



Practice Area

briefings

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Game Plan: Womble Carlyle Session at ACC ACES 2015 Uses Hypothetical Exercise to Build Collaborative Skills

The general counsel of AmecTek, a global software solutions company, faced a daunting challenge. A proposed new law would require corporate officers, under individual criminal penalty, to certify that all independent contractors are properly classified under federal, state and international laws, and that all contractors' employees are properly classified for FLSA purposes.

However, when the general counsel spoke with the company's HR director, she learned that many workers were misclassified, and that AmecTek's chief executive officer had pressured the HR department to inaccurately categorize workers in order to save money.

It is a hypothetical scenario, but in-house counsel often must contend with similar situations. At the Association of Corporate Counsel's Advanced Compliance Educa-

tion Summit (ACES), which took place April 26-28 in New Orleans, in-house attorneys participated in a dynamic and interactive tabletop exercise designed to foster collaboration and innovative problem solving.

Womble Carlyle attorneys Alison Bost, Brent Clinkscale, Meredith McKee, Claire Rauscher and Mark Schamel, Boeing Company Ethics and Compliance Chief Counsel Stephen Epstein, and American Association for the Advancement of Science (AAAS) Chief Financial Officer/Chief Legal Officer Colleen Struss led the exercise. Womble Carlyle, a full-service law firm serving middle market companies, is the sponsor of the ACC's Compliance and Ethics Committee.

For this exercise, in-house attorney participants in the program were divided into teams of six to eight people. Each team was assigned a facilitator to help direct the conversation.

The teams spent approximately 15 minutes discussing the scenario and brainstorming possible approaches to address the AmecTek dilemma. Bost said the following questions were assigned to various teams to address:

- Discuss what else the general counsel should do to investigate this matter and gather necessary information;
- Develop the outline of how they would go about assessing the legal risk to AmecTek based on existing practices;
- Develop the outline of a remediation plan for AmecTek, including the design of new internal controls;
- Develop a strategy for assessing additional resources needed to bring AmecTek into compliance, budget development, and management involvement;
- Develop a strategy for internal



SECOND STOP:

PARIS



Bonjour! It's Winston, and today, I'm in Paris for the second leg of a client service world tour.

My French Poodle *ami*, Pierre, is the general counsel of a French modular dog house construction company with locations around the world. Its U.S. operation is defending a class action lawsuit, and Womble Carlyle's Construction Team is working closely with Pierre's in-house staff. Our Construction attorneys are experienced in building product defense and complex mass tort litigation. Plus, our BullDoxSM Team (*love that name!*) is helping with e-discovery. From talking with Pierre, we know that controlling litigation costs is a major concern for the company, so cost containment is a focus for our defense.

The litigation is ongoing, but things are going well, and the client is pleased. Now, I'm going to treat Pierre to some fine French cuisine. You know your buddy Winston isn't going to pass up a good meal!

Tomorrow, I'm heading to Charles de Gaulle Airport to catch a long flight to Shanghai. Travel to the end of the Womble Carlyle briefing to our final destination!



Join the World Tour!

Tag a photo of you and your pet to connect with Winston and friends!



#WinstonsFriends

David Hamilton & furry friends, @DBH7

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communications regarding the new requirements and methods for auditing compliance;

- Develop a strategy for external communications in the event this compliance issue becomes public;
- Explore possible metrics, controls and monitoring procedures for measuring the effectiveness of AmecTek's compliance program; and
- Design a strategy for building a culture of compliance at AmecTek both during and after these specific compliance efforts.

Then, each team shared their proposed solutions with another team. The other team of attorneys then provided feedback on those ideas and — this is key, Rauscher said — the presenting attorneys were not allowed to rebut, explain or comment on any of that feedback. Instead, they were instructed simply to listen and consider what they were hearing from their peers.

Rauscher said that isn't always easy for attorneys. Most of the comments were critical, punching holes in the solutions being presented. An attorney's instincts are to defend his or her argument. But Rauscher said that a critical review can be constructive.

"It's perfectly natural for attorneys and business people to be personally invested in their initial ideas and solutions to a problem," McKee said. "But that pride-of-authorship may blind you to shortcomings or keep you from engaging in the additional, critical discussion necessary to generate an even better idea."

Once the presenters returned to their table, they revised and refined their proposals, and to a table, found value in the feedback they

had received from their peers. Each table then presented their ideas to the whole group. And the facilitators then concluded the program with a list of high-level tips and lessons learned from the collective exercise.

"This exercise shows the value of the collective mind in reaching reasoned decisions," Rauscher said. "At the end of the session, the resolution by the table is complete and well-rounded."

In addition, the activity promotes cooperation between in-house and outside counsel. In-house and outside counsel naturally will approach this hypothetical scenario from different perspectives. By working together to solve the problem, each gains a better understanding of the other.

The Womble Carlyle team has used this same basic exercise with other groups of lawyers, including attorneys from the ACC's National Capital Region Chapter. But each session is unique, as each group of lawyers comes up with different ideas, different questions and different responses.

And while the AmecTek exercise was hypothetical, participants learned and practiced skills that they can take back and use at their companies to solve real-world problems.

"Good decisions aren't made in a vacuum," Womble Carlyle's Schamel said. "Getting a broad range of informed opinions is an approach that in-house lawyers can incorporate into their regular decision-making process."

AmecTek Case Study

The following hypothetical scenario served as the basis of discussion for the "Creating Compliance Strategy for a Hypothetical New Tax and Employment Law" session at ACC ACES

2015. This scenario was developed by Womble Carlyle lawyers Alison Bost, Beth Jones, Claire Rauscher and Mark Schamel, and Human Rights Campaign General Counsel Rob Falk.

As Michelle Bolero quietly closed her laptop, she could not believe what she had just learned. She stepped into the general counsel job for AmecTek nearly two years ago. At every turn, she had been surprised at the lax controls in place for a company of AmecTek's size. But this issue was categorically different.

Company history

AmecTek is a global provider of specialized software solutions for industries with complex modeling needs. Founded 12 years ago, the company's initial products were highly successful, and AmecTek quickly attracted top developers, subject domain experts, and salespeople who extended the core technology to several other industries and product lines. Their divisions had evolved to industry-specific solutions, and their corporate divisions were organized around those industries: engineering companies, biotech firms, universities, government and financial institutions. AmecTek went public seven years ago.

Recent developments

Upon that CEO's retirement, the board, searching for fiscal accountability, promoted the CFO to take the reins as the new chief executive. Throughout his three year tenure, the current CEO has been vigilant in controlling expenses. For example, over the last two years, the management team launched plans to cut costs by outsourcing non-value added functions. This hard work had begun to show results in the most

recent annual financial statement where there were significant reductions to operating expenses. The stock price had taken a noticeable dip in the last several months as earnings and revenue fell short of expectations when a few key high profile sales contracts failed to materialize. Among the middle management ranks, there has been some recent grumbling about a talent drain because wages are no longer competitive. There have also been reports that employee morale has suffered at the hands of relentless expense cuts.

Today, the company has 1,600 employees in the United States located in 22 states. Approximately 70 percent are classified as exempt. In addition, the company has 200 employees located in India, Canada and Germany.

Unfortunately for Bolero, the CEO holds a certain ambivalence for lawyers. Her position was created only after the board insisted on it when the auditors expressed growing concern with the company's lack of controls. While the CEO appreciates the predictability and control of having a general counsel, he resents the interference in his endeavors to execute his strategic plans. He is also frequently critical of paying expensive fees to hire lawyers and outside counsel whom he sees as unnecessary obstacles to meeting profitability goals. In spite of the lack of support, Bolero has had some successes in pushing through necessary improvements, in large part due to the support of the board's chairman who is scheduled to retire early next year.

Recent changes in the law

A few months ago, Bolero learned of a recent bill that was working its way through the legislature. If passed,

the bill requires officers of corporations to certify, under individual criminal penalty, that all independent contractors are properly classified under federal, state and other nations' laws, and that all employees of the contractors are properly classified for FLSA purposes. It was introduced by the minority party; but due to relentless media coverage and constituent outcries, even those who would normally oppose the bill began lining up behind it. Pundits predicted the vote would be close but would ultimately fall short. However, in a surprising burst of last minute deal-making, the bill passed and was signed into law earlier this week.

The drafters of the law were intentionally vague as to whether individual board members would be also required to sign the certification. Many experts who have followed the developments and legislative history believe that board members will be required to sign. The law is self-executing, and goes into effect 120 days after enactment. The secretary of labor has the authority to issue expedited regulations.

Bolero prepared a one page memo to the CEO explaining the implications of the law. His response was: "Please lead the implementation process." Bolero has begun to wonder how she would guide the organization into compliance. Her knowledge of independent contractors is less than ideal due to limitations of the financial management system. Only contracts with value in excess of \$200,000 are required to be provided to the company's headquarters.

Bolero began by interviewing colleagues in the company to try to get a better handle on the scope of the project. She informally chatted

with one of the product managers, who confided that he had been directed by HR to misclassify workers to save on the HR budget and this policy began three years ago. Both this product manager and the HR director knew that the workers were being misclassified. And Bolero immediately knew that the misclassification created liability under FLSA.

She went to the HR director, a close colleague and friend, to discuss the issue. The HR director confirmed Bolero's fears. He stated that he had deliberately changed the classification of a "number" of workers to save money. He would not go any further than that.

Given that the HR director declined to provide additional information, Bolero had his entire email history duplicated and stored to protect efforts to erase evidence. She started running some key word searches, and found a string of emails between the HR director and the CEO who was putting enormous pressure on the HR director to misclassify workers. The emails show that when he first assumed the reins as CEO, he admitted to the HR director that demand for the company's solutions had long term limitations. He needed to harvest as much short-term profit as possible to shore up the income statement and balance sheet for potential acquirers. Only the CEO, CFO and HR director were aware of this inside strategy. **PAB**

