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Quarterly State Compliance Review

By Sandra Feldman

This edition of the Quarterly State Compliance Review looks at some legislation of interest to corporate lawyers that went into effect recently. It also examines some recent decisions of interest, including two from the Delaware Chancery Court.

IN THE STATE LEGISLATURES

The period between Jan. 1 and April 1 is generally a slow one when it comes to amendments to state business organization statutes. Nevertheless there were some bills of interest that went into effect during that period. Highlights include the following:

In Delaware, House Bill 297, which was signed Jan. 26, 2010 and made effective retroactively to Jan. 1, 2006, amended the Franchise Tax Law to require corporations filing franchise tax reports on a consolidated basis to submit to the Secretary of State the consolidating ending balance sheets which accompanied their federal Form 1120 Schedule L.

In New Jersey, Assembly Bill 2882, effective Jan. 11, authorized the Department of State to offer one- and two-hour service options for expedited over-the-counter corporate service requests. Also in New Jersey, Assembly Bill 2879, effective Jan. 11, amended the Business Corporation Act to provide that

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The Determination of a Corporation's 'Principal Place of Business'

Supreme Court Clarifies

By Jeremy A. Rist and Catherine A. Armentano

Every first-year law student learns one of the canonical formulations of federal civil procedure: In order for a federal court to have subject matter jurisdiction over a case or controversy, the matter generally must either arise under the Constitution, laws, or treaties of the United States ("federal question" jurisdiction); or the plaintiffs in an action based on state law must have complete diversity of state citizenship from all of the defendants, and the amount in controversy must exceed $75,000 ("diversity" jurisdiction). 28 U.S.C. §§ 1331; 1332. When the litigants are individuals — "natural persons" — determinations of citizenship are simplified by the rule that a person has only one domicile, and by the well-tested standards that have evolved for identifying where that place may be. Where a corporation is a litigant, however, determinations of citizenship are complicated by the so-called "dual citizenship" doctrine, that holds a corporation is a citizen of *both* its state of incorporation *and* "of the State where it has its principal place of business[.]" 28 U.S.C. § 1332(c)(1).

Exactly what this phrase means, however, has never been altogether clear since that second basis of state citizenship was codified in 1958. As the decades have progressed, the evolution of corporate structure and corporate commercial activity has rendered the application of this unarticulated standard a quagmire. What is the "principal place of business" of a multinational corporation that has corporate headquarters in New York, but enjoys relatively few sales in that state, and instead conducts business in all 50 states and 39 other nations? What about a corporation whose leadership team is spread across three offices in three separate states, and does roughly equal amounts of business in each of the states in which those offices are located? Is the proper locus of analysis whether there is a particular *place* within a state that can be said to be a corporation's "principal place of business," or should a court look to which state has the greatest *aggregate*

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Jurisdiction

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number of business-related contacts to the corporation in determining where the corporation's principal "place of business" lies?

Cacophony of Approaches

In response to these sometimes-vexing factual problems and the silence of the statute itself, the federal Courts of Appeals have developed various standards to assess a corporation's principal place of business. The result has been a cacophony of approaches that often leave a corporation unsure of exactly what state it will be deemed a citizen of for jurisdictional purposes, and exposed to the very real possibility that it will be assigned *multiple* "principal places of business" by different federal courts across the country.

Finally, earlier this Term, in *Hertz Corp. v. Friend et al.*, No. 08-1107, 2010 U.S. LEXIS 1897 (U.S. Feb. 23, 2010), the Supreme Court clarified the jumble of tests used by the lower federal courts and unanimously endorsed the so-called "nerve center" test for determining a corporation's principal place of business. Now it is clear that "the place where a corporation's officers direct, control, and coordinate the corporation's activities" should be considered its principal place of business." *Hertz* will change and simplify in almost every Circuit — sometimes dramatically — the analysis used to identify the principal place of business of a corporation, and thus affect when a corporation may be sued in, or may remove a case to, federal court, and should lead to greater predictability in determining when a federal court will find diversity jurisdiction to be present.

What Is 'Business,' Anyway?

Hertz well illustrates the jurisdictional problems in which many large national corporations have found themselves over the past two decades. In *Hertz*, two California-based employees sued the automobile rental provider in California state court for alleged violations of state wage and hour laws, and sought relief on behalf of a class of similarly situated California citizens. Hertz removed the matter to federal district court, alleging that complete diversity was present — the putative class members were limited to citizens of California; Hertz was a Delaware corporation with its principal place of business in New Jersey. Hertz alleged that its "leadership" was located at its "corporate headquarters" in Park Ridge, NJ, and its "core executive and administrative functions" were carried out in New Jersey and, to a lesser extent, in Oklahoma. Hertz further stated that 273 of its 1606 car rental locations were in California; 2300 of its 11,230 full-time employees, and about 3.8 million of its 21 million annual transactions, or approximately 17% to 20% of its total sales-related contacts were in California.

The last set of facts was particularly relevant in the Ninth Circuit, which had adopted a corporate citizenship test that essentially rejected as irrelevant the location of corporation's headquarters and central executive activities. Instead, the Ninth Circuit had instructed the district courts to determine a corporation's business activity on an aggregate, state-by-state basis. If that business activity was "substantially larger" or "substantially predominated" in one state, that state was the corporation's principal place of business. Only if there was no such state would a court look to the corporation's "nerve center" — the "place where the majority of its executive and administrative functions

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Tips and Time Savers For Trial Preparation

100 Days and Counting

By Nancy J. Geenen and Suann Ingle

This article examines calendar and activity milestones during the three-to-four-month period before making an opening statement at trial. A comprehensive checklist of activities and tasks is vital for success in today's high-stakes civil litigation, especially as a guideline for in-house counsel with budgetary concerns who may not have experience in trial preparation and delivery timelines. Checklists are gaining increased attention in a multitude of places, including hospitals and cockpits, protecting against inadvertent error and maximizing the opportunity for success in a stressful environment.

Preparing for trial is as much about a methodical approach to tasks and deadlines as it is about the craft of the presenting a persuasive story. A trial team — from the most seasoned trial attorney to novice litigator — needs a forward-looking roadmap that identifies the destination and describes the landmarks along the way. Methodical trial preparation provides the trial attorney with more time for creative and analytical thinking that is often the difference between winning and losing a close case.

100 Days Before Trial

Assemble the entire trial team for a day-long, in-person planning and strategy session. At this first meeting, address and assign substantive and logistic tasks.

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Tip

Use this meeting to set the tone and the expectations for the period leading up to trial and then for the trial itself. Regardless of trial team's size, the lead trial attorney assigns responsibility for the multitude of tasks that require the attention and diligence of team members. Team meetings should stress accountability and include pep talks regarding the demands of trial preparation and trial. At some point during preparation, each and every trial team member will have a "mini" breakdown. Identifying the probability of such a personal event removes some of the sting for the rest of the trial team. This is not to suggest that disrespectful or abusive behaviors are tolerated, but it is an opportunity to emphasize the importance of nutrition and fitness throughout the preparation process.

In addition to the traditional checklists found in many trial treatises, the 100-day tasks and assignments include: scheduling interactive team meetings (frequency and mode: phone, video, and in-person conferences); creating the trial task list and trial calendar, which includes alerts for the trial team (with a separate external calendar for in-house counsel and client); starting the electronic trial book including all court orders, pleadings and discovery; confirming witness and expert availability for preparation sessions and testimony at trial; scheduling tutorials and mock exercises; identifying potential motions *in limine*, applicable jury instructions, documents and other information likely to become exhibits; and reviewing the most recent iteration of the trial themes. (See Figures 1 and 2, below.)

Time Saver

Implement a virtual trial site where all of the trial preparation information is available to all trial team members 24/7.

Tip

The task list and team calendar are living documents with a single editor, usually an experienced paralegal or seasoned associate who owns the editorial rights for the life of the case. Tasks should be numbered with columns for date, description, responsible person, status, and sign off for completion. This list is standardized for all trial activities through post-trial motions.

In addition to deadlines and docketing events, include "fun" events on the trial team calendar. Add social and personal events, birthdays, holidays

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Figure 1: Sample Trial Task List

No.	Due Date	Trial Task	Assignment	Status/Comments	Sign Off
1		Pretrial Planning Session		Trial team and client to attend. Revisit motion to bifurcate. Review pretrial process and trial tasks.	
2		Order certified copies of Patents in Suit and file wrappers		Add request for patents identified in motion to amend. Review patents. Certified copies - most received with the exception of two that issued since our order date. Will do inventory to make sure everything was received.	

Figure 2: Sample Standing Orders and Docket

Name	Order/ Time	Level	Preparation Dates - TC (1 Hour each) Oct 3 – 10	Preparation Dates - TC (2 - 4 Hours)	Preparation Dates in - person (3 - 5 Hours) Nov. 7 - 9	Testimony Preparation and Trial Attendance
Witness 1	1 2.5	A	Oct. 3, 2pm CDT	Oct. 29	Nov. 7 9 am CDT	Arrive Nov. 26. Prep 11/ 27 - 11/28. Trial 11/ 29 and 12/3
Expert 1	3 1.0	B	Oct. 5 Noon CDT	Oct. 31	Nov. 9 9am CDT	Arrive Dec. 2. Prep 12/3 - 12/4 Trial 12/5 - 12/6

Trial Preparation

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and anniversaries. Participation in these events elevates the trust and camaraderie between and among the trial team.

Tip

Engage the client in the "real" trial preparation process, including client expectations with respect to budget, mock exercises, witness coordination, settlement, and trial outlines and themes. Client management is an opportunity to test the client's appetite for the trial, including budget expectations. Many times the client's eyes are much bigger than the stomach. Certainly the parties have participated in unsuccessful settlement efforts; however, the trial attorney must focus the client, in-house counsel, the chief financial officer, and others in leadership, on the strengths and weaknesses of the case at trial, which is often very different from other stages of litigation.

Time Saver

A good test of the client's appetite for trial is a 90-minute presentation of the main case themes, witness testimony, evidentiary issues, and a closing argument with an accompanying 30 minutes for questions and answers. Ask the client representative to invite a cross-section of management, excluding any trial witnesses, to attend. This rehearsal prepares the client for the value of the upcoming mock exercises, often reveals nuances about the case known only to company insiders, and generates good discussion about the merits of having a jury decide a significant business issue for the company.

Finally, focus groups and mock exercises are a valuable means to test the claims and defenses that survive to trial. Use video depositions or mock depositions to test the reactions of the mock jurors to the witnesses through whom evidence will be introduced.

Tip

Trial attorneys often lose the advantage of the mock exercise by trying to "win" in front of the client. Set the expectations with the client that mock exercises are not about winning or losing. Successful mock exercises test the strengths of the adversary's case and the weaknesses of your client's case. The true value of the exercise comes from identifying which themes or information are persuasive with the jurors who are undecided. Give some consideration to purpose of the mock exercise: is it early enough in the process for the trial team to test some competing themes? If so, analyze whether client representatives should attend and participate.

75 Days Before Trial

Trial preparation activities are chock-full of strategic decisions that may be outcome determinative. The trial team has the mock exercise report and recommendations so that witness and expert preparation can start in earnest.

Tip/Time Saver

Keep the trial consultants, both jury and presentation experts, involved in the development and critique of the trial presentation. Having the opportunity to work through a story-board and choose from several graphic presentation styles will standardize your themes and messaging. Multimedia is now standard in most courtrooms, and most juries expect to see a "show." Consistency between what the jury hears from attorneys and witnesses and what the jury sees in exhibits and demonstratives is a critical component in a persuasive trial presentation. (See Figure 3, below.)

The senior members are working the trial themes into sound bites that are repetitive and memorable for the witnesses, drafting the trial brief to tell the story, and matching the jury instructions to both the themes and the trial brief. The elements of the claim/defense and evidence chart are tied to jury instructions and burdens of proof. The paralegal is organizing the witness files, ordering certified copies or originals of documents and scheduling hotel and travel logistics for witnesses and the trial team.

Time Saver

Have a paralegal develop a working relationship with each witness so that the trial attorney is not burdened with travel logistics relating to preparation and trial. The lead trial attorney is crafting the order of presentation of testimony and evidence, observing the trial judge in action and reading recent orders and decisions, and working on the outline of the closing argument.

Tip

Follow and attend the trial judge's pretrial motion calendar and observe jury selection and trial procedure in other cases on the court's docket. Ideally, the observing attorney has been through one or more trials from start to finish. Make sure that attorney prepares written summaries and presents an oral report during a scheduled trial team meeting.

60 Days Before Trial

The trial team practices direct and cross examination with each witness and expert, becoming more intense and aggressive with each session.

Tip

With fact witnesses, digital recording and observation is an effective tool for continued training and improvement. As expert witness practice goes forward, experts learn to use their reports as persuasive demonstratives that simplify and teach concepts central to the experts' opinions and testimony.

Time Saver

Read the case from start to finish; the pleadings, the primary and secondary witness depositions, the

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Figure 3: Sample Witness Preparation Schedule

Name	Order/ Time	Level	Preparation Dates - TC (1 Hour each) Oct 3 – 10	Preparation Dates - TC (2 - 4 Hours)	Preparation Dates in - person (3 - 5 Hours) Nov. 7 - 9	Testimony Preparation and Trial Attendance
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Expert 1	3 1.0	B	Oct. 5 Noon CDT	Oct. 31	Nov. 9 9am CDT	Arrive Dec. 2. Prep 12/3 - 12/4 Trial 12/5 - 12/6

Blogging and Your Business

The FTC Steps In

By Barbara E. Hoey

Social networking, blogging, and the use of sites like Facebook and Twitter to communicate are exploding. As in-house counsel, if your employees post a blog comment, or an entry on Facebook or Twitter about your company or its products, a number of questions are raised. What if the comment is wrong or exaggerated? What if your employee makes a claim about the product that is untrue? Is the company responsible?

The FTC Has an Interest

The FTC has taken an increased interest in the use of social media sites for product advertising. On Dec. 1, 2009, new FTC "guides," published at 16 C.F.R. § 255, went into effect, requiring that any person who goes onto a blog, Web site or a "social network" site and posts a comment about a product must disclose whether that person is receiving "anything of value" from the maker/producer of that product. Many commentators have focused on how these guides will affect advertisers, marketing companies, and professional bloggers. What many employers fail to realize is that the guides may also apply to companies and employees who are not professional advertisers.

At first glance, these new guides make sense, as any consumer who reads a comment about a product should know whether the manufacturer is paying the "commenter." This was the intent of the guides: namely to protect consumers from what appear to be "neutral" bloggers who sample products and recommend them. What was happening more frequently in recent years, however, was that these bloggers were not neutral at all. They were either paid directly by the producer to sample and comment on its products, or received free products. Either way, their objectivity could certainly be subject to challenge.

Given a second glance, however, the guides went a bit too far, as they now provide that anyone who receives a salary must disclose that fact, as a "material connection" to the advertiser. So, in effect, the FTC has told employers that they need to be responsible for any "posts" or "comments" their employees make on the Internet about their products, in the same way they are responsible for the content of paid advertising. This is not as dire as it may sound, but it does require all employers to update their Internet policies and to make employees aware of certain types of behavior they should avoid when they are out "twittering," "tweeting," "chatting" and "blogging."

The FTC Guides

The focus of the guides (which are not laws or regulations) are "endorsements" — a term that is defined as "any advertising message … that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other that the sponsoring advertiser." The guides state that an endorsement "must reflect the honest opinions, findings, beliefs, or experiences of the endorser." They go on to state that both advertisers and endorsers "may be subject to liability for false and unsubstantiated statements made through endorsements," or for "failing to disclose material connections between themselves and the endorsers."

This means that if there is a relationship between the speaker who presents the message and the advertiser, it must be disclosed. Thus, any blogger who "receives cash or in-kind payment to review a product" is considered an "endorsement." Also, bloggers who make an endorsement "must disclose the material connections they share with the seller of the product or service."

'*Material Connection*'

What is a "material connection?" The guides define the term as any "payment" by the maker or advertiser to the bloggers, whether the payment was specifically in exchange for creating or posting the blog or not. Thus, if someone is on the payroll, or on the payroll of an ad agency or marketing firm, and they are blogging or making comments about your product, that blog or comment could be considered a "sponsored" endorsement. Most importantly, the guides specifically state that companies are subject to liability for false or unsubstantiated statements made through "sponsored endorsements," or for failing to disclose "material connections" between themselves and their endorsers. To quote the guides:

> Any paid endorsement must not include any representation that would be deceptive if made directly by the sponsoring advertiser.

Therefore, an employee who uses electronic media, including e-mail, blogs or social networking sites, to make comments about a product made by his or her employer, and who fails to disclose his or her relationship with that manufacturer, may create legal liability under the FTC guides. Further, should a consumer rely on a particular comment in that posting to his or her detriment, any ensuing damage could be attributed to the manufacturer/company.

Again, the aim of the guides is that a consumer or reader of a blog be informed and know whether the person making comments is employed by the company.

What Is the Likelihood of Enforcement and What Are the Penalties?

It's important to understand that these guides are not FTC rules or regulations. They are just guides. So there is no express fine for violating the guides.

While the FTC's own comments to the guides include a statement that the Commission would be "unlikely" to take action against a company for the conduct of a single "rogue" employee who violates a company's social media policy via an illegal endorsement, that comment remains to be tested.

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Blogging

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Certainly, the comment underscores the need for a good policy. So, should your company fail to create a social media policy and publicize it to employees, the FTC may not have much patience. On the other hand, if your company has the policy, publicizes it, trains people and still has one bad actor go "off the reservation," on a first offense or considering that this rule is still in its infancy, a cease-and-desist letter is likely the worst that could be expected.

What if a Consumer Makes a Complaint?

Should a noncompliant endorsement create broad consumer injury or damage, the endorser's employer may find that it cannot escape associated liability under the new guides. While guides themselves do not have the same force that a statute does, courts view them as an indication of how a law should be interpreted, and often act consistently with them. From the FTC's perspective, however, it would probably first issue a warning letter.

What Does This Mean for Employers?

The intent of the guides, the FTC has made clear, is not to entrap average companies or employees, who happen to make positive comments about their companies' products. Nor is it likely that the FTC expects companies to be able to oversee all the postings and Internet chatter of employees. That said, however, these guides have been out since October 2009, so it is fair to assume the FTC will expect that companies will take reasonable steps to educate their employees and to comply with them.

There are two essential measures every company should consider in an effort to comply with the FTC guides. First, every company should have an Internet use policy. That policy should include some references to social networking and regulation of employee conduct on social networking sites. Second, employees need to be educated to ensure that they understand the policy as implemented. The education the company provides should subject to a specific protocol and acknowledged in writing by each employee.

What Can Employers Regulate?

An employer has the right to monitor. The need for concern, however, is when the employer takes action based on an employee's activity because an employer cannot always discipline an employee for what they do on these sites. In this regard, there are two different types of conduct to consider: on-duty and off-duty conduct.

On-Duty Conduct: An employer certainly can and should regulate what employees do on work time and on company computers. This your property. These are your systems, and the courts — within bounds of reason — have been clear that employers can regulate the use of their own systems. You can also regulate how employees behave when they are on duty.

Off-Duty Conduct: Things get a bit murkier once employees are off premises or duty. If an employer issues an employee a "company laptop" or allows an employee to have electronic access to the company's network from home, there is a recognition that the company can regulate the employee's use of that equipment and system. Once again, even if the employee is not on "work time," that individual is using your system and must do so responsibly and in compliance with your rules and standards. Other basic rules should be followed at all times:

- Employees should never be able to "electronically" abuse or harass each other, on or off duty.
- You can also remind employees to be professional and appropriate, when they tweet or blog about the company or its products.
- Remind employees that what they tweet or blog can be seen by all — and there can be disciplinary consequences for inappropriate comments.

Comments About Products

Given the new FTC guides, your company should also take steps to regulate what employees do — as it relates to the brand and your products, even when they are both off duty and are not using your system. Here, the ability to control the behavior is obviously limited, but companies should at least put a policy in place that sets some boundaries:

- Employees should be told they can never disclose confidential information, trade secrets, and other business information that should not be in the public domain.
- Employees should be told that they cannot speak "for" the company. If there is some public issue going on and they are asked for comment, they should refer comment back to the company. You should designate a company spokesperson for this business.
- Employees, in light of the FTC rule and even before this rule, should be told not to use company logos or the company brand on their own blogs or Web sites. It should be clear that whatever page or posting the employee is making is theirs, and is not endorsed by the company. (Necessary because an employer cannot possibly control the quality and content of what employees are saying about you and your products.)
- If an employee posts a comment, company policy should state that an individual must disclose that the company employs him/her.

When Can You Discipline Employees for What They Say?

There are many laws that regulate whether you can discipline employees for making comments about the company:

- Whistleblowing laws protect employees from discipline for disclosing or reporting violations of laws or regulations.
- The National Labor Relations Act can protect employees from discipline, if they are "blogging" or chatting about workplace concerns.
- What about "off-duty conduct" statutes? In states such as New

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How Companies Are Addressing Social Media Risk

By Melissa Krasnow

Social media, including Facebook, Twitter, YouTube, etc., is an evolving and growing means of communication. According to some reports, people have been spending more time using social media sites than e-mail since February 2009. *See* "A World of Connections," *The Economist*, Jan. 28, 2010. For companies, social media presents both opportunities and risks. These risks include reputational, brand, legal, regulatory and security concerns. This article outlines some approaches that companies are taking to manage the risks, including: 1) reviewing existing company compliance policies and preparing social media policies as warranted; 2) restricting workplace access to social media; 3) utilizing social media monitoring tools; 4) taking into account actual social media business issues; and 5) reviewing insurance coverage.

Company Compliance Policies And Social Media Policies

According to a recent survey by Manpower, 29% of companies in the Americas and 20% of companies worldwide have a social media policy. *See* "Social Networks vs. Management? Harness the Power of Social Media, *Manpower*, January 2010. Companies that do not have social media policies likely are preparing them or at least considering them. While there are social media policies, other company compliance policies (*e.g.*, codes of conduct, codes of ethics, confidentiality obligations, privacy policies, intellectual property policies, etc.) often cover aspects of social media use. The starting point is for a company to review existing policies, determine whether they cover aspects of social media and revise or update them as necessary or appropriate and prepare a social media policy as warranted. A new social media policy should be drafted to be consistent and integrated with other company compliance policies.

By way of example, a company record retention policy and legal hold could be implicated by social media use. Information on a company's social networking site is considered to be electronically stored information. As soon as a company is reasonably aware of the possibility of litigation, audit or investigation, it must take steps to preserve all records that may be relevant to the matter, including electronically stored information. If information on the social networking site may be relevant, the company must take appropriate steps to preserve it. Accordingly, a company's record retention policy and legal hold should be reviewed regarding social media and revised and updated if necessary or appropriate. Any new social media policy should be drafted to work together with the record retention policy and legal hold.

Social media policies typically are tailored to a particular company's circumstances, including the many different ways that companies use social media. Many social media policies are not publicly available. Based on a review of the social media policies of Sun (which was acquired by Oracle in early 2010), Yahoo, IBM, Edelman, Cisco and Dell, following are some of the common elements of these policies:

- Identify yourself and make it clear when you are speaking on behalf of or about the company;
- Use common sense and judgment;
- Know that there is personally liability for content;
- Understand that disclaimers are advisable, but not a shield from liability;
- Realize that disclosed information should be accurate;
- Seek advice from the legal department or management when necessary (*e.g.*, when unsure about posting or for permission to comment on work-related legal matters);
- Do not disclose confidential or financial information or material, non-public information about the company; and
- Follow established company guidelines, policies and codes.

Social media policies often involve different areas of a company (e.g., human resources, marketing, legal, communications, etc.). A number of different laws could potentially apply, including without limitation employment, intellectual property, privacy and securities law. In some cases, there may be additional regulation (*e.g.*, Federal Trade Commission, Financial Industry Regulatory Authority, Food and Drug Administration, etc.). As a result, a multi-disciplinary business and legal team frequently is assembled to prepare a social media policy. As with other company compliance policies, a social media policy needs to be implemented and enforced consistently.

Restricting Workplace Access to Social Media

According to a survey by Robert Half, 54% of U.S. workplaces completely block access to social networks, whereas 19% permit access solely for business purposes, 16% permit limited personal use and 10% permit any personal use of social networks. *See* "Whistle — But Don't Tweet — While You Work," *Robert Half*, October 2009.

Social Media Monitoring Tools

Social media monitoring tools encompass analytics software for tracking and analysis (*e.g.*, traffic, keywords, trends, etc.), including

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Social Media Risk

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Web software tools like Webtrends, Omniture and Google Analytics. In addition, there are URL shorteners, including Bit.ly and Ow.ly, which track information like clicks from different traffic sources. There also are tools that collect metrics on Twitter — Twittersearch, Twitrratr, Twinfluence and Tweetstats. Company employees could engage in monitoring on behalf of the company. Moreover, there are third-party paid monitoring options, which can be domestic or global in scope. These include Radian6 (owned by Webtrends), Sysomos and Buzzlogic. These tools track the activity of a brand in social media and provide insights about the tone of the dialogue (*i.e.*, "sentiment analysis").

Considering Actual Social Media Business Issues

Certain business issues are arising through the use of social media. Examples of these include an impostor establishing an impostor site, pretending to be another person (*e.g.*, Twitter impostors in the case of celebrities and executives) and whether Facebook's terms of use can be modified. Once aware of these issues, a company can work to devise protections and solutions (*e.g.*, how to deter impostor sites and how to shut them down).

Reviewing Insurance Coverage

A company should review the particular terms of its existing insurance coverage and determine whether any social media use or aspects are covered.

Conclusion

Addressing the risks of social media should not necessarily outweigh realizing the opportunities. Companies also must recognize and encourage the opportunities offered by social media for communication, relationship-building and reputation and brand enhancement, among other things.

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Trial Preparation

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dispositive motions, the declarations and exhibits, the expert reports, and the court's orders. With good preparation, expect only minor adjustments to be made, but there is still time to make significant changes to the case to be tried if necessary.

45 Days Before Trial

The trial team prepares for the fireworks between the parties. Opposing counsel clash swords as each side tries to control the exhibits and the pretrial procedures. Pretrial filings are prepared, filed and served. Many judges ask for joint filings of pretrial statements, exhibit lists, witness lists, neutral statements of the case and *voir dire* for the jury and preliminary jury instructions.

Tip

Prepare a lead negotiator, with a supporting team, to handle all communications with opposing counsel. Having one point of contact and confirming areas of agreement and dispute streamlines the joint preparation and presentation process, and prepares for a "final" settlement conference that positions the client for the best possible settlement outcome.

Tip

Consider appointing a senior member of the trial team as lead settlement attorney to attend the settlement conference while the rest of the trial team prepares without the distraction of negotiations. Avoid delay in trial preparation in the hope that "the settlement conference will make this trial go away." Other team members are scouting the courtroom, befriending the courtroom clerk and the court reporter, and mapping the physical layout and technology capabilities of the courtroom.

30 Days Before Trial

The opening statement is outlined, witness scripts are finalized, stipulations regarding admissibility of exhibits, deposition transcript designations, and jury materials are reached (or not), and cross-examination scripts are started. The lead attorney is refining the order of presentation of the case. Every item on the task list is reviewed for completion or finalized.

Tip

Work backward through the trial, from the closing argument and verdict form. The lead trial attorney attends one start-to-finish practice session with each witness and expert with the dual purpose of listening for the consistent storyline and identifying ways to punch up the trial themes. Know the exhibits and the testimony so that the outline of the closing argument and preparation of the opening statement are focused on presentation techniques that tell the story emphasize the trial themes. Within two weeks of trial, the trial team arrives on site and logistics are tested and finalized.

Ten Days Before Trial

Demonstratives are finalized and exchanged, objections to exhibits and demonstratives are filed and resolved, and negotiations regarding jury materials begins again. Witnesses for both sides have been served with trial subpoenas, and the daily trial schedule is finalized with the court. The lead trial attorney works the order of presentation and practices the opening statement with the trial team and client representative. Split the rest of the trial team between witness preparation and jury material preparation. Federal judges are trending toward timed-trials that force the parties to streamline the presentation of the case. Time the witness practice sessions and have witness use the exhibit binders as part of the preparation. Focus other trial team members on courtroom set up, demonstratives, animations, digital playback of depositions for cross-examination purposes, and *voir dire* procedures.

Tip

Move all equipment, courtroom library, and trial materials into the courtroom at least one day before jury selection begins. Have at least one laptop with a tested broadband card for Internet access to have real-time research and e-mail available.

Time Saver

Equipment failures will occur, so have redundancies in place so the case is ready to go forward, even if the lights in the courtroom fail. Test all technology, including projectors, sound, and monitors and have extra bulbs, batteries and power cords available in the courtroom. An easel

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Compliance Review

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any notice to shareholders given by a corporation pursuant to any provision of the Act, its certificate of incorporation, bylaws or a resolution of directors or shareholders, may be given by a form of electronic transmission consented to by the shareholder to whom the notice is given.

In Oregon, House Bill 3405, ratified by Ballot Measure 67, provided that effective Feb. 27, filing fees with the Secretary of State will increase from $50 to $100 for domestic entity formations, annual reports, amendments, and dissolutions and from $50 to $275 for foreign entity qualifications, annual reports, amendments and withdrawals.

In Virginia, House Bill 1957 (Laws of 2009) effective April 1, 2010, provided that a limited liability company may change its principal office address on the records of the State Corporation Commission by filing a statement of change on a form supplied by the Commission for that purpose.

IN THE STATE COURTS

DE Chancery Court Rules On Whether LLC Managers And Controlling Members Owe A Fiduciary Duty of Loyalty

In *Kelly v. Marconi Broadcasting, Co., LLC*, C.A. No. 4516, decided Feb. 24, 2010, the plaintiff, a former minority member of a Delaware LLC, brought an action against the LLC's managers and controlling members. Among other claims, the plaintiff alleged that the defendants breached the fiduciary duty of loyalty owed to him by entering into a self-interested merger on terms that were unfair to him. The defendants moved to dismiss the claim, arguing that any fiduciary duties of members or managers must be expressly set forth in the LLC agreement and that the LLC agreement in this case did not impose a duty of loyalty.

The Delaware Chancery Court pointed out that in the absence of a provision in the LLC agreement restricting or eliminating fiduciary duties, members and managers owe traditional fiduciary duties of loyalty and care to each other and the LLC. Here, the LLC agreement stated that the managers shall run the LLC's affairs in a prudent and business-like manner and devote such time to those affairs as they determine in good faith is reasonably necessary. According to the court, that provision not only did not explicitly limit the applicability of the default principles of fiduciary duties, they suggest the parties intended the default principles to apply.

The court then noted that the plaintiff alleged that the managers entered into the merger to profit from a premeditated scheme to squeeze the plaintiff out and seize control of an FCC license held by the LLC. According to the court, if those allegations were true they supported a claim for breach of the duty of loyalty.

The LLC agreement also contained an exculpatory clause eliminating monetary liability for all conduct except willful or fraudulent misconduct or willful breaches of fiduciary duties. According to the court, the alleged facts suggest that the managers' actions were willfully intended to extinguish the plaintiff's membership interest. Thus, the court denied the motion to dismiss the claim that the managers breached their fiduciary duty of loyalty.

As to the controlling members, the LLC agreement was silent as to what duties were owed to minority members. And, according to the court, in the absence of a provision, controlling members owe the traditional fiduciary duties that controlling shareholders owe minority shareholders. Thus, the controlling members had a duty not to cause the LLC to enter into a merger that would benefit the controlling members at the expense of minority members. And because the plaintiff alleged facts that, if true, showed that the members did effect the merger to benefit themselves at the plaintiff's expense, the court denied the motion to dismiss the claim that the controlling members breached their fiduciary duty of loyalty.

DE Chancery Court Rules On Stockholders of Record, Bylaws That Reduce Board, And Vote Buying

Kurz v. Holbrook, C.A. No. 5019, decided Feb. 9, 2010, involved a contest for control of the board of directors of a publicly traded corporation (EMAK). Before the litigation, EMAK's board consisted of four members with three vacancies. The plaintiff group solicited consents to remove certain directors and fill the vacancies. The defendant group solicited consents to amend the bylaws to reduce the board size to three directors. The inspector of elections disallowed the plaintiff group's consents for shares in which the record owner was the Depository Trust Company (DTC), but in which the shares were voted by DTC participant banks and brokers, because the consents were not accompanied by an omnibus proxy from DTC granting the banks and brokers voting authority. The plaintiff group sued, claiming its consents were valid and the defendant group's were not.

The Delaware Chancery Court held that the plaintiff group's consents were valid. The court acknowledged that under Delaware law only the stockholder of record can vote or act by consent and that the stock ledger is the only evidence as to who is a stockholder entitled to vote or act by consent. However, according to the court it was not necessary for DTC to give a proxy to the banks and brokers because their names appeared in the "Cede breakdown." And, according to the court, the "Cede breakdown" is part of the stock ledger for the purpose of determining who is entitled to vote or act by consent. Thus, the banks and brokers were stockholders of record.

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The defendant group also claimed that the plaintiff group engaged in improper vote buying. A member of the plaintiff group bought shares from an EMAK shareholder shortly before the closing date of the solicitation in order to have consents from a majority of shares. According to the court, even though the buyer did not use corporate resources, the purchase had to be reviewed because it resulted in disenfranchising the stockholders who were against the consent solicitation. However, the court found that the purchase was not improper. The court noted that there was no fraud involved. The court pointed out that the seller knew about the competing consent solicitations. In addition, he transferred 100% of the economic risk to the buyer, meaning that the buyer had an interest in the corporation's performance.

The Chancery Court also held that the defendant group's consents were ineffective because they purported to amend the bylaws in a manner that conflicted with the General Corporation Law. According to the court, a bylaw that would reduce the board size below the number of currently sitting directors would result in ending the term of a director in a manner not contemplated by Sec. 141 — which provides that a director's term ends when a successor is elected or the director resigns.

GA Supreme Court Holds That Common Law Fraud Claims May Be Based on Forbearance in the Sale of Publicly Traded Securities

In *Holmes v. Grubman*, S09Q1585, decided Feb. 8, 2010, the plaintiffs, Holmes and four entities he controlled, owned over two million shares of WorldCom stock. They alleged that in June 1999 Holmes ordered his broker to sell all their WorldCom stock — which was being traded at $92 per share — and that the broker convinced him not to sell, knowing that the stock was grossly overvalued, in order to keep WorldCom's lucrative investment banking business. Eventually they sold the shares and suffered alleged losses of $200 million. The plaintiffs brought an action for fraud and other claims in a federal court -which dismissed for failure to state a claim upon which relief can be granted. On appeal, the U.S. Court of Appeals for the Second Circuit certified questions to the Georgia Supreme Court including whether Georgia common law recognizes fraud claims based on forbearance in the sale of publicly traded securities.

The Georgia Supreme Court noted that it is well settled in Georgia and elsewhere that induced forbearance can be the basis for tort liability. The court also noted that while the U.S. Supreme Court has held that only buyers or sellers can make a claim under Rule 10b-5, the Court has long recognized that in the ordinary case of deceit a misrepresentation that leads to refusal to sell is actionable. Thus, the court concluded that Georgia law permits fraud and negligent misrepresentation claims based on forbearance in the sale of publicly traded securities as long as the plaintiffs allege that the misrepresentations were directed at them to their injury and that there was specific reliance on the defendants' misrepresentations.

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are performed." Accordingly, the district court determined that the "plurality" of these activities in California was "significantly" greater than those activities in Hertz' next-most-active state, Florida, and remanded the class action to state court. The Ninth Circuit subsequently affirmed. In light of a split among the Courts of Appeals in the application of the test for corporate citizenship, the Supreme Court granted certiorari.

Ruling Not Unique

The Ninth Circuit's ruling as to Hertz's principal place of business was not unique to Hertz whatsoever. As the Ninth Circuit itself has realized, because of the size of California's economy — it presently accounts for approximately 12% of the nation's economic activity — it is obvious that "nearly every national retailer, no matter how far flung its operations — will be deemed a citizen of California for diversity purposes." *Davis v. HSBC Bank Nev., N.A.*, 557 F.3d 1026, 1029-30 (9th Cir. 2009). Hertz is not the only corporation that has fallen into that trap. For example:

1. In *Ghaderi v. United Airlines, Inc.*, 136 F.Supp.2d 1041, 1044-46 (N.D. Cal. 2001), the Northern District of California applied the "substantial predominance" test and analyzed the following factors to identify the principal place of business of United Airlines, Inc., a Delaware corporation with headquarters in Chicago: the location of its employees; where sales took place; its production activities; its tangible property; its sources of income; the value of land owned and leased; and the replacement cost of assets located in a certain state. The court then gauged United's aggregate contacts with the public in each state and determined that United's contacts with California were significantly deeper than those of United in Illinois.

2. In 2009, the United States District Court for the Central District of California found that Target Corporation's principal place of business was also in California, instead of Minnesota, where its executive and administrative functions are located. *Diaz v. Target Corp.*, No. 09-3477, 2009 U.S.Dist. LEXIS 62000, *5-*6 (C.D. Cal. July 2, 2009). The court found significant that Target employed 15.86% of its workforce in California, as compared with 8.45% of its workforce in Minnesota (the state where the next greatest percentage of employees were found). Similarly, 14.15% of Target's tangible property, and 14.12% of its stores were located in California, whereas 8.59% and 8.6%, respectively, were found in Texas, where its next greatest percentage of property and stores were located. In light of

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these figures and others, the court determined that Target's activities "substantially predominated" in California as compared with any other State, and deemed it to be a citizen of California for purposes of defeating diversity jurisdiction.

3. That same year, the Central District also concluded that Costco Wholesale Corporation's principal place of business was in California, despite the location of its executive headquarters in Washington State, because 32% of its employees were located in California, as opposed to 11% in Washington; and 34% of Costco's sales occurred in California, as opposed to only 8% in Washington. *Castaneda v. Costco Wholesale Corp.*, No. 08-7599, 2009 U.S. Dist. LEXIS 3595, *7 (C. D. Cal. Jan. 9, 2009). Regardless of the fact that Costco's headquarters were in Washington, the court held that "California is the state where [Costco] 'conducts the most activity that is visible and impacts the public' and where there is the 'greatest potential for litigation.'"

Other Diverse Tests

Other of the Courts of Appeals had adopted other diverse tests to determine a corporation's principal place of business. In circumstances where a corporation's activities were "far flung," some courts had adopted a test that looked at the "nerve center" or corporate activity. But whether activities were not "far flung," but instead concentrated in only a few locales, an analysis that focused on a corporation's actual business activities was often used. In practice, these tests devolved into long checklists of various fact-specific inquiries to which the appellate courts directed the district courts. The section of Moore's Federal Practice that details these tests runs to 14 pages. In sum, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits had adopted some form of the "substantial predominance" or "total activity" test. Complexity, indeed, had run amok.

The 'Nerve Center' Test

As Justice Breyer's opinion for the unanimous Court makes clear, the Court sought to adopt a single, uniform standard that would apply throughout the United States. Moreover, it was important that the rule be as simple as possible, as "[s]imple jurisdictional rules … promote greater predictability." Finally, the Court recognized that the "substantial predominance" approach used in the Ninth Circuit and elsewhere distorted the language of section 1332 — the statute does not deem a corporation a citizen of the state where it has the most aggregate business activities. It instead contemplates a single, identifiable place, the "principal place of business," within a state. In other words, how many employees Hertz has in California instead of New Jersey, Illinois, or elsewhere is wholly irrelevant.

Accordingly, in *Hertz*, the Court stated that "the phrase 'principal place of business'" "refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities." For example, if "the bulk of a company's business activities visible to the public takes place in New Jersey, while its top officers direct those activities just across the river in New York, the 'principal place of business' is New York." Because a corporation's headquarters typically directs, controls and coordinates a corporations' activities, and therefore serves as the corporation's "nerve center," its location may determine one state of which the corporation is a citizen.

But this is not necessarily dispositive. If a corporation's headquarters is "simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)," "a bare office with a computer" or otherwise not actually where the officers and directors direct, control and coordinate the corporation's activities, then it should not be found to be the "nerve center" of the corporation, and should not be used to determine the corporation's principal place of business. In addition, the mere filing of a Form 10-K with the U.S. Securities and Exchange Commission (SEC), which lists a corporation's principal place of business as a particular state, or other similarly conclusory acts, without more, does not establish the corporation's nerve center. The totality of the circumstances concerning the direction of the corporation's strategic activities must be examined.

Consequences of *Hertz*

The Supreme Court intended *Hertz* to provide a more simple, predictable, and uniform method of determining a corporation's principal place of business. Surely in most cases it will bring commonality to the old tests, but not necessary clarity to how to apply the new test. For example, where is the corporate "brain," to use the Supreme Court's term, of a corporation in which critical corporate functions are fulfilled by a number of officers, each of whom spends substantial time in multiple — and different — offices? How does the increasing electronification and portability of corporate communications and records factor into the analysis? Are there certain corporations — small companies, with mostly online activities — that cannot truly be said to have a single "principal place of business" at all? Although the new inquiry is likely cleaner than that which it often replaces, one cannot assume that no difficult interpretative questions remain to be resolved.

Second, in all but possibly the Seventh Circuit (which had already substantially proceeded under the "nerve test" adopted in *Hertz*), corporations will need to change their standard ways of thinking about jurisdictional arguments. Although most of the other Courts of Appeals had not progressed so far down the "substantial predominance" analysis as had the Ninth Circuit, all except the Seventh Circuit appeared to use it for cases involving diffuse, but not "far-flung," business activities, and many courts looked to the totality

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of business connections to a given state as at least a factor in the jurisdictional analysis. Accordingly, at a minimum, all corporations should revisit at this time any "stock" or "boilerplate" facts and arguments they customarily utilize in support of, or to defend against, the appropriateness of diversity jurisdiction. This may also provide the occasion for developing more detailed, formalized internal statements or policies of where a corporation believes its "principal place of business" to be, or where the "nerve center" of the corporation truly lies.

Third, the existence of diversity jurisdiction in any particular pending case should now be re-examined immediately in light of *Hertz*. In some circumstances, the time to challenge the existence of diversity jurisdiction in federal court, or to seek removal of an action from state court to federal court, may not have yet expired, and the shifting of the jurisdictional sands may provide a corporation a tool to remove to federal court a case that was previously mired in state court, or to dismiss or remand from federal court other matters.

CONCLUSION

The most significant, long-term impact of *Hertz* may be that it reopens the federal courts in California and certain other large states to out-of-state corporations that happen to conduct substantial commercial affairs there. No longer will the economic inevitability of those activities — what corporation would not wish to conduct business in the world's seventh-largest economy? — preclude a corporation from enjoying any benefits associated with litigating in federal court. The new jurisdictional focus may also allow the greater fulfillment of the spirit of the Class Action Fairness Act of 2005, which contemplated more class actions being heard in federal court instead of state court — a safeguard the "substantial predominance" test often frustrated. In short, *Hertz*, if properly applied, has the potential to substantially restructure many aspects of corporate litigation today, if politics and resistance from the lower courts do not interfere.

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Trial Preparation

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pad and markers should always be within reach. In the event a projector bulb fails, the lead attorney is well versed in the presentation and will describe (and draw) the visual communication piece without pause.

FIRST DAY OF TRIAL

Jury selection takes most of the day, but the jurors are now seated, sworn and instructed. The lead trial attorney stands to present a seamless story that is authentic, trustworthy and persuasive. The trial theme is a Twitter-like post that is simple and easy for the jury to remember. The opening demonstratives guide the jury through the opening statement and illustrate the promises to be fulfilled by the close of the evidence.

CONCLUSION

Trial is demanding, both physically and emotionally. A successful trial attorney is a good story teller, reaching the hearts and minds of each juror during the multimedia presentation of the client's case. Every trial is different, as is every trial team. Rarely does a trial team have the luxury of planning, much less controlling, the events that occur during the 100 days before trial. A systematic approach to trial preparation frees the trial attorney to reach peak performance as trial begins.

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Blogging

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York, which prohibit discipline for "lawful" off-duty behavior, you may need to be careful.

- Consider the discrimination laws. Your company may not be able to discipline someone if the comment is actually some form of "protected activity."
- Consider privacy concerns. Do not use "pretexting" or other false means to get private information off an employee's Facebook page or Web site.

As you monitor employees, don't get the company into trouble by going further than the law allows.

CONCLUSION

Most commentators agree that the intent of the FTC guides was good, in that the agency was trying to protect consumers from being duped into believing that the "neutral blogger," who just "happened" to talk about the great new face cream she just tried, but was being paid to try the cream, or paid to post on the blog. However, all do not agree upon the breadth and scope of the guides, and how they apply to large employers.

Employees are generally not paid to advertise their employer's products, but they are all paid a salary. Some employees are very active users of electronic and social media, and may in the course of such use comment on their company or its products. An employer typically would not be aware of such activity, especially if it takes place outside of work hours and using the employee's personal computer. The employer certainly is not aware of the content, and — in most cases — would not pay the employee for making these comments. That said, under the FTC guides, you can be responsible for those comments.

These guides will create some new challenges for employers. However, if employers take some reasonable steps by creating policies, training and monitoring employees' behavior, they should not run the risk of serious penalties.

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