



Monday, October 20
11:00 am-12:30 pm

113 In-house Counsel as Circus Ringmaster

Michael B. Keating

Partner

Foley Hoag

Peter Marchel

Vice President and General Counsel

Alexander Morford & Woo

J. Henry Walker IV

Partner

Kilpatrick Stockton

Faculty Biographies

Michael B. Keating

Michael B. Keating is one of the principal trial attorneys for Foley Hoag LLP and is chairman of the litigation department in the firm's Boston office. His practice focuses on representing corporate and individual litigants in a range of complex litigation in both federal and state courts. Mr. Keating also has substantial experience in the commercial arbitration of disputes both as counsel and as an arbitrator and was selected by the Center for Public Resources to serve on its permanent mediation panel. Mr. Keating was appointed special counsel by the Massachusetts Supreme Judicial Court to the Commission on Judicial Conduct and, later, appointed as chairman of the Court Management Advisory Board, which advises the Supreme Judicial Court on all matters of judicial administration.

Mr. Keating has served as a special master for the U.S. District Court, is a former president of the Boston Bar Association, a fellow of the American College of Trial Lawyers, and has been ranked by Chambers USA: America's Leading Business Lawyers as Massachusetts' leading general commercial litigator.

Mr. Keating received a BA, cum laude and Phi Beta Kappa, from Williams College. He holds a LLB from Harvard Law School.

Peter Marchel

Peter Marchel is vice president and general counsel for Alexander, Morford & Woo's home office in Seattle. He specializes in the placement of Directors' and Officers' (D&O) Liability Insurance for companies in both the United States and Canada. Mr. Marchel provides insight on litigation management and securities issues pertinent to today's CEO, and he has addressed these and other topics for organizations such as the following: CPCU, IBA West, IIABW, PLUS, ARM Northwest, NACD (National Association of Corporate Directors), FEI (Financial Executives International), and ACC.

Working in various capacities during his tenure in the insurance industry, Mr. Marchel's experience extends from acting as in-house counsel and handling litigation for a national insurance carrier to running the legal division for a multi-national brokerage firm.

Mr. Marchel holds numerous insurance designations, including CPCU, AIM, and AIS. He received a BA from the University of Washington, where he also earned a certificate in Total Quality Management. Mr. Marchel received his JD and MBA in Business, Government and Not-for-Profit Management from Willamette University in Salem, OR.

Henry Walker

Henry Walker is a partner in the litigation department at Kilpatrick Stockton, LLP in Atlanta. While at Kilpatrick Stockton, Mr. Walker has handled complex litigation matters

for clients, including class action, technology litigation, antitrust, and intellectual property cases. He has also provided extensive client counseling on the best ways to minimize risks and prevent litigation in business initiatives.

Prior to rejoining Kilpatrick Stockton, Mr. Walker served as chief litigation counsel to BellSouth Corporation and its successor, AT&T South, managing a team of lawyers and paralegals responsible for a large and challenging litigation docket. While with BellSouth, Mr. Walker was chair of both the legal department's technology committee and professional development committee, and led a team that implemented a new e-billing and matter management system.

Mr. Walker is very active in the State Bar of Georgia, currently serving on the board of governors and numerous committees. He also played a significant role in the passage of significant tort reform legislation in Georgia in 2005. Additionally, Mr. Walker is active in the ACC, including serving as the chair of ACC's Litigation Committee. Because of his experience, Mr. Walker is a frequent speaker on litigation topics, including electronic discovery, class actions, and litigation management metrics.

Mr. Walker received a BA from the University of Virginia and is a graduate of Mercer University Walter F. George School of Law.



Team Leadership

- Crisis/Project Management
 - Who is in charge of what areas?
 - What is the plan?
 - Decide, Delegate, Follow-up and Adjust



Team Leadership

- Internal Leadership
 - Executive Contact
 - Dealing with implicated executives
 - Board Contact
 - Audit Committee
 - Internal Departments
 - Human Resources
 - Internal Audit
 - Other



Team Leadership

Independent Investigation

- Outside Counsel
- Auditors
- Outside Communication
 - Shareholders
 - Media / Press



Self-Preservation

- Legal has a Higher Duty
- Know Your Role
- Know Your Allies
- Avoid Paralysis by Analysis
- Avoid being the Scapegoat



Internal & External Communications

- Silence is deadly, but Loose Lips Sinks Ships
- Centralize Communications to Designated Individuals
- Each Communication Must Be Scrutinized For Truth, Accuracy and Long Term Ramifications
- Consider External Help



Loyalty to Management

- There is No Place For Truly Bad Actors
- People are Important
- Managing Emotional Reactions
- Long-Term Considerations



Ethical & Professional Obligations

- Are you a Gatekeeper?
- Attorney-Client Privilege Issues
 - Who do you represent?
 - Who do others represent?
 - Upjohn Warnings
 - Joint Defense Issues



Ethical & Professional Issues

- Conflicts
 - Attorney Client Privilege
 - Upjohn Warnings
- Ethical Duties
 - Does this shift / change as the fact pattern changes



SEC and Other Regulatory Disclosures

- Requirements/Considerations
- Timing of Disclosures
- Content of Disclosures
- SEC Communications



Board Investigation Using Independent Counsel

- When to Initiate
- Who should Conduct and Oversee
- Issues with Special Committees
- Reporting on Results



Insurance Coverage Issues

- Know the policy
 - Who's the insured
 - Directors
 - Officers
 - Employees
 - Company
 - What triggers a claim
 - Investigations
 - Complaint
 - Regulatory / Administrative Actions



Insurance Coverage Issues

(Cont'd)

- When to report
- The Process
 - Notice
 - ROR / Denial
 - Planning the defense
- Defense
- Settlement



Document Preservation

- Institute Broad Preservation Hold Processes
- Back-up Tapes/Auto-Delete
- Verbal and Written Communication to Key Custodians
- Compliance/Follow-up



Class Actions

- Be prepared for the Litigation Shoe to Drop
- Be Aware – Plaintiff's Counsel Are Monitoring Market and Press
- Identify Potential Claims and Take Remedial Action
- Review All Statements with Goal of Minimizing Risks
- Don't Let Fear of Litigation Drive Bad Decisions

The Independent Investigation

By: Michael Keating
Foley Hoag LLP

A Check List for Diligent Directors

- ✓ DO Pay Attention to Hot-Button Areas
- ✓ DO Respond Promptly to Danger Signs
- ✓ DO Assure the Independence of Decision Makers
- ✓ DO Assure the Independence of Counsel

A Check List for Diligent Directors

- × DON'T Leave it to Others
- × DON'T Rush to Judgment
- × DON'T Spin the Investigation to Match a Preferred Result
- × DON'T Ignore the Value of a Fair Process

Benefits of Investigating

- Fiduciary duty
- Sarbanes Oxley compliance
- Federal Sentencing Guidelines
- Cooperation with regulators
- Dismissal of derivative claims
- Control the media story
- Fix the problem (or find out there isn't one)

Danger Signs

- Internal tips from management/employees
- Anonymous tips
- Civil Suits
- Government inquiries and investigations
- Self-regulation organization inquiries
- Media Reports
- Information from financial statements

What Should You Do?

- Find the facts.
- Carefully and deliberately analyze the evidence.
- Render a fair, reasoned and informed decision.

Don't Leave it to Others

How Should You Do It?

- Assure the independence of investigations.
- Don't leave it to others; participate actively.
- Don't rush to judgment.
- Assure a fair process.

HP "could not confirm that the techniques employed by the outside consulting firm and the party retained by that firm complied in all respects with applicable law."

Form 8-K filed September 6, 2006

Assure Independence

"This was a social atmosphere painted in too much vivid Stanford Cardinal red for the SLC members to have reasonably ignored it."

In re Oracle, 824 A. 2d 917 (Del. Ch. 2003)

Don't Rush to Judgment

"How can the court and the company's stockholders reasonably repose confidence in an SLC whose Chairman has publicly and prematurely issued statements exculpating one of the key company insiders whose conduct is supposed to be impartially investigated by the SLC?"

Biondi v. Scrushy, 820 A. 2d 1148 (Del. Ch. 2003)

Assure a Fair Process

“Every member of the Board had already decided, by June 2, 2005, to terminate O’Connell for cause without regard to O’Connell’s rights under the Employment Agreement and Marc Racicot’s repeated assurances that he would be given a fair hearing before a decision was made.”

Award of Arbitrators, AAA CASE: 11 116 Y 01362 05 (2006)

Conclusions

- You are not alone. Use advisors – but remember, they work for you, not the other way around.
- Process, Process, Process.
- Integrity is everything. Always choose the right way, not the easy way.

ACC – THREE RING CIRCUS SEMINAR
Noble Manufacturing Corp. Fact Pattern

As background, Noble Manufacturing Group (“Noble”) is a publicly traded company with three main divisions. The Advanced Widget Software Division (“AWS”) was acquired by Noble about three years ago in a cash/stock deal. While still highly profitable and a large player in the market, corporate development believes that the primary AWS software product is nearing the end of its life cycle. A recent internal corporate strategy report stated that competitive products may be faster, better and cheaper. The report also stated that, even with upgrades and a new version coming out soon, new sales are becoming difficult. Further, Noble cut about 30 percent of its work force to get the synergy they promised at the time of the merger. Morale is low among the pre-merger AWS employees.

On March 5, 2008, Mr. Smitty, a mid-level manager in the Noble Finance Group, reports at the CFO’s bi-weekly staff meeting that preliminary 1Q revenue numbers from the AWS are way below projections. AWS had failed to close a number of contracts that they believed were sure things. If the trend continues, the mid-level manager believes that this revenue shortfall could significantly affect Noble’s 1Q earnings report. When asked how much, Mr. Smitty replies he thinks the shortfall could be between \$50-100 million or 3-5 cents per share.

The CFO, who worked on the deal to acquire AWS, believes that Mr. Smitty is a bit of an alarmist. Mr. Smitty is not well liked in the company and is often described as a contrarian. It is also well known that Mr. Smitty does not like the AWS division head or its local finance person. He describes them as “fast and loose.” The CFO asks her Finance AVP to look into the situation and report back within 48 hours. AVP talks to the AWS President who reports that several sales are in the pipeline and believes they will hit or be very close to their 1Q numbers. AVP also discusses the matter with the internal Finance Department person in AWS who says she has been repeatedly told that several sales are pending and that the beginning of the year is always slow. The sales force has provided her with the names and number of the customers. She volunteers, however, that she is not “on the inside” and notes that since reorganization at the beginning of the year, she has not been included in the AWS President’s weekly staff meetings.

The Finance AVP reports his findings to the CFO. He verbally suggests it might be a good idea to get the internal auditing and the external accountants involved, but the CFO says no. The AVP suggests that the AWS President be called in for a meeting with the CEO to give a status report. CFO acknowledges that the AWS President likes to fly solo a little too much but has always delivered his numbers in the past. Following up, the CFO calls the AWS President who reports that “everything is under control.” He reports that AWS 6.0 has some exciting new features that will be released in the fall. They are offering free upgrades to customers who sign up now and that seems to be boosting new sales. The CFO does not report any issues to the CEO because he regularly plays golf with the AWS

President and because “the CEO gets the same sales reports and probably already knows about this issue.”

Sure enough, AWS makes its 1Q numbers based on a number of sales late in the quarter. Noble beats its earnings projections by 2 cents per share and its stock price continues to rise. It is one of the few bright spots in the market and is attracting a lot of positive attention from the analysts. After the earnings announcement, the CEO appears on CNBC and projects a positive growth trend for all divisions, including AWS. All presentations related to the earnings call and CNBC appearance are reviewed and approved by the CFO and the GC.

On May 1, 2008 at the bi-weekly CFO meeting, Mr. Smitty reports that he believes that the 1Q revenue numbers from AWS division are “soft.” He thinks that the company needs to do a comprehensive review of AWS’s finances. CFO refers the matter to AVP again for further direction. AVP reports they should engage internal auditing to do an immediate investigation. The CFO is unable to meet with the CEO for two weeks because CEO is in Scotland playing golf and fishing. Upon his return, the CEO immediately authorizes an investigation and reports that an investigation has begun to the Board. He notes that the CFO should have communicated this information to him earlier. At the end of the meeting, CEO and CFO call General Counsel to inform her that they are conducting an investigation. The GC is not consulted as to the specifics of the investigation.

In the first 24 hours, internal audit discovers that a number of the sales contracts are not properly documented in violation of company policy. A number of other large contracts are for sales that merely require small refundable deposits for AWS 6.0. Upon their initial review, the amounts booked raise a number of questions but require a contract by contract review to determine whether company accounting procedures were followed. Some contracts contain addendums that would require potentially large rebates that were not disclosed to Finance at the time of the sale. Internal auditors bring in outside auditors. Outside auditors are not happy that they were not informed of these issues earlier.

CFO reports to CEO that the investigation has revealed some irregularities with AWS revenue. CEO sends a short note to the Board and asked the audit committee to call special meeting. On the AWS front, the news continues to get worse. Further investigations reveal suspect sales contracts dating back nearly two years, including a file with five previously undisclosed contracts with rebate and discount addendums that go into effect 12-24 months after the contracts were signed. These contracts were reported and “mistakenly” booked as full price contracts. While initially cooperative, the AWS President has been unable to schedule a meeting with the auditors for several days. The facts are unclear as to the amount of suspect revenue or the number of customers that could be involved. The five contracts with undisclosed rebates total a few million dollars. External auditors believe that a restatement may be in order, but believe that it will take some time to determine the amount of the restatement.

The next day, the Wall Street Journal, based on an undisclosed source, says that the company is investigating accounting improprieties related to revenue numbers from its AWS division and believes that the sales numbers may be inflated. Stock price drops 20% in one day. Company is besieged by reporters waiting on a comment. The CFO believes that Mr. Smitty is the person who leaked the story and wants him fired.

CEO calls a meeting with the GC the next morning at 7am. He asked the legal department to be “on point” on the AWS revenue issue. He says while he had previously been looking to the CFO, he now wants the GC to help him get to the bottom of “this mess.” He tells the GC that he can have all the resources that are needed and there are no sacred cows. “Just get to the bottom of it. Don’t forget, however, that our futures could be at stake if this goes bad.” He expects an action plan by 7am the next day and daily reports every morning at 7am.

OTHER POTENTIAL STAGES

Stage 2

- Mr. Smitty becomes a whistleblower under SOX
- SEC sends an informal notice - inquiry letter

Stage 3

- AWS Division President continues to stonewall and is rumored to be talking to an attorney
- WSJ reports SEC sent notice and does follow-up story on accounting issues citing internal sources
- Derivative Investigation requested

Stage 4

- Stock drops 40% over five-day period - overall stockmarket market shrinks 10%
- SEC formal investigation
 - AWS Division President wants separate counsel
 - Audit Committee requested independent investigation
 - Shareholders lawsuit filed.
 - Derivative lawsuit filed.

