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Complying With Ethical Obligations As a Managing Attorney

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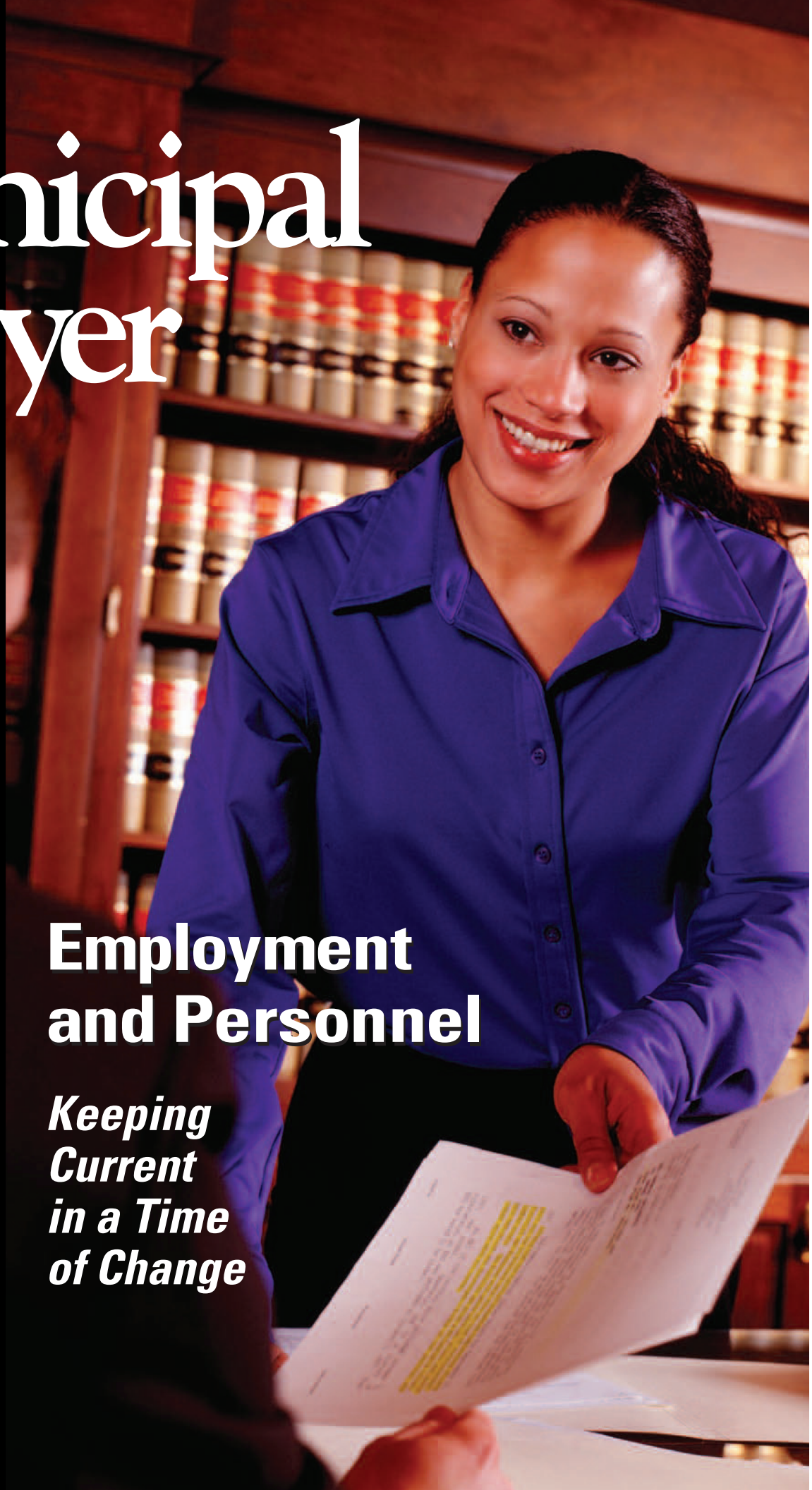
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Employment and Personnel

Keeping Current in a Time of Change

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Legal Supervisors on the Hook

What Are "Reasonable Efforts" under MRPC 5.1 and 5.3?

— by Lewis Kinard —

Lawyers who supervise others are accountable for their subordinates' professional conduct. This has been true for a long time. Today, however, more laws, more cases, more supervisees, more electronic data, and a faster pace mean a greater professional risk to the supervising attorney than ever before. As a result, it is imperative that managing attorneys understand the applicable standards, know in detail what their staff are doing, implement and thoroughly train staff on appropriate information management systems, and document all efforts.

Reasonably Prudent Efforts

In addition to the direct ethical obligations placed on supervisors related to their own work, the American Bar Association (ABA) Model Rule of Professional Conduct 5.1[1] mandates that supervising lawyers "shall make reasonable efforts"[2] to ensure compliance by *all* lawyers in the department with *all* rules of professional conduct; Rule 5.3 applies the same standard to the supervision of non-lawyer assistants.[3] These rules apply to lawyers in governmental agencies and "other organizations."[4]

"Reasonable" in the Rules means the conduct of a reasonably prudent and competent lawyer.[5] The "reasonable efforts" standard requires managing attorneys to implement information management systems that detect potential conflicts of interest, manage critical dates, protect confidentiality, account for client funds and property, and ensure that less experienced lawyers and non-lawyers are adequately supervised.[6]

Managing attorneys in legal departments often carry their own case loads in addition to their supervisory duties. They already have greater overall responsibilities than their staff, yet the Rules impose a higher duty than that required of the non-managing staff. For example, the failure to maintain an effective calendaring and follow-up system as a means of supervising employees and monitoring cases places the managing attorney at risk, even if she has actual knowledge of the status of each case and no harm occurs.[7] Breaching this duty to have appropriate systems in place may subject a managing attorney to discipline, *even if* she is not held responsible for a particular professional conduct violation.[8]

But, one size does not fit all. The monitoring systems must take into account the size of the organization, nature of the practice, the relative experience levels of staff, staff proximity to each other and their supervisors, the supervisor to supervisee ratios, and other factors.[9] This means that policies and procedures that have worked well decades ago may no longer be sufficient.

Modern Office = More Risks?

Legal departments in modernized offices today face new and increasing challenges, on top of the traditional issues: staff are scattered across multiple locations with fewer managers in each, the volume of work is greater and performed at high-speed-Internet pace, and most information is managed electronically. Some of our present-day "solutions" actually add to the problems by introducing new risks and opportunities for missteps, even as they address other needs. For example, electronic communications 20 years ago were limited to photocopiers and facsimile machines; today, we have written e-mail, instant messaging, short or "text" messaging, video-messaging, online file sharing, and more, each with its own new risks to client confidentiality and privileges. Policies implemented for storage, access, and purging of paper records are generally inadequate for stored electronic data.

Modern expectations from clients, disciplinary committees, and the courts are also higher. The bar overall, like the general population, is becoming more technologically proficient. The more that some legal departments are able to do with technology in delivering their legal services, the more "customers" (courts, governing bodies, internal clients, and the public) tend to expect from all legal departments. While a recent search turned up no published decisions or ethics opinions where the "objective reasonableness standard" used in Fourth Amendment cases[10] was borrowed to update older deci-

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sions regarding the "reasonable efforts" threshold under Rules 5.1 and 5.3, there appears nothing to prevent courts from doing so eventually. That means that "reasonable" would also be judged in the overall context, not just the isolated, internal environment. Consequently, law firms and legal departments could be held to standards that are getting higher as the technological sophistication of the bar increases.

Traps for the Unwary

A material change in circumstances could create a gaping deficiency in what were once sound information management systems. If a department's policies and procedures were last revised prior to the implementation, or major upgrade, of a computer network, shared network document storage, e-mail or other tool for enhancing collaboration and efficiency, then a review is necessary to ensure that those policies and procedures are still achieving their goals in these new circumstances. For example, are dual notification requirements being met with the department's electronic calendaring system now, given that so many staff carry PDAs around? Are access rights to the networked document storage system appropriately managed to ensure that supervisors can view the information stored by their supervisees or can access it in an emergency? Are storage and naming protocols consistent and effective now that not everything is kept in a paper file within centralized cabinets? Are methods of recording activities at least as reliable as the old-fashioned method of scribbling notes inside the front flap of the file jacket?

"Reasonable efforts" in supervising lawyers are quite different from those required when supervising non-lawyers, because non-lawyers are not themselves always directly regulated by similar rules of professional conduct.[11] Managing attorneys must remain aware of this need for additional attention. Conduct that exceeds a negligent lack of oversight may even be construed as assisting a person who is not a lawyer in the unauthorized practice of law and, thus, become a separate violation of Rule 5.05(b).[12]

In summary, the responsibility that falls on the supervisory lawyer's shoulders is significant and puts that lawyer at risk of discipline based on the actions of others. Too many managing attorneys incorrectly assume either that they know everything that is done in their office, or that they do not need to know everything that their non-lawyer assistants do each day. Taking charge and remaining in charge will prevent costly and potentially disastrous mistakes.[13] For example, a business process consultant on our staff once interviewed a paralegal in a new customer's office, who stated that she intentionally withheld information about the work she did. "No one here really knows what I do," the paralegal said, "and I am not going to tell you." If you have staff guarding their work processes as if they were proprietary secrets, then you may be seriously at risk.[14]

The Standard of Care—With a Hook

Changes in the legal profession over the past 20 years are analogous to those in other professions, such as accounting and medicine. In medicine, treatment that experts agree is appropriate, accepted, and widely used is called the "standard of care." Other professionals use that term or something similar (like "best practice"). Standards of care in medicine are ever-changing as new techniques, tools, and remedies enable adoption of even better practices. A breach of the applicable standard of care exposes a medical professional to discipline.[15] In accounting, the standard of care is the most current version of the "Generally Accepted Accounting Principles" (GAAP). Medical and accounting professionals wisely do not go outside these standards without consideration of the consequences.

Likewise, today's "standard of care" in legal office management includes the appropriate use of tools that are widely available to give managing lawyers better options than ever before. Managing attorneys no longer must be in the same suite, building, or state to be able to effectively oversee case loads and ensure quality of work. File reviews no longer require gathering stacks of paper files and interrupting work in progress. With electronic case files and modern case management systems (CMS) designed for even large legal departments, managing attorneys in departments of any size can fulfill their supervisory duties much more effectively. Most CMS solutions can also help document compliance supervision through implementing defined work flow management, standardized case management procedures, and mandatory dual-notification calendaring systems.

The best systems in the world, however, are of no help in meeting the Rule 5.1 and 5.3 obligations if managers neglect to explain them to their staff, including providing the "big picture" view of why their department is using the systems in the first place. Design and document your efforts that show compliance with Rules 5.1 and 5.3 as you would advise a client to do, because the ability to *prove* that you followed a reasonably prudent course could be what saves your own license from blemish if a subordinate is disciplined.[16] Simple steps—such as a sign-in sheet for trainees—can help document such efforts.

Inquire Within

As the disciplinary panel held in the proceeding affirmed by *In Re Conwell*, a managing lawyer is held to the "knows or reasonably should know" standard.[17] The box on page 25 summarizes the qualities of law office management systems that have been found to meet the "reasonable efforts" test across numerous U.S. jurisdictions for Rules 5.1 and 5.3, or their equivalents. These can be used to assess whether your office management systems are adequate and effective. Before rushing to implement the right answer to the wrong problem, however, make sure you know your office. Ask these questions:

- Have our policies been updated since we moved into electronic CMS and/or document management systems?
- Are our electronic information management systems configured correctly

so that we meet our obligations under Rules 1.6 through 1.13?
- How well do we document our routine professional conduct refresher training for lawyers and non-lawyer staff?
- Are the appropriate security and screening systems in place?[18]
- Is the flow of work within our department consistent with the intent behind Rule 1.3?

Reasonably Effective Supervision

- Centralize oversight for supervisor convenience & consistency
- Update policies and procedures for the CMS, DMS and electronic work supervision era
- Configure CMS to standardize processes across entire department
- Train on requirements, benefits and tools often
- Make sure all staff understand the RPCs that apply to the legal work
- Monitor usage and security
- Set up reminder systems
- Mandatory documentation of oversight & compliance
- Reward compliance

Preliminary Steps

With any legal matter, the more a lawyer knows about the facts, the better he is able to view those facts in light of the applicable law. So it is with the work flow in a legal department. Ask the questions. Embrace the truth in order to understand how each process was created and implemented, then evaluate the results in a non-incriminating manner. Finally, undertake a business process improvement effort for any areas that are found unacceptable.[19]

If you are too busy, or cannot see your office objectively, hire a business process improvement consultant to help you. These professionals can assess and document office staff procedures in ways that you may not be able to. A true BPM/BPI approach starts with assessing the *whole* truth about present processes before designing any changes.[20] Questions to answer up front include:

- Who does what with which information and in what sequence?
- Do those work flows make sense?
- Are they meeting the duties that your rules of professional conduct place upon you and your office?
- Is physical and electronic security reasonable?
- Are staff following the policies already in place?
- How can a supervisor confirm that?

With the answers to these questions, you may determine that your systems are due for a major upgrade.

Reasonable Systems

Meeting the "reasonable efforts" test takes effort, by definition. A managing lawyer cannot turn a blind eye or use the "if it isn't broken, don't fix it" attitude. Those who do will more than likely be caught by the "knew or should have known" analysis if any inquiry is made down the road.

So be that reasonably prudent attorney. Know everything about the systems the staff is required to use, as well as understand every job duty every supervisee has. Train your staff frequently about the rules of professional conduct that govern your practice of law and the staff you supervise. Emphasize to all staff members the importance of knowing and following those rules.

By knowing what your information management systems are, updating them to meet the demands of the electronic law practice age, carefully instructing all staff on the needs and uses of the systems, and documenting ongoing efforts, legal managers will be well on the way to meeting the obligations imposed by Rules 5.1 and 5.3. With legal information management systems commercially available at a reasonable cost, the capability to oversee and monitor work non-intrusively is within reach, regardless of the size of your staff.

The sooner you have completed these steps, the sooner you will rest assured that your license is reasonably safe.

Notes

1. This article is based on, and all Rule references herein are from, the ABA's Model Rules of Professional Conduct (2007 Edition), available at http://www.abanet.org/cpr/mrpc/model_rules.html.

2. Rule 5.1 reads: "(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct …." Model Rules of Prof'l Conduct R. 5.1 (1983).

3. Rule 5.3 reads: "(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;…" *Id.* at R. 5.3.

4. "Firm" is defined in Rule 1.0 (c) as denoting "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." *Id.* at R.1.0(c); *see also*, Comment 3 to Rule 1.0.

5. *Id.* at R. 5.1 cmt 2.

6. *Id.* at R.1.0 (h).

7. *Cf.*, Matter of Sullivan II (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 1997 Calif. Op. LEXIS 184, 5-6.

8. Model Rules of Prof'l Conduct R. 5.1 cmt 6 (1983).

9. *Id.* at Rule 5.1 Cmt 3.

10. *See, e.g.*, Scott v. Harris, 127 S. Ct. 1769 (2007).

11. Hazard & Hodes, The Law of Lawyering, § 5.3:102 (Second Edition 1996); Model Rules of Prof'l Conduct R. 5.3 cmt 1 (1983).

12. Garcia v. Comm'n for Lawyer Discipline, No. 03-05-00413-CV, __S.W.2d__ 2007 (Tex. Ct. App. July 26, 2007) (the Texas Court of Appeals affirmed findings made in a disciplinary action against an attorney, Garcia. He worked as the in-house counsel for a non-profit organization providing services that included immigration legal matters. He was found to have assisted an entity that was not a member of the bar—his employer—in the

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unauthorized practice of law).
13. Kenneth W. Luke, Assistant Bar Counsel, *Practicing With Nonlawyer Assistants* (March 2003) at www.mass.gov/obcbbo/nonlawyer.htm.
14. In re: Cohen, 847 A.2d 1162 (D.C. 2004) (name partner suspended from practice due to actions of associates he did not know about personally).
15. This is not to suggest that mere violation of a lawyer's ethical duties exposes him to civil liability for malpractice. *See, e.g.*, Hizey v. Carpenter, 830 P.2d 646 (Wash. 1992); Model Rules of Prof'l Conduct, Preamble (1983).
16. *See, e.g.*, People v. Peters, 82 P.3d 389 (Colo. O.P.D.J. 2003) (lawyer escaped discipline for a Rule 5.3 violation by showing the extent of oversight and training provided).
17. *See, e.g.*, In re Conwell, 69 P.3d 589, 592 (Kan. 2003) (attorney "knew or should have known" that others were improperly dealing with the due diligence fees and should have taken steps to attempt to protect the individuals who had deposited funds into his law firm's trust account).
18. *See, e.g.*, the analogous discussion respecting the properties of an acceptable "screen" to avoid imputed conflicts of interest in *Dworkin v. General Motors Corp.*, 906 F. Supp. 273, 279 (E.D. Pa. 1995) (quoting *Maritans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1289 (Pa. 1992)), namely: the discussion of sensitive information is prohibited in policy and practice "*in, around, with or near*" the screened professional; the circulation of sensitive documents is carefully controlled; access to files and matter information is appropriately restricted; there is a strong firm policy in place against a breach, including sanctions, physical and or geographical isolation; and staff are thoroughly instructed on the policy and reasons for it.
19. For a thorough manual on BPI from a court's perspective, *see* David C. Steelman, *Court Business Process Enhancement Manual: An Aid to Process Improvement and Process Reengineering for Judges, Court Managers, and Court Information Technology Directors* (Conference of State Court Administrators and National Association for Court Management, Joint Technology Committee, Technology Reengineering Subcommittee, May 2003) at http://www.ncsconline.org/WC/Publications/KIS_ReengiBPEManual.pdf. The manual was written for all levels of judges and court managers who are involved in making changes to technology in the courts.
20. For a good resource Web site, try www.BPMinstitute.org, a peer-to-peer exchange for business process management professionals. This site is a good source of unbiased information and education on BPM, Workflow, and Integration-related issues since 1997. **ML**

Federal

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> persuasive about the policy or legal grounds for taking such a step.…And our decision today certainly does not have the virtue of introducing new competition to the market. Rather, it addresses—and changes—an existing negotiation process that is respectful of the principles of federalism and that appears to be working well today. If it ain't broke, why are we fixing it? [4]

My thoughts exactly.

Notes

1. Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, 72 Fed. Reg. 65,670 (Nov. 23, 2007) (to be codified at 47 C.F.R. pt. 76). Available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-5802.pdf.
2. Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Report and Order and Further Notice of Proposed Rulemaking,* FCC 06-180, 22 FCC Rcd 5101 (adopted Dec. 20, 2006, released Mar. 5, 2007). This First Order is currently being challenged in the courts.
3. 72 Fed. Reg. 65,670 (Nov. 23, 2007).
4. PEG stands for "Public, Educational and Governmental Access/Institutional Networks."
5. 72 Fed. Reg. 65,671 (Nov. 23, 2007).
6. 47 U.S.C. § 541(a)(1), § 546 (2007).
7. 72 Fed. Reg. 65,671 (Nov. 23, 2007).
8. *Id.*
9. First Report and Order, 22 FCC Red at 5148-49. Such fees include "processing fees, consultant fees, and attorney fees", and "application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services providing to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments."
10. *See Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 5150-51. The FCC states "[c]apital costs refer to those costs incurred in or associated with the construction of PEG access facilities." "Support payments,"such as costs association with training and salary, are distinct from capital costs.
11. *Id.*
12. 72 Fed. Reg. 65,672 (Nov. 23, 2007).
13. *Id.*
14. Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Second Report and Order,* FCC 07-190, pg. 25 (Nov. 6, 2007). **ML**

