Inside Q4 2021

ACC Association of Corporate Counsel
SOUTH FLORIDA

FOCUS

President's Letter

Aline V. Drucker

While we find ourselves already at the end of 2021, and hearing the pitter-patter of the year 2022 on our doorsteps, most folks I encounter these days - myself certainly included - are still getting over the ramifications of 2020. The need to process all the changes in our professional and personal lives from 2020, while balancing life almost 2 years later as we welcome in 2022, reminds me of the famous scene in Captain America: Winter Soldier where Steve Rogers and Sam Wilson are both running laps in Washington D.C.

Cap (known by his alter-ego Steve Rogers and portrayed by actor Chris Evans in the Marvel Cinematic Universe) runs significantly faster due to his superpowers than Falcon, a mere mortal (known by his alter-ego Sam Wilson, portrayed by the actor Anthony Mackie). Each time Cap passes Falcon as he completes yet another running lap, while Falcon is still working on his current one, Cap shouts "ON YOUR LEFT," giving Falcon a heads up that he is passing him yet again, and clearly having too much fun showing off his speed. This is the collective "us," constantly hearing someone shouting "on your left" as we fumble into this new upcoming year, still trying to complete the never-ending lap that was 2020.

I was particularly stuck by the resilience and the sense of community within our ranks of in-house attorneys and our sponsors as we finally were able to host in-person holiday parties in 2021. ACC South Florida is thrilled to be able to have sponsors who helped usher in two holiday parties this year, both in Miami-Dade and Palm Beach Counties. This allows for the most options for our membership to attend at a convenient location of their choice and serves the diverse membership across several counties that all comprise our Chapter. But even more importantly, these social events around the holidays provide much needed in-person contact, networking and connection within our community. While we are all busy professionals who are focused on our jobs and families, it is wonderful to see so many wanting to reach out, support one another, and spend some quality time in person together, especially during this time of the year.

As I have officially taken on the role of President of ACC South Florida as of October 1st, I am enormously optimistic about what lies ahead for our Chapter, and our exceptional programming for 2022 and beyond. Our sponsors are more enthusiastic than ever to start scheduling more in-person events in Q1 of 2022. We are bringing back our extremely popular Progressive Dinner, and many new exciting programming initiatives. Plans are already underway for the Annual CLE Conference, our largest and most attended event of the year which provides a full day's program of CLE's and social networking opportunities for hundreds of our members who are all in-house counsel in South Florida. The future looks merry and bright and the best is surely yet to come.

As we approach the end of this year and look forward to a happy and healthy New Year, I want to wish each of you and your families much health, joy, and peace. Merry Christmas, Happy Hanukkah and may we all have a wonderful, safe, and joyous holiday season.

How Epic V. Apple Ruling Might Play Out For Big Tech

By Scott Wagner and Ilana Drescher

The U.S. antitrust laws are slow to keep up with technical innovation and changing marketplaces. Nowhere is that more evident than in the tech sector, where companies and other players in the market do not fit neatly into traditional principles of market definitions and market actors.

The convergence between the tech sector and the antitrust laws is coming under an increasingly bright spotlight both in the halls of Congress and the nation's courts.

The Sept. 10 decision in Apple Inc. v. Epic Games Inc. was a long-awaited one in the showdown between two titans in the tech sector.

Epic is the developer of Fortnite, a widely popular online video game; Apple is one of the largest companies in the world. The 185-page decision followed a 16-day trial in the U.S. District Court for the Northern District of California.

While Apple was successful in convincing the court that it is not a monopolist, U.S. District Judge Yvonne Gonzalez Rogers determined that certain of Apple's App Store practices are illegal. The decision will have ramifications across the multitrillion-dollar U.S. tech industry.

Most significantly, Judge Gonzalez Rogers addressed the key issue of the relevant market for purposes of the dispute. Epic argued that the relevant market was Apple's own internal operating systems related to the App Store — essentially a monopoly in a market of one. Apple's proposed definition of the market included all video game platforms.

The court rejected both parties' definitions. Instead, the court found that the relevant market was digital mobile gaming transactions.

The court's determination largely rested on the fact that more than 80% of apps in Apple's App Store are essentially free — the user pays nothing, and the developer only pays a minimal an upfront $99 fee. By contrast, gaming apps account for approximately 70% of all App Store revenues, and those revenues are generated by fewer than 10% of all App Store consumers.

The court evaluated Apple's conduct in the digital gaming mobile transaction market. Apple derives profits from the App Store by way of its mandatory 30% commission on purchases of apps and in-app purchases within the Apple ecosystem.

In a ruling that largely preserves Apple's way of doing business, the court determined that Apple was not an illegal monopolist.

The court found that while "Apple enjoys considerable market share of over 55% and extraordinarily high profit margins, these factors alone do not show antitrust conduct." Indeed, Judge Gonzalez Rogers said, "Success is not illegal."

However, Apple did not secure a complete victory. Epic Games also challenged Apple's practice of prohibiting developers from offering app users the option of making in-app purchases outside of Apple's App Store. This policy is known as an anti-steering provision, because it forbids app developers from steering customers to less expensive alternatives.

Apple's anti-steering policy prohibited Epic from offering its Fortnite app products at a discount through its own store. Instead, Epic and other app developers were required to use Apple's App Store and give Apple a 30% commission fee for each purchase made.

Epic argued that Apple's use of anti-steering provisions was illegal because it forced developers to use the App Store and prohibited them from telling app users about alternative ways to pay.

Judge Gonzalez Rogers held that:

> When coupled with Apple's incipient antitrust violations, [Apple's] anti-steering provisions are anti-competitive and a nationwide remedy to eliminate those provisions is warranted.

The court issued an injunction prohibiting Apple from employing its anti-steering policy.

At first blush, allowing app users to pay for subscriptions outside of Apple's App Store may seem like it will have a small impact on Apple's business.

Even if users have the option to click out of the App Store to make in-app purchases, they are unlikely to do so given the convenience of staying within the Apple network.

However, it is a fairly significant development. Apple's business model, like many other Big Tech companies, thrives on controlling its ecosystem, and Judge Gonzalez Rogers' ruling forces Apple to give up some of its control.

Apple and Epic Games have each filed notices of appeal with the U.S. Court of Appeals for the Ninth Circuit.

Beyond the apparent impact on Apple's business practices, Judge Gonzalez Rodgers' ruling is likely to provide a road map for future litigation and legislation related to other tech giants such as Amazon.com Inc., Google LLC and Facebook Inc.

Google has its own app store, and both Google and Facebook exert tremendous control over advertising (and associated software and apps) on their platforms. There are currently class actions throughout the country challenging both companies' practices.

For example, Google is currently facing a lawsuit filed by 36 states and Washington, D.C., in the Northern District of California that challenges Google's policy requiring Google Play app developers to pay a 30% commission fee on sales made through the app.

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The case is still in its early stages, but it is hard to see how Google will distinguish its ecosystem and anti-steering provisions from Apple's and avoid an outcome similar to the Epic decision.

Similarly, in August, the Federal Trade Commission filed an amended complaint alleging that Facebook violated antitrust laws by buying Instagram and WhatsApp in order to eliminate them as competitors, with the acting director of the FTC's competition bureau saying:

> After failing to compete with new innovators, Facebook illegally bought or buried them when their popularity became an existential threat. ... This conduct is no less anti-competitive than if Facebook had bribed emerging app competitors not to compete.

In that case, the FTC has argued that the relevant market is the U.S. personal social-networking space, and Facebook Inc. is a monopoly in that arena. Facebook's motion to dismiss is presently pending and it has released the following statement:

> The FTC's fictional market ignores the competitive reality: Facebook competes vigorously with TikTok, iMessage, Twitter, Snapchat, LinkedIn, YouTube, and countless others to help people share, connect, communicate or simply be entertained. The FTC cannot credibly claim Facebook has monopoly power because no such power exists.

Ultimately, the Epic case posed the question: What is the ecosystem — or in antitrust jargon, the relevant market — of a tech giant? This issue is expected to persist and evolve over time.

And more and more private plaintiffs and regulators are advancing the position that a Google or an Apple or an Amazon in and of itself can be a relevant market. If one of the tech giants is defined as a monopolist in a market of one, it will likely lead to significant restrictions on that company's business practices.

Ultimately, new measures to regulate and ensure competition in the tech sector may not be developed through the courts. Congress has taken an intense interest in Big Tech companies and the role they play in the economy and society at large.

In just the most recent example, a bipartisan group of senators introduced the American Innovation and Choice Online Act on October 18.

Under the proposed legislation, companies like Amazon, Apple, Google and Facebook would be barred from biasing search results in favor of their products.

Tech firms would not be allowed to use competitors' data to compete against them and would be prohibited from requiring a business to buy their goods or services to secure preferred placement.

The bill would also make it illegal to prevent a third party from interoperating with the dominant platform in a way that's unequal to that party's products — which takes aim at companies, who have been accused of using their market power to stifle competition.

The U.S. House of Representatives introduced a similar bill earlier this year.

Sen. Amy Klobuchar, D-Minn., described the antitrust rules as a way for America to deal with its "monopoly problem" and restore open markets and fair competition in a sector dominated by a small handful of companies.

Sen. Dick Durbin, D-Ill., said the regulations would "fight strong arm tactics used by Big Tech to disadvantage their consumers and exclude competitors from the marketplace."

On the other hand, critics argue that these proposals would prohibit convenient integrations across digital platforms, like Google Maps results in Google Search, and iMessage, FaceTime and the Apple App Store automatically installed on the iPhone, and easy access to same-day delivery for Amazon Prime.

One thing seems certain, the rules governing how the tech giants operate will change. Whether they change to significantly curtail the way the businesses currently operate remains to be seen.

Nevertheless, the U.S. antitrust laws are sure to play a central role in the oversight of Big Tech companies and the role that these companies play in the economy.

Authors:

Scott N. Wagner is a partner in the firm's Litigation Group, where he represents companies and individuals in antitrust and other complex litigation. As part of his practice, he conducts internal investigations and guides clients through regulatory investigations conducted by the Department of Justice, Federal Trade Commission and state attorneys general.

Scott led Bilzin Sumberg's Antitrust Team in achieving tremendous results for major opt-out plaintiffs in the precedent-setting LCD and CRT price-fixing litigations, some of the largest antitrust litigations in recent history. He currently represents major opt-out plaintiffs in the Capacitors and Broiler Chickens price-fixing litigations.

In addition to his antitrust and litigation work, Scott serves as trusted counsel to public and private companies, entrepreneurs and developers. He renders high-level legal and business advice on a wide variety of issues. The fresh prospective and innovative insight Scott brings to his clients' business challenges often serves as the catalyst for exceptional results in the courtroom and the boardroom.

He earned his J.D., cum laude, from Georgetown University and his B.A. from Tulane University.

Ilana Drescher is an Associate in Bilzin Sumberg's Litigation Group. Ilana guides clients through complex business litigation and antitrust disputes. Her practice focuses on defending food and beverage companies and other consumer product organizations in false advertising and deceptive labeling class action litigation, and the representation of major opt-out plaintiffs in price fixing antitrust litigation.

Prior to joining the Firm, Ilana served as a Law Clerk to Judge William J. Martini of the U.S. District Court for the District of New Jersey, where she handled civil and criminal cases including a major antitrust trial. She also served as a Law Clerk in the Staff Attorney's Office for the U.S. Court of Appeals for the Second Circuit in New York, where she focused on criminal and constitutional law cases including civil rights, and appellate and civil procedure.

Ilana earned her J.D. at New York University and her B.A., cum laude, at the University of Florida.

Protecting the Attorney-Client Privilege and Work Product Doctrine in Internal Investigations

By Ralf Rodriguez

In-house counsel are rightly focused on the confidentiality of materials and communications from an internal investigation. To protect investigative materials and communications from disclosure, counsel must thoroughly understand how both the attorney-client privilege and the work product doctrine apply in this context. These privileges are limited, and counsel who do not know the limits risk an inadvertent waiver. This article provides an overview of the key points in-house counsel should bear in mind when conducting an internal investigation to establish and maintain its privileged status.

Investigative Purpose

At the outset of an internal investigation, in-house counsel should candidly assess whether its purpose is to provide the company with legal advice, or if it has a business purpose. In the former case, a court will usually treat the investigation as privileged. In the latter case, the materials will typically be discoverable. The distinction between an investigation conducted to provide legal advice to the company as opposed to an investigation completed "in the ordinary course of business" serves as the linchpin for determining whether the privilege applies. *See e.g. In re County of Erie*, 473 F. 3d 413, 420 n. 7 (2d Cir. 2007).

Thus, at the outset of an investigation, in-house counsel should clearly document its scope and purpose. Identify the key legal issues for which the company is seeking legal advice, being mindful that this documentation could be reviewed in camera in the event of a governmental or third-party inquiry. Therefore, in-house counsel should clearly outline the legal advice being sought without revealing all the details.

Retention of Outside Counsel

Another factor the courts emphasize when analyzing assertions of privilege is whether the company retains outside counsel to provide legal advice and lead the investigation. Involvement of outside counsel helps establish that the investigation was initiated for the specific purpose of obtaining legal advice, that an attorney-client relationship attaches to the investigation, and that the company reasonably anticipated litigation. Each of these elements supports an assertion of privilege, and outside counsel's notes and questions constitute the mental impressions and opinions of legal counsel, thereby qualifying for protection under the work pro*duct doctrine.* See e.g., Hickman v. Taylor, 329 U.S. 495 (1947).

It is important to understand, however, that involvement of outside counsel does not offer blanket protection. For example, any recordings or transcripts taken of an interview with any adverse party are subject to discovery pursuant to Fed. R. Civ. P. 26 (b)(3)(C). This rule allows a party to obtain another party's previous statements, including "contemporaneous stenographic, mechanical, electrical, or other recording – or a transcription of it – that recites substantially verbatim the person's oral statement." Id. Another vulnerability to bear in mind is that even if outside counsel is retained to interview an employee who has made an allegation against the company, the attorney-client privilege may not apply to communications exchanged during that interview given the adversarial nature of the relationship. The work product doctrine, however, should still apply to prevent disclosure of outside counsel's notes and observations.

Waiver

Privilege can be waived inadvertently in several ways. First, when preparing a privilege log identifying privileged materials obtained during the course of an internal investigation, be sure to include materials in the possession of outside counsel. Failure to do so could lead a court to determine the company waived the privilege with respect to those documents. Likewise, the privilege applying to any investigative communications or materials could be waived by having a witnesses testify about them. Similarly, if a company refers to information obtained as part of its internal investigation to support its claims or defenses in a case, a court is likely to find a waiver of any privilege relating to such information. Finally, cases are legion finding the attorney-client privilege is waived when the confidential communication is disclosed to a third-party. As such, if in-house counsel must share privileged investigative information with a third party, it should be in the context of a documented need for legal advice. For example, the privilege is not typically waived if the third party is necessary or useful for effective communication and consultation between outside counsel and the company. *See e.g., United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (recognizing exemption to waiver rule when the third party, such as an accountant, is necessary or useful for the effective consultation between the attorney and the client).

Conducting an internal investigation can be a high-stakes and extremely sensitive endeavor. Companies understandably want internal investigations to remain just that: internal. Proceeding in line with the points presented above will help ensure that the attorney-client privilege and/or work product doctrine attaches to a company's investigative materials and communications.

Author:

Ralf Rodriguez is a member of Cozen O'Connor's Commercial Litigation Department where he focuses his practice on construction law. He has experience representing domestic and international general contractors, construction managers, sureties, and other construction professionals in the United States and abroad in negotiation, litigation, arbitration, and mediation of construction and design defect claims, insurance claims, surety bond claims, and related matters. A large part of Ralf's practice also involves representing corporate clients in completing internal investigations of sensitive matters and responding to governmental inquiries, defending regulatory actions and fraud claims. He has aided clients in completing numerous investigations of sensitive matters in foreign jurisdictions, including Latin America and the Caribbean.

Riding the Rollercoaster of COVID-19 Mandates and "Anti-Mandates" - Hold on Tightly!

By Shayla N. Waldon and Natalie M. Nathanson

Since the COVID-19 pandemic began, employers have been riding the rollercoaster of competing COVID-19 mandates. Employers wish to see their employees getting back to work safely, but conflicting laws create a tangled web of federal, state, and local mandates that provide direction (and create confusion) for employers. As litigation abounds over the federal government's authority to impose vaccination requirements, the compliance rollercoaster of mandates and "anti-mandates," seems to be speeding downhill without any brakes.

Federal Mandate

Along with a sweeping mandate from the Centers for Medicare and Medicaid Services for healthcare facilities, the largest-scale federal mandate was the much-anticipated Emergency Temporary Standard (ETS) from the Occupational Health & Safety Administration (OSHA) that was announced on November 4, 2021 (effective on November 5, 2021). Among other things, the ETS required employers with 100 or more employees to develop policies that require their employees either to be fully vaccinated or to submit to weekly testing within sixty (60) days, or by January 4, 2022. The ETS also required paid leave while employees receive the vaccine or recover from its side effects, and it mandated mask-wearing and social distancing for unvaccinated employees. Through the ETS, OSHA endeavored to increase vaccination rates and to stop the spread of COVID-19. The ETS included several exceptions, including (i) those for whom a vaccine is medical contraindicated; (ii) those whose medical condition requires a delay in vaccination; and (iii) those who are entitled to an accommodation under federal civil rights law, i.e., those who have a disability or a sincerely held religious belief that conflicts with the vaccination requirement.

State Objections

The implementation and enforcement of the ETS was nearly as short-lived as an amusement park thrill ride. Upon the ETS' taking effect, twenty-six (26) states filed lawsuits in multiple jurisdictions to prevent its enforcement. On November 6, 2021, a panel of the Fifth Circuit Court of Appeals (covering Texas, Mississippi, and Louisiana) agreed that enforcement of the ETS should be stayed. To streamline adjudication of the lawsuits, the Chief Justice of the U.S. Supreme Court conducted a statutorily authorized lottery to decide the court in which the lawsuits would be consolidated. Following the lottery, the Sixth Circuit – a largely conservative court covering Kentucky, Michigan, Ohio, and Tennessee – will preside over the cases. It is likely that the Sixth Circuit will leave the Fifth Circuit stay intact while the merits of the case are decided, though it has authority to lift it. The issue is sure to reach the U.S. Supreme Court. In the meantime, after the Fifth Circuit extended the stay on November 12, OSHA announced that it would temporarily suspend its ETS implementation and enforcement activities pending the outcome of the litigation.

As states battle the federal government over authority to regulate COVID-19 prevention, several of those states are creating "anti-mandates." For example, Florida enacted four (4) bills in November 2021 to curtail employer vaccination mandates. Among other things, private employers ***must*** grant accommodations from mandatory vaccination policies in the five (5) circumstances enumerated in the statute. Employees can request an accommodation using a form created by the Florida Department of Health, which form must be completed by a licensed physician. If an employer receives an accommodation form that meets the statutory requirements, the employer must exempt the employee from its COVID-19 vaccination mandates. The new Florida law likewise prohibits the termination of employment – or the functional equivalent of termination – for an employee's failure to adhere to a COVID-19 vaccination mandate, and it prescribes a schedule of fines for employers who violate the law. This law, yet another gut twisting loop in the rollercoaster, creates potential legal landmines for employers.

Health Plan Surcharges

While riding the ups and downs of this COVID-19 rollercoaster, what can employers do? To avoid or limit the cost of weekly testing or the risks associated with employee terminations, many employers are exploring whether to impose a surcharge for unvaccinated workers who participate in their group health insurance plans. The IRS, DOL, and HHS have issued guidance to clarify that these surcharges (or corresponding premium discounts) are allowable, but employers ***must*** comply with other federal laws, including the Affordable Care Act (ACA), HIPAA, the Americans with Disabilities Act and Title VII, as follows:

- To comply with HIPAA, the surcharge should be structured as a written wellness program and communicated to employees. Additionally, the surcharge (combined with any other existing surcharges) must not exceed thirty percent (30%) of the total cost of an employee's health insurance premiums for self-only coverage.
- To comply with the Affordable Care Act, the cost of health insurance coverage including the surcharge must still be "affordable" as defined by the ACA.
- To comply with the ADA and Title VII, accommodations should be provided if an employee is unable to get vaccinated for medical reasons or if the employee has a sincerely held religious belief that

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prohibits vaccination. Additional rules apply under the ADA and GINA for employers who give the vaccinations or administer them in a clinic on site.

Employer Action Steps

In addition to restructuring health plans, some employers are preparing policies and accommodation forms with the expectation that the ETS may become law. In states like Florida, Iowa, Tennessee, and Utah, employers are bracing for a likely tidal wave of exemption/accommodation requests, including for reasons other than a disability or religious belief. As such, employers everywhere should carefully track the rapidly evolving standards and create policies that address the requirements of federal, state, or even local law. Then, employers should train employees on implementing and enforcing these policies.

With states asking the Sixth Circuit to hear the ETS dispute en banc, and the federal government's request to dissolve the stay on ETS enforcement, the roller-coaster of mandates and "anti-mandates" continues. Employers should work with experienced counsel who can partner with them for the ride to ensure that their businesses are not derailed.

Authors:

Natalie M. Nathanson is a principal in the Miami, Florida, office of Jackson Lewis P.C. She focuses her practice on employee benefits, ERISA plans, and executive compensation matters.

In her legal practice, Natalie offers a depth of experience gained from serving as both in-house counsel and a law firm partner.

Shayla N. Waldon is an associate in the Miami, Florida, office of Jackson Lewis P.C. She partners with managers and executives of companies both large and small to provide valuable employment advice and to manage the risks associated with employment litigation.

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ACC South Florida Upcoming Events

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Jan. 15
Fort Lauderdale Beach Clean Up

Jan. 27
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FEBRUARY

Feb. 9
Top Golf Miami
presented by Bilzin Sumberg

Week of Feb. 21
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presented by Fisher Phillips

MARCH

Mar. 10
Miami-Dade Progressive Dinner
presented by Shook, Hardy & Bacon; Buchanan Ingersoll & Rooney; DLA Piper

TBA
Social Event
presented by FordHarrison

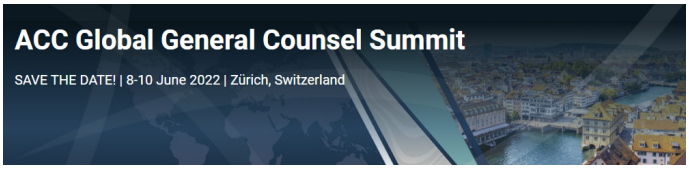
ACC News

2022 Virtual Cybersecurity Summit: March 8-10

Registration is now open for the 2022 Virtual Cybersecurity Summit. These program offers three days of live educational sessions and networking opportunities, designed to engage and educate professionals about today's most pressing cybersecurity concerns.

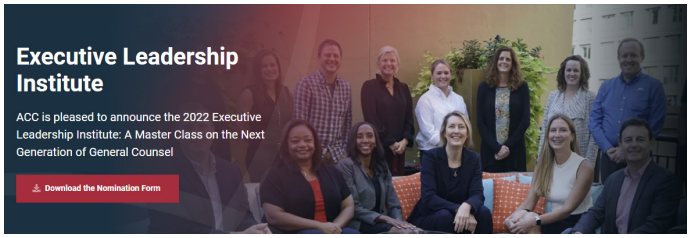
2022 ACC Global General Counsel Summit: June 8–10 Zurich Switzerland

Save the date for the 2022 Global General Counsel Summit, 8-10 June 2022, in Zürich, Switzerland, to collaborate and share ideas on critical trends and challenges facing general counsel with your global chief legal officers in a small, highly interactive setting. Seats are limited. Questions? Want to reserve your seat? Contact Ramsey Saleeby.



ACC Executive Leadership Institute: July 26–29 2022 Chicago, IL

Invest in your high-performers and put your succession plan in place. Nominate your rising stars to gain the professional development they need to one day lead your department at the 2022 Executive Leadership Institute. Seats are limited



DEI Maturity Model

The DEI Maturity Model is designed for legal departments to benchmark their diversity, equity, and inclusion efforts across a wide range of functional areas. Download the model.

Renew Your ACC Membership

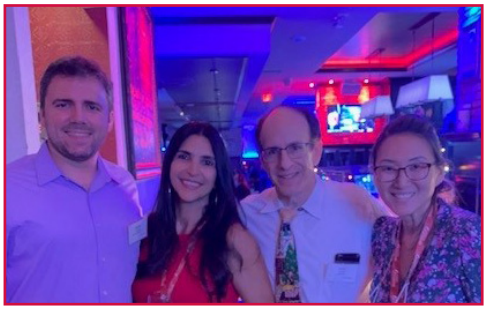
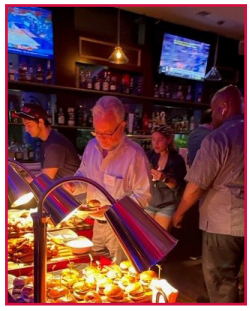
Don't forget to renew your ACC membership!

EVENT PHOTOS

Miami Holiday Party presented by Cozen O'Connor





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ACC Association of Corporate Counsel
SOUTH FLORIDA

Christina Kim
Executive Director

Executive Director Note

Dear Members,

"The days are long but the years are short…"

Soon 2021 will come to an end and looking back, I am proud of what our chapter has accomplished. We hosted our first annual conference in a hybrid format, had more events than ever both virtually and in-person, and had close to 90 new members join our community.

We are excited for what is in store for the upcoming year! Already we are hitting the ground running with some great activities in the first quarter of the year (check them out in the Upcoming Events section) and we kicked off our sponsorship enrollment period for 2022 and are already welcoming new and current sponsors who will partner with us on programming and events. If you know of any firms or vendors who would like to sponsor our chapter, please click here for our sponsorship booklet and information.

Wishing everyone a wonderful holiday season and health and happiness in the new year!

Sincerely,
Christina Y. Kim
Executive Director, ACC South Florida

Christina & family at Waipi'o Valley on the Big Island, Hawaii during Thanksgiving.