Inside Q2 2021

ACC Association of Corporate Counsel

SOUTH FLORIDA

FOCUS

President's Letter

Jessica Rivera

Dear Members,

"What we call the beginning is often the end. And to make an end is to make a beginning. The end is where we start from." – T.S. Eliot

As I was strolling through the grocery store – maskless for the first time in 15 months – a thought arose: 'It's the beginning of the end of COVID-19!' Moments later, I recognized that my thought was incomplete, as it assumed some sort of finality to this season of life. I questioned, 'what comes after 'the end' of COVID-19?' The beginning of something else, to be sure. Shrouded in both beauty and mystery, moments throughout life may feel familiar but are precious in that no two moments are ever the same.

Take, for example, our first-ever hybrid-format **11th Annual ACC South Florida CLE Conference** held April 30, 2021 at the Seminole Hard Rock Casino & Hotel. Though our chapter has held many CLE conferences in the past, the excitement to see fellow members and sponsors in person for the first time in over a year was palpable, energizing and unique. It was wonderful to see the collaboration among our virtual and in-person attendees, and grateful to our sponsors for their flexibility and commitment to presenting at our conference. A **HUGE** thank you goes to the CLE conference committee, CLE Conference Committee Chair **Carlos Cardelle**, and Executive Director **Christina Kim**, for making this postponed, long-awaited event such a tremendous success.

In addition to the conference, our chapter this year hosted an interactive GC/CLO Roundtable on relevant topics such as workforce reopening post-COVID, and initiatives on diversity and inclusion, and also held several virtual community and legal aid events including a family friendly event supporting ZooMiami by **Nelson Mullins**. We also marked Mental Health Awareness Month with a powerful mindfulness workshop with Marcia Narine Weldon. It was during this event that I was reminded of how it important it is to prioritize self-care and preserve mental energy, especially during these continued stressful times. Each of us have so many labels – professional, spouse, parent, child, sibling – that we sometimes lose sight of the one label we all are able to share: student. We are, after all, students of life, learning through and by experience. From the mundane experience of walking down grocery store aisles, to applying laws in new ways at our workplaces, to developing meditating, mindfulness and mindset practices to fuel our spirit… there is always an opportunity to discover, to learn, and to grow. As the end of Spring nears, I encourage you all to make time to reflect on where there may be space for new opportunities (and new beginnings) to rise.

I hope you and your loved ones have a wonderful and safe summer.

Be well,
Jessica

We're Getting SOCIAL!

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

You can find updates, event information and more at:

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ACC South Florida Chapter

The Supreme Court is Set to Redefine Standing Requirements for Consumer Protection Statutes

By Scott N. Wagner, Ilana A. Drescher, and Brian M. Trujillo, Bilzin Sumberg

This is the first part in a two-part series that will explore the forthcoming TransUnion decision.

In April of 2019, a three-judge panel of the Eleventh Circuit issued a decision that was widely viewed as swinging open the doors of courts in the Circuit to plaintiffs seeking damages for bare procedural violations of consumer protection statutes.[1] In October of 2020, the full Eleventh Circuit sitting en banc reversed the panel's prior decision. The court's decision in *Muransky v. Godiva* dramatically altered the Circuit's plaintiff-friendly view of standing.[2] Godiva brought the Eleventh Circuit in line with many of its sister circuits, the Ninth Circuit, however, took a contrary view. In *Ramirez v. TransUnion LLC*, the Ninth Circuit essentially ruled that bare statutory violations sufficed to confer standing on potential plaintiffs.[3]

The Supreme Court held in *Spokeo, Inc. v. Robins* that pleading a bare statutory violation is not enough to establish standing under Article III of the United States Constitution.[4] Justice Alito, writing for the court, found that in order to establish standing a plaintiff must suffer a "concrete injury" resulting from the alleged statutory violation. The Court emphasized that, while Congress has the authority to create a right to sue for a statutory violation, Congress "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[5]

The Court confirmed that concrete harms may be tangible or intangible. And, Justice Alito outlined broad considerations for determining when an intangible injury is concrete, observing that "both history and the judgment of Congress play important roles," and that "the risk of real harm" can satisfy the requirement of concreteness.[6] He explained that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[7]

While not setting clear parameters for what amounted to a concrete injury, the Court provided examples of cases in which intangible injuries are "concrete" enough for standing. The examples included infringement on free speech or free exercise of religion and informational injury due to failure to follow statutory disclosure requirements. However, the Court noted that certain bare statutory violations do not actually cause anyone real, or concrete, harm—*e.g.*, a consumer report misidentifying a person's zip code.

Upon remand of *Spokeo*, the Ninth Circuit once again held that the plaintiff had standing. This time, the Ninth Circuit determined that inaccuracies concerning "age, marital status, educational background, and employment history" presented a material risk of harm to the plaintiff because this is "the type [of information] that may be important to employers or others making use of a consumer report."[8]

Spokeo petitioned the Supreme Court for *certiorari*, arguing that "the limited guidance afforded by this Court's opinion in *Spokeo* has resulted in disagreement and confusion among the lower courts over Congress's role in the Article III standing inquiry and whether a claimed intangible harm resulting from a statutory violation is sufficiently concrete."[9] The Supreme Court, however, declined to revisit *Spokeo* at that time. Nevertheless, the defendant's prediction about the questions left open by *Spokeo* proved to be correct. Disagreement and confusion ensued over the meaning of concrete harm—le ading to a flood of litigation and the spilling of ink of federal district and appellate courts seeking to define just what constitutes a harm that is sufficiently "concrete" to rise above the level of a bare statutory violation.

In *Godiva*, the Eleventh Circuit concluded that rather than blindly deferring to Congress, "[f]ederal courts [must] retain our constitutional duty to evaluate whether a plaintiff has pleaded a concrete injury—even where Congress has said that a party may sue over a statutory violation."[10] Indeed, the Eleventh Circuit held, that the plaintiff's claim that "he was provided with an electronically printed receipt" that "displayed the last four digits of his credit card as well as the first six digits of his account number"—a technical violation of FACTA[11]—does not, by itself, constitute concrete harm. Specifically, the Court determined that it "makes little sense to suggest that receipt of a noncompliant receipt itself is a concrete injury" and the plaintiff did not allege any other harm, so he did not have Article III standing.[12]

After *Godiva*, plaintiffs in the Eleventh Circuit had to allege and prove something more than a bare statutory violation to have standing. This made it substantially more difficult to achieve class certification for violations of consumer protection statutes.

However, the Supreme Court is currently considering a case that could, once again, dramatically change the landscape. Apparently recognizing the confusion and uncertainty caused by its *Spokeo* decision, the Supreme Court granted certiorari in *TransUnion LLC v. Ramirez*.[13]

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The Court heard oral argument on the case on March 30, 2021.

TransUnion made its way to the Supreme Court after the Ninth Circuit held both that "every member of a class certified under Rule 23 must satisfy the basic requirements of Article III . . . ," and that every member of the putative class had met this requirement even though numerous class members where wholly unaware that TransUnion had failed to comply with the requirements of the Fair Credit Reporting Act ("FCRA").[14] And, as in *Spokeo* and *Godiva*, TransUnion wrestles with the question of whether a bare statutory violation of a consumer protection statute—in this case the FCRA—is sufficient injury-in-fact to establish Article III standing.

The Supreme Court's decision in *TransUnion* is likely to have dramatic implications as diminished limits on who can sue, if the Ninth Circuit's decision is upheld, virtually ensure that more *will* sue. Thus, while *Godiva* continued *Spokeo's* trend towards strict adherence to Article III standing requirements, *TransUnion* presents the Court an opportunity to decide whether it would continue or reverse that trend.

Authors:

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[1] *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), *reh'g en banc granted, opinion vacated*, 939 F.3d 1278 (11th Cir. 2019), and *on reh'g en banc*, 979 F.3d 917 (11th Cir. 2020).
[2] *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020).
[3] *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), cert. granted in part, 141 S. Ct. 972 (2020).
[4] 136 S. Ct. 1540 (2016).
[5] *Id.* at 1548.
[6] *Id.* at 1549.
[7] *Id.*
[8] *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017).
[9] Petition for a Writ of Certiorari at 21, Spokeo, Inc. v. Robins, No. 17-806 (U.S. Dec. 04, 2017) (Petition Denied).
[10] *Muransky*, 979 F.3d at 921.
[11] The Fair and Accurate Credit Transactions Act ("FACTA") "forbids merchants from printing more than the last five digits of the card number (or the card's expiration date) on receipts offered to customers." *Muransky*, 979 F.3d at 921.
[12] *Id.* at 929.
[13] Docket No. 20-297.
[14] *Ramirez*, 951 F.3d at 1017.

New Summary Judgment Rule Signals Major Change for Florida Civil Litigation

By Michael A. Holt, FisherPhillips

The Florida Supreme Court's recent summary judgment rule change has been a long time coming and may require litigators to reconsider the costs and benefits of state court litigation.

Anecdotally, individual plaintiffs generally fare better in Florida's state courts than they do in federal court. Several factors likely contribute to this widespread belief: discovery is broad and there is no express proportionality requirement, motions are usually resolved at hearings rather than on the papers, and the standard for obtaining summary judgment is higher than in federal court. But the Florida Supreme Court's adoption of the federal summary judgment standard may be signaling a broader shift toward faster and more cost-effective state-court litigation.

Key Differences in the Florida and Federal Rules

Although the federal and former Florida summary judgment rules used similar language, courts have interpreted them very differently.

Under Florida Rule of Civil Procedure 1.510, a party seeking summary judgment has the burden of proving a negative—the absence of a factual dispute—and must irrefutably show that the other party cannot prevail on its claim or defense. *See, e.g., D.H. v. Adept Cmty Servs., Inc.*, 271 So. 3d 870, 877 (Fla. 2018); *Holl v. Talcott*, 191 So. 2d 40, 43–44 (Fla. 1966). This burden is high and the Florida Supreme Court has cautioned that summary judgment should not be rendered "unless the facts are so crystalized that nothing remains but questions of law." *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003). Notably, the hurdle to summary judgment was often higher than the party's trial burden. *See, e.g., Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 30 (Fla. 1977). A party could not obtain summary judgment simply by pointing out the other side's lack of evidence. *See id.* On top of this high bar, decades of reminders that courts should use great caution when granting summary judgment, *e.g., Stephens v. Dichtenmueller*, 216 So. 2d 448, 450 (Fla. 1968), make it no surprise that summary judgment is relatively rare in Florida's state courts.

ON THE FRONT LINES OF WORKPLACE LAW℠

In contrast, federal courts interpreted Federal Rule of Civil Procedure 56 very differently. In a series of cases known as the *Celotex* trilogy, the United States Supreme Court held that the summary judgment rule does not require a movant to negate the opponent's claim—it may be enough to point out the absence of evidence to support the case, which the other party must then refute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). In response, a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" and a court need not accept a nonmovant's version of the facts that is "blatantly contradicted by the record." *Matsushita Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007). Ultimately, the summary judgment inquiry is essentially the same as the test for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether is it so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 417 U.S. 242, 251–52 (1986).

Comparing the two standards, it is no surprise that the state-court rule allowed more claims and defenses past summary judgment (even some that lacked any merit and that would eventually be resolved by directed verdict). And no doubt the cost and risk of trial has led to settlement of baseless claims, which disproportionately drives up legal expenses for companies that might face numerous lawsuits.

Florida Finally Adopts the Federal Standard

In *Wilsonart, LLC v. Lopez*, 308 So. 3d 961 (Fla. 2020), the Florida Supreme Court finally addressed the diverging summary judgment standards. That case involved a fatal rear-end car accident. The defendant offered video evidence from a dashboard camera that contradicted the plaintiff's theory of the case and summary judgment evidence. *Id.* at 963. Under the federal standard, the defendant would be entitled to summary judgment because no reasonable jury would find for the plaintiff in light of the video. By contrast, the Florida rule would have led to denial of summary judgment if the record raised even the slightest doubt.

The Florida Supreme Court decided the time had come to adopt the *Celotex* trilogy, which it would engraft onto the Florida rule through addition of a comment. This change was set to take effect May 1, 2021. But after considering comments and oral argument, the Florida Supreme Court changed its approach slightly and decided to replace most of rule 1.510 with the text of federal rule 56 and all of the case law interpreting it. *In re Amendments to Fla. R. Civ. P. 1.510*, No. SC20-1490, 2021 WL 1684095, at *1–3 (Fla. Apr. 29, 2021).

In a notable difference from the federal rule, and to ensure trial courts would give real effect to the new rule, the Florida Supreme Court specified that trial courts *must* state on the record the specific reasons for granting or denying summary judgment. *Id.* at *4.

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The new rule applies to all summary judgment motions decided after May 1, 2021, and parties in pending cases will be allowed to renew motions that were denied under the old rule. Thus, the Court plainly expects the new rule to lead to different outcomes.

Conclusion

Florida's adoption of the federal summary judgment standard is an important step in reducing forum shopping and will help avoid different outcomes in Florida's state and federal courts based on the same facts.

This rule change comes just less than two years after the Florida Supreme Court adopted the Daubert standard for admissibility of expert opinion testimony. *See In re Amendments to the Fla. Evid. Code*, No. SC19-107 (Fla. May 23, 2019). Together, the decisions to adopt the federal summary judgment and expert testimony standards mark a major shift for Florida courts. While these rules are "procedural" in some respects, the application of these rules is often case dispositive. And because these changes will lead to mean more cases resolved before trial, defendants are likely to welcome them.

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Prohibition Ends Here! Permissible Improvements to Diversity and Inclusion Programs to Increase Minority Representation among Management

By Matthew Luttinger, FordHarrison LLP

Executive Summary:

To further the call for racial justice, corporations throughout the U.S. are taking actions to increase minority representation in all levels of leadership. As important as this objective is, companies must be cautious to structure diversity and inclusion programs in such a way that they do not run afoul of the U.S. Department of Labor (DOL) or Equal Employment Opportunity Commission (EEOC) which could view these policies and practices as discriminatory. This article will discuss what employers can permissibly do to increase diversity among management and executives.

Benefits of a diverse workplace and the work required to get there

A diverse workplace requires a commitment of time, energy and resources, including a commitment to create and maintain a diverse workplace, engaging key decision-makers and determining obtainable goals. Benefits of a diverse workplace include increased employee productivity, increased attention, reduced legal claims, enhanced internal and public image and increased customer loyalty. When employees feel their organizations are diverse and inclusive, they are more likely to agree that they share diverse ideas to develop innovative solutions, more likely to agree that they meet the needs of their customers and more likely to agree that their team works collaboratively to achieve their objectives.

Understanding implicit bias and effectively handling macroaggressions

Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions and decisions in an unconscious matter. These implicit biases are entrenched in society but can be unlearned. They are distinct from explicit biases in that they do not necessarily align with core beliefs.

Microaggressions result from implicit bias. One way employers can help create a truly inclusive workplace culture at their organization is by effectively handling microaggressions. Microaggressions are the subtle, indirect actions that communicate some sort of bias against a member of a historically marginalized group. Microaggressions are not always intentional or explicit. The disparaging nature of microaggressions is subtly hidden within everyday practices and conversations. Many individuals are unaware that a simple compliment or question could be perceived as a microaggression. Steps to reduce the risk of microaggressions

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include: (1) recognizing a microaggression; (2) creating a safe and inclusive culture; (3) training your team; and (4) responding to microaggressions.

Recognizing microaggressions

The first step in addressing microaggressions is to recognize when a microaggression has occurred and what message it may be sending. The context of the relationship and situation is critical. Some examples of sexist microaggressions include: (1) "You're a girl, you don't have to be good at math."; (2) asking a woman her age and, upon hearing she is 31, darting a look at her ring finger; and (3) labeling an assertive female committee chair/dean as a "b____," while describing a male counterpart as a "forceful leader."

Other varieties of microaggressions include microassaults, microinsults and microinvalidations. Microassaults are conscious and intentional actions or slurs. Examples include: slurs, catcalling, and intentionally mis-gendering or outing somebody. Microinsults subtly convey rudeness and insensitivity and demean a person's identity. Examples include: "that's so gay" and a white employee telling a co-worker of color "you're so articulate." Microinvalidations are communications that subtly exclude, negate or nullify one's thoughts or feelings. Examples include unintentionally mis-gendering and staying silent when something should be corrected.

Creating a safe and inclusive culture

Companies should have programs and initiatives in order create a safe and inclusive culture in order to reduce the risk of microaggressions. Companies do a better job of increasing diversity when they forgo the control tactics and frame their efforts more positively. The most effective programs spark engagement, increase contact among different groups or draw on people's strong desire to look good to others.

One approach is to manage risk around recruiting, including reserving candidate spots for historically black colleges and universities, setting goals, and requiring females/minorities on every interview panel. When the goal is to expand diversity in candidate pools for certain positions, employers must revise the recruiting and interviewing process. One example would be to: (1) create candidate slate requirements for the position; (2) commit to interviewing a final slate of five candidates (of those five candidates, one has to be a woman and one has to be a person of color (female of color cannot hold two spots); (3) partner with a sourcing firm to identify candidates through access to their candidate base; and (4) use performance-based hiring. This process should increase the amount of minority hires.

Another approach is to create employee resources groups. Employee resource groups can be effective strategies for reducing unwanted attrition by: (1) providing a meaningful space where underrepresented employees can meet regularly to build sense of community; (2) supporting employees and giving them a place to discuss issues and interests; (3) planning monthly programming or other events; and (4) recruiting, engaging and building culture. Companies can also create minority or gender based mentorship/sponsorship which effectively lays out the structure and goals of such an engagement.

Diversity training and responding to microaggressions

Diversity training is an essential component of any diversity and inclusion initiative. The training needs to be interactive and varied and include all areas, including generational issues and religious accommodations, that all employees might not understand. Companies should make sure the content of all training programs is inclusive and offer different formats and training methods so employees can engage with learning content in a way that works best for them.

One approach to responding to microaggressions is to survey employees. Using surveys to gather feedback from employees on perceptions about the company's diversity and inclusion efforts by asking the right questions will get companies the feedback they need. Once this feedback is received and the results are analyzed, companies can identify opportunities for impact, track progress and transform the feedback into growth.

Author:

Matt Luttinger is a Senior Associate in FordHarrison's West Palm Beach office. He counsels employers in a host of employment law concerns including the development and review of employment and HR policies, compliance with the FMLA and the ADA, benefits, discipline and termination issues, DOL investiga tions, and OSHA investigations and citation contests. If you have any questions regarding this article please feel free to contact Matt Luttinger, (561) 345-7504 or *mluttinger@fordharrison.com*, or the FordHarrison attorney with whom you usually work.

ACC South Florida Upcoming Events

JULY

July 14 - Coffee Talk CLE presented by Fisher Phillips LLP

July 28 - Member Appreciation presented by Foley & Lardner LLP

AUGUST

Data Steward CLE Seminar with ACC Florida Chapters

Social Event presented by Littler

Social Event presented by Gunster

SEPTEMBER

Social Event presented by Bilzin Sumberg

Social Event presented by FordHarrison

Coffee Talk CLE presented by White & Case

General Counsel Can Sink or Swim in the Rising Sea of Decarbonization

By Gaida Zirkelbach, SustainaBase

There is a new wave of decarbonization and sustainability. It is here because companies want to do the right thing, and their customers, investors, and other stakeholders demand increased commitments. In addition, there are regulatory, reputational, and other risks in not acting.

Because the legal team plays an important role in reducing risk and finding opportunities, in-house attorneys increasingly find themselves addressing climate change-related issues. Today, General Counsel is instrumental in addressing climate change risk, finding opportunities in a low-carbon economy, and positioning companies to sink or swim.

So, in a rising sea of risks and opportunities, what is in-house counsel to do?

1. Set the tone from the top to future-proof operations

General Counsel are in a unique position to work with investors, the board, and executives to determine the company's climate change-related risks and opportunities, and to then establish the company's related strategies to future-proof operations. In rolling out those strategies, attorneys can create the right culture and policies, setting the tone from the top regarding the company's true commitment.

2. You can't manage what you don't measure, so set up great internal reporting

It is now common to see companies making time-bound carbon and sustainability commitments and targets, such as reducing CO2 emissions x% by _____, becoming carbon neutral by a certain date, and/or setting an internal carbon price. But does the company understand what it will take to achieve those commitments and have plan in place? Does the company have a protocol-compliant, science-based carbon accounting system in place to track the KPIs and metrics needed to achieve its goals?

You can't manage what you don't measure. In-house counsel should be involved in ensuring that the right carbon accounting systems and internal reporting is in place, so that the c-suite and other employees can track progress. This is why reliable, continuous carbon accounting is so important.

3. Avoid greenwashing and bolster your brand with external reporting backed by data and science

Companies report their commitments and progress to outside stakeholders, including investors, customers and reporting organizations, such as the CDP. They are also seeking third-party labels, such as through the Amazon Climate-Pledge Friendly Program. With "green" claims on websites, social media, reports, third-party label applications, and more, there is an increased risk of greenwashing (i.e. false and misleading environmental claims) in careless public statements and glossy reporting. In-house counsel can minimize this risk with robust review procedures and ensuring that the company has science-based data to back its claims. As investors and customers become more and more sustainability-savvy, it will become increasingly important for climate and sustainability-related claims to be transparent, withstand outside scrutiny, and avoid being misleading, not only due to potential legal claims, but also due to the negative effects on a company's brand.

4. Button up the Upstream and Downstream Value Chain

Carbon accounting and sustainability metrics are intertwined with the efforts of other companies in the value chain. This is why investors flow down carbon reduction requirements to their portfolio companies, and companies such as AT&T and Walmart do the same when procuring products and services. In other words, it is often the case that meeting sustainability commitments requires action and reporting throughout the value chain.

In-house counsel is positioned well to help ensure this action and reporting because they often play crucial roles in investor-relationships, as well as in establishing and approving contract and procurement requirements. These requirements should typically include regular, science-backed carbon reporting, showing compliance and progress towards agreed-upon goals.

Whatever the industry sector, General Counsel is instrumental in addressing climate change risk, and positioning companies to sink or swim as they decarbonize and make operations more sustainable. And, if General Counsel succeed, not only will they set up their companies to thrive, they will also be vital in fighting climate change itself.

Author:

Gaida Zirkelbach is the CEO of SustainaBase, a climate tech company providing a SaaS platform that has everything companies and municipalities need for effortless, dynamic management and reporting of carbon emissions, water, waste, and more. Gaida previously served as General Counsel for MotionPoint Corporation and prior to that as a partner at the Gunster law firm. She is also a member of ACC South Florida. You can find Gaida on *LinkedIn* or visit *www.SustainaBase.com*. If you want to connect with her to discuss your particular situation, you can schedule time *here*.

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Holiday Party
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EVENT PHOTOS

11th Annual CLE Conference
April 30, 2021

Positively Legal: The Power of Unfocus

By Caterina Cavallaro, Standards Australia, General Counsel

When we think of excellence and achievement, we often think of being focused and staying on task — following our "to do" lists, timetables, and calendar reminders. However, extensive focus uses a lot of energy and can exhaust our brains. Research shows that the brain operates optimally when it toggles between focus and unfocus, needing both to allow the unconscious brain to make connections and solve problems, "develop resilience, enhance creativity, and make better decisions."

The shortcomings of a focused mind

Richard Davidson, a neuroscientist at the University of Wisconsin, calls focus an essential ability. During sharp focus, he says, key circuitry in the prefrontal cortex gets into a synchronized state with the object of focus, which he calls "phase-locking." For example, if "people are focused on pressing a button each time they hear a certain tone, the electric signals in their prefrontal area fire precisely in sync with the target sound. The better your focus, the stronger the neural lock."

There are benefits to sharp focus, but this focus can be limiting, and we can miss making connections. For example: Sharp focus is like the beam of a flashlight. "While a bright and narrow beam of light cast straight out in front of you is terrifically helpful if that's where you need to be looking," Dr. Srini Pillay writes in his book Tinker Dabble Doodle Try: Unlock the Power of the Unfocused Mind, "what about your peripheral vision and the light you might need to see into the murky middle distance?"

Another example is the well-known invisible gorilla study. Participants were asked to watch a basketball game between a team wearing white and a team wearing black. Participants were told to count how many times the white-shirted team passed the ball to one another. A person in a gorilla suit walked right through the game and most participants, focusing on counting the passes, did not notice the gorilla.

The balance to such sharp focus is "defocused attention," something often identified in highly creative people who have a "wider spotlight that gives them access to more elements." These people then have "greater potential to generate more unusual ideas, as they have a wider array of elements than can be combined with the focus of their attention".

But we don't need to be a creative genius to have a "eureka" moment, generate novel ideas, and solve problems. We can all do it by learning to access our default mode network (DMN), a collection of regions that are active during rest and are usually deactivated during focused tasks.

The default mode network

Pillay thinks access to the brain's DMN, known as the "unfocus network," is just as important as the focus network. The process of "unfocusing" does the following:

- Recharges your brain, reducing amygdala activation and creating calmness;
- Activates the prefrontal cortex and enhances innovation;
- Improves long term memory; and
- Increases activity in the DMN.

There are practical ways to engage the DMN and Pillay suggests first introducing them during periods of the day when the brain would be in a natural slump like right after lunch or in the middle of the day.

Positive constructive daydreaming

Positive constructive daydreaming is a specific type of mind wandering for a short period of time, usually 15 minutes or so, and is characterised by "playful, wishful imagery, and planful creative thought" that serves four adaptive functions: 1. future planning, 2. creative incubation and problem-solving, 3. attentional cycling (when an individual can flexibly switch between various informational streams), and 4. dishabituation (which improves learning since an individual is taking short, recuperative mental breaks from externally demanding tasks).

This type of mind wandering that has been shown to help creativity. "While our minds wander," writes Daniel Goleman in his book Focus: The Hidden Driver of Excellence, "we become better at anything that depends on a flash of insight, from coming up with imaginative wordplay to inventions and original thinking." Positive constructive daydreaming is distinguished from other less productive mind-wandering like negative rumination.

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During this time, you should engage in a low-key activity such as knitting, gardening, or going for a walk and let your mind wander to something positive like lying on a yacht or a beach or going for a run through the woods with your dog. This wandering then helps us "wander over to a solution."

In addition, going for a walk on a curved path has been also shown to increase creativity. A 2012 study by Angela K. Leung and colleagues tested three groups, one walked in a rectangle, one sat down, and the last walked freely. The group walking freely outperformed the other two in the mental test they were given.

A five-to-15-minute nap has been shown to give one to three hours of clarity and should be done a few times a week. Occasionally, if you need it for creativity, try napping for 90 minutes.

Doodling can also increase creativity. It can be done during a conference call as it helps a bored or tired mind to stay awake a little longer. A 40 person study in 2009, found that those who doodled during a 2.5 minute dull and rambling voice mail message recalled 29 percent more details from the message when tested.

Block out time for undemanding tasks and holidays

Block out time for daily breaks you find undemanding like walking or doing crosswords, make time for events to break up the monotony of the week, and ensure you take regular vacations.

Goleman describes a conversation he had with Salesforce CEO Marc Benioff who said, "New ideas won't appear if you don't have permission within yourself." When serving as VP at Oracle, Benioff said he took a month off in Hawaii to relax which, "opened up my career to new ideas, perspectives, and directions." It was during one such holiday that Benioff decided to quit Oracle and start Salesforce.

Actively engaging our DMN can help us to find solutions to unsolved problems, become creative, and enjoy ourselves in the process.

ACC News

Th ACC Xchange 2021: June 15-17

As an ACC member, you already know that ACC is the place to go for best practices and skill development in law department management and legal operations. That's why, if you are looking to hone your leadership game, you know you won't find this targeted, advanced-level training anywhere else, but ACC. Join us to Xperience the Xchange, a one-of-a kind 2-day event designed to give in-house legal executives the keys to drive innovation and transform the law department. *Register today*!

ACC Executive Leadership Institute: 30 August–2 September (Chicago, IL)

There are two weeks left to give your top performers an exclusive professional development opportunity. Help them reach the level needed to one day lead your department. Nominate them to attend the 2021 ACC Executive Leadership Institute. *Nominations end 31 May*!

ACC In-house Counsel Certification Program

- 7–17 June
- 12 July – 5 August
- 12–22 July
- 23 August – 2 September

The *In-house Counsel Certification Program* covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day.

Mini MBA for In-house Counsel: June Series

In today's evolving climate, it is more important than ever for in-house lawyers to take on a more strategic role, investing in the company's ability to grow. ACC and the Boston University Questrom School of Business are bringing to you virtually their popular *Mini MBA program*. Master the executive skills needed to ensure that you—and your organization—continue to move forward.

The Global Women in Law & Leadership Virtual Conference and Honors Program: June 21-23

The ACC Foundation would like to honor women in the legal profession! This event, taking place virtually, includes programming focusing on soft skills, innovative leadership, and tangible takeaways to help advance female lawyers in today's busy world. *Reserve your spot today*!

ACC Corporate Counsel University®: June–August

Registration is now open for the *2021 Corporate Counsel University®* (CCU). It will be held in Summer 2021, starting the week of June 14. This comprehensive education program is specifically designed for those new to in-house practice or in-house lawyers with less than five years of experience, as well as those who simply need to sharpen their basic practice skills.

2021 ACC Virtual Annual Meeting: October 19-21

It's here! The 2021 ACC Annual Meeting program is ready and it's jam-packed with valuable substantive and career-focused content you don't want to miss. *Check it out*!

2021 Cybersecurity Summit On Demand

Cybersecurity touches every aspect of consumer and corporate culture, and vulnerabilities present grave financial, legal, and reputational risks. Preventing, preparing for, and responding to data breaches in real time are chief concerns in today's workforce. This *on demand conference programming* will keep you apprised of the latest threats and innovations. The recordings will complement your broad understanding of cybersecurity strategies and principles, enabling you to become a more well-rounded, focused, and effective practitioner.

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Executive Director Note

Dear Members,

We are halfway through 2021! The highlight of the quarter was our 11th Annual CLE Conference. We were so excited to be able to bring it to you in a hybrid format so we can both meet in person and virtually with all our members and sponsors. It was a full day of informative and engaging programming and it was great to see all the familiar faces we missed! Thank you to our Sponsors, CLE Conference Planning Committee and ACC South Florida Board for all their support in helping this come together.

Summer is here and we are not slowing down! We have many upcoming events that we hope you will join us for. Coffee Talk CLEs, Member Appreciation, Virtual Webinars, and Social Events are all on the calendar so please keep an eye out for invitations and we look forward to seeing you either virtually or in-person soon.

Please continue to stay healthy and safe!

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

Christina & family celebrating their puppy, Rocket's 1st birthday!