

Tuesday, May 1 11:00 am-12:30 pm

## 802 Avoiding (And If All Else Fails Planning for) Litigation Legal Manager Track

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ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions

April 29-May 1, Hyatt Regency St. Louis at Union Station

The in-house bar association.



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The points of view and suggestions contained in this presentation are solely those of the author. They are presented for discussion purposes only and may or may not apply to your specific facts and circumstances.

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#### Agenda

- Your Role
- Your Friends
- Your Challenges
  - Your Tools

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#### Your Role

- Strategist
- Resource Selector
- Cost Containment And Savings
- Establisher Of Standards And Processes
  - Knowledge Sharer
    - Hand Holder
      - Realist

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#### Strategist

- Analysis Of Your Environment And Potential Exposures
  - Corporate Philosophy/Client Risk Tolerances
    - Case Assessment

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- Resource Selector
- Consultant/Third Party Vendor Selection
  - Internal Training Topics And Sources
    - Outside Counsel Selection
      - Expert Selection
      - Witness Selection

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#### Cost Containment And Savings

- Consultant/Third Party Vendor Selection
  - Internal Training Topics And Sources
    - Fee Structures, RFPs
    - Arbitration Versus Litigation

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- Establisher Of Standards And Processes
- Contract And Correspondence Key Provisions
  - People Interactions: The Value Of Nice
- Point Persons For Key Functions/Geographies
  - Claim Notification Procedures
  - What Is Handled Internally? Externally?
    - Settlement Guidelines
    - Budgeting Guidelines

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#### Knowledge Sharer

- Statute Interpreter
- Case Assessment And Analysis
- Litigation Process, Costs, And Timing
  - Post Litigation Debriefs

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- Hand Holder
- Calm In The Storm
  - Positive Force
    - Predictor

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#### Realist

- Litigation Avoidance Catalyst
- Litigation Resolution Catalyst

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- Your Friends
- Risk Manager
- HR Management
- Marketing Management
- Environmental Health & Safety Management
- GC, Employment, Supply Chain, Marketing, Securities, Compliance In-House Attorneys

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#### Your Challenges

- Liability, Privacy, And Compliance "Explosion"
  - New Discovery Rules
  - Cost And Timing Constraints On Training
  - Lack Of Company Wide Understanding Of Litigation And Its Import?
    - Bet the Company Litigation

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#### Your Tools

- Build Alliances
- Establish Processes And Procedures
- Understand Your Employer's Business
  - Identify Areas For Improvement

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#### Additional Tools \*

- First 90 Days Handling Litigation Checklist
  - Outside Counsel Selection Guidelines
- Outside Counsel Billing and Budgeting Guidelines
  - Internal Training Topics And Sources
    - SOX Overview Sources
- New Discovery Rules Action Items For In-House Litigation Counsel Checklist
  - \*Presentation Handouts

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#### Conclusion

- Welcome To The Exciting World Of Litigation!
- Have Fun And Mitigate, Mitigate, Mitigate!

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#### An Interesting Case Study

- Employee's Allegations:
  - Female employee
  - Late to a meeting
  - Company practice of spanking employees who are late to meetings and encouraging co-workers to "hoot and holler" during spankings
  - Female employee resigned
  - Female employee sued

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#### Company Position:

- Not sexual harassment b/c practice is applied to male employees as well as female employees
- Submission to spankings was <u>voluntary</u> as the employee had a choice b/w receiving a spanking or having a written notice placed in your personnel file

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- Result:
  - \$1,200,000 for punitive damages
  - \$500,000 for compensatory damages
  - \$450,000 for emotional distress
  - \$40,000 for future medical expenses
  - \$10,000 for lost wages
- <u>Lesson</u>: Proper litigation avoidance and planning practices can help you avoid results like this.
- Quote from COO: "We are a good company regardless of how this story made us appear."

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#### **Outline**

- Corporate Approach
- Investigations
- ADR
- Document Retention/Preservation/Collection
- Witnesses
- Outside Counsel
- Your Client

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#### **Corporate Approach**

- What is the Company's Approach to Litigation?
  - Scorched Earth deter future claims
  - Cost of Doing Business future claims inevitable
  - Don't Start Out with the First and Then Adopt the Second
- Constantly Evaluate the Big Picture
- Pay the Plaintiff or Pay Outside Counsel Don't Pay Both

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#### **Investigations**

- In-House v. Outside Counsel
- Privilege Issues
- Upjohn Warning
- Documentation
- Witness Statements Pros and Cons
- The Investigation Report (a/k/a "Exhibit 1")
- Prompt and Remedial Action

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#### ADR

- Mediation
  - Know Your Mediators
  - Bring Your Client and Know Your Authority
  - Don't Sweat the Small Stuff cost splitting, location, "free discovery"
  - Don't Be Afraid to Show Your Hand
- Arbitration
  - ♠ Know Your Arbitration Vendors
  - Make It Distinguishable for Litigation
    - High/Low Arbitration
    - Baseball Style Arbitration
- Jury Waivers
  - Eliminates Significant Portion of Potential Risk
  - Governed by State Law (e.g., California)

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#### **Document Retention/Preservation/Collection**

- Retention Policy
  - Learn It
  - Be Prepared to Produce It
  - Know How to Explain It
- Preservation Notice
  - Who Should Receive
  - How Should it be Delivered
  - When Do You Send Reminders
  - What About Turnover?
- Collection Procedures
  - In-House
  - Third Party Vendor
  - Preserving the Meta Data

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#### **Witnesses**

- Witness Interviews
  - The Earlier, the Better
  - Turnover
  - The Unreliable Witness Written Statement?
  - Cross-Examine Your Witnesses
  - The Best Story Wins
- 30(b)(6) Representative(s)
- IT Representative
- Experts

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#### **Outside Counsel**

- National, Regional, Local
- Know Who You Want to Use <u>Before</u> You Are Served
- Over-Communicate
- Establish Parameters and Expectations Early
- Staffing and Fees/Costs
- Never Disclose Your Full Settlement Authority

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#### **Your Client**

- Who is Your Client?
  - What Does the Client Want to Accomplish?
  - You Recommend; the Client Decides
  - Manage Expectations
- Prepare the Business Case for Your Recommendation
- Notice, Notice No Surprises
- Don't Become the Client
- Today's Client is Tomorrow's Litigant

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# THE THREAT OF CRIMINAL PROSECUTION TO IN-HOUSE COUNSEL

The Tide Has Changed But It Is Not a Tsunami

December, 2005

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The post-Enron world has raised many new concerns and worries for corporate general counsel. One concern which was almost non-existent before the Enron debacle was consideration of one's own personal exposure to criminal prosecution. While the number of corporate counsel facing criminal charges is nowhere near the number of other corporate executives who have been indicted, the post-Enron prosecutorial announcements contain clear warnings for in-house counsel which must be given their due. On the other hand, a review of the recent corporate fraud prosecutions involving in-house counsel gives some indication that the threat of criminal prosecution to corporate counsel is not as ominous as some fear.

#### The Arthur Andersen Case Brought New Focus On the Actions of In-House Counsel

When it was discovered that a handful of Arthur Andersen employees had caused the destruction of volumes of records relating to Enron, the Department of Justice reacted swiftly and aggressively. In March 2002, it brought an obstruction of justice charge against the firm, but not against any individuals. By June 2002, a jury had returned its guilty verdict against Arthur Andersen, and as is all too well known, the result of the indictment and the firm's conviction resulted in the destruction of a company that employed tens of thousands of employees.

The Department of Justice was severely criticized for its decision to bring criminal charges against Arthur Andersen, and prosecutors clearly felt the aftershocks of the decision to go after the firm instead of responsible individuals. Following the collapse of Arthur Andersen, prosecutors—including the U.S. Attorney for the Southern District of New York, James Comey (who later was elevated to U.S. Deputy Attorney General and head of the President's Corporate Fraud Task Force), New York Attorney General Eliot Spitzer, and Manhattan District Attorney Robert Morgenthau—made clear that the focus of future corporate fraud

prosecutions would not be on the corporate entities, but squarely on the corporate executives responsible for the criminal conduct.\*

The Arthur Andersen case, however, did not just bring the focus on corporate executives in general. The case brought a spotlight directly on in-house counsel. According to interviews of jurors after the verdict, Arthur Andersen in-house counsel Nancy Temple was identified by the jury as the "corrupt persuader" in the obstruction trial.<sup>†</sup> Ms. Temple, in anticipation of an SEC investigation of Enron, allegedly had on several occasions given instructions for Arthur Andersen employees to follow the company document retention policy (which in fact called for the destruction of documents after a certain period of time). Her actions were key evidence in the trial, and though never indicted, within the press, she became inextricably tied to the Arthur Andersen indictment and conviction. Congress, in fact, referred her to the Attorney General for criminal consideration related to her role in the destruction of records by Arthur Andersen.<sup>‡</sup> Moreover, her actions helped bring to the forefront consideration of corporate counsel's role in the then-escalating corporate fraud investigations.

#### The Arthur Andersen Prosecution Also Signaled A New and Aggressive Legal Analysis of Corporate Counsel Conduct

Because most of the attention and criticism relating to the Arthur Andersen case focused on the "death penalty" handed to Arthur Andersen by the Department of Justice, less attention has been given to the aggressive legal theory the federal prosecutors relied upon. The case, however, clearly demonstrates one of the real risks corporate counsel faces—that is, how divergent prosecutors' application of criminal statutes can be from in-house counsel's understanding of the law.

Arthur Andersen was charged with violating 18 U.S.C. § 1512(b)(2)(A) which makes it a crime to "corruptly persuad[e] another person" to withhold or alter documents for use in an official proceeding. The prosecution's theory on what amounted to corrupt persuasion was very broad. The U.S. Supreme Court's opinion in *Arthur Andersen v. United States*, § set out the prosecution's aggressive position:

The parties vigorously disputed how the jury would be instructed on "corruptly." The District Court based its instruction on the definition of that term found in the Fifth Circuit Pattern Jury Instruction for § 1503. This pattern instruction defined "corruptly" as "knowingly and dishonestly, with the specific intent to subvert or undermine the integrity" of a proceeding. The Government, however, insisted on excluding "dishonestly" and adding the term "impede" to the phrase "subvert or undermine." The District Court agreed over petitioner's objections, and the jury was told to convict if it found petitioner intended to "subvert, undermine, or impede" governmental factfinding by suggesting to its employees that they enforce the document retention policy.

These changes were significant. No longer was any type of "dishonest[y]" necessary to a finding of guilt, and it was enough for petitioner to have simply "impede[d] the Government's factfinding ability."

Even more troubling, the jury was further told "even if defendant honestly and sincerely believed that its conduct was lawful, you may find defendant guilty."\*\*

As the jury instructions show, the government utilized a legal theory indicating its willingness to convict Arthur Andersen even where in-house counsel honestly and sincerely believed what she was instructing employees to do was legal. Just as important, not only was this aggressive legal theory advocated by the federal prosecutors, but the federal trial judge and the Fifth Circuit both ruled that the legal theory was correct and that the instructions as given were proper.

#### DOJ Announces Its Intention to Pursue Corporate Counsel

In the wake of Arthur Andersen, prosecutors investigating corporate fraud clearly began looking closely at the conduct of inhouse counsel. Corporate counsel's role—both as advisors and as gatekeepers—came under scrutiny. By the summer of 2003, as the President's Corporate Fraud Task Force was concluding its first year of investigations, a few general counsel were already indicted, and the Department of Justice put out strong warnings that it was clearly targeting corporate counsel. In June 2003, then-Deputy Attorney General Larry Thompson announced:

Major corporate fraud cannot happen over an extended period of time without the complicity of accountants, lawyers, and other professionals. [Federal prosecutors will] follow the evidence wherever it leads—to not only those executives but also to those lawyers or other professionals who defraud the investing public. ††

This position was re-emphasized in July 2003 in the First Year Report to the President by the Corporate Fraud Task Force, where the Task Force stated:

Task Force members have recognized that many of the corporate fraud schemes under investigation could not have occurred without various professionals, including attorneys, accountants and financial advisors, sometimes facilitating, aiding and abetting the conduct being investigated. Therefore, the conduct of professionals has been a focus of the Task Force's work.<sup>‡‡</sup>

As the multitude of corporate fraud investigations began to turn into criminal indictments, the names of corporate counsel began to appear as criminal defendants. The commentary by some toward in-house counsel was harsh. Though speaking of enforcement actions taken by the Securities and Exchange Committee beyond just criminal indictment, Stephen Cutler, the Director of Enforcement for the SEC, captured the view of many prosecutors toward in-house counsel in the post-Enron era:

Consistent with Sarbanes-Oxley's focus on the important role of lawyers as gatekeepers, we have stepped up our scrutiny of the role of lawyers in the corporate frauds we investigate. We have named lawyers as respondents or defendants in more than 30 of our enforcement actions in the past two years.

Many of those we charged could have avoided problems if they had heeded Elihu Root's advice [that "about half the practice of a decent lawyer is telling his clients that they are damned fools and should stop"]. We have seen too many examples of lawyers who twisted themselves into pretzels to accommodate the wishes of company management, and failed in their responsibility to insist that the company comply with the law. §§

The prosecutorial proclamations that corporate counsel were now within the target zone of prosecutors were backed up by the prosecutors' actions. By the end of 2005, 14 in-house counsel had been hit with criminal charges:

April 2002: Sanford Freedman, former general counsel of Tollman-Hundley Hotels, was indicted in federal court by the Southern District of New York for bank fraud, tax evasion, and obstruction of justice.\*\*\*

June 2002: Franklin Brown, former general counsel of Rite Aid Corp., was indicted in federal court in the Middle District of Pennsylvania for securities fraud, wire fraud, and obstruction of justice. †††

September 2002: Mark Belnick, former general counsel of Tyco International, was indicted by the Manhattan District Attorney's Office for securities fraud, grand larceny, and falsifying business records. †††

June 2003: Jay Lapine, former general counsel of HBO & Co., was indicted in federal court in the Northern District of California for securities fraud, mail fraud, and wire fraud. §§§

<u>July 2003</u>: David Klarman, former general counsel of U.S. Wireless Inc., was indicted in federal court in the Northern District of California for securities fraud and wire fraud.\*\*\*\*

<u>January 2004</u>: James Moen, former general counsel of Katun Corporation, was indicted in federal court in the District of Minnesota for wire fraud and computer fraud.<sup>††††</sup>

June 2004: Leonard Goldner, former general counsel of Symbol Technologies, Incorporated, was indicted in federal court in the Eastern District of New York for securities fraud, wire and mail fraud, and tax evasion. §§§§§

<u>September 2004</u>: Steven Woghin, former general counsel of Computer Associates International, was indicted in federal court in the Eastern District of New York for securities fraud and obstruction of justice.\*\*\*\*\*

January 2005: Scott Wiegand, former general counsel of PurchasePro.com Inc., was indicted in federal court in the Eastern District of Virginia for securities fraud and false statements.

October 2005: Alan Koehler, former general counsel of Buddy's Carpet, was indicted in federal court in the Southern District of Ohio for tax fraud. §§§§§§

October 2005: Steven Gremminger, former associate general counsel of KPMG, was indicted in federal court by the Southern District of New York for tax fraud and obstruction of justice.

November 2005: Peter Atkinson, former general counsel of Hollinger, Inc., was added as a defendant in a superseding indictment connected with Mark Kipnis.

<u>February 2006</u>: Robert Graham, former assistant general counsel of General Re Corporation and American International Group, Inc., was indicted for aiding and abetting securities fraud \*\*\*\*\*\*\*

#### But the News is Not All Bad

While for those 14 in-house counsel the threat of criminal prosecution was all too real, developments starting in mid-2005 should give other corporate counsel reason not to overreact. Most notable, while the decision came too late to save Arthur Andersen, on May 31, 2005, the United States Supreme Court overturned the

Moreover, prosecutors have not experienced complete success in some of the cases in which general counsel were indicted. First, in June 2005, in *United States v. Bruce Hill*, after a month-long trial, Mr. Hill was convicted of perjury, but the jury was deadlocked as to all of the securities fraud related charges, and the court declared a mistrial as to those counts. †††††††

Then in July 2005, after a six week trial in the criminal case against Tyco International Ltd.'s general counsel, the jury acquitted Mark A. Belnick of all counts. The Jury Mr. Belnick was charged with grand larceny, securities fraud, and falsifying business records relating to his own multi-million dollar compensation. Defense counsel argued that the prosecutor's case was built on a basic misunderstanding of general counsel's role as gatekeeper. (Significant credibility should be given to the argument since the jury acquitted Mr. Belnick.) Though the prosecution could not establish Mr. Belnick had direct knowledge of Tyco's misdeeds, they argued he had to have known. In closing argument, however, the defense successfully argued that the prosecution was trying to expand Mr. Belnick's role from general counsel to that of an inspector general.

Also in July 2005, one of the defendants in the McKesson HBO & Co. series of indictments, former McKesson CFO Richard Hawkins, was acquitted in a judge-tried case. Former general counsel for HBO & Co., Jay Lapine, is still awaiting trial, and while Hawkins' acquittal does not directly affect his case, it

involved many of the same government witnesses and it bodes well for Lapine's chances in his own trial.

In addition, Scott Wiegand was acquitted after an eleven-day long bench trial in December 2005. Wiegand, the former general counsel of PurchasePro.com Inc., did not call witnesses during the trial, successfully arguing simply that the government's evidence was insufficient.

Further, the numbers, while concerning, are not as alarming when compared to the full scope of the government's effort to prosecute corporate fraud. In its first three years, the Corporate Fraud Task Force has indicted over 1300 defendants. Only 1 percent of these are in-house counsel. Of the 14 in-house counsel indicted in the post-Enron era, Belnick and Wiegand were acquitted and only seven thus far have been convicted. That number is in stark contrast with the Corporate Fraud Task Force announcement that, as of August 2005, over 100 corporate CEOs and presidents and 80 vice-presidents have been convicted of some form of corporate fraud over the past three years. 

\*\*!!!!!!!\*\*\*

It is also worth noting that two of the seven convicted in-house counsel pled guilty to criminal charges which involved blatant self-dealing and conduct which clearly those involved knew was criminal. Leonard Goldner was the former general counsel of Symbol Technologies who, at the time of his guilty plea in October 2004, admitted to orchestrating a scheme in which he and other members of Symbol's executive management team fraudulently exploited Symbol's stock option plans "to enrich themselves and illegally minimize their tax obligations." David Klarman was the former general counsel of U.S. Wireless and, at the time of his guilty plea in December 2003, he admitted that he and the U.S. Wireless CEO set up several off-shore shell companies to transfer stock options and shares embezzled from U.S. Wireless.

#### Notwithstanding the Limited Number of Indictments and Convictions, There is One Clear Message for Corporate Counsel

If Martha Stewart's prosecution did not get the message across, then the indictment of "Scooter" Libby should have made clear there is great truth to the maxim that the cover-up is often worse than the crime. This long-time, but often unheeded, adage is equally true for in-house counsel. Of the seven post-Enron general counsel convictions, five of them involved allegations of obstruction of justice in one form or another. Two more awaiting trial are also charged with some form of obstruction.

Putting aside the fact that there are separate criminal statutes prohibiting obstructing an investigation, lying, destroying records, or hiding information is often by far the best evidence to prove a person's criminal intent. Securities fraud and other corporate crimes are often difficult to explain to a jury. A lie, on the other hand, is easy for every juror to understand. The prosecution of Inso Corporation general counsel Bruce Hill is a perfect example. Mr. Hill's jury did not find him guilty of any of the fraud counts against him. But they did convict him of one crime: committing perjury in his testimony before the SEC during its investigation of Inso Corporation. Mr. Hill's world might be very different today if not for his lie during the investigation.

Besides creating incriminating evidence, a perceived cover-up can create a strong negative reaction from agents and prosecutors who are conducting an investigation. Lying to the FBI is one of the best ways to energize an agent to pursue an investigation. Moreover, actions which might be viewed as obstructionary—even if unintentional—can ruin the company's and corporate counsel's credibility with the government officials who will be deciding if a crime has been committed. Roslynn Mauskop, the U.S. Attorney

for the Eastern District of New York, summed up prosecutors' sentiment about attempts to obstruct an investigation when she announced the indictment and guilty plea of former general counsel of Computer Associates International, Steven Woghin:

For more than two years, former CA executives have allegedly obstructed the government's investigation. However, they have failed to prevent the government from getting to the truth. In fact, all they have accomplished was getting themselves charged with the additional obstruction of justice crimes, which now carry stiff penalties under Sarbanes-Oxley. ††††††††

Even more important to note for corporate counsel is the type of conduct which was charged as criminal obstruction in several of the indictments. Making false statements to government employees or in documents submitted directly to the government would obviously run the risk of false statement or obstruction charges. But, in three different cases against corporate counsel, part of the obstruction allegations included lying to nongovernment internal investigators. In the conspiracy to obstruct justice charge against Rite Aid general counsel Franklin Brown, the indictment specifically alleged as part of the conspiracy "providing false and misleading information to Rite Aid's internal investigators." Similarly, the indictment against Symbol Technologies' general counsel Leonard Goldner specifically alleged that he had instructed an employee to lie to the law firm conducting the internal investigation. §§§§§§§§§ Likewise, Computer Associates' general counsel Steven Woghin was charged with providing false information to the company's outside law firm with the intent that the law firm would then provide the false information to the government authorities.\*

Finally, another fallout of the Arthur Andersen case was enactment of a new federal obstruction of justice statute. As part 

#### Conclusion

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<sup>\*</sup> Lanny A. Brever & Christopher J. Burke, *Lawyers, Accountants and Other Capital Market "Gatekeepers" Come Under Prosecutors' Scrutiny*, WASH. LEGAL FOUND.: LEGAL BACKGROUNDER, Aug. 22, 2003, *available at* http://www.wlf.org/upload/082203LBBreuer.pdf.

<sup>†</sup> Brenda Saping Jeffreys, *Supreme Court's Review of Andersen Might Help Guide GCs*, TEX. LAW., Feb. 9, 2005, *available at* http://www.law.com/jsp/cc/pubarticleCC.jsp?id=1107783323434.

<sup>&</sup>lt;sup>‡</sup> Letter from the House Committee on Energy and Commerce to John Ashcroft, U.S. Attorney General (Dec. 17, 2002).

<sup>§ 125</sup> S. Ct. 2129, 2136 (2005).

<sup>\*\*</sup> *Id*.

<sup>&</sup>lt;sup>††</sup> Press Release, United States Attorney for the Northern District of California, SEC, U.S. Attorney's Office and FBI Bring Fraud and Conspiracy Charges Against Former McKesson HBOC Chairman Charles McCall; U.S. Attorney's Office and FBI also Indict Former HBOC General Counsel (June 4, 2003), *available at* http://www.usdoj.gov/usao/can/press/html/2003\_06\_04\_mckesson.html.

<sup>&</sup>lt;sup>‡‡</sup> CORPORATE FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT 2.7 (2003), http://www.usdoj.gov/dag/cftf/first\_year\_report.pdf.

<sup>§§</sup> Stephen M. Cutler, Director, SEC Div. of Enforcement, Address at the UCLA School of Law: The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program (Sept. 20, 2004), available at http://www.sec.gov/news/speech/spch092004smc.htm. The focus of this article is on in-house counsel. Mr. Cutler pointed out that of the 30 enforcement actions against attorneys that he alluded to, half were brought against outside counsel.

<sup>\*\*\*</sup> Mark Hamblett, General Counsel Indicted in \$42 Million Scheme: Prosecutor Claims an In-House Lawyer Helped Execs Evade Payments, NAT'L L.J., Apr. 29, 2002 at A21.

<sup>††† 3</sup> Ex-Rite Aid Executives Charged with Fraud, Conspiracy, BOSTON GLOBE, June 22, 2002, at D2.

<sup>\*\*\*\*</sup> Kevin McCoy & Thor Valdmanis, Former Tyco Executive Charged with Looting Millions, USA TODAY, Sept. 13, 2002, at A1. Additional charges were filed in February 2003.

<sup>§§§</sup> Press Release, United States Attorney for the Northern District of California, *supra* note ††.

<sup>\*\*\*\*</sup> Press Release, United States Attorney for the Northern District of California, United States Attorney and SEC Bring Fraud Charges Against Former Officers of U.S. Wireless, Inc. (July 13, 2003), *available at* http://www.usdoj.gov/usao/can/press/html/2003\_07\_14\_uswireless.html.

<sup>†††††</sup> Jennifer Bjorhus, *Indictments Expand Katun Case Two Former Execs and Co-Founder Charged in Alleged Kickback, Bribe Scheme*, St. Paul Pioneer Press, Jan. 14, 2004, at C3.

<sup>\*\*\*\*\*\*</sup> Tamara Loomis, *GC's in Trouble: Tangled Web*, CORP. COUNS., July 2004, at 26.

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§§§§ Steve Lohr & Floyd Norris, U.S. Files Charges Against 7 Symbol Executives, INT'L HERALD TRIB., June 4, 2004, at 15.
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\*\*\*\*\*\* Press Release, Department of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges; Former General Counsel Pleads Guilty, Company Enters into Cooperation Agreement (Sept. 22, 2004), available at http://www.usdoj.gov/opa/pr/2004/September/04\_crm\_642.htm.

††††† Alec Klein & Jerry Markon, 6 Indicted in AOL Accounting Case: Prosecutors Allege Scheme With Partner, WASH. POST, Jan. 11, 2005, at E1. †††† Press Release, United States Attorney for the Northern District of Illinois, Two Hollinger Executives, Ravelston Company Accused of Self-dealing in U.S.-Canada Corporate Fraud Indictment (Aug. 18, 2005), available at http://www.usdoj.gov/usao/iln/pr/chicago/2005/pr0818\_01.pdf.

§§§§§§ Press Release, United States Attorney for the Southern District of Ohio, Former Owners of Buddy's Carpet Indicted with Others in Tax Fraud Conspiracy (Oct. 5, 2005), available at http://www.usdoj.gov/usao/ohs/Press/10-5-05.htm.

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†††††† Press Release United States Attorney for the District of Massachusetts, Former General Counsel of Inso Convicted of Perjury (June 6, 2005), *available at* http://www.usdoj.gov/usao/ma/presspage/June2005/Hill-Bruce-Conviction.htm.

\*\*\*\*\*\*\*\*\* Jay K. Musoff & Adam S. Zimmerman, *The Changing Role of General Counsel*, N.Y.L.J., Aug. 6, 2004, at 3.

†††††† John G. Edwards, Former PurchasePro Executive Acquitted in Fraud Case, LAS VEGAS REV.-J., Dec. 21, 2005, available at 2005 WLNR 20711238.

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05_opa_434.htm.
York, Former General Counsel of Symbol Technologies Pleads Guilty to
Conspiring to Obstruct the Internal Revenue Service in the Collection of Income
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SILICON VALLEY/SAN JOSE BUS. J., Jan. 27, 2004, available at http://www.
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iiiiiiii Indictment of Martin L. Grass, Franklin C. Brown, Franklyn M.
Bergonzi, and Eric S. Sorkin, at 78, available at
http://www.usdoj.gov/dag/cftf/chargingdocs/
grassetalind.pdf. The indictment also alleged providing false and misleading
information to the SEC and the FBI.
§§§§§§§§§§ Indictment of Tomo Razmilovic, Kenneth Jaeggi, Brian Burke, Michael
Degennaro, Frank Borghese, Leonard Goldner, Christopher Desantis, and James
Heuschneider, at 68, available at http://www.usdoj.gov/dag/cftf/chargingdocs/
symbol.pdf. The law firm had been retained to conduct the internal
investigation at the behest of the SEC.
        Lohr & Norris, supra note §§§, at 15.
††††††††† 148 Cong. Rec. 57418 (daily ed. July 25, 2002) (statement of Sen.
Leahy). ####### 148 Cong. Rec. 57419 (daily ed. July 25, 2002) (statement of Sen.
Leahy).
§§§§§§§§§ Moreover, in-house counsel also face threats to their own job security.
See The Dating Game in the News: Five GCs Have Already Been Implicated in
Stock Option Backdating Problems, SECURITIES MOSAIC, Aug. 1, 2006
("Backdating problems have already cost three general council their jobs.").
         Mark A. Sargent, Lawyers in the Moral Maze, 49 VILL. L. REV. 867,
880 (2004).
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# Session 802, Part 1: Avoiding Criminal Litigation (With Theories Applicable To the Civil Practice)

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions

April 29-May 1, Hyatt Regency St. Louis at Union Station



Criminal fraud can turn into class action or shareholder derivative suits.

But, with a lower standard of proof.

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions



#### The Prosecutor's Perspective

. . . and the similarities to many plaintiff's attorneys

- · The smell test
- Industry practices
- "Don't fall into the GAAP"

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions

April 29-May 1, Hyatt Regency St. Louis at Union Station



#### United States v. Arthur Andersen

". . . even if defendant honestly and sincerely believed that its conduct was lawful, you may find defendant guilty."

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions



"At the time, the incident didn't strike me as any big deal.... It's a common practice in the automobile industry for employees to drive new cars to test for defects. As far as I knew from my Ford days, the testing was usually done with the odometers disconnected so that we wouldn't be short-changing the eventual buyers on their warranties."

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions

April 29-May 1, Hyatt Regency St. Louis at Union Station



"The other guys who really should have known better were our lawyers. When that employee was stopped by the police, our plant manager had called one of our lawyers and asked him if he could continue to disconnect odometers. He'd said, "Yeah, we've always done it that way."

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions



"I blame myself for not looking into the matter. If they had said that both Ford and GM had stopped the practice years go, which, by the way, we still don't know for sure, I'd have said, "Then why in the hell are we still doing it? But I didn't ask the key questions."

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April 29-May 1, Hyatt Regency St. Louis at Union Station



# So How Does a Prosecutor Think?

Evaluate the issue as if it was a newspaper article . . . written by a vindictive reporter.

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions

## The Corporate News Gazette

Vol. XVX, No. 20 Edition

NitrathEndition

St. Louis, Mo.– It is being reported that, following long-standing industry practice, Chrysler is operating a quality assurance program by having plant executives drive new vehicles home each day with the odometers disconnected in order to protect the customer's warranty.

# The Corporate News Gazette

Vol. XVX, No. 20 Edition

**HitterhEndition** 

St. Louis, Mo.- It is being reported that,

Chrysler is

having plant executives drive new vehicles home each day with the odometers disconnected



### A Prosecutor's View of Compliance

- Culture versus Checklist
- Organizational structures which encourage bad actions
- "Will others think this is the right thing to do?"

ACC's 5th Annual Corporate Counsel University: New Challenges/New Solutions

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# Establishing Outside Counsel Standards





#### ALLYSON BOULDON | WM. WRIGLEY JR. COMPANY

Allyson Bouldon is counsel-Americas for gum and confections manufacturer and marketer Wm. Wrigley Jr. Company. Her responsibilities include litigation supervision, litigation, real estate, credit and employment benefits for Wrigley and its Americas affiliated companies.

Wrigley's Americas/Pacific Group supports North and South America, Australia and the Pacific and retains more than 20 outside firms. The Group includes four attorneys and two paralegals.

#### situation

When new outside counsel is engaged, corporate counsel often receive a retainer letter confirming the law firm's staffing and fees. In-house counsel should not assume this initial communication fully addresses the company's business needs and expectations.

# in-house counsel challenge

About six years ago, we realized that each outside law firm we retained could establish its own staffing, billing and other processes to govern our relationship. We concluded that over time, this approach could impair efficiency. Worse, it could impair our valued outside counsel relationships.

#### approach adopted

To guard against this, corporate counsel should establish standards by which outside counsel will conduct and invoice each matter. The Wrigley Law Department Outside Counsel Policies and Procedures Guide sets forth our case management policies and required invoice formats. Topics addressed include estimated matter duration, budgets, staffing, billing and appropriate communications.

We also developed an invoice cover sheet format that lists matter names and total fees. Only this document is forwarded for payment processing. This ensures the privileged information often contained in detailed legal invoices is viewed solely on a need-to-know basis.

We presented copies of our guide to each of our outside law firms, first in North and South America, and subsequently to our remaining outside legal professionals worldwide. We stressed that adherence to the guidelines, particularly invoicing timing and format, was a condition precedent to invoice approval and payment. Some firms

had questions. One provided feedback regarding our computerized research guidelines and adjustments were made. Most accepted our guide as drafted. Copies of the guide now accompany each new firm's retention letter.

# success

Guide usage has reduced the surprises we receive regarding legal actions. We also can better compare different firms' efficiency, and our budgeting and planning have improved.

# implementation

- 1. Solicit early involvement of your general counsel and your department members worldwide to ensure full reflection of your department's philosophy and consistent practice globally.
- 2. Consult third parties to determine content. This could include outside counsel whose current practices work well for your organization.
- 3. Share proposed guidelines and obtain departmental "buy-in." Address additional personnel needs or work tasks to best ensure timely guideline monitoring and enforcement.
- 4. Disseminate the guidelines to outside counsel and consider explaining the guidelines' business drivers.
- 5. Retain the guidelines in an accessible location and clarify where latitude for amendment exists.

#### future issues to consider

1) Periodically monitor guidelines. Update, for example, to address intranet access. 2) Consider new technologies or audit methods to facilitate invoice compliance review. 3) Obtain and incorporate outside counsel feedback as appropriate.

#### Allyson Bouldon April 30, 2007

Disclaimer: This sample checklist is provided for informational and discussion purposes only. The views and information provided herein are solely those of the author and are not meant to apply to the facts or circumstances of your particular client matters.

#### FIRST 90 DAYS HANDLING LITIGATION CHECKLIST

- ✓ Understand your client's business! Manufacturing? Services? Financial Industry? Not for Profit? Each sector has unique litigation exposures. Schedule meetings as needed with business persons in Risk Management, Marketing, Treasury/Finance, Environmental, and Procurement.
- ✓ **Get to Know Your Risk Manager!** Obtain history of claims, insurance coverage types and amounts, potential risks and exposures.
- ✓ Review All Insurance Policies! Supplement the D&O coverage as may be needed to fully address the needs of all in-house counsel and your officers. Suggest other changes as needed. Understand your deductibles! Understand your exclusions!
- ✓ **Review All Pending Litigation!** Look for trends, big exposure matters and odd matters. Settle what you can. Always do a de-brief at the end of the case with clients to discuss learnings obtained from the litigation and suggested practice and policy changes.
- ✓ Determine What Your Company's Litigation Settlement Philosophy Is!
- ✓ Develop Billing and Budget Formats and Guidelines for Outside Counsel!
- ✓ Review Your Company's Records Retention Policy! Draw up a plan to develop one if none is in place.
- ✓ Review and Update Your Litigation Hold Policy and Processes! Develop them if none in place.
- ✓ **Identify Electronic Discovery Vendor!** Should litigation arise, you will want to already have a vendor in place.
- ✓ **Analyze Your Litigation Spend!** Propose RFP's, flat fees, alternate billing arrangements as needed.
- ✓ **Select Outside Counsel!** Identify sources you will rely upon to make outside counsel selections.
- ✓ **Review Any Comparative Advertising Currently in Use!** Discuss planned future comparative advertising.
- ✓ Gain Understanding of Any Key Studies that Support Your Comparative Ad Claims!
- **✓ Determine Your Environmental Exposures!**
- ✓ Meet With Personnel To Understand Personnel Practices and Exposure Areas. Develop policies and training plans to address gaps.
- ✓ Understand Your Deal/M&A Activities and Potential Exposures!

- ✓ Ensure Financial Exposure of Pending Litigation is Known to Appropriate Persons!
- ✓ **Determine Whether Your Company is SOX Compliant!** Suggest becoming so if not already compliant.
- ✓ **Review SOX!** Become familiar with its provisions, esp. those pertaining to liability and duties.
- ✓ Determine Whether There Are Crisis Management and Security Programs In Place! Enhance, help develop as needed.
- ✓ Prepare List of Training Topics and Sources! ACC, on-line, in-person, third party vendor, self conducted are all sources. Common topics include: How to conduct workplace investigations for your personnel dept., how to make comparative claims for your advertising group, how to draft termination provisions in contracts for your procurement group, etc.
- ✓ Additional Items As Needed For Your Environment!
- ✓ Have Fun, Stay Calm and Don't Get Overwhelmed!

#### Allyson Bouldon April 30, 2007

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#### SAMPLE LITIGATION HOLD NOTICE

#### **In-House Counsel's Background Considerations:**

- Obtain Clarity And Consensus On What The Hold Must Include! Communicate the types of relevant documents clearly and with minimal legalese. If your hold is not widely and similarly understood, you raise risks of noncompliance, non-uniform compliance, or further discovery issues.
- Is There Attorney-Client Privilege? For Whom?
- Method Of Delivery? Recommend via email and via facsimile or other immediate hard copy notice to relevant persons without email access. Decide whether due to import of message, emails or hard copy should issue with a confirmation of receipt request.
- **Author?** The General Counsel? The head of Litigation? Recommend highest possible ranking attorney within the Company.
- **Recipients?** Control group, executives, involved business groups (i.e. marketing, regulatory, ES&H, etc.) plus others? Company wide? US only?
- **Document Date Limits?** Decide whether you should you include them or request any and all relevant documents?
- How Much Should Recipients Be Told About The Litigation Within The Hold Notice And During Any Follow Up Meetings Or Calls?
- To Whom Should Relevant Documents Be Forwarded? Highly recommend identifying one person work with IT to ensure that the recipient is provided with storage needed to receive any forwarded items and to ensure retained items are not deleted as part of records retention processes.
- Records Retention Procedures During And After Hold Period? Work with IT and Legal to develop policies and practices.
- Should This Hold Be Conducted In Conformance With Our Standard Litigation Hold Processes And Procedures?
- Under What Circumstances Will This Hold Be Removed?
- How Will We Communicate Removal of the Hold?
- Obtain Outside Counsel's Assistance With Notice Contents!
- And, Always Review Your Litigation Hold Policy! If you do not have one, highly recommend that you develop one as soon as possible and that you obtain both legal and business side buy-in!

#### **Sample Body of Notice For US Only Purposes:**

Attorney – Client Privileged and Confidential Communication Attorney Work Product

TO: All US Marketing, Graphics, Regulatory, and R&D Personnel

FROM: Jane Doe, General Counsel

**RE:** Notice of New Litigation and Mandatory Document Hold:

StarPlus® Product

**DATE:** May 2, 2007

The Company has become involved in a lawsuit involving claims regarding our StarPlus product. Your assistance is needed to help us resolve this lawsuit.

You are required to forward copies of any and all documents in your possession that pertain to, reference, or mention our StarPlus product to John Doe, Deputy General Counsel. Kindly forward these documents to John no later than May 30, 2007.

"Documents" means any emails, pdf or other attachments, scanned items, spreadsheets, word documents, power point materials, sales materials, studies, or other written materials or pictures that refer to the StarPlus product. You are required to forward these materials regardless of who the author is or the date of the document.

You must also hold on to, keep secure, and maintain, all original documents in your possession until further notice from the Law Department. You may not alter, dispose of, misplace, erase, or delete any of these documents.

Please note that the Company is required by law to comply with requests for documents. Your failure to comply with this request could jeopardize the Company's ability to successfully resolve this lawsuit and could lead to imposition of sanctions against the Company. Also, in the event of your non-compliance, you could be made personally liable by the court, or you could be subjected to discipline by the Company pursuant to the Company's Personnel Policies.

Please refrain from discussing this confidential matter with any Company personnel other than your supervisor(s). Further, you may not discuss this confidential matter with any third parties.

Please direct any questions and documents regarding this Notice to:

John Doe Deputy General Counsel 1000 American Way Blvd. Chicago, IL, ZIP (312) 555-5555, John.Doe@email.com

Thank you in advance for your cooperation.

#### Allyson Bouldon April 30, 2007

Disclaimer: This sample Memo is provided for informational and discussion purposes only. The views and information provided herein are solely those of the author and are not meant to apply to the facts or specific federal or local laws that govern your particular client matters.

### SAMPLE LITIGATION SETTLEMENT REQUEST INTEROFFICE MEMO

#### **In-House Counsel's Background Considerations:**

- **Brevity, Brevity!** The business persons you approach to obtain settlement approval for litigation are very busy. They will look to you to deliver a concise overview, recommended action, and reasoning for your recommended action.
- Avoid Legalese! The document should allow any reader, regardless of his or her level of litigation savvy, to understand the instant case, and to make a decision regarding your recommendation.
- Method Of Delivery? Ideally, the memo would be emailed or delivered in advance with a request for a very brief face to face meeting to address any questions and agree on next steps.
- Obtain Outside Counsel's Assistance! Ensure that your summary is accurate in its statement of the litigation progress to date and the likely outcomes should settlement not occur as recommended.
- Accept Your Decision Maker's Response Calmly, Communicate It Within The Law Department As Needed! If your decision maker proves unwilling to accept your recommendation, remain calm and ensure that the right persons within the Law Department are aware of the decision maker's stance. Depending on the litigation, you may need to re-approach the decision maker, or approach additional or higher level decision makers, or direct outside counsel to continue to litigate the case. Try to understand why the decision maker is reluctant to accept your proposal and if possible, develop solutions. For example, if your decision maker is unable to agree to settlement because they are unwilling/unable to pay out on a settlement due to timing issues, find out when the timing and financials would allow a settlement to be paid out. Find out if a different dollar amount would help. Then work with outside counsel to understand whether the litigation progress can proceed in a timeline that meets legal requirements and serves your business needs.

#### Sample Body of Memo

Attorney-Client Privileged and Confidential Communication Attorney Work Product: For Settlement Purposes Only

TO: John Doe, Vice President of Research and Development

FROM: Jane Doe, Staff Attorney

**RE:** Request for Approval of Proposed Litigation Settlement:

StarPlus® Product Container Alleged Injury Issue

DATE: May 2, 2007

#### **Issue**

In September of 2006, the Company was sued by a 29 year old man (the "Plaintiff") who alleges he cut his gums and sustained other dental injuries while attempting to open our StarPlus product with his teeth. In his lawsuit, he seeks damages in excess of \$75,000.

We contend that the plaintiff failed to properly utilize our product and that he failed to follow the labeling and other product usage instructions.

#### **Recommended Action**

Per below, the Law Department recommends that we pay up to \$10,000 to settle this case:

- The costs to take this matter through the courts and through a trial will exceed \$50,000 based on the budget supplied by outside counsel;
- Plaintiff has requested a jury trial and he has filed his suit in Madison County, Illinois.
   Madison County is well-known for being very "pro-plaintiff" and for its large jury awards;
- Plaintiff is sympathetic. He is not highly educated and is currently unemployed with a wife and two small children. A jury is likely to respond more favorably to Plaintiff than to our Company;
- Plaintiff sustained \$8000 in dental bills and so is likely to receive at least this amount as a result of any trial; and
- The risk of setting a bad precedent by agreeing to this settlement is low because R&D has recently redesigned and relabeled our packaging to make future misuse of this type nearly impossible.

#### **Next Steps**

I would like ten minutes of your time on Friday May 4<sup>th</sup> to address any questions you may have and to obtain your response. Thank you and please advise. My ext. is 4578.