

President

Reagan McCoy
Concord Oil Co.
210.224.4455
rsmccoy@concordstx.com

President Elect

Diane Hirsch
Valero Energy Corporation
210.345.4172
diane.hirsch@valero.com

Vice President

John Bibb
Kinetic Concepts, Inc.
210.255.6838
Bibbj@kci.com

Vice President

Ingrid Etienne
The Nature Conservancy
210.224.8774 x251
ietienne@tnc.org

Vice President

Kay Grimes
Lone Star Bakery
210.648.6400
kgrimes@lonestarbakery.com

Vice President

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

Secretary

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

Treasurer

Robert Leckie
rbleckie@gmail.com


Immediate Past President

Lee Cusenbary
Mission Pharmacal Company
210.581.0680
lcusenbary@missionpharmcal.com

Executive Director

Amber S. Clark
830.336.2049
accasouthcentral@yahoo.com

Tradition. Commitment to quality legal service for over 100 years.
Innovation. Creative, cost-effective solutions for our clients.



JW
JACKSON WALKER L.L.P.
TRADITION AND INNOVATION SINCE 1887

Intellectual Property • Energy • Business Transactions • Litigation • Real Estate • Bankruptcy
Labor and Employment • Tax and Estate Planning • Legislative • Health Care • Immigration

Austin • Dallas • Fort Worth • Houston • Richardson • San Angelo • San Antonio

WWW.JW.COM
1-866-932-5599

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 Amber S. Clark, executive director, at accasouthcentral@yahoo.com.



ACC
1025 Connecticut Ave. NW
Suite 200
Washington DC 20036



Reagan McCoy President's Message

Dear
Colleagues,

It is hard to believe that summer is

almost over, and that I am already entering the last half of my chapter presidency. As predicted, our volunteer board has been successful in putting on more great programs, some very fun social events, and a well-attended pro bono clinic. We are now gearing up for November when we will be offering another unique and highly entertaining Ethics Follies.

The majority of you are probably already aware of all of the great educational programs our local chapter offers each month. Most likely, you also know that our chapter offers great networking events for you to meet other area in-house counsel. However, I wonder how many of you are fully aware of all that is available to you through your ACC membership. It has only been through my involvement over the last several years with the chapter board of directors—and the additional leadership training through ACC National that comes with that involvement—that I have begun to scratch the surface of understanding the myriad of resources that are available to in-house counsel who are members of ACC.

As ACC celebrates its 25th year of serving in-house counsel, as “the In-house Bar

Association,” I would like to encourage all of you (members and non-members alike) to take a few minutes to educate yourself about the benefits of an ACC membership. If you are already a member—are you getting the most out of your ACC membership? When was the last time you went to www.acc.com and perused all of the resources available to you? Do you even know what is available on the ACC website? If you are not a member—what are you missing? If your company will not pay for your ACC membership, would it be worth it to you and your career to pay for your own membership?

The best way for you to familiarize yourself with all of the resources that are available to you through ACC is to simply take the time to explore the ACC website at www.acc.com. If you have trouble remembering your password, there is a link on the website that will allow you to easily request that your login and password be sent to you. If you are not yet a member, but would like to check out all of the member resources, contact our executive director, Amber Clark, at 830.336.2049 or accasouthcentral@yahoo.com for a trial password.

One of my favorite online resources is the ACC infoPAKSM. An InfoPAKSM is a comprehensive collection of articles and other substantive materials on a particular legal issue. InfoPAKSM can be ordered online at

www.acc.com/vl/infopak. They are FREE to members. Non-members who wish to order one can have one emailed to them at a cost of \$150.

Some of the InfoPAK topics that have been added to the ACC Virtual LibrarySM just this year include:

- Small Law Department
- Pro Bono Law Department
- Human Resources Manual
- Glossary of Job Descriptions
- Role of the General Counsel
- Email and the Internet
- Employee Benefits for Domestic Partners and Same Sex Spouses
- Managing Family and Medical Leaves of Absence
- Internal Investigations
- Drafting and Interpreting Contracts
- General Counsel Executive Summary of Employment Law
- New to In-House Practice
- Records Retention Law

continued on page 4

Privilege & Co-representation Issues . . .	2
2007 Ethics Follies	5
Don't Miss	6
Texas Supreme Court Denies Review . . .	7
Records Management Difficult?	8
Member Spotlight	9
Chapter Photos	10
Get to Know ACC	11
New Corporate Cost-Cutting Policy . . .	12
Welcome New Members	13
ACColades	13

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

By Susan Hackett
Senior Vice President and General Counsel
Association of Corporate Counsel (ACC)

Martine Turcotte is a very happy lady—at least for a while. She recently won a decision for her client, BCE—the Canadian telecommunications giant—in a US federal court in a case that raised questions (and the specter of unpleasant results) about what many of us do on a daily basis without a lot of thought. Martine’s experience provides a caution to us all—don’t provide legal advice to subsidiaries without safeguards in place.

Many ACC members work in companies that have partially or wholly-owned parents, subsidiaries or affiliates—call them corporate family members. Many times, and certainly when the entities fully share the same ultimate ownership, in-house counsel provide advice for entities across the family (and their employer client’s “borders”), in order to ensure that appropriate policies and practices are adopted and followed by each of the entities. It’s in each of the entire family’s interests for other members of the family to stay out of trouble (avoiding reputational run-off) at least, and at best to be properly coordinated when they share a variety of common interests: the same regulators, suppliers, customers, industry partners, investors, and so on. And for the most part, this approach works very well. Indeed, we all know the repercussions that would follow a failure in a related entity that the parent or other corporate family members knew about but “ignored”: the entire family of brands would be tarnished and the entire entity group pilloried.

But even cross-counseling that works well “for the most part” still has room for the exceptions. Martine’s company, BCE, has been engaged in a grueling battle before the Delaware courts for more than five years litigating with former US subsidiaries and their creditors regarding BCE’s decision to stop financing the operations of one of its struggling former subs, Teleglobe. The two sides haven’t gotten to the meat of the underlying matter yet. They’re still arguing over privilege claims stemming from whether client services provided by BCE in-house lawyers to Teleglobe (when it was a sub) entitle Teleglobe to see BCE privileged communications and work product that would otherwise be protected from a hostile party’s discovery demands.

The disputed material pertains to BCE’s inside and outside legal advice to the client regarding its decision to pull their financing, including presentations by BCE’s chief legal officer—Martine Turcotte—to the board and opinions from outside law firms, all discussing ramifications of the company’s decisions on the defensibility of the kind of litigation it now faces. BCE claims that these events occurred after they severed joint representation of the sub; Teleglobe claims otherwise, arguing it has the right to see everything that passed through BCE’s in-house law department because in-house lawyers, at one time, had provided Teleglobe with legal advice on the financial commitments, meaning the subsidiaries share the legal privilege.

When Martine approached ACC and asked for our opinion and support, we thought the issue was one that deserved attention; after reviewing the facts and the rules, we decided to file amicus rather than risk allowing the lower court’s decisions in favor of Teleglobe’s discovery demands to become precedent. Our brief is online at www.acc.com/public/amicus/teleglobe.pdf.

The Court of Appeals agreed with BCE’s and ACC’s arguments, citing our amicus in a 93-page decision written by Judge Ambrose and handed down July 17, 2007 (www.acc.com/public/amicus/teleglobeopinion.pdf). The court vacated an order from the US District Court in Delaware that would have forced BCE to produce 900 privileged documents, remanding it back for further examination. But they didn’t stop there. They all but wrote a handbook on how parents and subsidiaries can steer through the tricky shoals of shared legal advice and keep the parent’s privilege intact. Along the way, the court discusses a number of major issues and doctrines, including (1) the attorney-client privilege, (2) the disclosure rule and the requirement that communications be in confidence, (3) privileged information sharing under (a) the co-client or joint-client privilege and (b) the community-of interest or common-interest privilege, (4) the exception for adverse litigation, and (5) the problems that arise when the interests of the clients in the joint representation begin to diverge.

What I’ll discuss further below and what the court held is this: There’s nothing wrong and a lot right with the concept of in-house counsel providing legal services across corporate family lines. But there are risks and they can be addressed with forethought. Indeed, it is advisable for in-house counsel to have paperwork in place so that the moment parent and subsidiary realize their interests might diverge through spin-off, insolvency or sale, the parent can sever its legal ties and counsel arrangement, and get the subsidiary separate legal counsel. But, as these deals can take months to play out, there’s no reason the parent can’t then continue to provide the subsidiary with legal advice on other non-related matters without putting its privilege at risk.

Good advice, but of course, when is “the moment” of realization, how can the shared legal services relationship be effectively severed, and what is now to be avoided as conflicted representation, and more?

ACC has created an important article (www.acc.com/public/attyclientpriv/parentsbcprsrnttethics.pdf) that reviews the following issues for your consideration to avoid learning BCE’s lesson the hard way:

- When, and to what extent, the representation of wholly or less than wholly-owned entities by a single in-house legal department raises conflicts issues for in-house counsel.
- An overview of attorney-client and work product privilege in the context of multi-entity enterprises.
- Conflicts and privilege issues that can arise once the decision has been made to sell an entity or its assets, or once the sale has been completed.

* Please note that this article was written before the BCE case was decided, and while we’re amending it to reflect the impact of this recent decision, it may not be finished with those revisions by the time you read it!

Further, we suggest that you may wish to consider executing a form of a joint defense agreement if you/your legal team provides services to multiple entities in the corporate family. A joint defense agreement allows a counsel for one client to work with another client on matters in which they share common interests, and which they agree do not present conflicts. A joint defense agreement asks the parties to recognize that the lawyer represents one of the clients and the lawyer’s loyalties will remain with that

client should common interests at some point diverge. Thus, if a conflict arises in the future, the joint defense relationship is automatically severed. It’s a neat little tool that’s simple to execute and helps protect both you (professionally), and your client (in case business interests diverge in the future) resulting from your services provided across the corporate family. (www.acc.com/vl/index.php?action=search&full=yes&anytext=Joint+Defens.)

I’ve borrowed and consolidated some of the themes from our overview of joint representation in a multi-entity environment for your consideration below. Thanks and cudos go to Peter Jarvis of Hinshaw & Culbertson, one of ACC’s ethics specialists.

Current-Client Conflicts of Interest in a Multi-Entity Setting

There is no general black letter rule of professional conduct that defines the term “client,” and a favorite on the in-house counsel ethics hit parade is always the topic of identifying the client in thorny situations. On the other hand, ABA Model Rule 1.13, Organization as Client, provides a starting point: I’ve included some of the pertinent sections below:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows, or reasonably should know, that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [regarding certain conflicts of interest]. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

According to Comment [1] to this rule, the words “Other constituents” refers to “the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.” Thus, it does not expressly include all ostensibly related entities. On the other hand, “constituents” can certainly include entities that are stockholders in other entities, and the rule more broadly acknowledges that representations may cross single organizational lines.

If, in fact, any non-clients appear to be in doubt about whether the lawyer represents them, the lawyer must explain that she does not. See *id.*; ABA Model Rule 4.3. Whether in a context of entity or individual clients, the test developed in caselaw and in ethics opinions to determine who is and is not a client, depends upon the subjective belief of the putative client and secondarily on proof of facts that it was, at least to some degree, reasonable for the client to hold such a belief.

Stated another way, in-house counsel who actually provides legal advice to multiple entities, or who allows those entities to form the reasonable belief that they are clients, will be held to have multiple clients. Once this conclusion is reached, the attendant duties of loyalty and confiden-

tiality that are part of the representation of any client apply to these intended or unintended entity clients. As a practical matter, the only way for counsel to seek to limit these duties once they attach is first expressly to disclaim them (in writing, if at all possible) and then to make sure that her conduct is consistent with any disclaimers. And the only way to be certain that an attorney-client relationship is at an end is to end it clearly and unambiguously. When a client has reasonable, ongoing expectations of a relationship based on a history of past work, a court may view the relationship as a current-client relationship even though, as of a particular date, the lawyer is not actually doing work for that client.

The Current-Client Conflicts Rule

ABA Model Rule 1.7 is typical of current-client conflicts rules throughout the US and, in fact, has directly been adopted in some form by most United States jurisdictions. It provides in pertinent part that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client; or
 - (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) The representation is not prohibited by law;
 - (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) Each affected client gives informed consent, confirmed in writing.

The current-client conflicts rules can briefly be summarized in terms of veto power. Although Texas takes a different approach as a matter of state law,¹ the current client always has veto power to prevent the lawyer from acting adversely to that client in all other United States jurisdictions. Indeed, in some situations (which vary from state to state) a lawyer cannot proceed adversely to a current client even with consent. See, e.g., *In re Johnson*, 300 Or. 52, 707 P.2d 573 (1985); Restatement (Third) of the Law: Law Governing Lawyers §128, reporters’ note cmt. c (2000) (“Restatement”).

It also bears mention that over time, a situation that did not initially present a conflict or require a waiver can develop into one that does. Similarly, a previously valid waiver may have to be repeated if the facts change in material and unanticipated manners. In fact, it is also possible that a situation that began as one in which no conflict existed, or in which only a waiveable conflict existed, can turn into one in which (depending upon the rules of the jurisdiction) continuing representation, even with a waiver, is not permissible. See, e.g., *In re Stauffer*, 327 Or. 44, 956 P.2d 967 (1998); Oregon Formal Op. Nos. 2005-122, 2005-40.

One final point. Legal departments are “firms” within the meaning of the conflicts rules. See, e.g., ABA Model Rule 1.0(c). Unless the situation is one in which screening to

avoid conflicts is permitted by applicable law, a current-client conflict that is attributable to one in-house lawyer will be attributed to all members of the legal department—the same rule that applies to outside firms. See, e.g., ABA Model Rule 1.10; Restatement §123, cmt. d(i) (2000).

As a general proposition, all representations of multiple “current” clients create at least a theoretical potential for conflicts, but again generally, simultaneous presentation of wholly commonly owned and solvent entities will not usually lead to conflicts problems. When common ownership is less than complete, the potential for current-client conflicts becomes greater—even if one of the entities has a sufficient ownership interest in the other to exercise effective control. When the interests of multiple but related clients are in conflict, conflict waivers must be obtained from disinterested parties in order for the joint legal representation to continue since the in-house lawyer is professionally obligated to its employer-client under the rules previously discussed.

In the situation of an insolvent related entity, it is a matter of black letter law that management and the board of the entity owe their duties to continue to run the entity for the benefit of its creditors, and not for the benefit of its equity owners (as would be the case if the business were solvent). In what are called “deepening insolvency” situations, lawyers and other advisers whose actions increase the degree of insolvency (and therefore of creditor debt) in an attempt to assist the equity owners are at risk of being sued. While there are many unknowns in these situations, it seems relatively clear that in-house counsel of a multi-entity enterprise who wish to act for the benefit of a solvent entity and to the detriment of an insolvent entity, and who appreciate that’s what they are doing, act at their potential peril.

So what about the attorney-client privilege—how is it applied in a multi-entity joint relationship? In general, if there is co-representation on an issue, then there is co-attorney-client privilege, which can be enforced against third parties, as well as now-feeding entity family members. (There can be privilege between co-entities sharing a lawyer, as well as separate privilege that is not shared if the entities have their own counsel on non-shared matters, too. They are not mutually exclusive.)

Thus, in Martine’s case, the court held that documents created by the in-house lawyers during the joint representation were discoverable to both parties. The dispute arose over documents and communications that took place after BCE claimed it had severed its joint legal relationship on all relevant counseling to its sub. And the court agreed that it is possible to not only sever the joint defense relationship in its entirety on a going-forward basis, but also possible to continue representation on non-disputed matters (say, IP management or environmental compliance) and sever it on disputed matters (relating to financial business decisions, for instance).

Of course, all of the rules pertaining to privilege still apply: it can be waived if confidentiality is broken by any party to the privilege (include the related entity which has received legal services from another family members’ lawyer and then divulges the confidential information to a third party), it does not survive the crime fraud rule exceptions, and it does not prevent anyone from investigating facts (since privilege doesn’t cover facts, it covers communications and related work product of lawyers). See ACC’s resources defining in-house privilege application, waiver, and best practices to ensure that privilege is properly protected: www.acc.com/php/cms/index.php?id=84.

The trickiest part of the equation is figuring out at what point the relationship must be severed in order to be able to claim privilege with lawyers who formerly advised from now-hostile subs: Is the point prior to any “negative” assessments or actions, or upon some form of notice? Or is there some kind of material conflict standard? The answer is not clear, and thus, ACC recommends considering adoption of joint defense agreements between entities sharing legal counsel. This enables the company to notice the affiliates, with whom it’s sharing counsel, of what the terms of the sharing are, and also to sever the relationship formally when there is concern that a notice that can be pointed to must be given.

Other Practical Considerations:

- Consider non-representation of some entities: just because you can, doesn’t mean you should. Some entities may not be well suited to share your services because of the potential for conflicts or waivers or other issues. It’s okay to just say “no” and encourage them to get their own counsel.
- Clearly limit the scope of representation (and do it in writing): don’t try to be everybody’s lawyer for everything, or you may end up being barred from being anybody’s lawyer for anything. If their needs are many, then other family members may need to hire their own in-house counsel or the family may wish to pay for outside representation where it’s needed. This is especially important if the affiliate might at some time be sold: where documents are requested by the buyer, it will be easier to limit them to those covered in the scope of representation.
- If you do need to sever the relationship, ABA Model Rules 1.9 and 1.10 allow you to do so, only if you end it prior to any material legal work impacting the severed party’s representation has begun. So don’t wait to sever a relationship until the matter raising a conflict is too ripe.
- Confirm in writing what will or will not be shared before the representation begins to help ensure that if and when it ends, the files that may be open to both parties are limited to those agreed upon in advance.
- Beware the “sale” of privilege before the sale of assets is considered in a related entity that has shared legal services and is now to be sold. See John Villa’s excellent article on this subject at www.acc.com/protected/pubs/docket/nd01/ethics1.php and www.acc.com/vl/index.php?action=search&full=yes&anytext=Villa.
- Watch what goes out the door and act promptly if a mistake is made and something is inadvertently disclosed. Generally, if inadvertently disclosed and quickly remedied, the rules and courts will allow you to put something that shouldn’t have been shared back into the privileged “box.”

The only thing that’s clear is that there is still much that is unclear for the counsel who navigates this twisting path. But the need for, and practicality of co-counseling related entities is so apparent, and the risks attendant to ignoring ill-advised behaviors in related entities is so high, that today’s in-house lawyer (and her client) has little choice but to venture forth and provide co-counsel. But, forewarned is forearmed: Exercise caution!

If you have questions or if I can be of service, please feel free to call me at 202.293.4103, x318, or email me at hackett@acc.com. ACC’s advocacy and ethics team is waiting to serve you!

1 See Texas RPC 1.6.

ACC offers a slew of other resources to the in-house lawyer. Following is a bullet point summary that ACC has provided, which lays out some of the resources that come with your membership.

- **Centralized Databank of Sample Forms, Guidelines, and Knowledge from Other In-house Counsel:** ACC's Virtual LibrarySM offers one-stop shopping for those seeking to benchmark with their peers or obtain sample forms, policies, and information. (www.acc.com/vl/)
- **A Virtual Rolodex of In-house Attorneys at Your Disposal: MemberToMemberSM:** A powerful networking tool that links members seeking advice with volunteer "member experts" in more than 100 substantive areas. Whether it is a substantive question, management issue, or recommendations of outside counsel, this service is a quick and cost-effective way to obtain guidance from your peers. (www.acc.com/php/find.php#mtm)
- **Specialized "Most Frequently Asked" Issues in One Compact Package:** ACC InfoPAKSSM provides you with customized information packages that include articles, sample forms and policies, caselaw, and contact names on such sought after topics as corporate compliance, starting a legal department, managing a law department, attorney-client privilege, managing outside counsel and records retention. (www.acc.com/vl/infopak)
- **Chief Legal Officer ("CLO") Resources** provide you with information on how your peers are handling the executive, legal, and department management roles of today's CLO. Some of what you'll find includes ACC's new *Law Department/Attorney Conduct Manual*, global law department resources, surveys on CEO expectations of the CLO, the Executive Update, a newsletter for chief legal officers, and **Leading Practice Profiles** (www.acc.com/vl/practiceprofiles.php), which examine best practices at work in legal departments from various industries. (www.acc.com/networks/clo)
- **Locate Other ACC Members:** ACC's virtual **Membership Directory** puts networking at your fingertips. The cyberversion of ACC's member directory provides real time searches on name, title, company name, law school, city, state, Chapter, Committee, or any combination thereof. (www.acc.com/php/find.php)

- **Assistance in Hiring Legal Staff:** ACC's Inhouse JoblineSM lists in-house counsel positions in the US and around the world. (jobline.acc.com)
- **Pro Bono Opportunities: CorporateProBono.Org,** ACC's joint project with the Pro Bono Institute, offers online and technical assistance resources that address specific corporate practice setting concerns; customized training materials and information on local training clinics; partnering assistance, member pro bono best practices; mentor and peer networks; and a searchable database of information about available local legal services pro bono projects that need volunteers. (www.CorporateProBono.Org)
- **Enhancing the Future of the Legal Profession:** The ACC **Pipeline Project** seeks to increase the number of minorities entering the legal profession. Working with Street Law Inc. (www.streetlaw.org), an internationally recognized non-profit, ACC's initiative places corporate counsel in junior and senior high school classrooms in communities of color, where they teach classes on corporate and constitutional law—inspiring kids to consider law as a positive force, and a future career option. (www.acc.com/diversity/pipeline/)
- **Ethics/Professionalism:** ACC remains a leader in developing materials and information on ethical and professional issues directly affecting in-house counsel. Our **Inhouse CaselawSM** library (www.acc.com/vl/caselaw.php) provides members with references to cases that define in-house practice. Coupled with resources and policy initiatives in our advocacy homepages, corporate counsel will find all they need to answer common in-house ethics and professionalism questions.
- **ACC and Thomson West have also jointly published *Corporate Counsel Guidelines*** by John Villa, a highly acclaimed corporate ethics expert. This resource is the seminal publication on in-house ethics issues. (www.acc.com/practice/books.php)
- **Useful Practice Information:** Our award-winning journal, the **ACC Docket**, is filled with practical information in-house counsel need for their daily practice. It is the only corporate counsel publication featuring articles written by corporate counsel for corporate counsel, and

provides you with valuable and useful information and not theoretical postulations. (www.acc.com/p-docket.php)

ACC truly does understand the needs and challenges of the in-house attorney, and has spent the last 25 years building

and improving on the resources it provides to its members. As ACC celebrates this silver anniversary, I challenge you to give yourself the gift of learning how ACC—at both the local and national level—can help you make the most out of your in-house career.

2007 Ethics Follies



By Lee Cusenbary, ACC South/Central Texas Chapter Immediate Past President

For nine years, ACC has been the proud host of San Antonio's ethics conference for in-house counsel, providing a full year of ethics CLE in one three-hour session. Traditionally, there were three speakers, usually judges, who told anecdotes about attorneys behaving badly. They were usually interesting, sometimes humorous, but always respectful and appropriate.

Last year, ACC took what some perceived as a big risk and produced a musical production in place of the traditional ethics conference for ACC with all local attorneys and judges, singing and dancing to parodies of popular music. It was somewhat of a "risk" for two reasons. First, we hadn't done it before and, let's face it, attorney-filled audiences generally know good theater and have refined tastes for parody. They can be a tough crowd. Second, attorneys are generally educated and trained to have certain professionalism in front of their peers and judges. Swinging around a feather boa (ya gotta love Justice Angelini) or dancing with abandon to Aretha Franklin's "R.E.S.P.E.C.T." (Mary Doggett killed on that one) at the respectful hour of 1:00 PM at the Plaza Club is not standard fare for us corporate types. After all the song lyrics were written and staged, the ironic challenge was not in creating the substance of the conference. It was the challenge of setting the lawyerly correctness aside and being in the moment, on stage, in the spotlight, and delivering the musicality of the show. Without this abandon, the conference wouldn't be entertaining.

Since I was pushing everyone to let go of convention and perform, I thought I should put my top hat where my mouth was. With this concern on my mind and in the last few days before the show, my wife and I worked up an "off the schedule" song for us to do to open the show called "Keepin' Out of Mischief Now." It's an old Fat's Waller tune that has fortuitous lyrics for an ethics conference. When the show was about to start, and my wife started to play the piano and I got up to perform the first song of the conference. I was sort of terrified to belt out this tune in the Plaza Club, standing in



the spot where I had watched politicians and judges speak with dignity and repose. I literally closed my eyes under my tipped-forward hat, and began to sing into the mic. After about two phrases of lyrics were out there, warbling around the room, I opened my eyes and saw a few smiles, some nervous laughter, and some terrified looks of disbelief. I figured the "toothpaste was out of the tube," so to speak, and there was no going back. I just had fun with it. My hopes were that this "taking the first bullet" approach helped everyone relax and just have fun. I think it worked. The three hour confer-

continued on page 6

continued from page 5

ence sped by, with some laughs (Brennan Holland is a great Phantom), some great singing (Cynthia worked that cowgirl outfit), and a killer ending. Who knew that "Sarbanes Oxley" could so neatly replace the word "OKLAHOMA" in that show stopping tune of the same name.

The show was really well-received by the membership. It turns out I was the only one who was worried about propriety. The rest of the cast just had a great time. As reflected in many attendee's evaluations, it was a fun way to get Ethics CLE, and enjoy a great party afterwards. Thanks to Fulbright for the open bar and great food. Many wrote it was the best CLE they had ever attended. Since the response was overwhelmingly positive, ACC is going to do it again.

On November 8 at 1:00 PM, please consider being a part of Ethics Follies and the 10th Anniversary of the conference. Whether you prefer to sit in the audience or work on the show itself, please take advantage of this fun experience. You'll see new song parodies, videos, and skits. There will be great door prizes, surprise guests, and laughs. We'll have more skits and digital short films to respond to the favorable responses to those skits and films last year. No music is safe from parody, as this year's show will bring to light alternative attorney billing issues with a medley from Dreamgirls, unethical executives get what they have coming to the



music from the musical Chicago, and music from Hairspray fills the air with lacquer and ethical leadership. You will

also hear popular rock and country classics, including the timeless gem, "Who's Your Daddy," by Toby Keith. A SNL ripoff of Weekend Update will also premiere this year with the unethical (and funny) news from around the nation.

There are many opportunities to be a part of the show's cast or it's production team, so if you can run a spot light, play a CD, do the "cotton-eyed joe," sing, dance, or act, send my co-chair, Kay Grimes, or me an email and we'll give you as big or small a role as you prefer. And yes, there is food, wine, and beer at the few rehearsals we have right before the show. The goal is to have fun, build some friendships among ACC members and outside counsel, and put on a great show. If you saw it last year, please tell your co-workers and friends about this year's Follies. I hope to share a laugh, some good ethics debate, and a glass of wine with you on November 8.

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 web page at www.acca.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.

Texas Supreme Court Denies Review of Court of Appeals Decision Holding Texas Franchise Tax Earned Surplus Throwback Unconstitutional

Dan Butcher
Partner, Dallas
214.651.4640

dan.butcher@strasburger.com

Farley Katz
Partner, San Antonio
210.250.6007

farley.katz@strasburger.com

In a case in which Strasburger & Price, LLP represented Home Interiors & Gifts, Inc. ("Home Interiors") a Texas Court of Appeals has ruled that the Texas franchise tax earned surplus throwback provision as applied to Home Interiors unconstitutionally burdens interstate commerce in violation of the Commerce Clause of the United States Constitution. *Home Interiors & Gifts, Inc. v. Strayhorn*, 175 SW 3d 856 (Tex. App. – Austin, 2005.) The Texas Comptroller petitioned the Texas Supreme Court to review the Court of Appeals decision. On March 9, 2007, the Supreme Court denied the Comptroller's Petition for Review and on June 1, 2007, it denied the Comptroller's motion for rehearing of that denial. The decision is now final in the Texas courts. The Comptroller is considering whether to seek review by the United States Supreme Court.

Home Interiors

Home Interiors is a Texas corporation which manufactures and purchases home decor products, accessories, and gifts, and then wholesales them to independent contractors throughout the country. During the periods in issue, approximately 90% of Home Interiors' sales were to customers outside of Texas.

The Texas Franchise Tax

The Texas franchise tax is imposed on corporations for the privilege of doing business in Texas. The tax (prior to the recently-enacted "Margin Tax") was in effect the greater of 4.5% of "net taxable earned surplus" or .25% of "net taxable capital." Net taxable earned surplus and net taxable capital are apportioned to Texas on the basis of the ratio of a corporation's gross receipts generated in Texas to its world-wide gross receipts.

Texas' Throwback Provisions

For purposes of determining these apportionment ratios, Texas adopted two different provisions that treat sales of tangible personal property shipped from Texas to customers outside of Texas as though the sales were made to customers in Texas. These are known as the "throwback" provisions. To apportion net taxable capital, sales are thrown back to Texas if the corporation is not "subject to taxation" in the purchaser's state. Tex. Tax Code §171.103(1). To apportion net taxable earned surplus, sales are thrown back to Texas if the corporation is not "subject to any tax on, or measured by, net income" in the purchaser's state. Tex. Tax Code §171.1032(a)(1).

Public Law 86-272

The court explained that the different standards for throwback were adopted because Texas sought to tax income from sales to customers in states that were prohibited by Public Law 86-272 from imposing an income tax on the seller. Public Law 86-272 [15 U.S.C. §381(a)] was adopted by Congress in 1959 to create minimum standards for business activity in a state before that state may impose a tax "on, or measured by, net income."

Commerce Clause Requirements

Under the U.S. Constitution, a state tax on interstate commerce must be fairly apportioned. The U.S. Supreme Court has held that a tax is fairly apportioned if it is both "internally consistent" and "externally consistent." To be internally consistent, a tax, if hypothetically adopted by all states in which interstate commerce is conducted, must impose no greater burden on interstate commerce than would be imposed by the same tax on commerce occurring solely within the taxing state. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 179 (1995). The court ruled that the earned surplus throwback provision requiring Home

continued on page 4

continued from page 7

Interiors to “throwback” out-of-state sales in computing the earned surplus portion of the Texas franchise tax violated the fair apportionment requirement because it caused the tax to be internally inconsistent.

Internal Consistency Test

Applying a hypothetical standard under which all states are assumed to impose a tax similar to the Texas franchise tax, the court reasoned that an interstate corporation could be subject to tax on its taxable capital in every state where it established substantial nexus, as well as a tax on 100 percent of its earned surplus in Texas, while a corporation operating only in Texas would be subject to tax only on the greater of its taxable capital or earned surplus. The additional tax burden on corporations operating in interstate commerce violated the Commerce Clause.

Potential Refund Opportunity

Although the dual tax base and throwback provisions have been eliminated in the new Margin Tax, businesses that, under the former franchise tax, paid increased tax due to earned surplus throwback should consider filing claims for refund. Likely candidates for refunds include businesses that:

- Sold tangible personal property that is shipped from Texas to purchasers in one or more other states;
- Were protected by Public Law 86-272 from a tax on net income in those states; and
- Had sales to those states thrown back to Texas for apportioning earned surplus.

Refund claims are subject to a four year period of limitations. Tex. Tax Code Sections 111.107(a) and 111.201. Taxpayers that obtained valid extensions of their 2003 Texas franchise tax reports may be able to obtain refunds for their 2003 report year by filing refund claims by November 15, 2007.

Why Is Records Management So Difficult?



Marty Provin
Executive Vice President
Jordan Lawrence

It has been seven years since the Arthur Andersen/Enron saga propelled corporate records management from a back-office, out of sight and out of mind corporate function, to its current status as a “hot button” issue on the minds of corporate counsel and senior level I.T. management. The continual stream of high profile cases in which records management issues are at the center serve as a constant reminder of the incredible risk and expense that is associated with the management of records and information.

Over-retention is at the heart of nearly every records and information management challenge that companies face. The amount of electronic information and paper that companies create is growing at exponential rates. Companies seem committed to keeping it all, even though, 60% of legacy informa-

tion is not required to be maintained for any regulatory or valid business requirement, in spite of the fact that retaining this information creates enormous problems in terms of costs, efficiency and compliance.

What causes this over-retention problem?

Far too often, the corporate records policy is not connected to the people, the process or integrated into the technology that generates or retains all of this information.

Compounding the issue is the often conscious decision by the company to “save everything,” regardless of policy. The notion of “keep everything” to be safe and assure compliance often makes it impossible for companies to find the critical information they need. In fact, this line of thinking creates the exact opposite effect, making it nearly impossible to find important documents. Keeping everything also places tremendous strain on already overtaxed IT resources.

Finally, the software and service vendor communities wield

tremendous influence on the way organizations approach the management of their records and information. For good reason, their revenue is often a function volume of information being retained.

The eDiscovery outsourcing industry has grown from virtually nothing to over \$2.0 billion in the United States alone by this year. The research firm, Gartner, estimates that the information storage management market will reach \$7 billion by 2008.

The good news is that over retention of information is a very solvable problem. Companies can start putting “management” back into records management using these basic guidelines;

1. Develop a team from legal and I.T. that are focused on establishing policies that are “Actionable”.
2. Educate your employees.
3. Regularly communicate the Records Management Policy consistent with all other Corporate Policies.
4. Dispose of legacy information when appropriate and in accordance with policy.
5. Consistently audit and enforce the policy.

Following these few steps, companies will realize significant cost savings from dramatically lower volumes of information to manage and store, while greatly reducing the risks and costs associated with discovery. For additional thoughts or to discuss your organizations specific situation, please contact the author at mprovin@jlggroup.com.

Member Spotlight



Kay Grimes is a corporate attorney for the Lone Star Bakery. She is the vice president of ACC South/Central Texas Chapter.

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 have been a member for two years. The resourcefulness of the members is of great value. As in-house counsel, it is virtually impossible to be well-versed in all areas of the law. The association allows me access to expertise in all areas of law. I have seen the association grow in many ways, but particularly in the arena of not only realizing what we can do for each other as members, but what we can do collectively for the community.

Tell us something about yourself that may surprise other people.

I am extremely introverted and shy. Not really. I am not sure there is too much that I have done that would surprise anyone that knows me. When I was in my young 20's (actually all of the 20's seem young now), I worked as a private inves-

tigator and went undercover with a different identification for an entire year while working on a case. I was a legal secretary by day, under my real name, but in the moonlight hours I was a member of a country club with another identity investigating a young mother suspected of doing drugs and engaging in other inappropriate conduct. The case ended up going to trial, but fortunately I did not have to testify.

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

My most embarrassing moment in my role as an attorney occurred while trying a case in El Paso, Texas. I represented a billion dollar corporation who was being sued for negligence involving an automobile accident. The plaintiff had injured his back in at least three subsequent accidents, which were totally unrelated to my client. He, however, was trying to blame all his injuries and drug addictions on my client. I was deep into my cross examination of the plaintiff, and after getting him to testify that he really did not know which accident caused what, I said to him, “So, Mr. Doe, you really cannot testify that my client caused the injuries of which you complain today; you are just giving us your best “GUESSTATION.” Immediately, I turned to the Judge and said, “Is that even a word?” The Judge broke out in laughter, followed by the jury. The entire courtroom was laughing so hard at my

blunder and embarrassment (including me) that the Judge had to call a 10-minute recess. When we resumed, the Judge said on the record, "Okay, where were we before we took a break. Oh yes, we were at the point where Ms. Grimes was making up words." Again, there was more laughter, but I finished my examination. I ended up winning the case. To this day I believe it was partly because the jury no longer saw me as some highly compensated big city lawyer from San Antonio representing a billion dollar client. Rather, they saw me as one of them!

Where did you attend law school and college?

What did you enjoy most about your college and law school experience?

I completed my undergraduate study at UT Austin. I attended St. Mary's Law School. UT Austin is a good university with some incredibly credentialed professors, but at that time in my life I enjoyed living in Austin more than anything. School was secondary. I absolutely loved St. Mary's Law School. I loved concentrating and focusing on "the law." I felt like I was a sponge reading cases. I found myself reading the majority opinions and thinking...Wow. Then I found myself reading the dissenting opinion and thinking...Wow. I was fascinated by some of the brilliant minds. I felt like I was a character in "Paper Chase," sharing a common role with all my classmates. We shared an intimate three years of our lives together. Priceless.

Why did you become an in-house counsel?

I had my own practice for about ten years prior to becoming in-house counsel at Lone Star Bakery, Inc. I practiced out of my home, which was ideal while my children were young. However, a few years after my divorce, I no longer liked the solitude of working at home, and I did not like the financial instability. I wanted to have a place to go after taking the children to school. I wanted to work around other people. I wanted financial security. The timing was perfect as my children were less dependent on Mom. I approached Lone Star Bakery, Inc., who I had represented for years and told the owner I wanted to give up my own practice and told him why. He understood the flexibility I would need with my children. He, being the wise businessman he is, decided to take me in, and now they just cannot get rid of me! All

fun aside, it really is a perfect fit for all involved, and I am most grateful for the opportunities Lone Star Bakery has given me, and the trust they have bestowed upon me.

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?

I am currently tackling my most challenging legal issue. I am representing the bakery in a lawsuit against the FDA. It is an extremely complicated case, involving scientific terminology I have never heard before. I, however, am moving full steam ahead and love the challenge. This, no doubt, is my "David and Goliath" case. For me, my most significant accomplishment as a lawyer is successfully balancing the practice of law and my personal life. I had done very well in law school, and had the opportunity to pursue many lucrative paths. I had my first child, Belle, during my third year of law school; she was my honor with which I graduated. I had my second child, Clayton, soon thereafter. I chose to set the parameters of my law practice so as not to interfere with my children and other aspects of my personal life. I knew the practice of law would always be there, but my time with my children at home was limited. I have no regrets; rather, lots and lots of joy!

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

I like to exercise; particularly I like to run. That is not to say exercise is like "play" for me, but it is an essential part of my life. I enjoy traveling, gardening, and reading. I am involved with a monthly Bunco group and a Book Club. I love the theatre, dining, and wining!

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

I worked for about seven years as a legal secretary prior to attending law school. I found myself more and more wanting to be on the other side of the closed door; typing thoughts of others was not enough. I wanted those typed thoughts to be mine. I have always received strong support from my family and my friends. I lean on their ability to

comfort me during those times in my life when I find myself in the midst of a storm, and I count on their wisdom and values to guide me through struggles. My one and only true counselor is God. God's power is not limited to guiding me through the storm, he can remove it. I accept all that comes my way, good or bad, because my faith in God assures me that all things that come to me, have first passed through my Father.

What is your favorite book or movie? Why?

My favorite book is "You Are Special" written by Max Lucado. It is a children's book, but one that should be read by all adults, as well as children. It takes all of five minutes to read. Its message about who we are and whose we are is the best investment of your time!

Chapter Photos



Carolyn Shellman, CPS Energy and Linda Wright, Zachry Construction at August Luncheon



Reagan McCoy, Chief Justice Wallace Jefferson, Stan McCormick

Get to Know ACC

Fast Facts About ACC America

Founded: 1982
 Current Membership: 22,047 (on 7/07)
 Countries Represented: 73
 Organizations Represented: approximately 8,500
 Fortune 100 Companies Represented: All
 Chapters: There are 48 chapters serving the membership. The first was the Colorado Chapter, the latest is the Ontario Chapter.

Fast Facts About ACC South/Central Texas

Formed: 1995
 Current Membership: 160 (on 7/07)
 Organizations Represented: 55
 Number of General Counsel Members: 37
 Industries Represented: 83

Longest Standing ACC South/Central Texas Members

Murray L. Johnston, Zachry Construction, ACC member since December 1985
 Kenneth Smith, USAA, ACC member since October 1991
 Steven A. Bennet, USAA, ACC member since October 1992
 Donald Duncan, Alamo Group, ACC member since December 1992
 William Woods, USAA, ACC member since June 1993

Longest Standing ACC South/Central Texas Officer/Advisor

Stan McCormick, member and Chapter Officer/Advisor since 1995.

ACC South/Central Texas Presidents

Reagan S. McCoy (2007)
 Lee Cusenbary (2006)
 Michael B. Clark (2005)
 Mary B. Stich (2004)
 Linda Drozd (2003)
 Todd Silberman (2002)
 Becky Rainey (2001)
 Richard Reed (2000)
 Carol Morrow (1999)
 Jerry King (1998)
 Stan McCormick (1997)
 Bruce Clements (1996)
 Merrie Cavanaugh (1995)

New Corporate Cost-Cutting Policy

Due to the current financial situation, changes will be made to the Business Travel Standards and Procedures Manual. Effective Monday, the following revised procedures apply:

Lodging

All employees are encouraged to stay with relatives and friends while on business travel. If weather permits, public areas such as parks should be used as temporary lodging sites. Bus terminals, train stations, and office lobbies may provide shelter in periods of inclement weather.

Transportation

Hitchhiking is the preferred mode of travel in lieu of commercial transport. Luminescent safety vests will be issued to all employees prior to their departure on business trips. Bus transportation will be used only when work schedules require such travel. Airline tickets will be authorized in extreme circumstances and the lowest fares will be used. For example, if a meeting is scheduled in Seattle, but the lower fare can be obtained by traveling to Detroit, then travel to Detroit will be substituted for travel to Seattle.

Meals

Expenditures for meals will be limited to an absolute minimum. It should be noted that certain grocery and specialty chains, such as Hickory Farms, General Nutrition centers, and, Costco, Sams stores, etc. often provide free samples of promotional items. Entire meals can be obtained in this manner. Travelers should also be familiar with indigenous roots, berries, and other protein sources available at their destinations. If restaurants must be utilized, travelers should use "all you can eat" salad bars. This is especially effective for employees traveling together as one plate can be used to feed the entire group. Employees are also encouraged to bring their own food on business travel. Cans of tuna fish, Spam, and Beefaroni can be consumed at your leisure

without the necessary bother of heating or costly preparation.

Miscellaneous

All employees are encouraged to devise innovative techniques in effort to save company dollars. One enterprising individual has already suggested that money could be raised during airport layover periods which could be used to defray travel expenses. In support of this idea, red caps will be issued to all employees prior to their departure so that they may earn tips by helping others with their luggage. Small plastic roses and ball point pens will also be available to employees so that sales may be made as time permits.



We hit the
bull's-eye for
employers.

FULBRIGHT
FULBRIGHT & JAWORSKI L.L.P.

FOR LABOR AND EMPLOYMENT LAW ASSISTANCE
IN AUSTIN 512/474-5201 IN SAN ANTONIO 210/224-5575
WWW.FULBRIGHT.COM

Welcome New Members

Ahab Ayoub

Rooster Products International, Inc
(5/1/2007)

Ann Barron

Valero Energy Corporation
(6/1/2007)

David Butler

Community Hospital Corporation
(6/1/2007)

Joseph Fielder

HEB Grocery Company, LP
(5/1/2007)

Jason Goff

San Antonio Housing Authority
(6/1/2007)

Julia Rendon

Valero Energy Corporation
(6/1/2007)

Michael Shearn

Genzyme
(4/1/2007)

Carolyn Shellman

CPS Energy
(5/1/2007)

Lauren Wood

Clear Channel Communications
(6/1/2007)

Cynthia P. Hill

Valero Energy Corporation
(6/1/2007)

ACColades

New to In-house

Lauren Wood has joined the Labor & Employment team at Clear Channel. Lauren was previously with Cox Smith Matthews.

Ahab S. Ayoub began as general counsel to The Rooster® Group in March of 2007. Previously, Ayab operated a solo intellectual property practice in Houston.

On the Move

Brennan Holland has moved to Pittsburgh, PA to accept a new position as vice president and general counsel of Home Loan Services, Inc. A subsidiary of Merrill Lynch Bank & Trust Co., FSB

Promotions

Nancy J. Anderson has been appointed as the new director of Southwest Research Institute's Legal and Patents Office. Nancy now holds the title of senior counsel and has assumed responsibility for the day-to-day management of the Legal Department's staff with primary responsibility for the institute's insurance and risk management program and foreign tax issues.

Members' Companies in the News:

Rackspace's first-quarter revenues top \$75 Million. The company's revenue soared 64.4 percent in the first quarter of 2007, compared to the same quarter a year ago. Rackspace was also recently awarded the Microsoft's Worldwide Hosting Service Provider of the Year award for the third time.

* Company News Taken from the *San Antonio Business Journal*