Wingate, Russotti & Shapiro, LLP

Network Newsletter

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FEATURED ARTICLES:

TWO SUPER LAWYERS SELECTED

Kenneth Halperin

Robert J. Bellinson

Jason Rubin

Philip Russotti

Wingate, Russotti and Shapiro is proud to announce the naming of two (2) of our attorneys as Super Lawyers, Kenneth Halperin and Robert Bellinson. Phil Russotti and Jason Rubin have been previously named, now making four (4) attorneys who have been recognized as Super Lawyers. This honor is the product of the investigative procedures by the publisher of *Law and Politics*. The investigation examines the attorney's standing within the community in which the attorney practices, professional achievements, verdicts and settlements, honors and awards, special licenses and certificates, scholarly lectures and writings and any other outstanding achievements. Bar associations and courts throughout the country recognize the legitimacy of the Super Lawyer selection process. Most recently, the New Jersey Supreme Court upheld the findings of a Special Master assigned by the court to among other things, examine the details of the Super Lawyer evaluation process. The Special Master reported "The Super Lawyer selection process is a comprehensive, good-faith attempt to produce a list of lawyers that have attained high peer recognition, met ethical standards, and demonstrated some degree of achievement in their field. It is absolutely clear from this record that Super Lawyers does not permit a lawyer to buy one's way onto the list nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists." Thus, this is truly a recognition by one's peers of accomplishment in the field.

Kenneth Halperin has been practicing law for eighteen (18) years and is a specialist in construction litigation dealing with the New York State Labor Law. Rob Bellinson is an accomplished trial attorney and has a reputation in our firm for always "bringing home the bacon."

Jason Rubin was named as super lawyer in 2010, because he is an extremely experienced medical malpractice attorney. He tries cases and handles appeals. In one recent case a cause of action was dismissed on Statute of Limitations grounds in the Supreme Court and Jason appealed to the Appellate Division, 2nd Department. The dismissal was affirmed. Jason moved to reargue because he believed the decision was erroneous. The motion was denied. He moved to reargue again and finally convinced the court that they had made a mistake. They set aside their prior rulings, reinstated the cause of action and remanded the case for trial. This can only be accomplished by an outstanding attorney.

Phil Russotti is a leading trial lawyer in the City of New York and has been recognized as a Super Lawyer since its inception in 2007.

Many firms have only one or two Super Lawyers, few have as many as we do.

"...'the marriage had irretrievably broken down with no prospect of reconciliation,' would create an irrebuttable presumption that would, in essence, establish the ground for divorce..."

SUMMER 2011

THE 2010 CHANGES TO NEW YORK'S DIVORCE LAW: NO FAULT DIVORCE FINALLY COMES TO NEW YORK

by Daniel Clement

Last year, New York became the last state to recognize no-fault grounds for divorce. Effective October 12, 2010, DRL 170 was amended to add irretrievable breakdown as a grounds for divorce.

DRL 170(7) specifically provides:

> The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

It was widely thought that no-fault divorce would eliminate grounds as an issue in divorces, obviating the need for grounds trials. When signing no-fault into law, Governor Patterson noted:

> Finally, New York has brought its divorce laws into the 21st century... These bills fix a broken process that produced extended and contentious litigation, poisoned feelings between the parties and harmed the interests of those persons... who did not have sufficient financial wherewithal to protect their legal rights.

When enacted, it was assumed that the sworn to allegation that "the marriage had irretrievably broken down with no prospect of reconciliation," would create an irrebuttable presumption that would, in essence, establish the ground for divorce, completely eliminating the need for a grounds trial. However, in Strack v. Strack, 2011 NY Slip Op 21033 (Essex County), an upstate judge ruled that because the new law does not explicitly abolish a right to trial in a divorce action; when contested, a party is entitled to a trial to determine:

> Whether a breakdown of a marriage is irretrievable... This Court does hold, however, that whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties. Accordingly, the fact finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation.

In addition to no fault divorce, new laws were enacted to provide for awards of temporary maintenance and counsel fees. DRL §236(B)(5-a)(c) provides that temporary maintenance is to be awarded during the divorce when one party's income is less than 2/3's of the other spouse's income. The amount of maintenance is to be the lesser of a) 30% of the payor's income minus 20% of the non-payor's income or b) 40% of the combined income minus the non payor's income.

In addition, DRL 238 was enacted to create a rebuttable presumption that the "monied" spouse should pay to the "non-monied" spouse interim counsel fees in all divorce or family law cases. The purpose of the law is to "even the playing field."

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BUSINESS OPPORTUNITY PROGRAMS FOR MINORITY AND WOMEN BUSINESS OWNERS IN NY STATE

by Bill Drewes

A large part of my practice is devoted to working with minority and women owned businesses. I assist my clients in identifying and participating in the various business opportunity entitlement programs available at the federal, state and local government levels as well as the private sector, particularly the Fortune 500 corporations and major Wall Street firms.

Why would a minority or woman business owner want to participate in these programs? The answer is simple: to increase the sale of their products or services. These programs give the minority and woman business owner an advantage when marketing their goods and services to government agencies and major corporations. It also gives them access to Requests for Proposals (RFPs) and bid invitations which, in some cases, are sent exclusively to minority and women businesses. These are called "set aside" business opportunities. Minority and women businesses are also eligible for a variety of loan and technical assistance programs.

Under each certification category, ownership must be real, substantial, and continuing. The applicant must have and exercise the authority to independently control the business decisions of the enterprise. In other words: "command and control."

To be qualified for these programs the business must first be certified by a recognized third party certifying agency, as either a minority owned or woman owned business. In some cases, it would be certified as both a minority and a woman owned business enterprise (MWBE).

The definition of a MINORITY BUSINESSS ENTERPRISE (MBE) is a business enterprise at least fifty-one percent (51%) owned by, or in the case of a publicly owned business at least fifty-one percent (51%) of the stock of which is owned by citizens or permanent resident aliens meeting the ethnic definitions of: Black-persons with origins in black African racial groups; Hispanic-persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent; Asian-Pacific-India -persons having origins in any of the Far East countries and Native American or Alaskan Native persons.

The definition of a WOMEN-OWNED BUSINESSS ENTERPRISE (WBE) is a business at least fifty-one percent (51%) owned by, or in the case of a publicly owned business at least fifty-one percent (51%) of the stock of which is owned by citizens or permanent resident aliens who are women.

New York State and New York City have their own minority and women business enterprise (MWBE) certification rules and procedures, for example, New York State's program is administered by The New York State Department of Economic Development and New York City's program is administered by the New York City Department of Small Business Services.

"The answer is simple: to increase the sale of their products or services."

SUMMER 2011

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I help my clients by:

Getting them certified as MWBEs at federal, state, local government levels & the private sector; preparing vendor bid list applications to government agencies, public corporations, private companies; preparing Request for Proposals (RFPs); developing company business plans; applying for small business loans for clients; raising venture capital for clients; negotiating joint venture partnerships; procuring contracts for MWBEs from corporations, government agencies and other organizations.

"Civil collaborative practice is more cost efficient and less time-consuming than litigation."

CIVIL COLLABORATIVE PRACTICE A BETTER WAY TO RESOLVE DISPUTES

by Stephen G. Gordon and Marc O. Sheridan

Consider the closely held corporation forced to restructure; or the family partnership caught in hard times and hard feelings; or the sole proprietor confronted with employment issues; or the thorny estate or malpractice dispute. Traditionally, these impasses were litigated – with all the attendant financial, emotional and temporal expense intrinsic to litigation. However, in recent years, a highly efficient dispute resolution process – civil collaborative practice - has gained prominence. Collaborative practitioners are found in all 50 states and in over 22 countries around the world.

Civil collaborative practice is a voluntary process which provides a better way to resolve disputes. It preserves key relationships, solves problems mutually and privately, and avoids financially draining, time-consuming tactics. Civil collaborative practice is conducted outside the courtroom in a series of private, confidential face-to-face meetings. The parties, not the judge or jury, control the process and the outcome. Each party is zealously represented by specially trained settlement counsel. Collaborative attorneys have the same professional obligation to their clients as do litigators.

Everyone's full effort is directed towards settlement. If settlement is impossible, the collaborative attorneys must withdraw from further representing their clients. Thus the threat to "see you in court" is eliminated. The parties forego the "battle to win" in favor of "creative problem solving." This fundamental shift in approach towards conflict resolution results in "win-win" solutions.

The parties pledge full and open disclosure. There is no costly gamesmanship in the exchange of the essential information upon which settlement rests. Negotiation is "interest-based" rather than "positional". The specific interests of each party are identified. Settlement is achieved by mutually fashioning a result that meets the main interests of the parties.

Often a team approach is employed: attorneys address specific legal issues, mental health professionals deal with emotional and psychological issues that frequently impede settlement, and financial and other experts explore options from their professional perspectives.

Civil collaborative practice is more cost efficient and less time-consuming than litigation. It allows for professionals to focus on finding substantive solutions rather than making motions and court appearances and leaves decision-making to the clients. It fosters respectful discourse and discourages bullying and maneuvering. It preserves individual integrity and salvages relationships among the parties.

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TRADEMARK LAW BASICS

by Jeffrey E. Jacobson

"...The purpose of trademark law is not only to protect the trademark owner, but to protect consumers as well..."

Trademark law provides the exclusive right to use a mark that serves to differentiate the goods of one person or business from those of another. A trademark commonly includes a word, phrase, logo, design or a combination of these, which are used in relation to goods and services. Trademarks are used to designate the source of a good, and are frequently used as an indicator of the quality of the goods. The same is true for marks used in connection with services, which are typically referred to as "service marks". Trademarks can be valuable assets of a business, as the mark associated with the goods or services help a business gain recognition and consumer loyalty.

The purpose of trademark law is not only to protect the trademark owner, but to protect consumers as well. Trademark law recognizes that trademark owners should benefit from the consumer goodwill acquired through trademark use. While there is no "legal monopoly" associated with a trademark, the owner of the trademark is protected in that others may not trade on that trademark's "goodwill," without the owner's consent. Accordingly, an owner can prevent another from using the trademark in commerce. Protection of the trademark not only protects the mark, but the goodwill achieved by the owner through advertising, publicity, previous sales, etc.

Trademark law is also concerned with avoiding consumer deception, and as a result, seeks to protect the source and quality expectations of consumers. If a trademark is used by someone other than the trademark owner, without the owner's consent, and in a way that would likely confuse a potential consumer, courts will usually find infringement. Like other types of intellectual property, a trademark can be licensed, bought, sold and assigned.

A trademark will not be registered if the mark does not distinguish goods or services from those used by its competitors. Even if a mark appears to be nondistinctive on its surface, the mark may be protected if it acquired secondary meaning, typically referred to as a "descriptive mark". Secondary meaning is the prolonged, exclusive use of the mark such that it comes to indicate the origin of goods at issue, through strong consumer association, e.g. "Windows" for windowing software.

Trademarks can be registered either at the state or federal level. Prior to registering a trademark, a trademark search should be performed on all state and federal registered marks as well as pending marks. Based on the results of the search, it may be advisable to seek federal registration for the trademark. Federal registration provides constructive notice nationwide to all users of similar marks, whether or not they are aware of the trademark owner's use of the mark. If a trademark is not being used in interstate commerce, the state-level registration is most appropriate.

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SAVING REAL ESTATE THROUGH BANKRUPTCY

by Norma E. Ortiz

"...bankruptcy has become the only remedy available to many property owners facing foreclosure."

In the current depressed economy, many real estate owners are confronting the worst market conditions in decades. Foreclosures and loan defaults are at an all-time high and credit is hard to come by. As a result, bankruptcy has become the only remedy available to many property owners facing foreclosure. Here are some of the ways bankruptcy can help:

• **The Mere Filing of a Bankruptcy Case Stops a Foreclosure:**
The "automatic stay" provision of the Bankruptcy Code stops virtually all litigation and any attempt to collect a debt the moment a bankruptcy case is filed with the court. In fact, a bankruptcy petition filed at 11:59 a.m. stops a 12:00 p.m. foreclosure sale. With certain exceptions, a federal bankruptcy case filing trumps many state law rights of creditors to proceed against a debtor.

• **A Bankruptcy Case Can Be Used to Cure a Default and Reinstate a Mortgage:**
Most property owners that have fallen behind on mortgage payments have few remedies available to them that do not include either the full payment of their mortgage arrears in one lump-sum or redemption of the property through payment of the entire balance due to the lender. But in this credit-tight market, these options are rarely available. For that reason, a Chapter 11 or 13 case is often the only solution available to save real estate. These cases enable a property owner to cure a mortgage default by repaying the mortgage arrears through a monthly payment plan. Once the property owner completes the plan, the mortgage is reinstated and the default is cured.

• **Some Mortgages Can Be Eliminated or Modified in Bankruptcy:**
The Bankruptcy Code permits a debtor to modify the terms of a mortgage when the property is worth less than the amount due to the lender. Although the first mortgage on a debtor's residence may not be modified, a second mortgage on a residence and any mortgage on any other property may be modified or reduced. In some instances, if the first mortgage exceeds the value of the property, a second mortgage holder can lose its lien and be treated as a general creditor with no rights against the real estate. This bankruptcy procedure has become a powerful tool for homeowners with no equity in their homes. Relieving homeowners of the burden of paying second mortgages often provides the additional income needed to save the home.

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LAW FIRMS FACE PRIVACY AND DATA SECURITY RISKS IN HANDLING PERSONAL INFORMATION

by Boris Segalis

"...the firm must appropriately safeguard the information to protect the interests of the firm and its clients."

A modern law firm processes a significant amount of personal information by collecting, using, maintaining, disclosing and disposing of information about its partners, employees, clients, opposing parties and other individuals. A firm that mishandles personal information or experiences an information security breach may face regulatory investigations, ethical sanctions, financial and reputational harm to the firm's clients and, potentially, irreparable harm to one of the firm's most valuable assets – its reputation. These liabilities may arise even if personal information is mishandled by a firm's service provider or a firm inadvertently assists a client in violating an individual's privacy rights.

Today, over 48 states and U.S. territories have information security breach notification laws, and many states have enacted other information security requirements. Federal requirements govern the privacy and security of financial information, consumer reports and health data, as well as the disposition of personal information in bankruptcy proceedings. In addition, the Federal Trade Commission has brought numerous privacy enforcement actions based on its authority to enforce against deceptive or unfair trade practices. Foreign data protection laws, specifically those in Europe, impose restrictions on cross-border transfers of personal data, including sending the information to the U.S. in connection with litigation discovery. Law firms must understand how these requirements apply to their personal information handling practices.

Law firms may face privacy and information security issues in numerous circumstances. As employers, firms may collect candidates' and employees' credit reports, payroll, retirement plans and health benefits information. Firms also may monitor workplace electronic communications. In addition, law firms may receive records containing personal information from clients, adverse parties and third parties. Law enforcement agencies have repeatedly put law firms on notice of the high risk of privacy and information security violations firms face because they are likely to maintain critical, private information.

Regardless of the circumstances in which a law firm handles personal information, the firm must appropriately safeguard the information to protect the interests of the firm and its clients. To mitigate the risks associated with handling personal information, law firms should take a proactive approach to privacy and information management by conducting a privacy and information security assessment of their personal information practices and implementing a comprehensive privacy and information management program. At a minimum, a successful program will include administrative, technical and physical safeguards to protect personal information.

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"...forming the business, protecting the company's intellectual property to drafting general corporate agreements, counsel is an invaluable asset to a start-up company."

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START-UP AND GROW WITH COUNSEL: TACKLING LEGAL ISSUES FACED BY SMALL BUSINESSES [EXCERPT FROM FULL ARTICLE]

by Robert Shapiro

The failure to bring counsel in at the earliest stages of a business can prove to be extremely costly and time consuming as pitfalls that could otherwise be avoided are not, and a competitive edge in the marketplace may be left unprotected.

Choosing the Right Corporate Form for the Business

One of the first things that must be considered when starting a business is the type of legal entity to choose and its jurisdiction. Some things to take into consideration include: the size and nature of the business; number of equity owners; tax implications (consult with CPA); and whether the company intends to reinvest earnings into the business.

With a corporation or a limited liability company, a shareholders' agreement or an operating agreement, respectively, should be drafted in order to set forth the structure of the business and delineate the rights, obligations, and protections of the shareholders or members.

It is also imperative for business owners to observe the corporate form and adhere to certain formalities to ensure that it is clear to all that they are doing business with a company; failure to do so could subject the business owner to personal liability for corporate obligations.

Intellectual Property Protection and Counseling

Virtually every start-up company needs some form of intellectual property protection and counseling; the company's trademarks, copyrights, patents, technology, customer lists, manufacturing process, or other confidential information that may be protected as a trade secret, all require adequate protection. Intellectual property is often a company's most important asset and is what sets it apart in the marketplace from other competitors or would be entrants who may be unable to, for example, easily overcome the goodwill related to a particular trademark or replicate the confidential business information protected as a trade secret.

General Corporate Agreements

Once a company has been properly formed and has appropriately protected its valuable intellectual property assets, it truly is "ready for business." At this point, it is advisable to proceed with written agreements such as agreements with vendors, suppliers, manufacturers, and independent contractors, in order to avoid disagreements down the road and to avoid the time and expense of litigation.

Conclusion

From forming the business, protecting the company's intellectual property to drafting general corporate agreements, counsel is an invaluable asset to a start-up company. Without proper legal guidance, a start-up company may find the road to success even more difficult than it is already and may fail to reach its true potential.

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WHAT IS BRANDING AND HOW TO PROTECT IT?

by Arina Shulga

The key to business success often lies in creation of a powerful brand. A brand identifies the source of goods and services and can include a name, a logo or design, a color (like orange for Home Depot) or a slogan. The goal of using branding as a marketing strategy is to get customers to buy that particular brand because they have come to identify it with a certain look, feel, quality or another attribute that they prefer.

There are certain steps to take in order to protect your client's brand in this competitive marketplace.

First, research availability. Creating a brand is expensive, so thoroughly research the market first to know the competition and determine if the same or similar brand is being used.

Second, file federal trademark applications. Federal registration gives: (1) exclusive nationwide ownership of the mark; (2) official notice to others that the mark is not available; (3) the right to sue in federal courts (where it is more likely to win an infringement lawsuit and get larger damages, including attorney fees); (4) a presumption that the trademark owner is the rightful owner; and (5) an option to file an "intent to use" application instead of the "actual use" one to establish an early priority date.

Third, enter into non-disclosure agreements (NDAs) with potential investors, partners, licensees, and manufacturers, to protect the brand while it is being developed. Once the brand is released, NDAs are typically entered into when parties intend to do business together, either through collaboration, joint venture or project outsourcing - projects that would involve disclosing proprietary information. Proprietary information is defined broadly and is not limited to the brand name (that, once released, is already known to the public at large). It can include information about how the business is run and what makes it successful, business plans, financial projections, trade secrets, designs, licenses, drawings, technology, research, product plans, products, services, suppliers, customers, prices and costs. It is up to the disclosing party to enforce the NDAs. One common method is issuance of an injunction or a restraining order against the receiving party.

Finally, ongoing monitoring and vigilance is critical to detecting and preventing infringements, dilution or violations of confidentiality.

"One common method is issuance of an injunction or a restraining order against the receiving party."

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GET THE MOST FROM YOUR COLLECTION ATTORNEY

by Arthur Teichberg

"The primary purpose of commencing a lawsuit, then, is not so much to see it through conclusion as to put as much pressure as possible on the debtor..."

Seeking the services of a collection attorney may seem like a last resort – a desperate attempt to collect an otherwise uncollectible debt. But there are definite benefits to using a collection attorney. Whether a debt involves goods sold and delivered or services rendered, there are many things a collection attorney can do that no one else can do as well – if at all.

Calling in a collection attorney offers a creditor several benefits:

- It may be the only sure way to get any of the money that's due to your company.
- It can help you earn a reputation as a person who never gives up on a debt.

"Notification that a debt is in the hands of an attorney, and no longer in the hands of a creditor, immediately puts pressure on the debtor to pay up. It underscores the seriousness of the debtor's obligation," says attorney Arthur J. Teichberg (New York), who has been involved in the collection of slow-paying accounts since 1960.

LEGAL METHODS THAT GET RESULTS

In addition to adding psychological pressure, a collection attorney can take a number of specific steps:

Maintaining meaningful contact with the debtor via certified mail or telephone

A debtor may ignore a creditor's communications, but is far less likely to ignore those from an attorney.

Getting a commitment to pay schedule

The attorney may work out a written agreement with the debtor, including notes or checks. "Notes can work well if a significant amount of money is involved – and the debtor cooperates", Teichberg emphasizes. "They are preferable to postdated checks, which can sometimes be a problem."

The Benefits of a lawsuit

Commencing a lawsuit means that the debtor has retain counsel – which puts even more pressure on the customer to pay. Legal fees are prohibitive, and facing a lawsuit is time-consuming as well as costly. It's a prospect few debtors want to face.

Still more pressure is put on the debtor by the fact that credit reporting agencies such as D&B often review court records for the names of debtors being sued – and punish them. This can hurt debtors, because the message gets out to other creditors: Beware, don't give too much credit.

The primary purpose of commencing a lawsuit, then, is not so much to see it through conclusion as to put as much pressure as possible on the debtor, convincing it to pay.

Litigation v. Settlement

A debtor that has been sued is probably better off if it can settle rather than wait for legal proceedings to drag out. But what about the creditor? While it may be cost-effective to pursue a money judgment against a debtor who has no real defenses, in dealing with a debtor that has viable defenses, it's often wise for the creditor's attorney to try for a settlement instead. This invariably means getting less than the original amount sought, but settling may actually save the creditor money.

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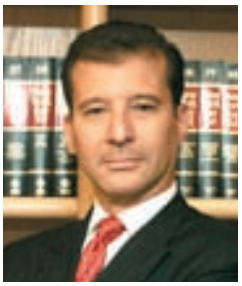
WRS NEWS

INSURANCE COMPANY SETTLED BECAUSE OF FEAR OF BAD FAITH CLAIM



Thomas M. Oliva

Tom Oliva recently obtained a fantastic result in a trial in Bronx County. He represented a fifty year old woman who was involved in a car accident and sustained a herniated cervical disc. She subsequently underwent a disectomy and fusion. The defendant had a policy of $1,250,000.00. We believed the case was worth $1,000,000.00 to settle. The initial offer was $300,000.00 and then increased to $500,000.00 during the trial, then $750,000.00, $850,000.00 was eventually offered with the suggestion that the parties split the difference between $850,000.00 and $1,000,000.00. While the jury was out, Tom rejected that offer holding fast for the $1,000,000.00. The jury came in with a verdict of $1,500,000. This subjected the insurance company to a bad faith claim because the defendant would have been exposed to a judgment in excess of the policy after we indicated that we would take $1,000,000.00 to settle the case. Due to the combination of Tom's terrific result and the pressure put on the insurance company they paid the full amount of the policy to settle the case, $250,000.00 more than our initial demand.

It is this kind of dogged effort and conviction in our abilities which sets us apart from other firms.

UPCOMING NETWORKING

EVENTS

OCTOBER 11

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NOVEMBER 10

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