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Inside

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of the New York State Bar Association

Message from the Chair

I'd like to thank the Section for entrusting me with its leadership in a time of great challenge and opportunity. Looking at the Section today, it has flourished under Gary Roth's able chairmanship in 2008, increasing its membership to nearly 2,000, continuing the success of the Kenneth R. Standard Diversity Internship Program, and even creating a sponsored internship to allow for the program's extension to non-profit organizations.

The Section also presented stimulating educational events, from the Ethics for Corporate Counsel panel to an up-to-the-minute program at the NYSBA Annual Meeting on issues in E-Discovery. Every company is impacted by this intersection of evolving technology and the law, and the many who attended took valuable, practical insight from panelists representing the judiciary, corporate law departments, and private practice.

We have a rich foundation to build on during the coming year in addressing the needs of our members. This is a time of transition for many and a time of challenge for all of us tasked with guiding our clients in a difficult business climate. We hope that you will profit from the Section's help by taking advantage of our substantive programs and networking opportunities. We will also be making greater use of technological tools to keep you informed and engaged; look for richer features and content on the Section Web site in 2009.

Please remember that the Section exists to serve you, its members—so reach out and contact us if you have ideas as to program topics, content for *Inside* or our Web site, or would like to become more active in Section events and programs.

Fawn M. Horvath

Inside

SPECIAL ISSUE: PRIVILEGE PRIMER

New York Adopts New Rules of Professional Conduct

By Janice Handler

On December 16, 2008, a new set of attorney conduct rules for New York was announced, effective April 1, 2009. The Rules of Professional Conduct, which will replace the existing Disciplinary Rules, introduce a number of important ethics changes for New York lawyers and are set forth in a new format and numbering system based on the ABA Model Rules. *Inside* plans, in future issues, to provide more information about the impact of these changes. Meanwhile, the new rules can be viewed on the New York State Unified Court System's Web site, www.nycourts.gov.

Extra! is the breaking news segment of *Inside*, where we will flag new developments in the law of interest to corporate counsel.

DOJ Changes Policies With Respect to Corporate Attorney-Client Privilege

By Janice Handler

For years, corporate attorney-client privilege has trended in only one direction—going, going, gone. At last, a reversal of that trend is reflected by a revision in DOJ guidelines, effective August 28, 2008, with respect to waiver of the corporate privilege. The DOJ reversal overturned long-standing DOJ policies coercing corporations into waiving the privilege by regarding waiver as a significant factor in determining corporate co-operation when weighing indictments. Under former DOJ guidelines, prosecutors were instructed, in evaluating corporate co-operation, to assess whether the corporation was protecting culpable employees and, in this regard, to consider whether the corporation waives attorney-client privilege and work product for documents relating to internal investigations. The new policy, reversing this directive, is set forth in the DOJ attorney handbook, which many believe will increase the likelihood of it being followed.

The DOJ hardly acted out of the goodness of its heart. The Second Circuit's affirmation of *U.S. v. Stein*,[1] wherein the District Court blasted the DOJ policies,[2] was a factor, as was the pendency of federal legislation (Attorney Client Privilege Protection Act) to reverse these policies.

Corporate Criminal Liability Rule Survives Assault

By Peter A. Crusco

On its surface, the case before the U.S. Court of Appeals for the Second Circuit, *United States v. Ionia Management S.A.*,[3] involved only illegal off-shore dumping and its concealment by low-level employees' falsification of records and misrepresentations to the U.S. Coast Guard; however, this was not your routine appeal to overturn a corporation's conviction. The able appellate defense counsel teamed with high-profile *amici*, including several national associations, in challenging the 100-year-old U.S. Supreme Court precedent, *New York Central Railroad & Hudson River Railroad v. United States*,[4] and its progeny, that established the corporate liability standard in federal criminal cases: that is, the doctrine of vicarious liability—the corporation's liability for the acts of its agents committed in the scope of the agent's employment for the benefit of the corporation.

It was hoped that Ionia would benefit from the "perfect storm" created by various factors including: recent federal court rulings in other areas of the law that limited employer liability; the disproportionate, catastrophic and highly criticized economic consequences of prosecutions of certain businesses;[5] and the law of the majority of the states, which requires that corporate criminal liability be based upon proof of criminal conduct by a "high managerial agent," or a person whose responsibilities are so significant that his or her acts may fairly be assumed to represent company policy.[6]

In the end, though, the grand effort was rebuffed by the Court which, in a summary fashion, confirmed the standard and refused to require the prosecution to prove as an additional element that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees, although the Court did state that a corporate compliance program may be relevant to whether an employee was acting in the scope of his employment.[7]

Where are we now? For corporate criminal liability, the standard of vicarious liability remains unchanged.

Endnotes

1. *U.S. v. Stein*, 541 F.3d 130 (2nd Cir. 2008).
2. *U.S .v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y.2006).
3. *United States v Ionia Management S.A.*, __ F.3d __ (2nd Cir. 2009), No. 07-5801 CR, Jan. 20, 2009).
4. *New York Central Railroad & Hudson River Railroad v. United States*, 212 U.S. 481 (1909).
5. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
6. *See generally* Model Penal Code Proposed draft § 2.07 (1), (5) (1962).
7. The Court cited as precedent its decision in *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2nd Cir. 1989).

Janice Handler is the co-editor of *Inside* and former General Counsel of Elizabeth Arden Cosmetics Co. She currently teaches Corporate Counseling at Fordham Law School.

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Inside Inside

In the Fall 2008 issue of *Inside*, we featured a *Dear Inside* letter from a reader asking for a "Primer" on corporate privilege. We are "privileged" to offer, not one but—yes—four primers on privilege in this issue. Our authors include both inside and outside counsel, each treating a specific issue relating to corporate attorney-client privilege.

Josephine Robinson and John Cianfrone, inside lawyers for Gucci Group, discuss privilege (or lack thereof) in the European Union. Shari Brandt and James Walker tell you whether corporate "*Miranda* warnings" really do protect you (Short answer: Not always). Christopher Karagheuzoff comprehensively describes the erosion of corporate attorney-client privilege by government entities; and we even have a box focusing on practical tips and pointers for New York lawyers, written by David Vanaman and Stephen Butler of Parsons Brinckerhoff.

This subject is timely, and we hope you will find our in-depth treatment helpful and useful in your in-house practice.

Janice Handler
and Allison B. Tomlinson

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NYSBA

Can an Upjohn Warning Avoid Representational Ambiguity?[1]

By Shari A. Brandt and James Q. Walker

The head trader of Hedgeco gets called into a meeting with an in-house attorney and Hedgeco's regular outside counsel. He occasionally plays golf with the in-house attorney, and also knows the outside lawyer, who represented him personally in SEC depositions two years ago in connection with an investigation involving Hedgeco's trading of certain swap positions. After sitting down and exchanging pleasantries, the outside counsel announces that for the purpose of this interview, he and the in-house attorney represent Hedgeco, and not him individually; that any privilege that applies to the discussion that takes place belongs to Hedgeco, and not to him; and that Hedgeco may, in its sole discretion, decide to share the information he provides with government officials in connection with pending civil or criminal investigations, or disclose any information he provides to the public. The head trader is suddenly very uncomfortable, and asks his former lawyer (outside counsel) and his golf buddy (in-house counsel) whether he needs his own lawyer, and is told only that they cannot advise him in this matter, other than to advise him that he is free to seek his own attorney in connection with this interview. The head trader then asks whether he has to answer their questions, and is told that he is free to refuse to answer their questions, but that they will need to advise Hedgeco that he refused to cooperate with the investigation, and this may affect his continued employment at the firm. The head trader then turns to the two lawyers and says, "But you represented me—you are my lawyers too, aren't you?"

I. Possible Limitations on the Protection Provided by Upjohn Warnings.

It is always awkward to start a meeting with an already nervous employee by chilling the atmosphere with a standard Upjohn warning—explaining that the lawyers in the room represent the company and not the individual employee, that the privilege covering the conversation belongs to the company, and that anything the employee says may be disclosed to an outside party at the company's discretion.[2] The employee may feel betrayed, believing that as an employee of the company, the company's lawyers also represent the employee. Indeed, the employee may assume that the only reason the company's lawyers are distancing themselves from him or her is because they assume the employee was involved in the misconduct under investigation. This is further exacerbated by the unwillingness of the company lawyers to advise the employee, instead suggesting that the employee may wish to secure his or her own attorney.

Ironically, a recent decision issued by the Central District of California calls into question whether the Upjohn warnings that the company's lawyers provide in meetings with employees specifically to preserve the company's privilege are sufficient to protect the privilege, especially if the lawyer at issue had a prior attorney-client relationship with the individual employee. On February 25, 2009, Judge Cormac J. Carney of the U.S. District Court for the Central District of California issued a bench decision following a three-day evidentiary hearing in *United States v. Nicholas*. The hearing examined whether Irell & Manella LLP was free to disclose to Broadcom's auditor and to the government statements made to Irell lawyers by Broadcom's chief financial officer, William Ruehle, during an internal investigation of stock options backdating after the lawyers warned Ruehle that they were interviewing him on behalf of Broadcom. To complicate matters, Irell had jointly represented Broadcom and Ruehle in a prior unrelated civil matter, and represented Ruehle, other employees, and the company in two civil lawsuits involving allegations of stock options backdating at the time of the meeting in which Ruehle made the statements at issue. Ruehle argued that the statements he made to Irell were privileged, and therefore they could not be used as evidence against him.

Although the extent of any former or current attorney-client relationship between Irell and Ruehle when he was interviewed in the internal investigation is not entirely clear from the facts that have been reported, papers filed by Ruehle in connection with the evidentiary hearing state his position that he viewed himself as having a continuing attorney-client relationship with Irell.[3] Based upon that view, Ruehle argued that Upjohn warnings, which he did not recall receiving, were insufficient to invalidate the attorney-client relationship.[4]

Although Judge Carney, as of press time, had not issued a written opinion, the judge's comments from the bench indicated his acceptance of Ruehle's arguments.[5] Judge Carney criticized Irell for disclosing information it had learned from Ruehle to the company's outside auditors. Judge Carney then ruled that if Irell had intended to disclose information learned from Ruehle, the firm should have obtained informed written consent from Ruehle making it clear that it intended to represent multiple clients with adverse interests and to disclose privileged information.

This decision clearly puts into question whether traditional Upjohn warnings can be relied upon to protect the company's ownership of the privilege. The decision also suggests that both outside *and* in-house counsel need

to think carefully about whether simultaneous representation of a company employee may jeopardize the lawyers' ability to represent the corporate client in future matters. Although the extent of any former or current attorney-client relationship between Irell and Ruehle at the time of the interview is not entirely clear from the facts that have been reported, it seems that when the firm interviewed Ruehle, it was gathering facts on behalf of the company, and not representing Ruehle. Judge Carney's decision substantially raises the bar on what is required of lawyers to communicate effectively that outside counsel represents the company and not the individual employee who is being interviewed—namely obtaining, at least under these facts, the employee's *written* acknowledgement that the lawyers effectively communicated an Upjohn warning prior to the interview.[6]

II. Steps Necessary to Protect the Company's Privilege When In-House or Outside Counsel Decide to Represent an Employee of the Company.

Although the *Nicholas* decision is troubling to in-house and outside company counsel, there are steps that can be taken by the lawyers who represent the company to minimize the risk of the harmful outcomes that can result from a challenge to the use and / or disclosure of information gained from interviews of employees—outcomes that include suppression of evidence, disqualification of counsel, and lawyer disciplinary action. For example, in any instance in which the lawyers decide that it serves the interests of the corporate client and the corporate employee to provide common representation in connection with a matter, the lawyer can seek an advance waiver of conflicts. Indeed, the New York City Bar Association has approved advance waivers of conflicts, provided that: (i) the law firm discloses the relevant implications, advantages and risks of the common representation so that the client can make an informed decision as to whether to consent (and the client is in a position to understand); and (ii) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients.[7] Similarly, courts have upheld advance waivers of conflicts where the client consented to the waiver after full and reasonable disclosure.[8] In addition, lawyers may obtain a client's consent to the firm's continued representation of one of the clients should a conflict develop during the course of a concurrent representation such that it would be inappropriate to continue to represent the clients jointly.[9] Finally, with respect to any meeting with a corporate employee, lawyers may remove any ambiguity as to whether they represent the employee as well as the individual by giving a proper Upjohn warning, and creating contemporaneous evidence that the warning was provided.

Accordingly, whenever outside or in-house attorneys who represent the corporation interview corporate employees in connection with the investigation of a potential, threatened, or pending civil litigation or investigation (including an internal, regulatory or criminal investigation), the lawyers should consider the following steps:

- Provide a complete Upjohn warning in which the employee is informed that the lawyers represent the corporation and not the individual employee; the interview is covered by the attorney-client privilege, which belongs to and is controlled by the company, not the individual employee; and only the company may decide whether to waive the privilege and disclose information from the interview to third parties, including the government.
- If the employee is not represented by independent counsel in the interview, comply with Rule 4.3 in New York's Rules of Professional Conduct (formerly DR 7-104(A)(2) in the Lawyer's Code of Professional Conduct) by avoiding giving legal advice to the employee, other than the advice to secure counsel where the lawyers believe that the interests of the employee are reasonably likely to conflict with the interests of the corporate client. The lawyers may indicate that they have not learned any facts which suggest that the interests of the employee and the employer are in conflict, if this is true.
- Obtain the employee's written acknowledgement that the Upjohn warning was provided at the outset of the meeting. One way of accomplishing this would be to bring a pre-printed sheet listing the warnings to any interview of a company employee, review the sheet with the employee, and then obtain a signature from the employee acknowledging that the warnings were read.

If either outside counsel or an in-house attorney determines that it serves the interests of the corporation and the corporate employee to represent them concurrently, the representation should be memorialized in an engagement letter (or in the case of the in-house lawyer, a memo to the employee), signed by the employee and the corporation,[10] that:

- Defines the scope of the representation of the employee in the instant matter;
- Describes the lawyer's concurrent representation of the corporation (and possibly affiliates) on a wide range of matters;
- Describes the risks and advantages of the concurrent representation;
- States that the corporation will compensate the lawyer for the instant representation;

- States that the information that the lawyer learns from the corporate employee will not be kept confidential from the corporation;
- States that the corporation may, in its sole discretion, decide to share the information that the lawyer learns from the corporate employee with third parties, including the government;

"Following the Nicholas *decision, whenever in-house and outside attorneys interview an employee in connection with an investigation, the attorneys should consider obtaining written confirmation that the employee was given, and understood, the Upjohn warning."*

- States that the interests of the corporation and the employee are aligned, but provides that if a conflict should arise, the employee acknowledges that the corporation has been a longstanding client, and the employee consents to the lawyer's continued representation of the corporation; and
- Provides that the employee also waives any conflict that may arise in the future with respect to the lawyer's representation of the corporation, including in matters in which the interests of the corporation are adverse to the interests of the individual employee, such that the employee agrees not to move to disqualify the lawyer from representing the corporation in such future matters.

In sum, in-house and outside counsel should proceed with care when interviewing company employees. Following the *Nicholas* decision, whenever in-house and outside attorneys interview an employee in connection with an investigation, the attorneys should consider obtaining written confirmation that the employee was given, and understood, the Upjohn warning. Additionally, before undertaking a dual representation of both the company and company employees, outside company counsel and in-house counsel should go forward with the dual representation only after carefully considering the potential impact of that simultaneous representation on the ability to protect the company's privilege in future investigations and litigations, and then entering into the form of engagement letter outlined above.[11]

Endnotes

1. This article may be considered attorney advertising under applicable state law, is provided for educational and information purposes only, and is not intended and should not be construed as legal advice.
2. *See Upjohn v. United States*, 449 U.S. 383, 386-96 (1981) (holding that the attorney client privilege can be maintained between a company and its attorneys even though communications have occurred between counsel and third-party employees). The purpose of the warning is to remove any doubt that the lawyer or lawyers speaking to the employee represent the company, and not the employee, and that any privilege that may attach to the discussion that ensues is controlled by the company.
3. *See* Defendant William J. Ruehle's Memorandum of Law Re: Attorney-Client Privilege and Feb. 23, 2009 Evidentiary Hearing at 5–6, *United States v. Nicholas*, No. SACR 08-139-CJC (C.D. Cal. Jan. 20, 2009).
4. *Id.* at 6; *see also* William J. Ruehle's Notice of Motion and Motion to Strike the Government's *Ex Parte* Application for Evidentiary Hearing Re: Attorney-Client Privilege; and Opposition to Government's *Ex Parte* Application for Evidentiary Hearing Re: Attorney-Client Privilege, Exhibit 2 (Special Master Protective Order Requiring Destruction or Return of Documents and Limiting the Further Use or Disclosure of the Documents or Their Contents) at 3, No. SACR 08-139-CJC (C.D. Cal. Jan. 20, 2009).
5. *See* Gabe Friedman, *Judge Slams Irell Firm for Ethics Lapses*, Daily Journal Corporation, Feb. 26, 2009; *see also* Gabe Friedman, *U.S. Judge Has Harsh Take on Irell's Role in Broadcom Case*, Daily Journal Corporation, Feb. 24, 2009.
6. What is unclear after Judge Carney's decision is whether oral Upjohn warnings are sufficient where there has been no prior simultaneous representation of the employee and the company. The Upjohn Task Force established by the ABA White Collar Crime Committee is about to complete a report on recommendations for company counsel, and we will be interested to see if the Task Force addresses this issue.
7. N.Y. City Eth. Op. 2006-1 (2006).
8. *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003); *but see Celgene Corp. v. KV Pharm. Co.*, 2008 WL 2937415, at *5 (D.N.J. July 29, 2008) (court disqualified law firm from representing defendant in patent dispute notwithstanding advance waiver signed by plaintiff where the waiver language in the retention agreements did not adequately address the risks associated with a conflict between concurrent representations, and thus consent was not "truly informed").
9. *See* N.Y. State Eth. Op. 823 (2008).
10. *See* Rules of Professional Conduct, Rule 1.7(b)(4).
11. Following press time, Judge Carney issued a strongly worded Order Suppressing Privileged Communications in *United States v. Nicholas*, which clarified certain facts. The Order states that Irell concurrently represented Ruehle and Broadcom in other actions when Irell interviewed Ruehle. (Slip Op. at 3–4; 12–13.) Judge Carney doubted that Irell gave any Upjohn warning to Ruehle because Ruehle did not recall any warning and no warning is referenced in the lawyers' notes or any other written record, and any warning that may have been provided was "woefully inadequate" because the Irell lawyers never told Ruehle that Irell did not represent him. *Id.* at 11. In any event, Judge Carney determined that the concurrent representations necessitated a written waiver of the "clear conflict" to waive the privilege covering Ruehle's statements. *Id.* at 12. Judge Carney concluded by suppressing Ruehle's statements and referring Irell to the California State Bar for "appropriate discipline." *Id.* at 19.

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Response to Questions Posed in NYSBA's *Inside* Publication Regarding the Erosion of Attorney-Client Privilege in Corporations

By Christopher G. Karagheuzoff

Corporate clients rely on the protection of the attorney-client privilege for communications with in-house lawyers every day, be it for routine legal advice or for extraordinary matters such as internal investigations into corporate wrongdoing.

Erosion of privilege has been much discussed (and written about) in recent years. There are several important steps that in-house lawyers can take to protect the privilege. But first, let's begin with a primer.

The Basics

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law."[1] The privilege protects from disclosure communications between client and counsel made for the purpose of obtaining legal advice or services, provided that those communications are made and maintained in confidence.

The work product doctrine protects documents and things that were prepared in anticipation of litigation by, under the supervision of, or at the behest of an attorney. The work product protection is a qualified one.

Of course, a corporation may expressly waive privilege protections. Often, the decision to do so is motivated by business interests. But especially in the corporate context, privilege is frequently waived inadvertently, as in circumstances where an employee forwards what was confidential legal advice to a third party.

Privilege may also be waived implicitly. "At-issue" waiver occurs when litigants place privileged communications in issue in litigation, such that fairness requires an examination of the otherwise protected communications. The most common scenario in which at-issue waiver occurs is when a litigant attempts to use privilege offensively, by relying on a privileged communication to support a claim or defense, while at the same time seeking to shield the underlying communication from the opposing party on the grounds of privilege.

A type of implicit waiver also occurs in circumstances where legal services are provided in furtherance of criminal, fraudulent, or other misconduct.[2] The scope of conduct that falls within the crime-fraud exception varies among U.S. jurisdictions, with some courts allowing it to be invoked even in circumstances where the alleged conduct is described merely as "wrongful" rather than "criminal" or "fraudulent." In New York, the crime-fraud exception generally removes the privilege from those attorney-client communications that are "relate[d] to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct."[3]

Government Investigations

Many articles have been written on the myriad threats to corporate privilege. In a post-Enron era, perhaps no greater recent threat to corporate privilege has emerged than that which has been caused by government incentivization of a company's cooperation with investigators through the waiver of privilege. Making matters even dicier, there is a split in authority in the courts as to whether such cooperation waives the privilege for *all* purposes and renders material disclosed to the government discoverable by private litigants.

A. The Thompson Memorandum

You have asked specifically about the 2006 McNulty memorandum. First, a little background is in order. In response to a series of corporate scandals that ushered in the 21st Century, government enforcement agencies such as the DOJ announced policies requiring or encouraging companies to waive their attorney-client privilege and work product protection. In 2003 Larry D. Thompson, then U.S. Deputy Attorney General, wrote a memo to all U.S. Attorneys providing guidelines for prosecutors to use in deciding whether to prosecute a corporation.[4]

The Thompson memorandum's main focus was an increase of "emphasis on and scrutiny of" the authenticity of a corporation's cooperation.[5] To further this purpose, the memorandum outlined nine factors that federal prosecutors must consider in determining whether to charge a corporation.[6] One of the nine factors included "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."[7]

The release of the Thompson memorandum and the pressure placed on corporations by prosecutors to waive the attorney-client privilege in return for lenient treatment, led to a wave of criticism within the business and legal community that the memorandum encroached on the basic rights of corporations and individuals, and

discouraged self-policing.[8] On October 21, 2005, then Acting Deputy Attorney General, Robert McCallum, Jr., seemed to acknowledge the concern over the rise in government requests to waive privilege when he directed all U.S. Attorneys and heads of department components to establish written waiver-review procedures for their districts or components.[9] The memorandum required federal prosecutors to obtain written approval from the U.S. Attorney or other supervisor before seeking waivers of the attorney-client privilege or work product protection. However, the memorandum fell short of saying that the DOJ would stop requiring waivers of attorney-client privilege and work product protection from business organizations.

B. The McNulty Memorandum

It was not until late 2006 that the DOJ officially revisited its policy on requesting waivers and revised the controversial guidelines outlined in the Thompson memorandum.[10] The McNulty memorandum called for prosecutors to continue to consider many of the guidelines listed in the Thompson memorandum, but restricted how federal prosecutors could seek the privileged information from corporations.[11] First, the McNulty memorandum provided that prosecutors must have a legitimate need for privileged information before issuing a request for waiver.[12] Whether a legitimate need exists was determined by four factors: (1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver.[13]

Second, the memorandum included new procedural requirements which prosecutors were required to follow when requesting waiver of attorney-client privilege or work product protection. The memorandum divided the information sought by prosecutors into two categories and imposed different procedural obligations for prosecutors seeking production under each category.[14] Category I was characterized as purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I"). Category I information included copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, and/or reports containing investigative facts documented by counsel.[15] Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors were required to obtain written authorization from the U.S. Attorney, who then had to consult with the Assistant Attorney General for the Criminal Division before granting or denying the request.[16]

If the factual information under Category I was insufficient to conduct a thorough investigation, prosecutors were permitted to request that the corporation provide attorney-client communications ("Category II").[17] However, prosecutors were cautioned from requesting Category II information except in "rare circumstances."[18] In addition, prosecutors were not to consider a corporation's non-waiver of Category II privilege against the corporation in making a charging decision.[19]

Although the McNulty memorandum restricted the way in which prosecutors could request waivers of the attorney-client privilege, it did not address the concern that the government could still consider a corporation's refusal to waive "factual" work product protections against the corporation when deciding whether to charge.

C. New Revisions to the DOJ Guidelines

Late last summer, the DOJ addressed some of the criticism surrounding the McNulty Memorandum by once again issuing new guidelines, entitled "Principles of Federal Prosecutions of Business Organizations."[20] Under the revised Principles, a corporation's cooperation will no longer be measured by the extent to which it waives the attorney-client privilege, but rather by the extent to which it discloses relevant facts and evidence.[21] Federal prosecutors are discouraged from demanding disclosure of non-factual attorney-client communications (previously designated under the old guidelines as Category II information) as a criterion for receiving credit for cooperation with official investigations.[22]

Although the revised guideline on waiver of the attorney-client privilege reflects a departure from the McNulty memorandum, which set up a two-tier system of procedures for prosecutors to follow before requesting a waiver from a corporation, it is important to note the general limitations of the revised DOJ Principles. First, the Principles still identify a corporation's "timely and voluntary disclosure of wrongdoing" as a factor relevant in the government's decision to charge a corporation.[23] That is, corporations that timely disclose relevant facts relating to the underlying misconduct (in essence, Category I information as defined in the old guidelines)[24] will receive credit for cooperation which may help to avoid indictment.[25] Second, the principles do not revise the well-established rule that legal advice or a communication in furtherance of a crime or fraud is not protected under the attorney-client privilege. Third, the Principles do not apply to the Securities Exchange Commission or other federal regulators, who often request privilege waivers during official investigations.[26]

The consequences of cooperation or non-cooperation with the government in matters of privilege waiver may extend beyond whether the company faces prosecution. This is because, as set forth above, the materials implicated by a company's waivers may later be deemed by

courts to be discoverable by private litigants. Indeed, the courts are split with respect to their recognition of a selective waiver doctrine that allows a corporation to disclose to the government narrowly tailored, privileged information under a protective order without the risk of waiver of privilege for all purposes.[27]

Anyone with a particular interest in this area should, at a minimum, read and compare the above-referenced DOJ memoranda and guidelines for themselves and review some of the many commentaries on them. Of course, where circumstances warrant, outside legal counsel should be consulted promptly.

Steps In-House Counsel Can Take to Prevent the Erosion of Privilege

You have also asked for guidance with respect to steps that in-house counsel might take to prevent waiver of privilege. Before commending you to a couple of articles on the subject, I would highlight three areas uniquely in the control of in-house counsel that, if adhered to, will go a long way toward maintaining privilege protections.

Know your client. Often, in-house counsel may be called upon to render advice to multiple entities within the same corporate family. Counsel should be vigilant when considering the implications of advice that he or she offers to his or her employer's parents, subsidiaries, or affiliates, inasmuch as there may come a time when the interests of those entities diverge with respect to the issue on which advice has been sought. Thus, in circumstances where in-house counsel may be called upon to opine with respect to the legal implications of transactions involving multiple associated corporate entities, he or she must continually evaluate whether conflicts between the positions of the parties have arisen, such that it may be appropriate for the entities to retain separate counsel. This is because, in circumstances where *multiple* entities hold the privilege, any *one* of them can waive it without the permission of the others.

Know the hat that you are wearing. In the course of any given day, in-house counsel may be called upon to render advice that is business rather than legal in nature. Know—and just as important, *make sure that your clients know*—at all times which "hat" you are wearing, i.e., that of a lawyer when you are furnishing privileged legal advice, and that of a business advisor when you are offering non-privileged business advice. To reduce the likelihood of confusion and help to ensure that, in litigation, a court will be able to distinguish between the two when resolving privilege disputes, in-house counsel, wherever possible, should segregate files to distinguish between business and legal tasks. In-house counsel should also clearly define the legal versus business nature of any advice being provided (especially when contained in a writing) in connection with any corporate transaction.

Educate your client. In-house counsel should initiate programs by which company business personnel who routinely seek the assistance of inside or outside legal counsel, or have access to privileged information, are educated with regard to the nature and scope of privilege and the ways in which conduct can result in a waiver of it. Annual programs that do so make the most sense, particularly in organizations in which there may be significant staff turnover.

There are many other steps that counsel may take to protect the privilege, and many articles that have been written by practitioners on this subject. One article that I co-authored, entitled "Thirteen Steps to Cope with Corporate Privilege," was published in the October 2007 issue of *ACC Docket*. It may be obtained by members of the Association of Corporate Counsel (ACC) through ACC's Web site, or by linking to the long form of my attorney bio on the dorsey.com Web site. Another piece prepared for the ACC 2006 Annual Meeting, entitled "Pragmatic Practices for Protecting the Privilege," dated October 23, 2006, covers the subject at some length. It is available at http://www.acc.com/public/attyclientpriv/pragpract.pdf.

Endnotes

1. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).
2. *U.S. v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997).
3. *In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994) (quoting *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2d Cir.1984)); *see United States v. Zolin*, 491 U.S. 554, 563, 109 S. Ct. 2619, 2626, 105 L. Ed. 2d 469 (1989) (citation omitted) ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime.").
4. *See* Memorandum from Deputy Attorney General Larry D. Thompson to United States Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (hereinafter "The Thompson memorandum").
5. *Id.* at 1.
6. *Id.* at 3.
7. *Id.*
8. For example, the ABA noted that "[b]ecause the effectiveness of [a company's internal compliance programs and procedures] depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, any attempt to require routine waiver of attorney-client and work product protections will seriously undermine systems that are crucial to compliance and have worked well." The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Senate Comm. on the Judiciary, 109th Cong. (2006) (testimony of Karen J. Mathis, Immediate Past President, American Bar Association).
9. *See m*emorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to U.S. Attorneys and Heads of Department Components, Waiver of Corporate Attorney-Client and Work Product Protection (October 21, 2005).
10. Memorandum from Deputy Attorney General Paul J. McNulty to United States Attorneys, Principles of Federal Prosecution of Busi-

ness Organizations (Dec. 12, 2006), *available at* www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf (hereinafter "McNulty memorandum").

11. *Id.* at 8–11.
12. *Id.* at 8.
13. *Id.* at 9.
14. *Id.* at 9–11.
15. *Id. at* 9.
16. *Id.*
17. *Id.* at 10.
18. *Id.*
19. *Id.*
20. Department of Justice, U.S. Attorney's Manual, Title 9, Section 28, Principles of Federal Prosecutions of Business Organizations, *available at* http://www.usdoj.gov/ usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (hereinafter "Principles").
21. *Id.* at 10.
22. *Id.* ("[E]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection."). Other revisions, beyond those concerning the attorney-client privilege, include instructing prosecutors to not consider a corporation's advancement of attorneys' fees to employees, officers, or directors when evaluating cooperation, and specifying that the mere participation in a joint defense agreement will not render a corporation ineligible for cooperation credit. Moreover, prosecutors are instructed not to consider whether a corporation has sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation.
23. *Id.* at 11.
24. *See* McNulty memorandum at 9 (referring to Category I information as including copies of key documents, witness statements, or purely factually interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries or reports containing investigative facts document by counsel).
25. *See* Principles at 11.
26. *See, e.g.*, Press Release, Securities and Exchange Commission, SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion (Oct. 23, 2001), *available at* http://www.sec.gov/news/headlines/ prosdiscretion.htm.
27. *Compare, e.g., Lawrence E. Jaffe Pension Plan v. Household Int'l. Inc.*, 244 F.R.D. 412, 433 (N.D. Ill. Dec. 12, 2006) (finding disclosure to government officials with appropriate confidentiality agreement resulted in only a selective waiver of privilege that did not require disclosure in subsequent civil lawsuit) with *In re Qwest Communications Int'l, Inc.*, 450 F.3d 1179, 1194 (10th Cir. 2006) (rejecting selective waiver doctrine and finding that voluntary disclosure to government officials expressly waived privilege notwithstanding confidentiality agreement).

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Practical Pointers for In-House Lawyers from In-House Lawyers

By David Vanaman and Stephen D. Butler

The legislative underpinnings of the attorney-client privilege in New York can be found in NY CLS CPLR 3101 and 4503. The modern judicial application of the privilege in New York can be found in *Rossi v Blue Cross and Blue Shield of Greater NY*, 73 N.Y.2d 588; 540 N.E.2d 703; 542 N.Y.S.2d 508; 1989 N.Y. LEXIS 668 (1989), *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371; 581 N.E.2d 1055; 575 N.Y.S.2d 809; 1991 N.Y. LEXIS 4218 (1991) and their progeny. Collectively, the statutes and case law provide a framework that is beyond the scope of this article,[1] but some guideposts for corporate counsel can be gleaned from the language of the cases:

- The attorney-client privilege protects communications between client and attorney, in the course of a professional relationship, for the purpose of obtaining legal advice. It protects both the giving of professional advice to those who can act on it and the giving of information to the lawyer to enable him or her to give sound and informed advice. Thus, a confidential report from lawyer to client transmitted in the course of professional employment and conveying the lawyer's assessment of the client's legal position has the earmarks of a privileged communication.
- The privilege is not lost by reason of the fact that the communication also deals with non-legal matters because in transmitting legal advice and furnishing legal services, it will often be necessary for a lawyer to refer to non-privileged matter. The presence of non-privileged matter may, however, influence whether the communication will be protected in whole or in part. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client.
- An in-house lawyer may wear several hats (e.g., business advisor, financial consultant) and because the distinctions are often hard to draw, the invocation of the attorney-client privilege may be questionable in many instances. Thus, a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a non-lawyer.
- Routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status merely because in-house counsel participates or is "copied in" on correspondence or memoranda. So, too, may underlying facts be discoverable even if they are related in what otherwise qualifies as a privileged communication.
- The scope of the attorney-client privilege is fact-sensitive and must be addressed on a case-by-case basis. No ready test exists for distinguishing between protected legal communications and unprotected business or personal communications; the inquiry is necessarily fact-specific. A party's own labels are not determinative, and the burden of establishing any right to protection is on the party asserting it.

With these points in mind, in-house counsel seeking to preserve the privilege would be wise to tailor appropriate communications by:

- Identifying intended recipients and reminding them of the need to maintain confidentiality and limit distribution of the communication.
- Making it clear that the communication is to or from from counsel in his or her role as an attorney for the company.
- Placing the discussion in the context of the legal issues facing the company while providing advice with respect thereto.
- Making judicious use of the legend ATTORNEY-CLIENT PRIVILEGED COMMUNICATION in the header of documents and in the subject line of e-mails. It alone does not make the communication privileged, but it does provide a readily identifiable beacon in what is typically an ocean of paper and e-mail.

While not definitive in scope, such efforts can help to demonstrate the purpose of an in-house counsel's communications and thereby sustain a future claim of privilege.

Endnote

1. The extent to which prosecutors may or may not seek a waiver of the privilege in a corporate setting as well as the protections that may be afforded via attorney work product are likewise beyond the scope of this article.

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EU Privilege: An Inconvenient, but Not Private, Truth

Not even your in-house counsel's Voicemail messages or Caller ID are outside of the scope of discovery in the EU

By Josephine Lee Robinson and John Cianfrone

You are the General Counsel of a multinational corporation with headquarters in New York City. Imagine it is 6 a.m. and you get a phone call from a Paris based employee of your company's French subsidiary who wants to discuss possible violations of the EU Competition Law. He wants to forward to you documents that substantiate his claim. How do you direct him knowing that European Union privacy laws do not protect your communication? Do you hang up the phone? Tell him or her to call back with the phone number blocked or call from a pay phone? How do you preserve your ethical obligations in upholding the law as well as maintain your client's attorney client privilege.

"The rules of privilege in the European Union, specifically attorney-client privilege and the work product doctrine, differ greatly from those recognized in the United States."

In this profound, unprecedented economic crisis, European Union corporations are forced to pay in-house counsel for advice that is generally not subject to privilege, and, at times, incur the additional expense for advice from outside counsel on sensitive matters that their in-house attorneys are quite capable of advising upon. This article provides an overview of the current privilege rules pertaining to in-house counsel in European Union states, which may help in avoiding unnecessary litigation regarding a waiver of privilege.

The rules of privilege in the European Union, specifically attorney-client privilege and the work product doctrine, differ greatly from those recognized in the United States. EU member states greatly restrict these privileges to outside counsel. Therefore, it is imperative for in-house counsel to recognize these limitations and plan accordingly for what can be an economic hardship.

The European Court of Justice has held that an attorney-client privilege exists where: (1) the communication is made for the purpose and in the interest of the client's defense, and (2) the lawyer is independent.[1] The European Commission had interpreted this to mean that communications with in-house counsel are not protected because in-house counsel is an employee of their client and, therefore, cannot have the independent take that an outside attorney can have. This stance was reaffirmed by the European Court of First Instance (CFI) in *Akzo*, the appeal of which is pending.[2]

Akzo: Background

Akzo was only the third case concerning legal privilege to come before the EU courts. It, therefore, has provided companies important guidance concerning the scope and conditions of legal privilege for EC countries.

In *Akzo*, the European Commission conducted a dawn raid of Akzo's premises in Manchester in February 2003. During the investigation, a dispute arose over whether the commission had the right to inspect certain documents Akzo had prepared in connection with an internal investigation program. Akzo unsuccessfully claimed Legal Professional Privilege (LPP) to the documents because the company had established the program in consultation with outside counsel to determine whether it was complying with competition laws.[3] Akzo employees had apparently first used the documents for internal discussions before forwarding them to outside counsel.[4] The court held that these documents were not privileged because Akzo had failed to demonstrate that they had been prepared *exclusively* for purposes of seeking outside legal advice. The mere fact that Akzo later provided the documents to outside counsel did not confer the privilege. Thus, Akzo shows that legal privilege will extend to a company's internal documents that were prepared before any communication with the company's external lawyers only when the internal documents were prepared specifically and exclusively for purposes of seeking legal advice from outside counsel.[5]

Be Diligent During the Dawn Raid of Your Company's Premises

When the Commission conducts a dawn raid of a company's premises, the Commission has the right to review and obtain copies of all company records that relate to the subject matter of its investigation. This right, however, is subject to legal privilege. The company invoking legal privilege must explain the grounds for and substantiate its claim, but it doesn't have to reveal the contents of the document for which it claims privilege.

Beware of Cursory Glances

Cursory glances, also known as "skim reads" or "brief examinations," could undermine LPP. In *Akzo*, the

CFI stated that where the status of privilege is in dispute between the company and the Commission, a company should, where possible, allow the Commission to skim read the superficial features of a document to assess a claim for LPP. A skim read of a document could be construed as being limited to the heading of the document as well as: the general layout (e.g., e-mail, memo, etc.), author and recipient. In other words, this could be interpreted as information that would be revealed in the equivalent of a privilege log in many U.S. jurisdictions. Accordingly, if the company invoking legal privilege believes the dispute can be resolved by allowing the Commission to take a cursory look at the general layout, heading, title, or other superficial features of the document (i.e., showing the Commission that the document comes from, or is addressed to, an independent lawyer *without disclosing the contents of the document*) they may believe this approach is more appealing than spending time and money in possible litigation. However, this could cause irreparable harm to the company. For instance, if after revealing such superficial information to the Commission, the Commission does not agree with the LPP claim, the company may go to court to challenge the Commission's order to produce the document; however, although mere "superficial features" of a document may already have been seen by the Commission during such cursory glances, that information may have been all the Commission was looking for. It can be argued that in the context of an e-mail, merely the heading, author/recipient(s) and dates may be not only the proper information that the Commission deems subject to a cursory glance, but the only information that it needs; the inquiry could have been only whether the author and recipient had contact on a given date on a particular subject.

Nevertheless, since the CFI appears to define a cursory glance as a skim read, it appears that some content of a document should be subject to viewing by the Commission. This could result in irreparable damage even if the document is ultimately excluded because the information contained therein was made available—even momentarily—to the Commission, which can lead to further probing or investigations. Instead, the company should assert LPP and place the document in a sealed envelope, which may be taken by the Commission in the raid, until a court decides whether the document is privileged.

To preserve the document pending the challenge, the company must request interim relief from the court as soon as possible within the two-month deadline to challenge the validity of the order. European courts have held that the Commission is prohibited from compelling the company to reveal the contents of the document until the end of the two-month filing deadline. In the meantime, the document in dispute should be placed in a sealed envelope, which, as noted above, may be taken by the Commission in the raid.

Although procedurally a company has a right to demand a court order to force the company to produce the document, the Commission does not always follow this procedure and the courts do not seem to punish this behavior harshly. During the dawn raid at Akzo's premises, the Commission refused to accept Akzo's claims that certain documents might be privileged and demanded the documents. The Commission refused Akzo the opportunity to go to court (disputed documents should have been separated in a sealed envelope and the company is given the right to request a court decision) to keep the Commission from reviewing the documents. The CFI ruled that the Commission had infringed upon Akzo's rights by denying it the right to seek privilege protection from the court. Despite this finding, the court found that the Commission's actions should go unsanctioned except for a minor fee awarded to Akzo for legal costs because the court ultimately found that the documents in question were not covered by legal privilege (inferentially, one might argue that had the documents been privileged, sanctions would have been imposed). This is why in-house counsel should label documents in a way that will satisfy a cursory inspection as privileged without actually revealing any privileged information. That is, the document should have a cover page with information similar to what is contained in a privilege log in the U.S. This page should have the author's name, recipient(s) of the document, and subject matter of the document (or a short description of the content of the document and the nature of the privilege the company is asserting).

Legal Privilege Is Narrowly Construed

The *Akzo* decision confirms that legal privilege is a valid defense to refuse the Commission access to lawyer-client communications if the in-house counsel takes the necessary precautions to ensure LPP. However, the *Akzo* court also demonstrated that in close cases, the legal privilege will be narrowly construed favoring the Commission's investigatory powers.[6]

All Documents Should Be Conspicuously Marked as Privileged

All documents should be marked clearly so that the intent of the author is apparent on the face of the document. Wording such as "privileged and confidential" and "prepared exclusively for the purposes of obtaining external legal advice" should become the norm for e-mail headers and the like.[7] As an alternative to labeling concerns, consideration should be given to how much sensitive information about contentious issues should be conveyed verbally rather than in writing. Also, if possible, all potentially privileged documents should be kept separate from normal business records. This being said, it should be remembered that the CFI also held in *Akzo* that if a company seeks to invoke privilege in an abusive man-

ner, the Commission may deem the company's behavior an aggravating circumstance and fines may be imposed.

One obvious solution is to hire outside counsel at the outset in order to secure available attorney-client privileges. However, since there can be a great expense attached to hiring an outside law firm, this should be limited to the most sensitive of matters after consultation with the in-house attorney. If the employee discusses the matter initially with the in-house counsel, it should be verbally (and not by phone) as the privilege in connection with documents (including e-mails and may even include voice messages[8]) prepared for legal advice is limited to those prepared exclusively for advice from outside counsel.

It should be noted that in 2006, the EU enacted a data-retention directive. This directive requires the retention of a wide variety of communications, including fixed and mobile telephone data. The telecommunications data include subscriber information as well as caller identifications, e-mail, voice and voicemails and conference call data, and even text messages. The European directive mandates the retention of these types of communications data to support the investigation and prosecution of serious crimes across all EU member countries.[9]

Also, if possible, all potentially privileged documents should be kept separate from normal business records. As stated earlier, it was the position of the CFI in *Akzo* that if a company is abusing the doctrine of privilege, it could be subject to fines by the Commission.[10]

The *Akzo* case confirms that companies wishing to claim legal privilege should do so at the earliest possible moment in the investigation and should not let the Commission review, no matter how briefly. This is particularly crucial because such cursory review may constitute a waiver of legal privilege in other jurisdictions, including the United States.[11]

Conclusion

In-house counsel should be disciplined and proactive in preparing for a dawn raid. This means that all documents should be clearly marked as to their intent on the face of the document. Second, outside counsel should be hired as early in the transaction as possible, because communications between the in-house counsel and the external counsel, as well as between the company and the external counsel, enjoy attorney-client privileges. Third, a company should claim legal privilege at the earliest moment possible to ensure legal privilege has not been waived in other jurisdictions.

Last, as a preventative measure to litigation of such issues, consideration should be given to putting a law firm on a flat-fee retainer. As law firms are struggling to cope with the economic situation, there may be an opportunity for in-house counsel to have a firm on retainer should any issues arise. Due to the precipitous fall in business at most law firms, perhaps firms will be more eager than in the past to agree to a retainer. Then, should an issue arise, there is a medium in place for employees to go directly to and be assured of attorney-client privilege.

Endnotes

1. See Case. No. 155/79, *AM&S Europe Ltd. v. Commission*, 1982 E.C.R. 1575.
2. *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission* (Joined Cases T-125/03 and T-253/03).
3. Frederic Louis, *et al*., *EU Court Clarifies Limits on Legal Privilege in European Commission Investigations*, Email Alerts (WilmerHale, Oct. 9. 2007).
4. *Id.*
5. *Id.*
6. Frederic Louis, *supra* note 3.
7. EU Court Clarifies Legal Privilege in European Competition Investigations, Freshfields Bruckhaus Deringer, Sept. 2007.
8. Data Protection Act, 1998, Part VI, Section 68(1)(b) and Schedule 11.
9. Official Journal of European Union, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
10. Frederic Louis, *supra* note 3.
11. *Id.*

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Ethics for Corporate Counsel

New Issues and Developments Relating to Employment, Corporate Policy, Whistle-Blower, and Privilege Issues

By Janice Handler

On October 28, 2008, at the New York City Bar, the Corporate Counsel Section presented its annual program on Ethics. The program covered new developments relating to employment, corporate policy, whistle-blower, and privilege issues.

The presenters were a blue-ribbon panel, led by Michael Ross, Esq., a principal in the Law Offices of Michael S. Ross, New York City, and moderated by Steven G. Nachimson, Esq., Assistant General Counsel of Compass Group USA, Inc. and a member of the Corporate Counsel Section's Executive Committee.

Other panelists included: Andral N. Bratton, Esq., Deputy Chief Counsel, Departmental Disciplinary Committee, Supreme Court Appellate Division, First Department; John K. Villa, Esq., Williams & Connolly LLP, Washington, D.C.; Gregory J. Hessinger, Esq., Reed Smith LLP, New York City; James Q. Walker, Esq., Richards Kibbe & Orbe LLP, New York City. All are practitioners who devote a major part of their practice to attorney ethics and disciplinary matters.

The panel reviewed current "hot" areas, including employee right to privacy and employee e-mails, with respect to which the panelists noted that many corporate policies on these subjects do not reflect business realities. While many policies presuppose no employee access to technology for personal business, in fact, most companies do permit such use. The discussion also included discovery of employee e-mails and potential breaches of attorney-client privilege in this discovery.

Another "hot topic" was retainer agreements that require advance waiver of conflicts. Serious doubts exist as to whether such waivers will continue to be effective in New York.

The role of in-house counsel in preparing corporate employees for depositions was another timely topic. The panelists discussed the pros of corporate counsel involvement (corporate counsel knows the players and business the best and can be an asset to the process) and the cons (the prospect of employee intimidation exists). Recent New York disciplinary cases have involved this issue.

Employee settlement agreements and whistle-blowers were also discussed.

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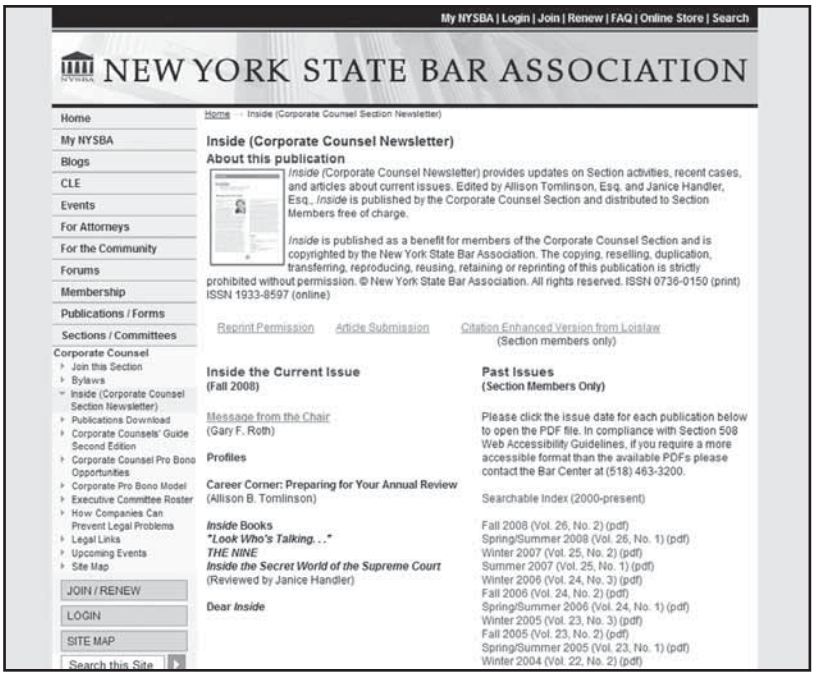

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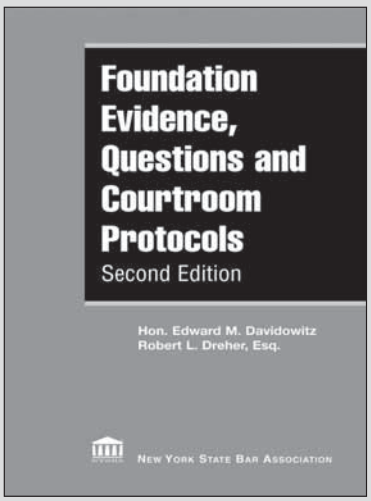

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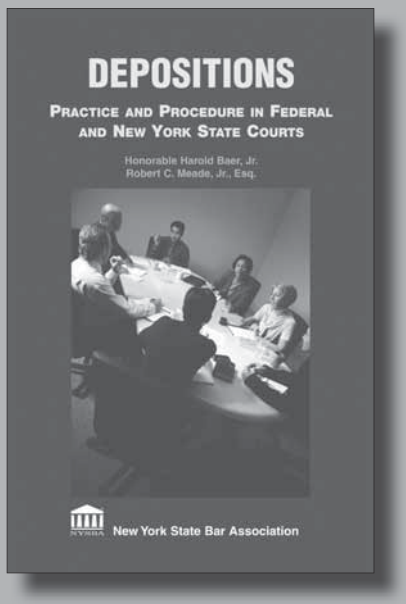

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