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FOCUS

President's Message

Jonathan Dean

By the time you read this, we will already know who will be president of the United States for the next four years (and, in a matter of only slightly less interest to the readers of this space, next year's president of the Northeast Ohio Chapter of the ACC). The past year—and the few months of my predecessor's term, which were included in my service as chapter president—have shot by; my granddaughters can now talk, the older one can even write out one word (zoo), and the legal (and economic) world has evolved at a tremendous rush.

We have had some successes during 2008, locally and nationally.

While many lawyers and groups of lawyers contributed to the result, our national organization has spoken forcefully about the continual erosion of companies' rights to the effective assistance of counsel. The government had been demanding, for example as spelled out in the Justice Department's Thompson Memorandum of 2003, that companies waive their rights of attorney-client privilege in order to receive recognition for having cooperated

with the Department. Legislation has been introduced to correct this imbalance. The Department of Justice has backed away from the Thompson Memorandum. While we aren't there yet, it is at least recognized that corporations and their employees are entitled to the advice to counsel, protected by attorney-client privilege.

On another front, ACC continues to focus attention on the extraordinary cost of legal services today. Go to ACC's website and review the latest ACC-Serengetti survey of outside counsel use, published on October 20. The survey gathers some of the techniques that in-house lawyers are developing to control overall legal costs. The ACC Value Challenge asks even more basic questions: Are new associates worth what firms charge for them? Are the ratios of associates to partners in some firms intended to provide good service to clients, or to contribute to the partners' annual take? Are hourly fees an incentive to efficiency or to overkill



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issues of only peripheral importance to clients? The answers to some of these questions may seem obvious, and others more subtle, but the important point is that ACC provides a forum for us to ask them.

Here in Cleveland, we have progressed as well. Reach Out, our new joint program with the merged Metropolitan Bar Association to provide advice to qualifying non-profits, is beginning after some initial delays. We hope that in coming years Reach Out will thrive with the same health as our joint program with the Legal Aid Society for Saturday morning legal clinics. Speaking of that program, we had another successful clinic on September 20 at the Westside Catholic Center. Five volunteers, with the help of student interns and the sage advice of legal aid professionals served 45 customers.

Also in September, Tucker Ellis & West hosted our second breakfast

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Counseling Around Corners

Susan Hackett

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The economic downturn is more evident everywhere I go. The impact can be seen and felt all around us: closing businesses, laid off workers, less abundance, less “consumerism,” and an increased focus on family time.

My mother recently reminded me of some things I had since pushed aside. Mom, born in the Depression years, grew up in a very large family that barely made ends meet from day to day. They lived without a lot of frills, and only because all of the kids pitched in at home or to earn money. They focused on frugality, getting good value from everything they purchased, doing everything they could with less. I saw the enduring imprint of the Depression on my mom every time she rolled up and “re-gifted” the paper and the ribbon off her birthday package, or made us carry recycled lunch bags, or carefully washed and stored the empty mayonnaise jars for future use. We teased her mercilessly about this kind of frugal behavior.

In the last few months, those of us who grew up with plenty and who have been living large have seen a glimpse of what was bred in many of our elder parents’ bones: a healthy respect for prudence, a less ostentatious lifestyle. We are stepping back from excess and more carefully shepherding our resources because we are worried about what might come. Those of us fortunate enough to enjoy relative security in our jobs, our homes, and our daily routines cannot escape the unfortunate comparison to some of our neighbors and colleagues who have been harder hit.

By reflecting on the past, we can learn prudence relevant to corporate counseling in today’s volatile environment. As you examine your budgets and look at what can or must be trimmed, or what you can do to drive greater value, outside counsel costs often rise to the top of the pile. Empirically, we know that outside counsel costs constitutes more than 50 percent of the budget for more than half of in-house

departments. While many outside counsel are worth every penny they are paid, we all know there are many more who could be managed to spend a bit less for the work they perform, relative to the value of the services provided. Unless we manage toward those efficiencies, we are going to be caught spending our precious time in unproductive arguments over bills.

ACC has resources readily available to you for your consideration as you hone in on costs and increased value:

Hours, Rates, and Budgets

Don’t ask for a discounted rate or a freeze on fees. Many members have indicated that their approach to their firms this year is to ask for a 10 to 20 percent rate decrease. In part, this plan is fueled by the perception (and reality) that rates charged are out of proportion, and that they have grown exponentially for several years without any corresponding increase or change in the value of the services those counsel provide. Services have gotten more expensive and AmLaw and others continue to report that firms and leading partners are sometimes profiting in an almost unseemly manner. While everyone likes a profit, you have to start to wonder, “Who is in control here?”

Every situation has its own unique drivers, and I believe focusing on reducing outside lawyers’ rates is the wrong way to go in establishing the groundwork for successfully controlling costs. In-house counsel are surprised to find that, despite setting lower billing rates, fee ceilings, or blended rates for their work, the overall bill submitted did not get any smaller. Law firms that overcharge for matters and that agree to freeze or reduce their rates, just bill more hours, involve more billers, or do not properly control other expenses. Bills inevitably gravitate toward a certain amount, regardless of what might have been negotiated.

Set a budget for the project and to hold the firm accountable. Talk about what that project or matter is worth. Do not attach a price to the project, nor accept a fee reduction or a request for a discount. Simply state that this is what the matter is worth to you and then ask, “Is the firm willing to take this matter on for this fee?”

You should clearly articulate that you will not allow adjustments or overruns, except in pre-determined (in writing) extreme circumstances. For the price you agree to, they must finish the project, however that is defined. If it is important to you, tell them which lawyers you want in charge of or working on your matter. Make sure you are playing fair: tell them up front that you will not seek a refund or rebate if they resolve the matter more quickly/less expensively. You want them to profit by working efficiently. While some worry that the work done could suffer as a result of this kind of arrangement, I believe this is a myth of convenience, without any empirical merit. Firms that set flat fees for services begin to value lawyers who provide services not based on hours, but on getting clients what they want quickly.

What do you get from this? Much of the time, you will get lower costs. However, even if costs are not reduced, there is something to be said for managing them predictably for your clients in such tumultuous times, since busted budgets and missed financial targets often cause even more trouble. In addition to the surety of bills inline with your expense expectations, you and the firm will not have to waste time arguing over hours or bills.

Establishing a Budget

A project budget is not something that your outside counsel should prepare. It is something you must drive. Outside counsel should be critical in the process of mining their data. Perhaps they have done 437 of these kinds of cases over the last five years and can average some costs for you as a starting point. In-house departments

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must set—and evaluate—the budget based on the value of the work to the client. If a project is only “worth” \$50,000 to the client, what does it matter if the firm says it will cost \$100,000? You either find another firm or settle out now for \$40,000, and spend your time and effort on something that has a higher value.

While many of us are unsure of how to effectively evaluate the “worth” of some kinds of matters, we have to do this in the process of owning our own budgets and costs. If you do not know what a matter is worth, you certainly cannot expect your outside firm to live up to your cost efficiency expectations. We are developing a highly refined set of evaluation tools for our ACC Value Challenge project that will help in-house counsel determine the value of legal work by some other method than the cost of a lawyer’s hour multiplied by the time the lawyer spends working on the matter. If your goal is to set budgets based on incenting efficient performance from all players, inside and out, be sure to visit www.acc.com/valuechallenge for additional tools and insight.

A significant portion of the time you spend with your firms should be focused on evaluation and review of their services. Most of us, however, do very little to tell our firms what they do that we like and what we want them to do differently. The closest we get is paying or disputing the bill. While your outside firms are not blind, they may not focus on what your needs or concerns are unless you tell them. They are aware that companies are tightening their belts, that legal services are a cost center, and that you are under pressure to do more with less, but what do you expect them to propose without guidance from you? Further, if you work in a larger department, you must also have this “evaluation/review” conversation with your own lawyers internally. You want to incent their better management of firms by rewarding those who drive better performance at lower and predicted costs, and reproaching those that do not. Keep in mind that cost overrun by law firms is often enabled by a lack of good in-house management.

You need to consider adopting evaluation/review criteria for both the in-house staff and the outside firm. Make it clear that compensation and continued retention depends on adherence to a set of criteria that you all understand and are equipped to employ. If you are going to tell internal counsel that they must hire firms and return results and rates within set parameters, you have to allow them to select firms that will accept and abide by those terms, which may mean firing more expensive and less flexible firms that you’ve worked with for years. You have to support your staff’s decisions.

Perhaps one of the best exercises you can go through now is that of data mining to review the kinds of work done in the last year and compare it to previous years, looking at a variety of comparatives. Ask your firms to begin to mine their data for you, too. Given that many of them have long experience performing the kind of work you retain them to do, they should be able to clearly discuss specific types of work, what it costs, when it’s successful, who does it best, etc.

What if You are Unable to Hire Outside Help At All?

When you cannot afford to hire expertise, or the extra hands you need to create a solution to a thorny client problem, your friends in the ACC network can help. There is intrinsic value to what you will derive from a conversation with an experienced in-house peer over the value of analysis of a legal problem that an outside firm might offer. ACC offers several ways to leverage your membership:

- Join an ACC committee to find other practitioners interested in the same subject; (There is no additional cost and no limit on the number of committees you can join as an ACC member)
- Attend your local chapter meetings to find similarly situated peers who are confronted with many of the same issues as you;
- Post questions or requests on any of our many Listservs;
- Visit the online Membership Directory to reach out to a company that is likely to have an answer you want, or has the established best practice you would like to emulate;

- Search ACC’s online database of research, which includes thousands of documents such as articles (including back issues of the *ACC Docket*), how-to’s, ACC InfoPAKS, program materials/outlines, collected member forms, and policies, and links to other useful sites or resources;
- Look through ACC’s Leading Practices Profiles for added insight to member and department practices. These practical benchmarking tools capture how members have tackled tough topics through in-depth interviews that address their experience in getting started, key resources they developed, staffing and expense and lessons learned;
- Contact vendors who support ACC for discounts, ideas and access to their research. Especially helpful may be those vendors in the ACC Alliance program that co-market specialized products and services made for corporate counsel and available to ACC members at a reduced cost.

For those of you who have already been hit by the downturn and have lost, or may be in jeopardy of losing your job, know that ACC is standing right beside you. We offer in-transition membership at no cost (so long as you were a member prior to losing your position), and we also offer a variety of services and the best job postings in the business on ACC’s In-House Jobline.

Please share your thoughts on what you are doing to focus on more prudent management of your client’s time and spend. You can reach me at hackett@acc.com.

2009 Continuing Legal Education Seminar Schedule

January 22	Recruiting, Retaining and Terminating Employees: Practical Tips to Avoid Litigation presented by Litler Mendelson, P.C.	May 21	TBA	November 19	Legal Ethics, Professionalism, and Substance Abuse presented by Porter, Wright, Morris & Arthur
February 19	TBA	June 18	Intellectual Property presented by McDonald Hopkins	December 10	Corporate Securities presented by Squire, Sanders & Dempsey
March 19	Corporate Compliance presented by Roetzel & Andress	July 16	Real Estate Finance presented by Dinn, Hochman & Potter LLC	For more information on upcoming chapter programs, go to northeastohio.acc.com .	
April 23	Employment Law Update presented by Schneider, Smeltz, Ranney & LaFond LLP	August 6	TBA		
		September 17	TBA		
		October 15	Foreign Corrupt Practices Act presented by Calfee, Halter & Griswold		

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on law department management. The provocative topic was “Doing away with hourly billing...one client at a time.” We hope to continue these lively breakfasts in the coming year.

Lastly, while I was unable to fly to the West Coast, many of our members attended the annual ACC convention in Seattle in October. As always, the convention provided thoroughly practical training carrying CLE credit and an opportunity to network with our peers from other corporate law departments. In addition, our members who are active in chapter governance (and we are always looking for new blood for our board and officer positions) attended equally practical workshops where officers and board members from other chapters share best practices.

I look forward to seeing you at chapter events in the year to come.

Welcome New Members

Harlin Adelman, University Hospital Health System

Melissa Dials, GrafTech International Holdings Inc.

James Christopher Fallon, The Sherwin-Williams Company

Theresa R. Haumann, Brush Engineered Materials, Inc.

Chad F. Hesse, Diebold, Inc.

Timothy M. Kuhman, Equity Trust Company

Brian H. Linick, The Sherwin-Williams Company

Lessie Milton-Jones, Dominion East Ohio

Jan E. Murray, Cleveland Clinic

Susan K. Steinhauer, White Hat Management

Amanda A. VanHorn, Akron General Health System

Barbara J. Vimont, Akron General Health System

Ann E. Zellmer, Cleveland Clinic Foundation

Wage and Hour Litigation: “Plastics” for a New Generation of Plaintiff Lawyers

By Bradley Sherman

There is this famous scene in *The Graduate* where Mr. McGuire takes young Benjamin Braddock aside and whispers “just one word” in his ear about how to strike it rich in business . . . “Plastics.” If Benjamin were a young Plaintiff’s lawyer and he came to me today for advice on how to “strike it rich” in employment law, the one word I would whisper in his ear is “wage and hour litigation.” Well, that’s three words, but I think you get my point.

Wage and hour litigation—especially class action litigation—is today’s golden goose for the Plaintiff’s employment bar. According to *Business Week*, from 2001 to 2006, wage and hour litigation has doubled. Last year, wage and hour class actions out paced all other employment-related class actions combined. Settlements and verdicts over this time have topped more than half-a-billion dollars. However, even with this boom, employers in Ohio have remained relatively unscathed. For whatever reason, the lawyers that make their living suing employers on wage and hour issues have not pitched their tent in the Western Reserve. The question is not if, but when, and in my experience, companies are, for the most part, ill equipped to fend off such lawsuits. In fact, issues related to compliance with federal and state wage laws are the greatest uninsured risks facing business today.

Many corporate executives and counsel ask “why this and why now?” The answers to these questions are not easy and probably best reserved for a more academic discussion over a beer. However, there are a few factors that deserve special mention because they emphasize why this is the “cause du jour.” First, unlike virtually all other employment litigation, the burden of proof in wage and hour matters rests firmly with the company. Second, intent is irrelevant to liability. Sure, if an employer purposely thumbs its nose at the Fair Labor Standards Act – the federal law that covers most wage and hour issues – the statute of limitations can be increased from

two to three years. But, this is relatively insignificant, especially when considering the third factor, that a prevailing plaintiff is entitled to double damages and attorneys fees almost automatically irrespective of intent. Finally, these disputes, especially class actions, are expensive to defend, document intensive, and usually require extensive e-discovery and multiple depositions. Accordingly, plaintiffs understand that even a “cost of litigation” settlement is a six-figure demand.

So what should you as corporate counsel do to protect your companies from being the next target? Here are three steps to take:

1. Audit Timekeeping Policies.

Make sure your non-exempt employees are accurately recording all of their working time. If they use time sheets, managers must question successive round number time entries. Are employees working off the clock? Are they taking their PDAs home and emailing at night? Are your employees truly relieved of all of their work responsibilities during meal breaks? These are all practices that need to be routinely audited. In fact, when my firm conducts such audits for our clients, the best employer averages 5-10 wage and hour violations.

2. Constantly Evaluate the Exempt Status of Positions.

Just because an employee is paid a salary does not mean he or she is exempt from wage and hour laws. Employers get this wrong all the time, and it is a costly mistake because employers usually do not keep time records for their exempt employees and, thus, cannot defend against overtime claims if the employee is misclassified. Whether an employee is truly exempt is a fact-intensive analysis of that person’s duties and responsibilities. This analysis must go beyond what is contained in the job description. Therefore, it is imperative to have your

companies’ exempt positions evaluated to insure compliance.

3. If Your Company Values EPL Insurance—Make Sure Wage and Hour Matters Are Covered.

As I mentioned earlier, wage and hour litigation was traditionally uninsurable. Over the past couple of years this has changed for those who know what to ask. If your company is considering the purchase of a new EPLI policy, make sure to ask your broker to price coverage for wage and hour disputes. While it is difficult for the average business to obtain cost effective coverage for wage and hour damage awards, most companies now offer policies that will at least help defray the cost of defending such claims.

The best way to defend wage and hour litigation is to prevent it from occurring in the first place. Appropriate and routine evaluation of your companies’ positions, policies and procedures will make sure that you are not a part of today’s “plastics” revolution.

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**NEOACCA extends sincere thanks to
Special Counsel and Jurinnov for underwriting the
publication costs of this newsletter.**



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