Monday, October 20
2:30 pm-4:00 pm

208 Anatomy of a Trial: Influencing the Outcome from the Client's Chair

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Faculty Biographies

Michael R. Booden

Michael R. Booden currently serves as assistant general counsel for Health Care Service Corporation in Chicago.

Prior to his current position, Mr. Booden was counsel at Goodrich Corporation in Chicago, where he provided legal advice in a wide range of areas including: government procurement, international traffic in arms regulations, labor & employment, litigation, and intellectual property. Additionally, Mr. Booden has served as either first or second chair in over thirty trials in state and federal courts and before administrative judges. Upon graduating from law school, Mr. Booden served as a judicial clerk to the late John J. Stamos, who formerly served on the Illinois Appellate Court and Illinois Supreme Court.

In 2007, Mr. Booden received the Member of the Year award from the ACC Chicago Chapter, where he previously served as president and as a member on its Board of Directors. Mr. Booden also previously served as chairperson to ACC's National Litigation Committee.

Mr. Booden received his BS from Northern Illinois University and is a graduate of The John Marshall Law School.

Allyson Bouldon

Allyson Bouldon is general counsel for the Tegrant Corporation in DeKalb, IL. As general counsel, Ms. Bouldon is charged with providing legal and administrative support to the company in all aspects of its operations. Ms. Bouldon's areas of responsibility include: serving as corporate secretary for parent company and its subsidiaries, antitrust, litigation, litigation supervision, real estate, environmental, health & safety, credit, labor, employment & benefits, intellectual property, compliance, and supply chain.

Prior to joining Tegrant, Ms. Bouldon served as counsel for the William Wrigley Jr. Company in Chicago, Illinois. She was also a law firm associate and held an in-house position in the healthcare field.

Additionally, Ms. Bouldon has authored legal practice articles and is a frequent guest speaker.

Ms. Bouldon received a BA from Dartmouth College and is a graduate of The Law School at the University of Chicago.

John R. Linton

John R. Linton is currently serving as general counsel for JRL Enterprises LLC, a Colorado based, diversified professional consulting, training, and service company.

Prior to assuming his position with JRL, Mr. Linton served the worldwide franchisor of real estate brokerage offices RE/MAX International, Inc. for more than 17 years in various capacities, including 14 years as its founding general counsel. Over this period, Mr. Linton personally managed all major litigation in which RE/MAX was involved, including the defense of complex litigation initiated against RE/MAX and its affiliated franchisees and regional sub-franchisors. Among other responsibilities, Mr. Linton directed the strategic planning for these cases, selected and supervised outside counsel, and created the team based cooperative relationships that reduced expenses and brought efficiency to the process. In particular, he provided the leadership needed to gain management support for expenditures that often included extraordinary strategies and trial preparation tools and technologies.

Prior to joining RE/MAX and its affiliated headquarter companies, Mr. Linton served the National Association of REALTORS (NAR) as its vice president of Legal Affairs, managing the legal department he established there in 1976 after leaving Kirkland & Ellis, a major Chicago based private practice law firm.

Scott A. Mayer

Scott A. Mayer is a trial attorney with the Chicago legal department office of the United States Postal Service where his focus is on defending the USPS before the Equal Employment Opportunity Commission, the Merit Service Protection Board, the National Labor Relations Board, and in federal district court as a special assistant US attorney.

Prior to joining the USPS legal department, Mr. Mayer served as senior labor and employment counsel at Baxter Healthcare Corporation; chief counsel, labor and employment, at Allegiance Healthcare Corporation; and as assistant general counsel at Moore North America, Inc.

Mr. Mayer received a BA from the University of Illinois, and is an honors graduate of IIT/Chicago-Kent College of Law.

"Anatomy of a Trial: Influencing the Outcome from the Client's Chair"

It has been suggested that no event in the life of in-house counsel offers a greater opportunity for leadership and the demonstration of professional skills and value than litigation brought against the corporate client. But this same event can also carry the highest risk of crippling career setbacks and loss of employment. This latter risk is maximized when we forget to regularly remind our corporate clients that we are not worthy of the omnipotent, all knowing attributes sometimes imputed to us — and we then go on to allow them to act on our own best judgments or gut feelings. In the litigation context, we must instead point out that what counts is not views which are based on our own experiences to date, but rather what likely local jurors will think in regards to a given issue or question. Accordingly, the critical, strategic decisions that need to be made early in significant cases are best tested before being implemented — and some of the more important tools that are discussed below are designed to fill that very testing-of-decisions need.

There is no shortage of sound judgment in the ranks of in-house lawyers, but sometimes we forget that we practice law amidst an expansive array of tools that can be employed to confirm or better assure the correctness of critical decisions and minimize the risk of inadvertently taking a case down a wrong path. An in-house lawyer who allows the corporate client to act upon his or her gut feelings without appropriate cautions, warnings or alternative recommendations, may well be tying their continued employment to the outcome of the case — unwittingly, unwisely and unnecessarily. Where one falls on this litigation reward-risk spectrum at the end of a case will depend upon any number of factors, but at the top of that list is in-house counsel's role and familiarity with the litigation process and with the many means available for testing decisions and otherwise improving the corporate client's prospects for a favorable outcome.

Our goal in this presentation is to provide an informative, if only brief, exposure to the litigation process along with insights from the experiences of in-house lawyers who have shouldered responsibility for litigation management — and to do so in what we hope will be a fun and entertaining way. On a safe practices level, this take away writing is designed to describe a couple of the most useful techniques you can employ to enhance communication of your story line and evidence to the Court and jurors, make more reliable, trustworthy decisions early in the case and, in general, bring about a higher level of coordinated, productive effort — practices that can make a favorable outcome in any case more likely.

The exemplary practices that have been employed by one party but not the other in our case for this course include: 1) the use of a local focus group to help design a clear, effective demonstrative exhibit, to test competing themes for the case and to sample local attitudes regarding the legal theories advanced; 2) the use of a mock jury to test the completeness and understandability of the story line of the defense or case-in-chief, to pick up local language hot buttons, to help select from alternatives the most effective witnesses; to determine the best case-worst case possible outcomes of the case for settlement purposes; to identify means for building on the strengths and overcoming the weaknesses of trial counsel and to identify juror profiles that do not support the client's side of the case; and 3) the use of a trial consultant to help with implementation of #s 1 & 2 above and with the jury selection process.

The goal of in-house counsel using the above tools at the case strategy planning and preparation stages is to bridge and avoid communication gaps between witnesses and the judge or jury so the best and most complete case story line can be presented and understood — and to help assure that the jury selected is not susceptible to being influence by one or more individuals that have case-unfriendly profiles.

There are any number of additional tools or techniques for improving the prospects for a favorable outcome, for determining the up-side and down-side of a given case and its settlement value/cost and for planning or preparing for other contingencies, e.g., handling media inquiries; responding appropriately to settlement opportunities. However, all outcome enhancing practices have costs associated with their use, as does the process of planning for contingencies. These costs vary from a few thousand dollars to tens or hundreds of thousands of dollars, so the extent to which the client is willing to allocate the financial resources necessary to permit use of the various other practices available will vary in relation to any number of factors, the most important of which are the possible negative consequences of an adverse outcome of the case.

If the corporate client is facing very little financial loss and no exposure to intangible assets, there will be a natural reluctance to authorize the expenditures necessary for focus groups, mock trails and a trial consultant. On the other hand, if the case could result in serious damage to corporate goodwill, the loss of invaluable IP assets or the right to continued use of a business model or possible liability at a ruinous level, the case may be deemed to be catastrophic in its possible consequences — a ranking which typically prompts the Chairman of the Board or CEO to support a much more robust financial allocation for case preparation and trial.

The different mind-set needed for response to catastrophic litigation and an array of some 19 of the various tools and planning practices that may be invoked were presented in Litigation Track Course #304 at the October 2005 annual ACC meeting. That course was entitled "Taking a Proactive Approach to Catastrophic Litigation" and those interested in a more in-depth discussion of additional tools and planning techniques are referred to the ACC online resources. See generally John Sabine DeGroote, James L. Golden, John R. Linton and Frank C. Vecella, *Taking a Proactive Approach to Catastrophic Litigation*, October 17, 2005, Association of Corporate Counsel. (This earlier course material can be found under the above course title at: http://www.acca.com/am/05/material.php).

It must be emphasized at this point that the practices discussed below and in the referenced additional material have to do with the degree or extent of analysis, planning and preparation of the case for trial and jury selection and should never be allowed to delay or fundamentally change the important basic initial steps that must or should be

taken with any new litigation matter. These well-known basic initial steps have been or are being covered in other ACC courses and they include, but are not limited to, promptly issuing a "Document Hold" instruction to suspend the document destruction component of the company's document retention program and take related steps to avoid the spoliation of evidence, doing an early case assessment on the merits, developing affirmative defenses, possible counterclaims and projecting the likely costs to defend the case, reporting the case to the appropriate insurance carriers with recommendations of defense counsel, exploring opportunities for early settlement or for staying the case pending the outcome of third-party mediation, and so on.

The Purposes and Value of Focus Group Input:

A "focus group" is nothing more or less that a collection of residents from the jurisdiction in which the Court sits and from which population the eventual jury will come. Ideally, members of the focus group will mirror the local jury selection pool and reflect local attitudes and local communication nuances.

The reason for convening a focus group is to get a "best sense" of future jury reaction to some aspect of the case, the legal theory advanced, local biases and feedback regarding the communication levels and techniques that are most likely to be understood and appreciated by the eventual jury.

There is virtually no limit to the kinds of questions or issues that can be put to a focus group for evaluation, discussion and local opinion. In a race discrimination case, for example, the party convening the focus group might ask whether the members believe that racial discrimination is largely a thing of the past or if they think the opposite — that it is a serious, ever present problem for employees within their area. The group's answer to this question and their discussion of the matter may reveal the extent of pre-disposition one way or another toward corporations and corporate treatment of minority, protected class employees. It might also raise concerns about local biases toward minorities or toward corporations — or it might reveal the existence of a recent high profile case that will need to be distinguished in the opening statement and as part of the case story line and presentation of evidence.

Focus groups are also of value in the design and refinement of demonstrative exhibits that are often essential at trial to show a comparison or to summarize or display an accumulation of information from actual witness testimony and a multitude of documents in the case. A party to litigation that has developed what it believes to be a crystal clear and straight forward demonstrative exhibit is sometimes shocked to learn from a focus group that its intended main message is completely lost in the shadow of an unintended alternative message the focus group members see in the exhibit. Obviously, it is far better to learn of such a defect several weeks before trial, and be able to modify the exhibit to eliminate the alternative message, than to be derailed by it in the middle of the trial or worse, never learn of the problem and end up with an unfavorable outcome

Focus groups can also be helpful in revealing any existing level of gender bias. Are males on the local jury more likely to be persuaded by male executive witnesses than by female executive witnesses or vice versa? Are their possible similar biases among women jurors? This kind of feedback can be helpful in selecting witnesses to present the company's case or defenses. And it can also be useful in jury selection.

Finally, a focus group can reveal local language preferences and word usages. If the client's witnesses and trial counsel use these preferences and words, the jury may be more likely to accept them as one of their own and align with their position in the case.

The Purposes and Value of Mock Jury Feedback:

A "mock jury" is simply a grouping of eight to twelve local residents convened to hear the case or some aspect of the case and to deliberate and decide the matter as if they were the actual jury hearing the case. The goal is to make the jury role as realistic as possible and to use individuals who might otherwise be part of the jury pool for the case.

While more expensive than a focus group, a mock jury can be more valuable and employed to gather a wider range of information than is possible from a focus group. Most notably, a properly selected and charged mock jury can be asked to hear an abbreviated version of the case-in-chief and the defense and then deliberate to a verdict, including a damage amount, if any, they think is warranted by the facts. Obviously, this kind of feedback can be invaluable in terms of assessing the down side and up side of a case and in formulating settlement offers or responses.

In addition to the foregoing, a mock jury can be invaluable in assessing the effectiveness of particular prospective witnesses and in identifying gaps in the case story line and measuring the impact of the case theme. This kind of feedback well in advance of the actual trial can direct attention to needed changes in the case strategic plan.

By videotaping the mock jury presentation and deliberations, the process becomes a resource that can be consulted at leisure to answer future questions that may arise as the trial date nears.

The mock jury process is also useful for measuring the effectiveness of trial counsel — how well does he or she relate to the jurors? — do they engage in practices that annoy the jury? — are their things trial counsel could do differently or in a different order that would make the opening statement or the story line easier to understand or easier to accept or believe?

Finally, the discussions during deliberation often reveal unexpected leanings, by juror profile or occupation, in favor of or in opposition to the corporate client's position in

the case. This information can be invaluable in deciding how best to use preemptory challenges in the jury selection process.

The Role and Value of a Trial Consultant:

Trial consultants are the experts on implementation and effective use of focus groups and mock juries and often of the behavioral sciences on which these techniques depend. Typically, a trial consultant will have an established relationship with a trial preparation facility that has focus group deliberation rooms or mock jury rooms that can be observed through two-way mirrors by trial counsel, in-house counsel and client executives. Good trial consultants also have established contact and recruiting methods and participant pools for inexpensively identifying and recruiting qualified individuals from the local community. They will also have a procedure for concealing the identity of the party paying for and using the process and for screening participant to exclude those with relationships to either party or the legal counsel involved. They also will have or create custom sequential evaluation forms with pre-tested questions — and they are experienced at guiding and prompting the participants in their discussions and deliberations to focus on issues or questions of particular interest to the corporate client. in-house counsel and trial counsel.

An experienced trial consultant will invariably deliver more than was contracted for or expected from either a focus group or a mock jury process and be on deck with a wealth of helpful information at the time of jury selection in the case.

Last, but not least, a trial consultant will have the time and patience to deal with all the tabulations of information, the scheduling of everything from participant refreshments and food to the videographer and the facility and the confidentiality issues that must be handled with each participant in an effort to keep these activities confidential from the client's adversary.

NOTE: This written material was prepared by Course #208 Panel Member John R. Linton to prompt discussion by other Course #208 Panel Members and those attending this course of these and other tools and methods for enhancing the prospects for a favorable case outcome. The views, biases and sentiments revealed in the above information do not reflect any consensus of views or opinions among members of the panel for this course. To the contrary, it is hoped and expected that the differing experiences, successes and failure of various panel members in the litigation management arena will add, as time permits, to a lively discussion of the pros and cons and values of the various tools and techniques discussed or referenced above.

From: MichaelToms@arianna.com
Sent: Friday, January 04, 2008 11:32 AM
To: MikeDeLia@SecuritySolutions.com
Subject: Lacroix Investigation

Michael—

One of my Investigators has discovered that Lacroix made one call from her home number to New Vogue's general number, lasting two minutes. Thanks for getting me Lacroix's personal cell number. As soon as we're able to get records of her recent calls from this number, I will let you know.

Mike

Exhibit A

From: CarlosEvers@arianna.com
Sent: Monday, January 7, 2008 7:30 AM
To: MichaelToms@arianna.com
Subject: Email Bug

Michael—

You mentioned that you would like to confirm whether Lacroix is speaking to the reporter from BlackBook. We could create a fictitious employee who sends an email to the reporter containing confidential information. The reporter is sure to confirm the story with her contact at Arianna. I can attach to this email a new state of the art "web bug." It's like a "read receipt," except it can tell me to whom an email is forwarded. If we send an email to the BlackBook reporter, and she forwards it on to her source, we will have hit paydirt. Let me know what you think.

Carlos

From: MichaelToms@arianna.com
Sent: Monday, January 7, 2008 12:05 PM
To: CarlosEvers@arianna.com: ReaganDaniels@arianna.com
Subject: Email Bug

Carlos—

I know that Dunne would love to have this information. If/when we put the tracer in an email and/or document to the reporter, is there any chance it will be discovered? Is it something that a firewall could pick up, or anti-virus?

This needs to be part of the risk assessment. If BlackBook knows something like that was sent to them, and they ultimately trace it back to us somehow, we could end up with some seriously bad publicity. Thanks.

Michael

Exhibit B

From: MichaelToms@arianna.com
Sent: Tuesday, January 08, 2008 2:50 PM
To: MikeDeLia@SecuritySolutions.com
Subject: Lacroix Investigation

Mike—

Is it legally permissible for us to obtain non-Arianna phone records (home & personal cell) of Lacroix? My thanks in advance.

Michael

From: MikeDeLia@SecuritySolutions.com
Sent: Tuesday, January 08, 2008 3:10 PM
To: MichaelToms@arianna.com
Subject: Lacroix Investigation

Michael—

There's nothing to worry about. It is definitely not illegal. I have used this technique for over 15 years. It is standard operating procedure in these types of investigations. Investigatory agencies all over the country use this technique.

Mike

Exhibit C

From: MichaelToms@arianna.com
Sent: Thursday, January 10, 2008 12:52 PM
To: MikeDeLia@SecuritySolutions.com
Subject: Lacroix Investigation

Mike—

I just got back from a meeting with Dunne and Spears. Dunne is thrilled with our timely and informative results. It could not have gone better. However, Spears is asking me (again!) about the legality of obtaining Lacroix's home and personal cell phone records. Although I explained to her—as you related to me—that it is perfectly legal—which my own research supports, she wants me to get the opinion of outside counsel. I know you mentioned that there is a firm in your building that specializes in this area. Can you please get me a consult? Thanks much.

Michael

P.S. How do we obtain these records?

From: MikeDeLia@SecuritySolutions.com
Sent: Thursday, January 10, 2008 1:02 PM
To: MichaelToms@arianna.com
Subject: Lacroix Investigation

Michael—

The methodology utilized is social engineering, my investigators call operators under some ruse, to obtain the call record over the phone, the information is verbally communicated to the investigator, who has to write it down. In essence, the Operator shouldn't give it out, and that person is liable in some sense, we have been using this technique for years and it has not been challenged. I think it's on the edge, but above board. We use pretext interviews on a number of investigations to extract information and/or make covert purchases of stolen property or fake goods, in a sense, all undercover operations.

Mike

From: MichaelToms@arianna.com
Sent: Thursday, January 10, 2008 3:06 PM
To: MikeDeLia@SecuritySolutions.com
Subject: Lacroix Investigation

I shouldn't have asked....

Exhibit D

From: ReaganDaniels@arianna.com
Sent: Sunday, January 13, 2008 11:52 AM
To: MichaelToms@arianna.com
Subject: Lacroix Investigation

Michael—

I have serious reservations about what we are doing. As I understand Mr. DeLia's methodology in obtaining this phone record information it leaves me with the opinion that it is very unethical at the least and probably illegal. If it is not totally illegal, then it is leaving Arianna in a position that could damage our reputation or worse. I am requesting that we cease this phone number gathering method immediately and discount any of its information. I think we need to re-focus our strategy and proceed on the high ground course.

Reagan

Exhibit E

From: MikeDelia@SecuritySolutions.com
Sent: Wednesday, January 16, 2008 4:54 PM
To: MichaelToms@arianna.com
Subject: FW:FW: Legal Research on Pretexting

Michael—

As you requested.

Mike

From: JohnArmstrong@AD&CLegal.Com
Sent: Wednesday, January 16, 2008 4:17 PM
To: MikeDelia@SecuritySolutions.com
Subject: FW: Legal Research on Pretexting

My law clerk only found one case on point.

From: SarahWeeks@AD&CLegal.Com
Sent: Wednesday, January 16, 2008 3:35 PM
To: JohnArmstrong@AD&CLegal.Com
Subject: Legal Research on Pretexting

In *Clemons v. Walker*, the plaintiff brought an action against a licensed private investigator for procuring copies of the plaintiff's cell phone records under the Electronic Communications Privacy Act, 18 U.S.C. 25 *et seq.*, which criminalizes and creates civil liability for intentionally intercepting electronic communications without a warrant." 82 Fed. Appx. 436, 439 (6th Cir. 2003)(attached below). There were no other causes of action asserted. The private investigator requested that the telephone company transmit the billing records for the plaintiff's cell via the private investigator's fax machine. *Id.*

Finding in favor of the private investigator, the court held that the statute does not impose liability upon "a person not acting under color of law [who] intercepts a wire, oral or electronic communication where such person is a party to the communication...unless such communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the Constitution or laws of the United States or of any State." *Id.* at 439-40 (*quoting* 18 U.S.C. 2511(2)(d)). The court further held that the private investigator was in fact "a party to the communication," and therefore not subject to liability under the Act, because the private investigator had specifically requested the records himself from the telephone company and had received them the records via his own fax machine. *Id.* at 440.

If you need anything else, let me know. Sarah

Exhibit F