

## Stranger than Fiction: Questions in the FCPA World

In the world of the Foreign Corrupt Practices Act (FCPA), some of the fact scenarios are so preposterous that if they were in a book, labeled as fiction, they would probably be placed on the Science Fiction shelf. We were reminded of the maxim that sometimes life is stranger than fiction when we saw the article *“Lawyer for Mexico arm of US drugmaker Baxter recorded allegedly offering payment in lawsuit”* by reporter Ricardo Alonso-Zaldivar, in the Chicago Tribune’s August 17, 2011 edition. While I cannot say that the players came out of central casting, the facts certainly seem to have been dreamed up by a screen writer.

Alonso reported that a Chicago based US company, Baxter, is in litigation in Mexico with a local company Translog. Baxter alleges that Translog breached a contract for delivering certain time sensitive medical supplies. Translog alleges that Baxter breached the contract between the parties. Alonso reports that a trial lawyer for Baxter, Jorge Hernandez Martin, is alleged to have offered an expert, retained by Translog, Rafael Aspuru Alvarez money to *“leave the country on a key court date to undermine the case”*. At another point Alonso reports that Hernandez told Aspuru, *“If you tell me, ‘You know I was going to charge 100,000 pesos (about \$8,100),’ I’ll pay you double.”*

All of the above was allegedly recorded by Aspuru during a meeting he held with Hernandez in February of this year. A Translog representative provided a copy of the recording to the Associated Press (AP). Hernandez is also reported to have said to Aspuru, *“I told the company”* presumably about the offer. Providing comment for article, a Baxter spokesman said to AP that *“[Hernandez] now has absolutely no role in this matter or representing Baxter in any capacity.”*

Inspired, as always by the FCPA Professor to question, question and question; we ask the following:

1. Does the FCPA apply to judicial proceedings overseas?
2. Is a private individual, who is an expert to assist a foreign court, a “foreign official” under the Act?
3. Is such a private official an “instrumentality thereof” of a foreign government?

We could not find any FCPA enforcement actions relating to US lawyers involved in overseas litigation so there does not appear to be any case law, enforcement actions or Opinion Releases discussing this issue, we believe that US courts would find that the FCPA does apply to foreign judicial proceedings because you cannot get more ‘foreign government’ than a foreign country’s court system. We also believe that the Department of Justice (DOJ) would take the position that it does and give severe sanctions against an individual who attempts to use bribery to influence a foreign judicial proceeding. The FCPA Blog, in a post entitled, “Disorder in the Court” puts it more succinctly by “noting, judges, court clerks and others in the judicial system are ‘foreign

officials' under the U.S. Foreign Corrupt Practices Act. Bribing them can violate U.S. law and certainly violates local law.”

However, the FCPA requires an action “in order to assist such domestic concern in *obtaining or retaining business for, or with, or directing business to, any person*”. Right now all we have to go on is Alonso’s article in the Chicago Tribune. He reports that Baxter had a contract with Translog to have certain critical medical supplies shipped. Baxter alleges that Translog, after “running into financial problems” refused to make the shipments and Baxter was forced to use other shippers. Translog counters that it had an exclusive contract with Baxter and Baxter’s use of other shipping companies violates this exclusive contract. Alonso reports that the dispute is valued at \$25 million. That certainly sounds like *obtaining or retaining business*.

Having opined that the answers to the above queries would be answered in the affirmative, is a private citizen, who provides a judge in a judicial proceeding “impartial technical advice” a private official under the FCPA? Is this the ‘other’ referred to by the FCPA Blog? This is a closer question. In the US, an expert is generally viewed as one who can bring technical advocacy to a jury but an expert’s role may be different under the Mexican legal system. This difference might make such an expert a part of the Mexican judicial system and therefore covered by the FCPA.

So once again, unlike Socrates, we do not know the answers but at least we can pose some interesting questions. Sometimes I wonder if the FCPA Professor has to make up questions for his Final Examinations or he just reads the newspapers and get his ideas from the strange world of international business. The *Baxter* matter indicates that he only need look in the newspaper.

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