

Gus J. Solomon Inn of Court 2011-12 Program: Big Case – Small Firm

Programming Committee:

The Hon. Geoff Wren; Chris Allnatt; Heather Brann; Lisa Hunt; and Parna Mehrbani

Instructions:

This year's program is entitled "Big Case –Small Firm." The program explores a civil litigation case with a myriad of legal and procedural issues that challenge two opposing law firms' capabilities and resilience. It is based on a short hypothetical scenario that will be used by all groups in their presentations. The scenario includes and excludes facts purposefully.

Each monthly topic has multiple **substantive** and **practical** issues built in, although the issues vary each month. There are enough issues that a group likely could not cover all of them in one hour. Groups should feel free to present on the issues that they feel are most important, most interesting, or where they have an expertise. Issues may be presented from the perspective of the plaintiff, the defense firm and/or the judge. Issues should be viewed through "real world" law and procedure, and not as a "law school" exercise.

Each group's presentation is unique to that group. The presentations, in other words, need not build on top of each other. The monthly topics are not meant to follow the chronological life of the case. However, the topics are in a specific order that adds coherency to the entire program. Below we suggest some questions for each group to consider in developing your presentations. However, groups are not limited to the questions raised and should feel free to be creative in framing their presentations.

And finally, have fun!

The Scenario:

Mary Mother signed on to the social network website *familysafenetworks.com* to buy some jeans for her ten-year-old daughter. *Familysafenetworks.com* functions as both a social network and a user-driven marketplace to sell products and services, similar to Craigslist, but the site focuses on family-oriented merchandise and services.

Mary Mother has used this website many times before, and at one time, paid for a premium membership. She has since downgraded to the free standard membership. Mary Mother has always placed a lot of trust on the website's family-appropriate content. Indeed, *familysafenetworks.com* has and continues to market itself as the "social network for wholesome families" and "safe for your kids."

However, this time, when she was going through the market ads, Mary found explicit child pornography. Mary Mother does not know if the pornography was posted by another user or by somebody in the company or whether whoever posted the pornography was a saboteur. The incident allegedly has caused Mary Mother severe emotional distress, leaving her psychologically disabled. To this day, she has not used the internet and is too afraid to have her daughter supervised by anyone except her or her husband.

Familysafenetworks.com takes the position that users have the responsibility to, in their words, “protect themselves when walking the open streets of the internet,” and, further, that users voluntarily click on a “terms of agreement” outlining user responsibility, assumption of risk, mandatory arbitration, and forfeiture of the right to bring a class action. There is potential argument that the “terms of agreement” are ambiguous. To use the website, users must make a profile with a sign-in name and password. Each user has a profile page where they can post information about themselves and links to their market page when they are selling or buying products or services through the website.

The Legal Players

Mary Mother has approached the Wynn and Associates law firm to bring a civil suit against *familysafenetworks.com*. Suanne Wynn is a seasoned attorney with years of success in filing civil suits. The firm has one other attorney, an associate, Ralph Lowpay, a recent law graduate.

Suanne Wynn has agreed to take the case and quickly finds two dozen other similarly situated mothers who have encountered the same problem on the website. Wynn and Associates is evaluating them as potential clients. Mary Mother works in Portland, but lives in Vancouver, Washington. The other similarly situated mothers all live Portland.

Familysafenetworks.com, Inc. has hired the civil defense firm, Myd, Size and Dunless LLC to defend against the action. Myd, Size and Dunless is a law firm with sixteen (16) attorneys with various years of experience including one recent law school graduate and two of counsel attorneys with forty years of experience each. Renee Rainmaker is an associate who has been with the firm for twelve years. Renee Rainmaker, through a family friend, has brought in *familysafenetworks.com, Inc.* as a client.

Familysafenetworks.com, Inc. is a Delaware corporation. Its principal place of business is in Oregon.

Monthly Topics

1. Substantive law and practicalities –

Suanne Wynn has completed her client intake interview with Mary Mother and is reviewing her notes. Mary has given her letters and correspondents that Mary has had with similarly-situation mothers. Suanne believes the sooner a trial can be scheduled, the higher the settlement value will be.

What are possible causes of action? What are some anticipated defenses that may complicate or delay trial? Who should be sued? Should the suit be brought under state or federal law? Why or why not? How does a law firm's size and resources impact these decisions, and what ethical considerations may arise? What is the financial value of the case?

Meanwhile, familysafenetworks.com, Inc. has found several comments on the internet that suggest a lawsuit may be filed against them. The company has met with Myd, Size and Dunless, LLC, and the partners are now reviewing the situation for potential litigation.

2. Procedure and strategy –

Suanne Wynn and Associates has filed the complaint and served it on the defendants. The plaintiff's firm is outlining a potential legal strategy to proceed on the suit.

The defense firm is outlining their own strategy. Their client adamantly believes they have zero liability and should not pay a dime. The client has expressed the unfairness of having to pay to defend against "such a frivolous law suit."

What motion practice might the parties utilize, i.e. venue, choice of law? When and in what order should motions be filed? How does the *familysafenetworks.com* "terms of agreement" affect the law suit? In light of recent United States Supreme Court rulings, can the defense compel arbitration and preclude a class action suit? Might there be circumstances when a defendant would not oppose class certification? Strategically, should the suit be in state or federal court? When is motion practice enough or too much?

3. Investigation and discovery –

Outline a good investigation and discovery strategy. How would the firms proceed on discovery? What facts would either firm need to know first? What kinds of investigation would either firm do, i.e. hire a P.I. to follow Mary Mother, look for previously filed lawsuits? How do the claims and defenses affect the scope of discovery?

Who would the firms want to depose first? Why? Is there anyone that either of the firms would want to hold off deposing? What kinds of questions would be asked in deposition? How do you handle the deposition of a ten-year-old child? What are the parents' rights with respect to their child?

How much investigation should Suanne Wynn and Associates have done before filing the lawsuit?

If the defendant suspects one of its employees posted the pornography, what are its obligations in discovery? How does a corporate party prepare its employees for the discovery process? Where are the potential conflicting clients? If defendant wants to do their own internal investigations in order to improve internal corporate policies, how does that affect the

discovery? The group can discuss eDiscovery, but bear in mind that this subject was covered in some depth a couple years ago.

4. Old and new media –

Mary Mother has made use of a personal Facebook account to collaborate with the similarly situated mothers. Not all of the privacy settings are in place and a young associate with the defense firm, Myd, Size, and Dunless, by anonymously becoming online “friends” with Mary Mother, has gained access to her online postings. The postings show Mary gleefully bragging about what her attorney has told her. The defense associate also finds one posting where Mary describes her new pole-dancing workout lessons.

Suanne Wynn, Mary’s attorney, has also seen the postings and is concerned that her client is becoming overzealous. The client wants to start an “online grassroots campaign” to bankrupt Familysafenetworks.com, Inc. In addition, this case has drawn attention by both traditional media and new media forums. How do lawyers handle and use traditional media? What about newer media? Is it wise for an attorney to have a Facebook “friendship” with her client? How can the press advance or hinder your case? Could the defense ethically direct the news media to Mary’s Facebook postings? What are the ethical responsibilities and obligations of the attorneys on both sides? Are there recent ethics rulings on the issue?

5. Staffing and office support –

Both law firms realize just how big of a case this is and that they need more staff and attorneys to sift through tens of thousands of electronic documents and keep up with motions and brief writing.

Wynn and Associates is financially stable at the outset, but Suanne Wynn recognizes that pursuit of litigation against Familysafenetworks.com, Inc. poses the risk of cash flow problems. When should a law firm start thinking about these issues? Where should the plaintiff’s firm look for new personnel? Explore the possibilities of partnering with another law firm, bringing on a full-time attorney, or hiring a contract attorney. What are the issues and concerns? For example, how do you organize compensation and resource sharing? What happens when two attorneys disagree on the strategy and/or what is best for the client?

Suanne Wynn has concern about being able to mentor and direct her inexperienced associate, Ralph Lowpay, through the case. How can she address that concern? What are the best practices for law firms taking on these kinds of cases or considering taking these kinds of cases in the future?

The defense firm is exploring international outsourcing, i.e., to India. Can outsourcing ensure adequate performance of the work, competent representation of the client, and meet the standards of the lawyer’s ethical code? What are its benefits and limitations? In addition, Renee Rainmaker, the associate who brought in the case, wants partnership, but is getting push back from the partners. The partners mention something about “not time yet” and “the firm does not have enough money.” Instead, the partners want to hire a new law graduate on a

contract basis and pay \$12/hour. Explore the issues from Renee's and the partners' perspective. What is a reasonable pay scale? Is it ever justifiable to pay a new law graduate \$12/hour? Can a new law graduate truly be an independent contractor? What should firms expect from associates and vice versa?

6. Communications –

As the case progresses, communications start breaking down. The two law firms are having trouble coordinating their schedules and have started an extended email war. For the past four weeks, they have been sending emails such as: "We have these dates available." "Well, that date is no longer available; you took too long to reply." "No, that date is for a deposition, I can't be at the storage unit that day to exchange documents."

Both clients are developing unreasonable expectations. Mary Mother wants her trial *now*. The corporate officers of *Familysafenetworks.com*, Inc. want personal representation and are confused as to who the law firm is representing. Meanwhile, both firms are educating their clients on the legal process.

Some partners of Myd, Size and Dunless are from the pre-electronic era and are oblivious of computer language such as "meta-data," "chat room," or "instant messaging." Mr. Dunless boasts proudly that he does not know what a social network is, nor does he really care. Mr. Dunless does not communicate via e-mail; his secretary does so for him. One of his young associates is fairly savvy about technology and technological issues. Renee Rainmaker, because this is her case, is trying to bring together the intergenerational gap and facilitate intra-office communication, and would like to see more two-way mentoring.

Meanwhile, Suanne Wynn is studying new techniques on reading the body language and demeanor of witnesses in deposition and on the witness stand, and communicating with the judge and the jury. Suanne Wynn wants to be able to detect deception in witnesses and read how the judge and the jury are responding during a hearing or trial.

7. Intersection of civil and criminal liability and potential liability-

The Department of Justice is getting involved. The DOJ is seeking the identity of the individual user of *familysafenetworks.com* who uploaded the child pornography and is subpoenaing the company for massive amounts of information about its users, computer algorithms, and other data. The company wants to be cooperative, but has concerns about revealing trade secrets and the DOJ releasing its users' data.

While nothing has been formally filed, the DOJ has also discussed bringing a government civil or criminal law suit against *Familysafenetworks.com*, Inc. because the company did not have adequate filters to prevent users of *familysafenetworks.com* from uploading child pornography to the site.

This is creating issues for both sides. The DOJ's involvement is starting to create work that the defendant expects Myd, Size and Dunless to handle. Myd, Size and Dunless is concerned about

being distracted from the civil case. The firm is reviewing the scope of their representation, their resource capabilities, and changes to their defense strategy. The plaintiff's firm has concerns about the timeline of the case, and whether the case will be delayed for months or even years, because of the DOJ's involvement. The plaintiff is concerned about a judgment in light of the possibility that a criminal financial penalty against the company will render it insolvent. The plaintiff is also looking into the benefits of potentially working with the DOJ.

Some Resources

Resources for active listening/communication skills:

<http://www.taftcollege.edu/lrc/class/assignments/actlisten.html>

http://www.mindtools.com/pages/article/newCS_99.htm

http://www.businesslistening.com/listening_skills.php

Detecting deception in interviews:

<http://www.psychologytoday.com/blog/spycatcher/201011/four-opportunities-detect-deception>

Generation gap/workplace issues:

<http://apps.americanbar.org/lpm/lpt/articles/mgt08044.html>

<http://www.psychologytoday.com/blog/wired-success/200906/millennials-poised-take-over-the-workplace>

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2868990/>

Gender gap issues:

http://www.americanbar.org/publications/young_lawyer/2010-11/july_august_2011/plugging_leaky_pipeline_of_women_attorney_attrition.html

http://www.oolawlaw.com/0207CL_Osterloh%20and%20Orta.pdf

Law firm finances:

<http://apps.americanbar.org/lpm/lpt/articles/fin01101.shtml>

Law firm outsourcing:

<http://apps.americanbar.org/lpm/lpt/articles/fin03101.shtml>

http://www.abajournal.com/news/article/malpractice_suit_alleges_negligence_by_mcd_ermotts_temporary_lawyers/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email

Red flags for problem clients:

<http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/7b5cf49dd95319c085256e540074c184?OpenDocument>

Red flags for problem lawyers (an article for clients):

http://www.huffingtonpost.com/laurie-giles/red-flags-that-you-hired-b_894906.html