

# FOCUS

## President's Message

Robert Gage

This is the time of year when ACC chapters put the finishing touches on their submissions to be selected as Chapter of the Year. To prepare the submission, chapter leaders go over their accomplishments for the prior year (actually, the period under review this time is March 2008 to May 2009) and make their best case for why their chapter should earn top honors.

CO-ACC has done a lot to distinguish itself over the past year. But something recently occurred to me: we've been doing all of this work to tell ACC what we've been doing, but shouldn't we share some of this information with our members? Here, then, are some of the highlights that will be included in CO-ACC's Chapter of the Year submission:

**Programs.** The core value CO-ACC provides to its members is high-quality and highly affordable educational programs. CO-ACC has partnered with local law firms to provide CLE programs specifically tailored to the interests of in-house counsel. Topics from our law firm-sponsored CLE programs since March 2008 included: ediscovery, privacy and data security, investigations, cutting-edge employment issues, intellectual property and crisis management. In addition, CO-ACC has been taking more initiative in creating its own content. In January 2009, CO-ACC sponsored the "Advice From the Experts" event, a half-day program on successful partnering between in-house and outside counsel, featuring panels comprised of leaders from local companies and law firms. Of course, in April 2009, CO-ACC

sponsored its signature event, the Corporate Law Leadership Forum, which was one of the best-attended events in CO-ACC's history.

**Membership.** Without members, there is no chapter. The chapter leaders are keenly aware that member retention and recruitment is vital to our success. The economic challenges of the past 12 months have resulted in a decrease in membership. Our retention took a big hit this year, as we lost approximately 100 members due to cost reductions at a single large law department. However, our recruitment of new members has been a real success story. Our losses were offset by the addition of 72 members during the submission period. Due to impressive recruitment results, there was a modest reduction in total membership from 340 members in March 2008 to 306 members as of May 2009. Considering the challenges of the last 12 months, this is an impressive achievement.

**Chapter Administration.** Our leadership has continued to implement a long-term strategy to supply the chapter with effective support. Last year, we retained a professional administrative support company, Accent on Management, to provide a part-time chapter administrator. This has allowed us to provide a much higher level of service to our members and takes a great deal of burden off of chapter leaders who — it should not be forgotten — have full-time day jobs. Earlier this year, Accent on Management took over the bookkeeping function for the chapter. Doing so enables chapter leaders

to get monthly reports of the chapter's finances and frees them up to focus on more strategic matters, such as managing the budget and how to best use chapter resources. In addition, the chapter's officers typically hold their positions for only a year. The professional chapter administrator stays involved in CO-ACC matters year after year, so the continuity and stability provided by this arrangement is invaluable to us.

**Community Involvement.**

CO-ACC provides its members with opportunities to give back to the community. This is an important part of the chapter's mission. Last year, there were several such activities, including a meet and greet with Ohio State and Capitol law students who got the opportunity to talk with members of the in-house bar in a relaxed social setting. CO-ACC also invited its members to join in cleaning a local park as part of the chapter's annual Community Service Day.

I can't possibly include all of the details of our Chapter of the Year submission in this modest space. These are just some highlights. There are also a number of initiatives we are working on today that will be fodder for next year's submission. The Chapter of the Year process forces chapter leaders to survey where we've been and where we're going. I feel very confident telling you that our chapter is in great shape and looks like it will stay that way for some time to come.

## Oxymorons and Indexes

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I couldn't decide which topic I really wanted to write about most for this quarter's chapter newsletter. One describes an incredible advance for in-house counsel and the value returned for their client's legal spend; and the other, which describes what may be the greatest bite into your practical ability to assert attorney work product protections in the history of my tenure here. So you get both — I told you I couldn't decide!

### Bad News First: "Work-Product Protection" is now an oxymoron

On August 13, 2009, the First Circuit Court of Appeals issued an *en banc* opinion that has severe and negative ramifications for corporate clients — and even greater consequences for the in-house lawyers and financial teams that prepare corporate tax, accounting and financial statements for them.

In *US v. Textron*, the court overruled its own previous panel decision (and departs from the precedent of virtually every other US court), protecting the traditional and widely accepted interpretation of what constitutes attorney work product in the disclosure and financial reporting context. The IRS sought production of Textron's lawyers' estimates of the company's potential liability for tax positions it pursued, Textron asserted attorney-work product protections and refused to disclose the files, and the ping pong of decisions in this case began. (ACC filed two amicus briefs in the case, available online along with the court's decisions, at the URLs listed at the end of this article.)

This most recent *Textron* decision is final, unless the company decides to take the case to the US Supreme Court (and we'll be there again as amicus, if they decide to go forward). It is important to overturn this ruling and have the Supremes resolve this important issue,

or public companies' in-house lawyers will be hamstrung with little alternative except to avoid any documentation of estimated litigation liabilities and, perhaps by extension, other forms of litigation reserves if the lawyer wishes to be able to assert confidentiality over such work product.

Perhaps more importantly, from a policy perspective, this case could be a watershed moment in establishing and defining work product protections that truly make or break the role of lawyers in a public company context.

The court's ruling replaces a long-standing test that protects documents prepared by attorneys because of or in anticipation of litigation (constituting protected attorney work product as defined in the US Federal Rules of Evidence, Rule 26(b)) in favor of one that suggests a much narrower standard, if any remaining protection at all. The court argued that Textron's attorneys' assessments of potential litigation liability for tax positions were not protected because financial reporting and accounting requirements dictate creation of such liability estimates, and thus any resulting work papers are mere "business" documents created pursuant to those requirements.

According to the court, "any lawyer" would call Textron's counsel's assessment of potential liability mere tax or business documents, not litigation documents. But by "any lawyer," the court sure wasn't talking about the 24,000 members of ACC. If a lawyer's assessment of the company's potential legal liability for a position it asserted — which the government now challenges — isn't attorney work product, what the heck is? The court makes a twisted and Herculean effort to reach the perverse result it adopts.

In adopting this standard, the court seeks to promote greater convenience for government investigators at the expense of the public interest in promoting accurate and complete preparation of corporate financial documents and audits. By ignoring or setting aside clear precedent to protect attorney work product, such as estimation of potential liabilities, this court eviscerates the notion that the in-house lawyer should create or share legal assessments with internal financial colleagues or the company's auditors.

As noted by the dissent in this case (who are the judges who wrote the panel opinion that this *en banc* court overturns): "In adopting its test, the majority ignores a tome of precedents from the circuit courts and contravenes much of the principles underlying the work-product doctrine. It also brushes aside the actual text of Rule 26(b)(3), which "[n]owhere . . . state[s] that a document must have been prepared to aid in the conduct of litigation in order to constitute work product." *Adlman*, 134 F.3d at 1198." The result is that companies that empower their lawyers and auditors to work together in an effort to ensure that their financials and accounting disclosures are accurate and well-informed are punished by this decision. The court thus suggests the inconceivable: that it is more advisable for lawyers to avoid documenting or sharing information that could be used against the company's interests in litigation. In citing to ACC's amicus brief in this matter, the dissent notes further: "Thus, as *amici* worry, the majority's new rule will have ramifications that will affect the form and detail of documents attorneys prepare when working to convince auditors of the soundness of a corporation's reserves."

And that means that the role of in-house counsel is not only hamstrung, it's permanently damaged. The court's ruling

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diminishes the value of the important preventive and strategic roles that in-house counsel play in complex, publicly traded companies. And calls into question the entire notion public policy presumption that confidential legal counsel encourages better corporate decision-making and more reliable and accurate public statements of financial position on which our markets must rely. In pursuit of greater transparency for IRS investigators in this one case, the court ends up promoting opposite result in the larger marketplace. Bad facts made bad law here. ACC will continue to fight to protect your client's right to expect candid and confidential counsel, and your ability to protect the work product that makes your contributions to the company's good fiscal health possible.

To read ACC's amicus briefs and the court's decisions, go to ACC's Advocacy Homepage ([www.acc.com/advocacy](http://www.acc.com/advocacy)) or use the following URLs:

[U.S. v Textron Decision, 8/13/09:](http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=07-2631EB.01A)  
[www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=07-2631EB.01A](http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=07-2631EB.01A)

[ACC-US Chamber Amicus Brief in US v. Textron, 4/22/09:](http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=207212)  
[www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=207212](http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=207212)

[ACC-US Chamber Amicus Brief in US v Textron, 4/8/08:](http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15823)  
[www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15823](http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15823)

**Remember:** ACC advocacy is the voice of the in-house bar. We perform that function by engaging in work that protects individual members' practice rights and their companies' rights to counsel of choice: in-house lawyers. Textron came to us for help in taking this case on. You should, too, if your company faces a problem that impacts in-house practice and professional standards like this one does. We don't have the resources to become involved in every case but we can't be the voice of the in-house bar unless we speak out on

matters that truly impact YOU. Call me when you see those cases; that's how we move the needle and make sure that the in-house bar is your voice.

**I'd rather leave you with the good news:** The ACC Value Index is about to turn inefficient and non-aligned law firm business models "inside out."

The premise of the ACC Value Challenge (our project to reconnect the cost of legal services to their value) is our belief that far too often, what drives the definition of success in outside law firms is size, expensive reputation and profitability. While we can't stop folks in firms from reading the AmLaw 200 rankings and measuring themselves against these metrics, maybe we can redirect the definition of success toward something more closely aligned with what *clients* value.

That's where the ACC Value Index comes in: the idea is to ask ACC members to share information about the firms they value most on an online database (the ACC Value Index). The intake form for the ACC Value Index is now up and online for ACC members to go to to pre-populate the system with data for launch. The form presents you with a simple scoring system, asking you to give 1 to 5 stars to firms you use on six different value criteria. Once launched (at the ACC Annual Meeting in Boston in October), members will also be able to go to the database to search for returns — information about firms they might be considering or to see how their own firms stack up. If you want to find the firms that scored well for value in other members' hearts — say, attorneys in California who do employment law or lawyers in France who do commercial litigation — the system will return the information. Data can be further sliced and diced, too. With the ACC Value Index, you'll be able to see what other members think of their firms and then connect with them for more information if you need it. It's not designed to be complex. It's designed to give a quick, down-and-dirty sense of

which firms are most valued, and then connect members who have experience with a firm to members who want more info on them.

If you are willing to help us pre-populate the system, go to [www.acc.com/evaluate](http://www.acc.com/evaluate) and tell us how you feel about your firms and the value they offer. Fill in multiple forms for each firm you feel strongly about: the form only takes about 30 seconds to complete and submit, unless you wish to write explanatory comments or accolades for your favorite lawyers at the firm in the comment box.

The full system that allows searching of the data will be out in beta soon for those who entered data as part of this push so that you can see how the system works, play around with it and decide if you want to keep the postings you made, and either edit or remove them. So this is a no-risk proposition — but imagine the upside of having candid peer reviews of firms ("candid" since the system is only open to ACC members) at your fingertips 24/7, covering firms around the world and allowing you to find the "value-based" expertise you need from outside counsel.

Imagine also the impact on the law firm community: maybe it will become at least as important to have satisfied clients promoting your value than to advertise that you're the most expensive firm in the market and your profit-per-partner is 20 times the salary of the in-house counsel who hire you. Kind of makes you feel like maybe we're the folks who hold the purse strings after all, doesn't it?

If you would like more info on the ACC Value Index, feel free to contact my team leaders at [accvalueindex@acc.com](mailto:accvalueindex@acc.com). Your peers (and your firms) are anxiously waiting to hear who you like and who it is that drives value in your outside legal relationships and spend.

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## Welcome to New Members

**Russell Austin**, Battelle Memorial Institute

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**Cecilia Martaus**, Sterling Commerce, Inc.



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## 2009 CLE Programs

### October 6

8:30 AM Breakfast/Registration

Topics:

- “Ethical Issues in Litigation—A Cautionary Tale: I Did What? I’m Being Charged with What?”
- “Class Actions: Keeping the Barbarians Outside the Gate (Or at Least From Plundering Your Castle)”
- “Employment and Labor Law Issues During Recessionary Times”

Location: Nationwide

Sponsored by: Baker Hostetler

### November 10

9:00 AM –12:00 PM with Lunch

Topics: “Hot Topics in Labor & Employment Law” and “Washington, DC Update: The Obama Era—A Brand New (Work) Day”

Location: Nationwide

Sponsored by: Littler Mendelson