

Inside

- 2...Oxymorons and Indexes
- 4...Welcome New Member
- 4...ACC News

FOCUS

President's Message

Joseph Santos

CONNACCA hosted its third training session of the year on Tuesday, June 16. The topic was "Export Controls and Economic Sanctions," co-sponsored by *The Connecticut Law Tribune* and *GC New England*. As the federal government has focused increasingly on export restrictions and enforcement — and as the economy puts pressures on all companies to find lower cost solutions — these two forces combined make this topic one of increasing relevance to all our members.

The speakers were four senior partners from Kelley, Dry and Warren's Washington, DC office: Eric McClafferty, who focuses on international trade and has substantial experience in export controls and compliance; David Laufman, a specialist on federal criminal investigations and prosecutions, congressional investigations, corporate compliance, US trade controls and

government contract bid protest litigation; Laurence Lasoff, who has represented clients in regulatory proceedings and counsels exporters in a wide range of defense and technology sectors; and Darryl Jackson, whose export controls practice concentrates on compliance and defending corporations and executives against enforcement actions, including criminal indictments and civil administrative cases.

Topics covered included:

- Government enforcement priorities and objectives in export control;
- Key government agencies;
- Risks of non-compliance;
- The need for licenses;
- Importance of product and technology classification;



- Consequences of non-compliance;
- Getting into compliance; and
- Developing an export management system

Twenty-five member representatives

attended the event, which included a lively Q&A session followed by the usual delicious reception fare.

Additional events will be announced in the near future. As always, we want to thank to our members for their continued support of our organization.

For more information on upcoming events, please visit our chapter website at connecticut.acc.com.

Oxymorons and Indexes

Susan Hackett

Senior Vice President and General Counsel, Association of Corporate Counsel

hackett@acc.com

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

Continued on page 2

Continued from page 2

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) 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

[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

[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

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 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. 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.

Board Members and Contacts

President

Joseph Santos

Hamilton Sundstrand, a United Technologies Company
860.654.6870
Joseph.Santos@hs.utc.com

Vice President

Amy Gallent

The Hartford Financial Services Group, Inc.
860.547.8712
agallent@thehartford.com

Secretary

Robin Smith

LEGO Systems Inc.
860.763.6888
robin.smith@america.lego.com

Treasurer

Dennis Mayer

Otis Elevator Company
860.676.5028
dennis.mayer@otis.com

Immediate Past President

Kenneth Bunge

KEB Advisory Services, LLC
860.663.0567
bunge_kenneth_e@sbcglobal.net

Board of Directors

Catherine Bashaw

John Beers

Douglas Brown

Frank Rudewicz

Philip Wellman

Welcome New Member

Thomas Dorer, University of Hartford



1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

ACC News

Give Back to the Community by Participating in ACC Community Service Month

Throughout August and September, ACC chapters all over the country will support National Public Lands Day (npld.com) by participating in their own community service events. They will help to preserve local parks and other public lands as well as working with local schools and other community-based non-profit organizations. More members are expected to participate this year. Join your local chapter's event, and give back to your community today!

2009 ACC Annual Meeting — Why You Should Be There

Only value-driven, high-quality education will help you sharpen your skills and be ready for the challenges ahead. That's why we developed the 2009 ACC Annual Meeting, packed with over 100 sessions. In just three days, you can earn over 15 CLE/CPD credit hours and save yourself the stress of time, cost and travel to other individual courses. Join us in Boston on October 18–21 for new ideas and inspirations to help you and your organization move forward! Learn more and register at am.acc.com.

ACC Introduces QuickCounsel

Too busy to research legal topics? No worries. Check out ACC's newest online resource: *QuickCounsel*. These resources provide top-level information on important in-house topics, such as unrelated business income tax, selecting and managing international law firms, and marketing yourself in a challenging economy. Each *QuickCounsel* includes an overview and links to supporting materials for deeper information on the particular legal topic. To access *QuickCounsel*, go to www.acc.com/quickcounsel.