COMMERCE Magazine's Second Annual Law Firm Managing Partners Roundtable

COMPILED BY MILES Z. EPSTEIN
EDITOR, COMMERCE

COMMERCE MAGAZINE'S SECOND ANNUAL LAW Firm Managing Partners Roundtable addresses trends in New Jersey business case law, legal issues that businesses should be concerned about and also shows how law firms can help a company solve problems. The following managing partners participated in this analysis of these key subject areas:

- Patrick C. Dunican, Jr., Esq., Managing Director, *Gibbons*
- John J. Eagan, Esq., Managing Partner, *Norris McLaughlin & Marcus, P.A.*
- Martin Kafafian, Esq., Managing Partner, *Beattie Padovano LLC*
- David H. Nachman, Esq., Managing Partner, *Nachman & Associates*
- Richard W. Schey, Esq., Managing Partner, *Jackson Lewis LLP*
- Michael Sirota, Esq., Co-Managing Shareholder, *Cole, Schotz, Meisel, Forman & Leonard, PA*
- Lois M. Van Deusen, Esq., Managing Partner *McCarter & English LLP*

Q. *What courtroom or legal trends are you seeing that should concern businesses in general and New Jersey firms in particular?*

DUNICAN: One legal trend that is continuing to impact New Jersey firms is the ever-growing demand on in-house counsel to control and minimize the cost of legal services. Virtually all in-house counsel are looking at different, more efficient ways in which they can provide their services to their internal clients. They are examining the organization of their legal departments, the number of outside law firms to be included on the "approved" list and the nature of the outsourced services that are required. The truth is that, traditionally, in-house and outside counsel usually agree upon reduced billing rates or fees discounted by some percentage with neither side being truly satisfied by these options—but true "partnering" in an ideal setting means that both the client and the law firm are satisfied by the agreed upon arrangement. The number of potential billing arrangements is limited only by the time, imagination and willingness of the participants. Most importantly, the billing arrangement must be customized to meet the client's needs. Therefore, if outside counsel is proposing a billing alternative, the law firm must know and understand the client's business. As the ground rules of the relationships between law firms and clients continue to change, the ability to "partner" on how legal services are paid for will be critical and in everyone's best interest.

EAGAN: In February, New Jersey began to recognize civil unions between same-sex couples where the union has been formalized by a civil union license. New Jersey will also adopt the rights created under the civil union law which have already been enacted in other states. In enacting the new law, the New Jersey Legislature also amended New Jersey's Law Against Discrimination and New Jersey's Family Leave Act to include civil unions within their protections. The impact of these changes will likely extend into lawsuits for personal injury and Workers Compensation (wrongful death, survival actions, loss of consortium, emotional distress), employee benefits packages and contractually created rights governed by state law. Federal law, on the other hand, does not recognize civil unions so issues may arise between state and federal law. Although the Family Leave Act provides that state law may create rights greater than those provided under federal law, there are issues that businesses will need to review with their HR departments and legal counsel. The Employee Retirement Income Security Act (ERISA) will present even greater challenges and again will need to be reviewed so that the implications of New Jersey's civil union law can be considered.

KAFAFIAN: On Dec. 1, 2006, the revised Federal Rules of Civil Procedure became effective and the petty tyranny of litigation discovery has laid siege to the electronic age. Just like the Rules of Court of New Jersey, which became effective on Sept. 1, 2006, the Federal Rules explicitly provide for the disclosure of "electronically stored information." Interestingly, under the New Jersey Rules, the requesting party may require that a specific format be used when the electronic information is disclosed even if that format was not initially used to store the electronic information. In addition, a party, under the Rules, may be required to disclose backup

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media and metadata, which might reveal information otherwise thought to have been deleted, or, in the case of metadata, information that the user might not have known existed. Fortunately, the Rules provide "safe harbors," which, if proactively used, can safeguard your email and other sensitive information. Businesses should develop a system that is designed to comply with the specific holding periods, to avoid disclosing trade secrets or proprietary information and to meet the company's operational needs, among other things.

NACHMAN: One trend has been prominent since the early 1990s, and yet it continues to expand today. There continues to be an increase in the expansion of business beyond U.S. borders. One reason for the increased reach beyond U.S. borders is technology, but another is the inception of laws and regulations (e.g. NAFTA) that have expanded the opportunity for the flow of trade in both goods and services to our Northern (Canada) and Southern (Mexico) partners. Nachman & Associates, P.C.'s practice is devoted exclusively to Business Immigration Law. We provide international managers with creative methodologies for quickly transferring highly-skilled foreign national workers to the United States. In addition, in 2006, we opened a Canadian division with offices in Montreal and Toronto. We did this to serve the needs of our clients and their international affiliates. A Canadian lawyer on our staff assists clients with Canadian law issues as cross-border business needs change and expand. We have also forged, and continue to forge, strategic alliances with international attorneys in many foreign countries (Slovakia, Japan, Australia, Korea, Singapore, China, Israel, etc.) to be able to service the needs of our multinational clients.

The President has made it clear that he is interested in the reform of the U.S. immigration system. It is still not clear what form CIR is going to take. Most CIR, thus far, is focused on employment verification or form I-9 enforcement. Our offices continue to establish I-9 training programs for human resources managers to train them about the Form I-9 rules. Interestingly, many states such as Colorado and Georgia have passed legislation dealing with employment verification and they have taken liabilities and responsibilities to an all new level. New Jersey businesses that are doing business in other states must be aware of the new state employment verification rules to avoid significant liabilities. Recently, the U.S. Department of Homeland Security issued a regulation proposing fee increases for most immigration applications and petitions. The U.S. Department of Labor is in the process of considering assessing a fee for the PERM process which presently has no filing fee.

SCHEY: Businesses should be concerned with the new amendments to the Federal Rules of Civil Procedure and the New Jersey State Court Rules regarding electronic discovery. The new rules clarify to what extent a business must preserve electronically stored information in the event of future litigation. Extensive media coverage of the new rules has made plaintiffs' attorneys more aware of employers' information retention requirements. The sanctions and penalties imposed on employers who do not adequately respond to e-discovery demands can be significant, and those unprepared for e-discovery may be pressured to settle otherwise defensible claims. Businesses need to review and update their electronically stored information policies and, in advance of litigation, establish procedures for responding to e-discovery issues.

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Our E-Discovery and Workplace Technology practice group is dedicated to assisting businesses to navigate this complicated area. Another legal trend that businesses need to be concerned with is the growing number of class action lawsuits based on wage and hour laws. Misclassifying employees or miscalculating or failing to pay overtime are common mistakes employers make. All types of industries have been targeted, from manufacturing to financial services. Class action claims tend to incur greater defense costs, thus, more pressure to settle, and large settlements have encouraged even more class action lawsuits. It is important that employers conduct a comprehensive wage and hour audit to protect against claims.

SIROTA: Courts are placing increasing burdens on businesses facing litigation, or even potential litigation, to maintain, collect and produce evidence stored on computer systems. It is not only documents or emails actively in use that are "fair game." Deleted e-mails and documents, internal drafts, cell phone records, data on "legacy" systems—the courts permit litigators to mine all these sources for potential evidence, and forensic experts can often retrieve data that employees believe were long gone. With employees treating e-mails as casual conversation, many litigators consider deleted e-mails as likely "smoking guns." The federal and New Jersey state courts have recently adopted extensive new rules that address electronically stored evidence. The new rules include requirements for seeking and producing electronically stored evidence, allocating costs for retrieving hard-to-access data, and penalties for failing to preserve that evidence. The courts have wide discretion in deciding how to enforce these rules, making it difficult to predict how they will rule with certainty in particular cases. What is clear, however, is that businesses that fail to heed their preservation and production obligations will pay a price in litigation.

VAN DEUSEN: Across the country, litigation is off from a few years ago. There are a number of suspected reasons including tort reform, less receptiveness to punitive damages, alternate dispute resolution and early settlement. In the courtroom, video and computer aided presentations are becoming increasingly common and perceived to be effective. Electronic discovery has drastically changed the pretrial processes and firms have scrambled to keep abreast of new and emerging technologies designed to facilitate efficient methods to handle increasingly voluminous discovery.

Q. Can you please describe a problem that a client brought to your firm, and discuss how you solved it?

DUNICAN: In December 2006, the Federal Rules of Civil Procedure were amended to establish procedures and guidelines for the production of electronically stored information (ESI). In the wake of this development, many clients have approached Gibbons seeking assistance with a variety of questions and concerns surrounding discovery of ESI. In one recent example, a client explained that

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it was defending a number of employment-related matters brought against it in a variety of courts and jurisdictions, and expressed concerns about potential loss of relevant and discoverable ESI. We met with the client, assessed the situation, and proposed and implemented a strategy that brought the client peace of mind. This included our preparation of "litigation hold" notices to be distributed by the client's General Counsel to a targeted group of employee data custodians in certain matters.The notices directed employees to preserve specific categories of information and provided instructions for how to efficiently identify and collect relevant ESI.

Additionally, we are in the process of working with the Assistant General Counsel to design and implement a document retention and records management policy that will assist the client going forward. The policy will allow the client to categorize information, assign storage locations and retention schedules and, significantly, prescribe a process for instituting a litigation hold to halt the routine destruction of ESI in appropriate circumstances. Implementation of this program will allow the client to more easily navigate, in future matters, the issues that were of concern in the present litigations and provide a strong weapon to defend against any future attacks on its document retention methods.

EAGAN: A client recently discussed with us the difficulties he faced in attracting talented employees in a competitive marketplace. He said that the marketplace had become so tight that he might be required to give employees equity in his company, which would make them stockholders. This concerned the client because he had future plans to sell the company and didn't want to be required to get approvals from these employees/stockholders. To sell the company, he would need the ability to retain key employees should a purchaser desire to keep them. We created a new class of non-voting equity and kept all of the voting equity with the client. In order to be eligible to receive the non-voting equity, employees would enter into a Stock Grant-Employment Agreement with the company, which would provide that (1) if the client sold the company, the employee/stockholders would be required to sell their stock; and (2) in order to be eligible to participate in such sale, employee/stockholders would agree to remain with the company post-closing should the purchaser so desire. If any employee/stockholders voluntarily terminated their employment post-closing, they would forfeit the proceeds of their stock sale.The client could control any potential forfeiture by placing employee/stockholders' sale proceeds in an escrow account for the one-year period. By our efforts, the client was able to retain and attract talented key employees, allow those employees to participate in the growth of the business, retain control of the company, cause them to come along in any sale by the client and require that they remain with the company, post-sale.

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KAFAFIAN: *The problem:* A key sales employee has just resigned and has taken his Rolodex to a competitor. One other thing—he never signed a restrictive covenant or confidentiality agreement. *The solution:* Even absent contract protections, here are some basic common law protections. Misappropriation of company property—removal may be either physical or electronic. The company should assert ownership rights by legal action. Duty of loyalty—while employed, an employee may not undermine her employer by diverting business to herself or competitors. The duty lapses once she leaves, but she remains liable if, while employed, she divulged confidential information to her new employer. Trade secret—a company can act to protect its "trade secrets," for example, recipes, source code or customer information, but it needs to show it took steps to maintain confidentiality, *e.g.,* limiting physical or electronic access or labeling documents "confidential." With evidence of the foregoing, a letter would be sent demanding the individual "cease and desist" from further unlawful activity and return all company property immediately. If there is evidence the new employer is complicit, then a similar letter is also sent to that company.

NACHMAN: A prominent business executive for a world renowned company was being stopped each time he entered the United States because, as he was told, his name was on the "watch list." This was quite strange since the "watch list" is for terrorists, criminals and those who have violated their immigration status in the United States. Our client was none of these. Our staff prepared letters and made calls to DHS. We spoke to the port director and found that DHS had inadvertently placed a record in the database for our client. Working in cooperation with DHS officers, the record was deleted. Our client can now enter the United States without wasting his time waiting in "secondary inspection."

SCHEY: A client called to report that a former employee had taken confidential information. The client wanted the information back and also wanted the former employee prohibited from using the information. The former employee argued the information was neither a trade secret nor confidential information, and that he had been given the information when employed, so he did not "take" it. Before this situation occurred, we had worked with the employer to implement policies which defined the types of information which were considered to be trade secrets or confidential information, as well as a policy governing the return of company property upon termination of employment. Based on these policies, the employer successfully retrieved the confidential information, and obtained the former employee's agreement not to use the information, without which might otherwise have resulted in costly litigation. We take great pleasure in providing preventive advice which protects employer rights and limits litigation.

SIROTA: On March 16, 2007, The Coca-Cola Company completed its acquisition of Fuze Beverage, LLC, a manufacturer and distributor of non-alcoholic, new age energy drinks and teas. Cole Schotz, which has represented Fuze since its infancy, negotiated the transaction with members of Coke's in-house legal department and its outside counsel. Fuze is the brainchild of Lance Collins, who founded the brand in the basement of his Bergen County, NJ home. Since its founding, Fuze has been one of the fastest growing companies in its market segment. Presently, Fuze employs over 90 people, and its beverages, which come in a variety of uniquely colorful labels and flavors, are sold in grocery, convenience and big box stores throughout the United States and its territories, Canada and the Caribbean. For the past several years, members in the firm's Corporate, Finance & Business Transactions Department have represented Fuze on several rounds of private debt and equity financing and general corporate matters, and the firm has also represented Fuze on general litigation matters.

VAN DEUSEN: One of our largest clients had hundreds of cases pending against it that were assigned out to trial en masse. We were able to staff the matters and handle more than 60 trials in a period of less than 12 months, and then negotiate a favorable settlement of all the cases. This extraordinarily difficult assignment required massive coordination and training of many of our firm's trial lawyers, and a commitment to service to the client that allowed it to conclude the litigation within the confines of its business objectives. ■