

.....

Key Employee Departures to Competitors:

**How to Find and Use Smoking Gun  
Evidence to Protect Your Business**

.....

*July 16, 2009*

STROZ FRIEDBERG

and

**GIBSON, DUNN & CRUTCHER LLP**

---

LONDON · PARIS · MUNICH · BRUSSELS · DUBAI · SINGAPORE · LOS ANGELES · NEW YORK · WASHINGTON, D.C.  
ORANGE COUNTY · SAN FRANCISCO · PALO ALTO · CENTURY CITY · DALLAS · DENVER

---

# The Speakers



Jason C. Schwartz  
Employment Partner  
Gibson, Dunn & Crutcher LLP



Karl G. Nelson  
Employment Partner  
Gibson, Dunn & Crutcher LLP



Jessica Brown  
Employment Partner  
Gibson, Dunn & Crutcher LLP



Seth Berman  
Managing Director  
Stroz Friedberg

# Our Scenario

You are the General Counsel of Vulnerable, Inc., a technology company with operations in Texas, Colorado, and the District of Columbia.

You get an urgent call from your CEO, Victor Vexed, who is in a state of distress. He tells you that your VP of Sales, Rex Ruthless, has just accepted an offer to join your fierce competitor, Rival, Inc. You remember that Rex was a charismatic Texan who was laid off last month with a significant severance package.

After you put the phone down, you find out:

1. Vulnerable's biggest customer has just pulled out of negotiations for a contract renewal after weeks of dragging its feet.
2. The office gossip is that Rex's sales team is about to quit and its members won't discuss their plans.
3. Your assistant cannot find any sign of Rex's laptop or company cell phone.

What do you do?

# Initial Steps

- Locate employment contracts
- Assemble internal and external team
- Preserve evidence and safeguard assets
  - recover employee laptops, PDAs, etc. immediately
  - summon expert IT assistance
  - revoke building and remote IT access rights
  - take steps to prevent tampering by other employees
  - issue document preservation/hold notices
- Take action with respect to those employees still in the office?
- Brief internal team on privilege issues, compliance with contracts

# Review Employment Contracts

- Review the contracts in question
  - are they signed?
  - what state's law will apply?
  - are they enforceable?
- In Rex's case, assume his contract contains these relevant provisions:
  - express confidentiality clause
  - express prohibition against outside business interests during employment
  - 24 month post-termination employee non-solicit
  - 24 month post-termination customer non-solicit
  - 24 month post-termination non-compete

# Consider Non-Contractual Legal Theories

- Common law duties of loyalty/fiduciary obligations
- Misappropriation:
  - common law
  - statutory protections
  - “inevitable disclosure” doctrine
- Statutory protection of electronic data (*e.g.*, Computer Fraud and Abuse Act)
- Tortious interference with contractual or business relations
- Unfair business practices/employee raiding theories
- Conspiracy

# Gather the Facts: Issues to Be Investigated

- Can the rumor that Rex is joining Rival, Inc. be substantiated?
- Are the three sales employees leaving to join Rival, Inc. too? May others follow? Has there been any “solicitation” of employees by Rex and/or Rival, Inc.?
- Is Rex behind the failed negotiations? Are other customers being targeted?
- Has Rex undertaken competitive activities for Rival, Inc. during work hours or in breach of his outside interests restriction?
- Has confidential information been misused, copied, and/or removed?
- Has Rex informed customers of his departure or sought to entice them away?
- Was Rex aware of any wrongdoing on the part of any of the other employees?
- Is Rival aware of the employees’ contractual obligations to Vulnerable, Inc.? Any indicia of bad faith on the part of Rival, Inc.?
- What is the financial position of Rex/Rival, Inc. to satisfy any award of damages?

# Gathering Evidence – The Traditional Way

- Search employee offices – desk files, notepads, post-its, whiteboards etc.
- Make a forensic image of the employees' laptops, PCs
- Review access to computer systems
- Check cellular and office telephone records, call logs, dial-outs
- Preserve voicemail messages, and voice recordings if applicable
- Review photocopying records
- Read expense reports
- Review building security records/card access readers
- Consider covert surveillance – but proceed carefully, using an experienced investigator who knows the bounds of the law

# Gathering Evidence – What Might You Find?

- Recently accessed information/restricted data
- Business plans
- Resumes
- Letters, calls, emails, faxes to competitors or potential competitors
- Evidence of malice/bad faith

# Gathering Evidence – Then What?

- Collect documentary evidence first
- Then proceed with witness interviews
- Interview friendly sources first
  - did Rex tell you where he was going?
  - did he ask you to join him?
  - did he take anything from Vulnerable?
- Then interview the targets when you have good incriminating evidence

Such evidence might also be found through less traditional means

# Gathering Evidence - Forensic Reconstruction (1)

- Link File analysis is conducted to reconstruct file access activity showing access to a particular document:

The image shows a screenshot of a file's properties window for a Link file. The file name is 'Burgundy PR UK 2006 v2.DOC.lnk'. Several fields are circled in red: 'File Type: lnk', 'Last Accessed: 05/22/07 09:11:14AM', 'File Acquired: 05/21/07 06:38:35PM', and 'Full Path: C:\Documents and Settings\hnaseem\_ol...Recent\Burgundy PR UK 2006 v2.DOC.lnk'. Three callout boxes provide context: 'Link file shows this document was accessed...' points to the file type and last accessed date; 'On a particular date and time...' points to the file acquired date; and 'And was actually located on his computer in this location.' points to the full path.

Name:	Burgundy PR UK 2006 v2.DOC.lnk
File Ext:	lnk
File Type:	lnk
File Category:	Windows
Description:	File, Archive
Last Accessed:	05/22/07 09:11:14AM
File Created:	08/29/06 03:03:16PM
Last Written:	08/29/06 03:04:08PM
Entry Modified:	08/29/06 03:04:08PM
File Acquired:	05/21/07 06:38:35PM
Starting Extent:	0C-C1880790,448
File Extents:	1
Permissions:	•
References:	0
Physical Location:	7,703,748,544
Physical Sector:	15,046,383
Evidence File:	karachi_laptop
File Identifier:	17448
Full Path:	C:\Documents and Settings\hnaseem_ol...Recent\Burgundy PR UK 2006 v2.DOC.lnk
Short Name:	BURGUN~1.LNK

Link file shows this document was accessed...

On a particular date and time...

And was actually located on his computer in this location.

# Gathering Evidence - Forensic Reconstruction (2)

- Analysis of Document Server also yielded evidence of restricted file access to relevant documents:

```
partial log.txt - Notepad
File Edit Format View Help
.....
Item: ODM_NAME
Returning #764343 v7 [REDACTED] o (Sep
2006)

ODMA->GetDocInfo: [9/12/2006 @ 13:29:0249]
Called by MS word
Calling Doc Id ::ODMA\PCDOCS\NYDOCS1\764343\7
Item: ODM_TITLETEXT
Returning #764343 v7 [REDACTED] (Sep
2006)

ODMA->GetLeadMoniker: [9/12/2006 @ 13:29:0249]
Called by MS word
Calling Doc Id ::ODMA\PCDOCS\NYDOCS1\764343\7
Returning ODM_E_FAIL

ODMA->CloseDoc: [9/12/2006 @ 13:30:0221]
Called by MS word
DocId: ::ODMA\PCDOCS\NYDOCS1\764343\7
Shadow( 1 ) PagesPrinted( 0 )
```

# Gathering Evidence - Forensic Reconstruction (3)

- Further analysis of company's web server data show relevant internet searches:

Date/Time	Time Zone	Request IP	Request	URL
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sowood.com/img/pagetext.gif
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sowood.com/img/contact.gif
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sowood.com/img/angle.gif
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.google.com/url?sa=Q&q=sowood+capital&start=0&ie=utf-8&oe=utf-8&client=firefox-a&rls=org
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.google.com/images/nav_logo.png
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sowood.com/img/pr.gif
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sowoodcapital.com/files/index
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.google.com/url?sa=Q&q=waypoint+capital&start=0&ie=utf-8&oe=utf-8&client=firefox-a&rls=org
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.google.com/search?q=waypoint+capital&start=0&ie=utf-8&oe=utf-8&client=firefox-a&rls=org
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/0001193125-07-062959-index.htm
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g46s98.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657page2.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657page3.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657page1.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g37s44.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g67g91.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g88o70.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g00p54.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g47b83.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g92g64.jpg
[25/Mar/2011:05:00]	-0500	169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/ds1a.htm

# Gathering Evidence - Forensic Reconstruction (4)

- Metadata analysis is conducted on all files of new company's laptop to show ownership.

Filename	Author	Company	CreateDate	LastSavedDate	LastSavedBy
IQ6UJ9A023PMYTax Research Consultant Customer Letter 11-06 (2).doc	CK		11/8/2006 15:52	11/8/2006 15:52	n
IQ6UJ9A023PN0Tax Research Consultant Options.xls	ya		6/12/2006 13:14	9/14/2006 11:24	C
IQ6UJ9A020F9KANALOGIC MYA 2007 - 2009 with FIN48.xls	CC		6/17/2003 16:30	10/31/2007 11:22	C
IQ6UJ9A020F9MANALOGIC MYA 2007 - 2009 without FIN48.xls	CC		6/17/2003 16:30	10/31/2007 11:22	C
IQ6UJ9A02RQY0ANALOGIC MYA 2007 - 2009 - CCH AGREEMENT.xls	CC		6/17/2003 16:30	10/31/2007 11:22	C
IQ6UJ9A0339DECCH Tax Research Internet Network.doc	CC		4/7/2008 12:08	4/7/2008 12:08	C
IQDCPKA10005MRiveroGordimerMya.xls	CC		6/17/2003 16:30	1/20/2009 19:17	C
IQDCPKA1001JBOgle Proposal.doc	W		4/2/2009 9:50	4/2/2009 9:50	W
IQRR44A10006HWarady & Davis LLP Addendum 02_2009.xls	G		6/17/2003 16:30	2/4/2009 13:26	C
(FMR) Fidelity 3-5-2009.doc	C		3/7/2009 15:46	3/8/2009 11:22	W
00000039.doc	CC		10/11/2007 21:09	10/11/2007 21:09	C
0511 end date 10-23-08.xls	Ka		10/18/2007 10:25	10/24/2008 22:07	K
0511 end date 1-16-08.xls	Ka		10/18/2007 15:55	1/16/2008 13:10	K
0511 end date 1-16-081.xls	Ka		10/18/2007 15:55	1/16/2008 13:10	K
0511 end date 12-20-08.xls	Ka		10/18/2007 10:25	1/9/2009 11:24	K
0511 end date 1-26-09 (2).xls	Ka		10/18/2007 15:37	2/2/2009 17:41	K
0511 end date 1-26-09.xls	Ka		10/18/2007 15:37	2/2/2009 17:41	K
0511 end date 1-26-091.xls	Ka		10/18/2007 15:37	2/2/2009 17:41	K

# Gathering Evidence - Forensic Reconstruction (5)

- Time/Data analysis is conducted on the new company's computer to show if/when these files were moved:

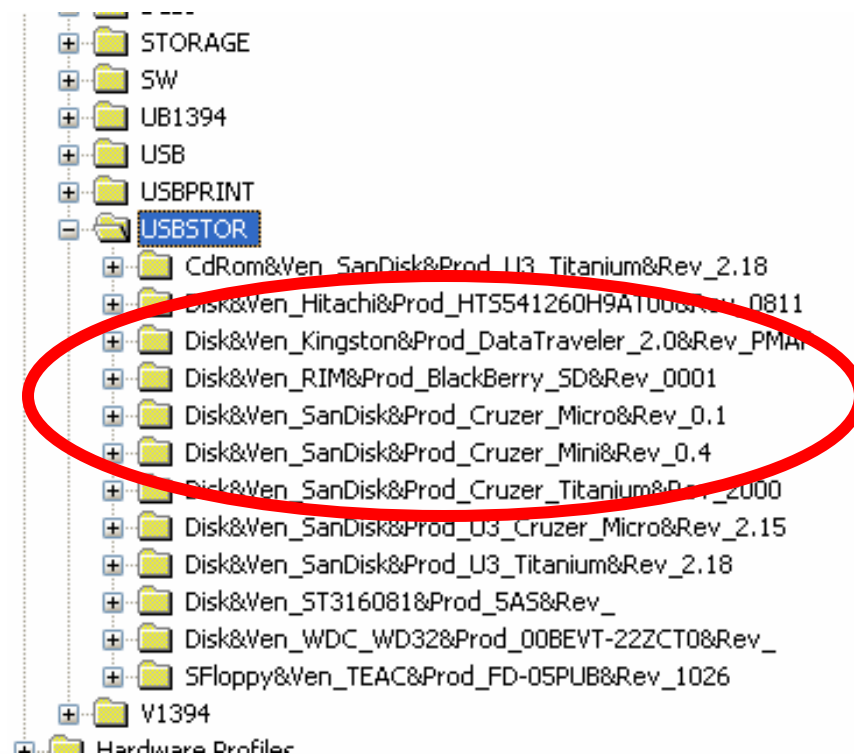
Full Path	File Created	Last Written
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...me.doc	07/13/07 11:02:39AM	03/20/00 08:30:02AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...oc	07/13/07 11:02:39AM	04/17/00 06:37:44PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...oc	07/13/07 11:02:40AM	04/24/00 01:59:50PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...e.doc	07/13/07 11:02:40AM	08/11/00 11:36:46AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...e.doc	07/13/07 11:02:41AM	04/12/00 09:33:36AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...oc	07/13/07 11:02:42AM	05/31/01 11:11:46AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...oc	07/13/07 11:02:42AM	02/08/00 12:08:48PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...EW.doc	07/13/07 11:02:43AM	06/12/01 12:08:24PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...EW.doc	07/13/07 11:02:43AM	11/24/99 09:53:40AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...s	07/13/07 11:02:44AM	03/19/01 09:25:18AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...um.doc	07/13/07 11:02:45AM	10/04/05 06:34:28PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...um.doc	07/13/07 11:02:46AM	02/11/02 11:42:26AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...s\Pe...	07/13/07 11:02:47AM	01/09/02 03:09:34PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...s\Pe...	07/13/07 11:02:48AM	01/02/02 08:57:46AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...s\Pe...me.doc	07/13/07 11:02:49AM	04/03/00 11:07:38AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...s\Pe...	07/13/07 11:02:50AM	10/17/00 01:43:50PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...s\Pe...	07/13/07 11:02:50AM	07/17/00 04:53:10PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...s\Pe...	07/13/07 11:02:51AM	03/21/01 04:39:20PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...e.doc	07/13/07 11:02:51AM	11/24/99 08:43:06AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...DC	07/13/07 11:02:52AM	02/17/00 09:53:02AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...ph	07/13/07 11:02:53AM	11/24/99 09:57:02AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...c	07/13/07 11:02:54AM	03/01/02 11:05:40AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...c	07/13/07 11:02:54AM	06/02/00 09:45:44AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\Pe...c	07/13/07 11:02:55AM	05/02/01 12:25:46PM

Note the Creation Date of the file is after the Last Written Date. This phenomena occurs when a file is moved from one device to another. The creation date in this instance is the date the file was moved.

Note the incremental progression of creation date. Showing that a large number of files are being transferred from a thumb drive to this new computer.

# Gathering Evidence - Forensic Reconstruction (6)

- Device analysis showed the existence of a SanDisk Cruzer thumb drive being plugged into the new machine. Device was subsequently recovered empty, but analysis showed the existence of these very documents after being recovered from deleted space.



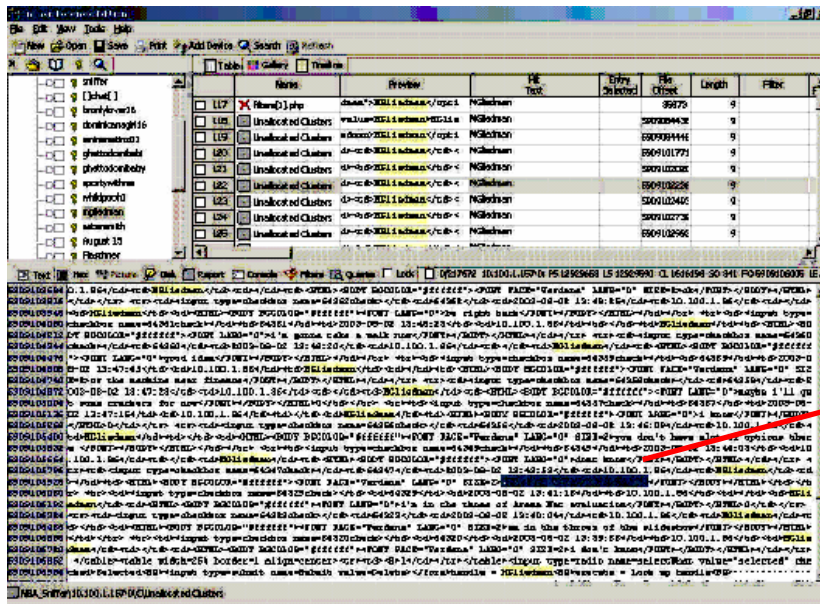


# Live Incidents

"Why is Norma getting transferred?" →



Keyword search for AOL screen name: bigcompanycio



jsmith@http://5.18.1.170/  
was/filters.php?handle1=  
bigcompanycio&handle2=  
none

# What Can Be Done?

- Send a “cease and desist” letter? Purpose:
  - To halt or slow the conduct
  - To obtain admissions or further indicia of guilt
  - To demand reaffirmation of contractual obligations and possibly other concessions
  - To demonstrate reasonableness and the need for injunctive relief
  - To provide additional time to gather evidence and draft pleadings
- Include or otherwise notify Rival, Inc.? Purpose:
  - Have the company reconsider its hiring decision
  - Have Rival think twice before recruiting any other Vulnerable, Inc. employees
  - Put Rival on notice of the contracts so that, if it proceeds, it may be liable for intentional interference with contractual relations

# What Can Be Done?

- Just lay low and then file suit? Purpose:
  - Catch Rex and Rival by surprise
  - Win the potential race to the courthouse
- Need to decide first whether a lawsuit is worthwhile
  - Jason will discuss the question of whether to pursue litigation
  - This is a question best considered very early on
- If not, consider non-legal alternatives
  - protect/consolidate customers – senior involvement
  - reassure and motivate remaining employees
  - motivate departing employees to remain?

# Should We Sue?

- Evaluation of strength of case/likelihood of success
- Harm suffered
- Costs
  - Legal costs
  - Customer relationships
  - Management time
  - Cross-claims
- Potential relief
  - Injunctive relief
  - Damages
- Reputational issues
  - Marketplace
  - Competitors
  - Employees and Prospective Employees
- Other alternatives
  - Pre-suit discovery/settlement
  - ADR
  - Criminal referral

# Initial Litigation Issues

- Who should you sue
- Where should you sue
- What claims should you assert
- Whether and how to file for a TRO
  - What conduct should you seek to restrain
- Whether and how to seek a preliminary injunction
- Whether and how to seek expedited discovery

# Discovery Considerations

- Exposure of Vulnerable's sensitive and trade secret information
- Risks of "cross contamination" impacting future business activities
- Use of confidentiality agreements and protective orders to restrict use of discovery
  - "attorneys' eyes only" designations
  - resulting need for expert support
- Third party discovery considerations
  - telephone records
  - internet-based private email accounts
- Document management and related considerations and burdens

# Settlement

- Consent order vs. settlement agreement
- Terms of settlement
- Compliance monitoring

# Any Questions?

- **Jason C. Schwartz**  
[jschwartz@gibsondunn.com](mailto:jschwartz@gibsondunn.com)  
+1 202 955 8242
- **Karl G. Nelson**  
[knelson@gibsondunn.com](mailto:knelson@gibsondunn.com)  
+1 214 698 3203
- **Jessica Brown**  
[jbrown@gibsondunn.com](mailto:jbrown@gibsondunn.com)  
+1 303 298 5944
- **Seth Berman**  
[sberman@StrozFriedberg.com](mailto:sberman@StrozFriedberg.com)  
+ 1 617 848 5665 (*Boston*)  
+44 207 841 5870 (*London*)