Virtual

CCI

Corporate Counsel Institute Series

Session I: Thurs., June 18, 2020

11 a.m. - 2 p.m.

ACC Association of Corporate Counsel
ST. LOUIS

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2020 Virtual Corporate Counsel Institute (CCI) Agenda

SESSION I: Thursday, June 18, 2020
3.0 MO MCLE | Including 1.0 MO Ethics

10:45 - 11:00 a.m.

Zoom call open for check-in and troubleshooting

11:00 - 11:10 a.m.

Welcome
Brian Parsons, Senior Counsel, Litigation, Macy's Corporate Services, Inc.
President, Association of Corporate Counsel, St. Louis Chapter

Hon. Glenn Norton
President, Bar Association of Metropolitan St. Louis

11:10 - 12:00 p.m.

An Eye on Pay Equity (1.0 MO MCLE)
Ogletree, Deakins, Nash, Smoak & Stewart P.C.
Gregg M. Lemley, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart P.C.
Liz Washko, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart P.C.

12:00 - 12:10 p.m.

Break

12:10 - 1:00 p.m.

From Competence to Excellence: The Ethical Imperative for Excellent Client Service (1.0 MO Ethics)
Sean Carter
Humorist at Law
In this presentation, legal humorist Sean Carter will review the competence requirement with an eye towards demonstrating that the ethical canon actually requires far more than mere competence on the part of the practitioners.

1:00 - 1:10 p.m.

Break

1:10 - 2:00 p.m.

Navigating the Straits of the FCPA - One Client's Journey from Investigation to Declination (1.0 MO MCLE)
Stinson LLP
Steve Spiegelhalter, Principal, Ernst & Young LLP
John Munich, Partner, Stinson LLP
Habib Ilahi, Partner, Stinson LLP

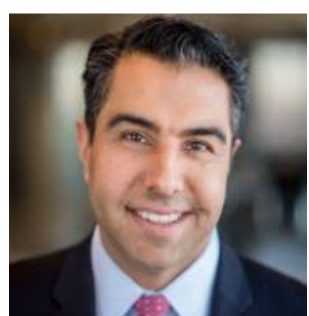
FACULTY

Sean Carter, Humorist at Law

Sean Carter graduated from Harvard Law School in 1992. His ten years of legal practice focused on corporate securities and mergers and acquisitions. During this time, he represented such clients as GNC, Experian, The Boston Beer Company Homeside Lending, Safelite Auto Glass, J. Crew, and many others. Most recently, he served as in-house counsel to a publicly traded finance company.

In 2002, Mr. Carter left the practice of law to pursue a career as the country's foremost Humorist at Law. Since then, Mr. Carter has crisscrossed the country delivering comedic professional educational seminars for more than 400 organizations in more than 40 states. He is also the author of the first-ever comedic legal treatise -- *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law.*

Finally, Sean lives in Mesa, Arizona with his wife and four sons.



Habib Ilahi, Partner, Stinson LLP

A trusted partner on health care and business litigation matters, Habib counsels business entities and individuals in highly regulated industries through complex health care, procurement, and other government enforcement investigations and litigation, as well as through general white collar criminal and civil defense matters.

As a former federal prosecutor with the Fraud Section of the U.S. Department of Justice, Civil Division, he worked exclusively on matters involving the False Claims Act, Anti-Kickback Statute, and the Stark Law. He has experience advising and representing pharmaceutical and life sciences companies, hospital systems, national nursing home and long term care facility chains, large and small businesses, and a variety of other types of health care providers in high-stakes investigations and litigation involving Medicare, Medicaid, TRICARE, and other health care programs.

Outside of the health care arena, Habib has advised and represented numerous government contractors, foreign and domestic business entities, and individuals in various types of criminal, civil, and administrative government investigations, including those involving government contracting and procurement fraud, violations of the Foreign Corrupt Practices Act, securities and accounting fraud, tax fraud, civil and criminal conflicts of interest violations, lobbying violations, and sanctions and export-control violations.

In addition to his federal government experience, Habib was Special Counsel to Karl A. Racine, the Attorney General for the District of Columbia, where he advised the Office of the Attorney General on various criminal justice and opioid enforcement related issues affecting the District

of Columbia. Prior to his government service, Habib spent nearly 15 years in private practice at white collar defense litigation boutiques in Washington, D.C., and Houston.

Gregg M. Lemley, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart P.C.

Mr. Lemley has practiced exclusively in labor and employment law and related litigation since 1995. He concentrates his practice primarily in litigation of employment and employment related commercial disputes and employer counseling. He has represented employers in a wide range of litigation matters in both state and federal court, and before arbitrators, administrative law judges and other tribunals in disputes involving alleged discrimination based on race, sex, age, religion, disability, national origin and the FMLA, sexual and racial harassment, retaliation (including workers' compensation and whistleblower retaliation), tortious interference with contract, ERISA violations, LMRA claims, employment contract disputes and other employment related claims and commercial disputes, including numerous non-compete and non-solicitation disputes. He also has extensive experience representing clients in class and collective action wage and hour claims brought under the FLSA and state wage laws. He also has practiced before numerous state administrative hearing tribunals and has extensive experience in alternative dispute resolution, including mediation and early neutral evaluation.

Mr. Lemley also is a certified mediator for the Eastern and Western Districts of Missouri and for the State of Missouri. Additionally, he assists both private and public employers in the development, implementation and application of harassment, drug testing, family medical leave and a wide range of other personnel policies and in drafting and revising employee handbooks, and has counseled clients in developing overarching HR compliance plans, conducting HR compliance audits, engaging in mass layoffs and in evaluating employment and labor issues related to business combinations. Mr. Lemley has presented client seminars on topics ranging from harassment to employee evaluation, discipline and termination in light of state and federal employment laws, to proper hiring protocol, navigating employee leave laws, social media, workplace technologies and a broad range of other topics. Mr. Lemley also frequently addresses the television, radio, and print media on a variety of employment related topics.

Mr. Lemley has been designated a 2009-present Missouri Super Lawyer based on peer surveys by Law & Politics recognizing him as among the top 5% of attorneys in Missouri. Mr. Lemley has been listed in Chambers USA since 2010, where he has been singled out as one of the top labor and employment lawyers in the country and for "delivering easily understandable advice and taking time to understand client interests fully," and highlighted for his work in wrongful termination and discrimination matters. Mr. Lemley has been listed in Best Lawyers since 2013 and is a 2017 and 2018 BTI Client Service MVP.

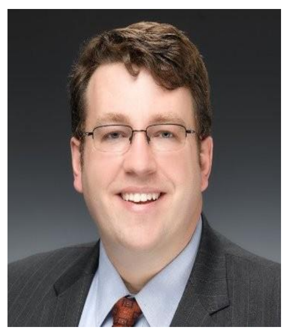
Mr. Lemley founded the St. Louis office of Ogletree Deakins in 2007.

John Munich, Partner, Stinson LLP

John has successfully represented clients in some of the most significant lawsuits heard in Missouri and elsewhere, including his role as lead counsel in Missouri v. Jenkins, one of the more noteworthy constitutional cases decided by the United States Supreme Court in the last 25 years. He concentrates his practice on complex business and commercial trials and appeals, constitutional law cases and internal and regulatory investigations. As chair of the firm's Business and Commercial Litigation practice, he marshals a deep arsenal of resources to represent companies faced with the most complex litigation challenges.

John draws on his significant government experience when representing clients. As Chief of Litigation, and later Deputy Attorney General for the State of Missouri, he supervised all of the state's civil litigation and helped create and supervised Missouri's Medicaid Fraud Control Unit in the Office of the Attorney General. As an Assistant U.S. Attorney for the District of Columbia, he defended the United States and its agencies in complex constitutional and government contracts cases and prosecuted civil health fraud matters.

In addition to representing clients in complex business and commercial disputes nationwide, John has handled regulatory and governmental investigations, including Foreign Corrupt Practices Act matters and those involving health care providers and other regulated businesses. John leads Stinson's Education Funding Litigation practice group, which has handled state school funding lawsuits in over 15 states. John also has successfully defended several clients in qui tam lawsuits brought under the False Claims Act.



Steve Spiegelhalter, Principal, Ernst & Young LLP

Steve has over 16 years of professional experience that includes investigating complex criminal and civil matters in more than 45 countries, evaluating, and implementing compliance programs and analyzing corporate internal controls.

Currently, Steve is a Principal and leader of the Forensic & Integrity Services practice (EY Forensics) at Ernst & Young LLP in Washington, DC — a practice that includes approximately 100 professionals.

Steve previously worked as a prosecutor in the US Department of Justice’s Criminal Division, Fraud Section, Foreign Corrupt Practices Act (FCPA) Unit and as a corporate compliance officer.

Steve earned his Juris Doctor degree from Georgetown University Law Center, and his BA in International Relations from Brigham Young University.

Liz Washko, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart P.C.

Liz Washko is a Shareholder in the Nashville office and the co-chair of the firm's Pay Equity Practice Group. Ms. Washko represents management in a wide variety of employment matters, at the agency level and in litigation. Ms. Washko has experience defending employers in FLSA collective actions, in pay discrimination cases (individual plaintiff and class/collective actions) and conducting proactive pay audits and pay equity analyses. Ms. Washko has served as lead counsel in jury trials in state and federal courts. In addition to her litigation practice, Ms. Washko conducts training on employment issues, drafts and reviews employment policies and agreements, and conducts harassment and other types of investigations for employers. Ms. Washko is a frequent speaker and writer on topics relating to all types of employment issues and works with clients on preventive strategies to avoid discrimination, retaliation, and other employment claims. Ms. Washko has been practicing law since graduating from Rutgers School of Law in 1993. She joined Ogletree Deakins in 2000 and was elected to shareholder status in 2003.

While Ms. Washko represents employers of all sizes and in all industries, she has expertise representing clients in the restaurant, retail, healthcare, and manufacturing industries.

Ms. Washko is a member of the American Health Lawyers' Association and is the Chair of the Labor and Employment practice group of the AHLA. Ms. Washko also is a member of the Labor Standards Legislation Subcommittee of the ABA's Labor and Employment Section. She is a regular contributing editor to the ABA's FLSA Treatise and annual supplements and the FMLA annual supplements.

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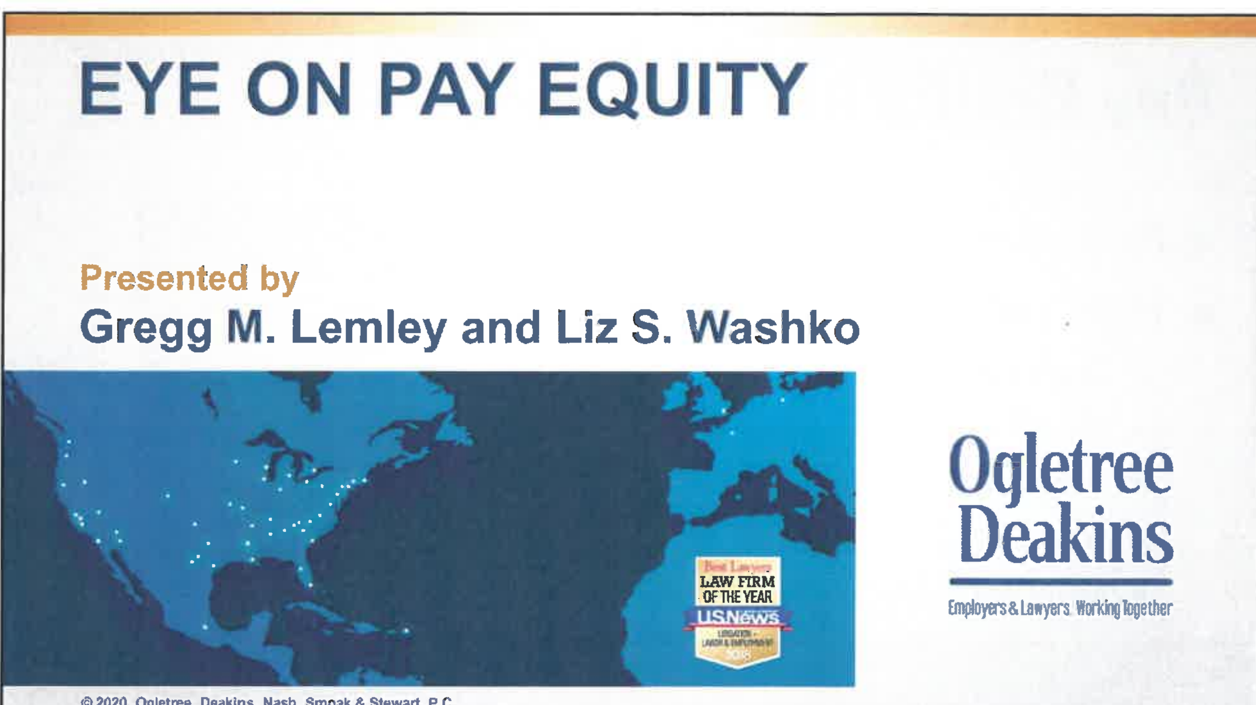

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Agenda

- Overview of applicable laws
- Recent legal developments
- Best practices to protect your company

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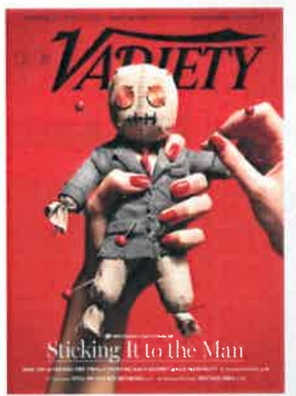
2

Pay Equity In The News:

- Hollywood and sports figures
- High profile lawsuits against:
  - Tech companies
  - Healthcare
  - Higher education
  - Banking and Finance
  - Manufacturing



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3

Public Relations

- Companies publishing pay scales and audit results
- Investor requests for reports on pay equity

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Federal and State Laws

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Equal Pay Act

- Equal wages to men and women who perform jobs that:
  - Require equal skill, effort, and responsibility; and
  - Are performed within the same establishment under similar working conditions.
- Pay differentials permitted based on:
  - A bona fide seniority system, merit system, incentive system (quality or quantity of production) or any other factor other than sex

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6

Title VII of the Civil Rights Act

- Unlawful to discriminate against employees in connection with compensation based on protected characteristics – including gender and race
- Female employee paid less than a similarly situated male employee without a legitimate explanation for the pay difference
- Applies to race, national origin, etc.

7

State Legislation - Key Points

- State laws create potential for differing standards for determining pay equity
  - Protected classes – race/ethnicity; gender identity
  - Equal work v. “substantially similar” work
  - Continued applicability of “same establishment”
  - Justifications for pay differences
- Salary history bans
- Transparency issues

8

Increased Risks for Employers

- EEOC/Agency Charges
  - Increased charge activity
  - Expansive investigations
  - Increased litigation activity – EEOC as plaintiff
- Increased private litigation
  - Individual claims of pay discrimination
  - Potential class actions
- Internal complaints
  - Increased awareness - media and social media

Factors Contributing to Risk

- **Lack of** meaningful standards or guidelines
- **Noncompliance** with standards/guidelines
- Unfettered **discretion** and subjective decision-making
- No **training** for decision-makers
- Failure to **articulate** or **document** the reasons for decisions
- Failure to **communicate** criteria

Best Practices for Prevention and Protection

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Take Action

- ✓ Clean-up data – HRIS system
- ✓ Audit data to identify pay disparities and weaknesses – and make corrections
- ✓ Review and analyze policies, procedures, and processes

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HRIS Data

- Basis for any analysis:
  - Needed for internal analyses/audits
  - Requested by EEOC/plaintiffs/experts
- Garbage in/garbage out

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HRIS Data – Common Issues

- Inaccurate/inconsistent data
  - Job titles
  - Missing gender/race of some employees
  - Inaccurate information
- Missing useful data
  - Education/experience
  - Time in job
  - Performance ratings

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Purposes of a Pay Audit

- Identify potential average pay disparities within appropriate job classifications – systemic flags
- Determine whether there are legitimate explanations for disparities
- Take steps to correct the disparities

Pay Audit Considerations

- Conduct audit under privilege
- Identify appropriate comparator groups
- Understand pay decisions
  - What types of pay decisions are there – starting pay, merit increases, adjustments, other compensation
  - What factors are relied on to make pay decisions

Pay Audit Considerations

- Have the data analyzed – by an expert
  - Statistically significant differences
  - Outliers
- Determine if factors explain disparities
- Correct disparities that cannot be explained with legitimate reasons
  - Timing of corrections
  - Communication regarding corrections

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Policy and Procedure Review

- Review written policies, procedures, practices
  - Decision-makers – scope of authority
  - Factors considered – related to job, objective, quantifiable
  - How are decisions documented
- Identify weaknesses in the systems that may lead to disparities
- Modifications to improve policies and procedures

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Practical Tips

- Written policies for starting pay, pay increases and bonuses
- Limit subjectivity with objective factors
- Assess performance evaluation, merit and promotion processes
- Document pay decisions
- Enforce policies/guidelines
- Train decision-makers
- Conduct periodic pay analyses
- Assess job descriptions

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FROM COMPETENCE TO EXCELLENCE: THE ETHICAL IMPERATIVE FOR EXCELLENT CLIENT SERVICE

SEAN CARTER
HUMORIST AT LAW

NOTES

BEYOND COMPETENCE TO EXCELLENCE

The *Ethycal* Requirement for Excellent Client Service

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Sean Carter
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Mr. Carter graduated from Harvard Law School in 1992. His ten years of legal practice focused on corporate securities and mergers and acquisitions. During this time, he represented such clients as GNC, Experian, The Boston Beer Company, Homeside Lending, Safelite Auto Glass, J. Crew and many others, before eventually serving as in-house counsel to a publicly-traded finance company.

In 2002, Mr. Carter left the practice of law to pursue a career as the country's foremost Humorist at Law. Since then, Mr. Carter has crisscrossed the country delivering his Lawpsided Seminars for state and local bar associations, law firms, in-house corporate legal departments and law schools. Each year, he presents more than 100 humorous programs on such topics as legal ethics, stress management, constitutional law, legal marketing and much more.

Mr. Carter is the author of the first-ever comedic legal treatise -- *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law*. His syndicated legal humor column has appeared in general circulation newspapers in more than 30 states and his weekly humor column for lawyers appeared in the *ABA e-Report* from 2003 to 2006.

Finally, Sean lives in Mesa, Arizona with his wife and four sons.

INTRODUCTION

The very first rule of the ethics canon – Rule 1.1 of the Rules of Professional Conduct[1] – calls for lawyers to provide *competent* representation to clients. Yet, mere competence, in any area of life, just isn't enough. Most lawyers would like to establish a reputation for excellence. In fact, the quest for excellence isn't just an idle wish for only the most committed lawyers, but it is rather a *requirement* for all lawyers who would like to steer clear of ethical violations.

COMPETENCE

While Rule 1.1 refers to competence, the standard of care required by this rule (and several other provisions of the canon) is much higher. Rule 1.1 sets forth the obligation this way:

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. *Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Reasonable Competence

As you can see, Rule 1.1 requires a lawyer to be knowledgeable, skillful, thorough and prepared. But how knowledgeable is knowledgeable enough? How prepared must a lawyer be? The answer is that the lawyer must be *reasonably* skillful, thorough, etc. Obviously, the reasonable standard is subject to interpretation. As a result, some lawyers interpret the standard as minimalist in nature. Or in other words, lawyers must simply possess the minimal amount of knowledge, skill, etc. in order to render a passable level of representation to the client. So long as the lawyer isn't sued for malpractice or found to have provided "inadequate assistance of counsel" by a later court, the lawyer has met the threshold of "competence."

And it's understandable how a lawyer could come to this (mistaken) interpretation of the reasonable standard by reading the comments to Rule 1.1. For instance, Comment 2 reads as follows:

> *"A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study."*

[1] For purposes of this discussion, we will reference the ABA Model Rules of Professional Conduct.

At first glance, it seems that the commentators are saying, in effect, "Hey, you don't need any particular knowledge or prior experience to adequately represent a client. Just being a lawyer is enough in most cases to get you through. And if you come across something completely new, just 'bone up' on the topic and you'll be fine." Well, this approach is almost guaranteed to lead to serious disciplinary trouble for the lawyer who strives to "get by" with the minimal level of competence. This has been illustrated even more clearly since the Great Recession, with the increased number of lawyers who were unable to secure employment after graduating from law school. In the past, these lawyers would have been trained by senior lawyers as they worked as associates in law firms. But in a depressed employment market, these lawyers set up their own "shingles" as solo practitioners, despite having little to no practical experience. The results were as to be expected, and so were the disciplinary consequences.

Past Experience

For instance, two recent law graduates open their own firm in 2008. Shortly thereafter, they were retained by a client who was injured in a fall. During the course of the representation, they made a number of strategic errors and by the time the case reached trial, they came to the realization that they were completely unprepared to try a case in court. At that point, they brought in an experienced litigator, but the damage had been done. The case was ultimately dismissed and the lawyers were each suspended for nine months for their inadequate representation.[2]

In another matter, an inexperienced Georgia lawyer displayed "an alarming lack of familiarity with fundamental legal procedure," such as failing to respond to the Formal Complaint, because she believed that a response was optional.[3] And this isn't just something that bedevils lawyers fresh out of law school, but even seasoned attorneys who attempt to undertake matters in areas of the law in which they have no prior experience.

For instance, a 40-year Kansas lawyer lost his license as the result of an abysmal representation of the client in a capital murder case – the lawyer's first capital murder case.[4] Interestingly, it appears that the lawyer was relying on the language from the commentary ("A lawyer can provide adequate representation in a wholly novel field through necessary study"). But sure enough, the Kansas disciplinary authorities concluded that the lawyer's 60 hours of pre-trial "study" wasn't nearly enough. And the lawyer was held responsible for his ignorance of that fact. Similarly, a Colorado lawyer was suspending for 90 days for his mishandling of the defense in his first child sexual assault case.[5]

And perhaps surprisingly, it's not just subject-matter inexperience that can cause a lawyer ethical troubles. Even a very experienced lawyer can run into trouble if she finds herself practice

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[2] *2013 NY Slip Op 03439 [109 AD3d 64].*

[3] *Georgia Supreme Court S15Y0904 and S15Y0905.*

[4] *Kansas Supreme Court No. 111,425.* Of course, it didn't help the lawyer's case when he appeared at his disciplinary hearing dressed as Thomas Jefferson.

[5] *Colorado 10PDJ088.*

law in new and unfamiliar surroundings. For example, a 16-year veteran of the county prosecutors office was laid off and forced to open her own law practice. While being extremely familiar with criminal law and procedure, she didn't have any experience in running her own practice, particularly in dealing with the finances of a law practice. She soon thereafter found herself in violation of trust accounting rules and was suspended for two-years (stayed).[6] Another Ohio lawyer worked for more than 40 years for a large law firm, where he never had to deal with trust account management. After later opening his own law firm, he overdrew his client account and drew a fully-stayed one-year suspension.[7] And in yet another case, a Delaware lawyer was suspended for two years for working out of his Pennsylvania home and not in "exclusive, designated office space" in Delaware as required by state rules.[8]

Attorney Errors

Also, a lawyer's typographical and drafting errors in briefs can subject the lawyer to disciplinary action. This is particularly true if these errors accrue to the benefit of the client. For instance, in one matter, a lawyer incorrectly includes favorable witness testimony in his brief, but it later turns out that this testimony was given in connection with another matter.[9] In another matter, the attorney joined unrelated quotations of a witness' testimony without inserting an ellipses or other notation, so that it appeared to be a continuous stream of testimony.[10]

In these types of cases, the lawyer is not only subject to discipline for failing to be reasonably thorough. But more seriously, the disciplinary authorities may question the lawyer's honesty, especially if the error was favorable to the lawyer's case. In that event, lawyers may be charged with the failure to be candid before the tribunal (Rule 3.3) and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (Rule 8.4(c)) and conduct that is prejudicial to the administration of justice (Rule 8.4(d)).

And an attorney's errors need not be so glaringly obvious as ignoring formal complaints, commingling client funds or quoting testimony given in another action to justify disciplinary action. Any misreading or misapplication of applicable law can result in disciplinary action, such as knowingly filing bankruptcy on behalf of dead person,[11] incorrectly advising a client that

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[6] *138 Ohio St.3d 302, 2013-Ohio-5494.*

[7] 135 Ohio St.3d 274, 2013-Ohio-953.

[8] *Delaware No. 397, 2013, Board Case No. 2012-0019-B.*

[9] In a criminal appeal brief, a Wyoming lawyer argued that forensic interviewer had improperly vouched for the victim's credibility at trial. To support this contention, the lawyer quoted corroborating testimony that the forensic interviewer had given in another case. The lawyer received a public censure. *2015 WY 59, D-14-0007.*

[10] *2013 NY Slip Op 06095 [111 AD3d 98].* The lawyer received a public censure.

[11] *134 Ohio St.3d 139, 2012-Ohio-5389.* The attorney was suspended for one-year (six months stayed).

he didn't need to appear at an immigration hearing,[12] or submitting multiple recusal motions when only one such motion is allowed by rule.[13]

Continuing Legal Education

And while it seems rather obvious that a lawyer should be familiar with the applicable rules and regulations in a particular practice area, it must be remembered that the law is constantly in flux. Of course, it has always been the case that lawyers were required to engage in continuing legal education. Comment 8 to Rule 1.1 reads:

> *"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."*

Needless to say, lawyers who fail to meet even the basic MCLE requirements will be subject to disciplinary action. In many jurisdictions, lawyers who fail to file timely CLE declarations have their licenses summarily suspended until they can demonstrate compliance. And, of course, lawyers who file false declarations[14] or have their assistants take online classes on their behalf[15] suffer more severe consequences.

However, in the information age, lawyers must remember "relevant technology" makes it possible to keep up-to-date, if not up-to-the-minute, on new legal developments. In the past, it might have been excusable for a lawyer to be unaware of a major new judicial opinion, law or administrative rule for weeks or even months afterwards. After all, new appellate volumes or Shepard's inserts were only printed and distributed periodically. However, now that new legislation and judicial rulings are published on the Internet within days (if not minutes), a lawyer has no excuse to be ignorant of the latest developments.

Of course, just because the information is available on the Internet, it does not mean that it will reach the attorney in a timely manner. Here is where lawyers must be proactive and regularly seek out the latest legal developments in their fields of practice. One of the best ways to do so is to subscribe to practice digests or follow leading experts on blogs and social media. And while this may seem like a lot of "extra" work, it is increasingly being seen as the bare minimum effort to maintain competence.

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[12] *Attorney Grievance Commission of Maryland, No. 63, September Term, 2013*. As a result of not appearing at the hearing, the client was order removed from the U.S. The lawyer was ultimately disbarred. In aggravation, he failed to respond in any way to the disciplinary matter.

[13] *2013 UT 14.* A Utah lawyer was suspended for 6 months for submitting multiple recusal motions when only one such motion is allowed by rule. The lawyer was later disbarred for practicing law during this suspension.

[14] A North Carolina attorney was publicly reprimanded for filing a false CLE declaration. *14 M 4670.*

[15] An Illinois lawyer was suspended for three months for having his secretary take online courses for him. *Commission No. 2010PR00163.*

For example, a New Jersey attorney was found to have provided ineffective appellate assistance of counsel because the lawyer failed to raise a defense that only become available as a matter of law in a case that was decided 8 days *after* the lawyer filed his appellate brief. In making this ruling, the New Jersey Supreme Court concluded that the lawyer had an obligation to keep *continually* abreast of changes in the law and was obligated to amend his appellate brief to include any new defenses that may arise prior to disposition of the case.[16]

In fact, the lawyer's error need not constitute a violation of law or court rule to justify disciplinary action. Even errors in judgment can subject a lawyer to disciplinary action, such as the Illinois lawyer who was charged with filing a frivolous claim in connection with her premature filing of a lawsuit in the case of the missing Malaysia Airlines Flight 370.[17]

Technological Competence

Finally, an even more broad consideration for purposes of competence is the lawyer's overall use of technology. A lawyer has an obligation to use modern technology so as to facilitate an efficient resolution of the client's problem. Therefore, the lawyer who is still using a teletype machine, a mimeograph, and sending telegrams via Western Union is not being competent in representing the client. This pretty much goes without saying.

However, a less obvious duty is that the lawyer must use the technology to not only decrease the time it takes to complete the representation, but increase the lawyer's skill as an advocate and even advisor. And part of this obligation means that the lawyer must use the Internet to inform himself about current business, social and cultural trends. For instance, an Iowa lawyer was suspended for a year for allowing his client to be a victim of a popular Internet scam called the "Nigerian 419 scam."[18] In his defense, the lawyer argued that he should not be punished for not preventing his client's misfortune, as he had been duped as well. However, the court concluded that the lawyer had failed to meet his obligation of competence because he could have uncovered the scam by doing even the most cursory search on the Internet.[19]

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[16] *State of New Jersey v. Naquan O Neil, a/k/a Naquan O Neal (A-68-12) (072072).*

[17] *Illinois Commission No. 2014PR00092.* While the search for the plane was still ongoing, the attorney filed a lawsuit on behalf of the victims of the crash. Without any evidence upon which to base a case of action, the lawyer alleged that the crash was the result of "the negligence of *unknown individuals and entities* in the design, manufacture, ownership, operation, lease, repair and maintenance of the aircraft and its component parts." In the end, the Disciplinary Commission dropped all charges against the lawyer, concluding that "the law provided no clear guidance on whether or not her pleading was permissible."

[18] *This scam comes in several variations. But the variation used in this case began when the client received an e-mail claiming that he was entitled to inherit $18.8 million from a long lost relative residing in Nigeria. However, before paying over this inheritance, the client must pay certain inheritance taxes and purchase an "anti-terrorism certificate," which, in this case, required the advance payment of $177,600. Needless to say, once the client (with funds secured by his lawyer) made the advance payment, he never heard from the scammers again.*

[19] *Iowa Supreme Court No. 13–0780.*

DILIGENCE

A concept closely related to competence is diligence, which is embodied in Rule 1.3:

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Obviously, the lawyer who fails to reasonably diligent and prompt under Rule 1.3 is also failing to be reasonably thorough under Rule 1.1. As a result, when lawyers are charged with violating Rule 1.3, they are almost invariably also charged with violating Rule 1.1. For this reason, a competent lawyers is also a diligent lawyer. And fortunately, the commentary to this rule provides significant guidance to help lawyers be sufficiently diligent.

Putting Clients First

Comment [1] starts with, "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer…"

In other words, it simply isn't acceptable for a client to fail to meet the client objectives in a representation because doing so would be fattening, inconvenient or cost the lawyer money. For example, an Arkansas lawyer earned himself a two-year suspension from the practice of law for fraudulently listing his bankruptcy client's address as being in the state of Arkansas (the client actually lived in Oklahoma). His reason for doing so was to get the case assigned to a bankruptcy court near the lawyer's home, so that the lawyer could avoid travelling back and forth between Arkansas and Oklahoma. Obviously, a fraudulent bankruptcy filing wasn't in the best interest of the client, even if it would save travel time for the lawyer.

In fact, even when the putting the client's interest first might cause real personal hardship, the lawyer is required to do so. As a result, lawyers have been sanctioned for neglecting client matters while they attended important personal events, such as a sibling's wedding in France[20] and even the birth of their own child.[21] Although, in each case, the lawyer's sanction was greatly increased because they falsely claimed to be hospitalized with grave illnesses in an effort to hide their actual whereabouts.

[20] A Minnesota lawyer was suspended indefinitely (and for at least 120 days) for pretending to be sick in a hospital while she was actually in Paris attending her brother's wedding. *Minnesota Supreme Court, A14-0995.*

[21] Maryland lawyer disbarred for falsely claiming that he had epilepsy, so that he could be excused from court to be at the birth of his child. *Maryland Attorney Grievance Commission, Misc. Docket AG No. 12, September Term, 2012.*

Avoiding Over-Commitment

Another thing that often keeps lawyers from being diligent is that they take on so many matters that they are unable to serve every client adequately. The commentary provides a specific warning against over-commitment.

> "[2] A lawyer's work load must be controlled so that each matter can be handled competently."

Of course, this is often easier said than done. After all, very few lawyers are paid for the work that they turn away. Yet, at some point, it becomes necessary to turn away client matters. Some lawyers have learned the hard way that sometimes it's better to "Just Say No." Take, for instance, the so-called "Foreclosure King" of Florida who, with a team of newly minted associates, had 100,000 pending foreclosure cases on their books when the firm was forced to close, unable to keep up with the workload. Or take the case of the two Illinois lawyers who left 2,200 debt-relief clients in the lurch when they were unable to service their outsized client base.[22]

Needless to say, a lawyer need not have thousands of clients in order to over-commit herself. Yet, even if just one case is neglected, the results can be disastrous. For instance, a Michigan lawyer with "an inclination to overcommit herself" was suspended for 35-months for her lack of diligence on behalf of an adoptive couple.[23] As a result of her failure to promptly and diligently pursue the matter, the state forcibly removed from their home the child they had raised from birth to almost three years of age.

In other cases, lawyers have failed to act timely on behalf of those people from whom time really is of the essence – convicted prisoners.[24] This is particularly damaging to all involved (particularly the client), but it is somewhat understandable. Being incarcerated, the client is out of sight and thus, out of mind. As a result, the over-committed lawyer is more likely to serve those clients who can command the attention of the lawyer by their physical presence or their economic position.

As a result, small and/or poor clients are also more likely to be neglected by the over-committed lawyer. Yet, the lawyer's obligation to the client is not determined by the amount of that client's fee. Every client is entitled to prompt and diligent service and failure to meet that standard of service will have consequences. For instance, a Kentucky lawyer who was engaged by a client to write a single letter for the very modest fee of $50 was suspended for 30 days when he failed to write that letter.[25]

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[22] *Illinois Commission Nos. 2012PR00057 and 2012PR00058.*

[23] *Michigan Case No. 09-80-GA.*

[24] Disbarred for failing to file post-conviction relief for two clients for seven years. *136 Ohio St.3d 71, 2013-Ohio-2154.* 36-month suspension for neglecting client's case. *Arkansas CPC Docket No. 2015-066.* Disbarred for not filing habeas corpus petition. *Maryland Attorney Grievance Commission, Miscellaneous Docket AG No. 33, September Term, 2009.*

[25] *Kentucky Supreme Court 2012-SC-000832-KB.*

In fact, even if the client isn't paying a fee, the lawyer still owes the same duty of diligence. This principle was illustrated when a Maryland attorney was disbarred for her failure to diligently pursue *pro bono* representation for a number of homeless clients.[26] Likewise, even if the client has not signed an engagement letter (as required by state bar rules), the client is still owed the duty of diligence.[27]

And even when the over-committed lawyer is able to avoid neglecting any clients, it's likely that *all* clients are receiving a decreased level of care. This can result in the lawyer producing "shockingly poor briefs,"[28] engaging in "a pattern of gross and inexcusable inattention to details,"[29] writing "bare bones motions,"[30] repeatedly filing the identical brief in 31 of 35 appeals,[31] and filing nearly identical summary judgment motions in at least nine cases.[32]

It can also result in the most utter failures on the part of lawyers. For instance, a New Jersey attorney convinced his client to plead guilty to a DWI charge, despite the fact that the prosecutor had made available to him exculpatory video evidence of the incident (the attorney never watched the video).[33] In another matter, a Wyoming lawyer convinced his client to plead guilty to a DUI despite the fact that the client's blood alcohol content was 0.0% (the attorney never found the time to review the report). [34]

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[26] *Maryland Attorney Grievance Commission, Miscellaneous Docket AG No. 47, September Term 2011.*

[27] South Carolina lawyer was reprimanded for failure to diligently pursue car accident civil suit, notwithstanding that the client never executed a written fee agreement. *SC Appellate Case No. 2012-211406.*

[28] New York lawyer suspended for two years for submitting briefs, replete with defects such as incorrect clients' names, inclusion of irrelevant boilerplate, and reference to evidence that had not been submitted. *2012 NY Slip Op 02959 [96 AD3d 60].*

[29] Wisconsin lawyer was publicly reprimanded for "intentional disregard of the rules and the details, including his failure to proofread." *Wisconsin Case No.: 2013AP360-D.*

[30] An Ohio lawyer was disbarred for a high volume practice in which he handled about 1,000 matters a year. As a result, he gave the most minimal "bare bones motions." *133 Ohio St.3d 1, 2012-Ohio-3868.*

[31] An Ohio lawyer was suspended for two years for filing identical briefs, each of which was (1) was ten pages long, (2) repeated the same grammatical errors, (3) raised the same assignment of error—"The imposition of a prison sentence in this case imposes an unnecessary burden on state's resources"—(4) failed to cite any case law in support of the assigned error, and (5) failed to include any information regarding the cost of incarceration or why the appellant's sentence would burden the state's resources. *142 Ohio St.3d 230, 2014-Ohio-5459.*

[32] New York lawyer publicly reprimanded. *2015 NY Slip Op 07269 [132 AD3d 191].*

[33] *New Jersey Disciplinary Review Board, Docket No. DRB 12-119, District Docket No. XA-2011-0017E.*

[34] *2015 WY 112, D-15-0006.*

Procrastination

Another impediment to diligence representation is the all-too-human tendency to procrastinate. And while procrastination is an understandable behavior, disciplinary authorities are not usually "understanding" of lawyers who allow procrastination to adversely affect their clients.

The most common example of this client interest-diminishing procrastination is when the lawyer delays filing a lawsuit, answer or an appeal, until it is too late. At which time, the claim is either time-barred or a default has been entered against the client. Lawyers who allow procrastination to reach this point almost always suffer disciplinary sanctions, and often malpractice judgments.[35]

In other cases, the punishment may be less severe, but procrastination usually results in some form of disciplinary sanction. It may be just a censure in the case of a lawyer who unreasonably delays in helping the client obtain a divorce.[36]

Failure to Supervise

Of course, most lawyers work in concert with other lawyers, paralegals, secretaries and others. As a result, part of meeting the obligation to be diligent is to properly supervise those with whom the lawyer entrusts client matters. The obligation is more specifically set forth in Rules 5.1, 5.2, and 5.3.

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

[35] Ohio lawyer received a six-month (stayed) suspension for failing to respond to defense motions, resulting in dismissal of two cases. *146 Ohio St.3d 44, 2016-Ohio-535. Maryland Attorney Grievance Commission, Misc. Docket AG No. 82, September Term 2011.* New York lawyer suspended for 90-days for allowing appeal to be dismissed for lack of prosecution. *New York D-61-15.* Maryland lawyer accepted consent disbarment after allowing clients medical malpractice claim to statutorily expire (and then lying to the client about it for the next five years). *Maryland Attorney Grievance Commission, Misc. Docket AG, No. 0067, September Term, 2014.* New Jersey lawyer suspended for three months for allowing the statute of limitations to expire medical practice claim. *New Jersey Disciplinary Review Board, Docket No. DRB 12-003, District Docket No. XIV-2011-0118E.* An Illinois lawyer was suspended for 30 days for allowing a civil claim to be dismissed. *Illinois Commission No. 2013PR00110.* New Jersey reprimanded for promising to file an appeal that was never filed. *New Jersey Disciplinary Review Board, Docket No. DRB 14-071, District Docket No. IV-2012-0018E.*

[36] *2015 NY Slip Op 06097 [131 AD3d 171].*

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.1 sets forth the duties of a partner or senior lawyer. Under this rule, a partner is responsible for making reasonable efforts to see that the firm's lawyers act ethically. However, that doesn't mean that a partner is necessarily responsible for any ethical breach of other lawyers. And generally speaking, so long as the firm has reasonable ethical measures in place, a partner won't be held liable for the actions of other partners, unless she orders or has knowledge of those actions.

However, there is another situation in which a partner may be held responsible for even the actions of an equal (or even higher ranking) partner. That is when the other partner is working for the subject partner's clients. In that case, the subject partner is ultimately responsible that the client's representation is handled competently. And if that duty is not met, the subject partner may be held responsible for its breach, regardless of which lawyer in the firm ultimately dropped the ball.[37]

Now, in the case of supervising junior lawyers or associates of the firm, a partner must take reasonable efforts to ensure that associate conforms to the ethics rules. Interestingly, the commentary doesn't provide any guidance to determine what are "reasonable efforts."

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.2 sets forth the responsibilities of a junior or associate lawyer. Under this rule, the associate's main responsibility is to maintain compliance with the ethical standards, even if

[37] New Jersey lawyer disbarred for neglecting client matters despite arguing that the neglect stemmed from his partner's handling of the matters. *New Jersey D-42, September Term 2014, 075285.*

directed to do otherwise. However, the rule allows the associate to defer to a partner's judgment in ambiguous cases.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 provides the greatest ethical exposure to lawyers for failure to properly supervisor co-workers. For one, all lawyers, even associates, must make reasonable efforts to ensure that nonlawyers conduct themselves in ways compatible with the professional obligations of the lawyer. And one way in which nonlawyers meet this standard is to avoid the unauthorized practice of law. Nonlawyers should not act as lawyers and supervising attorneys should certainly not direct them to do so, or even allow for it to occur with their knowledge. If a lawyer does direct or permit the unauthorized practice of law, the lawyer may face severe consequences, including disbarment.[38]

Also, it should be noted that the supervisory responsibility of Rule 5.3(b) isn't limited to acts of gross malfeasance on the part of nonlawyers. A lawyer may even be held ethically responsible for a nonlawyer's lack of diligence, failure to communicate with clients, etc. For instance, a Colorado lawyer received a nine-month suspension as a result of his paralegal's failure to timely divorce documents on behalf of the client. In this matter, the disciplinary

[38] A California lawyer agreed to disbarment for allowing a nonlawyer to open and operate a law firm that offer credit-repair services in his name. *California 13-O-11844.*

authority suspended the supervising attorney because he failed to personally review the status of the matter that he had delegated to his paralegal.[39]

Rule 5.3(c)(2) sets forth a duty that might not be obvious upon a casual reading of the provision. However, lawyers should never be casual in regards to taking *timely* remedial action once an ethical violation is uncovered. Failure to do so can result in the attorney being held directly responsible for the nonlawyer's unethical activity. For instance, a Maryland lawyer was disbarred as a result of embezzlement from his firm's client trust account by a paralegal. In most cases, a lawyer would not receive such a heavy sanction for another person's unethical (and unlawful) conduct, unless the lawyer ordered the conduct or knew about it. There is no evidence that either was true in this case. Nevertheless, the lawyer was disbarred because he discovered financial discrepancies at a time when "its consequences could have been avoided or mitigated." However, rather than taking immediate action. The attorney ignored the theft of smaller amounts until his paralegal eventually embezzled almost all of the client funds held by the firm.[40]

[39] *Colorado 13PDJ047.*

[40] *Maryland Misc. Docket AG No. 73, September 2013 Term.*

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NAVIGATING THE STRAITS OF THE FCPA - ONE CLIENT'S JOURNEY FROM INVESTIGATION TO DECLINATION

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NOTES

STINSON

Navigating the Straits of the FCPA – One Client's Journey From Investigation to Declination

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Origins of the Investigation

- Layne Christiansen, a company with key divisions in water infrastructure, mineral exploration and energy, with substantial operations in a number of African nations, including Mali, Guinea, Burkina Faso, the Democratic Republic of Congo and others.
- These operations reported to a division management team at a Layne subsidiary in Australia
- Through an existing compliance platform company officials in the United States learned of possible improprieties, implicating the FCPA, in some of the African operations
- Concerns related to payments by company employees to customs clearing agents, tax consultants and others in Africa

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Layne Locations in Africa

Mauritania

Mali

Guinea

Burkina Faso

Democratic Rep. of Congo

Zambia

Tanzania

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Initiating the Investigation

- The company's general counsel and compliance head engaged the company board and audit committee after an initial review of the concerning evidence
- The company retained Stinson to conduct an in-depth investigation
- An 8-attorney team from Stinson traveled to Africa and Australia, secured dozens of computer hard drives and mobile devices, interviewed witnesses and reviewed millions of documents
- Investigation complicated by the fact that implicated employees had sought to conceal their actions from company officials by using non-Layne communications channels to discuss their plans and activities (e.g., Yahoo chat)

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Conducting the Investigation/ Reporting Results

- Layne/Stinson organized and consolidated the materials collected, formed conclusions about the nature and extent of the concerning activity and reported to audit committee and full board
- Review of electronic communications and devices required forensic analysis from outside vendors and specialists
- Simultaneously, the company hired a Chief Compliance Officer and staffed up its Compliance Office
- Layne further strengthened its compliance efforts by hiring a compliance/internal controls consultant to assist in improving Layne's compliance process and in providing information to the government

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Voluntary Reporting of the Findings to the Government

- The company decided it should make a voluntary report to the DOJ and SEC as to what it had discovered in its investigation
- Over the span of about 24 months, the Layne General Counsel, the head of the audit committee and Stinson attorneys met with DOJ and SEC officials a dozen times
- The Layne team discussed results of interviews/document reviews in almost real time with government attorneys and solicited feedback on proposed additional routes the investigation might take
- The Layne team brought company witnesses from overseas for interviews by government attorneys
- Throughout this period, the company took extensive measures to reinforce its compliance programs and internal controls to resolve deficiencies that had allowed the overseas employees to conduct questionable activities without near-immediate detection by the company

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Results

- DOJ recognizes "pervasive criminal conduct" but declines to prosecute based on self-disclosure, exemplary cooperation and significant remediation. No fine. Nothing else.
- Minimum SEC penalty
- No monitor

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Current State of the FCPA

- Prohibits bribery of foreign officials (Anti-Bribery Provisions) – DOJ Enforcement
- Requires public companies to maintain accurate records and have vigorous internal accounting controls (Accounting Provisions) – SEC Enforcement

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Current State of the FCPA – Cont'd

ANTI-BRIBERY PROVISIONS

The FCPA prohibits the giving or offering—directly or indirectly—of gifts, payments, or "anything of value" to foreign government officials to secure an improper benefit in obtaining or retaining business

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Current State of the FCPA – Cont'd

ACCOUNTING PROVISIONS

Must keep accurate books and records

- Section 13(b)(2)(A) of the Securities Exchange Act
- Section 13(b)(7)

Must maintain effective internal controls

- Section 13(b)(2)(B)

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Current State of the FCPA – Cont'd

THE FCPA APPLIES TO:

- Publicly traded companies in the U.S.
- Entities incorporated or based in the U.S. (including, for example, joint ventures with U.S. companies)
- Officers, employees, and agents of such companies
- U.S. nationals and residents wherever they may be
- Any person who furthers foreign bribery while "in" the U.S.

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Current State of the FCPA – Cont'd

CONSEQUENCES OF FCPA VIOLATIONS COMPANIES:

- Criminal fine up to $2 million per violation, civil penalties up to $10,000 per violation, and forfeit all profits.
- Compliance monitors
- Suspension or debarment
- Private lawsuits
- Reputational harm

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Current State of the FCPA – Cont'd

CONSEQUENCES OF FCPA VIOLATIONS – CONT'D

INDIVIDUALS:

- Criminal sentence up to five years in prison and/or
- Fine up to $100,000 per violation, and civil penalties up to $10,000 per violation, plus discretionary additional fines imposed by court
- Debarment by SEC
- Reputational harm

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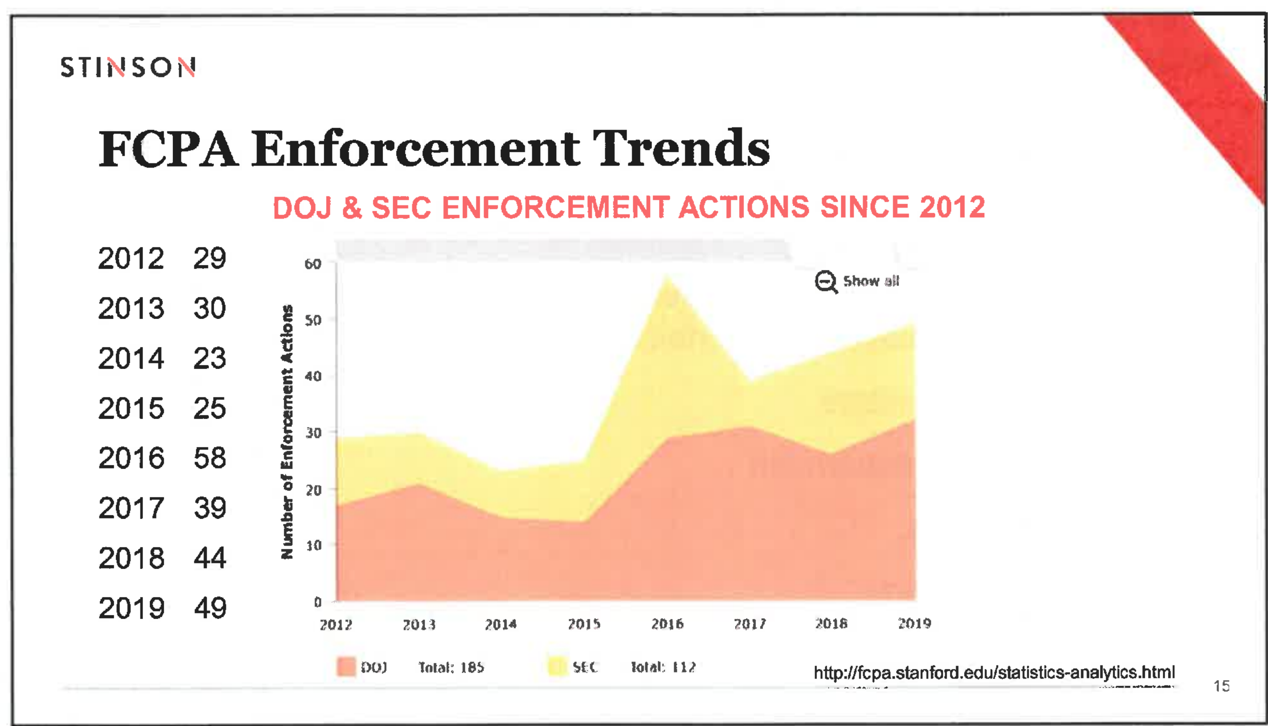

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FCPA Guidance – DOJ

FCPA CORPORATE ENFORCEMENT POLICY

- Launched as a Pilot Program in 2016
- Declination *available* when three requirements met:
  1) Voluntary self-disclosure
  2) Full cooperation
  3) Timely and appropriate remediation

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FCPA Guidance – DOJ – Cont'd

- Policy formally launched in November 2017:
  - The Policy now *presumed* a case to be resolved via declination where the requirements were met.
- Three significant policy changes in 2018 (not limited to FCPA cases):
  - No "piling on": provides guidelines aimed at preventing duplicative fines on companies under investigation by multiple government agencies

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FCPA Guidance – DOJ – Cont'd

- Monitorship: details when and to what extent prosecutors should impose monitorships
- Changes to requirements for corporate disclosures for culpable individuals: reduces amount of information companies seeking cooperation credit need to provide about employees allegedly involved in criminal conduct

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FCPA Guidance – DOJ – Cont'd

2019 CHANGES:

- DOJ will not direct a company's internal investigation
- Presumption of declination for companies undergoing mergers or acquisitions that identify misconduct at target company
- Required disclosure of individuals *substantially* involved in wrongdoing instead of *all* individuals involved
- Fulsome disclosures should be made when they are discovered

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FCPA Guidance – SEC

- Unlike the DOJ, the SEC did not issue formal FCPA guidance
- In deciding whether to grant cooperation credit to companies, the SEC considers four broad factors outlined in the 2001 Seaboard Report:
- Self-policing, Self-reporting, Remediation and Cooperation

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DOJ Evaluation of Corporate Compliance Programs

Three fundamental questions:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith?
3. Does the corporation's compliance program work in practice?

DOJ does not use any rigid formula to assess the effectiveness of corporate compliance programs.

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Making Your Case to the DOJ

- Defensibly scope the investigation
- Focus on the corporate controls that existed and were violated
- Start immediately on assessing and improving the compliance program
- Prepare yourself to answer why the same scheme would not succeed a second time

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Lessons Learned

- Perform a compliance assessment to know where your risks are
- Engage the Board/Audit Committee
- Self-report quickly and investigate quickly and thoroughly
- Candor and know the playing field – the relative absence of hard guideposts (i.e., precedent)
- Transparency, transparency, transparency
- Anticipate the agencies' needs and help them
- Compliance program and internal controls are critical
- Put your best team in place and control costs

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The Four C's - Key Principles

COOPERATION (U.S.S.G. Section 8c2.5(g))

- Prompt disclosure and cooperation (prior to government investigation)
- Up to 5 points in the U.S.S.G.
- Additional "cooperation discount" in negotiating penalty

CANDOR

- Real candor
- Rapport/relationship with government attorneys
- Reputation is more than half the battle

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The Four C's - Key Principles – Cont'd

COLLATERAL CONSEQUENCES (U.S. Attorney's Manual Section 9-28.1000)

- Federal/state contractor status
- Arthur Andersen situation

COMPLIANCE (U.S.S.G. Sections 8B2.1; 8C2.5(f))

- Credit for pre-existing program that is "generally effective" in detecting and stopping criminal conduct (irrespective of whether it worked in a given instance)
- Management is knowledgeable about program and provides reasonable oversight
- High level personnel of company are assigned overall responsibility for program
- Those running program report frequently to top management and are given adequate resources and authority and direct access to board
- Company takes reasonable steps to communicate program's elements to employees
- Periodic monitoring and testing of the program

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The Holy Grail

U.S. Department of Justice

Fraud Section, Criminal Division

August 6, 2014

John Munich, Esq.
Russell Berland, Esq.
Stinson Leonard Street LLP
7700 Forsyth Road, Suite 1100
St. Louis, MO 63105

Re: Layne Christensen

Dear Messrs. Munich and Berland:

I write regarding the investigation by the Department of Justice, Criminal Division, Fraud Section into Layne Christensen Company (the "Company") regarding possible violations of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, *et seq* (the "FCPA"), including by the Company's subsidiaries in Australia and various African countries. During the course of the investigation, you have provided certain information to the Department and have described the results of the Company's internal investigation into this matter. As you know, the Department greatly values voluntary disclosures by companies and their cooperation with investigations, such as the disclosure and cooperation here. We appreciated your thorough investigation and cogent presentation of the facts, and particularly value the remedial efforts undertaken by the Company as a result of the findings of its internal investigation

Based upon the information that has been made available to us to date, we have closed our inquiry into this matter. Our decision not to file criminal charges does not mean that we concluded that your client and others involved in the above-referenced matter did not, in fact, violate the FPCA. If additional information or evidence should be made available to us in the future, we may reopen our inquiry.

Sincerely,

PATRICK STOK[illegible]
DEPUTY CHIEF

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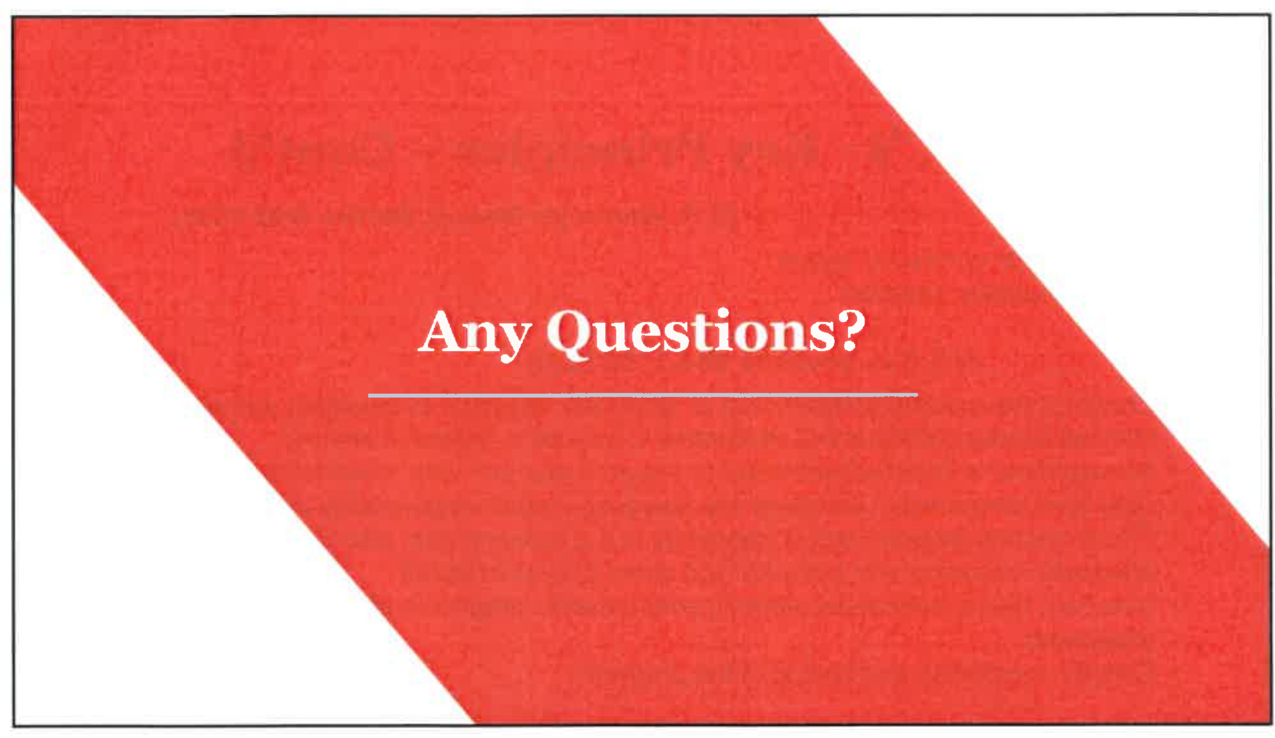

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With a Total Commitment to client success, Thompson Coburn was awarded the 2019 ACC Value Champion Award alongside Rabo AgriFinance by the Association for Corporate Counsel at the national level

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The choice of a lawyer is an important decision and should not be based solely upon advertisements.

2020 Virtual Corporate Counsel Institute (CCI) Agenda

SESSION II: Tuesday, July 14, 2020
3.0 MO MCLE | Including 1.0 Elimination of Bias

10:45 - 11:00 a.m.	**Zoom call open for check-in and troubleshooting**
11:00 - 11:10 a.m.	**Welcome** **Brian Parsons, Senior Counsel, Litigation, Macy's Corporate Services, Inc.** **President, Association of Corporate Counsel, St. Louis Chapter** **Robert Tamaso, Partner, Husch Blackwell LLP** **President-Elect, Bar Association of Metropolitan St. Louis**
11:10 - 12:00 p.m.	**Current Trends Shaping the IP Landscape** (1.0 MO MCLE) **Armstrong Teasdale, LLP** Andrea Cannon, Deputy General Counsel, Nestle Purina Donna Schmitt, Partner, Armstrong Teasdale, LLP Marc W. Vander Tuig, Partner, Armstrong Teasdale, LLP
12:00 - 12:10 p.m.	**Break**
12:10 - 1:00 p.m.	**Dismantling Assimilation in the Legal Profession Things** (1.0 Elimination of Bias) **Greensfelder, Hemker & Gale, P.C.** Christopher A. Pickett, Officer and Chief Diversity Officer, Greensfelder, Hemker & Gale, P.C.
1:00 - 1:10 p.m.	**Break**
1:10 - 2:00 p.m.	**Litigation in the COVID-era: Preparing For and Executing Remote Depositions, Hearings and Virtual Trials** (1.0 MO MCLE) **Thompson Coburn LLP** Suzanne Galvin, Partner, Thompson Coburn LLP John Kingston, Partner, Thompson Coburn LLP

2020 Virtual Corporate Counsel Institute (CCI) Agenda

SESSION III: Tuesday, August 11, 2020
3.0 MO MCLE

10:45 - 11:00 a.m.	**Zoom call open for check-in and troubleshooting**
11:00 - 11:10 a.m.	**Welcome** **Brian Parsons, Senior Counsel, Litigation, Macy's Corporate Services, Inc.** **President, Association of Corporate Counsel, St. Louis Chapter** **Robert Tamaso, Partner, Husch Blackwell LLP** **President-Elect, Bar Association of Metropolitan St. Louis**
11:10 - 12:00 p.m.	**Navigating the Shifting Landscape of Data Privacy** (1.0 MO MCLE) **Polsinelli** Dan Glowski, Vice President & Assistant General Counsel, Reinsurance Group of America Rebecca Frigy Romine, Shareholder and Privacy Officer, Polsinelli
12:00 - 12:10 p.m.	**Break**
12:10 - 1:00 p.m.	**When the Tables Turn: Strategies to Prepare In-House Counsel When Deposed as Witnesses** (1.0 MO MCLE) **Husch Blackwell LLP** Sarah Hellmann, Partner, Husch Blackwell LLP Urmila P. Baumann, Associate Chief Counsel, Cigna/Express Scripts
1:00 - 1:10 p.m.	**Break**
1:10 - 2:00 p.m.	**All Things AI: Dealing with Privacy, Intellectual Property and Commercial Aspects of AI in Your Business** (1.0 MO MCLE) **Gowling WLG** Kelsey O'Brien, Senior Legal Counsel, Accenture LLP - St. Louis Jahmiah Ferdinand Hodkin, Partner, Gowling WLG - Ottawa Selina Kim, Partner, Gowling WLG - Toronto Todd Burke, Partner, Gowling WLG - Ottawa (Moderator)