

Inside

- 2...Summer Fun, The Reading Undone, and Everything You Need to Go Back to School This Fall
- 4...ACC Value Challenge: Returning Value to Legal Services
- 5... Gearing Up: 4th Annual Corporate Counsel Awards
- 5...ACC News

FOCUS

President's Message

Kevin S. Lapidus

What it Means to Be a Corporate Counsel

The practice of law for in-house counsel differs from that of other attorneys. The skills necessary to succeed, the concerns that pervade our practice, the support we require and utilize, and our daily routines, are all unique to our section of the legal bar. Our WMACCA leadership knows that an understanding of this paradigm and the underpinnings of in-house practice are necessary to effectively focus and manage our chapter resources.

Skills

The skills that enable in-house counsel to succeed are more expansive than those required for success in other parts of the legal bar. Moreover, many non-legal skills are utilized in our daily practice. A primary skill that enables us to effectively represent our companies and associations is a keen understanding of our organization's business. Frequently, we move back and forth between the realm of business and law. A thorough and forward-looking understanding of our markets or industries, a skill-set we are not trained for in law school or law firms, provides a unique vantage point to tailor our legal advice and help shape the policies and procedures for our companies and associations.

Our in-house positions also require heightened interpersonal and communication skills. The collaborative nature of corporations and associations and empha-

sis on large, complicated, long-term team projects, create an environment where our ability to work with others, whether as leaders or coworkers, becomes an increasingly important skill. In addition, the fact that we work alongside other non-attorney colleagues means our ability to communicate in-person and express ourselves in a concise and constructive manner are also important. Our responsibilities, and the requirements of a corporation or association that is trying to grow, call for problem-solving skills and the ability to bring other people into the fold to work with us and understand the merits of our advice in order to ensure they help implement it.

Financial acumen is another important skill for in-house counsel. Whether we are working on transactions, pursuing litigation, or creating corporate compliance procedures, an understanding of the effects our actions will have on the company's finances is crucial to representing our clients. In addition, we are called upon to budget and forecast our legal expenses, requiring an understanding of the economics of our practice area and legal needs.

Concerns

As corporate counsel we also focus on our own universe of issues and concerns. For



example, we frequently devise the operating procedures or risk management processes for our companies. Understanding how decisions are made and by whom, as well as what steps our business units take before acting, is important. We may also attempt to benchmark

these procedures, as well as our corporate policies, against other similarly situated enterprises. In this respect, we frequently are concerned about industry standards, best practices, and legal and operational trends.

As in-house counsel we must also be aware of, and take into account, both micro and macro trends. New developments in business, law, politics, and societal trends may require us to calibrate the manner in which our company or association conducts business, enters new markets, structures contracts, or otherwise conducts itself. Developments in financial markets, leading to new manners of doing business, consumer spending trends, or other societal cultural shifts also may result in a new operating focus, policies, contract structures, or regulatory and litigation positions and postures.

Another significant concern for in-house counsel is the scope of the attorney client privilege as it pertains to our relationship and communications with our internal

continued on page 4

Summer Fun, The Reading Undone, and Everything You Need to Go Back to School This Fall

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Those of you with kids in your life know that this time of year is when kids who've been enjoying a lazier pace and unlimited play time look around and realize that there is still much to do before they're sentenced to another year in the classroom. And they haven't even started plowing through their summer reading list.

I hope that summer has brought many of you some needed playtime and relaxation. Since we sometimes let the reading pile slide a little in summertime, I thought I'd help you catch up since Fall will bring challenges to you, too, that require you to be on top of your game.

SCARIEST HORROR: STORY BEACH READING FASB and their proposed new loss contingency reporting rules

Summer started with an unwelcome announcement from the Financial Accounting Standards Board, or FASB (pronounced FAZ-BEE), that they were going ahead with a proposal they'd been urged to discard: a revision of Financial Accounting Standard (FAS) number 5, which regulates public company reporting of disclosures regarding potential losses or liabilities of the company. This proposed rule was issued in June with a comment deadline of August 8. ACC filed comments, co-signed by more than 100 companies and many other organizations. At last count, FASB had received over 225 comment letters protesting the rule, which is a firestorm of activity in terms of these kinds of comment requests, especially considering they snuck it in while everyone was on vacation!

ACC's comments, the FAS 5 revision proposal, and a number of our co-commenter's letters are online for your perusal at www.acc.com/php/cms/index.php?id=84. When you get to this page, you'll notice that this information is housed on the privilege protection page. Why is this story on the privilege page? That's why you need to catch up on your summer reading.

ACC's letter details our concerns over several facets of the proposal, but focuses most on the following three points:

1. These proposals are a solution in pursuit of a problem. The current standards aren't broken: there is no evidence that current disclosure requirements are insufficient or harming market transparency. Adopting significant new and ill-advised proposals without evidence that changes are necessary, without a focus on how the rules will improve reporting (rather than just suggesting we need "more"), or without assurance that the new rules will improve (rather than frustrate) meaningful disclosure is folly.
2. Heightened disclosure requirements will create unprecedented waivers of the company's attorney/client privilege and work product rights. Because the proposed amendments will require clients to produce more sensitive and speculative information about possible losses related to litigation, and require earlier production of loss analyses than currently required (namely, before an exposure is well documented or quantified by "facts" as opposed to by an attorney's initial evaluation of possible liability or harm), reporting will likely increase the risk of waiver of privilege and have related punitive effects. These required "qualitative" disclosures will broadly communicate the company's litigation assessments that previously were carefully guarded in adversarial proceedings. Additionally, independent auditors may seek more detail from counsel to test the estimates and disclosures reported, adding to the risk of privilege waiver to auditors.
3. Deeper disclosures of attorney-client privileged assessments will coerce undesirable outcomes in matters on which companies are only asked to report. The proposed amendments' requirements to provide qualitative assessments of likely outcomes, timing of resolution, and the company's assumptions on loss amounts "give away the store" to any interested

adversaries, providing invaluable detail about the company's litigation strategies and settlement coercion-points. The result would be a perverse twist on the FASB's stated desire to disclose more accurate and timely information about loss contingencies: companies' litigation counsel would likely become more circumspect about providing their clients with legal assessments and detailed contingency analyses to assist in their decision-making in order to avoid unnecessary disclosure or liability. Further, since contingency reporting under the rules must be made earlier and include disclosures on cases that are not well quantified or even likely, there's a concern that setting and publishing such numbers will become self-fulfilling prophecies—the settlement floor, even in cases that otherwise have little merit.

ACC has requested an opportunity to testify before the FASB when they meet to discuss these rules further. We'll keep you posted.

HEARTWARMING "WILL IT ALL TURN OUT ALRIGHT?" NOVELETTE

The saga continues: Can the DOJ overcome tremendous odds to save itself and untold numbers of innocent ACC members' clients from perilous privilege erosion?

In July, U.S. Attorney General Michael Mukasey announced to the Senate Judiciary Committee that new Deputy Attorney General Mark Filip was crafting another U.S. Department of Justice (DOJ) guideline that would replace the McNulty Memo and offer "real, significant proposed changes." The DOJ's McNulty Memo, like its predecessors, the Holder and Thompson Memos, have been criticized by ACC and its coalition partners for including privilege waiver, amongst other inappropriate terms, in the DOJ's list of criteria for cooperation in corporate failure investigations. Deputy Attorney General Filip issued a letter to the Senate Judiciary Com-

mittee leadership that offered an executive summary of the memo he said was still in draft, angering Senator Specter, who called for the DOJ to stop stalling and for the mark-up and passage of *The Attorney Client Privilege Protection Act of 2008*. And yet, the outlined terms of the proposed memo in this executive summary, if realized, are significant steps in the right direction. As always, the proof will be in the pudding, so watch the ACC site for info on the publication of the new DOJ Memo to be issued by the end of August. To read the Deputy Attorney General's executive summary of the memo he's promising and Senator Specter's response, visit the ACC Privilege Protection page at www.acc.com/php/cms/index.php?id=84.

TIMELESS TEAR-JERKER

You done me wrong, but our relationship—while often dysfunctional—is everything to me, so I'm taking you back. But under new terms.

More than 120 top CLOs and law firm managing partners have been in therapy with ACC this summer, and talking about how to get their relationships back in order. This sizzling summer best-seller is about to expose their clandestine meetings in top hotels around the country as they attended focus-group sessions for ACC's new initiative: the ACC Value Challenge. So tune in for this summer's hottest reality show, and see many of them caught on tape, telling everyone who will listen about the errant ways of their inside/outside counsel relationships, and how they plan to make it up to each other (and their clients).

Seriously though, we all recognize that there have been decades of conversations about the problems in-house counsel have with rising costs, a lack of focus on value (rather than profit per partner), the perverse disincentives to efficient service inherent in the billable hour system, and much more. And law firms are tired of arguing over bills, constant RFPs that have replaced the longer-term relationships that made practice satisfying for them, clients' willingness to trade in meaningful project management for a 10 percent discount, and a tendency to suggest they want innovation and a revised relationship, but at the end of the day, a decision that it's easier to chuck all that and continue to purchase over-priced billable hours

from legacy firms. What can be done that will actually move the needle? That's what these focus groups were meeting to discuss this summer. ACC hosted off-the-record discussions to explore how we can change the focus from griping to acting on what is necessary to move us out of these unproductive cycles and help in-house and outside counsel rediscover the value of their relationships.

You can read ACC's magnum opus on how we're planning to help in-house counsel begin a (r)evolution in their outside firm relationships online at www.acc.com/public/accvaluechallenge-overview.pdf. And if you're bored with all the reading and just want to veg in front of the big screen, you can tune into the launch of ACC's Value Challenge by tuning in on your computer or getting your colleagues together in the conference room over lunch to pick up the live, free video feed of the Town Hall Meeting at which we'll "reveal all!" Contact ACCValueChallengeEvents@acc.com for information on how to tune in September 26 (or download the archived version from the website).

Get past "you done me wrong": it's best left in dimestore novels. ACC's Value Challenge is committed to working with you over the course of the coming months and years to help you take control of your outside spend and "(r)evolutinize" your outside counsel relationships and in-house budget and matter management.

THE TRAVEL JOURNAL THAT TAKES YOU PLACES YOU WERE NEVER LICENSED TO GO

ABA House passes model in-house counsel registration guidance for states that are seeking to accommodate in-house lawyers who've moved to a new job, but lack a local license where they're now employed.

Two-thirds of US states have now passed a version of the rule that ACC worked so hard to "encourage" the ABA to adopt: namely, Model Rule of Professional Conduct 5.5, which authorizes lawyers who are licensed and in good standing in their "home" jurisdictions to practice on a temporary basis (when taking a deposition, or negotiating a matter, etc.) in another jurisdiction in which they are not licensed. In-house counsel got further relief under the rule; under the provisions of section

5.5(d), in-house counsel who are licensed and in good standing in one jurisdiction are authorized to engage in "permanent" practice for their employer-clients when they move to a new job in another jurisdiction in which they are not licensed. While 5.5(d) is a complete authorization in and of itself, quite a number of states adopting the rule have coupled it with a registration system that allows the state to keep track of these in-house lawyers and usually collect payment from them comparable to local members' bar dues. Unfortunately, in their zeal to regulate, many state bar licensing authorities lost sight of the purpose of the rule, and the registration systems they adopted became more like mini-Spanish Inquisitions than simple registrations.

Not liking to see great disparity amongst the state rules regulating any aspect of lawyer practice, the ABA formed a group that proposed a model in-house registration system to provide some level of consistency and to suggest best practices. The first versions were overly complex. The new and improved model was adopted by the ABA House at the ABA Annual Meeting, and could be reading that saves you from much more reading studying for the bar exam next time you move to a job in another jurisdiction!

ACC's comment letters, our concerns that the ABA not adopt a model that pre-empts the underlying logic of 5.5(d) (namely, that no registration is needed at all in states that adopt the rule—the authorization is complete and the burdens of administering a rule may not be justified by any quantifiable threat the rules seem to suggest exist), and the new rule all appear online at:

ACC's Fall 2007 comment letter to ABA ([www.acc.com/php/chapters/filespace/All\(admin\)/accabainhousecomment.pdf](http://www.acc.com/php/chapters/filespace/All(admin)/accabainhousecomment.pdf))

ACC's Summer 2008 comment letter to ABA (www.acc.com/public/acc-comment-aba.pdf)

ABA Model In-House Counsel Registration Rules (www.acc.com/public/aba-sect-lega-educ-admi.pdf)

Alright, now that you're caught up on the essentials and can approach fall equipped with the knowledge you need to move to the next grade, enjoy these last few days of warm weather and summer fun!

continued from page 1

clients. Precisely because of our need to understand the business operations around us, operating results, and financial and regulatory risks, information about our companies and associations is crucial to informing and performing our work. Our position in being embedded in our client's operations and process flow, which permits us to provide tailored and proactive advice and counsel, will be significantly impaired without the free-flow of information and our inclusion in meetings and decisions.

Needs

Our needs as in-house counsel are far greater than merely accessing online legal information and resources. As discussed above, we operate at the confluence of business, law, politics, and societal trends. We need varied, timely, and accurate news and information about each of these areas in order to provide informed advice and to conduct ourselves in a proactive manner. Our focus is on both micro market news and information, and an understanding of broader macro developments and trends.

Our practice also requires access to benchmarking data and best practices policies, procedures, and form agreements from other companies. We operate in an environment where third-party regulators or enforcement agencies judge our conduct on a comparative basis to other entities in our industry segments or in the broader business markets. It is risky to not keep pace with new methods of doing business or preventive policies and procedures. In order to keep pace with varied and frequent developments, we need access to

documents, policies, and procedures from other members of the in-house bar.

Daily Routine

When we enter our offices each morning, there is frequently nowhere to hide—we have to walk by, if not make eye-contact with, our clients—quite a different experience than our law-firm colleagues! In addition to the increased accountability of working with our clients, we also have to deal with the long-term effects of our actions, whether a closed transaction or a new policy or procedure. An acquisition, for example, does not merely result in a closing binder as a trophy for our wall or a new deal cube; rather, it means having to grapple with integrating the new business or company and solving the long-term issues that may arise after the closing.

The result of this situational structure and long-term integration and operational involvement, is that we are generally more forward looking than outside counsel. We are not only solving problems for today's juxtaposition of facts and issues, but also creating dynamic structures that will facilitate a working relationship or risk management solution that succeeds over time as well. We engage in heightened strategic thinking and planning to help avoid the collateral or future issues as well as solving today's issues.

The WMACCA Solution

Identifying what is different about the in-house practice of law is the first step in designing and operating an effective chapter for our association. WMACCA's goal is to serve the interests of its members,

and we must first understand the skills, concerns, needs, and daily routine of our members in order to bring our resources to bear in a manner that addresses these items. While WMACCA is led by a board that consists of members who share many of these same issues and demands, we need you to let our leadership team—and our national ACC office—know what your concerns and needs are, whether there are skills you would like to improve, and if our programs and operational modes are complementary to your daily routines.

Specific actions that ACC and WMACCA have taken that are geared toward this unique practice of law include: information packs with best practices policies and procedures, as well as form documents; forum list-serves to facilitate communication among similarly situated practitioners; leadership development opportunities; distance learning and time-shifting programming; and programs geared toward niche subjects as well as macro trends and developments. Moreover, our programming includes legal, political, social and business topics. For example, on September 18, 2008, we will hold a mini-executive MBA program to highlight the finance and business issues that in-house counsel need to understand.

WMACCA is designed and operated by and for our members, and is intended to reflect the unique issues and requirements of corporate counsel—a day in the life of a corporate counsel, and a day in the life of WMACCA, are distinct from other parts of the legal bar.

ACC Value Challenge: Returning Value to Legal Services

In-house lawyers have been living for years with the kind of “sticker”-shock we have all been feeling at the supermarket and the gas pump as of late. The billing rates of our outside law firms have gone to all-new highs. And we have often felt that the traditional law firm business model no longer delivers what we need: value driven, high quality legal services that deliver solutions for a reasonable cost.

This month, ACC is launching a new initiative to address this concern. As the

“Voice of the In-house Bar,” ACC has the great good fortune of an exceptional network of members and chapters that can stimulate dialogue, ideas, and the development of best practices to enable in-house counsel to take better control of their outside legal spend.

The goals ACC hopes to achieve with this initiative are:

1. Create a national dialogue about the need to reconnect value to costs, especially

within the law firm community, with a common language and framework that ACC will have helped define and that our members will help drive.

2. Identify and empower core groups of leaders in the in-house and outside firm communities, as well as in consulting houses, vendor organizations, legal and business media, and the law school community by engaging them and then soliciting more participants every year.

3. Offer a tool kit for use by in-house counsel and another for outside firms (and shared resources, as well, of course), containing leading practices, management tools, models for managing value, and networks by which participants in this process can communicate their experiences and ask questions of each other, including “who do you use and how do you do this?”

4. Nourish the development of an in-house client community that gives law firms reasonable comfort that their efforts to implement change will be supported and rewarded.

5. Encourage law firms that are more focused on retention of talent valued by clients, and matter management driven by the client’s expectations and needs.

6. Foster greater satisfaction and pride in their work for both inside and outside lawyers—spending less time bickering over bills and more time focused on solving client problems.

7. Ensure recognition by senior (non-legal) management that in-house counsel are taking the lead, rather than simply being reactive, and that they are exercising strong business skills in balancing their inside and outside legal spend—targeting results and outcomes, rather than just hoping to manage an unpredictable process.

ACC has been working in four markets—San Francisco Bay Area, Chicago, Hous-

ton, and New York—to develop a database for the initiative. These pilot programs include an intimate and in-depth dialogue with a core group of in-house counsel and law firm managing partners, and are intended to provide information, benchmarks, ideas, and feedback. The official launch of the project will integrate what they have learned into the larger initiative, and will take place in Washington, DC with a “town-hall” meeting in September.

Watch for announcements in our e-newsletter and on our webpage about opportunities to view the “town-hall” meeting with other WMACCA colleagues and to begin the dialogue.

Since law firm/client relationships are individual and often local, WMACCA is prepared to help move this initiative forward by reaching into our membership in order to bring together leaders from every sized company and firm, in every kind of practice. WMACCA will hold one or more Value Challenge chapter programs after the launch and offer interested senior in-house counsel and our local law firm leaders the opportunity to work together on the initiative.

If you have an interest in taking a leadership role in this initiative within WMACCA, please contact Kevin Lapidus, WMACCA president, at klapidus@sunedison.com, or Ilene Reid, WMACCA executive director, at WMACCA@verizon.net.

Gearing Up For the 4th Annual Corporate Counsel Awards

In just three years, the WMACCA Corporate Counsel Awards have become the premier honor for in-house counsel in our region. And our gala reception celebrating the nominees and winners has become the most important networking event for in-house counsel and their business colleagues.

We are busily preparing for the 4th Annual Corporate Counsel Awards Reception, and look forward to seeing you there. This year’s Awards Reception will be held on Wednesday, October 29, from 6:00 to 10:00 PM, at The Ritz-Carlton Tysons Corner. Please mark your calendars and keep your eyes open for this year’s invitation to arrive any time now!

The Corporate Counsel Awards recognize the significant role that in-house counsel play in the private sector organizations that employ them, and honor some of the best and brightest among our peers. WMACCA will bestow awards in the following categories:

- Outstanding Chief Legal Officer
- Outstanding In-house Counsel
- Outstanding Law Department
- Outstanding Community Service (by an individual or department)
- Corporate Counsel Career Achievement Award

ACC News

ACC Top Ten: Key Questions (and Answers) for Complying with US Export and Embargo/Sanctions Law and Regulations

As markets, supply chains, and workforces become increasingly global, more and more businesses are confronted with the need to comply with US export laws. But, the diversity and complexity of these laws and the implementation of regulations make benchmarking obligations and adopting sensible internal compliance mechanisms a difficult challenge. Read ACC Top Ten at www.acc.com/resource/v9984 to gain a better understanding of US export control laws

and learn how to manage the compliance risks inherent to global business.

2008 Annual Meeting: Become Indispensable to Your Company’s In-house Legal Team

Don’t miss the educational and networking event of the year for corporate practitioners. With over 100 programs with special sessions for new in-house counsel, new legal managers, chief legal officers, small law department practitioners and much more, the 2008 Annual Meeting, October 19–22 in Seattle, WA, has something for every in-house practitioner. To help you

become the most informed and indispensable member of your company’s legal team, ACC’s Annual Meeting offers a variety of opportunities to meet, interact with, and learn from fellow in-house counsel with a wide variety of experience. Check out am.acc.com to register, select your sessions, and book your hotel! Don’t delay. Register today for only \$1400. This early rate expires on September 5. Questions? Contact education@acc.com or 202.293.4103, x.451.

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