

## Inside 2Q2008

- 2...(R)evolution in the Law Firm Service Market
- 4...Member Spotlight & Welcome New Members
- 5...When Good Companies Go Bad
- 7...First Annual Non-Profit Pro Bono Event
- 8...The Communication Gap Between IT and Legal
- 10..."Are You Listening?"
- 12...Reasons Why Companies Fail At Records Management
- 13...ACC News
- 14...Job Openings? & Don't Miss

# FOCUS

## President's Message

**Diane Hirsch**

As a not-for-profit corporation organized to serve its in-house counsel members, the Association of Corporate Counsel also serves the communities where ACC local chapters exist. In past years, the South/Central Texas ACC Chapter members have volunteered time to service various community programs, primarily the Community Justice Program ("CJP"). As our members are in-house lawyers with skills and expertise in areas of law that do not necessarily match the needs of the CJP clients, this year our ACC chapter decided to refocus our pro bono opportunity and we teamed up with Texas C-Bar to assist non-profit entities with their varied business issues.

On April 16, in conjunction with the Texas C-Bar, we hosted an "Ask a Lawyer" event at the CPS Energy Management and Training Center. Representatives from local non-profits had the opportunity to meet with volunteer lawyers in a discrete setting to address their corporation's specific issues. Over 25 lawyers volunteered their time to serve several non-profits. Specific questions from the non-profit

representatives regarding contracts, labor and employment, real estate, and other transactional matters were addressed by attorneys with expertise in that field.

I could not be more proud of our members who worked tirelessly in organizing and hosting this event. I also want to thank all our members who volunteered their time to ensure the needs of the non-profits were fully addressed. Since C-Bar is organized to assist non-profit entities with their business legal issues, we look forward to teaming up with them again in the future as our members' corporate skills are a great match to the needs of various local non-profits.

And, so as not to leave the CJP program out of our pro bono plan, we have elected to have all proceeds from our annual Ethics Follies donated to the program. As big as the Follies is expected to be this year, I am confident that the CJP will greatly benefit from this chapter decision.



As always, the support of our members is directly proportional to the success of our organization. I am humbled to serve as president of an organization where so many members continue to

share their time and talents with our community. If you want to become a more active member of ACC, be a part of the Follies production, or if you have any ideas on how to make ACC a better service organization, please contact me or our chapter administrator, Amber Clark, at [accasouthcentral@yahoo.com](mailto:accasouthcentral@yahoo.com).

# (R)evolution in the Law Firm Service Market

Susan Hackett

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

Contact: [hackett@acc.com](mailto:hackett@acc.com)

**THESIS:** Traditional law firm business models for providing legal services and law school training for lawyers are not necessarily aligned with what corporate clients want: value-driven, high-quality legal services that deliver performance for a reasonable cost and develop lawyers as both savvy counselors and efficient business partners.

**THE PROBLEM:** Sometimes I feel like the “old lady of the in-house bar” (even at 47) ... I’ve been at ACC for close to 20 years. If one thing has remained a constant, it’s that members are less than satisfied with their outside counsel relationships. They may like their outside lawyers (or at least some of them), and they may agree that there’s incredible expertise out there—there is no shortage of smarts or talent. They may even tell you about the 4,017 different metrics and mechanisms that they employ to assure themselves that they’ve got a handle on their outside spend. But still ...

... Even in the best relationships, in-house counsel often don’t feel their outside costs are predictable or value-driven. Somehow or another, for all that they like in their outside lawyers, they have a lot of concerns regarding the firms they employ. Somehow or another, more time often is spent arguing over the bill after the fact than in setting expectations and goals upfront that everyone can manage to meet. Somehow, they feel that more precious time is spent on process than on counseling.

Another thing that hasn’t changed is that clients aren’t happy about their in-house lawyers’ inability to get a handle on their ever-increasing legal spend. The “inelasticity” of the price increases in the law firm business is, frankly, mind-boggling. In every other marketplace of services, prices go up and down with the economy or as new efficiencies or ideas surface and talent moves about. At firms, especially bigger firms, prices go up 6 percent per year, and we all have a sneaking suspicion that even if we negotiate a 10 percent price reduc-

tion on our matter, they’ll simply bill us for 15 percent more “service.” And all this happens at the same time that in-house departments, across the board, have decreased their own expenses, while at the same time increasing efficiencies and productivity.

Accordingly, a lot of very unhappy corporate counsel tell me that their corporate procurement departments are closely scrutinizing the legal department and their spend. And increasingly pressured managing in-house managers counsel look for the fix: they host beauty contests, develop convergence strategies, apply collars and cuffs and whatever’s new in fee management, they set up dashboards and compare costs by firm and regions and matter type and turnaround time, and they spend lots of time training their lawyers to engage in early case assessment. While some have some success (and while none of these are “bad” ideas), at best, all this tinkering does little more than rearrange the deck chairs on the Titanic.

Some blame the ubiquitous billable hour and its perverse drivers toward inefficient and terribly expensive results. Some blame the morph of law firms (professional entities) to a business model (profit driven). Others point to the almighty “profit per partner” ratings, highly leveraged pools of stunningly inexperienced and overpriced associates, and an increasingly de-equalized middle class of partners. Indeed, one of the most disturbing trends in all of this mess and despite the tall stacks of money paid out by clients is the incredible number of lawyers who are either pushed out of the profession, or run screaming from the building, often before they’ve enjoyed any semblance of the career and professional fulfillment we all envisioned we’d have when we were in law school.

In-house counsel from large departments, small departments, and every kind of company in every kind of industry are very powerful people and we can choose to hire

whom we want—everyone says so, right? And yet, we just can’t seem to get outside counsel and their costs “under control.”

**THE SOLUTION:** So I say: Time to roll our sleeves up and talk about what we *can* do if we work together to create long-term institutional change, rather than railing that everything we try on our own doesn’t return results consistent with our expectations—nothing changes on the larger scale.

**Revolution + Evolution = (R)evolution?**

**SETTING EXPECTATIONS:** I recognize that nothing anyone can do will change everything overnight, and lots of different folks want lots of different things, so there’s not even consensus around what success might look like even if we could envision it. So here’s what we ask and what we think is a reasonable expectation: join ACC in thinking like a revolutionary change agent (that is, thinking big picture and out of the box), but also help us implement real reform by working on evolutionary advances over time (that is, focus on practical solutions).

**The Proposition: ACC’s Value Challenge—Re-connecting value to the cost of legal services.**

**What ACC’s Value Challenge is and isn’t:** The value challenge is not an answer, but a movement. It’s not about laying blame; it’s about creating responsibility for change.

So let’s all agree that firms need to be responsible for addressing client dissatisfaction. And let’s recognize that no one’s saying that firms shouldn’t profit; on the contrary, firms must be sustainable entities. Let’s also get it straight: a focus on connecting cost to value does not mean that everything should be cheap or that we’ll lose our commitment to quality. There are lots of expensive lawyers out there who are worth every penny (the problem is the expensive lawyers who aren’t), and there are many high quality

lawyers who don't cost what some of their peers in big firm practices charge for the same services.

On the corporate counsel side, if firms are providing services we aren't happy with, why do we keep buying those services, thereby enabling inefficiency, inflated cost structures and poor practices? It's in-house counsel's responsibility to better manage their spend, help firms understand what we and our clients want, and reward outside counsel who deliver the outcomes we've asked for. If we're to convince corporate management that we know what we're doing, we better start recognizing that in 2008, no one gets hired or promoted just for retaining the expensive firms with big reputations. Regardless of their ranking status, in-house counsel will be evaluated for managing firms that provide value and results.

Accordingly, ACC will:

- promote intelligent and facilitated dialogue among corporate counsel, law firms, and eventually other stakeholders, including law schools, to help drive alignment and focus on value;
- develop methodologies and metrics that corporate counsel can use to assess the strengths and weaknesses of law firm vendors;
- create tools that in-house counsel and firms can share to drive change in the performance of valued legal services; and
- enhance awareness and promote communication of success stories in achieving value and alignment—creating practical benchmarking.

To accomplish these goals we're prepared to really dig in, dig deep, and commit ACC resources and stake our reputation for delivering results. While we have lots of ideas on tap and will be working on several plans concurrently, I wanted to use this forum to discuss an early role for chapter leaders and members:

**WHAT CAN YOU DO?—Getting Started.** We hope to engage members, local law firm leadership, ACC chapters, local and national bar groups, law schools, and other stakeholders to discuss what we should

do and how we should do it in a highly interactive discussion format involving small groups focused on delivering recommendations and direction. These conversations will cover a variety of topics, discuss best practices at work, help define "value" in legal services, discuss alternative models for law firms to use to conduct their business and to cost/bill their work, and really drill in on retention, training/development, and promotion of talent (at the entry level, in the middle ranks, and at the highest end of business). We will use the resulting intelligence to help shape more and better tools, resources, models for consideration, best practices and so on. In other words, we'll evolve together.

You will also be receiving an email soon (depending on publication dates, some of you may have already received it) from ACC's Value Challenge Steering Committee that asks you some simple survey questions that will allow us to collect some baseline information and feedback to target meaningful dialogue in these first sessions. Please watch for it and invest the 3-5 minutes it will take to complete this survey (it's online, so it's simple to do).

### **WHAT WE HOPE TO ACCOMPLISH: Desired Outcomes**

1. Create a national dialog about the need to reconnect value to costs, especially within the law firm community, with a common language and framework that ACC will have helped define and that our members will help drive.
2. Identify and empower core groups of leaders in the in-house and outside firm communities, as well as in consulting houses, vendor organizations, legal and business media, and the law school community: engage them and then solicit more participants every year.
3. Offer a tool kit for use by in-house counsel and another for outside firms (and shared resources, as well, of course), containing leading practices, management tools, models for managing value, and networks by which participants in this process can communicate their experiences and ask questions of each other, including "who do you use and how do you do this?"

4. Nourish the development of an in-house client community that gives law firms reasonable comfort that their efforts to implement change will be supported and rewarded.
5. Encourage law firms that are more focused on retention of talent valued by clients, and matter management driven by the client's expectations and needs.
6. Foster greater satisfaction and pride in their work for both inside and outside lawyers—spending less time bickering over bills and more time focused on solving client problems.
7. Ensure recognition by senior (non-legal) management that in-house counsel are taking the lead, rather than simply being reactive, and that they are exercising strong business skills in balancing their inside and outside legal spend—targeting results and outcomes, rather than just hoping to manage an unpredictable process.

*All of this is in pursuit of perhaps the most important outcome: a legal profession in which all attorneys deliver value.*

As the "increasingly mature" lady of the in-house bar, I see this initiative as the culmination of my career with this organization to date; yeah, I guess that makes it personal for me. But if these problems, and your dissatisfaction with the way things are is personal to you, too, please join me in starting the ACC Value Challenge (R)evolution. We here at ACC can think of nothing that's more *valuable* that we can offer you, your clients and our profession.

Susan Hackett: [hackett@acc.com](mailto:hackett@acc.com)

## Member Spotlight: Karen M. Thompson

*Karen M. Thompson, Assistant General Counsel, NuStar Energy L.P.*

**How long have you been a member of ACC? What is the greatest value you get from the organization and how have you seen it grow over the years?**

I've been a member since February 2004. ACC's Virtual Library<sup>SM</sup> is great. I refer to it all the time and am nearly always able to find something on point. There is no other resource that covers such an extensive list of quality, in-house materials. I never dreamed I'd need an infoPAK<sup>SM</sup> on Canadian employment law, dealing with accountants, or records management. The library has changed dramatically in the last few years, and keeps getting better. I also appreciate meeting other in-house attorneys who are dealing with the same issues.

**Tell us something about yourself that may surprise other people.**

Before joining Valero, I lived in the Republic of Palau and worked at Sam's Dive Tours. The average workday at Sam's meant riding my bike to work in shorts and a tank top and talking to tourists to make sure they were having the best vacation of their lives. Pretty good gig, but Sam wasn't big on stock options. My husband and I traveled in Asia for four months before returning to Texas.

**What is your most embarrassing moment? How did you handle it?**

Not appropriate for publication.

**Where did you attend law school and college? What did you enjoy most about your college and law school experiences?**

I went to college at UT Austin and then to the University of Houston Law Center. One of my best undergrad memories from UT was the summer I signed up for a media law class (my first law related course, I think). It was a summer of lazy afternoons at the lake and margaritas by the pool. Luckily, my poor performance in that class didn't keep me from ultimately going to law school. I think having worked before going on to UH gave me a good perspective, allowing me to really enjoy the challenges of law school and the student lifestyle. I'm probably one of the few lawyers who actually enjoyed civil procedure. Plus, that's where I met my husband.

**Why did you become an in-house counsel?**

I never planned to be an in-house attorney. During my job search upon returning from Palau, an opportunity to join Valero presented itself. I was impressed with the top-notch lawyers at Valero and the fact that they seemed to enjoy their jobs and have both a sense of humor and a healthy perspective. At that time, I might also have been one of those misguided lawyers who thought that in-house practice was going to mean a low stress, 9-5 hour day. Even once it became clear that I would work longer and harder than I had at my law firm, there was no going back.

**What has been your most challenging legal issue to date and how did you handle the situation? What are your most memorable or significant accomplishments as a lawyer?**

It seems that every week there is a new challenging legal issue at NuStar. I now have responsibility in areas that are new to me so I've had to learn new areas of the law quickly. Generally, though, I think international legal issues have been the most challenging because not all laws are written in English, translations are often nonsensical, the local attorneys don't speak our language, and the business and political customs of some countries are so contrary to our own. I like to travel, though, and these are usually interesting opportunities to learn something about another culture.

**What are some of your hobbies and interests? What do you enjoy doing outside of work?**

My family is my biggest interest. My kids are two and four and still love being with their parents, so we spend a lot of time at the zoo, playing chase, hide-and-seek, and diapering babydolls, etc. On the rare occasion that I do get some time alone (and it's not in the middle of the night) I like to practice yoga, garden, read, take pictures,



hike, bike, run, ski, and generally get outside. We love to travel and scuba dive, and look forward to traveling more frequently when the kids are older.

**Who influenced you the most to become an attorney? In what ways? Who do you "lean on" for moral or spiritual support?**

My uncle was a civil rights attorney in Washington, DC and his job always seemed fascinating and exciting. I lean mostly on my husband, my sister, and my girlfriends for support. I think I might have quit being a lawyer a long time ago if not for the incredible support and friendship of some of the women I've met throughout my career.

## Welcome New Members

**(Since February 2008)**

**Michael F. Barry, USAA**

**Anthony Castiglione, USAA**

**Michael A. Kueber, USAA**

**Benjamin V. Lugg, San Antonio  
Housing Authority**

# When Good Companies Go Bad: The Reasons for Decent's Descent

By C. Lee Cusenbary, author of the ethical musical "Decent's Descent"

After a decade of providing relevant and instructive ethics conferences in San Antonio for in-house attorneys, ACC is ready to spread its wings and take on a broader responsibility. ACC will produce a three-hour "ethical musical" on November 6, 2008, at the beautiful Charline McCombs Empire Theatre at 1:00 PM. In addition to the familiar faces of in-house counsel, you will also find executives, physicians, directors, and compliance officers from some of San Antonio's largest corporations. Since 2002, the Sarbanes-Oxley Act has forced changes in US corporations' management, including new roles for general counsel and their legal departments. Even for privately held companies, the need for codes of conduct and heightened awareness of business ethics has become evident. The new corporate mantra is "doing what's right equals profitability." Consumers now expect and look for corporate responsibility and for ethical decisions to be made. One might observe that the new marketing trend for companies and law firms is to shine a spotlight on how ethical corporations have become before anyone even challenges the current standards. In other words, being "ethical" is the new being "green." Consultants work overtime to help companies get their compliance and codes of conduct in order. With more focus, more honest competition, and resulting financial stability, it is the consumer who benefits. Forbes has partnered with Ethisphere Magazine to conduct studies to support these trends, and the financial impact of doing the right thing.

Successful corporations, such as Valero Energy Corporation, have already invested in ethics training for its managers and upper level executives. Valero has recognized the value of such programs for the stability and growth of the company. "Business and legal ethics are an important aspect of working at Valero, it's part of our culture here," comments Diane Hirsch, managing counsel, in the litigation section

of Valero Energy Corporation and current ACC chapter president. "It really helps for the executives to see why the company's attorneys are recommending certain changes and compliance training. It's a great idea to open the conference to other professionals," she adds.

To provide the "ethical musical" to the clients of ACC's membership, ACC opens the doors this year to other professionals. The gesture has been received by San Antonio's business community with excitement and gratitude. San Antonio will now have a city-wide ethics conference, where in-house attorneys can sit at the same table

with the executives they advise, and see ethics issues displayed live on stage. "Once you see a chain of events live, on stage, that lead to an executive getting indicted for cooking the books, or making false representations to the US government... you never forget it," comments Lone Star Bakery's general counsel,

Kay Grimes. "To make it more watchable, the Follies uses comedy and music to make the message really fun to watch. I laugh out loud. Some of the parody songs are hilarious," she adds.

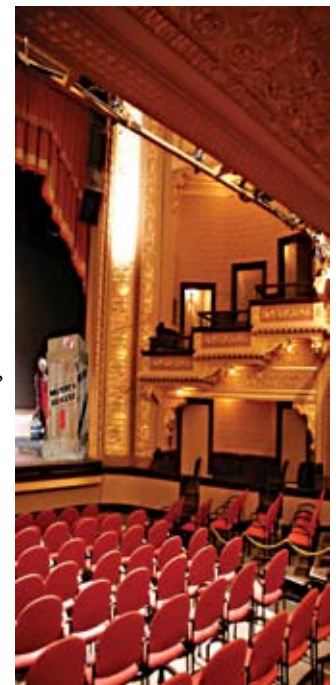
"The Follies," as they are often called, are in their third year of poking fun of just about everything from Martha Stewart to Jeffrey Skilling. Besides the change of opening the doors to other professions, Follies 2008 will also change locations to an historic theatre. The Charline McCombs Empire Theatre sits right around the corner from The Majestic and shares dressing rooms and back stage areas. Another new element this November will be the addition of many recognizable names. From the world of theatre, many local talents have volunteered to join the professionals onstage



to help carry the load of three hours of dialogue, singing, and dancing. Federal, state, and Bexar County judges and justices (eight at current count), also join the cast. "People who care about the business and legal community recognize the value of a city-wide ethics conference," says Amber Clark, ACC's executive director. "They want to be a part

of it because it keeps San Antonio a great place to work and attracts other companies here," she adds. At current count, the cast of the musical titled, "Decent's Descent," totals over fifty doctors, lawyers, judges, and actors. Corporate/firm sponsorships, table reservations, and individual CLE tickets are currently available on the website: [www.ethicsfollies.com](http://www.ethicsfollies.com).

The story of Decent's Descent is an ethical musical, akin to a morality play. The Decent family is in its third generation, and the youngest son, Bear Lee Decent, Jr., played by Lamont Jefferson, is the new president. He has capable people around him, but listens to no one. The flurry of activity around him grows as he decides to take Decent Food and Drug public, with the help of B. Trey Hastily, played by Steven Bull. The descent of the company's ethics and profitability reach a climax of almost



*continued on page 6*



continued from page 5

losing the company. The lessons learned about pitfalls and the value of compliance is self-evident and not preachy, with facts taken from national headlines. As one line from the opening song "Parody Tonight" says, "We'd be surprised, if you don't recognize, someone you know in the show tonight!"

Salient ethics topics from SEC compliance, the Texas Rules of Disciplinary Conduct, human resources, technology management, confidentiality agreements, and internet/web usage at work are about 30 minutes of the jam-packed, fast moving script, which is in its fourth month of revisions and editing. Attendees will also learn that there are common themes of behaviors that indicate an upcoming ethical or legal hardship. Overzealous ego-driven CEOs, a hyper-focus on achieving numbers rather than quality, and not setting the ethical tone at the top of the company's leadership are some of the reasons for Decent Food & Drugs Descent.

Another new addition to the Ethics Follies is The Ethical Life Award. ACC will host a city-wide nomination process for the first annual awards, given to a law firm and an in-house law department which exhibited ethical behavior in their legal and business activities. The chairperson for The Ethical Life Awards nominations committee is Kelli Cubeta, the general counsel of BSG Clearing, Inc. The awards will be presented within the script of the show like an awards ceremony within the musical itself. The nomination period begins in September of 2008, with forms available online at [www.ethicsfollies.com](http://www.ethicsfollies.com) at that time.

Consider spending half a day to celebrate the great city of San Antonio, and its small town trust and honesty despite its remarkable growth. Be a part of Ethics Follies on November 6, 2008. You'll also get all your Texas Ethics CLE training for the year. Sponsoring a table for eight will help ACC achieve its goal of giving back to the community since all proceeds benefit the Community Justice Program, which provides free legal services to those who can't afford them. Please contact me or Amber Clark at 830.336.2049 or email to [acca@gvtc.com](mailto:acca@gvtc.com) for more information.

## Association of Corporate Counsel's 11th Annual Ethics Conference

Co-sponsored by  
The San Antonio Bar Association  
Nov. 6, 2008 at 1 p.m. Empire Theatre

Experience "Ethics Follies," the seriously fun ethics conference.  
**3 Hours Ethics CLE**  
Attorneys, business executives, compliance/ethics officers and city employees are invited to purchase tickets. Judges are our guests.  
All proceeds benefit  
The Community Justice Program

SAVE  
THE  
DATE!



See skits,  
Hear parodies  
& reserve seats:  
[www.ethicsfollies.com](http://www.ethicsfollies.com)



You can also visit [www.ethicsfollies.com](http://www.ethicsfollies.com) to watch videos and read reviews of the past Ethics Follies conferences and leave a comment, or read the Follies Forum blog.

C. Lee Cusenbary  
General Counsel  
Mission Pharmacal Company  
Phone: 210.696.8400

# ACC South/Central Texas' First Annual Non-Profit Pro Bono Event

Staff lawyers with over 10 San Antonio corporate legal departments participated in the ACC South Central TX Chapter's Non Profit Pro Bono event. During the April 16, 2008 "Ask a Lawyer" event, representatives with six area non-profit organizations met one-on-one with lawyers to discuss matters such as contract creation and negotiation, labor, employment and real estate transactions.

Members answered the call to assist Texas C-Bar, a state-wide organization focused on assisting nonprofit entities with their business legal issues. Prior to the event, ACC members participated in a non profit roundtable hosted by Jackson Walker to discuss common issues concerning non profit organizations.

"As members of the Association of Corporate Counsel, this is a great way for each of us to come together and offer a few hours of our time and really give back to non-profit agencies that do so much for our communities with limited resources," said Katherine Yates, legal counsel for CPS Energy.

Thanks to the following pro bono attorneys:

Adam Boland  
Andrea Porter  
Bob Temple  
Carolyn Shellman  
Curt Brockmann  
Dan Lopez  
Diane Hirsch  
Howard Anderson  
Ingrid Etienne  
Jennifer Bligh  
John McCleod

Joseph Arrambide  
Justin Rice  
Kathy Yates  
Kay Grimes  
Kelli Cubeta  
Michael Cubeta  
Monica Trollinger  
Pat Escobedo  
Paul Gonzalez  
Reagan McCoy  
Serina Rivela

A special thanks to CPS Energy who hosted the event at their Energy Management Training Center, as well as Valero, Bexar Met, and Southwest Research Institute for sponsoring the event.

The event was organized by the ACC Pro Bono and Social Concerns Committee. For information on upcoming committee events or to get involved with the committee, please contact Ingrid Etienne at [ietienne@tnc.org](mailto:ietienne@tnc.org).



# The Communication Gap Between IT and Legal: Real-life Blunders and How to Learn from Their Mistakes

By Pat Mccolloch, Bill Detamore and Chris Knox

This article originally appeared in E-Discovery Advisor magazine

The last time the Federal Rules of Civil Procedure were amended to address electronic data, the internet, cell phones and even personal computers did not yet exist. With the recent explosion in Electronically Stored Information or “ESI”, the need to address e-discovery in a modern context was paramount. The Federal Rules finally caught up with the changing times with several new rules addressing ESI that became effective on December 1, 2006. This is not surprising given that most industry studies over the past decade estimate that 95 percent or more of all information resides in an electronic form.

One of the paradigm shifts the new Federal Rules has brought to the discovery phase of litigation is that IT and Legal, two departments with seemingly very different goals, backgrounds, approaches and even language, are now being required to work together as a team. If IT and Legal do not communicate, coordinate and operate in unison, the organization loses control over their information, wastes valuable resources, or even worse, faces sanctions and fines for not properly responding to requests for production. More often than not, the failure of the organization’s technology department to understand how counsel intends to use the requested information; and counsel’s failure to understand the form with which the data can be harvested and programmatically manipulated leads to higher costs and less persuasive evidence at trial.

Let’s face it; IT and Legal have different DNA. They have contrasting backgrounds, training, and terminology. However, as stakeholders in their organization, they must work together to bridge the communication gap wherever possible if they hope to manage the complexities of electronic discovery. When miscommunications occur, they usually result in unnecessary time and expense recreating or organizing information that already exists within the client’s systems. This information is extremely valuable since it

can be manipulated or reused in a variety of ways to support the both ongoing and future legal claims.

To illustrate the why it is critical that IT and Legal speak the same language; we have compiled three true stories:

## Unnecessary Effort and a Weaker Argument

An organization is sued for fraudulently inducing customers to buy certain products or services. The plaintiffs’ theories are varied and the alleged deceptions took many forms (inter alia unscrupulous sales representatives, misleading advertising, failing to honor contractual rescission rights). The organization’s sales and marketing units track activities with its customers including advertising campaigns, telephone calls, mailing campaigns, and other contacts with prospective customers. That data exists within CRM and sales automation applications.

Defense counsel would like to present evidence that the allegations asserted by plaintiffs were, even if true, isolated, and certainly not a common business practice. In order to do so, the attorneys meet with the technology staff supporting these applications and request certain information to rebut the plaintiff’s claims. The supportive IT staff (under direct orders from the CIO to provide highest priority support, “whatever information the lawyers ask for, make sure they get it”) dedicates resources to customize reports for the lawyers and provides those reports containing all of the requested information in the format requested by counsel. Trial counsel takes those reports, and manually enters certain information into a database application created especially for the litigation in connection with the organization’s expert.

This resulted in unnecessary labor to manually enter the information as well as a high risk of inaccuracy. Both could have been avoided if the selected data had

been exported from the CRM and sales automation applications and imported into counsel’s database in an automated way. The client’s review of this matter (with someone who understood the data structure of the CRM and sales automation applications and counsels’ legal arguments) confirmed that the data could have been collected and organized with some minor programming at a savings of \$140,000. Moreover, there was other information that could have supported the defense theories in the case.

Here, because of less than complete understanding between the lawyers and IT (even with the best of intentions), the organization spent more than it should have and developed a less persuasive case

## Avoiding a \$12 million IT bill

With the advent of large corporations outsourcing their IT management and support, the risk is potentially magnified even more. The IT vendor typically has goals that are fairly straightforward: Keep the client’s systems up and running, and if something goes down bring it back up as soon as possible. These black and white extremes can at times get lost in the greyer world of discovery. In this real example, a Fortune 200 healthcare provider found itself needing to produce emails for ten custodians for a period of two years. The company was creating daily back-ups of their 20 separate Microsoft Exchange servers, and their retention policy, combined with various litigation holds, resulted in the existence of roughly 12,500 back-up tapes for their email systems alone. At the time, the company was engaged in a multi-year agreement with a Fortune 100 IT solution provider to handle all IT infrastructures.

Legal immediately contacted the IT provider and requested the restoration of all 10 custodians’ email for the previous two years. IT departments are typically set up to handle desktop support as well as network disaster recovery. Naturally,

their solution to this request included the restoration of all Microsoft Exchange environments to an online 'live' format so that the 10 individuals' mailboxes could be searched. This approach would have required approximately 500 Terabytes of storage space (500,000 Gigabytes). The resulting quote was \$12.48 million!

There were two vital holes in the communication between Legal and IT. First, Legal simply requested the restoration of the custodian's email. IT personnel can often be quite literal, and heard this request as a need to recreate their live Exchange environment for all 20 Exchange servers. Microsoft Exchange backups contain a backup file (EDB) which can be read and searched without having to recreate the entire Exchange environment. This process enables the restoration of individual mailboxes without the need to restore the entire environment. Due to the decrease in complexity as well as online storage, this approach would cost \$3.1M, or roughly 75 percent cheaper than the original quote by the IT provider.

In addition to the miscommunication about how the email was to be restored, Legal was unclear of the scope they wished to cover. As mentioned, the company was creating daily backups for all employees. Daily backups on email servers are extremely duplicative. Only added or deleted email would change on the back-ups on a daily basis. At the time, the company was not enforcing any mailbox limitations, so employees had no reason to delete email from their mailbox. Given this scenario, it was possible to sample the backups on a monthly basis instead of daily. An index was provided by IT for the backup tapes and was used to narrow the focus to a small sub-set of tapes. This approach added a very small—but ultimately acceptable—risk that an email sent, received and deleted within the month would be missed but decreased the cost of the project to about \$1.1M, less than 10 percent of the original quote from the IT provider.

### **When is a backup not backed up?**

Finally, consider the case of a large government agency that was defending itself in a Title VII case. The request for production was quite broad and the universe included

all e-mail and other ESI pertaining to the human resources department. The time period in question was long enough that some earlier proprietary e-mail systems had been in use and therefore much of what is known about today's systems such as MS Exchange were not necessarily valid. During the first several attempts by Legal to request backup tapes of the e-mail systems, the IT Department stood firm in its conviction that backups "did not exist". Some members of the legal team who asked this question over the weeks simply attributed this answer to the long timeframe involved and the proprietary nature of the system. In the opinion of Legal, they had been told that backups did not exist. It was not until the IT Manager was asked the fifth time about this issue when he finally replied "Why would we make backups of the system when every single message that comes in or goes out is automatically copied off line to tape." In other words, the IT Department was not running a specific "backup tool," but in fact was saving the data in an even more usable format! However, the legal team had continually asked for "backups" without explaining that their ultimate goal was to know what all old messages existed and therefore potentially needed to be reviewed. In the end, more than 5 million messages were recovered to be potentially analyzed to support the defendant, resulting in a much more comprehensive data collection.

Through these examples, as well as the multitudes of others that continually come to light in the reporting of e-discovery cases, it is clear that miscommunications between Legal and IT can pose a very real danger with potentially high consequences. Risks include not having the proper information to launch a strong defense; increased litigation support expenditures due to inefficiencies and/or errors in collection; as well as sanctions and fines for spoliation or the court concluding that the firm did not undertake collection of ESI in a good faith effort. The good news however is that it does not have to be that way.

By employing the services of a team experienced with the e-discovery process, these landmines can be avoided or at least mitigated. In advance of any litigation (or

as early as possible after filing), it's critical to prepare a discovery management plan, created by a multi-functional discovery management team. The team should have input from the various stakeholders including litigation counsel, support staff, and information technologists to conduct a thorough analysis of the issues. To be most effective, this cross-functional team should:

- Perform an inventory of all ESI information stores. Know where your e-mail, CRM, Accounting, HR and other important data are stored and how it is managed. This inventory should be conducted under the direction of the E-Discovery Team.
- Develop standards and procedures for important discovery tasks such as implementing litigation holds, ESI collection and preservation; as well as processing. Documented standards that can be referenced by all of the players can go a long way in avoiding miscommunication between Legal and IT.
- Communicate clearly and often. Make an effort to understand the language of the other stakeholders. Don't just tell them what you need. Tell them why you need it and how you are going to use the information.

Frequently, both IT and Legal think they are communicating clearly. The challenge is that each person communicates in a way that is unique to their industry, their job function and their prior experience. In other words, one man's "backup" may or may not equal another man's "copy." The best strategy is to tell the other stakeholder what you need and why.

# “Are You Listening?” Good Communication Between Outside Counsel and In-house Corporate Counsel Means Everyone Wins

By David M. Prichard, Anthony A. Avey and Brendan K. McBride of Prichard, Hawkins, McFarland & Young

As in a marriage, communication is the key to a growing, healthy relationship between outside counsel and their in-house corporate counterparts. When both sides are attentive and willing to communicate, trust grows and the relationship flourishes. When information flows freely, each side feels empowered and active as a part of the decision making process. And each party to the relationship has the information necessary to help the other. But when the communication stops, suspicions often take their place. And the relationship begins to grow unsteady. This article has its genesis in the February 6, 2008 monthly meeting and presentation by David Prichard, Tony Avey and Marialyn Barnard of the San Antonio Firm of Prichard, Hawkins, McFarland & Young, and John Harvey, general counsel, and senior vice-president for Dallas-based software company, i2 Technologies, about the frustrations that come from inadequate communication between outside and in-house counsel.

*Winning is great. Winning—with communication— is even better.*

Corporate clients hire outside litigation counsel for their expertise, experience, and proven track records for success. While the ultimate results are the touchstone of the representation, clients expect much more. Corporate counsel should be able to insist upon efficiency and value. Their outside counsel needs to be aware of the costs of the litigation and alternative means for pricing services to take the emphasis off of billable trench-warfare.

Corporate counsel can and should expect outside counsel—even the best and “biggest”—to approach file handling, billing, budgeting and strategy with a mind toward the costs and benefits to the company, and an understanding of the company’s long-term and short-term goals and business purposes.

That may include strategic planning at the beginning of a case rather than “throw it all on the wall and see what sticks” which usually yields legal bills that

exceed the value of the results obtained. It may include setting realistic and achievable budgets and thoughtful projections regarding the timing of the litigation, and the likely duration of the case. All of this information is useful for corporate counsel in deciding what litigation strategies are and are not conducive to the company’s ultimate business goals.

*Ask, announce or arrive*

A common place where communications often break down, and frustration begins to grow, is in the adjusting of attorneys’ billable rates. When dealing with your outside litigation counsel, how should corporate counsel find out about new rates? Does counsel ask, announce, or does the increase just arrive?

The gold standard in communicating fee and rate increases is to ask. Corporate counsel should be paid the courtesy of a *request for approval* for a rate increase before one is put into place. Such a procedure shows respect for the authority of the client and corporate counsel as the ultimate decision-maker, and also aids corporate counsel in adjusting budgets and reporting to his or her superiors in the company regarding the costs and benefits of important litigation decisions.

Second best—and, based on responses from ACC members at the meeting, the most common approach—is to merely announce a rate or fee increase.

The worst—and, unfortunately a common practice—is for bills to merely arrive with increased rates, frequently placing corporate counsel in the stressful and unenviable position of revising budgets and justifying the rates after the fact.

*The changing faces of litigation law firms*

The practical reality is that the company’s business purposes and its own cost-benefit priorities may be at odds with the business model applied by the outside counsel’s firm. It is not unusual for “clock-minded”

modern law firms to have in place a multi-level authority structure with pressure at each level: senior partners, junior partners, senior associates, and associates, to generate profits by increasing billing, to support salaries, overhead and lifestyles. It may even become habit in such organizations to think about “success” as a question of increasing billable hours while minimizing the firm’s risks. It’s important to understand the business approach that outside counsel takes to the company’s legal matters. Are the incentives placed to maximize the quality of the results while still giving due regard to costs? The inefficiency of these models, to put it frankly, should not become the clients’ burden.

For example, a case may be ripe for a creative legal strategy that would posture the case for an early resolution well within the value the company places on the claim. But that would mean less opportunity to work up the case and bill for the time in doing so. Subjectively, working up the file anyway can always be justified by the lawyers involved on the grounds that they want the most favorable resolution possible for their clients – after all, that’s what they’re being paid to do. But if it costs the company \$200,000 in additional legal fees to decrease the value of a claim against the company by \$50,000 at settlement, it could hardly be counted a “victory.”

Fortunately, in response, some firms have begun to understand that with careful communication, a mutually beneficial business relationship can be engineered between the firm and the client under which the incentives are balanced to obtain great results, efficiently, and in a cost-effective manner. Alternative billing arrangements such as flat-fee litigation retainers, geographical litigation plans, mixed hourly fee and contingency agreements and creative incentives and bonuses that reward efficiency and results are not impossible. Likewise, simple budgeting by law firms (as is done in the corporate world) would provide certainty to the client and provide

an avenue for the law firm to support its billings. It encourages creative lawyering, long-term strategic planning, and an approach to legal representation that is mindful of the real business needs of the company rather than being primarily “clock-minded.” It’s all a matter of shifting expectations and then improving communications.

The financial objectives of the law firm should not compete with the financial health of the firm’s corporate clients. Just like having to quietly accept the routine practice of rate increases arriving unannounced like unwelcome relatives, if corporate counsel has become accustomed to expect certain level of communication and service, they won’t know they can ask for more. But the truth is . . . they can.

#### *Talk to me*

The more outside counsel is willing to share information and receive input from corporate counsel about the litigation, the better the chances for a productive relationship between the two, and the better the chances that corporate counsel’s input can help the outside counsel understand the business needs of the company and arrive at real victories.

Two simple procedures can go along way toward keeping these lines of communication open: regular case status reports or evaluations, and reasonably accurate budgeting.

#### *Case evaluations/status reports*

Does corporate counsel receive detailed case evaluations and case status reports on the matters outside counsel is handling for the company? Are these reports regularly updated? The advantages are several. Not only does it keep corporate counsel in the loop as to major developments it also helps corporate counsel take an active role in understanding the issues and constantly reassessing the company’s objectives. Beyond its benefits to corporate counsel, it’s a good practice for outside counsel to regularly reassess the status of the case to improve and refine strategies as the case develops, better positioning the case for trial or settlement.

The reports should, at a minimum, contain information about the factual and legal claims at issue, information about the local venue, including the judge presiding over the case, the potential jury pool, the lawyers involved and, if available, information on prior verdicts and settlements in similar cases for that venue. It should include a basic but brief explanation of the major legal issues involved in the case and detail of the major facts developed during discovery and depositions. Finally, it should include a candid and reasoned assessment of the prospects for success, the settlement value of the case based on the information available, and a recommendation as to whether the case is a good candidate for trial or settlement.

#### *Budgets*

A case budget. The first and most obvious value is that it requires outside counsel to give serious consideration to how much time the matter deserves. It’s one thing to just write down isolated time entries for a few hundred dollars here and there, or to send out a bill with just one month’s fees. It’s quite another to have to think about how much of the client’s money is going to be spent by the time the representation concludes, and how to justify those costs before they are incurred.

The budget should be a thoughtful analysis detailing the work to be performed, and an educated guess as to the time that will be billed for it.

Of course, every lawsuit or transaction is different, so the budgets should be regarded as a useful tool rather than rigid guidelines. So much of what may drive up (or even reduce) the cost of a case is outside of the control of the outside counsel – and simply unpredictable. But experienced counsel should be able to assess with reasonable accuracy the average amount of time and money involved in the major aspects of working up the lawsuit or handling the transaction in which they’ve been retained to provide services. The budget should also factor in major aspects of costs and expenses (travel, copying, litigation service vendors that might be necessary, expert’s fees, etc.). This information is invaluable in assessing the value of the

case, recommending strategy and meeting the company’s business needs.

#### *An ounce of prevention . . .*

There’s no room for distrust in the relationship between corporate counsel and the outside counsel they retain to protect the company’s interests. A basic adjustment to the expectations, and a basic level of reasonable communication, not only fosters a more productive, mutually beneficial, long-term relationship, but it incidentally brings better results – and real success that both inside and outside counsel can be proud to report. When effective communication is the norm . . . everyone wins.

# Reasons Why Companies Fail At Records Management

By Marty Provin, executive vice president of Jordan Lawrence

This article is written for the attorney who finds his or her self with responsibility for their company's (or their clients) records management initiatives and, for the purpose of this article, the related practices of privacy or ediscovery. If you find yourself in one of these categories, take a moment and consider today's environment:

"Data Breaches Hit Record In 2007 ..... more than 79 million records reported compromised in the United States" *The Associated Press, December 30, 2007*

"The Plaintiff's Bar is starting to recognize that e-discovery is a powerful litigation weapon, especially when suing companies with large IT systems and voluminous ESI storage" *Top Trends in E-Discovery Noted at ILTA Conference by Ralph E. Losey*

"Six Qualcomm attorneys were issued sanctions for mishandling evidence in a patent case against Broadcom" *The Wall Street Journal, January 8, 2008*

Clearly, records management is something that companies continue to struggle with and arguably something that companies are failing at. While there are a number of contributing factors for these failures, three reasons for failure stand apart.

Companies fail at records management, and everything that goes along with it, because they create and retain tremendous amounts of records and information:

- Inconsistently,
- Unnecessarily, and
- And without "effective process."

Corporate records and information is generally managed inconsistently throughout the organization, from one business representative, department or business unit to the next and differently depending on the media in which the information exists. Think for a moment about a common record type that you would find in any business, like terminated employee files. Which department would maintain this type of information in your company? Certainly you would expect to find

terminated employee files in the Human Resources department, but what about in Employee Relations or Payroll and others? And does your company maintain this information in paper or electronically? Probably both and likely this information is stored and backed-up across a wide variety of areas and media. And finally, do you suppose that every instance of this record type is maintained for the same period of time? Probably not. Generally there is great inconsistency in the length of time companies retain the same types of information regardless of what is stipulated in the corporate records policy.

Using this same example, now consider how unnecessary it is that you have all of this information in the first place. While there are of course regulatory requirements to retain this type of information for a period of time, businesses frequently tend to keep every version and every copy for excessively long periods of time if not permanently. Bear in mind this example is of a defined business record, imagine the inconsistency of more general types of information, including e-mail, business people create and retain daily.

We find that on average over 55 percent of information that a company maintains is done so without a specific regulatory or business requirement. This over-retention and redundancy represents unnecessary risk and cost to the organization. By way of example, we find the percentage growth of e-mail storage alone easily exceeds 30 percent annually in most companies. There are the hard costs associated with managing and storing this information. But consider also the potential risk and costs this unnecessary information can create when the company is required to collect, review and produce it during discovery.

And finally, companies frequently *lack effective processes* for managing records. Records and information is distributed



throughout the enterprise, much of which is sensitive in nature and all of which could be required to be produced. This lack of process manifests itself in risky practices like mobile computing or overlooked back-up tapes. Ever wonder how a company manages to lose a laptop with thousands of individual's personal data or how back-up tapes are

lost or found in closets? According to the non-profit group Identity Theft Resource Center, "A lot of (privacy) breaches are due to inadequate information handling, such as laptop computers with Social Security numbers on them that are lost, human error, and something completely avoidable, as opposed to a hacker breaking into your system." But this lack of process extends well beyond individual business folks and into activities such as back-up procedures for servers located in remote facilities and even into corporate legal departments. We have found that 27 percent of companies do not have a formal process in place to manage legal holds.

All of this is reason to give counsel great concern, but manageable if counsel approaches records management in a logical and disciplined manner like they would if they were preparing for a case. Unfortunately, companies tend to jump to a solution without understanding the problem. Counsel should start by examining the evidence; what records does the company really have? Who has what? And where are corporate records and information maintained, both in terms of areas of the business but also the various media and systems in which the information resides? What is the relationship between business people and the information they use and what are the current practices associated with managing records and information? It is also critical that counsel develop a clear understanding of the organizations "information" infrastructure. With this information in hand, counsel and their support teams like IT and Risk Manage-

ment is well positioned to craft actionable policy, develop effective processes, leverage technology, cut costs and minimize the risk of sanctions towards the company or directly imposed on the attorney.

Contact the author at [mprovin@jlggroup.com](mailto:mprovin@jlggroup.com)

### About the Author

**Marty Provin** is executive vice president of Jordan Lawrence. He has over 17 years of extensive experience in technology and records management. Provin advises in-house legal counsel in the areas of records management, data privacy and e-discovery and the confluence of technology in these areas. Provin is a member of the Associa-

tion of Corporate Counsel, and is a frequent speaker in the legal and IT communities.

### About Jordan Lawrence

**Jordan Lawrence** is a specialty consulting firm, that for the last 20 years has worked with large, complex organizations to assess, develop and enforce corporate records and information management policies and supporting processes. They are an ACC Alliance Partner.



"She never lets us forget she was an English major."

## ACC News

### ACC Seeking Nominations for "Excellence in Corporate Practice"

ACC is now accepting nominations for the 2008 "Excellence in Corporate Practice" award for exemplary achievement within the in-house legal profession. Nominees must have achieved success in one or more areas involving services and contributions to the legal profession. Nomination forms must be received no later than July 1, and awards will be presented October 19–22 at ACC's 2008 Annual Meeting in Seattle, WA. For the 2008 nomination form and a list of past recipients, visit [www.acc.com/php/cms/](http://www.acc.com/php/cms/)

[index.php?id=282](http://www.acc.com/php/cms/index.php?id=282). For information on the Annual Meeting, visit [am.acc.com](http://am.acc.com).

### Recruit a Member and Win A Prize—Guaranteed!

Each time you use the Association of Corporate Counsel network, you gain valuable skills and experience only available through ACC. More members in ACC translate into improved educational opportunities, enhanced networking, increased online resources, and advancement of the profession worldwide. You can help expand your ACC network by taking part in the "Everybody Wins" membership drive. When you

recruit new members to ACC, you will win prizes ranging from complimentary \$5.00 Starbucks' cards and cutting edge electronics including portable DVD players, digital cameras and new computers, to free ACC Annual Meeting or ACC Europe Annual Conference registration and a \$750 travel stipend. ACC's "Everybody Wins" membership drive ends on August 30—so don't delay, recruit today! Learn more at [www.acc.com/everybodywins.com](http://www.acc.com/everybodywins.com).

## Board Members and Contacts

### President

#### Diane Hirsch

Valero Energy Corporation  
210.345.4172  
diane.hirsch@valero.com

### President Elect

#### Kay Grimes

Lone Star Bakery  
210.648.6400  
kgrimes@lonestarbakery.com

### Vice President

#### Timothy Alcott

San Antonio Housing Authority  
210.477.6633  
timothy\_alcott@saha.org

### Vice President

#### Ingrid Etienne

The Nature Conservancy  
210.224.8774 x251  
ietienne@tnc.org

### Vice President

#### Richard Larsen

MDI, Inc.  
210.582.2664  
richard.larsen@mdisecure.com

### Vice President

#### Daniel Lopez

Clear Channel Communications  
210.832.3341  
danlopez@clearchannl.com

### Secretary

#### Abel Martinez

H.E. Butt Grocery Co.  
210.938.8232  
martinez.abel@heb.com

### Treasurer

#### Robert Leckie

210.860.7254  
rbleckie@gmail.com

### Immediate Past President

#### Reagan McCoy

Concord Oil Co.  
210.224.4455  
rsmccoy@concordsatx.com

### Executive Director

#### Amber S. Clark

830.336.2049  
accasouthcentral@yahoo.com



Association of Corporate Counsel  
South/Central Texas Chapter

1025 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036-5425

## Job Openings?

Is your company looking to fill an in-house position? Do you know about a current in-house job opening? If so, please let us know so that we can advertise the position to our membership.

Send an email to our chapter executive director at [accasouthcentral@yahoo.com](mailto:accasouthcentral@yahoo.com).

## Don't Miss

We continue to hold our monthly luncheons on the first Wednesday of the month from 12:00–1:30 PM at the San Antonio Plaza Club. The cost to attend the luncheons is \$10.00 for members and \$18.00 for non-members. (In-house counsel and sponsoring firm only, please.) Check out our chapter webpage at [www.acc.com/chapters/sanant.php](http://www.acc.com/chapters/sanant.php) for our current calendar of events and registration information.

No other professional organization in San Antonio offers better CLE programs at a more affordable price that is specifically geared to meeting the needs and issues of in-house counsel.