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Inside

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New York Contract Law

A Guide for Non-New York Attorneys

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AUTHOR
Glen Banks, Esq.
Norton Rose Fulbright

New York Contract Law: A Guide for Non-New York Attorneys is an invaluable reference allowing the practitioner to quickly and easily gain an understanding of New York Contract Law. Many contracts involving parties outside the United States contain a New York choice-of-law clause and, up until now, the foreign practitioner had no practical, authoritative reference to turn to when they had a question regarding New York Law. *New York Contract Law: A Guide for Non-New York Attorneys* fills this void. In addition to lawyers outside the United States, this book will also benefit lawyers within the United States whose practice includes advising clients regarding contracts governed by New York Law.

Written by Glen Banks, Esq., a recognized authority on contract law with over 35 years' experience, this book is presented in an easy-to-read question-and-answer format to allow easy access to a wide array of topics. All aspects of contract law are covered, from the basic requirements of a valid contract to a contract's termination, assignment or repudiation. Particular agreements and clauses are discussed as well as the role of counsel when working on a transaction governed by New York Law. Resources for further study and to keep up on changes in New York Law are also provided.

For your convenience, *New York Contract Law: A Guide for Non-New York Attorneys* can be purchased in hard copy (which includes a CD containing the entire book in a searchable, pdf format) or can be downloaded as an e-book in a pdf format.

Key Discussions
Is there a binding agreement?
Is that agreement valid and enforceable?
How is meaning given to the terms of the agreement?
What constitutes a breach of the contract?
When is a breach excused?
How is action taken to enforce the contract after a breach?
What remedy can the court grant to redress a breach?

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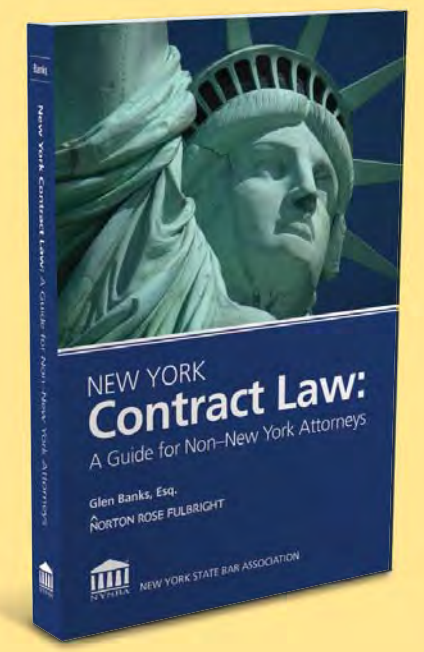

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From the Foreword by Judith S. Kaye, Former Chief Judge of the State of New York

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Message from the Chair

Dear Corporate Counsel Section Members,

Happy New Year!

What a year it was, huh? We had quite a few events in the past twelve months together.

- January: A Joint Annual Meeting CLE with NYSBA's Business Law Section regarding technology and the law.
- March: "Dinner with a Lawyer" where our colleagues provided mentoring advice to law students pondering their future.
- June: We were lucky enough to participate in the World Corporate Congress, a gathering of in-house lawyers from all over the world to discuss topics of mutual interest.
- July: We co-sponsored the NYSBA International Law Section and Ethical Systems program aimed at improving the ethical frameworks of companies and the in-house lawyers who support them. A lively networking session followed.
- August: The Corporate Counsel Section's Kenneth G. Standard Internship Program, which focuses on identifying and supporting in-house internship opportunities for law students from a diverse range of backgrounds, hosted a reception to celebrate the students selected as well as their families.
- October: A two-day extravaganza with our kindred section, Business Law, bringing together NYC and Capital Region attorneys. It was filled with CLEs, networking receptions, and a wonderful tour of the Capitol building, which I highly recommend when you are in the area—it truly is a modern palace.
- October: Our biennial "hot topics" ethics CLE, always a lively panel sure to keep you up at night with potential scary situations and their possible solutions.
- November: Our annual Member Appreciation Reception which provided an opportunity for current, Executive Committee and potential members to mingle in a festive atmosphere at the Kimberly Hotel.

In addition we launched the "Communities" portion of our website, enabling members to communicate directly with their leadership as well as with each other. We partnered with Lexology to provide a new member benefit. Lexology collaborates with leading lawyers and other thought leaders to deliver tailored updates and analysis to the desktops of in-house counsel. And, we revived our Pro Bono Committee which will renew our efforts to give back to our community through a variety of new and creative ways.

By the time you read this, my term as Chair will have ended. It has been my pleasure to serve you and I hope to see you at upcoming events. Meanwhile, I invite you to join me in welcoming our incoming Chair, Jana Behe. Jana is a long-standing member and contributor to the Section. Among other things, Jana has led our Membership Committee, co-chaired the Section's Kenneth G. Standard Internship Program and represents us in the House of Delegates. I encourage you to get involved as I know that she has plans to accomplish many great things during her term! Jana can be reached at jbehe@nystec.com.

Thank you again for being part of this Section and participating in these events.

All the best for a happy, healthy and prosperous New Year!

Jeffrey P. Laner

Save the Date!

January 25, 2017 (NYSBA Annual Meeting)
Joint program with the Business Law Section
Held at Hilton Midtown, NYC

For registration and more information on the above event, please visit www.nysba.org/corporate

Inside *Inside*

Elizabeth J. Shampnoi

Welcome to the Winter issue of *Inside*. The Section is working to provide Corporate Counsel Section members with a variety of topics to mull over in *Inside* and at its CLEs as well as social events.

In this issue, we have aimed to provide quality practice-related information, such as articles on cybersecurity and arbitration, representing foreign clients and intellectual property risk management, as well as the interesting alternatives, such as book and movie reviews. We have also continued our recently found tradition of publishing interviews of practitioners, providing insight as to the career ambitions and the paths they took to get to where they are today, boulders, green pastures and all. Our committee chairs have also provided updates on the activities they are spearheading in the areas of pro bono opportunity and membership, and our outgoing Section Chair has colorfully recapped the accomplishments and activities of the Section and its members since the last issue of *Inside*.

Jessica Thaler-Parker

In that regard, we do want to take the opportunity to thank Jeff Laner for his service as chair and welcome Jana Behe as our incoming chair. The strength and dedication of our Section's leadership is something we all benefit from.

For those interested in getting involved, whether in assisting in programming, speaking, or writing for *Inside* or who just want to provide the Section with ideas for CLEs, events, and articles, we encourage you to connect with the members of the Section's Executive Committee, including us, the editors for *Inside*. Our Section's success and ability to serve its members starts from the support and attention of the members.

Enjoy reading!

Elizabeth J. Shampnoi and Jessica Thaler-Parker

Section Committee Update

Ethics for Corporate Counsel Program Highlights

By Howard S. Shafer and Elliot Rahimi, Cardozo Law Student

On Thursday, October 7th, the Corporate Counsel Section held its annual *Ethics for Corporate Counsel* program at the New York International Arbitration Center (150 E. 42nd Street, 17th Floor, New York, NY) from 9:00 a.m. to 12:30 p.m. Program Chair Steven G. Nachimson, Assistant General Counsel of Compass Group USA, Inc., assembled a panel of ethics professionals. The panel consisted of Michael S. Ross, Chair, Law Offices of Michael S. Ross; Naomi F. Goldstein, Deputy Chief Counsel at the Departmental Disciplinary Committee, Appellate Division First Judicial Department; Michael Coleman Mayes, Esq., Vice President, General Counsel and Secretary at the New York Public Library; Janis M. Meyer, Esq., Partner at Hinshaw & Culbertson LLP, and Jerome G. Snider, Professional Responsibility Counsel at Davis Polk & Wardwell. The program was very well-received and was the most recent in the Section's series concerning the ethical issues faced by attorneys working for corporations and/or other business entities.

The topics discussed included: conflicts of interest, past and current conflicts and advance waivers, simultaneous representation of a party-corporation and of a non-party deposition witness and the imputation of conflicts involving corporations; supervision of in-house staff (including in the context of the unauthorized practice of law); revised New York Temporary Practice and In-House Counsel Registration Rules; and recent attorney-client privilege decisions and waiver, including the common interest doctrine, crime-fraud exceptions and intra-law firm attorney-client privilege. The panel also touched on the ethics-related prohibitions against harassment and discrimination, including the recent amendment to American Bar Association Model Rule of Professional Conduct 8.4(g).

The Corporate Counsel Section's *Ethics for Corporate Counsel* is always a program that informs and inspires and this year was no different. Thank you to our fantastic panel and please be sure to look for our program next fall.

NEW YORK STATE BAR ASSOCIATION

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The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 45 counties (check our website for a list of the eligible counties). Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit www.nysba.org/joinlr.

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Don't Be a Robot: You Cannot Automate Your Ethical Considerations

By Natalie Sulimani

I could say that today's lawyer faces a myriad of challenges when it comes to staying abreast of emerging technology and client considerations, but let's face it, every generation has its challenges.

A few years ago, I wrote articles and spoke on panels regarding Cloud computing and I hope you paid attention. Cloud computing is now the backbone of most emerging technologies out there. More and more, technology vendors base their platforms in the cloud. It is cost effective, mobile, and more secure.

To illustrate it in simple terms, have you noticed the trend of diminishing hard drives and cell phones that come in 32GB models? Do you wonder why? Simply, the trend is to now store everything in the cloud and for good reason. TECH FAILS. The only thing that can help you avoid data loss is redundancy. Sure, you can store your information on a local hard drive but you are doing your clients a disservice by not storing data in the cloud.

To address the mounting concerns and opinions regarding the legal profession and technology, the American Bar Association drafted a model rule in which it is imperative that the attorney stay abreast of legal trends. No longer is ignorance of technology an excuse for not fulfilling your ethical obligations. On March 28, 2015, the New York State Bar Association agreed by adopting a variation of the ABA's model rule 1.1 pertaining to competence:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

In other words, lawyers cannot be ignorant of technology in their practice or, even, their day-to-day lives because our ethical obligations do not stop when we leave the office. We carry around our laptops, cell phones and various points of electronic vulnerabilities so that we need to be vigilant. Vigilant in terms of password protection, knowing how to wipe your data remotely and even checking the permissions of a mobile app you are downloading.

Notably, the rule says benefits AND risks. I am an early adopter. I like technology and we have a rapport. That's not to say that I think that all technology is for everyone. Part of your ethical duty is knowing your limits. Just because a software boasts of all the bells and whistles, if you can't learn the software (it may not be you but them), don't use it. You are putting your clients at risk because you know just enough to be dangerous.

For a moment, let's take a step back in time. Let me take you, once again, through the basics of cloud computing. In simple terms, cloud computing is any data that does not reside on your hard drive or on your local server (if you have servers in your office). The first iteration of the cloud is voicemail. Answering machines were replaced with voicemail, which meant that your messages were stored on a remote server that required you to use a code to retrieve them. Although this was a shift in where personal and official information was stored, I cannot remember anyone wondering whether this would be an issue of confidentiality or otherwise.

In the various local and state bars you will find more than a handful of opinions about the cloud and technology in general, and I think, it all boils down to the adopted rule above. Use technology. Your clients and your practice demand that you do but be smart about it. Know the risks. What I find the most interesting, and seems a bit counterintuitive, is the relaxing of the rules when it comes to legal practice and ethical obligations. This, by no means, reflects on the relaxation of our ethical obligations but in a testament to the evolving technology.

When lawyers began to use third party emails such as Gmail, the question was whether there were ethical issues with using unencrypted email. If you'll recall, there were vendors (and they probably still do exist) that sell encrypted email platforms, one that requires authentication to open the email. Not to say there isn't a place or a reason for this, but not many of us would need that level of security. It is also cumbersome and delays pertinent information to your client.

So how do the courts view this use of the cloud? An opinion rendered in 1998 in New York State said that a lawyer may use **unencrypted** email to transmit confidential information since it is considered as private as any other form of communication. The reasoning was that there is a reasonable expectation that email will be as

private as other forms of telecommunication. However, the attorney must assess whether there may be a chance that any confidential information could be intercepted. For example, if your client is divorcing his or her spouse, an email that both spouses share, or even an email to which the non-client spouse has access, should not be the method of communication. The attorney must seek alternate methods of communicating.

Gmail will also scan keywords in your email and provide relevant advertising. For instance, if you were discussing shoes in an email, the email service provider would tailor ads when you were in the email inbox and you would now be receiving advertisements for Zappos or any other shoe vendor. After all, nothing is better than a captive audience.

So, the question now becomes whether a lawyer can use an email service that scans emails to provide computer-generated advertisements. The New York State Bar Association opined in Opinion 820 (2/8/08 (32-07)) that, yes, it was okay, since the emails were scanned by machine and not by human eyes. If the emails were read by someone other than sender and recipient, the opinion would have certainly been different.

Which now brings us to emerging technologies. This can come in so many different forms such as keyword searches to automated documents to utilizing big data (i.e., databases of information) to gain an edge over your adversary. We are all familiar with these concepts in one form or another such as HotDocs, OCR, and litigation review platforms but the technology continues to be more sophisticated and more intuitive. Even to the point that there are services out there marketing to in-house counsel that their software can review contracts and technologies that will help you parse together a contract, all at the click of a button.

How ethical can this be and where is the line of streamlining legal fees for your clients and just malpractice?

Pursuant to ABA Rule 5.4, a lawyer, when advising his or her client, must exercise independent professional judgment.

The rule of thumb being, you can use technology up to a point. The attorney still needs to review the work product and maintain a level of control over the final product. You can use technology as it was meant to be, a tool, but you are the one representing the client. It is up to you to present independent legal counsel to them. The technology is there to help you help your client.

Some of the best practices in utilizing emerging technology is sourcing the right technology for you and your practice. What will help you in your field to best represent your client? This could mean document automation, an online docketing system or an online intake platform. Also, recognize whether your clients will be open to this technology. After all, if your clients won't want to use this technology, you are now hindering your representation of them.

You should also be careful to vet your technology vendors. What is their reputation? Where do they store your information and how can they ensure the confidentiality of your client's information? These are all questions that need to be addressed. Vendors that service the legal industry should easily be able to give you the answer to these questions. Read their terms of service. If you don't like something, negotiate. We are lawyers, after all!

And, most importantly, if you decide to discontinue the use of the software, what will become of your data? Is it data you'll want to export out or ensure that it is destroyed?

The New York State Bar Association Ethics Opinion 842 offers some guidance on choosing vendors, specifically, cloud vendors, which as I mentioned above, since most legal technology does run in a cloud environment:

- Ensure that the online storage provider has an enforceable obligation to preserve confidentiality and security and will notify you of a subpoena.
- Investigate the online storage provider's security measures, policies, recoverability methods, and other procedures.
- Ensure that the online storage provider has available technology to guard against breaches.
- Investigate storage provider's ability to wipe data and transfer data to the attorney should you decide to sever the relationship.

Our obligations to keep abreast of changing law don't stop there. We owe it to our clients to take advantage of technology in our practice and to do so safely. Pick and choose what works for you and leave what doesn't. Technology, after all, is only as good as its user and that's okay.

Natalie Sulimani is the founder and partner of Sulimani & Nahoum, PC. She is engaged in a wide variety of corporate, employment, intellectual property, technology, Internet, arbitration and litigation matters. She is General Counsel to a global IT Company based out of the United States. Otherwise, you can find her geeking out on myriad devices. ANDROID only. Ms. Sulimani earned her LL.B. from the University of Manchester at Kiryat Ono, Israel. You can reach Natalie at natalie@sulimanilawfirm.com.

Inside Interview

Sarena Straus

Director and Senior Counsel II
Boehringer Ingelheim Pharmaceuticals
Conducted by Georgia Tsismenakis


Sarena Straus

Sarena Straus was raised in Westchester County, New York. She attended Barnard College, where she earned her Bachelor of Arts, *cum laude,* in Art History and Political Science. Ms. Straus earned her Juris Doctor from Fordham University School of Law. After serving as a Prosecutor with the Office of the Bronx District Attorney, Ms. Straus wrote about her experiences as an Assistant District Attorney in her book, *Bronx D.A.: True Stories from the Sex Crimes and Domestic Violence Unit* (Barricade Books, 2006). In 2010, the book was sold to CBS/Paramount as a television pilot. Ms. Straus has since taken on roles as General Counsel at Aurora Healthcare Consulting, Senior Counsel at Bristol Myers Squibb, and is now a Director and Senior Counsel II at Boehringer Ingelheim Pharmaceuticals, where she counsels the compliance organization for its anti-bribery, anti-corruption program, and also provides counsel on marketed and developmental products, including in the rare disease space. She has additionally project managed a complete overhaul of the U.S. legal department's transactions support and sits on a global legal innovations team. Ms. Straus was lead counsel for the negotiation and implementation of a Corporate Integrity Agreement, and is also on its enforcement team.

There's No Way I'd Ever Be a Lawyer

Sarena Straus now admits that she was a natural born lawyer, but almost missed her calling just to be contrary. "From about the time that I was two years old, my parents kept saying that I was going to be a lawyer. So of course, being argumentative, I said, 'The more you say it, the more I won't.'"

Growing up with renaissance parents who toggled fluidly between the art world and professional careers (her father, a retired oncologist, seven years ago opened a successful gallery on New York's Lower East Side and is also a widely published poet; her mother, a lifelong educator, has taught everything from Kindergarten in Brownsville, Brooklyn to medical students and college theologians; she was also the principal at the largest Hebrew school in the U.S., and is now the director of the Hudson Valley Center for Contemporary Art), Ms. Straus always had diverse interests. As a teenager, she studied and competed in opera and, as an adult, performed (as part of the New York Choral Society) at Carnegie Hall and in other prestigious venues.

She loved to sing and perform, but hated the audition process, so as a method of channeling her creative energy into something that did not involve trying to break into theatre, she entered college with the idea of becoming a drama and art therapist, using theatre and art techniques to facilitate growth and promote health in prison rehabilitation centers. It was then that Ms. Straus first realized that there "was always" an interest in crime, but it took quite some time, and some luck, for her to find the path linking that interest with the law.

Then, when she was a college freshman, Ms. Straus took an acting job with the clinical program at Columbia University School of Law. She was hired to play the role of someone who had been in the foster care system, and came out the other end in a good place. "It was my first real exposure [to what] a lawyer could be; something other than someone working in a law firm because working in a law firm never appealed to me."

It was at around the same time that Ms. Straus first learned that her father had been a victim of child abuse. "My own grandmother told me that she had been abusive toward him, sharing her great pain and regret and the wish that she'd had help." The convergence of these two experiences propelled Ms. Straus's interest in protecting children, which ultimately led her, almost inevitably, down the path of becoming a prosecutor in the Sex Crimes and Domestic Violence Unit of the Bronx District Attorney's Office.

There's All Kinds of Bad and All Kinds of Good

While it took Ms. Straus some time to find an interest in the legal field, she lights up when she discusses her experience as an Assistant District Attorney. Even after 15 years, "I miss it every day," she explains. She is a "prosecutor at heart," always seeking justice. She adds,

"sometimes it was just about getting somebody off the street and in custody to make the world a safer place, but sometimes there was an opportunity to help. Whether it was helping a parent or child by getting them resources or counseling as victims, or finding them a safe place to live, or even helping the defendant get the education and intervention he or she needed to stop, there were opportunities to do good."

Focusing her career at the DA's office on the Sex Crimes and Domestic Violence Unit was "hard and draining, and emotional, but it was definitely something you could feel good about and feel like you're making a difference." Ms. Straus truly believes that a prosecutor's role is "to do justice, but prosecutors wield tremendous power, and justice isn't just about convictions; it can come in many forms."

Ms. Straus had many proud moments in her career as a prosecutor and was involved in several "firsts" in the Bronx. She was the first prosecutor to work on luring cases, helping secure a grant for the office to fund computers for sting operations, and conducted trainings to protect children online. She also had the first successful prosecution under the "course of sexual conduct against a child" statute, "which recognized that children could not reliably remember dates [allowing the prosecution] to establish a crime over a course of time." She also had the first successful conviction trying a domestic violence case where the victim had wanted to drop charges and ended up testifying for the defense.

Ms. Straus' role became especially challenging when she handled domestic violence cases. She recalls that "many people [in the office] shied away from 'kid cases.' I preferred to work on 'kid cases' over domestic violence. I found it challenging when sitting across from a domestic violence victim who had been through some of the most awful things you can imagine and then you come back a week or months later and they would stand up in court and point the finger at the prosecutor, saying he or she had forced them to go forward, that we tricked them into it, that the defendant had never done anything to them, and that we were liars. Sometimes they would go back to their abuser at the expense of their children and it was really hard for me to understand how somebody could do that. How could they do that to themselves or their child?" It made everything that she worked for feel futile at the time, but she kept going because she loved the work. She further emphasizes that "you don't feel the same passion about other things; it's a very different type of caring" as a prosecutor.

The Best Litigators Are Storytellers

When Ms. Straus began at the Bronx District Attorney's Office, she never intended to write a book about her experiences, "but when you're a prosecutor, you are weaving a story. Prosecutors, and the best litigators, are storytellers at heart." While some people go into the District Attorney's Office "thinking some day they will write about it," Ms. Straus actually started writing poetry as a form of catharsis and because she missed having that artistic outlet. Then, she says, "it kind of evolved and I kept writing." She uses a poem (often about cases that she handled) to introduce each chapter of her book, *Bronx D.A.: True Stories from the Sex Crimes and Domestic Violence Unit.*

When Ms. Straus set it in her mind to begin writing, she hunkered down and spent the better part of a year putting together the first draft. "I pulled from my trial notes [and reviewed] trial transcripts. I wanted to see what exactly happened. I tried to the best of my ability to retell the cases accurately."

She made a "conscious decision that the book was not going to be a tell-all, but about the experience of being a prosecutor," keeping all defendant's names confidential even in the case of convicted defendants. While she gave real names for colleagues, it was only to talk about what was positive. "It was an amazing and emotional experience" for Ms. Straus and she did not want to distract from that with anything that could be perceived as hurtful.

Ms. Straus found great success in her book. She used a traditional publisher and went on book tour. Later, the book was optioned by television writer Jessica Sharzer (co-Executive producer of American Horror). They sold the book as a pilot to CBS Paramount and though it was not picked up (they lost to J.J. Abrams and Robert DeNiro), Ms. Straus remembers this as an "exciting" experience.

While she no longer writes poetry, Ms. Straus continues to write fiction and has written three complete novels in the genres of criminal thriller and young adult sci-fi. She maintains that "once you're a writer, you're always a writer."

I Am Not Somebody Who Can Quite Bring Themselves to Take a Position I Don't Believe in

Not only was Ms. Straus' book successful in its own right, but it opened doors for her career. She soon became a television and radio legal commentator for such shows as *The O'Reilly Factor* and *Nancy Grace*.

While she enjoyed legal commentating, she felt that the "television people might have preferred that I be more aggressive and get in people's faces, but that's not who I am or what I wanted to be doing. I was never comfortable in the role of trying someone in the media." While she appreciated the experience, Ms. Straus

preferred to provide her opinion on new criminal laws under consideration.

She finds these discussions interesting because "you can have objective conversations of pros and cons and how things can backfire." She adds that "you can't legislate for everything and you can't make everything criminal—not everything is black and white and a prosecutor understands that."

"Crime bills," she explains, "are often reactive, trying to criminalize behavior based on particularly heinous, individual crimes, but that kind of reactive approach is often not very well thought through. They don't consider the real-world applications and ramifications, how the laws may backfire and have unintended consequences." One example she gives is the 2011 push for Caylee's Law, which sought to criminalize the failure to report the disappearance of a child within a certain period of time (as little as 24 hours in some states) and has since been approved in various forms in several states. The bills were introduced shortly after the high-profile acquittal of Casey Anthony, for the murder of her two-year-old daughter, Caylee, who Anthony failed to report as missing for a period of 31 days. "Among many unintended consequences of such a law are the criminalization of innocent and warranted failures to report, as well as deterring reporting by people who might otherwise report a child missing, but who are afraid they'll get in trouble for not doing so on time. In the end, the bills were about trying to make sense of a verdict that the public didn't agree with and trying to find some way to have put Anthony in prison, not about writing a good law that will do something to better protect children."

I Am Definitely a Jack of All Trades

After leaving the District Attorney's Office, Ms. Straus "wasn't seeking to be in the life sciences industry." In fact, she attributes her current career to "happenstance." When she was looking to leave the District Attorney's Office, she initially wanted to pursue opportunities with the federal government, but the process was much longer than she anticipated. That was when a friend of her brothers asked her to come and help him with the legal aspects of a medical management startup, Aurora Healthcare Consulting, while she waited to hear back from the U.S. Attorney's Office. She ended up staying with Aurora for six years, serving as its General Counsel.

From there, Ms. Straus joined Bristol Myers Squibb as employment counsel, and then four years later joined Boehringer Ingelheim, where she currently works on a wide variety of matters. Being in-house has afforded her a vast amount of experience in everything from restructurings to transactions and project management, to overseeing government investigations and counseling compliance.

In her current role as Director & Senior Counsel II at Boehringer Ingelheim Pharmaceuticals (Boehringer), Ms. Straus focuses on Federal Food, Drug, and Cosmetic Act (FDCA) and regulatory work. She was also the lead attorney in the negotiation and implementation of the Corporate Integrity Agreement (CIA), which is an agreement between Boehringer and the government to comply with federal health care industry requirements. She enjoys this role because it keeps her "toes in government water." She also enjoys regulatory work because of the "nuanced interpretation of the law and how it relates to advertisements, promotions, and studies."

Ms. Straus enjoys the diverse experience that her position at Boehringer allows, stating that "you can do a lot of different things and you can float around a lot more than you could at a law firm." She has even had the opportunity to work on some litigation cases, though admittedly not "quite as sexy" as her cases at the District Attorney's Office. Her team knows that; "they can throw new things at me and I'll go do it and have fun. I'm never afraid to try something new."

Ms. Straus' favorite part of her role at Boehringer has been her involvement in CIA negotiations because she was able to "work on the other side of government." Additionally, she enjoys leading the enforcement team because she is able to bring "a better compliance structure to the organization and foster a culture of compliance [so that] you are doing things in a way that is ethical and good for the company, its patients, and the products."

She also enjoys the counseling aspect of her role: "It's what being a lawyer is fundamentally about—coming up with ways for a business to accomplish what it wants to while complying with the law." She feels particularly proud to work on the current product she supports, which is a drug that slows the progression of a rare and fatal lung disease called Idiopathic Pulmonary Fibrosis, or IPF. Her work not only affords her the opportunity to counsel the brand team on marketing, but also to work with the team on many disease awareness and educational programs. "Most people have never even heard of IPF and many physicians have never seen the disease. A lot of what we work on is awareness and education, which is extremely rewarding, especially in a disease like this, where up until just over a year ago, there were no approved treatments in the U.S."

Fearlessness Is a Big Piece of It

Ms. Straus believes that there are "so many things you can do as a lawyer, that there is absolutely no reason that you should spend your career unhappy." She attri-

butes her success to her experiences as a prosecutor and her willingness to try new things. "Being a prosecutor is a really good training ground [for] whatever you do in your legal career because they don't have the resources or the leisure to have people sit down and micromanage you and feed you everything. You get thrown in there right away and you are making decisions that can affect the entire course of a person's life from day one." This allowed Ms. Straus to become more fearless, or at least appear to be. "I get told that I am very calm and unflappable,' which cracks me up because I feel like there is a storm in my head all the time. But really, being a prosecutor and especially working in crimes against children, gives you a lot of perspective. People are always saying, 'it could be worse,' but when you have witnessed something that really could not be any worse, everything else seems manageable."

In addition to fearlessness, Ms. Straus emphasizes that having an interest in what you are doing and using your prior experiences to help take advantage of an opportunity are also important. "It's a lot easier to do a good job and be fearless if you like what you're doing. I think loving what you're doing and being willing to fail and being in an organization that is willing to let you try things and fail" is important. After all, Ms. Straus maintains that "without failure there's no innovation."

This interview was conducted by Georgia Tsismenakis, a New York-based attorney. She is interested in practicing within the corporate and business law sector and would like to represent start-ups and small businesses with their legal and operational needs. She currently works as a Director of Operations for a legal education company. She was previously an Associate Attorney at a litigation firm located in Manhattan. She can be reached via email at georgiatsis@gmail.com.

Cybersecurity and Arbitration: Protecting Your Documents and Ensuring Confidentiality

By Tankut Eker, Dan Meyers and Al-Karim Makhani

One of the core advantages that drives parties to arbitrate is the promise of confidentiality. Unlike court proceedings, which are open to the public, arbitrations provide parties with a private forum through which to air and resolve their disputes. This advantage, however, is threatened by unwanted and unauthorized intrusions by cybercriminals, who have become ubiquitous in the modern world and target the legal sector with particular vigilance. Notwithstanding this modern threat, most arbitration practitioners continue to rely upon unsecure platforms to store, serve, and file their documents, most notably unencrypted emails and commercially available "cloud" repositories.

Particular care should be paid in international arbitrations, where the parties, counsel, and arbitrators frequently hail from different countries (or continents), triggering a web of data privacy laws that affirmatively obligate parties to take reasonable security measures to protect sensitive and personal information. Combined with attorney ethical obligations to ensure the confidentiality of client information, this intersection of regulatory requirements and security shortcomings creates a perfect storm for practitioners and their clients alike.

"Earlier this year, the FBI's Cyber Division issued Alert 160304-1, which specifically warned that cybercriminals are actively targeting the legal sector to obtain non-public information about corporations in order to turn potentially significant profits on stock markets trades."

Fortunately, the current circumstances are not all doom-and-gloom. The legal technology sector has developed convenient and secure platforms that empower parties, their counsel and the arbitrators themselves to not only store, serve, and file documents securely, but also to collaboratively draft documents from opposite ends of the world.

Confidentiality vs. Hackers

Practitioners are well-versed in the benefits of arbitration over other avenues of dispute resolution. Since the inception of arbitration centuries ago, one key component remains unchanged in its significance—confidentiality. In his 1934 work, *The Historical Background of Commercial Arbitration*, Wolaver suggests that the origins of arbitration lay in the settlement of trade disputes by amicable *private* tribunals.[1] Now, more than ever, confidentiality is a vital component to the process. A survey of U.S. and European users of international commercial arbitration conducted on behalf of the London Court of International Arbitration by the London Business School listed confidentiality as the most important benefit.[2] Arbitrations are held in private and a party's involvement in arbitration proceedings is confidential. This is in stark contrast to most domestic legal systems, where court hearings are open to the public, the identity of the parties is a matter of public record, and most filings can be accessed by any interested third party.

"Although there have been recent attempts to make email more secure through encryption or creating a private wire between senders and receivers, these options remain infrequently used."

The recently reported cyberattacks on law firms such as Mossack Fonseca, Cravath Swaine & Moore, and Weil Gotshal & Manges have put the issue of law firm cybersecurity in the spotlight. But the truth is that such attacks are neither new nor infrequent. Cyberattacks against law firms have been on the rise for a number of years—unsurprising given the wealth of highly sensitive and valuable client information that law firms possess. It is a misconception that these attacks are randomly carried out by bored, tech-savvy teenagers looking for a buzz. They are often conducted by sophisticated, well-funded hackers looking for specific information about pending deals or disputes. Earlier this year, the FBI's Cyber Division issued Alert 160304-1, which specifically warned that cybercriminals are actively targeting the legal sector to obtain non-public information about corporations in order to turn potentially significant profits on stock markets trades.[3]

Basic Email Is Not Secure

Email is the most popular form of communication (along with texting) in the world. But it is also one of the most vulnerable to hacking, which can take the form of viruses, malware, trojans, keyloggers, man-in-the-middle, and man-in-the-browser attacks (not to mention potential breaches of devices, networks, and servers themselves). Even Yahoo's own Safety Center advises, "Never send your credit card number, Social Security number, bank account number, driver's license number or similar details in an email, which is generally not secure. Think of email

as a paper postcard—people can see what's written on it if they try hard enough."[4]

To understand why email is not secure, one must remember that the historical design of the same fundamental email system that we use today was never conceived with security in mind. To the contrary, when email was originated decades ago internet usage was extremely limited and everything that was transferred was done openly and could be accessed and read by everyone else "online." Of course, significant advances have occurred in privacy and security in the intervening years—foremost of which being passwords, which are designed to limit access to emails to the intended recipients.

But the fact remains that every email resides in many locations at once. The sender's device (smart phone, tablet, computer) is the originating source, but before the email arrives at the recipient's device, the email will travel through myriad intermediary networks, servers, routers, and switches which are often operated by different providers. Each of these locations is a separate vulnerability point to unauthorized intrusions. A hacker that infiltrates any of these locations can access (and even alter) the content of the emails that are passing through.

Although there have been recent attempts to make email more secure through encryption or creating a private wire between senders and receivers, these options remain infrequently used.

Most Cloud Repositories Are Not Secure

The alternative methods that many arbitrators, practitioners and counsel rely upon to store, transmit, serve, and "file" sensitive documents in an arbitration are commercially available "cloud" repositories like Box, Dropbox, and similar platforms. But as with email, these environments were not designed with security as the priority and the results have been significant unauthorized intrusions, such as the 68 million Dropbox users that reportedly had their information hacked.[5]

"Because such platforms are designed from the start with an emphasis on security, the features that ensure confidentiality are multifaceted and nearly impossible to circumvent."

The Committee on Professional Ethics of the New York State Bar Association itself recognized the inherent problem of security in cloud environments when it issued Opinion 842, which concludes that a lawyer may only "use an online data storage system to store and back up client confidential information" if the lawyer first "takes reasonable care to ensure that confidentiality is maintained in a manner consistent with the lawyer's obligations under rule 1.6" and "exercise[s] reasonable care to prevent others whose services are utilized by the lawyer from disclosing or using confidential information of a client."[6]

"In today's digital age, attorneys and their clients can never be too careful when handling sensitive information contained in electronic documents."

While the various vulnerabilities of commercially available online storage environments are too many to discuss in-full, some of the highlights are:

- many such platforms claim ownership over all information that is uploaded, thus claiming the right to use and share such information for any disclosed purpose;
- the administrators and developers of such platforms have full access to the information shared;
- the security measures utilized by most platforms are not disclosed to users;
- users are typically not allowed to perform encryption on their own information before uploading;
- many providers utilize U.S.-based servers and are subject to U.S.-government eavesdropping programs (even if the users reside outside of the U.S.); and
- most of these solutions do not have built-in password protection or encryption for individual documents.

LegalTech to the Rescue

Fortunately for arbitrators, practitioners, and their clients, the gap between current (unsecure) practices and the need for confidentiality is being filled by the legal technology industry. Platforms such as TransCEND, which is specifically designed for the legal industry, empower arbitrators, parties, and their counsel to securely store, transmit, and edit sensitive documents from anywhere in the world.

Because such platforms are designed from the start with an emphasis on security, the features that ensure confidentiality are multifaceted and nearly impossible to circumvent. Security begins with multi-factor authentication to access the database in the first place (i.e., two sets of login criteria to obtain access). Thereafter, every file uploaded is encapsulated within an encryption shield to prevent the interception of data and the unauthorized extraction or distribution of content. Further, through

the use of access controls within the platform (known as "Information Rights Management"), the party uploading a document can control how much access they give to his or her counterparties (or to the arbitrators themselves). For example, when filing particularly sensitive documents through the platform, the receiving parties' access can be restricted to being able to view the contents through the platform while disabling the ability to edit, print, download or email the document to others. Even the ability to take a "screenshot" can be disabled.

Conclusion

In today's digital age, attorneys, and their clients can never be too careful when handling sensitive information contained in electronic documents. For the arbitration community—and in particular the international arbitration community—this means taking advantage of the technological advances that ensure the ability to share and collaborate without running afoul of your client's confidence and the web of regulatory security requirements.

Endnotes

1. *See* The Historical Background of Commercial Arbitration, available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review.
2. *See* Bagner, "Confidentiality—A Fundamental Principle in International, Commercial Arbitration?" (2001) 18 Journal of International Arbitration 2.
3. *See* FBI's Cyber Division issued Alert 160304-1, available at https://info.publicintelligence.net/FBI-InsiderTradingHacking.pdf.
4. *See* https://safety.yahoo.com/Security/PREVENT-ID-THEFT.html
5. *See* https://www.washingtonpost.com/news/the-switch/wp/2016/09/07/hacked-dropbox-data-of-68-million-users-is-now-or-sale-on-the-dark-web/.
6. NYSBA Comm. on Professional Ethics of, Formal Op. 842 (2010).

Tankut Eker is the Managing Director of TransCEND, a secure document storage and collaboration platform frequently used in arbitrations. Dan Meyers is the President of the Consulting and Information Governance divisions at TransPerfect Legal Solutions (TLS) and a former litigation Partner at Bracewell & Giuliani LLP. Al-Karim Makhani is a Senior Case Consultant at TLS and a former Senior Associate in the Disputes group at Stephenson Harwood LLP.

"You Have Been Served": Putting Together a Protocol to Prepare for the Unexpected

By Katherine A. Lemire

What would you do when a government agency comes knocking on your door with a subpoena? It may seem out of the question…or is it?

There seems to be another high-profile federal investigation making news each week, and no business is immune in this environment of heightened regulatory scrutiny. While large organizations may have divisions of attorneys well-versed in these scenarios, mid- and small-sized companies might be caught off-guard, clamoring for the right thing to do. It is wise to have a protocol in place before the unforeseen happens.

If the subpoena lands on your desk, there are a few suggestions that you would be wise to consider to ensure you protect yourself and your clients.

Be Smart at the Outset

There are immediate first steps that will help you to limit your business's liability and exposure. For example, be certain that the appropriate executives within the company receive a copy of the government-issued document immediately. Working with the internal legal team, ensure the word gets out to the right people that no one deletes or destroys any documents or emails that are relevant to the subpoena. Also, keep in mind that outside contractors who may have documents and emails responsive to the subpoena should be put on notice as soon as possible, though they might not fall under attorney-client privilege.

"Be aware, however, that if you use an external public relations firm, it might not fall under attorney-client privilege."

Keeping your company cooperating in good faith with investigators is also in your best interest. For example, if a subpoena is delivered by a law enforcement agent, it is best to not interfere with his or her efforts to serve the subpoena; at the same time, keep the interaction short.

Don't Be Afraid to Interact with the Prosecutor

Prosecutors can be reasonable, and there are several appropriate ways to negotiate with investigators to save time and resources on both sides. Many subpoenas will include the name of the prosecutor directing the investigation. Counsel should call the prosecutor, and talk about how to work together to produce materials actually sought by the prosecutor. For example, if the documents requested in the subpoena are very broad in scope, you may want to lessen the burden on staff by finding out the government's focus. This might allow you to shorten an otherwise broad time period covered by the request, for example, narrowing years' worth of bank records to a single year or months. Also working with the prosecutor, you could request prioritization of documents to be produced and hammer down a reasonable schedule for document production. Counsel should also find out if the company is a target in the investigation, or a witness, as this is a pertinent question and will be asked by the company executives who are made aware of the subpoena requests.

Ensure Your Key Constituencies Are Apprised and Keep an Eye on Public Image

Whether your business is a witness or the target of an investigation, you should carefully consider who should be alerted about the situation, being mindful of limiting information leaks while complying with required notifications. This includes your media operation, which should be brought in as appropriate to ensure you are prepared if the media is made aware of the subpoena.

"For example, if your company was served a subpoena as a witness in an investigation, it might be beneficial to comment that you are cooperating with prosecutors and otherwise clarify that the company itself is not a target of the investigation."

Be aware, however, that if you use an external public relations firm, it might not fall under attorney-client privilege. In a decision earlier this year, a federal judge in the Southern District of New York ordered the disclosure of litigation-related communications with a public relations firm. See *Bloomingburg Jewish Education Center v. Village of Bloomingburg*, 2016 WL 1069956 (S.D.N.Y. March 18, 2016).

Whether you use an internal staff or consultants, crafting a media strategy is crucial, whether the plan is not to respond to reporters' inquiries, or to make short,

concise statements to allay fears that the issue might affect the viability of your business. Assume that all statements to the media are open to interpretation by prosecutors, and therefore might be taken as a sign of bad faith. That said, it can be helpful to provide the media with short and clear statements to put investors, clients, and other core constituencies at ease.

"Keeping your key constituencies in-the-know to the extent it is possible and legally prudent is an important part of the internal and external process of dealing with such a sensitive matter."

For example, if your company was served a subpoena as a witness in an investigation, it might be beneficial to comment that you are cooperating with prosecutors and otherwise clarify that the company itself is not a target of the investigation.

Asking all relevant persons to direct reporters' calls to your media operation will help to ensure no one inadvertently provides the media with information that should not be revealed. Keeping your key constituencies in-the-know to the extent it is possible and legally prudent is an important part of the internal and external process of dealing with such a sensitive matter. Each case and situation is unique, and as such, these decisions should be considered carefully and with experienced hands.

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Inside Books

Fair Labor Lawyer: The Remarkable Life of New Deal Attorney and Supreme Court Advocate Bessie Margolin

Edited by Marlene Trestman
(Louisiana State University Press, 2016; 243 pages)
Reviewed by Randi Melnick

Decades before we had the notorious RBG,[1] the legal community had the extraordinary and trailblazing Bessie Margolin. Although never receiving the level of notoriety now enjoyed by many women in the legal and political sphere, Margolin played an integral role in paving the way for the RBGs of the world to rise. In her book, *Fair Labor Lawyer*, Marlene Trestman pens a love letter for the woman who devoted her life to advancing the rights of America's workforce, and by default, the opportunities possible for female professionals.

Raised in a Jewish Orphan's home in New Orleans, Margolin's journey was unique from the start. Coming up in institutions that impressed the importance of good citizenship, social justice, and hard work, Margolin's life work honored these principles; using her intellect and charm, she tirelessly championed for progressive change, contributing to some of the most significant legal events in modern history. At a time when only 2% of America's attorneys were female (and even fewer of whom were Jewish,) Margolin earned the respect of classmates, colleagues, bosses and judges, almost all of whom were male and Anglo. By the end of her career, Margolin was celebrated by several of the greatest legal minds of the time. Among the many notable guests at her retirement party were several sitting and former Supreme Court Justices. Chief Justice Earl Warrenb who delivered the speech of the evening, reflected that Margolin had made "great contributions to millions of working people."

Having argued before the Supreme Court 24 times, Margolin was victorious in all but three cases. To date, the record of Supreme Court arguments presented by a female attorney stands at 33. Margolin first made her bones defending the constitutionality of the New Deal's Tennessee Valley Authority, but the majority of her career was focused on and recognized for her fight for enforcement of the minimum wage, overtime, and child labor law protections of the Fair Labor Standards Act. Margolin's career took a fascinating interlude in 1946 when she traveled to Nuremberg, Germany to serve as a war crimes attorney, where she was responsible for drafting the rules establishing the American military tribunals. This experience would forever change her life, leading to a love of international travel and the attendant social scene. Later in her career Margolin would more directly fight for other women in the workforce as a founding member of the National Organization for Women. Margolin was one of the early champions of the Equal Pay Act, not only arguing and winning many of the early appeals, but also devoting time to public speaking to educate corporate attorneys in a non-adversarial forum in an effort to secure compliance from employers.

Margolin's liberal and progressive work was not without consequence. Margolin endured a thorough and invasive government investigation of her "loyalty" as a result of the Red Scare, which left a stain on her pursuit of a federal judgeship. Margolin undertook a long-term, aggressive campaign for a judgeship and ultimately was not able to overcome the limitations on the opportunities for women and the scrutiny of her personal relationships which were inextricably linked to her professional life. Early in her career, Margolin was put forth for certain opportunities only after making assurances that she would marry only her work and would not subjugate her commitment to the law in favor of a more domestic life. Rather than marry and have children of her own, Margolin carried on a number of not-so-secret long-term romantic affairs, which Trestman deftly weaves into the narrative of Margolin's professional journey.

Similar to the roadblocks Margolin faced in pursuit of a judgeship, she was unable to secure a professorship despite her distinguished pedigree, as those coveted positions were reserved for men, and not for Jews. Margolin devoted significant time and energy into pursuing a professorship, but academia was not ready for her. As Trestman points out, "before 1950 only five women ever held positions as full-time, tenure, or tenure-track law professors at accredited law schools." Despite the unfulfilled promise of a judicial or educational endeavor, Margolin's many powerful achievements made room for opportunities for generations of women to come.

Trestman's book tells this very important story, although it leaves out any detail of her personal relationship with Margolin with whom she shared common childhood experiences that undoubtedly bonded them. Personally, I think the book would have been served well with some more intimate information about Margolin's relationship with her mentees to balance the density of

the historical information that made the reading experience feel a little bit like homework. Nonetheless, Trestman's admiration for Margolin is apparent in her writing and this reader very much appreciated the opportunity to get to "know" and be grateful for a pioneer who made my path a little bit easier. In the aftermath of our recent Presidential election, this book is an excellent reminder of how far we have come, and an inspiring call to action to continue fighting the good fight to break glass ceilings everywhere. Bessie would be proud of you, Marlene.

You too, Hillary.

Endnote

1. Ruth Bader Ginsburg is an Associate Justice of the Supreme Court of the United States. She has become a pop culture icon as a result of her fiery dissents and outspoken commentary. Ginsburg's increasingly fiery dissents led to her being called "The Notorious R.B.G."

Randi Melnick is a labor and employment attorney in New York City. Randi focuses on and enjoys building bridges and solving problems in the workplace. She can be reached at www.linkedin.com/in/randimelnick-employmentlawyer or Randimelnick@gmail.com.

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Breaking Through Bias: Communications Techniques for Women to Succeed at Work

Edited by Andrea S. Kramer and Alton B. Harris
(Bibliomotion, 2016, 182 pages)
Reviewed by Janice Handler

Display grit! Stop speaking in question marks! Don't say "you know." Dress nicely. Smile frequently (but only when appropriate).

These are the suggestions of Andrea S. Kramer and Alton B. Harris, a husband-wife lawyer, writer, consultant team focused on gender-related issues affecting professional women. In *Breaking Through Bias: Communications Techniques for Women to Succeed at Work*, Kramer and Harris apply their considerable experience in managing law firms and personnel consulting to developing and articulating tools that can be used to confront gender identity issues in the workplace.

The authors begin with their personal stories explaining their interest in how gender stereotypes and biases hold women back. Andie writes of encountering gender bias issues after leaving a small law firm founded by her husband. She tells of encountering obstacles in women's career paths that were not in men's; inconsistency of opportunities; and unfair demands on women trying to have children. She developed the view that women need to recognize and purposefully counter gender stereotypes and biases through nuanced and carefully honed communication techniques. Al points out that the firm of which he was founding partner hired men and women in equal numbers, but only 10% became equity partners. He attributes the low percentage of women in senior positions to the fact that men who control careers (the "gatekeepers") hold gender stereotypes that heavily handicap women, and feels that with the right information and training, women can overcome the discriminatory consequences.

From these experiences, the authors pose a problem and a solution. The problem is gender bias in the workplace, that men are assumed to have traits of action, competence, and independence which are associated with workplace leadership, while women are seen to display sensitivity, warmth and caregiving, leading to low expectations of women's performance, capabilities and potential.

The solution: since we will not reform workplaces immediately, we need to change women's understanding of how they should communicate with the gatekeepers. By better understanding how to become better attuned to gender stereotypes and managing impressions, women can better control their careers and advancement and overcome the "Goldilocks Dilemma" where equivalent behaviors are perceived differently in the two sexes (i.e., "she's bossy, he's a leader") and women must constantly balance being too hard, too soft, or just right.

The book then details specific techniques to allow a woman to use her voice, movements, and body language to communicate a competent, confident, and socially sensitive leader and to acquire the key strengths of grit; high self-awareness and self-monitoring; commitment to managing impressions one makes; and ability to use a variety of communication techniques to overcome biases.

The rest of the book outlines these techniques, which include:

1. combining "communal" (feminine, nurturing, socially sensitive) traits with "agentic" (masculine, assertive, competitive, self-confident, forceful, risk taking) traits to project confident, capable, leadership.

2. using nonverbal communications (facial expressions, eye contact, dress, head nodding, smiling) to enhance one's image); and

3. communicating in difficult situations (meetings, performance reviews, giving and receiving assignments).

Most of the specific advice that emerges falls into the "can't hurt" category. For example: overcome self-stereotypes; set and track clear long term goals; stop playing with hair, jewelry, and clothing; have a firm handshake; stop ending sentences with a question; stop using words like "like," "feel," "sorry,"; smile more—but only when appropriate.

Other advice sounds "woo woo" to me, e.g., engage in mind priming (where you focus on your achievements for five minutes before a presentation; strike certain poses such as "Wonder Woman" to achieve self-confidence).

While not inclined to engage in Wonder Woman poses (Andie and Al swear they work!) I did find useful advice relating to giving and accepting assignments and how to say no. As both the giver and receiver of unclear assignments, I agree that it is important to be clear and unambiguous about what is expected and when. Interestingly, the biggest offender I encountered was a **male** boss who started every order with "It would be great if you would…." As to saying "no" to assignments which do not enhance one's knowledge base or career, good advice on the hows—but I'm not sure "no" is an option as often as the authors suggest.

This book is chock full of links to web-based analytical and teaching tools (the ABA has a "grit project"—who knew?); the advice is sensible; the anecdotes well written. But a question lingers—does anyone in this twentyfirst century **need** this book? Though its encomiums suggest it should be placed with the Bible in every hotel room ("a book with tremendous potential to substantially affect the advancement of women"), there is really nothing groundbreaking here.

But I admit to a bias of my own. When I went to law school, there were six women in my class, three of us tied for first place in the class. It was a buyer's market, and we all got jobs easily in part because each law firm and corporation and government agency wanted its woman. Some of us were fragile flowers who said "you know" and ended every sentence with a question. Some were mean girls, some Queen Bees. We worked hard, and we made many mistakes (some of which this book might have prevented). Mostly we just showed up every day. We didn't think a whole lot about gender identity.

If this is sounds like "When I was your age, I walked five miles to school during blizzards," guilty! But it does affect my reading of this book. And it's hard to resist telling Gen X, Y, or whatever to put on their big girl pants and get on with it. It is also hard, in this 21st century, which offers female heads of state and female mass murderers, to view gender bias as that big a deal. But the Kramers are in today's arena, and I am not. And I guess it can't hurt to display grit, stop saying "you know,"' don't speak in question marks, wear nice clothes, and smile frequently (but only when appropriate).

Janice Handler is the former Editor of *Inside* and former General Counsel of Elizabeth Arden. She is an adjunct Professor of Law at Fordham Law School.

Secondment Firms Provide an Innovative and Practical Solution Enabling In-House Legal Teams to Staff Flexibly, Efficiently, and Cost-Effectively

By Randi Rosenblatt

Introduction

If you are an in-house lawyer facing ever-changing compliance demands, struggling to prioritize business needs, feeling constrained by headcount and a restricted budget, or realizing that each day brings a new hat that you are expected to wear, you may find comfort in the fact that you are in good company. In-house lawyers are increasingly overwhelmed, trying to balance these, and many other, competing demands. In turn, in-house lawyers are seeking more services from outside vendors, including alternative fee arrangements, new technology offerings, external compliance solutions, and much more. Secondment firms are another innovative solution frequently used by in-house legal teams—specifically, they address the ongoing need for flexible, cost-effective and efficient legal staffing support. Secondments firms are companies that hire well-trained, experienced lawyers to work on temporary engagements at in-house legal departments. The lawyers hired are W-2 employees of the secondment firm yet their substantive work is supervised by the in-house legal department. Law firms also use the services provided by secondment firms but generally on a more infrequent basis. In addition to the advantages secondment firms provide to clients, they have also proved to benefit those attorneys who work within the model.

Benefits of the Secondment Model

Secondment firms were created to fill gaps in the marketplace in ways that complement and, at times, replace the options provided by law firms, other legal service providers, and in-house legal teams themselves. By providing high-caliber attorneys to clients at discounted rates (and employing those attorneys while also providing them with a robust benefits package), without requiring an ongoing commitment, secondment firms impart an attractive alternative for in-house legal teams focused on decreasing their legal spending without compromising work quality. Secondment firms often provide lawyers to fill in for parental leaves, assist during reorganizations or hiring freezes, provide niche expertise, aid with shifting workflows, supplement legal teams when new regulations emerge, and assume intensive project work when employees are too busy to handle. Secondment firms also enable companies to work with an attorney on a trial basis, through an "extended interview," so the company gets its immediate staffing needs addressed while also assessing whether to hire the attorney permanently.

The benefits that the secondment model provides to in-house legal teams are measurable, which helps explain why the model continues to grow. Listed below are some of the benefits that in-house legal departments have enjoyed by using secondment firms:

- staffing up and down as needed, with maximum flexibility and without the need for workload foresight;
- providing a more cost-effective alternative to outsourcing work to law firms;
- accessing top legal talent at flat weekly rates that are reasonable and predictable;
- avoiding employment risk, as well as the costs and concerns associated with employment; and
- handling the time-consuming task of sourcing and vetting appropriate talent for temporary work.

Sourcing Secondees

For many years, companies have taken advantage of opportunities to "second," or borrow attorneys from outside law firms. Law firm secondments can be successful when the seconded lawyer is talented and has prior knowledge of, and experience with, the client and is able to join the client temporarily and instantly provide invaluable support. In practice, however, not all law firm secondments are successful. Many law firms view secondments as merely a favor to a client with the hope of strengthening that client relationship, often at a financial loss to the firm. Therefore, some law firms are reluctant to provide their "best" attorneys as secondees, as those attorneys will no longer benefit (and bill) other firm clients, and many firms also fear that their best talent will then get poached. When a secondment need arises, companies are, therefore, increasingly turning to secondment firms that can access top talent, across jurisdictions and practice areas, who squarely fit the need of the company, for as long or as short as the company needs, without an ongoing obligation of any kind.

Attorneys Operating in the Secondment Model

An additional treasure of the secondment firm model is that it has created a market for attorneys to do high quality work on their own terms. The model embraces lawyers with non-linear paths as well as those with more conventional careers. A secondee may be an entrepreneur looking to take on small projects as she launches her business, or a hopeful author writing his first book and seeking legal work as he aims for publication, or a law firm lawyer hoping to gain in-house experience to become more marketable. A secondee may also be a retiring general counsel who wants to phase into retirement rather than retire outright, or a lawyer who relocated or is seeking to reinvent, or a re-entry mom who took a few years off and wants to return to the practice of law. Regardless of the attorney profile, secondment firms have created a market for attorneys to practice law in alternative ways that suit their varying needs, making for happy clients and happy lawyers.

Conclusion

Secondment firms consistently satisfy the varying needs of in-house legal teams by enabling them to staff flexibly, efficiently, and cost-effectively. They also meet the needs of many attorneys who have an interest in practicing law in a non-traditional way. Since secondment firms are, by their nature, innovative, they are always developing ways to further benefit their clients. With secondment firms focused on meeting the ever-changing needs of the market, their growth can only continue.

Randi Rosenblatt is the Director of Business Development at Bliss Lawyers, a secondment firm that places high-caliber attorneys in temporary and temp to perm engagements at companies and law firms. Prior to joining Bliss, Randi was Senior Counsel, Director at Heineken USA in New York. She previously practiced law as a corporate attorney at the law firms of Schiff Hardin LLP and Watson Farley and Williams LLP. She can be reached at rrosenblatt@blisslawyers.com.

The Future of Intellectual Property Risk Management for In-House Counsel: Predictive Economics

By Gill Eapen

Uncertainty is a persistent characteristic of the modern economy. In-house counsel face daunting challenges to assure compliance in the presence of a plethora of changing regulations, to manage risk in the diverse intellectual property estate that supports the value of the firm, to defend against the threat of litigation from many different participants and to assure the future viability and growth of the firm. The times have changed—gone are the days when life was simple and decisions based on static information adequate. As part of the senior management team, in-house counsel have as much responsibility now in anticipating and managing all risks faced by the firm to maximize shareholder value. There are two distinct areas that are becoming increasingly complex to manage in the presence of high uncertainty and information complexity.

"Budgetary processes are often complex in large organizations and typically focus on operating activities driven by demand seen in the previous time-period."

Managing the Risk and Value of the Intellectual Property (IP) Estate

Recent advancements in science and technology mean that the value of any firm is largely based on the intellectual property it creates, nourishes, manages, and protects. Ideas could be as valuable as technologies, and trade secrets more powerful than patents. Managing a portfolio of such diverse IP positions is not an easy task. The interactions among these IP positions could be an important aspect as the value and risk of individual positions cannot be disconnected from the rest of the portfolio. The perennial question for in-house counsel is how to assure that the actions taken (or not taken) in every IP position by the company is value maximizing. This is not an internal question. The value of an IP position largely depends on what exists in the market and what could be emerging. Keeping track of technology trends and competitor actions in a globally integrated economy with concentrated political and regime risks is not a manual task anymore. Contemporary products and technologies are extremely complex bundles of protected IP that emanate from academic institutions to foreign governments. Recent trends in public domain software licensing make it even more challenging to understand who owns what and the legal implications of actions and decisions pursued by the company.

Forecasting and Managing Internal and External Cost of Actions

If the external complexity was not enough, corporations are constantly trying to become more efficient by cutting costs and applying technologies. This has put pressure on in-house counsel to better estimate the resources required to manage their portfolio of activities. Uncertainty in costs, timelines, the chance of success, and ultimate benefits, make it immensely challenging for them to estimate and manage what is needed. Budgetary processes are often complex in large organizations and typically focus on operating activities driven by demand seen in the previous time-period. However, the volatility in regulatory actions facing legal counsel is likely a lot higher than other parts of the organization. To make matters worse, the resources needed to execute are not just internal but come from many external sources including consultants and experts. Changes in regulatory regimes bring discontinuous effects in resource requirements for in-house counsel and these often cannot be estimated using traditional tools and processes. High variability in required resources for complying with changing regulations and high uncertainty in how the risk and value are changing in IP positions make the job of in-house counsel challenging.

"On the resource management side, machine learning algorithms can continuously predict required internal and external resources, using historical data."

Predictive Economics to the Rescue

Predictive economics is an emerging area that combines the latest ideas in machine and deep learning that operate on any available data to make predictive models that feed into market based economic modeling and assists in answering questions on risk and value. For example, models can be built to predict any event at a patent level—such as approval, infringement, maintenance, and others. These models, working from the cloud, can provide continuous predictions on every event. These probabilistic predictions can be accumulated to the com-

pany level, giving a dynamic view into how the IP estate value and risk are changing as well as what actions may be most optimal. For example, if the model's prediction of chance of infringement on a particular patent is high, in-house counsel may proactively intervene to reduce the risk. Similarly, if the chance of approval for a filed patent is low, actions can be taken to improve the odds. More generally, these models can give guidance on the timing and design of patent applications and actions to maximize portfolio value. Models can also forecast the type and number of legal actions that are likely at the patent level, providing real time transparency into the legal risk carried by the firm within categories, locations, and the overall company. In the modern economy, where the value of the firm largely depends on the underlying IP positions, the risk of the IP portfolio is an important consideration. As such, in-house counsel is a critical link in communications with markets and shareholders externally and with corporate finance internally to forecast, estimate, and monitor firm performance. Instituting a systematic value and risk measurement and monitoring system for the IP portfolio goes a long way to ease the burden of in-house counsel in day-to-day management and designing strategic actions to maximize firm value.

"Those who embrace an analytically driven risk, value and resource management process could gain significant competitive advantages in this age of possibilities, in the presence of high uncertainty."

On the resource management side, machine learning algorithms can continuously predict required internal and external resources, using historical data. Such predictions are useful not only for budgeting and internal management but also to understand the risk of not being able to meet certain requirements within allowed time frames. Since these models are operating continuously, they can provide warnings if certain projects and actions are not progressing as anticipated. This is useful as a performance monitoring system keeping in-house counsel constantly appraised of overall time and cost-risk carried by the firm. In situations where a regulatory change could impact a large number of actions, the models can provide scenario expectations in different regulatory and political outcomes. This may allow in-house counsel to design and manage contingency plans to mitigate risk.

What In-House Counsel Can Do

In a dynamic world, driven by real time information and processes, traditional techniques of monitoring and managing costs, risks and value are all but obsolete. However, recent advancements in technology, analytics, and economics allow us to rapidly create predictive and economic models that can provide estimates of value and risk of IP as well as forecast internal and external resource requirements to take actions. These models can be built using your own data, complemented by any relevant external data. They could be deployed internally or in the cloud, providing real time and actionable intelligence to most questions faced by in-house counsel in companies of any size, complexity and industry. Those who embrace an analytically driven risk, value and resource management process could gain significant competitive advantages in this age of possibilities, in the presence of high uncertainty.

Gill Eapen is the Managing Director of Predictive Economics and Management Consulting at Stout Risius Ross, Inc. He is the founder of Decision Options, the firm that pioneered methodologies and tools in the area of decision-making under uncertainty. Over the last three decades, he has consulted with over 50 companies in many industries on a plethora of strategic, financial and operating issues.

Continuing Legal Education

By Natalie Sulimani

On October 13th-14th the Business Law Section and the Corporate Counsel Section held their annual joint fall meeting in the state's capital, Albany. As always, the Corporate Counsel was excited to participate in this program in which we joined colleagues of the Business Law Section in learning more about updates in our respective areas of practice.

On the first day of the event, we took at tour of the State Capitol building. It was a beautiful tour filled with spectacular architecture and a rich history. The tour was then followed by a Welcome Reception at the Renaissance Hotel. This provided a great opportunity to meet the speakers and members of each Section in a relaxed, social environment. Plus, the Renaissance Hotel is a fantastic choice of accommodation in the heart of downtown Albany with new, finely detailed rooms and an always active bar/restaurant.

The next day we kicked off the joint CLE with the Business Law Section's "How to Make Sausage: Influencing Public Policy in New York State" with speakers *Joshua L. Oppenheimer, Esq.*, Greenberg Traurig, LLP; NYSBA's outside legislative counsel, *Hermes Fernandez, Esq.*, Bond, Schoeneck & King; and *Ronald F. Kennedy, Esq.*, NYSBA Director of Governmental Relations. We learned the finer points of what is and isn't considered lobbying (you'd be surprised) and other nuances of doing business in New York.

This was followed by our luncheon keynote speaker, *Meghan Cook*, Program Director for the Center of Technology in Government, University at Albany, who spoke to us about Smart Cities, what they are and where to find them. Also, their growing presence in cities around the world. While the definition of this is broad and the applications are many, according the Wikipedia, "A **smart city** is an urban development vision to integrate multiple information and communication technology and Internet of Things solutions in a secure fashion to manage a city's assets…." We highly recommend hearing Ms. Cook talk about it if you get the opportunity.

After lunch, we got down to emerging technology and ethical considerations. This was a panel discussion with *Nathan A. Huber*, Director of Business Development, Premonition; *Lance Koonce, Esq.*, Davis Wright Tremaine, LLP; *Nehal Madhani, Esq.*, Alt Legal Inc.; *Natalie Sulimani, Esq.*, Partner, Sulimani & Nahoum, P.C.; and *Katherine Suchocki, Esq.*, Director, Law Practice Management of NYSBA.

The panelists spoke about their respective technologies, what they use in their law practice and the ethical considerations of using emerging technology as well as the changes in the ABA Model rules in light of emerging technology and the way law practice, in general, is evolving.

If you missed this program or if I have piqued your interest in the slightest, you're in luck! The program was recorded and is available for your viewing pleasure through the NYSBA.org website. Also, in this issue you can find my article relating to emerging technology and ethics, but it's only the tip of the iceberg as you will see if you check out the program online.

Until next fall, we hope to see you and if you have ideas for any joint programs, contact any member of the Executive Committee. We love to hear from you!

Membership

By Jana Behe

The Corporate Counsel Section Membership Committee sponsored a Membership Appreciation event at the Kimberly Hotel in New York City on November 15, 2016. The event was widely attended and offered a great opportunity for members of the Section to network. We look forward to providing more opportunities like this in the future. We are always interested in hearing from our members and learning more about what is of value to you! If you have ideas for future events and locations or would like to join the Membership Committee, please reach out to Jana Behe at jbehe@nystec.com.

Pro Bono

By Barbara Levi

Hello Corporate Counsel Section members! My name is Barbara Levi and I am a former Chair of the Corporate Counsel Section's Executive Committee. I am very excited to be leading the Section's Pro Bono Committee in 2017, and if you are looking to engage in new and fulfilling committee work this year, I encourage you to consider joining me in serving on the Pro Bono Committee. This is a great way to meet other Section members as we collaborate and build this newly reformulated committee from the ground up.

The initial emphasis of the committee's work will be to (a) educate our Section's members on pro bono requirements and opportunities, and (b) identify and learn how to navigate real or perceived roadblocks that may be preventing corporate counsel from feeling confident about participating in pro bono service. From there, where we take this committee will be up to us!

We'll work together by phone meetings, speaking once every couple of months or as needed. Please contact me at blevilankalis@gmail.com if you're interested in joining the committee and exploring this very important area of professional responsibility. I think you will find the experience very rewarding, both personally and professionally, and I look forward to hearing from you.

Trial Preparation for In-House Counsel Is About More Than Winning or Losing the Case

By Stephen Wagner

When faced with litigation needs either as a plaintiff or defendant, in-house counsel are confronted with myriad issues, some only tangentially related to the winning of the case but all of significant importance. Given that in-house counsel wear several hats (lawyer, business advisor, HR specialist and more), they need to consider not only the merits of the case and defenses, but also the overall impact the litigation will have on the company. These considerations include the obvious factors of cost and impact on workload, but also not-so-obvious ones, such as whether the litigation is consistent with the business goals of the company, and the impact the litigation will have on the company's reputation.

"In today's litigation environment, especially with e-discovery at the heart of all significant cases, the most hands-on duty for in-house counsel by far is information gathering."

To illustrate these considerations, consider this scenario: assume you are general counsel to a defense contractor, established in the mid-20th century, with a stellar reputation, that sells a proprietary product to the U.S. and foreign governments, primarily for military application. The U.S. government decides to terminate a contract, leaving your company with excess inventory and manpower acquired specifically for this project. After a thorough review of the contract, you are fairly certain that the purchaser has breached the contract and is liable for damages. All pre-litigation settlement attempts by management, including several attempts by you and your government counterpart, have failed.

The numbers involved are quite high, although it is not a "bet the company case." Your management, incensed by the actions of the government, asks you whether it should pursue this case. What are the factors that you must consider?

1. How Much Time Will I Spend on This Case?

As general counsel, you will have to run point on this case, serving as the "go to" person for both outside counsel and management. One of the most important considerations, often not given the requisite attention, is the toll the litigation will take on you and your ability to fulfill all of your other obligations. Assume that you are running point on a merger or divestiture, or that the government is investigating the company for potential antitrust or securities issues, or that you are in charge of a major audit by the defense department. The first consideration must be whether you have the time and sufficient manpower in your office to be able to manage the litigation and still fulfill all of your other duties.

In today's litigation environment, especially with e-discovery at the heart of all significant cases, the most hands-on duty for in-house counsel by far is information gathering. Considering the hundreds of emails business personnel receive on a daily basis, in virtually all commercial cases, gathering the relevant evidence, both for offensive and defensive purposes, is the most expensive element of the litigation. In-house counsel's coordination and supervision of this effort is not only the most cost-effective, but also most efficient, as counsel would know which personnel to tap in the first instance. In-house counsel will also need to ensure that litigation holds are in place, and that no confidential material is inadvertently produced.

Moreover, in-house counsel probably will be present throughout trial. First, at trial, the corporation needs a "face," so that the jury (and judge for that matter) can relate to a person rather than a concept. Second, the witnesses will feel more comfortable with a member of the "family" present during their testimony, and your presence will be necessary during preparation sessions as well. So, with the help of outside counsel, you will need time both in and out of the office during various stages of the litigation. Can your schedule accommodate all of this?

"Your company's executives may primarily look at the dollars and cents aspect of the litigation, and not pay attention to day-to-day developments or much of the substance."

If your assessment is that your office, given its current makeup, will be unable to successfully function if this litigation is brought, management must be informed and decisions made that reflect the reality of the toll a major litigation can take on your time and focus.

2. Cost and Budget

Just as any corporate executive would establish a budget for any initiative, so too must in-house counsel set a budget for the litigation and establish expectations accordingly. This includes attorney fees, expert witness costs, e-discovery retrieval and maintenance, travel expenses and the like. Before management decides to bring

an action or to rigorously defend against one, it must have a firm grasp of these potential outlays.

Part of in-house counsel's job, of course, is managing expectations. Thus, realistic budgets, as well as timetables, must be established and adhered to. Your company's executives may primarily look at the dollars and cents aspect of the litigation, and not pay attention to day-to-day developments or much of the substance. So bringing the matter in under budget is always beneficial. These matters should be dealt with as early in the process as possible.

3. What Do I Keep? What Do I Farm Out?

Another crucial consideration, touched on briefly above, is a precise division of labor. Outside counsel always means cost and expense. The more that can be done in-house, the better, if your in-house resources are capable of performing the necessary work.

"Team with outside counsel to discuss not only the substance of the case, but also project management aspects and status updates, and a system for keeping track of who is doing what."

In our scenario, in-house counsel should make the first designation of personnel with knowledge of the facts (contract manager, head of the tech/manufacturing team, quality control or assurance, etc.) and coordinate the document retrieval process. Depending on the level of prior litigation experience of in-house counsel, he or she could also conduct the initial meetings with key personnel and prepare memoranda for outside counsel, who can use such information to make further cuts or expand on the information sought. The resulting benefits are twofold: an enormous savings, and ability for in-house counsel to have first-hand knowledge of the facts, which will be enormously helpful in counsel's ability to relay relevant information to management. Moreover, this hands-on approach will enable in-house counsel to have sufficient knowledge to engage in discussions with outside counsel on substantive strategic and tactical issues and evaluate their efficacy based on first-hand knowledge.

At the same time, the best in-house counsel appreciate that management of outside counsel, just like management of her internal team, must be handled properly. Know when micromanagement is detracting from the ability of outside counsel to work efficiently. Team with outside counsel to discuss not only the substance of the case, but also project management aspects and status updates, and a system for keeping track of who is doing what. And the right outside counsel will gladly engage you in this conversation and work with you to emphasize efficiency and prevent the need for micromanaging, time or cost overruns, or other defects in the process that will result in unpleasant discussions about fees and budget.

"In-house counsel must attend to a range of legal and business issues when determining whether to initiate, or vigorously defend against, litigation and, having decided to bring or defend the case, during the case itself."

4. Should We Do It?

After costs, time, division of labor, case evaluation, and similar considerations are dealt with, the thornier, extra-legal aspects of the litigation must be evaluated. First, despite the money at issue, does a government contractor want to sue the government? Second, do you want your company to get a reputation as litigious? Third, to what extent will third-parties be involved, such as vendors or other customers? Fourth, are there issues that you do not want management to reveal at deposition, and is there a way to prevent that? In the long run, will the litigation do more harm than the short term economic gain? How will the company's stellar reputation in the industry be affected by the litigation?

Conclusion

In-house counsel must attend to a range of legal and business issues when determining whether to initiate, or vigorously defend against, litigation and, having decided to bring or defend the case, during the case itself. In addition to active participation in all litigation activities (fact determination, evidence gathering, witness identification and preparation, etc.) they must serve as liaison between outside counsel and management, manage the budget, manage expectations, and, most importantly, determine whether the litigation is in consonance with the business goals of the company.

Stephen Wagner is a co-founding partner and the litigation chair of Cohen Tauber Spievack & Wagner P.C. Stephen was on the faculty at the *2016 Northeast Corporate Counsel Forum* **CLE discussing ethical issues in working as in-house counsel among corporate parents and subsidiaries. He also regularly moderates roundtables of in-house counsel discussing best practices and shared challenges. Stephen represents corporate clients in the U.S. and abroad in complex commercial litigation. He can be reached at swagner@ctswlaw.com.**

Tips for Legal Counsel Representing Foreign Investors in Private M&A in Spain

By Rubén Ferrer and David Riopérez

Transactions always vary in one form or another. The singularity of each seller and target requires a personalized approach to ensure a successful closing. There are, however, certain general issues that regularly emerge in Spanish transactions. This article is intended to help legal counsel representing foreign investors navigate M&A deals in Spain.

1. Restrictions to Foreign Investments

Foreign investment in Spain is generally unrestricted. However, a certain control process is in place to gather information concerning foreign transactions and to take measures on grounds of public order and security, where appropriate. Said process may be in the form of a simple notification procedure (either before or after the transaction has taken place), or a review and approval procedure prior to entering into the transaction.

"In short, the buyer will not be liable for the payment of any amounts owed by the insolvent company upon transfer of a production unit unless the buyer has expressly undertaken such obligation or unless legally required to do so; for example, in the case of employment and Social Security liabilities."

With certain exceptions, Spanish legislation requires foreign investments to be notified after the transaction is closed. On the other hand, investments made through a tax haven must generally be notified beforehand. Furthermore, if the acquisition is leveraged and debt is provided from overseas, additional post-deal filings with the Bank of Spain may be required.

Very exceptionally, for foreign investments related to the exercise of public authorities or activities that may affect public order, national security, or public health, the Spanish Government may suspend the liberalization status and restrict or even forbid such investments. Once suspension is declared, foreign investors must request prior administrative approval to carry out any investment. Other industry-specific restrictions exist for foreign investments, although they are limited and generally comparable to other EU member states. In certain scenarios, the Spanish Government must be notified ex post of any investment in a company directly or indirectly carrying out certain regulated activities in the electric, gas or hydrocarbon industries.

With regard to antitrust approvals, investments in Spain are subject to Spanish or EU merger control when certain thresholds are met and control over the target company is acquired.

2. Liabilities in an M&A Transaction

The parties can generally allocate risks and liabilities between them as they deem appropriate, although this will not be enforceable vis-à-vis third parties.[1] Certain limitations apply, such as in the case of willful misconduct, where liability cannot be excluded or limited. Caps, baskets, and deductibles are common in Spanish M&A deals.

In a share deal the buyer acquires all the target's assets and liabilities, except for those that are expressly carved out. The parties may agree that the seller remains liable for certain contingencies and liabilities of the target by agreeing on a specific indemnity or the representations and warranties regime under the acquisition agreement.

In an asset deal, the liabilities are limited to the assets and liabilities being expressly transferred. However, under Spanish law certain tax and employment liabilities are passed over to the buyer if the acquired assets are considered to be a stand-alone business. Such liabilities may be mitigated in some cases by requesting certain certificates of liabilities from the relevant authorities, although sellers tend to resist providing such certificates because oftentimes an audit over them is triggered when such certificates are requested. Transfer of Undertakings (Protection of Employment) regulations (TUPE) may be applicable; hence, the buyer takes over all the employees and related conditions that were employed by the seller and linked to the transferred business.

"Employment at will, as such, does not exist under Spanish law."

The sale of the production units of a company subject to insolvency proceedings has recently become common practice in Spanish commercial courts. These proceedings allow such production units to continue as a going concern, minimizing the destruction of the business landscape. From the buyer's perspective, it will be able to define the acquisition target without all the liabilities outstanding or hidden in the transferor company. In

short, the buyer will not be liable for the payment of any amounts owed by the insolvent company upon transfer of a production unit unless the buyer has expressly undertaken such obligation or unless legally required to do so; for example, in the case of employment and Social Security liabilities.

3. Termination of Employment Agreements

The costs of redundancies in any workforce restructuring post-acquisition must be considered. Employment at will, as such, does not exist under Spanish law. A company's decision to terminate an employment contract is deemed a dismissal, and must be based on disciplinary reasons or objective (economical, technical, organizational, or production) grounds.

"In a share deal, careful attention should be paid to the assets of the company because if real estate constitutes more than 50% of such assets, then transfer tax may be levied."

Objective dismissals require a 15-day prior notice and payment of a compensation equivalent to 20 days of salary per each year worked, up to a maximum of one year of salary. Dismissals without due cause (or dismissals based on disciplinary or objective grounds which, after the affected employee's claim, are subsequently not upheld in court), can normally still be carried out but entail higher compensations.[2] In certain limited cases (i.e., when the dismissal impairs fundamental rights or refers to employees under special protection like pregnant women or employees' legal representatives), a court may find a dismissal to be null and void, which would imply the obligation of reinstating the employee in his or her former post. There is a specific and compulsory process for plant closing or mass layoffs, including a previous round of negotiations with unions for 30 days, with the aim of reaching an agreement on the effects and consequences of the mass layoffs, and with very specific procedure, information and documentation requirements.

On the other hand, a change of control in an M&A transaction may trigger certain resignation and compensation rights in favor of top executives. Contractors who have the risk of being reclassified as employees is an usual issue to come across in M&A deals. If new employment contracts with top executives are signed at closing, it should be verified whether they are aligned with any earn-out provisions under the acquisition agreement and whether the relevant contract responds to the reality of the duties to be performed.

4. Tax Issues

Tax implications in a share deal are generally different from those in an asset deal. Also, if the acquisition is implemented by means of a merger or a demerger, then certain tax breaks may apply.

Asset deals normally involve that the acquirer inherits any tax liabilities attached to the acquired assets, although such liabilities can be materially limited if certain certificates are obtained from the seller as mentioned above. In a share deal, careful attention should be paid to the assets of the company because if real estate constitutes more than 50% of such assets, then transfer tax may be levied.

"If personal data is expected to be transferred outside of Spain, additional restrictions may apply, including the need to obtain specific authorization from the Spanish Data Protection Agency."

Normally, no value added tax (VAT) or transfer tax is levied in a share deal. VAT may be levied in an asset deal if the relevant assets do not constitute a stand-alone business or other conditions are met. In a share deal, if a post-acquisition merger between the special purpose vehicle and the target is envisaged, careful attention should be paid to such merger to ascertain whether any goodwill would be tax deductible as well as whether the beneficial tax regime for mergers in Spain can be applied.

5. Data Protection and Privacy Issues

Strict rules exist in Spain regarding the collection, use, processing, and transfer of personal data and potential fines are substantial. It should be ensured that all personal data files have been properly managed and notified to the Spanish Authorities and that the target has in place all security measures and paperwork required under Spanish law. If personal data is expected to be transferred outside of Spain, additional restrictions may apply, including the need to obtain specific authorization from the Spanish Data Protection Agency. The EU Regulation on Data Protection that has recently been published (applicable from May 25th, 2018)[3] sets forth new requirements and fines.

"Software subject to a patent right is difficult to obtain in Spain."

6. Information Technology (IT) and Intellectual Property (IP) Matters

Careful consideration should be given to IT/IP matters to make sure that title to all assets stays with the target, and that no other group company, employees, in-

dependent contractor or third parties can claim any economic rights over such assets. Patents, trademarks, and other IP rights tend to have an expiry date, but oftentimes subject to possible (limited or unlimited) extensions. Software tends to be considered a type of IP right, which is similar to copyright, for which registration in a public register is not mandatory. Software subject to a patent right is difficult to obtain in Spain.

7. Conclusion

Matters described above are some of the issues foreign investors and their legal counsel must consider when approaching a potential deal in Spain. Experienced Spanish legal counsel is imperative to know how to best approach them.

Rubén Ferrer is the Managing Partner of the New York office at Gómez-Acebo & Pombo. His practice is focused on cross-border M&A, private equity and restructurings in Spain. He has been recognized as a leading M&A practitioner by international publications such as *Chambers and Partners*, *The Legal 500* and *Best Lawyers*, and he was a winner of the "40 under Forty" Award in Spain and the "Emerging Leaders Award" in the U.S. Clients describe him as "extremely efficient" and "customer and results-oriented."

David Riopérez is Counsel in the Corporate/M&A Department at the New York office of Gómez-Acebo & Pombo. He advises clients on mergers and acquisitions, spinoffs, divestitures and shareholders' disputes, as well as on distribution, agency and franchise matters in Spain. His experience encompasses a broad range of industries, including agribusiness, technology, real estate, manufacturing, retail and food.

Endnotes

1. For instance, Spanish tax authorities will seek payment of any tax debts from the legally established taxpayer and not from the liable person pursuant to the acquisition agreement, irrespective of subsequent claims between the parties.
2. In accordance with Spanish Employment Law, a combination of up to 45 days of salary per each year worked capped at 42 monthly payments until February 11th, 2012, and up to 33 days of salary per each year worked capped at 24 monthly payments from February 12th, 2012.
3. http://ec.europa.eu/justice/data-protection/.

Inside Movies
Review: *Equity*
By Janice Handler

"I like money"

These words appear early in the movie, Equity, spoken by Naomi (*Anna Gunn*, *Breaking Bad*), an investment banker addressing a student group at her alma mater. When this remark is met by nervous laughter, she doubles down. "I really do like money," she repeats. "I like knowing I have it." Acknowledging that her Wall Street salary helped send her brothers to college, she adds, "But I'm not going to sit here and tell you that I did it only for others…it is ok to do it for ourselves….I am so glad that it is finally acceptable for women to talk about their ambitious openly…. Don't let money be a dirty word. We can like that too."

The rest of the movie, which is themed around showing that women can be as ambitious, greedy, venal, duplicitous and manipulative as men, is predictable "Wall Street Wolves" type stuff. The gimmick is that they are not wolves but wolfesses. (One website I consulted said that the name for a female wolf is "bitch").

Naomi is a middle-aged Wall Street banker, specializing in IPOs, who previously failed in taking a company public and has much riding on the public launch of a social networking site that promises (but may or may not be able to deliver) a high degree of privacy to its participants. Without divulging "spoiler alerts" I can only say that she is betrayed by everyone—her lover (James Purefoy), her assistant (Sarah Megan Thomas), and an old college friend (Alysia Reiner), who just happens to be an assistant U.S. Attorney investigating Wall Street.

Despite having been an SEC enforcement attorney, I didn't really get much of what the illegalities were or exactly how they were done. It doesn't matter. The guilty pleasures treat is noting that all the key characters are female (Naomi, the Assistant U.S. Attorney, Naomi's ambitious and back-stabbing assistant,) and that they all act just like men. (The film's director Meera Menon and screenwriter Amy Fox are also women.) No nurturing or caretaking or socially sensitive sisterhood here. No need to break through gender bias. The only reminder you get that these are women is that all of them use sexual behavior as just another tool for professional gain. Even the government attorney is not unwilling to entrap a boozy acquaintance over cocktails to develop her case.

I leave it up to the viewer to decide if it is a good thing or a bad thing that women have earned equal opportunity white collar mugshots. Meanwhile, grab some popcorn for a movie which is provocative as well as entertaining.

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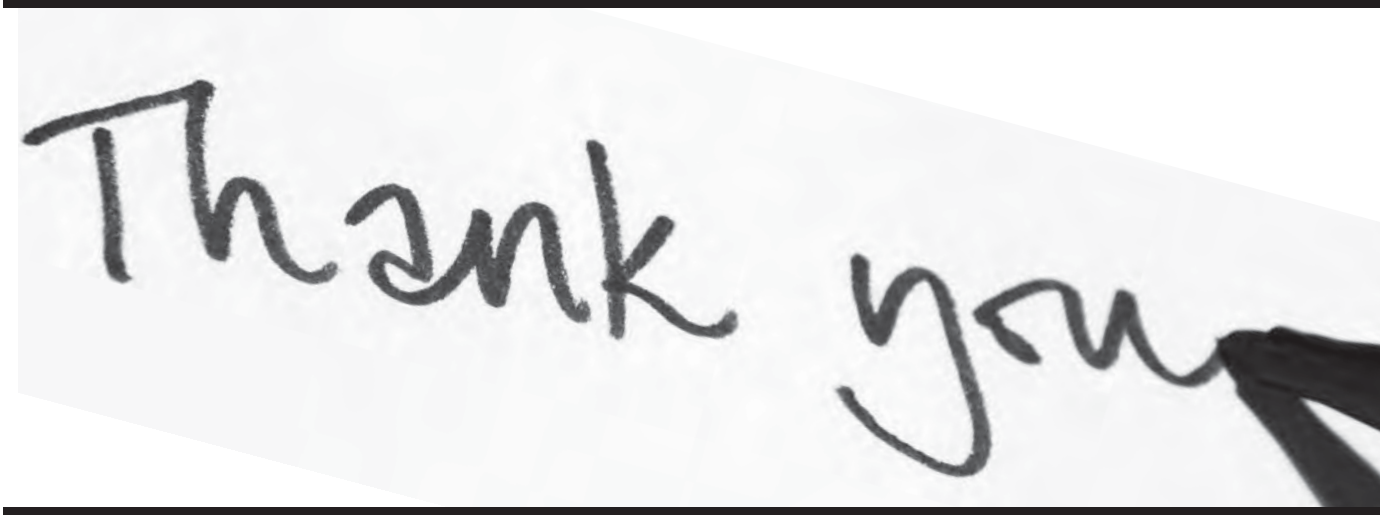

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☐ Attorneys admitted 2014 - 3.31.2016	60

OTHER

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☐ Newly Admitted Member*	FREE
☐ Law Student Member	FREE

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Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS

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