion in legal work is projected to head to India and 489,000 lawyer jobs in the United States are expected to move to lower-cost countries by 2015.[5] Supporters and economic free traders say that LPO spares American law firms from mundane paperwork, allows small firms to take on bigger cases, results in cost savings, permits 24/7 operations, provides access to a global labor market, and increases flexibility in responding to workload and client demands.

The supporters also claim that the most significant driving force behind the outsourcing of legal jobs is cost savings. Corporate legal departments were the earliest to tout the benefits of legal outsourcing, which pressured law firms to offer this alternative to corporate clients as a cost-cutting solution.[6] With junior associates in the United States charging an hourly rate of $300- $400 plus per hour,[7] it appears to be an attractive option for law firms to transfer low-level tasks to overseas markets, where the rate of pay is between 10 to 15% of that of lawyers in the United States. For example, LPO salaries for Indian lawyers are often well below $10,000 a year, while a contract lawyer in this country usually earns around $30 an hour and an associate's base salary at major New York law firms start at $160,000 a year.[8] LPO vendors usually target the more mundane yet time-consuming tasks related to legal practice, such as document review, as opposed to more complex duties such as appellate brief drafting.[9]

However, what supporters fail to recognize or mention is the sheer detriment that "off shoring" is inflicting on the United States workforce, especially in this time of economic downturn as more and more qualified American workers are losing their jobs while major American corporations turn to the United States government for funding. Fortunately, the primary movement to outsourcing document reviews appears to be to "on shore" centers – specifically to licensed lawyers in less-populated, less expensive areas of the United States.[10] Ohio, North Carolina, Tennessee and Texas, for instance, have a wealth of law schools, a supply of legal skills and legal services capacity, and less expensive document storage costs than many other regions in the country.[11] "On shoring" work to law firms in smaller metropolitan areas or to lower cost domestic niche firms, where billable rates are lower but quality is just as high, is a cost saving solution that also favorably impacts the United States economy and workforce.[12]

Risks and Challenges – Why Domestic "On Shoring" Is the Better Approach

Prior to outsourcing legal jobs, law firms and legal departments must first consider the risks and challenges, which may very well outweigh the rewards and advantages. First, the practice results in a reduction of domestic legal jobs for lawyers, paralegals and administrative support personnel in the United States. In these tough economic times, additional displacement of American jobs overseas could have a grave impact on the country's ability to rebound economically.

With over 1 million active practicing attorneys in the United States, and approximately 40,000 new graduates each year, there is a compelling demand for legal jobs to remain in the United States.[13] A series of recent blogs by legal educators discuss how legal outsourcing is affecting law students and new attorneys.[14] One of these factors is the impact that LPO may have on starting salaries. Professor Anne Enquist of the Seattle University School of Law states that students "cannot assume that when they graduate they will be able to make a six-figure income doing basic legal work for several years as they work their way up to partner. They will have to adjust their expectations, as well as try to figure out how to justify the salaries they hope to receive."[15] With the average attorney having approximately $70,000 - $90,000 in student loan debt,[16] in addition to a declining economy, domestic-educated and trained attorneys may be willing to work for less simply to keep afloat.

Second, legal "off shoring" is an extremely risk-prone sector riddled with issues of confidentiality and attorney-client privilege. The transference of legal information to a foreign country may compromise client confidentiality and privacy if the law firm or legal department does not implement proper security measures. Outsourcing legal data across the globe may result in an inadvertent waiver of the attorney-client privilege because the United States government monitors cross-border communications, and privacy rights afforded by the United State Constitution are often unavailable in foreign countries.

Recently, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (the "ABCNY

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The NBA Commercial Law Section Will Have Several Events at the 84th Annual NBA Convention and Exhibits

The Commercial Law Section will continue its efforts to forge relationships between its members and in-house counsel at major corporations through its events at the 84th Annual National Bar Association Convention in San Diego, California. All of the Section's events promise to be informative and fruitful and are designed to maximize networking opportunities.

Annual Section Meeting and Election of Officers

The first event will be the Annual Section Meeting and Election of Officers scheduled for Thursday, August 6th from noon to 1:00 p.m. We will highlight the activities of the past year and prepare for the 2010 Corporate Counsel Conference. Meeting attendees will have the opportunity to sign up to volunteer to assist with 2010 Conference planning.

At the meeting, the Slate of Officers for the 2009-2010 Bar Year will be presented and voted upon. This new group of Officers will lead the Section for the upcoming Bar Year and be responsible for planning the 2010 Conference.

Volunteering to help plan the Conference is a great way to get more involved in the Section and to maximize networking opportunities, so be sure to sign up to help.

General Counsel Summit

Immediately following the Annual Section Meeting, we will host the General Counsel Summit from 1:00 p.m. to 3:00 p.m. This is an event you will not want to miss! Our featured speakers include the General Counsels from ArvinMeritor, Del Monte Foods, Lego North America, Schering-Plough Corporation, and Shell Oil Company.

This discussion will be patterned in a lively debate format. The General Counsels will discuss topics ranging from cost cutting and diversity to e-discovery and globalization. The discussion will give the General Counsels the opportunity to share with outside counsel the most significant challenges facing their legal departments and the role of outside counsel in working to resolve those challenges. You are certain to gain promising first-hand insight from these GCs, and you will have the opportunity to pose your questions to them directly.

Annual Section Reception

Immediately following the Summit, Section members will have the opportunity to network with the General Counsels and other in-house counsel at the Annual Section Reception from 3:30 p.m. to 6:00 p.m. For many years, the Section has been fortunate enough to have Schering-Plough Corporation sponsor the Annual Reception and participate in other Section events such as the Corporate Counsel Conference and the Career Networking Conference. Because of Schering-Plough's continued commitment to the Section and its outstanding leadership, we will take the opportunity to present an award to the company during the Annual Reception. We are grateful for our partnership with Schering-Plough and for Baker & McKenzie LLP's co-sponsorship of this year's event.

As you can see, we have a full slate of Commercial Law Section activities in which you can participate. Please take advantage of these opportunities, and we'll see you at the Annual Convention.

Member Spotlights

Gregory M. Wesley – Board Appointments

Mr. Wesley, who is a 1997 graduate of the University of Wisconsin and a Partner and Employment Group Co-Chair of Gonzalez, Saggio & Harlan LLP, Milwaukee, was elected to serve a three-year term on the Board of Directors of the United Way of Greater Milwaukee and to serve a six-year term to the Board of Trustees of the Medical College of Wisconsin.

La Tanya Langley – Receives 40 Under 40 Award

On June 19, 2009, six chambers of commerce in Connecticut and the Fairfield County Business Journal presented LaTanya Langley, an NBACLS Executive Committee member, with "Fairfield County's 40 Under 40" award. The award recognizes successful young business professionals and leaders who have demonstrated success in their careers before the age of 40 and who are helping build the county's dynamic economy. La Tanya is Director and Senior Counsel at Diageo North America, which is based in Norwalk, CT. She provides legal advice on commercial, procurement, global, corporate relations and real estate matters.

La Tanya has dedicated much of her time to improving the lives of young people in the greater Norwalk area and serves on several professional, church, and community-based boards, including A.H.E.A.D. – African Heritage Employees at Diageo; St. Luke's School Alumni Board; the Advisory Committee for Person-to-Person; and the Norwalk Historical Commission. She also is Director of Christian Education for Grace Baptist Church in Norwalk.

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Accepting the award, La Tanya defined leadership as a necessary principle of professional and personal existence, involving spirituality, integrity, honesty, dexterity, and a fondness for learning and achievement in team environments. She believes the goal of leadership is to influence organizations and communities positively and help them reach their highest potential.

Michael Choy – Forms Choy Lichenstein

In May 2009, NBACLS Executive Committee member, Michael Choy, formed his own law firm — CHOY LICHENSTEIN LLC — in Birmingham, Alabama. His firm specializes in civil litigation and trials in state and federal courts in Alabama. He also represents corporate and individual clients who have governmental affairs issues. Michael has extensive jury trial experience across a broad spectrum of industries and subject matters and currently represents several corporations that participate in the Commercial Law Section's Corporate Counsel Program.

From 1984 to 1985, Michael clerked for the now retired Honorable U. W. Clemon, the first of only two African-American Judges appointed to the federal bench in Alabama. After his clerkship ended in 1985, Michael joined the Legal Department of BellSouth Corporation (now AT&T) and held various positions of increasing responsibility until he decided to enter private practice in 1992.

Robert Simpson – Swift Jury Decision for ExxonMobil

After only 40 minutes of deliberations, a Connecticut Superior Court jury recently returned a verdict in favor of defendant Exxon Mobil Corporation (ExxonMobil). The verdict is one of few of its kind in the nation. Robert R. Simpson, a partner with Shipman & Goodwin LLP's Hartford, CT office, represented ExxonMobil.

The decision was the culmination of six days of trial and voir dire that involved a six-figure claim by a Texas plaintiff who claimed she tore tendons in both ankles, missed five months of work and required future surgery due to a fall in a hole at a Mobil station on January 22, 2006. Although ExxonMobil leased the premises, the property was owned by the Connecticut Department of Transportation. The defense focused on plaintiff's lack of credibility and ExxonMobil's lack of control of the premises.

On June 2, the jury received the case at 4:05 p.m. They were asked to determine "whether the plaintiff proved by a preponderance of the evidence that ExxonMobil had control over the area at issue." Although it is rare for a trier of fact to be convinced that a lessee of the premises does not have control, at 4:45 p.m., the jury delivered their answer — "No"— and entered a verdict for the defendant.

Vickie E. Turner – Distinguished Alumni & San Diego Super Lawyer

Ms. Turner has been honored by the University of San Diego School of Law with its 2009 Distinguished Alumni Award. On September 18, 2009, a luncheon will be held at the Westin Hotel to celebrate this honor. The award is presented to alumni who are recognized throughout the community for their exemplary work and who embody the high ethical standards and commitment to community service that the law school seeks to instill in its graduates.

Ms. Turner was also the only woman selected as one of top 6 product liability defense lawyers in San Diego by 2009 Super Lawyers and was featured in a full page story in the Super Lawyer Magazine.

The Case For Keeping Legal Process Outsourcing ...

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Committee") opined that a New York lawyer legally and ethically may outsource legal support services overseas to foreign lawyers or laypersons.[17] The ABCNY Committee opined that under the NY Code, a lawyer, law firm, or corporation must: (a) supervise the non-lawyer to ensure that the person is providing work that contributes to the lawyer's competent representation of the client; (b) maintain client confidences and secrets; (c) avoid conflicts of interest; (d) bill appropriately for the non-lawyer's services; and (e) obtain the client's informed consent for outsourcing.[18]

The ABA Standing Committee on Ethics and Professional Responsibility has not yet specifically addressed the ethical implications of outsourcing domestic legal work to foreign legal workers.[19] However, the Committee's opinion on the domestic use of contract lawyers advises attorneys seeking to outsource legal work to exercise reasonable care to avoid conflicts and to comply with other applicable provisions of the Model Rules.[20]

In addition, there are hidden costs to overseas outsourcing, including vendor management, quality control, contract management, and higher operational costs. Law firms and legal departments that outsource legal work might also incur traveling and training expenses related to educating overseas lawyers, who might not be familiar with the laws, legal practices, and professional ethics rules in the United States. Furthermore, even though the overseas lawyers may be fluent in English, cultural differences and communication barriers still abound.

Another significant and serious consequence of "off shoring" is the company's exposure to fraud. For example, in January 2009, the chairman and co-founder of Satyam Computer Services, a leading Indian outsourcing company that serves more than a third of the Fortune 500 companies, confirmed that the company significantly inflated its earnings and assets for years, roiling Indian stock markets and throwing the industry into turmoil.[21] Naturally, it is easier for a corporation or major law firm to oversee a domestic outsourcing operation than one in a foreign country.

Finally, there is a growing perception that Indian lawyers provide the same, if not higher, quality of service as their American counterparts. While these foreign attorneys may be well-educated, highly-skilled professionals who can easily handle minor and less sensitive legal work at relatively meager salaries, most are not educated in American law schools, they most likely will not comply with American ethical standards and may not have the same handle or grasp on United States law and procedure as a domestically trained attorney.

Conclusion

From a proponent's perspective, offshore legal outsourcing could be viewed as a boom to the legal industry: Law firms may turn to this practice to attract cost-conscious corporate clients and provide 24/7 legal services, and legal departments can utilize it to lower costs and focus on higher-level work. Nevertheless, in this era of economic downturn, when thousands of legal jobs have been lost and corporate clients have cut their demand for legal services, the outsourcing of legal processes overseas is more of a curse to American lawyers and paralegals looking for work. No doubt, minority-owned law firms and minority lawyers struggling to attract and service corporate clients as well as their non-minority counterparts will experience more negatives than positives from this growing industry. Emphasizing value over costs, and perhaps even a little patriotism that does not necessarily rise to protectionism, will be crucial to attracting corporate clients away from off shoring. If using LPO is the only option, "on shoring" should always be the first choice.

[1] *Herbert A. Igbanugo, Esq. is a founding shareholder of Igbanugo Partners Int'l Law Firm, PLLC, which is located in downtown Minneapolis. He is admitted to practice in Minnesota and New York. Mr. Igbanugo's principal practice areas are U.S. Immigration and Nationality Law and International Trade Law in Sub-Saharan Africa. He can be contacted by telephone at 612-746-0360 or by e-mail at higbanugo@igbanugo-law.com.*

[2] Eric Bellman, and Nathan Koppel. *Legal Services Enter Outsourcing Domain*. The Wall Street Journal Online (September 28, 2005): 1-4, available at http://pangea3.com/images/WSJ_29Sep2005.pdf

[3] Maya Karwande. *Legal Process Outsourcing Efficient And Ethical?* Immigration Daily, available at http://www.ilw.com/articles/2008,0926-karwande.shtm#3.

[4] *Off shoring Legal Services to India: An Update*. 2007. ValueNotes: ValueNotes Database Pvt. Ltd: 1-5.

[5] Anthony Lin. *Legal Outsourcing to India Is Growing, but Still Confronts Fundamental Issues: Is it just about cost, or can Indian lawyers do some things better than their American counterparts?* New York Law Journal (January 23, 2008), available at http://www.law.com/jsp/article.jsp?id=1200996336809.

[6] Mark Ross. *Legal Process Outsourcing (LPO): 2007 And Beyond*, Immigration Daily, available at http://www.ilw.com/articles/2008,0125-ross.shtm.

[7] *Id*.

[8] Supra note 4 (Lin).

[9] *Id*.

[10] *Contract Attorney Work Grows…but in onshore centers, not India*. The Posse List, February 20, 2009, available http://www.theposselist.com/2009/02/20/contract-attorney-work-grows-but-in-onshore-centers-not-india.

[11] *Id.*

[12] *Id.*

[13] Statistics released by the American Bar Association, National Lawyer Population by State, Compiled by: ABA Market Research Department, available at: http://www.abanet.org/marketresearch/resource.html

[14] Sally Kane, *Legal Outsourcing (LPO) is Big Business*, About.com, June 20, 2009, available at: http://legalcareers.about.com/b/2009/06/20/legal-outsourcing-lpo-is-big-business.htm?p=1

[15] *Id.*

[16] Statistics released by the American Bar Association, National Lawyer Population by State, Compiled by: ABA Market Research Department, available at: http://www.abanet.org/marketresearch/resource.html

[17] Steven C. Bennett, Esq., *Ethical Implications of Overseas Outsourcing*, Lexis Nexus, citing ABCNY Op. 2006-3 (Aug. 2006), available at: http://law.lexisnexis.com/litigation-news/articles/article.aspx?groupid=2oKGuUXPxVQ=&article=685+/IJqJuM=

[18] *Id.*

[19] *Id.*

[20] *Id.*; *see* ABA Op. 88-356 (1988).

[21] Heather Timmons and Bettina Wassener, *Satyam Chief Admits Huge Fraud*, New York Times, January 8, 2009, available at: http://www.nytimes.com/2009/01/08/business/worldbusiness/08satyam.html?_r=1&scp=2&sq=satyam&st=cse

Message from the Chair . . . *continued from page 1*

Gotshal & Manges; Holland & Knight; Beveridge & Diamond; Huron Consulting Group; and Nelson Mullins Riley & Scarborough, just to name a few. As we continue to enhance our Conference, I am certain that more firms and corporations will benefit from these relationships.

I would be remiss if I did not mention our efforts to recognize our members who have excelled in the profession. We felt it important to not only recognize leaders on the diversity front, but also to acknowledge that our members are among the most talented lawyers in the country. To that end, we established the Outstanding In-House and Outstanding Outside Counsel of the Year Awards, and based on your nominations, we were pleased to present the inaugural awards to Gregory Kenny of Exxon Mobil Corporation and Steven Wright of Holland & Knight.

Indeed, the Section continues to grow and prosper. I greatly appreciate your help in achieving these accomplishments. Our executive committee, conference consultant and many volunteers make this Section great! I leave you in their very capable hands. Again, thank you for the opportunity to serve.

Surviving the E-Discovery Adventure ... *continued from page 1*

1. The Initial Hold Letter - Communicate Before You Send

Outside counsel eager to demonstrate their knowledge in the e-discovery area and to protect their interests may be inclined to shoot off a litigation hold letter to a client immediately after engagement (sometimes even in the engagement letter). This *seems* like a prudent thing to do after being thoroughly educated through countless e-discovery workshops, lectures, webinars, etc., right? Not so fast.

Too often outside counsel lose sight of the fact that "the identification and preservation of potentially relevant information can be a complex undertaking."[3] Before sending such a letter, did you advise the client it was coming? Did you discuss the scope of what should be preserved? Do you know the potential cost and business impact on your client to preserve everything in your letter? Do you know whether a similar letter/memorandum has already been sent internally that could potentially be in conflict with the notice you are sending?

Outside counsel should keep in mind that in many instances the in-house counsel/client has been dealing with the key issues in the lawsuit before a complaint was filed; therefore, your client may be in the best position to identify the subject areas for purposes of preservation. Sending out a preservation notice without this insight and input from the client suggests that you have not tailored the notice to your client's particular circumstance or case. In addition, we have seen preservation letters that ask clients to preserve far more than what is necessary for the lawsuit. This "everything-but-the-kitchen sink" type of preservation notice can be harmful for your client, and for various reasons, not the least of which are the likely extraordinary expense or interruption of your client's business.[4] An overly broad preservation notice also places the client in the difficult position of defending itself from having to preserve not only what opposing counsel may request, but also everything that *its* outside counsel mandated be preserved.

The in-house lawyer also has some responsibility here. Knowing how overzealous some of your outside counsel can be, you should advise them during the initial engagement that you want to discuss preservation issues immediately. This needs to be done quickly because certain firms are encompassing preservation issues in their engagement letter. As you know, there is still a majority of cases where e-discovery issues are minimal or simply don't play a role; you may be in the best position to know this because you have probably dealt with this issue pre-litigation.

2. Review and Retrieval - In-House and Outside Counsel Must Work in Harmony

With the mounting pressure within legal departments to cut costs, many companies have decided to keep the search and retrieval function for relevant electronically stored information (ESI) in-house. Although there is nothing inherently wrong with this approach, excluding outside counsel from understanding the search and retrieval process is problematic and may place in-house and outside counsel at odds.

Too often, outside counsel allow their clients to exclude them from the search and retrieval process in fear of placing a strain on the relationship. This is especially true where law firms allow senior associates to manage e-discovery issues with the client. How many associates (even partners) will be bold enough to tell the client that they must play a role in the search and retrieval process other than rubber stamping what in-house counsel has done? Unfortunately, outside counsel must take the risk of alienating good clients because the exposure is too great. After all, while a party to litigation has the duty to preserve, the oversight and accountability for ensuring preservation rests squarely on the shoulders of counsel. Indeed, in the seminal *Zubulake* case, the court held that "[c]ounsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents."[5]

Here, partnership between in-house and outside counsel is critical. Outside counsel cannot simply issue a litigation hold, and then rely on the representations of its client or in-house counsel regarding the client's preservation efforts.[6] Rather, counsel must ensure: "(1) that all relevant information (or at least all sources of relevant information) is discovered; (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party."[7] In addition, the Federal Rules of Civil Procedure require that an attorney signing a disclosure or discovery response must certify "to the best of [her] knowledge, information and belief, *formed after a reasonable inquiry*" that the disclosure is "complete and correct as of the time it is made."[8] In cases where in-house counsel is present, it is virtually impossible for outside counsel to meet these affirmative obligations without the cooperation and partnership of in-house counsel.

As evidenced by recent sanctions against both client and counsel in *Qualcomm, Inc. v. Broadcom Corp.*,[9] there is a lot at stake. In *Qualcomm*, a magistrate judge found that outside counsel had failed to properly search for and produce responsive documents during the course of discovery and that once they discovered that relevant documents existed, but had not been produced, they nevertheless continued to conceal the documents, while maintaining an argument based on false information to the court during the trial. In addition to levying an $8,568,633.24 monetary sanction

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Surviving the E-Discovery Adventure ... *continued from page 10*

against Qualcomm, the magistrate judge referred six of its outside lawyers to the State Bar of California for investigation into potential ethical violations.

Qualcomm is an extreme but cautionary tale, and we can all benefit from the unfortunate circumstances befalling the lawyers who litigated that case. While the conduct of *Qualcomm*'s attorneys seems outrageous, it is the apparently massive breakdown in communication between Qualcomm's in-house and outside counsel that should serve as a clarion call to counsel who represent corporate clients. Clients and in-house counsel must act in good faith while cooperating with outside counsel to ensure proper adherence to the rules.

3. Quick Peeks - Cost vs. Conscience

The advent of e-discovery also has the consequence of forcing clients to pay their outside counsel extraordinary amounts of fees to review ESI. Given this economic climate, many clients simply cannot afford to pay six or seven figures for document review. Frankly, even in the best of times, clients will likely cringe at the sky-high costs of e-discovery document review by their attorneys. But we think that too many lawyers advise their clients that this is an absolute and necessary cost. We have heard many lawyers remark, "We can't simply hand the documents over to opposing counsel without our review." The response is simple: Yes, you can — *after taking some necessary and appropriate precautions*. Take, for example, one enormous and underutilized cost-saving procedure: the "quick peek" agreement. A "quick-peek" agreement is a cost-effective method of shifting the costs of reviewing significant amounts of ESI to the opposing side.

This type of agreement allows the producing party to disclose ESI prior to a confidentiality or privilege review. This approach often presents a great deal of agitation for outside and in-house counsel. Some outside counsel believe that their ethical obligations to their clients to provide competent and diligent representation and to protect those clients' confidential information are compromised.[10] In-house counsel and clients are concerned with the opposing party getting access to sensitive material and/or privileged information.

It is true that quick peek agreements require "stringent guidelines and restrictions to prevent the waiver of confidentiality and privilege."[11] To address these concerns, counsel should include a "claw-back" provision in the quick peek agreement, and, if necessary, enter into a protective order.[12] A clawback provision allows the producing party to pull back privileged documents, without waiving the asserted privilege. There is added protection in Federal Rule of Evidence 502, which provides protection in the event of inadvertent disclosure of privileged information. Without minimizing the concerns raised by the use of agreements and clawback provisions, these are strong cost-controlling vehicles, which, if done properly, can balance the competing need to manage costs and protect client confidences.

This is another area where in-house and outside counsel must make sure they are on the same page. Employing a quick peek agreement and clawback provision is an important strategic tool, and while clients must appreciate their obligations to produce, outside counsel must appreciate a client's need to control how much it spends in fees.

Concluding Thoughts

These are just a few areas where ethics and e-discovery overlap. The underlying theme in each of these areas is communication. Although this article focuses on the communication between outside and in-house counsel, you should also remember that communication with opposing counsel and the court, each with accompanying ethical issues, are also critical throughout the e-discovery process.

[1] *Robert R. Simpson is a partner in the law firm of Shipman & Goodwin LLP, where he is a member of the Litigation Department. Attorney Simpson's practice focuses on product liability, employment and business litigation. He is a member of The Sedona Conference Working Group on Electronic Document Retention & Production (WG1). He frequently lectures and counsels clients on e-discovery issues.*

Leander A. Dolphin is an associate at Shipman & Goodwin LLP. Attorney Dolphin practices in the areas of civil litigation, providing representation in general business and employment law litigation matters.

[2]There is a wealth of commentary on e-discovery and how to navigate the e-discovery rules. Excellent resources include the work of the Sedona Conference Working Group on Electronic Document Retention and Production (WG1); Steven A. Weiss, *Ten Electronic Discovery Cases You Should Read*, ABA Litigation (2007); and John M. Barkett, THE ETHICS OF E-DISCOVERY (2009) to name just a few.

[3]*The Sedona Commentary on Legal Holds: The Trigger and the Process, A Project of the Sedona Conference Working Group on Electronic Document Retention & Production (WG1)* (2007).

[4]*Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (*Zubulake IV*) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations….").

[5]*Zubulake v. UBS Warburg*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*).

[6]*See, e.g., Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837 (HB), 2006 U.S. Dist. LEXIS 32211, at *17 (S.D.N.Y. May 23, 2006) ("[c]ounsel's obligation is not confined to a request for documents; the duty is to search for *sources* of information).

[7]*Zubulake V*, 229 F.R.D. at 432.

[8]Fed. R. Civ. Proc. R. 26(g); *see also*, Advisory Cmte. Notes (1983 Amendment) (noting that "Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37").

[9]*Qualcomm, Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 U.S. Dist. LEXIS 911 (S.D.Ca. Jan. 7, 2008) (imposing an $8,568,633.24 sanction against Qualcomm and referring six outside counsel to the State Bar of California for investigation of possible ethical violations).

[10]MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.6 (2008).

[11]The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, cmt.10d (2007).

[12]Note also that not all jurisdictions endorse the use of quick-peek agreements, citing the voluntary disclosure of confidential and/or privileged information. Before entering into a quick-peek agreement, counsel should be familiar with the laws of the jurisdiction in which they practice. But see Fed. R. Evid. 502 advisory committee's notes subdivisions (d) and (e) (providing that a court order will protect disclosures made pursuant to the order).

United States/Canada Cross-Border Transactions

By Andrew S. Nunes, Esq.[1]

In this global economy, companies are doing more and more business in foreign jurisdictions. One of the first international jurisdictions in which many U.S. companies seek to do business is Canada. Attorneys for U.S. companies that have purchased, or have entertained purchasing, a Canadian company or have otherwise sought to establish a presence in Canada will be familiar with two important federal statutes – the *Investment Canada Act* (the "ICA") and the *Competition Act* (the "CA"). Attorneys should be aware of recent amendments to these statutes which may impact on U.S. companies entering into cross-border transactions, directly or indirectly, involving Canadian entities.

Investment Canada Act

(i) Threshold Amendments

Under the ICA, an investment in a Canadian business (which includes all new business activities commenced in Canada and most acquisitions of control of existing Canadian businesses) by a non-Canadian is, subject to a limited number of exemptions, either "notifiable" or "reviewable."

If the applicable threshold for review is not exceeded, the transaction is merely "notifiable," requiring only that a short notice be filed with the Investment Review Branch of Industry Canada. However, where the applicable review threshold is exceeded, the investment will be "reviewable," requiring an application to, and the approval of, the Minister responsible for the ICA. In the case of a direct acquisition of control of a Canadian business, this approval must be obtained before the parties complete the transaction.

When they come into force, the recent amendments to the ICA will change the threshold for the review of direct acquisitions of control by World Trade Organization (WTO) investors (including American-controlled companies) — from Cdn$312 million based on book value of the assets of the business being acquired to Cdn$600 million based on the "enterprise value" of the subject business, with the threshold increasing to Cdn$1 billion over approximately a four-year period. The Canadian government's view is that the combination of the higher dollar threshold and the new method of calculating value will reduce the number of foreign investments requiring review. This it is expected will facilitate the speedy completion of cross-border transactions which previously might have been delayed and, possibly, denied, due to the need for a formal ICA review.

(ii) "National Security" Test

On the flip-side, the amendments to the ICA have also introduced a "national security" test for the review of transactions that in some cases may only have a very minor Canadian connection, allowing the Governor in Council to block transactions in the interest of protecting Canada's national security.

***Competition Act* – Merger Provisions**

(i) Threshold Amendments

Under the CA, the parties to certain mergers must comply with the pre-merger notification obligations and mandatory waiting periods where both the "size-of-parties" and "size-of-transaction" monetary thresholds are exceeded. While the "size-of-parties" threshold will remain at Cdn$400 million, the amendments to the CA generally increase the "size-of-transaction" threshold from Cdn$50 million to Cdn$70 million. This threshold will be revised annually based on a formula tied to changes to the national gross domestic product.

(ii) Process Amendments

Previously, where the thresholds were exceeded, the parties would have to file a notification and wait either 14 or 42 days (depending on whether a short-form or long-form application was required) before closing the deal.

The amendments replace these waiting periods with a U.S. "second-request" type of process for merger notification and review. There will be an initial 30-day waiting period following the filing of a pre-merger notification. This waiting period can be extended by the Commissioner of Competition if, within the initial 30-day waiting period, she issues a "second request" notice requiring the production of additional information. Closing would be prohibited until 30 days after compliance with the Commissioner's second request, however long that takes.

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U.S./Canada Cross-Border... *continued from page 12*

The changes to the CA also establish the potential for administrative monetary penalties of up to Cdn$10,000 per day for failure to comply with the pre-merger notification regime.

* * *

While it is expected that the changes to the ICA will make more U.S./Canada cross-border transactions subject to one less hurdle, U.S. attorneys will want to carefully consider the potential application of the new "second request" process for mergers under the CA because it may make certain U.S./Canada cross-border transactions lengthier and more involved than they have been in the past.

[1] *Andrew S. Nunes is a partner at the law firm of Fasken Martineau DuMoulin LLP where he is a member of the Business Law Department. Fasken Martineau DuMoulin LLP (www.fasken.com) is a Canadian-based full service law firm providing strategic advice in virtually all areas of business law and litigation. Andrew can be reached at 416.865.4510 or anunes@fasken.com.*

Robert Johnson, Managing Counsel for McDonald's Corporation, Recognized

The NBA Commercial Law Section congratulates Robert Johnson on Chicago United's inclusion of him among the 46 local business people who it will feature in its 2009 Business Leaders of Color Publication. The business advocacy organization recommends accomplished corporate and civic leaders to Fortune 1000 corporate boards looking to increase diversity among their ranks.

Chicago United has presented the Business Leaders of Color publication biannually since 2003. It received more than 160 nominations from a wide variety of products and services industries. Among the people who Chicago United has recognized in the past are First Lady Michelle Obama, Ralph Alvarez, President and Chief Operating Officer of McDonald's Corp., and Valerie Jarrett, Senior Advisor to President Barack Obama.

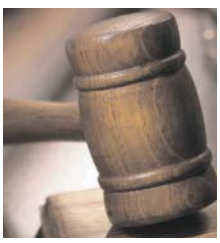
Mr. Johnson has demonstrated his commitment to diversity in many ways, not the least of which has been through his participation in the NBA Commercial Law Section's Corporate Counsel Conference and his retention of some of the outside attorneys who he has interviewed during that annual event.

Member Spotlights

Donald O. Johnson - Establishes Law Firm in Richmond, VA

Donald O. Johnson, J.D., LL.M., CPCU recently established D. O. Johnson Law Office, PC in Richmond, VA, fulfilling a long-held desire to open a law firm in an area in which his father's family has lived since before the Civil War. Don's practice focuses on providing legal counseling and litigation services to clients involved in insurance coverage and bad faith claims handling litigation, individuals and companies involved in breach of contract, negligence, and other legal disputes involving intentional and unintentional tort allegations, and companies faced with complex electronic document production and witness preparation challenges.

Don, who is bilingual (English/Spanish), has more than 14 years of legal experience practicing at a large national firm, ten years of which involved property and liability insurance coverage and bad faith litigation. In addition, he earned a Master's degree in Trial Advocacy from Temple University's Beasley School of Law and a Chartered Property and Casualty Underwriters insurance professional designation from the American Institute for CPCU. He is licensed to practice law in Virginia, the District of Columbia, Maryland, and Pennsylvania. His contact information can be obtained at www.dojlaw.com.



YOUR VOICE

If you have comments concerning the NBACLS newsletter, or if you are a NBACLS member who wants to submit an article to us for publication consideration, please contact Donald O. Johnson at donjohnson@dojlaw.com.

E-Mail Address Changes

If you change your e-mail address and wish to continue receiving the electronic copy of the Section newsletter, please send your new e-mail address to Undrea Hines at undrea.hines@nbacls.com.

Coming Events

August 1 - 8, 2009
NBA 84th Annual Convention & Exhibits
San Diego, California

August 6, 2009
NBA Dr. Martin Luther King, Jr.
Drum Major for Justice Advocacy Competition
San Diego, California

November 4 – 10, 2009
Board of Governors Meeting
& Annual Wiley A. Branton Issues Symposium
Philadelphia, Pennsylvania

January 27 – 31, 2010
Judicial Council & Board of Governors
Mid-Winter Meeting
Honolulu, Hawaii

April 7 – 11, 2010
NBA 29th Annual Mid-Year Conference
& Gertrude E. Rush Award Dinner
St. Louis, Missouri

Highlights from the 2009 Corporate Counsel Conference

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