



Lisa Whitney
President's Message

Dear
 Greater
 New York
 Chapter
 Members:

The first quarter of 2007 has passed and your chapter board and committee members are planning some important events that will be of interest to you.

Ethics Marathon and Chapter Annual Meeting

I am proud to announce that the chapter will hold its annual Ethics Marathon and annual Meeting on June 19. Pfizer has graciously offered to host this event at their offices with a continental breakfast and lunch provided. This event will be free of charge for chapter members. There will be seven panels providing you with multiple chances to earn your required CLE Ethics Credits, while still being able to pick and chose from the topics that mean the most to you.

Two separate panels will discuss ethics in the workplace and employment law issues, such as: Blogging in the Workplace; Enforcement of Employee Handbooks; Global Issues for an International Employer; Privilege & Ethics Nightmares; Conducting Internal Investigations; Employee Evaluations; Diversity; Privacy Employee References; and more.

A third panel will focus on ethical issues facing in-house counsel in a multi-jurisdictional corporation.

A fourth panel will discuss lessons learned from the Hewlett Packard situation including how to conduct investigations and respond to the media and deal with outside directors.

A fifth panel will focus on ethical issues that arise in doing business globally, including foreign corrupt practice laws and merger and acquisition issues.

A sixth panel will address ethical issues in creating a records retention policy, including litigation concerns and meta data issues.

The final ethical hot topic will discuss legal ethics and financial services and banking, with a focus on the suitability of the sub-prime market.

To top it all off we will also hold the chapter's Annual Meeting where your vote and voice count. The day will end with a cocktail reception for you to network with your in-house colleagues.

The Ethics Marathon will be free of charge to members in good standing. In-house counsel who are eligible for membership, but who are not members, will be charged \$225.

Membership Survey Winners Announced

I would like to thank all members who participated in the membership survey. Your input was invaluable. As you know we advised you that members who participated in the survey would win a \$200 gift certificate to a fine New York Restaurant. I am pleased to announce that through a generous donation of our member Timothy Bartley, general counsel of the Charlie Palmer Group, there now are three \$200 gift certificates for our lucky three participants.

Member Participation Wanted

I have been very pleased with the number of members who have contacted me wanting to get involved with the chapter. The members' participation is the most important element of a successful organization. ACC wants you! So let me or any of your board members or committee chairs know if you would like to become more involved in the chapter.

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Employment Law Committee Meeting

The Employment Law Committee held a roundtable called “Ranting About Retaliation” on February 8, hosted by Chair Maryrose Maness, senior assistant general counsel of Altria Corporate Services, Inc. The discussion was led by Philip Davidoff, a partner in the New York office of Ford & Harrison LLP. Phil examined how the law of employment retaliation has changed in the Second Circuit after the Supreme Court’s recent Burlington Northern decision, and reviewed recent or significant decisions which illustrate the three components of a prima facie Title VII retaliation case: known protected activity; adverse action; and causation. Burlington Northern defined “adverse employment action” broadly, meaning that employers are now at risk for challenges to small, as well as major employment decisions, and even actions which may affect an employee outside of the workplace. The group shared experiences and discussed strategies, including heightened communication between counsel and management when a current employee has filed a charge or lawsuit.

The Employment Law Committee plans to meet again on Thursday, September 27, to determine the Parameters of Workplace Privacy. Please register early; the last meeting was so popular that not everyone who wanted to attend could be accommodated.

Better Ingredients, Better Pizza. (And Smarter Lawyers)

On March 21, Forty ACC-GNY members converged on the Madison Avenue offices of Frankfurt Kurnit Klein & Selz for a two-hour presentation on advertising and marketing law. The event was titled “How to Avoid the Legal Traps in Your Company’s Marketing Efforts.” Frankfurt Kurnit partners Rick Kurnit and Candice Kersh presented together with ACC-GNY Board Member Elaine Reiss—general counsel to the Environmental Simulation Center.

Ms. Kersh focused on when advertisers need to have “substantiation”—statistical or other support—for product claims made in their ads. “One key issue,” said Kersh, “is whether the messages in your ads are mere ‘puffery,’ which does not require substantiation, or whether they constitute product claims that do require substantiation.” She also helped the audience understand the many issues and challenges to “comparative advertising.” She finished with a discussion of some of the challenges advertisers face when embarking on branded entertainment projects, and suggested some potential solutions and best practices.

Rick Kurnit followed with highlights of copyright, trademark, and publicity rights clearance issues. He underlined the risks arising from new technologies, and the ability of marketing departments to create and publish materials without involving outside firms that specialize in marketing communications.

Rick also focused on the inadequacy of old form agreements for the use of photographs or illustrations. “Your purchase orders must explicitly include ‘work for hire’ language and be signed at the outset of the engagement,” said Kurnit. “Otherwise suppliers of creative materials can sue you for reusing materials in new executions beyond the scope of the initial project.”

Kurnit urged the audience to train their marketers to understand IP rights and to separate the “inspiration” for their ads from the “execution.” “This way, you reduce the risk of having the protectable elements of materials used to create the preliminary version creep back into the final execution.”

Elaine Reiss closed with sound advice for corporate counsel on how best to communicate with their marketing departments and establish systems for legal department oversight.

Viva la Revolution?

By Susan Hackett, Senior Vice President and General Counsel, ACC

Am I the only one who sees the pink elephant dancing in the room? I'm still waiting for the in-house counsel community to rise up and protest, but the silence is deafening. What's going on out there? Many of the top-tier law firms announced their most recent round of first-year associate pay hikes, and though the legal press reports one major firm after another following suit, there's been surprising little action in response from the in-house bar. Disgust? Sure. But no hint of the revolution that I thought was coming. In-house counsel of the world: Who's managing your legal spending—you or the firms?

Let's do the math. Be conservative and say that an average employer pays about one-third of an employee's pay on top of their salary in order to offer benefits (such as paid vacation/sick time, health, life, disability insurance, retirement or 401K-type contributions, etc.). The newly announced first year salary level of \$160,000 plus \$50,000 in benefits takes us to a total of \$210,000. Then there's overhead, including a portion of the law firm's high-market rent, top-notch administrative support, computer, library, other office technologies, and the art-filled lobby. So let's add another \$100,000 on top of the previous \$210,000, and for the sake of keeping it simple, let's say that our highly recruited first year associate is now costing the firm \$300,000 year. Every associate will get this hike, even the not so competitively recruited ones get it.

That doesn't even take into account the cost of the cocktail-cruising summer associate program, the firm's high-power recruitment, or the cost of attrition. For every 10 of those really expensive first years less than half will make it to partnership and profitability before they're either pushed out or run screaming from the building.

Then, there's the added bonus that the majority of big firms operate on a lockstep salary system for associates, so a raise for the first-rung associates necessitates a corresponding \$15,000/year increase (at least) for every other successive class. This way, the natives won't feel bad that the least experi-

enced workers who've labored a shorter time are making more than them. Let's say, conservatively, that the \$300,000 cost of a first year associate, when combined with the very real costs of attrition and recruiting, brings us to a nice "blended" rate of about \$400,000/year in costs.

Who's paying for this? Do you think that when the decision is made to up first-year salaries that the partnership votes to take less money to pay for it? Or do you think that the associates will be expected to "earn their keep?" The latter is a nicer way of saying that clients will be billed for the over-worked first-year associates' time and efforts, and the associates will be expected to perform the feat of billing more than anyone thinks they're worth. Both clients and associates lose.

I'm having so much fun with the math, I think I'll keep going.

If you assume that every one of those associates will bill 2,000 hours that can actually be invoiced to a client (as opposed to a certain amount of time that will be billed, but written off as non-collectable for pro bono, incompetence, client objections, learning curve, you name it), that means that their 2,000 hours will have to be billed at an average of \$200 per hour in order to reach the break even point. We all know that firms don't charge associate rates to break even. Large firms bill up to \$400 per hour for these newcomers.

Perhaps a few of those new-to-the-profession associates are so smart or have amazing previous experience, making them worth every dime of \$200+ per hour, and perhaps every one of their 2,000 hours billed is actually providing efficient and meaningful value to the clients they serve. But perhaps the vast number of those hired—smart, hardworking, and deserving as they are—are worth nowhere near \$200 per hour.

Do you remember how much you knew or what your functional worth was the first day you entered the workforce to take your first "real" job? I remember feeling incredibly incompetent and very confused that I'd not learned any of the stuff that I needed in

private practice during my summer work, or in law school. Indeed, law school may teach students how to think like a lawyer, but it does very little to produce graduates who are capable of providing valuable and efficient legal services right out of the box. And that's okay, the value of a lawyer is something that's learned and earned over time with hard experience. But clients are expected to pay for it from day one, since firms don't seem to think it's their cross to bear, and I don't see associates volunteering to do internships until their services are worth what they're charging for them either. Most attorneys in the corporate bar are willing to pay for entry level associates working under supervision; it's how it's done...but at a rate that within the last five years was reserved for only the most experienced partners? Come on.

Sanity check: You can hire an incredibly smart and experienced partner-level lawyer in the next town over from New York or DC or Chicago or LA who bills at \$250 hour, and who can do the same work with a better result in half the time. That lawyer is very likely a refugee from the big firm and every bit as smart. Let's not forget about those nice folks in India or Iowa or ConsultantLand, or about your favorite vendors who will do the work for even less.

Sanity check: The members of the federal judiciary, who we hope will be composed of the best in our profession, and who must be attracted to engage in public service on the bench at the pinnacle of their careers, are paid less than these new first-years. Most of these newbies will make more in their first year than an associate justice of the US Supreme Court. Our underpaid judiciary is not the fault of large law firm associates, but it's a sign of how out of whack the law firm world's artificial pricing structure is.

Sanity check: Most new associates spend their time—as they should—learning the ropes by doing legal drudgery: endless, painstaking research; document review and shuffling through terabytes of discovery material; making necessary appearances and filings in courts; writing form contracts and

pleadings; and hopefully learning their craft at the elbows of their seniors who have the experience necessary to bill \$500 per hour and more for their time and counsel. Associate apprenticeship is necessary and supervision of those on the learning curve is professionally mandated by every state's legal regulations, but billing for the time of the supervising lawyer and the learning associate is part of a time-honored legal tradition that often amounts to double-billing. Those in the non-law-firm vending community who can expertly perform a variety of the services performed by first-years at a third of the price are gaining ground and expanding their business lines daily. Why not hire a legal research company or a team of ediscovery consultants to do document work, or another in-house paralegal to do the routine and repetitive contracts and pleadings work? I hear of more and more in-house counsel who: 1) won't pay for entry level associates any more—they are "outlawed" in the retention letter, 2) mandate that their firms work with vendors on some of the less exciting aspects of the case or matter that can be severed and done for a fraction of the firm's costs, and 3) give increasing amounts of work to a couple of savvy law firms who've started creating and offering those alliances with preferred out-sourcers so that they can be more efficient.

Sanity check: Many of the best and brightest students graduating from school today say that they don't want to work the hours or make the sacrifices that their senior partners did when they entered the profession. But they'll take the money, thank you. They'll still apply for the jobs in firms where they know that they're expected to put their lives on hold in perpetuity in order to earn the salary and have an eventual shot at a seven-figure income. And their partners, unable to get over their own frustrations, will continue to demand the same rituals of crazy hours that caused their pain.

Sanity check: Who says that firms that are paying these rates will recruit the best talent? Skyrocketing salaries and the need to bleed revenues from the resulting associate

classes will do more to prevent these firms from hiring anything other than driven and "pedigreed" applicants, even though that may not be the only kind of talent that clients want. Perhaps what clients actually want is not the editor of the law review from one of the 25 "top 10" law schools in the country. Perhaps they want talent more broadly defined: experienced, diverse, and with life experiences beyond those normally held by the majority of "highly-pedigreed" graduates. Maybe clients want lawyers with a more developed ethical compass to work on their complex corporate-quagmire problems. Maybe clients are more interested in graduates with a pronounced passion for public service, or who communicate really well with juries, or who—dare I say it? —are actually satisfied with their jobs because they work in a more balanced work environment. There are plenty of bright lawyers who are actually a pleasure to work with because they are happy, and their lives are a bit more balanced with a mix of work and non-work activities and interests. Some of them might be in that rarified air of graduates who get the \$160,000 per year (read: \$400,000) offer; a great many of those people work elsewhere, though, and don't carry the baggage or the price tag of large law firm life.

Every study out there says it over and over: You don't get more—indeed, you get less—from folks who are working at surge capacity 24/7/365. Those workers are less and less productive and more and more inefficient. The business model of hourly billing in firms exacerbates the problem by encouraging work to be done in greater quantity, rather than with greater efficiency.

So who will stop the madness? Are we going to wait until firms announce in 2009 that the class of 2010 will be offered \$180,000? Will that finally be enough? Or have you reached the end of your rope now?

The corporate legal community needs to stand up and exercise its not inconsiderable influence. You and your clients are being

overcharged for legal work in the largest firms. Do something about it. Tell your firms that charge too much that you won't pay increased rates, and that you don't want any of those nice new associates (or their increasingly expensive senior associate colleagues) billing to your account unless the firm can quantify why it is that they'll provide more value to you as the client than a partner in a less expensive firm, or an expert legal service vendor/consultant. Ask why, if the top 20 recruits in the nation need this much, it is that firms can't just give a raise to them, rather than to every associate in the firm's pool? Explain to them that they're killing the practice of law by driving associates into the ground, and that you're not going to help them do it.

Then go out and hire from the abundant pool of talent in less expensive places, whether it be smaller firm lawyers, or lawyers working outside the confines of the really big cities. Let your expensive firms' management know that while you'll miss their high quality work, they've just got it wrong and you won't be forced to pay for their continued lack of business principal and judgment. Remind them that in spite of what they tell themselves and you everyday, there's quality legal service to be had at a fraction of the cost. After all, most of those large firm's mid-level and experienced associates will be secretly interviewing for jobs in your legal department or these alleged "second" and "third" tier firms as soon as they realize that the cycle of pain at the most prestigious firms just won't stop. We all know they'll be willing to take half the pay in order to earn the privilege of working somewhere they're valued for more than the number of hours they bill, but rather lauded for the high quality legal services they're bright enough to provide.

What can ACC do to support you on this matter? We're considering the alternatives and would like to hear your views. Let me know by emailing me at hackett@acc.com. After all, my bill to you is only \$225 per year if you're eligible for membership!

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Upcoming Events

- May 22** Age Suits on the Increase: New Developments in the U.S. and the U.K.
- May 31** Ediscovery and the New Federal Rules: What Counsel and Companies Need to Know
- June 19** 2007 Annual Meeting and Ethics Marathon

ACC: Planning for the Future

ACC strives to be the premier association for in-house counsel and we have made significant strides towards that goal. Consider last year we crossed the 20,000 membership threshold, while averaging a net gain of 1,400 members per year for the past 5 years. The Annual Meeting has doubled in size in 5 years and we expect total attendance to surpass 3,000 people in Chicago this October. ACC Online and the ACC *Docket* provide a wealth of useful and practical information that in-house counsel can use for their professional development. In addition, the committee network continues to expand and the chapter network has never been stronger or more robust.

ACC's Strategic Plan constitutes a critical component of our success. The Board of Directors as well as chapter and committee representatives first developed this plan over 3 years ago. This January, the directors and a group of chapter and committee representatives met to assess and refine the plan based on the results of our recent member needs assessment survey. As a result, two strategic initiatives were added as initiatives for ACC to focus on in the next year or two. This plan provides the guidance and focus that is critical to our recent success and our future challenges.

Here are the major goals of the strategic plan with examples:

- Be the Voice of the In-House Bar by advancing the in-house practice of law and the professional standing of in-house attorneys. (E.g., preserve the attorney-client privilege and promote MJP reform.)
- Provide value to in-house counsel at each stage of their career through targeted resources and services. (E.g., Corporate Counsel University for new in-house attorneys and CLO Think Tanks.)
- Build a global network. (E.g., a thriving chapter in Europe and 1000 members outside the US in 60 countries.)
- Improve awareness of ACC in the in-house community while developing and expanding our brand in the legal and business communities. (Recognition in the media as the source of information about the in-house practice, including such publications as *Business Week*, *Forbes*, *USA Today* and the *Wall Street Journal*.)
- Provide more training on general business and management issues. (E.g., Executive Leadership Institute, Mini MBA Program covering financial and business issues)
- To leverage technology resources and skills. (E.g., enhance our website and expand our use of technology to deliver resources to and facilitate networking among our members.)

Would you like to see your name in print? Send articles for publication in the next newsletter to the Editor, Elaine Reiss, at elainesreiss@hotmail.com.