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FOCUS

President's Message

Brenna Nava, Corporate Counsel, Rackspace Hosting



Where did this summer go?!? I hope that all of you were able to survive the great heat wave of 2018 and take some time off for a summer vacation. We

are inching closer to the end of this fabulous year and I am so proud of all that our Chapter has accomplished: our annual golf tournament, Missions baseball game, Thirsty Thursdays and Foodie Fridays, breakfast briefings, monthly luncheons and oil and gas or WIN events.

I wanted to highlight one of our newer events which provides attendees a chance to network with other members while giving back to the community. Last year, our members and their families participated in an event at the San Antonio Food Bank's urban farm. We washed some goats; cleaned the chicken coops; and helped with the landscaping. This year, our ACC members and their families returned to the San Antonio Food Bank to help sort food in their warehouse. On their website, the San Antonio Food Bank captures the spirit of volunteerism: "Fighting hunger doesn't always start with a meal. It starts with those who serve." I am so proud that I had the chance to serve alongside all of those who attended these events.

A lot of our companies provide the opportunity, time, and resources to par-

ticipate in pro bono or volunteer activities. In one year, my 30-person legal team at Rackspace donated 400 hours, participated in the biggest Thanksgiving food drive in San Antonio, and led a diaper drive after Hurricane Harvey that brought more than 11,000 diapers to the Texas Diaper Bank and grateful families across the region. Volunteer events like these and ones ACC hosted at the Food Bank offer us a wonderful opportunity to show that we are more than a lawyer.

I hope you all saw the recent campaign called #morethanalawyer that the ACC launched a few weeks ago. This campaign is designed for all of us to tell our story about how we are just that. As in-house lawyers, we are often called to take on a variety of tasks that folks may not traditionally think of when they think of the legal profession. We may be in a factory, behind the cash register, inspecting a construction site, or on an assembly line. We want members to snap an image, post it with the hashtag, and tell everyone why you are #morethanalawyer on your favorite social media platform to help us celebrate the many diverse contributions of the in-house profession to businesses worldwide. I would love to see some of your friendly smiles on that page. Let's share with the rest of the world some of the great work that our South Central Texas lawyers are doing!

Upcoming Events

October 21-24th

ACC Annual Meeting in Austin with Texas Chapters' Party on October 23rd

**Oct 31 (2pm)
and Nov 1 (7pm)**

Ethics Follies "Shyster Act" register at www.ethicsfollies.com for sponsorship information email Amber Clark at southcentraltx@accglobal.com

No November Luncheon

December 5th

December CLE Luncheon, Plaza Club 11:45- 1pm, topic TBD. Sponsored and presented by LexisNexis.

December 13th

Save the Date!: Annual ACC Holiday Party at Paloma Blanca

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

The best way to find yourself is to lose yourself in the service of others.

— Mahatma Gandhi

Street Law Brings Together ACC Chapters and Local Schools for Legal Learning

The lack of diversity in the legal profession is not a new issue, but Street Law, ACC, the ACC Foundation, and ACC members are working to put the issue behind us once and for all.

The Corporate Legal Diversity Pipeline Program, a national partnership between Street Law and ACC, encourages diverse students to pursue careers in law. The hope is to foster a next generation of more diverse lawyers, bringing new and needed perspectives to the legal profession. Students gain exposure to the law and have the opportunity to receive counseling on the steps they can take to pursue a legal career. Corporate law departments share their knowledge and make connections with up-and-coming students. The hope is that these connections will serve as a pipeline for future diverse legal leaders.

The four tenets of the Corporate Legal Diversity Pipeline Program are: 1) training, 2) classroom visits, 3) a conference at a corporate legal department, and 4) extensions (mentoring, internships, etc.). While more than a dozen ACC chapters currently participate, ACC headquarters also undertook this initiative in the spring. As long champions of this program, it was wonderful for ACC staff to interact with students directly.

In late March, students from Potomac High School in Oxon Hill, Maryland, visited the new ACC national headquarters office to participate in their class of the ACC/Street Law Corporate Legal Diversity Pipeline Program. All of the students are members of the Law, Education, and Public Service Academy at their school.

Each of the legal volunteers spoke about how he or she became a lawyer. The students were able to hear first-hand that it's truly achievable if that is their goal. It's certainly hard to study, prepare, and be accepted into college and then law school. But it is attainable with planning, mentoring, and access to the right role models.

Much of the day was spent on legal simulations, interactive ways for the

students to learn about the practice of law. This included discussing and practicing how to review and analyze facts in a case, and how to present before a judge. The volunteers also covered other public speaking skills, like delivering information calmly and confidently.

Many of the students only knew about lawyers from what they'd seen on TV, so time with real lawyers provided them with a more realistic understanding of a legal career. It's not always as exciting as what's on TV, but it's also a lot more approachable. One student shared that he'd previously thought that all lawyers were always "aggressive," but the time spent with ACC showed that lawyers don't have to be aggressive – or at least that they are much more than just that!

Our program provided the opportunity to teach this class of students more about the law in a few days than they'd likely learned in their entire lives. It was a memorable, fulfilling day for both the students and all of the volunteer leaders.

More than a dozen ACC chapters are active in Street Law nationwide, and the program is now 17 years old. This year, we expect that approximately 5,300 students will participate in the Corporate Legal Diversity Pipeline Program through partnerships with more than 70 companies, law firms, and ACC chapters. Some companies that participate include Coca-Cola, Merck, Verizon, Nationwide, HP, GE, Turner, and Capital One. It's an opportunity for the entire law department, from attorneys, to paralegals, to administrative staff, to collaborate and share their knowledge with the next generation of legal and business professionals.

Volunteer leaders participate in Street Law's half-day training before they begin the program. Street Law helps the leaders to select topics that will interest the students and highlight the volunteers' expertise. The program at ACC focused on immigration and cyberbullying – legal

topics in the news today and relevant to the students' daily lives. Other topics frequently covered include: intellectual property, contracts, torts, alternative dispute resolution, employment law, and environmental law.

In addition to classroom learning on civil law and legal careers, the students truly enjoy the experiential components – seeing what a corporate law department looks like, observing the interactions between business colleagues, and even hearing about a typical "day in the life." They come away with a stronger interest in and knowledge of the law, with many new role models.

One of the highlights of the Street Law program is that many corporate law departments stay connected with the most promising students. In fact, these top students may return for another job shadow day, be asked to apply for internships or scholarships, or participate in mentoring. In many cases, it's the start of a strong relationship between the company and the students, a true pipeline for new, diverse legal talent.

If you're curious about starting your own Street Law program on behalf of your ACC chapter, you may find further encouragement in these results: In the post-program survey, between 67 percent and 75 percent (on average) of the participating students said they are more interested in pursuing a legal career than they were before the program. For the program at ACC, the Potomac High students were no exception. Seventy percent said they were more interested in pursuing a legal career than they had been prior to the Street Law/ACC program.

The hope is that more ACC chapters will participate in this worthwhile program. For more information, visit www.streetlaw.org. We are constantly inspired by the in-house community's efforts to give back and we are pleased to partner with so many of our volunteer leaders to increase the pipeline of diverse students entering the legal profession.

ACC News

2018 ACC Annual Meeting: Rates Increase After September 20

The 2018 ACC Annual Meeting, the world's largest gathering of in-house counsel, is scheduled for October 21-24 in Austin, TX. In less than three days you can 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. Group discounts are available. Visit am.acc.com for more information.

Drive Success with Business Education for In-house Counsel

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel, September 12-14, and November 7-9
- Finance and Accounting for In-house Counsel, September 5-7
- Project Management for in-house Law Department, November 14-15

Learn more and register at www.acc.com/businessedu.

ACC Law Department Leadership: A Transformational Leadership Program Presented by ACC and Queen's University

If you are an in-house lawyer looking to develop the transformational leadership behavior to influence, motivate, and inspire

your reports, peers, executives, and other stakeholders around you to move forward, this is the ideal opportunity for you. The program is taking place September 28 in Toronto. Register today at www.acc.com/LDL.

Are You Conducting Diligence on EVERY VENDOR and Third-party that has Access to Your Systems or Data?

Your vendors are now prime targets for data breaches and small vendors can provide easy access for hackers. Even cleaning crews, HVAC vendors, and food distributors, to name a few, can all lead to data breaches, but are often overlooked in the vendor diligence process. ACC's Exclusive third-party due diligence service should be in your arsenal. 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.](#)

ACC Chief Legal Officers 2018 Survey

The ACC Chief Legal Officers Survey offers an opportunity to get data that supports the imperative for the CLO to report directly to the CEO. Other notable find-

ings include what keeps CLOs up at night, reporting structures, how CLOs view the future of departmental budgets and staffing, litigation and contract workload, and where data breaches and regulatory issues have the greatest impact. Download it today at www.acc.com/closurvey.

2018 ACC Foundation: The State of Cybersecurity Report is now available.

Cybersecurity touches every aspect of consumer and corporate culture and is a chief concern for individuals and corporate leaders. Learn what more than 600 corporate counsel say about their cybersecurity experiences, role, and practices. Download the free executive summary at www.acc.com/cyber.

Thomson Reuters Practical Law Connect is the first-of-its-kind solution that integrates Practical Law legal know-how resources with essential Westlaw legal research. More than 230 Practical Law attorney-editors handpick resources and organize them into our proprietary task-based menus so you can get right to work. [Learn more about Practical Law Connect.](#)

NAVEX Global helps protect your people, reputation, and bottom line through a comprehensive suite of ethics and compliance software, consulting, and services. These include whistleblower hotlines, case management software, online training, policy management, and advisory services. ACC members receive an exclusive 10 percent discount off of their first year subscription fee when they purchase one of the Online Training Compliance courses. For More Information, visit <http://trust.navexglobal.com/ACC> or call +1.866.297.0224

#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 #morethanalawyer! ACC will share your images and feature them on the #morethanalawyer page on the ACC site.

2018 ACC Chapter Board of Directors



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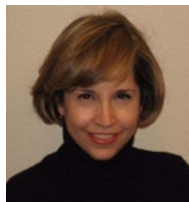
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PAST PRESIDENTS:

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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!

This year our monthly CLE luncheons will continue to take place at the Plaza Club.

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

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 Amber Clark at southcentraltx@accglobal.com.



ACColades

Congratulations to the following chapter members for being named as "Outstanding Lawyer" by the San Antonio Business Journal:

- » Doug Becker, Alamo Title
- » Deneen Donnley, USAA
- » Mary Stich, Rackspace



Congratulations to ACC Members' companies- NuStar Energy & Rackspace for being recognized as 2018 People Companies that Care!

Read what People had to say about Nustar at:

<https://people.com/human-interest/people-50-companies-that-care-2018/#22-nustar-energy-l-p>

Read what People had to say about Rackspace:

<https://people.com/human-interest/people-50-companies-that-care-2018/#25-rackspace>

Read Rackspace's Blog about the award:

<https://blog.rackspace.com/rackers-earn-spot-on-people-magazine-companies-that-care-list>

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.



Suzanne Shorlemer Bailey was recently recognized as a "Pillar of Fairness" as part of the Northside Independent School District's "Pillars of Character" awards.



CONGRATULATIONS!
2018 ETHICAL LIFE AWARD WINNERS:



Michael H. Gibbs
In-House Lawyer Category



Annalyn G. Smith
Private Lawyer Category

Five Key Considerations when Contemplating a Ground Lease

By Joe Esposito and Jenny Gruber, Kilpatrick Townsend

It's no secret that the real estate market is one of the hottest in nation right now. Though the experts predict a slowdown in the meteoric rise in property prices, the commercial market remains strong due to continued population and job growth. You've probably noticed signs stating "Ground Lease Available" on many vacant tracts along major highways and thoroughfares. That's no coincidence. Rather, it's indicative of the current state of the market. But what is a ground lease? And why do they seem so ubiquitous right now?

Ground leases typically involve an unimproved tract of land where a proposed tenant will develop and own the improvements while the property owner will continue to own the underlying land and will serve as landlord under a ground lease. Most ground leases will be long enough to permit construction of improvements and amortization of the cost of such improvements over the life of the lease. Depending on the situation and whether the tenant intends to self-finance or obtain a loan, most lease terms will run 15 to 35 years.

But why would a property owner and prospective purchaser choose a ground lease over a traditional sale? For an owner, a ground lease allows realization of the income potential of vacant property without selling the land outright. And in today's market with the constant appreciation of real estate prices this can be especially lucrative in the long-run. Moreover, the owner can avoid the capital gains tax that would result from an outright sale of the land while still benefitting from the current fair market value of the land via the rental rate under the ground lease.

With a ground lease, a prospective purchaser can realize the benefits from the development and long-term control of the property without having to obtain a full cash purchase price from a lender, an investor or from the purchaser's own resources. And while it is true that the

monthly rental payments under a ground lease will match or exceed the total interest and principal payments under a traditional loan, there are tax benefits for the prospective purchase as well in that the rental payments are usually tax deductible. But perhaps the most common reason a prospective purchaser will agree to a ground lease is that the current owner is unwilling to sell.

Regardless of why a ground lease is chosen, the parties should realize that a ground lease deserves its own special treatment. In some ways, it's similar to a purchase and sale but includes concepts found in typical leasing arrangements and even partnerships. If the parties fail to treat a ground lease accordingly, the economics will be wrong, important issues will remain unaddressed and problems will ensue. This article will highlight five key issues when contemplating a ground lease. These five issues are as follows:

- Cost and ownership of improvements;
- Subordinated vs. unsubordinated ground leases;
- Casualty and condemnation issues;
- Competitive restrictions and other restrictive covenants; and
- Title insurance considerations.

1) Cost and ownership of improvements:

As mentioned above, the tenant is usually responsible for constructing the improvements on the property and will own such improvements once completed. However, everything is negotiable and tenants sometimes require that the landlord pay for the infrastructure costs, including the cost of bringing utility lines to the property. The tenant controls the construction process and has much discretion over the nature of the improvements. However, since ownership of the improvements will revert to the landlord after the expiration of the

ground lease, the landlord will exert a certain amount of control over the design and construction of the improvements by requiring covenants to build by a certain date and approval rights with respect to design and build quality. Most landlords will want to pre-approve any plans and specifications, and tenants would be wise to seek such approval upon entering into the ground lease.

An additional consideration is whether the project is a standalone project or part of a larger development. If the project is a part of a larger development, such as a shopping center, the landlord will try exert even more control either via the ground lease itself or by restrictive covenants recorded against the property.

2) Subordinated vs. unsubordinated ground leases:

If the tenant requires a loan to construct its improvements, one of the first questions to consider is whether the ground lease will be subordinated to the tenant's loan. Subordination is very risky for a landlord but it can net a higher rent and result in larger developments that require additional capital. The landlord will need to consider how to best protect its ownership interest in the land and will require as many protections as feasible under the ground lease and even in the loan agreement itself, including notice and cure opportunities on par with the borrower's rights. The landowner must determine whether the benefits of the proposed ground lease outweigh the increased risks to which the landowner is exposed by such subordination.

More often than not, the landlord will outright refuse any subordination and the tenant must convince its lender that the lender's security in the tenant's leasehold interest is sufficient to protect the lender. The tenant has an uphill battle convincing their lender to subordinate its interest to the landowner but it's possible through less favorable loan terms, providing sufficient guaranties to the lender and by

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allowing the lender ample opportunity to cure any default by the tenant under the ground lease.

3) Casualty and condemnation issues:

Often ignored in most agreements, both landlords and tenants would do well to pay attention to the condemnation and casualty provisions of a ground lease. Since the landlord owns the land and the tenant the improvements, an inherent tension exists between the two parties when a casualty or condemnation event occurs leaving limited insurance proceeds or award money to go around. If the property or the lease is encumbered by a deed of trust, the battle becomes even more complicated.

Typically, landlords will claim any portion of the proceeds or awards attributable to their leased fee interest in the land. Tenants will argue that they are entitled to the portion attributable to tenant's leasehold interest that is destroyed or taken. Additionally, a tenant will claim any portion attributable to the destroying or taking of the actual improvements, which would include the building and any furniture, fixtures and equipment, should go to the tenant. After all, the tenant paid for the cost of the improvements so they should receive any amount related to such improvements. However, if the ground lease is near the end of its term the landlord will argue that it should receive the proceeds or awards attributable to the improvements since the landlord stands to benefit from ownership of such improvements and the tenant has already amortized most or all of its construction costs.

The parties should also consider what is deemed a total or substantial loss or taking and when the tenant can terminate the lease or when the tenant is obligated to rebuild.

4) Competitive restrictions and other restrictive covenants:

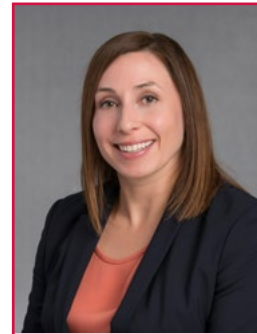
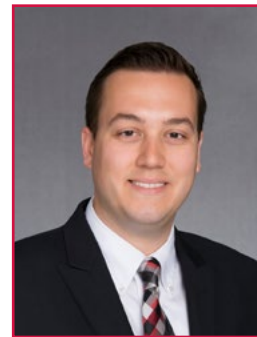
If the landlord owns nearby property or if the subject property is part of a larger development, the tenant may want to insist on restrictions that protect tenant's exclusive operation of its business. The landlord might be agreeable to such restrictions depending on the size of the tenant or the strength of the tenant's brand. But much will depend on the lay of the land and whether the landlord has already promised similar restrictions to another lessee. In return, the landlord will want to restrict the tenant's use of the property to a single use so that the landlord can optimize the mix of businesses and uses within the shopping center and ensure none of its lessees cannibalize each other. Any restrictions should be set out in a memorandum of lease or other instrument recorded in the applicable real property records in a manner sufficient to encumber the property and any restricted property, as applicable.

Additionally, the tenant will want to review any existing restrictive covenants that burden the property. If none currently exist and the landlord plans on recording its own declaration of restrictive covenants, the tenant will want the right to review and make changes to such declaration before it's recorded. The landlord will oppose any significant changes or restrictions on its rights as the declarant. The tenant will also want to make sure the ground lease contains a prohibition against further encumbrances against the property without the tenant's prior approval since the owner could otherwise encumber the property without the tenant's consent.

5) Title insurance considerations:

Tenants under a ground lease may obtain a leasehold policy, which would insure the tenant's leasehold interest in the subject property. Because the tenant will construct its own improvements and has agreed to lease the property for a substantial period of time, a ground lessee has title concerns similar to a fee simple owner in that there is risk of substantial loss if the property cannot be used for its intended purpose. The insured amount under the policy can be based on the aggregate rental payments due under the life of the lease, the market value of the real property or the cost of improvements made or to be made by the tenant.

In conclusion, entering into a ground lease may be mutually beneficial for landlords and tenants when the



economics make sense, but the parties need to be aware of the key issues and considerations inherent to ground leases which differ from those in a standard lease or purchase and sale.

Welcome New Members!

Erika Anderson
LP Risk, Inc.

Joshua Macias
Rackspace Hosting, Inc.

Janette Dansby
Rackspace Hosting, Inc.

Todd Stanley
Adeavor

Bradley Wilder
Harland Clarke Holdings Corp.

Stan Little
Harland Clarke Holdings Corp.

Pamelyn Woodfolk
Harland Clarke Holdings Corp.

Rachel Rolf
Trinity University

The Do's and Don'ts of Conducting an Internal Investigation

By Butch Hulse, Dykema

A well-executed investigation can assist a company to stop or even prevent wrongdoing. It can mitigate the harm or consequences of wrongdoing that may have occurred and prevent potential lawsuits by third parties. Government agencies also expect and reward internal investigations as part of an effective compliance program. Indeed, in several noteworthy instances, the government has declined to pursue charges against a company based on its handling of suspected illegal conduct, including the thoroughness of its internal investigation. A fair investigation also demonstrates to employees and other stakeholders that the company takes allegations of wrongdoing seriously and promptly addresses them, thereby improving a company's culture. However, a poorly executed investigation can make matters materially worse and potentially create liability where none previously existed. It can foster a lack of trust and whet the appetite of the same third parties or governmental agencies you would prefer to avoid.

Yet, despite the possible consequences, many companies are ill prepared to conduct an internal investigation. Many approach every investigation in the same rote manner by strictly adhering to a "playbook", or worse, they approach every investigation in an ad hoc manner with each investigator left to do as he/she sees fit. Advance planning and preparation can be the difference between a well-designed, minimally disruptive and ultimately effective investigation and an incredibly disruptive one that leaves stakeholders and employees frustrated or worse.

A thorough investigation has seven basic, but essential, steps: (1) choose the investigator; (2) develop the work plan; (3) collect and review the evidence; (4) conduct interviews; (5) reach a conclusion; (6) publish the conclusion; and (7) close the investigation. While these are generally listed in order, most investigations are not linear exercises and you will often need to circle back to

one step or another. The success of the investigation depends on executing each of these steps effectively.

Choose the Investigator

Choosing the investigator is not just the first step; it is also the most critical. Get this wrong and the outcome is predetermined. An effective investigator has some key essential characteristics or skills. The existence of these should determine who is assigned the task. The investigator should have the requisite experience and skill set to lead an investigation. Have they done it before? Can they communicate clearly and effectively? Are they organized? Detail-oriented? The investigator should understand the subject matter or issue at hand. For example, a leader in the human resources department may be the best person to handle an investigation into allegations of work-place harassment while an internal auditor may be better suited to investigation alleged accounting improprieties or allegations of embezzlement. The investigator must not be biased or susceptible to even the appearance of bias – nothing will destroy the credibility of an investigation faster, rendering the conclusion worthless and any action taken susceptible to challenge. The investigator should also be credible, independent and carry clout within the organization.

Develop the Work Plan

Once assigned, the investigator's first task is to develop the work plan. The work plan serves two critical purposes. It is the investigator's road map, detailing where he has been and where he is going, allowing him to stay on task. Equally, if not more important, the work plan is the backbone of the file once the investigation is closed. The work plan demonstrates whether the company conducted a fair and thorough investigation or cut corners and failed to consider critical sources of information. Because investigations are not linear and even the best plan requires revision, the work plan is a living

document. Accordingly, it should be reviewed constantly and updated often.

Collect and Review Evidence

Once the investigator has a plan, it is time to execute. The investigator should start by collecting and reviewing the evidence – at least that evidence that is easily or moderately accessible. The investigator can always go back and gather more, but they should "kick the tires" initially to get a sense of the veracity of the issue and ensure the work plan is on target. This initial review also allows the investigator to develop a timeline of the relevant events and ensure that they identified all key players. Email is frequently the most telling source of evidence and often provides a contemporaneous and often unvarnished view of what occurred, making it the ideal starting point for an investigation.

Conduct Interviews

Witness interviews are the next step in the investigation, and they are not easy to do – at least do well. Aside from selecting the right investigator, witness interviews are the most perilous step in conducting an investigation. A good interview can be invaluable in determining what actual happened – the ultimate goal in any investigation. A poorly handled interview can complicate the investigation, breed distrust and anxiety and even create liability. The investigator must always be honest but not necessarily open. They should share what they need to share to be effective, but also be sensitive to confidentiality and the reputations of others. The interviewer should be sensitive to the individual being interviewed as well as the person against whom an allegation was made. Be considerate and cooperative; let the person take breaks or end the interview if they insist. Don't bluff and don't make threats. That rarely works and usually backfires.

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Always have at least one additional person with you besides the person being interviewed. This does two important things. It allows you to focus on the interview – asking good questions, following up on leads, reading body language or facial expressions – while ensuring accurate and complete notes are taken. It also gives you a witness in the event things go awry and there is later a disagreement about what transpired or what was said.

Reach a Conclusion

Assuming you have circled back as necessary and are confident you have been thorough, fair and considered any evidence that is material to the issue and you are equally confident a *neutral* third party would agree, it's time to reach and publish your conclusion. Again, the role of the investigator is to do just that – reach a conclusion regarding what happened. It is not the investigator's job to prove or disprove an allegation. Taking that approach can lead you astray and make you more susceptible to confirmation bias or allegations that the investigation was neither fair nor thorough.

Publish the Conclusion

When publishing the results, the investigator should stick to the facts and be objective and balanced. They should document the evidence that supports the conclusions and factual findings, but also

document the evidence that may support a contrary conclusion. Again, be *fair* and be thorough. "Inconclusive" is not a bad word. As long as you were *thorough*, it may be the only *fair* conclusion.

Language matters. Avoid loaded, inflammatory or judgmental terms. They don't make the report any more persuasive. Instead, they subject the investigator and the investigation to criticism. For the same reason, the investigator should limit the use of adjectives and adverbs. Statements such as "egregious misconduct" or "patently unfair" do not assist in describing what happened, which is the investigator's role.

Close the Investigation

At this point, it is time to close the investigation, which has two essential elements. First, the investigator should create the investigation file. A complete file includes the final work plan (what you did), the evidence (what you considered) and the final report (what you concluded). A well-constructed file is one that a third party can review years later and conclude the investigation was fair and balanced and the conclusions were reasonable and accurate in light of the evidence. The next essential element is to close out with the people involved, e.g., the person who reported the issue, the people interviewed, and the people who assisted in gathering evidence. The goal here is to ensure people appreciate that an appropriate investigation was

conducted – the company took the matter seriously. There is no need to share your conclusions. Indeed, rarely should the investigator do so.

If executed well, the investigation and the contents of the investigation file will be of great value to the enterprise. If done poorly, the investigator will likely have made matters worse. Fortunately, with the right skill set, considerate planning and solid execution, the investigator can ensure the company is on the right side of this challenge.



About the author Butch Hulse is a member of Dykema's Litigation Department and Government Investigations and Corporate Compliance team. Hulse has extensive experience representing and

advising clients, including Fortune 100 companies, officers, boards and board committees on complex litigation, health care compliance, anticorruption compliance and other risk matters. Mr. Hulse has experience interacting with federal, state and foreign regulatory and enforcement agencies and has led numerous internal investigations, managed third party inquiries and investigations and litigated or managed litigation in a variety of complex and high stakes matters, including many "bet the company" disputes.

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Ethics Follies

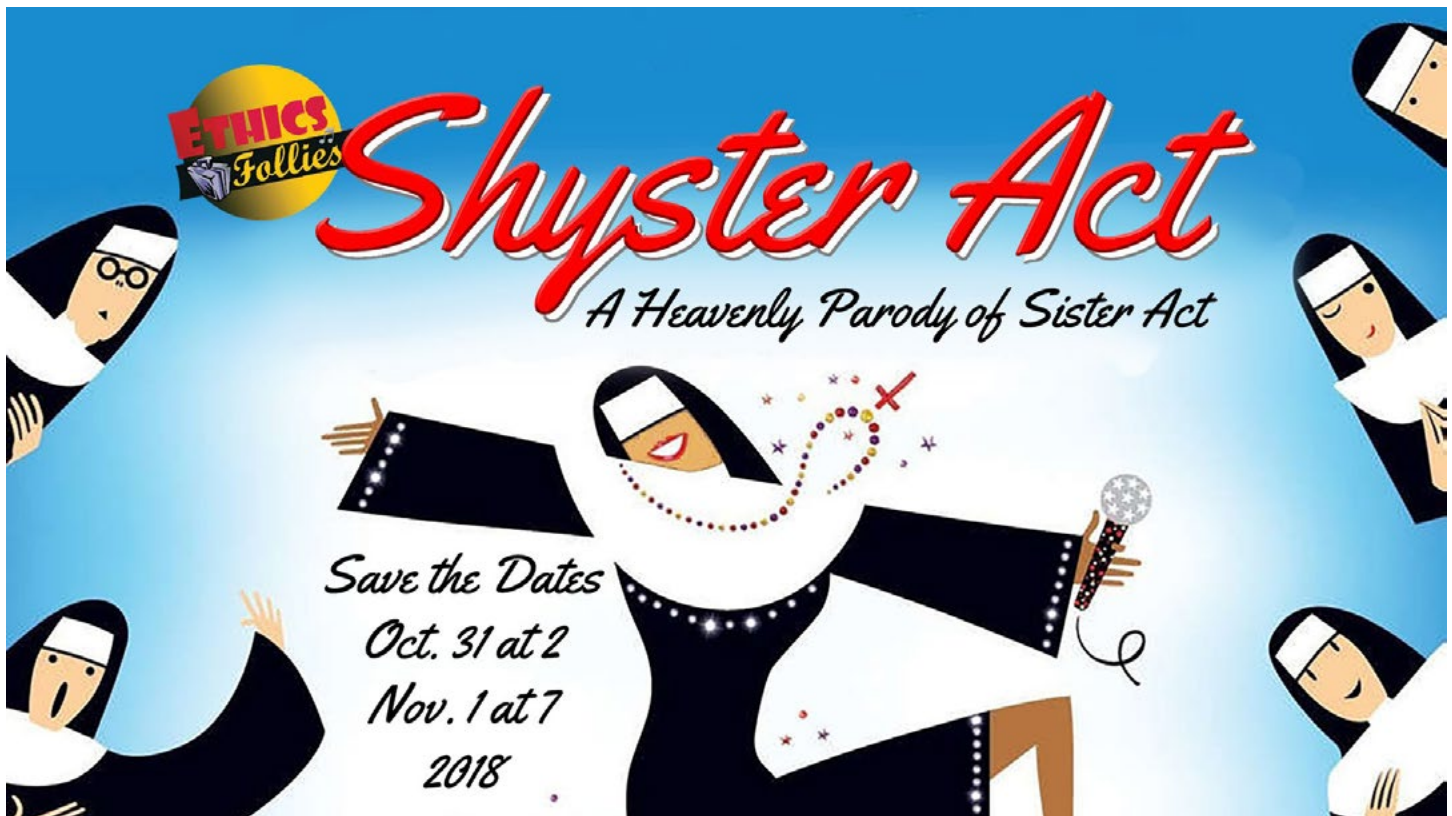
By Lee Cusenbary, General Counsel of Mission Pharmacal



Ethics Follies® 2018 is in full swing with two national legal conferences, two shows for our chapter and one show in New Jersey for the ACC New Jersey Chapter. We hope your company will sponsor this annual musical ethics event and attend to support our Chapter's annual event and The Community Justice Program. Show dates at The Empire Theatre are October 31, 2018 at 2 to 4:30 p.m. (so you get home in time to trick or treat with the kids) and November 1, 2018 at 7 with a catered reception afterwards. All attendees will receive two hours of Texas Ethics MCLE and a great time of memorable ethics and entertainment.

Shyster Act is a year in the making, with a fully-produced parody of Whoopi Goldberg's "Sister Act." Our version is called "Shyster Act" and is full of current ethics issues in the media, in the boardroom, in the courtroom, and in Washington, D.C. You'll enjoy 45 attorneys, judges, professional actors and other volunteers as they tell the story of a famous entertainer who overhears her attorney discuss a social media data manipulation scheme to get a U.S. Senator elected. She must go into hiding in a local nunnery to avoid being killed by the shyster attorney she once trusted. Both the nuns and the famous singer learn something about ethics and the importance of trust in the fast-paced musical comedy. Don't miss ACC's President, Brenna Nava, dancing beautifully with other ACC members in the number #MeToo or the entire plot told by attorney Grant Bryan and Judge Philip Kazen in a parody of Barry Manilow's Copacabana, complete with showgirls.

Other songs parodied in *Shyster Act* include hit songs by Demi Lovato, *Dear Evan Hansen*, Dua Lipa, Donna Summer, Megan Trainor, and others. Go to EthicFollies.com to purchase individual CLE tickets in the Mezzanine for either show date. You can also sponsor the event to show your support for an annual ethics conference in San Antonio and benefit the CJP. If you would like to participate in the show in a big or small way, there is a spot that is just right for you. Just let Amber Clark or me know you are interested. Thanks for your support of our Chapter's annual event.



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Email your comments to southcentraltx@accglobal.com.

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