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ACC AMERICA
Association of Corporate Counsel
Western Pennsylvania Chapter

Inside 2Q2011

FOCUS

President's Message

Max Laun

I take the opportunity of having the bully pulpit of the president's letter to again ask our membership to commit to taking part in Pro Bono activities. It's your professional and moral obligation, but more importantly, you will feel very good about helping another navigate the oft-confusing legal system. Personally, I am part of a team from Alcoa that does Protection from Abuse (PFA) orders in Family Court, and have regularly done a number of Custody Conciliations in Family Court, as well as doing a number of other things. Regardless of the outcome of a particular case, it's always rewarding to feel that I have made some small difference in the life of a person who would not otherwise have been represented.

Here in Western Pennsylvania, we are very fortunate to have the Pro Bono Center of the Allegheny County Bar Foundation (*www.acbf.org/Pro_Bono_Center/Pro_Bono_Center.asp*), which offers a wide variety of pro bono opportunities for practitioners of all experiences and bents across the region. The Pro Bono Center matches needs with volunteers, provides free or low-cost training and mentoring support, and all representations are covered by its professional malpractice policy. I commend their services to you.

Finally, as promised in my first president's message, thanks to the unflagging efforts of Linda Schneider of GlaxoSmithKline, our Vice President – Pro Bono, we held our first ever training session on doing simple wills and powers of attorney for estate planning purposes. Co-sponsored with the Pro Bono Center, this training was held on June 2, 2011.

Spring Cleaning

Susan Hackett, Senior Vice President and General Counsel, ACC

Ahh, spring. It's so lovely outside that I actually spent a bit of time in the last few weeks cleaning up the piles I let build up over the winter, in preparation for the simpler, more carefree lifestyle that defines summer.

As in-house counsel, we often wish we could do the same with our work: we'd like to organize and somehow regiment the firms and stakeholders clamoring for our attention, and behold, a myriad of benefits from efficiently operating legal services that operate under a logical business model. Well, there's a reason we call it work — it's never that easy to clean out and reorganize work. But in the spirit of aspiring to do better, I thought I'd share some good tips I have come across from members who are working to "clean up" their practices and improve their results this year.

1. Don't hire the lawyer, hire the firm.

I know, I know. This is contrary to everything that most in-house lawyers have been taught and believe from decades of experience. The longstanding in-house mantra is "I hire the lawyer, not the firm." Far be it for me to in any way de-value the importance of trusted relationships that have been forged over time with that special person who represents you so well as outside counsel — that person with whom you've done the Vulcan Mind Meld and who "gets" you and your client implicitly.

But, if you want to clean up, you need to invest in more than just a handful of good lawyers. You need to invest in firms that have adopted legal service management models that allow their individual lawyers to succeed. Gone are the days when in-house counsel were satisfied with paying whatever the firm charged after the work was done — today's in-house lawyer negotiates fee structures and staffing up front, demanding (regardless of the fee valuation method used) the best deal and the best "value" for their client's needs; they are increasingly likely to focus on a predictable and budgeted cost in advance. So here's my first piece of advice: don't invest all of your time in just a few lawyers; invest as much if not more time in the firms that support them so that not only can they do their work well, but everyone on the firm's team is capable of delivering what you want, when you want it and how you want it.

2. Think about disaggregation and how it can help.

Disaggregation is a hot trend these days, and for good reason. Firms that want to be able to offer you predictable costs have to understand all the component parts to their services, how they operate most efficiently, and what it costs to deliver them. The cost is not what the firm charges in terms of rate — that's their price; the cost is what the firm has to ante up (salary, overhead, tech, personnel) in order to provide the service. In order to provide the service predictably (both in terms of results and efficiency), the firm has to be able to understand who does what best, the process that is most efficient in order to deliver the service, the knowledge management that prevents them from needing to charge each time to reinvent the wheel, and so on. So look for firms that have gone through disaggregation processes — that doesn't mean you have to buy individual pieces, but the firm that doesn't know what it costs can't offer you a predictable/budgeted price and can't improve the service and cost without risks. We all want firms that profit from offering efficient services, not firms that simply agree to discounts and then look for ways to "make up" what they are "losing" by offering you a better price.

3. Focus on who provides which pieces best.

It's really easy to look to hire a firm that does your work soup to nuts, but have you considered whether easy is actually best? Perhaps there are pieces of the work that the department should do, pieces that should be outsourced to a more efficient provider, or teams of firms that should work on your matters. Ask your firms to discuss with you as to who is doing what on your matters and why, and whether that's the best option for you, especially when the work is likely to be repetitive to some degree (And, repetitive does not necessarily equate with routine or non-complex work).

4. Do your work upfront; don't manage the bill.

High performing departments are finding that the greatest savings and predictability in their spend is driven by a focus on managing the matter before the work begins, and not simply heaving the matters over the wall to outside counsel, having them start work, and then arguing later over whether they got it right. This means not only early case assessment techniques, but also discussions on strategy and delivery of the service prior to the start. You can't believe how many departments are simply choos-

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ing to pay to exit the work at the start, rather than wasting all their time, opportunity cost, and money pursuing work that inevitably settles at the last minute. Another group of departments are finding that their spend is becoming far more predictable when they've taken time to work with their firms up front to decide how the matter will be priced/what the budget is, what the ceilings are, how important this is to the client, and at which points they'll hit the "escape" button if the matter starts to unravel or take unanticipated turns. Having your counsel understand these issues up front will save you time and create far more satisfying results and relationships.

5. Invest in communications and knowledge-sharing plans that detail your preferences before the work begins.

No one has time in the middle of any matter to start thinking about the processes by which they can most effectively communicate or by which they'll share data/info/experiential knowledge. Too many matters go south not because the lawyering was bad, but because *the process* was not facilitated by communications or knowledge-sharing that can have a make-or-break impact on the work. If you set up your preferences and lines of communication, as well as connect the folks who have the data and knowledge with each other, before the matter begins, you will be well served, many times over, in the management of your ongoing relationship.

6. Finally, evaluate what's working and what's not — pointed feedback is critical!

We all know that the vast majority of clients never actually "fire" firms — they just stop sending them work, or the work dissipates over time. The firm never really knows what it did wrong, even if they committed whopper mistakes. The client never really knows what it could have done differently to have promoted better results, they just know it didn't work out well. And so they hire new firms and repeat the same unsuccessful behaviors. We all know the definition of insanity: doing the same things over and over and expecting different/better results each time.

In order to improve and keep a relationship moving forward, both inside and outside counsel must commit to regular (before, during and after) evaluations of what's working and what could or should be done differently. No one likes to deliver evaluations — indeed, most of us will do anything to avoid them. But this is crucial to a better operation and continuous improvement in your relationships and results. There are lots of tools you can use to make this a simple part of the process rather than a hurried process at the end with a less-than-perfect result. Commit with your firms to an evaluation process that includes both evals from you as the client on the firm and its lawyers, as well as receiving constructive input from the firm on how you as the client could have made the firm more successful. It's a two-way street, and the client has to be the one who asks for it and then opens itself up to learning from it.

Such is the stuff of better-organized work that produces better results for less money. It's not easy, but I recommend that those interested in cleaning up their practices take a look at some of the following resources to help you not only sweep away bad habits, but provide a platform on which efficient and consistent results flourish.

LIST OF RESOURCES:

Eval resources (scorecards, AVC, all-state, etc.) – AVI
www.acc.com/valuechallenge/valueindex

Disaggregation (process management stuff from Seyfarth and others) – Use of Tailored Six Sigma Methodologies at Seyfarth Shaw
http://www.acc.com/legalresources/resource.cfm?show=80026

Meet. Talk. Act.
http://www.acc.com/advocacy/valuechallenge/toolkit/upload/VC-Meet-Talk-Act.pdf

Outsourcing, offshoring, staff practices manual – Legal Process Outsourcing: A How-To Guide on Legal Process Outsourcing (LPO)
http://www.acc.com/legalresources/resource.cfm?show=1112956

Early case assessment - Sample Early Case Assessment Form – Valorem and Summit
http://www.acc.com/legalresources/resource.cfm?show=645579

Fee valuation / budgeting - ACC Value-Based Fee Primer
http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=967965

For additional resources, please visit:
http://www.acc.com/valuechallenge

Social Media and Online Advertising: What You Keep and Don't Disclose Can Hurt You

By John R. Gotaskie, Jr., Fox Rothschild LLP

Recently, the blogosphere has been all "atwitter" regarding the fact that, unbeknownst to the consumer, Apple Computer has been capturing location data from iPhones and iPads — meaning, if your employees and customers have these devices, Apple knows precisely where they have been. The captured location data is stored on an iPhone or iPad for up to one year and is uploaded to Apple's servers every time a user syncs the device with iTunes.

Apple has come under considerable criticism for this practice both in the media as well as in Congress. It has become something of an embarrassment for Apple, which is considered one of the leading online technology companies. So what went wrong? And what are the lessons for in-house counsel and their companies? Have you taken every reasonable step to protect your organization with regard to online data tracking and collection activities? If not, the risks of having incomplete policies and noncompliant practices could be substantial, including a loss of consumer confidence in your brand, investigations from state and federal authorities — including Congressional subpoenas, one of the broadest possible law enforcement tools — and lawsuits from those aggrieved. Sony, for example, recently was forced to shut down its Play Station online gaming network for several weeks and respond to inquires from Congress after its security systems, including those that retain sensitive customer data collected online, were breached.

For Apple, the essential issue is that it was capturing and storing data from users' devices without receiving prior consent or at a minimum, informing users of the practice. In today's online advertising and social media world, consumers are often willing to allow the capture and use of location information *if* the data collection efforts and how such data will be used are disclosed. In this instance, Apple failed its customers on both counts.

Perhaps because many of Apple's users expect location information will be used to enhance their online experience, most consumers do not seem to be as bothered as one might expect from this "Big Brother" experience. For example, social apps such as Twitter, Foursquare, Living Social and Groupon all use the location features of Apple's PDAs to provide a richer consumer experience.

The larger issue, however, is what happens with such stored personal information once it is available in the public sphere. Within the last month, Google, Sony and Apple have all come under fire for the capture, and occasional disclosure, of sensitive personal information. These events may provide impetus for the Federal Trade Commission's efforts to regulate online advertising and for Congress to consider additional laws.

In 2009, the FTC issued its "Principles for Online Behavioral Advertising," a practice it distinguished from "First Party Behavioral Advertising" and "Contextual Advertising." First-Party Behavioral Advertising is conducted by an entity and at a single web site (e.g., a banner or pop-up advertisement seen by an individual consumer at a particular web site). Because this advertising does not involve tracking, the FTC concluded it is likely to be consistent with consumer expectations and thus less likely than Online Behavioral Advertising to lead to consumer harm.

Contextual Advertising is based on a consumer's visit to a single web page or in response to a single search query that involves no retention of data about the consumer's online activities other than those necessary for the immediate delivery of an advertisement. Think of the paid links at the top of a Google search results page. Because of its limited concerns regarding consumer tracking from Contextual Advertising, the FTC concluded its principles did not need to cover contextual advertising.

The FTC's principles for Online Behavioral Advertising, published in 2009, were a result of work the FTC began in 1995 when the Internet was in its infancy. It involved a number of interim reports and studies, a two-day town hall meeting in November 2007 and comments from 63 different stakeholders, including companies, business advocacy groups such as the Chamber of Commerce, academics, consumer and privacy advocates and individual consumers. From the meetings and discussions coordinated by the FTC, four principles emerged: (1) transparency and consumer control; (2) reasonable security and limited data retention for consumer data; (3) affirmative express consent for material changes to existing privacy promises; and (4) affirmative express consent to using sensitive data for behavioral advertising. The main points involve transparency — that is, ensuring the consumer understands to what he or she agreed with regard to any tracking of web or other online activities through apps or other tools — along with affirmative express consent — meaning the FTC wants consumers to be able to "opt-in" to tracking services.

The advertising, Internet and computer industries have taken a slightly different approach. In response to the publication of the FTC principles, a cadre of five different industry groups issued its own set of seven self-regulatory principles for Online Behavioral Advertising: (1) education; (2) transparency; (3) consumer control; (4) data security; (5) notice of material changes; (6) sensitive data protection; and (7) accountability. The most significant difference between the FTC and industry approaches is that the third and fourth FTC principles, affirmative consent, are notably absent from the industry regime. The industry regime, in other words, contemplates full disclosure just as the FTC does, but wants consumers to "opt-out" from rather than "opt-in" to tracking.

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So what does this mean for you? The FTC is continuing to closely monitor online tracking and data retention activities, including traditional web-based advertising and searching as well as apps and the activities that companies such as Apple, Google and Foursquare are doing with location-based services. Additionally, especially in light of the Apple and Google experiences in the last several months, both Houses of Congress have announced committee investigations and will hold hearings regarding online privacy concerns this summer. Given this challenging regulatory and possibly changing legal environment, along with the coming presidential and congressional election cycle, companies need to be especially cautious. The single most important thing companies can do today is review their online data tracking and retention policies to ensure they are fully disclosing *all* types of data they are collecting, telling consumers what they are doing with such data and ensuring the data is protected as carefully as possible. While this seems like common sense, the recent experiences of Sony and Apple demonstrate how damaging this situation can be for companies and how they can leave fertile ground for laws and regulations that further suppress innovation.

John R. Gotaskie, Jr., is a partner and litigator with Fox Rothschild LLP, and is based in the firm's Pittsburgh office. He may be reached at jgotaskie@foxrothschild.com.

Welcome New Members!

Kevin Acklin, Bunting Graphics, Inc.

Paula Allan, FedEx Ground

Kim Geary, FedEx Ground

Christina Johansen, FedEx Ground

Jason Norris, FedEx Ground

John Ott, Federal Home Loan Bank of Pittsburgh

Michael Rynn, FedEx Ground

Beth Thomas, FedEx Ground

Michele Weatherly, Federal Home Loan Bank of Pittsburgh

ACC News

ACC's 2011 Annual Meeting: Program Schedule and Session Selection Now Available

Join your peers this fall at ACC's 2011 Annual Meeting (October 23–26, Denver, CO) to fulfill annual CLE/CPD requirements, enhance legal skills, and expand professional networks. Now you can review the complete program schedule online and select your sessions through the link in the registration confirmation email. Between now and Sept 14, register for the meeting or invite your in-house colleagues to register, and you will be entered into Network, Learn & Win for a chance to win great prizes such as local restaurant gift certificate, complimentary room upgrade, and free meeting registration. Learn more and register at *am.acc.com*.

Enhance Your Business Management Skills and Bring More to the Table

Take part in the business education programs offered by ACC and the Boston University School of Management to enhance your business management skills and meet the challenges of today's ever-changing business environment. Mark your calendar for these upcoming programs: Risk Management (September 14–16), and Mini MBA for In-house Counsel (December 5–7). All programs are pending approval for CLE credits and will take place in Boston, MA. For more information, go to *www.acc.com/businessedu*.

Evaluate Outside Counsel and Win Prizes

Did you know that more than 1,100 law firms have been evaluated in the ACC Value Index? The ACC Value Index is a client satisfaction measurement tool that helps you evaluate, find, and benchmark outside counsel. You can score firms and share your opinions about the value they provide (anonymously, if you wish). You can also search for firms that excel in specific practice areas and markets, read comments, and contact reviewers for direct conversation. Between now and September 30, you will receive a $5 Starbucks card for every two law firm reviews submitted, and will have a chance to win a $200 Amazon gift card. Each chapter that reaches its volume and/or member participation rate target will win a $1,000 "ACC Education Coupon" good for participation in any ACC education program. To search or submit reviews, visit *www.acc.com/valueindex*.

ACC's 2011 March Mayhem: In-house Jobline℠ Crowned Champion

Which ACC resource reign supreme amongst our members? In our recent March Mayhem tournament, In-house Jobline℠ slam dunked on the other 15 resources and claimed the crown. ACC's Annual Meeting came in a close second with Chapters and Committees/Interest Groups rounding out the final four. A big thank you to all the participants for casting your votes, and congratulations to Sarena Straus, Senior Associate Director and Senior Counsel of Boehringer Ingelheim Pharmaceuticals, Inc., for winning the grand prize — $600 ACC education credits and branded ACC gifts. Learn more at *www.acc.com/mayhem*.

Photos

Corporate Governance Challenges: Morgan Lewis sponsored a breakfast CLE program entitled "New Rules of the Game: Corporate Goverenance Challenges 2011," at the Duquesne Club on April 12, 2011. Panelists included (l-r): Linda L. Griggs; Marc J. Sonnenfeld; Anne C. Flannery; Marlee S. Myers; Leslie R. Caldwell; Gretchen R. Haggerty; and John G. Ferreira.

"Career Transition" Sponsored by Burns White on April 19, 2011 at the Pittsburgh Renaissance Hotel. Pictured (l-r): Presenter Susan Seitz (Highmark, Inc.); Ken Christman (WPAACC Immediate Past President): and Presenter Lyle Washowich (Burns White.)

Annual Board of Directors Retreat: The Board of Directors held their annual planning and strategic meeting at the offices of Alcoa on January 31, 2011. Pictured (l-r): Jeffrey Solomon (Director); Susan Apel (VP, Membership); Kathleen Dohmlo (VP, Programs); Scott Seewald (Director); Susan Shin (VP, Communications); Max Laun (President); Linda Schneider (VP, Pro Bono Initiatives); Ken Christman (Immediate Past President); and Edward Jones (Director).

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Calendar of Upcoming Events

Don't miss our only summer luncheon program scheduled for August 2, 2011! Leech Tishman Fuscaldo & Lampl is the sponsor. The program will be held at the Engineer's Society of Western Pennsylvania, 337 Fourth Avenue, Pittsburgh, PA 15222. Kenneth Foltz Sr and Kaylyn Boca of the firm will talk with us about "Real Estate — New Market Tax Credits."

Please watch your e-mail, and log into the chapter website (*www.acc.com/chapters/wpenn/*) for the list of our new programs, which will begin in September. Our Vice President – Programs, Kathleen Dohmlo of Lanxess, and her committee, are putting together another outstanding year's worth of CLEs for your participation.

Nominating Committee

Our Nominating Committee, chaired by President-elect John Glicksman, is assembling the slate of officers and board members for next year. The election will be held at the chapter's annual meeting in November. If you are interested in serving on the board, please contact John at *jglicksman@plsg.com* or our Chapter Administrator Barb Dudek at *bmdudek@comcast.net*.