## Inside 2Q2012




ACC AMERICA
Association of Corporate Counsel
North Florida Chapter


# FOCUS

## President’s Message

***John Price***

Hello North Florida. I hope this newsletter finds you doing well both professionally and personally. It’s hard to believe we’re nearly halfway through 2012. I’m sure our respective schedules are similarly hectic and full, so, if you’re reading this, I hope that means you’ve found a moment to relax and catch-up on your leisure reading (sure… our newsletter classifies as leisure reading).

The North Florida Chapter has been busy since we published our last newsletter. On March 14, Constangy Brooks & Smith hosted a well-received program on executive compensation. The event took place at the World Golf Village, and preceded the start of Constangy’s well-known Employment Law Workshop (which ACC members were also invited to attend). Constangy presented a number of fantastic topics and sessions throughout the day, and finished-out the day with a classy cocktail reception.

After setting the mark quite high last year with their golf outing at Timuquana Country Club, Fowler White Boggs outdid themselves with this year’s golf event on April 26. Fowler called-in a number of favors in order to provide the attendees with perfect weather for this year’s event. In addition to the perfect weather, attendees were truly blessed with a magnificent venue — Timuquana recently completed significant renovations to the clubhouse and course. With more than a half-dozen carts rolling-out of the clubhouse, we really had the course covered. Based on what I saw that day, our chapter is made up of a number of very talented golfers, some of whom could truly quit their day job and survive just fine on the links (yours truly is specifically excluded from that group). After spending several hours enjoying the weather and sport, golfers were treated to a wonderful cocktail reception at the Club, and prizes were presented to the top three foursomes.

So as not to be accused of having too much fun, on May 3, Fowler White Boggs hosted a program on Supreme Court Cases: The 10 Cases Corporate Counsel Need to Know. Held at the River Club in downtown Jacksonville, attendees were treated to a wonderful lunch and an even more tempting table of desserts. The three guest speakers provided the crowd great insight into those Supreme Court cases which have had the greatest impact on the areas of arbitration, employment law, and attorney/client privilege.

We have also enjoyed another great event at the Baseball Grounds of Jacksonville. McGuireWoods reserved Skydeck Four for a game between the Jacksonville Suns and the Jackson Generals, and hosted this event for the third year in a row. This was an event enjoyed by both ACC members and their families. We hope you were able to join us!

If you’ve just recently joined the ACC, or are new to our chapter — Welcome! We have over 150 members representing more than 70 companies, and we continue to grow. If you’d like to get involved in helping steer the direction of the chapter, or would like to give us feedback on how we’re doing or things you’d like to see more of, please drop me an e-mail.

Don’t forget, this year’s National ACC Meeting is in Orlando, Florida. Regular registration ends on August 22, but the sessions are already filling-up fast. You can learn more about the Annual Meeting, and review the action-packed program schedule at *http://am.acc.com*.

I look forward to seeing each of you soon at one of our upcoming events.

All the best,
John Price

# "It's deja vu all over again."

***By James A. Merklinger, Vice President and General Counsel***

The following article draws heavily on ACC Leading Practice Profile on Knowledge Management. View the full report at: *www.acc.com/legalresources/resource.cfm?show=16806*

Even if you don't know who Yogi Berra is, you might appreciate that quote — unless it describes how you manage a legal department. Legal departments are full of smart people with clever ideas. If you don't save those ideas, you might waste time re-inventing solutions. To find out how members avoid this type of inefficiency, ACC reached out to several law departments that told us about their knowledge management practices.

Participants were asked to identify aspects of their knowledge management programs that they considered to be leading or best practices. Here, we've compiled some of these program elements.

## Best Practices

**1. Building a corporate culture that supports knowledge management.** Many participants underscored the importance of a collaborative culture in successful knowledge sharing. When the general counsel promotes a culture of sharing information across departments, touting the power of group intellect and value of collective intelligence, participation in knowledge sharing is robust.
**Suggestion:** Encourage knowledge sharing by acknowledging contributions positively, demonstrating the impact of successful knowledge management (KM) practices on the bottom line and promoting success stories.

**2. Incentivizing participation in the development of knowledge management systems.** In organizations without dedicated KM attorneys, law departments that strive for collaborative participation support the implementation of reward or recognition systems.
**Suggestion:** Don't simply say KM is part of the job. Provide incentives for participation, along with a clear message that a strong KM can free up time for attorneys.

**3. Using effective knowledge management to improve the value of outside counsel relationships.** Knowledge management programs influence the selection of outside counsel.
**Suggestion:** Invest in a matter management program that allows law firms to respond more efficiently and produce a higher quality product.

**4. Making a paperless commitment.** Two participants cite their paperless commitments, as facilitated by KM technology, as leading practices. Converting paper to electronic format not only saves money by eliminating the need for physical storage, but also expedites organization and retrieval of relevant documents and allows for secure storage.
**Suggestion:** Identify documents that are appropriate for electronic format, but be sure to have a policy regarding printing only when necessary. If not, you'll end up with more staff printing documents and using more paper than if you only had the documents available in hard copy.

**5. Aligning knowledge management with professional development.** Make knowledge management a part of the professional development plan for staff.
**Suggestion:** Develop training. Whether it's a live training program, an annotated precedent or a podcast, all techniques are aimed at the same goal: training and meeting the resource needs of lawyers on any particular topic.

**6. Having dedicated knowledge management attorneys.** These non-practicing lawyers are embedded in the various practice groups, create and maintain model precedents and forms, collect and catalogue reusable work product, and update the group on legal and industry developments.
**Suggestion:** Whether or not you assign this role will depend on your department size and need.

**7. Taking a team approach to knowledge management.** Several participants underscored that enabling and fostering individual contributions by all employees facilitates implementation of successful KM systems.
**Suggestion:** Bring together a diverse group to identify your KM needs and design your process. Include staff outside of legal.

**8. Tying knowledge management to the client's strategy.** A key factor in successful program implementation is a clear KM strategy that ties into the execution of the client's strategy.
**Suggestion:** Include KM in the strategic planning of the client.

## People

Knowledge management begins with people, and the ability for people to share knowledge is important to the success of a knowledge management practice. With organizations operating in multiple office locations, having systems for connecting to valuable information is crucial. Here are a few ways participants succeeded in bringing knowledge together.

**1. Individual organizing and sharing.** The Bombardier Recreational Products, Inc., law department cites a heightened interest in personal libraries and personal networks tailored to individual or small group needs. Marie-Claude Simard, Senior Legal Counsel of BRP, views the personal interest in sharing knowledge as a positive step in rounding out the KM program, noting "technology is not always the best way to obtain knowledge. With technology, it isn't always easy to get a feel for a case by just looking at files, so it is important to speak one on one. …Asking colleagues, 'What would you do?' cannot be done electronically."

**2. Blogs.** Attorneys are increasingly utilizing blogs to share their expertise with others. These blogs are used both internally and externally by companies and law firms to provide added value to clients and staff. Osler shared how these blogs feature updates in the law and matters of interest to the client, keeping clients constantly attuned to the firm and its services. The blogs are saved on the various platforms of the companies and thereby create a unique set of knowledge.

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**3. Ongoing dialogue.** Various participants mentioned the importance of regular, scheduled contact by the groups that head KM. The feedback from different people is important to ensure that knowledge management needs are addressed and handled adequately.

**4. Staff participation.** Successful knowledge management programs enable and foster individual contributions by all employees. This trend frees up time from the attorneys and allows other employees to contribute and feel responsible for updating KM.

**5. Open communication.** One key to success is open and frequent communication between the information systems department and the legal department. Successful knowledge management relies on effective, ongoing collaboration between both departments. With differing fields of expertise, attorneys and IT professionals can be challenged to understand each other. For this reason, it is important to constantly foster good communication and cooperation between the groups.

## Technology Tools

Even as I write this, I'm confident a new tool has been launched to assist you with your knowledge management challenges. In the interest of promoting the sharing of knowledge, I hope you will contact me with recommendations of tools you have found helpful so we can share the information with other members. Below are some of the technology participants identified as being used in their knowledge management systems.

**1. SharePoint.** Participants cited Microsoft SharePoint as a vital tool of their knowledge management and knowledge sharing program. Although all participants use SharePoint as a portal for sharing information and creating work group areas, the level of dependence on the software varies: Some law departments base their entire programs on the SharePoint portal, while others use it in conjunction with other software. All agree, however, that SharePoint has changed the way knowledge assets are managed. Generally, organizations that have consolidated systems and channeled them into SharePoint have found that SharePoint is easier to maintain, gives them more leverage with vendors and facilitates searching across multiple databases.

**2. Serengeti Tracker.** The law departments of Symantec and Vertis rely on Serengeti Tracker to help manage outside counsel and electronic billing.

**3. Shared drives.** Copies of contracts, precedents, sample documents, email and research matters can all be found in shared drives at many companies. These drives allow for quick access to information and many are also full-text searchable. Several participants have created lists of key words as a group to facilitate tagging for users.

**4. Open-source software.** The rise of open-source business class, enterprise document and content management software, which allows businesses to try out software without investing in licensing fees, is significant. Free or low-cost software recommended by participants for knowledge management include Knowledge Tree, Alfresco, DNN, Drupal, Joomla! and Plone.

**5. Law department intranets.** The Vertis legal department relies on an intranet containing policies, entity information and legal guidelines. Johnson & Johnson's law department's intranet-based portal, LegalEase, facilitates sharing of information across the legal organization. Johnson & Johnson's law department also utilizes a separate intranet to identify attorneys responsible for various areas of the law or business departments, available to all employees. The intranets contain information such as company policies, record retention policies and expert locators.

**6. Document management systems (DMS).** A worldwide DMS can help a company collaborate within different corporate divisions and legal areas. Legal departments often find that there is significant repetition of issues in daily practice. An integrated DMS can help law departments streamline information exchange to resolve these issues more efficiently. Cited DMS systems include DocuShare, which integrates with Outlook and can be accessed by outside counsel. Also mentioned were Interwoven and Hummingbird/Open Text DM5.2.

**7. Automatic sharing.** Several organizations explained that having the KM program integrated into workflow is key. Systems should be simple and easy to use One participant developed a knowledge submissions system that enables users to click and send a piece of know-how directly from the document management system or email.

**8. Email management.** Although tools for saving and managing email are critical, several participants cite present limitations in harvesting knowledge and information from email. The use of automated tools for searching, archiving and storing email is important. Systems, such as Alfresco and GlobalRelay, allow users to save email content directly to KM systems. Email tools are also becoming more important for preserving data and extracting knowledge. Again, the key to success is people — knowing what to save and where, so that it's retrievable and useful.

**9. Sample agreements and templates.** Various participants catalogue sample agreements and contracts for clients, which can serve as models and cut down on attorney time. Factiva, a Dow Jones & Reuters Company that delivers business information with search tools, uses a smart precedent system from Exari. This "smart" web-based XML system allows lawyers to draft templates that the sales team can use. The system frees up attorneys' time by eliminating calls from sales, asking for a first draft of a contract for a client. When the company amends templates and creates new ones, the lawyer responsible for the program inputs changes into the system.

ACC recently launched the ACC Contract Advisor, a contract database that provides model contracts and sample clauses, and allows users to benchmark their existing contracts against a database of similar contracts, to determine how similar or divergent the contract is from the collection. This "wisdom of the crowd" can be accessed by members online at *www.acc.com/contracts*.

Don't forget, ACC is one big source of knowledge, by in-house counsel, for in-house counsel. Access the knowledge of your peers at *www.acc.com*. If you have comments, questions or wish to add knowledge to this article, please contact me: James A. Merklinger, Vice President and General Counsel, *merklinger@acc.com*

# Member Spotlight — Christopher Romaine, Fortegra Financial

The ACC (North Florida) newsletter Member Spotlight focuses this quarter on Christopher Romaine, Senior Vice President, General Counsel and Secretary of Jacksonville-based Fortegra Financial. As a New York Stock Exchange-listed insurance services company, Fortegra Financial's diverse businesses include credit life insurance and business process outsourcing, as well as eReinsure, the leading internet platform for managing reinsurance negotiations and placements.

Chris joined Fortegra Financial as its Associate General Counsel, before its December 2010 IPO. Promoted to his current position in July 2011, Chris has enjoyed a long history of success in corporate counsel positions. A mergers and acquisitions and securities specialist, Chris has served as Senior Counsel with MBNA America Bank and as Managing Counsel for Toyota Financial Services. Like many ACC North Florida members, he started his career as retained counsel, working as an associate at the firms of Richard, Layton and Finger and Dow, Lohnes & Albertson.

A keen proponent of partnering with his Fortegra Financial business counterparts, Chris believes the best part of his job is the ability to strategically shape the enterprise. He has great advice on how to maximize the value of any senior corporate counsel position. Chris tells us, "Law is a means of helping out the business. Optimally, a great general counsel develops relationships with management and staff, so that he/she is viewed as a trusted adviser. It is important not to be viewed as yet another hurdle".

Chris grew up in the New York suburbs and was awarded his baccalaureate degree in music from Brown University and his J. D. from the University of Pennsylvania. Chris wanted to become a lawyer so that he could better help people and make the world a better place. When not working at Fortegra Financial, Chris enjoys spending time with his wife, Abby, a radio talk show host, and their three children, ages, 7, 10 and 11 and playing violin.

We look forward to getting better acquainted with Chris at upcoming member events in 2012!

# The Regulators Are Watching: How Does Your Anti-corruption Training Stack Up?

***By Jason Baker; Kate Dodds; Andrea Falcione, JD, CCEP; and Kirsten Liston, SAI Global***

## Setting the Scene

The UK Bribery Act (Bribery Act) and the Foreign Corrupt Practices Act (FCPA) have caused most global companies to review and reassess their anti-bribery and anti-corruption (ABAC) programs with a keen eye towards measuring program completeness and effectiveness.

As companies take into account the changing global benchmark for effectiveness, programs designed several years ago may have fallen behind both their peers and the expectations of regulators. There is an increasing need to focus on behavior, and therefore on training, an important trend in the face of the Bribery Act under which training must be 'proportionate' to ABAC risks *and* should be outcomes-based. A rules-based approach is passé. Instead, companies increasingly prefer to develop and consume learning content and materials designed to proactively influence behavior in a positive, meaningful, and measurable way.

Individuals and businesses are becoming increasingly sophisticated in their attitudes towards and expectations of compliance training—demanding, for example, a more interactive and engaging learning experience, with significant learner control. In addition, technological developments and changes in working practices mean that companies are increasingly looking to incorporate delivery of their ABAC training and awareness materials on mobile devices.

## Incorporating Key Elements of Effective ABAC Training Programs

As the global ABAC landscape has changed we have seen a few clear trends in ABAC training. To be truly effective, we advise our clients to build programs that reflect what we now consider to be best practice and that include:

- **Increase in time** dedicated to ABAC training—accompanied by a **decrease in the seat time** of any one instance of training
- Increase in the **number of times** a typical employee receives ABAC training or communications each year—many companies consider one-and-done training no longer sufficient
- Broader audiences **inside the company** who receive training—including training for certain offline or mobile workers without easy access to computers or the internet
- Expanded audiences **outside the company** who receive training—some companies feel an obligation to train or certify both their own employees *and* business partners, agents, and other third parties

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- Increased **variety of training** offered, including different forms of training beyond just online courseware—reflecting an increased **focus on relevance** for each audience, which requires developing programs that are specific to roles, risks, regions, etc.

A strong ABAC program incorporates different tools for different audiences and focuses on maximizing engagement and retention.

## Creating a Program Strategy

Designing an effective, global ABAC training program demands a complex approach, and compliance and ethics professionals must ensure their learning objectives are aligned with their company's broader business objectives. Typically, a well-designed program strategy involves striking the appropriate balance between satisfying the demands of an external regulator (who may, for example, demand an audit trail for evidence of training of specific durations in specific areas) and providing training materials that focus on achieving genuine change in knowledge, attitudes, and behavior. To align these sometimes disparate objectives, it is important to conduct a training needs analysis (TNA) to determine the relative importance of these goals and then identify different audience groups, inventory current training programs and plans, and detect any technical limitations.

A TNA should give you a holistic view of all corporate training requirements, thereby enabling you to incorporate ABAC learning into what is, of course, a much bigger picture. In addition, because the typical multi-national company must speak to multiple audiences, each with a unique set of learning needs, a TNA is invaluable in determining the most effective delivery options and content format to speak to your different audiences and deliver on your overall objectives. Often, a blended approach is necessary to reach and influence all audience groups effectively.

## Delivering on Your Business Objectives

Best practice ABAC training uses effective adult learning and instructional design methodology to genuinely influence knowledge, attitudes, and behavior in a way that achieves real business and cultural change. The elements for success here are reflective of quality instructional design generally:

***1. Focus on behavior—not the details or history of the law.*** Attorneys and other subject matter experts (SMEs) often assume that effective ABAC training requires knowledge of the law, including how those laws have changed over time. However, the history of the law is just not relevant for the average employee, and it's neither useful nor relevant to study the differences between laws. Focusing on behavior keeps your content relevant and more current, even as laws change.

***2. Emphasize application, including context and gray areas.*** Effective ABAC training should focus less on *teaching* anti-bribery concepts than on *applying* them. Without thoughtful and rigorous training in this area, employees who simply 'know the rules' may find themselves in risky situations without even recognizing it. General anti-bribery principles are quite simple, but employees often need to see them in action to recognize their day-to-day implications. Training should help learners spot key 'red flags' or warning signs and give them clear direction on how to escalate or report their concerns.

***3. Consider learner attitudes.*** It's important to engage your audience in the training. To that end, your tone should be conversational rather than authoritative. Avoid overly legalistic language in favor of plain speech. Remember that, unlike children, adult learners are autonomous and self-directed. They will have accumulated a foundation of life experiences, knowledge, and education and are practical and therefore goal- and relevancy-oriented.

***4. Support learner engagement with formative questions and feedback.*** Great stories and scenarios are central to good training, but following these with challenging formative questions delivers the most effective learning.

Good formative questions:

- Focus on 'what do you ***think***' not 'what do you know'
- Focus on ***behavior***—what would you do?
- Use ***feedback*** after answering as a learning tool to deliver key messages

## Satisfying the Regulator

Although it is important to build effective and engaging ABAC solutions for many different audiences, both inside and outside the company, there is another important audience to consider: any government or regulatory bodies who may question or review your program, perhaps after an incident has occurred. Here are some key elements for defensibility:

***1. Address proportionality.*** The key concept of proportionality underpins the Bribery Act, and 'Communication and Training' is one of the six principles laid out in the accompanying guidance published by the Ministry of Justice. The onus is on businesses to ensure the training they implement is proportionate to the bribery risks they face and should reflect variables such as the industry and territories in which a business operates as well as its size and scale—and the length and complexity—of its supply or distribution chain.

***2. Involve SMEs.*** Be sure you have SME content assurance for your ABAC training outputs—whether online, offline or live.

***3. Include key course elements.*** It is considered best practice to personalize your training by incorporating executive messaging, company policies and contact information (Compliance Officer, HR, etc.), anti-click-through mechanisms (in the case of online education), and policy certification.

***4. Implement adequate testing.*** Your ABAC training should include a test not only of knowledge but also of skills by focusing on application and behavior—not simply the letter of the law.

***5. Consider your audit trail.*** While planning your program, it's important to consider how to track training completions

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and what kind of reports you will need. Establish a centralized reporting system to capture **all** training—including in-person, online, and training provided by various different vendors. Keeping all data in one location will allow you to identify potential risk and holistically report on your program at a high level.

Similarly, be sure to collect, date stamp, and archive all course scripts. If you change your content over time, it will be important to introduce version control, so that you may always reproduce the exact content a given user received.

## Conclusion

Any ABAC program that's designed to meet the global benchmark must address multiple, sometimes conflicting aims:

- Keeping up with peer companies
- Providing proportionate, behavior-focused training that engages employees, enables recognition of risky situations, and challenges counter-productive attitudes and behaviors
- Presenting a good learning experience while also creating an adequate audit trail

A strong anti-bribery policy or even a great training campaign aren't enough by themselves; instead, the best ABAC programs target the corporate culture. Communication with employees should be ongoing, driving change in attitudes and behaviors while accumulating evidence of ongoing training and awareness efforts to satisfy regulators.

A tall order, perhaps—but, in today's regulatory climate, a reputation for being an ethical company with a strong anti-bribery culture can be a competitive advantage, just as a breach or high-profile scandal can have the opposite effect.

# Hiring and Retaining Global Talent — The ABC's of Employment-Based Immigration for In-House Counsel

***By Giselle Carson, Marks Gray, P.A.***

After numerous interviews, the company finds the ideal candidate for the job opening. She meets every requirement and then some. But, a barrier exists; she is a foreign national who will require sponsorship to work in the U.S.

An American manager living abroad is relocated to the U.S. He is married to a foreign national and has two kids who have not been registered as being U.S. citizens.

As in-house counsel, you have been asked to oversee the process of obtaining the appropriate work visa for the ideal candidate, permanent residency for the spouse of the key manager, and the citizenship of their two kids and you wonder: Which visa is appropriate for the candidate? What is involved in obtaining legal permanent residency? What is required to apply? How long will the process take?

Congress has created a somewhat confusing array of more than 40 categories of visa classifications in an alphabet-soup kind of arrangement. This article provides an overview of commonly used nonimmigrant employment visa categories available to foreign nationals seeking employment in the U.S. such as the E-1/E-2, E-3, H-1B, H-3, L-1, O-1,P and TN.

## Background Introduction

The Immigration and Nationality Act (INA) requires most foreign visitors to obtain a visa before entering the U.S. The U.S. State Department has jurisdiction over visa issuance. Once the person enters the U.S., the foreign national becomes subject to the U.S. Citizenship & Immigration Services' jurisdiction (USCIS).

U.S. visas are classified into two main categories: immigrant and nonimmigrant. Those persons, who intend to enter the U.S. for a temporary period of time for a specific purpose, such as to work for a particular employer typically apply for nonimmigrant visas. Those persons seeking to enter the U.S. or change status to legal permanent resident apply for an immigrant visa which leads to a "green card".

Most employers choose to sponsor an employee for a nonimmigrant visa before considering an immigrant visa or permanent residence status. Obtaining an employment-based immigrant visa requires an involved and distinct process.

Obtaining a family-based immigrant visa also requires a distinct process. The spouse of the key manager relocating to the U.S. should consider applying for a family-based immigrant visa. Immigrant visa sponsorship is beyond the scope of this article but likely to be covered in a follow up article.

Employment-based nonimmigrant visas require the employer to file a petition with USCIS on behalf of the prospective employee. Upon approval of the petition, if the prospective employee is in the U.S., the person will be granted a change of status to the requested visa category. If the person is abroad, in order to enter the U.S. she/he will need to apply for a visa at a U.S. Embassy.

The difficulty or ease with which a visa is adjudicated varies regularly depending on the visa category and political situation. Approximate USCIS processing times can be found at *https://egov.uscis.gov/cris/processTimesDisplayInit.do*

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## Commonly Used Employment Visa Categories

### E-1/E-2 Visa

The E-1 visa (for traders) and E-2 visa (for investors) are available for individuals from nations that have a treaty with the U.S. involving trade or investment. Owners and key employees of businesses that conduct substantial trade between the U.S. and the home country can file for an E-1. Foreign nationals who come to direct and develop the operations of an enterprise in which he or she has invested a substantial amount of capital in the U.S. can file for an E-2. This status is typically granted for two years and extensions are granted in two-year increments. There is no limit to the amount of renewals as long as the business/investment is not marginal and the investor has intent to return to their home country once the investment is completed. A significant advantage of this status is that spouse of E-1/E-2 visa holder is eligible to apply for employment authorization.

### E-3 Visa

The E-3 visa was created in 2005. It is similar to the H-1B visa but exclusively for professionals who are citizens of Australia and coming to the U.S. to perform services in a specialty occupation. The number of E-3 Visas issued per year is limited to 10,500. However, this cap is typically not reached.

Similarly to the H-1B, the employer must obtain a certified LCA from the DOL to verify that the wage and working conditions are appropriate prior to filing for a visa. The prospective employee can apply directly for a new E-3 visa abroad at the American Consulate. The visa application should include the LCA, an offer of employment, evidence of the relevant education (or its equivalent), and a license or permission to practice, if required. If in the U.S., the foreign national can apply for an extension or change of status.

The E-Visa can be granted for up to two years and extensions, in two-year increments, are permitted indefinitely. The spouse of an E-3 visa holder can apply for work authorization. Careful planning is required when using this visa particularly when extension and changes of status or application for legal permanent residence are needed.

### H-1B Visa

This is the most commonly used employment-based visa. It is available for persons who will be employed in a "specialty occupation", which is defined as an "occupation that requires the application of specialized body of knowledge and a bachelor's degree or higher, or its equivalent, at a minimum for entry to work in the U.S." Positions considered specialty occupations include, but are not limited to: accountants, computer programmers, dietitians, designers, architects, researchers, engineers, scientists, teachers, and physicians. In 2010, the top users of H-1B visas were foreign nationals from India (30%), Canada (16%), Mexico (7%), China (4%) and United Kingdom (4%).

The H-1B is limited to a cap of 65,000 new visas per year, with an additional 20,000 for those with a U.S. master's degree. Some employers, such as institutions of higher education, non-profit organizations and certain governmental entities are exempt from the visa cap. These visas become available on or about April 1st of each year with an October 1st start work date. Filing a new application in a timely manner is critical.

Prior to filing with USCIS, employers are required to obtain a certified Labor Condition Application (LCA) from the U.S.DOL. The LCA requires the employer to attest, among others, that it will pay the foreign worker the higher of either the "actual wage" or prevailing wage for the position and that the working conditions for the H-1B worker will not adversely affect the working conditions of U.S. workers.

It is currently taking four to six months for a regular H-1B to be adjudicated. For an additional $1,225 fee, the petition can be filed via Premium Processing, and the petition should be adjudicated in 15 days. The H-1B visa can be granted for up to three years, and extended for an additional three years. The six year maximum can be extended under certain circumstances.

### H-3 Visa

The H-3 trainee visa is available to individuals coming to the U.S. temporarily to participate in a documented training program, other than graduate or medical education training, which is not readily available in the foreign national's country. It is also available for those coming to participate in a special education exchange visitor training program for children with physical, mental or emotional disabilities. The person cannot engage in productive employment or be placed in a position in which U.S. workers are regularly employed.

The H-3 petition must include a detailed statement by the employer explaining the resources to provide the training, the type of training offered and the amount of hours of classroom instruction, among other details. The foreign national must show to be "nearing completion" or have a "bachelor's degree" or extensive training and experience.

A trainee H-3 visa can be granted for the duration of the training program or up to two years. If the trainee petition is approved for a special education exchange visitor, the trainee may remain in the U.S. for up to 18 months. The special education trainee visa is limited to 50 per year. Generally, there are no extensions, changes of status, or readmission granted after two years unless the person resided outside the U.S. for six months or the training is seasonal, intermittent or less than six months, or if the original period of stay was less than two years.

### L-1 Visa

The L-1 visa is available for a person who has worked for a related company abroad (a foreign affiliate, subsidiary, parent or branch of the U.S. company) in an executive, managerial or "specialized-knowledge" capacity for at least one continuous year within the three years prior to filing to come to the U.S. to work for the U.S company in an executive or managerial (L-1A) or specialized knowledge (L-1B) capacity.

The regulations define "specialized knowledge" as special or advanced knowledge possessed by an individual of the petitioning organization's products, services, research, equipment, techniques, management or others. However, USCIS has been

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interpreting the regulations to mean that the worker has unique and narrowly held knowledge within the employer's operation which requires a more detail description of the worker's background to establish his/her specialized knowledge.

Some advantages of the L visa include: there is no quota, no prevailing wage and an L-2 spouse can apply to obtain employment authorization. In most cases, to process an L visa the sponsoring employer must first file a petition with USCIS. Once the petition is approved, the prospective employee can change status in the U.S. or apply to obtain a visa at the U.S. embassy abroad. The adjudication process can take four to six months, if no premium processing is involved.

The maximum stay is seven years for managers and executives and five years for specialized-knowledge employees. The individual may be admitted initially for up to three years with extensions allowed. However, if the foreign national is coming to work for a "new company" (doing business in the U.S. for less than one year), the initial admission will be for one year.

**O-1 Visa**
The O-1 visa is available for persons with an extraordinary ability in the sciences, arts, education, business or athletics. This visa is for those candidates who are highly regarded and recognized in their field. To qualify, the foreign national must satisfy at least three requirements including: having been featured in publications or other forms of media of national or international repute; made noteworthy innovations or contributions to the area of expertise; been an employee with pivotal responsibility; been the recipient of national and/or international acclaim and/or awards.

The petition must include a consultation from a labor or peer group in support of the candidates' ability and renown. It can be granted for up to three years and extended in one year increments indefinitely.

**P Visa**
The P visa is available to artists, entertainers, and professional athletes who have been internationally recognized in their field and are coming to the U.S. to compete or participate in specific events. Individual athletes and their support staff can be granted P-1A visa status for up to five years. Athletic teams and their support personnel can be granted P-1A status for one year. Entertainers (individuals or a group) can be granted P-1B status for up to one year. Artists and entertainers of a culturally unique program can be granted P-3 status for up to one year of stay.

An application for a P visa requires a U.S. employer to file a petition with a USCIS. The application should include a "consultation," an employment contract or engagement letter describing the activities to be performed, documents as evidence of the foreign national's achievements and an itinerary. I have successfully filed several P visas for athletes including golfers and tennis players and for artists, entertainers and cultural groups coming to perform and/or engage in exhibitions in the U.S.

**TN Visa**
The TN visa is available for certain Canadian and Mexican professionals including accountants, architects, economists, engineers, designers, land surveyors, dentists, pharmacists, physicians, nurses, teachers and scientists. It can be granted for up to three years and extended in three year increments indefinitely.

The advantages of a TN visa include that there is no quota; no prevailing wage requirement; or prior application with USCIS. Disadvantages include that it is limited to foreign nationals that meet the educational, experience and/or licensure for the designated professions and it does not provide for dual intent to facilitate permanent residency.

In conclusion, the ongoing globalization, slow U.S. population growth and the baby-boom generation retiring are making hiring and retaining a global workforce a key to business success, particularly for difficult to fill jobs in specialty and highly skilled areas. A general knowledge of immigration laws and the process and ability to partner with outside counsel is an essential strategy for corporate success in our increasingly global economy. More information on the visas discussed above can be found at *www.uscis.gov*

## Welcome New Members!

**Bradley Blair,** Bank of America Merrill Lynch

**Gina Floresca,** PSS World Medical, Inc.

**Cody Galloway,** The Crom Corporation

**Matt McClure,** Web.com Group, Inc.

**Jeff Neace,** Web.com Group, Inc.

**Elaina Paskalakis,** Citizens Property Insurance Corporation

**Matthew Zolnor,** MSC Care Management

# The Brave New World of Document Review
# Technology Assisted Review

***By Timothy P. Mahoney, Regional Sales Vice President and Executive Director, Special Counsel, Inc.[1]***

Whether called Technology Assisted Review (TAR), Computer Assisted Review (CAR) or Machine Assisted Review (MAR) the use of analytics in e-discovery litigation is grabbing all the headlines. Special Counsel, Inc. (SCI), the nation's largest Legal Process Outsourcing and Staffing provider, is a leader in understanding the practical applications of TAR in litigation related e-discovery and document review matters. In this article we will explain the foundations of TAR, discuss how to effectively use it in your litigation practice and how to make the most of this very expensive new tool.

## The Brave New World.

2012 is predicted to be the year that TAR goes mainstream. There is a growing body of evidence that TAR is at least as effective as human review. TAR meets the proportionality considerations of FRCP 26(b)(2)(C).

### Judicial Acceptance is coming.

In *Monique Da Silva Moore v. Publicis Groupe & MSL Group*, Case No. 11-cv-01279 (S.D.N.Y. Feb. 24, 2012), U.S. Magistrate Judge Andrew J. Peck for the U.S. District Court for the Southern District of New York endorsed the use of predictive coding to locate electronically stored information in a document-intensive, employment discrimination case involving 3 million emails. This is the first case to date that endorses a protocol for the use of predictive coding to locate documents relevant to litigation in ESI.



### Why TAR?

A 1985 study by Blair & Maron showed that keywords, a widely used litigation support technique, identified only 20% of relevant documents. A 2009 TREC (Text Retrieval Conference) Study showed the real number may be as low as 9% of relevant documents being identified using search word methodology. The Sedona Conference noted that keyword searches can leave up to 80% of relevant ESI undiscovered.

## What Constitutes TAR?

TAR includes many different items including:

- Near Duplication
- Email Threading
- Concept Clustering, and
- Predictive Coding

### How Does Predictive Coding Work?

Predictive coding uses mathematical formulas to apply decision criteria made by attorneys or paralegals working on the case across a data set. A random set of documents is coded and applied against the data collection. Applying its mathematical formulas the computer learns which documents have a higher likelihood of being relevant. Through several iterations the formulas are applied to the data set until such time as the results are statistically validated.

### TAR the Death of Human Aided Review?

The advent of TAR is not a case of "machine replacing humans." Effective TAR involves the interaction of man and machine. Quality of reviewers is key as data sets, while potentially smaller, have a much higher level of relevant documents. Key emphasis is on the process: It is not the tool that is defensible, but the process. High quality review attorneys, project managers and documented review processes will still be necessary.

### The Future of Document Review with TAR

TAR is an increasingly viable and essential part of the solution for controlling costs and improving the outcome of the search for and review of ESI in appropriate cases. TAR is consistent with Special Counsel's focus on reducing costs and improving quality for its clients during the document review process. TAR is not a license to put the e-discovery portion of a case on autopilot. Attorney review of these highly relevant documents is still required. Attorney-client privileged documents will also need to be screened by competent counsel.

*To learn more about Technology Aided Review and how Special Counsel can help you economically manage your document and e-discovery projects contact:*
*Timothy P. Mahoney, Esq.*
*Regional Sales Vice President and Executive Director*
*612-340-2033*
*Timothy.mahoney@specialcounsel.com*

# Forget Me Not: Immigration Compliance Issues in Mergers and Acquisitions

***By Melissa A. Dearing, Fowler White Boggs P.A.***

You have reviewed the seller's corporate governance documents and key operating and employment contracts. You have evaluated the seller's pending and potential lawsuits and its patent filings and trademarks. You have considered any potential product liability claims, as well as potential environmental costs and liability. You have taken inventory of the seller's real estate. While these types of due diligence inquiries are a critical part of any merger or acquisition, buyers often neglect to consider immigration-related compliance issues, including the target buyer's I-9 compliance and transitioning of the buyer's foreign national workforce. Ignoring such compliance issues can have devastating consequences after the sale, including significant fines, potential criminal penalties, debarment from the H-1B and PERM programs, vulnerability to government raids and the loss of key employees. Below are some critical immigration-related considerations that every corporate lawyer should keep in mind in carrying out a merger or acquisition.

## Importance of Evaluating Immigration Compliance in the Face of Vigorous Worksite Enforcement

Since January 2009, Immigration and Customs Enforcement ("ICE") has audited more than 6,468 employers, debarred 521 companies and individuals, and imposed more than $76.4 million in financial sanctions.[1] The number of Form I-9 notices of inspection increased more than 375 percent from fiscal year 2008 to fiscal year 2011.[2] Further, while big business has traditionally considered itself to be immune from worksite enforcement initiatives, this myth was shattered when ICE created the Employment Compliance Inspection Center in January 2011, a Center that was established for the express purpose of enabling ICE to conduct I-9 audits of the largest employers. Indeed, an ICE official recently warned that "[t]he inspections will touch on employers of all sizes and in every state in the nation — no one industry is being targeted nor is any one industry immune from scrutiny."[3] Accordingly, not only have the number of I-9 inspections increased dramatically, but the scope of ICE's targets has expanded from small businesses to very large companies. Therefore, acquiring or merging with a company, without evaluating its immigration compliance framework, can lead to significant financial and other consequences.[4] The following are the types of immigration-related inquiries that corporate counsel should be making in the context of due diligence for a merger or acquisition:

- Whether the seller has ever been the recipient of an ICE notice of inspection or had its Form I-9s audited by any other governmental agency, and the results of any such inspection or audit.
- Whether the seller has an established I-9 compliance program, which includes written policies and practices, I-9 training, and periodic I-9 self audits.
- Whether the seller has ever been the subject of a Department of Labor ("DOL"), Department of Homeland Security ("DHS") or Department of Justice ("DOJ") investigation, proceeding or inspection concerning: compliance with employer obligations and document retention requirements under the H-1B and PERM programs, compliance with the Immigration Reform and Control Act of 1986 ("IRCA"), or any complaint related to the employment of foreign national workers.
- Whether the seller has ever been the recipient of a Social Security Administration ("SSA") "no-match" letter.
- Whether the seller has written policies or practices in place addressing the protocol for dealing with a "no match" letter.
- Whether the seller has written policies or practices governing the export[5] of source code, technical data or technology to foreign nationals in compliance with the International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR").

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1 Written testimony of U.S. Immigration and Customs Enforcement (ICE) Director John Morton for a House Committee on Appropriations, Subcommittee on Homeland Security hearing on The President's Fiscal Year 2013 budget request for ICE, available at *http://www.dhs.gov/ynews/testimony/20120308-ice-fy13-budget-request-hac.shtm.*

2 Statement of John Morton, Director, U.S. Immigration and Customs Enforcement, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement: "Oversight Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law," available at *http://www.dhs.gov/ynews/testimony/20111012-morton-ice-oversight.shtm*

3 Heather Draper, "ICE Turns Up Heat on I-9s," Denver Bus. Jnl. (March 11, 2011), available at: *http://www.bizjournals.com/denver/print-edition/2011/03/11/ice-turns-up-heat-on-i-9s.html?page=all.*

4 An acquiring company has two options relative to Form I-9s for employees of the buyer: (1) treat all acquired employees as new hires and complete a new Form I-9 for each individual, entering the effective date of the acquisition or merger as the date the employee commenced employment in Section 2 of the new Form I-9; or (2) treat acquired individuals as continuing in their uninterrupted employment status and retain the seller's Forms I-9 for each acquired employee. In the latter situation, however, in the event that the seller's Form I-9s contain any errors or omissions, the acquiring company will be liable for such errors or omission. *See* M-274, *Handbook for Employers,* Instructions for Completing Form I-9 (Employment Eligibility Verification Form), pg. 45. The M-274 is available electronically at *http://www.uscis.gov/files/form/m-274.pdf.*

5 Under the EAR and ITAR, an export of technology, technical data or source code is "deemed" to take place when it is released to a foreign national within the United States. *See* 15 C.F.R. § 734.2(b)(2)(ii); 22 C.F.R. § 120.17(a)(4).

*continued from page 10*

- Whether the seller operates in a jurisdiction that imposes additional immigration-related obligations and whether the seller is in compliance with the same.
- Whether the acquired employees will be subject to verification under E-Verify either because the buyer is a federal contractor or the employees will be working in a state that requires use of E-Verify.[6]

Moreover, the buyer should conduct an audit of immigration-related documents as part of its due diligence, which would include a review of the following:

- A complete copy of all I-9 documentation for current and terminated employees whose I-9s fall within the I-9 retention period;
- All written policies and procedures regarding the company's I-9 compliance program;
- A description of any unwritten I-9 processes or procedures pertaining to I-9 completion, training, and document retention;
- A copy of all no match letters received from the SSA;
- A copy of all documents concerning or relating to any DHS, DOL or DOJ investigation, inspection, proceeding or enforcement action concerning the employment of foreign nationals;
- A copy of all documents analyzing the propriety of releasing source code, technical data or technology to foreign nationals under ITAR or the EAR; and
- A copy of all licenses permitting the release of source code, technical data or technology to foreign nationals under ITAR or the EAR.

By making the aforementioned inquiries and document requests part of the pre-purchase due diligence process, corporate counsel can adequately identify and counsel the buyer on potential exposure for immigration compliance violations and advise the buyer relative to contractual protections against exposure.

## Ensuring Continuity in Employment for Foreign National Workers

In addition to conducting adequate due diligence regarding immigration compliance, corporate counsel should also inquire about the seller's foreign national workforce. The reasons for this are two-fold. First, it permits the buyer to identify those employees who hold non-immigrant status or are currently pursuing legal permanent resident status through the seller's company. Identifying these issues are critical to ensuring maintenance of status and determining whether and under what circumstances the buyer can seamlessly continue the legal permanent resident process. Second, it permits the buyer to identify whether the seller is employing any undocumented workers. Accordingly, as part of its due diligence in the merger and acquisition context, the buyer should request the following:

- A list of all H-1B workers and a copy of every public inspection file maintained for such workers;
- A copy of all files maintained in connection with the Program Electronic Review Management ("PERM") rules;
- A list of employees for whom the seller has agreed to pursue permanent residency;
- A list of all employees who hold E-1, E-2, E-3, F-1 OPT, H-1B J-1, L-1A, L-1B, O-1, TN or other visa status, along with their job titles; and
- A list of all employees for whom the seller is currently pursuing permanent residency and the stage that they are at in the process.

The foregoing information is critical since knowing it in advance of the sale will assist the buyer in developing specific language that should be included in sale, merger, or acquisition documents to ensure immigration issues are addressed. Moreover, advance planning will assist the buyer in predicting its legal costs associated with immigration, avoiding unnecessary expenses[7] and ensuring that its foreign national workforce does not suffer a lapse of status.

## Conclusion

While immigration issues have often been just an afterthought for buyers engaged in mergers and acquisitions, the current immigration enforcement environment, and the concomitant penalties associated with it, mandates that closer attention be paid to these issues. Moreover, by asking the right immigration-related questions during the due diligence process, the buyer can likewise craft the appropriate language for the sale, merger or acquisition documents and ensure a seamless transition for its key foreign national workers.

6 Note that, at least as to federal contractors, the United States Citizenship and Immigration Services has clarified the timelines for verifying acquired employees through E-Verify. In that regard, if the acquiring company chooses to complete new Form I-9s for its entire workforce, the acquiring company will have 180 days from the effective date of the merger or acquisition to create an E-Verify case. If the company is not verifying its entire workforce, the company will have 90 days from the effective date of the merger or acquisition to create an E-Verify. *See* M-574A, Supplemental Guide for Federal Contractors (September 2010), pg. 24. The M-574A is available electronically at *http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify%20from%20Controlled%20Vocabulary/Supplemental%20Guidance%20for%20Federal%20Contractors_September%202010.pdf.*

7 By way of example, in the corporate restructuring context, including in the merger and acquisition context, if certain requirements are met, the seller is not required to file an amended H-1B petition for a foreign national continuing in its employ following the transaction, provided that the regulatory requirements set forth in 20 C.F.R. § 655.730(e) are satisfied. Of course, there are other caveats to this rule, including where a foreign national is moved to a new location or there are material changes to his or her position.

# Social Media Risks to Corporate Communicators

***By Timothy J. Conner, Jennifer A. Mansfield and Charles D. Tobin[1]***

Social media have opened up exciting and vast new platforms for corporate marketing. Active engagement with company executives, commentary on products and services, news about corporate development — a quick tweet or Facebook posting can reach billions of consumers at almost no cost to the company.

But social media can actually cost a company millions in liability with just one careless communication. All communicators in the new media environment, and especially corporate communicators, need to be on guard for the legal risks that have been developing as fast as the technology. The risks crop up in a variety of legal areas.
Release of Confidential Information

New media present new means for a company's employees, through wrongdoing or inadvertence, to release confidential or sensitive information. Once information is released through social media, it can be nearly impossible to pull it back. The improper release of confidential information can lead to unwanted publicity and legal exposure.

For example, in October of this year, a vendor for Lawrence (Kansas) Memorial Hospital's on-line bill pay service experienced a computer glitch that exposed the financial information of more than 8,000 patients, triggering a federal investigation. The hospital faces potential exposure of up to $25,000 in fines from the U.S. Office of Civil Rights, the federal agency that oversees patient privacy and confidentiality. The hospital also issued letters to all of the 8,000 plus patients and offered them a one-year subscription to a credit monitoring service.

In another example, Wisconsin nurses posted confidential patient X-rays on Facebook, which instigated an FBI investigation for potential violations of the Health Insurance Portability and Accessibility Act ("HIPAA"). Civil penalties can be as high as $1,500,000 for all violations in a calendar year. The U.S. Department of Health and Human Services is considering implementing regulations in early 2012 that would allow individuals to receive a percentage of fines levied or monetary settlements reached with the government. And, although there is no private cause of action for HIPAA violations, Missouri has allowed them to form the basis for state law claims of negligence per se, and under North Carolina law, a HIPAA violation may be actionable as an intentional infliction of emotional distress. Litigation in this area surely will increase.

## Intellectual Property Infringement

The widespread access to photographs, literature and other creative works on the Internet also has led to a proliferation of intellectual property claims. Many people have the mistaken impression that if they find a photograph or video on the internet, it's okay to reuse it. A company may encounter risk through two primary sources: employees posting on behalf of the company and individual users posting on the company's website.

For example, the website unclebarky.com reported that it took down photos it posted of reporter and news anchor Kim Fischer after the photographer threatened a copyright infringement lawsuit. In November 2011, Singapore Press Holdings sued Yahoo! in the Singapore High Court for allegedly reproducing 23 articles from its newspapers over a 12-month period.

*Maremont v. Susan Fredman Design Group, Ltd.* is a more unusual case, where a U.S. federal court held that the plaintiff stated a claim for false endorsement under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A). The plaintiff in that case, a popular interior designer with large social media followings, was severely injured in an accident. While Maremont was still in the hospital, employees of Susan Fredman Design Group, where she worked, posted to Facebook and Twitter under Maremont's accounts, which showed Maremont's photo next to the posts. Although Maremont asked her employer to stop posting under her name, the posts continued until Maremont eventually changed her passwords. In a March 2011 opinion, the court held that Maremont's allegations of "Defendants' deceptive use of her name and likeness" stated a claim for false endorsement, which is misuse of a trademark, and denied the defendant's motion to dismiss.

Of course, the Internet is not a "public domain" smorgasbord, where everyone is free to graze on others' artistic content. The copyright to images and literature on the Internet presumptively remains the property of the creator or their assignee. Companies therefore need to be careful before lifting material off of the internet and using it for themselves.

## Defamation and Privacy Claims

Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230, protects companies from liability when someone *outside of the company* posts injurious material on the company's website. The company itself, however, may be liable *when an employee* posts defamatory or invasive material. The law does not protect the company when, in the eyes of the law, it is the publisher of the wrongful statement.

For this reason, a Minnesota court held that an invasion of privacy claim could result from a healthcare worker posting test results diagnosing a sexually transmitted disease on a publicly accessible social network, even though the information remained on the Web for just 24 hours. Likewise, the parents of a murder victim sued the individual and the employer

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1 Mr. Conner and Ms. Mansfield are with the National Media Practice Team of Holland & Knight LLP and are resident in the firm's Jacksonville, FL office. Mr. Tobin is the chair of the firm's practice team and is resident in the firm's Washington D.C. office.

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when an emergency medical worker posted photographs of the victim's body on Facebook.

## Government Regulations to Protect Consumers and Children

Government regulations concerning advertising or communicating to others via social media also impose restrictions. For instance, regulations on advertising under the federal Food, Drug, and Cosmetics Act apply equally to social media sites and print advertising. In 2010, the Food and Drug Administration issued a warning letter to Novartis for four violations relating to information "shared" about the drug Tasigna on Facebook.

Likewise, Securities and Exchange Commission regulations regarding communications about stocks and other investments apply to information posted on social media. In 2007, the CEO of Whole Foods Market engaged in "sock puppet" activities — creating a false person and posting criticisms of competitors while praising Whole Foods — that led to an SEC investigation of the company. Although the SEC eventually found no violations of regulations, the company went through a gauntlet of bad publicity and undoubtedly incurred extensive costs to defend the multi-year SEC investigation.

The Federal Trade Commission in 2009 also implemented regulations that now require on-line product reviewers to disclose connections between advertisers and their endorsers that might materially affect the weight or credibility of the endorsement. The FTC has aggressively enforced this provision with respect to bloggers. For example, in 2010, the FTC approved a final order settling charges that Reverb Communications, Inc., and its owner, Tracie Snitker, engaged in deceptive advertising by posing as ordinary consumers posting game reviews at the online iTunes store, without disclosing that the reviews came from paid employees working on behalf of the developers. And earlier this year, the FTC finalized an order settling charges that Legacy Learning Systems Inc. and its owner, Lester Gabriel Smith, deceptively advertised the "Learn and Master Guitar" program through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers without clearly disclosing they were paid substantial commissions for every sale they generated. Under the final order, Smith and Legacy Learning will pay $250,000, and maintain a system to review and monitor their affiliate marketers' representations and disclosures.

The government has also become proactive in protecting children on the web. If a company's website targets children under thirteen years of age, or the company should know that children under thirteen are attracted to the website, then the company must comply with the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501-06. Under COPPA, companies with websites must obtain verifiable parental consent when they collect personally identifiable information for their own use, or when they collect such information that will be publicly posted.

## Labor and Employment Claims

In 2010, CareerBuilder.com and Jobsite released studies showing that employers used social media to support their recruitment efforts and to research job candidates. But sometimes employers will receive information via social media that they cannot lawfully consider when hiring, such as race or religion. If the employer receives that information anyway, it must take steps to ensure that it does not base hiring decisions on the protected status. For example, under the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, an employer cannot take religion into account in making employment decisions. But in *Gaskill v. University of Kentucky* a federal court found direct evidence that an applicant was denied employment precisely because of his religious beliefs. In that case, Gaskill was a professor considered the lead candidate to head the University's new observatory, when a search committee member found an on-line article he authored titled "Modern Astronomy, the Bible, and Creation," causing concerns about whether to hire a "creationist." A key document was an email from the chair of the search committee complaining to the head of the astronomy department that Gaskell will be denied the job "because of his religious beliefs" and that "no objective observer could possibly believe" the decision was based on anything other than religion, because Gaskill was "so superbly qualified [and] so breathtakingly above the other applicants in background and experience." The federal district court denied cross motions for summary judgment, soon after which the University paid Gaskill $125,000 as part of a settlement agreement in which it denied any wrongdoing.

Social media posts on company sites also provide fertile fodder for disparate treatment claims. A mid-level manager's discriminatory animus or statements could support a discrimination claim against the company. In *Blakey v. Continental Airlines, Inc.*, a court held that the airline could be liable for harassing remarks employees allegedly made on the airline's internet forum for crew members. While employers should not be held liable for non-work social media sites that they do not know about, even for private Facebook or Twitter posts, employers are potentially liable when they learn about harassing posts but do nothing to stop the conduct.

Workplace use of social media also can bring federal labor law claims. Even in right-to-work states, the law protects employees' discussions of the "terms and conditions of employment." For this reason, a National Labor Relations Board administrative law judge recently determined that a New York nonprofit organization violated federal law when it fired five employees for their Facebook posts reacting to a co-worker's criticism of their performance. The judge held that the employees have a right to discuss the terms and conditions of their employment, and the Facebook posts were "concerted" activity, and therefore protected under the Act.

Some NLRB administrative decisions and complaints have declared certain firings over social media posts to be protected activity, while others have found that the firings were lawful. Before firing an employee over his or her social media posts, the company should analyze the posts for protected content -- such as gripes about the boss or how much employees are paid -- and whether the posts are between coworkers. If the posts are about the terms and conditions of

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employment, or are shared with coworkers, they may be protected by law.

### Protecting the Company from the Risks of Social Media

Companies of course want to continue to push information out over the Internet and interact with customers through social media. That makes perfect business sense. But the company can and should also take reasonable steps to protect itself while taking advantage of these wonderful new forms of communication. For example:

- The company's website should always contain the most up-to-date terms of use and privacy policies.
- Companies should implement clear policies that address which employees can use social media in the workplace, what types of materials they may post, and that the company expects all employees to safeguard proprietary and private information at all times.
- Appropriate internet use on company time should become a regular part of new-employee training, and should be reinforced through company in-services and written internal communications.
- Company managers should be trained in employee privacy rights, laws against discriminatory communications in the workplace, federal labor relations laws, and other legal issues protecting employee communications.
- Company policies should be implemented setting out what information can be considered when hiring and whether or when an internet search will be conducted on candidates.
- Employees should be trained to obtain clearance from the copyright holder for the use of material found on the Internet. The company also should implement the procedures under the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, so that the company is protected when it follows the "safe harbor" provisions of the law.
- All companies should secure insurance to cover as many of these risks as possible.

With proper training and risk management, social media provide a low-cost and reasonably safe environment for companies to expand their businesses and engage their consumers.

## Did You Know? Association of Corporate Counsel's *Contract Advisor*

***By John Price***

Folks… you asked for it, the ACC listened, and the *Contract Advisor* was born. If you haven't visited the ACC website (*www.acc.com*) recently, the *Contract Advisor* is a great reason to spend a few minutes getting reacquainted.

The *Contract Advisor* is a great reference tool recently developed by the ACC. As may be expected, the *Contract Advisor* allows users to access model/sample contracts, sample clauses. These sample contracts and clauses are great, and are truly similar to what most of us may encounter in our practice. Like most great writers (er… contract drafters), I'm sure from time to time you've faced the dreaded writers block or brain cramp. If/when that happens to you, the sample contracts and clauses contained within the *Contract Advisor* can provide just the jumpstart your brain needs to make headway on that stubborn project.

If that's not enough to pique your interest, perhaps the contract comparison and benchmarking feature will do the job. One of the neatest features of the *Contract Advisor* is its ability to analyze a user's contract, and provide that user real-time feedback about that contract. To use this feature, a user is asked to paste the text of a contract into the system. Once the user has provided the system the text to be analyzed, and has selected the method of feedback desired (web-based or downloadable report), the system processes the content and produces feedback. Not only does the system provide the user a list of the potentially missing clauses (with suggested versions of those missing clauses), it also provides feedback on the content of the included clauses. This comparison and benchmarking feature is truly amazing.

Currently, the *Contract Advisor* covers the following contract types: Executive Employment, Guarantee, Independent Contractor, Lease, License, Non-Competition, Non-Disclosure, Promissory Note, Severance, and Social Media Policy. From what we hear, the *Contract Advisor* has been a hit with members, and will be enhanced as it continues to be utilized.

Next time you're struggling through an unfamiliar contract, or are tasked with drafting a new contract from the ground up, please remember you have a friend/guide in the ACC's *Contract Advisor*.

# Chapter Event Photos

## Fowler White CLE Event at the River Club on May 3

Hala A. Sandridge, Fowler White - Office Managing Shareholder of Tampa office and member of Business and Appellate Litigation Practice Group (speaker)

The nearly completed Duval County Courthouse taken from the River Club (The courthouse opened for business on June 18, 2012)

David D. Burns, Fowler White - Associate in Business and Appellate Litigation Practice Group (speaker)

## Golf outing and cocktail party at Timuquana Country Club, sponsored by Fowler White (Platinum Sponsor) on April 26

Katie Schmidt (Fidelity National Financial, Inc.); Megan H. Wilson (Fraud Review Counsel at Fidelity National Financial, Inc.) (Left to Right)

Brad Blair ( Bank of American Merrill Lynch); Kyle Sawicki (Fowler White); Trevor Ross (Bank of America Merrill Lynch); Bob Ledoux (VP & General Counsel, Florida East Coast Railway, LLC) (Left to Right)

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# Upcoming Events

**August 28** — Aloft Cocktail Party (Networking Event) Sponsored by Akerman Senterfitt LLP

**September 12** — GC Panel Discussion Topic (TBA) Sponsored by Special Counsel

**October 12** — Ethics CLE Sponsored by: McGuireWoods LLP

**October 30** — Affordable Case Act Overview Sponsored by Akerman Senterfitt LLP

**November 12** — Holiday Party Sponsored by Jackson Lewis LLP

# ACC News

## ACC's 2011 Census Report Available

Based on responses from over 5,800 in-house counsel representing more than 4,100 companies, ACC's 2011 Census Report provides unique insight into the in-house counsel community, with details on compensation, demographics and law department structures.

Among the key findings included in the report:

- One-third (37 percent) reported that their organization's compliance departments report to the general counsel.
- Almost all (90 percent) respondents personally manage outside counsel retained by their law departments.
- Forty percent (40 percent) worked as an attorney in a law firm or in other non-in-house legal position for five years or less prior to becoming in-house counsel.

Why should you consider purchasing the report?

- Evaluate your department's use of outside legal counsel in relation to current trends. How often do your peers go to firms and what for?
- Assess your compensation compared to your peers. Did you see the same increases as the rest of the in-house community?
- See how similar organizations structure their legal departments. Is your department structured centrally or across business units? What are other companies doing and why?

The full report is available for purchase. Learn more at *www.acc.com/census.*