

Corporate Counsel Organization Highlights

San Francisco Compliance Conference Features Akin Gump, Ernst & Young And Fios

As a service to corporate counsel, *The Metropolitan Corporate Counsel* has encouraged its major supporters to sponsor Global Compliance Conferences throughout the country. Their purpose is to alert corporate counsel to current compliance issues and to provide them with the ammunition necessary to convince their managements of the need for an effective compliance system. Akin Gump and the other sponsors were so enthusiastic about the record-breaking turnout for the Conference held in Dallas on May 1, 2007, that they scheduled another successful Conference in San Francisco on January 24. Interest in compliance never flags, as major companies continue to be beset by risk management failures. In May, the flavor of the month was option backdating and in January, the subprime meltdown.

Steve Kaufhold, Partner in Akin Gump's Security Litigation Practice Group, described the panel he moderated as follows:

"Panelists Jina Choi (SEC Branch Chief), Joseph Rosenbaum (Ernst & Young Partner), Paul Bessette (Akin Gump Partner) and moderator Steven Kaufhold (Akin Gump Partner) led a discussion on corporate investigation best practices. Ms. Choi emphasized the need for companies and counsel to maintain their credibility both in terms of how investigations are conducted and how they are described to Commission staff. She also encouraged public companies and their counsel to communicate with Commission staff during all phases of an investigation. Mr. Rosenbaum and Mr. Bessette both focused on the importance of planning and conducting a comprehensive investigation designed to get to the bottom of material issues. The panel also discussed the need for comprehensive document collection and analysis – particularly in the area of electronically stored messages and documents. The panel received a number of questions from the conference participants, with several people raising the issue of how to determine the appropriate scope of an investigation given cost and resource challenges."

We asked a few of the presenters (in the order in which they appeared) to summarize for our readers their most important message:

Jack Holleran, Senior Manager, Corporate Compliance Advisory Services, Ernst & Young, responded:

"Effective compliance risk management starts with clearly defining what 'compliance' means for the organization. This includes both mandatory requirements, such as the laws and regulations that apply to the organization's business, and voluntary requirements, such as code of conduct and policies. Once compliance is clearly defined, the organization can prioritize its compliance risks and determine which are more significant, and then build a compliance program, including controls, processes, and training, to manage those risks efficiently and effectively. This approach not only helps companies stay out of trouble, by preventing and detecting non-compliance; it also helps drive competitive advantage by integrating

compliance into every employee's job, and into every business decision."

Ed Rubinoff, Partner in Akin Gump's International Trade Practice Group, said:

"U.S. Government enforcement of the Foreign Corrupt Practices Act ("FCPA") has intensified in recent years for a variety of reasons, including disclosure and recordkeeping obligations under Sarbanes-Oxley. In addition, fines imposed for violations under the FCPA have reached new record levels, and the scope of activities that attract the attention of the Justice Department and the Securities Exchange Commission, which enforce the anti-bribery and recordkeeping requirements of the law, have broadened. The few defenses and exceptions to the FCPA are narrowly construed, yet generate many of the complex issues faced by companies involved in cross-border transactions. Because both agencies apply the rule of successor liability to violations of the FCPA, companies contemplating mergers, acquisitions and joint ventures are advised to conduct thorough due diligence on FCPA compliance before completing a proposed deal, and should implement rigorous safeguards to ensure continued adherence to the law post-transaction."

The most important messages about e-discovery are summarized as follows:

Fraser McAlpine, Partner in Akin Gump's Labor and Employment Practice Group, mentioned: "Corporations must develop a strategy for E-Discovery for each type of litigation that they can reasonably anticipate, and they should do so independently of any particular dispute that they believe will lead to litigation. If corporations wait until they actually anticipate a specific claim or lawsuit (that is, wait for the "triggering event" that gives rise to the obligation to preserve Electronically Stored Information), they will make it more difficult to develop an effective procedure to preserve the ESI relevant to a specific dispute."

Prashant Dubey, Senior Vice President, Fios Consulting, commented that it was important to maintain proportionality in the face of frenzy, stating that: "In this environment of 'grey zones' where the FRCP governing discovery do not lay out a recipe book for how to behave, yet mandate a process for interaction between parties, it is tempting to operate on the fringes of the continuum. On one end, some parties act as though the paper world is still omnipresent and summarily dismiss/ignore the existence of ESI as part of the potential evidence pool. On the other end, some default to an extreme risk-averse position (often advocated by outside counsel, borne from anxiety about *Qualcomm*-like sanctions), and are over-inclusive in the electronically stored information universe with inappropriate regard for the cost of discovery. Overindulging proportionality is well advised in this environment since judges have proven that they still judge the appropriateness of discovery behavior through a lens of reasonableness."

Sam Panarella, Vice President & Managing Director, Fios Consulting,

remarked: "The explosion of electronically stored information (ESI) created and stored by companies, the amendments to the Federal Rules of Civil Procedure governing discovery and several court decisions penalizing companies for poor e-discovery practices have combined to create an environment of fear and uncertainty for companies that are compelled to identify, preserve, collect and produce ESI for discovery. While there is certainly reason to be concerned about the risks in this area, a sense of proportionality is critical. Rather than rushing headlong into technology purchases and major process overhauls, companies would be best served by taking a measured approach that focuses on their particular discovery needs, litigation portfolio and industry area, with the goal of creating an e-discovery business process that allows the company to demonstrate reasonableness and good faith in its e-discovery practices but does not overburden the company's ability to conduct its core business."

Mary Ann Reichard, Manager, Ernst & Young's Fraud Investigation & Dispute Services, observed: "Compliance officers and those in the general counsel's office must understand that records and information management is a key component to reducing litigation costs, complying with discovery requests and supporting internal and government investigations. How so? Records management programs that encompass all the ways organizations communicate business information (from email to spreadsheets and presentations) allow the organization to effectively comply with discovery requests by quickly knowing what information they have and where they have it. Almost all daily work communications and documents are de facto business records, even though they are likely not currently managed as such. Having a business process for responding to discovery requests that is tightly integrated with a robust records management function can help to ensure that responses are complete and accurate."

Partners Notes

West Publishes Revised Edition Of Federal Civil Rules Handbook

Each Federal Rule of Civil Procedure has been revised, the most sweeping change since the rules were enacted in 1938. To help lawyers understand the unprecedented changes that became effective on Dec. 1, Thomson West has published the *Federal Civil Rules Handbook*, 2008 edition.

The 2008 edition of the *Federal Civil Rules Handbook* not only contains the text of the newly amended rules but also includes substantial analysis and commentary to guide practitioners through these new waters. It includes a summary of the amendments, which explains the objectives, nature and scope of the amendments. The book also contains a "road map" for each rule, summarizing the substantive, organizational and language changes for that rule, as well as commentary at the rule section or sub-section level providing detailed information about all of these developments.

"The amendments change the entire landscape of the Federal Civil Rules," said co-author Steven F. Baicker-McKee. "If litigators cite a provision based on where it used to be located, they may be citing to the wrong provision. In addition, the stylistic changes to the rules mean attorneys may be citing a rule to the court using old terminology. The new edition of the handbook provides a road map that can orient lawyers to these dramatic changes and give them comfort that when they go to court they are fully prepared."

In addition to the amendments to the rules, the United States Supreme Court adopted revisions for each of the appended illustrated federal forms. The Supreme Court also promulgated an entirely new rule, Rule 5.2, designed to address confidentially in pleadings, and issued its decision last year in *Bell Atlantic Corp. v. Twombly*, which expressly overturned prior precedent and may have significantly changed the nature of notice pleading under the Federal Rules. These new developments are critical to litigators and extensively covered in *Federal Civil Rules Handbook*, 2008 edition.

This new edition of the handbook also marks its 15th anniversary as it continues to serve as the most comprehensive single-volume guide on all procedural aspects of civil litigation, saving research time. It contains more than 1,800 pages of procedural guidance, providing expert discussion and practice tips, including practical applications, limitations and traps, and specifying the timing for each step in a civil action. The 2008 edition is updated with the most current case law available, including more than 1,000 new citations, many of which are 2007 cases.

A podcast interview with two of the co-authors, Steven F. Baicker-McKee and William M. Janssen, discussing the new Federal Rules of Civil Procedure and their impact on litigators can be downloaded at <http://feeds.feedburner.com/Westcast>.

Save the Date:

National Association of Women Lawyers
Fourth Annual General Counsel Institute

Thursday & Friday, November 6 & 7