ACC AMERICA
Association of Corporate Counsel
Mountain West Chapter

Third Quarter 2007

Focus

Kevin McMurray
President's Message

Warm summer greetings to our Mountain West Chapter members!

I want to say "thanks" to everyone who participated in our inaugural CLO Club CLE event in May at the Alta Club in Salt Lake City, Utah. I believe the event was a complete success and laid a firm groundwork for future CLO Club events. Special thanks go to chapter board members Katherine Lofft and Dawn Call, and chapter executive director Nalisa Dunford for all their hard work in planning and organizing the event. I also want to express appreciation to our fellow chapter member Thomas Jepperson (vice president and general counsel of Questar Corporation) and Questar Corporation. Tom's enthusiasm in helping the board plan and organize the event was inspiring, and we're all grateful to Questar Corporation for their event sponsorship.

Recently, my company has been the subject of some very negative reports in the press. The negative news has resulted in some significant legal and regulatory challenges. As I discussed the matter with our president, I jokingly explained that our situation was not unlike that of the experience of someone passing a kidney stone. "It's a painful process," I told him, "but one thing is certain—the stone will definitely pass!"

All kidding aside, this is a serious challenge for our company. Many of us have faced similar serious situations in our business and personal lives. While we realize we can't always promise or ensure a favorable outcome to every challenging situation, there are things we can do to make every challenge as positive an experience as possible for everyone involved, and an opportunity for professional and personal growth.

Here are some suggestions that might help us better handle our challenges:

- Don't waste time and energy worrying about the present discomfort of the situation or future unknown consequences; but, rather, focus on developing, implementing, and carrying out a strategy to effectively work through the issues.
- Empower others and encourage them to think creatively in developing, implementing, and carrying out strategies to help resolve the challenge.
- Balance and maintain expectations at a reasonable level.
- Always treat others professionally and courteously and be sensitive to their concerns.
- Remain optimistic and positive.

While these suggestions may not guarantee a successful resolution of any particular challenge, we can use these ideas to help us cope positively with adversity in business and life.

Best wishes to everyone. I look forward to seeing each of you at upcoming chapter events.

New Chapter Directory

We are working on an ACC Mountain West Directory and need your help! To make sure your information listed in the directory is up-to-date, please take a minute to update your contact information through ACC's website at *www.acc.com/php/cms/index.php?id=12*. You can also send us your updated information including name, current position and title, work phone number, and cell phone number (if available) to *nalisadunford@msn.com*. The directory should be ready this Fall.

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 al—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/parentsbcrprsnttnethics.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,[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 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 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!

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1 *See* Texas RPC 1.6.

Upcoming Events

September

Nutritional Law Symposium
Date: Friday, September 21
Time: 8:00 AM–5:00 PM
Location: Thanksgiving Point Golf Club,

Morning symposium with a golf scramble in the afternoon. For more information, contact Nicole Larson, Stoel Rives Marketing Manager, at 801.715.6657 or *nlarson@stoel.com*.

"Behind the Scenes of the Enron Investigation and Trial: Lessons in Corporate Governance"—Salt Lake City
Speaker: John Hueston of Irell & Manella, Los Angeles
Date: Wednesday, September 26
Time: 12:00–2:00 PM
Cost: $29
Location: Market Street Grill, Cottonwood
RSVP: please email *nalisadunford@msn.com* for more information

Join us for an unprecedented opportunity to hear Mr. Hueston discuss exclusive details behind the scenes of the Enron case, including how he managed to convict Kenneth Lay on each and every count. Mr. Hueston will also lead a general discussion among in-house lawyers on how to avoid the corporate governance failures which created the climate that ultimately led to the fall of Enron and the conviction of its two top officers. This is a CLE Luncheon you won't want to miss!

As a prosecutor, Mr. Hueston was presented with four awards by each of the last three US attorneys general for his trial work. He has never lost a trial.

The Los Angeles Times described Mr. Hueston's cross-examination of Lay as "devastating;" *The Associated Press* called him "the perfect David to Lay's Goliath."

"John Hueston Named to *American Lawyer* Fab 50 Litigators and *Fortune Magazine* as Person Who Shaped the Business World in 2006." "He Doesn't Just Win. He Destroys." *Los Angeles Times*, 2006.

This event was originally scheduled for April 17 and was cancelled due to Mr. Hueston's flight being cancelled by the airline due to mechanical problems. If you are interested in attending, please email nalisadunford@msn.com.

Salt Lake National Community Service Day Event to benefit the Boys & Girls Clubs of Greater Salt Lake and Utah Counties
Join us for the national community service day event at Snowbird Resort this fall where you will be able to give something back to your community! The Boys & Girls Club will be selecting a special group of kids who have earned the right to attend this event by achieving high academic goals. ACCMW and participating sponsors will host the kids at Snowbird Resort where they will be treated to a fun-filled day in the mountains. Some of the activities include a nature hike, a ride on the gondola, and of course the Alpine Slide! In addition, they will be entertained with face painting, crafts, a caricature artist, and a special take home gift bag. This is an event you and your family won't want to miss!

October

New Developments in Corporate Law CLE
Boise & Salt Lake City
Date: October 16
Sponsored by Holland & Hart, LLP

Both events include a continental breakfast, and will be free of charge. More details to follow.

Lunch–n–Learn—Boise
Sponsored by Givens Pursley LLP
Details to follow.

ACC Annual Meeting—Chicago
This year, corporate counsel from all over the world will get together for a three-day meeting hosted by ACC from October 29–31 in Chicago, IL. It will be the world's largest gathering of corporate counsel with thousands in attendance.

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November

Annual Awards Gala—Salt Lake City

Date: November, 8

Location: Museum of Fine Arts

Boise—Date and Location TBA

November marks the month for our annual Awards Gala. Join us for great entertainment, delicious food, and the chance to network with your fellow in-house colleagues.

Looking for Nominations!

Our chapter will recognize four members (two from Utah and two from either Idaho, Wyoming, or Montana) who have exhibited great leadership and achievement through their participation and advancement of chapter causes, corporate counsel issues, and pro bono and community service projects. These are the highest chapter honors for providing distinguished service and demonstrating an ongoing commitment to the association's success. We will present the awards at our membership event. If you would like to nominate someone, please email *nalisadunford@msn.com*.

MW Chapter holds it's first CLO Club Meeting, sponsored by Questar Corporation

We were pleased to host, together with Questar Corporation, the first large-scale gathering of the area's general counsel and chief legal officers. At this well-attended event, participants had the opportunity not only to meet and network with others in their exclusive peer group, but also to discuss some of the pressing legal issues of the moment. We look forward to the next meeting of the General Counsel Roundtable, which we anticipate will take place in the fall, and encourage other general counsel and chief legal officers in the area (including those not able to make the first meeting) to attend. It is only through the efforts and involvement of these individuals that the Roundtable will perpetuate and be a success. If you are a CLO and would like to be invited to the next Roundtable, please email *nalisadunford@msn.com*.

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

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ACC News Briefs

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*.

Welcome New Members

We wish to welcome the following new members who have joined our chapter recently:

Berne S. Broadbent, The Church of Jesus Christ of Latter-day Saints
J. Nicholas Call, CHG Healthcare Services
Jared R. Frei, Xango, LLC
Bernard Masters, Boart Longyear Ltd.
Amy J. Perius, Rio Tinto Energy America
Ryan J. Taylor, Novell, Inc.
Michelle N. Wilson, Xango, LLC
Robert A. Wood, Xango, LLC
R. Joe Zeidner, 1-800 Contacts, Inc.