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President's Message

Michael Herman, SVP/GC, Rayonier Inc.

My Cheese Moved

A couple of newsletters ago, my President's Message discussed the book "Who Moved My Cheese," the classic tale about preparing for, adapting to and embracing change. Since then, I've had to live my own column.

My cheese moved.

On January 27, 2014, my employer, Rayonier, announced that it was splitting up the company by spinning off our specialty cellulose business, which we call Performance Fibers, from our Timber and Real Estate business. The new company will also trade on the NYSE.

Rayonier, a timber, real estate and specialty cellulose (a natural polymer) company, was birthed 87 years ago, in Shelton, Washington. In 1937, three companies who made specialty cellulose merged to form Rayonier and took it public on the NYSE. That same year, Rayonier headed east and built its first specialty cellulose facility outside of Washington, in Fernandina Beach, and began buying timberlands in Florida and Georgia, in addition to continuing timberland acquisitions in Washington. In 1954 we built our mill in Jesup, Georgia, which at the time was the largest of its kind in the world. In 1957, that first mill in Shelton closed.

Everything changed in 1968 when a big conglomerate, ITT, bought Rayonier. In the 1970's, at the urging of ITT's CEO, Rayonier built a specialty cellulose mill in Quebec, which failed so spectacularly that it closed in less than ten years and Fortune Magazine wrote a cover story about it. In 1985, we put all of our timberlands into a master limited partnership, which also traded on the NYSE. We later bought back all of the units and recombined the timber business with the rest of Rayonier.

And the march eastward that began in the 1930's was culminated in the 1990's, when Rayonier closed its remaining two Washington specialty cellulose mills.

Conglomerates fell out of favor and ITT spun off Rayonier to ITT's shareholders in 1994, and Rayonier was once again traded on the NYSE. (Incidentally, ITT has spawned so many spin-offs since then—including a few in the last couple of years--that I have lost count.) In 1999 we bought a million acres of timberland in Florida, Georgia and Alabama, and moved our headquarters to Jacksonville from Stamford, Connecticut. In 2004, Rayonier converted to a Real Estate Investment Trust (REIT), one of only two REITs at that time focused on timberland. In 2013 we completed our largest capital project since we built the 1954 Jesup mill--a $400 million expansion that took two years and thousands of skilled tradesmen to complete.

And now January 27.

Forest products companies don't exactly move with the speed of a Google. We grow trees, after all, and that long-term perspective permeates our culture. And that long-term perspective has made me also reflect on all the cheese moving in my career since I graduated law school in 1987.

I started my first job as a lawyer at a large firm in New York City, Shearman & Sterling, just in time for the October, 1987 stock market crash. I saw grown men cry. A despondent soul actually jumped from our building, from a few floors up from our offices. Around this time, big firm lawyers began leaving the practice of law in droves to become investment bankers, only to find themselves out of work a few years later when the economy turned down in 1991.

My next job, as a deal lawyer for a subsidiary of IBM, coincided with the company's nadir—the dawn of the PC and software age, which helped kill IBM's mainframe and big storage businesses. I got out just as the IBM CEO was "retired" and the top-to-bottom restructuring of an American industrial icon began.

Next, I joined a privately held chemical company, General Chemical, which dated back to 1899 and had been spun off from Allied-Signal (now Honeywell, after a merger a few years ago). In 1993, we released sulfuric acid mist in an 8-mile cloud over Richmond, California and the crisis almost destroyed the company, but we made it through criminal charges, 60,000-plaintiff class action litigation, 14 regulatory investigations, insurance coverage litigation and a host of other legal challenges.

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Structuring Relationships with Staffing Companies to Avoid Joint Employer Liability

By Justin C. Sorrell and Richard N. Margulies, Jackson Lewis P.C.

Staffing companies offer employers a variety of valuable benefits, including lower fixed personnel costs and out-sourced HR obligations. With these benefits, however, come the risk that the employer and the staffing company may be legally considered "joint employers." This increases litigation exposure for the employer: a joint employment relationship makes the employer liable for labor and employment law violations committed by the staffing company or for harms suffered by individuals it may not have even considered as its own employees. Though an employer may feel like the deck is stacked against it in favor of a finding of a joint employer relationship (the EEOC's Guidance, for example, states that typically staffing companies and employers are joint employers), through diligent planning and a willingness to relinquish significant control over the staffing company's employees, the risk of joint employer liability can be reduced.

While the specific factors vary based on the employment law at issue, courts and governmental agencies generally find a joint employment relationship exists when both the employer and staffing company exercise significant control over workers and make determinations regarding the terms and conditions of the workers' employment. In other words, to avoid being a joint employer, the employer must be willing to allow the staffing company to be in control of essentially all of the typical elements of the employer-employee relationship, including hiring and discipline. This takes a degree of trust that can only be achieved through a properly structured relationship with the staffing company.

First, the employer should carefully evaluate the staffing company's workplace policies. The employer must rely on the staffing company to enforce all workplace policies or it will appear that the employer is exercising control over the staffing company's employees, so if the staffing company's policies do not meet the needs of the employer, the employer should insist on proper terms being adopted before engaging that staffing company.

Second, in order to avoid the appearance of controlling the hiring of workers, the employer must take steps at the front-end to clearly communicate the necessary qualifications for the job. By providing detailed job qualifications, the staffing company is more likely to be able to hire and place appropriate workers without the employer's additional input.

Third, the employer should ensure a system is in place that enables the staffing company to monitor job performance and take action in the event of deficiencies. For example, because the employer should neither discipline the workers nor force the staffing company to take specific action against a worker, the employer should ensure a reporting system is in place that allows the employer to report deficiencies in performance the staffing company can then investigate and resolve without further employer participation.

Fourth, the contract between the employer and staffing company should contain protective language in the event that joint employer issue does arise during litigation. The contract should contain a clear, strong statement that the staffing company is the sole employer of the workers. The contract should also contain an indemnification clause enabling the employer to be indemnified for employment law violations committed by the staffing company. Because an indemnification clause is only good if there is money available to pay the indemnity, the contract should also allow the employer to confirm the ongoing presence of sufficient litigation insurance to meet any indemnification obligations.

Structuring the relationship with the staffing company is key to avoiding joint employer liability. With the proper relationship in place, the employer will have a solid foundation from which it can enjoy the benefits staffing companies offer while reducing litigation exposure.

Perspectives on Contract Shipping vs. Less-than-Truckload (LTL) Shipping

By J.C. Van Lierop, III, Esq., Akerman LLP

Frequent shippers of freight are confronted with the question of whether, from a business standpoint, it is better to enter into a term contract with a trucking company to move its products or to ship freight on a less-than-truckload (LTL) basis. For the uninitiated, LTL shipments are made on a one-time basis, based upon the availability of space on a particular truck at a particular time going to a destination where the shipper needs its freight to be delivered. In many instances, shippers use transportation brokers to find LTL space that meets the shipper's needs.

So which is better? According to Mr. Shelby Turner, the Director of Transportation for Top Truck Logistics, LLC, a division of Southeast Farms, Inc., the answer depends on the shipper's particular circumstances. Turner says that both methods have their relative advantages and disadvantages: "Personally, I use both. Trucking companies are cheaper, but like to stick to their lanes. Brokers will cost a little more, but can cover a larger area."

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"If you have a load that consistently ships from point A to point B, contracting with a trucking company is your best bet," explains Turner. A contract guarantees a shipper will have space on a truck for a given period of time at a locked-in rate. By contrast, an LTL shipper assumes some risk that there may be no truck space available when it is needed. For example, LTL space can become scarce during the holidays. Other factors can also come into play. "I had three truckers tell me earlier this month that they will drive on Christmas day, but not to contact them the first week of deer season," a smiling Turner says. "By contracting, you avoid those situations."

Further, contract rates are generally cheaper than LTL rates, which normally range from $100-$160 per pallet if a broker is used. LTL rates also tend to fluctuate based upon the time of year. To illustrate the point, Turner said that over this past Thanksgiving, a shipment from Fargo, North Dakota to the Bronx cost $4,800. The regular rate is around $4,200.

Another consideration is time. In many instances, LTL shipments will take longer to arrive because they may be transferred several times at "breakbulk" terminals before reaching the final destination. Trucking companies generally take a more direct route and are therefore often faster.

On the other hand, shipping LTL, especially using a broker, offers great flexibility which trucking companies may not be able to match. "Brokers will have relationships with many owner-operators and with trucking companies that cover a large geographical area. Trucking companies will only run a certain number of trucks a week on specified routes, while brokers can find trucks servicing a wide variety of destinations at any time by using their load boards and databases," Turner says. Turner believes this is a great advantage of LTL shipping, especially when a shipper needs to make a shipment on short notice or one which doesn't occur on a regular basis. However, Turner warns, "There are lots of scams out there, so anyone new to the industry should be very careful."

Thus, as with many things in life and business, whether it is better to contract ship or LTL ship depends on the situation. Considerations of regularity, timing, expense, and availability are paramount in making a decision as to which shipping method to use. Given Turner's experience, either alternative may be more beneficial in a particular instance depending on the circumstances involved.

The author is an attorney in Akerman LLP's Jacksonville, Florida office. He has significant logistics experience gained while serving as the chief Logistics Officer for a 2,600-person U.S. Army aviation brigade.

The United States Supreme Court Changes the Standard for Title VII Retaliation Claims & Its Significant Impact on Florida Retaliation Claims

By Anthony J. Hall, Esq. & Ashley L. Fitzgerald, Esq., Littler Mendelson, P.C.

On June 24, 2013, in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517 (2013), the U.S. Supreme Court broke its long string of pronouncing expansive standards in the context of Title VII retaliation claims by requiring strict "but-for" causation and rejecting the more liberal "motivating factor" standard used for Title VII discrimination claims. Going forward, a plaintiff will be required to prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." While this more exacting causation standard may enable employers to defeat more retaliation claims at summary judgment, Nassar does not eliminate—or even reduce—employers' need to guard against retaliation claims through sound policies, prompt investigations and supervisory training.

Nassar's Retaliation Claim

Dr. Naiel Nassar, a former professor at the University of Texas Southwestern Medical Center, sued the University for Title VII discrimination and retaliation after he was denied a position at the University's medical clinic. With respect to his retaliation claim, Nassar alleged the University did not hire him because, in his prior employment with the University, he made complaints of discrimination.

Before the District Court and the Fifth Circuit Court of Appeals, Nassar and the University squared off on the causation standard for retaliation under Title VII: the University maintained that Nassar needed to prove he would have been hired "but-for" his prior discrimination complaints, while Nassar argued he needed only to establish that those complaints were a "motivating factor" in the University's decision. The opposing positions mirrored a nationwide split on the Title VII retaliation causation standard. The split originated from the U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*, which held that "but-for" causation applied to ADEA retaliation claims. Consistent with its heightened interest in retaliation claims, the Court granted certiorari to resolve the split the *Gross* decision inspired.

The Supreme Court's Analysis

Retaliation claims have skyrocketed in recent years, which may explain why the Court has taken such an interest in them.

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In 2012, 38% of all charges filed with the EEOC included a claim of retaliation. At oral argument in *Nassar*, Justice Kennedy acknowledged this growing trend and warned that the Court should be very careful about the causation standard, especially where a failing employee claims retaliation as a "defensive mechanism" when termination appears imminent.

With this concern as a backdrop, the Court approached the causation question by looking to the 1991 amendment to Title VII that established the "motivating factor" standard for discrimination claims. The amendment provides that Title VII is violated "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." According to the Court in *Nassar*, excluding "retaliation" from the 1991 amendment evinces Congress's intent to require plaintiffs to prove "but-for" causation for retaliation claims.

In adopting the "but-for" causation standard, the Court rejected arguments by Nassar and the government (which joined in the oral argument) that retaliation is synonymous with discrimination and, therefore, Congress did not need to separately mention retaliation in its 1991 amendment. The Court acknowledged it has previously applied such reasoning in the context of broadly-worded anti-discrimination statutes, but found the reasoning to be "inappropriate in the context of a statute as precise, complex, and exhaustive as Title VII." The Court also rejected arguments that the "motivating factor" standard should be adopted because it is consistent with the EEOC's interpretation, as expressed in the agency's Compliance Manual and other published guidance. Writing for a 5-4 majority, Justice Kennedy opined that the EEOC's interpretation did not specifically address or reconcile the omission of retaliation from the 1991 amendment and relied on circular reasoning. Therefore, the EEOC's position was not sufficiently persuasive to warrant deference from the Court.

While the dissent voiced strong objection to applying two different standards to claims of discrimination and retaliation under the same act, the majority maintained the distinction is not only mandated by the text of the statute, but also critical to the "fair and responsible allocation of resources in the judicial and litigation systems." Echoing concerns raised at oral argument, the Court again noted the upsurge in retaliation claims and worried that an employee facing demotion or termination "might be tempted to make an unfounded charge of … discrimination" to stage a retaliation claim to prevent the "undesired change in employment circumstance." According to the Court, a lower causation standard would make it difficult for employers to combat these frivolous claims at the summary judgment stage and, consequently, would divert judicial, administrative and employer resources from legitimate efforts to combat discrimination and harassment.

Effects on Florida Employers

As the Supreme Court has changed the standard for federal claims, this change has implications on claims brought solely under Florida law. If a claim of retaliation is brought under the Florida Civil Rights Act (rather than or in addition to Title VII) or one of the other Florida retaliation statutes, the federal and state courts construing those claims routinely analyze them by utilizing the same analytical framework as its federal counterparts, including Title VII. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1995). Thus, such claims alleging retaliation under the Florida law, will likely utilize the more stringent *Nassar* "but-for" causation standard going forward.

Implications to ADA Claims

Although only retaliation claims brought under Title VII were specifically addressed by the Supreme Court, the Eleventh Circuit uses the same analysis for retaliation claims under the Americans with Disabilities Act (and its state counterpart) as it does for Title VII retaliation claims. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). Accordingly, in the Eleventh Circuit, it is arguable that the change in causation for retaliation claims brought under the ADA will also be analyzed using the *Nassar* "but-for" analysis.

Indeed, other courts have utilized the Nassar "but-for" causation analysis to claims under the Rehabilitation Act. *Cross v. Commonwealth of Mass., Executive Office of Labor and Workforce Dev.*, Civil Action 12-10424-RGS, 2013 U.S. Dist. LEXIS 98983, at 4 (D. Mass. July 16, 2013).

What Practical Steps Should Employers Take?

Although the Court in Nassar adopted the more exacting "but-for" causation standard for Title VII retaliation claims (and likely for Florida state law and ADA claims), the application of this standard is unlikely to lead to a noticeable decrease in such claims. When the Court imposed the "but-for" causation standard for ADEA retaliations under Gross, there was a nominal 1% decrease in age charges filed with the EEOC; at best, a similar decrease can be expected post-*Nassar*. As such, employers must remain vigilant in responding to complaints of discrimination and take prophylactic measures to protect against retaliation claims.

To guard against such claims, employers should consider taking the following steps:

- Develop and implement strong anti-retaliation policies.
- Educate and train all managers and supervisors about unlawful retaliation and the company's policies against it.
- Provide multiple avenues for reporting discrimination claims, at least one of which is outside of the employee's chain of command.
- Promptly investigate all complaints of discrimination, using an outside investigator where appropriate.
- Validate the legitimate business reasons for disciplining or terminating an employee who engaged in protected activity prior to taking any adverse employment action.
- Ensure that the complaint, investigation, and conclusion(s) of an investigation are properly documented.

Implementing these steps effectively will maximize an employer's ability to utilize the reasoning and holding in Nassar to combat frivolous retaliation claims at the summary judgment stage.

E-Verify Updates and Impact of the Federal Government Shutdown on Immigration and Employment Verification Matters

By Giselle Carson, Marks Gray, P.A.

E-Verify is the web-based employment verification tool of the future and soon you may be asked "should we be using E-Verify?" or "what is our exposure?"

This update provides you with guidance to minimize E-Verify Tentative Nonconfirmations (TNCs) and liability, and to overcome recent system challenges.

Also, for 16 days in October, as a result of the federal government shutdown, many immigration and employment verification services were adversely affected which resulted in employers' inability to hire and retain key personnel. This situation could repeat itself in the near future. Here is an overview of how services were impacted during the federal government shutdown, and guidance for the future.

E-Verify

A key component of any immigration reform package will be the nationwide implementation of E-Verify. E-Verify is an internet-based system that compares information from Form I-9, Employment Eligibility Verification, with the DHS, SSA and DOS records to confirm that an employee is authorized to work in the U.S.

Currently, many employers are proactively enrolling in E-Verify. Others are required to enroll as a requirement of their contracts with the federal or state governments, or because they operate in a state that mandates participation. There are a number of issues open for interpretation relating to states' mandate including what types of contracts are subject to the mandate, calculating the relevant number of employees and who is an out-of-state employee?

The activities of employers enrolled in E-Verify are being monitored by the USCIS' compliance unit and information is shared with ICE and OSC. Information shared includes incidences or patterns of "misuse, abuse, or fraudulent (E-Verify) use, the employment of unauthorized aliens and the failure to use E-Verify on all new hires." USCIS has advised that it is particularly monitoring employers with a high incidence of uncontested TNCs. As a result, enrolled employers must use the program consistently and promptly address all TNCs.

After an employee is entered in E-Verify, the system issues a confirmation or TNC of the employee's authorization to work.

The primary causes of TNCs are:

- Citizenship status non-confirmation (35%) which occurs because the employee's status changed since the person last received his/her SS number;
- SSA name mismatch (33%) which occurs because the employee changed names but did not report the change to SSA;
- Inability to identify Form I-94, arrival/departure record, number (7%) which occurs because the database is not updated timely; and
- USCIS name mismatch (5%)

If your company has a significant number of TNCs, you should take note of these primary causes and plan to address them during the Form I-9 employment verification process. A significant number of TNCs can lead to a government investigation.

However, as a result of the government shutdown and other system glitches, many employers have to resolve TNCs caused by the shutdown.

Resolving TNCs and FNCs resulting from the shutdown

Employees who received a TNC between September 17th and September 30th and could not resolve the TNC before the shutdown have twelve additional federal business days (Monday-Friday, not including federal holidays) from the date printed on the Referral Letter or Referral Date Confirmation to resolve the TNC.

Employers should close cases for employees who received a Final Nonconfirmation (FNC) or DHS No Show as a result of the shutdown and select either "employee continues to work for the employer after receiving a FNC result," or "employee continues to work for the employer after receiving a Now Show result." The employer should then create a new case in E-Verify for that employee. These steps are necessary for the employee to continue to work and have an opportunity to timely contest and resolve the TNC that led to the FNC.

Resolving TNCs from an E-Verify technical glitch

On October 22, 2013, E-Verify encountered a significant technical glitch that caused erroneous TNCs to be issued for employees who provided U.S. Passports or Passport Cards. To resolve these TNCs, employers should close the case by clicking on the "Show Additional Choices" button, choose "Cancel Request" and select "Wrong Data" as the reason. The employer should then create a new case for the employee using the same U.S. Passport or Passport Card information provided for Form I-9.

Employers can contact E-Verify Customer Support at E-Verify@dhs.gov but should expect longer than usual delays and response times.

Preventing liability related to employment verification matters

When resolving E-Verify TNCs, employers must:

- Ensure that the employee is promptly notified of the TNC and provided with an opportunity to contest the TNC result;
- Not ask the employee to provide a different document if the document(s) provided by the employee is an acceptable document and appears to be genuine and relate to the individual presenting it;

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- Not request that the employee produces more documents than are required by Form I-9 to establish the employee's identity and employment authorization;
- Not take any adverse action against the employee during the TNC resolution period.

Refusing an acceptable document or requiring an employee to present a new or different document during the verification process could be considered document abuse and is prohibited under the Immigration and Nationality Act. Employers found to have requested more or different documents than an employee chooses from List A or List B and C have been fined $100–$1,000 per affected worker.

Employers are also prohibited from discriminating against workers on the basis of citizenship or immigration status. The OSC provides that employers can inquire in an interview or employment application whether an applicant is legally authorized to work in the U.S. If the applicant responds affirmatively, the inquiry should end. If the applicant responds in the negative, the employer can inquire into the person's current immigration status. Pre-employment questions should focus on employment authorization rather than the person's specific status as a citizen or permanent resident.

Employers found to have engaged in citizenship or status discrimination have been ordered to pay civil monetary penalties of $375–$3,200 per individual discriminated against for the first offense; $3,200–$6,500 per individual discriminated against for the second offense; and $4,300–$16,000 per individual for subsequent offenses.

U.S. Citizenship and Immigration Services (USCIS)

The majority of CIS' services and operations continued during the shutdown. However, we experienced processing delays which we expect will continue for a while now that the government has reopened.

Department of State (DOS)

Fortunately, most consulates remained open to process visas, issue passports and interview applicants but processing of visa applications was slower than usual.

Department of Labor (DOL)

The issuance of prevailing wages needed for the "green card" process and processing of PERM labor certification applications came to a halt preventing employers from starting the "green card" process for foreign nationals. DOL also stopped processing Labor Condition Applications (LCAs) limiting employers' ability to hire H-1B, H-1-B1 and E-3 workers. The PERM and iCert websites were down and did not open until a day after the government reopened, and continue to experience shutdowns and delays.

The Future

E-Verify and worksite enforcement are cornerstones of immigration reform and as they continue to evolve, they will impose a higher standard of due diligence for employers. With the government's ongoing enforcement efforts, it is critical that in-house counsel remain vigilant and aware of the trends in this area of law.

As to other immigration services, ongoing delays are expected as agencies reopen and begin processing cases that were on hold. We are expecting guidance from USCIS and DOL to retroactively handle missed deadlines, lapses in immigration status and other hardships resulting for the shutdown.

The Ethics of E-mail Communication & Suggested Best Practices

By Daniel F. Blanks and Kimberly T. Mydock, McGuireWoods LLP

Technology has revolutionized our way of life. The legal profession is no exception. With smart phones and virtually unlimited data storage available, lawyers have myriad tools at their disposal to practice law. And while technology makes our professional lives easier in many respects, Florida attorneys must still abide by the ethical and professional rules set forth in the Rules Regulating the Florida Bar.[1] In 2012, the ABA added provisions to the ABA Model Rules requiring lawyers to keep abreast of "the benefits and risks associated with relevant technology" [2] and to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information."[3] Florida has not yet considered these changes. This article reviews the Florida Bar's attempts to address the legal ethics of electronic communication with clients and adversaries — often creating more questions than answers — and suggests best practices to avoid breaching client confidentiality when using technology.

Advisory Ethics Opinions Guide Lawyers' Use of Advancing Technology in E-mail Communication

The advent of e-mail, smart phones, and tablets has enabled attorneys to constantly and rapidly communicate with their clients while sharing vast quantities of confidential client data from almost anywhere. The days of locked file cabinets and dusty boxes full of original client papers have been replaced with seemingly endless volumes of electronic data stored on key chain thumb drives, portable devices, and in the virtual cloud.

[1]While it is clear that Florida lawyers must abide by the Rules Regulating the Florida Bar, the impact of these rules and advisory ethics opinions regarding these rules on non-Florida attorneys should be analyzed through the perspective of multi-jurisdictional practice and is outside the scope of this article. Unlike Florida, most states' ethics rules sometimes require those states' lawyers to comply with the ethics rules of other jurisdictions in which they are litigating, where they act, etc. ABA Model Rule 8.5.

[2]ABA Model Rule 1.1, cmt. [8].

[3]ABA Model Rule 1.6(c).

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In the midst of this technological revolution, lawyers must be mindful of the professional and ethical rules, and in particular Rule 4-1.6(a) and Rule 4-4.4(b) of the Rules Regulating the Florida Bar, when implementing new technology: (i) Rule 4-1.6(a)[4] imposes a strict duty of confidentiality on Florida attorneys; and (ii) Rule 4-4.4(b)[5] requires notification by the recipient to the sender of inadvertently disclosed material.

In an effort to keep pace with the digital revolution, the Florida Bar Professional Ethics Committee (the "FPEC") has issued three formal advisory ethics opinions[6] since 2000 addressing attorneys' use of e-mail communication, including: (i) the need for e-mail encryption[7]; (ii) the mining of metadata[8]; and (iii) the use of electronic storage media[9].

a. Cryptic E-mail Encryption

As lawyers and clients have transitioned from the use of traditional mail and facsimile to e-mail, the confidentiality of electronically transmitted client data has raised new ethics concerns. To address one concern, in 2000, the FPEC issued a formal advisory opinion providing guidance on the use of unencrypted e-mail when communicating with clients.[10]

While first acknowledging that the FPEC had not yet "issue[d] an opinion on the confidentiality implications of using e-mail to communicate with clients," the FPEC noted that "almost all of the jurisdictions that have considered the issue have decided that an attorney does not violate the duty of confidentiality by sending unencrypted e-mail."[11] The FPEC adopted the majority view while cautioning attorneys to "consult with the client and follow the client's instructions before transmitting highly sensitive information by e-mail."[12] The FPEC further explained that a Florida attorney may send an unencrypted e-mail without violating an ethical rule "under normal circumstances."[13] However, a 2010 advisory opinion by the California Bar found that "encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous."[14] Therefore, Florida attorneys should be mindful of the potential need to use encrypted e-mail under certain circumstances.[15]

b. You Emailed Him What?!

Lawyers are also faced with client confidentiality issues when e-mailing electronic versions of draft documents to adversaries. Drafts exchanged with clients may include various revisions or comments exchanged between counsel and the client. Inadvertently disclosing the "metadata," or "information about information" stored within these electronic documents, could divulge confidential legal advice provided to the client or other proprietary information.[16] Lawyers, therefore, must be careful when sharing electronic documents to ensure compliance with ethical rules governing client confidentiality[17] and notification of inadvertent disclosure[18].

In 2006, the FPEC provided guidance to attorneys related to metadata and imposed certain duties on both sending and recipient attorneys:

> (1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and

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[4]Rule 4-1.6(a) states: "A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent." R. Regulating Fla. Bar 4-1.6(a).

[5]Rule 4-4.4(b) states: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." R. Regulating Fla. Bar 4-4.4(b).

[6]Pursuant to Rule 2-9.4(a) of the Rules Regulating the Florida Bar, the Board of Governors has promulgated rules governing the issuance of ethics opinions. *See* The Florida Bar, *Florida Procedures for Ruling on Question of Ethics, available at* http://www.floridabar.org/tfb/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/7b685 8c726e19c8a85256b2f006ca50b?OpenDocument (last visited Dec. 8, 2013) (hereinafter "Florida Procedures for Ruling on Questions of Ethics"). Both the FPEC and the Board of Governors have the authority to issue advisory ethics opinions. *Florida Procedures for Ruling on Question of Ethics*, §§ 1-2. While the ethics opinions are advisory only and thus non-binding, Florida courts have recognized that FPEC advisory ethics opinions are "persuasive authority and, if well reasoned, are entitled to great weight." *Chastain v. Cunningham Law Group, P.A.*, 16 So. 3d 203, 206-07 (Fla. 2d DCA 2009); *see* also *Fla. Bar v. Hines*, 39 So. 3d 1196, 1201 (Fla. 2010); *Florida Procedures for Ruling on Question of Ethics*, § 1.

[7]Fla. Bar Prof'l Ethics Comm., Formal Op. 00-4 (2000).

[8]Fla. Bar Prof'l Ethics Comm., Formal Op. 06-2 (2006).

[9]Fla. Bar Prof'l Ethics Comm., Formal Op. 10-2 (2010).

[10]Fla. Bar Prof'l Ethics Comm., Formal Op. 00-4 (2000).

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]Cal. Bar Standing Comm. on Prof'l Resp. & Conduct, Formal Op. 2010-179 (2010).

[15]The ABA has provided advice and helpful links to programs and instructions on how to encrypt e-mails. See American Bar Association, F*YI: Playing It Safe With Encryption, available at* http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/FYI_Playing_it_safe.html (last visited Dec. 8, 2013).

[16]*See* Fla. Bar Prof'l Ethics Comm., Formal Op. 06-2 (2006).

[17]*See* R. Regulating Fla. Bar 4-1.6(a).

[18]*See* R. Regulating Fla. Bar 4-4.4(b); *see also* Fla. R. Civ. P. 1.285 (governing inadvertent disclosure of privileged materials and noting that it does not "affect[] any obligation pursuant to R. Regulating Fla. Bar 4-4.4(b)").

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> to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.
>
> (2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit . . . .
>
> (3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must promptly notify the sender.[19]

MCGUIREWOODS

The Florida Bar's position on metadata is somewhat unclear and contradictory. Rule 4-4.4(b) only requires an attorney to notify a sender of an inadvertent disclosure. In fact, the commentary specifically declines to opine whether an attorney must *return* an inadvertently disclosed document.[20] In contrast, FPEC Opinion 06-2 cautions against an attorney attempting to access any hidden or concealed metadata.[21] Other jurisdictions have asserted varying opinions as to whether an attorney may specifically search or "mine" a document for hidden metadata. Two recent ethics opinions in other jurisdictions attempt to strike a balance, permitting attorneys to view metadata recovered using standard software but prohibiting mining through "special" or "forensic" software.[22] Because the FPEC issued one of the earlier opinions on metadata and technology continues to rapidly change, it is conceivable that the FPEC will revisit or update its opinion in the near future.

c. You Had What Stored on Your Phone?!

In 2010, the FPEC provided guidance to attorneys on complying with their ethical obligations when using devices that can store confidential client information, including cellular phones and other digital devices that contain hard drives. Specifically, the FPEC opinion outlined certain "reasonable steps" for lawyers to follow when using such devices:

> [W]hen a lawyer chooses to use Devices[23] that contain Storage Media,[24] the lawyer must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition. These reasonable steps include: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives[25] or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.[26]

While attorneys may employ devices such as smart phones, flash drives, and tablets in their practices, attorneys must continue to take reasonable steps to maintain client confidentiality. When retiring a smart phone, tablet, or other device, an attorney must ensure that all confidential client information is permanently removed prior to disposal.[27]

One thing is clear from the FPEC's advisory opinions, even the least technologically sophisticated attorney must be aware of the impact of technology on the attorney's ethical obligations. Indeed, the FPEC's opinions provide guidance to attorneys based on what is "reasonable" or "normal" based on existing technology. As such, Florida attorneys must be vigilant and stay informed as technology continues to evolve and change the way we practice law.

Suggested Best Practices

While technology makes our lives easier in many respects, it also creates more opportunities for attorneys to unintentionally breach client confidences or

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[19] Fla. Bar Prof'l Ethics Comm., Formal Op. 06-2 (2006) (internal citations and quotations omitted).

[20] *See* R. Regulating Fla. Bar 4-4.4, cmt. Florida Rule of Civil Procedure 1.285 explains that a party who inadvertently discloses materials may subsequently assert privilege to the materials by serving written notice. Fla. R. Civ. P. 1.285(a). Upon receipt of the notice, the recipient "shall promptly return, sequester, or destroy the materials" and all copies, in addition to notifying "any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule." Fla. R. Civ. P. 1.285(b).

[21] Fla. Bar Prof'l Ethics Comm., Formal Op. 06-2 (2006).

[22] *See* Or. St. Bar Bd. of Governors, Formal Op. 2011-187 (2011); Wash. St. Bar Ass'n Rules of Prof'l Conduct Comm., Advisory Op. 2216 (2012).

[23] Devices include: "computers, printers, copiers, scanners, cellular phones, personal digital assistants ('PDA's'), flash drives, memory sticks, facsimile machines and other electronic or digital devices." Fla. Bar Prof'l Ethics Comm., Formal Op. 10-2 (2010).

[24] Storage Media is defined as "any media that stores digital representations of documents." *Id.*

[25] In the context of FPEC Opinion 10-2, Hard Drives is used as the equivalent of Storage Media. *See id.*

[26] *Id.*

[27] *Id.*

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to otherwise violate their professional and ethical obligations. A few simple suggested best practices may avoid easy mistakes:

- Consult with clients regarding preferences and policies on how client information should be stored and transmitted electronically (some clients set a higher standard than the ethics rules, such as prohibiting their lawyers from storing client documents in the "cloud," etc.).
- Insert e-mail addresses into an e-mail communication only when the message is ready to send, and avoid using "auto-fill" functions when adding e-mail addresses.
- Become familiar with technology or methods to remove metadata from electronic documents or utilize software to "scrub" or "clean" a document prior to electronic transmission.
- Transmit password-protected documents and passwords separately.
- Verify security and encryption policies of cloud storage and third-party service providers prior to sharing or storing confidential client information.
- Password-protect laptops, tablets, smart phones, and other electronic devices.
- Activate software that can remotely erase data to protect information on lost or stolen devices.
- Review policies regarding sending electronic communications from non-business e-mail addresses regarding law firm or client business.

Implementing these practices may reduce the risk of an attorney's inadvertent disclosure of confidential client information, and thus help avoid an ethics violation.

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Rising Environmental Enforcement: Keeping Your Client Out of the Clink

Stacy Watson May, Esq., Of Counsel, Holland & Knight LLP

RECENT TRENDS OF FEDERAL ENVIRONMENTAL ENFORCEMENT. During the last four years, there appears to be an increased focus on pursuing higher profile environmental violations. Although the actual number of civil cases opened has declined slightly, United States Environmental Protection Agency ("USEPA") has promoted its enforcement actions through the press to a greater degree and repeatedly sought both civil and criminal penalties in cases receiving media attention. During that same time frame, there has been an overall increase in criminal enforcement by the USEPA. In FY 2008, the number of defendants charged was 176 contrasted with FY 2012, where 231 defendants were charged for criminal enforcement matters.

USEPA reports that in FY 2012, the its Office of Criminal Enforcement Forensics and Training (OCEFT) had fewer case carrying agents than in FY 2011, which played a role in the slight decrease in the new cases opened in 2012. USEPA also reports an increased focus on tier 1 and tier 2 cases, which are generally more complex and more resource intensive, resulting in more significant penalties. Office of Enforcement and Compliance Assurance, USEPA, Enforcement Basic Information, December 17, 2012.

I. FEDERAL ENVIRONMENTAL ENFORCEMENT PRIORITIES. USEPA and the Department of Transportation have identified many environmental enforcement priorities through fiscal year 2016, including the following:

- Combined sewer overflow, sanitary sewer overflow and concentrated animal feeding operations (CAFOs) pursuant to the Clean Water Act.
- Cutting toxic air pollution affecting communities' health and reducing widespread air pollution from the largest sources pursuant to the Clean Air Act.
- Mining and mineral processing pursuant to RCRA.
- Energy extraction sector pursuant to the Clean Water Act, Clean Air Act and the Safe Drinking Water Act.
- CFC Smuggling - The Environmental Crimes Section (ECS) led a national initiative to curb the smuggling of ozone-depleting chlorofluorocarbons (CFCs).
- Hazardous Materials - an initiative to combat the illegal shipment of hazardous materials by air, highway, rail or water.
- Worker Endangerment - The ECS and USEPA criminal investigation division provided OSHA compliance officers with criminal investigative and environmental training to enlist their help in identifying serious environmental crimes by employers who are willing to ignore worker safety laws.

II. CRIMINAL CASE SELECTION. USEPA's criminal case selection process is guided by two general measures: (i) significant environmental harm and (ii) culpable conduct. USEPA, The Exercise of Investigative Discretion, January 12, 1994. Significant environmental harm is measured by looking at the presence of actual harm, and the threat of significant harm, to the environment or health. Several factors serve as indicators to measure significant environmental harm, including: (i) actual harm; (ii) the threat of significant harm to the environment or human health; (iii) failure to report an actual discharge, release or omission; (iv) when certain illegal conduct appears to represent a trend or common attitude within the regulated community, criminal investigation may provide a significant deterrent effect incommensurate with its singular environmental impact.

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Culpable conduct is measured by evaluating the (i) history of repeated violations; (ii) deliberate misconduct resulting in violation; (iii) concealment of misconduct or falsification of required records; (iv) tampering with monitoring or control equipment; (v) business operation of pollution-related activities without a permit, license, manifest or other required documentation.

In addition to considering the significant environmental harm and culpable conduct, USEPA will review additional considerations such as the culpability of individual employees and their corporate employers. Whether the corporate officer or employee personally commits the act, or directs, aids, or counsels other employees to do so is inconsequential to the issue of corporate culpability. Corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done. On the other hand, USEPA policy strongly encourages self-monitoring, self-disclosure, and self-correction.

There is a universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while most serious environmental violations ought to be investigated criminally.

III. LESSONS LEARNED FROM RECENT HIGH-PROFILE ENVIRONMENTAL CASES. Several recent cases from the headlines highlight the need for environmental compliance and responsible management of violations.

A. THE HEADLINES. In addition to facing the civil suit which resulted in $1 billion in civil penalties under the Clean Water Act for the Deepwater Horizon incident which killed 11 people and spilled millions of gallons of oil, BP and Transocean Deepwater agreed to settle the criminal charges, paying $4 billion in criminal fines. The company, as well as three current or former employees of BP, plead guilty to various charges including manslaughter, obstruction of Congress and environmental crimes under the Clean Water Act and the Migratory Bird Treaty Act. BP also agreed to retain a process safety and risk management monitor, an independent auditor and an ethics monitor to improve its candor with the United States Government. Transocean Deepwater also plead guilty and agreed to pay $400 million in criminal fines and penalties and its affiliated companies have agreed to pay $1 billion to resolve civil penalty claims under the Clean Water Act and to implement improvements in operational safety and emergency response capabilities.

The Scotts Miracle-Gro Company settled civil and criminal charges, agreeing to a $4 million fine and to perform community service for 11 criminal violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Scotts will contribute $500,000 to organizations that protect bird habitats. In a separate civil agreement with the EPA, Scotts agreed to pay more than $6 million in civil penalties and spend $2 million on environmental projects to resolve additional civil pesticide violations. Scotts plead guilty on February 21, 2012 to illegally applying insecticides to its wild bird food products that are toxic to birds, falsifying pesticide registration documents, distributing pesticides with misleading and unapproved labels, and distributing unregistered pesticides, continuing to sell the products for six months after employees warned management of the dangers of these pesticides. This is reportedly the largest civil settlement and criminal penalty under FIFRA as of February 2012.

Criminal penalties are not only for large incidents. A New Jersey man was prosecuted by the USEPA and sentenced in November 2013 to 42 months in prison for violating the asbestos provisions of the Clean Air Act. He bought a warehouse and hired unqualified day laborers to remove the asbestos materials illegally and continued to do so even after being ordered by inspectors to stop all work. The man and his co-conspirator were ordered to serve an additional three years of supervised release and to pay restitution of $451,936.80.

B. THE LESSONS LEARNED: Do not place profits over safety, do not make false statements to agency officials who inspect or investigate a facility, and do not falsify records to make the incident look better than the actual situation. False information is likely to come to light and be in the newspaper headlines. Once there has been a violation, complete the efforts to correct the problem to avoid recurrence. Falsifying information and repeating a violation are two of the most likely triggers that cause an agency to consider pursuing criminal penalties.

C. THE BEST DEFENSE IS A GOOD ENVIRONMENTAL MANAGEMENT SYSTEM ("EMS"). A good EMS allows the company to identify the rules it must comply with and to create a system for verifying compliance. Where a violation is made during a systematic audit and voluntarily disclosed to the USEPA, up to 100% reduction of the gravity based portion of the penalty can be achieved so long as the nine criteria are met, including no history of repeat violations, expeditious correction and remediation, a corrective action plan which prevents recurrence and full cooperation with the agency's investigation. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 FR 19618 (Apr. 11, 2000). It goes without saying that companies who discover and disclose their own violations rarely face a criminal investigation surrounding the conduct.

Stacy Watson May counsels clients in environmental compliance and enforcement actions across multiple states as well as at the federal and local levels, regularly negotiating reduced penalties with government agencies and assisting in the design of corrective actions and environmental management systems regarding the clean air act, clean water act, RCRA, remediation, hazardous materials handling and permitting matters.

Holland & Knight

ALERT

Second Circuit Holds In-House Lawyer Precluded from Blowing Whistle on Former Employer

November 12, 2013

Christopher A. Myers
Michelle T. Hess

The Second Circuit issued an opinion tackling the interplay between an attorney's ethical obligation to maintain client confidences and the ability to act as a "whistleblower" to report unlawful conduct to the government. The court's opinion was issued on Oct. 25, 2013, and the case is *Fair Laboratory Practices Assocs. v. Quest Diagnostics, et al.*, 2013 WL 5763181, No. 11-1565-cv (2d Cir. Oct. 25, 2013).

Plaintiffs Alleged Defendants' Pricing Scheme Violated the Anti-Kickback Statute

In 2005, plaintiff Fair Laboratory Practices Associates (FLPA) filed a *qui tam* action pursuant to the False Claims Act against defendants Quest Diagnostics Incorporated and Unilab Corporation alleging violations of the Anti-Kickback Statute. FLPA was formed for the sole purpose of bringing this *qui tam* lawsuit against Quest and Unilab. One of the general partners in FLPA, Mark Bibi, previously served as general counsel to Unilab, with the two other partners being former Unilab executives as well. In his role as general counsel, Bibi served as the sole lawyer for Unilab, advising the company on its contracts with managed care organizations (MCOs), managing the company's litigation, and advising the company on compliance with healthcare fraud and abuse laws.

Quest provides diagnostic medical testing services for MCOs and independent practice associations (IPAs). Quest acquired Unilab, a clinical laboratory company, in 2003. The plaintiffs alleged in their federal lawsuit that the defendants violated the Anti-Kickback Statute by operating a "pull through" scheme, whereby defendants charged IPAs and MCOs below cost rates for laboratory tests to improperly induce physicians in the IPAs to refer Medicare and Medicaid-reimbursable patients to the defendants and to induce the MCOs to arrange for their in-network physicians to send Medicare and Medicaid-reimbursable tests to the defendants. The plaintiffs alleged that such a scheme violated the Anti-Kickback Statute, which prohibits offering "remuneration" to induce another person to make referrals for services for which payments may be made under a federal healthcare program. 42 U.S.C. §1320a-7b(b)(2). The statute defines "remuneration" as including "transfers of items or services for free or for other than fair market value." 42 U.S.C. §1320a-7a(i)(6).

Court Found the False Claims Act Does Not Trump Attorney's Duty of Confidentiality

While the federal government clearly has a significant interest in encouraging people to come forward to report fraud and abuse without fear of retaliation, the Second Circuit held that such an interest does not trump the government's strong intent to preserve the attorney-client privilege. Both the Second Circuit and the Southern District judge discussed striking a balance between those interests, which were squarely at odds in this case. In conducting that analysis, both courts rejected the plaintiffs' arguments that the False Claims Act pre-empted the rules of New York state that govern the disclosure of client confidences. Writing for the Second Circuit, Judge Cabranes said,

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"Nothing in the False Claims Act evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences." *Fair Laboratory Practices Assocs.*, 2013 WL 5763181 at *5.

The proper inquiry then was whether Bibi violated New York's ethics rules by disclosing confidential information about Unilab for use in the lawsuit and whether such a violation warranted dismissal of the underlying complaint and disqualification of the individual relators and their counsel. The court held that New York ethics rules preclude an attorney from disclosing confidential information of a former client, with limited exceptions. N.Y. Rule 1.9(c). One such exception permits disclosure should the lawyer reasonably believe disclosure is necessary to prevent the client from committing a crime. N.Y. Rule 1.6(b)(2). While Bibi may have reasonably believed the defendants were committing crimes by violating the Anti-Kickback Statute, the Second Circuit held that the confidential information revealed by Bibi exceeded what was reasonably necessary to prevent the alleged fraudulent scheme. The Second Circuit acknowledged that the other partners in FLPA possessed sufficient information to bring the action, but Bibi made the conscious decision to participate in the action and to divulge protected client confidences.

Not only did the Second Circuit uphold the district court's finding that Bibi violated the ethics rules, the court also upheld the decision to dismiss the complaint and to disqualify the plaintiffs, and their counsel, from pursuing the action. Because Bibi engaged in "unrestricted sharing of confidential information with the other relators," the Second Circuit held that there was no way to avoid prejudice to the defendants. *Fair Laboratory Practices Assocs.*, 2013 WL 5763181 at *9. The disqualification of FLSA's counsel was similarly found to be within the province of the trial court's discretion.

Implications for Companies in Regulated Industries

This case presented the Second Circuit with a question that has the potential to keep corporate executives up at night: can an in-house attorney use confidential communications to blow the whistle on a former client? To the reassurance of many, the Second Circuit answered in the negative. The opposite result could have struck fear in the hearts of executives in highly regulated industries, such as healthcare, who routinely turn to their in-house colleagues and outside attorneys for advice on the fraud and abuse laws. Since the False Claims Act can bring significant financial payouts to relators, allowing attorneys to divulge client confidences to obtain such payouts would expose them to an inherent conflict of interest. Despite the incentives to whistleblowers in federal statutes, such as the False Claims Act and Dodd-Frank Act, the Second Circuit upheld an ethical check on an attorney's ability to participate as a relator against a former client. It seems that this same principle would apply even more strongly to lawyers and their current clients.

In recent years, Congress has expanded the scope of the False Claims Act and other whistleblower "bounty" provisions as part of healthcare and financial reform. Congress enacted amendments to make it easier for both whistleblowers and the government to pursue actions under both the False Claims Act and the Anti-Kickback Statute. Notably, the Southern District found that the plaintiffs' disqualification did not foreclose the government, the real party in interest in False Claims Act cases, from intervening — a finding not disturbed on appeal. While the federal government opted not to intervene in this particular case, the federal government's declination in these cases is hardly a sure thing. As a result, companies operating in highly regulated industries should ensure they have in place effective compliance programs. While not a complete defense, strong compliance programs give companies potentially powerful arguments against corporate liability.

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To ensure compliance with Treasury Regulations (31 CFR Part 10, §10.35), we inform you that any tax advice contained in this correspondence was not intended or written by us to be used, and cannot be used by you or anyone else, for the purpose of avoiding penalties imposed by the Internal Revenue Code.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

Authors

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Taking Charge of Legal Spending - The ACC Value Challenge

By Catherine Moynihan, Director of Legal Management Services, ACC

What an interesting and exciting time to be working as in-house counsel. The balance of power has shifted. Corporate counsel are taking the reins firmly in hand, proactively managing legal spending and the legal function to drive better value for clients. As the *ACC Value Challenge* reaches its 5-year anniversary, we could not be more excited about these changes.

ACC launched the Value Challenge (AVC) in September 2008 in response to the disproportionate growth in legal costs relative to other business expenses. Worse, companies were smarting over the extreme unpredictability of legal spending. **The ACC Value Challenge is committed to the proposition that law firms and law departments can improve efficiency through better relationship, management, and pricing practices, and still reduce costs** (while maintaining law firm profitability).

The Value Challenge is not just a call to action. To help law department and law firm leaders control costs, the ACC provides resources, educational opportunities and, importantly, shares what's working in the value movement. **The *AVC resource library* is chock full of examples of effective "value practices" employed by legal departments and law firms, as well as guides to implementing value-based fees, outside counsel management, project management, strategic staffing, knowledge management and more**. And ACC's *Legal Service Management* workshops, offered twice a year, provide hands on training in using key tools and techniques. We welcome both internal and external counsel to take advantage of the AVC resource library and participate in the workshops.

Leading Value Practices – The ACC Value Champions

Since 2012, ACC has been recognizing the inspiring accomplishments of legal department leaders implementing value initiatives. The ACC Value Champions demonstrate the myriad ways that legal department leaders can drive value.

Convergence and Conversion to Value-Based Fees

- Bank of America reduced it approved law firms from hundreds down to a "litigation roundtable" of 30 and moved over 80% of its litigation to fixed fees;
- United Technologies has 70% of its outside spending on value-based fees, and is on the march to 100%;
- Office Depot reached a tipping point of over 50% of outside spend on value-based fees, tailoring the fee type to the practice area (employment, securities, real estate, even patent troll joint defense);
- Pfizer, GlaxoSmithKline and Home Depot are at or on the march to 100% of outside spending on value-based fees, and the list goes on…

Moving the Right Work to the Right Resource – Downshifting Low Value Work and Upshifting Strategic Work

- Nike and British Telecom have implemented legal work intake portals, managed by an LPO and a law firm respectively, that use playbooks to allocate the work. Lower value, repetitive work is outsourced and in-house counsel get to handle the more complex, strategically important work;
- When Mondelez was spinning off Kraft Foods, it worked with Axiom to address the 20,000 patents, 40,000 contracts and 80,000 trademarks, supported by playbooks – all for a fixed fee.

Taking Client/Firm Collaboration To the Next Level – Preventative Lawyering

- Healthcare Insurance Reciprocal of Canada (HIROC) and Borden Ladner Gervais negotiated a six-year partnership in 2011, based entirely on value-based fee arrangements. The agreement sets a base price combined with a performance bonus, while making adjustments for in-sourcing over time;
- Target and Nilan Johnson Lewis have parsed employment legal work into four components and applied a slightly different retainer model to each and, along with prevention measures, achieved 20% savings;
- Similarly, RBC Capital Markets and Morgan Lewis have teamed up to yield savings of 35% by tailoring fee structures to the specific matter or portfolio;
- Tyco International works with only one firm, Shook Hardy & Bacon, on all of its US litigation. Together, they have cut product liability cases in half, new case filings by 65%, and case cycle time by 40% since 2004;
- Sherwin Williams demonstrated how the use of a single firm, Gallagher Sharp, to coordinate designated types of matters nationwide can result in significant savings (15%) and improved outcomes, particularly when both inside and outside counsel undergo technical product training in order to more effectively represent the client.

Multi-faceted Value Initiatives – Pulling Lots of Value Levers

- Marsh & McLennan and Medtronic have handled huge growth in demand for their legal services, while holding steady on in-house counsel staffing and decreasing outside legal spending by leveraging technology, converging and converting to value-based fees – great models of focused leadership guided by benchmarking and metrics;
- NetApp has combined implementing new technology with legal process and project management, outsourcing, and strong outside counsel management practices – value-based fees and quarterly business reviews – to speed up legal services cost-effectively.

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Smaller Departments Driving Value - In Lots of Ways and in Lots of Countries

- United Retirement Plan Consultants (US) collaborated creatively with its law firm, Porter Wright, to create a tool to overcome two of most common barriers to fixed fees – lack of data and risk of variability in project scope;
- Lucchini (Italy) has benefited greatly from its GC's leadership on vendor management and use of technology-enabled decision-making and process management to cut cycle time by 65% and spending by 40% – best practices that other functions in the company have adopted;
- China State Construction Engineering Corporation (Dubai) insourced all contract work, gained efficiency with technology and employed new law firm management practices – fixed fees with success bonuses – a switch that has enhanced recoveries by 60 percent and saved 50 percent on external legal fees in 2012.

Taking on the ACC Value Challenge – A Good Place to Start is to "Meet.Talk.Act."

Ready to start your own value program? A good way to start building value-based client/firm relationships is to, very simply, engage in conversations with law firms about specific ways to improve value - then take action. Host an informal lunch with your key external counsel. Theme: **"Working together, how can we improve the value of legal services?"** Some suggested questions to discuss:

- How can we improve trust and improve our relationship, on both sides?
- How can we assure an adequate flow of work so that outside lawyers understand the client better and can be more efficient in what they do?
- How can we get junior lawyers better trained, priced at more reasonable levels, practicing law more on the front line, and less likely to leave?
- How can we better budget and manage costs and staffing?
- How can we evaluate progress and performance?
- How can we create a culture of continuous improvement, on both sides?

At the end of the meeting, agree to try out some of the ideas, even if on a small scale, and to meet regularly to assess these efforts. Over time, you will settle on **the most effective approaches to reduce costs, improve spend predictability, and achieve better legal outcomes;** and along the way you will see that they also yield higher client and career satisfaction.

For more information about the ACC Value Challenge, contact ACC's Director of Legal Management Services, Catherine J Moynihan at Moynihan@acc.com.

"The ACC Value Challenge provides online resources, skill-building workshops and benchmarking information, all of which the RBC team have utilized. It's about sharing what works, and I am proud that members of my team have now become leaders of the ACC Value Challenge – having been named 2012 ACC Value Champions and serving as faculty for ACC's Legal Service Management workshops and on the ACC Value Challenge Steering Committee. Join us in taking on the ACC Value Challenge!"

- David Allgood, Executive Vice President & General Counsel, Royal Bank of Canada and Chair, Association of Corporate Counsel Board of Directors

Some of the 2013 ACC Value Champions with ACC CEO Veta Richardson (L to R): Richard Stock of Catalyst Consulting; Mike Caplan and Mel Schwarz of Marsh McLennan Companies; Connie Brenton of NetApp; Michael Boyce of Health Insurance Reciprocal of Canada; Veta Richardson; John Morris of Borden Ladner Gervais

ACC News

Meet ACC's New Compliance Portal

Check out ACC's new Compliance Portal and put this great resource to use. With focused resource bundles, improved navigation, and a new search function, the Compliance Portal is *the* go-to place for all your compliance needs. Resource bundles cover popular topics such as global anti-corruption, export controls, antitrust, and many more. Learn more at *www.acc.com/compliance*.

Take the Pain Out of Contracting

With the new ACC Contracts Portal, controlling your contract process from beginning to end has never been easier. Use the ACC Contracts Portal to draft and benchmark contracts, prepare yourself to enter into tough contract negotiations, and refine your processes with practical resources focused on effective contract management and best practices. Learn more at *www.acc.com/contracts*.

Be Recognized As An ACC Value Champion

Have you implemented value-based pricing, or any of the related management practices advocated as part of ACC's Value Challenge? If so, you could be selected and recognized as an ACC Value Champion! ACC wants to celebrate your accomplishments and share your management tactics, enabling others to model your successes and drive value for clients. Tell us your story and get the recognition you deserve. Nominations are due by February 7, 2014. To submit your story, or for more information, visit *www.acc.com/valuechampions*.

Legal Service Management Workshops

Ready to take your management skills to the next level and thrive in the evolving legal marketplace? Join law department and law firm leaders at the Legal Service Management program (March 4–5, Atlanta, GA or May 6–7, St Louis, MO) to develop skills in structuring value-based firm/client relationships through business school style case study. Space is limited, and this program will sell out. Questions? Contact Catherine J. Moynihan at moynihan@acc.com or +1 202.293.4103 x398. Secure your spot today at *www.acc.com/legalservicemanagement*.

Compliance & Ethics Training is Back!

Mark your calendar for ACC's Compliance & Ethics Training (April 7–8, 2014, Austin, TX) — a two-day program packed full with compliance essentials. This is the program you should attend if you need to make your organization's compliance program more robust and successful, or want to better defend your organization against a myriad of internal and external compliance risks. For more information, visit *www.acc.com/ce*.

Jumpstart Your Career with Corporate Counsel University

The Corporate Counsel University® (June 1–3, Minneapolis, MN) is developed exclusively for attorneys who are new to in-house or who are looking for ways sharpen their basic in-house practice skills. This program introduces the fundamentals of in-house practice and covers the different roles and responsibilities expected of an in-house counsel. For more information, visit *ccu.acc.com*.

Save the Date: ACC's 2014 Annual Meeting

Join in-house counsel from all over the world at ACC's 2014 Annual Meeting (October 28–31, New Orleans, LA). As the world's largest gathering of the in-house counsel community, this meeting offers over 100 CLE/CPD programs and dynamic networking opportunities. For more information and early bird registration, visit *am.acc.com*.

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In 1996, I became VP/GC and General Chemical went public on the NYSE. In 1999, we spun off some of our businesses into another NYSE-traded company and I joined the new company as VP/GC. We went on a torrential acquisition spree, took on a lot of debt, and spiraled into Chapter 11 bankruptcy in 2002. (The former parent also did the same.) I left just as the company was emerging from bankruptcy and joined Rayonier in 2003. A few weeks ago, the last of the old General Chemical, now 115 years old, was sold to a Canadian company.

For Rayonier, the cheese has moved a lot over 87 years. And personally, in my role as an in-house lawyer, I've helped move a lot of cheese, too--for Rayonier, General Chemical and the other clients I've served. And I'll be SVP/GC of one of the Rayonier companies (a secret, for now, which one), so my cheese will move again later this year.

Why do I recount all of this? Many of our chapter members are in the earlier stages of their careers. Look where 87 years has taken Rayonier, 115 years has taken General Chemical, and 27 years as a lawyer has taken me. What have I learned?

The cheese keeps moving. Make sure you're ahead of it. Or as Jack Welch famously said, "Change before you have to."

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