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ACC America
Association of Corporate Counsel
Western Pennsylvania Chapter

FOCUS

President's Message

Ken Christman

The Benefits of Membership

Happy New Year and welcome to another year of membership in the ACC Western Pennsylvania Chapter. Our goal, as always, is to provide the best possible value to our members. There are several ways in which we seek to do this.

Chapter CLE Programs

Our chapter's CLE programs have always been one of the principal benefits of membership. They offer a convenient way for members to satisfy their annual Pennsylvania CLE requirement, including the necessary ethics credit. In the past year, we have made a number of changes in order to make these programs even better.

First, our traditional, monthly luncheon programs have been moved from Monday to Tuesday. This was done in response to a recent survey of our members, in which many of you participated.

Second, we significantly increased the number of CLE programs that we offer. We sought to provide more variety, both in substantive content and in the timing of our programs.

In addition to our monthly luncheon programs, the 2009–2010 program schedule includes three breakfast programs, offering either two or three hours of CLE credit, and four, one-hour cocktail programs, held at the end of the work day. We hope these new programs will provide opportunities for members to attend, especially those working outside the downtown area, who may have been unable to attend downtown programs during the middle of the workday.

Finally, we have obtained a number of law firm sponsorships, which enabled us to significantly reduce the cost of these programs to members. This should be very helpful at a time when many members are facing budgetary constraints.

Our first luncheon program of the new year was held at the Duquesne Club on Tuesday, January 12. The presenter was Barry Friedman of Metz Lewis LLC. His program, entitled "Are the Sands Shifting or the Sky Falling? Changing Perspectives on Patent Utility," included a discussion of current issues in patent law, including the uncertainties over what is and is not patentable.

Our second luncheon program was held on February 2, 2010, at the Rivers Club. The presenters were James P. Hollihan and Denyse Sabagh of Duane Morris LLP, who discussed "Recent Developments in Employment and Immigration."

On February 11, we held a cocktail program at the Carnegie Science Center, beginning at 5:30 p.m. The program was entitled "Proportionality: How to Control the Costs of Ediscovery." Our presenters were Jennifer Keadle Mason of Mintzer, Sarowitz, Zeris, Ledva & Meyers LLP and Peter L. Mansmann of Precise Inc. Litigation Technologies. This program offered a truly unique opportunity. While members attended the CLE program, their families were invited to enjoy free access to selected exhibits at the Science Center, including roboworld™, which included the world's largest and most comprehensive robotics exhibition.

Finally, our luncheon program on March 2, 2010 featured Charles De Monaco of Fox Rothchild LLP, who discussed "Creating and Maintaining

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Ethical Issues in the New Service Paradigm

Susan Hackett, senior vice president and general counsel, Association of Corporate Counsel,

Many of you know me lately for my work as an evangelist for the ACC Value Challenge — our project to help corporate counsel and firms reconnect the cost of legal services to their value. But before the ACC Value Challenge dominated my agenda, I spent much of my time working on in-house ethics and professionalism issues.

It's no surprise then that I would eventually seek to marry these two tranches of work. And so I bring the couple before you for your consideration in this column: my goal will be to give you a short overview of some of the professional, ethical issues that will confront corporate counsel who are working with firms to reinvent the legal service provision model by employing new fee structures, new staffing options, new knowledge management techniques, new technologies and more.

We don't have the space or time in this column to go in-depth (see below for links to more material), but many of you will first run into new ethical challenges as you seek to restructure fees for service from hourly rates to other options, and then consider the staffing decisions that such fee structures may dictate. Basically, these arrangements seek to shift the risk of cost/profit from clients (who in the past both paid the firm's "guaranteed" profit, and bore the all the risks of the cost) to firms. Firms in the new paradigm will be asked essentially to "put skin in the game," making them responsible for not only their own efficiency and costs, but also for more of the outcome risk, which may make them less objective about the method of providing their services and the advice they provide. Firms will also face new (but not insurmountable) issues in professional liability and the responsibility to come up with "solutions," in cooperation with other service providers who are not lawyers or who may reside outside the four walls and insurance coverage of the law firm.

Both the use of hourly fees and the use of value-based fee arrangements[1] can present ethical issues. And the ABA's Model Rules of Professional Conduct in the US, and codes of conduct in other jurisdictions such as Canada, Australia and many European jurisdictions, typically purport to detail the ethical considerations in setting and collecting fees, but are usually unhelpful. Indeed, model rule platitudes – such as, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses" (ABA Model Rule 1.5 on Fees), are not only of no help, but often serve to support the proliferation of everything but the most ethical practices. Unreasonable to a client may not be unreasonable to a firm or an ethics authority.

So what are the ethical risks behind the implementation of both hourly or value-based fee arrangements?

Hourly billing can create disincentives to efficiency or encourage waste; it is often cited as supporting "make-work" for firm lawyers who need to bill a certain number of hours per cycle, regardless of whether the work warrants the additional time and effort; it does not encourage firms to assign the right (as opposed to the available/unoccupied/needing-to-be-trained) talent to the matter or improve the efficiency of staff members who perform repetitive tasks; it removes accountability from both junior and senior lawyers for the outcome (they see themselves as only responsible for engaging in necessary legal analysis or process), and more, all of which are problems under legal ethics guidelines such as the ABA Model Rules.

Likewise, newly negotiated fee arrangements based on value (and not just hours x rates) are often the result of experimentation between clients and firms with fee and staffing formats they've not tried before; thus, firms and clients may set fees for service that may not be based on an understanding of what the cost will actually be, and this could give rise to wildly inaccurate or unrealistic estimates that firms or clients don't want to be held to. Additionally, new staffing structures can create a lack of responsibility or lack of proper oversight for supervisory relationships (both in poorly coordinated lawyer teams and for outsourced non-lawyers working on matters that the firm used to be entirely responsible for on their own); lawyers without management skill sets will become responsible (a competence issue) for management services or for supervising work done by others that they aren't competent to supervise; a decrease in diligence might be suffered in matters governed by a fixed fee, which removes incentives for lawyers to continue working on a matter that requires investment beyond the normal amount the fee was intended to cover; and lawyers in firms could be deemed to lack objectivity and independence in their guidance if their fees are determined based on outcome.

But let's be clear: the challenges associated with value-based fee and staffing arrangements, albeit different than the challenges associated with hourly fees, are no greater in magnitude. Indeed, I would argue that many of the value-based fee structures that clients and firms are experimenting with offer better incentives to better behavior and remove many of the ethical tensions that have

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1. I don't like to use the words "alternative fees" since I think that all fees are alternatives that should be considered and chosen based on the matter and the client/firm relationship. The use of the term "value-based fees" infers fees that have been structured to provide the best alternative from the choices available based on what the work is worth and other priorities the client may have, such as speediness, priority, budget pressures, whether the work is repetitive, etc.

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plagued lawyers who increasingly feel disenchanted with practice, precisely because they see the misalignment of their firms' business models and billing practices with their client's best interests, and their oath to behave according to the highest principles of professionalism. Bottom line: Ethical lawyers make sure that they behave ethically: there are simply new issues to consider and navigate in the process.

ACC is developing a line of resources to help lawyers in both firms and departments understand these new challenges and assure that their re-designed relationships operate both smoothly and to the highest standards of professionalism. Our initial treatise on the topic is now online on the ACC Value Challenge homepage at *www.acc.com/valuechallenge*. We are also available to travel to chapters and large departments to help them plan ethics workshops that qualify for ethics credits, examine these issues and discuss both best practices and pitfalls to avoid.

Until then, here are a few ideas to consider to ensure that any "value-based" fee and staffing structures you implement are grounded in sound ethical practices:

- Draft agreements that focus the firm on diligent representation regardless of the fee structure — such as fixed fees with "safety valves" or decision trees that plan for variances in how the matter may unfold. Such arrangements should allow for renegotiation or "change orders" when the client objectives change during the course of the representation or allow the firm to assume a new direction when unexpected difficulties arise that could not have been planned for;
- Ensure the fees fairly and adequately compensate the firm's lawyers for the services provided throughout the representation, so as not to provide an incentive to improperly curtail services — the issue is usually not to try to go cheap, but to assure the firm that the sustainable profitability that makes the work worth their while yet aligned with client needs;
- Consider up front (and then stick to the agreement) whether firms who put skin in the game and "win" will be able to keep 100 percent or some portion of the windfall; if the firm takes a risk, it should be rewarded so long as the client receives the value it negotiated for.
- Refrain from using a fee arrangement with incentives that could impose a significant material limitation on the lawyers' representation; or if the material limitation is "consent-able," obtain the client's informed consent;
- Base fee prices on data and experience in previous matters, and communicate early and often, enabling clients to make informed decisions regarding representation and to incent the firm to engage in better process and project management and continuous improvement; and
- Explicitly state in the agreement when fees are to be considered earned.

Also, because many law firms' internal cost structures create high-priced fees, some firms can only "stretch" so far; many value-based fee arrangements will make use of legal outsourcing or off-shoring for parts or stages of the work that can be done by non-lawyers. Additionally, many firms are struggling with the appropriate role of their entry-level lawyers or para-professional staff and how they can be trained and contributing. Firms engaging in outsourcing or "pushing the work down" must ensure that the service providers they choose are properly supervised and that they and their work product complies with the requirements of the rules of professional conduct — such supervision can be contracted to the provider (if an outsourcer or contract lawyer company) or made the responsibility of the client's law department or the law firm (when the work is assigned to para-professionals). To successfully make use of legal outsourcing or non-legal staff, lawyers must:

- Ensure the use of properly skilled and well-educated professionals who are trained to the client's needs, and ensure that their work is being monitored and checked upon by licensed lawyers (in the jurisdiction in which the matter takes place);
- Carefully consider when lawyers vs. paralegals vs. business or legal process staffers are the best choice, and make sure that adequate supervision of non-lawyer work is in place;
- Ensure the local legal landscape is adequate to protect the clients' interests or that the contract for services mandates the standards by which you wish their work to be performed (conflicts, professional standards, etc.);
- Assure confidentiality and security through non-disclosure agreements and mandated IT security procedures; and
- Obtain the clients' informed consent regarding any outsourcing plans if there is a risk that clients will believe the firm's lawyers are performing services and not others.

These are but a few of the issues we see arising as the new legal service paradigm shifts the way that clients and firms traditionally related to each other. Do you have suggestions or questions about the ACC Value Challenge and ethics/professionalism issues affecting in-house practice and your client's service? Feel free to contact me at *hackett@acc.com*, and let me know how ACC can help.

Effective Corporate Compliance Is Essential When Dealing with Foreign Transactions and Policies Relating to the Foreign Corrupt Practices Act

By Charles A. De Monaco[1]

Effective corporate compliance to prevent and detect violations of law is the most effective way to stay compliant with the developing law regarding the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §78m. This article is intended to provide a brief overview of the FCPA and why corporate compliance is essential to compliance with that Act and other laws and regulations.[2] Written materials will be provided at the ACC Western Pennsylvania Chapter CLE program on March 2, 2010, "**Creating and Maintaining an Effective Compliance Program**" (See ***Upcoming Programs/ Events*** for details).

The U.S. Attorneys' Manual (USAM), which may be accessed on the U.S. Department of Justice website, contains the Department's policy regarding investigations and prosecutions of violations under the FCPA. The Act prohibits both domestic and foreign corporations and nationals from offering or paying, or authorizing the offer or payment, of anything of value to a foreign government official, foreign political party, party official, or candidate for foreign public office, or to any official of a public international organization in order to obtain or retain business. In addition, the FCPA requires publicly-held U.S. companies to make and keep books and records which, in reasonable detail, accurately reflect the disposition of company assets, and to devise and maintain a system of international accounting controls sufficient to reasonably assure that transactions are authorized, recorded accurately and periodically reviewed. *See* USAM, 9-47.100.

U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a "domestic concern," or a foreign national or business. An "issuer" is a corporation that has issued securities registered in the U.S., or that is required to file periodic reports with the U.S. Securities and Exchange Commission (SEC). A "domestic concern" is any individual who is a citizen, national or resident of the U.S., or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship that has its principal place of business in the U.S., or which is organized under the laws of a state of the United States, or a territory, possession or commonwealth of the United States. *See* USAM, Title 9, Criminal Resource Manual, §1018, p. 1.

"Issuers" and "domestic concerns" may be held liable under the FCPA pursuant to either territorial or nationality jurisdiction principles. In addition, U.S. parent corporations may be held liable for the acts of their foreign subsidiaries where they authorized, directed or controlled the activity in question, as can U.S. citizens or residents who are employed by or acting on behalf of such foreign-incorporated subsidiaries. *Id.*

An essential element is that the person making or authorizing the payment must have a corrupt intent. The FCPA prohibits any corrupt payment intended to influence a foreign official to engage in an unlawful act, to obtain any improper advantage, or to improperly influence other government officials. The FCPA does not require that a corrupt act succeed in its purpose. *Id.* p.2.

The FCPA allows for certain affirmative defenses that can be used to defend against alleged violations of the Act, such as asserting that the payment was lawful under the written laws of the foreign country or that money was spent as part of demonstrating a product or performing a contractual obligation. To invoke an affirmative defense, a defendant is required to show in the first instance that the payment met these requirements. *Id.* p 3.

The FCPA requires companies whose securities are listed in the U.S. to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require issuers to make and keep books and records that accurately and fairly reflect the transactions and dispositions of the assets of the corporation. In addition, such corporations must devise and maintain a system of internal accounting controls adequate to provide reasonable assurances that: (i) transactions are executed in accordance with management's authorization; (ii) transactions are recorded as necessary to enable preparation of financial statements in accordance with GAAP and to maintain accountability of assets; (iii) access to assets as permitted only in accordance with management's authorization; and (iv) the recorded accountability for assets is periodically compared with the existing assets and any differences are addressed. The issuer is also responsible for the books and records of subsidiaries over which it exercises control. It is important to note that the willful circumvention of or failure to implement a system of internal accounting controls, or willful falsification of an issuer's books, records or accounts is a criminal offense, whether or not such falsification is related to the foreign corrupt practice prescribed by the FCPA. *Id.,* §1017.

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1 Mr. De Monaco is a partner at Fox Rothschild LLP. In addition to other positions held, Mr. De Monaco served for 15 years in the U.S. Department of Justice as an assistant U.S. attorney in Pittsburgh, PA and as an assistant section chief in the Environment and Natural Resources Division at Main Justice in Washington, D.C.

2 For a copy of the written presentation with attachments made to the Los Angeles Bar Association in September 2009 on this topic, please contact Charles A. De Monaco at Fox Rothschild LLP, 625 Liberty Avenue, 29th Floor, Pittsburgh, PA 15222-3115, 412.394.6929, *cdemonaco@foxrothschild.com.*

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The sanctions against bribery are severe. Corporations and other business entities are subject to a fine of up to $2 million and officers, directors, stockholders, employees and agents (including non-U.S. nationals) are subject to a fine up to $100,000.00 and imprisonment for up to five (5) years. However, under the Alternative Fines Act, these fines may be greater and the actual fine may be up to twice the amount of the benefit that the defendant sought to obtain by making the corrupt payment. It must be understood that fines imposed upon individuals may be greater and may not be paid by their employer or principal. *Id.,* §1019.

In addition to criminal investigations and prosecutions, the attorney general or SEC may bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent or stockholder acting on behalf of the firm) is in violation (or about to be) of the FCPA anti-bribery provisions. *Id.*

Furthermore, a person or firm found in violation of the FCPA may be barred from doing business with the federal government. Indictment alone can lead to suspension of the right to do business with the government. Other significant sanctions may be imposed against individuals and organizations. *Id.*

It is essential for companies and counsel to have a thorough working knowledge of the FCPA, its regulations and guidance provided by the Justice Department.[3] It is extremely important for all companies to have an effective corporate compliance program to prevent and detect violations of the FCPA and similar anti-corruption laws, both domestic and foreign, and to ensure that its books and records are legally compliant. Having an effective corporate compliance program may prevent a violation from occurring in the first instance and, if a violation does occur, serve as a mitigating factor in the exercise of prosecutorial discretion.

3 The guidance given to prosecutors by the Justice Department is contained in the Principles of Federal Prosecution of Business Organizations, USAM, Chapter 9-28.000.

Welcome New Members

Chintan Amin, Bayer Corporation

Mansi Arora, Alcoa Inc.

Lars Benecke, Bayer Corporation

Kimberly Cuccia, NiSource, Inc.

Brett Farrar, Bayer Corporation

Brian Fetterolf, TriState Capital Bank

Theodore Gallagher, NiSource Corporate Services Company

Cheree Johnson, H.J. Heinz Company

Justin Long, Giant Eagle, Inc.

Joan Marshall, Thermo Fisher Scientific Inc.

Patrick O'Leary, Thermo Fisher Scientific Inc.

Lisa Pitell, Ibis Tek, LLC

John Sabo, Thermo Fisher Scientific Inc.

John Unice, Bayer Corporation

Brian Walters, Matthews International Corporation

James Whelton, C&J Welding and Construction, LLC

Vincent Zappa, Zamagias Properties

Chapter Photos

IP Potpourri: The Chapter kicked off 2010 by co-hosting a luncheon CLE entitled "Recent Developments in IP." Featured speaker was Barry I. Friedman of Metz Lewis LCC.

Security Alert: The final luncheon CLE for 2009 was co-hosted in December by Buchanan Ingersoll & Rooney PC. David A. Gurwin (left) and Matthew H. Meade alerted attendees to "What In-House Counsel Should Know About Data Security: Understanding Corporate Obligations to Provide Security Breach Notification Requirements."

Ethical Enlightenment: The chapter co-hosted a special membership/ breakfast CLE event in November with Eckert Seamans Cherin & Mellott, LLC. Featured speaker, Dr. Jim Weber of Duquesne University (right), gave an overview of issues critical to "Ethical Decision Making." Dr. Weber is shown with 2009 chapter VP of Membership Kevin Whyte.

Trustworthy Advice: In November, the Chapter co-hosted an evening cocktail CLE program entitled "Counseling in an Era of Increased Antitrust Enforcement and Litigation: What You and Your Client Need to Know." Featured speakers included (l-r) P. Gavin Eastgate, Debra H. Dermody, William J. Sheridan, and Michael E. Lowenstein, all of Reed Smith LLP

Grape Expectations: For the November luncheon CLE program, Karl Schieneman of JurInnov Ltd. and Erin Beckner of Tucker Arensberg, P.C., provided attendees with tips and tools for "Managing Outside Counsel." The speakers also revealed that when confronted with e-discovery, there are 3 Cs of successful e-discovery document production — Communication, Coordination, and Compliance — plus it doesn't hurt to have a 4th C — Cabernet. Karl is shown holding a bottle of *The 4th C e-Discovery Cabernet*, his own brand of e-discovery-inspired wine.

ACC News

Fill out the ACC Value Index Evaluation Form and Win a $1,000 "ACC Education Coupon"

As part of the ACC Value Challenge, the ACC Value Index (*www.acc.com/valueindex*) is connecting law firm value to client satisfaction. ACC has set a goal to reach 10,000 evaluations by September 30, 2010. Help us reach our goal and make the Value Index a valuable resource for members by visiting the site and rating your firms in the areas of expertise, responsiveness, efficiency, budget management, and results. Volume targets have been set up for each chapter, so begin entering your targets today at *http://www.acc.com/valuechallenge/valueindex/index.cfm*.

Recruit a Member and Win A Prize in ACC's Member-Get-A-Member Campaign

Each time you use the ACC network, you gain valuable skills and experience only available through ACC. More members in ACC translate into improved educational opportunities, enhanced networking, increased online resources, and advancement of the profession worldwide. Help expand your ACC network by taking part in the "Everybody Wins" membership drive! When you recruit new members to ACC, you will win prizes ranging from complimentary $5.00 Starbucks' Cards and cutting edge electronics including portable DVD players, digital cameras and video recorders, to free ACC Annual Meeting, CCU, or ACC Europe Meeting registrations with a $750.00 travel stipend. ACC's "Everybody Wins" membership drive ends May 30, 2010. Don't delay, recruit today! Learn more at *www.acc.com/everybodywins*.

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an Effective Compliance Program." Please read Mr. DeMonaco's article, "Effective Corporate Compliance Is Essential When Dealing With Foreign Transactions and Policies Relating to the Foreign Corrupt Practices Act," featured in this issue of *Focus*.

I hope you have the opportunity to attend one or more of these programs. For more information on upcoming chapter programs, go to *westernpennsylvania.acc.com*.

ACC Committees

Another benefit of membership is the opportunity to participate on one or more committees. Our national organization sponsors 16 different committees, each focusing on a substantive legal practice area (such as employment and labor or corporate law and securities) or type of practice (such as insurance staff counsel or small law department). Each committee holds a monthly teleconference. Instructions on how to join a committee are found at *www.acc.com/committees.*

ACC Website

ACC's website (*www.acc.com*) provides a wealth of valuable information to members. It includes sample forms, articles and the popular InfoPAKs℠, which cover a range of timely business and legal topics. Recent additions include "A Primer on Financial Regulatory Reform" and "Homeland Security."

Finally, remember that this is your organization. As I said at the outset, we strive to provide value to you. In that regard, we always welcome your comments and suggestions.

Upcoming Programs

Proportionality: How to Control the Cost of E-Discovery
One-hour cocktail seminar
Thursday, March 18, 2010
Carnegie Science Center, One Allegheny Avenue, Pittsburgh, PA 15212

Mergers and Acquisitions: The International Deal
One-credit luncheon program
Tuesday, April 6, 2010, 11:30 AM to 1:00 PM
Fairmont Pittsburgh, 510 Market Street, Pittsburgh, PA 15222

Corporate Governance & Compliance
Three-credit breakfast program
Tuesday, April 20, 2010, 8:00 AM to Noon
Duquesne Club, 325 Sixth Avenue, Pittsburgh, PA 15222