

FOCUS

President's Message

Joseph Santos

Dear Members,

CONNACCA has conducted another excellent series of seminars.

On September 24, Withers Bergman, LLP presented on "Going Offshore: Exploiting International Business Opportunities." This included a discussion of structuring joint ventures and other investments, protecting investments, US regulatory issues and tax considerations. On hand were Jeffrey Blomberg (partner in the Greenwich office), John Greenwood (New Haven), Mitchell Kops (New Haven) and Justin Zamparelli (New York), and moderator William Harnisch (Greenwich and New

York). The event took place at The Hartford Club from 3:30-5:00 PM, with a reception that followed.

In October, many of our members, including several of CONNACCA's board members, attended the ACC Annual Meeting in Boston.

On November 10, 2009, another of our supporting firms, Anderson Kill & Olick, P.C., presented on "Emerging Legal Issues in Insurance Risk Management," also at The Hartford Club. Issues discussed included D&O and professional liability policies, how to settle law-



suits without forfeiting coverage, anti-concurrent causation clauses, coverage for property and business interruption claims and new developments in the law of product liability claims. Also covered were choice of law and

forum selection clauses in coverage disputes. Among those on hand were Finley Harckham, a senior litigation shareholder in the New York office.

As always, my thanks to our members for their continued support of these excellent programs and the CONNACCA organization.

Welcome New Members

Robert Abbott, Alstom Power Inc.

Christopher J. Boccaccio,
Pratt & Whitney Group

Mark D. Roellig, Massachusetts
Mutual Life Insurance Company

Michael J. Askew, Electric
Boat Corporation

Adam Edelstein, MarketStance

Gregg C. Benson, Pfizer Inc.

Denise C. McCarthy, Neopost, Inc.

International Legal Consideration for In-house Counsel

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So much of our time is spent attending to the *urgent* matters on our desks. Many of us complain that we don't have time to deal with the *important* ones: the ones that should be a priority in terms of long-term success, but are often shuffled to the bottom of the pile. Today, I'd like to talk to you about something that I think is long-term "important," and explain why at some point, if left unattended, it may become a daily "urgent" problem plaguing your practice.

In-house counsel have complex jobs as both generalists and specialists for their company client, and this complexity increases as the number of jurisdictions and related "international" considerations that your practice must contemplate increases. Even companies that largely work in only one country are ever-more likely to contend with suppliers, laws, and other influences from beyond their "home" jurisdiction's borders.

So please consider for a few minutes how a number of developments and emerging trends in international legal practice may affect your ability to get your work done as a lawyer operating across country lines.

Trendlines that will affect your practice as an in-house counsel.

In-house counsel in places like the United States, Canada, Australia and New Zealand have long enjoyed the confidence that their ability to practice as in-house lawyers would be fully recognized and respected, both as lawyers at the bar and amongst the client community they serve. Yes, they fought for it, but no one questions it nowadays.

But in many parts of the world, regulators of the local profession still do not recognize in-house counsel as carrying the same professional rights and respon-

sibilities as lawyers in outside practice. In many jurisdictions in Europe and Asia, for instance, in-house counsel can no longer carry privilege rights for their clients or aren't seen as sufficiently independent to be allowed to exercise the status of outside counsel in courts or elsewhere. In many of these jurisdictions, an in-house counsel becomes a "non-lawyer" the day they receive compensation by paycheck rather than retainer check. [See, e.g., ACC's International Practice Almanac offering overviews of practice rights for in-house lawyers jurisdiction by jurisdiction — <http://www.acc.com/search.cfm?anytext=International%20Practice%20Almanac>.] In addition, almost every major business jurisdiction in the world places some level of limitation on the ability of lawyers not locally admitted to engage in practicing.

Many jurisdictions around the world have been engaging in MJP (or multi-jurisdictional practice) reform efforts to help the states or provinces that separately regulate lawyers, figure out how to allow and when to regulate inter/multi-state or inter/multi-province services within the country's borders without requiring separate admissions in each jurisdiction. While the ability of lawyers practicing within these nations has improved, we still have a ways to go before larger MJP authorization systems catch up with 21st century practice realities. Now these regulators have to figure out solutions that either facilitate or protect both the bar and the public from lawyers practicing in their jurisdictions who are not locally licensed anywhere in the country. It seems that our progress has been limited to figuring out a bit more about how a lawyer licensed in Ontario or California can follow a legal matter they've been retained to handle for a client to Alberta or Georgia (respectively). However, we still haven't really gotten a handle on how a lawyer

from the company's office in another country, locally educated and licensed there, can come work at corporate HQ in the company's home country, or how outside counsel in the many jurisdictions abroad doing work for the company in their home jurisdiction can engage in providing services that are essentially deemed as being provided by a "non-lawyer" since that person is not admitted in the company's home country.

So, here's the important nugget: if you thought that MJP was all but in the bag, it's actually just getting started in the emerging context of multinational practice. The corporate legal community, from both companies and firms, will need to push hard to explain why this is crucial for the bars to do since many are completely disinclined to get involved. They see the issues as a mere administrative inconvenience to the foreign lawyer that can be simply answered by saying "no."

I see an emerging opportunity in many jurisdictions in the next few years as a number of efforts are launched to think more about how to deal with multinational practice issues. Lawyer associations and bar groups around the world are starting to set up commissions, and ACC will be there to help. What is going to drive change more than anything else, according to my small and completely subjective crystal ball, is that these emerging conversations on international licensing authorization will take place at the same time that governments and other stakeholders are also thinking about how to make corporate lawyers better gatekeepers for the client entities they serve. And also how lawyers and the law can become more of a service profession to a larger segment of their society, rather than simply a business venture for the highly educated and

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well-compensated corporate lawyers of the world.

For instance: The bars in Europe [and elsewhere] are about to begin to consider responses to initiatives such as the Legal Services Act (www.justice.gov.uk/publications/legalservicesbill.htm), which arose in the United Kingdom a few years back; the fundamental precepts are now being replicated/gaining traction throughout Europe through the EU's Services Directive, which will take force at the end of 2009 [http://ec.europa.eu/internal_market/services/services-dir/index_en.htm]. When both of these initiatives were announced, quite a number of prominent leaders in the US ethics and professionalism community said: "Interesting, but an isolated event in time, and it will never happen here. Our self-regulated profession operates under time-honored traditions of independence and lawyers know best."

But hear the undertones and think about whether it really is unlikely that this kind of "reform" movement will not seep beyond the four corners of Europe. The Legal Services Act was largely a consumer-driven initiative, responding to the perception and reality that legal services are not affordable or meaningful to most citizens' basic needs. The Act authorizes the development of new kinds of professional service entities that would include multidisciplinary practices and would liberalize the practice of law to make it more accessible. The EU Services Directive requires EU governments to review their rules governing the liberal professions, to ensure they are necessary and appropriate — that directive may open all kinds of conversations about whom should be allowed the privilege of lawyer in a society and how those persons should be regulated.

So — here's the nugget: why isn't it possible for such an over-arching review in Europe to include a discussion of whether companies can be better served by in-house lawyers who are fully recognized

by the bars and carry the privileges that their peers in outside practice have always enjoyed — hold them to the same standards of professionalism, of course, but offer them the same privileges of practice. Since the Akzo-Nobel case (in which ACC filed an intervention) is also still pending and may be decided soon, there will be the added limelight of a decision that either upends or supports the notion of privilege protection in the in-house practice context as interpreted by the highest courts in the EU interpreting local and EU law.

And, of course, for lawyers beyond the physical borders of the EU, EU rules define anyone not admitted in a EU jurisdiction as a non-lawyer for purposes of legal services provided in the EU jurisdiction. That means all of you out there who don't sit in Europe with a local admission, but have client interests in the EU. And this also applies to your local counsel whom you'd like to deploy in the EU negotiation or who has delivered the memo to your colleague sitting in Brussels, which is now discoverable, because privilege only applies to materials generated by lawyers (not non-lawyers).

At the same time, there are new initiatives in Australia and elsewhere that allow for law firms to seek out capital through public financing — essentially authorizing firms to become publicly traded companies, and thus be regulated as such. Thus, decisions about legal service modeling and provision in a publicly traded law firm may be influenced greatly by non-lawyers and regulators over time. And in the United States, in response to Enron and other corporate meltdowns, we see entities such as the SEC seeking to regulate the roles, fiduciary responsibilities, and even reporting requirements of lawyers working in public companies. We see Congress increasingly likely to hold hearings on corporate failures and subpoena lawyers and attorney-client privileged documents as a part of their investigations (and remember, privilege is a court doctrine in the United States, and Congress

often maintains that it has no protective status in response to a Congressional subpoena). This all means that folks who aren't "part of the guild" are increasing likely to have a hand in lawyer regulation.

We live in a new world, quite distinct from the traditions of our profession which allowed us to make decisions about professionalism as lawyers, without much "interference" from other stakeholders, such as clients, shareholders, public company regulators and the media. In an era marked by an alarming number of monumental corporate failures, questions about "where were the lawyers in all this?" will not be answered solely at legal colloquia. Like it or not, living in the new world will have consequences to our regulation and ability to practice for our clients. And we should be out in front of them, not lagging behind to see what others will make of our profession and how it works.

My point is that the consequences may seem remote to you right now. You could look at each of the above events as if they are separate and unrelated to your license, your practice and your client's service. But I think that is a short sighted view. And if I have only these few minutes with you every now and then to take you away from what's urgent to talk to you about what's important, then let this be my call to ACC members: If you want to protect what's important to you locally, you'd better be prepared to join us in fighting for what's unfolding internationally. It will directly affect your practice and your capacity to practice in the not so distant future. Contact me at hackett@acc.com.

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ACC News

ACC Value Index Launched!

Since its launch at the Annual Meeting, the ACC Value Index — a resource that measures client satisfaction with law firms — has acquired over 1600 evaluations of more than 600 law firms. We need your help to expand its evaluation library. Browse evaluations and take a minute to fill out evaluations for the law firms you work with at www.acc.com/evaluation. You will need to enter your member ID and password to gain access to the site. To have your password emailed to you, enter your email address at www.acc.com/login/forgotmypassword.cfm.

New QuickCounsel, “Legal Implications of Furloughs” Published

QuickCounsel is an electronic compendium of resources, presenting a quick overview of a subject and a bibliography designed to provide members with instant, substantive information on a subject. They are short pieces, 2–3 pages in length with relevant resources included at the end. Check out the newest QuickCounsel, “Legal Implications of Furloughs,” at www.acc.com/legalresources/quickcounsel/liof.cfm.

Avoid Frostbite in a Cross-border Transaction: Top Ten Things to Consider When Doing a Deal in Canada

Your company has decided to do a deal in Canada, how to proceed? “Top Ten Things to Consider When Doing a Deal in Canada” highlights key matters that are unique to Canadian cross-border transactions, including competition (i.e., antitrust), labor and employment, tax matters, foreign investment restrictions and environmental concerns. To learn more, go to www.acc.com/legalresources/publications/topten.