Litigation Management Roundtable

Moderator:
Lance J. Ream, Gordon Rees Scully Mansukhani LLP

Roundtable Panelists:
Zabrina M. Jenkins
Starbucks
Seattle, Washington

Andrew Wallace
LBJ/North Tarrant Express
Dallas, Texas

Suzanne C. Ferguson
Hotwire Communications
Fort Lauderdale, Florida

Henry Gonzalez
Gonzalez Chiscano Angulo & Kasson, PC
San Antonio, Texas

Litigation Management Subcommittee Members:

Anthony J. Carriuolo
Berger Singerman, LLP
Fort Lauderdale, Florida

William E. Weinberger
Parker Milliken
Los Angeles, California

Lance J. Ream
Gordon Rees Scully Mansukhani, LLP
Denver, Colorado

Bambo Obaro
Weil
Silicon Valley, California
I. General Scope of Discussions

This year, our Litigation Management Roundtable will address continuing trends and emerging issues of concern to corporate counsel. We will also discuss certain ethical issues today’s business and litigation environments pose to inside and outside counsel.

Our panelists will provide their thoughts on the challenges in-house and outside counsel face now and into the near-future, and how outside counsel may continue to provide value to their organizational clients.

II. Objectives of this Program

This Corporate Counsel Committee CLE event includes a roundtable of in-house litigation counsel and outside counsel who routinely manage significant, high-stakes cases and critical industries. This program presents an opportunity to hear from lawyers who bear substantial legal and budgetary responsibilities and manage a variety of competing demands and concerns. They will share their perspectives on a variety of issues affecting the current and future practices of in-house and outside counsel.

III. Where is the Work Going?

A recent survey by Altman Weil, Inc. on management, staffing and spending trends in law departments found that many law departments are negotiating discounts with larger firms or moving work to smaller firms and staffing up their own law departments. According to the survey, this year, 31 percent of Chief Legal Officers reported that they’d moved outside work to firms with lower billing rates while also noting that they are “successfully using smaller law firms that offer quality work and service at considerable reductions in cost.” That finding is similar to last year’s study, which showed that 33 percent of CLOs had shifted outside work to
lower-priced firms. The survey also found that 47 percent of law departments are now sending some of the work that they once gave to law firms to outside vendors that aren’t law firms. Litigation discovery, including electronic discovery, and document review are the most common types of work that get outsourced to vendors. While law departments are angling for better deals when they have to look outside, they’re also continuing to grow in response to increased workloads: 42 percent of the respondents said they planned to hire more in-house lawyers in the next year—and only 7.5 percent planned to cut staff.

The RoundTable participants will explore changing trends in how companies are procuring legal services and selecting outside counsel.

IV. Litigation Trends

A. Consumer Protection/Deceptive Advertising

The current era of social media has brought with it innovative and unprecedented ways for companies to reach consumers. It has also given rise to “fake news” and a renewed emphasis on truth in advertising. Indeed, by design, it is oftentimes difficult to tell whether something is a paid advertisement or an unsolicited posting about a product someone genuinely likes. The Federal Trade Commission has engaged in a well-publicized campaign to provide guidance on the types of disclosures that must be made in advertising and sent warning letters to a number of social media influencers and marketers.

Given such, it is not surprising that many corporate law departments have reported an increase in litigation related to consumer protection and deceptive advertising. From FTC enforcement actions and high profile class actions that we see in the news to the many less-publicized lawsuits companies are facing, the panel will discuss the types of cases being filed as well as strategies for handling them and preventative measures.
B. Protecting Business Innovations Post-Alice Corp. v. CLS Bank Int’l

Today it seems everyone thinks they’ve just ‘invented’ the next great breakthrough for consumers or business. Only to learn that someone else beat them to it. Or, that their great idea is worthy of patent protection under federal law.

The use of programs and high-powered computer systems continues to spread into virtually every aspect of life, analyzing every decision or “like” of consumers. While some of these analytical approaches may provide decisional value to businesses, are they patentable? And wouldn’t any business want to know that before spending substantial capital to develop them?

The United States Supreme Court in recent years has addressed the patentability of several computer-assisted programs whose creators asserted were entitled to patent protection. Not all have succeeded, however.

The Court in Alice Corp. v. CLS Bank Int’l, 573 U.S. 208, 134 S.Ct. 2347 (2014), rejected patent claims relating to a computer-assisted program designed to anticipate the potential failures of transactional partners to perform their obligations. The Court reiterated the longstanding rule that “abstract ideas”, and fundamental human or economic practices, are not patentable, and that the implementation of computers do not transform those things into patent-eligible ‘inventions’. The Court cited its other decisions in which patent protection was equally denied for matters that were already well known or commonly implemented, and that did not supply the necessary inventive concept.

On the other hand, in its earlier opinion in Diamond v. Diehr, 450 U.S. 175, 101 S.Ct. 1048 (1981), the Court recognized patent protection for a computer-implemented process that
employed a well-known mathematical equation to solve a technological problem the industry had not been able to solve.

Many companies invest heavily to develop innovative ways to better meet consumers’ needs or to anticipate those needs. But is all of that capital investment protectable from competitive replication? Inside counsel should be generally aware of the current trends in patent protection cases, and may wish to consider proactive steps to best protect the company’s investment in new technologies and consumer research.

The threshold question of whether a patent infringement claim exists, might be best answered by a company’s own employees rather than outside counsel. An organization’s employees, including its lawyers, should have an intimate familiarity with the product under scrutiny and should be well-suited to assess initially whether infringement is occurring. Certainly outside patent counsel, and a litigation team in cases of actual allegations of infringement, will play a role in terms of strategy, joint defense agreements, and the evaluation of general patent legitimacy, but the legwork at the outset related to overlap between the patented functionality and the product set might be best handled internally with a view toward packaging the substantive data for outside counsel to use.

Our panelists will discuss their views on these important topics to today’s businesses.

C. Privacy Laws and Related Litigation

In the past year, concerns over privacy rights and legislative and regulatory efforts to enhance protections have increased at the same time as data breaches and hacks have ballooned. In mid-2018, the European Union’s General Data Protection Regulation (“GDPR”) took effect; various states have enacted new, expanded privacy laws, like California’s Consumer Privacy Act of 2018 (effective January 1, 2020) or are considering enacting such enhanced protections;
Congress is considering several proposals for a comprehensive cyber-privacy law, to replace patchwork federal consumer privacy laws and possibly preempt the laws adopted by states. In December 2018, Marriott disclosed that a data breach had occurred, impacting over 500 million users of its Starwood reservations system. This disclosure followed others from Google, impacting users of its social network platform, Google+; from Facebook, affecting accounts of 50 million users; and many others in industries ranging from retail to health care to financial institutions.

After a data breach, in-house counsel can expect law enforcement and regulatory responses as well as class-action claims. Liability exposure can arise from a variety of circumstances, including consumer data breaches as noted above, e-discovery vendor non-compliance with security or privacy protocols, failure to preserve electronically stored information during litigation, and careless use of personal devices or file-sharing applications for company business.

In the past year, has the concern over data breach or privacy claims increased? Will companies experience expanded claims in the coming year, or are corporations getting a handle on protecting data?

What are the best practices for a corporation to respond to a data breach? At what point in the response to a breach should outside litigation or investigatory counsel involved? For what functions? Should outside counsel or in-house counsel take the lead in coordinating strategy? And how is the outside counsel’s role best coordinated with other professionals responding to a breach – GC, CIO, information security officer, others?

What data security requirements are corporations imposing on outside litigation counsel? How are they monitoring compliance? How do corporations handle a data breach by an outside
counsel involving the company’s data? What protocols for transfer of electronic information are
established to secure such transfers from the corporation to outside counsel?

The panelists will explore these and other issues confronting corporations and their GC’s
and the developing response to these challenges.