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FOCUS

President's Message

Carlos I. Cardelle

Great start to 2018!

As I take a look back at the first half of 2018, I cannot help but be proud of our Chapter! We have been active on all fronts – sponsorship engagement, community service and outreach, exciting member events and revamping our Law School Ambassadors program. Some examples – this year we re-envisioned our sponsorship program and recommitted ourselves to our Board-Sponsor success partnership initiative; we participated in a beach clean-up effort and joined forces for Tour de Broward benefiting Joe DiMaggio's Children's Hospital in Broward; we went to an escape room, bowling and cooking with three great Sponsors (thanks to Rumberger, Bilzin and Gunster); celebrated our fun-filled Progressive Dinner (thanks to Shook, Cozen O'Connor and Shutts); and enjoyed a mixology social (thanks to Jackson Lewis). The caliber of our sponsor-led programming will be great this year too! We have many new and exciting events being planned with member-engagement being the focus.

This year, I hope you also get to meet and interact with our new Law School Ambassadors – eight great law students from our local area law schools. You can read about some of them in this edition of our newsletter. We are proud to consider the program as part of our community



outreach efforts and hope our Law School Ambassadors learn about the amazing and interesting work being done by our members as they discern their professional paths.

Speaking of the amazing work our members as in-house counsel deliver on a daily basis, our CLE conference

organizing committee selected a perfect theme for our 9th Annual CLE Conference: SUPERCOUNSELORS: Protectors of the Company! One of the privileges of leading this Chapter is having the opportunity to meet members at our events and learning about the work they do. It is one of the reasons I initially joined the ACC – the opportunity the ACC provides our members in this regard is unique. During my time as member and now President I can attest that the caliber and quality of the in-house professional in our community is astounding. I am excited that this year's CLE conference honors you – the in-house counsel. Please make sure to save the date – Thursday, September 27, 2018!

On behalf of our Board, I hope you enjoy our newsletter, events and especially our 9th Annual CLE Conference in September! Please also follow us on social media and visit our website often – we are constantly updating our site with upcoming events and pictures of past events. It is an honor to lead this group of professionals and I truly hope to meet as many of you as I can.

Please always feel free to reach to me, our Membership Chair, Alan Kramer or our Executive Director, Christina Kim with any thoughts and ideas for our Chapter.

See you soon!

Carlos I. Cardelle

President, ACC South Florida Chapter

ACC South Florida Upcoming Events

June 21, 2018

Miami Wine Tasting Event
Sponsored by Boies, Schiller & Flexner LLP

July 2018

Boynton Beach Brewery Event
Sponsored by Ford Harrison

July 2018

Member Appreciation Event

August 2018

Miami Social Event
Sponsored by Shook, Hardy & Bacon L.L.P.

September 27, 2018

9th Annual CLE Conference -
SUPERCOUNSELORS: Protectors
of the Company - Marriott Harbor
Beach Resort & Spa

ACC Advocates for a Seat at the Table: General Counsel at the Executive Table and the Boardroom

By Mary Blatch, Director of Government and Regulatory Affairs, ACC
Stephanie Johnson, Manager, Public Policy and Advocacy, ACC

ACC has launched an exciting new initiative to ensure that general counsel have a seat at the executive table and in the boardroom. Based on our 2013 research report, [Skills for the 21st Century General Counsel](#), it is clear that CEOs and boards of directors increasingly want the general counsel to contribute to corporate strategy. Additionally, when the general counsel has a seat at the executive leadership table, it shows that a company considers ethics, compliance, and other legal risk considerations to be top of mind.

Despite the clear benefits of securing a seat at the table for general counsel, [ACC's Chief Legal Officers 2018 Survey](#) (CLO Survey) indicates too many general counsel do not have a direct reporting relationship with the CEO and do not regularly attend board meetings. Globally, only 64 percent of general counsel report directly to the CEO, and 73 percent "almost always" attend board meetings.

The CLO Survey includes companies across the globe and of all sizes, but the statistics don't change greatly for US companies or even public companies. In the United States, 70 percent of general counsel report directly to the CEO and 76 percent almost always attend board meetings. Among public companies, 70 percent of general counsel report directly to the CEO and 80 percent almost always attend board meetings.

ACC believes that these numbers are too low. They indicate that too many general counsel find themselves without the information, access, and influence they need to fully contribute in order to ensure their company stays ahead of risk and maintains a healthy corporate culture. By advocating on this issue, particularly to boards of directors and institutional investors, we aim to improve the role and status of general counsel and promote ethics and compliance as vital aspects of corporate culture.

Starting a Movement

Last year, when the National Association of Corporate Directors (NACD) announced that the focus of its annual Blue Ribbon Commission Report would be corporate culture, ACC submitted a white paper detailing how executive reporting and board access for general counsel is a corporate governance matter. In "Leveraging Legal Leadership: The General Counsel as a Corporate Culture Influencer," ACC identifies five key indicators of a general counsel who is well positioned as a key ally in establishing a corporate culture of compliance and ethics:

1. The GC reports directly to the CEO and is considered part of the executive management team;
2. The GC has regular contact with the board;
3. The GC is viewed as independent from the management team;
4. The GC advises on issues outside the traditional legal realm, including ethics, reputation management, and public policy; and,
5. Business units regularly include the legal department in decision-making.

The ideas in ACC's white paper served as the basis for Recommendation #5 in the NACD Blue Ribbon Commission Report on Culture as a Corporate Asset, which instructs directors to assess whether the chief legal officer or general counsel is well positioned within management and in relation to the board.

In addition to having the role of the general counsel included as a recommendation in the NACD report, ACC has been creating other thought leadership on this subject. ACC partnered with the John L. Weinberg Center for Corporate Governance at the University



TAKE YOUR PLACE.

of Delaware to film a video on the Seat at the Table topic. In addition to ACC President and CEO Veta T. Richardson, the video featured Gloria Santona, former McDonald's general counsel and current board member at Aon plc, and Weinberg Center Associate Director Ann Mulé. The Weinberg Center distributed the video to thousands of influencers in the corporate governance space.

ACC and the Weinberg Center also worked together to interview Kenneth C. Frazier, president and CEO of Merck. Frazier highlighted the significance of a direct reporting line between the general counsel and the chief executive officer, stating that, "If the CEO isn't listening to the lawyers, neither will anyone else in the organization. Setting the appropriate tone from the top is essential."

In response to a public consultation of the United Kingdom Financial Reporting Council (FRC), ACC submitted comments urging a recommendation that general counsel report directly to the CEO and regularly attend board meetings. According to the Chief Legal Officers 2018 Survey, only 47 percent of general counsel in the UK report directly to the chief executive officer.

ACC staff have also engaged in speaking opportunities on the topic of general counsel influence. These include

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presentations at the SMU Dedman School of Law Corporate Counsel Symposium, NACD Philadelphia, the ABA Business Law Section Fall Meeting, and Ethisphere's Global Ethics Summit.

Most recently, we interviewed Teri Plummer McClure, chief human resources officer and senior vice president of labor for UPS. The Weinberg Center video, the interviews, and more are available at www.acc.com/governance.

Also available on the website are a number of our media placements on this topic, including articles in Law360, Ethisphere Magazine, The Global Legal Post, Le Monde Du Droit, and the Financial Times.

What's Next?

As ACC seeks to further support our positions on the importance of the general counsel, we will be looking to leverage the wealth of data that comes from our annual CLO Survey and other research projects. We are also looking to take the initiative globally. Most areas outside of the United States have lower levels of direct-to-CEO reporting and board attendance among general counsel.

As an ACC member, you can help as well. We would love to hear from general counsel who do not currently report to the CEO or who did not report to the CEO in a prior role. Any stories that illustrate potential pitfalls of reporting arrangements

where the general counsel does not have access to the CEO is helpful to us in creating case studies, and of course, we value your privacy and treat this information as confidential. Finally, if you have connections in the company directory or institutional investor communities, you can be of assistance as we look for additional avenues of communicating our message to these constituencies.

Be sure to check out our activities at www.acc.com/governance. For more information about ACC's Seat at the Table initiative or if you would like to discuss other issues relevant to ACC advocacy, please feel free to contact the author at m.blatch@acc.com or 202-677-4775 or email our team at advocacy@acc.com.

ACC News

2018 ACC Annual Meeting: Exclusively for In-house Counsel

The 2018 ACC Annual Meeting, the world's largest gathering of in-house counsel, is scheduled for October 21-24 in Austin, TX. In less than three days you can choose from over 100 substantive sessions to fulfill your annual CLE/CPD requirements, meet leading legal service providers and network with your in-house peers from around the world. Group discounts are available. Visit am.acc.com for more information.

Drive Success with Business Education for In-house Counsel

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel, June 4-6, September 12-14, and November 7-9
- Finance and Accounting for In-house Counsel, September 5-7
- Project Management for in-house Law Department, November 14-15

Learn more and register at www.acc.com/businessedu.

Are You Conducting Diligence on EVERY VENDOR and Third-party that has Access to Your Systems or Data?

Your vendors are now prime targets for data breaches and small vendors can provide easy access for hackers. Even cleaning crews, HVAC vendors, and food distributors, to name a few, can all lead to data breaches, but are often overlooked in the vendor diligence process. ACC's Exclusive third-party due diligence service should be in your arsenal. Visit www.acc.com/VRS for more information.

New to In-house? Are you prepared?

The ACC Corporate Counsel University® (June 20-22, Philadelphia, PA), combines practical fundamentals with career building opportunities, which will help you excel in your in-house role. Come to this unrivaled event to gain valuable insights from experienced in-house counsel, earn CLE/CPD credits (including ethics credits) and build relationships and expand your network of peers. Register at ccu.acc.com.

ACC Chief Legal Officers 2018 Survey

The ACC Chief Legal Officers Survey offers an opportunity to get data that supports the imperative for the CLO to report directly to the CEO. Other notable findings include what keeps CLOs up at night, reporting structures, how CLOs view the future of departmental budgets and staffing, litigation and contract workload, and where data breaches and regulatory issues have the greatest impact. Download it today at www.acc.com/closurvey

Over-retention of personal data is an egregious violation of the GDPR and data protection laws. Meet your requirements in 45 days with Jordan Lawrence's proven standards, models and frameworks that are relied on by hundreds of your corporate counsel peers. Demonstrate compliance. Reduce risks. Learn more today: [Data Minimization Service](#)

A Guide to Due Diligence Preparedness - a free eBook from Wolters Kluwer and effects. To help you prepare for a due diligence, download our due diligence guide that includes a helpful checklist to rate your current readiness and identify where you need to improve your company's legal data governance. For more visit www.WoltersKluwerLR.com.

Past Events

ACC South Florida Bowls with Bilzin Sumberg

Bilzin Sumberg invited ACC South Florida members to join them as they struck up fun with a mix of cocktails, bites and bowling on March 15 at the exciting Basement Miami on Miami Beach.



Gunster Cooking Event

On April 19, Gunster sponsored a cooking class event led by Chef Lenore Nolan-Ryan and chef leaders of World Class Catering & Cooking School in Fort Lauderdale. ACC South Florida members chopped, sliced and diced as they learned new recipes and kitchen techniques that got them working together and thinking like chefs.



GUNSTER
FLORIDA'S LAW FIRM FOR BUSINESS



2018 Progressive Dinner

ACC South Florida held its 2018 Progressive Dinner in Miami on May 9. Shook Hardy & Bacon, our cocktail hour sponsor, provided a technology CLE: 'What In House Counsel Needs to Know about GDPR and other Privacy and Data Security Developments'. Thank you to all of our sponsors, Shook Hardy & Bacon, Cozen O'Connor (dinner sponsor), and Shutts & Bowen (dessert sponsor), who banded together to present a 1920's Whodunnit murder mystery complete with an in house murder, a cast of suspects and clues served with each course!



Harnessing E-Discovery Trends to Manage Litigation Costs

By Meredith Schultz, counsel, Boies Schiller Flexner LLP

Harnessing E-Discovery Trends to Manage Litigation Costs

The cost of producing electronically stored information (“ESI”) is, in many cases, disproportionate to its value, particularly when it often does little to advance your company’s interests in civil litigation. However, outside counsel that is fluent in information technology and its interplay with the evolving governing rules and case law can utilize this specialized expertise as a means of minimizing their client’s discovery burden. Specifically, opportunities exist to lower a client’s production burden, shift the costs of large productions, and reduce motion practice by exploiting emerging trends in the electronic discovery field.

The Monetary Value of the ESI Protocol

Document review and production costs are significant; therefore, outside counsel’s acts of drafting and negotiating the ESI Protocol under Fed. R. Civ. P. 26(f)(3)(C) present an opportunity to reign in these costs at the outset of the case. To minimize litigation spend, companies should identify any categories of data they don’t want to produce, either due to burden or due to impertinent content. Then, outside counsel can draft an ESI Protocol containing an exhaustive list of data collection sources that omits troublesome categories, such as internal instant messages, data stored on employees’ personal devices, text messages, social media, and personal email. Any subsequent motions filed against your company to compel production of excluded data face an uphill battle against a negotiated ESI Protocol.

Other ways ESI Protocols can minimize discovery costs is through including well-crafted document processing specifications. Requiring the opposing party to produce both hard copy and electronic documents in an easy-to-use format saves your company processing costs. A well-drafted ESI protocol should also

exclude searches of signature text, embedded objects, irrelevant file extensions, and

“near duplicates.” While some files may have the same content and look exactly alike, that does not necessarily mean they are “true duplicates,” because their electronic file has a unique MD5 hash value. Agreement to eliminate “near duplicates” and other extraneous files can greatly reduce attorney review time on irrelevant documents.

Search Term Negotiation Techniques to Control Costs

Time is money in document review. Negotiations over search terms are often six-figure, and sometimes seven-figure negotiations. Outside counsel must be strategic and aggressive to both reduce the number of documents you produce, and to exclude unnecessary documents from the opposing party’s production. Some of the best practices to utilize in order to gain the upper hand in search term negotiation are (1) drafting proposed search terms for both your data and the opposing party’s data prior to any negotiation; (2) negotiating with hard numbers on document volumes, with counter-proposals; (3) having ready examples of non-responsive document hits from the opposing party’s terms; (4) running terms in real-time during negotiations to monitor changing volumes; and (5) maintaining a detailed record of the negotiations and results.

Search term negotiations are almost meaningless and subject to rampant manipulation without a written agreement on how the terms will be applied to the data. To ensure consistency and reciprocity in the application of search terms, and to ensure that your search terms are targeting the opposing party’s critical documents, outside counsel must enforce rules for the application of the following: wildcard characters; expanders and



restrictors; proximity searches; exact match searches; metadata searches; and case sensitivity.

Locking this down can speed discovery and avoid motion practice.

Save Money while Protecting Confidential Information

Protecting confidential ESI is expensive. It is time-consuming for outside counsel and staff to comply with Local Rules for filing under seal; motion practice on challenges to proposed sealed filings is costly and risks uncertain outcomes, and de-designating one’s own sealed materials, should the need arise, is burdensome. To avoid all of these costs, outside counsel should request that the court enter an agreed standing order on sealed filings. Such orders eliminate the requirement to seek leave of Court to file under seal; allow parties to de-designate their own confidential designations without motion practice, simply by filing the materially publicly or notifying opposing counsel; and establish an out-of-court procedure for challenging designations, setting forth requisite notice and a timeline for objections.

Additionally, if you suspect your company is at risk of becoming a defendant or subpoena recipient in related lawsuits, outside counsel should make an agreement that confidentiality designations are binding on third parties and in subsequent actions.

Shifting the Costs of Discovery to the Requesting Party

The 2015 amendments to the Federal Rules of Civil Procedure can be employed to reduce discovery costs, particularly for the producing party. Most significantly, the “reasonably calculated to lead to discovery of admissible evidence” standard on producing documents is gone. Instead, the burden and expense of producing requested documents must be in pro-

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portion to their relevance to the claims. The Advisory Committee Notes on the 2015 Amendment state: “Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case. . . . The present amendment restores the proportionality factors to their original place in defining the scope of discovery.” Pursuant to this amendment, district courts are increasingly upholding objections to discovery requests, and as a result, aggressive objections are a wise investment.

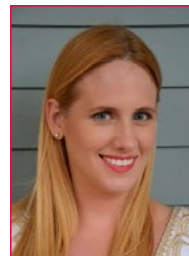
In addition to upholding objections, courts are also shifting the costs of burdensome production to the requesting party upon application from the producing party. Fed. R. Civ. P. 26(b)(2)(B), Fed. R. Civ. P. 36(c)(1)(B), and the 2006 Advisory Committee Comments to Fed. R. Civ. P. 34 provide that courts may shift

the costs of producing ESI to the requesting party. Similarly, individual district courts and circuit courts of appeal have gone beyond the federal rules, instituting model orders and local rules that further unburden the responding party. For example, the Federal Circuit’s Model Order Regarding E-Discovery Patent Cases allocates discovery costs to the requesting party that exceed certain limits. Additionally, several Courts of Appeal have held that expenses associated with a third-party electronic database service can constitute taxable costs per Fed. R. Civ. P. 54(d).

Conclusion

Companies should view the discovery process as a critical part of the litigation, but not a process that should be an unchecked drain on their resources. Companies should have extensive con-

versations with their outside counsel to create a strategy that takes control of the discovery process – and its costs – and uses the process as opportunity to play offense instead of defense.



About the Author

Meredith Schultz is counsel at Boies Schiller Flexner LLP in Ft. Lauderdale, Florida. Her practice focuses on antitrust, securities, defamation, and class action litigation. Ms.

Schultz is a leading authority on electronic discovery law and emerging e-discovery trends, and is often consulted by Fortune 500 companies in that capacity. Prior to joining Boies Schiller Flexner LLP, Ms. Schultz attended the University of Chicago Law School and served as a law clerk for the Hon. Donald M. Middlebrooks in the Southern District of Florida.

ACC Association of Corporate Counsel SOUTH FLORIDA

9th Annual CLE Conference

SUPERCOUNSELORS
PROTECTORS OF THE COMPANY

THURSDAY, SEPTEMBER 27, 2018
MARRIOTT HARBOR BEACH RESORT & SPA
FORT LAUDERDALE, FLORIDA

PRESENTED BY
Bilzin Sumberg

Broward College Paralegal Internship Program

Does your company need assistance with trial preparation, conducting legal research, or drafting legal memoranda? If so, consider providing an internship opportunity to a Broward College student paralegal intern.

Broward College is recognized as a Top 3 Community College in the nation, being named as a Finalist with Distinction for the 2017 Aspen Prize for Community College Excellence. The Aspen Prize is the nation's preeminent recognition of high achievement and performance in America's community colleges, and Broward College was selected from 1,000 public community colleges nationwide.

Broward College's Paralegal Studies Program is ABA-approved, one of only about 25% of all paralegal programs in the United States to hold that distinction. The Program offers a 64-credit hour Associate of Science degree in Paralegal Studies, with its curriculum emphasizing technology and hands-on practical application.

Our Paralegal Practicum course is an independent study course that is designed to allow students to apply the knowledge and skills they have developed in our

ParalegalStudies curriculum through practical work experience. As part of the Practicum internship, student paralegal interns will perform substantive legal work under the supervision of an attorney for a minimum of 144 hours during the semester.

By the time our students enroll in the Paralegal Practicum, they are familiar with the many different areas of law covered throughout our curriculum. They also are proficient in conducting legal research using WestlawNext, and they have been exposed to a variety of legal software including, Clio , ProDoc, and Best Case among others. In addition, our students are able to work flexible hours, and they have the potential to receive college credit for completing their internships.

As the host of a Broward College student paralegal intern, at no cost or risk to you, you will be temporarily adding to your team a competent, hard-working professional who is extremely eager to learn. Additionally, you will be giving back to



the South Florida community by providing a unique opportunity to an aspiring paralegal from Broward

County's first and largest institution of higher education. Furthermore, you will play a key role in Improving the legal profession by promoting competence, ethical conduct and professionalism through high quality training and legal education. In that way, you will be able to greatly impact and influence the practice of law as it affects the in-house bar by playing a key role in helping to train the next generation of in-house paralegals.

If you are interested in potentially hosting a Broward College student paralegal intern, the process is very simple. It starts merely by contacting our Program Manager and Internship Coordinator, Professor Ellis Keeter at:

Professor Ellis Keeter, Esq.
Broward College North Campus
ekeeter@broward.edu
(954)201-2446

Welcome New Members!

Donya Becton

Associate General Counsel,
Atkins North America, Inc.,
Miami

Howard Burnston

Senior Corporate Counsel,
IBERIABANK, Palm Beach

Scott Chitoff

Chief Legal Officer, Zumba
Fitness, LLC, Hallandale

Glenn Criser

Vice President, General
Counsel, Tropical Shipping
USA, LLC, Riviera Beach

Sophie Delasnerie

Senior Legal Counsel, VINCI
Concessions, Miami

Sharee Eriks

Associate General Counsel,
AlphaStaff, Inc., Fort
Lauderdale

Salvador Escalon

Executive VP and General
Counsel, Millicom
International, Coral Gables

Michael Finch,

Corporate Counsel,
InVivo Therapeutics Corp.,
Pompano Beach

Alexander Lima

Associate General Counsel,
Anixter International Inc.,
Miami

Melissa Longo

Corporate Counsel, The
GEO Group, Inc., Boca Raton

Pedro Menocal

VP & General Counsel,
Humantelligence Inc., Miami
Beach

Steven Muscatello

Managing Counsel –
Employment Counsel, G4S
Secure Solutions (USA) Inc,
Miami

Brian Nelson

Chief Legal Counsel,
Innovate-I / ScheduALL,
Hollywood

Tara Pellegrino

General Counsel, Stanton
Optical, Palm Springs

Olivia Rodriguez

Senior Counsel, BUPA
Global, Palmetto Bay

Rico Williams

Counsel, Sheridan
Healthcare, Inc., Plantation

Accessible Websites Make Good Legal and Business Sense

By Virginia Jacko

A growing number of courtrooms throughout America are hearing lawsuits brought by visually-impaired and hearing-impaired plaintiffs, alleging that specific commercial websites have violated their rights under Title III of the Americans with Disabilities Act (ADA) because they cannot access them.

Although judges' decisions have varied in past cases and some appeals are pending, a very simple question arises from these disputes. Why would any profit-motivated, reputation-conscious establishment take the risk of offending millions of consumers with disabilities, their families and friends when resolution of the website accessibility issue is readily available?

Visually-challenged Internet users rely on a variety of assistive technologies, including large-print software, braille output devices and page-reading software, to access digital content. However, many of today's private- and public-sector websites are improperly designed or coded to accommodate these specialized tools, rendering their digital content inaccessible to the visually impaired.

For hearing-impaired Internet users, the issue is video and other content with sound that lacks closed captioning options. Since they cannot hear this content, they are being prevented from receiving potentially relevant information.

As a direct result, the visually impaired and hearing impaired are often prevented from taking advantage of such common Internet conveniences as online shopping, banking, bill paying, learning and other interactive services. Nearly all of the incompatibilities that bar assistive technologies and closed captioning can be replaced by implementing alternate programming languages and designs. Yet many businesses and other website owners are hesitant to dedicate the time and expense to ensure full inclusion on their sites. In some cases, establishments prefer



to dedicate their energies and resources to legal action rather than issue resolution, a lose/lose decision for any company concerned about its public image.

It is noteworthy that the U.S. Department of Justice

filed a Statement of Interest in one recent Florida case, *Gil v. Winn-Dixie*, asserting that ADA "Title III applies to discrimination in the goods and services 'of' a place of public accommodation, rather than being limited to those goods and services provided 'at' or 'in' a place of accommodation." Therefore, the Justice Department concludes that Title III accessibility requirements are equally applicable in the digital world.

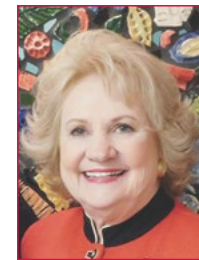
The "gold standard" of website accessibility rules is the Web Content Accessibility Guidelines (WCAG), developed by the World Wide Web Consortium. WCAG benchmarks have been adopted by thousands of progressive e-commerce businesses and by the federal government. By following WCAG recommendations, any establishment or entity can ensure that its website is ADA compliant.

Miami Lighthouse for the Blind and Visually Impaired provides auditing services of private and public websites, offering a full examination of coding and design, audits accessibility of website content, and tests for usability within that ensure accessibility of information on the monitor with keystroke commands utilizing screen-reading software. Past customers of Miami Lighthouse's Website Accessibility Compliance services include a variety of public- and private-sector entities, including city and county governments, educational and medical institutions, airlines and nonprofits.

Miami Lighthouse's highly qualified computer science instructors review websites to ensure industry-best practices complying with Section 508 of the ADA law and the World Wide Web Consortium, to ensure legal compliance. The implementation of the audit-report findings demon-

strates pro-active, civic-minded commitment to inclusion of all Internet users because accessibility benefits everyone in the long run.

An increasing number of advocates for the rights of the visually impaired and hearing impaired are encouraging the filing of highly publicized website-accessibility lawsuits in federal and state courts throughout the United States. Knowing that a rising tide of litigation is upon us, the wise choice is to be certain your company or institution proactively adopts website standards that fully accommodate persons with disabilities.



About the Author and Miami Lighthouse for the Blind and Visually Impaired

Virginia Jacko is President and CEO of Miami Lighthouse for the Blind and Visually

Impaired. She is one of the only CEOs in the country who happens to be blind; however, her vision has enabled the Miami Lighthouse to increase the number of program participants 33 fold during her thirteen-year tenure. During this period, revenue increased fourfold to over \$11 million in 2017, and the organization's Charity Navigator rating has gone to 4-stars, the highest rating possible. This 4-star designation has now been received ten consecutive times placing Miami Lighthouse among the top 38 nonprofits in the nation.

A variety of innovative new programs and ventures have been introduced under her leadership: website accessibility audits for ADA compliance, Braille and technology literacy, adult basic education, GED, ESOL, job readiness, music, year-round programming for blind and visually impaired schoolchildren, inclusion pre-kindergartens for blind and visually impaired three- and four-year olds and their sighted peers, and eye wellness services to schoolchildren throughout the State of Florida to prevent blindness. Miami Lighthouse is recognized as a national Center of Excellence through professional publications and academic presentations.

For additional information visit www.miamilighthouse.org

ACC Ambassador Program

ACC South Florida selected 8 law students for its 2018 Ambassadors Program. The Ambassador Program is a unique networking and educational opportunity that provides rare access to ACC South Florida's in-house counsel membership and its law firm sponsors.

Selected law students, or "ACC South Florida Ambassadors": receive a scholarship in the amount of \$1,000.00; and volunteer at various community service/pro bono events during the year. ACC South Florida Ambassadors are also invited to attend all ACC South Florida events. Below are biographies of three representative ACC South Florida Ambassadors.



Ashley-Ann Bryan

Ashley-Ann Bryan is a rising third year Law student at the St. Thomas University school of Law who is very involved in school and community. Along with being an ambassador for the ACC, Ashley-Ann on the executive board of the St Thomas Law Mock Trial Team as Vice President of Communication and is an Article Editor for the St. Thomas Law Review Journal, She is pursuing a certification in business law and have been accepted to be a part of the St. Thomas Tax Clinic. Ashley-Ann is also currently interning at

Broward College, Office of the General Counsel. She aspires to have an exciting and fulfilling career as a corporate counsel/litigator.



Guilherme Faviero

Guilherme Faviero is a joint-degree student at the University of Miami where he is earning both a Juris Doctor and Master in Public Health Degrees. As a law student with a strong background in science and a deep interest in policy, he believes in the socially transformative power that lies at the intersection of business, technology, and the law.



Tatyana Krimus

Tatyana Krimus holds a B.A. in Political Science and History from University of Western Ontario and a MSc in Public Policy from University College London. Prior to law school, she worked in public health agencies conducting research and implementing policy initiatives to improve the health of local communities. In her second year of Law School, Tatyana serves as an intern with the University of Miami's Immigration Clinic.

Connect with ACC South Florida Chapter!

You can find updates, event information and more at:



@accsouthflorida/



@accsouthflorida



Association of Corporate Counsel South Florida Chapter



Sponsors for 2018

PLATINUM:

Bilzin Sumberg

GOLD:

Boies, Schiller & Flexner

Ford Harrison

Gunster

Jackson Lewis

Little

Shook Hardy & Bacon

SILVER:

Akerman

Baker & McKenzie

Bowman and Brooke

Fisher Phillips

Kelley Kronenberg

Navigant

Squire Patton Boggs

BRONZE:

Alvarez & Diaz-Silveria Corporation Service Company

HighQ

Saul Ewing Arnstein & Lehr

Wargo French

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PROGRESSIVE DINNER :

Shook Hardy and Bacon

(Premier Sponsor)

Cozen O'Connor

(Dinner Sponsor)

Shutts

(Dessert Sponsor)

SOCIAL EVENTS:

Rumberger Kirk & Caldwell

WORKSHOP:

Akerman

Cozen O'Connor

What a Pom Wonderful World: Food and Beverage Makers' New Legal Adversary

By Lori Lustrin, *Bilzin Sumberg's* Litigation



Food and beverage manufacturers are well accustomed to heeding counsel's advice of dotting their "I's" and crossing their "T's" to ensure their product labels comply with applicable governmental regulations. But since the United States Supreme Court's pronouncement in *Pom Wonderful LLC v. Coca-Cola Co.*, food and beverage makers now face a heightened level of scrutiny from what may be their most formidable challengers—direct competitors.

Pom holds that private companies have standing under the Lanham Act (a statute traditionally used in trademark disputes), to wage false and misleading advertising claims against their competitors.¹ The facts in *Pom* were relatively straightforward. Beverage maker Pom Wonderful brought a Lanham Act claim against industry giant Coca-Cola regarding the labelling on one of its Minute Maid juices. *Pom* Wonderful alleged that the juice's label—that prominently stated it was "pomegranate blueberry" blend—was misleading because the juice contained only 0.3% pomegranate juice and only 0.2% blueberry juice. Coca-Cola lodged a traditional preclusion defense, contending that applicable Food, Drug and Cosmetic Act ("FDCA") regulations precluded *Pom*'s suit.

Rejecting Coca-Cola's argument, the *Pom* Court found that the Lanham Act complemented the FDCA's labelling regulations. The Court reasoned that government regulators often times lack the unique "perspective" and "market expertise" of competitors necessary to uncover non-compliance. For example, the Court observed that competitors "have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies." *Id.* at 2238. The Supreme Court thus concluded that the Lanham Act not only empowers private parties to protect their own interests, but also serves an important public policy function by "taking

advantage of synergies among multiple methods of regulation" to protect consumers. *Id.* at 2238-39.²

In the wake of the *Pom* Court's pronouncement, federal courts have seen a substantial uptick in *Pom*-style claims. See, e.g., *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 843 F.3d 48, 62 (2d Cir. 2016) (finding plaintiffs' Lanham Act claim regarding false statements made on pregnancy test label was not produced); *ThermoLife Int'l, LLC v. Gaspari Nutrition Inc.*, 648 F. App'x 609, 612 (9th Cir. 2016) (reversing district court's dismissal of *Pom*-style Lanham Act claims as precluded by the FDCA); *JHP Pharm., LLC v. Hospira, Inc.*, 52 F. Supp. 3d 992, 1006 (C.D. Cal. 2014) (holding that a *Pom*-style claim was not precluded by the FDCA); *Par Sterile Prod., LLC v. Fresenius Kabi USA LLC*, No. 14 C 3349, 2015 WL 1263041, at *4 (N.D. Ill. Mar. 17, 2015) (same). Surely, more are still to come.

The takeaway from *Pom* and its progeny is that food and beverage firms must adjust to a fundamentally different legal landscape—one where they (and, conversely, their competitors) have a powerful tool for policing one another's labeling and advertising. So long as a claimant can establish that its competitor's label is either false or contains a statement or representation that—even if ambiguous or literally true—was misleading in context, they can directly hold their competitors accountable.

And the stakes are high. If successful, the Lanham Act provides for the award of actual damages (measured by the amount of the plaintiffs' lost sales attributable to the competition's misleading label), but also the competitor's profits, the plaintiff's attorney's fees, and even corrective advertising—remedies rarely available under state consumer-protection statutes. For those who play by the rules but find out

their competitors refuse to do so, that's quite, well, wonderful.

The converse, of course, is also true. Food and beverage companies are already the targets of shotgun-style putative class action lawsuits and increasing scrutiny from FTC and FDA regulators. Now they must also plan to defend claims brought by adversaries that know (or should know) their business as well as anyone. This is particularly true in highly competitive markets, where competitors may use *Pom*-style actions as a means to maintain, gain or regain market position.

At bottom, regardless of which side of the "v" companies may fall, *Pom* requires food and beverage manufacturers to be all the more vigilant in ensuring their product labels—and those of their competitors—are legally compliant.

If you have any questions about product labeling and advertising claims, including *Pom* Lanham Act claims, please contact Lori Lustrin or Melissa Pallett-Vasquez.



About the Author

Lori Lustrin is a Partner in Bilzin Sumberg's Litigation Group. Lori's practice focuses on antitrust and federal multidistrict class actions, including class action defense work

with an emphasis on the consumer product and food and beverage industries. She also has substantial experience in a broad range of complex business litigation matters, including intellectual property disputes, landlord-tenant disputes, land use litigation, bankruptcy litigation, employment disputes, professional malpractice actions, unfair and deceptive trade practices issues, fraud claims, defamation suits, products liability matters, and international arbitrations. Lori's varied practice has allowed her to represent clients through trial and appeal, both in Florida and in federal courts across the country.

Lori received her J.D. from the University of Florida Levin College of Law, graduating cum laude. She earned her B.A. from Brandeis University, graduating magna cum laude.

¹As the *Pom* Court explained, the Lanham Act, codified at 15 U.S.C. §1125(a)(1), "imposes civil liability on any person who 'uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.'" *POM Wonderful*, 134 S. Ct. at 2234.

²Coca-Cola ultimately prevailed at trial before a jury who declined to find the Minute Maid label misleading.

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southflexec@accglobal.com

Christina Kim
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Executive Director Letter

Hello Members and Sponsors!

In the first half of 2018 our members have been rocking and rolling with so many interactive social events, informative CLEs and community service activities. The fun does not stop there as we have many more upcoming events so it's not too late to come out and join us. Of course, mark your calendars for our 9th Annual CLE Conference on September 27 at the Marriott Harbor Beach and Resort & Spa - with a theme like SUPERCOUNSELORS: Protectors of the Company, it is bound to be an awesome event.

The most important part of our organization is YOU so if you have any feedback, want to participate in any planning or join a committee, please do not hesitate to let me know.

On a personal note, April 2018 marked my third year as Executive Director for ACC South Florida. Time has flown by so quickly and it has been a wonderful experience getting to know so many of our members, see our programming grow and expand, and the engagement from our sponsors. I look forward to many more years to come!



Christina Y. Kim
Executive Director, ACC South Florida