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The National Association of

namwolf

Minority & Women Owned Law Firms

"Legal excellence knows no color or gender"

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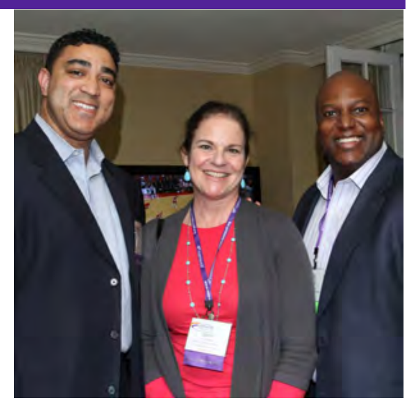
2012 Business Meeting New Orleans



NAMWOLF member firms, corporate/ public entity partners and sponsors gathered in New Orleans February 26 - 28 for the annual business meeting. Participants enjoyed two and a half days of planning, communication, and networking sessions.

The business meeting started off with a beautiful cocktail reception sponsored by Wong Fleming, P.C. Sunday night. On Monday, the opening session featured a State of the Organization presentation by NAMWOLF's Executive Director and General Counsel, Jason L. Brown, who began NAMWOLF's 11th year by declaring that the fast growing organization now has over 100 law firms and 150 corporations and public entities in 30 states. Jason and Board Member Renée Welze Livingston (Livingston Law Firm) discussed the current goals as growing NAMWOLF into each of the 50 states—strategically by states and practice areas—along with improving communication with members, improving governance, continuing to be financially independent and increasing law firm and corporate engagement and support. Currently, 57% of revenues come from firms, 39% from corporations, 4% from vendors. NAMWOLF expenses in 2011 were 53% administrative, 33% events, 9% marketing and 5% travel.

Jason and Board Member Robin Wofford, (Wilson, Turner, Kosmo, LLP) announced also that:

1. The 2011 Annual Meeting was the largest and most successful meeting held

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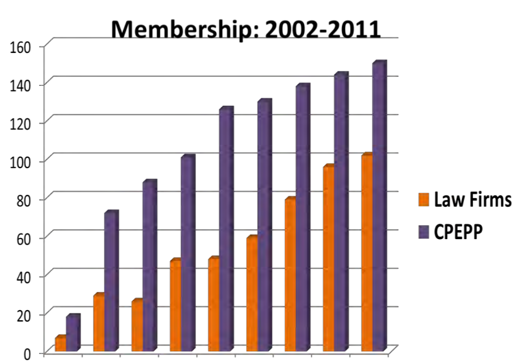

Cont'd, 2012 Business Meeting—New Orleans, LA

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to date. 373 people attended the 2011 Annual Meeting in Las Vegas. Additionally, the 2012 Business Meeting was the largest and most successful in our 11 year history;

2. The Inclusion Initiative continues to grow exponentially. In 2010, eleven companies in the Inclusion Initiative exceeded their goal of spending $30MM on minority and women owned law firms with a $42MM spend. In 2011, seventeen companies in the Inclusion Initiative exceeded their goal of spending $70MM spend on minority and women owned law firms with a $97MM spend. There are now twenty-two companies in the Inclusion Initiative who have set a goal of spending $118MM on minority and women owned law firms in 2012;
3. NAMWOLF held its first Regional Meeting in June 2011 in San Francisco, and the feedback and attendance was so great, the organization is planning two for 2012; and
4. NAMWOLF officially announced the date/location for the 2012 Annual Meeting and Law Firm Expo as October 14-17, 2012 in Atlanta, Georgia.

Shell generously sponsored breakfasts both days and the daily refreshments for attendees. The luncheons on Monday and Tuesday provided In-House and Law Firm Members with the opportunity to network. The Monday afternoon and Tuesday morning sessions focused on committee work, recruiting committee members and initiative activities. The Annual Meeting Co-Chairs, Joel Stern (HP) and Lizz Patrick (Patrick Law Group) broke participants out in various subcommittees to brainstorm for the 2012 Annual Meeting to be held in Atlanta, Georgia October 14-17, 2011 at the Sheraton Hotel (CLE, EXPO, In-House, Entertainment). Each Initiative also held its own meeting. Current Initiatives include Insurance, Intellectual Property, Transactional, Labor & Employment and Young Lawyers. ***Members who were not at the Business Meeting, but who would like to join a committee and/or initiative are encouraged to reach out to Jane Kalata.

After a fun cocktail reception on Monday night sponsored by four firms (Aaron, PLC; Kuchler Polk Schell Weiner & Richeson, L.L.C.; LeBlanc Buler LLC; and Lynn Luker & Associates, LLC), attendees participated in a traditional Mardi Gras parade (photos below) through the French Quarter then met up with their assigned groups for a New Orleans Style Dine Around at various restaurants.

"Are You Getting the Most Out of Your MWBE Certification?" was presented by Heather Auslander and Julie Cox from Certify My Company. Their presentation included tips on how to effectively network and maximize your certification status. Too Smart Girls & Brian Brown presented "Build a Bigger Book of Business" with tips on using social media and marketing to increase business.

NAMWOLF would like to thank all of this year's attendees and sponsors for a successful business meeting. We look forward to seeing everyone in Atlanta October 14-17 for the Annual Meeting and Law Firm Expo.

Message from the Executive Director
Jason L. Brown

2012 is off to a tremendous start for NAMWOLF. Coming off a year filled with significant milestones - 10th Anniversary, 100th Law Firm Member, Platinum Partners - NAMWOLF is showing no signs of slowing down. Within the first two months of this year we have been very busy. We have established a three year strategic plan for the organization in hopes of ensuring the future stability, growth and relevance of NAMWOLF. We have started a new practice area initiative for those law firm members with an expertise in labor and employment law. We have also started a new endeavor focused on the professional development of the young lawyers in our member law firms that is appropriately titled - the Young Lawyers Initiative. In an effort to support and enhance the marketing efforts of our firms, marketing professionals within our member law firms have collaborated to create the Marketing Initiative. In addition to these new efforts, NAMWOLF also held our 8th Annual Business Meeting in New Orleans with record attendance. We are building upon the momentum from last year's success to ensure that 2012 is another year filled with great milestones.

This year, NAMWOLF will be seeking new ways for our law firm members and corporate partners to be more engaged. Periodically, you will see emails and receive phone calls soliciting your involvement in NAMWOLF activities. I strongly encourage you to get involved in your organization as we work to provide you more opportunities to connect with one another, retain lasting business relationships and maximize the value of your NAMWOLF affiliation. During the Business Meeting, many of you learned of the great opportunities for getting involved with NAMWOLF. We are thrilled that so many of you signed up to join a committee or an initiative. If you were not able to attend the meeting, please know that your participation is still welcome for most NAMWOLF committees/initiatives. We are a volunteer organization and we greatly rely on volunteer leadership to assist our small staff in ensuring that we are making progress towards our goal of achieving equity within the legal profession.

There are a some exciting things on the horizon for NAMWOLF. We will be launching our revamped website in April. In addition, we will be having our first ever Regional Meeting on the East Coast later this Spring. I look forward to connecting with each of you over the coming months. We've started out the year with a bang and we hope to continue this momentum throughout 2012.

The Mission

Promote diversity in the legal profession by fostering successful relationships among preeminent minority and women-owned law firms and private/public entities.

Our Guiding Values

Equality
Excellence
Collaboration
Commitment
Passion

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Update — IP Alliance

By Jose I. Rojas, The Rojas Law Firm

The NAMWOLF IP Alliance was formed in 2011 to a) bring together NAMWOLF member firms that have substantial intellectual property practices and expertise and b) highlight to major corporations and public entities that our top notch, AV-rated minority and women owned firms have such expertise. Although no formal studies documenting the fact has been found, there is widespread anecdotal evidence that intellectual property is an area of the law that has some of the least usage of women and minority attorneys. Accordingly, it is also one of the areas of law that provides the greatest opportunity for NAMWOLF members, as well as for our corporate and public entity partners to meet their diversity spending goals. To tap into this potential, the IP Alliance developed a detailed, Ten Step Action Plan which is about to be launched starting after the Business Meeting in New Orleans. The Action Plans divides the nation into six geographic regions and calls for business "missions" by teams of IP Alliance members to these regions to visit existing and prospective NAMWOLF Corporate and Public Entity Partners (CPEPPs) and Inclusion Initiative members headquartered in the region. The visits will include a brief presentation about NAMWOLF's IP Alliance and our members' capabilities as well as possible presentation of short CLE-type updates on recent developments in germane areas of IP law.

The Action Plan also calls for participation at some of the major industry association events (such as the IP Owners, the AIPLA and the INTA meetings) to raise awareness of NAMWOLF and our Alliance. Last year, in the IP Alliance's first outside activity, we sponsored a table at the AIPLA Mid-year meeting in San Francisco which overlapped with the International Trademark Association's annual meeting there. We developed a one page, two-sided, color flyer introducing NAMWOLF, the IP Alliance and the Alliance members. Several of our IP Alliance members attended the meetings, manned the table and spread the word about the launch of this initiative.

Another component of the IP Alliance's mission is to create cross-referral and joint venturing opportunities among the law firm members. While many of our NAMWOLF firms are relatively small in size, if a number of the firms with relevant expertise for a particular matter agree to collaborate on a client project, we can deploy resources similar to, if not greater than, those available from the big, majority owned law firms, with equal or better quality, and at a better value. The IP Alliance is in search of its first opportunity to engage in a client project involving multiple member firms.

The IP Alliance is planning to make its first regional visit to the Texas area this Spring and invites all IP Alliance members to participate. 2012 will be an exciting year for our members involved with the IP Alliance. If your firm has substantial expertise in patents, trademarks, copyrights or trade secrets, please call Jane Kalata at the NAMWOLF office to join our initiative.

The NAMWOLF Newsletter is now completely formatted with hyperlinks so you can link to a person, firm or company by clicking on the name, photo, logo or event with the Control (Crtl) button…
For ease of reading, other than the box to the right, we've removed the color/underlined link look!

NAMWOLF Newsletter/Website Submissions

Please send **newsletter submissions** to the editor, Justi Rae Miller, at jmiller@berensmiller.com in Word, Arial, 10 font, single space. Please limit substantive articles to 550 words. Photo, logo and a short bio (2-3 sentences) should accompany the article. Photos/logos need to be .jpg equivalent at 300 DPI. Deadlines are as follows:

2nd Quarter 2012: May 1, 2012
3rd Quarter 2012: August 1, 2012

NAMWOLF now features member law firm successes & announcements on its website at Emerging Trends and sends out these notices on Twitter and Facebook.

Please send **announcements & successes** to jane_kalata@namwolf.org in Word, Arial, 10 font, single space and limited to approximately 350 words. Photo and logo submissions should accompany the announcement/awards and need to be jpg equivalent at 300 DPI. A link to the article at your firm's website is also suggested.

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Spotlight on the Rojas Law Firm

By Shukura L. Ingram, Thomas Kennedy Sampson & Tompkins LLP

In the heart of one of the most diverse cities in the United States, the Rojas Law Firm provides high quality legal services to major corporations and local businesses. Based in Miami, the firm's practice encompasses both litigation and transactional work, with a special emphasis on Intellectual Property. The firm celebrated its 10th anniversary in October 2011.

Jose Rojas, who is Cuban-American, founded the firm with a colleague in 2001. Having traversed through small and large, national firms, Jose knew it was time to offer clients more for less. Notably, in 2001, there were no Hispanic-owned law firms in Miami comprised of lawyers educated in the U.S. with an established reputation for handling complex litigation. His concept was to establish a boutique firm that specialized in intellectual property law and complex commercial litigation, including international business disputes, banking, accounting and legal malpractice, as well as transactional work. Ten years later the firm has grown to seven, bilingual, multi-cultural lawyers and a support staff. The attorneys are *AV-rated* with substantial experience, which is a real value for their clients' dollar. The firm prides itself on being able to offer competitive rates to large companies, yet flexible and small enough to be attractive and cost-effective for small, local businesses. Although the firm's practice areas have expanded over the years, it continues to specialize in Intellectual Property including, but not limited to, trademarks, filing and prosecution of patents and franchising.

<u>Why diversity is important to the firm</u>

Diversity is the core essence of the Rojas Law Firm. The firm strives to reflect the community in which its lawyers work and live. All of the firm's members are Hispanic or women lawyers.

<u>How the Rojas Law Firm became familiar with NAMWOLF</u>

Jose was an active member of the Defense Research Institute (DRI) and was planning to attend a DRI meeting in Chicago when he saw a communication referencing NAMWOLF (which was having a meeting in Chicago at the same time). Jose was interested in finding out more about NAMWOLF and began researching the organization. He knew his firm was a perfect fit for NAMWOLF once he learned about the organization's purpose and goals. Jose immediately signed on as a sponsor for NAMWOLF's meeting and shortly thereafter he applied for membership.

<u>Why NAMWOLF?</u>

Jose was impressed by the fact that NAMWOLF, unlike other large bar associations, encouraged corporate partners and businesses to hire minority and women owned law firms instead of simply focusing on encouraging large firms to hire diverse lawyers.

<u>Tangible benefits of attending Annual Meetings</u>

Meeting and interacting with in-house counsel is invaluable. However, the long lasting relationships that are established and nurtured through NAMWOLF provide long-lasting rewards. In fact, the business clients that the Rojas Law Firm has secured through NAMWOLF were initiated by, or because of, fellow member firms. Another benefit of attending the Annual Meetings is being able to network, socialize and brainstorm, face to face with like-minded lawyers in a relaxed environment.

<u>Involvement with NAMWOLF</u>

Jose Rojas was the co-founder and co-chair of the Insurance Initiative. Jose now serves as a Board Member of NAMWOLF and the Chair of the IP Alliance.

<u>The IP Alliance</u>

The IP Alliance is NAMWOLF's initiative focused on Intellectual Property practice. Many member firms had an IP focus in their practices, yet it did not appear that corporate partners were allocating much of their IP work to NAMWOLF firms. Thus, the IP Alliance concept was born. The goal is to identify NAMWOLF firms with IP expertise and then to spread the word to corporate partners and companies that there are minority and women owned law firms that specialize in intellectual property. Further, companies are encouraged to use some of their budgeted "NAMWOLF funds" for use on member firms that specialize in intellectual

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ROJAS LAW FIRM, LLP
attorneys at law

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property law. When the IP Alliance was created, many corporate partners were very supportive. The Alliance developed a 10-point action plan and in 2011 the IP Alliance was launched at the Annual Meeting. The Alliance has been off to a wonderful start, having already made its debut appearance at the American Intellectual Property Law Association's annual meeting in San Francisco. Plans are underway for the IP Alliance to visit corporate and public entities across the U.S. to introduce them to the IP Alliance and the work of NAMWOLF. The first visits are tentatively scheduled for Dallas in April and Chicago in June.

Benefits of joining the IP Alliance

Members of the IP Alliance have the benefit of collaborative efforts to encourage companies to look to NAMWOLF for their intellectual property legal needs. The IP Alliance can pull together and gather resources, as a large firm does, to address the complex needs of companies. Further, the Alliance can assemble a team for the particular needs of a company, on an as needed basis, without the built-in cost of large firm infrastructure. Jose commented that the IP Alliance is the perfect example of the whole being greater than the sum of its parts.

Another benefit for Alliance members is that they are welcome to attend the regional trips to visit corporate and public entities. The regional trips will allow members to interact with in-house counsel by hosting and presenting at CLE seminars and other presentations on relevant IP topics (latest developments, etc.). This personal exposure, highlighting the qualifications of member firms, serves both the Alliance members and NAMWOLF as a whole.

Recent Accomplishments

Jose Rojas has been named as one of the *Best Lawyers in America* and recognized as one of Florida's *Super Lawyers*.

The Rojas Law Firm recently appealed an important issue in the Eleventh Circuit. Representing the FDIC, the firm challenged a Florida District Court's jurisdiction to enter injunctive relief in cases involving failed banks. The injunctive relief that was challenged hampered the FDIC's ability to handle the failing bank crisis. The firm prevailed and the Eleventh Circuit agreed that the District Court did not have the jurisdiction to enter the injunctive relief that was challenged.

TKST

THOMAS KENNEDY SAMPSON & TOMPKINS LLP

The author of this Spotlight article, Shukura L. Ingram, is a Senior Associate at Thomas Kennedy Sampson & Tompkins LLP. The firm is a certified Minority Business Enterprise by the Georgia Minority Supplier Development Council. The firm, which was founded in 1971, is Georgia's oldest minority owned law firm. Ms. Ingram's principal areas of practice include wrongful death, personal injury, medical malpractice, insurance defense and premises liability.

No Presumption of Irreparable Injury, Even for Trademark Infringement - What's a Trademark Holder to Do?

By Robert R. Cross and Ryan J. Meckfessel, Sideman & Bancroft, LLP

Traditional Presumption of Injunctive Relief in IP Cases

Courts in IP cases traditionally stated that "irreparable injury may be presumed from a showing of likelihood of success on the merits," thus creating a presumption in favor of injunctive relief. However, the presumption has been called into question after the Supreme Court's opinions in *eBay Inc. v. Mercexchange* (2006) (overruling presumption in favor of injunctive relief in patent infringement cases) and *Winter v. NRDC* (2008) (irreparable injury must be "likely," not merely "possible" to support a preliminary injunction). Several circuits have applied *eBay/ Winter* in copyright infringement cases. (*CoxCom, Inc.* (1st Cir. 2008): *Flexible Lifeline Systems* (9th Cir. 2011)(our longstanding precedent finding a plaintiff entitled to a presumption of irreparable harm on a showing of likelihood of success on the merits in a copyright infringement case, as stated in *Elvis Presley* . . . has been effectively overruled. In other words, "*Elvis* has left the building.").

Application of *eBay/Winters* in Trademark Cases

The courts of appeal have not yet fully resolved application of *eBay/Winter* in trademark infringement cases. (*Medical Corp. v. Axiom Worldwide* (11th Cir.) (*eBay* applicable to trademark cases but presumption favoring injunctive relief may be appropriate based on historical traditions recognized in the *eBay* concurrences); *Voice of the Arab World, Inc.* (1st Cir.) (declining to reach impact of *eBay/Winter* on traditional rule)). The leading treatise even asserts that the traditional presumption of irreparable injury is not "in any way inconsistent with the letter or the spirit" of *eBay.* (5 *McCarthy on Trademarks* § 30.47).

Showing Irreparable Harm

To improve the argument for injunctive relief, a trademark infringement plaintiff should attempt to show the likelihood of irreparable harm through any of several recognized methods:

- Damages to plaintiff's goodwill or reputation resulting from customer confusion (e.g., unauthorized sale of "gray market" goods (*AFL Telecommunications LLC*), ex-franchisee's continued use of the franchisor's mark (*Wetzel's Pretzels*), close resemblance of the defendant's and plaintiff's marks (*CytoSport, Inc.*))

Robert R. Cross and Ryan J. Meckfessel are partners of Sideman & Bancroft, LLP. Their practices focus on complex business, intellectual property and trust litigation.

- Loss of business, business opportunities, economic value of previously confidential and proprietary information, or opportunity to negotiate other license agreements (*Berster Technologies*)
- Ongoing infringement which will continue to harm the plaintiff in the absence of an injunction (*Hokto Kinok*)
- Where money damages would be difficult to quantify (5 McCarthy, § 30:2: "It is notoriously difficult for the owner of a trademark to prove measurable damage caused by acts of infringement")

Conclusion

While the Circuits have not spoken clearly, many district courts will now require a trademark infringement plaintiff to demonstrate the likelihood of irreparable harm in order to obtain preliminary (or permanent) injunctive relief. However, the traditional preference for that remedy will usually allow injunctive relief based on even a slight but plausible showing.

Cloud Computing: Avoid a Storm

By Dennis C. Garcia, Microsoft

Cloud computing involves the provision of applications and services offered over the internet via network connections, data centers and computer systems. An example of cloud computing is Microsoft's Office 365 solution – where users can get virtually anywhere access to email, shared calendars, instant messaging, video conferencing and document collaboration. Organizations acquire cloud solutions as a way to reduce their IT computing costs.
Keep the following areas "top of mind" when negotiating cloud contracts:

Cloud Computing is Not Custom Outsourcing:

Some customers expect cloud providers to negotiate from a customer's standard outsourcing services form contract or that any eventual agreed upon terms will be totally tailored to fit a customer's specific needs. However such positions are not commercially reasonable since cloud computing is very different from business process outsourcing services. Traditionally business process outsourcing services involves an IT vendor's assumption of processes, functions, assets and/or employees from a customer. These offerings are usually complex, highly custom, lengthy in duration and very expensive. Such offerings are in stark contrast to cloud computing solutions which are meant to be repeatable and standardized packaged offerings that are highly scalable to a large number of customers.

Data, Data and Data:

If your client's data will be flowing through a cloud computing solution, your client needs to be absolutely confident that it can entrust its valuable data with a cloud provider and its cloud computing solution. Your client does not want to have to explain to its senior management, its shareholders, its customers and regulators why it experienced a data breach. Be sure to ask yourself these questions:

- What is a cloud provider's reputation on data issues?
- Does a cloud provider promote absolute transparency with respect to how it secures data, how it can use data and where data goes (and are you and your client okay with that)?
- Is the cloud contract specific enough regarding a cloud provider's data obligations – especially in connection with information privacy law (e.g., a Data Processing Agreement if your client conducts operations in Europe)?

> ***"Cloud computing is very different from business process outsourcing services."***

Balance Risk and Reward:

Generally speaking a cloud provider wants to limit its liability under its cloud contract with a customer while a customer wants to shift as much financial liability as possible – whether it be in the form of a very high financial cap or unlimited liability – to a cloud provider. It is commercially reasonable for a cloud provider to meaningfully limit its liability since it is not an attractive business proposition for a cloud provider to sign up to a level of financial risk that may be unlimited or so above and beyond its expected financial benefits under a cloud contract. In addition, a cloud provider may not be able to offer a customer attractive pricing, discounts and other business concessions unless it could first reasonably manage its business risks by relying on contract provisions like limitation of liability. Also consider any limitation of liability concerns in conjunction with the broader cloud contract obligations and the nature of the cloud provider. For instance, how strong are other cloud contract risk-mitigation provisions like service level agreements or intellectual property indemnification? Are you contracting with just any cloud provider or a cloud provider that is experienced, respected, and well-capitalized enough to be in a position to fulfill its contractual responsibilities?

Dennis C. Garcia is a Senior Attorney with Microsoft's Legal & Corporate Affairs Group in Chicago and manages the provision of legal support to Microsoft's U.S. Central Region Enterprise Sector. Dennis received his law degree from Columbia Law School and is a member of the New York, Connecticut and Illinois state bars.

Lawsuits Challenging Status of Interns on the Rise

By Sara Goldsmith Schwartz, Schwartz Hannum, P.C.

The prospect of hiring volunteer interns is alluring. But many employers are learning the hard way that interns cannot be employed as volunteers, except in narrow circumstances. Two recent lawsuits illustrate this trend—and underscore the importance of conferring with counsel before hiring anyone on a volunteer basis.

Both cases involve the entertainment media, which rely heavily on interns, and seek class-action status. In *Wang v. Hearst Corp.*, a former intern for the fashion magazine Harper's Bazaar claims that the publisher failed to pay minimum wage and overtime to numerous interns who worked up to 55 hours per week over a four-month period. Similarly, in *Glatt v. Fox Searchlight Pictures, Inc.*, two interns allege that the defendant unlawfully treated them—and dozens of their peers—as unpaid volunteers for work related to production of the movie "Black Swan."

"*Some states impose additional requirements. For instance, in Massachusetts, a for-profit employer may need to show that an unpaid internship is part of a formal educational program, such as by being affiliated with a local college or university.*"

In light of these cases, which are in their initial stages, and which may portend a wave of such lawsuits if the plaintiffs are successful, employers should familiarize themselves *now* with this important area of the law.

Federal Requirements

Under federal law, an internship at a for-profit business cannot be unpaid unless: (1) the internship is similar to training given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees and works under close supervision of existing staff; (4) the employer derives no immediate advantage from the activities of the intern, and, on occasion, its operations may actually be impeded; (5) the intern is not entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

State Requirements

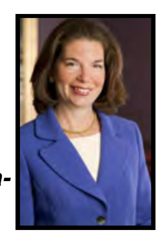
Some states impose additional requirements. For instance, in Massachusetts, a for-profit employer may need to show that an unpaid internship is part of a formal educational program, such as by being affiliated with a local college or university. If this interpretation of Massachusetts law is upheld against an employer that fails to comply with it, then the employer will be subject to *mandatory* treble damages and required to pay the prevailing plaintiff's attorneys' fees. Thus, employers should be sure to review state, as well as federal, law in considering the feasibility of any proposed internship.

Recommendations For Employers

Employers interested in pursuing potential internships should: (1) require interns to sign an agreement confirming that no wages will be paid for time spent in the internship and that the intern will not be entitled to employment at the conclusion of the internship; (2) structure the internship to focus on the provision of broadly applicable training to the intern, not on performance of routine tasks by the intern; (3) avoid even the appearance that unpaid interns are being used to displace or to avoid hiring regular employees; (4) establish a formal academic affiliation, if required or advisable under applicable state law; and (5) confer with experienced employment counsel to ensure that the legal implications of the proposed internship are fully understood and addressed.

If you have questions about establishing an unpaid internship, or need assistance with a threatened lawsuit involving these issues, please feel free to contact us.

Sara is the Founder and Managing Partner of Schwartz Hannum PC, a management-side labor and employment law firm located in Andover, Massachusetts. Sara gratefully acknowledges the efforts of Arabela Thomas, who assisted with the preparation of this article.



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Clarifying the Standards for Divided Infringement Under the Patent Laws

By Theodore K. Cheng, Yoon & Kim LLP

The year 2012 may be another watershed in the annals of the Federal Circuit, as the court prepares to clarify the standards for divided infringement in a pair of closely watched *en banc* appeals. The court's clarification will provide clearer expectations to patent practitioners, portfolio managers, and business owners as to whether their activities with third-parties constitute divided infringement.

Divided (or joint) infringement typically arises when a patent holder asserts that a method claim – a series of steps for performing a function or accomplishing a result – is being carried out by multiple parties, such as when one party performs the first step and the other performs the remaining steps. In *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007), the court held that liability would not be imposed against a party that performs only some of the steps unless that party also possesses "direction or control" over another party who performed the remaining steps. That standard was reaffirmed in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008).

Then, in *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 629 F.3d 1311 (Fed. Cir. 2010), the court held "as a matter of Federal Circuit law that there can only be joint infringement when there is an agency relationship between the parties who perform the method steps or when one party is contractually obligated to the other to perform the steps." There, in a patent directed to an improved method for storing webpage content, Limelight performed the majority of the steps, but at least one of the steps of each claim was performed by its customers. The court concluded that no substantial evidence supported finding that the customers had performed any of the steps as Limelight's agents. It also rejected any contractual obligation by the customers to perform one of the steps, concluding that the contract "merely explains that the customer will have to perform the steps *if* it decides to take advantage of Limelight's service."

A split panel reaffirmed the same standard in *McKesson Technologies Inc. v. Epic Systems Corp.*, No. 2010-1291 (Fed. Cir. Apr. 12, 2011). There, in a patent directed to an electronic method of communication between healthcare providers and patients involving personalized webpages for doctors and their patients, no single party had performed each step of the method. However, one party (the health care provider) had completed a portion and had allegedly induced website users to complete the remaining steps, although the encouragement did not amount to "control or direction" over the users. The court held the patent not infringed because no party could be considered a direct infringer, and, consequently, there was also no inducement liability in the absence of any underlying direct infringement.

Thereafter, the court vacated both panel decisions and ordered *en banc* rehearings. In *Akamai*, the parties briefed the following: "If separate entities each perform separate steps of a method claim, under what circumstances would that claim be directly infringed and to what extent would each of the parties be liable?" In *McKesson*, the parties briefed two questions: (1) "If separate entities each perform separate steps of a method claim, under what circumstances, if any, would either entity or any third party be liable for inducing infringement or for contributory infringement? *See Fromson v. Advance Offset Plate, Inc.*, 720 F.2d 1565 (Fed. Cir. 1983)" and (2) "Does the nature of the relationship between the relevant actors – e.g., service provider/user; doctor/patient – affect the question of direct or indirect infringement liability?"

Oral argument on both appeals took place on November 18, 2011, during which a number of different formulations for determining divided infringement were addressed. The judges appeared particularly interested in testing the boundaries of any standard set by the court, raising several concerns and posing hypothetical questions to the appellate counsel. Several judges also asked whether any problems associated with establishing a standard could be addressed by proper claim drafting. A decision is expected sometime this year, and practitioners, as well as those who manage patent portfolios, eagerly await the court's pronouncements.

Theodore K. Cheng is a partner at Yoon & Kim LLP, where he maintains a general litigation practice, specializing in intellectual property, general commercial disputes, and appellate matters. Yoon & Kim is the largest 100% Asian American-owned law firm on the East coast, with practice areas in commercial litigation, intellectual property, international and domestic arbitration and mediation, real estate, and lender representation.

Mexico's New Data Privacy Law: Are You in Compliance?

By Luis Salazar and Giselle Del Amo, Infante Zumpano

On December 2011, Mexico's Federal Institute for Access to Information and Data Protection (the "Institute") issued the long-awaited final regulations ("Regulations") on Mexico's Federal Law on the Protection of Personal Data in the Possession of Private Parties ("FDPA"). These Regulations govern the processing of "Personal Data" belonging to individuals, or "Owners," by a business, or "Responsible Party." If a business is subject to FDAP, it must establish internal policies to meet the FDAP's requirements of lawfulness, consent, notice, quality, purpose, loyalty, proportionality and responsibility in their treatment of Personal Data.

The notion of consent dominates the Regulations, which require Responsible Parties to obtain an Owner's consent through user-friendly and cost-free procedures. Moreover, obtaining financial information and other sensitive data require a business to obtain the Owner's express written consent. The Regulations require Responsible Parties to provide a "privacy notice" to Owners, which should identify the contact information for the Responsible Party, the kind of information being collected, the purposes for which the information is collected, instructions regarding revoking consent, notice procedures, information on transfers to third parties, and whether the Responsible Party is collecting sensitive personal data.

The Regulations also provide that Responsible Parties must update and correctly maintain Personal Data. In the event of a transfer, the Regulations require that Responsible Parties enter into contracts with third parties that include the regulatory requirements for handling the Personal Data. Personal Data may be shared with parties without the consent of the Owner if the transfer is provided for by law, if the transfer is necessary for a medical purpose, or if the transfer is to an affiliate of the Responsible Party. When adopting measures to guarantee the proper treatment of Personal Data, Responsible Parties should consider the inherent risk of the Personal Data, whether the data is Sensitive Personal Data, the number of Owners the Responsible Party is dealing with, the value of the Personal Data to third parties, and the potential consequences in the event of a privacy breach.

Owners have the right to access, correct, delete or oppose the use of their Personal Data at any time. If a Responsible Party fails to comply with an Owner's directions, the Owner has the right to make a claim against the Responsible Party with the Institute. If a Responsible Party fails to comply with the directions of the Institute, the Institute may also elect to impose substantial fines and sanctions.

The Regulations suggest that Responsible Parties should take internal measures to secure their compliance with FDAP and the Regulations. To get started, Responsible Parties should maintain an inventory of Personal Data, a log of cancellations and deletions and should also conduct regular risk analysis of the Personal Data. Finally, by conducting frequent audits and reviews of current security measures, Responsible Parties can continuously modify their practices to ensure their compliance with FDAP and the Regulations.

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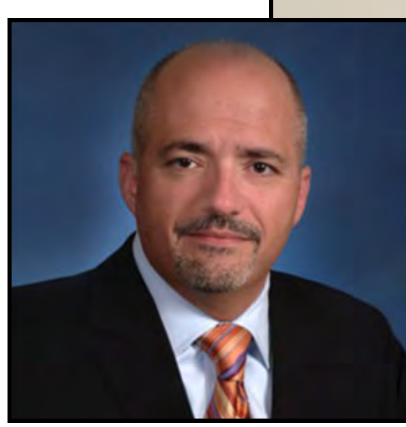

Benefits of ADR in Intellectual Property Disputes

By Leslie Viviana Marenco, Concepción Martinez & Bellido

Intellectual Property ("IP") disputes historically have been resolved through litigation rather than arbitration. The vast majority of IP cases - involving copyright, patent and trademark infringement - still take place in the federal courts. Litigators have generally seen arbitration as a dispute resolution method geared at matters dealing with private contracts. Because IP's very existence has been a product of public policies supporting invention, branding and ingenuity, the courts have seemed to be the more appropriate locale to handle these disagreements. But not only is litigation expensive, it is a liability on a company's balance sheet for as long as the lawsuit exists. Additionally, litigation is available to the public. In the last 30 years however, both arbitration and mediation have received increasing attention as acceptable methods of resolving IP disputes.

Arbitration is a particularly advantageous forum for the resolution of disputes where highly complex and technical issues are involved, such as in a patent infringement case, or where business decisions need be made quickly, such as in the case of computer products, where the technology is constantly in flux. Since the parameters of an arbitration can largely be determined in advance between the parties through an arbitration agreement, many of the disadvantages associated with court litigation may be avoided. Arbitration proceedings, for example, can be concluded in far less time than litigation, generally lasting from approximately 12 to 15 months. This is due, in part, to the fact that the parties can control the duration of the arbitration by including in the arbitration agreement a clause requiring that a decision be rendered within a certain period of time. When, for example, proceedings must conclude by a date certain, discovery, which constitutes the majority of time expended in litigation, must be streamlined.

> ***"...judges/juries tend not to be experts in IP and the technologies involved in patent cases."***

Additionally, judges/juries tend not to be experts in IP and the technologies involved in patent cases. Considerable time is needed to bring them up to speed on such matters as the technical background (i.e., the state of the art before the patented invention); the nomenclature of the technical field; the teachings in prior patents and publications; and the advantages of the patent invention. In arbitration, the parties can select an arbitrator who has the relevant technical IP expertise. The AAA, for example, has established a National Panel of Patent Arbitrators which includes "individuals having experience in patent law and/or special technical expertise" and appoints arbitrators from this panel, as appropriate. This results not only in time savings, but a significant reduction in costs to all parties and possibly even a fairer judgment. An experienced patent arbitrator familiar with "claim interpretation" issues will more quickly appreciate the important technical terminology and be able to more efficiently review and decide the case. In addition, an experienced patent arbitrator tends to have more time available than a judge to evaluate the subject matter of the patent and prior patents, publications and products (i.e., prior art) that bear on whether the patent represents a valid, enforceable advance in the technology. From the parties' points of view, knowing that the decision maker understands the technology and the guiding principles of IP law can elevate their confidence in the process because they are ensured that their positions and technical and scientific arguments are understood and considered.

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There are many forums for dispute resolution in the area of IP. Each has its advantages and disadvantages. However, it is becoming apparent to more and more business organizations that the benefits of ADR are substantial and often outweigh the traditional values that have led many to use litigation to handle IP cases.

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The Difficulties in Proving Damages in Intellectual Property Litigation: *Northern District of California Rejects Hypothetical License Finding and Cuts Down Largest Copyright Infringement Jury Verdict of $1.3 Billion*

By Philip J. Wang, Lim, Ruger & Kim, LLP

A recent high-profile case from Northern California highlights the difficulty of proving damages in IP cases based on a hypothetical license model. On September 1, 2011, the Northern District of California entered a Judgment As a Matter of Law and reduced a $1.3 billion jury verdict for copyright infringement against SAP in *Oracle USA, Inc., et al. v. SAP AG, et al.*, Case No. C07-1658PJH (N.D. Cal). The jury verdict was the largest ever in a copyright infringement case. The Court found that Oracle's hypothetical license model for proving damages was too speculative because Oracle did not present any benchmark evidence to support a hypothetical license. Instead, Oracle presented only witness testimony speculating on what Oracle would have charged for such a hypothetical license. The Court entered a remittitur of $272 million based on the lost profit analysis done by Oracle's expert.

"Oracle presented only witness testimony speculating on what Oracle would have charged for such a hypothetical license."

Oracle accused SAP's subsidiary, TomorrowNow, of stealing Oracle's customer support software and using it to provide low cost maintenance to companies familiar with Oracle's products. Shortly before trial, SAP conceded liability on copyright infringement but continued to contest Oracle's damages claims.

At trial, Oracle's damages expert and executives testified that had SAP sought to license the stolen software, Oracle would have charged SAP between 1.66 and 3 billion dollars. Another Oracle employee testified that because SAP and Oracle are competitors, such a license would be unique and unprecedented. Oracle did not present any figures against which the hypothetical license fees could be benchmarked since it had never previously licensed the software and there were no comparable licenses from other sources. Notwithstanding the lack of any comparable data, the jury returned a verdict of $1.3 billion based on the fair market value of a hypothetical license. Following the verdict, SAP filed post-trial motions to reduce the jury award.

Relying on the Copyright Act provision allowing only actual damages "as a result of the infringement" plus recoverable profits "attributable to the infringement," the Court held that to prove damages based on a hypothetical license model, Oracle needed to establish:

(1) but for the infringement, the parties would have agreed to license the copyrighted work; and

(2) an objective, non-speculative license price through objective evidence of benchmark transactions.

Since Oracle did not present any actual data of prior or comparable licenses, the Court overturned the jury verdict as speculative and entered a remittitur of $272 million based on the Oracle expert's lost profits analysis. Oracle could either accept the remittitur or proceed to a new trial. On February 8, 2012, Oracle rejected the remittitur and demanded a new trial.

While the eventual verdict and the Court's decision will likely be appealed, this decision highlights the difficulty of proving damages in IP cases, particularly where (1) there are no comparable licenses to benchmark against because Plaintiff never licenses the IP; and (2) the wrongdoer generates little or no profit. As Oracle's President Safra Catz testified in response to a question about SAP's settlement offer:

"SAP paying us $40 million is a reward for their bad behavior. This is like taking someone's $2,000 watch and hocking it for $20 and then offering us $20. … (It) undervalues the basis of our entire industry. It's all about intellectual property."

LIM RUGER

Philip J. Wang is an IP and commercial litigation partner in the San Francisco office of Lim, Ruger & Kim, LLP. His practice also includes securities and derivative litigation, government enforcement actions, and antitrust litigation. Trusted by Fortune 500 companies and entrepreneurs, the firm of Lim, Ruger & Kim, LLP is a firm focused on complex commercial litigation, employment, and sophisticated real estate, finance, and corporate transactions.

Removal and the Federal Courts Jurisdiction and Venue Clarification Act of 2011

By Mary Platt, Griesling Law, LLC

Imagine your business is organized under Delaware law with its principal place of business in Philadelphia, but you sell products or services nationwide. An unhappy customer in Chicago sues your company in Illinois state court where you have done enough business to be sued, but where you would prefer not to defend your case. Every business wants to avoid the expense, uncertainty and distraction of litigation, and those burdens are greater if your business is sued in another state. You may be able to mitigate those burdens in some circumstances. The process, known as “removal” from state court to federal court, is the first step, and can be followed by asking the Court to “transfer venue” to a more convenient federal court.

“Removal” allows a defendant to move a state court case to a federal court in the same state. A threshold consideration is whether federal court has the power—“subject matter jurisdiction”—to hear the case because the case involves a federal law or diversity of citizenship. Federal question jurisdiction exists if the party bringing the case alleges a violation of the Constitution or federal law, or treaties to which the United States is a party. Diversity jurisdiction exists where the disputed amount is at least $75,000 and parties are from different states or are non-U.S. citizens. Corporations are citizens of states where they are incorporated and have their principal place of business. Here are some ways the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the “Act”), impacts *civil cases filed on and after January 6, 2012*:

- If removal is based on federal question jurisdiction, the federal court must sever any unrelated state law claims and remand them to the state court. Previously, the federal court had discretion to decide unrelated state law claims.

- Each defendant has 30 days after receipt or service of the initial papers to request removal, and the judicially-created “unanimity rule” requiring all defendants consent to removal (except in class actions) is now in the statute.

- If the initial papers did not did not state the amount at issue, a defendant may remove a diversity case within 30 days after receiving information that the amount meets the jurisdictional minimum.

Mary Platt represents clients in commercial litigation, class actions, antitrust, trade secrets, unfair competition, insurance, appellate litigation and intellectual property matters. Mary’s clients are public and closely-held companies predominately in the technology, chemical and real estate industries.

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- A diversity case may be removed more than one year after the case began if the plaintiff acted in bad faith to prevent removal, such as concealing the amount in dispute.

The Act also allows a case to be transferred “[f]or the convenience of the parties and witnesses and in the interest of justice” to *any* district court to which all parties have consented, instead of limiting it to “where [the case] might have been brought” under prior law. Most likely a plaintiff who chose to file a lawsuit against your company in Illinois will not consent to transfer the case to Pennsylvania, so you may want to consider asking the court to transfer the case to federal court in Pennsylvania where it could have been brought by plaintiff. The court will consider plaintiff’s choice of forum, defendant’s preference, where the claim arose, the convenience of parties and witnesses, location of any books and records, and the public interest. The party seeking transfer must persuade the court that transfer is appropriate. If you have a contract specifying where you will sue each other, the court will probably enforce it depending on the circumstances.

Top 10 Employer To Do List for 2012

By Katherin Nukk-Freeman and Suzanne M. Cerra, Nukk-Freeman & Cerra, P.C.

Nukk-Freeman & Cerra, P.C. wants to make sure that all employers -- NAMWOLF members and their clients alike -- are prepared to hit the ground running in 2012. There have been several changes in the law over the past year directly affecting employers and their employment practices. Below is our "Top Ten" list every employer should review to prepare effectively for the upcoming year.

1. Post New NLRA Notice by April 30, 2012 - NEW DEADLINE!

All employers subject to the National Labor Relations Act ("NLRA"), which includes most private sector employers, must post a detailed notice of employees' rights under the Act, including the right among employees to unionize. For copies of the notice and detailed posting requirements, go to www.nlrb.gov/poster.

2. Review Your Employment Agreements Regarding Class Action Waivers

On January 3, 2012, The National Labor Relations Board ("NLRB") ruled that employers are in violation of the NLRA when they require employees to sign, as a condition of employment, a class action waiver which completely prohibits all collective legal claims. The Board held that such waivers violated the fundamental principals sought to be protected by the NLRA, namely the right of employees to act together in a *concerted* effort to protect their interests with regard to "*terms and conditions of their employment*." This decision relates to all employees covered under the NLRA which encompasses both union *and non-union* employees alike**.** *See D.R.Horton, Inc. 357 NLRB No. 184 (Jan. 3, 2012).*

3. Update Your Payroll Practices to Reflect Updated W-2 Reporting Requirements for Group Health Plans

The Internal Revenue Service (IRS) has recently issued an update to its previously issued interim guidance regarding employer obligations to report the cost of employer-provided group health coverage on employee forms W-2 pursuant to the Patient Protection and Affordable Care Act ("The Affordable Care Act"). "Small employers" (those who are required to file fewer than 250 forms W-2 in a calendar year) remain exempt until further notice. For all covered employers, however, the update provides detailed information regarding the plans subject to this requirement and the accompanying cost-calculation procedures for the employers to carry out their obligations under the Act.

4. Be Aware of the Limitations on the Authority You as an Employer May or *May Not* Have Over What Your Employees Say on Facebook or Other Social Media Sites.

The NLRB has issued a series of decisions further refining and, seemingly, further restricting the employer's ability to prescribe boundaries for employee use of social networking sites. Through these decisions, the NLRB has deemed a variety of employee Facebook postings, referring negatively to the employee's place of employment, as *protected activity* under the NLRA and has consequently held employers in violation of the Act for taking any adverse action against those employees for such behavior.

"All employers subject to the National Labor Relations Act ("NLRA"), which includes most private sector employers, must post a detailed notice of employees' rights under the Act, including the right among employees to unionize."

5. Learn About the Latest Advances in Smart Phone Technology and Social Media

Protect your business with an appropriate Social Media Policy, educate yourself about the DOL's new smart phone app (http://www.dol.gov/whd/), that lets employees track work time on their phones and learn about E-Verify (www.uscis.gov/everify*),* an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.

6. Plan Notices to Their Eligible Employees ASAP

For calendar year Plans, these notices should have been distributed by Dec. 2, 2011. Depending on the plan's format, these notices can include the Safe Harbor 401(k) Plan Annual Notice, the Qualified Automatic Contribution

(Continued on page 17)

Top 10 Employer To Do List for 2012 Cont'd

(Top 10 Employer Continued from page 16)

Arrangements Safe Harbor Notice, the Qualified Default Investment Alternative Notice, and the 401(k) Automatic Enrollment Notice.

7. Familiarize Yourself With the New and Significant Amendments to the Americans With Disabilities Act ("ADA")

Earlier in 2011, the Equal Employment Opportunity Commission ("EEOC") issued its final regulations and interpretive guidance implementing the ADA Amendments Act. The amendments, which became effective in May of 2011, have the intended effect of making it easier for employees who wish to seek protection under the ADA to establish that they meet the threshold standard of having a "disability" under the Act. The EEOC amendments direct a broad application of the term "disability" and amend many of the terms used to establish the existence of a "disability" to encompass a more expansive spectrum of people entitled to protection. To learn more go to http://www.eeoc.gov/laws/statutes/adaaa_info.cfm.

8. Determine if You Can Benefit from the IRS's Voluntary Classification Settlement Program.

If your company currently has workers classified as "Independent Contractors", evaluate whether the classifications are appropriate, and if not, whether the IRS's Voluntary Classification Settlement Program (VCSP) is the right plan of action for your company. To learn more on the IRS's VCSP, go to www.nfclegal.com/news/legal_updates.html

9. Update Your Employee Handbook

Throughout 2011 there have been many updates to the laws which employers must not only be aware of but which, in many instances, require substantive changes to current practices in order to remain in compliance. Employers would be prudent to check their employee handbook and make sure policies for Social Media, Electronic Communications Systems, and Breaktime for Nursing Mothers are all up to date. 2012 Handbooks should also reflect the Americans with Disabilities Act Amendments.

10. Schedule Critical Employee Training Sessions for Q1

Plan sessions now for existing and newly hired employees as to the existing law and the updates regarding anti-harassment/discrimination, social media responsibility, performance management training, complying with the FMLA and ADA, and wage and hour compliance.

Katherin Nukk-Freeman devotes a majority of her practice to the counseling of clients on diverse employment issues including those pertaining to family and medical leaves, wage and hour requirements, COBRA compliance, discrimination laws, hiring and termination decisions, drug testing, and state and federal disability laws.

Suzanne M. Cerra has devoted her legal career to representing employers in all aspects of employment law, including discrimination, sexual harassment, and wrongful termination matters. She also has extensive experience in matters involving the enforcement of restrictive covenants and the protection of trade secrets and confidential information.

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The Young Lawyers Initiative

By Lauren E. Kerr, Bush Seyferth Paige, PLLC

Law Firm Member associates Lauren Kerr (Bush Seyferth Paige, PLLC) and Jennifer Coya (The Rojas Law Firm) collaborated on an initiative to support the professional development of young lawyers within NAMWOLF's membership. With the support of NAMWOLF leadership, the Young Lawyers Initiative (YLI) officially launched at the 2012 Annual Business Meeting and is pleased to announce the success of its inaugural session. Interested young lawyers were joined by Janice Brown of the Brown Law Group and Kerin Kaminski of Giffen & Kaminski, who shared their enthusiastic spirit and valuable insights.

Our panelists have routinely encouraged their associates' attendance at NAMWOLF meetings. We asked what factors they consider when deciding which associates to bring. Young lawyers, take note – the key criteria was:

- Low maintenance – plain and simple
- Personable – adept socializer and friendly
- Responsible – able to look after themselves and respectful of their firm's reputation
- Proven time manager – a few days away from the office won't set this young lawyer behind
- Proactive – don't just enjoy the cocktail reception – engage other attorneys, meet a potential client, join a committee, volunteer
- Skilled at following up – understand the crucial step of making the post-conference contact
- Enthusiastic – we're here to promote diversity, develop business, and have some fun!

We also asked how a young lawyer can build relationships with potential clients. Bottom line: spend time with them, and make it count. Look for holes in the meeting agenda during which you can break from the group to do something together. Be engaged and "authentic in the moment" so that your genuine interest in them is apparent. Ms. Kaminski highlighted the importance of exercising good judgment and recognizing professional boundaries: never speak negatively about your employer, other law firms, or personal problems. Ms. Brown reminded us that "this is business" and that having a fun, casual relationship with a potential client does not mean you are "friends."

Our panelists encouraged the young lawyers to think strategically about their personal growth plans. It is essential to "be excellent at whatever you do," so continue to develop legal skills; but "if you don't have a plan of your own, you'll be a tool in another person's plan." Ms. Brown emphasized visualization techniques to get clarity about your job and where you want to be, and act purposefully every day to achieve those goals.

The YLI is open to all lawyers practicing ten years or less who work for NAMWOLF Law Firm Members. Please contact Lauren Kerr at kerr@bsplaw.com, or the NAMWOLF office, if you would like to be involved.

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Ms. Kerr has experience in a range of practice areas, including product liability litigation, complex commercial litigation, employment law, real estate litigation and financial services. She focuses on electronic communication in the litigation context and prepares training seminars and presentations on topics such as e-discovery, social media, and identity theft and data security in the workplace.