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# Welcome New Members

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

- Theodore G. Bryant**, SunCoast Holdings Inc.
- Jeff Cohen**, Lennar Corporation
- Susan Faw**, Chico's FAS, Inc.
- Silvia Iglesias**, FPL Energy, LLC
- Temple Kearns**, Lennar Corporation
- Steve Lee**, Hellmann Worldwide Logistics, Inc.
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- Julie RebyWaas**, Baptist Health South Florida
- Christy Rodriguez**, J.I. Kislak, Inc.
- Jose A. Santos**, JM Dealer Services
- Walter Sarries**, Citco Corporate Services Inc.
- Lillian A. Ser**, Flagstone Property Group
- Erica W. Stump**, Vital Pharmaceuticals, Inc.
- Monalee Zarapkar**, Lennar Corporation



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## Steven J. Sibner President's Message



Dear Fellow  
ACC-SFL  
Members:

I hope you are all  
having a good year thus far!

### Bad News/Good News:

I have both bad news and good news to report. The bad news (at least for our local chapter) is that George Villasana, our local chapter president, has left the South Florida area to pursue other opportunities in California. Of course, this is not bad news for George or for ACC members in California, where I am sure George will maintain an active role with ACC.

I want to personally thank George for his service to our chapter, and we wish him the best of luck in California.

**Now, for the good news.** Your board has been working actively to put together several programs and events for the remainder

of the year. Here are the events and dates:

- September 6—CLE (E-Discovery) and Social Networking,
- September 29—National Public Lands Day Community Service Event,
- October 27—Minority Mentoring Picnic,
- October—CLE and Social Networking, and
- December 6—Ethics CLE and Annual Holiday Reception.

For details on these events, please check out the South Florida Chapter section of the ACC web site at [www.acc.com/chapters/sfl.php](http://www.acc.com/chapters/sfl.php). We hope you will join us. You also will receive notice of other events as soon as they are scheduled.

### "One Night in the Islands" A Great Success

I also want to thank all of our members, sponsors, and the Host Committee who made our One Night in the Island event such a great success. We had over 300 attendees, and we will be making a

\$20,000 donation to Take Stock in Children, as well as providing a \$2,500 scholarship to a deserving minority student at Florida International University.

### Get Involved!

In the last few months, I have heard from several of you who expressed a desire to see more events and become more involved in the local chapter. There are several ways for you to become involved, whether as a member of the Board of Directors (we have our annual elections in December), an event coordinator, or serving on other committees. If you have an interest in getting involved or have an idea for an event, please send an email to our executive director, Jody Rosen, at [jrosen@associationsource.com](mailto:jrosen@associationsource.com), or feel free to contact me directly at [steven\\_sibner@ncci.com](mailto:steven_sibner@ncci.com).

I look forward to hearing from you or seeing you at one of our upcoming events!  
*Steven J. Sibner, President*

## Get A Year's Worth Of CLE at ACC's 2007 Annual Meeting

ACC offers the best continuing legal education for in-house counsel. Our 2007 Annual Meeting (October 29-31 in Chicago, IL) provides corporate practitioners with over 100 CLE-approved sessions from which to choose. Various tracks of programming developed by in-house counsel for in-house counsel cover a wide range of legal and management topics including intellectual property, litigation, labor & employment, corporate & securities, international, and financial services. Plus, you'll get a year's worth of CLE in one shot. Don't miss out! Go to [am.acc.com](http://am.acc.com) and register today.

### All in the Corporate Family:

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## 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](http://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](http://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/parentsbcprprntethics.pdf](http://www.acc.com/public/attyclientpriv/parentsbcprprntethics.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.](http://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,<sup>1</sup> 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](http://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](http://www.acc.com/protected/pubs/docket/nd01/ethics1.php) and [www.acc.com/vl/index.php?action=search&full=yes&anytext=Villa](http://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](mailto:hackett@acc.com). ACC’s advocacy and ethics team is waiting to serve you!

1 See Texas RPC 1.6.

## Legislative Alert: Florida Enacts Domestic Violence Leave Law

By Patrick G. DeBlasio, III,  
Esq., partner, Jackson Lewis  
LLP Miami office

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Under this new law, employees are required to provide “appropriate advance notice” of the need for leave unless prevented from doing so because of imminent danger

Florida employers will need to act fast to come into compliance with a new law passed by the Florida legislature and signed by Governor Crist on June 12, 2007. The law took effect on July 1, 2007 and requires employers with fifty (50) or more employees to provide up to three days leave for a variety of activities connected with domestic violence issues. Employees who have worked for employers for 3 months or longer are eligible to take the leave. Whether it is paid or unpaid has been left to the discretion of the employer.

The law covers leave for specific activities such as:

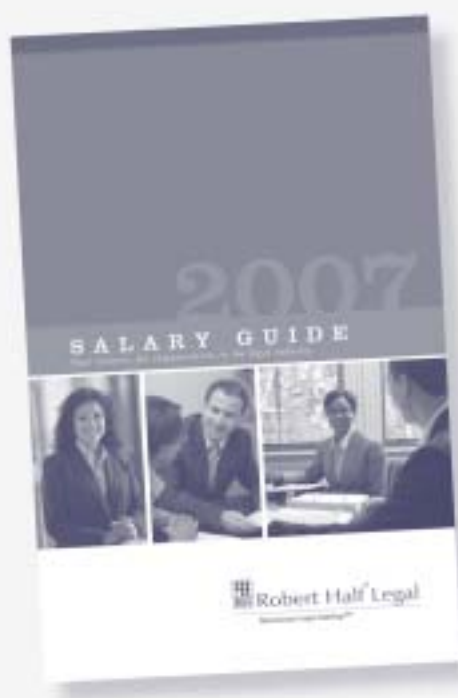
- seeking an injunction for protection against domestic violence or repeat violence, or sexual violence;
- obtaining medical care or mental health counseling or both for the employee or a family or household member to address injuries resulting from domestic violence;
- obtaining services from victims services organizations such as a domestic violence shelter or rape crisis center;
- making the employee’s home secure from the perpetrator of domestic violence or finding a new home to escape the perpetrator;
- seeking legal assistance to address issues arising from domestic violence or attending or preparing for court related proceedings arising from the act of domestic violence.

to the health or safety of the employee or a family member. The amount of notice required is determined by company policy. Also, employees must exhaust any available annual vacation or personal leave and sick leave, if applicable, unless the employer waives this requirement.

Employers must keep confidential all information relating to leave for domestic violence.

Employers are prohibited from interfering with, restraining, and denying the exercise or attempt to exercise the rights provided by this law. Additionally, employers may not discriminate or retaliate against an employee for exercising his or her rights under the domestic leave law. A person claiming to be aggrieved by a violation of the law may file a lawsuit in state circuit court seeking damages (monetary relief such as loss wages and benefits) or equitable relief (such as reinstatement) or both.

*This article is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis LLP and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. For more information, please contact Patrick DeBlasio at 305.577.7602 or [deblasip@jacksonlewis.com](mailto:deblasip@jacksonlewis.com).*

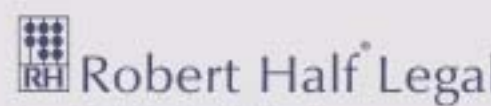


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## ACC News Briefs

### Advance Your Career; Find Your Next Hire

If you are looking for a new lawyer for your in-house department or looking for your next career move, check out ACC’s In-house Jobline<sup>SM</sup>, the premier career website for the in-house community. Here are a few reasons why:

For job seekers:

- Find positions that match your specific criteria, including practice area, geographic location, and job title.
- Browse more than 1,100 current job postings,
- Post your resume for free.
- Explore the online career center, featuring compensation data, and career advancement advice.

For employers:

- Find the right match for your department from the thousands of qualified candidates registered on the website.
- Receive automatic notification when candidates who meet your criteria add their resume to the website.

- Take advantage of a discount on job postings, only for ACC members. Move to the next level with ACC’s In-house Jobline: [www.jobline.acc.com](http://www.jobline.acc.com).

### Learn the Basics to a Successful In-house Career at Canadian CCU

Whether you practice in Canada, the United States or are involved in work that crosses the border, in-house counsel face a number of similar challenges. Open only to in-house counsel, Canadian CCU (November 18–20, The Metro-politan Hotel, Toronto, ON) teaches attendees how to excel in their new role with a focus on the basics you need to succeed. Registrants will learn first-hand from in-house colleagues the tools and best practices necessary to foster a successful in-house career. Network with the best and brightest in the in-house legal profession! Register for only \$575 US at [ccucanada.acc.com](http://ccucanada.acc.com).

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