Corporate Counsel News

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Virginia State Bar Corporate Counsel Section
http://www.vsb.org/sections/cc/index.htm

Whistle-Blowing Employees have a New Friend in Sarbanes-Oxley

by Jennifer A. Short and Brandon H. Elledge[1]

In the first decision rendered under the whistle-blower retaliation provision of the Sarbanes-Oxley Act of 2002, a Virginia employer was ordered to reinstate its former CFO, to award him back pay plus interest, and to cover the employee's "special damages," including litigation costs, expenses, and attorney's fees. In *Welch v. Cardinal Bankshares Corporation* (issued on January 28, 2004), Administrative Law Judge Stephen L. Purcell established how whistle-blower retaliation claims under the Sarbanes-Oxley Act will be evaluated by the Department of Labor, and set the standards by which public companies will be judged when dealing with employee concerns about company accounting practices.

The *Welch* decision raises several concerns for employers, public companies, and anyone mindful of whistle-blowers in the workplace. In addition to the extent of the relief awarded to the whistle-blower in the case, the decision is noteworthy because it (1) rejected the employer's claim that the whistle-blower did not cooperate with its internal accounting investigation, (2) found such claim to be a pretext for the employee's unlawful termination, (3) held that the employee's whistle-blowing need only be a "contributing factor" in his termination in order to constitute a violation of the Sarbanes-Oxley Act, and (4) established different standards of proof for the whistle-blowing employee and his employer, which favor the employee.

The whistle-blower at issue in this decision, David Welch, served as the CFO of Virginia-based Bank of Floyd and its holding company, Cardinal Bankshares. Welch was suspended and discharged from his position in October 2002 after he refused to sign financial certification forms, expressed concerns over the bank's financial reporting and internal accounting controls, and made allegations regarding insider trading of the bank's publicly-traded stock.

Prior to his termination, Welch also had informed management of Cardinal Bankshares of the steep criminal penalties afforded under the Sarbanes-Oxley Act as well as the whistle-blower provision of the Act. Section 806 of Sarbanes-Oxley protects employees who raise concerns about a public company's practices by providing that a company shall not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an

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Thanks! Swearing In of In-House Corporate Counsel

By David Ross Rosenfeld

In the last edition of this newsletter we put out a call for attorneys to sponsor in-house attorneys seeking to be sworn in before the Virginia Supreme Court after having completed the certification/registration process required under amended Rule 1A:5. More than a dozen of you answered the call and we thank you!

The need for a sponsor arose after the Virginia Supreme Court's amended Rule 1A:5 to require that by July 1, 2004, all non-Virginia licensed in-house attorneys working in Virginia would have to become either certified by, or registered with the Bar. Attorneys opting for certification will be able to appear in court on behalf of his/her entity employer; those who merely "registered," cannot. However, those who obtained "certification" will be required to appear before, and be sworn in by the Supreme Court of Virginia in Richmond and satisfy Virginia's annual 12 credit CLE requirement.

Thanks again for your help. ❖

more inside...

View from the Chair

by J. Philip Hart, Chair, Cornerstone Realty Group

As the 2003-2004 chair of the Virginia State Bar's Corporate Counsel Section, I am pleased to report that we have had a good year.

This year the Section continued a number of activities that have been our staple for years. We held our law school writing competition again this spring, and our winners were: Angela Montag, of William & Mary Law School, first prize; Bruce Easmunt, of George Mason Law School, second prize; and Shaun Richardson, of William & Mary Law School, third prize. On May 20, we will sponsor annual luncheons for our members in Northern Virginia, Richmond, Hampton Roads and Roanoke. We will also sponsor a CLE program at the Virginia State Bar's annual meeting in Virginia Beach next June. The topic will be the "Do Not Call" law, which we are all discovering has wide implications for businesses and non-profits.

The Section also undertook several new programs and projects this year. In October, we sponsored a CLE program with Squire, Sanders & Dempsey on the topic of ethics issues for in-house counsel. In December, we sponsored another CLE in Northern Virginia at which speakers from Holland & Knight and Chubb Insurance Company spoke about potential legal liability of in-house attorneys and insurance products available to afford some protection. We have also updated our section website with a goal of making "second generation" improvements. Take a look at the website at http://www.vsb.org/sections/cc/index.html and let us know what you think we could do to make it more useful to you. We are considering adding a listserv feature to the website soon.

The Section has undertaken a special project this year in Richmond. Section members are sponsoring fellow in-house attorneys who have recently become members of the Virginia State Bar under the VSB's new corporate counsel rule during their swearing in before the Virginia Supreme Court. For information, call Dolly Shaffner at the VSB at 804-775-0514.

Thank you for being a member of the section. The board of governors is always glad to hear from our section members, and you may call me directly at 804-643-1761.

Hope to see you at the Beach! ❖

Philip Hart

"Do Not Call"– VSB Annual Meeting

By Jennifer Leigh McClellan, Verizon Corporation

At the VSB Annual Meeting this June, the Virginia State Bar Corporate Council Section will sponsor a blue-ribbon panel of national experts and a CLE program on the recent "Do Not Call" and "Anti-Spam" legislation. Titled, "An Update on the Do Not Call Act and Anti-Spam," this two hour program, will be held on Friday, June 18, 2004, at the Holiday Inn, 39th Street, Virginia Beach starting at 11:00 am. Michael Goodman, Staff Attorney from the Federal Trade Commission Bureau of Consumer Protection will provide an overview of the federal Do Not Call Act, various FCC and FTC rule-makings, the Do Not Call List, and recent federal anti-spam activities. Richard Schwieker from the Office of the Attorney General, Civil Litigation Unit, Commonwealth of Virginia will address state do not call legislation. Lisa Hicks-Thomas from the Office of the Attorney General, Computer Crimes Unit, Commonwealth of Virginia will address state anti-spam legislation and prosecution. Finally, Guy Tripp, a partner at Hunton & Williams will address compliance issues facing corporations with an emphasis on direct marketing agencies and departments.

To ensure compliance with the Bar's policy that only paid registrants at the Annual Meetings receive CLE credit for attendance at seminars and workshops, CLE forms will only be available in the packets that are given to paid attendees at the time of registration. ❖

Our Website's New Look

By David Ross Rosenfeld

If you haven't visited it lately, you'll want to check out the Section's redesigned website at http://www.vsb.org/sections/cc/index.html. Our new Webmaster, Eileen Johnson, General Counsel, National Wildlife Federation, has updated the content and, working closely with Alison Anderson, our web designer, has given the site a fresh new look.

New content is being added daily and outdated content is now removed on a regular basis. Highlights of the new design include back issues of the section newsletter, a current calendar of upcoming events of interest to Section members, and the first prize award-winning essay in this year's Law Student Writing Competition. We have also included links to sites which we hope will be of value to in-house corporate counsel and the corporate legal community, and are looking into adding a 'listserv' feature to support communication and a dialogue among our section members.

The website is an effective means of communicating with our members and a way of providing you with useful information. Let us know what you need and want. Send your suggestions and ideas for additional links to Eileen Johnson at johnsone@nwf.org. ❖

Solving Billing Problems Before the Bill Comes In

by Edward Henry Beck, Exxon-Mobil Corporation

It's happened to all Corporate Counsel at some time or other - outside counsel had been retained for a project or a case; the scope of the work has been agreed upon and a timeline has been established. In due course, the work was completed and, in most instances, a good result has been obtained. Then, a month or so later the bill arrives. Then Corporate Counsel utters the famous words: "How could it be so large".

While no system is foolproof, there are some concrete steps that you can take to prevent this problem rearing its ugly head. Your first and best tool is a properly crafted retention letter. The letter should spell out in some detail exactly what you want Outside Counsel to do for you. The scope of the work to be performed should be outlined in detail. The attorneys who will work on the case or project should be specifically identified and their rates specified and agreed to **before** any work is started. You and Outside Counsel should agree on the period for which the initial rates will be in effect. Nothing causes more headaches than where rates mysteriously go up during the course of a matter. Nail down the details and all concerned will feel better down the line.

This doesn't mean that each and every retention letter has to be 20 pages long. Many corporations use a short retention cover letter geared to a specific matter and then attach to the letter a standard set of the Corporation's Guidelines for Outside Counsel. The Guidelines can be tailored to include a variety of items. Matters such as what disbursements will be paid for, what kind of travel will be permitted and what kind of electronic research is billable are set out. In any event, it is important to have Outside Counsel formally accept the terms of the retention letter and attached Guidelines before work is commenced. Some Corporations actually have a "Rate sheet" as part of their guidelines. Outside Counsel submits the sheet with its proposed rates when it agrees to the Guidelines and then the rates are signed off on and agreed to by Corporate Counsel.

Without beating the issues to death, the lesson to be learned is that some up front planning between Corporate and Outside Counsel can help to avoid many problems in the future. ❖

2004 Law Student Writing Competition

by David Ross Rosenfeld

With student entries spanning a wide variety of topics from Sarbanes Oxley to corporate computer technology in the 21st century, this year's $2,500 first prize in the VSB Corporate Counsel Section "Annual Law Student Writing Competition" was awarded to Angela Montag. Ms. Montag, a third year law student at William and Mary School of Law, offers an analysis of the pitfalls and obstacles inherent in "inside down round" financing, which occurs when investor dollars are scarce and "the company offers equity securities to existing investors at a valuation that is lower than the valuation of the previous round." The complete text of Ms. Montag's article will be published on the VSB Corporate Counsel Section website - http://www.vsb.org/sections/cc/index.html.

Second place in this year's competition went to Bruce Easmunt, a third year law student at George Mason University Law School. In his article, Mr. Easmunt studies Delaware's status as the 'incorporation capital' of the United States. Observing that "Delaware is home to over fifty percent of all companies listed on the New York Stock Exchange and almost sixty percent of all Fortune 500 companies," Mr. Easmunt's paper explores "the methods employed by the Delaware legislature to obtain these results and the factors that make Delaware so desirable to corporations." For his efforts, Mr. Easmunt receives the second place cash award of $1,500.

The third place award and a cash prize of $1,000, this year went to Shaun Richardson, a third year law student also at William and Mary, for his article on litigation discovery of corporate documents residing in various electronic formats. In addition to providing an historical overview of how courts have responded to electronic discovery requests, Mr. Richardson evaluates the various options available to litigants responding to a discovery request targeting a corporation's electronically stored data.

Finally, kudos and heartfelt thanks to the two judges of this year's writing competition: Greg E. Summy, General Solicitor, Norfolk Southern Corporation and Kathleen Kronau of Shenandoah Life Insurance Co. ❖

Mark Your Calendars

May 20, 2004 – 10th Annual Corporate Counsel Luncheon, Northern Virginia, Norfolk, and Richmond

June 18, 2004 – State Bar Annual Bar Meeting, Corporate Counsel program "Do Not Call!"

11:00 a.m –Virginia Beach; Corporate Counsel Section Business Meeting;

11:00 a.m to 12:30 - Corporate Counsel Program at the Virginia State Bar

REMINDER – This year, to ensure compliance with the Bar's policy that only paid registrants at the Annual Meetings receive CLE credit for attendance at seminars and workshops, CLE forms will be included in the packets that are given to paid attendees at the time of registration.

August 1, 2004 – Deadline for submission of manuscript for publication in the September edition of the Corporate Counsel Section Newsletter

Whistle-Blowing Employees *(continued from page 1)*

employee in the terms and conditions of employment because of any lawful act" taken by an employee.[2] Protected acts under Section 806 include providing information, testifying, or otherwise assisting in an investigation (conducted either by the government or the employer) or a proceeding relating to a potential securities law violation.

After he was fired, Welch filed a complaint with the U.S. Department of Labor, alleging that he was discharged in violation of Section 806.[3] Cardinal Bankshares responded that Welch was fired solely because he refused to meet with the bank's attorney and auditor/accountant, who had been instructed to investigate Welch's allegations. Presumably because the proposed meeting involved "internal Company matters," Cardinal Bankshares refused Welch's request to have his own counsel present at the meeting.

Judge Purcell was not convinced by Cardinal Bankshares' argument and determined that Welch's whistle-blowing activities were, in fact, a "contributing factor" in his termination, in violation of Section 806. In making this ruling, Judge Purcell held that an employee's whistle-blowing need not be the sole – or even a significant – factor in the termination decision in order to constitute a Section 806 violation. As to the bank's defense, Judge Purcell specifically found that its investigation of Welch's allegations was "orchestrated" by the bank's CEO, acting in concert with its lawyer and accountant/auditor, so that that the bank could "justify" Welch's termination. Judge Purcell further noted that the proximity in time between Welch's whistle-blowing activities and his termination "is itself sufficient to create an inference of unlawful discrimination." Accordingly, Judge Purcell concluded that the bank had contemplated firing Welch *before* he refused to meet with its attorney and accountant, and that the bank's insistence that Welch meet with company counsel and its accountant without Welch's own counsel "was clearly imposed for the purpose of using Welch's anticipated refusal to comply as a pretext for firing him."

Beyond the specific facts of this particular case, the standards of proof articulated in *Welch* will impact any company defending a Department of Labor proceeding under Section 806. Judge Purcell held that the employee must "demonstrate *by a preponderance of the evidence*" that his protected behavior was a contributing factor in the termination or adverse employment decision. However, once the whistle-blower makes this showing, the burden shifts to the employer to rebut the presumption that the employee is entitled to relief. The employer then must demonstrate "*by clear and convincing evidence* that it would have taken the same unfavorable personnel action in the absence of any protected behavior" in order to avoid liability.

Similarly, Section 806 only requires a whistle-blowing employee to have provided information that he "reasonably believes constitutes a violation" of the Act. Thus, an administrative law judge in reviewing a retaliation claim does not evaluate the validity of the underlying conduct that a whistle-blower has reported. Judge Purcell remarked that the statutory language clearly means that whistle-blowers are not required to show that the information they have reported actually constitutes a violation of the Act. To sustain a claim under Section 806, an employee need only establish that he reasonably believed the employer committed a securities violation, that he disclosed the company's conduct to the federal government or his employer, and, as a result, he suffered an adverse employment action. The employee's "reasonable belief" is measured by an objective standard.

In *Welch*, Judge Purcell concluded that Welch raised three allegations that objectively represented a "reasonable belief" that Cardinal Bankshares had violated the Sarbanes-Oxley Act: (1) two journal entries were improperly recorded with the effect of inflating Cardinal Bankshares' reported income; (2) Welch's access to the outside auditors had been restricted; and (3) Cardinal Bankshares' internal controls were inadequate since too many people without appropriate expertise were making journal entries. Welch reported these concerns to his employer, and consequently lost his job.

Judge Purcell awarded Welch the full extent of remedies available under Section 806, including (1) reinstatement to his former position as CFO without loss of seniority and without loss of any benefits to which he was entitled prior to his discharge, (2) back pay with interest, and (3) "special damages," which covered Welch's litigation costs and expenses, including his expert witness fees and reasonable attorney's fees.[4]

For employers and their corporate counsel, the *Welch* decision highlights that Sarbanes-Oxley is about more than just financial reporting. The Act also provides a wealth of relief and a relatively easy burden of proof to employees who claim that they reported potential securities violations committed by their employers and were punished as a result.

The best protection against whistle-blower claims is for companies to establish procedures for conducting internal investigations of any alleged or potential securities violations. (*See* "Don't Blame the Messenger: Establishing Accounting Complaint Procedures," Corporate Counsel News, Winter 2004.) The company's procedures should be made known to all employees, who can then be expected to cooperate in internal investigations as a condition of their continued employment.

Companies subject to Sarbanes-Oxley also should be mindful of the high burden of proof they could face in rebutting a whistle-blower retaliation charge. Knowing the "clear and convincing" standard they must meet, such companies should take steps to ensure that they can establish clear grounds for making an

adverse employment decision – i.e., to show that the same result would have occurred in the absence of any protected activity by the whistle-blowing employee. Such measures include proper and frequent documentation and consultations with employees who are presenting problems in the workplace or who are not performing well.

Finally, all companies – including privately held and not-for-profit corporations – must tread cautiously when dealing with employees who "blow the whistle" or complain about the legality of company conduct. Although the *Welch* decision focuses on the civil remedies and protections that are available to employees of public companies under Section 806, Sarbanes-Oxley also amended a *criminal* obstruction of justice statute that applies much more broadly. Section 1107 prohibits *any* person or company from intentionally retaliating against anyone who provides "any truthful information relating to the commission or possible commission of *any* Federal offense."[5] Under this provision, "retaliation" specifically includes actions that affect the whistle-blower's employment or livelihood. So, while publicly-traded companies can be liable for damages and costs when they retaliate against whistle-blowers, all companies can be criminally liable for intentionally engaging in the same behavior. ❖

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2. *See* 18 U.S.C. § 1514A.

3. A whistle-blowing employee must commence an action under Section 806 by filing a complaint with the Secretary of Labor within 90 days of the adverse employment decision. If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint, the employee may bring an action at law or equity in the appropriate district court of the United States.

4. Employers also should note that Section 806 does not "diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement." Thus, an employee is not barred from pursuing alternative theories of recovery against his employer merely because he brings an action under the whistle-blower provision of the Act.

5. *See* 18 U.S.C. § 1513(e) (violation of this provision is punishable by fine and/or imprisonment of up to 10 years).

May 20, 2004 - Annual Corporate Counsel Luncheon

By David Ross Rosenfeld

Following an established and honored tradition, on May 20, 2004, the VSB Corporate Counsel Section will hold luncheons for corporate counsel in three separate locations across the Commonwealth. Gathering in Richmond, Norfolk, and Northern Virginia, the Section will reach out to in-house corporate counsel throughout the state and invite each of them to join in luncheons designed to promote collegiality, facilitate networking, and encourage professionalism.

As a treat for those attending this year's Northern Virginia luncheon being held at Clydes at Tysons Corner, Vienna, Virginia, Edward Beck, the coordinator of the Northern Virginia luncheon, has arranged for Bernard Soraci to address the group. Mr. Soraci is charge of all of ExxonMobil's Company Operated Service Station Business in the United States and, in his last job, was head of ExxonMobil's domestic dealer business. He has also served in various other assignments including work in Mobil's Japanese affiliate and was the Manager of Mobil's operations in Keyna.

Douglas Callaway, in-house counsel with Wachovia Securities, is organizing this year's Corporate Counsel section luncheon in Richmond. It will be held at the Downtown Club, 901 East Byrd Street in Richmond. Michael Schewel, the Virginia Secretary of Commerce and Trade will be addressing those gathered at the Downtown Club, and Mr. Schewel will speak on recent developments that impact on Virginia business.

Corporate counsel from the Tidwater area will be gathering at the Harbor Club in Norfolk where the luncheon is being organized by Greg Summy, a member of the Corporate Counsel section's Board of Governors.

Space at each of these venues is limited so if you are interested in attending, reserve a seat now by calling, e-mailing, or faxing:

In Northern Virginia: Edward Beck
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In Richmond: Douglas Callaway
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In Norfolk: Greg Summy
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Non-US Attorneys Gain Status as Corporate Counsel

By David Ross Rosenfeld

After approving an amendment to Rule 1A:5 which established a structure and system for certifying non-Virginia barred attorneys employed as corporate counsel in Virginia, the Virginia State Bar has petitioned the Virginia Supreme Court to adopt a further amendment to the Rule 1A:5 which would permit lawyers from foreign countries to qualify and become Registered Corporate Counsel while employed as in-house corporate counsel in Virginia.

As a result of the Virginia Supreme Court's June, 2003 amendment to Rule 1A:5, all nonVirginia licensed attorneys employed as in-house counsel in Virginia will be required to enroll with the Virginia State Bar either as "Certified" or "Registered" corporate counsel (CLE compliance is only required for those seeking "Certification"). Thus, through this program, attorneys admitted to practice in U.S. states other than Virginia can be employed as and hold themselves out as in-house corporate counsel provided they undergo the new registration requirements established by Rule 1A:5 as amended.

Although this amendment to the Rule addressed the needs and requirements of most in-house corporate counsel and their employers, a gap in the application of the rule was identified. Specifically, the rule did not cover the situation involving, for example, the attorney licensed to practice only in a foreign country such as England or France, but who was employed as corporate counsel by a multi-national entity and is about to be transferred to that company's Virginia office.

Addressing this need, the Virginia State Bar has petitioned the Court to further amend the provisions of Section II of Rule 1A:5 to address these foreign barred attorneys. Specifically, the proposed amendment would make it possible for a "person admitted to the practice of law . . . in a country other than the United States . . . who is a member in good standing of a recognized legal profession in that country" to "register under Part II of this rule."

As noted on the Virginia State Bar's website, the period for public comment on this proposed amendment closes on May 10, 2004. Court action is expected thereafter and Virginia State Bar sources are optimistic that the Court will adopt the proposed amendment. A copy of the Virginia State Bar's petition containing the full text of the proposed amendment may be found at http://www.vsb.org/profguides/proposed/rule1A-5.html ❖

Corporate Counsel Career Program

By David Ross Rosenfeld

For the second consecutive year, the Corporate Counsel and the George Mason University Law School co-sponsored the "Corporate Counsel Career Seminar" for Washington, D.C. area law students. Held at the George Mason University Law School on February 17, 2004, the program, moderated by David Rosenfeld, a member of the Section's Board of Governors, presented five corporate lawyers who candidly discussed their views and insights on the role and function of the "in-house corporate counsel."

Panel participants included Edward Beck, litigation counsel at Exxon-Mobil Oil, Dan Mailer, a solo practitioner in Merrifield, Virginia with extensive experience as in-house corporate counsel, Scott Snyder, an attorney with the Law Offices of Roger S. Makey, the in-house law firm for Travelers Insurance Company in Virginia, Catherine Dunlap Mayes, of SallieMae in Reston, Virginia, and Matt Clanton, of the National Wildlife Federation, also in Reston.

Responding to questions from an overflowing audience of law students, the panel members discussed the academic and experience prerequisites for an 'in-house' position, the career mobility that exists for an attorney seeking to move between the private sector and corporate America, whether service as 'in-house counsel' is the practice of law or business administration, how the ethics rules governing attorneys impact on attorneys serving as 'in-house' counsel, and how in-house counsel are grappling with the constraints and obligations imposed by Sarbanes-Oxley. ❖

Editorial Policy

CORPORATE COUNSEL NEWS is published by the Virginia State Bar Corporate Counsel Section and is intended to provide information relating to law practice and management for the education and benefit of in-house counsel and others with similar interests. Statements or expressions of opinion or comments appearing herein are those of the editors, authors and contributors and should not be deemed as endorsed by the Corporate Counsel Section or the Virginia State Bar.

CORPORATE COUNSEL NEWS welcomes articles of interest to fellow members of the Corporate Counsel Section for publication in future editions.

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Dues: $20 for July 1 - June 30.
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Please return your request to: Membership Department
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