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FOCUS

President's Message

Jonathan Dean

The summer isn't what it used to be. I remember my mother telling me that there was "nobody" in New York City in the summer. That was before air conditioning, when the courts shut down and the white-shoe lawyers went to the Hamptons, or, in Cleveland terms, Northern Michigan or Chautauqua, and things slowed down. Not any more. ACC and its members have been busy since May when I wrote my previous letter.

On June 11, our friends at Jackson Lewis hosted a river cruise. They were celebrating their 50th anniversary as a firm and their recent establishment of a Cleveland office. The weather gods were kind, blue skies and still waters, the food delicious and the company good. A historian from the Western Reserve Historical Society provided fascinating historical background, but most of us were so busy catching up with each other that we missed some of the background commentary. We thank Jackson Lewis and look forward to working with them in the future.

I established a personal goal for the year—to begin informal exchanges among our members about practical issues of law department management. Member Betsy Rader organized our first discussion. Her topic, computer solutions to practical problems, brought out more than 20 members, who gathered on the 24th floor at Eaton Center to describe what

we were doing or hoped to do with computers. Most of us left comforted that others were going through the same struggles we were, and disappointed that the killer app that would let us manage our workflow, store our documents, measure outside counsel spending, and help our clients draft documents was still lurking over the horizon. We agreed to exchange email addresses so that anyone who is considering the purchase of a system can get practical advice from lawyers who have actually implemented it.

In May, McDonald Hopkins challenged us to consider how to deal with some key practical issues facing our clients. While I was out of town, I understand that the presentations were valuable and practical. In June, the folks at Giffen & Kaminski helped us feel the pain of a hapless counsel whose client is confronted by a federal investigator. They asked us to consider the question, "What would you do if the FBI appeared at one of your facilities with a subpoena and removed all of its servers as part of a government investigation?" The question gave new meaning to the concept of disaster recovery. Those in attendance gave high ratings to a lively presentation.

For the future, we have announced the first session of Reach Out, a joint project



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between ACC and the newly merged Cleveland Metropolitan Bar Association to provide legal advice to not-for-profits who serve the greater community. John Moran and Cindy Binns have been working hard with the Bar Association to put this exciting new program together. No one will be put in front of a not-for-profit without the opportunity for training. Several sources have provided training materials. Work continued throughout August to get this program off and running.

As I look back on the year so far, I am struck by the positive attitude and community concerns of our members. Everything that we have undertaken this year has been driven by our members, the board, and our capable administrator, Nancy Schneider. The president's job is therefore not a difficult one. I hope to see new people serving on committees and on the board. We are working on plans to better serve our members south of Cuyahoga County with more seminars and perhaps other meetings at new locations more accessible from the south. Most importantly, we will continue to bring opportunities for community service to our members.

Summer Fun, The Reading Undone, and Everything You Need to Go Back to School This Fall

Susan Hackett

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

Contact: hackett@acc.com

Those of you with kids in your life know that this time of year is when kids who've been enjoying a lazier pace and unlimited play time look around and realize that there is still much to do before they're sentenced to another year in the classroom. And they haven't even started plowing through their summer reading list.

I hope that summer has brought many of you some needed playtime and relaxation. Since we sometimes let the reading pile slide a little in summertime, I thought I'd help you catch up since Fall will bring challenges to you, too, that require you to be on top of your game.

SCARIEST HORROR: STORY BEACH READING

FASB and their proposed new loss contingency reporting rules

Summer started with an unwelcome announcement from the Financial Accounting Standards Board, or FASB (pronounced FAZ-BEE), that they were going ahead with a proposal they'd been urged to discard: a revision of Financial Accounting Standard (FAS) number 5, which regulates public company reporting of disclosures regarding potential losses or liabilities of the company. This proposed rule was issued in June with a comment deadline of August 8. ACC filed comments, co-signed by more than 100 companies and many other organizations. At last count, FASB had received over 225 comment letters protesting the rule, which is a firestorm of activity in terms of these kinds of comment requests, especially considering they snuck it in while everyone was on vacation!

ACC's comments, the FAS 5 revision proposal, and a number of our co-commenter's letters are online for your perusal at www.acc.com/php/cms/index.php?id=84. When you get to this page, you'll notice that this information is housed on the privilege protection page. Why is this story on the privilege page? That's why you need to catch up on your summer reading.

ACC's letter details our concerns over several facets of the proposal, but focuses most on the following three points:

1. These proposals are a solution in pursuit of a problem. The current standards aren't broken: there is no evidence that current disclosure requirements are insufficient or harming market transparency. Adopting significant new and ill-advised proposals without evidence that changes are necessary, without a focus on how the rules will improve reporting (rather than just suggesting we need "more"), or without assurance that the new rules will improve (rather than frustrate) meaningful disclosure is folly.
2. Heightened disclosure requirements will create unprecedented waivers of the company's attorney/client privilege and work product rights. Because the proposed amendments will require clients to produce more sensitive and speculative information about possible losses related to litigation, and require earlier production of loss analyses than currently required (namely, before an exposure is well documented or quantified by "facts" as opposed to by an attorney's initial evaluation of possible liability or harm), reporting will likely increase the risk of waiver of privilege and have related punitive effects. These required "qualitative" disclosures will broadly communicate the company's litigation assessments that previously were carefully guarded in adversarial proceedings. Additionally, independent auditors may seek more detail from counsel to test the estimates and disclosures reported, adding to the risk of privilege waiver to auditors.
3. Deeper disclosures of attorney-client privileged assessments will coerce undesirable outcomes in matters on which companies are only asked to report. The proposed amendments' requirements to provide qualitative assessments of likely outcomes, timing of resolution, and the company's assumptions on loss amounts "give away the store" to any interested

adversaries, providing invaluable detail about the company's litigation strategies and settlement coercion-points. The result would be a perverse twist on the FASB's stated desire to disclose more accurate and timely information about loss contingencies: companies' litigation counsel would likely become more circumspect about providing their clients with legal assessments and detailed contingency analyses to assist in their decision-making in order to avoid unnecessary disclosure or liability. Further, since contingency reporting under the rules must be made earlier and include disclosures on cases that are not well quantified or even likely, there's a concern that setting and publishing such numbers will become self-fulfilling prophecies—the settlement floor, even in cases that otherwise have little merit.

ACC has requested an opportunity to testify before the FASB when they meet to discuss these rules further. We'll keep you posted.

HEARTWARMING "WILL IT ALL TURN OUT ALRIGHT?" NOVELETTE

The saga continues: Can the DOJ overcome tremendous odds to save itself and untold numbers of innocent ACC members's clients from perilous privilege erosion?

In July, U.S. Attorney General Michael Mukasey announced to the Senate Judiciary Committee that new Deputy Attorney General Mark Filip was crafting another U.S. Department of Justice (DOJ) guideline that would replace the McNulty Memo and offer "real, significant proposed changes." The DOJ's McNulty Memo, like its predecessors, the Holder and Thompson Memos, have been criticized by ACC and its coalition partners for including privilege waiver, amongst other inappropriate terms, in the DOJ's list of criteria for cooperation in corporate failure investigations. Deputy Attorney General Filip issued a letter to the Senate Judiciary Com-

mittee leadership that offered an executive summary of the memo he said was still in draft, angering Senator Specter, who called for the DOJ to stop stalling and for the mark-up and passage of *The Attorney Client Privilege Protection Act of 2008*. And yet, the outlined terms of the proposed memo in this executive summary, if realized, are significant steps in the right direction. As always, the proof will be in the pudding, so watch the ACC site for info on the publication of the new DOJ Memo to be issued by the end of August. To read the Deputy Attorney General's executive summary of the memo he's promising and Senator Specter's response, visit the ACC Privilege Protection page at www.acc.com/php/cms/index.php?id=84.

TIMELESS TEAR-JERKER

You done me wrong, but our relationship—while often dysfunctional—is everything to me, so I'm taking you back. But under new terms.

More than 120 top CLOs and law firm managing partners have been in therapy with ACC this summer, and talking about how to get their relationships back in order. This sizzling summer best-seller is about to expose their clandestine meetings in top hotels around the country as they attended focus-group sessions for ACC's new initiative: the ACC Value Challenge. So tune in for this summer's hottest reality show, and see many of them caught on tape, telling everyone who will listen about the errant ways of their inside/outside counsel relationships, and how they plan to make it up to each other (and their clients).

Seriously though, we all recognize that there have been decades of conversations about the problems in-house counsel have with rising costs, a lack of focus on value (rather than profit per partner), the perverse disincentives to efficient service inherent in the billable hour system, and much more. And law firms are tired of arguing over bills, constant RFPs that have replaced the longer-term relationships that made practice satisfying for them, clients' willingness to trade in meaningful project management for a 10 percent discount, and a tendency to suggest they want innovation and a revised relationship, but at the end of the day, a decision that it's easier to chuck all that and continue to purchase over-priced billable hours

from legacy firms. What can be done that will actually move the needle? That's what these focus groups were meeting to discuss this summer. ACC hosted off-the-record discussions to explore how we can change the focus from griping to acting on what is necessary to move us out of these unproductive cycles and help in-house and outside counsel rediscover the value of their relationships.

You can read ACC's magnus opus on how we're planning to help in-house counsel begin a (r)evolution in their outside firm relationships online at www.acc.com/public/accvaluechallenge-overview.pdf. And if you're bored with all the reading and just want to veg in front of the big screen, you can tune into the launch of ACC's Value Challenge by tuning in on your computer or getting your colleagues together in the conference room over lunch to pick up the live, free video feed of the Town Hall Meeting at which we'll "reveal all!" Contact ACCValueChallengeEvents@acc.com for information on how to tune in September 26 (or download the archived version from the website).

Get past "you done me wrong": it's best left in dimestore novels. ACC's Value Challenge is committed to working with you over the course of the coming months and years to help you take control of your outside spend and "(r)evolutinize" your outside counsel relationships and in-house budget and matter management.

THE TRAVEL JOURNAL THAT TAKES YOU PLACES YOU WERE NEVER LICENSED TO GO

ABA House passes model in-house counsel registration guidance for states that are seeking to accommodate in-house lawyers who've moved to a new job, but lack a local license where they're now employed.

Two-thirds of US states have now passed a version of the rule that ACC worked so hard to "encourage" the ABA to adopt: namely, Model Rule of Professional Conduct 5.5, which authorizes lawyers who are licensed and in good standing in their "home" jurisdictions to practice on a temporary basis (when taking a deposition, or negotiating a matter, etc.) in another jurisdiction in which they are not licensed. In-house counsel got further relief under the rule; under the provisions of section

5.5(d), in-house counsel who are licensed and in good standing in one jurisdiction are authorized to engage in "permanent" practice for their employer-clients when they move to a new job in another jurisdiction in which they are not licensed. While 5.5(d) is a complete authorization in and of itself, quite a number of states adopting the rule have coupled it with a registration system that allows the state to keep track of these in-house lawyers and usually collect payment from them comparable to local members' bar dues. Unfortunately, in their zeal to regulate, many state bar licensing authorities lost sight of the purpose of the rule, and the registration systems they adopted became more like mini-Spanish Inquisitions than simple registrations.

Not liking to see great disparity amongst the state rules regulating any aspect of lawyer practice, the ABA formed a group that proposed a model in-house registration system to provide some level of consistency and to suggest best practices. The first versions were overly complex. The new and improved model was adopted by the ABA House at the ABA Annual Meeting, and could be reading that saves you from much more reading studying for the bar exam next time you move to a job in another jurisdiction!

ACC's comment letters, our concerns that the ABA not adopt a model that pre-empts the underlying logic of 5.5(d) (namely, that no registration is needed at all in states that adopt the rule—the authorization is complete and the burdens of administering a rule may not be justified by any quantifiable threat the rules seem to suggest exist), and the new rule all appear online at:

ACC's Fall 2007 comment letter to ABA ([www.acc.com/php/chapters/filespace/All\(admin\)/accabainhousecomment.pdf](http://www.acc.com/php/chapters/filespace/All(admin)/accabainhousecomment.pdf))

ACC's Summer 2008 comment letter to ABA (www.acc.com/public/acc-comment-aba.pdf)

ABA Model In-House Counsel Registration Rules (www.acc.com/public/aba-sect-lega-educ-admi.pdf)

Alright, now that you're caught up on the essentials and can approach fall equipped with the knowledge you need to move to the next grade, enjoy these last few days of warm weather and summer fun!

Know Your Mold

By Jean R. Robertson and Tiara N. A. Patton

One of the best kept secrets in the tooling industry is an Ohio law that grants a lien to molders and moldbuilders for services performed related to dies, molds, patterns and forms. The Ohio Molder's Lien Law is provided in Ohio Revised Code (O.R.C. or Code) §§ 1333.29 through 1333.31 (Molder's Lien Law), and the applicable provisions that outline Ohio Moldbuilder's Lien Law (Moldbuilder's Lien Law) are located in O.R.C. §§ 1333.32 through 1333.34. Qualifying entities benefit from a lien that is superior to all other creditors and secure a molder's or moldbuilder's right to full payment by a customer for whose benefit the mold is utilized.

Molder v. Moldbuilder

The Molder

Ohio law defines a molder as an entity that makes or improves a die, mold, pattern or form ("mold"), or uses a mold to manufacture, assemble or fabricate an assortment of products. The Molder's Lien secures full payment of what the customer owes the molder for the fabrication, repair or modification of the mold notwithstanding the fact that the mold itself is likely to be owned by that customer. The Molder's Lien functions as a possessory lien having priority over other security interests in the mold. Therefore, in order to maintain the statutory lien (and priority status) a molder that uses a mold but has not itself made the mold must not give up possession of the subject mold.¹

After nonpayment for at least 60 days past the date payment was due, a molder may send notice of the deficiency to the customer pursuant to the Code. If nonpayment continues, the molder may enforce the lien a couple of ways. The molder can simply retain possession until the customer pays the amount due. Alternatively, the molder can file suit to enforce the lien

1. See *In re Flue Gas Resources*, 77 B.R. 628, 631 (Bankr. N.D. Ohio 1987) (reinforcing the premise that the molders' lien is perfected by physical possession of the mold).

through a judgment to sell the mold, while still retaining possession. If sold pursuant to a court order, excess proceeds from the sale after satisfaction of the outstanding debt must be paid to the customer. Conversely, the customer can obtain possession of the mold during the course of the civil proceedings by making a deposit (or filing a bond) with the clerk of courts in the total amount due, notification costs, together with an amount that the court considers sufficient to cover the probable amount of the costs and interest that could be awarded to the molder if he prevails in the civil action.

The Moldbuilder

A moldbuilder is an entity that actually fabricates, cuts, casts or designs molds for the plastic or metal forming industries. A molder that has not made a mold but only uses it for manufacturing is not a moldbuilder. This distinction has legal significance. The law grants a moldbuilder a lien in the amount that the customer owes on all molds it produces (and proceeds from their subsequent transfer) until the moldbuilder is paid in full. Any contractual provision that waives these rights will be considered void and unenforceable as a matter of public policy.

The lien attaches when the mold is delivered to the customer. To perfect the lien, a moldbuilder must file a UCC financing statement, which constitutes constructive notice.² However, once the financing statement has been filed, priority as against others is determined based on the date of attachment. Failure to file the financing statement will jeopardize the lien's priority status, allowing other creditors' liens in the mold to have priority over the moldbuilder's lien.

To enforce its lien, the moldbuilder must provide written notice to the customer/molder indicating the lien claimed and making a demand for payment of the

2. It is important to note that a moldbuilder retains the lien even if it is not in possession of the mold for which the lien is claimed.

amount owed. Continued nonpayment gives a moldbuilder the right to: (1) enforce the right to possession of the mold by judgment or any available judicial procedure; (2) bring civil action to enforce the lien; (3) take possession of the mold (if it can be done peacefully); or (4) sell the mold in a public auction. These remedies notwithstanding, the customer/molder's rights under applicable patent, bankruptcy or copyright laws are to be respected.

Conclusion

Know your mold. It is critical for molders and moldbuilders make themselves aware of their unique statutory rights to assist in assessing the credit-worthiness of their customers and in structuring their transactions with those customers. Conversely, these special laws present a cautionary tale to financial institutions and customers and thus deserve their attention as well.

Jean R. Robertson is a partner at Calfee, Halter & Griswold LLP and her practice includes business restructuring, corporate bankruptcy and creditors' rights. Tiara N. A. Patton is an associate with Calfee, Halter & Griswold LLP in the firm's Business Restructuring practice group. You may contact the authors at 216.622.8200. For more info, go to www.calfee.com

Upcoming Programs and Events

- September 18 1.5 CLE
“E-Discovery: It Just Won’t Go Away” presented by Buckley King; cosponsored by CT Corp.
- September 20 NEOACCA members will staff a Brief Advice and Referral Clinic at the Westside Catholic Center.
- September NEOACCA members will be invited to participate in National Community Service Day, date and times to be announced.
- October 16 1.5 CLE
“Financial Restructuring Short of Bankruptcy,” presented by Calfee, Halter & Griswold LLP; cosponsored by BOWNE.

- November 20 2.5 CLE
“Legal Ethics, Professionalism and Substance Abuse,” presented by Porter, Wright; cosponsored by Ursuline College Accelerated Program (UCAP).
- December 4 1.5 CLE with Squire, Sanders & Dempsey; cosponsored by RRDonnely.

For more information on upcoming chapter programs, go to northeastohio.acc.com.

ACC News

Recruit a Member and Win a Prize—Guaranteed!

Each time you use the ACC network, you get access to valuable skills and experience only available through ACC. More members provide improved educational opportunities, enhanced networking, increased online resources, and advancement of the profession worldwide. You can expand your network by taking part in ACC’s “Everybody Wins” membership drive. Recruit a member and you will win prizes ranging from Starbucks’ Cards loaded with \$5 and cutting edge electronics including portable DVD players, digital cameras, and new computers, to free ACC Annual Meeting registrations and a \$750 travel stipend. ACC’s “Everybody Wins” membership drive ends on September 30—so don’t delay, recruit today! See the attached brochure for more information. Also, for tips on recruiting members, including a sample email to send to your colleagues, go to www.acc.com/everybodywins.

2008 Annual Meeting: Become Indispensable to Your Company’s In-house Legal Team

Don’t miss the educational and networking event of the year for corporate practitioners. With over 100 programs with special sessions for new in-house counsel, new legal managers, chief legal officers, small law department practitioners and much more, the 2008 Annual Meeting, October 19–22 in Seattle, WA, has something for every in-house practitioner. To help you become the most informed and indispensable member of your company’s legal team, ACC’s Annual Meeting offers a variety of opportunities to meet, interact with, and learn from fellow in-house counsel with a wide variety of experience. Check out am.acc.com to register, select your sessions, and book your hotel! Don’t delay. Register today for only \$1400. This early rate expires on September 5. Questions? Contact education@acc.com or 202.293.4103, x.451.

Welcome New Members

- Charles R. Aley**, Novelis Corporation
- James Michael Donchess**, The Sherwin-Williams Company
- Susan F. George**, The J. M. Smucker Company
- Mrs. Sindi M. Harrison**, S. D. Myers, Inc.
- Xiao Lin (Charlene) Li**, The Sherwin-Williams Company
- James J. McGrath**, Triumph Ventures Group, Ltd.
- Julanne Montville**, American Greetings
- Mia M. Mounts**, Parker Hannifin Corporation
- David Brian Nolin**, The Timken Company
- Joel R. Pentz**, Cleveland-Cuyahoga County Port Authority
- Richard D. Porter**, ABB Inc.
- Maria T. Sarca**, Parker Hannifin Corporation
- Meaghan E. Spaner**, Parker Hannifin Corporation
- Ronnie Michael Tamburrino**, The Sherwin-Williams Company
- Karen Wensick**, Parker Hannifin Corporation

Board Members and Contacts

President

Jonathan Dean
Eaton Corporation
216.523.4129
jonathandean@eaton.com

Vice President

William T. Davis
National City Corporation
216.952.4873
wdavis@davisnoragon.com

Treasurer

John D. Moran
GrafTech International Ltd.
216.676.2397
john.moran@graftech.com

Secretary

Mark A. McClendon
Avery Dennison
440.534.4948
mark.mcclendon@averydennison.com

Program Chair

David G. Slezak
DentalCare Partners, Inc.
440.684.6966
dslezak@dcpartners.com

Pro Bono Co-chairs

Cynthia A. Binns
GrafTech International Ltd.
216.676.2289
cynthia.binns@graftech.com

John D. Moran
216.676.2397
john.moran@graftech.com

Sponsorship Chair

Rhonda S. Ferguson
FirstEnergy Corp.
330.384.5620
rferguson@firstenergycorp.com

Board of Directors

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Michael Yaksic
J. Adam Zangerle

Chapter Administrator

Nancy A. Schneider
440.988.3213
neoacca@centurytel.net



Association of Corporate Counsel
Northeast Ohio Chapter

Nancy A. Schneider
Chapter Administrator
413 Oaknoll Dr.
Amherst, OH 44001

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216.622.2100



The Legal Technology Company

216.664.1100