



Lisa Whitney
President's Message

A Community of Corporate Counsel

Our chapter continues to present a high volume of

excellent CLE programs addressing a wide range of current topics facing in-house attorneys. Elsewhere in this newsletter is a list of offerings this fall, and others are in the planning stages.

Our parent organization, ACC, has vast resources available (see www.acc.com) at no charge above the membership fee—much less than the cost of retained counsel for an hour. Note specifically the Virtual Library research tool, which has a wealth of information, treatises, forms for contracts, and policies, among other things. Another great feature is the In-house Jobline that lists a wide variety of in-house positions that are available around the country. In addition, you will be impressed with the valuable advocacy initiatives that ACC has taken to represent in-house counsel on such critical issues as privilege and multi-jurisdictional practice.

I would also like to talk with you about another extremely valuable aspect of your membership in ACC and its Greater New York Chapter—the community of corporate counsel that the chapter provides. Not only does this lead to numerous personal

contacts—some of my best friends in New York and around the country started as ACC colleagues—but it provides an invaluable network of professionals who can provide the “in-house perspective” on virtually any issue you may face domestically or around the world. While we will maintain our commitment to excellence in our extensive CLE offerings, the chapter is committed to enhancing the networking opportunities inherent in ACC membership.

A great networking opportunity, in an interesting environment, will take place on September 20 at the Agora Gallery in Chelsea. Join us in recognizing excellent in-house pro bono, and use the opportunity to make new contacts while renewing old ones.

Our goal is to expand and enhance committees at the chapter level. The Employment Law, In-transition and Technology Committees are robust. We want to expand this committee structure to encompass other areas that are meaningful for you. As a former chair of the Small Law Department Committee on the national level, I can attest to the usefulness of committees. A high level of member involvement is needed for this to work well. The chapter will facilitate such activities so let us know where your interests lie.

I strongly urge all members to attend the ACC Annual Meeting, October 29–31, in Chicago. That is where you will experience the full impact of ACC as a community of corporate counsel. CLE programs are available for experts and generalists whether from large or small departments. Special arrangements are provided for first time attendees to optimize their participation in the Annual Meeting. As important

continued on page 2

NY ACCA Annual Meeting Features
Ethics and Employment Panels 2

All in the Corporate Family:
Privilege and Co-representation
Issues for In-house Lawyers 3

Programs Recap 5

Truth, Law and Ethics:
A Thirty-Year View 6

Get A Year's Worth Of CLE at
ACC's 2007 Annual Meeting 8

Learn the Basics to a Successful
In-house Career at Canadian CCU . 8

Large Law Department
Joins en Masse 9

Save the Date 9

as the substantive programs arranged by type of practice, are the social activities that are available to get to know your in-house colleagues. You will have a great time and begin to build and expand your ACC network, which can provide practical guidance on a myriad issues.

Finally, all of our CLE programs are introduced by a chapter leader. Please introduce yourself and tell us what you would like the chapter community to help you accomplish. I am looking forward to meeting more members personally.

Lisa Whitney

NY ACCA Annual Meeting Features Ethics and Employment Panels

The Greater New York Chapter of ACC America (NY ACCA) hosted its annual meeting on June 19. The meeting featured a series of panels on employment and ethics issues, and the unanimous election of the proposed slate of directors.

The day-long program, prepared by Robin Dunlop, Zenith Media, and chaired by NY ACCA President Lisa Whitney, took place at the Pfizer headquarters in New York City, with a remote feed at Kraft Kennedy and Lesser.

Margaret Madden, vice president and assistant general counsel, Pfizer, moderated a panel on investigation of employees, discussing what advisories must be given and when, how to provide independent counsel to employees, and how to provide joint representation of employers and supervisors in employment discrimination litigation.

Josephine Belli, associate general counsel, Combe Inc., moderated a panel on diversity in the workplace. Kenneth Standard, past president of the New York State Bar Association, discussed the decline of minority students in law schools and urged lawyers to reach out to minority youth, both socially and academically.

A panel led by Susan Hackett, general counsel, ACC, examined ethical issues facing general counsel in a multi-jurisdictional corporation. Dan Karson, Kroll, moderated a panel on Lessons Learned From Hewlett Packard. Panel members included Jo Backer Laird, general counsel, Christies, who discussed independent investigations. The keynote address by Lee Peeler, president and CEO of the

National Advertising Review Board, examined the role of truth in making ethical marketing decisions.

In a panel on Ethical Issues in Doing Business Globally, moderator Ron Martin, vice president of global business practices and corporate social responsibility, Colgate Palmolive Company, offered hypothetical problems that panelists explored. The discussion among Michael Gilbert, Dechert; Andrew Hruska, King & Spalding LLP, and Kirk G. Forrest, vice president, general counsel and secretary, Minerals Technologies, Inc., focused on competing in a global economy while complying with the U.S. Foreign Corrupt Practices Act.

Michael Kraft, Kraft Kennedy and Lesser, discussed avoiding ethics problems in creating a records retention policy.

Thomas Baxter, executive vice president and general counsel, Federal Reserve Bank, moderated a panel on practices associated with predatory lending in the subprime mortgage market, and ethical issues for lawyers representing borrowers and market participants. Participants included David Berenbaum, executive vice president, National Community Reinvestment Coalition; Andrew L. Sandler, Skadden Arps, Slate Meager and Flom, LLP; Michael S. Heifer, general counsel and corporate secretary, Citigroup, and Greg Walker, managing director and managing attorney, UBS, AG.

For copies of the printed materials, email john@innovativeresultsllc.com.

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 argu-

ments, 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 confidentiality 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,⁴ 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 waivable 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 current-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, please feel free to contact Susan Hackett at 202.293.4103, x318, or hackett@acc.com. ACC's advocacy and ethics team is waiting to serve you!

1 See Texas RPC 1.6.

Programs Recap

Successful Ways to Defeat Class Actions

The law firm of Anderson Kill & Olick, P.C., in conjunction with the Greater New York Chapter of ACC, presented a seminar entitled “Successful Ways to Defeat Class Actions” this past March.

Class action lawsuits remain a vexing problem for today’s businesses. They come in many forms, and often expose companies to huge potential liability and disruption. But, there are tried and true—and new—ways of defeating or limiting class actions, especially in light of the Class Action Fairness Act of 2005 (“CAFA”).

This seminar provided insight into successful strategies in maneuvering through the increasingly complex set of laws that surround class action litigation. Using several recent examples of decisions and settlements in a variety of consumer product class action cases, the speakers offered views from an experienced strategic defense perspective. Since CAFA went into effect just over two years ago, federal class action filings have been on the rise (even as securities class actions have plummeted) in federal district courts. There are several meaningful changes in the law of which companies must be aware before they make any decisions when facing a class action lawsuit such as jurisdiction and expanded diversity, amount in controversy, coupon settlement provisions, ability to get discovery, and other significant changes. As for the strategies to help defend, the essence of the discussion centered around strategies to get the class certification denied, winning on motions to dismiss, and for summary judgment.

If you are interested in receiving a set of course materials, please contact Steve Cooper, chair of Anderson Kill’s Commercial Litigation Group, at scooper@andersonkill.com or 212.278.1854.

Significant Developments in Antitrust Law

This past May, the law firm of Anderson Kill & Olick, P.C., in conjunction with the Greater New York Chapter of ACC America, presented a seminar entitled “Significant Developments in Antitrust Law.”

Antitrust law remains a hot topic for lawyers and businesses. After deciding several significant antitrust cases in the 2005–2006 term, the Supreme Court decided four more cases this term. The Supreme Court’s decisions narrowed the scope of the antitrust laws which likely will have a significant impact on the way many companies do business in the United States. For example, the Supreme Court’s reversal of the Fifth Circuit’s decision in the Leegin case, set aside a one-hundred year old precedent and thereby agreements establishing the minimum prices retailers charge for their products are no longer per se unlawful.

This seminar included a review of antitrust basics—significant antitrust laws and the criminal penalties and civil damages incurred if violated, and an in-depth overview of the basic tenets of anticompetitive behavior. The second part of the presentation was a review of Congress’ Antitrust Modernization Commission’s final report and recommendations. This overview included highlights of the report, such as the recommended remedies available to plaintiffs under antitrust laws that would allow for a right of contribution among non-settling defendants, and a right of claim reduction for non-settling defendants in situations where one or more defendants settle. Also important in the report is the recommendation that Congress should allow both direct and indirect purchasers of price-fixed goods or services to recover for their injuries; and a suggested repeal of the Robinson-Patman Act, a relic from the post-Depression era antitrust laws.

A panel discussion at the seminar considered the four cases before the Supreme Court this term which cases involved predatory buying, pleading requirements, implied immunity and vertical price-fixing agreements. The panel focused on the legal arguments presented to the court, the likely outcome and the implications to current business practices of the possible decisions. As predicted, the antitrust plaintiffs lost in all four cases.

If you are interested in receiving a set of course materials, please contact Larry Kill or Mark Weyman, co-chairs of Anderson Kill’s antitrust/unfair competition group. They can be reached at lkill@andersonkill.com or 212.278.1722, or mweyman@andersonkill.com or 212.278.1852.

Truth, Law and Ethics: A Thirty-Year View

*Remarks of C. Lee Peeler, President and CEO, National Advertising Review Council; EVP, National Advertising Council of Better Business Bureaus
Before the Greater New York Chapter of ACC America,
June 19, 2007*

The Association of Corporate Counsel has a well-deserved reputation as an important forum for the discussion of corporate compliance issues and the subject of today's meeting, "Ethics," is an especially important and current compliance topic.

Exactly what do we mean by ethics—are we talking about law, policy or philosophy? In fact, we are talking about all three. The concept "ethics" is a broad one, covering "the philosophy of human conduct, with an emphasis on the determination of right and wrong."

That determination is of course exactly what the law is intended to do: set standards for what is right or wrong. But ethics also clearly go beyond the law in many ways. There are broad sets of ethical codes applicable to different professions and businesses. As lawyers, we have long followed a mandatory code of ethics. Federal government employees follow a set of ethics laws, rules and interpretations that is several inches thick. Various business sectors, from real estate, to direct marketing, to word of mouth marketers, have adopted their own codes of ethics, as have many individual companies. Your organization includes on its Website a section dedicated to in-house ethics.

Many of these ethical codes predate accompanying legal requirements. In fact, the Better Business Bureau System, which seeks to encourage trust in the marketplace by encouraging good business ethics, is now almost 100 years old.

Judging from the amount being written about ethical behavior, it is a wildly popular subject. *Business Week* and the *New York Times* both have their own ethics gurus—"Ask Abbey" columns for the ethically impaired. And Amazon.com lists more than 13,000 titles for sale related to the subject of business ethics, ranging from "Cowboy Ethics: What Wall Street

Can Learn from the Code of the West" to "The Complete Idiot's Guide To Understanding Ethics." If you search Google for "ethics", you get more than 111,000,000 hits—compared to a scant 103,000,000 hits for Paris Hilton. By this measure, ethics have truly achieved celebrity status.

It is curious that this explosion of writing about ethics coincides with an era in which ethics—and especially "business ethics" are popularly perceived to be candidates for the endangered species lists—a quaint concept from the past.

Any newspaper reader has to be struck by the constant stream of stories about ethical lapses.

So what I would like to do today is provide some insights on one aspect of ethics compliance: telling the truth.

Telling the truth is a common element in every ethical code of which I am aware—from the Ten Commandments to the Cowboy Code. Encouraging high standards for truth in advertising is the main purpose of the organization I now head, the National Advertising Review Council. Over the years, the Federal Trade Commission developed a rigorous set of standards for testing truthfulness of advertising and other representations made by businesses. What distinguishes these standards from many other legal standards is that they are performance-based—they judge legality based not on technical legal rules but on outcomes. Thus, for example, under the Federal Trade Commission Act it is the net impression of the advertising or other commercial representations to reasonable members of the target audience that governs how you interpret advertising. You look beyond the question of what the advertiser intended to convey to the net effect of the advertising on the audience. You look beyond questions of technical legal compliance to the question of what the listener heard. For example, each statement in an advertisement could be literally true, but if the net impression of the advertising is still misleading, then the ad is legally deceptive.

Similarly, what you don't say—the information that is missing from the advertisement—can be just as misleading as the

information that is there. Truthfulness is not about how much information you disclose, but how well you disclose it.

In other words, it is the advertisers' obligation, at least in the first instance, to have proof for the claims made in the advertising.

These are tough, rigorous standards that have provoked a wide range of responses from advertisers.

The cases I saw at the FTC fell into a handful of broad categories. There were ads from advertisers who didn't seem to care about truthfulness; ads from advertisers who cared but let something critical slip through the cracks and ad from advertisers who pushed too far or got too cute.

From my then-narrow view as a regulator, the "my-attorney-approved-it defense" was basically good news. Reliance on advice of counsel has never been accepted as a defense in an FTC deceptive advertising case. And it meant that if the case went to trial we could depose the attorney. From a regulator's standpoint, a win/win.

But from a broader point of view it was troubling. It suggested that some advertising attorneys were counseling their clients on a mechanical approach to legal compliance. Not "what is the right thing to do," but "what is the minimum you can do that might possibly squeak by." That approach may work in some areas that are governed by complex regulations that tell you exactly what you can do and not do, but if you are dealing with a performance based standard like advertising law—the technical compliance approach doesn't work.

A second, even more common response was "Well all my competitors are doing the same thing." And, like the "my-attorney-approved-it" defense, this defense never worked. Truth isn't a comparative or relative standard, it is an absolute one. The fact that many competitors—or even a whole industry—are making a particular set of claims is not a defense to a deception action. Relying on the due diligence of your competitor's advertising clearance process is always risky. A company can't "outsource" its obligation to communicate truthfully with its customers.

I have always thought that being an in-house advertising-review attorney is probably a really tough job.

With respect to many ethical compliance issues, in-house attorneys face the similar struggle in making objective judgments. How would the conduct look to a neutral third party? That is why many corporations and all government agencies have independent ethics officers.

Advertising industry self-regulation is an ethics officer for truth in advertising—knowledgeable, impartial and respected. It was founded in 1971, at a time when advertising and advertisers were clearly in the sights of the media, the Congress and the regulatory agencies.

Fortunately the majority of the industry understood that the credibility of advertising claims was critical to its survival. So the industry created a unique self-regulatory structure—the National Advertising Review Council and the National Advertising Division (NAD). The job of this self-regulatory program was to monitor advertising claims and respond to complaints from competitors and consumer groups about the truthfulness and accuracy of advertising claims, make fast determinations of whether the complaints were justified and, if they were not, seek voluntary modifications or discontinuance of problem advertising.

Advertising industry self-regulation has now decided over 4,600 cases and the self-regulatory process has become the forum of choice for many advertisers seeking an efficient resolution of disputes about the truthfulness of comparative advertising claims. Despite being an entirely voluntary process, advertising industry self-regulation has an overall compliance record of well over 95%.

Initial skepticism has been replaced by admiration at a job well done. The program has been described by FTC chairmen as a model of self-regulation. Its success has served as the inspiration for similar self-regulatory programs in such diverse areas as video games, alcohol and direct-to-consumer drug advertising.

In addition, the self-regulatory process has proven demonstrably superior to litigation or government regulation as a means

of resolving most disputes about the truthfulness of advertising claims, and particularly comparative advertising claims.

- It is fast—the goal of the system is to render decisions in 60 business days.
- It is efficient—there is no burdensome discovery process. The advertiser and the challenger present the information that they believe supports their view of advertising and the case get decided.
- It is expert—NAD attorneys only handle advertising cases, they bring a wealth of experience in reviewing advertising claims and substantiation to every decision they make.
- And, compared to the cost of litigation, the self-regulatory process is cheap.

Any advertiser, any consumer group, or any consumer can use this process.

If consumers don't believe the claims made in a company's advertising, the company has little to sell. Although it may be in the short-term interest of an individual marketer to shade the truth at times, or even lie, it is never in the interest of the advertising industry in general.

Advertising self-regulation stepped forward and created a forum for the discussion of these issues. As a result, eleven of

the nation's largest food and beverage advertisers have created a new self-regulatory program will pledge to devote at least 50% of their measured child-directed media advertising to promoting healthier products or healthy lifestyles. The existence of an industry self-regulatory structure that is perceived as impartial and credible can give industry-led initiatives like this the opportunity to prove themselves to what will always be a skeptical press and public.

To sum up: My message to you today is that truth matters—both ethically and to the long-term reputation, credibility and success in the market place of your company and industry.

In your role as ethics counselors, you should look to the performance based approach that both the government and self-regulatory bodies bring to often difficult problem of determining truthfulness in judging your clients' own actions.

Finally, an advertisement of my own: Self-regulation works. It can provide faster, more efficient relief for most deceptive advertising issues. "Try it. You'll like it."

Thank you.
C. Lee Peeler

Get A Year's Worth Of CLE at ACC's 2007 Annual Meeting

ACC offers the best continuing legal education for in-house counsel. Our 2007 Annual Meeting (October 29–31 in Chicago, IL) provides corporate practitioners with over 100 CLE-approved sessions from which to choose. Various tracks of programming developed by in-house counsel for in-house counsel cover a wide range of legal and management topics including intellectual property, litigation, labor & employment, corporate & securities, international, and financial services. Plus, you'll get a year's worth of CLE in one shot. Don't miss out! Go to am.acc.com and register today.

Learn the Basics to a Successful In-house Career at Canadian CCU

Whether you practice in Canada, the United States or are involved in work that crosses the border, in-house counsel face a number of similar challenges. Open only to in-house counsel, Canadian CCU (November 18–20, The Metropolitan Hotel, Toronto, ON) teaches attendees how to excel in their new role with a focus on the basics you need to succeed. Registrants will learn first-hand from in-house colleagues the tools and best practices necessary to foster a successful in-house career. Network with the best and brightest in the in-house legal profession! Register for only \$575 US at ccucanada.acc.com.

Board of Directors

President

Lisa Whitney
VF Sportswear, Inc
212.841.7282
Lisa_whitney@vfc.com

Vice President

Maryrose Maness
Altria Corporate Services, Inc.
917.663.3566
Maryrose.maness@altria.com

Vice President

Deborah Prutzman
Merrill Lynch Bank USA
212.236.9448
Deborah_prutzman@ml.com

Treasurer and Vice President

David Skoblow
CLS Bank International
212.943.2296
dskoblow@cls-bank.com

Secretary

Ellen Zimmerman
UJA – Federation
212.836.1312
zimmermane@ujafedny.org

Board of Directors

Thomas Baxter
Josephine Belli-Marinos
Albert Driver
Robin Dunlop
Evelyn Finkelstein
Jeffrey Green
Daniel Karson
Michael Kraft
Rosemary Nelson

Chapter Representative

John Ogden
201.962.8062
john@innovativeresultsllc.com

Newsletter Editor

Elaine Reiss
Environmental Simulation Center
212.222.8064
elainesreiss@hotmail.com

Large Law Department Joins en Masse

Soon after being appointed GC at AIG, Anastasia Kelly (member, ACC board of directors; formerly GC at Sears and MCI) enrolled her 70 attorneys as ACC members! We welcome Stasia to NY and the AIG attorneys to ACC!

Save the Date

- September 18** “Key Corporate and Antitrust Issues in Public and Private European M&A”
- September 20** Pro Bono Award
- September 25** “A Proactive Plan for In-house Counsel’s Understanding, Managing and Inspiring Outside Counsel”
- September 27** “Cybercrime: The Insider Threat”
- October 2** “International Anti-corruption in the Corporate Context” & “The Development of Class Actions in the EU”
- October 3** “Managing Generational Diversity”
- October 4** “Financial Services Litigation”
- October 5** “Protecting Your Corporate Data: Using Self-Help and Taking Protective Measures”
- October 16** “Arbitration Agreements: The Ever Changing Legal Landscape”
- October 18** “Meeting the Challenge of Global Compliance”
- October 23** “Emerging Risks in Emerging Markets”
- October 25** “Bankruptcy and Restructuring”
- November 1** “Temporary Employees: HR Solution or Corporate Liability?”
- November 7** Distinguished Service Award
- November 8** “D+O Insurance”
- November 14** “Financial Services Insurance”
- November 29** “Legal issues concerning investments in Eastern Europe and Austria”

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

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.