President’s Message
Wes Sharples, Senior Legal Counsel- Lewis Energy, ACC South/Central Texas Chapter President

The other night my car thermometer read 92 degrees at 9:30 p.m. I was surprised because it actually felt hotter. It’s summer in South Texas, the dog days, with back-to-school fast approaching. Hopefully, you’ve found time to escape the heat and relax, perhaps under an umbrella, tropical drink in hand, with commercial worthy views of a tropical locale.

Ok, enough day dreaming. Your Chapter has not slowed down for summer vacation, providing a full calendar of social and professional events:

• **9th Annual Family Night with the Missions.** Peanuts, popcorn, cracker-jacks, and the opportunity to take in a ballgame with friends and family. On May 18th, Family Night with the Missions was well attended by members and sponsors. Cheers and laughter were abundant and, while I cannot report on the outcome of the game (bedtime intervened for the kiddos), I am confident in declaring victory for our Chapter. Thank you to Amber and to the Social Events Committee for organizing another successful event.

• **Foodie Fridays.** In June, we enjoyed sliders at Sangria on the Burg. I’ll be back at a later date for refreshments. In July, it was tacos at El Machito in the Quarry. Thank you to Sherena Shaw-rieh and Monica Lerma for organizing. We’re looking forward to the August lunch, which Brenna Nava is organizing at the new Bottling Dept. Food Hall in the Pearl.

• **Monthly Luncheons.** At the June luncheon, Jackson Walker, a long time valued sponsor of our Chapter, provided practical advice for preparing and executing transformative corporate transactions. In July, Bracewell provided an Environmental Law update. Our summer schedule was bookened by two new sponsors: Langley & Banack in June, with a presentation on Construction Law and Collections; and Kilpatrick Townsend in August with a Supreme Court update. The August luncheon was also our last at Oak Hills Country Club for the next several months. The Club is undergoing renovations, and we will be relocating to the Plaza Club for the remainder of 2017.

I hope you enjoy the rest of your summer, and I look forward to seeing each of you in the fall.

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Some Best Practices to Remember
In addition to spelling out in your M&A deal documentation how the parties intend to deal with privilege ownership, to the right is a list of some common sense steps to follow to protect against waiver or loss of the privilege in the midst of M&A activity flurry:

1. Address post-closing ownership of the seller’s privilege in the relevant transaction (acquisition) documents. You can expressly include or exclude privilege from the transferred assets.

2. Avoid or have counsel manage multi-party e-mails and e-mail strings when discussing litigation and regulatory matters.

3. Give preference to oral updates over e-mails and document sharing.

4. Provide privileged documents as late in the acquisition process as possible.
The past few months have been quite eventful at the Association of Corporate Counsel (ACC) as we approach the final year of the five-year strategic plan launched shortly after I was named ACC’s CEO. Our focus has been on using feedback from surveys, focus groups, and leadership discussions to design the next five-year strategic plan to meet the evolving needs of ACC members.

With staff offices in Washington, DC and Melbourne, Australia, and a new office opening later this year in Hong Kong, our team of in-house professionals stands ready to serve ACC members regardless of the time zone. Combined with the local services and networking opportunities offered by ACC chapters, we continue to believe that ACC offers an unmatched value proposition. Over the past few months, I’ve attended some of these amazing chapter programs and met many of our chapter leaders in person.

This spring, my travels have taken me to ACC chapters near and far — from St. Louis to Tel Aviv, to Europe, and to Dubai.

Most recently, I returned from Tel Aviv, where ACC Israel hosted its 15th Annual Summit, borrowing the theme of the “Inside Counsel Revolution” from the program’s keynote speaker, Ben Heineman, Jr., former General Electric GC. Approximately 300 in-house counsel, or two-thirds of all ACC Israel Chapter members, turned out to support the impressive conference. I was honored to offer welcome remarks, present on professional development strategies for women in corporate legal departments, and moderate a career forum.

Closer to home, I had the pleasure of joining ACC St. Louis for the Ferguson Twilight Run, although I must admit to only walking briskly. It was a terrific, community-focused good time! The chapter is celebrating its 30th anniversary in 2017 with the mantra, “ACC St. Louis – 30 Years Young and Still Keeping its Members Informed, Inspired, and Involved.” To highlight this milestone, ACC St. Louis has hosted a number of social activities for members and their families in addition to their usual strong slate of CLE programs.

ACC was also excited to charter a new chapter, ACC Oklahoma, the first US-based chapter in many years. The chapter will serve members from Tulsa to Oklahoma City, and although a personal conflict prevented me from meeting its leaders this spring, I am anxiously looking forward to visiting them soon. The ACC team and I look forward to supporting ACC Oklahoma as it thrives and grows!

In May, I attended the ACC Europe Annual Conference in Cascais, Portugal, where a leadership theme guided the programming and discussion. Traditional sessions on legal updates, combined with interactive “learning labs,” helped us address how to “lead the law, lead the business, and lead yourself.” ACC staff also helped to present a program that I developed, called “8 Minute Mentoring,” an opportunity for participants to provide peer-to-peer mentoring through several separate eight-minute conversations.

A few days later, I was in Dubai to welcome the incoming ACC Middle East board of directors and attend the annual In-House Counsel Awards Dinner. ACC also announced a very special partnership between ACC and the Government of Dubai Legal Affairs Department (LAD). ACC will develop an innovative, first-of-its-kind certification program that will be available to all 6,000 in-house lawyers working in the countries that comprise the Gulf Cooperation Council (GCC). Slated to start in 2018, the certification credential will establish consistent best practices and standards for in-house lawyers in the GCC and beyond. At the signing ceremony, I was joined by Johann Le Frapper, chair of the ACC global board of directors and group general counsel at Pierre Fabre, as well as Jim Merklinger, ACC vice president and chief legal officer, who will lead development of the program.

We also announced ACC’s recent alliance with the Hong Kong Corporate Counsel Association (HKCCA), which will rebrand as ACC Hong Kong. As a result of the alliance, we are excited to be able to welcome about 800 new members, who will contribute valuable perspectives to their peers regarding doing business in Hong Kong and the greater Asia Pacific region.

Many of our members work for companies that have corporate counsel in India, given its importance as an emerging market. Last year in December, my travels took me across India, where I met with over 100 in-house counsel who were thrilled to connect with one another and with ACC. Since then, we’ve hosted quite a few programs in Bangalore, Mumbai, and New Delhi, and we are seeking to deepen our networks across the country. We expect that an ACC India Chapter will be on the horizon for 2018.

Every interaction with members reminds me that peer connections are the backbone of a strong in-house counsel network. We could never achieve this without the support and drive of our chapter leaders. We are appreciative for the work that you do and look forward to continuing to work with you in service to all ACC members. Thank you again for your contributions to ACC!
ACC News

ACC Annual Meeting: Rates Increase after September 13
The 2017 ACC Annual Meeting, the world’s largest gathering of in-house counsel, is scheduled for October 15-18 in Washington, DC. 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. Visit am.acc.com to build your customized schedule.

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, Nov. 7-9
• Finance and Accounting for In-house Counsel, Sept 25-27
• Project Management for in-house Law Department, Nov 13-14
Learn more and register at www.acc.com/businessedu.

Law Department Leadership 2.0 is coming to Montreal
Law Department Leadership 2.0 is back and coming to Montreal for the first time on 18 September. This popular program will provide you with the skills you need to be an effective leader in your company. Sessions will focus on getting the most out of your team, selling your ideas to senior management, trends in the in-house market, and essential project management skills for in-house leaders. Register today at www.acc.com/ldl.

Just Released — Global Perspectives: ACC In-house Trends Report
Based on responses from 1,800 in-house counsel in 53 countries, the Global Perspectives: ACC In-house Trends Report reveals insights that lawyers, department leaders, aspiring in-house counsel, law firms and anyone working with inside counsel can use to plan a positive future. It covers trending topics such as the inside-outside counsel relationship, career mobility, professional development, department resource allocation, cybersecurity, professional privilege, and more. Interviews with global in-house counsel sharing their experiences are also included. Visit www.acc.com/trends to download your report today.

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.

Post Non-US Jobs for Free!
Take advantage of FREE unlimited postings until October 31, 2017. All postings will remain live through the end of the year. Post your in-house counsel positions to ACC Jobline where they will be seen by thousands of qualified candidates. Learn more.

ACC Alliance Partners
Legal solutions from Thomson Reuters deliver best-of-class products and services for your corporate legal department. Their solutions include practice tools as well as software and services to manage department resources. With eligible purchases of Thomson Reuters legal solutions, members may earn “ACC Dollars” which can be used toward ACC-related purchases. Learn more here.

WOULD YOU BE INTERESTED IN VOLUNTEERING?
We are always looking for volunteers to help with our various 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 and their chairpersons. Contact Amber Clark, Wes Sharples, or any ACC board member for more information.

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Board Leadership
Monica Lerma
Charitable Giving
Scott Shreder
Community Outreach
Brenna Nava
Ethical Life Awards
Kay Mary Harrell & David Kilgore
Ethics Follies
Lee Cusenbary
Foodie Fridays
Brenna Nava & Monica Trollinger
Golf Tournament
Rich Reynolds & Tim Alcott

Membership
Rich Reynolds
Oil & Gas Group
Wes Sharples
Roundtables and Programming
Kelly Curl
Running Club
Javier Aranda
Social Events
Kathy Yates
Women’s Interest & Networking
“WIN” Group
Ingrid Etienne
Notice to ACC Members Regarding 2018 Proposed Slate of Officers:

Our chapter’s membership will get a chance to vote on next year’s ACC South/Central Texas chapter officers at our annual business meeting, which will take place on September 6, 2017 during our September luncheon.

Pursuant to the chapter’s bylaws, the nominating committee proposes the following slate of officers for 2018:

Proposed 2018 ACC Board of Directors:

President for 2018:
**Brenna Nava**
Rackspace

President-Elect:
**Zandra Pulis**
CPS Energy

Treasurer:
**Javier Aranda**
Whataburger

Assistant Treasurer:
**Scott Shreder**
USAA

Secretary:
**Kelly Curl**
Andeavor

Vice Presidents:
**Mike Dillinger**
Nustar Energy (New Addition)

**Kay Mary Harrell**
DPT Laboratories

**Jessica Lerma**
Capture RX (New Addition)

**Monica Lerma**
iHeart Media

**Courtney McKendrick-Green**
Jordan Foster Construction
(New Addition)

**Rode Moore**
Zachry Group

**Erin Seki**
HEB

Immediate Past President
**Wes Sharples**
Lewis Energy

Who Owns the Attorney-Client Privilege in Merger and Acquisition Transactions? A Refresher for Transactional Practitioners.

*By Lui Chambers, Shareholder, Langley & Banack, Inc.*

Privilege Ownership – The Basics

We all remember that moment in law school when we first learned about the attorney-client privilege—the sacrosanct common law evidentiary privilege that protects communications of legal advice between attorneys and clients, including communications between corporate employees and a corporation’s attorneys.¹ The privilege is typically waived when the privilege holder discloses the protected information to a third party. In the context of M&A transactions, the privilege is often waived because the privilege covers only “communications” between the lawyer and his client.

When transactional attorneys work on M&A transactions, particularly on the buy-side, we often focus on a seller’s or a target’s litigation matters. For instance, we ensure that we (i) reflect all such matters properly on disclosure schedules and (ii) take the financial impact of litigation exposure into account when defining the purchase price. Rarely do we shift our focus from our disclosure obligations to addressing the transfer of the attorney-client privilege post-closing between a purchaser and a seller with respect to the M&A communications itself or the disposition/acquisition of assets.

The general rule established by the U.S. Supreme Court in 1985² is that absent an agreement to the contrary, the privilege transfers to the purchaser after the sale of a business that results in a change of


² See continued on page 5
In Texas, whether the attorney-client privilege transfers with an acquisition will depend on whether the acquisition is considered a merger or if the acquisition was by purchase/sale of all or substantially all of the assets of a company. Transferring assets alone, without any attempt to continue the pre-existing management or operation of those assets, generally does not transfer the attorney-client privilege. However, when a company passes to new management, the authority to assert the privilege also goes with all or substantially all of the assets, and where all the business is continued by the purchaser, the privilege also goes with control (management). Practitioners must note, however, that Texas law does not provide a blanket privilege for all M&A–related communications. Where it gets tricky is in carve-outs transactions, e.g., in the context of a sale of only a portion of a company’s assets, or a sale of one of its divisions or portion(s) thereof. Another grey area is M&A deal communications. Different states take different approaches. Courts will look at a number of factors to make a determination on privilege ownership. Leaving this decision open for the courts to ponder, however, introduces uncertainty into your transaction.

Include Privilege Ownership Provision in Your Transaction/Acquisition Documents

In Texas, as well as in other jurisdictions, including New York and Delaware, the applicable rule on transferring privilege may be varied or contradicted in the acquisition agreement, i.e., denied or affirmed with specific language. Thus, it is important that the question of privilege ownership should be expressly addressed in the acquisition agreement. In doing so, the drafter should carefully consider the following questions:

1. Which communications between the purchaser and seller are covered? Should communications during deal negotiations become the purchaser’s privilege? That is actually the rule in Delaware, while in New York, the privilege for deal communications remains with the seller after the closing.

2. Who has access to the privileged communications? The purchaser only? Is there a common interest agreement in place? Does your jurisdiction recognize the common interest privilege or the “allied litigant” privilege? Do the parties retain the right to use the privileged communications against each other?

3. Who controls the privilege? When litigating with third parties? When litigating with regulators or governmental agencies?

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4. Under the common interest doctrine, privileged information can be disclosed to a separate entity that has a common legal interest with the privilege holder, whether or not the third party is a co-defendant. In some jurisdictions, the common interest doctrine can be used to protect disclosures made during the due diligence process.

5. Texas does not subscribe to this approach and requires that the communications alleged to be covered were made to a lawyer (1) representing another party in a pending action, and (2) concerning a matter of common interest therein. See Tex. R. Evid. 503(b)(1)(C) (Confidential communications to which the attorney-client privilege applies include those “by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action, if the communications concern a matter of common interest in the pending action[,]” (emphasis added); see also In re XL Specialty Ins. Co., 373 S.W.3d 46, 50-52 (Tex. 2012) (construing Tex. R. Evid. 503(b)(1)(C) as the “allied litigant” privilege, the Court held that communications must be made in the context of a pending action, and they must be “made between a client, or the client’s lawyer, to another party’s lawyer, not to the other party itself.”).

6. New York makes a distinction between the privilege that is implicated by communications about general business matters before merger negotiations and the privilege invoked by the communications about the merger itself. The privilege from general business communications belongs to the surviving entity or the purchaser, while the privilege with respect to merger communication between the parties does not pass to the surviving entity.
Don’t Miss!

For the remainder of 2017 our monthly CLE luncheons will 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/santan.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 are specifically geared to meeting the needs and issues of in-house counsel.

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.

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.

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!

Upcoming Events

October 2, 2017
Oil & Gas Group Luncheon: OSHA Update Under the Trump Administration sponsored and presented by Katten Muchin Rosenmann LLP at TopGolf 12-1pm

October 4, 2017
October Express CLE Luncheon - Labor & Employment Topic TBA, sponsored and presented by Schmoyer Reinhard at The Plaza Club 12-1pm.

October 25th (3:30pm) & October 26th (7pm)

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

Christine Floyd
USAA

Julia Hedgpeth
USAA

Caitlin Larsen
James Avery Craftsman, Inc.

Ryan Reiffert
WGVS USA, LLC

Sydney Schneider
Rackspace Hosting, Inc.

Holly Windham
Rackspace US, Inc.

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.

Fuego 5K- Thanks Preferred Counsel & Whataburger for sponsoring Team ACCelerate
Ten years ago, Amber Clark and I walked into the Empire Theatre and couldn’t believe that the Las Casas Foundation was going to let us use the theatre for ACC’s Ethics Follies! Now, we are preparing to celebrate the tenth anniversary getting “our ethics at The Empire.” Don’t miss this special show, which is the continuation of the first production at The Empire, “Decent’s Descent.” It features parodies from current hit Broadway shows Waitress, Dear Evan Hansen, Book of Mormon and a new episode of the Spanish telenovela, Maraca 9.

The first meeting of the cast and crew is September 21st at Dykema Cox Smith at 6 p.m. You are invited to come and be a part of the cast or crew this year. You can make a prop, find a costume, sing and dance, or help move sets backstage. It’s all fun and it’s all for a good cause. The Community Justice Center continues to rely on our chapter for half its budget each year, so we need your help to get law departments and law firms to sponsor the shows on October 25 at 3:30 and October 26 at 7. There are catered receptions after both shows, so enjoy a drink and some great food while you network with others who believe “good ethics is good for business.” Feel free to contact Amber Clark of Lee Cusenbary (lee.cusenbary@missionpharmacal.com) to get involved in this special anniversary show!

Save the Date!

Please mark your calendars for the shows on October 25 at 3:30 and October 26 at 7. Catered networking receptions follow both performances and benefit the Community Justice Program as part of our ACC Chapter’s commitment to pro bono work. Last Ethics Follies season, our chapter donated $18,000 to the CJP to help provide free legal services to those in need. By inviting your executive suite to attend Ethics Follies, you can gently remind the leadership why “good ethics is good for business.” They will also have a great time and network with other city leaders. Get your ethics at the Empire this October.

Cast and crew of Maraca 9: “The Wall Between Us” rehearses for their over-the-top soap opera featuring leadership ethics. NuStar Energy has donated the use of their executive’s jet for the short film this year.)
Summer Fun

Foodie Friday Event

WIN Event

ACC Volunteer Event with San Antonio Food Bank
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