Business Breakups
Should you litigate or mediate?

Staying Fit Pays
Healthy Employees Lower Corporate Costs

Avoiding the Trap
Common mistakes lead to legal malpractice claims
From the Chair’s Desk ................................................................. Page 1

SPECIAL E-DISCOVERY ISSUE:
E-Discovery: Ineffective ESI Retrieval Imperils Court Outcomes, Budgets.
Companies Slow to Adapt to New FRCP Rules ........................................ Page 2
E-Discovery Rules: A Recap Managing the New and
Emerging Data Requirements .......................................................... Page 3
Fourteen Questions to Ask in Creating an E-Discovery Plan ......................... Page 4
Anatomy of an E-Discovery Nightmare ............................................... Page 5

FEATURES:
Your Employees Have Malicious Mail:
Employer E-mail Policies Can Nullify Attorney-Client Privilege .................. Page 6
Business Break-ups: Litigate or Mediate? .............................................. Page 7
Mistakes that Lead to Malpractice:
Common Sense Approaches to Reduce Your Risk ................................ Page 9
Employee Wellness Curbs Corporate Costs ......................................... Page 11
Product Recalls Stir Public Sentiment ................................................. Page 12

DEPARTMENTS:
Member Profile ........................................................................... Page 14
Welcome New Members ................................................................. Page 15
A Tradition of Leadership ............................................................... Page 16
Advisor Corner ............................................................................ Page 17
Firms on the Move ...................................................................... Page 18
Spotlight on Sponsors ................................................................. Page 20

About USLAW ........................................................................... Page 22
FROM THE Chair’s Desk

USLAW HAS COME A LONG WAY since its inception seven years ago. Today, we mark a new milestone with the launch of USLAW Magazine. This publication was developed to facilitate communication with our member firms and clients.

Our inaugural issue focuses on the challenges facing many of our member firms and clients, including the fluid and dynamic area of e-discovery and electronic evidence. In our special spotlight on e-discovery, we discuss recent court developments, trends and best practices.

Our inaugural publication also addresses cost saving measures corporate counsel can implement in their organizations to stem the tide of rising healthcare premium costs, a concern to virtually every company in today’s competitive economy.

This publication was made possible through the enormous efforts of our member firms, many of whom submitted articles and worked diligently to identify and address topics of importance to our clients. Please join me in thanking them for their support.

I hope you will enjoy this first edition of USLAW Magazine. We plan to publish it twice annually (spring and fall) to coincide with our annual client conferences. We look forward to hearing your feedback.

On behalf of all of us at USLAW, thank you for your continued support. We look forward to seeing you in Miami!

Sincerely,

Mark Solheim
Chair, USLAW NETWORK, Inc.
Larson • King, LLP
St. Paul, Minnesota
Changes made to The Federal Rules of Civil Procedure (FRCP) governing e-discovery have been on the books for over a year, yet many companies (and their law firms) have been slow to adapt to these sweeping rules.

Long gone are the days when lawyers could walk to a locked file cabinet and produce the relevant documents in a case to satisfy their discovery burden. Today, companies and their in-house and outside counsel must not only maintain a paper trail; they must also carve an efficient and defensible path to gathering Electronically Stored Information (ESI) whenever they are required to produce such data in litigation.

The newest version of the FRCP rules requires diligence very early in litigation to investigate, identify, and preserve relevant electronic evidence. Much broader in scope than previous versions, the definition of electronic records now includes e-mails, as well as relevant attachments, electronic copies of word processing files, digital image files, and the associated metadata, which describes the history, tracking, and management of an electronic file. It has been reported that approximately 90% of such computer-generated records are never printed to paper, meaning in the very near future, practically every lawsuit will involve the exchange of ESI.

CONSOLIDATE COMPETING AGENDAS

While many in the legal community grasp the impact of these regulations, a large number of companies have seemed reluctant to make the internal structural and technical changes necessary. The impact of the FRCP rules cuts across corporate departments and divisions, requiring collaboration and cooperation among legal, IT, operations, and the C-suite. To craft an effective e-records management program, all departments must engage together. Legal counsel, in-house or outside, must speak the language of the major players involved to effect the required technology and records management changes.

Reasons for the lag in corporate adaptation to the changing rules are many, but some of it revolves around the budget impacts such a renovation of records management requires. CIOs, CEOs, CFOs, and others whose engagement is necessary do not want to divert funds that could be used to pursue profits to prepare for future litigation that may never happen.

More common, many believe IT already has in place the systems it needs — back-up tapes that store every piece of information that flows through the organization, complementing a well-oiled process for managing paper records. Rather than take preventive measures, many senior managers “wait and see” and presume they have the records to deal with a lawsuit if it occurs. This approach simply ignores the hundreds of thousands of dollars that it may cost to search the system to...
In light of the recent Qualcomm e-discovery meltdown, how can in-house counsel, law firms, and corporate technology professionals adapt to and manage the ESI requirements in the new FRCP rules? The first step is comprehensively understanding the new rules, including what is discoverable and how that information can and should be produced.

FRCP Amendments and What They Mean

The FRCP amendments can be grouped into several main areas for the purpose of understanding their impact:

- Early attention to ESI;
- The concept of “reasonably accessible”;
- The form of data production;
- Post production assertion of privilege;
- Application of “Safe Harbor” from sanctions due to the routine destruction of ESI.

Early Attention to ESI

This mandate simply states that ESI must be identified, preserved, and disclosed at the onset of any lawsuit. Companies need to demonstrate an internal protocol that clearly and comprehensively manages electronic information.

Reasonable Accessibility

The e-discovery amendments set up a two-tier procedure for the discovery of ESI. If the ESI is relevant, non-privileged, and “reasonably accessible,” it must be produced. A party need not provide discovery of ESI, however, from sources that the party identifies as not “reasonably accessible” because of undue burden or cost. Generally, ESI is not reasonably accessible if it requires special processes to recover. Certainly, legacy data and disaster back-up tapes are arguably not “reasonably accessible.”

But, companies must still be prepared to unearth and produce data that is difficult to recover. Parties in a suit can still request ESI that is not reasonably accessible if they can show “good cause.”

The Form of Production

Another amendment provides a plaintiff with the right to specify the form of production of ESI. It also provides the right to object to the form of production. If the requesting party does not specify the form of production, ESI must be produced in the form that it is ordinarily maintained or reasonably useable.

Parties may require that the production of ESI be in a format with metadata intact. The rules define metadata as “information describing the history, tracking or management of an electronic file.”

Post-Production Assertion of Privilege

The e-discovery amendments provide what has been identified as a “clawback provision.” This grants the producing party the right to request that specific information be returned or sequestered until a privilege claim can be resolved. Of course, the amendments allow the parties to custom tailor an agreement regarding how they wish to handle privilege issues. For example, the parties may agree that inadvertent disclosure of privileged information is to be returned and will not constitute a waiver.

The Safe Harbor Provision

The so-called “safe harbor” provision allows a limited protection of a party against sanctions for its inability to provide deleted or lost ESI due to routine operation of an information system. Routine operation is defined as “the ways in which such systems are generally designed, programmed, and implemented to meet a party’s technical and business needs. This operation includes the alteration and overwriting of information, often without the operator’s specific direction or awareness.”

The “safe harbor” requires good faith compliance. It does not provide protection for intentional or negligent destruction. For instance, failure to suspend a deletion policy upon notice of litigation will not be protected even if the deletion policy was considered routine operation.

In this new reality of discovery, every company must have defensible and relevant plans and protocols for managing ESI. See the accompanying articles on E-discovery management, a review of the recent Qualcomm case, and 14 considerations for crafting your own ESI protocol.

By Robert Casarona Roetzel & Andress, Ohio

Robert B. Casarona is a partner with Roetzel & Andress, LPA, USLAW NETWORK’s Ohio member firm. He practices in business litigation, construction litigation, and environmental matters, including toxic torts. He can be reached at rcasarona@ralaw.com and 216.615.4841. For more information on Roetzel & Andress LPA, please visit www.ralaw.com.
When putting an effective pre-litigation e-discovery plan in place, the following questions should be addressed and answered regarding preservation of Electronically Stored Information (ESI):

1. Has your organization educated your legal, administrative and information technology (IT) staff on the fundamentals of preserving ESI and other records?
2. Does your records and information retention policy contain language clearly addressing both paper and electronic records?
3. Does your policy have guidelines for preserving relevant data if a “trigger event” such as a lawsuit or regulatory investigation is likely or in the process of occurring?
4. When faced with a “trigger event” does your plan account for the scope of the data needed and target only ESI relevant to the allegations of the claim?
5. Does your policy acknowledge preservation obligations stated in recent spoliation cases?
6. Does your policy color your organization in the best possible light, including statements that show your intent to preserve evidence because it is the right thing to do?
7. Does your policy take into account the “safe harbor” provisions of federal and state rules, which serve to protect your company from sanctions if during routine operations of your computer systems, electronic evidence is destroyed despite reasonable efforts to preserve it?
8. Does your plan use ESI preservation measures that are legally defensible?
9. Does your plan use legal hold notices identifying the specific scope and reason for the hold? Does it clearly outline the key players’ specific obligations and warn them that failure to comply could result in sanctions?
10. Does your plan identify the contacts in each department authorized to initiate a legal hold and is a standard operating procedure in place that ensures a uniform approach is used?
11. Does your plan allow for modification of legal holds?
12. Are you creating an audit trail detailing actions and facts that can reasonably defend your plan before an investigating agency or court?
13. Are you monitoring the expense of preserving evidence and looking at ways you can shift those costs to your opponent if the scope of ESI or other record retrieval exceeds the value of the claim?
14. Do you have in-house or outside counsel with expertise in facilitating communication among business units? Can they assist in creating and implementing a bullet-proof plan?
Qualcomm and Broadcom, two chip manufacturers for cell phones and other technologies have been battling it out in the courts for years over alleged patent infringements. Following the case was a lot like witnessing a slow moving hurricane. As the courts forced Qualcomm to bring more ESI to light, it fed the hurricane that delivered a devastating blow to everyone sitting on Qualcomm’s side of the courtroom.

The entire case hinged on proper e-discovery. In Qualcomm the lawyers avoided pursuing the investigation necessary that would have revealed the 46,000 relevant e-mails. Worse, the lawyers actually failed to find the large volume of relevant e-mails because effective investigation of electronically stored evidence may not have even been on their radar screen. Whatever the reason, the case should be required reading as a textbook case on what not to do in light of the new e-discovery rules and requirements.

During initial discovery Broadcom repeatedly asked for electronic evidence and testimony showing participation in the JVT (The short form for an industry group called the Joint Video Team). During preparation for a deposition of a Qualcomm witness, an outside lawyer found 21 relevant e-mails relating to the JVT from 2002. Despite Broadcom’s pointed discovery demands, these e-mails were not produced. At trial, the existence of the 21 e-mails was revealed during cross examination. Additional e-mails were produced, and the court ultimately held that the patents at issue were unenforceable due to the evidence of Qualcomm’s participation in the JVT in 2002. Qualcomm was held responsible for Broadcom’s costs and attorneys’ fees related to the litigation.

The first domino had fallen. Thereafter, it only got worse. Post-trial, Qualcomm was ordered to search its computer system and the computers of key custodians. The 46,000 e-mails were found using very basic search terms, such as “JVT,” proving an even deeper degree of failure on the part of inside and outside counsel than initially suspected.

Discussing the facts of the discovery disaster, the court pointed to “numerous warning flags” that should have alerted outside counsel to problems.

Like DNA evidence in a murder trial, ESI ultimately disproved Qualcomm’s patent infringement claim and revealed gross misconduct by the company. The courts determined Qualcomm selectively
Your Employees Have Malicious Mail: Employer E-mail Policies Can Nullify Attorney-Client Privilege

By Daniel J. Scully and Brian M. Ziff
Clark Hill PLC, Detroit, Michigan

E-mail has revolutionized the way business is conducted worldwide with its ease, efficiency, and speed. But it is also dramatically altering the legal landscape and the ways disputes between employers and employees are pursued and resolved.

The 2006 Amendments to the Federal Rules of Civil Procedure make it impossible to avoid electronic discovery issues and the potentially overwhelming consequences in virtually every legal issue. And there has been a profound impact in employer-employee issues, where the Amendments have now made information discoverable that would likely have been protected under prior versions of the Federal Rules.

A spate of recent court decisions sends a very clear message to employers regarding their e-mail policies. Given what can now be captured in the discovery process, all employers should strongly consider implementing a comprehensive, “no personal use” email policy, with full disclosure to and acknowledgement by all employees.

In New York State, a court determined recently that an employer’s e-mail policy can nullify attorney-client privilege. In Scott v. Beth Israel Med. Ctr., Inc., 2007 WL 3053351 (N.Y. Sup. 2007), a former employee filed six causes of action relating to his termination against his former employer. During the discovery process, the employee filed a motion for a protective order requiring the employer to turn over all e-mail correspondence between the employee and his personal attorney. Communicated via the employer’s e-mail system, the employee alleged his employer had sole possession of the correspondence.

The employee argued his e-mails were privileged under both the attorney-client privilege and work-product doctrine, but the employer countered that the e-mails were never protected because the employee could not have made the communications in confidence because of the employer’s e-mail system in violation of its e-mail policy. The employer further argued that the former employee waived his attorney-client and work-product privileges by generating these documents via the company e-mail system.

Significantly, the employer’s e-mail policy stated that its e-mail system should be used for business purposes only and that it reserved the right to access and disclose e-mails at any time, without prior notice. The policy was contained in the employer’s Human Resources and Procedure Manual, and although the employee denied any knowledge of the policy, the Court found his argument unconvincing as the policy was generally distributed and available to all employees.

To determine whether the employee’s correspondence was entitled to attorney-client privilege protection, the Court applied the test formulated by a federal bankruptcy court in re Asia Global Crossing, Ltd., 322 B.R. 247, 256 (Bankr. D.N.Y. 2005), a case involving corporate executives who had used their employer’s e-mail system to communicate with their personal attorney concerning actual or potential litigation with the employer, the owner of the e-mail system:

In general, a court should consider four factors: (1) does the corporation maintain a policy banning personal or objectionable use, (2) does the company monitor the use of the employee’s computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Following application of the Asia Global Factors, the Scott Court held that the employee did not have an expectation of privacy in his email communications, stating, “The effect of an employer e-mail policy...is to have the employer looking over your shoulder each time you send an e-mail. In other words, the otherwise privileged communication between [the employee]...and [his attorney]...would not have been made in confidence because of the [the employer’s]...policy.”

The Scott Court case concluded that a clear “no personal use” e-mail policy, which is communicated to all employees, effectively serves to waive any privilege or confidentiality rights those employees might otherwise hold. As a result of Scott and similar decisions, employers should consider implementing comprehensive “no personal use” e-mail policies, which encompass the four Asia Global factors. As demonstrated by these cases, such a policy may serve not only as a shield in daily business practice, but may also serve as a sword in subsequent litigation against current or former employees.

Dan Scully (dscully@clarkhill.com) and Brian Ziff (bziff@clarkhill.com) are litigation partners with Clark Hill PLC, USLAW NETWORK’s Michigan firm, which is headquartered in Detroit. Sarah Shaver, an associate with Clark Hill, contributed to this article. For more information on Clark Hill, please visit www.clarkhill.com or call (800) 949-3120.
Like personal relationships, business relationships sometimes turn bitter. And when they reach a point of contention where business partners view the differences as irreconcilable, former professional allies often consider a divorce, complete with recompense for damage done. It is here that business associates face a crossroads: Should they litigate or mediate?

Litigate or Mediate?

By Joe Epstein, ESQ and Lynne S. Bassis, ESQ

Litigation and mediation are very different approaches to business disputes. And every conflict requires a careful evaluation as to which path will be most effective. But when you or your client is standing at the proverbial fork in the road, weighing the pros and cons of both approaches, several factors can help point you in one direction or another. Litigation often makes the most business sense when:

- There is a need to establish legal precedent;
- Parties or companies fear appearing weak or need to set a standard to prevent future legal attacks;
- There is a likelihood of success;
- Little or no trust remains between the parties;
- Neither has a business or personal need to part amicably;
- Parties need immediate injunctive or other equitable relief.

Absent these six factors, before taking your associates-turned-adversaries to court, you may want to carefully consider your options with a mediator. In certain situations, business mediation may prove more efficient and cost-effective than engaging in no-holds barred legal warfare, which could wage on for months or years and dig deep into the pockets of everyone involved. If disputants place a high value on the business relationship and hope to restore a mutually beneficial partnership, then mediation may re-build that bridge, without burning as many financial ones as heading to court.

Other factors that may make mediation the right choice are:

- The risks of litigation are substantial;
- The direct and indirect litigation costs are substantial;
- The facts are clear and discoverable;
- Maintaining productive relationships post mediation is desirable.

Here are a few examples of when and where a mediation strategy can be deployed to keep you or your clients out of court.

PRE-LITIGATION: SIMILAR PRIORITIES

In situations where some degree of trust remains among partners, pre-litigation mediation may offer the best opportunity for resolution. This approach works best if all parties have some similar priorities. If key stakeholders are willing to honestly discuss the situation in the controlled setting of mediation, parties desire a quick and cost-effective solution, or they hope to restore the business relationship, mediation may be a strong fit.

In pre-litigation mediation, everyone involved must willingly fully disclose their perception of the situation and agree they can engage in productive dialogue. If legal counsel attends, they must take a problem-solving approach and work collaboratively and confidently through the negotiations to produce a fair and just compromise.

Cases that lend themselves more readily to pre-litigation mediation are those involving professional associations, family firms, and suppliers and customers. Certain types of cases — employment issues, professional liability, contracts, and potential class action situations — are also strong candidates for alternative resolution strategies.

EARLY MEDIATION: CREATIVE STRATEGIES AVOID COURT

Those who have just filed a lawsuit can also consider early mediation. In these cases, communication breakdowns and distrust often make it necessary for the parties to gather information through the formal discovery process and start to build their cases. But once the decision to engage in early mediation is made, they can direct counsel to take only depositions from key players and postpone taking statements from those not directly involved. This approach can defer the costs of a full scale legal battle and still provide a reasonable settlement.

Early mediation allows stakeholders to explore creative solutions to the conflict and potentially reconcile critical business relationships. As with pre-litigation, at this point some level of trust and shared goals must exist between parties. They must remain open-minded to creative solutions and engage in solution-oriented dialogue. This is especially relevant if they hope to maintain an on going relationship.

Since a lawsuit has been filed, it’s highly likely communication has broken down.
Mediators can play an invaluable role at this stage, engaging the various stakeholders, mending trust fences where possible, and guiding parties to an agreed upon discovery plan before convening the mediation.

One cautionary note needs to be raised regarding early mediation. While some formal discovery prior to mediation is desired, disputants may need assistance crafting that plan. Some parties have enough trust to handle this on their own. Other fighting factions harbor too much distrust to cooperatively form a discovery plan and may require the assistance of outside counsel or the mediator.

Mediation remains an option for disputants throughout the course of a case, from its early days before litigation develops and all the way through trial proceedings.

**REFINING YOUR DECISION TO MEDIATE OR LITIGATE**

Businesses are becoming more and more sophisticated in their cost/benefits analysis of litigation verses mediation. In certain cases, litigation is clearly the best option. This is especially true of corporations involved with multiple suppliers, vendors and other partnerships. Bending too easily to an out-of-court settlement may prompt potentially predatory plaintiffs, motivated by monetary gain, to start filing frivolous lawsuits. Companies caught in the early days before litigation develops and all the way through trial proceedings.

Some companies consider getting a few courtroom wins under their belt to be good business. This approach, when successful, discourages a deluge of lawsuits by setting legal precedents and building a high financial barrier that will make it difficult for plaintiffs to get to the mediation table. If company leaders and counsel are confident their strategy will work best with their case. The mediation must know that a cookie-cutter approach will not lead to a fair settlement that is satisfactory for all parties. He or she must possess the flexibility and skills to design a game plan that fits the issues of the case and the unspoken expectations of the disputing partners. Keeping this in mind, consider interviewing prospective mediators, get references and gather information about their track record to ensure your choice can produce the best possible resolution.

**PREPARING FOR MEDIATION**

Preparation for mediation requires the same foresight and strategy as preparing for trial. Astute counsel will engage in the same preparation and use the same tools of persuasion to carve an effective path to resolution. Mediation themes, theories, clients, and experts are all part and parcel of an effective mediation. The client should be a significant focus and participant in prepping for the mediation — they often exert more influence on the other disputants than anyone else present at the mediation table. And mock mediations, like mock trials, are invaluable in the process.

A detailed mediation checklist is a hallmark of a good mediation strategy. Your checklist should contain at least the following:
- Pre-mediation persuasion strategy;
- Communication and persuasion strategies targeting the mediator before and during the mediation;
- Realistic risk analysis with a best alternative to a negotiated agreement and a worst alternative;
- Process to ensure all parties have the information they require for a productive mediation;
- Plan to handle relationship and emotional components in the conflict;
- Participants at the mediation table and how it will be set;
- Identification of stakeholders who might have influence or possess veto power of terms of settlement and if and how they should be engaged.

Preparation for mediation requires significant attention and analysis, analogous to preparing for trial. It requires a thoughtful plan and a carefully considered strategy for success.

Business mediation offers the opportunity for a dynamic and creative resolution. In mediation, parties can engage in a collaborative process with an open file philosophy. Businesses can use a facilitative approach that encourages open and candid dialogue that opens the door to a greater sense of fairness, maintains relationships, and encourages creative solutions to complex conflicts. When mediation is the right choice for you or your client, negotiators and partners in conflict can build a bridge to resolution rather than scorching the earth with full-blown litigation.

**Crafting your Mediation Strategy**

Companies considering mediation should expect a custom designed strategy that will work best with their case. The mediation must address the nuances of the parties involved, the legal, business, and personal issues in play, the personalities of the disputants, business and relationship history, short- and long-term goals, and much more. Choosing mediation as an alternative route to dispute resolution and a mediator to handle that resolution requires a careful analysis. (See the sidebar for 13 Considerations in Creating a Mediation Strategy.)

Mediators come in many different varieties, levels of training and expertise. When choosing a mediator, look for a professional mediator who is proactive, creative, experienced, facilitative, insightful, instinctive, empathetic and assertive. The top notch mediator knows that a cookie-cutter approach will not lead to a fair settlement that is satisfactory for all parties. He or she must possess the flexibility and skills to design a game plan that fits the issues of the case and the unspoken expectations of the disputing partners. Keeping this in mind, consider interviewing prospective mediators, get references and gather information about their track record to ensure your choice can produce the best possible resolution.

**In crafting a mediation strategy, consider these 13 questions:**

1. Is this an appropriate case for pre-litigation or early dispute resolution?
2. What would be the best time for this mediation?
3. How can parties use their mediator to assist in the exchange of information necessary for a productive mediation?
4. Who should be at the mediation?
5. How can information, themes, interests, needs, and positions be creatively, efficiently and persuasively presented?
6. How do parties and the mediator handle fear at mediation?
7. Should pre-mediation caucuses, site visits or staggered starts be used?
8. Should there be joint sessions and, if so, when should they occur, who should speak and how should they be structured?
9. Should there be party caucuses, negotiator only caucuses, and/or principal only caucuses?
10. In multi-party cases should there be pre-mediation meetings with the plaintiff’s side, with the defense side or, in a multi-defendant case, should the mediator meet with each defendant separately or with certain combinations of defendants?
11. Should co-mediation be used? If so, what blend of skills and attributes should the parties be seeking?
12. In multi-party cases or multi-issue cases, should settlement pods be used with appropriate participants?
13. What are the underlying interests, needs, and motivations of the key stakeholders and how can they best be explored during mediation?
Legal malpractice claims are an inherent risk of doing business for lawyers in every jurisdiction. In 2005, an American Bar Association study showed that each year attorneys have a 4 to 17 percent chance of being sued for legal malpractice, depending on their jurisdiction and type of practice. While personal injury cases lead the field in malpractice claims, accounting for about 30 percent of all claims, all lawyers, regardless of practice, are at risk for malpractice claims. And while these surprise attacks are never anticipated, there are steps you can take to prevent or reduce your chances of facing a malpractice suit.

CLIENT TYPES AND TEMPERAMENTS

Malpractice claims often arise from a combination of a weak case and unrealistic client expectations regarding the anticipated outcome. Lawyers must be clear with their clients, outlining both the methods of communication and resultant work product, but also in managing the client’s expectations of results.

Some clients are more emotionally invested and feel they were severely wronged. Even in business cases, the feeling is “this is personal.” They expect damages and recovery beyond what the facts support. It is these clients that lawyers must carefully examine. These are the clients more likely than not to turn on their former advocates.

Attorneys must not only vigilantly assess the case, they must also pay attention to the client’s temperament and state of mind. Keep a watchful eye out for the following factors:

- Past litigation history;
- Type of claim — a client willing to sue another professional may also be willing to sue his attorney;
- If other attorneys have declined to take the case or terminated representation;
- Argumentative or confrontational demeanor;
- An unwillingness to listen to the advice they’ve sought.

Any of these factors should cause pause and reconsideration. If you choose not to represent a prospective client, a non-engagement letter should be sent quickly to nullify any subsequent claims.

CLEAR AND CONSISTENT COMMUNICATION

Many malpractice claims arise out of communication gaps and gaffes. Make sure early that your client understands your firm’s communication protocol and that you understand your
client’s expectations for communication. Communication expectations must be established and managed on both sides of the case equation. Well-crafted engagement letters should outline and reinforce the communication procedures and processes you will follow in a case. Further, they should include comprehensive descriptions of your scope of services, including what you will and will not provide, billing system, fees, hourly rates of all individuals on the case, and the right to dispute legal fees — all need to be included in your engagement letter.

Client updates are imperative and should document, at regular intervals, the strategy, procedures, progress, problems, settlement offers, conferences, and, if necessary, options for appeal. All decisions and conversations should also be recorded in memos or letters to the client.

CASE SELECTION
Malpractice claims arise more frequently in small law firms, but larger firms are certainly not immune. In litigation outside your legal expertise, where multiple parties are involved, the risk of malpractice increases exponentially, even for the most diligent attorneys. One of the first steps any lawyer must take before accepting a case is to comprehensively assess the proposed case to identify the issues, theories and discovery demands anticipated over the course of the representation. This should also take into account the demands of an attorney’s existing case load. Clearly, such an assessment will be more difficult and less accurate for an attorney practicing outside his field of specialty.

While taking that big case with unlimited fee and prominence potential may be intoxicating, attorneys must be circumspect and highly sensitive to taking on work that is outside of either their or their firm’s competencies.

SCHEDULING
Even attorneys working a case within their area of expertise risk malpractice through missed deadlines. Before taking a case, attorneys must evaluate their entire caseload, including time restraints and available resources. When attorneys or staff members are overextended, missed deadlines grow in prevalence. Similarly, busy lawyers can also fail to fully explore a case and all the aspects at play. Missed deadlines and insufficient pre-case analysis are two of the leading causes of malpractice actions and smart attorneys must avoid those traps.

Many missed deadlines are caused by an inadequate calendaring system. To ensure you never miss a critical deadline, maintain an active calendaring system and regularly assess your files. There are many file management systems currently on the market, and they can mitigate missed deadlines.

CONFLICTING INTERESTS
Un-checked conflicts can also set the stage for a malpractice claim. Conflict checks should be repeatedly and routinely performed prior to meeting a prospective client, as a condition of representation, and when a new party is added to a case. The Rules for Professional Conduct contain multiple provisions addressing conflicts of interest. Although a violation of the RPC does not establish legal malpractice per se, many jurisdictions will admit proof of a violation to help establish such a claim. Further, many courts across the nation have held that an attorney is not entitled to payment for services rendered while a conflict of interest existed.

Conflict systems can significantly reduce your chances of stepping into this perilous situation. If a potential conflict is found, an attorney should advise the client of it without delay. The attorney should also recommend that the prospective client seek advice from separate counsel. You will need to carefully examine the clients and cases to determine if representation of multiple clients will impact your ability to fairly represent each client. Confirm that the representation is not in violation of any existing laws or regulations, and review the anticipated claims of the case to ensure that the clients are not in a position to assert claims against one another. In the event each of these factors is addressed, informed consent must be obtained from the client, in writing, as to the representation and potential for conflict.

CLAIMS FROM NON-CLIENTS
In many transactional cases, it is possible for third parties, especially those not represented by counsel, to assert and maintain reliance-based claims upon an attorney’s representations. The most telling example of this occurs in estate planning. Over the past two decades, many states abandoned the “strict privity” rule and now permit non-client beneficiaries to bring malpractice actions against an estate planning attorney. In most instances, the attorney has never met or interacted with these non-client plaintiffs. Therefore, the attorney must not only be mindful of the interests of the client-testator, but also of potential non-client beneficiary interests that can put him and his client at risk.

To avoid claims by non-clients, it is essential to identify to whom a fiduciary duty is owed and any parties that may reasonably rely on your conduct. Where such duties to non-clients exist, document the file by confirming the specific requests and interests of your client. Moreover, do not undertake tasks on behalf of non-clients, such as the preparation of forms or filing of papers. This will create duties to the non-client without the protections afforded through formal client relations such as the Retainer Agreement, Letter of Engagement or similar protection letters.

FEE DISPUTES
While fees should have been discussed and agreed upon at the outset, issues concerning the non-payment of legal fees may arise. Consistent and detailed billing procedures that include internal protocols to address, at an early stage, outstanding invoices with clients, can reduce or even sidestep fee disputes. But, when a client does initiate a fee dispute, as a general rule, attorneys and law firms should avoid a fee-related law suit. The costs to the firm can far exceed the actual fee amount, once non-billable time demands and the impact on insurance premiums are factored in. Before making a decision to act, law firms should conduct a cost-benefit analysis to assess the costs of defending a legal malpractice claim.

Malpractice claims for lawyers are a very real risk, as the data asserts, but there are many steps lawyers can take to significantly reduce the potential that they will be involved in a malpractice claim. Many avoidance strategies are common sense — managing the expectations of your clients, communicating clearly and regularly, focusing on your core competencies, and realistically assessing your case load, chief among them. Applying the same circumspection and precision at the case evaluation stage as you apply during them can go a long way in keeping malpractice claims at bay.

Karen Painter Randall (kran dall@connellfoley.com) is Co-Chair of the Professional Liability and Tort Law Department at Connell Foley, USLAW NETWORK’s New Jersey firm. Andrew Sayles (asayles@connellfoley.com) is an associate with Connell Foley. For more information on Connell Foley, please visit www.connellfoley.com or call 973.535.0500.
Each year, rising health care premiums deliver a staggering blow to corporate budgets. And while there are many factors pushing prices higher, the uniquely American philosophy of “work hard, play hard and eat hearty” has done its part in driving up premiums.

Employers have long looked for creative ways to motivate employees to adopt healthy lifestyles and break unhealthy habits to help lower corporate health insurance bills. With health care spending in the United States expected to reach $2.2 trillion in 2008, employers are feeling more of a sense of urgency to do so now than ever before.

Today, most Americans receive their health insurance through their employers, with the employee contributing a portion of the costs each pay period. The weight of ballooning premiums engulfing small and large businesses alike moved the federal government recently to pass a new diet of health care provider regulations. Issued in July 2007 by the U.S. Department of Labor, the rules allow employers to put in place wellness programs that integrate a reward/punishment monetary incentive to encourage employees to make healthier lifestyle choices. The goal: motivate employees to cut the fat, drop bad health habits, and make fewer trips to the doctor annually and over the course of their employment.

As an example of how the new rules work, an employer may now reward employees with a discount on their health insurance premiums for receiving a low score on an annual cholesterol test. Conversely, an employer is now permitted to assess a surcharge to the premium for employees who smoke.

**HIPAA REGULATIONS GUIDE WELLNESS IMPLEMENTATION**

The Health Insurance Portability and Accountability Act (HIPAA) providing the guidelines for implementing incentive-based health costs management offers two types of wellness programs. The less restrictive and less controversial is the “process-only” plan, which rewards all employees who participate in a wellness program regardless of results. For instance, employers may reimburse costs for membership in a fitness center, even if employees never use it, or if they use it, all they do is eat power bars and watch TV while lounging on a stationary bike.

The second type, a “results-based” wellness program, requires employees to demonstrate results if they want to earn discounts or avoid surcharges. These programs are also more heavily regulated. Under these guidelines, for example, an employer may opt to waive the $250 annual deductible for those employees who have a body mass index within a certain healthy range (e.g., 19 to 26). Additional restrictions for results-based programs include:

- **Rewards may not exceed 20 percent of the cost of coverage under the plan;**
- **The program must be reasonably designed to promote health or prevent disease;**
- **Employees (or their dependents for such plans) must have an opportunity to qualify for the benefit at least once per year;**
- **Reasonable alternatives must be offered to those who could not otherwise qualify for the benefit due to a disability; and**
- **Plan materials must disclose all the terms, including availability of reasonable alternatives.**

**BEWARE FEDERAL, STATE AND LOCAL LAWS**

The new regulations are careful to point out that any wellness program must comply with all other state and federal laws, including the Americans with Disabilities Act. The wellness regulations also continue to prohibit discrimination against employees with prior illnesses, poor medical histories, number of files claimed and unfavorable genetic information. Some states may also have a “lifestyle statute,” which forbids an employer from terminating employment because of an employee’s lawful, off-premises, after-hours activities, such as smoking. A careful review of state and local laws should be undertaken in conjunction with any wellness program initiative.

Crafting a wellness program that reduces employer health care costs and complies with any laws associated with it requires thorough legal research. Before starting an exercise program, physicians recommend getting a check up to assist individuals with tailoring a workout to achieve their fitness goals. The same principle holds true for any employer seeking to start a wellness program. HIPAA can serve as an effective tool for containing costs, but to reap the maximum benefits and minimize risks, employers should seek legal counsel to assess the range of regulations in this arena before starting a wellness program.
After the well-publicized product recalls of consumer products over the past year, a ground swell of support for strengthening the consumer protection laws globally, as well as in the United States, has formed. Reacting to public opinion and press reports, Congress has proposed legislation with severe penalties for companies failing to notify and report product defects. Emboldened by strong public opinion and pressure from consumer protection watchdogs, the Consumer Product Safety Commission (CPSC) is acting quickly to enforce existing notification and reporting requirements. In this environment of heightened consumer awareness, the stakes are high for manufacturers, distributors and retailers and the speed with which they notify and report under the current rules is more critical than ever.

Both houses of Congress have proposed versions of legislation to strengthen the CPSC’s enforcement powers by re-authorizing the CPSC and sharply increasing its resources. Last December, the House of Representatives unanimously passed the Consumer Product Safety Modernization Act. The Senate Commerce Committee approved a harsher competing version, “The CPSC Reform Act of 2007.” (At this writing, the full Senate has yet to act on the bill.)

While there are differences in the two bills, the passage of either in its present form would represent a monumental increase from the current maximum penalty for failure to report product safety issues. Today, that penalty is capped at $1.825 million.

WHAT THE BILLS WOULD CHANGE

The House bill is intended “to establish consumer product safety standards and other safety requirements for children’s products and to reauthorize and modernize the Consumer Product Safety Commission.”

The House Consumer Product Safety Modernization Act calls for:
- More stringent lead standards for children’s products;
- Mandatory safety standards for toy products;
- Mandatory pre-market third-party testing of children’s products;
- Tracking labels to aid recalls on products and packaging of children’s products;
- Prohibiting the sale and export of recalled products that violate U.S. consumer product safety rules and makes the domestic sale of such products a prohibited act;
- Limiting federal pre-emption, prohibiting the CPSC from using agency rulemaking actions to preempt state common law claims;
- Increasing potential penalties by more than 500%, increasing the cap on civil penalties from the current $1.825 million to $10 million;
- Creating a new power for CPSC to immediately share information about dangerous products with the public and ensures state public health agencies are kept informed;
- Significantly increasing CPSC resources to hire additional staff and modernize the testing lab.

The Senate bill makes many of the same changes, but also adds:
- Significant increases of public disclosure of company information and eliminating protection from disclosure of most information submitted to the CPSC;
- Expanded CPSC authority over corrective actions, including recalls;
- Disclosure to the CPSC of the manufacturer, retailer, distributor, and contractor involved with a product or substance;
- Increases civil and criminal penalties with the cap on civil penalties raised to $20 million and expanded criminal penali-
ties for officers and directors;
• Termination of import licenses for repeat offenders;
• Exportation of nonconforming consumer products or banned hazardous substance;
• Prohibition on the sale, distribution, or import of a product bearing false certification by a nationally recognized laboratory;
• New enforcement authority for State Attorney Generals;
• Disclosure of information to federal, state, local or foreign government agencies; and
• Whistleblower protection for employees of manufacturers, private labelers, distributors, and retailers.

AVOIDING SUBSTANTIAL PENALTIES
In one form or another, legislation will surely pass and increase the financial impact for manufacturers and importers of products across the spectrum for failing to quickly report safety issues to the CPSC. Understanding and reacting in real time to reporting obligations is critical for companies in this new era of enforcement. The statutes and regulations encompassing consumer product safety reporting obligations are convoluted, complex, and vague. Companies must heighten the awareness of key notification and reporting provisions or risk substantial penalties.

Reporting Obligations:
The Consumer Product Safety Act establishes reporting requirements for manufacturers, importers, distributors and retailers of consumer products. The Consumer Product Safety Commission must be notified immediately if such a company obtains information which reasonably supports the conclusion that a consumer product meet any of the following three criteria: (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied; (2) contains a defect which could create a substantial product hazard as defined in the regulation; or (3) creates an unreasonable risk of serious injury or death.

The term “substantial product hazard” is defined as a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public or a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of risk or otherwise) creates a substantial risk of injury to the public.

Even if a product complies with all applicable CPSC standards, the statutes require a company to report to the CPSC when it obtains information that one of its products creates an “unreasonable risk of serious injury or death” or contains a “defect” which could create a “substantial risk of injury to the public.”

“Unreasonable Risk of Serious Injury or Death” defined:
In determining whether a product presents an “unreasonable risk,” a company must “examine the utility of the product, the utility of the aspect of the product that causes the risk, the level of exposure to consumers to the risk, the nature and severity of the hazard presented, and the likelihood of resulting serious injury or death.” The manufacturer must also “evaluate the state of manufacturing or scientific art, the availability of alternate designs or products, and the feasibility of eliminating the risk.”

Defects which Could Create a “Substantial Risk of Injury to the Public” defined:
CPSC regulations create a broadly-based obligation for companies to report products which contain a “defect which could create a substantial product hazard.” This section of the statute defines a “substantial product hazard” as a product defect which, because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk or otherwise creates a “substantial risk of injury to the public.”

In determining whether the risk of injury associated with a product is the type of risk which will render a product defective, the Commission and staff consider the following:
• Utility of the product involved;
• Nature of risk of injury which the product presents;
• Necessity for the product;
• Population exposed to the product and its risk of injury;
• Commission’s own experience and expertise; and
• Case law interpreting Federal and State public health and safety statutes; and
• Case law in the area of products liability.

The applicable regulations confer a reporting obligation substantially broader than a company’s obligation to recall or remediate a product. The reporting obligations arise when a company obtains information that a product has a defect which could create a substantial risk of injury to the public. It is further noteworthy that the regulations require that any doubts be resolved in favor of reporting to the Commission.

TIMING OF REPORTS
CPSC regulations provide that a firm must “immediately” report to the Commission if it receives information that one of its products could create a substantial risk of injury to the public. Immediate is defined as 24 hours. If information is not readily reportable, companies may conduct a “reasonably expeditious investigation to evaluate the reportability of the information.” The regulations point out that any investigation “should not exceed ten days unless a firm can demonstrate that a longer period is reasonable.”

If an employee of the company finds a product to have the potential for risk or harm, the regulations provide that five days should be the maximum reasonable time for information to reach the Chief Executive Officer or official responsible for complying with the reporting requirements.

PENALTIES SOUGHT BY COMMISSION
The Consumer Product Safety Commission may assess a penalty for violating the reporting requirements. The maximum amount of civil penalties that can be sought will likely increase to at least $10 million with the passage of the new legislation.

CONCLUSION
Congress’s reaction to the unprecedented number of consumer product recalls in 2007, based on violations of product safety standards, will no doubt lead to additional standards and product requirements, as well as substantially higher penalties for violation of product and reporting requirements.

To prepare, companies in all industries with products of all types must thoroughly understand their options and requirements under CPSC regulations today and in the future. This is a fast-changing landscape—keep a close eye on the wrangling in Washington, D.C. about this issue and the final bill that comes to pass, as it will have significant repercussions and require companies to put in place safety nets and new protocols for product information, as well as closely examine their own manufacturing and management systems. Adopting a formal process for data review and dedicated responsibility and authority for assuring compliance with current, and potentially upcoming legislation will reduce the substantial risk of exposure that pending legislation is likely to confer.

Neil Goldberg, Cheryl Possenti and Paul Steck are attorneys with Golberg Segalla, LLP, USLAW NETWORK’s Upstate New York member firm. Neil is past president of the Defense Research Institute (DRI). He serves on the Board of Directors of the Products Liability Advisory Committee (PLAC) and is on the Advisory Board of the Bureau of National Affairs (BNA) Product Safety & Liability Reporter. Cheryl serves as counsel to two of the world’s foremost makers of toys and children’s products, and is national coordinating counsel for certain recalled products. Paul focuses on products liability litigation. Prior to obtaining his law degree, he was a regulatory specialist for a consumer products testing laboratory, where he evaluated product designs and consulted on safety issues for children’s products, as well as the regulatory requirements for domestic and international distribution of various consumer products. They can be reached at Goldberg Segalla LLP at www.goldbergsegalla.com and 716-566-5401.

www.goldbergsegalla.com and 716-566-5401.
Desirable and diverse North Carolina, from the Wright Brother’s famous flight at Kitty Hawk on the beautiful Outer Banks to the Biltmore mansion in Asheville in the Blue Ridge Mountains, has become the nation’s 11th most populous state. As the only USLAW NETWORK member in the state, Poyner & Spruill is a full service firm with offices in Raleigh, Charlotte, Rocky Mount, and Southern Pines. With more than 100 attorneys, Poyner & Spruill offers a practice spanning every state and federal district in the state. The firm’s corporate, regulatory, and litigation practices are wide-ranging and closely tied with business and governmental concerns throughout the state. Historically, firm attorneys have served as leaders of government and civic institutions, and today that tradition of involvement continues with a new generation of partners.

Those unfamiliar with the state may be surprised to find that North Carolina is the third most popular “boomer retirement state,” preceded only by Florida and Arizona. Consequently, Poyner & Spruill has seen a notable rise in acute care, long term care, and assisted living industries, as well as a boom in “retirement real estate” development along the Inner and Outer Banks and in the western mountains. The firm’s ten-attorney healthcare section is uniquely positioned to assist residential healthcare providers, physician groups and outpatient clinics with matters in the corporate and litigation contexts, including privacy issues, wage and hour concerns, Certificate of Need proceedings, and Medicare/Medicaid fraud and abuse issues. Healthcare and corporate clients also appreciate the convenience of working with land use, real estate, employee benefits, and construction litigators all in one firm. Serving many restaurant and fast-food chains based in North Carolina and those with units located here, they offer a full range of services, including lease negotiations, real estate development, employment law issues, zoning and land use issues, product defense, and premises liability defense.

The firm has a sophisticated and pro-active Bankruptcy and Creditors Rights practice which transcends state boundaries as their professionals serve the needs of a broad array of national leader, manufacturer and corporate clients handling all of their needs in the insolvency area from workouts with problem credits to bankruptcy case representation to litigation defense in every federal jurisdiction nationwide.

While Southern in “roots” and manner, the firm is cutting-edge in its use of technology. The firm launched e4Close for our banking and mortgage clients to help them manage the foreclosure process and dispose of real property. The firm’s proprietary e4Close system has decreased clients’ costs by 30% on foreclosure-related legal fees and generated far more accurate reporting than ever before, and has spawned a new system of extranet services for major clients. These dedicated websites enable clients to provide data and documentation on a matter via a download and track progress on a daily basis. This innovative use of technology sets the firm apart from others. Cutting edge technology also streamlines their litigation and makes the client an integral part of the litigation team.

Culturally, the firm is an inclusive place, with attorneys who hail from different states and religious and ethnic backgrounds. Attorneys say they enjoy practicing at Poyner & Spruill because of the “collegial spirit” and the “top-shelf legal minds” working here.

As the new century unfolds, Poyner & Spruill is positioned to offer outstanding legal representation in a cost-efficient and client-responsive manner. To get to know them better, please visit them online at www.poynerspruill.com.

FIRM FACTS:
- North Carolina Member Firm
- Full service law firm with special emphasis on corporate law, regulatory issues, and commercial litigation
- Offices in Raleigh, Charlotte, Rocky Mount and Southern Pines, NC
- Founded in 1986
- 110 attorneys
- www.poynerspruill.com

KEY CONTACTS:

Judy Thompson  
704.342.5299
jthompson@poynerspruill.com

Randy Adams  
252.972.7094
rradams@poynerspruill.com

Pat Fogarty  
704.342.5339
pfogarty@poynerspruill.com
Welcome New Members

Johnson Spalding Doyle, West & Trent, L.L.P.

Firm Facts: Houston Member Firm
Ligitation firm focusing on product liability, pharmaceutical, commercial, nursing home, medical, and personal injury litigation.
28 attorneys
www.js-ilp.com • (713) 222-2323

Key Contacts:
Brian P. Johnson • (713) 222.2323
bjohnson@js-ilp.com
John E. Spalding • (713) 222.2323
jspalding@js-ilp.com
T. Christopher Trent • (713) 860.0525
trent@js-ilp.com

Whether in or out of the courtroom, Johnson Spalding utilizes its attorneys’ powers of persuasion for successful outcomes in every aspect of their legal practice — motions before the court, mediation presentations, and scholarly legal writings — incorporating a combination of intellectual curiosity and decisiveness that enables us to focus on the very heart of the case.

Johnson Spalding, which became a USLAW NETWORK member firm in 2008, offers clients deep experience in complex commercial and civil litigation and a lengthy tenure representing some of the most recognizable companies in Corporate America including:
- Alcon Laboratories, Inc.
- Ameristar
- Aon Corporation
- Bridgestone/Firestone North American Tire, LLC
- Chrysler Corporation
- GlaxoSmithKline
- Goodyear Tire & Rubber Company
- KB Home
- Pacificare Health Systems
- Wyeth
- Yokohama Tire Corporation

Ultimately, success in litigation centers around the ability to convince members of the community that your position is the right and just one. The lawyers at Johnson Spalding have a well-established record of courtroom victories on behalf of their clients. Partners in the firm pride themselves on their abilities to successfully try cases involving different types of litigation, including product liability, pharmaceutical, commercial, nursing home, medical malpractice, and personal injury litigation.

Rincon Mounts, P.C.

Firm Facts: El Paso Member Firm
Full service litigation firm with emphasis on product liability and design, industrial safety, toxic tort, breach of fiduciary duty, and rail and road transportation.
Founded in 2006
5 attorneys
www.rinconmounts.com • (888) 532-6630

Key Contacts:
Carlos Rincon
jrincon@rinconmounts.com
James A. Mounts III
jmounts@rinconmounts.com
John Anderson
janderson@rinconmounts.com

In 2006, after successful careers as partners in large defense firms, Carlos Rincon and James Mounts co-founded Rincon Mounts, P.C., motivated by a desire to provide better service to clients in a smaller firm that offered greater opportunities for client collaboration and attention.

Today, Rincon Mounts handles a wide range of cases, ranging from complex contractual and fiduciary claims to the defense of multiple wrongful death, catastrophic injury, wrongful termination and FELA matters. The firm’s attorneys are experienced in evaluating, and trying to verdict, cases that include product design, industrial safety, toxic tort, tractor trailer and train accidents, and breach of fiduciary duty issues.

Rincon Mounts works with its clients to develop an early evaluation of each case and the development of case objectives and acceptable budget parameters. Rincon Mounts represents some of West Texas’ largest employers, including The City of El Paso and Ready One Industries. Notably, the firm serves as panel trial counsel for many organizations including Coca-Cola Enterprises, Inc., Union Pacific Railroad, SAIA Motor Freight, and national trucking underwriters such as Great West Casualty and Liberty Mutual Insurance Company.

Many of the firm’s lawyers are AV rated by the Martindale-Hubbell legal directory, have been recognized as Texas Super Lawyers in civil defense litigation, and hold positions of leadership with national defense bar associations, such as the Defense Research Institute. Additionally, Rincon Mounts lawyers have written extensively for a variety of legal publications and been featured speakers at national and statewide legal symposiums sponsored by the Federation of Defense and Corporate Counsel, DRI, and the State Bar of Texas.

Thorndal, Armstrong, Delk, Balkenbush & Eisinger LLP

Firm Facts: Nevada Member Firm
Full service litigation firm from trial to appellate cases, with special focus on complex litigation, general business, commercial law, and industrial insurance defense.
Founded in 1971
30 attorneys
www.thorndal.com • (702) 366.0622

Key Contacts:
Brian K. Terry
bterry@thorndal.com
Paul F. Eisinger
peisinger@thorndal.com
James J. Jackson
jjackson@thorndal.com

One of USLAW NETWORK’s newest member firms, Thorndal, Armstrong, Delk, Balkenbush & Eisinger has deep Nevada roots, having been in business in the State for more than 35 years. Founded in Las Vegas in 1971, the firm has grown from two lawyers to nearly thirty. It expanded its statewide services in 1986 with the opening of the northern Nevada office in Reno. An additional office was opened in Elko in 1996 to further satisfy client demand in the northeastern portion of the state.

The firm’s lawyers have diverse talents and broad experience in all civil matters. In addition to experiencing litigation cases through trial and to the appellate level, the firm’s attorneys have served as arbitrators or mediators in literally thousands of cases. These varied experiences enhance the firm’s ability to understand the needs of its clients and represent their interests throughout Nevada in both state and federal court.

Thorndal counts among its clients:
- Bechtel Nevada Corporation
- Black & Decker
- Caesars Entertainment
- Domino’s Pizza
- Goodyear Tire & Rubber Co.
- The Wackenhut Corporation
- Toys “R” Us, Inc.
- United States Department of Energy
- Mattel

With a strong emphasis in civil defense litigation, including expertise in complex litigation, general business, commercial law, and industrial insurance defense, Thorndal, Armstrong, Delk, Balkenbush & Eisinger provide clients with thorough, efficient and effective legal services.
USLAW NETWORK attorneys Marc Williams, partner with Huddleston Bolen, our West Virginia member firm, and Matt Cairns, partner with Ransmeier & Spellman, our New Hampshire member firm, continue that tradition of professional leadership and commitment.

Marc was recently named DRI’s president-elect. In 2008-2009, he will lead the organization as president. Prior to serving in this capacity, he previously served as the Membership Chair for DRI, as chair of the 2005 DRI Annual Meeting in Chicago, as a member of the DRI Board of Directors and as a DRI State Representative.

As a trial lawyer with a complex litigation practice, Marc has handled over 50 jury trials in both state and federal courts. His practice includes extensive experience in the trial and appellate defense of toxic tort, professional liability, product liability, premises liability, admiralty, insurance, employment law and complex commercial litigation matters. He has wide-ranging expertise in handling class action and mass joinder lawsuits alleging environmental and mass tort claims.

Matt Cairns, a partner in our New Hampshire member firm, Ransmeier & Spellman’s litigation practice group, and his practice focuses on products liability, commercial litigation, defense of sexual torts, general litigation, and general corporate representation.

A number of USLAW NETWORK members have also held DRI’s highest post, including Neil Goldberg of Goldberg Segalla and Sheryl Willert with Williams Kastner.

In addition to DRI, USLAW NETWORK members have a storied reputation for leadership among other national organizations, including FDCC, IADC, the ABA, and others.

Will Cleveland, a partner at Buist Moore Smyth & McGee PA, is a former International Association of Defense Counsel (IADC) president.

John W. Ames, a member of Greenebaum Doll & McDonald PLLC will be installed as president of the American Bankruptcy Institute (ABI) during the April Annual Meeting.

Gerald W. Weedon, a partner with Marks Gray PA, served as president of the Association of Defense Trial Attorneys (ADTA) from 2003 to 2004. Marks Gray partners James C. Rinaman, Jr. and H. Franklin Perritt, Jr., are also past presidents of ADTA.

Victor M. Halbach, Jr., also a partner with Marks Gray, has served as president of the Federation of Defense and Corporate Counsel (FDCC) from 1996 to 1997 and chair of the Board of Directors from 1997 to 1998.

Lee L. Piovarcy, from Martin, Tate, Morrow & Marston, P.C., is president-elect of the Trucking Industry Defense Association (TIDA) following six years on the organization’s board.

Roberta Cooper Ramo, a partner with Modrall Sperling PA in New Mexico is past president of the American Bar Association (ABA) and president-elect of the American Law Institute. She was the first woman in history to head the ABA, the world’s largest organization of attorneys.

Mary Torres, also a partner with Modrall Sperling, is currently treasurer of the National Conference of Bar Presidents and will assume her seat as president-elect of the National Conference of Bar Presidents in August 2008, and president in 2009.

Jean Lawler, managing partner with Murchison & Cumming LLP, is a past president (2004-2005) of the Federation of Defense & Corporate Counsel (FDCC).
LINDA THOEDE, Corporate Counsel with Clear Channel, a global communications company, personifies professionalism and leadership in the law.

Active with the Association of Corporate Counsel, the State Bar of Texas, the San Antonio Bar Association and serving as a San Antonio Bar Foundation Board Trustee, Linda also serves as a USLAW Client Advisor, guiding the organization on how it can best meet the needs of clients with wide-ranging and geographically dispersed legal issues.

In her experiences with numerous law firms all across the country, Linda knows firsthand what works and what doesn’t in the attorney-client relationship, and in her role as a USLAW client advisor, she reflects the voice of her corporate counsel peers and provides our members with invaluable insight and perspective.

“As corporate counsel, we have to look at every case and issue from both a business and a legal perspective. Essentially, we wear two hats, and it always helps us when law firms understand that and provide counsel that reflects these often competing interests,” says Linda. “To meet the needs of in-house counsel, law firms must be responsive, assertive, and client-oriented. I want counsel that provides options and strategies upfront and throughout litigation, keeping me informed so we can ensure we are on the same page and working to achieve the desired outcome.”

Linda has been with Clear Channel since 2006. Clear Channel Communications, Inc. is a global media and entertainment company based in San Antonio, Texas.

Clear Channel operates a number of separate divisions, including Clear Channel Radio, a leading radio company focused on serving local communities across the U.S. with more than 110 million listeners choosing Clear Channel Radio programming each week. The company’s content can be heard on AM/FM stations, HD digital radio channels, on the Internet, via iPods, through Motorola’s iRadio cell-phone service, and via mobile-navigation devices from Cobra, Garmin, Kenwood and others.

The company is also well known for its outdoor advertising business. Clear Channel Outdoor is the world’s largest outdoor advertising company with close to one million displays in 49 countries across five continents. In the United States, the company operates just under 200,000 advertising displays and has a presence in 49 of the top 50 Designated Market Areas. It also operates airport, rail, taxi and mall advertising businesses worldwide. Its Spectacolor (U.S.) and DEFI (international) divisions are the global market leaders in spectacular sign displays, including New York’s Times Square.

With its global reach, Clear Channel faces legal issues across the business spectrum. Linda oversees the high-risk general liability insured litigation for the company. She works extensively with outside counsel across the country to ensure proactive management of Clear Channel’s insured litigation. Drawn to law after pursuing a BBA in Human Resources, Linda remains one of the profession’s biggest champions.

“We deal with issues around the US and the globe, and I’ve really come to rely on USLAW and its member firms for advice, recommendations and at-a-moment’s notice, assistance. I can always trust my cases — whether I’m handling them directly or another on my team is — will be managed to Clear Channel’s best interests.”

— Linda Thoede
Clear Channel Communications

“Linda is a master lawyer. From both experience and her own natural talent, she has developed the ability to see the crux of a case. And from that vantage point, Linda is gifted at managing the case through the process, working diplomatically and creatively with her team of trial lawyers to get the very best result for her company.”

— Renée F. McElhaney
Cox Smith Matthews Incorporated
Nebraska-based Baird Holm LLP and the Greater Omaha Chamber of Commerce collaboratively sponsored the Omaha “Best Places to Work” competition.

Bingham McHale, LLP announced it has merged with the litigation firm of McTurnan & Turner. With the merger, Bingham McHale has one of the largest and most experienced business litigation departments in Indiana. The following attorneys joined Bingham McHale: Lee B. McTurnan; Wayne C. Turner; John F. McCauley; Anne L. Cowgur; Gregory A. Neibarger; Jacqueline B. Ponder; Kenneth J. Munson; Carl A. Hayes; Michael R. Limrick; and Shannon D. Landreth.

Charleston, South Carolina-based Buist Moore Smythe McGee P.A. announced that James D. Myrick has been named the Chair of the Litigation Department. In this role he will oversee approximately half of the Firm’s attorneys in a broad range of litigation.

Alabama’s Carr Allison named Judson W. Wells a shareholder in its Mobile, Alabama office. His practice focuses on Insurance Law, Corporate Defense and Mediation. Judson earned his J.D. from the University of Alabama School of Law and his B.A. at the University of Alabama.

Chandler & Udall, LLP, USLAW’s Tucson, Arizona firm added two intellectual property attorneys to their firm: Dale E. Regelman, Ph.D. and Quan L. Nguyen, M.S. Dale and Quan expand Chandler & Udall’s legal services in intellectual property on a national and international level. Both are highly experienced in counseling, patent procurement, intellectual property transactions and management, opinions and investor due diligence.

New-Jersey-based Connell Foley LLP has been named a “Go-To Law Firm” for the second-year running by Corporate Counsel magazine, which conducted a survey of general counsel at the top 500 U.S. companies. Connell Foley was nominated by a number of its clients who selected the firm as a “Go-To Law Firm” in the areas of Corporate Law & Transactions and Labor & Employment.

USLAW NETWORK’s Mississippi firm, Copeland, Cook, Taylor & Bush, P.A. was also named in Corporate Counsel magazine as a 2008 “Go-To Law Firm” in the area of litigation.

San Antonio-based Cox Smith Matthews Incorporated was ranked a No.1 firm in Texas for Natural Resource Law by The Best Lawyers in America® 2008. The firm also ranked No.1 in San Antonio in four areas, including: Corporate Law, Natural Resources Law, Oil & Gas Law, and Real Estate Law. In addition to this recognition, 33 of its attorneys were selected by their peers as The Best Lawyers in America® 2008.

USLAW NETWORK’s Dallas firm, Fee Smith Sharp & Vitullo, L.L.P., announced that Thomas W. Fee and Michael P. Sharp, were named Texas Super Lawyers by Texas Monthly Magazine. Super Lawyers identifies the top five percent of attorneys in each state, as chosen by their peers and through the independent research of Law & Politics. Super Lawyers is published in 48 states and reaches more than 10 million readers annually.

Honolulu, Hawaii, NETWORK firm Goodsell Anderson Quinn & SifTEL, LLP announced that six new lawyers joined the firm. They are: Alicia G. Huffman, Jonathan E. Shardlow, William K. Tanaka, Nicolas T. Kelsey, Claire E. Goldberg, and Rebecca L. Dayhuff.

Atlanta-based Hall Booth Smith & Slover, P.C. opened an office in Columbus, Georgia, its sixth in the state and seventh firm-wide. HBSS continues to differentiate itself as one of the largest law firms in Georgia, including being ranked the 23rd largest law firm in metro Atlanta.

USLAW’s West Virginia member Huddleston Bolen, LLP announced that 13 of its partners were recently honored by their inclusion in the 2008 edition of the Best Lawyers in America, representing more than half of the firm’s partners included in this prestigious list.

USLAW Minnesota member Larson & King LLP published The Reduction-in-Force Desk Reference. In a changing economy, mass layoffs, plant closings, and workforce reductions have become more common. Reductions-in-force (RIFs) require strategic planning, proactive communication, and awareness of the applicable laws. To help businesses meet these challenges, Larson & King has published The Reduction-in-Force Desk Reference, a handbook with practical tips to use throughout the RIF process.

Missouri NETWORK member Lashly & Baer, P.C. announced that John Fox Arnold (Corporate Law), Kenneth C. Brostron (Medical Malpractice Law; Personal Injury Litigation); and Richard D. Watters (Health Care Law) were selected by their peers for inclusion in the 15th edition of The Best Lawyers in America.

USLAW NETWORK’s Virginia member LeClairRyan announced that 25 attorneys in twelve of fifteen available practice areas were selected by their peers for inclusion in 2008’s Legal Elite published by Virginia Business magazine. Virginia Business magazine compiles the Legal Elite listing through an independent peer survey of lawyers admitted to practice in Virginia.
Jacksonville, Florida, NETWORK firm Marks Gray, P.A. announced the addition of six attorneys: Marianne Lloyd Aho will practice in the area of civil litigation; Robert H. Sturgess will practice in the areas of contract, tort, appellate and insurance law; Tanya M. Davis and Meagan L. Logan will practice in the areas of civil litigation and insurance defense and workers’ compensation defense, civil litigation and insurance defense, respectively; Judith A. Guthrie will practice in the areas of health law, long term care law and healthcare management; Michael A. Bittner, previously a real estate developer, will practice in the areas of commercial litigation, civil litigation, real estate development and land use.

Martín, Tate, Morrow & Marston, P.C., USLAW NETWORK’s Tennessee member, announced that the Tennessee Supreme Court has appointed David Wade, a shareholder in the firm, to the Advisory Commission on the Rules of Practice and Procedure. Wade will serve a three-year term on the Commission, which was established to study and advise the Supreme Court with respect to rules of practice and procedure. Members of the commission are appointed by the Tennessee Supreme Court.

New Mexico’s USLAW member Modrall Sperling announced the Best Lawyers in America has selected 35 of the firm’s attorneys in 28 specialities as the best in the State in their respective specialities. Modrall Sperling lawyers were recognized in a range of specialty areas, from natural resources law, to insurance, nonprofits, to commercial litigation, and employment law.

USLAW NETWORK’s Los Angeles firm Murchison & Cumming, LLP announced that Jean M. Lawler has been named Managing Partner of the Firm. In addition to her duties as Managing Partner, Jean also chairs the firm’s Insurance Law and Business Transactions practice groups. Pittsburgh member Pietragallo, Gordon, Alfano, Bosick & Raspanti, LLP was named by Northwest Airlines Corporation as a ‘Go-To Law Firm’ for litigation and by PNC Financial Services Group, Inc. as a ‘Go-To Law Firm’ for labor and employment law matters.

Twenty-three lawyers from Poyner & Spruill LLP were selected by their peers for inclusion in Law & Politics ranking of North Carolina Super Lawyers. Over one third of Poyner & Spruill’s 71 partners are included in the Super Lawyers list for this year.

Arkansas USLAW member Quattlebaum, Grooms, Tall & Burrow PLLC was recently recognized in the 2008 edition of Benchmark: America’s Leading Litigation Firms and Attorneys as one of only four “highly recommended firms” for litigation in Arkansas. The firm was also recognized by Chambers & Partners, Best Lawyers in America and Super Lawyers.

Ransmeier & Spellman Professional Corporation USLAW’s New Hampshire member, announced that litigation attorney Garry Lane successfully defended Southwest Airlines in a federal lawsuit claiming Southwest had discriminated against a passenger based on race. The week-long trial received national publicity in newspapers, magazines, radio and television (and even made the Jay Leno show). The eight-person jury ruled in Southwest’s favor and completely vindicated the company and its employees.

Ohio member firm Roetzel & Andress, LPA announced it was ranked #191 on The National Law Journal’s 2007 “NLJ 250” list. Roetzel & Andress was listed at #203 in 2006. This is The National Law Journal’s 30th annual survey of the nation’s largest law firms, based on total number of attorneys. Roetzel & Andress grew 12% from 2006 to 2007.

Colorado firm Rothgerber Johnson & Lyons LLP will present an in-depth, day-long seminar on the policy and legal issues impacting religious institutions at its annual RJ&L Religious Institutions Law Day on April 15. The seminar will offer a significant focus on the policy, legal and pastoral implications of church and churchgoer security and safety. The firm will also offer one of its ongoing RJ&L Employment Law Seminars focusing on discipline and termination to manage organizational and employee performance on April 22.

USLAW Utah member Strong & Hanni, P.C expanded its Aviation Practice Group by adding acquisition & sales, licensing, regulatory, leasing, ownership structuring and other transactional matters relating to aircraft. The Aviation Group serves clients in aviation law issues including product liability of fixed-wing and helicopter aircraft, aircraft accident causation, airport liability, and aviation insurance coverage.

USLAW’s Connecticut firm Tyler Cooper & Alcorn, LLP obtained summary judgment for a major Connecticut hospital in a case of alleged employment discrimination. The plaintiff, an employee of the hospital who was terminated from her job, filed a lawsuit alleging, among other claims, race and age discrimination. In all, the plaintiff cited 13 violations of her rights by the hospital. Tyler Cooper filed a motion for summary judgment with the U.S. District Court in New Haven. The court entered judgment in favor of the hospital, dismissing all 13 counts of the lawsuit.

U.S.LAW’s Miami Florida, member Wicker, Smith, O’Hara, McCoy and Ford P.A. announced that William F. Fink and Kurt M. Spengler, both senior partners with the firm, have been appointed to the American Board of Trial Advocates (ABOTA). ABOTA is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the 7th Amendment to the U.S. Constitution. Membership to the organization is by invitation only.

Washington and Oregon USLAW member Williams Kastner announced that Seattle Member Christopher Marks has been appointed Chair of the American Bar Association’s Toxic Torts and Environmental Law Committee for 2008-2009. TTEL is part of the 36,000-member Tort Trial & Insurance Practice Section of the ABA.
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The Center for Forensic Economic Studies is a firm of economists and statisticians specializing in litigation support. In 1980, Jerome Staller, then a senior government economist, formed a firm dedicated to applying economic and statistical analysis to problems arising in litigation. The firm provided attorneys and courts with calculations of damages in civil litigation. It also provided statistical analyses of liability in mass-tort and civil-rights matters. The firm earned a reputation for reporting the results of such analysis clearly and coherently. Building on its two main areas of practice — analysis of damages in personal injury matters and the statistical analysis of liability and damages in labor and employment matters — the firm has greatly expanded its scope.

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identify relevant ESI.

And despite the warnings of in-house counsel, many executives just don’t want to acknowledge that they may have an ESI and e-discovery management issue.

“This race is far from over...I was talking to the inside counsel of a regional utility who was basically having a problem getting his CIO to admit that content stored in e-mail is actually a record...How is this not settled at this point?” stated Andrew Drake, senior counsel for discovery management at Nationwide, during a panel discussion at a LegalTech show held in February.

Securing the resources and collaboration needed to put in place an e-discovery and ESI management plan that will protect your company requires finesse. It will take more than simply producing a ream of past lawsuits levied against other companies to convince IT that its system may need significant modifications to harness and safeguard legally relevant information. In working with CIOs and IT departments, territorial issues and turf battles can surface. In-house counsel, outside counsel, and e-discovery consultants can help bridge the divide between management, IT, and legal functions.

Recognizing the competing agendas of all key players instrumental to implementing an effective e-discovery plan will go far toward expediting it. For senior management, e-discovery plans can be presented as both short and long term cost savings measures. Seek out examples of cost-benefit analysis that can bolster your arguments. There is one immediate benefit: the money saved by deleting unnecessary files can free up valuable computer storage space and minimize investment in new hardware. The new rules provide a safe harbor provision acknowledging that deletion, alteration, and overwriting of files will occur as part of the routine operation of computer equipment. Provided this is done in “good faith”, it allows the company some leeway in creating a policy that only requires they keep information potentially relevant to a lawsuit.

In-house counsel have, at their disposal, some powerful examples of past lawsuits where simply relying on back up data or minimizing or ignoring ESI rules (see Qualcomm v. Broadcom article) can result in huge sanctions, taking a much larger bite out of the bottom line than the implementation costs of an updated e-discovery plan.

In working with IT, acknowledge and engage their expertise. If counsel can show that implementing a new process will be more efficient, minimize risk, make data retrieval and management more effective, the path will be paved for efficient implementation and modification of IT systems.

In order to adapt to the new rules, flexibility and collaboration will be key because the changes will not likely stop with the 2006 revisions to the rules.

BE PREPARED FOR RULE EXPANSION

The FRCP rules have wrought significant impact on the costs of doing business and the practice of law. The layers and complexity of ESI management will continue to evolve, increasing requirements on businesses and pushing up litigation costs.

Debra Logan, a research vice president at Gartner, a Stamford, Conn. based IT research firm, predicts these rules will expand in scope as more forms of ESI make their way into the mainstream. “The question is when will the courts determine that items such as instant messaging and texting need to be discoverable...Access to that information is something that companies will be asked to provide,” Logan was recently quoted as saying in webzine Byte and Switch.

States are working hard to catch up to the FRCP changes, adding another layer of e-discovery challenges. Currently fourteen states have e-discovery rules in place (AZ, CT, ID, IL, IN, KS, MN, MS, MT, NH, NJ, NC and TX) and five states are actively working on passing e-discovery rules (AL, CA, IA, MD, NE, OH and VA).

Companies must adapt to the new rules proactively or risk painful sanctions by the courts for not supplying information in the manner, format, and time demanded by the courts. It is imperative they possess the means to quickly access legally relevant information and produce it in an acceptable format should they become involved in a lawsuit. By the same token, they must know when and how to apply the protections existing under the new rules. This will require putting in place a system that sets aside that data and implementing a company-wide policy that offers the maximum amount of protection against e-discovery demands in lawsuits. (See sidebar on E-discovery planning and implementation for key criteria to consider in crafting your company’s ESI and e-discovery plan — page 4).

ANATOMY OF AN E-DISCOVERY NIGHTMARE

(Continued from Page 5)

held back tens of thousands of e-mails relevant to discovery. The company paid dearly for noncompliance — an $8.5 million sanction for its "monumental and intentional discovery violation.” The outcome wreaked havoc on Qualcomm’s reputation and that of its legal counsel.

The court also ordered Qualcomm executives and its outside attorneys to participate in a “Comprehensive Case Review and Enforcement of Discovery Obligations” (CREDO) program. It required participants to sit in the court room until they developed a discovery management plan to prevent such flagrant violations in the future.

Lawyers for the embattled chip company did not escape the wrath of the Magistrate Judge. Six of Qualcomm’s outside attorneys were referred to the California State Bar for investigation for their part in discovery violations. The District Court Judge recently left the sanctions in place with the exception of those against the six outside counsel. The district court held that the six lawyers should be permitted to fully defend their conduct, citing to the “self-defense” exception to the attorney-client privilege. The outside lawyers were granted the right to depose their client’s employees in order to defend themselves, keeping the hurricane alive a while longer.
In today's global marketplace, legal needs often transcend geographic boundaries. Clients with complex legal needs turn to USLAW NETWORK member firms to represent them in the courtroom and the boardroom, next door and across the United States. When a complex legal matter emerges – whether it's in a single jurisdiction or nationwide – USLAW is there. We represent some of the country's leading businesses in matters ranging from complex commercial litigation, employment law, products liability, and professional malpractice defense.

USLAW NETWORK is a national organization composed of more than 60 independent firms in 45 states with over 3,500 attorneys. An alliance with the Trans-European Law Firm Alliance (TELFA) gives us added access to 23 European law firms representing 600 lawyers.

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<td>Mark S. Barrow</td>
<td>(803) 256-2233</td>
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<td><a href="mailto:bwschoue@coxsmith.com">bwschoue@coxsmith.com</a></td>
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<td>Renee F. McElhaney</td>
<td>(210) 554-5597</td>
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<td><a href="mailto:rmcelhaney@coxsmith.com">rmcelhaney@coxsmith.com</a></td>
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<td><a href="mailto:swillert@williamskastner.com">swillert@williamskastner.com</a></td>
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<td>(304) 691-8306</td>
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<td>(414) 282-7103</td>
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