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# ACC Association of Corporate Counsel

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## TENNESSEE

# FOCUS

Q3 2018



### President's Message

**Justin R. Martin, Senior Corporate Counsel, Electric Power Research Institute**

ACC-Tennessee has a bright future with secure leadership as is attested by the strong group of nominees slated for election at our Annual Meeting to be held later this month on September 5, 2018 at 1pm ET (See this Newsletter, Page 4). As ACC-Tennessee transitions to a new Board, let's briefly recognize the current Board's achievements over the past 2 years to appreciate these following increases:

- Membership: +27%
- Sponsorships: +77%
- Newsletters: +200%

Before exiting stage left, I thank:

- **ACC National** for investing in our Chapter, including by sending one of their best, **Tori Payne** – *Associate Vice-President for Leadership and Development*, who led us through a SWOT analysis whereby the Chapter established its Vision and Mission.
- **The Chapter's Board**, who upped the ante by agreeing to give more of their time by supporting monthly teleconferences with two of those being in person in Nashville.
- **Everyone** for comprehensively reviewing and updating the Chapter's Administration, Governing Documents, Policies, Finances and Onboarding process.

Additionally, to my peers on the Board – thanks for helping me get the little things right as I have learned to be more:

- **Tactical and strategic in communications** – ideas and actions come down to effective communication, which can include a need to disclaim (what isn't intended, what is left open, what isn't decided) to avoid potential misreading of intent. Similarly, the importance of communicating status, explaining what one needs, and asking what somebody else needs to close an action item both prevents the ball from being dropped and averts the potential impression of being "grabby" or uncollaborative.
- **Dependable and reliable, providing timely leadership** – vision and mission are requirements of leadership, but the price of admission is giving the extra bit of effort to deliver slightly ahead of schedule or renegotiating for extra time *in advance* of when you can't meet a deadline, which not only shows your respect for others but saves their patience.
- **Able to read and adapt to others better and sooner** – We all have 2 or 3 other "jobs" in life --- work, family, church, other boards, exercise --- so knowing when to make the extra call or text vs. leave somebody alone until they howl for mercy can demonstrate the EQ that helps one lead effectively. If somebody is hard to read, then ask or have others ask for what is needed with a simple explanation of how it relates to pushing forward an organizational objective. If that's unclear, then find another way to achieve the goal.

The following members of the Chapter’s Board are rolling off, and they deserve thanks for helping ACC-Tennessee to properly and efficiently function by demonstrating trust, collegiality and commitment:

<u>Name</u>	<u>Chapter</u>	<u>Title</u>
<b><i>Sherie Edwards</i></b>	Director, Middle Tennessee	<i>VP, Corporate and Legal, State Volunteer Mutual Insurance Company</i>
<b><i>Jason Hood</i></b>	Immediate Past President	<i>President, DH Management, LLC</i>
<b><i>Danny Riederer</i></b>	Director, West Tennessee	<i>Senior Counsel, FedEx Express</i>
<b><i>Kevin Mann</i></b>	Director and VP, West Tennessee	<i>General Counsel, Secretary and Chief Legal Officer, TruGreen</i>
<b><i>Eleni Stratigeas</i></b>	Director and VP, East Tennessee	<i>Former SVP, Legal Affairs and Corporate Secretary, Scripps Interactive, Inc.</i>
<b><i>Jill Suwanski</i></b>	Director, Middle Tennessee	<i>Senior Counsel, Bridgestone Americas, Inc.</i>

Finally, please join us in [Knoxville](#), [Nashville](#) and [Memphis](#) on September 22nd for ACC-Tennessee’s Inaugural Statewide Service Project, the St. Jude Walk/Run Cure for Childhood Cancer. You can support in a variety ways – walk with family and kids in strollers or run with friends for time in your favorite trainers and Lululemon, or donate to support others who do. For questions, please don’t hesitate to reach out to me for Knoxville, Gulam Zade for Nashville and Meredith Wooten for Memphis.

See you at an event real soon!

Join us for the

Annual Meeting

Wednesday, September 5, 2018

12:00—1:00 PM CDT

Call in (605) 472-5381; 579746#

# ACC TN CALENDAR OF EVENTS

## West Region

**September 25**

CLE/Reception

“Effective Use of Restrictive Covenants”  
Sponsored by Wyatt Tarrant & Combs

**October 22**

CLE/Lunch

These Aren’t “Covert” Ops: Why Legal  
Operations is the New Frontier  
Sponsored by Counsel On Call

**November**

CLE/Lunch

Sponsored by Adams & Reese

**December**

CLE/Lunch

Sponsored by Ogletree Deakins



## Upper East Region

**September 19, 2018**

CLE/Lunch

These Aren’t “Covert” Ops: Why Legal  
Operations is the New Frontier  
Sponsored by Counsel On Call

**October 10, 2018**

CLE/Lunch

Sponsored by Butler Snow

**For more information on ACC TN events**

**go to <https://www.acc.com/chapters.tenn/>**

**\*Unless specifically noted, all meetings in the Middle Region are held the 2nd Thursday of the month.**

## Middle Region\*

**September 20, 2018**

**(3rd Thursday)**

CLE/Reception

“TN General Assembly 101 and  
Legislative Update”  
Sponsored by Butler Snow

**October 11, 2018**

CLE/Lunch

These Aren’t “Covert” Ops: Why Legal  
Operations is the New Frontier  
Sponsored by Counsel On Call

**November 8, 2018**

CLE/Lunch

Sponsored by Merchant & Gould

**December 13, 2018**

CLE/Lunch

Sponsored by Adams & Reese



## Lower East Region

**October 30, 2018**

CLE/Networking

Ethics & Implicit Bias in the  
Workplace

### Chapter Leadership

Justin Martin, President  
Electric Power Research Institute  
Senior Corporate Counsel

Stephen Cavezza, President Elect  
Mars, Inc.  
Counsel

Eleni Stratigeas, Vice President, East TN  
Scripps Networks Interactive, Inc.  
Vice President, Business and Legal Affairs

Gulam Zade, Vice President, Middle TN  
LOGICFORCE  
General Counsel

Kevin Mann, Vice President, West TN  
TruGreen  
General Counsel, Secretary and  
Chief Legal Officer

Scott Ellis, Secretary  
CoreCivic, Inc.  
Senior Director, Contract Compliance

Scott Lynn, Treasurer  
Ryman Hospitality Properties, Inc.  
Associate General Counsel

Jason Hood, Immediate Past President  
Sedgwick Claims Management Services, Inc.  
Executive Vice President & Chief Legal Officer

### Board of Directors

#### East Tennessee

Brad Hendrix  
CBL & Associates Properties, Inc.  
Associate Counsel—Management

Robbie Pope  
Regal Entertainment Group  
Real Estate Counsel

#### Middle Tennessee

Sherie Edwards  
State volunteer Mutual Insurance Company  
VP, Corporate and Legal

Peter Malanchuk  
Bridgestone Americas, Inc.  
Sr. Counsel Labor & Employment

Jill Suwanski  
Bridgestone Americas, Inc.  
Senior Counsel

#### West Tennessee

Daniel Riederer  
Fed Express  
Senior Counsel

Meredith Wooten  
Vero Business Capital  
General Counsel

### Executive Director

Melanie Gober Grand

**Register for the Annual Meeting:** Register for the 2018 [ACC Annual Meeting](#) on October 21-24 in Austin, TX, choose from over 100 substantive sessions to fulfill your annual CLE/CPD requirements, meet leading legal service providers and network with your in-house peers from around the world. This year’s education [sessions](#) cover the most pressing in-house issues and trends. Register soon to avoid the price increase on September 21st!

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To submit articles for the 4Q issue, contact Melanie Gober  
Grand at [acctennessee@accglobal.com](mailto:acctennessee@accglobal.com)

# 2019 ACC-TN Chapter Board Nominee Slate

<b>President</b>	Steve Cavezza	Counsel	Mars, Inc
<b>President-Elect</b>	Scott Ellis	Sr. Director, Contract Compliance	CoreCivic, Inc.
<b>Secretary</b>	Allison Cotton	Employment Counsel	Community Health Systems
<b>Treasurer</b>	Scott Lynn	Associate General Counsel	Ryman Hospitality Properties, Inc.
<b>East TN Vice-President</b>	Angelia Nystrom	Director of Specialty Programs	University of TN Foundation
<b>Middle TN Vice-President</b>	Gulam Zade	General Counsel	LOGICFORCE
<b>West TN Vice-President</b>	Meredith Wooten	General Counsel	Vero Business Capital
<b>Immediate Past President</b>	Justin Martin	Senior Corporate Counsel	Electric Power Research Institute
<b>East TN Director</b>	Brad Hendrix	Associate Counsel—Management	CBL & Associates Properties, Inc.
<b>East TN Director</b>	Robbie Pope	Real Estate Counsel	Regal Entertainment Group
<b>East TN Director</b>	Tammye Taylor	Senior Counsel Intellectual Property	Eastman Chemical Co.
<b>Middle TN Director</b>	April Berman	SVP, Deputy General Counsel	Asurion
<b>Middle TN Director</b>	Peter Malanchuk	Sr. Counsel Labor & Employment	Bridgestone Americas, Inc.
<b>Middle TN Director</b>	Leslie Zmugg	General Counsel & Secretary	Caterpillar Financial Svcs. Corp.
<b>West TN Director</b>	David Billions	Managing Dir.—Commercial Lit.	Federal Express Corporation
<b>West TN Director</b>	David Chambers	Patent Attorney	Smith Nephew, Inc.
<b>West TN Director</b>	Mickki Murray	IP Counsel	Medtronic

# Technology Creates Demand for Legal Operations Attorneys

By: Richard Stout, Executive Director – Managed Services Division, Counsel On Call

Lawyers may fear diminishing job prospects in a future dominated by artificial intelligence. But one could argue that there has never been a stronger demand for attorneys who are intrigued by this new frontier. This increased demand for attorneys who can navigate evolving technology is based upon three foundational ideas:

- (1) The trajectory of technology developments, integration and capabilities;
- (2) The lawyer’s core ethical duty of competence; and
- (3) The rapid expansion of the Legal Operations function in corporate legal departments.

## The Trajectory of Technology

Legal futurist, Richard Susskind, has analyzed the explosion of technology and its effects on the legal profession over the last decade. Citing Moore’s Law, which predicted that every two years the processing power of computers would double – yet cost would be cut in half – Susskind concluded in Tomorrow’s Lawyers: An Introduction to Your Future, that:

*“[i]t is simply inconceivable that information technology will radically alter all corners of our economy and society and yet somehow legal work will be exempt from any change.”*

Susskind predicted a new genre of career paths that would be available to future lawyers, with job titles such as Legal Process Analyst, Legal Project Manager, Legal Management Consultant, and Legal Knowledge Engineer. He noted, “When systems and processes play a more central role in law, this opens up the possibility of important new forms of legal service, and of exciting new jobs for those lawyers who are sufficiently flexible, open-minded, and entrepreneurial to adapt to changing marking conditions.”

These predictions are consistent with trends we see within corporate legal departments. Attorneys who understand constantly changing technology platforms and the legal implications of their data output are highly valued. For more than a decade, the project managers, analysts and process engineers within our Managed Services Division have prepared our clients well for this technological evolution, with measurable contributions to eDiscovery, corporate transactions and contracts management solutions.

Legal departments are proactively assessing and managing ever-increasing data volumes generated by their organizations. Attorneys with an understanding of their company’s cost controls and risk management perspectives for legal hold, compliance and business-critical data are essential to effective data management. Data that does not fall within these categories or no longer needs to be preserved (either by law or legal hold) represent massive amounts of storage and risk. These can be removed from the company’s systems. However, their removal requires expertise and understanding of available technologies to search, sample, identify and confirm critical data buckets. For large corporations, this can mean the defensible elimination of hundreds of millions of dollars in risk – a process designed and implemented by attorneys and project managers fluent in technology and adept in deploying and managing it.

We’re really just at the tip of an expanding iceberg in this area, which is why it’s vital that attorneys have at least some knowledge of technological advancements.

## (2) Technology’s Effect on the Ethical Duty of Competence

As technical knowledge becomes more engrained into the practice of all attorneys and drives future career paths, it requires a demonstration of sufficient levels of knowledge and familiarity to advise clients in their matters. Thus, these emerging technologies are creating new sources of data in which attorneys must become familiar and knowledgeable in order to satisfy their ethical duties of competence.

In 2012, Rule 1.1 of Model Rules of Professional Conduct was amended (Comment 8), as follows: *“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks **associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”* [Emphasis added]

In 2015, the California State Bar’s Standing Committee on Professional Responsibility and Conduct went a step further in the area of eDiscovery. The opinion concluded that:

*"... [A] lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent **curative assistance**..., even where the attorney may otherwise be highly experienced. It may also result in violations of [ethical] dut(ies)." [Emphasis added]*

“Curative assistance” in this context is limited to two options: (1) acquire the necessary knowledge and skills prior to accepting representation, or (2) partner with or work closely with those that do.

The California opinion provides "a competence litmus test" and [lists nine activities](#) which all attorneys handling eDiscovery should be able to perform either “by themselves or in association with competent co-counsel or expert consultants.”

The first curative measure “to acquire necessary knowledge: is an obvious challenge for experienced legal practitioners. Until recently, law schools did not teach technologies or legal requirements when dealing with the discovery of electronically stored information. While many law schools and bar associations offer eDiscovery tracks and continuing legal education programs, there is still a large gap of what can be taught in those environments and what an attorney needs to satisfy her ethical duties of competent eDiscovery representation.

The second curative measure for those not comfortable or not yet knowledgeable of the available technologies (and successful implementation of appropriate technologies) is to associate with those that do. This has been more common in the eDiscovery realm, but we have also seen the emergence of a new career path for these legal professionals.

### **(3) The Next Frontier: Legal Operations**

The confluence of emerging technology sources, along with the ethical obligation to stay abreast of the benefits and risks associated with “all relevant technologies,” could explain the emergence of Legal Operations professionals that are now found and sought after by so many corporate legal departments. Leveraging a dedicated Legal Operations (or “Legal Ops”) professional allows legal departments to focus on substantive areas on which the business relies while also having the benefit of the technical and legal know-how to better deliver those services for their internal client.

Although there is not a singular definition or job description of the Legal Operations function, the ability to analyze and manage data are key attributes of Legal Ops professionals. Many of today’s Legal Ops professionals honed these skills in eDiscovery practice, but common functions or skill sets within this discipline include: data analytics, knowledge management, vendor management and use of alternative legal service providers, budgeting, diversity initiatives, litigation support, data governance, technology deployment and support, project management and strategic planning.

Effective Legal Ops professionals should also know how to track and assess the Key Performance Indicators (“KPIs”) that demonstrate the savings and return on investment in this type of structure. Tracking KPIs are metrics that other departments (e.g., HR, finance and marketing) utilize to demonstrate their value within an organization. Therefore, setting up a data-driven legal department can lead to not only to risk reduction, but also to revenue generating capacity (i.e. “legal recovery programs,” or missed revenue, etc.) in terms the business units within an organization can understand.

DuPont offers a strong example of a success story through the implementation of Legal Ops. According to a feature on DuPont in [The Profitable Legal Department](#), the company’s legal recovery programs function as “any recoupment in the form of cash (royalty payments, settlements, and adjustments), products, services, or other quantifiable rights obtained for a company or its affiliates, through the intervention by legal professionals beyond a normal business transaction. In other words, the fundamental feature of a legal recovery is some sort of positive and quantifiable benefit gained for the company, as a result of proactive legal intervention.”

Over a four-year period, DuPont generated more than \$1 billion in total recoveries with an initiative regarding its business contracts.

“The long-term effect of a recovery program is to encourage the company to operate more efficiently and realize the value it is owed from contracts and other business agreements that it has already negotiated.”

What we’ve facilitated, and central to such an initiative, is the selection and deployment of the appropriate technology to (1) house all company contracts, and (2) to know what is in those contracts. An example of this type of initiative is a Contracts Management System (CMS). For those who have been involved in the selection and implementation of a contract management system, they will undoubtedly share that successful implementation and integration is a long road. The Legal Ops counsel plays a key role in understanding the legal and business needs, as well as the legal personnel that is required to capture the most relevant information. On a micro level and to make such a system an effective part of business, careful planning, design and effective abstraction processes are essential for true integration of the CMS. And when done correctly, the results are much more than a repository for company contracts; rather, it’s an interactive dashboard to business operations and provides opportunities to not only ensure compliance, but potentially lead to additional revenues.

Examples such as these demonstrate how managing risk through a data-driven Legal Ops function is helping lawyers get a seat at the table with business units to better demonstrate the value of the legal department. Additionally, the proliferation of technol-

ogy in all aspects of our society means that Legal Ops attorneys will play key role in understanding legal and business needs, and demand for this function is on the rise. So while many will continue to talk about the decline of attorneys while robots thrive, the value of attorneys who understand how to use technology will only increase.



*Richard Stout is the Executive Director of Counsel On Call's Managed Services Division, which he helped found in 2007. He works closely with corporate legal department and law firm clients to develop cost conscious, repeatable and defensible processes in areas ranging from eDiscovery to corporate transactions to contracts management, or any matter involving data, technology and people.*

*Counsel On Call is a 2018 ACC TN Platinum Sponsor.*

## **The Qualified Business Income Deduction: Proposed Regulations Shed Light on Several Key Issues**

**By: Shareholders of Baker Donelson's Tax Group: Thomas J. Mahoney Jr., William H.D. Fones Jr., Stuart M. Schabes, Robert L. Ash, Allen Blow**

The 2017 tax reform bill created a new deduction for owners of pass-through entities (partnerships, LLCs taxed as partnerships, S corporations, and sole proprietorships) of up to 20 percent of their "qualified business income" (the "QBI Deduction"). The QBI Deduction has received significant press due to the myriad of unanswered questions with respect to the operation of the deduction. On August 8, 2018, the U.S. Department of Treasury provided guidance on the QBI Deduction by promulgating proposed regulations (the "Proposed Regulations"). While the Proposed Regulations address many issues, this article addresses several specific issues that have caused a great deal of uncertainty.

### **Specified Services Trades or Businesses – Definition of "Reputation or Skill" to Be Narrowly Interpreted.**

One source of uncertainty with the QBI Deduction has been the exclusion for specified service trades or businesses (the "SSTB Exclusion"). Pursuant to the SSTB Exclusion, a taxpayer engaged in a specified service trade or business (SSTB) who has taxable income above \$415,000 (in the case of joint returns) or \$207,500 (in the case of other returns), may not treat any of the income from a SSTB as qualified business income for purposes of the QBI Deduction. An SSTB is a trade or business (1) involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners, or (2) that consist of investing and investment management, trading, or dealing in securities, partnership interests, or commodities. The Proposed Regulations provided guidance on a number of issues pertaining to the SSTB Exclusion.

A particular area of uncertainty with respect to the SSTB Exclusion is the inclusion in the definition of SSTB of the phrase "or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners" (the "Reputation or Skill Clause"). Commentators warned that the Reputation or Skill Clause might act as a "catch-all" causing many types of businesses not specifically identified as SSTBs to be classified as SSTBs. However, the Proposed Regulations take a relatively narrow view of the Reputation or Skill Clause. Under the Proposed Regulations, the Reputation or Skill Clause will only apply to a trade or business consisting of any of the following activities: (A) receiving fees, compensation, or other income for endorsing products or services, (B) licensing or receiving fees, compensation or other income for the use of an individual's image, likeness, name, signature, voice, trademark, or any other symbols associated with the individual's identity, or (C) receiving fees, compensation, or other income for appearing at an event or on radio, television, or another media format.

## Aggregation Rules.

In light of the SSTB Exclusion, a number of commentators suggested that taxpayers could split their businesses into multiple businesses, separating the portion of the business which would qualify for the QBI Deduction from the portion of the business which would not qualify for the QBI Deduction due to the SSTB Exclusion. This strategy has been colloquially referred to as "crack and pack." The Proposed Regulations take the position that such a strategy is inconsistent with the purpose of Section 199A. The Proposed Regulations clarify that a SSTB includes any trade or business that provides 80 percent or more of its property or services to a SSTB if there is 50 percent or more common ownership between the trades or businesses. Additionally, if a trade or business provides less than 80 percent of its property or services to an SSTB and there is 50 percent or more common ownership between the trades or businesses, then that portion of the trade or business which provides property or services to the 50 percent or more commonly-owned SSTB will be treated as a SSTB. For example, assume that a medical practice splits its operations into three separate businesses each under common ownership, one which provides medical services to patients (the "Medical Entity"), one which owns and leases a building to the Medical Entity, and one which provides administrative and back office services to the Medical Entity. Notwithstanding that the leasing business and administrative services business might qualify for the QBI Deduction if provided or performed by unrelated third parties, neither will be eligible for the QBI Deduction under the Proposed Regulations.

On the other hand, the Proposed Regulations permit some commonly owned businesses to be aggregated at the election of each owner. This can be beneficial where, for example, one entity provides management services to related businesses. W-2 wages of the management company can then be used to avoid or minimize a reduction in the 20 percent deduction on the income from the main line businesses. The ability to group the activities of different entities is more restrictive than under the passive loss rules, but still can be helpful in many common situations. If taxpayers elect to aggregate, they will be required to aggregate on a consistent basis in subsequent years, and to comply with certain reporting rules which will serve as a backstop to the consistency requirement.

## Conversion of Employees to Independent Contractors.

Employee wages are never eligible for the 20 percent deduction, but in many cases, an independent contractor doing essentially the same work could be eligible for the 20 percent deduction. In light of the IRS's ongoing focus on "worker reclassification" examinations, to prevent abuses, there is an "adverse presumption" that a person converted from employee status to independent contractor status should still be treated as receiving wage income. Also, absent substantive changes in the worker's services rendered, an employer who cooperates in reclassifying the worker may fall outside safe harbors protecting the employer from payroll tax assessments. Nevertheless, new businesses may wish to consider whether engaging workers as independent contractors will be an advantage in recruiting.

The Proposed Regulations are not final and are subject to a statutorily required notice and comment period, during which the public will have the opportunity to comment on the Proposed Regulations. Therefore, the Proposed Regulations may change before they become final.

Please remember that advice and counsel regarding your particular tax related issues, including the potential impact of the developments outlined above, are dependent on your specific facts and circumstances. As noted above, we anticipate providing important updates on other aspects of the Proposed Regulations. For more information about how these issues may affect you, your business, or related matters, contact the co-authors, [Tom Mahoney](#), [William Fones](#), [Stuart Schabes](#), [Larry Ash](#), and [Allen Blow](#), or any member of Baker Donelson's [Tax Group](#).



Tom Mahoney



William Fones



Stuart Schabes



Larry Ash



Allen Blow

# Hospital Not Liable For Retaliatory Discharge

By: Kara E. Shea, Butler Snow, LLP

*A recent decision by the Court of Appeals of Tennessee, in which the employer prevailed in a retaliatory discharge claim, demonstrates the importance of (1) maintaining confidentiality of workplace investigations and (2) keeping a cool head when dealing with an employee who is basically (or literally) asking to be fired.*

## Background

Cindy Terry worked as a medical sales product representative for Medical Center Medical Products (MCMP), an affiliate of Jackson-Madison County General Hospital District. She was part of a two-person team, along with Paige Higgins. Both Terry and Higgins were supervised by Ranee Terry (R.T.)—who isn't related to Cindy Terry.

During the 2010-11 fiscal year, MCMP sustained a large loss. On April 5, 2011, R.T. met with Terry and Higgins to address how to improve the situation. She informed them she was thinking about changing the team approach and instead assigning each employee individual territories and accounts. She also directed both employees to begin preparing several categories of weekly reports that would be due by 8:00 a.m. on Monday of the following week.

On the very same day as the MCMP team meeting, another employee filed a complaint with the hospital's HR department claiming that R.T. had subjected her to racial slurs and derogatory remarks. An HR employee conducted an investigation, interviewing several witnesses, including Terry.

The investigator then prepared a summary of her findings and sent the summary to Karen Utley, a vice president of the hospital and R.T.'s direct supervisor. HR redacted the names of all witnesses participating in the investigation from the report and didn't inform Utley or anyone in the applicable chain of command of the identities of the employees who participated in the investigation. Based on the findings in the report, Utley met with R.T. and provided verbal counseling.

## Performance issues continue

As time went on, R.T. experienced increasing problems with Terry's job performance. She failed to carry out the duties and submit the reports that had been assigned to her in the April 5 meeting and was absent from work.

On May 18, R.T. met again with Terry and Higgins to go over their goals and job responsibilities. She again asked both employees to submit weekly reports. Higgins complied with her requests, but Terry did not. Higgins grew increasingly frustrated with what she perceived as an unequal workload between herself and Terry, saying she was "fed up" with how things were going. She asked R.T. to pursue the idea of splitting up the territories and accounts so each woman would be responsible solely for her assigned accounts instead of sharing all the accounts.

In June 2011, R.T. took steps to divide the territories, asking both Terry and Higgins to submit spreadsheets to assist in this process. Terry failed to submit the spreadsheet. She also continued to fail to submit a territory map that had been requested from her since the previous January. She complained that the division of territories was unfair and continued to refuse to cooperate in the process. About the same time, R.T. received reports that Terry may have been falsifying records, indicating that she was visiting certain physicians when no such visits had been made.

Following an August 4 meeting in which R.T. again asked Terry for overdue work product and reports that she had failed or refused to provide, R.T. decided to set up a meeting with herself, Terry, and an HR representative to discuss Terry's performance issues. On August 18, they all met again, and Terry signed a copy of her job description and was issued a written warning for insubordination and poor job performance.

Regardless, the issues continued and seemed to come to a head on August 26, when R.T. entered Terry's office to find she had cleaned out her desk. Terry then requested a meeting, attended by R.T. and an HR representative, in which she stated that she believed she was being subjected to retaliation by R.T. because she participated in the HR investigation into the claims against R.T. the previous April. R.T. later testified that was the first time she had learned of Terry's participation in the investigation.

Terry's retaliation complaint was elevated to certain individuals in hospital management. She said that she felt her job responsibilities had been changed and that she was being singled out for criticism, and witnesses testified that on more than one occasion she asked to be fired. Meanwhile, R.T. continued to try to work with her, requesting that she complete overdue reports. She continued to refuse.

Finally, R.T. contacted Utley to ask for permission to fire Terry. Utley approved. Terry filed a grievance with the hospital, and following a hearing, the termination was upheld. She then sued the hospital for wrongful termination in violation of the Tennessee Human Rights Act (THRA), which prohibits retaliation against employees who engage in protected activity, such as participating in workplace investigations.

## Court's rulings

Before trial, there was a skirmish over whether Terry was entitled to a jury trial on a THRA claim filed in circuit court. The trial court held that she wasn't entitled to a jury trial and granted the hospital's request for trial by judge. The case was tried, and the court ruled in favor of the hospital, holding that she failed to meet her burden of showing she was terminated because she engaged in protected activity rather than because of her performance issues. The court also found that the individual who ultimately directed her termination—Utley—wasn't even aware that she had been a witness in the investigation and therefore couldn't have retaliated against her. Terry appealed.

The court of appeals affirmed all aspects of the trial court's rulings in favor of the hospital. First, it agreed that Terry failed to establish an essential element of her claim—namely, that Utley knew she had been a witness in the investigation into R.T.'s conduct. Case law holds that an employer shouldn't be held liable for retaliation if it has no knowledge that an employee engaged in the protected activity in question. Utley testified she had no such knowledge, and Terry wasn't able to provide proof to the contrary, other than her own speculation. The court pointed out that Utley couldn't have learned her identity based on the HR report of the investigation because all the witness names were redacted.

The court also pointed out that R.T., who requested the termination, didn't herself know about Terry's protected conduct until Terry told her in the meeting on August 31. And at that point, R.T. had already had numerous documented interactions with her about her job performance, and she had already received a written warning putting her on notice her job was in jeopardy.

The court also affirmed the trial court's ruling that Terry had failed to prove a causal connection between her protected activity and her termination. To prevail in a THRA retaliatory termination claim, an employee must show that "but for" the protected activity, she wouldn't have been fired. In this case, however, the hospital was able to present voluminous witness testimony and documented proof of Terry's performance issues and refusal to perform her job duties as requested. She also failed to present evidence showing she was "singled out" or that similarly situated employees were treated differently or subjected to different standards. In fact, the hospital presented convincing proof that the other member of the two-person team—Higgins—had been assigned the same duties and responsibilities and willingly completed those tasks. The court concluded that although Terry was adamant that she had been retaliated against, her mere belief about why she was fired wasn't sufficient to overcome the proof submitted by the hospital. *Terry v. Jackson-Madison County General Hospital District*, No. W2017-00984-COAR3-CV.

## Bottom line

Based on the trial record, the hospital seemingly did a lot right in this case, all of which contributed to its victory in the end. First, the confidential handling of the race discrimination complaint against R.T.—including the decisions to limit circulation of the report and redact the names of participating witnesses—was critical. Employers can take a lesson here. Although it isn't always possible to maintain complete confidentiality of an investigation report, you should take all possible steps to keep the process and results of a workplace investigation in "need-to-know channels" and protect the identities of witnesses who cooperate in the process. This not only will encourage greater cooperation from employees, but it also—as demonstrated here—may protect you from subsequent retaliation claims.

Also, if the hospital had made a "knee-jerk" decision to fire Terry at the first sign of trouble with her performance, the outcome might have been different. Instead, it patiently counseled her on numerous occasions, pulling in HR when the situation didn't improve and carefully documenting this process. Although dealing with her refusal to do her job over those weeks and months was likely very frustrating for all involved, the process created a solid evidentiary record showing that she was given every chance to get back on the right track. This was one of those situations in which, in the end, she gave the employer no choice but to fire her (and indeed apparently asked to be fired), and it did so likely expecting a lawsuit to follow. And sometimes, you can't prevent a lawsuit. But if you are patient and consistent in your protocols, as the employer was here, you can put yourself in the optimal position to defend a claim if one comes your way.



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# 5 Strategies for Intentional Relationship Building — The Social Way to Succeed

By Olga V. Mack, ACCDocket.com

**I**t's easy to think that in order to succeed, you need to put your nose to the grindstone and not "waste time" making friends, socializing, or meeting people. But the opposite is true. You need to engage — not avoid your colleagues — if you want to succeed. However, this does not mean you should be manipulative.

Instead, focus on being authentic, staying respectful, and giving back. Relationships are only manipulative or misleading when one party disproportionately gains and does not give back to the other. It is up to you to develop these important, mutually-beneficial relationships and leverage them in your professional growth. Focusing on forging lasting relationships is the best long-term strategy.

**1. Become valuable to others**—Helping others will help you feel productive and possibly even indispensable. It will also help you contribute to your team, both internally and externally. Focusing on how you can help others will also highlight areas where you need to invest in learning and teach you how to calibrate your responses, depending on the size and quality of the problem.

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Over time, more and more people will come to you for advice, and you will become the go-to person for certain problems. In the process, you will develop empathy and social awareness to help you read others, relate to them, and become even more valuable to those around you.

**2. Build relationships**—Connect personally to your colleagues. Talk about their families, their hobbies, and their stories. Allow them to share their passions with you. Focus on building authentic relationships. Professional relationships are important in your career progression. In the process, you will become more collaborative and become an integral part of the team. Always recognize the need to strategically invest in relationships that may benefit you now or later. After all, you must work with people every day. It is a lot better when you have great relationships with them.

**3. Know your colleagues' expertise**—Get to know what your colleagues know and reach out to them for advice. Don't just know people — know what they know. You need to know who knows what so that you can strategically leverage information and experiences to get your work done efficiently and effectively.

*[Related: [Fruits of Mentorship: How Veronica Abreu and Jennifer Lam Inspired Each Other and Airbnb](#)]*

Build a network of experts to approach when you need expert advice, such as when you're confronted with an issue where you lack the subject-matter skill, knowledge, or experience. If you build a wide network of experts, you will have people who can give you constructive and useful feedback when you have a difficult problem.

**4. Find an informal mentor**—Develop informal mentorship relationships based on personal connections and the mutual exchanging of advice. Involve more experienced colleagues in the sharing of guidance and information.

These professional friendships may help you identify which skill areas to develop, how to address issues that may concern you, how to navigate challenging situations, and whom you may need to know to advance. Moreover, a reliable mentor can help calibrate your strategy and responses to difficult situations. They can also put things in perspective and normalize your struggles.

Finally, mentors also help you by identifying opportunities to learn and improve, pushing the limits of your abilities, assisting you in becoming a more confident professional, and helping you bounce back from any setbacks.

**5. Create a support circle**—It helps to help people who will speak well of you. A compliment or introduction from the right person can boost your reputation. Relationships can make people think positively of you merely by association. Relationships with supportive, outgoing people can also help you make a good impression, stay poised and strong, and weather the most brutal storm. And it starts with finding the right crew.

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Ultimately, your best opportunities and impactful connections will come as a result of your relationship building efforts. Moreover, in order to build deep and wide relationships, be open-minded so you can consider many sides of different issues. Don't write off a potential relationship simply because you think you won't get along or the other person comes from a different back-

ground. We can learn the most from those who are different from ourselves, whether in terms of background, personality, career status, or other factors.

Most importantly, intentionally developing lasting and meaningful relationships is a crucial first step toward taking control and responsibility of your career. No matter how much you build relationships, others won't make your career happen. You need to put in the work! This means taking charge and changing what you can in your professional and personal life. Building relationships is an underrated aspect of your job that you can consistently improve, influence, and, over time, reap great benefits.



*Olga V. Mack, Career and Technology columnist for [ACCDocket.com](http://ACCDocket.com), is a technology strategist who enjoys advising her clients to success and growth.*

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December 12—U.S. Employment & Labor Law: New to In-house

**ACC Advocacy Updates:** ACC and the National Capital Region chapter submitted comments to the D.C. Court of Appeals on proposals from the Committee on Unauthorized Practice of Law and the DC Access to Justice Commission to amend Rule 49(c)(9). ACC formally submitted comments on Rule 49 in 2015 and 2016. In its letter, ACC again asked the court to remove the requirement that in-house counsel licensed outside DC be affiliated with a non-profit legal service provider and be supervised by an active member of the DC Bar in order to

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