

- 2... The Eye of the GDPR Storm
- 3... Welcome New Members!
- 3... ACC News
- 4... Chapter Board of Directors
- 5... ACColades
- 6... Representations & Warranties Insurance:
The New Frontier in Private Deal Making
- 8... Chapter Volunteer Opportunities in 2019
- 10.. Ethics Follies
- 12.. Chapter Leadership

FOCUS

President's Message

Brenna Nava, Senior Director, Legal, Rackspace Hosting



You've Got a Friend in Me.

We are near the end of 2018 and my tenure as Chapter President. If you read my other quarterly messages,

you would have seen a theme develop regarding the benefits of your ACC membership. In the first quarter, I discussed "experiences" and all of the amazing events that our Chapter hosts. In the second quarter, I discussed "learning" and the resources that ACC provides to ensure that you have the most up-to-date information on relevant legal topics. In the third quarter, I discussed "service" and our chapter's community outreach programs that offer members a chance to give back to our community. In this final chapter, I think it is important to focus on the "friendships" that you develop when you become involved with the ACC.

C.S. Lewis wrote about friendship in his book *The Four Loves*: "The typical expression of opening friendship would be something like, 'What? You too? I thought I was the only one!'" This quote resonated with me. I cannot count the number of times that I have been able to connect with someone over a common question or issue faced in our legal career. These connections then provided a foundation for friendship that has contributed to my success over the years. I have benefitted

from hearing about and learning from the trials and tribulations of others. I hope that I have been able to share insight about my experiences with and contribute to the success of some of you as well.

A recent article in *Entrepreneur* magazine highlights five of the ways that friendships help you. First, friends hold you accountable. Telling your friend about a goal that you have in your job or career can help you meet it. Your friend will be there to remind you that you wanted to chat with your boss about a promotion or meet more people in same industry. Second, friends can advocate or stick up for you. Many of us do not feel comfortable bragging about our accomplishments. Friends often come to the rescue to sing your praises to others. Third, friends can open doors or carve paths. Friends who rank above you can provide valuable insight into how they got to where they are today. They can also introduce you to people in their network which can help you expand your circle of impact. Fourth, friends can make you more productive. In a Gallup blog, Annamarie Mann – Gallup's Employee Engagement and Well-Being Practice Manager - writes "[F]riendships can take on a powerful dynamic in which casual, friendly banter turns innovative discussions...". Friends can help with time management or may offer ways to make work processes more efficient. Fifth, friends can provide a sounding board. This is probably the most intuitive. Sharing your concerns with an empathetic

ear can lead to greater happiness in your career. Talking through your issues can help restore your mental ability to think logically. Your friend might also offer advice that you had not considered on how to interpret or improve the situation.

I love that our South Central Texas community is such a close-knit group. I am blessed to have made so many friends through my participation and work with our incredible chapter. Thanks to those I have leaned on for support in the past and hope that I can continue to do so in the future. You should always know that "You've Got a Friend in Me".

And with that, my Presidency has come to an end and I pass the baton to your next Chapter President Zandra Pullis. Zandra is an excellent leader and I have no doubt that 2019 will be the best year yet!

The Eye of the GDPR Storm

By Tibor Nagy, Ogletree Deakins

The European Union's General Data Protection Regulation (GDPR) went into effect on May 25, 2018. It was preceded by years of debate, delays, and uncertainty on its final text. The months leading up to this date seemed quiet until a flood of emails barraged everyone's mailboxes — frantic requests from companies asking customers to officially opt-in or consent to receive their future messages. Now the storm seems to have abated, apart from the regular newflash of a data breach or cyber hack at a big corporation or government institution.

GDPR is the European Union's latest answer to the privacy challenges of a rapidly digitalizing world with companies and governments controlling and processing large amounts of personal data. The regulation grants important rights to individuals or data subjects, including required consent or opt-in, the right to access, and the right to be forgotten, to name a few.

In addition, its application is not limited to the European Union and can, for instance, also affect US-based companies that process personal data of EU citizens. It is an important step up

from the European Union's 1995 Data Protection Directive, which was their initial legislative answer to the first wave of digitalization and e-commerce.

Compliance with GDPR is proving to be a big challenge for companies. Namely, interpreting many of GDPR's provisions is not always easy. In addition, many companies struggle on where to assign responsibility for GDPR compliance. GDPR requires companies to appoint a Data Protection Officer (DPO), but attracting and retaining a DPO is no easy task. A DPO should also be able to call on the support of a number of people including, the board, the GC, CIO, and COO to engineer and implement an effective GDPR compliance roadmap.

Privacy, data protection, and information security are firmly on the general counsel's current priority list. Although sometimes initially and erroneously viewed as a purely legal issue, GDPR compliance is a large-scale issue that impacts the company's business model and reputation. It provides great opportunities for general counsel to use their legal, business, and leadership skills to add value to the company. As such,

general counsel cannot afford digital illiteracy and must stay on top of digital technology and cybersecurity trends.

Now that the initial excitement of GDPR has settled and the flurry of consent emails has subdued, it is tempting to carry on with business as usual. For example, the media is focused on the Brexit negotiations in Brussels, although the European Data Protection Authorities (DPAs) are convening in the city on October 22-26 during their 40th International Conference.

In fact, many DPAs already received the authority to impose much bigger fines through their national legislations. Presently, GDPR allows fines of up to four percent of annual global turnover or 20 million Euro, whichever is higher.

The DPAs are now assessing and planning for the future. Companies should use this valuable time and continue implementing their GDPR compliance roadmap to batten down the hatches. We are only in the eye of the GDPR storm.

"GDPR is the European Union's latest answer to the privacy challenges of a rapidly digitalizing world with companies and governments controlling and processing large amounts of personal data."



ACC News

ACC Xchange: The Mid-Year Meeting for Advancing Legal Executives

This reimagined conference (April 28-30, Minneapolis, MN) combines ACC's Mid-Year Meeting and Legal Operations Conference into one powerful event, delivering the trailblazing programs, content, training, and networking you need all in one place, at one time. Register today for cutting-edge mix of advanced-level education at www.acc.com/xchange.

Are you prepared to comply with new state privacy laws?

Rapidly growing data privacy regulations from California to New York make you accountable for all third-party service providers that access, process, or store your company's personal data. Download the case study on Plaza Home Mortgage and the ACC Vendor Risk Service. Visit www.acc.com/VRS for more information.

2018 ACC Global Compensation Report

For companies seeking to stay competitive in the marketplace and lawyers considering career moves, access to detailed compensation data for in-house counsel and legal operations professionals is absolutely essential. Based on responses from more than 5,000 lawyers in corporate legal departments from 65 countries and 39 different industry sectors, this first-ever ACC Global Compensation Report is precisely the resource you need. Download the free Executive Summary at www.acc.com/compensation.

2019 ACC Annual Meeting: Keep the Momentum Going

Exceptional in-house lawyers make attending the ACC Annual Meeting a priority. Mark your calendars for October 27-30 in Phoenix, AZ for the 2019 world's largest event on in-house counsel. Learn more at am.acc.com.

ACC Alliance

Have you considered that you and your professional legal services may be subject to malpractice scrutiny? Legal malpractice lawsuits can happen unexpectedly—even to in-house counsel. If you rely solely on the protection of corporate management liability coverage, your personal assets and reputation could be at risk. It may surprise you to learn that some of your peers have discovered firsthand that risky coverage gaps often exist. Since 1996, the ACC has turned to Chubb to address malpractice issues unique to in-house counsel. Learn more about Chubb at www.chubb/acc.

To effectively manage copyright, it is critical to understand when permission is needed and how to evaluate exceptions and limitations to copyright protection. Copyright Clearance Center's (CCC) Education Certificate Program can help. ACC members receive 25% off registrations made through 12.31.18 with promo code: ACC2018. Visit <http://go.copyright.com/acc2018/education> for a complete schedule.

Welcome New Members!

Jeffrey Adamcik
Contracts Attorney,
Southwest Research Institute

Kim Basil
Attorney,
Rackspace Hosting, Inc.

Raymond Elliott
Vice President and
General Counsel,
Liberty Oilfield Services

Alana Gillespie
Senior Counsel,
Rackspace Hosting, Inc.

Lori Loehr
Executive Director,
Regulatory Counsel,
USAA Federal Savings Bank

Larry Roberson
Senior Counsel,
Southwest Research Institute

Save the Date!

Friday, April 12th

ACC's 7th Annual Charity Golf
Tournament & Social

Quarry Golf Club
11:30 Registration & Lunch
1:15pm Tee Time
5:30pm Happy Hour

Foursome- \$600
Hole Sponsor- \$1,000



southcentraltx@accglobal.com

April 12, 2019

#MORETHANALAWYER

Show you are More Than a Lawyer!

Are you more than a lawyer? Do you break the mold of how the world typically perceives the legal sector? Do you help expose the diversity of functions and contributions of in-house lawyers in organizations across the world?

Then our chapter and ACC HQ wants to hear from you! Send an email to southcentraltx@accglobal with a short blurb and a photo of how you're #morethanlawyer! ACC will share your images and feature them on the #morethanlawyer page on the ACC site.

2018 ACC Board of Directors



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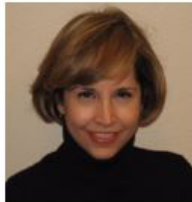
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Is Your ACC Member Profile Up-To-Date?

You may edit/update your contact or personal information, etc. by logging into www.acc.com and selecting "My ACC." Then click on "My Contact or My Personal Info." Scroll to the bottom of your profile and click on "Edit My Info." It's that easy!

Job Openings?

Is your company looking to fill an in-house position? Do you know about a current in-house job opening? If so, please let us know so that we can advertise the position to our membership.

Send an email to our Chapter Executive Director at southcentraltx@accglobal.com.

Don't Miss!

We are excited to announce that in 2019 our monthly luncheons will take place at **The Quarry Golf Course!**



444 East Basse Road, San Antonio, 78209

The cost to attend the luncheons is \$15.00 for members and \$25.00 for non-member guests. (In-house counsel and sponsoring firm only, please.) Check out our Chapter web page at <http://www.acc.com/chapters/sanant.php> for our current calendar of events and registration information.

No other professional organization in San Antonio offers better CLE programs at a more affordable price that is specifically geared to meeting the needs and issues of in-house counsel.

For more information, or to register for any of these events, contact Amber Clark at southcentraltx@accglobal.com

January 9, 2019

January Luncheon

11:45am-1pm

The Quarry Golf Club, General Counsel Panel Discussion, sponsored and presented by Haynes & Boone.

RSVP to southcentraltx@accglobal.com

ACC Running Club- "Team Accelerate" News



The ACC Running Club is in the process of planning some great runs for this year. If you would like to be included on the running club's email list and receive notices of events, please contact our new Team ACCelerate club chair, Javier Aranda at jaranda@wbhq.com.

ACColades

Have you received a promotion lately? Changed jobs? Do you know of someone who is new to in-house or who deserves a little recognition for a job well done? Please email us at southcentraltx@accglobal.com with your "ACColades" tips.



The Association of Corporate Counsel, South/Central Texas Chapter
Congratulates the 2018 Ethical Life Award Nominees and Recipients



Recipient for Private Practice
Annalyn Smith
Schmoyer Reinhard, LLP



Recipient for In-House Counsel
Michael Gibbs, General Counsel
Whataburger Restaurants

Please Join Us...Saturday, May 4th, 2019

South/Central TX ACC's 11th Annual Family Night with the Missions/ Sponsor Appreciation Event

6:00pm (Gates Open), 7:05pm (Game Start) Wolff
Stadium FIESTA DECK
5757 Hwy 90 West, San Antonio, Texas 78227

Bring the Whole Family!
Food and Beverages Provided.

RSVP to southcentraltx@accglobal.com



Representations & Warranties Insurance: The New Frontier in Private Deal Making

Jeff Gifford and Nick Monaghan, Dykema

In negotiating private acquisitions, corporate counsel are aware of the importance of the seller's representations and warranties ("*representations*") and the complex interplay between those representations and the negotiated closing conditions and indemnification obligations contained in the acquisition agreement. Inaccurate representations may provide the buyer with adequate basis to terminate an acquisition agreement prior to closing or to seek indemnification from the seller after closing.

Accordingly, the buyer's acquisition lawyer routinely expends a prodigious amount of energy in negotiating robust seller representations and counsels buyer to insist that a portion of the purchase price be held in escrow for a limited period after closing. Simultaneously, the seller's counsel vigorously seeks to limit the scope of the representations, takes measures to better ensure their accuracy, and endeavors to minimize any potential indemnification exposure by utilizing baskets and caps. Experienced acquisition counsel have become comfortable with these concepts and the acquisition agreement provisions that facilitate them.

The recent acceptance of representations & warranties insurance policies ("*R&W policies*") as the new standard in middle market and larger acquisitions has dramatically disrupted these traditional elements of M&A practice, including with regard to the negotiation of representations, indemnities, and escrows. R&W policies are now considered a customary feature of an M&A transaction and it is critical for corporate counsel that operate in the M&A space to become familiar with the coverage provided by R&W policies, the standard terms of R&W policies, the process by which such R&W policies are obtained, and the impact of R&W policies on acquisition negotiations.

Coverage Provided by R&W Policies

Fundamentally, R&W policies provide coverage for losses incurred by the insured that arise from inaccurate representations made in the acquisition agreement. If a seller makes an inaccurate representation that results in a loss to buyer, then the insured can make a claim against the R&W policy for such loss. Importantly, negative purchase price adjustments and other indemnifiable losses under an acquisition agreement are not covered under R&W policies, including losses related to liabilities that are retained by seller, losses based on specific indemnities, losses that are based on breached covenants, and other losses that arise from liabilities that are known at the time that the R&W policy is issued. In addition, the insurance underwriter will attempt to exclude from the R&W policy coverage any potential liabilities that are discovered and that cause concern during the diligence and underwriting process.

R&W policies are popular and becoming standard for middle market and larger transactions because they address a number of concerns of buyers and sellers. They provide each party with greater peace of mind—the seller finds comfort in believing that its post-closing indemnification obligations will be less severe and the buyer feels relief knowing that there will be adequate funds available in the event that it sustains a loss. Sellers are also pleased to have less of their purchase price proceeds tied up in escrow after closing. In situations involving multiple selling shareholders, R&W insurance can virtually eliminate the need for a buyer to pursue multiple shareholders to satisfy indemnity claims (thereby reducing the sting of "joint and several" liability for those shareholders). R&W policies also provide buyers with a formidable tool to make their acquisition

offers more attractive to sellers, particularly in a competitive setting.

Standard Terms of R&W Policies

Buy-side or Sell-side

R&W Policies are procured prior to closing and can be written with either the buyer or the seller as the insured under the policy. Buy-side policies (policies written with the buyer as the insured) are more common. With a buy-side policy, the buyer would file the claim directly with the carrier and control the claims process (limiting the seller's involvement in the process). Conversely, with a sell-side policy, the buyer would make an indemnity claim against the seller directly and the seller would then satisfy that claim and file a claim with the insurer for any insurable loss.

Policy Premiums and Fees

As the market for R&W policies has matured, policy pricing has become more attractive. Currently, policy premiums are generally priced at 2.5%-3.5% of the *policy limit*. In addition to the policy premium, the primary carrier would charge additional, non-refundable underwriting fees in the range of \$25,000-\$40,000 to offset its underwriting expenses.

For example, let's assume that buyer is purchasing a business for \$80 million and desires to obtain an R&W policy with an \$8 million policy limit (equal to 10% of the purchase price, essentially serving as a "cap"). The purchase price for the policy would include a premium ranging from \$200,000-\$280,000 (2.5%-3.5%), plus underwriting fees of \$25,000-\$40,000. This would amount to total policy costs of \$225,000-\$320,000, plus taxes and surplus lines fees varying by state.

Based on these pricing economics, it would be unusual for a policy to be issued for less than \$3 million. Accordingly, while

continued on page 7

continued from page 6

R&W policies are becoming standard for mid-to-large size transactions, they are less typical for deals with an enterprise value of less than \$20 million.

Who pays?

As between the buyer and seller, which is the more appropriate party to pay the policy premiums and fees? This is a subject of negotiation between the buyer and seller. It is often appropriate for the seller to bear at least half of the cost of insurance, since the procurement of the policy more acutely benefits the seller (providing the seller with the ability to “walk away” from its typical indemnity responsibilities). In these instances, the buyer would pay the premium and fees to the insurer directly and reduce from the purchase price paid at closing an amount equal to seller’s share of those amounts (as a component of sellers “transaction expenses” under the agreement). Nonetheless, in a competitive situation the buyer may consider covering the full amount of costs and fees. In other circumstances, a crafty buyer might provide that it will cover the full costs of the R&W policy in the non-binding letter of intent (and factor that amount into the purchase price that it offers).

Retentions

Like most insurance policies, R&W policies are issued with a retention (deductible). The general range for policy retentions is between 1.0%-1.5% of the *enterprise value* of the transaction, but that range varies based on the target company’s industry. It is common for the buyer and seller to split the retention, with the first half coming from the buyer’s basket in the acquisition agreement and the other half coming as an indemnity obligation of seller (which is often held in escrow at closing). Policy retentions are important in that they help ensure that buyers and sellers remain engaged in the diligence process and the negotiation of the representations, notwithstanding the purchase of an R&W policy.

In the \$80 million transaction example above, a one percent retention would be \$800,000. In the event that buyer sustains

a \$1 million indemnifiable loss, the first \$400,000 would not be paid to buyer as indemnification (and would be allocated against buyer’s basket), the next \$400,000 would be indemnifiable, but would be claimed against seller (rather than the insurer under the R&W policy), and the remaining \$200,000 (along with any future losses incurred by buyer during the policy term) would be claimed on the policy. Accordingly, even where R&W insurance is contemplated, the careful consideration of representations, indemnification provisions and escrows remain a critical component of the acquisition negotiations.

Policy Term

The term of the R&W policy will be consistent with the survival period of the majority of representations under the acquisition agreement, with such survival period (for non-fundamental representations) typically ranging from one to two years.

Process for Obtaining an R&W Policy

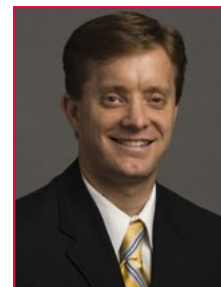
As the market for R&W insurance has matured, the process for obtaining insurance has become more streamlined and efficient. While policies can be procured in as little as two weeks (with the assistance of a skilled broker), it is preferable to begin the process well in advance of closing. In addition to reviewing diligence independently, the underwriter will require that a thorough legal and financial diligence process be conducted and typically requires written third party quality of earnings and legal diligence reports on the target. The diligence process concludes with an underwriting call scheduled with insured’s business and legal teams and its third party advisors to review the concerns uncovered in diligence.

Practice Impact and Recommendations

There are a number of actions that corporate counsel can take to better guarantee a smooth and efficient process for procuring R&W insurance:

- Engage an insurance broker that is a predominant player in the R&W policy space—an experienced broker is critical to ensuring a fast and smooth process and obtaining market policy terms.
- Commence the process early in the acquisition process—while the insurance market has become more streamlined, the underwriting process still takes time and typically requires the submission of third party quality of earnings and written legal diligence reports.
- Incorporate the R&W insurance concept into the terms of the acquisition agreement (with thoughtful consideration to the impact of the policy on the purchase price formula, indemnification provisions, basket, cap, and escrow).
- Negotiate market policy terms—ensure that in-house or third party counsel experienced in the negotiation or R&W policy terms reviews the R&W policy to ensure adequate coverage (and minimal exclusions) consistent with market practice and the terms of the acquisition agreement.

While R&W insurance is not appropriate for every acquisition transaction, it is a valuable solution for buyers that desire to structure an attractive bid and for sellers that desire to exit their ownership position with more certainty and peace of mind.



Jeff Gifford and Nick Monaghan are Members in Dykema’s Corporate Finance Group and are resident in the San Antonio office. They counsel their clients in business law matters, including in the purchase and sale of businesses and the procurement of R&W insurance.



Chapter Volunteer Opportunities in 2019

Your 2019 ACC Board of Directors recently met to plan for 2019. The board is looking for volunteers to help with our various chapter committees and activities. Please let us know if you would be interested in volunteering a small amount of your time to help keep our chapter running strong. We will work with you to line you up with a project that interests you! Below is a list of our current committees:

- 1. Membership:** The Membership Committee is responsible for identifying potential new members and improving relationships and engagement with existing members. Committee members serve as ambassadors for the ACC. The Chair of the Membership Committee takes new and/or potential members to lunch or coffee to discuss the benefits of membership.
- 2. Charitable Giving:** The Charitable Giving Committee reviews all charitable requests made to the ACC South Texas Central Chapter. This Committee also designates a scholarship recipient for the proceeds from our annual golf tournament.
- 3. Community Outreach:** The Community Outreach Committee is responsible for highlighting the ACC in the community by participating in panel discussions at local universities and St. Mary's Law School. This Committee also works with the CJP to host veteran's clinics where members can earn pro bono hours or volunteer with local non-profit companies like the SA Food Bank.
- 4. Ethics Follies:** The Ethics Follies Committee works with Lee to ensure a successful Follies program each year. Volunteers for this committee help with sponsorship solicitation, attendance promotion, props and set assistance, table setup, ushering, CLE sign-in, and post-show receptions.
- 5. Ethical Life Awards:** The Ethical Life Awards Committee is responsible for soliciting nominations and assembling a panel of judges to select the annual Ethical Life Award recipient. The Ethical Life Award is presented during the evening Ethics Follies performance.
- 6. Golf Tournament:** The Golf Tournament Committee is responsible for coordinating the annual golf tournament. Volunteers for this committee may help with sponsorship solicitation, golfer registration and other general tournament details. A portion of the proceeds from this fundraising activity go toward a different scholarship that is selected by the Charitable Giving Committee each year.
- 7. Roundtable and Programming:** The Roundtable and Programming Committee works with our top tier sponsors to present at least two breakfast or early afternoon/evening CLE presentations on interesting and unique topics.
- 8. Running Club Committee:** Team "ACCelerate". The Running Club Committee is responsible for identifying and coordinating teams for various races throughout the year and for soliciting sponsorships for those races.
- 9. Oil and Gas Shared Interest Group:** The Oil and Gas Committee secures and works with law firm to deliver CLE presentations on oil and gas topics.
- 10. WIN [Women's Interest Networking] Shared Interest Group:** The Women's Interest Networking (WIN) Committee partners with attorneys and vendors to provide several continuing education, professional development, and networking opportunities for women.
- 11. Foodie Fridays/Thirsty Thursdays:** The Foodie Fridays/Thirsty Thursdays Committee is responsible for setting up several informal networking "Dutch treat" networking lunches or happy hours at fun local restaurants and bars.
- 12. Social Events:** Coordinate social events, including annual family event; holiday party, golf tournament happy hour and Ethics Follies after party.



Board Planning Retreat





ACC's 21st ANNUAL ETHICS AND COMPLIANCE CONFERENCE



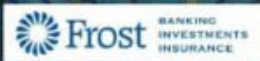
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Community Leaders



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Chapter Leadership

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— SOUTH/CENTRAL TEXAS —

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Let Us Know...



- What CLE presentation topics interest you?
- How can we help you make the most out of your ACC membership?
- Would you like to serve on a committee?
- Are we meeting your needs?
- Do you know someone interested in joining?
- Do you have some Corporate Counsel related news you'd like to share?
- Do you know someone who would be interested in becoming a speaker and/or sponsor?
- Would you like to join or lead one of our shared interest groups (running, theatre, dinner, etc.)?

Email your comments to southcentraltx@accglobal.com.

ACC South/Central Texas!

Chapter Web Page: www.acc.com/chapters/sanant/

Ethics Follies Web Page: www.ethicsfollies.com

Look for us on Facebook and
https://twitter.com/#!/ACC_SCTX

