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FOCUS

President's Message

Ken Bunge

Greetings to all Connecticut Chapter Members!

The Connecticut Chapter of the Association of Corporate America is working on a busy fall schedule. The first event we hope to take place is an annual membership meeting in late September or early October. One aspect of the program would be to recognize our law firm sponsors. We also hope to have a representative from ACC national headquarters attend as well to discuss their country-wide initiatives and issues that affect the in-house bar. Please feel free to contact me with regard to your interest in a reception, dinner or other format, as well as anything else you would like to see included in the event. Your input is very important!

We currently have three scheduled CLE programs for the fall as well. On October 8, attorneys from Saxe Doernberger & Vita will host a program on insurance law and on November 11, Epstein Becker & Green will host a program on employment law. To close out the year of CLE programs, Day Pitney will present a program on corporate ethics on December 4. Additional details on all of these programs will be provided on ACC's CONNACCA website.



The ACC annual meeting will take place in Seattle this fall from October 19–22. At least two CONNACCA members will be speaking on panels during the program. Phil Wellman will be a member of the panel “How to Respond to Your Financial Services Agency,” and I will be speaking on the panel “International Staffing: Recruiting, Training and Retaining Lawyers from Foreign Jurisdictions.” Information about the entire meeting and registration can be found on the ACC website.

In other news, on June 23, United Technologies Corporation's legal department hosted a reception to recognize the establishment of the Pro Bono Partnership's Hartford office. The Pro Bono Partnership's charter involves assisting the no-profit organizations by providing legal counseling and support. Charles Gill, United Technologies general counsel, thanked everyone who helped build this very significant pro bono program into a highly successful operation.

As for news with regard to the new Connecticut authorized house counsel program, June 30 was the deadline for

applications of current in-house counsel who work for corporations in Connecticut under the state Bar Examining Committee's “safe harbor” provision. As reported by the *Connecticut Law Tribune* in its June 30

edition, the bar examining committee's records indicate that 543 applications are on file and 140 attorneys have been certified under the program so far. If you would like additional information about the application process and requirements, go to www.jud.ct.gov/CBEC.

Finally, I am very pleased to report that Robin Smith, a member of the CONNACCA board, has been named general counsel Americas at Lego Systems, Inc. Congratulations Robin!

As always, I welcome your comments and suggestions. You can contact me by email at bunge_kenneth_e@sbcglobal.net.

Summer Fun, The Reading Undone, and Everything You Need to Go Back to School This Fall

Susan Hackett

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Those of you with kids in your life know that this time of year is when kids who've been enjoying a lazier pace and unlimited play time look around and realize that there is still much to do before they're sentenced to another year in the classroom. And they haven't even started plowing through their summer reading list.

I hope that summer has brought many of you some needed playtime and relaxation. Since we sometimes let the reading pile slide a little in summertime, I thought I'd help you catch up since Fall will bring challenges to you, too, that require you to be on top of your game.

SCARIEST HORROR: STORY BEACH READING **FASB and their proposed new loss contingency reporting rules**

Summer started with an unwelcome announcement from the Financial Accounting Standards Board, or FASB (pronounced FAZ-BEE), that they were going ahead with a proposal they'd been urged to discard: a revision of Financial Accounting Standard (FAS) number 5, which regulates public company reporting of disclosures regarding potential losses or liabilities of the company. This proposed rule was issued in June with a comment deadline of August 8. ACC filed comments, co-signed by more than 100 companies and many other organizations. At last count, FASB had received over 225 comment letters protesting the rule, which is a firestorm of activity in terms of these kinds of comment requests, especially considering they snuck it in while everyone was on vacation!

ACC's comments, the FAS 5 revision proposal, and a number of our co-commenter's letters are online for your perusal at www.acc.com/php/cms/index.php?id=84. When you get to this page, you'll notice that this information is housed on the privilege protection page. Why is this story on the privilege page? That's why you need to catch up on your summer reading.

ACC's letter details our concerns over several facets of the proposal, but focuses most on the following three points:

1. These proposals are a solution in pursuit of a problem. The current standards aren't broken: there is no evidence that current disclosure requirements are insufficient or harming market transparency. Adopting significant new and ill-advised proposals without evidence that changes are necessary, without a focus on how the rules will improve reporting (rather than just suggesting we need "more"), or without assurance that the new rules will improve (rather than frustrate) meaningful disclosure is folly.
2. Heightened disclosure requirements will create unprecedented waivers of the company's attorney/client privilege and work product rights. Because the proposed amendments will require clients to produce more sensitive and speculative information about possible losses related to litigation, and require earlier production of loss analyses than currently required (namely, before an exposure is well documented or quantified by "facts" as opposed to by an attorney's initial evaluation of possible liability or harm), reporting will likely increase the risk of waiver of privilege and have related punitive effects. These required "qualitative" disclosures will broadly communicate the company's litigation assessments that previously were carefully guarded in adversarial proceedings. Additionally, independent auditors may seek more detail from counsel to test the estimates and disclosures reported, adding to the risk of privilege waiver to auditors.
3. Deeper disclosures of attorney-client privileged assessments will coerce undesirable outcomes in matters on which companies are only asked to report. The proposed amendments' requirements to provide qualitative assessments of likely outcomes, timing of resolution, and the company's assumptions on loss amounts "give away the store" to any interested

adversaries, providing invaluable detail about the company's litigation strategies and settlement coercion-points. The result would be a perverse twist on the FASB's stated desire to disclose more accurate and timely information about loss contingencies: companies' litigation counsel would likely become more circumspect about providing their clients with legal assessments and detailed contingency analyses to assist in their decision-making in order to avoid unnecessary disclosure or liability. Further, since contingency reporting under the rules must be made earlier and include disclosures on cases that are not well quantified or even likely, there's a concern that setting and publishing such numbers will become self-fulfilling prophesies—the settlement floor, even in cases that otherwise have little merit.

ACC has requested an opportunity to testify before the FASB when they meet to discuss these rules further. We'll keep you posted.

HEARTWARMING "WILL IT ALL TURN OUT ALRIGHT?" NOVELETTE

The saga continues: Can the DOJ overcome tremendous odds to save itself and untold numbers of innocent ACC members' clients from perilous privilege erosion?

In July, U.S. Attorney General Michael Mukasey announced to the Senate Judiciary Committee that new Deputy Attorney General Mark Filip was crafting another U.S. Department of Justice (DOJ) guideline that would replace the McNulty Memo and offer "real, significant proposed changes." The DOJ's McNulty Memo, like its predecessors, the Holder and Thompson Memos, have been criticized by ACC and its coalition partners for including privilege waiver, amongst other inappropriate terms, in the DOJ's list of criteria for cooperation in corporate failure investigations. Deputy Attorney General Filip issued a letter to the Senate Judiciary Com-

mittee leadership that offered an executive summary of the memo he said was still in draft, angering Senator Specter, who called for the DOJ to stop stalling and for the mark-up and passage of *The Attorney Client Privilege Protection Act of 2008*. And yet, the outlined terms of the proposed memo in this executive summary, if realized, are significant steps in the right direction. As always, the proof will be in the pudding, so watch the ACC site for info on the publication of the new DOJ Memo to be issued by the end of August. To read the Deputy Attorney General's executive summary of the memo he's promising and Senator Specter's response, visit the ACC Privilege Protection page at www.acc.com/php/cms/index.php?id=84.

TIMELESS TEAR-JERKER

You done me wrong, but our relationship—while often dysfunctional—is everything to me, so I'm taking you back. But under new terms.

More than 120 top CLOs and law firm managing partners have been in therapy with ACC this summer, and talking about how to get their relationships back in order. This sizzling summer best-seller is about to expose their clandestine meetings in top hotels around the country as they attended focus-group sessions for ACC's new initiative: the ACC Value Challenge. So tune in for this summer's hottest reality show, and see many of them caught on tape, telling everyone who will listen about the errant ways of their inside/outside counsel relationships, and how they plan to make it up to each other (and their clients).

Seriously though, we all recognize that there have been decades of conversations about the problems in-house counsel have with rising costs, a lack of focus on value (rather than profit per partner), the perverse disincentives to efficient service inherent in the billable hour system, and much more. And law firms are tired of arguing over bills, constant RFPs that have replaced the longer-term relationships that made practice satisfying for them, clients' willingness to trade in meaningful project management for a 10 percent discount, and a tendency to suggest they want innovation and a revised relationship, but at the end of the day, a decision that it's easier to chuck all that and continue to purchase over-priced billable hours

from legacy firms. What can be done that will actually move the needle? That's what these focus groups were meeting to discuss this summer. ACC hosted off-the-record discussions to explore how we can change the focus from griping to acting on what is necessary to move us out of these unproductive cycles and help in-house and outside counsel rediscover the value of their relationships.

You can read ACC's magnus opus on how we're planning to help in-house counsel begin a (r)evolution in their outside firm relationships online at www.acc.com/public/accvaluechallenge-overview.pdf. And if you're bored with all the reading and just want to veg in front of the big screen, you can tune into the launch of ACC's Value Challenge by tuning in on your computer or getting your colleagues together in the conference room over lunch to pick up the live, free video feed of the Town Hall Meeting at which we'll "reveal all!" Contact ACCValueChallengeEvents@acc.com for information on how to tune in September 26 (or download the archived version from the website).

Get past "you done me wrong": it's best left in dimestore novels. ACC's Value Challenge is committed to working with you over the course of the coming months and years to help you take control of your outside spend and "(r)evolutinize" your outside counsel relationships and in-house budget and matter management.

THE TRAVEL JOURNAL THAT TAKES YOU PLACES YOU WERE NEVER LICENSED TO GO

ABA House passes model in-house counsel registration guidance for states that are seeking to accommodate in-house lawyers who've moved to a new job, but lack a local license where they're now employed.

Two-thirds of US states have now passed a version of the rule that ACC worked so hard to "encourage" the ABA to adopt: namely, Model Rule of Professional Conduct 5.5, which authorizes lawyers who are licensed and in good standing in their "home" jurisdictions to practice on a temporary basis (when taking a deposition, or negotiating a matter, etc.) in another jurisdiction in which they are not licensed. In-house counsel got further relief under the rule; under the provisions of section

5.5(d), in-house counsel who are licensed and in good standing in one jurisdiction are authorized to engage in "permanent" practice for their employer-clients when they move to a new job in another jurisdiction in which they are not licensed. While 5.5(d) is a complete authorization in and of itself, quite a number of states adopting the rule have coupled it with a registration system that allows the state to keep track of these in-house lawyers and usually collect payment from them comparable to local members' bar dues. Unfortunately, in their zeal to regulate, many state bar licensing authorities lost sight of the purpose of the rule, and the registration systems they adopted became more like mini-Spanish Inquisitions than simple registrations.

Not liking to see great disparity amongst the state rules regulating any aspect of lawyer practice, the ABA formed a group that proposed a model in-house registration system to provide some level of consistency and to suggest best practices. The first versions were overly complex. The new and improved model was adopted by the ABA House at the ABA Annual Meeting, and could be reading that saves you from much more reading studying for the bar exam next time you move to a job in another jurisdiction!

ACC's comment letters, our concerns that the ABA not adopt a model that pre-empts the underlying logic of 5.5(d) (namely, that no registration is needed at all in states that adopt the rule—the authorization is complete and the burdens of administering a rule may not be justified by any quantifiable threat the rules seem to suggest exist), and the new rule all appear online at:

ACC's Fall 2007 comment letter to ABA ([www.acc.com/php/chapters/filespace/All\(admin\)/accabainhousecomment.pdf](http://www.acc.com/php/chapters/filespace/All(admin)/accabainhousecomment.pdf))

ACC's Summer 2008 comment letter to ABA (www.acc.com/public/acc-comment-aba.pdf)

ABA Model In-House Counsel Registration Rules (www.acc.com/public/aba-sect-lega-educ-admi.pdf)

Alright, now that you're caught up on the essentials and can approach fall equipped with the knowledge you need to move to the next grade, enjoy these last few days of warm weather and summer fun!

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ACC Blog—Are You Connected?

ACC recently launched the first blog by in-house counsel, for in-house counsel. Help us make the blog a success by expressing your own opinions, or by simply perusing the dialogue. Recent blog discussions include “Why Does Historical Perspective Appear to Minimize the Impact of Change,” “Why Federal Courts Do Not Apply the Rule of Law Part 2,” “Federal Erosion of Business Civil Liberties: Part 5.” Check them out at www.acc.com/blog

Welcome New Members

We wish to welcome the following new members who have joined our chapter recently:

Jennifer E. Fournier, Triad Healthcare, Inc.

Jean Sorich, Ahlstrom Nonwovens LLC

Tanya Tymchenko, Pratt & Whitney Group

Damian Wasserbauer, IDT Corporation