



George Q. Sewell President's Message

Graduation Day

I am writing this President's Message on May 25, which is the "deadline day" for

the June issue of ACC's section in the *Fulton County Daily Report*. May 25 is a busy day around Georgia because it is also graduation day for most of the high schools in Georgia. I have a high school senior—my third and last—graduating from high school today, and I can attest that the last two weeks have been very busy for graduating seniors. In addition to finals, AP exams, and last-minutes projects, there have been end-of-year ceremonies, banquets, Baccalaureate, graduation practice, honors night, concerts, and more. And now today is the big day—graduation.

What does graduation have to do with in-house lawyering? Actually . . . nothing. In fact, although in-house lawyers are always extremely busy, we never "graduate." We work for 40 years, retire and then . . . well, you know the rest. Which brings me to the point of this President's Message: Whether in-house lawyering is a passionate career for you or just a paycheck, ACC provides you with the means to get the most out of your in-house experience.

ACC-Georgia Activities

As you can read on pages nearby, ACC-

Georgia is humming with activity in support of its goal of making in-house life better for its members. Vice President of Membership **Stephen Kaplan** is deep into planning our fall 2007 Golf/Tennis Event. This is a huge undertaking, and Stephen has been doing a fantastic job of planning the event and recruiting sponsors. The Golf/Tennis Tournament will give ACC members and sponsors a great opportunity to play golf and tennis while raising money for a great cause, the Pro Bono Partnership.

Vice President of Special Programs **Betsy Griswold's** article on the May lunch program highlights yet another great educational program that she and Vice President of Programs **John Tanner** organized. Many of you may not realize the tremendous behind-the-scenes effort that it takes to put on a good program month after month. John and Betsy, working with the Program Committee, handle this key responsibility so well that they make it seem easy, which it is not. Even further behind the scenes, Treasurer **Henry Abelman** has taken charge of the chapter's finances, and is taking our financial record keeping to the next level. Henry is completely reorganizing the way the chapter keeps its books, and putting everything into an electronic format so that budgeting, accounting, and reporting will be much easier.

Special kudos to Vice President of Outreach **Virginia Wadsworth**, who has been working non-stop for the past month to screen resumes and interview candidates for our two summer internships. On top of that, Virginia has coordinated the recruiting of host companies and scheduling the interns with the host companies for the entire summer.

Heather Peck has assumed the YLC Chair position this year and has brought new energy and enthusiasm to YLC leadership to continue the good work begun by Stephen Kaplan.

Also behind the scenes, Past President **Teresa Kennedy** headed up the

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All in the Corporate Family: Privilege and Co-representation Issues for In-house Lawyers

By Susan Hackett

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

Martine Turcotte is a very happy lady—at least for a while. She recently won a decision for her client, BCE—the Canadian telecommunications giant—in a US federal court in a case that raised questions (and the specter of unpleasant results) about what many of us do on a daily basis without a lot of thought. Martine's experience provides a caution to us all—don't provide legal advice to subsidiaries without safeguards in place.

Many ACC members work in companies that have partially or wholly-owned parents, subsidiaries or affiliates—call them corporate family members. Many times, and certainly when the entities fully share the same ultimate ownership, in-house counsel provide advice for entities across the family (and their employer client's "borders"), in order to ensure that appropriate policies and practices are adopted and followed by each of the entities. It's in each of the entire family's interests for other members of the family to stay out of trouble (avoiding reputational run-off) at least, and at best to be properly coordinated when they share a variety of common interests: the same regulators, suppliers, customers, industry partners, investors, and so on. And for the most part, this approach works very well. Indeed, we all know the repercussions that would follow a failure in a related entity that the parent or other corporate family members knew about but "ignored": the entire family of brands would be tarnished and the entire entity group pilloried.

But even cross-counseling that works well "for the most part" still has room for the exceptions. Martine's company, BCE, has been engaged in a grueling battle before the Delaware courts for more than five years litigating with former US subsidiaries and their creditors regarding BCE's decision to stop financing the operations of one of its struggling former subs, Teleglobe. The two sides haven't gotten to the meat of the underlying matter yet. They're still arguing over privilege claims stemming from whether client services provided by BCE in-house lawyers to Teleglobe (when it was a sub) entitle Teleglobe to see BCE privileged communications and work product that would otherwise be protected from a hostile party's discovery demands.

The disputed material pertains to BCE's inside and outside legal advice to the client regarding its decision to pull their financing, including presentations by BCE's chief legal officer—Martine Turcotte—to the board and opinions from outside law firms, all discussing ramifications of the company's decisions on the defensibility of the kind of litigation it now faces. BCE claims that these events occurred after they severed joint representation of the sub; Teleglobe claims otherwise, arguing it has the right to see everything that passed through BCE's in-house law department because in-house lawyers, at one time, had provided Teleglobe with legal advice on the financial commitments, meaning the subsidiaries share the legal privilege.

When Martine approached ACC and asked for our opinion and support, we thought the issue was one that deserved attention; after reviewing the facts and the rules, we decided to file amicus rather than risk allowing the lower court's decisions in favor of Teleglobe's discovery demands to become precedent. Our brief is online at www.acc.com/public/amicus/teleglobe.pdf.

The Court of Appeals agreed with BCE's and ACC's arguments, citing our amicus in a 93-page decision written by Judge Ambrose and handed down July 17, 2007 (www.acc.com/public/amicus/teleglobeopinion.pdf). The court vacated an order from the US District Court in Delaware that would have forced BCE to produce 900 privileged documents, remanding it back for further examination. But they didn't stop there. They all but wrote a handbook on how parents and subsidiaries can steer through the tricky shoals of shared legal advice and keep the parent's privilege intact. Along the way, the court discusses a number of major issues and doctrines, including (1) the attorney-client privilege, (2) the disclosure rule and the requirement that communications be in confidence, (3) privileged information sharing under (a) the co-client or joint-client privilege and (b) the community-of interest or common-interest privilege, (4) the exception for adverse litigation, and (5) the problems that arise when the interests of the clients in the joint representation begin to diverge.

What I'll discuss further below and what the court held is this: There's nothing wrong and a lot right with the concept of in-house counsel providing legal services across corporate family lines. But there are risks and they can be addressed with forethought. Indeed, it is advisable for in-house counsel to have paperwork in place so that the moment parent and subsidiary realize their interests might diverge through spin-off, insolvency or sale, the parent can sever its legal ties and counsel arrangement, and get the subsidiary separate legal counsel. But, as these deals can take months to play out, there's no reason the parent can't then continue to provide the subsidiary with legal advice on other non-related matters without putting its privilege at risk.

Good advice, but of course, when is "the moment" of realization, how can the shared legal services relationship be effectively severed, and what is now to be avoided as conflicted representation, and more?

ACC has created an important article (www.acc.com/public/attyclientpriv/parentsbcprpsntethics.pdf) that reviews the following issues for your consideration to avoid learning BCE's lesson the hard way:

- When, and to what extent, the representation of wholly or less than wholly-owned entities by a single in-house legal department raises conflicts issues for in-house counsel.
- An overview of attorney-client and work product privilege in the context of multi-entity enterprises.
- Conflicts and privilege issues that can arise once the decision has been made to sell an entity or its assets, or once the sale has been completed.

* Please note that this article was written before the BCE case was decided, and while we're amending it to reflect the impact of this recent decision, it may not be finished with those revisions by the time you read it!

Further, we suggest that you may wish to consider executing a form of a joint defense agreement if you/your legal team provides services to multiple entities in the corporate family. A joint defense agreement allows a counsel for one client to work with another client on matters in which they share common interests, and which they agree do not present conflicts. A joint defense agreement asks the parties to recognize that the lawyer represents one of the clients and the lawyer's loyalties will remain with that

client should common interests at some point diverge. Thus, if a conflict arises in the future, the joint defense relationship is automatically severed. It's a neat little tool that's simple to execute and helps protect both you (professionally), and your client (in case business interests diverge in the future) resulting from your services provided across the corporate family. (www.acc.com/vl/index.php?action=search&full=yes&anytext=Joint+Defens.)

I've borrowed and consolidated some of the themes from our overview of joint representation in a multi-entity environment for your consideration below. Thanks and cudos go to Peter Jarvis of Hinshaw & Culbertson, one of ACC's ethics specialists.

Current-Client Conflicts of Interest in a Multi-Entity Setting

There is no general black letter rule of professional conduct that defines the term "client," and a favorite on the in-house counsel ethics hit parade is always the topic of identifying the client in thorny situations. On the other hand, ABA Model Rule 1.13, Organization as Client, provides a starting point: I've included some of the pertinent sections below:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows, or reasonably should know, that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [regarding certain conflicts of interest]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

According to Comment [1] to this rule, the words "Other constituents" refers to "the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations." Thus, it does not expressly include all ostensibly related entities. On the other hand, "constituents" can certainly include entities that are stockholders in other entities, and the rule more broadly acknowledges that representations may cross single organizational lines.

If, in fact, any non-clients appear to be in doubt about whether the lawyer represents them, the lawyer must explain that she does not. See *id.*; ABA Model Rule 4.3. Whether in a context of entity or individual clients, the test developed in caselaw and in ethics opinions to determine who is and is not a client, depends upon the subjective belief of the putative client and secondarily on proof of facts that it was, at least to some degree, reasonable for the client to hold such a belief.

Stated another way, in-house counsel who actually provides legal advice to multiple entities, or who allows those entities to form the reasonable belief that they are clients, will be held to have multiple clients. Once this conclusion is reached, the attendant duties of loyalty and confiden-

tiality that are part of the representation of any client apply to these intended or unintended entity clients. As a practical matter, the only way for counsel to seek to limit these duties once they attach is first expressly to disclaim them (in writing, if at all possible) and then to make sure that her conduct is consistent with any disclaimers. And the only way to be certain that an attorney-client relationship is at an end is to end it clearly and unambiguously. When a client has reasonable, ongoing expectations of a relationship based on a history of past work, a court may view the relationship as a current-client relationship even though, as of a particular date, the lawyer is not actually doing work for that client.

The Current-Client Conflicts Rule

ABA Model Rule 1.7 is typical of current-client conflicts rules throughout the US and, in fact, has directly been adopted in some form by most United States jurisdictions. It provides in pertinent part that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client; or
- (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) The representation is not prohibited by law;
- (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) Each affected client gives informed consent, confirmed in writing.

The current-client conflicts rules can briefly be summarized in terms of veto power. Although Texas takes a different approach as a matter of state law,¹ the current client always has veto power to prevent the lawyer from acting adversely to that client in all other United States jurisdictions. Indeed, in some situations (which vary from state to state) a lawyer cannot proceed adversely to a current client even with consent. See, e.g., *In re Johnson*, 300 Or. 52, 707 P.2d 573 (1985); Restatement (Third) of the Law: Law Governing Lawyers §128, reporters' note cmt. c (2000) ("Restatement").

It also bears mention that over time, a situation that did not initially present a conflict or require a waiver can develop into one that does. Similarly, a previously valid waiver may have to be repeated if the facts change in material and unanticipated manners. In fact, it is also possible that a situation that began as one in which no conflict existed, or in which only a waiveable conflict existed, can turn into one in which (depending upon the rules of the jurisdiction) continuing representation, even with a waiver, is not permissible. See, e.g., *In re Stauffer*, 327 Or. 44, 956 P.2d 967 (1998); Oregon Formal Op. Nos. 2005-122, 2005-40.

One final point. Legal departments are "firms" within the meaning of the conflicts rules. See, e.g., ABA Model Rule 1.0(c). Unless the situation is one in which screening to avoid conflicts is permitted by applicable law, a cur-

rent-client conflict that is attributable to one in-house lawyer will be attributed to all members of the legal department—the same rule that applies to outside firms. See, e.g., ABA Model Rule 1.10; Restatement §123, cmt. d(i) (2000).

As a general proposition, all representations of multiple "current" clients create at least a theoretical potential for conflicts, but again generally, simultaneous presentation of wholly commonly owned and solvent entities will not usually lead to conflicts problems. When common ownership is less than complete, the potential for current-client conflicts becomes greater—even if one of the entities has a sufficient ownership interest in the other to exercise effective control. When the interests of multiple but related clients are in conflict, conflict waivers must be obtained from disinterested parties in order for the joint legal representation to continue since the in-house lawyer is professionally obligated to its employer-client under the rules previously discussed.

In the situation of an insolvent related entity, it is a matter of black letter law that management and the board of the entity owe their duties to continue to run the entity for the benefit of its creditors, and not for the benefit of its equity owners (as would be the case if the business were solvent). In what are called "deepening insolvency" situations, lawyers and other advisers whose actions increase the degree of insolvency (and therefore of creditor debt) in an attempt to assist the equity owners are at risk of being sued. While there are many unknowns in these situations, it seems relatively clear that in-house counsel of a multi-entity enterprise who wish to act for the benefit of a solvent entity and to the detriment of an insolvent entity, and who appreciate that's what they are doing, act at their potential peril.

So what about the attorney-client privilege—how is it applied in a multi-entity joint relationship? In general, if there is co-representation on an issue, then there is co-attorney-client privilege, which can be enforced against third parties, as well as now-feuding entity family members. (There can be privilege between co-entities sharing a lawyer, as well as separate privilege that is not shared if the entities have their own counsel on non-shared matters, too. They are not mutually exclusive.)

Thus, in Martine's case, the court held that documents created by the in-house lawyers during the joint representation were discoverable to both parties. The dispute arose over documents and communications that took place after BCE claimed it had severed its joint legal relationship on all relevant counseling to its sub. And the court agreed that it is possible to not only sever the joint defense relationship in its entirety on a going-forward basis, but also possible to continue representation on non-disputed matters (say, IP management or environmental compliance) and sever it on disputed matters (relating to financial business decisions, for instance).

Of course, all of the rules pertaining to privilege still apply: it can be waived if confidentiality is broken by any party to the privilege (include the related entity which has received legal services from another family members' lawyer and then divulges the confidential information to a third party), it does not survive the crime fraud rule exceptions, and it does not prevent anyone from investigating facts (since privilege doesn't cover facts, it covers communications and related work product of lawyers). See ACC's resources defining in-house privilege application, waiver, and best practices to ensure that privilege is properly protected: www.acc.com/php/cms/index.php?id=84.

The trickiest part of the equation is figuring out at what point the relationship must be severed in order to be able to claim privilege with lawyers who formerly advised from now-hostile subs: Is the point prior to any "negative" assessments or actions, or upon some form of notice? Or is there some kind of material conflict standard? The answer is not clear, and thus, ACC recommends considering adoption of joint defense agreements between entities sharing legal counsel. This enables the company to notice the affiliates, with whom it's sharing counsel, of what the terms of the sharing are, and also to sever the relationship formally when there is concern that a notice that can be pointed to must be given.

Other Practical Considerations:

- Consider non-representation of some entities: just because you can, doesn't mean you should. Some entities may not be well suited to share your services because of the potential for conflicts or waivers or other issues. It's okay to just say "no" and encourage them to get their own counsel.
- Clearly limit the scope of representation (and do it in writing): don't try to be everybody's lawyer for everything, or you may end up being barred from being anybody's lawyer for anything. If their needs are many, then other family members may need to hire their own in-house counsel or the family may wish to pay for outside representation where it's needed. This is especially important if the affiliate might at some time be sold: where documents are requested by the buyer, it will be easier to limit them to those covered in the scope of representation.
- If you do need to sever the relationship, ABA Model Rules 1.9 and 1.10 allow you to do so, only if you end it prior to any material legal work impacting the severed party's representation has begun. So don't wait to sever a relationship until the matter raising a conflict is too ripe.
- Confirm in writing what will or will not be shared before the representation begins to help ensure that if and when it ends, the files that may be open to both parties are limited to those agreed upon in advance.
- Beware the "sale" of privilege before the sale of assets is considered in a related entity that has shared legal services and is now to be sold. See John Villa's excellent article on this subject at www.acc.com/protected/pubs/docket/nd01/ethics1.php and www.acc.com/vl/index.php?action=search&full=yes&anytext=Villa.
- Watch what goes out the door and act promptly if a mistake is made and something is inadvertently disclosed. Generally, if inadvertently disclosed and quickly remedied, the rules and courts will allow you to put something that shouldn't have been shared back into the privileged "box."

The only thing that's clear is that there is still much that is unclear for the counsel who navigates this twisting path. But the need for, and practicality of co-counseling related entities is so apparent, and the risks attendant to ignoring ill-advised behaviors in related entities is so high, that today's in-house lawyer (and her client) has little choice but to venture forth and provide co-counsel. But, forewarned is forearmed: Exercise caution!

If you have questions or if I can be of service, please feel free to call me at 202.293.4103, x318, or email me at hackett@acc.com. ACC's advocacy and ethics team is waiting to serve you!

1 See Texas RPC 1.6.

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Nominating Committee's efforts to recruit a new secretary to fill the vacancy created by Sally Austin's resignation. I am pleased to announce that Matt Schwartz agreed to serve in this position and the board unanimously elected him as the new secretary. Matt recently transferred to Atlanta from Los Angeles where he was active in the ACC Southern California Chapter. Many thanks to Matt for volunteering to get involved in chapter leadership. I could go on and on, but space does not permit. Suffice it to say that all of the chapter's officers and directors are working hard to provide programs and benefits that are designed to enhance the in-house experience.

ACC National Resources

ACC National provides a wealth of information, programs, and other resources for its members—all of them are specifically designed for in-house lawyers. Each month we will

highlight in these pages at least one aspect of ACC National's program as a reminder about the vast resources for in-house lawyers that membership in ACC provides. This month's article provides information about services and links to websites for members in "transition," i.e., out of work.

Graduation

When you "graduate" from in-house lawyering, whether at the end of your career or "in transition" or otherwise, ACC's goal is that your membership in ACC will have provided you with all of the resources and tools necessary to have had a fruitful and successful in-house experience. Your chapter's officers and directors continue to strive towards that goal. Let us know how we are doing—give us feedback at every opportunity. We always welcome your input.

George Sewell
ACC-GA Chapter President

When You Suspect Wrongdoing

By Anthony L. Cochran¹

Chilivis Cochran Larkins & Bever, LLP

Imagine you suspect your bookkeeper of embezzlement; or your warehouse manager of stealing inventory; or a salesman of using your proprietary information to promote her own secret competing business; or a former salesman of accessing your confidential computer system. What should you do? These scenarios routinely occur every day—they are commonplace.

Many questions immediately leap to mind:

- Do you confront the employee? Or, instead, do you first gather evidence; and, if so, how should you do that?
- Should you call the police, the District Attorney's Office, the F.B.I., your insurance carrier? When should you call?
- Who should undertake these activities? Do you have written policies and protocols that cover such situations? Should you?

All of these are good questions. The answers often depend on the size of your company; whether you have in-house counsel; whether you have a Human Resources Department; how

much money is involved; whether you have insurance coverage; how vital is the proprietary information at risk.

Precipitous action taken before you have accurate, complete information can be disastrous. For instance, you do not want to expose your company (or yourself) to litigation for malicious prosecution. However, you may have to act quickly to prevent further damage to your company. If you act quickly, you may be able to recover money from the perpetrator, or at least minimize your losses.

Recognizing that every situation is different and unique, here are some guidelines to consider:

An ounce of prevention is worth a pound of cure. There should be oversight and supervision in place for everyone – up to the highest level—who handles money or proprietary information so no one can act unilaterally.

Whenever economically feasible, insure against the risk of wrongdoing. More often than not, the money is long gone by the time a perpetrator is finally discovered.

You should have written policies and protocols that cover suspicion of wrongdoing.

Discretion is essential. Information about suspected wrongdoing should be shared on a “need to know” basis, *only*. In conducting an investigation, a threshold issue is determining who should be interviewed. You should carefully weigh the value of the information you may gain from a potential interviewee against the possibility that that person may tip off the suspect about the investigation. To guard against that possibility, it is important to request that interviewees not talk to co-workers about the investigation. Likewise, it is important to advise all interviewees that the company will not retaliate against them in any way because of their cooperation in the investigation.

Many co-workers who are questioned as part of an employer's investigation claim they will talk only if they receive a guarantee that their statements and identity will remain confidential. Many employers agree to such a request without realizing it may be legally and practically impossible to honor that request. The better practice is for employers to tell employees who are questioned as part of an investigation that the company will attempt to maintain confidentiality as best it can, giving information only to those who have a need to know.

If the evidence shows illegal wrongdoing and the employee is not aware that you know of her illegal activities, you have the element of surprise which is one of management's greatest advantages. When confronting an employee by surprise with the evidence of illegal wrongdoing, there is a much greater chance of a confession and cooperation.

On the other had, if the suspect finds out that her illegal activities have been discovered before you confront her, the suspect might request another meeting be scheduled at a later date, request the opportunity to retain counsel, or request a more detailed explanation as to why she is not allowed to work. Often, these requests are calculated to give the suspect more time to create a story and try to lie her way out of the situation. For this reason, discretion is essential.

Speed is essential. As soon as wrongdoing is suspected, you must act quickly in addition to being discrete. Immediately try to get a handle on the situation as to the length of the illegal activity and the amount of loss.

The decision to refer the matter to law enforcement authorities needs to be made very early on in the process. This decision should take into consideration what is in the best interest of the company.

One of the first priorities should be to ensure that no further funds are lost and all evidence is preserved. This could include placing the employee on administrative leave and not allowing them access to the office or to the computer system via the Internet. Secure the computer that contains evidence of wrongdoing. Do not turn that computer on until a certified forensic computer specialist is on the scene and can preserve the evidence properly. The electronic information, e.g., e-mail, in your company's computer system can be very helpful. Do not overlook the metadata contained in the electronic information. If there is documentary evidence, obtain all copies of documents related to the suspected illegal activity.

Because the technology of monitoring conduct within the workplace is constantly changing, employers need to stay abreast of the forms of employee investigations and monitoring that will stand legal muster, and which forms might get the employer, instead of the employee, in trouble.

For example, employers should avoid the temptation to engage in video monitoring or to monitor employees' telephones, voice mail messages or e-mail messages until they have obtained specific guidance from qualified counsel. Intercepting a telephone call and relaying the information to a third party may be a criminal offense. Similarly, federal law provides criminal and civil penalties for intentionally intercepting or trying to intercept any electronic communication, which might include employees' emails.

On the other hand, employers may be able to protect themselves from violating the law by clearly notifying employees that business calls may be monitored, developing policies on the proper use of e-mail, and by obtaining written consent for monitoring phone calls and e-mail.

Any business owner or manager who has been through an investigation involving one of their employees suspected of wrongdoing will know that it is very time consuming and disruptive to normal job responsibilities. The quicker the matter can be resolved, the faster they can go back to operating the business or managing their department.

Utilize appropriate expertise. Anyone who investigates suspected wrongdoing is a potential witness in either a civil lawsuit or a criminal prosecution. Consequently, at least two experienced individuals should always be present when an employee is confronted. The confrontation should be properly documented in at least one of the following ways: a signed statement from the suspect, tape or video recording of the interview, contemporaneous handwritten notes prepared and preserved, or the immediate dictation of a memorandum memorializing what occurred.

If your company does not have employees experienced in investigations, you should retain someone with experience, e.g., private investigators with a law enforcement background. It may well be necessary to engage electronic information technicians to obtain and preserve computer information. Forensic accountants may be necessary to trace and follow the money.

Most importantly, if you suspect someone of wrongdoing, obtain proper guidance and assistance from legal counsel or an experienced professional investigator who knows how to handle these matters. For instance, if the suspected employee is a member of a union, there will be, in all likelihood, a host of questions that will need to be answered by a labor lawyer concerning when and how employees may be interviewed and when a suspected wrongdoer has a right to have representation during any investigatory interview.

The use of polygraphs (consistent with the federal Employee Polygraph Protection Act of 1988) is one investigative technique permitted in certain situations.

Because of the consequences of the wrongdoing, it is far less expensive to “get it right” up front. A bungled investigation can result in the perpetrator escaping or, worse yet, a lawsuit for defamation, malicious prosecution, intentional infliction of emotional distress, etc.

After following the guidelines described above, management and owners of the company often have two choices when they confront the suspected employee: (1) recover the money and

get on with operations, or (2) make a criminal referral to have the person prosecuted.

Often, the decision is made not to take any criminal action and simply get the company’s money back because the loss of productive time and the disruption that occurs when other employees have to participate in the investigation and go to court to testify outweighs the decision to make a criminal referral.

Sometimes the company decides that it is best to refer illegal activity to the proper authorities because the company owes it to their honest employees who do not commit illegal acts to show that the company will not tolerate any improper action on the part of any employee. Also, by making a criminal referral, that employee, if convicted, will have a criminal record that will allow other companies to know of her past activities and protect themselves from her possible future wrongdoing.

If the matter is referred for criminal prosecution, it is out of the hands of the company to control the situation. Law enforcement authorities on either a state or federal level will proceed to investigate and make decisions about whether to prosecute criminal acts, and once you set that machinery into motion, often you cannot stop it.

Often law enforcement will not take a case initially (due to complexity, work load, priorities, etc.) and it is necessary to hire private investigators who can investigate the matter privately and then hand it to law enforcement which will accept the matter for prosecution.

As always, the guiding principle should be what is in the best interest of your company given the amount or value of the potential loss, the precedent that is set for other employees, the effect on employee morale, and your company’s reputation.

1. The author would like to express his gratitude for the contributions made to this article by Tim Huhn of Huhn & Associates, Inc, Marc Foster of Investigative & Polygraph Group, Inc. and Dara DeHaven of Ogletree Deakins Nash Smaok Stewart.

Summer Interns Have Begun Work

Camille Bent Writes About Her Experiences at Coca-Cola and CIBA Vision



As a JD/MBA joint degree student, I knew that the internship offered by the Georgia Chapter of the Association of Corporate Counsel would be a perfect match for me and my interests. Since accepting the offer for the internship, I have worked at The Coca-Cola Company and CIBA Vision Corporation. The Legal Departments at both companies have gone above and beyond to make my experience productive and memorable. The Counsel that I have worked for have given me significant assignments that allow me to make a contribution to the company and its success. My experiences thus far have been tremendously beneficial to my legal education and training. My analytical and research skills have been put to good use with the assignments. In addition, talking informally with various attorneys at both companies has provided me with invaluable advice that has helped me narrow down the career path that will best suit my interests. Overall, I am very grateful for this wonderful opportunity, and I would recommend the internship to any law student who wants amazing networking opportunities and is looking to learn more about interactions between law and business.

Janine Willis Describes the Broad Experience She Has Received at the Home Depot



By Janine Willis

The Association of Corporate Counsel Internship offers an experience unlike any other I have come across. As a first year law student with a growing interest in corporate law, this internship provides valuable insight to the in-house corporate world. During my two-week placement at the Home Depot, I was able to spend time with associates, and counsel from just about every legal department and saw how the business was run and operated in several capacities. With the litigation department, I had the opportunity to sit in on a mediation proceeding, and saw first hand how the Home Depot really strives to work with their customers to reach an agreement that is reasonable to both parties. With the merchandising department, I was able to tackle a real client issue, and worked with counsel to address the client's needs. At Coca-Cola, I have had the opportunity to work closely with counsel from the International Operations Department to answer questions posed by their Mexican counterpart. All in all, I have received extremely valuable guidance and feedback from people that have a genuine interest in seeing me succeed. I have gained a wealth of knowledge and experience, and also have gotten to see things from a vantage point that few in my position have. The Association of Corporate Counsel Internship is, without a doubt, the best opportunity I have had to see how the corporate legal environment really is.

Past President Teresa Kennedy Selected for ACC National's Board of Directors



Congratulations to ACC-Georgia's Past President Teresa Kennedy on her selection to the National board of directors. Teresa was nominated to the ACC National nominating committee in February of this year. Then the ACC-Georgia Board of Directors followed up the nomination with a Board resolution strongly supporting Teresa's qualifications to serve on the National Board. In June Teresa received word that she will be formally elected to the Board at ACC's Annual Meeting next October in Chicago. Teresa's

selection is confirmation of the tremendous contribution to ACC that Teresa has made at the Chapter level and also to ACC National.

Each year ACC National invites nominations for new directors for the board, and it is not unusual for a person to be nominated two or three times before being selected. In a clear demonstration of the high regard that ACC National has for Teresa, she was selected on to the Board on her first nomination. This is a great honor both for Teresa and for ACC-Georgia.

Teresa joined ACC in 1996. During her years of membership, she has served as a chapter director and a chapter secretary, treasurer, VP/president elect and president. She is the immediate past president and continues to serve on the chapter executive committee and chapter board of directors.

Teresa also is active at the ACC National level. She has written articles for ACC Docket and Corporate Counsel magazine on topics such as work-life balance, trust between inside and outside counsel, evaluating and creating effective compliance programs, and marketing law. She joined ACC Docket Advisory Board in 2000 where she continues to serve. Teresa participated at ACC Annual meetings as a speaker in 2003, 2004, and 2005, and she has

attended ACC's Leadership Development Institute four times.

In her "day job," Teresa is assistant general counsel for Cox Communications, Inc. in Atlanta, Georgia. Teresa's responsibilities include oversight of Cox's corporate compliance program and providing legal counsel to Cox's Programming Department and to Cox Media (Cox's advertising sales subsidiary). Her practice included a wide range of general corporate matters, such as mergers and acquisitions, corporate governance, and SEC filings. Teresa received a Bachelors of Science Degree, with highest honors, from Auburn University. She is a 1981 graduate of the Vanderbilt University School of Law, where she served as executive editor of the Vanderbilt Law Review and received awards in Moot Court and American Jurisprudence.

Schedule of Upcoming Programs

September: "Annual Employment Law Update"

Sponsored by Seyfarth Shaw

October: TBA

November: "Premises and Other Liability Issues"

Sponsored by Swift Currie McGee & Hiers

December: "A Special Holiday Surprise"

For more information on upcoming chapter programs, go to www.acc.com/chapters/georgia.php.

The First Annual ACC-GA

Charity Golf and Tennis Tournament!

Join us for a great day playing of golf or tennis at an amazing location, followed by a reception and silent auction, all for a wonderful cause! Registration and details can be found at accgolf.golfreg.com.

When: October 1

Registration: Begins on the web site August

Where: Atlanta Country Club, Marietta, GA

Sponsors: 22 total

Proceeds Benefit Pro Bono Partnership of Atlanta

Save the Date!

On Saturday September 15, the ACC Georgia Chapter will again sponsor a National Day of Service opportunity for our members. The chapter would like to invite you and your family to join your other chapter members in this unique project. The chapter will participate in a work day at the Foster Care Support Foundation.

If you are interested in this volunteer opportunity with your fellow chapter members, please email our chapter administrator, Lisa Smith, at laotsu@bellsouth.net and sign up by September 1 as the size of the group may be limited. Please advise how many family members will be in attendance and the ages of any children under 18. More details and driving directions will be provided for those who sign up for this opportunity.

Thanks for your support as we make this a worthwhile event for the ACC Georgia Chapter.

Below is a brief description of what we will be doing on September 15. If you are interested in learning more about the Foster Care Support Foundation, please visit their web site at www.fostercare.org.

Foster Care Support Foundation

Assists Georgia's Foster Children by volunteering at the Foster Care Support Foundation, an all-volunteer community resource dedicated to providing clothing, toys and infant equipment to basic foster care families and children. A large group of volunteers are particularly needed on September 15 to prepare packages to be mailed to foster children throughout the State of Georgia.

Age Limit: 12 and over

Limit: 30 volunteers

Time: 10:00 AM to 2:00 PM

Location: Foster Care Support Foundation, Inc.

Data Security Explodes as a Retail Issue

Ted Claypoole,

Member, Privacy and Data Protection Team

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Prior to the recent implementation of Payment Card Industry (PCI) Data Security Standards, many business executives were hesitant to spend extensively on information privacy and security improvements. They could not see concrete examples of a data security breach or failure causing serious and expensive problems for any non-regulated businesses.

But now the blossoming fallout from the TJX security breach provides that example and illustrates the serious and lingering costs of recovery after a breach, as well as the need for constant vigilance in data security efforts. Between the huge losses suffered by TJX and the bank-imposed PCI requirements, retailers are rushing to comply.

TJX Companies Inc., the parent company of clothing retailers T.J. Maxx and Marshalls, continues to suffer from a massive and highly-publicized customer data breach. The breach already has cost the company millions of dollars, and TJX likely will face additional costs in the future.

On May 15th, the company announced that it took a charge of 3 cents per share (\$12 million after tax) to pay for legal fees, data security upgrades and customer communications. These expenses stem from a January admission by TJX officials that hackers had broken into the company's payment systems and stolen 45.6 million credit and debit card numbers over a nearly two year period. In terms of sheer numbers of records, it is the largest data security compromise in U.S. history.

The recent \$12 million charge for the first quarter of 2007 is in addition to \$5 million spent in the previous quarter. The company also announced it expects to incur another charge of 2 to 3 cents per share in the second quarter of 2007, plus more costs loom down the road. TJX already faces several lawsuits,

including a major suit from the Massachusetts Bankers Association seeking tens of millions in restitution, stemming from the customer data loss. The Federal Trade Commission also has announced it is investigating TJX. The millions in losses described here do not capture the damage to the company's reputation in the eyes of consumers, financial regulators and banks.

In another sobering note, damage from the TJX security breach has spread to businesses working for or with TJX. For example, TJX's bank, Fifth Third Bank, has been named as a defendant in some of the cases arising out of the data theft, on a theory that the bank was responsible for ensuring its merchant customers met their data security obligations. The vendors who sold TJX its data management systems could also be at risk as targets of litigation.

While the TJX matter involved outside hackers, in July the Boeing Corporation admitted that one of its quality assurance employees seems to have stolen over 320,000 company files over the course of two years. The employee has been arrested, but the damage still remains, illustrating the importance of building security systems to protect data from outside intrusion, but controlling internal access as well.

In addition to legal liability for lost customer data, companies now face stricter regulation from the credit and debit card companies. The new Payment Card Industry Data Security Standard Version 1.1, enforced by banks and payment card associations, took effect on Jan. 1. Merchants who accept payment cards (both credit and debit) must establish a number of security procedures including:

- Maintaining a secure computer network, which includes installing firewall configurations;
- Protecting stored customer data;
- Encrypting customer data when it is transmitted;
- Restricting access to customer data on a need-to-know basis;
- Regularly testing security procedures; and
- Having a policy to address customer data security.

Failure to comply with the PCI data security standards may lead to several hundred thousand dollar fines or even to revo-

cation of a business' right to accept credit cards from customers.

On May 25, 2007, Minnesota became the first state to adopt a law requiring businesses that fail to implement adequate security measures to pay costs that third parties incur due to those failures. Like the PCI data security rules, the Minnesota law allows financial institutions the right to recover certain costs from retailers losing data due to poor security practices. The Minnesota law provides for reimbursement of costs to notify cardholders of a security breach, to close and reopen accounts, to cancel and reissue cards, and to refund certain unauthorized charges.

The Texas House of Representatives has passed a bill that requires all businesses accepting credit cards to comply with all the PCI data security standards. Similar bills are currently under consideration in Illinois, Massachusetts and Connecticut, among others.

Nearly any business that handles confidential customer information is at risk of a data breach or theft. However, companies can learn from the TJX situation and take steps to help protect their business from similar catastrophes.

The first step is a comprehensive internal audit, questioning how customer financial data and other confidential information is stored, and who has access to such information. Conducting such an audit and then following the auditor's recommendations can provide a layer of protection to any company, establishing that the audited company made good faith efforts to learn and meet the relevant industry data security standards, even in the event of a data breach.

For similar protection, companies should engage outside experts to review security policies and procedures, and establish that the companies are taking reasonable precautions to secure customer data.

Thinking About Expanding Your Business? A Snapshot on Investing in Canada

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Partner

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Canada and the United States enjoy an economic partnership unique in the world, sharing one of the world's largest and most comprehensive trading relationships. Growth in bilateral trade between Canada and the U.S. has averaged almost 6.0% annually over the last decade. In 2005, bilateral trade in goods and services was \$709.5 billion, with over \$1.9 billion worth of goods and services crossing the border every single day. For this reason, Atlanta area businesses looking for their first international foothold invariably look to Canada first.

While Canada is geographically proximate and closely tied to the U.S. by a common language and culture, there are dis-

tinctive legal, business and regulatory differences of which any business looking north of the border should be aware.

Taxation

Tax considerations will drive the structure of virtually any expansion into Canada. If it is desired to consolidate the Canadian operating results with those of a U.S. parent for U.S. tax purposes, consideration may be given to using a fiscally-transparent entity such as an Alberta or Nova Scotia unlimited liability company. Such entities are taxed in Canada in the same manner as any other Canadian corporation. It is also possible to carry on business in Canada through a branch of the U.S. parent. There may be Canadian withholding tax on cross-border payments of dividends, interest, or royalties. Canada's tax treaty with the U.S. contains certain exemptions from and reductions in Canadian withholding and other taxes that may be applicable in certain circumstances. Canadian transfer pricing rules require cross-border payments for goods and services to be made on arm's-length terms.

Foreign Investment Review

Every acquisition of control of a Canadian business, or the establishment of control of a new Canadian business, by a non-Canadian is notifiable or reviewable under the *Investment Canada Act*. Generally speaking, an investment that is reviewable cannot be completed until the responsible federal Minister has declared the investment likely to be of 'net benefit to Canada'. A monetary threshold test applies to the determination of whether an investment is reviewable. A higher threshold applies to investments by non-Canadians that qualify as 'World Trade Organization investors' or to acquisitions from 'WTO investors' that are not Canadians. This higher threshold does not apply to investments in the following sensitive areas: uranium production, transportation services, financial services and culture businesses.

Beyond the *Investment Canada Act*, there are Canadian ownership and licensing restrictions on businesses providing, among others, telecommunications, transportation and financial services. Canada has also identified certain culturally sensitive areas, such as publishing and broadcasting, that may be subject to ownership restrictions.

Corporate and Securities Laws

Canadian corporate legislation exists at both the federal and provincial levels while securities legislation only exists provincially. M&A transactions are broadly similar to those in the U.S. Private transactions are effected as share or asset purchases while public transactions proceed as take-over bids (tender offers), amalgamations (mergers) or plans of arrangement (a court supervised process more flexible than a merger).

International Trade

Canada is a member of the World Trade Organization and a party to the various WTO trade agreements. Canada and the U.S. are both parties to the North American Free Trade Agreement. Therefore, many of Canada's customs and trade laws should be similar to those applicable in the U.S.

All goods imported into Canada are subject to Canada's customs and sales tax laws. Issues such as tariff classification, valuation, origin, marking, and labelling should be considered before commencing to ship goods to Canada. It is important to properly structure the Canadian business in order to minimize or eliminate customs duties and taxes whenever possible.

Determining whether NAFTA rules of origin are satisfied (and supplying documentation if they are) will avoid potential civil liability for non-compliance with customs laws and manage customs costs.

As Canada's *Export and Import Permits Act* imposes significant restrictions on the movement of goods into, around and out of Canada, it may impact the valuation of operations and strategic planning. However, virtually all domestic regulation in Canada is subject to NAFTA, and certain American parties may request review of an alleged violation by a NAFTA panel.

Antitrust

Mergers that exceed certain prescribed thresholds are subject to mandatory pre-merger notification under the *Competition Act*. These mergers cannot be completed until the parties have submitted their respective notifications and the mandatory waiting period has expired, been waived or terminated early. All mergers, regardless of whether they are subject to pre-merger notification, are subject to the substantive provisions of the *Competition Act*.

Intellectual Property

Canada's patent eligibility is based on "first to file", unlike its American "first to invent" counterpart. Novelty bars, the obviousness test and prosecution history estoppel all differ vastly from the U.S.

The importance of licences is heightened in Canadian trademark law, which requires licenses even for wholly-owned subsidiaries. Canada has not adopted the Nice International Classification System, which provides a distinct cost advantage. Registrants can also renew trade-mark registrations without proof of use.

Privacy

Canadian privacy legislation requires informed consent to the collection, use and disclosure of personal information, instead of merely notice of those purposes as permitted in the U.S. Public as well as non-public personal information is covered by legislation, which applies to affiliated organizations and third parties. There are both provincial and federal privacy standards that apply to the collection, use and disclosure of personal information before, during, and after a transaction.

Information Technology

Federal misleading advertising, provincial consumer and French language protection laws may apply when parties use the internet for sales or advertisement purposes.

Provincial sales taxes may apply to software licences depending on the server and user locations. This may result in double tax if not structured strategically. Custom software use by an

affiliate may result in loss of provincial sales tax exemptions.

Blake, Cassels & Graydon LLP is a national Canadian law firm with offices in Toronto, Montréal, Ottawa, Calgary, Vancouver, New York, Chicago, London, UK and Beijing. If you have questions about investing in Canada, please contact partners Michael Gans at 212.893.8416 or michael.gans@blakes.com, or Gail Lilley at 416.863.2647 or gail.lilley@blakes.com.

Growing the Business

Early last year, we wrote an article introducing Georgia's new Business Court, a division of Fulton County's Superior Court system. (See *Open for Business*, ACC Docket, Quarter 1, 2006.) This court was created for and currently exclusively handles complex commercial litigation with over one million dollars in controversy. In June it will be two years since the Supreme Court of Georgia approved the Business Case Division and it has been over a year since the Court took its first case.

At the time of our previous article, cases were just beginning to trickle into the court and had not progressed sufficiently to see if it really could deliver the specialized service, expedited discovery, and scheduling ease that it promised. Therefore, we agreed to follow up after litigants had some time to operate in the new forum and possibly resolve some disputes to see how participant attorneys rated their experience. At the writing of this article, the Court had 17 active cases and had closed 8 cases, including its first jury trial in January 2007.

Overall, the Court receives a positive rating from the participants interviewed, and all participants interviewed would return to the court if litigating the "right type" of case. Generally, the "right type" of case included one that had extensive discovery, voluminous documentary evidence, complicated issues, or a high number of interested parties.

Attorneys unanimously remarked that the judges were extremely accessible. Generally, litigants felt that the court would get involved quickly if it did not feel that attorneys were moving at an appropriate pace. This court involve-

ment improved the speed of discovery. One attorney boasted that despite the fact that numerous parties were involved in his litigation, depositions concluded in a five-to-six month span, where in other courts the time span would have lasted at least several more months. The same attorney noted that where his participation in the litigation could have dragged out for years in some courts, in this Court it only lasted one year.

Most attorneys also felt that the judges were more knowledgeable about their particular case and circumstances. Attorneys felt that when they went before the Court for motion hearings, for example, the Court was ready for the issues because the docket was not as crowded as in other courts. They also felt that the judges had greater expertise in addressing the sorts of legal issues raised by these cases than non-Business Court judges.

If attorneys are pleased with the attention that they have received in the Court, the Court, appreciates the attention that the Bar has afforded it. While being interviewed for this article, Judge Alice Bonner specifically noted that the private sector has supported the Court in a number of ways and expressed her gratitude for the support. Several business lawyers in the State Bar have provided monthly seminars at the courthouse on topics of special interest to the Business Court judges. Additionally, nearly a dozen firms have allowed Judges Bonner and Elizabeth Long to speak with their attorneys to raise awareness and promote the Court. Of course, support continues from William D. ("Bill") Barwick, who was president of the Georgia State Bar when the Court was formed, and Ray Fortin, who began and oversaw the campaign for the Court's conception.

Undoubtedly, Judge Bonner also feels that the Court has thus far been a success, and she easily pointed out some of its perceived advantages. Besides the increased availability of the judges, she feels that the Business Court is able to cultivate a more collegial and collaborative culture for the lawyer participants than in other courts. Judge Bonner recalls that in several of her cases lawyers actually met each other for the first time at the status conference and openly shared their views of the case with each other. She believes this leads to early resolution and indeed a couple of her cases have settled this way.

She also believes that the Court allows for predictability in scheduling, but with some measure of flexibility as well. For example, during the status conference, lawyers have the ability to provide their input into scheduling, but then dates and deadlines get set. This means that from the day the lawsuit is accepted, lawyers know the trial date and other important deadlines, though there is still the opportunity for the parties to agree with the Court on extensions due to unforeseen circumstances. This allows the parties and the lawyers to plan better, avoiding last minute surprises, and avoids unnecessary litigation expense due to slipped deadlines and uncertain trial dates.

Despite everyone's readiness for trial, Judge Bonner still has not had a case go to trial. She has one summary judgment ruling up on appeal. Her other cases have all resolved, which is certainly a measure of the success of the Court.

Attorneys and Judge Bonner had a few comments or suggestions about the future direction of the Court. One attorney suggested that the strict voluntary nature of the Court should be reconsidered since in a case with so many parties, one party could stop entry. To this suggestion there is a Proposed Rule Amendment that passed the Board of Governors' April 11, 2007, meeting and now will go before

the Georgia Supreme Court for final enactment. The Proposed Rule Amendment allows for the transfer of a case to the Business Court upon the discretion of the assigned Judge or the motion of one party. It carves out specific types of cases (i.e., personal injury, wrongful death, employment discrimination, and certain consumer claims), and importantly, it provides for a 20-day briefing period for parties to object to transfer before a final transfer decision is made.] Another comment offered that it would be beneficial to open this style division or even this Court to large or complex cases outside of commercial litigation, citing mass tort claims as an example. Some also wanted the Court to consider eliminating the \$1 million minimum amount in dispute in order to not arbitrarily prevent complex cases or cases otherwise well-suited to the Business Court from being accepted.

Some attorneys felt concerned that once the docket reached a heftier load, the benefits of the Court may be diminished. Judge Bonner herself is concerned about maintaining the level of individual attention if or when the docket becomes overcrowded. However, that has not happened yet, although eliminating the \$1 million requirement might open the door to many more cases, including matters that involve an issue of timely injunctive relief, which could have an impact on the ability of the Court to function as efficiently and swiftly as it is currently.

It is still early. One assumes that there will be changes and fluctuations as the division learns, stabilizes, and grows. However, it is undeniable that this experiment already has had successes. We look forward to seeing its performance in the future.

You can find more information on the court at the Fulton County Superior Court website – www.fultoncourt.org. Click Business Division.

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ACC Georgia Needs You!

Although Chapter monthly luncheons are on summer vacation until August, your board continues to be hard at work. Among our top priorities: formation of a Nominating Committee and recruitment of candidates for the 2008 chapter board.

ACC Georgia's Nominating Committee typically includes a diverse group of members who recruit and interview prospective officers and directors. This critical function takes only a few hours of time and the group's work establishes a solid foundation for our chapter's continued success. Members interested in serving on the nominating committee should contact committee-chair Teresa Kennedy at teresa.kennedy@cox.com.

The chapter's board, like the nominating committee, serves as the foundation for the chapter's development and success. Board service offers an opportunity to exercise leadership skills, enhance professional relationships, and directly impact the course of our chapter. If you are interested in "giving back" to the Georgia Chapter through board service, or would like to recommend a candidate for the 2008 board, please contact Teresa Kennedy.

Advance Your Career; Find Your Next Hire

If you are looking for a new lawyer for your in-house department or looking for your next career move, check out ACC's In-house JoblineSM, the premier career website for the in-house community. Here are a few reasons why:

For job seekers:

- Find positions that match your specific criteria, including practice area, geographic location, and job title.
- Browse more than 1,100 current job postings.
- Post your resume for free.
- Explore the online career center, featuring compensation data, and career advancement advice.

For employers:

- Find the right match for your department from the thousands of qualified candidates registered on the website.
- Receive automatic notification when candidates who meet your criteria add their resume to the website.
- Take advantage of a discount on job postings, only for ACC members. Move to the next level with ACC's In-house Jobline: www.jobline.acc.com.