

**ASSOCIATION OF CORPORATE COUNSEL  
BALTIMORE CHAPTER**

**THE LIFE OF IN-HOUSE COUNSEL  
IN THE ERA OF "BEST PRACTICES"**

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**June 27, 2007  
Baltimore, MD**

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**INTRODUCTION**

Good afternoon everyone. Thank you for inviting me to discuss a topic that certainly is near and dear to my professional heart: the ever-evolving role of in-house counsel in the operation and success of a corporation. Several decades ago, companies recruited lawyers primarily to contain or lower expenses and once on board, those in-house counsel often were given relatively narrow charters. They would for example, support a business unit in routine transactional negotiations and draft straightforward contracts, or manage high volume, low stakes disputes. Over time, similar roles were carved out for coordinating public policy and regulatory affairs. Many business executives

measured the value of in-house legal services merely by the dollars saved in retaining law firms. Back then, the notion of a General Counsel serving as a critical member of the Control Group of a company was a relatively novel one. But those days have long since passed.

If we fast forward the DVD, a completely different landscape emerges. Today the vast majority of in-house counsel perform a demanding and multifaceted role that is central to a company's strategic vision and operations. Increasingly, you are taking the lead in defining and articulating a company's institutional values. In the Executive Suite, the General Counsel's span of responsibility is now broad and her constituencies are many. Control groups, division heads and senior management expect instantaneous advice, realistic risk assessment, and round-the-clock support. And the Board of Directors (the "Board") will now hold her accountable for keeping them apprised of all developments and initiatives that might give rise to commercial or regulatory exposure, or affect public perception of the company.

For multinational corporations or those competing in highly-regulated industries, the General Counsel position is rendered all the

more challenging – in some cases daunting – by the Foreign Corrupt Practices Act, commercial bribery legislation, the Patriot Act, and Sarbanes-Oxley, all of which can be cryptic to those expected to comply with their provisions and broadly construed by those who enforce them. As privately-held companies follow the publicly-traded model and adopt so-called "best practices" that exceed legal or regulatory mandates or proscriptions, the realities of the two different environments are not as disparate as might appear at first blush.

In-house lawyers are no longer expected merely to provide legal advice; frequently, they are being asked to participate in strategic business decisions. Their judgment must be holistic and cross-disciplinary as they increasingly take the lead in regulatory, investigative, financial and technical matters that years ago never would have been entrusted to them. Not surprisingly, then, the legal departments of the Fortune 500 Companies have grown tremendously and have become every bit as sophisticated as the finest law firms they retain. General Electric recently reported a headcount of no less than

1,225 lawyers, a number that would rank it among the top 15 of the largest law firms in the United States.

The profile of the General Counsel has risen dramatically, both internally and externally. They are now often perceived as the “conscience of the company” and are being groomed for senior management positions. Indeed, before they retire, a surprising number are finding themselves in the chair of the Chief Executive Officer.

And irrespective of the sector or the size of a particular corporation and its legal department, all of these observations apply with equal force to Deputies and Associate General Counsel, the professionals with whom we partner on the vast majority of our engagements.

For our part, each day when outside counsel pick up the phone or log on to our computers, we need to remain ever mindful that in-house counsel are expected to combine finely-honed professional skills with so-called "business savvy" to provide realistic risk assessment, leadership during crises, and pragmatic solutions to complex problems. As one in-house counsel recently described his life to me, "we play three-dimensional chess 24x7."

## **I. CORPORATE GOVERNANCE: THE HYDRA**

In most companies the General Counsel's roles and responsibilities now are not unlike the multi-headed hydra of ancient mythology. On a given day, he or she is expected to serve as a trusted advisor, a zealous advocate, a legal (and perhaps a compliance) officer, and a fellow shareholder. What makes for an exceptionally dynamic and fulfilling professional calling is also fine grist for a law school ethics examination.

As a matter of law, in-house counsel's "clients" are, of course, the shareholders of the company. And given the fiduciary duties of a director and a senior executive, those interests, in principle, should always be aligned with those of the shareholders. In reality, however, as many of our clients will quickly tell you, life for them is not that straightforward. Clashes inevitably occur between senior management – most notably those in product development, marketing and sales – who are vying to capture market share and widen profit margins, and legal departments trying to ensure that hard-won earnings are not later disgorged and accompanied by a fine or an injunction. As many a

corporate governance expert has been quick to point out, in-house counsel are often selected and managed by those same executives.

Against this backdrop, in March 2005, the President of the New York City Bar Association appointed a Task Force to examine the role of in-house and outside counsel "with respect to counseling about corporate conduct." Among other things, the Task Force considered "the interplay between ethical rules, privileges and the evolving enforcement climate."

In November 2006, the Task Force issued a 190-page report (the "Report"), and the Executive Summary of that Report is included in the materials we have compiled for this presentation. After reviewing the salient facts in a number of recent corporate crises, the Task Force made the following observations and recommendations:

1. The forthright rendition of advice is every lawyer's duty. The traditional limitation of the lawyer's duties of loyalty to her client, and the related obligation to preserve client confidences, is very much in the public interest.

2. It would be counterproductive to impose on corporate counsel a legal or ethical duty flowing to the investing public which in turn, would create a general expectation of "whistleblowing" or "gatekeeping." The Task Force aptly noted, in my view, that any such duty probably would result in a chilling of lawyer-client communications, the exclusion of lawyers from certain strategic meetings, and the degradation of the ability of lawyers to provide well-informed advice to their corporate clients. But as the Task Force acknowledged, a public company client quite clearly has legal duties to the investing public, so the potential impact of any corporate action must be a concern for counsel.
3. A lawyer should not restrict her advice to narrow questions of legal compliance because there is a broad spectrum of conduct that may not violate the law but might nevertheless harm the client.

4. The Task Force recommended that New York's proposed Rules of Professional Conduct, then under consideration by the House of Delegates of the New York Bar Association, include a series of 2003 amendments to the American Bar Association Model Rules of Professional Conduct.

- ABA Model Rule 1.13(b), requiring, presumptively, a lawyer for a corporate client who learns of an ongoing impending violation of law likely to cause substantial injury to the client to report the matter up through the corporate hierarchy, including to the Board if necessary;
- ABA Model Rule 1.13(c), permitting a lawyer, if the Board insists on or fails to address a clear violation of law, to make limited disclosures of client confidences to the extent necessary to prevent substantial injury to the corporate client;

- ABA Model Rule 1.13(e), requiring a lawyer who believes he has been discharged for reporting up pursuant to Rule 1.13(b), or who withdraws for related reasons, to insure that the Board is informed of this fact;
  - ABA Model Rule 1.6(b)(2) and (3), permitting a lawyer to make limited disclosures of client confidences (such as to regulatory bodies) to prevent, or to rectify or mitigate, crimes or frauds in which the lawyer's services have been used (see Report pp. 71-95).
5. The role of the General Counsel of a public company is central to an effective system of corporate governance.
  6. The Board should review the tenure and terms of compensation of the General Counsel; should clearly define that executive's role in, among other things, alerting the Board and other decision-makers regarding potential legal violations; should articulate its

expectations with respect to performance; and should approve any decision to terminate the General Counsel.

7. To be effective, the General Counsel must be seen as a senior, influential and respected officer of the corporation, and a member of the company's senior management team. The General Counsel should be given adequate authority and resources to discharge her duties, and must have direct access to senior management and the Board. This must include opportunities to meet regularly with Independent Directors, separately from management.
8. When internal lawyers are assigned to subsidiaries or discrete business units, they should have at least a "dotted line" reporting relationship to the General Counsel who should be directly involved in their hiring and firing, and in setting their compensation.
9. The compensation of in-house counsel should not be determined in a manner that undermines the

independence of their legal advice, and deters them from raising, and appropriately addressing, concerns.

10. The General Counsel should have ultimate authority with respect to the selection of outside counsel and should clearly define their respective roles. In-house counsel should meet regularly with any law firm performing substantial work for the company.

These recommendations reflect the ever evolving realities of the in-house bar which include heightened and more onerous expectations by regulators, shareholders and Boards of Directors.

## **II. THE ERA OF BEST PRACTICES**

### **A. COMPLIANCE**

#### **1. Overview**

The confluence of deregulation, unprecedented technological innovation and the emergence of a global economy have thrust legal and regulatory compliance, and business ethics, into the spotlight as never before. Booming economies in China, India and elsewhere are forever changing the business landscape. As companies expand and compete

globally, they increasingly must harmonize different cultures and business philosophies while entering new markets governed by inconsistent statutes, regulations and enforcement policies. So in-house departments must be sufficiently informed of issues to devise global compliance strategies.

Perhaps most remarkably from my perspective, in many sectors, companies are now undertaking to gain a competitive advantage through their robust compliance initiatives. "Compliant business is good business" is the new mantra we hear in countless executive suites across Corporate America. In-house counsel now are very much responsible for the corporate culture and values of their companies. Culture simply can not be imposed by fiat by a Board or senior management. Whether publicly-traded or privately-held, an organization will flourish only if its personnel accept primary responsibility for the performance and accountability of the business.

## 2. Corporate Programs

For several decades, legislators and enforcement officials have undertaken to create concrete incentives for companies to commit to the principles of self-policing and self-reporting through voluntary adoption of corporate compliance programs. This is, in part, a recognition that there will never be adequate public sector resources to address satisfactorily all regulatory compliance issues in a given sector. But it is also a philosophical approach that favors a “carrot” over a “stick.” And at the heart of that approach is the fundamental premise that compliance does promote “good business.” If a corporation or firm establishes and enforces the requisite policies and practices, it can more credibly take the position that the failure of any employee to adhere to them is an aberrational violation that ought not be imputed to the company.

The incentives to develop and adopt a compliance program are very real. In deciding whether to pursue allegations or charges against a company, based on misconduct on the part of its officers and employees, federal and state officials now consider whether the organization has in place a corporate compliance program that includes a document

retention policy; a code of conduct and business ethics; appropriate privacy and procurement policies; anonymous reporting mechanisms; and zero tolerance of certain misconduct and violations.

A code of conduct and business ethics does not constitute a corporate compliance program. Federal enforcement officials and regulators have enunciated unequivocally their expectations and while some will acknowledge that the development and adoption of a program is by no means a "one size fits all" exercise, virtually every federal agency, and most state authorities, look for:

- Written policies and procedures, including a comprehensive code of conduct evincing a clear commitment to corporate integrity;
- A compliance officer with authority to monitor and enforce standards;
- Multiple reporting channels, including a "hot line," to the compliance officer, senior management and the Board;
- Effective training programs;
- A systematic auditing plan;

- Internal investigation and enforcement using publicized disciplinary guidelines; and finally
- Prompt corrective action plans for identified violations.

## **B. INTERNAL AUDITS AND INVESTIGATIONS**

In today's environment of rigorous regulatory scrutiny and aggressive class action litigation, public companies and their boards of directors must be prepared to determine quickly when and how best to assess corporate compliance and whether to disclose findings voluntarily to enforcement authorities. Effective compliance audits and adeptly executed internal investigations are critical in avoiding and defending allegations of misconduct. They can also protect a company in a civil lawsuit.

As corporations grapple with the obligation to self-police their affairs and work force while seeking to drive results and compete effectively in the marketplace, with increasing frequency, in-house counsel and compliance officers are required to devise a principled scheme and mechanism for assessing, among other things, the efficacy

of a compliance program that has been adopted. Many public and privately held companies are now conducting compliance and risk management audits to identify potential areas of concern. To implement effective audits, companies must:

- Develop a compliance road map that includes an assessment of the efficacy of internal controls;
- Determine a reporting structure;
- Implement solutions to compliance issues; and
- Discipline employees appropriately.

Needless to say, this is very much a company- and sector-specific exercise that must not only leverage any painful past experiences, but operate realistically and be fully aligned with the company's business plan. At both the design and implementation phases, these initiatives need to be coordinated closely with the Finance and Human Resources Departments.

Often, before any such system is in place, allegations by a disgruntled employee or an anonymous "whistleblower;" assertions in a

legislative hearing; or an article in a major newspaper raise the question whether an internal investigation should be initiated. Not surprisingly, our clients – in-house counsel and Boards – are seeking our advice on this critical threshold question.

Initiating an investigation before the government intervenes, or even before an enforcement inquiry is completed, can materially influence the ultimate resolution of the proceeding. Some issues to consider are:

- Is an investigation necessary?
- Who should drive it?
  - In-house counsel?;
  - The Compliance officer?;
  - The Audit Committee of the Board; or
  - A Special Committee?
- Is independent or outside counsel necessary?
- Are proper procedures in place for:
  - Preservation of evidence?;

- Preliminary assessment of regulatory framework/factual issues?;
  - Managing employee relations while conducting the investigation?; and
  - Managing effectively legislative and regulatory relations?
- Is the company prepared to disclose the findings voluntarily to regulators and enforcement authorities?

In their daily work and before undertaking an internal audit or investigation, all in-house lawyers must understand the fundamentals of privilege law. At the inception of any inquiry, critical decisions need to be made regarding channels and contents of verbal and written communications. Twenty years ago, both in-house and outside counsel could proceed with a fair degree of confidence that materials covered by the attorney-client and self-evaluative privileges, and the work product doctrine, presumptively would remain confidential and that enforcement officials, legislators and commercial adversaries would never be afforded access to them. Regrettably, that is a bygone era.

## **1. Legal Privileges: A Primer**

### **a. Introduction**

As we all know, legal privileges seek to promote zealous advocacy and communications between clients and their counsel. But as the Supreme Court cautioned decades ago, they are to be narrowly construed for they are in derogation of the search for truth in legal proceedings.<sup>1</sup>

### **b. The Attorney-Client Privilege**

The attorney-client shield, by far the most zealously guarded of the common law evidentiary privileges and the foundation of the community of interest doctrine, encourages “full and frank” communications between an advocate and his or her client.<sup>2</sup> Such an unrestricted flow of information and advice has long been recognized as a jurisprudential cornerstone of the English and American common law systems: “The privilege preserves the ability of laymen to defend themselves

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<sup>1</sup> *United States v. Nixon*, 418 U.S. 683, 94 (1974).

<sup>2</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

vigorously and thereby assures them that the law will be applied justly.”<sup>3</sup>

Moreover, “by protecting a client when he seeks to learn the dictates of the law, the attorney-client privilege protects the client’s ability to pursue his own goals within the confines of the law.”<sup>4</sup>

Courts have wrestled with the scope of the attorney-client privilege for decades. Perhaps the most frequently cited test was crafted in 1950 by Judge Wyzanski (D. Mass.) in *United States v. United Shoe Machinery Corp.*<sup>5</sup> He concluded that the privilege applies only if: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate, and in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal

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<sup>3</sup> *Developments in the Law-Privileged Communications III, ATTORNEY-CLIENT PRIVILEGE*, 98 HARV. L. REV. 1501, 1506-1507(1985).

<sup>4</sup> *Id.*

<sup>5</sup> 89 F. Supp. 357, 358-359 (D. Mass. 1950).

proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>6</sup>

### 1) *The Common Interest Doctrine*

The tenets of the common interest doctrine are now well settled. In short, it is an extension of the attorney-client privilege that is designed to protect otherwise privileged communications between multiple parties having an articulable common interest. In the transactional setting, it is typically called a common interest whereas in controversies it is referred to as a "joint defense." Quite apart from the moniker, this privilege<sup>7</sup> was first invoked by litigants seeking to develop a common defense to actual or threatened complex criminal charges or civil claims.

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<sup>6</sup> See also *Baltimore Scrap Corp. v. David J. Joseph Co.*, No. Civ.L-96-827 1996 WL 720785, \*5 (D. Md. Nov 20, 1996); *Arcuri v. Trump Taj Mahal Assoc.*, 154 F.R.D 97, 101-102 (D. NJ. 1994); *Deutsch v Cogan*, 580 A.2d 100,104 (Del. Ch. 1990); *In re Sunrise Sec. Litig.*, 130 M.D. 560, 570 (E.D. Pa. 1989); *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 200 (E.D.N.Y. 1988); *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp.136,144 (D. Del. 1977). Once the privilege is found applicable, the next question, of course, is whether it has been waived. Waiver is a fact-intensive inquiry that courts resolve using one of several approaches. The "strict liability" test focuses on the mere fact of a disclosure, irrespective of whether it was inadvertent or intentional. See, e.g., *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (ED. Mich. .1954). At the other end of the continuum is the so-called "intent test," under which a waiver occurs only when clearly intended by the client. See e.g., *Sub-urban Sevin Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 259.

<sup>7</sup> During the course of its evolution, the doctrine has been referred to as, *inter alia*, the "common interest privilege," the "common interest doctrine," the "common interest rule," the "joint defense privilege," the "joint litigant privilege," the "joint prosecution privilege," and the "pooled information privilege." See, e.g., Robert W. Higgason, *The Attorney-Client Privilege in Joint Defense and Common Interest Cases*, 34 HOUS. LAW. 20 (July/August 1996).

Since the notion was first recognized by the Virginia Supreme Court in the nineteenth century<sup>8</sup>, the concept of a common interest giving rise to a joint evidentiary privilege has blossomed into a widely recognized doctrine that is now applied in many contexts,<sup>9</sup> including grand jury investigations;<sup>10</sup> civil actions involving either common or different counsel for the plaintiffs or the defendants;<sup>11</sup> pre-litigation consultations and analyses;<sup>12</sup> communications with attorney's agents;<sup>13</sup> and corporate counsel's investigations of fraud on the part of internal management.<sup>14</sup> All of these applications are premised on the same rationale underlying the original judicial decision: mainly, that parties

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*See also* Susan IC Rushing, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 Tex L. Rev. 1273 (1990).

<sup>8</sup> *Chahoon v. Commonwealth*, 62 Va. (21 Gratt) 822 (1871). *See* Rushing, *supra*, note 7 at 1277.

<sup>9</sup> Recently, the joint-defense doctrine has been recognized as an independent privilege rather than an extension of the attorney-client privilege. From a practitioner's perspective, however, this question is purely an academic one. *See, e.g.*, Gerald Heller, *Raising the Joint Defense Privilege*, 44 FED. LAW. 46 (1997).

<sup>10</sup> *See, e.g.*, *Continental Oil Co. v. United States*, 330 F. 2d 347 (9th Cir. 1964).

<sup>11</sup> *See, e.g.*, *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508 (D. Conn. 1976); *Duplan Corp. v. Deering Milliken, Inc.*, 397 R Supp. 1146 (D.S.C. 1974); *Baxter Travenol Labs. v Abbott Labs.*, No. 84-C 5103, 1987 WL 12919 (N.D. Ill. June 19, 1987).

<sup>12</sup> *See, e.g.*, *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187 (N.D. Ill. 1985).

<sup>13</sup> *See, e.g.*, *In re Auclair*, 961 F.2d 65 (5th Cir. 1992).

<sup>14</sup> *See, e.g.*, *In re Crazy Eddies Sec. Litig.*, 131 F.R.D. 374 (E.D.N.Y. 1990). *See generally*, Paul R. Rice, *Attorney-Client Privilege in the United States*, §§ 4.35, 4.36 (1993).

having a common legal interest should be permitted to consult with one another and with their joint or separate counsel to the same extent a single individual or entity may do so in a similar context. When applied to transactional settings, the ramifications of this concept are especially profound in today's global marketplace.

### **c. The Work Product Doctrine**

The work product doctrine generally bars a litigant from discovering material “obtained or prepared by an adversary’s counsel in the course of her legal duties, provided that the work was done with an eye toward litigation.”<sup>15</sup> It is a qualified, not absolute, privilege. In short, a party may discover:

documents and tangible things ... prepared in anticipation of litigation ... by or for another party or ... that other party’s representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.<sup>16</sup>

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<sup>15</sup> *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

<sup>16</sup> Fed. R. Civ. P. 26(b)(3).

At its core, the doctrine “shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”<sup>17</sup> While factual materials falling within the scope of the doctrine may be discovered upon a showing of substantial need, a lawyer’s mental impressions, conclusions, opinions, and legal theories — “core” or “opinion” work product — are more sacrosanct.<sup>18</sup> The doctrine promotes the adversary system by “enabling attorneys to prepare cases without fear that their work product will be used against their clients.”<sup>19</sup>

#### **d. The Self Evaluative Privilege**

The self-evaluative privilege<sup>20</sup> seeks to encourage “self-improvement through uninhibited self-analysis and evaluation.”<sup>21</sup> As a matter of public policy, litigants have argued, and some jurists have

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<sup>17</sup> *United States. v. Nobles*, 422 U.S. 225, 238 (1975).

<sup>18</sup> See *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 279 (S.D.N.Y. 1995) (“*Leslie Fay II*”); see also Fed. R. Civ. P. 26(b)(3) (stating that the court “shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”).

<sup>19</sup> *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 428 (3d cir. 1991).

<sup>20</sup> The privilege has also been referred to as the peer review privilege, critical self-evaluative privilege, self-critical analysis privilege, self-examination privilege, and others. See *Tharp v. Slayer Steel Corp.*, 149 F.R.D.177,185 (S.D. Iowa 1993) (listing names).

<sup>21</sup> *In re Ashanti Goldfields Sec. Litig.*, 213 F.R.D. 102,104 (E.D.N.Y. 2003).

concluded, that “disclosure of documents reflecting candid self-examinations will deter or suppress socially useful investigations and evaluations or compliance with the law or with professional standards.”<sup>22</sup> Some courts have, therefore, held that materials reflecting self appraisals and proposed remedial measures are presumptively protected from discovery.

The Supreme Court has not determined whether the privilege should be recognized as a matter of federal law, and it certainly has “led a checkered existence in the federal courts.”<sup>23</sup> Documents and information subject to this qualified privilege must

[first], result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information

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<sup>22</sup> *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6, 7 (E.D.N.Y. 1995) (quoting *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 640 (S.D.N.Y.1987)).

<sup>23</sup> *Wimer v. Sealand Serv., Inc.*, 1997 WL 375661 at \*1(S.D.N.Y. July 3,1997) (noting that some courts have rejected the privilege out-right).

must be of the type whose flow would be curtailed if discovery were allowed.<sup>24</sup>

Even those courts that have recognized the privilege have “limited its reach and declined to utilize it to block production of purely factual materials.”<sup>25</sup> So it applies only to the analysis and recommendations resulting from the self-evaluations and not the underlying facts discovered during the investigation.<sup>26</sup> In addition, it may not be asserted against the government in civil litigation<sup>27</sup> or in administrative<sup>28</sup> or grand jury proceedings.<sup>29</sup>

## 2. Waiver

A waiver analysis begins with the nature of the privilege or doctrine asserted and its fundamental purpose.<sup>30</sup> A claim will generally

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<sup>24</sup> *Sheppard*, 893 F. Supp. at 7 (quoting *Chemical Bank v. Affiliated FM Ins. Co.*, No. 87 Civ. 0150, 1994 WL 89292 at \*1 (S.D.N.Y. March 16, 1994)).

<sup>25</sup> *Robinson v. United States*, 205 F.R.D.104,108-109 (W.D.N.Y. 2001).

<sup>26</sup> *See In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205 (E.D.N.Y. 1992).

<sup>27</sup> *See United States v. Dexter Corp.*, 132 F.R.D. 8, 8-10 (D. Conn. 1990).

<sup>28</sup> *See F.R.D. v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980).

<sup>29</sup> *See In is Grand. Jury Proceedings*, 861 F. Supp. 386, 389-90 (D. Md. 1994).

<sup>30</sup> *Permian Corp. v. United States.*, 665 F.2d 1214, 1219 (D.C. Cir. 1981).

be sustained only so long as it promotes the underlying rationale that it will be waived “when it no longer serves its useful purpose.”<sup>31</sup>

### **a. Inadvertent Waiver**

These days both courts and enforcement agencies tend to be fairly forgiving when inadvertent submissions occur during a voluminous discovery process.<sup>32</sup> Not surprisingly, the plaintiffs' class action bar is not quite so enlightened.<sup>33</sup> But with the advent of rapid-fire, instantaneous communications channels, we all have to remain vigilant about risks posed with respect to both confidentiality and privacy regulations.

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<sup>31</sup> *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at \*3 (Del. Ch. Nov. 13, 2002).

<sup>32</sup> See, e.g., *Deere & Co. v. Mtd Products, Inc.*, 2003 U.S. Dist. LEXIS 13325 (S.D. N.Y.); *Angell Investments, L.L.C. v. Purizer Corp., et al.*, 2002 U.S. Dist. LEXIS 11545 (N.D. Ill. 2002); *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213; 2001 Dist. LEXIS 5269 (S.D. N.Y. 2001) and *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2001 U.S. Dist. LEXIS 8896, 2001 WL 1571447.

<sup>33</sup> See, e.g., *In re Sealed Case*, 877 F.2d 976, 980 (Fed. Cir. 1989); *MG Capital, LLC v. Sullivan, et al.*, 2002 U.S. Dist. LEXIS 11803 (N.D. Ill. 2002); *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 121; 2002 U.S. Dist. LEXIS 13427 (D. N.J. 2002); *Ares-Serono, Inc. v. Organon Int'l B.V.*, 160 F.R.D. 1, 4 (D. Mass. 1994); *In re Grand Jury Investigation*, 142 F.R.D. 276, 278 (M.D.N.C. 1992); and *International Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988).

## **b. Intentional Waiver**

### **1) Selective**

Selective waiver is an intentional disclosure to only one or more parties and the case law in this area is “in a state of hopeless confusion.”<sup>34</sup> The issue now arises most typically when agencies or prosecutors seek production of corporate records or information, such as findings and conclusions in an internal investigation, that are covered by one or more privileges. The United States Securities and Exchange Commission, and other agencies, tried to bolster a cooperating company's invocation of the selective waiver doctrine by issuing confidentiality agreements in voluntary disclosures and enforcement investigations, but over time many of the federal circuit and district courts have declined to recognize the doctrine even when the disclosure occurred pursuant to such an agreement. So when considering whether to self-report, be sure to review carefully any protocols adopted by federal and state agencies.

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<sup>34</sup> *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294-95 (6th cir. 2002) (noting that “some courts have even taken internally inconsistent opinions”).

Think creatively; consider anonymous submissions through outside counsel and other approaches to manage the attendant risks.

## 2) Partial

Another question that arises in this setting is whether intentionally disclosing a portion of a protected communication waives protection as to the remaining sections or facets of the same communication.

Generally, “[w]hen a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party’s adversary.”<sup>35</sup> If a partial waiver does disadvantage an adversary — for example, by presenting a one-sided story to the court — the privilege can well be waived as to all communications on the same subject matter.<sup>36</sup> Central to this analysis is the “fairness doctrine,” which seeks to prevent the “prejudice to a party and distortion of the judicial process that may be caused by the

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<sup>35</sup> *Westinghouse*, 951 F.2d at 1426 n.12.

<sup>36</sup> *Id.*

privilege-holder's selective disclosure during litigation of otherwise privileged information.”<sup>37</sup>

Courts in the Second Circuit have now made clear that a broad subject matter waiver occurs “only when confidential communications are selectively disclosed *in the course of an ongoing litigation* to gain tactical advantage.”<sup>38</sup> While information revealed publicly loses its confidentiality, “there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed.”<sup>39</sup> The court of appeals has explained that even though public disclosures may be misleading, so long as they remain “extrajudicial,” “there is no *legal* prejudice that warrants broad court-imposed subject matter waiver,”<sup>40</sup> since even one-sided public disclosures create no risk of legal prejudice “until put at issue in ... litigation by the privilege holder.”<sup>41</sup>

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<sup>37</sup> *von Bulow v. von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987).

<sup>38</sup> *Leslie Fay II*, 161 F.R.D. at 283 n.5 (emphasis added).

<sup>39</sup> *von Bulow*, 828 F.2d at 103.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

#### **4. The Enforcement Assault**

The sanctity of evidentiary privileges has been under assault for the past five years, beginning with the 2003 publication of the “Principles of Federal Prosecution of Business Organizations” by then Deputy Attorney General Larry D. Thompson (the “Thompson Memorandum”), and the 2005 publication of “Waiver of Corporate Attorney-Client Privilege and Work Product Protection,” by then Acting Deputy Attorney General Robert D. McCallum. Although the debate about the intent and text of the Thompson Memorandum continues to rage, it undeniably created incentives for companies to waive evidentiary privileges that would otherwise protect the findings and conclusions generated by comprehensive internal investigations. Among other things, the Thompson Memorandum sought to encourage waiver of the attorney-client privilege and the work product doctrine by companies under government scrutiny as a means to obtain leniency from the United States Department of Justice (“DOJ”). Additionally, it permitted DOJ to consider a company’s payment of the legal fees of its employees as a sign of non-cooperation with the government.

Following court battles, in particular *United States v. Stein* (the KPMG case),<sup>42</sup> and Congressional hearings and Senator Arlen Specter's (R-PA) introduction of the Attorney-Client Privilege Protection Act, DOJ issued, in mid-December 2006, the "Principles of Federal Prosecution of Business Organizations" authored by Deputy Attorney General Paul J. McNulty (the "McNulty Memorandum"). The McNulty Memorandum articulates the Department's current policy regarding the prosecution of corporations and revises some of the principles previously advanced in the Thompson Memorandum. It confirms that the advancement of fees and expenses incurred by employees and agents of an organization will not be considered when assessing a company's cooperation in an enforcement investigation. Nevertheless, DOJ may press companies not to enter into Joint Defense Agreements and other information sharing arrangements and to terminate or otherwise sanction

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<sup>42</sup> In two oft-cited decisions in 2006, Judge Kaplan held that governmental interference in the payment of employee legal defense costs violates the Fifth and Sixth Amendment of the United States Constitution and that the use of economic coercion to secure a waiver of the privilege against self-incrimination violates the Fifth Amendment. See *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, No. S1 05 Crim. 0888 LAK, 2006 WL 2060430 (S.D.N.Y. July 25, 2006).

employees implicated in an internal inquiry or an enforcement proceeding.

Insofar as the demands for waivers of evidentiary privileges are concerned, the McNulty Memorandum makes clear that they are to be limited to those situations presenting “a legitimate need . . . to fulfill . . . law enforcement obligations.” In determining whether such a need exists, prosecutors must consider the likelihood and degree to which privileged information will advance the probe; whether, using alternate channels, the information can be obtained in a timely and complete manner; the scope of the corporation’s voluntary disclosure; and the collateral consequences of a waiver for the organization.

If a legitimate need is demonstrated, federal prosecutors must secure internal approvals before seeking a waiver. If the request is granted, any waiver must be restricted to “purely factual information,” although what constitutes “purely factual” information remains open to interpretation and thus to controversy. A response to a request for “purely factual” information may be considered in evaluating a company’s cooperation.

If the “purely factual information” does not allow the government to conduct a thorough investigation, federal prosecutors may request that a company produce “attorney-client communications or non-factual attorney work product” to supplement the factual information previously obtained. For this type of waiver, federal prosecutors must secure approval from the Deputy Attorney General after demonstrating the legitimate need for the information and the scope of the waiver. A corporation’s refusal to waive the privileges governing this material may not be considered in making a charging decision, although its waiver may be viewed favorably, leaving the company in the unenviable position of having to waive attorney-client and work product protections or risk that neutral consideration may equate to negative treatment.

Congress has now entered the fray. The Bill, introduced by Senator Specter, would prohibit officials from “demand[ing], request[ing], or condition[ing] treatment on the disclosure by any organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product.” The Privilege Protection Act also would require those

federal agencies to respect employees' constitutional rights and prohibit government interference with internal corporate decisions involving advancement of fees, indemnification or disciplinary actions.

Very recently, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (the "House Subcommittee") held hearings on the attorney-client privilege and is considering proposing legislation akin to the Senate's Bill. The House Subcommittee heard, or received written, testimony from former Attorneys General, Solicitors General, and Assistant United States Attorneys, the President of the American Bar Association, the Chairman of the Board of the Association of Corporate Counsel ("ACC"), and the Coalition to Preserve the Attorney-Client Privilege, whose members include the American Civil Liberties Union, the Financial Services Roundtable, and the U.S. Chamber of Commerce. The vast majority of the witnesses urged Congress to act because, among other things, DOJ's current policy fosters an environment where employees risk disciplinary action merely for exercising their constitutional rights. Moreover, witnesses encouraged Congress to mandate national guidance and

oversight by Main Justice in deciding whether to charge a corporation; the mere indictment of a company can lead to serious consequences for hundreds of innocent people and signal a death knell for the organization.

Representatives of the ACC highlighted for the House Subcommittee the results of its surveys, in 2005 and 2006, of 1,200 in-house counsel which confirmed that absent privileges, clients will be less candid; privileges facilitate the delivery of legal advice; privileges enhance the likelihood that clients will seek advice proactively; and privileges improve counsel's ability to guarantee effective compliance initiatives.<sup>43</sup> Similarly, several former senior Justice Department officials cautioned that DOJ's policies render "detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures" whose efficacy largely depends on the "ability of employees to speak candidly and confidentially with the lawyer conducting the investigation [and] any uncertainty as to whether attorney-client privilege and work product protections will be

honored makes it harder for companies to detect and remedy wrongdoing early.”<sup>44</sup> These issues remain front and center in the media, and are likely to be the focus of legislative initiatives as the year unfolds.

## CONCLUSION

As traumatic as this era of best practices and corporate governance might seem to all of us, the problems, the forces and dynamics giving rise to it really are not new. Regrettably, one thing we have learned in the American jurisprudential system, is that capitalism does indeed go awry periodically. We have seen that happen in virtually every sector since the Great Depression and each implosion or scandal has been either accompanied or triggered by legislative, and regulatory scrutiny and criminal proceedings. Harking back to the flamboyant 1980s and crises in the defense and financial services sectors, regulators and professionals alike have wrestled with questions of corporate ethics, conflicts of interest, voluntary disclosures of client confidences, and client oversight by in-house and outside counsel.

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<sup>43</sup> Remarks of Richard T. White, Chairman of the Board of the ACC, at p. 4.

<sup>44</sup> Letter to Attorney General Gonzales, dated September 5, 2006, at p. 2, presented to the House Subcommittee.

Well before the adoption of the federal sentencing guidelines for corporations, the notion of imposing on counsel a duty to take action had taken root. But what I think distinguishes this chapter is the pervasive awareness of the issues. We and other professionals have tended to address these critical issues, reactively and, therefore, episodically – in response to crises. Hopefully the most recent crises, which undeniably have been the most traumatic politically-charged ones, have forever changed that mindset.