



ACC Advocacy 2017 Filings

January - March

- On January 9, 2017, ACC submitted a letter to the United Kingdom Financial Conduct Authority regarding whether the head of the legal function should be included in the Senior Managers Regime. ACC argues the effort, which is aimed at increasing accountability in financial institutions, fails to take into consideration the unique position of in-house counsel in ensuring corporate compliance and would weaken the relationships between in-house counsel and their business-colleague clients.
- ACC filed a letter brief with the Supreme Court of California supporting the petition for review of a case raising the question of whether a court should sanction an attorney for the mishandling or misuse of non-privileged confidential business information. ACC urged the court to accept the case and establish a rule that protects such confidential information during the discovery process.
- On January 19, ACC filed an amicus brief in the United States Supreme Court supporting a petition to review the constitutionality of a New York law requiring nonresident New York-licensed attorneys to maintain a physical office for the practice of law, while imposing no such requirement on resident New York attorneys. Court review of this practice restriction could have lead to precedent helpful in attacking other multi-jurisdictional practice restrictions.
- In conjunction with our Northeast Chapter, in February ACC submitted comments to the Vermont Supreme Court supporting proposed amendments to Rules 1, 26, 34(b), 37(f) and 55(c) of the Vermont Rules of Civil Procedure, which would harmonize Vermont's rules with the newly adopted Federal Rules of Civil Procedure.
- In March, we publicly released our *Model Information Protection and Security Controls for Outside Counsel Possessing Company Confidential Information* ("Model Controls") document to help in-house counsel as they set cybersecurity expectations with their law firms and other legal vendors.
- Working with the Pro Bono Institute and the Corporate Advisory Committee of the National Legal Aid and Defenders Association, we helped organize a letter from general counsel supporting funding for Legal Services Corporation. The letter had 185 general counsel signatories and was sent to Congress on March 28th.



April – June

- We recognized our Advocacy Award recipients during the Mid-Year Meeting on April 3rd. The winners were Laura Dorman and Dawn Haghighi, for their work in organizing the Regulatory Working Group series of events, and Paul Lanois, for his consistent participation in policy work relating to subjects of interest to in-house counsel in Europe.
- Also in April, we submitted a white paper on the role of the general counsel as a key influencer of corporate culture to the National Association of Corporate Directors' (NACD) 2017 Blue Ribbon Commission, which explored the role of the board in overseeing corporate culture. Our white paper explains why general counsel need to have a seat at the table, namely as a direct report to the CEO and an attendee at board meetings, as part of a culture that values ethics and compliance. Our white paper served as the basis for the fifth recommendation of the NACD report, which directs boards to assess whether the chief legal officer is well-positioned within management and in relationship to the board to support an appropriate culture.
- In April, ACC joined the US Chamber of Commerce and the National Association of Manufacturers in an *amicus* brief filed in the Second Circuit in *Kiobel v. Cravath, Swaine & Moore, LLP*. ACC argues that in forcing disclosure of client documents held at the Cravath law firm to an overseas litigant, the district court ruling discourages full, frank attorney-client communication and undermines vital protections of confidentiality agreements.
- In late May, ACC offered comments in response to the European Commission's public consultation on whistleblower protection. ACC encouraged the Commission to consider the important roles corporate compliance systems and in-house counsel play in creating environments that encourage employees to speak out in cases of corporate misconduct. Also, ACC urged the Commission to not address whistleblower protections in a vacuum, but rather as part of a broader program to incentivize strong corporate compliance programs throughout Europe.
- ACC filed a brief June 1, 2017 in *Supreme Court of New Mexico v. United States, No. 13-1323*, urging the U.S. Supreme Court to grant the petition to review a Tenth Circuit ruling that a New Mexico professional conduct rule limiting the ability of prosecutors to subpoena lawyers to testify about their clients before federal grand juries does not apply to federal prosecutors.
- On June 2, ACC joined the US Chamber of Commerce in an *amicus* brief in support of Boehringer Ingelheim Pharmaceuticals, arguing against a "new



and aggressive theory of attorney-client privilege” advanced by the FTC that in-house counsel who lead settlement negotiations involving business and legal issues cannot claim privilege over the documents related to such negotiations.

July – September

- On August 8, ACC and its Employment and Labor Law Committee submitted comments in response to a proposal from the Department of Labor to rescind the so-called “persuader rule,” that went into effect in March of 2016. ACC first commented on the rule in 2011, objecting to how the proposed interpretation of the “advice” exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act would negatively impact the attorney-client relationship and organizations’ ability to seek legal counsel. The 2016 rule, which required attorneys to publicly disclose their clients’ identities, infringed on attorney-client confidentiality and ACC supported rescinding the rule.
- In September, ACC and its Canadian chapters sent a letter in support of Suncor Energy Inc.’s leave for appeal to the Supreme Court of Canada to review the Alberta Court of Appeal’s ruling in *Alberta v Suncor Energy Inc.* The Alberta Court of Appeal’s ruling narrows the scope of the litigation privilege, and ACC’s letter urges the Supreme Court of Canada to hear Suncor Energy’s appeal. The Court of Appeal decision also creates a burdensome process for analyzing privilege, suggesting courts examine claims of privilege “document by document.” ACC’s letter also points out that allowing the Court of Appeal’s decision to stand would create cross-border inconsistencies, especially in other common law jurisdictions.
- On September 29, ACC and the National Association of Manufacturing filed an amicus brief in *Cooper Tire & Rubber Company v. National Labor Relations Board*, supporting Cooper Tire’s position that its termination of an employee in response to discriminatory behavior occurring during a labor union protest was justified. ACC argued that the NLRB and the 8th Circuit should not put in-house counsel and their employers in the uncomfortable position of protecting employees on a picket line who participate in harassing and discriminatory behavior counter to federal employment discrimination statutes.

October – December

- In December, ACC filed an amicus in *Sampson v. 3M Company*. While taking no position on the merits of the claim of privilege, ACC contends in its brief that litigants deserve immediate appellate review of privilege determinations.



The Appellate Division of the New Jersey Superior Court denied appellate review of a lower court determination that documents, argued by counsel to be privileged attorney-client communications, be produced. ACC asked the court to make it clear that decisions as to a party's privilege claim be "presumed to be subject to immediate interlocutory appeal."

- ACC filed an amicus brief in *Johns Hopkins University v. Alcon Laboratories, Inc.*, supporting Alcon's position that a trial court order requiring disclosure of privileged communications that carved out communications with outside trial counsel should likewise carve out communications with inside counsel serving in a trial counsel capacity. The trial court ordered disclosure of legal advice relating to the subject patent's validity because Alcon is relying on an "opinion of counsel" defense. However, the trial court's order leaves Alcon's post-complaint communications with in-house counsel subject to disclosure. In its brief supporting Alcon's request for a writ of mandamus, ACC argues that this order, if allowed to stand, would "relegate...inside counsel to 'second class' litigator roles," reducing efficiency and increasing costs for corporate clients.
- In conjunction with its four California chapters, on December 1, ACC filed comments in response to the State Bar of California's review of its special admission rules, arguing for fewer restrictions on multijurisdictional practice. Following the submission, in partnership with Corporate Pro Bono (CPBO), ACC contacted general counsel members in California seeking support for a sign-on letter to the State Bar of California. In the letter, styled directly from California general counsel, we urge fewer restrictions on registered in-house counsel who wish to provide pro bono services.

ACC would like to thank our outside counsel:

- Maurice Baskin, Littler Mendelson P.C. (*Cooper Tire & Rubber Company v. National Labor Relations Board*)
- Lawrence S. Ebner, Capital Appellate Advocacy PLLC (*Ekaterina Schoenefeld v. Eric T. Schneiderman, et al.; Supreme Court of New Mexico v. United States, No. 13-1323*)
- John P. Elwood & Zachary J. Howe, Vinson & Elkins LLP (*Kiobel v. Cravath, Swaine & Moore, LLP; Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.*)
- Christopher J. Paoella, Reich & Paoella LLP (*Sampson v. 3M Company*)
- Mary-Christine Sungaila and Marco A. Pulido, Haynes and Boone LLP (*Johns Hopkins University v. Alcon Laboratories, Inc.*)