

Panel 1: Perspectives from the Bench

Moderator:

Daniel Garrie, Managing Partner at Law and Forensics, Neutral at JAMS, Editor-in-Chief of Journal of Law & Cyber Warfare

Panelists:

Hon. Leo M. Gordon, Judge of the U.S. Court of International Trade

Hon. Alex Kozinski, Judge of the U.S. Court of Appeals for the Ninth Circuit

David Shonka, Principal Deputy General Counsel, Federal Trade Commission (FTC)



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This is not legal advice nor should it be considered legal advice

This presentation and the comments contained therein represent only the personal views of the participants, and does not reflect those of their employers or clients

This presentation is offered for educational and informational uses only

Disclaimer

State of Affairs Hypothetical

- A federal judge is presiding over a multibillion-dollar intellectual property case. The plaintiff seeks a preliminary injunction, and that ruling, regardless of outcome, will have an outside effect on the parties' bottom lines and future viability. Accordingly, if an individual were to know the judge's preliminary injunction ruling, even a day early, he or she would be able to generate windfall profits by trading on that information — a practice that is becoming more and more common for cybercriminals.
- Court systems, both state and federal, are guardians of sensitive information for individuals and organizations. This extraordinary responsibility makes them a ripe target for cyberattacks.....

State of Affairs: Example

- In June 2016, the international activist hacker group Anonymous Legion claimed responsibility for a cyberattack on the State of Minnesota Judicial Branch’s website.
 - This was not the first attack on the Minnesota judiciary, who suffered two similar² “Denial of Service” attacks in December 2015. Though the cyber attackers disrupted Minnesota’s website functionality for 10 days, they did not breach any of protected data assets in court systems. Minnesota’s experience is unfortunate, but not unique.
- Budget: In March, federal Judiciary asked Congress to provide \$7.2 billion in Fiscal Year 2018 to fund the continuing operations of the judicial branch, and in part, to enhance cybersecurity.³
 - Cybersecurity is the Judiciary’s top administrative priority.
 - The request includes funding to strengthen cybersecurity capabilities by updating security systems, equipment, and information technology.

1 <http://www.startribune.com/minnesota-courts-website-attacked-again-by-hackers/384003231/>

2. <http://www.mprnews.org/story/2016/01/08/minnesota-court-website-cyberattack>

3. <http://www.uscourts.gov/news/2017/05/17/federal-judiciary-seeks-funds-support-court-operations-coming-year>

Question #1

- Under what circumstances might a court consider staying or suspending a civil case during the pendency of a parallel (or overlapping) criminal investigation or prosecution?
- And if a court would consider that, how might the issue be raised in the civil case?

Question #2

- In at least some cases, companies are including their house, or even outside, counsel on the teams that investigate security incidents.
- Given the technology issues, what role do you think lawyers have in investigating such incidents?

Question #2 cont'd

- Do you think all the email they receive and other discussions they participate in should be considered privileged?
- If a party claims attorney-client privilege for these communications, how do you determine whether it's legitimate, or just a device for hiding the facts?



Appendix



Daniel B. Garrie, Esq.

Law & Forensics -- Executive Managing Partner

JAMS – Special Master, Neutral, Arbitrator

Contact:

W: (855) 529 - 2466

M: (215) 280 – 7033

E: daniel@lawandforensics.com

URL: www.lawandforensics.com

B.A., Computer Science, Brandeis Uni.

M.A., Computer Science Brandeis Uni.

J.D., Rutgers School of Law

Daniel Garrie is an Arbitrator, Forensic Neutral, technical Special Master at JAMS, available in Los Angeles, New York, and Seattle; Executive Managing Partner of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups, with locations in the United States, India, and Brazil; and adjunct Professor of Law at Cardozo School of Law. He is also a Partner at Zeichner Ellman & Krause LLP, where he heads the global cybersecurity practice.

Mr. Garrie has built and sold several Internet security, e-commerce, and search technology startups. Prior to his time at Pulse Advisory, Daniel Garrie was the Worldwide Director of Electronic Discovery & Information Governance at Charles River Associates. He also works as a Strategic Partner for Quorum Ventures and a Board of Governors member for the Organization of Legal Professionals. He is a nationally recognized educator and lecturer on various topics including computer software, cyber security, e-discovery, forensics, emerging internet and mobile technologies, and cyber warfare. He is the Editor in Chief of the Journal of Law & Cyber Warfare, a fellow at the Ponemon Information Privacy Institute, a distinguished neutral with CPR, and on the editorial board of the Beijing Law Review.

Mr. Garrie's scholarship in e-discovery, forensics, and cyber security is frequently cited by the bench and the bar, including: *Arrivalstar v. US*, *US v. Briggs*, *Coast Professional, Inc. v. US*, *Genger v. TR Investors, LLC*, *John B. v. Goetz*, and *Northrup Grumman Computing Systems, Inc. v. US*. Mr. Garrie is also frequently quoted by leading publications including the *New York Times*, *Fortune*, *Forbes*, and the *Wall Street Journal* on issues relating to cyber security and cyberwarfare.



David Shonka
Principal Deputy General Counsel at
Federal Trade Commission (FTC)

Contact:
E: DSHONKA@ftc.gov

David C. Shonka has been the FTC's Acting General Counsel since March 2016. He has previously twice served in that position (January - June 2009 and October 2012 – June 2013). As the Acting General Counsel, he is the agency's chief legal advisor; and oversees its Litigation, Legal Counsel, and Opinions & Analysis groups, as well as the FTC's FOIA, employment law, and Energy Counsel staff. Mr. Shonka is a member of the Administrative Conference of the U.S., where he serves on the ACUS Committee on Judicial Review, the Model Adjudication Rules Working Group, and the Council of Independent Regulatory Agencies. He is also a member of the Sedona Conference and serves on the Steering Committee for Working Group 1 (e-discovery and electronic records), and is active in Working Groups 6 (cross-border transfers of data) and 11 (privacy and data security). He has previously chaired the FTC's E-discovery Steering Committee, and is a recipient of the 2015 Presidential Rank Award of Meritorious Executive. Mr. Shonka is also the FTC's Principal Deputy General Counsel.

Previously, he was the agency's Assistant General Counsel for Litigation. Before joining the FTC, he was an associate in a Washington D.C. law firm and a litigator in the Civil Division of the United States Department of Justice. During his FTC career, Mr. Shonka has advised the Commission on the full range of issues with which it deals, litigated competition and consumer protection cases in the federal district courts; tried cases in administrative proceedings, represented the Commission in appellate cases; and overseen the revision of the FTC's Rules of Practice pertaining to investigations and administrative litigation.

Mr. Shonka frequently speaks on consumer finance, competition, privacy, data security, and e-discovery topics both in the United States and abroad. He has also served as an instructor in trial advocacy courses, and represented the Commission in technical assistance missions abroad



Hon. Alex Kozinski
Judge of the U.S. Court of Appeals for the 9th Circuit

Judge Alex Kozinski serves on the United States Court of Appeals for the Ninth Circuit. Appointed by former President Ronald Reagan on November 7, 1985. Judge Kozinski has won support from various political groups with his common-sense decisions, libertarian instinct and humorous writing style.

Born in Romania, Judge Kozinski emigrated to California with his parents when he was twelve years old. He received his undergraduate degree from UCLA. After graduating from the UCLA School of Law, he clerked for Judge Anthony Kennedy on the United States Court of Appeals for the Ninth Circuit, and then for Chief Justice Warren Burger of the United States Supreme Court. He spent a few years in private practice before joining the White House Counsel's Office during former President Ronald Reagan's term.

Judge Kozinski began his judicial career as the Chief Judge of the then newly-formed Court of Federal Claims. At age 35, he was appointed to the Ninth Circuit by former President Ronald Reagan, making Judge Kozinski the youngest U.S. Appeals Court judge in the country. One of Judge Kozinski's highest profile cases has been *Mattel, Inc. v. MCA Records, Inc.*, in which the Ninth Circuit dismissed a lawsuit by Mattel against Danish pop group Aqua for dilution of the Barbie trademark in a song that lampooned Barbie. In that case, Judge Kozinski concluded his opinion with the words "[t]he parties are advised to chill".

Judge Kozinski is a renowned essayist, and has won admirers across the political spectrum with his clear and witty writing. His writings have been featured in such publications as *Slate*, *The New Yorker*, *The New Republic* and *The National Review*.



Hon. Leo M. Gordon
Judge of the U.S. Court of International Trade

Judge Leo M. Gordon has served as a judge of the United States Court of International Trade since March 2006. Judge Gordon is responsible for resolving judicial disputes involving challenges to the administration and enforcement of the federal customs and international trade laws by principally U.S. Customs and Border Protection, the U.S. Departments of Commerce, Agriculture, and Labor, and the U.S. International Trade Commission. In addition to his judicial duties, Judge Gordon has chaired, at different times, the Court's Rules, Budget, Public Affairs/Education, and Strategic Planning Committees. Judge Gordon began his career in 1977 as Assistant Counsel at the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, U.S. House of Representatives. In that capacity, Judge Gordon was the principal attorney responsible for the Customs Courts Act of 1980 that created the U.S. Court of International Trade. He also had responsibilities involving a wide range of antitrust and other commercial law legislative projects.

Judge Gordon is a member of the Board of Directors for the Federal Judges Association ("FJA"), serves on its Executive Committee, and co-chairs the Association's Benefits Committee. Judge Gordon is also a member of the Board of Directors for the Federal Judges Association ("FJA"), serves on its Executive Committee, and co-chairs the Association's Benefits Committee.

Judge Gordon is a Fellow (Miembro de Numero) of the International Customs Law Academy ("ICLA"). He has addressed the annual meeting of the ICLA in 2012 in Cancun, Mexico speaking on the "Resolution of Customs Disputes in the United States in the Digital Age," and in 2014 in New York speaking on "The U.S. Court of International Trade and Its Role in U.S. Customs Law." Judge Gordon is also a Director of the Academia de Intercambio y Estudios Judiciales ("AIEJ") (The Academy for the Interchange and Study of Judicial Matters) based in Buenos Aires, Argentina. Since 2013, he has conducted several judicial training programs for AIEJ in the United States and Argentina. He also played a principal role in the development of AIEJ's training program for 2017 and 2018.

Judge Gordon attended the University of North Carolina - Chapel Hill, graduating Phi Beta Kappa. He received a J.D. degree from Emory University School of Law. Judge Gordon is a member of the New Jersey, Georgia, and District of Columbia Bars.