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# FOCUS

## President's Message

**Thomas Schneider**

Greetings ACC Central Florida Chapter Members:

Having just returned from the ACC Annual Meeting in Seattle, I am refreshed and re-energized.

The networking opportunities, sharing of war stories, and rubbing elbows with fellow in-house practitioners (and vendors) were both fun and educational. Where else can an in-house lawyer from a Bible translation organization encounter in-house lawyers from as diverse a group of entities as Petco, Sallie Mae, World Vision, State Farm Insurance (my old company!), i-Trade FX, LLC (welcome to our newest chapter member, Kim!), Washington Mutual, Texas A&M Research Foundation, Chico's FAS, Alexander Morford & Woo, Billy Graham Evangelistic Association, Microsoft, Eli Lilly, William Wrigley, and UPS...just to name a few?

The CLE offerings were plentiful and included something for everyone. Most of the attendees left Seattle with either a great start or a great finish to their CLE requirements for the next reporting cycle—including satisfying ALL of those elusive ethics credit requirements!

Seattle has a reputation for rainy weather, but we experienced mainly sunny, cool days with brilliant fall foliage. Many lawyers and their families visited the Space Needle and an interactive music museum; rode the monorail, trolley busses and

streetcars; took the ferry across Puget Sound; and got coffee at the understated original Starbucks store down near Seattle's famed waterfront Public Market. Next October the ACC Annual Meeting will be in Boston—another interesting venue.

My point: if you have the opportunity to attend the ACC Annual Meeting next year, take it! You will benefit as an attorney, and your company will benefit from the relationships you make and the things you learn. (If cost is an object—ACC does offer a limited number of scholarships.)

On another important note, our chapter's participation in National Community Service Day was a success! This year the chapter worked with Seniors First ([www.seniorsfirstinc.org](http://www.seniorsfirstinc.org)) on a home improvement project, painting the exterior of a home for a local elderly in need. Many of the participants proved to be quite the craftsmen/women, while others endured comical incidents such as stepping in paint pails. Lunch was provided by Olive Garden, and to keep cool we had a frozen slushy machine.



Special thanks to chapter member Kelly Lodde with Hilton Grand Vacations Company, who helped organize the event. Thanks to all who participated and brought family and friends to help. Your painting and maintenance/repair skills were much appreciated!

Best regards,  
Tom Schneider, President  
ACC Central Florida Chapter



# Counseling Around Corners

Susan Hackett

Senior Vice President and General Counsel, Association of Corporate Counsel (ACC)

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The economic downturn is more evident everywhere I go. The impact can be seen and felt all around us: closing businesses, laid off workers, less abundance, less “consumerism,” and an increased focus on family time.

My mother recently reminded me of some things I had since pushed aside. Mom, born in the Depression years, grew up in a very large family that barely made ends meet from day to day. They lived without a lot of frills, and only because all of the kids pitched in at home or to earn money. They focused on frugality, getting good value from everything they purchased, doing everything they could with less. I saw the enduring imprint of the Depression on my mom every time she rolled up and “re-gifted” the paper and the ribbon off her birthday package, or made us carry recycled lunch bags, or carefully washed and stored the empty mayonnaise jars for future use. We teased her mercilessly about this kind of frugal behavior.

In the last few months, those of us who grew up with plenty and who have been living large have seen a glimpse of what was bred in many of our elder parents’ bones: a healthy respect for prudence, a less ostentatious lifestyle. We are stepping back from excess and more carefully shepherding our resources because we are worried about what might come. Those of us fortunate enough to enjoy relative security in our jobs, our homes, and our daily routines cannot escape the unfortunate comparison to some of our neighbors and colleagues who have been harder hit.

By reflecting on the past, we can learn prudence relevant to corporate counseling in today’s volatile environment. As you examine your budgets and look at what can or must be trimmed, or what you can do to drive greater value, outside counsel costs often rise to the top of the pile. Empirically, we know that outside counsel costs constitutes more than 50 percent of the budget for more than half of in-house

departments. While many outside counsel are worth every penny they are paid, we all know there are many more who could be managed to spend a bit less for the work they perform, relative to the value of the services provided. Unless we manage toward those efficiencies, we are going to be caught spending our precious time in unproductive arguments over bills.

ACC has resources readily available to you for your consideration as you hone in on costs and increased value:

## Hours, Rates, and Budgets

**Don’t ask for a discounted rate or a freeze on fees.** Many members have indicated that their approach to their firms this year is to ask for a 10 to 20 percent rate decrease. In part, this plan is fueled by the perception (and reality) that rates charged are out of proportion, and that they have grown exponentially for several years without any corresponding increase or change in the value of the services those counsel provide. Services have gotten more expensive and AmLaw and others continue to report that firms and leading partners are sometimes profiting in an almost unseemly manner. While everyone likes a profit, you have to start to wonder, “Who is in control here?”

Every situation has its own unique drivers, and I believe focusing on reducing outside lawyers’ rates is the wrong way to go in establishing the groundwork for successfully controlling costs. In-house counsel are surprised to find that, despite setting lower billing rates, fee ceilings, or blended rates for their work, the overall bill submitted did not get any smaller. Law firms that overcharge for matters and that agree to freeze or reduce their rates, just bill more hours, involve more billers, or do not properly control other expenses. Bills inevitably gravitate toward a certain amount, regardless of what might have been negotiated.

**Set a budget for the project and to hold the firm accountable.** Talk about what that project or matter is worth. Do not attach a price to the project, nor accept a fee reduction or a request for a discount. Simply state that this is what the matter is worth to you and then ask, “Is the firm willing to take this matter on for this fee?”

You should clearly articulate that you will not allow adjustments or overruns, except in pre-determined (in writing) extreme circumstances. For the price you agree to, they must finish the project, however that is defined. If it is important to you, tell them which lawyers you want in charge of or working on your matter. Make sure you are playing fair: tell them up front that you will not seek a refund or rebate if they resolve the matter more quickly/less expensively. You want them to profit by working efficiently. While some worry that the work done could suffer as a result of this kind of arrangement, I believe this is a myth of convenience, without any empirical merit. Firms that set flat fees for services begin to value lawyers who provide services not based on hours, but on getting clients what they want quickly.

What do you get from this? Much of the time, you will get lower costs. However, even if costs are not reduced, there is something to be said for managing them predictably for your clients in such tumultuous times, since busted budgets and missed financial targets often cause even more trouble. In addition to the surety of bills inline with your expense expectations, you and the firm will not have to waste time arguing over hours or bills.

## Establishing a Budget

**A project budget is not something that your outside counsel should prepare. It is something you must drive.** Outside counsel should be critical in the process of mining their data. Perhaps they have done 437 of these kinds of cases over the last five years and can average some costs for you as a starting point. In-house departments

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must set—and evaluate—the budget based on the value of the work to the client. If a project is only “worth” \$50,000 to the client, what does it matter if the firm says it will cost \$100,000? You either find another firm or settle out now for \$40,000, and spend your time and effort on something that has a higher value.

While many of us are unsure of how to effectively evaluate the “worth” of some kinds of matters, we have to do this in the process of owning our own budgets and costs. If you do not know what a matter is worth, you certainly cannot expect your outside firm to live up to your cost efficiency expectations. We are developing a highly refined set of evaluation tools for our ACC Value Challenge project that will help in-house counsel determine the value of legal work by some other method than the cost of a lawyer’s hour multiplied by the time the lawyer spends working on the matter. If your goal is to set budgets based on incenting efficient performance from all players, inside and out, be sure to visit [www.acc.com/valuechallenge](http://www.acc.com/valuechallenge) for additional tools and insight.

***A significant portion of the time you spend with your firms should be focused on evaluation and review of their services.*** Most of us, however, do very little to tell our firms what they do that we like and what we want them to do differently. The closest we get is paying or disputing the bill. While your outside firms are not blind, they may not focus on what your needs or concerns are unless you tell them. They are aware that companies are tightening their belts, that legal services are a cost center, and that you are under pressure to do more with less, but what do you expect them to propose without guidance from you? Further, if you work in a larger department, you must also have this “evaluation/review” conversation with your own lawyers internally. You want to incent their better management of firms by rewarding those who drive better performance at lower and predicted costs, and reproaching those that do not. Keep in mind that cost overrun by law firms is often enabled by a lack of good in-house management.

***You need to consider adopting evaluation/review criteria for both the in-house staff and the outside firm.*** Make it clear that compensation and continued retention depends on adherence to a set of criteria that you all understand and are equipped to employ. If you are going to tell internal counsel that they must hire firms and return results and rates within set parameters, you have to allow them to select firms that will accept and abide by those terms, which may mean firing more expensive and less flexible firms that you’ve worked with for years. You have to support your staff’s decisions.

Perhaps one of the best exercises you can go through now is that of data mining to review the kinds of work done in the last year and compare it to previous years, looking at a variety of comparatives. Ask your firms to begin to mine their data for you, too. Given that many of them have long experience performing the kind of work you retain them to do, they should be able to clearly discuss specific types of work, what it costs, when it’s successful, who does it best, etc.

### **What if You are Unable to Hire Outside Help At All?**

***When you cannot afford to hire expertise, or the extra hands you need to create a solution to a thorny client problem, your friends in the ACC network can help.*** There is intrinsic value to what you will derive from a conversation with an experienced in-house peer over the value of analysis of a legal problem that an outside firm might offer. ACC offers several ways to leverage your membership:

- Join an ACC committee to find other practitioners interested in the same subject; (There is no additional cost and no limit on the number of committees you can join as an ACC member)
- Attend your local chapter meetings to find similarly situated peers who are confronted with many of the same issues as you;
- Post questions or requests on any of our many Listservs;
- Visit the online Membership Directory to reach out to a company that is likely to have an answer you want, or has the established best practice you would like to emulate;

- Search ACC’s online database of research, which includes thousands of documents such as articles (including back issues of the *ACC Docket*), how-to’s, ACC InfoPAKS, program materials/outlines, collected member forms, and policies, and links to other useful sites or resources;
- Look through ACC’s Leading Practices Profiles for added insight to member and department practices. These practical benchmarking tools capture how members have tackled tough topics through in-depth interviews that address their experience in getting started, key resources they developed, staffing and expense and lessons learned;
- Contact vendors who support ACC for discounts, ideas and access to their research. Especially helpful may be those vendors in the ACC Alliance program that co-market specialized products and services made for corporate counsel and available to ACC members at a reduced cost.

For those of you who have already been hit by the downturn and have lost, or may be in jeopardy of losing your job, know that ACC is standing right beside you. We offer in-transition membership at no cost (so long as you were a member prior to losing your position), and we also offer a variety of services and the best job postings in the business on ACC’s In-House Jobline.

Please share your thoughts on what you are doing to focus on more prudent management of your client’s time and spend. You can reach me at [hackett@acc.com](mailto:hackett@acc.com).

# ADA Amendments Act of 2008 Broadens Scope of Protection for Employees

By Sarah P. L. Reiner and Mahala Dar-Janvier\*, GrayRobinson, P.A.

The ADA Amendments Act of 2008 (ADAAA) takes effect on January 1, 2009, and amends the Americans with Disabilities Act (ADA) to expand workplace protections for employees with disabilities, as well as employees “regarded as” having disabilities.

Under the ADAAA an employer shall not discriminate against a “qualified individual on the basis of disability.” The term “disability” is still defined as a physical or mental impairment that substantially limits one or more major life activities; however, the ADAAA expands the scope of protection available to employees by broadly defining “major life activities” and overturning two key Supreme Court decisions that presently narrowly construe what constitutes a “disability” under the ADA.

The ADA, as presently enacted, is silent on what constitutes a major life activity. However, the ADAAA includes a non-exclusive list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADAAA also expands the category of major life activities to include the operation of major bodily functions, such as functions of the immune system and the digestive, respiratory, circulatory, endocrine, and reproductive functions.

Congress makes clear a primary purpose of the ADAAA is to reject certain Supreme Court rulings that narrowed the broad scope of protection originally intended by Congress when it enacted the ADA. Specifically, the ADAAA rejects the ruling by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that the terms “substantially limited” and “major life activities” should be strictly construed to a demanding standard when determining the existence of a qualifying disability.

Under *Toyota*, a disability is not considered to “substantially limit” a “major life activity” unless it “prevents or severely restricts the employee from doing activities that are of central importance to most people’s lives.”

The ADAAA also rejects the standard set forth by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which requires courts to consider ameliorative effects of mitigation measures, such as medication or medical devices, when considering whether an employee’s impairment substantially limits a major life activity. This brings us to another significant change to the ADA likely to impact employers - the treatment of impairments that are episodic in nature, or in remission. Under the ADAAA, an impairment that is episodic or in remission is considered a disability if it substantially limits a major life activity when active. Accordingly, impairments such as epilepsy, diabetes, and asthma, may now be considered disabilities regardless if they are active at the time. Because the ADAAA rejects the holding in *Sutton*, these impairments will be considered disabilities regardless if they can be controlled by medication or medical devices. Clearly the ADAAA greatly expands when impairments will be found to be disabilities under the law.

Further the “regarded as” prong of the ADA has been modified by lowering the threshold for employees to succeed under a “regarded as” claim. An employee need only show that he or she has been subjected to a prohibited action because of an actual or perceived mental or physical impairment. The employee need not show that the impairment limits or is perceived to limit a major life activity. This interpretation is subject to two important restrictions. First, individuals with impairments that are transitory and minor are not covered under the “regarded as” prong.<sup>1</sup>

1. The ADAAA defines a “transitory impairment” as an impairment “with an actual or expected duration of six (6)

Second, the ADAAA relieves covered entities from the obligation and responsibility of providing reasonable accommodations and reasonable modifications to those who meet the definition of disability solely based on being “regarded as” disabled.

The ADAAA mandates that the EEOC revise its current regulations, particularly those in defining the term “substantially limits” as “significantly restricted,” to conform to the legislative intent as conveyed by the ADAAA. In 2007, the EEOC received 17,734 charge filings alleging disability discrimination - an increase of 14% from the prior year. In light of the sweeping changes to the ADA law heralded by Congress’ enactment of the ADAAA, it is likely that these numbers will increase. Employers will need to make a conscious effort to educate management and key employees on the changes in the law. The landscape of current ADA law can be expected to change significantly in the coming years, and the defense strategy employed by companies with regard to these cases will necessarily be required to change with it.

*\*Sarah P. L. Reiner, is an associate in the Labor and Employment Law Department of GrayRobinson, P.A. Mahala Dar-Janvier is a law clerk with GrayRobinson, P.A., and a student at the Florida A&M University College of Law.*

months or less.” However, the ADAAA does not define what is considered a “minor” impairment.

## Chapter News

### Call for Articles

Do you have an interesting story to share? A challenging court case? Do you know an in-house lawyer who has made a difference in their community or in someone's life? Please share your stories by sending them to Marshall Schirtzer at [mschirtzer@cfl.rr.com](mailto:mschirtzer@cfl.rr.com).

### Call for Involvement in Chapter

Would you like to be involved more in the chapter? Please let us know. We are always looking for help coordinating events and we are also looking for proposals of new topics for our CLE programs that might benefit chapter members. If you are interested in serving on the board of directors or as an officer next year, let us know! For more information, contact Marshall Schirtzer at [mschirtzer@cfl.rr.com](mailto:mschirtzer@cfl.rr.com).

### Upcoming Events

Date: December 3, 2008  
Title: ACC-Central Florida Chapter Annual Holiday Party and Board Member Elections  
Time: 6:00-9:00 PM  
Location: The Monkey Bar (located above the Wall Street Cantina)  
18 Wall Street Plaza, Orlando FL  
[www.wallstplaza.net/monkeybar](http://www.wallstplaza.net/monkeybar)  
RSVP: Marshall Schirtzer at [mschirtzer@cfl.rr.com](mailto:mschirtzer@cfl.rr.com)  
18 Wall Street Plaza

For more information on upcoming chapter programs, go to [centralfl.acc.com](http://centralfl.acc.com).

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## Welcome New Members

We wish to welcome the following new members who have recently joined the ACC Central Florida Chapter:

**L. Kim Estrada**, i-Trade FX, LLC

**Jennifer Gohlke**, Marriott International, Inc.

**Douglas Kelly**, Marriott International, Inc.

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