

## Inside 2Q2011

- 2...Spring Cleaning
- 4...Can You Cross Your Fingers While Negotiating?
- 5...Chapter Events
- 6...Mark Your Calendars: September 15 Third Thursday Seminar
- 6...Special Thanks to Our Sponsors for Their Support
- 7...Member Spotlight
- 7...Welcome New Members & Corporations
- 8...Call for Articles & Involvement

# FOCUS

## President's Message

**Jae Im, Senior Counsel, Wyndham Worldwide**

*"Never forget the importance of living with unbridled exhilaration. Never neglect to see the exquisite beauty in all living things. Today, and this very moment, is a gift. Stay focused on your purpose . . . . The most noble thing you can do is to give to others. Start focusing on your higher purpose."*

- The Monk Who Sold His Ferrari

Every day, every moment is truly a gift and we, the board, are thrilled to serve and give to you all. It is hard to believe that summer is upon us and we are more than halfway through 2011 already. With the launch of an ACC-CFL eGroup, E-Talk, we can all give to one another as we are more connected than ever before. If you have not signed up for E-Talk, I highly encourage you to do so. It is a great way to share information, forms and documents; get quick and free answers to legal questions from fellow members; and obtain referrals. To subscribe, simply log-in to the ACC website at [www.acc.com](http://www.acc.com), and under "My ACC," add yourself to the "ACC-CFL E-Talk Committee" to be automatically subscribed to the eGroup. You will not regret it.

On another note, I am pleased to report that "ACC Third Thursdays" has been a huge hit! With all programs taking place on the third Thursday of each month, attendance has soared. In addition, the level of the programs has been better than ever! I have seen many of you at the CLE programs and I know you will agree that the Program Committee has done a remarkable job of working with our

sponsors to put together some compelling programs. "Social Media and the Modern Day Lawsuit" by Rumberger, Kirk & Caldwell has been described by attendees as: "Eye opening to all those who use social networks"; "Very current and informative"; and "Perfect." Here are some things that I learned from the program.

The trend is that courts support the discoverability of social networking information. Thus, you will want to remind your outside counsel to request social media information by way of interrogatories and document requests. Outside counsel should also subpoena the social networks themselves. The advantage of obtaining information directly from a social network is that you do not have to rely on opposing party to produce everything. Another advantage is that you can obtain IP logs showing the times and content of all additions and deletions from the user's social network page. There is no telling what evidence may be revealed. Indeed, there have been cases where plaintiffs have alleged future pain and suffering and juries did not award damages based on social network site photos of plaintiffs' partying, dancing and living the good life. In addition, jurors' internet research, blog



comments and tweets have led to dozens of mistrials, appeals and overturned verdicts.

Greenberg Traurig hosted a very informative seminar on Due Diligence, which was highlighted by "Name that Sanction," a highly interactive ethics presentation utilizing

real life case studies. Fisher & Phillips presented "Bureaucracy Gone Wild: An Equal Employment Opportunity Commission Update" which emphasized the EEOC's focus on systemic discrimination and ways for employers to avoid this type of claim. For example, a simple response such as "we treated Charging Party just like all other applicants pursuant to our policy" defense can open the door to a systemic focus. And most recently, Charlie Sheen was sighted on Church Street. Ford & Harrison conducted a mock arbitration of *Charlie Sheen v. Warner Bros.* and Chuck Lorre and we, the audience, decided who prevailed. Sorry Charlie! Afterwards, the Ford & Harrison attorneys led a discussion of the pros and cons of mandatory arbitration clauses and tips to avoid involving our respective companies in similar disputes.

Simply stated, it is amazing how much you can learn from attending a good CLE program. I will always remember asking one of my mentors when I embarked upon

*continued on page 8*

# Spring Cleaning

Susan Hackett, Senior Vice President and General Counsel, ACC

Ahh, spring. It's so lovely outside that I actually spent a bit of time in the last few weeks cleaning up the piles I let build up over the winter, in preparation for the simpler, more carefree lifestyle that defines summer.

As in-house counsel, we often wish we could do the same with our work: we'd like to organize and somehow regiment the firms and stakeholders clamoring for our attention, and behold, a myriad of benefits from efficiently operating legal services that operate under a logical business model. Well, there's a reason we call it work — it's never that easy to clean out and reorganize work. But in the spirit of aspiring to do better, I thought I'd share some good tips I have come across from members who are working to "clean up" their practices and improve their results this year.

## 1. Don't hire the lawyer, hire the firm.

I know, I know. This is contrary to everything that most in-house lawyers have been taught and believe from decades of experience. The longstanding in-house mantra is "I hire the lawyer, not the firm." Far be it for me to in any way de-value the importance of trusted relationships that have been forged over time with that special person who represents you so well as outside counsel — that person with whom you've done the Vulcan Mind Meld and who "gets" you and your client implicitly.

But, if you want to clean up, you need to invest in more than just a handful of good lawyers. You need to invest in firms that have adopted legal service management models that allow their individual lawyers to succeed. Gone are the days when in-house counsel were satisfied with paying whatever the firm charged after the work was done — today's in-house lawyer negotiates fee structures and staffing up front, demanding (regardless of the fee valuation method used) the best deal and the best "value" for their client's needs; they are increasingly likely to focus on a predictable and budgeted cost in advance. So here's my first piece of advice: don't invest all of your time in just a few lawyers; invest as much if not more time in the firms that support them so that not only can they do their

work well, but everyone on the firm's team is capable of delivering what you want, when you want it and how you want it.

## 2. Think about disaggregation and how it can help.

Disaggregation is a hot trend these days, and for good reason. Firms that want to be able to offer you predictable costs have to understand all the component parts to their services, how they operate most efficiently, and what it costs to deliver them. The cost is not what the firm charges in terms of rate — that's their price; the cost is what the firm has to ante up (salary, overhead, tech, personnel) in order to provide the service. In order to provide the service predictably (both in terms of results and efficiency), the firm has to be able to understand who does what best, the process that is most efficient in order to deliver the service, the knowledge management that prevents them from needing to charge each time to reinvent the wheel, and so on. So look for firms that have gone through disaggregation processes — that doesn't mean you have to buy individual pieces, but the firm that doesn't know what it costs can't offer you a predictable/budgeted price and can't improve the service and cost without risks. We all want firms that profit from offering efficient services, not firms that simply agree to discounts and then look for ways to "make up" what they are "losing" by offering you a better price.

## 3. Focus on who provides which pieces best.

It's really easy to look to hire a firm that does your work soup to nuts, but have you considered whether easy is actually best? Perhaps there are pieces of the work that the department should do, pieces that should be outsourced to a more efficient provider, or teams of firms that should work on your matters. Ask your firms to discuss with you as to who is doing what on your matters and why, and whether that's the best option for you, especially when the work is likely to be repetitive to some degree (And, repetitive does not necessarily equate with routine or non-complex work).

## 4. Do your work upfront; don't manage the bill.

High performing departments are finding that the greatest savings and predictability in their spend is driven by a focus on managing the matter before the work begins, and not simply heaving the matters over the wall to outside counsel, having them start work, and then arguing later over whether they got it right. This means not only early case assessment techniques, but also discussions on strategy and delivery of the service prior to the start. You can't believe how many departments are simply choosing to pay to exit the work at the start, rather than wasting all their time, opportunity cost, and money pursuing work that inevitably settles at the last minute. Another group of departments are finding that their spend is becoming far more predictable when they've taken time to work with their firms up front to decide how the matter will be priced/what the budget is, what the ceilings are, how important this is to the client, and at which points they'll hit the "escape" button if the matter starts to unravel or take unanticipated turns. Having your counsel understand these issues up front will save you time and create far more satisfying results and relationships.

## 5. Invest in communications and knowledge-sharing plans that detail your preferences before the work begins.

No one has time in the middle of any matter to start thinking about the processes by which they can most effectively communicate or by which they'll share data/info/experiential knowledge. Too many matters go south not because the lawyering was bad, but because *the process* was not facilitated by communications or knowledge-sharing that can have a make-or-break impact on the work. If you set up your preferences and lines of communication, as well as connect the folks who have the data and knowledge with each other, before the matter begins, you will be well served, many times over, in the management of your ongoing relationship.

## 6. Finally, evaluate what's working and what's not

continued on page 3

continued from page 2

### — pointed feedback is critical!

We all know that the vast majority of clients never actually “fire” firms — they just stop sending them work, or the work dissipates over time. The firm never really knows what it did wrong, even if they committed whopper mistakes. The client never really knows what it could have done differently to have promoted better results, they just know it didn't work out well. And so they hire new firms and repeat the same unsuccessful behaviors. We all know the definition of insanity: doing the same things over and over and expecting different/better results each time.

In order to improve and keep a relationship moving forward, both inside and outside counsel must commit to regular (before, during and after) evaluations of what's working and what could or should be done differently. No one likes to deliver evaluations — indeed, most of us will do anything to avoid them. But this is crucial to a better operation and continuous improvement in your relationships and results. There are lots of tools you can use to make this a simple part of the process rather than a hurried

process at the end with a less-than-perfect result. Commit with your firms to an evaluation process that includes both evals from you as the client on the firm and its lawyers, as well as receiving constructive input from the firm on how you as the client could have made the firm more successful. It's a two-way street, and the client has to be the one who asks for it and then opens itself up to learning from it.

Such is the stuff of better-organized work that produces better results for less money. It's not easy, but I recommend that those interested in cleaning up their practices take a look at some of the following resources to help you not only sweep away bad habits, but provide a platform on which efficient and consistent results flourish.

#### LIST OF RESOURCES:

Eval resources (scorecards, AVC, allstate, etc.) – AVI

[www.acc.com/valuechallenge/valueindex](http://www.acc.com/valuechallenge/valueindex)

Disaggregation (process management stuff from Seyfarth and others) – Use of Tailored Six Sigma Methodologies at Seyfarth Shaw

<http://www.acc.com/legalresources/resource.cfm?show=80026>

Meet. Talk. Act.

<http://www.acc.com/advocacy/valuechallenge/toolkit/upload/VC-Meet-Talk-Act.pdf>

Outsourcing, offshoring, staff practices manual – Legal Process Outsourcing: A How-To Guide on Legal Process Outsourcing (LPO)

<http://www.acc.com/legalresources/resource.cfm?show=1112956>

Early case assessment - Sample Early Case Assessment Form – Valorem and Summit

<http://www.acc.com/legalresources/resource.cfm?show=645579>

Fee valuation / budgeting - ACC Value-Based Fee Primer

<http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=967965>

For additional resources, please visit:

<http://www.acc.com/valuechallenge>

## Fisher & Phillips Value



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For more on the Fisher & Phillips Value Statement, go to [www.laborlawyers.com/value](http://www.laborlawyers.com/value).

Jeffrey E. Mandel, Regional Managing Partner

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# Can You Cross Your Fingers While Negotiating?

By James A. Edwards, Esquire, Zimmerman, Kiser & Sutcliffe, P.A.

Mediation is supposed to be an informal, non-adversarial process for the consensual resolution of disputes. Mediation communications are typically privileged and confidential to encourage the free exchange of information, which is usually a blend of facts and opinions with more than a dash of posturing thrown in for good measure.

But ask yourself or the person next to you: Is it okay to lie during settlement negotiations including mediations? Does it happen?

## Puffing vs. Lying

Nobody in a mediation is expected to accurately announce the client's realistic final position during the opening presentation. It doesn't happen. Mediation is a process of give and take; of evaluating and responding; a sales pitch from each side. It is filled with opinion-based predictions.

The clients' and counsels' candid calculations about the merits of the case are typically not shared with anybody else; however, nobody expects it to be done any other way. "Puffing," (opinionated statements that exaggerate quality, value or merit) is not only permitted during mediations, it is expected.

Rule 4.1 of the ABA's Model Rules of Professional Conduct states, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." Florida's rule mirrors the ABA rule. There is no explicit "mediation" exception to that rule. However, the Comments to Rule 4.1 say this:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact depends on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact....[A] party's intentions as to an acceptable settlement of a claim are ordinarily in this category....

In Formal Opinion 06-439 issued by the ABA's Standing Committee on Ethics and Professional Responsibility is the following: "Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise...can be fairly characterized as 'puffing,' [and] ordinarily are not considered 'false statements of material fact' within the meaning of the Model Rules."

So, what happens when mediation puffing becomes lying?

## Empty Pockets — Misrepresentations regarding the amount of insurance coverage

The variety of potential lies is infinite, but let us look only at misrepresenting the amount of available insurance coverage. The ability of the defendant to pay is typically a very material fact in every mediation or negotiation. *Slotkin v. Citizens Casualty Co. of N.Y.*, 614 F.2d 301 (2<sup>nd</sup> Cir. 1979). Few clients are truly interested in taking a case to trial at considerable expense just to obtain a paper judgment. If there is only a limited amount of money available, will the other side accept less than the case is worth because of the financial circumstances?

Kennelly, defense counsel for an engineering firm, advised Plaintiff's counsel truthfully that there was a \$1 million policy of insurance, which had a "wasting" clause, meaning that defense costs were deducted from the \$1 million liability limits. Kennelly then grossly overstated defense costs, during dinner with plaintiff's counsel the night before mediation saying that only \$320,000 remained. During the mediation, conducted by a judge, plaintiff's counsel repeated the asserted coverage remaining. Kennelly offered no corrections. The mediator judge suggested plaintiff drop his demand from \$700,000 to \$400,000, which both sides initially agreed upon. Settlement was not concluded. Only when

later ordered, Kennelly revealed that there was actually \$725,000 remaining for settlement. Ethics proceedings ensued. Kennelly pled ignorance as to any obligations of candor in negotiations. He was young, inexperienced and very candid in his dealings with the grievance committee and court, resulting in "only" a published reprimand for punishment. *Statewide Grievance Committee v. Kennelly*, 2005 WL 758055 (Superior Ct., Hartford, CT 2005)

In *Slotkin*, supra, the underlying medical malpractice case was settled for \$185,000 following extended negotiations, based upon repeated assurances to plaintiff's counsel and the trial judge from the hospital's trial counsel and the hospital's corporate counsel that there was only \$200,000 insurance coverage available. In fact, there was an additional \$1 million excess policy. A trial was then conducted on the fraud claims, resulting in a verdict of \$680,000. One defense attorney was suspended from practice for six months. In *re McGrath*, 96 A.D.2d 267 (N.Y. App. Div. 1983). The hospital's corporate counsel was not held personally liable for fraud, as there was "only" gross negligence on his part for failing to check with hospital administration about the true amount of coverage; reliance on defense counsel was insufficient.

In *Railsback v. Mid-Century Ins. Co.*, 680 N.W.2d 652 (S.D. 2004), the plaintiff claimed she settled her case too cheaply, as the other driver's insurance company repeatedly told her there was only \$25,000 in coverage; in fact there was \$50,000. The insurer correctly pointed out that since the claimant and it were adversaries, no fiduciary duties were owed. The Supreme Court of South Dakota was not giving the defendant a free pass to lie. "The fact that settlement negotiations are an adversarial process does not diminish the duties of parties to a contract to refrain from material misrepresentation." That court went on to remind the claims representative that "[e]very participant in a fraud and each one who assists another in the perpetration of the fraud is liable to the injured party."

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continued from page 4

## Conclusion

Therefore, in mediations feel free to express all the opinions you want with your best game face. Puff away. And understand that the other side is doing likewise.

But do not tell a lie. Not a one. Not even a little fib.

*James A. Edwards is a shareholder of Zimmerman Kiser Sutcliffe, and is a Board Certified Civil Trial Lawyer and Certified Circuit Civil Mediator (Florida). Jim is admitted to practice in Florida and the U.S. Virgin Islands, is a member of the American Board of Trial Advocates and the Federation of Defense and Corporate Counsel. His litigation and appellate practice focuses on product liability defense, transportation matters, and commercial disputes.*

## Chapter Events

### Third Thursday, July 21

“Around the World in Two Days: Legal Strategies and Developments for Global Intellectual Property.” This will be an afternoon CLE seminar Presented by Platinum Sponsor GrayRobinson. 301 E. Pine Street, Suite 1400, Orlando FL 32801

### July 28 — Melbourne Presentation

“Around the World in Two Days: Legal Strategies and Developments for Global Intellectual Property” Presented by Platinum Sponsor GrayRobinson 1795 W. NASA Blvd., Melbourne, 32901

### August 4 — 6th Annual Networking Summer Bash

Ember  
42 West Central Boulevard,  
Orlando FL 32801

### Third Thursday, August 18

Afternoon CLE seminar presented by Gold Sponsor Zimmerman Kiser Sutcliffe P.A.

### Third Thursday, September 15

Afternoon General Counsel CLE seminar presented by Diamond Sponsor Jackson Lewis

### Third Thursday, October 20

CLE seminar presented by Platinum Sponsor Lowndes, Drosdick, Doster, Kantor & Reed P.A.

### Third Thursday, November 17

CLE seminar presented by Silver Sponsor Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A.

### December — Holiday Celebration

## Dean Mead is pleased to serve as a sponsor of the Association of Corporate Counsel Central Florida Chapter.



**Congratulations to our partner, Gregory K. Lawrence,** for being named a 2011 BTI Client Service All-Star. He is the only real estate attorney in Florida, and one of only four lawyers in the state, to be named among this exclusive group.

The 2011 BTI Client Service All-Star Team is comprised of 318 attorneys nationally recognized for their extraordinary dedication to client service. The Client Service All-Stars list is based solely on unprompted feedback from nearly 300 general counsel at large and Fortune 1000 companies.

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# Mark Your Calendars Now for the September 15 Third Thursday Seminar presented by Diamond Sponsor Jackson Lewis!

Jackson Lewis and your ACC Central Florida Chapter will be catering to our GCs/CLOs, as well as all other valued Central Florida members. Charting a Course: An Employment Law Overview will theme the presentation to our general membership. General Counsel Roundtable Discussions: Trends and Developments with the Biggest Impact on Your Business will be the concurrent session offered to our GCs and CLOs, and will include some delicious wine and cheese tasting. Adding Value: A panel Discussion of Strategic Planning and Demonstrating Success will be the grand finale as a combined session for all featuring a few of the Central

Florida Chapter's own GCs as panelists. This afternoon program promises to capture your attention and offer you 2.5 General and .50 Ethics CLE Credits. A cocktail/hors d'oeuvres reception will immediately follow adjournment of the final presentation.

**Concurrent Session A:** General Counsel and Chief Legal Officers

**Theme:** General Counsel Roundtable Discussions: Trends and Developments with the Biggest Impact on Your Business

**Concurrent Session B:** Corporate Counsel

**Theme:** Charting a Course: An Employment Law Overview

**Combined Session:** General Counsel/ Chief Legal Officers/Corporate Counsel

**Theme:** Adding Value: A Panel Discussion of Strategic Planning and Demonstrating Success

## Special Thanks to the Following Sponsors for Their Support

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## Member Spotlight

### ACC-Central Florida Puts the Spotlight on Jana Powell with CenturyLink

#### 1) What is a typical day for you?

I work in the Commercial Law group focusing on real estate issues, so the majority of my day is spent reviewing/drafting/negotiating contracts.

#### 2) Why and or how did you get into in-house law?

I've worked in large corporations for most of my career — even prior to law school, so the opportunity to practice real estate law in a corporate setting is a perfect fit for me.

#### 3) If a law student were to ask you for advice about a career as in-house counsel, what would you say?

To know intimately the business of the company you work for and establish relationships with the people that you support. As in-house counsel, you will be viewed as a business partner and looked to for business judgments. Thus, you won't be effective in your role unless you know the business and are familiar with your client's needs and how the people you support tend to do business.

#### 4) Before you worked in-house what is the most unusual or interesting job you have held?

When I was younger, my family owned a "Mel's Diner" type of restaurant in the

small Missouri town where I grew up. I started washing dishes when I was about 10, and by 13 was waiting tables and learning my way around a griddle as a short order cook. Breakfast was my favorite shift, and even today breakfast is the meal that I love to prepare for my family!

#### 5) What is the most peculiar request or question you have received as an attorney?

Many years ago, on my first visit to a doctor's office, a medical assistant, looking over my chart and noticing that I listed "attorney" as my profession on my paperwork, asked me if I sued doctors. How awkward.

#### 6) What do you like to do when you are not working?

My husband and I are new to Central Florida, so we try to attend as many of the local festivals and art fairs as we can to get a sense of the history and culture of the area.

#### 7) What do you consider your most important achievement as in-house counsel?



Helping the business groups I support recognize weak areas in their processes and working with them to develop a more streamlined and reduced-risk approach to the way they do business.

#### 8) What was the more light-hearted experience during your career?

I am so thankful that I get to work with a great group of attorneys. The camaraderie among the attorneys and the support staff helps take the edge off of even the most stressful days!

#### 9) In your job, what do you consider to be your biggest challenge?

Exercising patience. Decision-making in a large corporation involves input from many departments, which can be frustrating when a fast-track situation arises.

#### 10) What is something interesting about yourself that people may not know?

I'm a Lieutenant in the United States Coast Guard Reserve.

## Welcome New Members

We wish to welcome the following new members who have recently joined the ACC Central Florida Chapter:

**Laurie Beechner** with Sea World Parks & Entertainment, Inc.

**George A. Taylor** with Sea World Parks & Entertainment, Inc.

**Ed Bertero** with Sea World Parks & Entertainment, Inc.

**Adam Williams** with Universal City Development Partners, Ltd.

**Mayra I. Colón** with Harris Corporation

**Anne Dill** with Sea World Parks & Entertainment, Inc.

**Margaret L. Doudy** with Lockheed Martin Missiles and Fire Control

**Matt J. Julian** with Siemens Corporation

**Katrina Lindsey** with Darden Restaurants, Inc.

**Cliff W. Mayhall** with Universal Parks & Resorts

**Paul B. Powers** with SeaWorld Parks & Entertainment, Inc.

**Matthew W. Rearden** with Sea World Parks & Entertainment, Inc.

**Making a big splash in the Central Florida Chapter, we would like to welcome our newest corporate addition, SeaWorld!**

## Board Members and Contacts

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## ACC-CENTRAL FLORIDA CHAPTER MISSION STATEMENT

**ACC Central Florida Chapter supports its members and community through:**

Informing and educating members on topics integral to in-house practice;

Interacting with the local legal community to increase visibility for the chapter, in-house issues, and the ACC as a whole; and

Improving the community through acts of service and leadership.

*continued from page 1*

the practice of law, how he became an expert in his field. His response was “I attend lots of good seminars.”

Speaking of really good seminars, GCs — remember to mark the Third Thursday in September on your calendar for a spectacular event which will feature a “General Counsel Roundtable” where you will have to opportunity to discuss cutting edge issues with your fellow GCs. This will be followed by a panel discussion with select GCs, which will be open for all members to attend. You do not want to miss this!

In closing, I want to personally thank everyone who has completed the survey. Your feedback on what we are doing well and suggestions as to how we can improve has enabled us, the board, to better serve you.

I look forward to seeing you all at the always-popular Summer Bash in August! Enjoy your summer and cherish every day, every moment!

Yours truly,  
Jae Im  
ACC Central Florida Chapter President

## Call for Articles

Do you have an interesting story to share? A challenging court case?

Do you know an in-house lawyer who has made a difference in their community or in someone’s life? Please share your stories by sending them to [mschirtzer@cfl.rr.com](mailto:mschirtzer@cfl.rr.com).

## Call for Involvement in the Central Florida Chapter

Would you like to be involved more in the chapter? Please let us know. We are always looking for help coordinating events and we are also looking for proposals of new topics for our CLE programs that might benefit chapter members. If you are interested in serving on the board of directors or as an officer next year, let us know! For more information, contact Marshall Schirtzer at [mschirtzer@cfl.rr.com](mailto:mschirtzer@cfl.rr.com).