



William O'Brien President's Message

I hope all members have some plans for vacation this summer—2007 has been a busy season so far. Following is a brief update on our programs and initiatives.

We have offered a host of exceptional programs for our members this year,

This summer, we offered our first ever July program, which was clearly one of the most entertaining, amusing evenings we've ever experienced. Sponsor Goulston & Storrs created the game of "Jeopardy!" played by a panel of in-house panelists, complete with big screen graphics, sound effects, and questions covering ethics, compensation, and other legal issues. We chose

six panelists for the game known for their humor and ability to think fast on their feet, and had a simply riotous evening—and learned a lot to

boot. Amazingly, after over an hour of play, the two teams ended up in a tie.

Our all day conference in November will once more cover "Business Skills for Lawyers" (also known as our "Mini MBA") and be held at the Boston University School of Executive Leadership. This has been an intensely popular program in the past, with many requests that we continue to offer it. Since so many of our members

have learned the basics at previous programs, we will kick up the level of the sessions this year and gear the program towards a more knowledgeable audience. Watch the chapter website for details.

Best wishes to all Northeast members for a healthy and productive summer.

Sincerely,
 Bill O'Brien
 President, ACC-Northeast



covering everything from intellectual property and outside counsel management, to employment mistakes, mergers and acquisitions, ediscovery, internal investigations, and data privacy and security. Our Law Student Ethics Awards dinner in April was the signature event of the season, with six local judges joining members of the in-house community, deans from the participating law schools, and members of our sponsoring law firms.

Check out "Resources" on the ACC-Northeast Website!

We have a new section on our website (www.acc.com/chapters/ne.php), where we post useful articles from our sponsors, and materials from some of our programs. This is continually growing, so make it a habit to check out our resources from time to time.

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All in the Corporate Family: Privilege and Co-representation Issues for In-house Lawyers

By Susan Hackett
Senior Vice President and General Counsel
Association of Corporate Counsel (ACC)

Martine Turcotte is a very happy lady—at least for a while. She recently won a decision for her client, BCE—the Canadian telecommunications giant—in a US federal court in a case that raised questions (and the specter of unpleasant results) about what many of us do on a daily basis without a lot of thought. Martine's experience provides a caution to us all—don't provide legal advice to subsidiaries without safeguards in place.

Many ACC members work in companies that have partially or wholly-owned parents, subsidiaries or affiliates—call them corporate family members. Many times, and certainly when the entities fully share the same ultimate ownership, in-house counsel provide advice for entities across the family (and their employer client's "borders"), in order to ensure that appropriate policies and practices are adopted and followed by each of the entities. It's in each of the entire family's interests for other members of the family to stay out of trouble (avoiding reputational run-off) at least, and at best to be properly coordinated when they share a variety of common interests: the same regulators, suppliers, customers, industry partners, investors, and so on. And for the most part, this approach works very well. Indeed, we all know the repercussions that would follow a failure in a related entity that the parent or other corporate family members knew about but "ignored": the entire family of brands would be tarnished and the entire entity group pilloried.

But even cross-counseling that works well "for the most part" still has room for the exceptions. Martine's company, BCE, has been engaged in a grueling battle before the Delaware courts for more than five years litigating with former US subsidiaries and their creditors regarding BCE's decision to stop financing the operations of one of its struggling former subs, Teleglobe. The two sides haven't gotten to the meat of the underlying matter yet. They're still arguing over privilege claims stemming from whether client services provided by BCE in-house lawyers to Teleglobe (when it was a sub) entitle Teleglobe to see BCE privileged communications and work product that would otherwise be protected from a hostile party's discovery demands.

The disputed material pertains to BCE's inside and outside legal advice to the client regarding its decision to pull their financing, including presentations by BCE's chief legal officer—Martine Turcotte—to the board and opinions from outside law firms, all discussing ramifications of the company's decisions on the defensibility of the kind of litigation it now faces. BCE claims that these events occurred after they severed joint representation of the sub; Teleglobe claims otherwise, arguing it has the right to see everything that passed through BCE's in-house law department because in-house lawyers, at one time, had provided Teleglobe with legal advice on the financial commitments, meaning the subsidiaries share the legal privilege.

When Martine approached ACC and asked for our opinion and support, we thought the issue was one that deserved attention; after reviewing the facts and the rules, we decided to file amicus rather than risk allowing the lower court's decisions in favor of Teleglobe's discovery demands to become precedent. Our brief is online at www.acc.com/public/amicus/teleglobe.pdf.

The Court of Appeals agreed with BCE's and ACC's arguments, citing our amicus in a 93-page decision written by Judge Ambrose and handed down July 17, 2007 (www.acc.com/public/amicus/teleglobeopinion.pdf). The court vacated an order from the US District Court in Delaware that would have forced BCE to produce 900 privileged documents, remanding it back for further examination. But they didn't stop there. They all but wrote a handbook on how parents and subsidiaries can steer through the tricky shoals of shared legal advice and keep the parent's privilege intact. Along the way, the court discusses a number of major issues and doctrines, including (1) the attorney-client privilege, (2) the disclosure rule and the requirement that communications be in confidence, (3) privileged information sharing under (a) the co-client or joint-client privilege and (b) the community-of interest or common-interest privilege, (4) the exception for adverse litigation, and (5) the problems that arise when the interests of the clients in the joint representation begin to diverge.

What I'll discuss further below and what the court held is this: There's nothing wrong and a lot right with the concept of in-house counsel providing legal services across corporate family lines. But there are risks and they can be addressed with forethought. Indeed, it is advisable for in-house counsel to have paperwork in place so that the moment parent and subsidiary realize their interests might diverge through spin-off, insolvency or sale, the parent can sever its legal ties and counsel arrangement, and get the subsidiary separate legal counsel. But, as these deals can take months to play out, there's no reason the parent can't then continue to provide the subsidiary with legal advice on other non-related matters without putting its privilege at risk.

Good advice, but of course, when is "the moment" of realization, how can the shared legal services relationship be effectively severed, and what is now to be avoided as conflicted representation, and more?

ACC has created an important article (www.acc.com/public/attyclientpriv/parentsbcprsnattneethics.pdf) that reviews the following issues for your consideration to avoid learning BCE's lesson the hard way:

- When, and to what extent, the representation of wholly or less than wholly-owned entities by a single in-house legal department raises conflicts issues for in-house counsel.
- An overview of attorney-client and work product privilege in the context of multi-entity enterprises.
- Conflicts and privilege issues that can arise once the decision has been made to sell an entity or its assets, or once the sale has been completed.

* Please note that this article was written before the BCE case was decided, and while we're amending it to reflect the impact of this recent decision, it may not be finished with those revisions by the time you read it!

Further, we suggest that you may wish to consider executing a form of a joint defense agreement if you/your legal team provides services to multiple entities in the corporate family. A joint defense agreement allows a counsel for one client to work with another client on matters in which they share common interests, and which they agree do not present conflicts. A joint defense agreement asks the parties to recognize that the lawyer represents one of the clients and the lawyer's loyalties will remain with that

client should common interests at some point diverge. Thus, if a conflict arises in the future, the joint defense relationship is automatically severed. It's a neat little tool that's simple to execute and helps protect both you (professionally), and your client (in case business interests diverge in the future) resulting from your services provided across the corporate family. (www.acc.com/vl/index.php?action=search&full=yes&anytext=Joint+Defens.)

I've borrowed and consolidated some of the themes from our overview of joint representation in a multi-entity environment for your consideration below. Thanks and cudos go to Peter Jarvis of Hinshaw & Culbertson, one of ACC's ethics specialists.

Current-Client Conflicts of Interest in a Multi-Entity Setting

There is no general black letter rule of professional conduct that defines the term "client," and a favorite on the in-house counsel ethics hit parade is always the topic of identifying the client in thorny situations. On the other hand, ABA Model Rule 1.13, Organization as Client, provides a starting point: I've included some of the pertinent sections below:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows, or reasonably should know, that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [regarding certain conflicts of interest]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

According to Comment [1] to this rule, the words "Other constituents" refers to "the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations." Thus, it does not expressly include all ostensibly related entities. On the other hand, "constituents" can certainly include entities that are stockholders in other entities, and the rule more broadly acknowledges that representations may cross single organizational lines.

If, in fact, any non-clients appear to be in doubt about whether the lawyer represents them, the lawyer must explain that she does not. See *id.*; ABA Model Rule 4.3. Whether in a context of entity or individual clients, the test developed in caselaw and in ethics opinions to determine who is and is not a client, depends upon the subjective belief of the putative client and secondarily on proof of facts that it was, at least to some degree, reasonable for the client to hold such a belief.

Stated another way, in-house counsel who actually provides legal advice to multiple entities, or who allows those entities to form the reasonable belief that they are clients, will be held to have multiple clients. Once this conclusion is reached, the attendant duties of loyalty and confiden-

tiality that are part of the representation of any client apply to these intended or unintended entity clients. As a practical matter, the only way for counsel to seek to limit these duties once they attach is first expressly to disclaim them (in writing, if at all possible) and then to make sure that her conduct is consistent with any disclaimers. And the only way to be certain that an attorney-client relationship is at an end is to end it clearly and unambiguously. When a client has reasonable, ongoing expectations of a relationship based on a history of past work, a court may view the relationship as a current-client relationship even though, as of a particular date, the lawyer is not actually doing work for that client.

The Current-Client Conflicts Rule

ABA Model Rule 1.7 is typical of current-client conflicts rules throughout the US and, in fact, has directly been adopted in some form by most United States jurisdictions. It provides in pertinent part that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client; or
- (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) The representation is not prohibited by law;
- (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) Each affected client gives informed consent, confirmed in writing.

The current-client conflicts rules can briefly be summarized in terms of veto power. Although Texas takes a different approach as a matter of state law,¹ the current client always has veto power to prevent the lawyer from acting adversely to that client in all other United States jurisdictions. Indeed, in some situations (which vary from state to state) a lawyer cannot proceed adversely to a current client even with consent. See, e.g., *In re Johnson*, 300 Or. 52, 707 P.2d 573 (1985); Restatement (Third) of the Law: Law Governing Lawyers §128, reporters' note cmt. c (2000) ("Restatement").

It also bears mention that over time, a situation that did not initially present a conflict or require a waiver can develop into one that does. Similarly, a previously valid waiver may have to be repeated if the facts change in material and unanticipated manners. In fact, it is also possible that a situation that began as one in which no conflict existed, or in which only a waiveable conflict existed, can turn into one in which (depending upon the rules of the jurisdiction) continuing representation, even with a waiver, is not permissible. See, e.g., *In re Stauffer*, 327 Or. 44, 956 P.2d 967 (1998); Oregon Formal Op. Nos. 2005-122, 2005-40.

One final point. Legal departments are "firms" within the meaning of the conflicts rules. See, e.g., ABA Model Rule 1.0(c). Unless the situation is one in which screening to avoid conflicts is permitted by applicable law, a cur-

rent-client conflict that is attributable to one in-house lawyer will be attributed to all members of the legal department—the same rule that applies to outside firms. See, e.g., ABA Model Rule 1.10; Restatement §123, cmt. d(i) (2000).

As a general proposition, all representations of multiple "current" clients create at least a theoretical potential for conflicts, but again generally, simultaneous presentation of wholly commonly owned and solvent entities will not usually lead to conflicts problems. When common ownership is less than complete, the potential for current-client conflicts becomes greater—even if one of the entities has a sufficient ownership interest in the other to exercise effective control. When the interests of multiple but related clients are in conflict, conflict waivers must be obtained from disinterested parties in order for the joint legal representation to continue since the in-house lawyer is professionally obligated to its employer-client under the rules previously discussed.

In the situation of an insolvent related entity, it is a matter of black letter law that management and the board of the entity owe their duties to continue to run the entity for the benefit of its creditors, and not for the benefit of its equity owners (as would be the case if the business were solvent). In what are called "deepening insolvency" situations, lawyers and other advisers whose actions increase the degree of insolvency (and therefore of creditor debt) in an attempt to assist the equity owners are at risk of being sued. While there are many unknowns in these situations, it seems relatively clear that in-house counsel of a multi-entity enterprise who wish to act for the benefit of a solvent entity and to the detriment of an insolvent entity, and who appreciate that's what they are doing, act at their potential peril.

So what about the attorney-client privilege—how is it applied in a multi-entity joint relationship? In general, if there is co-representation on an issue, then there is co-attorney-client privilege, which can be enforced against third parties, as well as now-feuding entity family members. (There can be privilege between co-entities sharing a lawyer, as well as separate privilege that is not shared if the entities have their own counsel on non-shared matters, too. They are not mutually exclusive.)

Thus, in Martine's case, the court held that documents created by the in-house lawyers during the joint representation were discoverable to both parties. The dispute arose over documents and communications that took place after BCE claimed it had severed its joint legal relationship on all relevant counseling to its sub. And the court agreed that it is possible to not only sever the joint defense relationship in its entirety on a going-forward basis, but also possible to continue representation on non-disputed matters (say, IP management or environmental compliance) and sever it on disputed matters (relating to financial business decisions, for instance).

Of course, all of the rules pertaining to privilege still apply: it can be waived if confidentiality is broken by any party to the privilege (include the related entity which has received legal services from another family members' lawyer and then divulges the confidential information to a third party), it does not survive the crime fraud rule exceptions, and it does not prevent anyone from investigating facts (since privilege doesn't cover facts, it covers communications and related work product of lawyers). See ACC's resources defining in-house privilege application, waiver, and best practices to ensure that privilege is properly protected: www.acc.com/php/cms/index.php?id=84.

The trickiest part of the equation is figuring out at what point the relationship must be severed in order to be able to claim privilege with lawyers who formerly advised from now-hostile subs: Is the point prior to any "negative" assessments or actions, or upon some form of notice? Or is there some kind of material conflict standard? The answer is not clear, and thus, ACC recommends considering adoption of joint defense agreements between entities sharing legal counsel. This enables the company to notice the affiliates, with whom it's sharing counsel, of what the terms of the sharing are, and also to sever the relationship formally when there is concern that a notice that can be pointed to must be given.

Other Practical Considerations:

- Consider non-representation of some entities: just because you can, doesn't mean you should. Some entities may not be well suited to share your services because of the potential for conflicts or waivers or other issues. It's okay to just say "no" and encourage them to get their own counsel.
- Clearly limit the scope of representation (and do it in writing): don't try to be everybody's lawyer for everything, or you may end up being barred from being anybody's lawyer for anything. If their needs are many, then other family members may need to hire their own in-house counsel or the family may wish to pay for outside representation where it's needed. This is especially important if the affiliate might at some time be sold: where documents are requested by the buyer, it will be easier to limit them to those covered in the scope of representation.
- If you do need to sever the relationship, ABA Model Rules 1.9 and 1.10 allow you to do so, only if you end it prior to any material legal work impacting the severed party's representation has begun. So don't wait to sever a relationship until the matter raising a conflict is too ripe.
- Confirm in writing what will or will not be shared before the representation begins to help ensure that if and when it ends, the files that may be open to both parties are limited to those agreed upon in advance.
- Beware the "sale" of privilege before the sale of assets is considered in a related entity that has shared legal services and is now to be sold. See John Villa's excellent article on this subject at www.acc.com/protected/pubs/docket/nd01/ethics1.php and www.acc.com/vl/index.php?action=search&full=yes&anytext=Villa.
- Watch what goes out the door and act promptly if a mistake is made and something is inadvertently disclosed. Generally, if inadvertently disclosed and quickly remedied, the rules and courts will allow you to put something that shouldn't have been shared back into the privileged "box."

The only thing that's clear is that there is still much that is unclear for the counsel who navigates this twisting path. But the need for, and practicality of co-counseling related entities is so apparent, and the risks attendant to ignoring ill-advised behaviors in related entities is so high, that today's in-house lawyer (and her client) has little choice but to venture forth and provide co-counsel. But, forewarned is forearmed: Exercise caution!

If you have questions or if I can be of service, please feel free to call me at 202.293.4103, x318, or email me at hackett@acc.com. ACC's advocacy and ethics team is waiting to serve you!

1 See Texas RPC 1.6.

Committee Reports

Report from the Advocacy Committee

An ad hoc group of employment lawyers from both law firms and corporations has recently formed to track proposed legislation in the Commonwealth of Massachusetts concerning employment matters. The group's purpose is to provide timely information on proposed bills to the business and legal communities so that companies or individuals can take action should they desire to do so. The lawyers who initiated this effort believe that the business and legal communities need better and more timely information about legislative proposals that will impact the employer-employee relationship. The group is seeking additional volunteers to aid in its efforts. Any ACC members interested in participating in this committee should contact Northeast Chapter board member, Paul Nightingale, chairman of our Advocacy Committee. Paul can be reached at 617.887.3035 or paul.nightingale@hphood.com.

Report from the Diversity Committee

The board of the Northeast Chapter has established a Diversity and Inclusion Committee. The committee is charged with developing initiatives to promote a diverse and inclusive legal workforce. In addition to engaging in general advocacy efforts, the committee will dedicate itself to developing programs in select schools with significant minority populations in urban communities around Boston. The programs will afford opportunities to members to inspire and, over time, mentor students who demonstrate an interest in pursuing a career in the law. If you are interested in getting involved with the work of the committee, please email acc-northeast@comcast.net. Thank you.

Discount on "Think Twice" Insider Trading Videos for ACC-Northeast Members

For more than a decade, the dramatic and memorable Think Twice videos have been the leading training tools for educating employees and executives about insider trading and tipping. Three excellent videos are offered at a 10% discount to ACC-Northeast members. For more details, or to order, contact Brumberg Publications at 617.734.1979.

Upcoming Programs

We have excellent programs coming for fall. While titles and dates are still to be confirmed, following is an overview of what to expect:

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|------------------------------|--|
| September 6 | Back to School: Annual Review of Important Developments for In-house Counsel,
<i>Sponsored by Foley Hoag</i> |
| September 28 | Corporate Counsel in the Crosshairs, <i>hosted by Hasbro, Inc., Providence, RI</i> |
| October 15, 16, or 17 | International Developments
<i>Sponsored by Greenberg Traurig</i> |
| November 15 | Business Skills for Lawyers, Our Annual All-Day Conference
<i>Sponsored by Ropes & Gray and the Boston University Executive Leadership Center</i> |
| December | In-house Focus on China
<i>Sponsored by McDermott Will & Emery</i> |

Details will follow on our chapter website (www.acc.com/chapters/ne.php) and via email.

Litigation in the Digital World: Practical Tips For Corporate Counsel to Deal With the New Ediscovery Rules

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Introduction

While many companies are, at least from time to time, involved in some sort of litigation—whether in the context of a fight about a business contract, a product liability claim, a consumer class action, or one of the countless other kinds of lawsuits that companies may face—most do not relish the notion of slugging out a dispute in court. And who can blame them? Litigation can be an ugly affair, and one that can quickly get expensive in terms of both out-of-pocket costs (e.g., lawyers' fees, court costs, and the like) and, sometimes more importantly, the soft costs (e.g., lost productivity, distraction from regular business activities, etc.) that companies incur, to some degree or another, in virtually every litigation matter.

One reason why litigation can be so expensive is the discovery process. In any given case, litigants are required by the applicable procedural rules to make witnesses available for depositions, to answer written questions or “interrogatories,” and to produce often voluminous amounts of documents that are, or might be, relevant to some issue in dispute.

Most businesses operate in a digital environment, and the ubiquitous transmittal and storage of emails, spreadsheets, documents, slide presentations, and other forms of electronically stored information (“ESI”) has created a burden for companies when searching for, reviewing (internally and with outside counsel) and producing ESI. In 2006, the federal rules of civil procedure were amended to expressly address parties' obligations concerning the discovery of ESI, but many businesses are still struggling to get a handle on how best to deal with ESI in the litigation context. As a practical matter, the new e-discovery rules require a broader understanding—by a company's executives, counsel and employees—of the types of ESI created on a day-to-day basis, and the information technology available to the company at any given time. What follows are some practical suggestions for

ways that corporate counsel can deal with the rules and better manage ESI and the litigation-related costs associated with it.

Managing ESI-Related Discovery Issues: Awareness Is Key

First and foremost, awareness is key! Be sure to understand the different kinds of ESI your company generates. Equally importantly, be sure that your company's employees understand the potential litigation-related significance of the ESI they create. Educating your employees about certain basic concepts can help to avoid many discovery problems. For example:

- **Email:** Do your employees understand that writing and sending an email creates a permanent record that will exist in your company's IT system and in the IT system of all recipients? Do they realize that the tone and the content of what they write and send (often all too quickly and without much thought) may be subject to scrutiny by a judge or a jury in the event of a dispute?
- **Voice mail:** In recent times, many firms and businesses have integrated their IT and telephone systems. In addition to emails and other electronic documents, digital voice recordings are becoming much more commonplace and thus the fodder for many discovery requests. Does your company's phone system provide for digital voice messages? If so, do company employees understand that when they leave a message they may be creating an electronically stored copy of the message in the recipient's IT system, and that such ESI may be subject to discovery? They should be aware of this. And they also should know that the content and tone of the messages they create could someday be replayed in a courtroom.
- **Word documents:** MS Word (and comparable) documents are often sent as attachments to email messages. Like emails, they are stored on and retrievable from IT systems. Educate your employees: do they know that such documents often contain hidden “metadata” (i.e., an electronic record of changes made to the document, when they were made, etc.)? Such metadata can be very useful to liti-

gators in determining who drafted what, who made changes, and when. Even where a document is not attached to an email, the email may reference the existence of the document (or show an icon for the document) and that may open the door to further ESI discovery. Does your company have a policy about transmitting or retaining drafts of documents? Perhaps it should.

- **Other ESI:** Educate your employees so that they are at least generally aware of the other types of ESI that they generate and maintain. PFD and TIFF files, and any other electronic images of documents, information stored on PDAs, Outlook calendars, contact lists, Excel documents, Power Point slides, digital photographs, search criteria, internet site visit history information—the list of potentially discoverable ESI goes on and on. Basic awareness that such items are potentially discoverable can lead to a meaningful reduction of ESI-related discovery issues.

Practical Considerations Concerning ESI

Managing the different—and sometimes competing—burdens associated with ESI is no easy task. Here are a few practical suggestions to consider:

- **Assign Control.** In addition to the federal (and similar) state e-discovery rules, various statutes and regulations (Sarbanes-Oxley, OSHA, the Fair Labor Standards Act, and certain tax regulations, to name just a few) also can impact the preservation and discovery of ESI. Given the potential interactivity and complexities associated with these various rules and laws, and in light of the fast pace at which applicable technology changes, it may be wise to charge one person with the responsibility for overseeing your company's document control program. This person should of course be facile with the applicable rules and the types of ESI your company generates. And, this person likely will be subject to deposition discovery at some point, so that he or she also should be someone who can be relied upon to testify in an articulate fashion and who will otherwise make a good appearance as a witness.
- **Define A Strategy.** Think ahead of time, and develop at least a general strategy for dealing with the preservation, control, location and review of ESI. Try to anticipate the circumstances under which your company may need expert assistance, and identify a few appropriate experts upon whom you can rely in the event of a crisis. There are

numerous vendors who specialize in document management, providing services ranging from basic duplication and storage to sophisticated software systems that are designed to make it easier for your company to comply with applicable legal hold requirements. Investing in such services up front may help to avoid greater expense over time.

- **Preservation.** Many companies find themselves in hot water because they fail to take reasonable steps to preserve required information. Have a standard “legal hold” memorandum (or email) that can be tailored to meet particular preservation requirements. And be sure that your legal hold notices are sent to all employees who generate, receive, store or otherwise control potentially discoverable ESI.
- **Document/ESI Retention Program.** Many companies do not have any document retention policy. Others have one, but don't adhere to it consistently or at all. In the digital discovery world, a comprehensive document/ESI management and retention policy makes good business sense, and can help to avoid discovery headaches if it is consistently followed. In order to be most effective, such policies should be reviewed and amended from time to time to remain current with applicable legal hold requirements and IT capabilities.
- **Stay Informed.** It bears repeating: both the law and the applicable technologies are evolving rapidly. Counsel responsible for ESI are well advised to keep abreast of the changes that may impact your company in litigation.

These are just some of the practical suggestions company counsel may wish to consider. There are, of course, numerous variations on these themes, and what works well for one company may be less effective for another. When in doubt, consult with your litigation counsel or other experts.

Mark D. Cahill is the Chair of Choate's Litigation Department and a Partner in the Insurance & Reinsurance and Major Commercial Litigation Groups. Mark has substantial experience in the areas of insurance coverage, bad faith, extra-contractual claims and reinsurance, and he is a frequent speaker on various insurance-related issues. He represents public and private companies, and venture capital and private equity firms in complex contract, intellectual property, class action and financial litigation.

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Welcome New Members

We wish to welcome the following new members who have joined our chapter recently:

Kamran Bajwa, EFG-Hermes

Kyle Bettigole, Sapien Corporation

Keith Bilezerian, Covidien

Martha Born, Biogen Idec Inc.

Amy B. Clark, Watts Water Technologies, Inc.

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Lynn Toney Collins, Blue Cross & Blue Shield of Massachusetts, Inc.

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Cheryl A. Sessions, New Hampshire Community Loan Fund, Inc.