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Law Issue

Tuning In to Current Legal Trends

by Nora A. Jones

One growing area of law deals with telecommunications, a mainstay in nearly any business.



Movies and television programs often glamorize criminal trials, capturing the attention of millions with their "who done it" themes. Most people don't stop to realize that only a small percentage of real-life attorneys deal with criminal issues; most U.S. attorneys only handle civil matters involving disputes over property rights, liability for injuries, or payments owed.

Among the "hot" topics these days are intellectual property rights—patents, trademarks, and other intangibles that often distinguish one business from another. Another growing area of law deals with telecommunications as the transfer of voice and data are a mainstay in nearly any business. How issues are resolved is also being re-engineered in some instances, as some civil lawyers look for alternatives to litigation through such avenues as collaborative law. Some legal trends track technological advancement; others reflect social evolution.

INTELLECTUAL PROPERTY

An area of law that has grown tremendously in recent years pertains to intellectual property (IP). Businesses have come to understand that trade secrets, patents, trademarks, and copyrights are just as important as brick and mortar assets. Ronald Kisicki, partner at Jaeckle, Fleischmann and Mugel, LLP, estimates that many businesses can attribute 40% of their total worth to IP."



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--Ronald Kisicki, attorney**

Trade secrets can be considered an umbrella term," Kisicki begins. "Anything that a company develops that gives it a competitive edge in the marketplace may be considered a trade secret. In some cases that may be the way a company builds a widget; in other instances it may be a customer service process or simply a customer list. In any event, it is the knowledge or know-how that would threaten profitability if your competitor had it.

"To be legally protectable, trade secrets must remain a secret to the general public. Therefore, employee confidentiality agreements and non-compete clauses can be critical to protecting intellectual property.

"One of the most common IP errors small businesses make," says Kisicki, "is failing to appreciate that they have intellectual property. Failing to identify patents, trademarks, trade secrets, or copyrightable material and failing to have a policy in place to protect these vital assets can be fatal to a business. Small companies also often forget to secure confidentiality when dealing with employees or third party vendors or clients. What if the vendor supplying a component part decides to retool to compete directly or to sell the component part to your competitor?"

A trademark may be anything a company uses to promote its goods or services to create goodwill. It could be the name of the business, a product's packaging, a logo, or perhaps a slogan. By registering a trademark, a company can protect its right to exclusive use. However, enforcing a trademark can be difficult and sometimes expensive.

Kisicki explains that the Internet and technological tools have allowed businesses to enter the global market, but that also means enforcement of IP rights has become more challenging. Since a patent is a government grant that bestows certain property rights on the inventor, it is typically associated with a particular country or economic segment. How does one enforce a patent or trademark in China or South America?

"Legislation has changed to make it easier to apply for a patent in multiple countries," Kisicki notes. "But the process to achieve patent protection in foreign countries is not necessarily inexpensive and can be difficult to monitor and enforce in the far reaches of the marketplace."

In addition to globalization of the marketplace, employee mobility has added a layer of complexity to protecting intellectual property rights, Kisicki explains.

"Every business owner needs to safeguard what their employees may take with them if they move across town or across the globe. This can be done by a well-drafted employment agreement at the time of hire."

Telecommunications Law

Considering the rapid changes in and increased reliance on technology, small businesses can easily make a wrong turn in purchasing hardware, software, or services. Telecommunications is a perfect example.

Traditional phone service used to be a small portion of a business's expenses. Now, in addition to traditional telephone and fax service, most businesses have mobile phones, hand-held organizers, and Internet access. The services required to effectively use these systems has grown into a much larger chunk of the business budget.

TELECOMMUNICATIONS LAW



**"Be sure there are provisions allowing you to get out of a telecommunications contract."
--Martha Buyer, attorney**

Martha Buyer, a Western New York attorney who concentrates her practice in telecommunications law, cautions the small business owner to get advice before signing service contracts.

"Typically, the small business owner trusts the sales rep who has a 'great package deal' to offer," Buyer says. "A small growing company I recently consulted with had done just that. The telecommunications carrier snowed the business owner and sold her lots of services she will never need or use. When she began to question what she'd signed up for, I was horrified to learn just how aggressive the sales rep had been. Although I did get the carrier to renegotiate the contract, it took threats of going to the Public Service Commission, and careful review of the rewritten contract to rein in the excess charges."

Most telecom carriers want you to commit to a certain level of service. My advice is never commit to more than 65% of your actual usage, and be sure there are provisions allowing you to get out of the contract if there is a downturn in business or if you sell your business."

In addition, Buyer cautions that since legislation has not yet caught up with the technology, there will likely be changes in fee structures and surcharges that could significantly impact a long-term contract.

"The laws are so out of date it isn't even like fitting a square peg in a round hole," she adds. "It's more like comparing baking cookies to grilling a steak. Today, an interstate usage fee is charged on long distance voice communications. The federal budget uses those funds for schools, libraries, and telecommunication systems for the hearing impaired. That fee burden will most likely shift to encompass data communications or 'information services' in the very near future. So if you are thinking of switching to a VoIP (voice over Internet protocol) because of cost savings, beware. Those cost savings are likely to change-and even evaporate over the next year or so."

Speaking of legislation, Buyer also mentions the potential impact of the Sarbanes Oxley Act of 2002 on IT professionals.

"Sarbanes Oxley places a heavy burden on the people and systems that 'touch' financial data. That includes potential personal liability of the IT manager who doesn't properly protect data on the server. Although Sarbanes Oxley technically only applies to publicly held companies, what about the private business owner who has frequent dealings with a publicly traded company? The publicly traded companies that deal with privately held companies may require those private entities to step up on compliance issues."

In the nearly 20 years since AT&T was dismantled, dozens of new small carriers have gained market share; merged; lobbied for favorable legislation; or won court decisions to help them grow. None of this is likely to benefit the small business owner, Buyer comments.

"I recently attended a public hearing about the merger of Verizon and MCI," Buyer acknowledges. "It appeared that Verizon had representatives from a number of charitable organizations planted in the audience to speak up about the wonderful services of the company. Why not? Verizon is indisputably generous to not-for-profits. But the scenario at the PSC hearing wasn't about telecommunications service and the effect the mega-merger will have on Verizon's customers. Instead, it was a love-fest orchestrated by Verizon that had nothing to do with the situation at hand. The real question is: 'What happens when the small business owner is trying to get service from the mega-conglomerate?' Will these mergers improve customer service?"

"Telecommunications contracts are minefields for those who have neither the time nor expertise to recognize the subtleties inherent in these documents," Buyer warns.

COLLABORATIVE LAW

The explosion of civil litigation has led some factions of the legal community to seek out alternative solutions. One such trend has been in the area of matrimonial law.



Collaborative attorneys like Suzanne Brunsting do everything that conventional attorneys do, except go to court.

Suzanne Brunsting, after more than 20 years practicing matrimonial and family law, was convinced that many divorces turned into bad divorces by the very nature of the adversarial legal system.

"Lawyers are trained to be adversaries and to represent their individual clients zealously. However, the concept of 'opposing parties' aggravates divorce-related conflicts. Therefore, in 2001, I became a dedicated advocate for collaborative law, which is the practice and art of settling cases with legal counsel, but without court intervention at any stage," she explains.

In the family law context, each spouse has a separate, specially trained attorney whose only goal is to help solve the problems related to the separation and/or divorce. The parties may agree to bring in relevant resources (financial experts, child psychologists), but foremost, they contract to work together honestly, respectfully and in good faith to find the best possible solutions. Collaborative attorneys provide legal advice and prepare and process all paperwork required for a legal separation or divorce. They do everything that conventional attorneys do-except go to court.

"All negotiations take place in four-way conferences between the parties and their attorneys," Brunsting explains. "The attorneys cannot go to court or threaten to go to court. Settlement is the only agenda, as the attorneys help their clients address emotional, financial and legal issues. The separation/divorce is looked at as a problem to be solved rather than a battle to be fought and won. The attorneys must model calm, rational behavior and help their clients focus on the long term health of the family."

In her experience, Brunsting says most collaborative family law cases are resolved in two to five months, and on average, the cost is two-thirds that of a court-based divorce. "And the emotional cost can be significantly less," she adds.

The collaborative process is by no means restricted to matrimonial practice. However, at this time, more attorneys have seized collaboration as an alternative route in divorce/ separation than in other areas of practice. Collaborative law can be used to help clients negotiate probate disputes, employment and labor disputes, commercial contract issues and business partnership dissolutions.

How does this differ from mediation? "In mediation, a single neutral person-who may be a lawyer, mental health professional or someone else trained in mediation-facilitates discussions between clients," Brunsting explains. "The mediator helps clients reach agreement on the issues, but does not give individual legal advice. In the family law context, it is generally recommended that both parties retain their own attorney to participate in the separation agreement and process the divorce through the courts."

If two parties to a legal problem want a private, dignified and civilized process that builds in legal counsel, collaborative law should be seriously considered, says Brunsting.