Inside Q3 2024

ACC Association of Corporate Counsel
SOUTH FLORIDA

FOCUS

President's Message

Justin Carlson

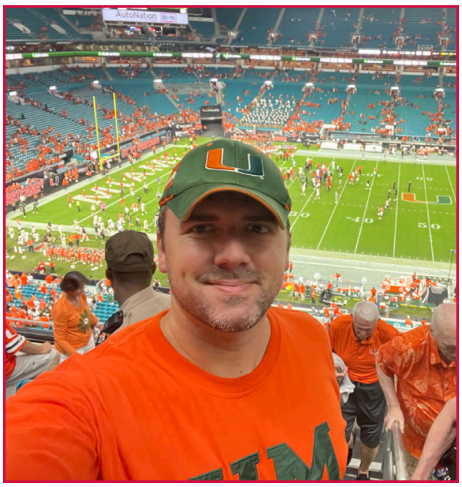
Happy fall to all! They say that only people with nothing to talk about discuss the weather, so I hope our readers disagree because this may be the second or third time I make some reference to weather or seasons in these articles. Fall in South Florida does not mean the same as it does to the rest of the country. While pumpkin spice lattes may be back at Starbucks, there will be no leaves turning colors, and cooler temperatures are still a ways off. Instead, we have the pleasure of the peak of hurricane season.

I note this because I am writing to you on the 32nd anniversary of Hurricane Andrew, an indelible experience in my life since my family's home was partially blown away while we sheltered inside. Our neighbor's patio was ripped off and dropped by the winds through our roof, and once the roof was compromised, the house held up poorly. It turns out that hurricane shutters are not built to withstand impacts from the inside (perhaps impact windows are). But amazingly, the portion of the house we retreated to once the roof opened up did not collapse or become exposed to the wind. And along with us, all of our pets managed to survive, except the fish whose aquarium exploded.

In the many years since, in theory, new building codes and standards have made us safer and more able to withstand storms. But the handful that have impacted South Florida since, including Hurricane Wilma in 2005 and Hurricane Irma in 2017, have been reminders of the damage even less powerful hurricanes can cause. So, I wish everyone a safe and uneventful hurricane season, and encourage you to have a plan in case a storm does threaten, including thorough documentation for the insurance claims that might follow.

The other joy of fall is the start of football season. For me, as my photo suggests, that means a different type of Hurricane season, which for the last 20 years has brought about as much joy on the field as actual hurricanes do when they strike (a truth my friends supporting Florida State are feeling acutely in Dublin as I write). But supporting a deficient sports team has taught me to appreciate the other aspects of gameday apart from the competition itself: feeling part of a larger community, embracing any reason to celebrate, time spent outdoors, good food and drinks, and the company of friends and family.

These aspects also apply to your membership with the Association of Corporate Counsel and our South Florida chapter. Growth of our chapter is a main focus of my presidency, but I cannot do it without you. We have over 550 members, but there are many more in-house attorneys in South Florida. Some of them likely do not know anything about who we are and what we do. Please help us spread the word about the benefits of participation. An individual membership is $435 a year, and makes you not only a member of our local chapter but also the national ACC. If someone has an employer that is leery



about covering that expense, let us know and we can provide materials showing the value our members and their employers receive through an ACC membership. If you have nine or more attorneys in your company, you can join as a Corporate Member which comes with further benefits. You can view more information about ACC membership on our website.

There are a lot of details about my Hurricane Andrew experience which I can share, as that event is vividly etched in my memory. But for that, you'll have to ask me in person! We have a packed fall calendar that will carry through to the holiday season. It begins with our signature event, the 14th Annual CLE Conference, taking place yet again at the Seminole Hard Rock Casino on September 12. Programming continues with smaller events hosted

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The FTC Ban on Non-Competes – Impact of Final Rule on M&A Transactions

By Jose Sariego, Bilzin Sumberg

The Federal Trade Commission last year proposed a sweeping rule outlawing most non-competition agreements nationwide. The rule applied both to non-competes in the employer-employee context and to a seller of a business in an M&A transaction. The rule as modified goes into effect September 4, 2024; however, a federal court has struck down the rule as exceeding the FTC's rulemaking authority. It remains to be seen whether the rule will survive this and several other judicial attacks.

Nonetheless, it is important to analyze the final rule for whenever and in what form it goes into effect. Non-competes are under attack across the country, and practitioners would be well advised to at least attempt to meet some of the more objectionable aspects of non-competes, particularly in the M&A context.

The proposed rule applied the non-compete ban to a seller of a business except if the seller owned 25% or more of the business being sold. The final rule drops the 25% ownership requirement. The prohibition on non-competes now *does not* apply "to a non-compete clause that is entered into by a person pursuant to a *bona fide sale* of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets."

The key term is "bona fide sale". According to the Commission, "a bona fide sale is one made in good faith as opposed to, for example, a transaction *whose sole purpose* is to evade the final rule." [Italics added.] The Commission further elaborated that it considers a bona fide sale to be "one that is made between two independent parties at arm's length, and in which the seller has *a reasonable opportunity to negotiate* the terms of the sale."

The Commission rejected a number of comments proposing additional guardrails to assure that the exception is not abused through the use of "sham transactions with wholly owned subsidiaries, 'springing' non-competes, repurchase rights, mandatory stock redemption programs, or similar evasion schemes." The FTC declined to specifically delineate each kind of sales transaction that is not a bona fide sale subject to the exception "to avoid the appearance that any arrangement not listed is allowed under the exception."

It remains to be seen whether inventive minds will nonetheless interpret the term "bona fide sale" to justify non-competes in questionable circumstances, but the elimination of ownership or other requirements to be entitled to the exception in the sale context is a welcome change.

Another aspect of the final rule that could impact M&A transactions is the exception for existing non-compete agreements for "senior executives", if the agreement was entered into prior to September 4, 2024, the current effective date of the rule. (This date will almost certainly be pushed later if and when the rule survives judicial challenges.) The proposed rule banned all non-competes, retroactively and prospectively, for all workers regardless of level or role within an organization or other criteria such as compensation. The final rule, however, now excepts previously agreed non-competes with senior executives because, as the Commission notes, "this subset of workers is less likely to be subject to the kind of acute, ongoing harms currently being suffered by other workers subject to existing non-competes and because commenters raised credible concerns about the practical impacts of extinguishing existing non-competes for senior executives."

"Senior executive" is defined as a worker who both (a) was in a "policy-making position" and (b) received "total annual compensation" of at least $151,164 in the preceding year (or partial year annualized). "Total annual compensation" includes salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during the preceding 52-week period. Total annual compensation *does not* include board, lodging and other facilities, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans or the cost of other similar fringe benefits. Significantly, compensation does not include discretionary bonuses or the value of stock or other equity grants, which can be a significant percentage of total compensation for these executives.

"Policy-making position" means "a business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority." The Commission stated that an officer of a subsidiary or affiliate of a business entity that is part of a "common enterprise" who has policy-making authority *for the common enterprise* may be deemed to have a policy-making position for purposes of this exception. However, a person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate that is part of the common enterprise.

Although this exception will grandfather many non-compete agreements entered into with senior executives of a seller that do not necessarily have an ownership stake in the business being sold (and therefore would not be excepted under the "bona fide sale" exception), the exception leaves many workers who buyers typically consider important (such as operating subsidiary chiefs) free retroactively from non-compete agreements entered into as part of the sale.

Moreover, if these "senior executives" indeed are "less likely to be subject to the kind of acute, ongoing harms currently

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being suffered by other workers," then it is hard to understand why the exception only applies to pre-existing non-competes and not to those entered into going forward. Certainly, these key workers are usually able to fend for themselves in an M&A transaction.

There are many other aspects of the final rule that could impact M&A transactions. For example, there is no exception for non-competes for highly trained or technical workers such as high-level software engineers that buyers often wish to tie up in connection with an acquisition. So although the final rule provides some welcome relief from the total non-compete ban, it remains to be seen how buyers adapt to the new landscape in negotiating M&A transactions that typically involve interlocking "bundled" consideration, including non-competes and other restrictive covenants.

Author:

Jose Sariego is a corporate partner at Bilzin Sumberg with over 30 years of experience negotiating and closing domestic and international mergers and acquisitions, investments, joint ventures, divestitures and other transactions. For more than 20 years, he was a member of senior management of three companies, serving as chief legal and compliance officer as well as secretary to the Board of Directors of two of the companies. Jose has particular experience in media, entertainment, intellectual property and technology law as General Counsel of HBO Latin America and as head of Business & Legal Affairs for NBC/Telemundo Network. He also has negotiated, documented and enforced employment agreements, non-compete and other restrictive covenants, and severance packages for himself and numerous other executives, talent and other highly-paid individuals.

"What Happens in Privilege Stays in Privilege," a Refresher for Corporate Counsel on the Attorney-Client and Work-Product Doctrines in Florida.

By Jonathan K. Osborne, Gunster FTL Managing Shareholder

You may remember the scene from the "Lincoln Lawyer," where Mickey Haller, played by Matthew McConaughey, returns to his home office (brandishing a baseball bat) where he finds his client, Louis Roulet, played by Ryan Philippe, sitting at his desk holding a glass of Glenfiddich. Roulet, leaning back in the chair, casually confesses to a murder for which another of Haller's clients has already been wrongfully convicted, and then menacingly reminds Haller that everything they discuss is "confidential" and protected by "attorney-client privilege." And although Roulet's pronouncement of the law may be true in a criminal case where the attorney and client only have a relationship for purposes of handling a legal matter, the attorney-client privilege and work-product protection are more complicated for in-house lawyers who wear legal and business hats.

This article highlights lessons from a recent federal court decision criticizing what the court called a "ploy" by a major company to use a law firm to shield advice concerning business issues from civil discovery; provides a brief refresher on the differences between attorney-client and work product protections; and ends with simple questions that will guide you in evaluating whether internal company communications are indeed privileged under Florida law.

I. Don't "Ploy" Privilege Games.

In a case currently pending in federal court in the Eastern District of Pennsylvania, the court reviewed in-camera documents withheld from production by the defendant CVS Health Corporation based on claims of attorney-client privilege and work-product protection.[1] And although the court's opinion issued on August 15, 2024, is worth a full read—here are the highlights: (1) CVS used an outside law firm to hire a consultant; (2) according to the court, the consultant's ultimate purpose was to provide business advice to the company; (3) the law firm was used an "intermediary" on many, but not all communications between the company and the consultant; and (4) the court concluded that the law firm's role was a "ploy" to shield correspondence between CVS and the consultant from discovery. In rejecting CVS' privilege claims, the court found there were numerous communications between CVS and the consultant to which counsel was not a party and that, even where counsel was copied or used to transmit information, the communications were focused on business, not legal issues. The court further concluded—in reasoning that may be helpful to your business—that just because CVS operates in a highly regulated industry does not "transform every decision about [its business] into a legal question."[2] And relatedly, as it related to CVS' work product claim, the court disagreed with the company that its work with the consultant was done in anticipation of litigation where there was no "reference or allusion" in the communications to "specific regulatory inquiries or pending or possible litigation."[3] Thus, although there are many instances where your company can—and should—retain outside counsel to assist with legal matters that will also require consultant input, recognize that if disputed, your claims of privilege and work product as to those communications are subject to judicial review. Accordingly, your company should adopt and enforce

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procedures for handling sensitive, privileged communications involving nonlawyers, including consultants; and, once in litigation or a government investigation, designate carefully to avoid an adverse ruling or inadvertent waiver.

II. Attorney-Client Privilege and Work Product are Not the Same.

In the corporate context, this question arises often—and the rules may differ based on where your company does business. In Florida, the attorney-client privilege protects confidential communications to and from the lawyer made in the "rendition of legal services to the client."[4] The client, not the lawyer, controls the privilege and courts will consider confidentiality preserved as long as the communications are not shared to anyone besides those to whom disclosure is made in furtherance of the legal services, or others necessary for the transmission of the communication.[5] On a related front, the work product doctrine generally protects from discovery documents or tangible things prepared by or for an attorney in anticipation of litigation or government investigation. Work product can include documents prepared by the client, counsel, and even third parties; and such documents need not contain legal advice to warrant protection. Accordingly, some documents that are work product may not be attorney-client privileged and vice versa. And, particularly in-house, many of your communications may not be protected at all.

III. It is Not Safe to Assume Your Communications with Your Clients are Protected.

During the last two ACC conferences, our panel has discussed a 2022 4th DCA case where various questions arose about waivers of attorney-client privilege and, ultimately, who in a company controls the privilege.[6] There, the court explains that individual stockholders, directors and officers do not control the privilege and have no authority to waive or assert privilege over the wishes of the company's board, whereas, in closely held businesses, courts analyze the company's governing documents to evaluate where authority sits. So, when evaluating whether your corporate client will assert or waive a privilege, your first question should be "who" makes that decision? Next, in evaluating whether the attorney-client privilege applies to particular corporate communications, including emails and text messages with you, ask the following questions:

1. Would the communication have been made but-for the contemplation of legal services?
2. If not a control group person, is the employee making the communication doing so with direction from their superior?
3. Is the communication made as part of the company's effort to secure legal advice?
4. Is the content of the communication related to the legal services being rendered, and the subject matter within the scope of the employee's work duties?
5. Was dissemination of the communication limited to those with "a need to know?"

If the answer to each of these questions is "yes," plaintiffs will have an uphill battle to climb in compelling production.

On other hand, if the answer to some of these questions, particularly 3 and 4 is "no," "sort of," "yikes," or "maybe," the uphill battle is more likely yours. Call the "Lincoln Lawyer."

Author:

Jonathan K. Osborne is the Managing Shareholder of the Fort Lauderdale office of Gunster, where he also co-chairs the firm's White Collar Defense & Internal Investigations practice. Jonathan is a first-chair trial lawyer and counselor to organizations and individuals in complex civil and white collar matters and internal investigations. His clients include leading companies, educational institutions, and business and community leaders. And drawing from his former experience as a federal prosecutor, he routinely defends clients facing sensitive investigations and governance concerns. Jonathan attended Georgetown Law and played college basketball at UNLV and the University of Alaska-Fairbanks.

[1] *United States of America, et al., ex rel. Stan Ellis v. CVS Health Corporation, et al.*, Case No. 16-1582.
[2] *Id.* at 4.
[3] *Id.* at 6.
[4] Fla. Stat. Sec. 90.502.
[5] There are various other exceptions to the attorney-client privilege defined by statute and in case law.
[6] Akerman LLP v. Cohen, 352 So.3d 331 (Fla. 4th DCA 2022)

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by our sponsors on September 26 and October 16, culminating in our annual Mini-MBA on October 25. We then officially shift to holiday mode, which includes holiday parties in Miami-Dade and Palm Beach in December. I hope to see you there!

In parallel, the national ACC will host its annual meeting in Nashville, Tennessee from October 6 – 9. Many of our members attend each year, and the chapter hosts a dinner for those who do. Please let us know if you plan to participate and we will include you.

Best wishes to some of you for the start of football, and to all of you for back to school and a very happy fall season.

A Quick-Start Guide for Counsel: How to Use Data Analytics to Predict & Manage Risks

By Stevi Sanderowitz, SterlingRisk

Introduction

In today's fast-changing legal landscape, it's crucial to anticipate and minimize potential risks. By harnessing the power of technology and data analytics, in-house counsel can improve predictive capabilities, proactively manage risks, improve case management, and ultimately contribute to their clients' corporate profitability.

This guide provides a practical and effective approach to implementing technology and data analytics in your legal practice. It outlines the steps to gather relevant data, analyze trends, and apply insights, all of which contribute to the broader goals of cost control and efficiency.

Step 1: Gather relevant data

The first step in leveraging data analytics is gathering relevant data. This involves collecting a wide range of information from internal and external sources, including claim history, customer information, market trends, weather patterns, reliable industry reports, litigation filings, and regulatory updates. IoT (Internet of Things), such as sensors, wearables, and other physical devices, can also gather real-time data and provide immediate and deeper insights into potential risk areas.

It is critical for any data analytics initiative to ensure that the collected data is accurate, comprehensive, timely, and sourced from high-quality and diverse data sources.

It is critical for any data analytics initiative to ensure that the collected data is accurate, comprehensive, timely, and sourced from high-quality and diverse data sources.

Step 2: Analyze data for insights and trends

Once the relevant data is collected, the next step is to analyze the information to identify significant patterns and trends.

Predictive analytic software (*e.g.*, Lex Machina, Judicata, Lexis+ AI, Westlaw Edge), machine learning, regression analysis, and statistical modeling can be used to understand underlying trends and identify patterns that forecast potential risks. For example, trend analysis could uncover seasonal increases in certain types of litigation or highlight operational areas with higher risk profiles.

Artwork by Summit Art Creations / *Shutterstock.com*

Step 3: Forecast future risks using trends identified in data analysis

Predictive models, developed using patterns and trends identified from data analysis, can potentially revolutionize your legal practice. These game-changing tools can forecast potential risks and claims, providing a new level of predictive capability that can significantly enhance your services.

Discover potential risks that can help elevate your legal work by conducting predictive data analysis. Summit Art Creations / Shutterstock.com

Additionally, predictive analytics can help in-house counsel streamline case assessments, expedite claim settlements, and identify fraudulent claims. For example, automated data models can quickly compare alleged claims against historical data to flag inconsistencies or patterns indicating fraud.

Predictive analytics can help in-house counsel streamline case assessments, expedite claim settlements, and identify fraudulent claims.

Step 4: Craft proactive risk management strategies based on predictive analytics

Next, data-driven insights must be applied to manage and mitigate risks actively. Armed with predictive analytics, in-house counsel can craft proactive risk management strategies. These strategies, designed to help companies avoid costly incidents and litigation, can significantly impact client profitability.

For example, data analytics might predict a high likelihood of events such as workplace incidents or forecast the seasonal increases in certain types of claims, allowing in-house counsel to advise clients on potential exposures and recommend adjustments to policies and procedures accordingly.

Data-driven insights must be applied to manage and mitigate risks actively.

No longer an option, but a necessity

In this era of information, leveraging technology and data analytics in your legal practice is becoming not just an option but a necessity for those seeking success in the legal industry.

By following these steps to gather, analyze, and apply data, in-house counsel can provide more accurate advice, manage cases more effectively, anticipate potential risks, and enhance client profitability.

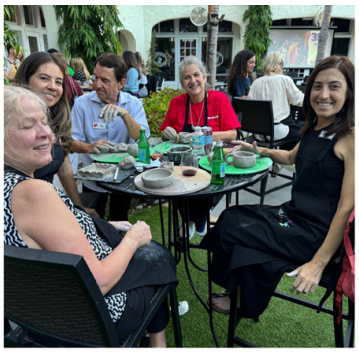
Disclaimer: The information in any resource collected in this virtual library should not be construed as legal advice or legal opinion on specific facts and should not be considered representative of the views of its authors, its sponsors, and/or ACC. These resources are not intended as a definitive statement on the subject addressed. Rather, they are intended to serve as a tool providing practical advice and references for the busy in-house practitioner and other readers.

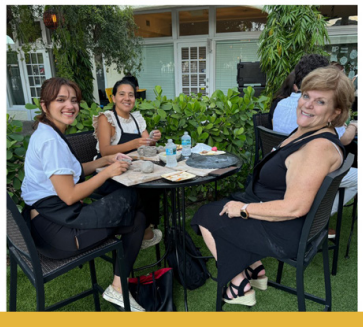
EVENT PHOTOS

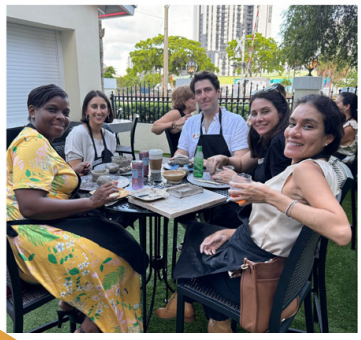
Advanced Directives Clinic at the Legal Services of Greater Miami

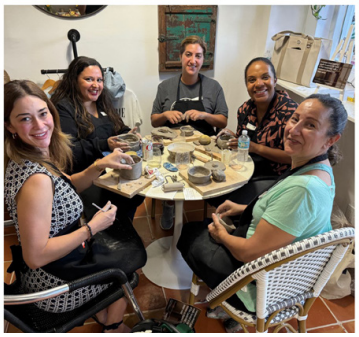
GC/CLO Dinner – Presented by Armstrong Teasdale

Pottery Making Class – Presented by Fisher Phillips

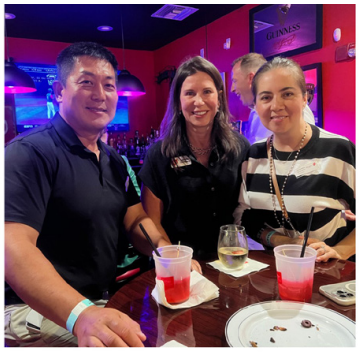
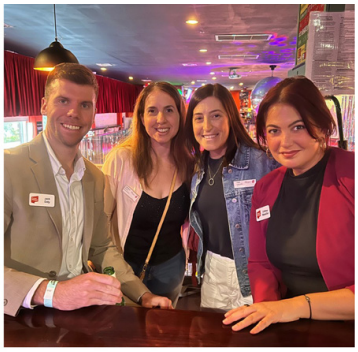
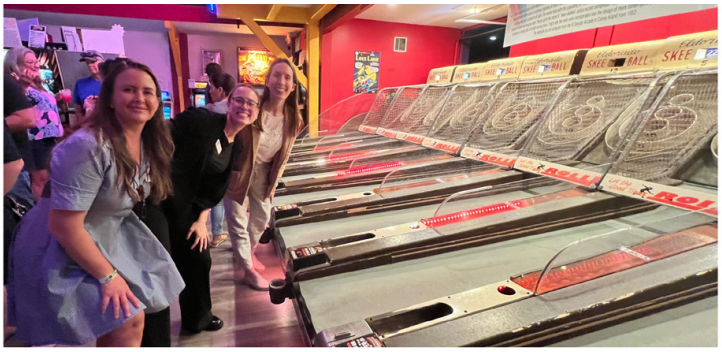


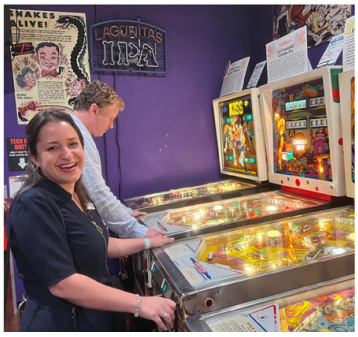


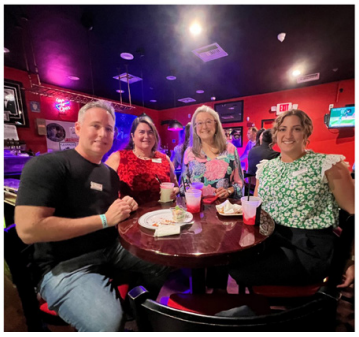




Silverball Retro Arcade – Presented by Fisher Phillips



We're Getting SOCIAL!

For the latest photos and details from our events, please be sure to follow ACC South Florida Chapter on Instagram and Facebook. On LinkedIn, join our group page exclusively for members. In addition, we are excited to now have a public ACC South Florida Chapter page for interaction with our sponsors, respective companies and everyone. On all of our social media platforms, feel free to tag ACC South Florida Chapter on your posts and hashtag #accsouthfl.

You can find updates, event information and more at:

accsouthflorida

@accsouthflorida

ACC South Florida Chapter

ACC South Florida Upcoming Events

SEPTEMBER

SEPTEMBER 26
Mixology Class
Presented by Nelson Mullins

OCTOBER

OCTOBER 6-9
ACC National Conference
in Nashville

OCTOBER 16
Sip, Swap & Share: Women's Event
Benefiting the Lotus House
Presented by DLA Piper

OCTOBER 25
Mini MBA
Presented by Foley & Lardner

NOVEMBER

WEEK OF NOVEMBER 3
Social Event
Presented by Gunster

NOVEMBER 14
New Member Happy Hour
in North Broward

DECEMBER

DECEMBER 3
Palm Beach Holiday Party

DECEMBER 12
Miami Dade Holiday Party

Be on the lookout
for calendar updates!

Welcome New Members!

Kati Amarantes
Bayview Asset Management, LLC

Jill Anderson Blanco
CalAtlantic National Title Solutions

David Armstrong
Cano Health

Angela Baena Paez
GE Healthcare

Amanda Baracat
Integra Beauty, Inc.

Alejandro Briceno
Chubb Group

Amar Eldaher
Meta Platforms Inc.

Bridgette Gallagher
Kandji

Marissa Gimelstein
Bayview Asset Management, LLC

Robert Karpeles
Bandwidth Inc.

Rodney McLellan
CitiMED

Gabrielle Mercadante
Nextera Energy, Inc.

Krystle Meyer
NextEra Energy, Inc.

A. Peter Prinsen
The Graham Company

Mor Shvarzman
Superior Group of Companies, Inc.

Paul Thompson
HackerUSA Inc.

Sara Thompson
Banyan Treatment Centers

Stephanie Toledo
CSL Behring LLC

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Saul Ewing Arnstein & Lehr LLP
Shook Hardy and Bacon, LLP
Squire Patton Boggs
TCDI
Winston & Strawn

Bronze
Armstrong Teasdale
Carlton Fields
Fox Rothschild
FTI Consulting
Latitude
Littler
Robert Half Legal

Miami-Dade Progressive Dinner
Shook Hardy and Bacon, LLP (Premier)
OmniBridgeway (Dinner)
Carlton Fields (Dessert)

GC/CLO Dinner
Armstrong Teasdale
FTI Consulting

Social Event + CLE
Carlton Fields

Mini MBA
Foley & Lardner

Women's Event
Fisher Phillips
DLA Piper

Holiday Party
Barnes & Thornburg (Palm Beach)
Cozen O'Connor (Miami)

Newsletter Article
Barnes & Thornburg
King & Spalding

Chapter Leadership

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Maritza Gomez
Senior Counsel, Employment, Gap, Inc.

David Brill
Managing Director, FTI Consulting

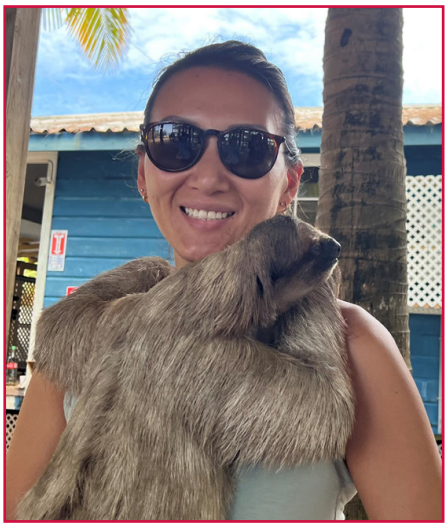
Executive Director
Christina Kim

ACC Association of Corporate Counsel
SOUTH FLORIDA

Christina Kim
Executive Director

Executive Director Note

Dear Members,


My new summer friend

We are approaching my favorite season, FALL! We hope you will find time in between the football games (GO BLUE!), tailgating, Taylor Swift concerts, trick-or-treating and all the Fall fun to join us at our upcoming events as we have some great ones approaching. One event I wanted to highlight is our Sip, Swap & Share event (Oct 16) benefiting the Lotus House, the largest shelter for women and children in the country. Our sponsor, DLA Piper, will be collecting new and gently used clothing from our members and during the event, you can swap and shop with fellow attendees. Any unclaimed items will be donated to the Lotus House to be sold at their Thrift Chic Boutique, with sales benefiting the Lotus House. Take this opportunity to clean out your closets for an awesome cause! Invitation to be distributed soon.

I also look forward to seeing many of you at our 14th Annual CLE Conference on September 12 – a special shout out to our Conference Committee for all their time and dedication to ensuring we have the informative seminar topics and providing feedback to make this the best conference yet. Get ready for a ROAR-ing good time.

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