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ACC AMERICA
Association of Corporate Counsel
Washington State Chapter

FOCUS

President's Message

Susan Ephron

Greetings fellow Washington ACC members—

It finally feels like Spring is in the air! I hope you've been able to attend one of the great programs we have had so far this year, such as our program for Members in Transition or CLE's on "How To Craft a Social Media Policy," "Protecting the Privilege Between In-house Counsel and the Business Client" and "Avoiding the Ethical Pitfalls of Internal Investigations." If not, we hope to see you are an upcoming event.

I'd like to remind you that the ACC is more than just informative, entertaining, cost-effective CLE programs and fabulous networking events—we aim to create a community of in-house practitioners and a resource for relevant information. One example of that community is the ACC Value Index, which

gives you access to law firm reviews written by your peers. If you ever need to hire a law firm or want to know how your peers rate the firms you work with, the ACC Value Index can be an important resource. Click on link below and then the number next to our chapter name to see the firms that have been evaluated: <http://www.acc.com/valuechallenge/AVI-Report-for-Chapters.cfm>.

Do you see the firms you use on this list? Do you agree with the scores?

So far 27 of our members have completed 60 evaluations on 39 firms. But, that's only 6.8% of our membership and a small fraction of the firms the membership uses. The more evaluations we have, the



better the information is for all of us. So, please take a few minutes to post evaluations of the firms you engage in now at <http://www.acc.com/valuechallenge/valueindex/index.cfm>.

It's easy to score firms on six value-based criteria, and it only takes a few moments.

Finally, our Chapter Administrator, Lynda Jonas, is stepping down after five years as chief "cat herder" for the board and "image consultant" for the chapter. She has made us look good in everything we have done and she will be missed. Thank you, Lynda!

Susan Ephron, WACC Chapter President
Counsel, Safeco Corporate Legal

Strategic Planning for Law Departments: Top Ten Nuggets from the Knowledgeable

Frederick J. Krebs, President of ACC, Deborah M. House, former Vice President & Deputy General Counsel, ACC

In these days of extreme competition and corporate belt cinching, chief legal officers, like other heads of corporate business units, are increasingly being asked to engage in the corporation's strategic planning process. The corporation's business goals, and the internal departmental goal of providing the best and most economical legal services possible drive this process.

We recently interviewed nine current or former chief legal officers based in Europe, Canada and the US, from a wide variety of industries to gain their insight into the law department strategic planning process. We gleaned the following nuggets of wisdom from their planning experiences.

1. One size does not fit all.

Your strategic planning process should take into account that the needs of companies/organizations (clients) will differ significantly and will constantly be subject to change. As a result, what they need and what you do will vary greatly. For example, if a company is in an aggressive acquisition mode, or implementing a new brand, or downsizing—all of those needs will drive the legal department's plan. The strategic plan for the legal department should also take into consideration the history/status/structure of the department (what it is and what it should be) and how that will affect the delivery of legal services.

Creation of the strategic plan also provides a valuable opportunity for in-house counsel to not only respond to their clients' needs, but to be pro-active as well. Moreover, client input can help determine how in-house counsel respond to client needs (e.g., how important legal news should be communicated). It can also be used to manage client expectations.

2. There is no substitute for careful thinking and planning.

Although approaches may vary, traditional strategic planning contemplates a progressive analysis and undertaking that typically starts with the creation of clear mission and

value statements, identifies strategic issues, progresses to the development of strategic goals and objectives, and finally to the creation and implementation of an action plan to meet the identified objectives. While the process should not be tortuous or any element belabored—it does require some important work that should not be avoided. Perhaps most importantly, you should understand the end goal and what you need to achieve. As one CLO put it: "plan from the future backward" and another said simply: "think before you plan!"

3. Align with and participate in the company's (client's) strategic planning.

While the level of sophistication of strategic planning may vary from company to company, as a general matter our business partners are ahead of us in the strategic planning department. This fact can be used to the distinct advantage of the legal department because aligning with the corporate goals facilitates the creation of the strategic plan for the legal department (to say nothing of enhancing counsel-client relationships). For example, if the client determines that one of its goals is to invest in a new foreign market, that goal will direct the legal department's plan as it determines how it will support that endeavor.

It is important to stress, however, that the legal department's strategic planning should not be simply a reactive endeavor. Rather, it is vital that the legal department secure a chair at the table of the corporate planning process and contribute to that process. For example, if the client's strategic goal is to move into a new foreign market that is subject to a legal and regulatory framework that makes outside investment very difficult—that fact needs to be brought to the attention of the client during the strategic planning process—not afterwards. That will not happen unless counsel is at the table. On a more mundane note, several CLOs noted that the department's plan should be written in the same style and format as the company

plan to facilitate communication and alignment.

And make sure you have the right people at the table when you do your internal department planning. You should involve appropriate staff in your planning process. And once you develop the goals, objectives and action plans make sure that all staff generally understand the where, why, how, what, and when that underlie those plans, and align their goals and activities appropriately. Note too that outside counsel may be appropriate participants in this process especially if you anticipate they will be important participants in achieving your goals.

4. The right horse for your course.

While we hesitate to compare in-house counsel (as one of our interviewees did) to equines, the underlying analysis attached to this phrase makes a good point. Your best attorney may not be the best attorney for the jobs required by your strategic planning. It does not mean existing staff is not competent. Rather, consider this—even a Kentucky Derby winner is not going to perform well in the Grand National Steeplechase or as a performing Lipizzaner Stallion. As corporate goals and legal department goals change, you must constantly reassess your department. Do you have access to the right skills sets to get the job done and if not, how will you get them? Perhaps you need more generalists and fewer specialists or vice versa given new corporate needs. And do not limit this evaluation just to in-house counsel; it applies to outside counsel as well.

5. Understand your client's business.

This cannot be said often enough as it applies to everything that you do. If you do not understand how the business works then you cannot help your client go where it needs to go; you cannot be a true business partner. And this applies from start to finish, including how your client makes

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money, the business climate in which it operates, and the legal and business risks that it faces.

For example, say your client engages in a particular type of transaction that by sheer numbers is profitable for the company, but on an individual basis runs on tight margins. In your strategic planning you will need to provide legal services that match those characteristics (e.g., by securing one outside law firm to do all of the transactions, but at a below market fixed price that would not be profitable for several firms splitting the business.) If you did not understand how the business operates your analysis about how to provide legal services may be faulty.

6. The bottom-line counts.

As a general matter, lawyers have a bad reputation as budget planners who traditionally argue that you cannot predict or control legal costs, especially litigation. In today's business environment many (if not most) clients do not tolerate this position. Good legal department strategic planning requires good budget planning. Part of this process requires understanding how you spend your legal dollars and determining whether you spend them in the right places. For example, you may find that others may handle the work done by your lawyers more cheaply and more effectively, such as paralegals or even clients with the right training and support. In other cases you might pinpoint areas of high risk and greater need for legal services.

Data from past activities will be useful in making this analysis. One CLO said he intended to develop a metric based on "the cost of failure" with failure being defined as anytime the company gets into a dispute where the company paid more than originally obligated including for legal services, settlements or because of contract disputes, or even to address employee disgruntlement. Lawyers do not like to project and adhere to proposed expenditures—but it can be done.

7. You are what you track; get the data, analyze, and apply it.

The importance of securing and applying the appropriate metrics cannot be underestimated. One of our interviewees noted he works off a pyramid structure

to demonstrate this. At the bottom of the pyramid is data, the next layer up is facts, the next ascending layer is knowledge, and the pinnacle component is wisdom. Data may come in many forms—crunching of numbers from outside counsel, numbers relating to transactions provided by clients, estimated hours to accomplish projects, timelines, client surveys, legal spend inside and out as well as the number and types of lawsuits. Collect the data and then use it in the strategic planning process.

8. Culture matters.

Strategic planning cannot be conducted in a vacuum. The existing culture of the company—or perhaps the absence of an appropriate culture—must be taken into consideration. For example, if the culture of the company is to marginalize lawyers or to view them as obstacles—that fact should be taken into consideration in strategic planning. In fact, part of the strategic planning in such an instance may be to establish an action plan to turn this culture around since the ability of the legal department to be effective is going to be directly affected by such a culture. Similarly, if the culture of the company is that business units work in competitive silos, and the goals of the company contemplate maintenance of the status quo, that also must be taken into consideration in planning and providing legal services.

9. Do not overanalyze.

The traditional strategic planning process contemplates a certain analysis. However beware of getting bogged down in the details. For example, do not torture yourself over whether something is an objective or a goal or whether your mission or values statement is perfect. Avoid a never-ending search for the appropriate data that may not exist or overspend your energies on compiling it. Dive in and get started with your planning and recognize your first time through the process may not be perfect. You can always start creating the data you now know you need; do not spend time bemoaning the fact that it doesn't exist currently. Moreover, the strategic planning process is not stagnant. You will have plenty of time to correct course as you move forward, and in fact should do so regularly.

10. Strategic planning can be more than strategic planning.

Use the planning process to achieve other goals. For example, one CLO saw it as a great tool for team building. It might also present a chance for an attorney to step out of his/her comfort zone and act as a leader where they otherwise might not have such an opportunity. Finally, it can be a way to direct and implement change in a manner that allows staff to understand the reasons, and gives them an opportunity to climb aboard or remain behind.

Additional Resources

Strategic Planning for In-house Counsel (ACC InfoPAK)

<http://www.acc.com/resource/v6813>

Law Department Management (ACC InfoPAK)

<http://www.acc.com/resource/v6014>

Leadership Training for Attorney Managers: If You Lead, Will They Follow? (ACC Docket Article)

<http://www.acc.com/resource/v8492>

Triple Time: Three Hot Ideas for Improving In-House Law Departments (ACC Docket Article)

<http://www.acc.com/resource/v7172>

Metrics to Creating & Fostering a Successful Law Department (Program Material)

<http://www.acc.com/resource/v8441>

A View from the Top: CEOs Forecast Their Vision & Plans for In-house Counsel (Program Material)

<http://www.acc.com/resource/v5586>

In-house Counsel Legal Department Ethical and Professional Conduct Manual: Chapter One: Legal Department Mission/Vision/Value/Roles/Goals (Quick Reference)

<http://www.acc.com/resource/v8413>

Performance Improvement Plan (Sample Policy)

<http://www.acc.com/resource/v7196>

Managing to Motivate and Maximize Productivity in the Law Department (Webcast Transcript)

<http://www.acc.com/resource/v7606>

Recent Events

January 26, 2010

**CLE Presentation, Sponsored By:
Perkins Coie**

“Employee Relations 2.0: How To Craft a Social Media Policy that Works for Your Company”

Linda Walton and Brian Flock, attorneys in Perkins Coie’s Labor & Employment Practice, provided an interesting and practical overview of how to craft a social media policy for your company. They provided many real-world examples showing the reasons why companies should have a social media policy and outlined ten best practices to address when implementing such a policy, even providing sample policy language. If you are interested in getting a copy of their presentation, please email Brad Toney at btoney@classmates.com.

March 5, 2010

WACC Members in Transition Program, held at Seattle University School of Law

WACC provided a program for in-house attorney’s in transition. Seattle University provided the venue, and a social hour followed the presentation. Panelists and topics included: “Stress Management in Times of Transition,” presented by Jane Faulkner, Certified Personal Coach and

J.D.; “Resume and Interview Do’s and Don’ts,” presented by Lynda Jonas of Legal Ease, L.L.C. and by Greg Walther of Robert Half Legal; “LinkedIn 101 and Networking Dos and Don’ts,” presented by Dan Hallak of Next Step Careers.

WACC hopes to provide more programs in 2010 for members in transition.

March 23, 2010

**CLE Presentation, Sponsored By:
Lane Powell**

“Think Before Hitting Send: Protecting Privilege Between In-house Counsel and the Business Client”

How many times have we heard about the litigation dangers of e-mail, or the massive effort required by electronic disclosure requirements under the Federal Rules? On March 22, our chapter hosted a CLE program sponsored by Seattle’s Lane Powell on the “Top Ten Tips Regarding In-house E-mail,” which addressed this topic. The program, by firm partner Mike Reilly, addressed some significant issues arising in use of e-mail that could jeopardize attorney-client privilege. He discussed the difference in perceptions of e-mail correspondence, which color how a jury might view e-mails in a far different way than the correspondents intended, as well

as the dangers inherent in use of e-mail by in-house counsel, including inadvertent disclosure through e-mail forwards, e-mail strings, or auto fill.

Some of the tips provided to help maintain privilege of e-mail correspondence of in-house counsel that were addressed include: Using the phrase “I’m responding to your request for legal counsel on this issue . . .”; limit distribution solely to those intended to receive it; add a header that says “Do not distribute to anyone other than those listed as recipients, without permission of the legal department.” [or use the Outlook tools to control distribution]; ensure you have written confidentiality agreements with all consultants with access to your servers that: (a) prohibit access to legal e-mail absent express authorization from the Company and (b) if consultants inadvertently access the information, they will not reveal it; do not use a business title when giving legal advice, and; educate your clients about privilege

It was an extremely informative presentation, and we thank Mike and Lane Powell for their support.

Corporate Counsel Responsibility for Electronic Discovery

By Karin Hansen, Esq. and Jeffrey Jacobs, Esq.

The time when corporate counsel could rely wholly on outside counsel to handle the entire eDiscovery process, from drafting and issuing litigation hold notices to overseeing data collection, processing, review and production, is over. Certainly the judgments against corporate defendants in two leading highly-publicized cases driven in large part by eDiscovery missteps — \$29 million against UBS in the Zubulake case (2004 WL 1620866 (S.D.N.Y. July 20, 2004)) and \$1.45 billion in Ronald Perelman’s lawsuit against Morgan Stanley in the Coleman case (2005 WL 679071 (Fla. Cir. Ct. March 1, 2005)) (later reversed for reasons unrelated to

the eDiscovery issues) — are large enough to attract the attention of most corporate counsel. Furthermore, the reputational risk for counsel of electronic discovery failure — as seen in the recent Qualcomm litigation rulings (2008 WL 66932 (S.D. Cal. Jan. 8, 2008), and further Order dated April 2, 2010) — should make active management of the electronic discovery process an important priority for all in-house litigation counsel.

Outside of the litigation context, eDiscovery issues most commonly arise in merger reviews by the Department of Justice and the Federal Trade Commission, and in the course of criminal investigations by the

Department of Justice and civil investigations by the Securities and Exchange Commission and other governmental agencies. It is far from career enhancing for a general counsel to have to report to the CEO that a corporate acquisition cannot be closed on schedule because of delays or glitches in producing electronically stored information to the reviewing government agencies. And most counsel, not to mention a large part of the general public, are all too familiar with the consequences of Arthur Anderson’s and Enron’s failures, whether perceived or actual, to preserve evidence sought by government investigators.

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Although these and other highly publicized cases indicate that corporate counsel need to be intimately familiar with, and ultimately responsible for, the entire eDiscovery process, two aspects of that process — data preservation and collection — have been the particular focus of most of the recent case law, and therefore present the most risk to the corporate counsel.

Once litigation (or a government investigation) has commenced, or is reasonably anticipated, the party to the litigation (or the target of the investigation) has an immediate duty to preserve information that may be relevant to the litigation or investigation, even in advance of a discovery request or subpoena. Failure to do so in a litigation context may result in the imposition of sanctions under Federal Rule of Civil Procedure (“FRCP”) 37, up to and including exclusion of evidence in support of the party’s case, the issuance of “adverse inference” jury instructions, the imposition of an obligation to pay the attorney’s fees of the requesting party, and even a dismissal or entry of a directed verdict in favor of the requesting party. In the context of a governmental investigation, such failure is one of the factors to be taken into account in determining whether the Department of Justice will seek indictment of a corporation, and may also result in a criminal prosecution for obstruction of justice.

In her groundbreaking Zubulake V opinion, referenced above, Judge Shira Scheindlin issued adverse inference jury instructions, resulting in a \$29.3 million verdict for plaintiff, after counsel for defendant UBS Warburg had issued a litigation hold, but never mentioned backup tapes in the hold instructions. Some employees deleted relevant emails in spite of the instructions, while others failed to provide all relevant information to counsel. As it turned out, the backup tapes, which had been overwritten, might have contained some of the deleted email that the employees had deleted. In her opinion, Judge Scheindlin outlined a list of responsibilities for counsel to assume, including obligations to be well advised to follow. They include obligations to:

- Actively monitor compliance with a litigation hold, noting that it is insufficient to simply advise a client of the hold and then expect the client to retain, identify and produce the relevant evidence;
- Become fully familiar with the client’s document retention policies, as well as the client’s data retention architecture and electronic systems, which will invariably involve speaking with the client’s information technology personnel;
- Communicate with all key players involved in the litigation, ascertaining how and where they store their information, and advising them of their retention obligations; and
- Ensure that relevant backup tapes or other backup media are retained, especially when they may be the only source of potentially relevant information.

One of the important lessons of the Zubulake case is that even a relatively routine employment discrimination matter can blow up into a huge liability without proper attention to the preservation and collection of relevant evidence.

In January 2010, Judge Scheindlin subtitled her discovery opinion in Montreal Pension Plan v. Banc of America, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) as “Zubulake Revisited: Six Years Later.” In this securities case, involving allegations of fraudulent valuations of a failed hedge fund, Judge Scheindlin noted that “[t]his case does not present any egregious examples of litigants purposefully destroying evidence. This is a case where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose.” She found that many of the plaintiffs had failed to uphold their preservation and legal hold responsibilities, and indicated her intention to impose monetary sanctions on those who had engaged in negligent conduct and adverse inference instructions on those who had engaged in gross negligence. In her analysis, Judge Scheindlin found that gross negligence included failure to issue a written litigation hold; failure to cease routine deletion of email; failure to collect ESI from key players; failure to collect ESI from retained files of former employees; and failure to preserve backup tapes when they were

the sole source of relevant information. Simple negligence included failure to collect records from non-key employees, and failure to take “all appropriate measures” to preserve ESI. She also took the opportunity to reaffirm the principles that she had outlined in her Zubulake V opinion. Right on the heels of Judge Scheindlin’s Montreal Pension decision, Judge Lee Rosenthal, who chairs the Federal Judicial Conference Advisory Committee for Federal Rules of Civil Procedure, issued a thoroughly researched sanctions opinion in Rimkus Consulting Group v. Cammarata (“Rimkus”), 2010 WL 645253 (S.D. Tex. Feb. 19, 2010). In this case, involving a suit to enforce noncompetition agreements, Judge Rosenthal acknowledged Judge Scheindlin’s Montreal Pension opinion but analyzed the differing standards of the various federal circuit courts with regard to the severity of sanction permitted to be imposed for gross negligence-based spoliation. She pointed out that in the Fifth Circuit, where she sits, intentional destruction of evidence, or bad faith, must be proven before an adverse inference instruction sanction may be imposed, a rule followed by the Seventh, Eighth, Tenth, Eleventh and D.C. Circuits. In the Second Circuit, where Judge Scheindlin sits, gross negligence (without evidence of intent or bad faith) is sufficient for the imposition of an adverse instruction sanction. Judge Rosenthal also noted that the Third Circuit has a standard requiring the court to “balance the degree of fault and prejudice”, while the “First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith.” As with all cases involving allegations of spoliation, the decision in Rimkus is very fact-specific. The case involved allegations of intentional destruction of electronically stored information. But even though the court found that there had been willful destruction of evidence, a significant amount of the incriminating evidence was in fact recovered by the plaintiff. The Court, applying the Fifth Circuit standard, was unwilling to issue an adverse inference instruction and instead allowed the jury to determine the implications of the defendants’ misconduct.

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These and other recent decisions involving electronic discovery issues, combined with the amendment of the Federal Rules of Civil Procedure in 2006 to require discussion of ESI-related issues and disclosure of ESI early in the course of a case, make it clear that at least in federal court, counsel are obligated to understand their clients' ESI, including its content, location, backup, and how to preserve it from automatic deletion or overwriting when it is relevant to a pending or anticipated litigation matter. It is clear that a written litigation hold notice is mandatory, with a further obligation for counsel to follow up and actively manage the preservation process to ensure that key players are aware of and understand their preservation obligations on an ongoing basis. Furthermore, this obligation does not only attach in federal courts. As of early March 2010, 30 states had adopted procedural rules addressing the discovery of ESI, and eight more states had ESI-related rules under consideration, including the State of Washington.

Although much of the case law has focused on preservation obligations, once the relevant custodians and potentially relevant information have been identified and preserved, it is necessary to collect the information. The type of case may dictate the method of collection – in some very routine cases, employees may be relied upon to simply review desktop information and download relevant materials to

portable media for transmittal to corporate or outside counsel. More contentious matters may call for collection by forensic experts, who can preserve all of the informational metadata (such as the time and date of creation and modification of the email or document) and can certify the chain of custody of the evidence in case of challenges to its authenticity. Of course the larger the matter, the more information that needs to be collected, and the more custodians at issue, the more likely it is that the use of a third-party eDiscovery vendor, with specialized expertise in the collection and management of large amounts of data, will be desirable. The risk of erring in the collection of this information – of failing to preserve necessary metadata, or destroying or modifying information in the process of collecting it – is that an adverse litigant may claim spoliation of evidence and seek – perhaps successfully – the sanctions outlined above.

How can corporate counsel protect themselves against these risks? Certainly it is essential to implement an effective coordination and communications process between in-house counsel, outside counsel and electronic discovery service providers. The assignment of responsibilities and active management of the various aspects of the electronic discovery process will help ensure that all critical elements of the process are addressed. In addition, counsel (whether in-house or outside) need to know where their client's information is located and who is responsible

for its backup and management. Finally, it is important to have in place a well-documented, legally defensible process for handling every electronic discovery matter in a consistent manner, across the entire enterprise. A process that goes into effect immediately when litigation commences or is reasonably anticipated, that facilitates the rapid identification of potentially relevant information sources, that ensures the timely preservation of potentially relevant information, and provides for the collection of that information in a defensible manner, is the best insurance against claims of eDiscovery failure and the spoliation of evidence.

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Membership Corner!

As an ACC member, one of your greatest benefits is consulting with your colleagues around the world for the information you need. If you are a small legal department (5 or less), you should join the Small Law Department eGroup (SLD). Members ask questions, either directly or anonymously, and request contracts, forms, and policies; and, they receive answers within a few days from others who have the answers. Topics

range from employment termination to distribution agreements. If you are only interested in intellectual property, then join that committee. Whatever your specialty, there is a committee. It's free, and saves your client both time and money. Try it by joining the committee and then signing up for the eGroup at <http://www.acc.com/committees/index.cfm>

If you are looking for an opportunity to meet more of your colleagues and become more involved in our chapter, please join the Membership Committee. No experience required! Email Karen Klein, Membership Committee Chair, at kklein@silverplanet.com.

Health Care Reform: Too Important to Build on an Unconstitutional Foundation

By Washington State Attorney General Rob McKenna

Health care is an intensely personal issue, whether you have excellent health insurance coverage or whether you risk surviving without it. Predictably, the complex new federal health care reform stirs strong passions from both those who support the measure and those who oppose it — regardless of whether they've read the 2,400 page measure.

On March 23, I joined a dozen (now 20) of my fellow AGs in a multistate, bipartisan lawsuit challenging a portion of the new federal health care law. We believe that certain provisions in the law expand federal authority beyond what is allowed under the U.S. Constitution. As the state's independently elected attorney general, I take my duty to defend our state's interests and citizens' constitutional rights very seriously. Health care reform is too important to build on an unconstitutional foundation.

The lawsuit makes two main arguments. First, we're challenging the constitutionality of the unprecedented requirement that individuals without health insurance must purchase private insurance or face a fine. Second, we're concerned about the constitutionality of the massive expansion of the Medicaid program, which will require states to spend billions more on this program when state budgets are already in crisis.

We believe both of these mandates represent unconstitutional expansions of federal authority and therefore violate the 10th Amendment, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Specifically, the states argue that the individual mandate violates the Commerce Clause. Never before has Congress required all Americans to purchase a specific product in the private marketplace.

Despite what many have reported, this suit will not overturn or repeal the new health care reform legislation. In fact, this lawsuit will not affect most provisions in the 2,400-

page bill, including several scheduled to take effect this year. Unchallenged provisions include, among many others, allowing children access to health insurance regardless of pre-existing conditions and prohibiting insurance companies from denying coverage to existing policy-holders when they fall ill.

State attorneys general use multistate lawsuits to address important national issues or when more than one state has an interest in a legal matter. As the lead state, the Florida Attorney General is committed to handling representation in the most cost-efficient manner possible. In fact, Florida has negotiated with a respected Constitutional expert to cap his fees at \$50,000 for the suit. Florida is also negotiating a cost-sharing agreement with the bulk of the states to cover the costs to pursue the case. Washington is not participating in the cost-sharing agreement.

The Attorney General is a separately elected, independent state official who derives his powers from our state constitution, which says that "the attorney general shall be the legal adviser of state officers, and shall perform such other duties as may be prescribed by law." Our state Supreme Court interprets these duties broadly, ruling that as legal adviser, the AG's role is something more than a passive observer of state government. The role of the Attorney General is one of many "checks and balances" in our democratic form of government.

Some have asked how the health care bill insurance mandate differs from requirements to purchase auto insurance. But auto insurance is mandated by the states, not the federal government. The individual states are not bound by the Constitution's Commerce Clause. And auto insurance is imposed on the privilege of driving, which you may choose to forgo. The health insur-



ance requirement is a mandate on every American.

Others have asked how the insurance mandate differs from Medicare or Social Security — federally-required entitlement programs. The insurance mandate isn't a tax. Medicare and Social Security are taxes that we pay in return for government services. It's unprec-

edented for the federal government to force you to buy a product from the private market, controlling which product qualifies, and penalizing you if you don't buy it. The government is neither collecting money you would pay for insurance nor providing the insurance. Under the health care bill, if you don't buy a qualified, government-approved insurance package, you pay a fine. Even though the penalty would be collected by the Internal Revenue Service, it's still a fine — not a tax.

There has been robust debate on this issue. Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at Georgetown Law Center, is one of many who agree with the states. He points to two recent cases where Constitutional law professors predicted the court would uphold laws banning handguns within 1,000 feet of a school (*U.S. v. Lopez*) and permitting women to sue rapists in federal court (*U.S. v. Morrison*) — yet the U.S. Supreme Court struck these laws down because they exceeded Congress' power under the Commerce Clause.

In a New York Times interview, Barnett says, "The individual mandate goes far beyond these previous acts. Congress has never before mandated that a citizen enter into an economic transaction with a private company, so there can be no judicial precedent for such a law. Telling someone how they must do something is one thing; commanding that they must do something is entirely different."

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The lawsuit over the health care bill is consistent with my commitment to independently fight for the rights of Washington state citizens and to uphold my oath of

office to defend the Constitution. To learn more about Washington's involvement in the health care lawsuit, go to: <http://www.atg.wa.gov/2010healthcarelawsuit.aspx>.

Learn more about Attorney General McKenna's legislative agenda at www.atg.wa.gov.

Law School Round-Up

In support of our law schools in Washington State, our chapter is proud to present the following events and updates from our local Law Schools:

Seattle University Law School Seattle University School of Law establishes pioneering Mental Health Court Clinic

As courts throughout the state and the country struggle with how to deal with mentally ill criminal offenders, Seattle University School of Law has started a groundbreaking clinic to train and inspire lawyers to practice in this important area of the law.

The Mental Health Court Clinic at the Ronald A. Peterson Law Clinic is believed to be the first of its kind in the country. Through an innovative partnership with Associated Counsel for the Accused (ACA), students get first-hand experience representing clients in Seattle Municipal Mental Health Court. "This is difficult work, full of challenges, but also great rewards," said Russell Kurth, an experienced mental health court practitioner at ACA and Distinguished Practitioner in Residence at the law school. "Through education at Seattle University School of Law, we're going to train the next generation of lawyers who care about these issues."

Seattle Mental Health Court is recognized as one of the leading and highest volume courts in the country dedicated solely to criminal cases involving mentally ill defendants. It is one of the few that operates as both a competency and a therapeutic court, protecting the rights of incompetent clients to not be prosecuted and offering those deemed competent assistance with housing, treatment, chemical dependency and other services. Prosecutors, defense attorneys, social workers, police and others work together to design a program of support and supervision that is tailored to

the needs of each defendant and protects public safety.

In harmony with the collaborative spirit of the court, the law school requires students interested in the Clinic to first complete the course in Law, Policy, and Mental Health taught by adjunct professor Mike Finkle, who has been the lead Mental Health Court prosecutor for the Office of the Seattle City Attorney and was recently appointed a King County District Court Judge.

Instead of simply locking people up, the Mental Health Court helps get to the root of the problem. Kurth says those who stay with the court program for two years have an 83 percent reduction in criminal behavior.

"It's humbling to know that we as attorneys can do so much if we use what we have learned in the right way, and with passion and not for personal gain," said Karen Murray, municipal court supervisor for the Associated Counsel for the Accused and a graduate of the law school. "We are totally committed to this clinic and our attorneys. We need more astute, knowledgeable people going into this field to give a voice to those who have none."

Students benefit from the experience. "In the Mental Health Court Clinic, I am not just learning about something – I am actually doing it," said 3L Megan Giske. "I am gaining practical experience in everything from criminal procedure to client counseling, but most importantly, I am learning how to advocate for a very unique population. The clinic has been very rewarding."

Annette Clark, interim dean at the law school who also holds a medical degree, said it's fitting that such a clinic found a home at Seattle University School of Law, which strives to educate outstanding lawyers to be leaders for a just and humane

world. "The law can be a healing profession," Clark said. "The work of the mental health court attorneys is evidence of that."

The clinic is funded in part by grants from the Val A. Browning Charitable Foundation and the Nesholm Family Foundation.

Justice Barbara Madsen named law school's Woman of the Year

Judges, lawyers, alumni and students turned out in force to honor Washington Supreme Court Chief Justice Barbara Madsen as Seattle University School of Law's 2010 Woman of the Year. The law school and the Women's Law Caucus presented the award at a special luncheon March 25.

Annette Clark, interim dean, said Justice Madsen is devoted to equal justice, promoting diversity and advocating for women and families who lives out the law

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L to R – Interim Dean Annette Clark, Justice Barbara Madsen



L to R – Women’s Law Caucus Co-President Michelle Hankins, Justice Barbara Madsen, Women’s Law Caucus Co-President Monica King

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school’s mission to educate outstanding lawyers to be leaders for a more just and humane world.

“For her, leadership is a calling, not an ambition. She leads with directness, with integrity, with grace, and with humility,” Dean Clark said. “She leads not to achieve for herself but to serve others. Justice Madsen, you are the embodiment of leading for a more just and humane world, in working to enhance human flourishing.” Justice Madsen accepted the award to a standing ovation from the audience, which included her husband and three of her four children, including her daughter Hillary, a ’08 graduate of Seattle University School of Law.

Madsen became chief justice in November 2009. She was the third woman elected to the court in 1992, and she was re-elected in 1998 and 2004. After earning her JD from Gonzaga University School of Law in 1977, she worked as a public defender in King and Snohomish counties. In 1982, she joined the Seattle City Attorney’s Office and was appointed special prosecutor in 1984. Mayor Charles Royer appointed Justice Madsen in 1988 to the Seattle Municipal Court bench.

Justice Madsen’s commitment to equal justice and diversity began when she served as the special prosecutor. She developed the child abuse component of the Family Violence Project. Later, while serving as a municipal court judge, she began working

toward the development of a Domestic Violence Coordinating Committee to comprehensively address violence in the family. As the Presiding Judge, Justice Madsen increased opportunities for women and attorneys of color to receive appointments as pro tem judges. She encouraged and increased diversity among the court employee population. Justice Madsen’s commitment to equal justice continues today in her role as the chair of the Washington State Gender and Justice Commission. Madsen was touched and grateful for the award,

saying that while women have made great strides — even running for president — they still lag behind in salaries and positions of authority. But when women see others running for president, serving as governor or on the Supreme Court, she said, “they see hope and opportunity.”

She said the work of the court, the establishment of commissions to explore, gender, diversity and equal justice, make her very proud and demonstrate the values she upholds. “Diversity matters,” she said. “Every voice has value, and justice belongs to all of us.”

Madsen praised Seattle University School of Law, calling its outreach to the community, level of activity and work for justice “unprecedented.” “The law school is just alive, and we are so much better for it,” Madsen said. “I look forward to hearing the voices of the students in this room.”

Law school encourages students to look beyond traditional careers

Seattle University Law School students learned about careers outside tradi-



Laura Murphy

tional practice at the law school’s first “Beyond the Traditional” Career Information Night, which attracted lawyers whose careers took them down a variety of paths. The event was organized

by Laura Murphy, associate director of the law school’s Center for Professional Development and former associate general counsel for Safeco.

Murphy said prospective law students often are attracted to the profession by the idea that a JD opens doors to many different careers. Once they are in law school, however, they find that career advisory programs are geared almost exclusively to the traditional practice areas valued by law firms and the criminal bar. There is little institutional support for lawyers who seek careers beyond the traditional. Seattle University Law School decided to break the mold and celebrate these lawyers’ achievements in the hope of inspiring its students to fulfill their true career passions. Now, in addition to sponsoring On Campus Interviewing season, the Public Interest Job Fair, its Small Firm Career Fair, and the new Corporate Intern Hiring Program, the Center for Professional Development (CPD) adds another innovative program, the Beyond Traditional Career Information Night.

That evening, 32 lawyers gathered with more than 100 students to talk about their careers and share their thoughts about the courses, internships and jobs that led them to their successes. In a single informational event, students were able to meet with a police lieutenant; corporate executives; a diversity director; an IP manager; lobbyists; non-profit administrators; government executives; a grant writer; claims specialists; and compliance professionals. They learned about real estate development; NCAA careers; media production; health regulation; sales; blogging; and school administration. They explored the differences between a DEA Special Agent and an ICE Special Agent. They learned that the IRS offers expedited advancement to certain professionals. They found there is a need for litigation managers and that lawyers make great HR managers. They received career development tips from recruiters and counselors and also learned how to break into those careers.

At the heart of the event were the lawyers who gave so generously of their time to the students. They sat in conversational groupings and shared stories and tips. Students moved from group to group,

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joining conversations and starting new threads. The lawyers listened to students' aspirations and made suggestions, referred them to friends and swapped business cards. One repeated comment overheard was how much the lawyers enjoyed spending time with law students. The students' enthusiasm reminded them of why they went to law school in the first place.

Lawyers interested in working with the program can email Laura Murphy at murphy@seattleu.edu

**University of Washington
UW Law Alumni: It's Reunion Time!**
Does your class year end with a 5 or 0? Then join us for Reunion Day 2010 on November 6! Watch www.law.washington.edu/alumni for registration and event information.

Law School Alumni Honored
The UW School of Law will honor three distinguished graduates at the 2010 Alumni Recognition Banquet on May 13 at the Grand Hyatt Hotel in Seattle. Recipient of the Distinguished Alumni Award is Johnson Toribiong, President of Palau. Sworn into office January 15, 2009, Toribiong is Palau's seventh president. He is a former ambassador of Palau to the Republic of China (Taiwan) and co-founder of the firm Toribiong and Coughlin. Toribiong is the first sitting head-of-state to receive a UW School of Law alumni association recognition award.

Michael Gotham, the director of recruiting and retention with the law firm Perkins Coie, will receive the Service Recognition Award. Gotham oversees law student and lateral attorney recruiting, new attorney orientation and integration, associate evaluation and compensation, and other attorney personnel matters at Perkins Coie.

The Recent Graduate Award will go to Sonia Rodriguez Martinez, owner and managing attorney of Morales Rodriguez P.S. in Yakima specializing in family law. In 2008, Rodriguez was appointed to the Yakima City Council, the first Latino member in Yakima history, serving until November 2009. Rodriguez was recently sworn in as a Pro Tem Judge in Yakima County.

Two More Conviction Reversals

On April 21, a Clark County judge vacated the sentences of Alan G. Northrop and Larry W. Davis, both convicted of rape and burglary in 1993, as a result of DNA testing not available at the time of their original trial. Students, faculty, staff, and volunteer attorneys with the UW School of Law worked on the case and were present when Judge Woolard announced her decision, at which time Northrop was released from state custody. Davis was released on parole earlier this year.

This is the second time in Washington state history that someone convicted of a crime has been exonerated based on DNA testing. The first DNA exoneration came in 2006, when a Yakima County judge vacated the rape conviction of IPNW client Ted Bradford. Bradford was entitled to a new trial, which ended February 11, 2010 when the jury pronounced Bradford not guilty.

UW Climbs 25 Spots in Law School Advocacy Rank

The UW School of Law was ranked 23rd out of 123 law schools in the 2009 Ranking of Appellate Advocacy Competitions, climbing from 48th place in 2008. The list ranks law school moot court team successes and are compiled by Brian Koppen and posted to his blog, Law School Advocacy. The UW law school moot court teams counted for this year's ranking include the Jessup International Law Competition, National Moot Court Competition, Animal Law, and Thomas Tang Moot Court Competition.

Anderson Appointed Visiting Professor at Harvard

Harvard University Law School has appointed Associate Professor Robert Anderson, Director of the UW School of Law Native American Law Center, as the Oneida Nation Visiting Professor. Anderson will teach American Indian law at Harvard one term for each of the next five years and will otherwise remain on the full-time faculty at the UW School of Law.

Obama Nominates UW Law Professor Paul Miller to USPS Board

President Barack Obama announced the nomination of Henry M. Jackson Professor of Law Paul Steven Miller to the Board

of Governors of the United State Postal Service. Miller, whose appointment to the board is pending U.S. Senate confirmation, will remain on the faculty at the law school and continue serve as director of the UW Disability Studies Program.

Barer Institute Launches

The Barer Institute for Law and Global Human Services, created by a gift from UW Regent and law school campaign chair Stan Barer and his wife, officially launched this year with the hire of Manisha Singh as Executive Director. Singh is former Deputy Assistant Secretary of State in the Bureau of Economic, Energy and Business Affairs with the U.S. State Department. The Barer Institute, which will involve an interdisciplinary effort based in the law school, will study and promote the effectiveness of legal frameworks as essential elements in achieving goals for human health, education, and social and economic well-being in developing countries.

Stay Connected with UW Law

You can stay connected with what's happening at the UW School of Law by watching its homepage at <http://www.law.washington.edu/>, becoming a fan on Facebook at <http://www.facebook.com/pages/UW-School-of-Law/23552538900>, following UW on Twitter at <http://twitter.com/UWSchoolofLaw>, or joining UW's LinkedIn Group at http://www.linkedin.com/groups?home=&gid=2203688&trk=anet_ug_hm.

Gonzaga University School of Law



Rosanna M. Peterson sworn in as federal judge

Former Gonzaga professor Rosanna M. Peterson was recently sworn in to serve as a district judge on the U.S. District Court for the Eastern District of Washington.

President Barack Obama nominated Judge Peterson to the position in October 2009. On Monday, January 25, the U.S. Senate voted unanimously to confirm her appointment.

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President Barack Obama signed her commission on Tuesday, January 26, and Judge Peterson was sworn in on Wednesday, January 27.

Judge Peterson is the first woman to sit as a district judge on the Spokane-based federal court. She fills a judgeship vacant since May 1, 2008, when District Judge Fred Van Sickle took senior status.

"I believe Professor Peterson has exactly the right mix of characteristics to be a great federal judge," said Acting Dean George Critchlow. "She is smart, decisive, thoughtful, and capable of both great compassion and toughness."

"I am extremely honored by the confidence expressed in me by President Obama and the Senate," Judge Peterson said. "Although I will miss working with my Gonzaga col-

leagues and students, I am looking forward to assuming my new responsibilities as a United States District Judge."

Judge Peterson graduated from the University of North Dakota, where she was editor-in-chief of the North Dakota Law Review. She was elected to the Order of the Barristers and selected as the outstanding graduate. Following graduation from law school, Judge Peterson clerked for the Hon. Fred Van Sickle in the United States District Court for the Eastern District of Washington.

Before becoming a partner in Rodgers & Peterson, Judge Peterson practiced general litigation, employment and education law, as well as criminal defense at several private law firms in Spokane.

Judge Peterson received the Smithmoore Myers Professionalism Award in 2006.

She served as president of the Federal Bar Association for Eastern Washington, president of the Washington Women Lawyers State Bar Association, and president of the Spokane County Washington Women Lawyers Bar Association. She has served on the board of directors for the Center for Justice and Spokane Intercollegiate Research and Technology Institute, and as the Eastern Washington representative to the Ninth Circuit Judicial Conference and Criminal Justice Act Attorneys Conference. Currently, Professor Peterson serves on the board of directors for the Eastern District of Washington Federal Court Historical Society.

In 2002, Judge Peterson became director of the Externship Program at Gonzaga University School of Law, where she also taught Evidence, Federal Jurisdiction, and Trial Advocacy.

Chapter Announcements

February 2010

ACC Leadership Development Institute

I was able to attend ACC National's Leadership Development Institute (LDI) in Washington D.C. in February. LDI provides chapter and committee leaders with the training and networking opportunities they need to effectively lead their constituents. Leaders from each of the ACC Chapters attended the event to learn and share ideas about recruiting members, obtaining sponsorships, successful programming, volunteer opportunities, etc. ACC National also spoke about upcoming technology updates, and made suggestions to ensure that each chapter is a success.

Both small and large chapters were represented, and it was great to hear (and share!) ideas. Attending the conference was a valuable learning experience, and I am thrilled that I was able to attend. I will look forward to sharing and implementing some of the great programs and ideas that I gathered from the conference. If you have any questions or are curious about some of the ideas that were shared, feel free send me an email. Until then, I will look forward to attending the next LDI conference!

Heather M. Deranek
Vice President and Secretary
Washington Chapter

LDI Conference Group



▲ L to R – Yvonne Estime, Director of Large Law Programs at Association of Corporate Counsel, WACC Vice President Heather Deranek

◀ L to R, Tori Payne, Director of Membership Development & Chapters, WACC Vice President Heather Deranek, Chapter Coordinator Caroline Sweeney



LDI Conference

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Have a question about the Washington Chapter?

Interested in joining our legal community? Please feel free to contact any one of our Board Members with any questions. We would be happy to talk with you and encourage you to join. Our chapter is always accepting new members!

Have an idea for our next newsletter? Feel free to contribute! Please email questions or submission requests to heather.deranek@onrequestimages.com.

ACCA News

Find Counsel. Drive Change. Improve Value. Use the ACC Value Index to:

- Leverage your ACC network to find the best law firm representation available.
- Search for firms that excel in specific practice areas and markets.
- Read helpful comments about firm attributes and value practices.
- Ping reviewers to get more information or initiate direct conversation. And, for the firms you've engaged, review them and help transform the legal landscape.
- Score firms on six value-based criteria – it only takes a few moments.
- Opt-in to permit firms to receive your anonymous feedback.
- Help ensure that law firms are judging their success on your satisfaction.

Contribute law firm evaluations today to the <http://www.acc.com/valuechallenge/valueindex/index.cfm>.

NACD offers Free Trial Membership to ACC Members

ACC has partnered with the National Association of Corporate Directors (NACD) to offer a free individual trial membership. NACD is the largest national membership organization by and for directors and the leading provider of board and director-level education, evaluations, training, resources, and community for the exchange of ideas on leading boardroom practices.

Enrollment in the free trial membership is open until June 30th. NACD is also offering discounts on full board memberships, in-boardroom training, evaluation services, and more. For more information on the available offers, contact Cyrus Alexander at cdalexander@nacdonline.org or 202.572.2097. To sign up for a free trial, visit their website at <http://nacdonline.org/acc/> or call 202.775.0509.

New Online Video Tutorials for Legal Resources

If you just can't find that ACC *Docket* article, survey, Top Ten or other legal resource, let us show you where it is! With ACC's new two-minute online tutorials, learn how to navigate through ACC's website to get the information you need quickly and easily. You may even stumble upon some of ACC's hidden resource treasures! Access the tutorials page at <http://www.acc.com/aboutacc/tutorials.cfm>.

Mini MBA – Bring More Than Your Legal Skills to the Table

Strengthen your business and management skills this year and bring added value to your company — ACC's Mini MBA program, scheduled for June 9–11, helps you achieve that goal! Presented in partnership with the Boston University School of Management, The Mini MBA explores the essential business skills that enhance and sharpen your management knowledge in critical MBA disciplines: accounting, finance, strategy, and organizational behavior. Visit www.acc.com/minimba for more information.

Read, Hear, and Share — Express Your Opinions at In-house ACCESS

Connect with your peers today and share your thoughts about the hottest issues impacting the in-house community. In-house ACCESS, the ACC blog, is the perfect place for you to jump in! You can comment on ACC President Fred Kreb's blog entry on "2010, The Year of Cautious Optimism for In-house Counsel," or comment on other recent postings. Check out the blog at www.inhouseaccess.com. If you write a blog and would like to share it with other in-house counsel, email your link to Michael Henderson at Henderson@acc.com.