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ACC's CLO THINKTANK EXECUTIVE REPORT

TOPIC: "STEMMING THE TIDE OF PRIVILEGE EROSION"

This Executive Report provides an overview of discussion results from ACC's CLO ThinkTank session titled "Stemming the Tide of Privilege Erosion," held on September 14 in Pentagon City, Virginia. ACC's CLO ThinkTank sessions are designed to provide a forum for CLOs who wish to exert greater leadership at the bar, in the courts, and in the halls of government on emerging issues of greatest concern. Below is summary information on key topics, discussion point highlights, and ideas on possible action items identified by these CLO thought leaders.

ThinkTank participants included the following Fortune 500 company thought leaders:

- Tom Dale, Vice President and General Counsel, Rolls-Royce North America
- Reggie Hedgebeth, General Counsel, Circuit City Stores, Incorporated
- Muzette Hill, ACC Board Member & Incoming Advocacy Committee Chair, Counsel, Ford Motor Credit Corporation
- Ann Kappler, Executive Vice President and General Counsel, Fannie Mae
- Stasia Kelly, Executive Vice President and General Counsel, MCI Communications
- Linda Madrid, Managing Director, General Counsel and Corporate Secretary, CarrAmerica Realty Corporation
- Dean Manson, Vice President and General Counsel, Hughes Network Systems, Incorporated
- Logan Robinson, Vice President and General Counsel, Delphi Corporation

KEY TOPICS

Below is a list of key discussion topics covered during this CLO ThinkTank session:

- **Education on Privilege: Internal & External Stakeholders, Regulators, Prosecutors, Public**
- **Limited Waiver Creates Predicament**
- **Impact of Erosion on In-House Practice**
- **Changing Relationships with Auditors Who Want Access to Privileged Material**
- **Counseling the Board**
- **Privilege as Part of Corporate Governance Initiatives**
- **Disconnect Between DOJ Impressions and Corporate Experience**
- **Privilege in the European Context/Outside the United States**
- **Sarbanes-Oxley 307 and Indemnification Issues**
- **Update on ACC Initiatives**



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KEY TAKEAWAYS

Thought leaders participating in this session described a number of ideas and practices. Listed below are the top five key themes and takeaways. Ideas on additional issues are described in the Discussion Highlights section below, and thoughts on action items are summarized in the final section on Conclusions & Proposed Action Items.

- There is a need for education on privilege—both in the in-house context in explaining what privilege is and the proper use of privilege to clients and in-house lawyers, and also with regard to outside constituencies, including concise statements on why privilege is important to corporations and in the public’s interest to protect.
- A disconnect exists between what DOJ perceives is occurring with regard to waiver requests and what corporations are experiencing.
- Governmental practices resulting in erosion of privilege are changing the way in-house lawyers practice, including driving lawyers to resort to inefficient methods of communication and resulting in a chill on communications and quick, remedial responses.
- The concept of limited waiver creates a predicament, including slippery-slope assertions and questions on when corporations might ever be able to say no to a request for privileged documents.
- Questions regarding privilege and the need for privileged documents in the audit context are becoming increasingly common and changing the ways in-house lawyers interact with auditors and even internal controls managers.

DISCUSSION HIGHLIGHTS

NEED FOR EDUCATION ON PRIVILEGE: INTERNAL & EXTERNAL STAKEHOLDERS, REGULATORS, PROSECUTORS, PUBLIC

- Education/ Examples of Client Misconceptions: Clients don’t fully understand what the privilege is and when it applies; client misconceptions about privilege attaching to emails or other documents prepared by clients simply by virtue of having an in-house lawyer cc’d or by placing a privileged legend on the document. Not ‘overdoing’ use of privilege legend when not warranted was discussed-- regulators become suspicious and it confuses legitimate claims of privilege when privilege assertions are over-expansive and all-inclusive. Participants discussed ideas on the best way to educate clients on this subject, and balancing the need to educate clients with the concern regarding deterring clients from coming to the legal department. A suggestion was made regarding developing client education materials in the context of describing what types of documents are discoverable generally.
- Education/ In-House Lawyers: Participants discussed concerns regarding the ramifications of over-use of privilege and the potential for dilution effect. Some participants described training and rules for in-house lawyers on privilege, including on when to mark documents privileged or as attorney work product. Others may not have education materials on this subject and expressed an interest in having them. Issues relating to the corporate “Miranda” statement and whether practices include advising of an individual’s right to counsel, providing written Miranda statements, and/or requests for signatures acknowledging receipt of the statement were discussed.
- Education/ Press: The notion that there is so much press on corporate failings and issues surrounding handing over documents, but very little press on the benefits of privilege was discussed. Participants identified exploring initiatives with the media to help restore public opinion in general or developing a short education piece as possible initiatives in this area.



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- Education/ Legislature: Participants identified a need for a different type of education materials to take to Capitol Hill articulating the benefits of privilege and need for protections, as well as the need to do the same at the state legislative level.
- Education/ Elevator Speech: Participants suggested developing a short statement communicating why it is important to protect privilege in the in-house context and that succinctly and in simple English explains the public policy interest.
- Education/ Ideas on Initiatives to Address: Suggestions for follow-up include developing simple, tailored education materials or guides for clients, in-house lawyers, insurance companies, the press, and legislators. In addition, developing a short, easy-to-grasp, persuasive 'elevator speech' stating why it is important to respect and protect the privilege was identified as another suggested initiative going forward.

LIMITED WAIVER CREATES PREDICAMENT

- Limited Waiver/ Issues: A number of issues were identified regarding ramifications of a limited waiver as a potential legislative fix:
 - Slippery slope/floodgates may open- many agencies may want access to otherwise privileged documents to make their regulatory enforcement cases;
 - Difficulty in asserting a position against providing otherwise privileged documents to agencies: what would be the defense to a demand for the documents?
 - Practical issues regarding the enforceability of limited waiver and potential exposure for third party suits; will third party plaintiffs take "no" for an answer?
 - Outside counsel (especially those in the settlement bar or in settlement mode) have a different perspective on the limited waiver issue than in-house counsel and especially CLOs.
 - Differing perspectives among public and private companies regarding the value of limited waiver could present challenges to supporting the limited waiver. If codified, the practice of seeking limited waivers may greatly expand, and companies that haven't previously experienced SEC or other pressure to waive or seen waiver as a problem may face new or increasing pressure to waive if limited waiver becomes a standard practice among regulatory agencies.
 - Question of what gets produced under a limited waiver- subject matter waiver/selective waiver

IMPACTS OF PRIVILEGE EROSION ON IN-HOUSE PRACTICE

- Impacts on Practice/ Changes in Communication Methods: Participants described huge changes in the way in-house lawyers practice. Discovery concerns are driving in-house lawyers to use inefficient means of communication (such as phone conversations and scheduling in-person meetings rather than providing written advice). These changes in communication methods present added challenges for global companies, with individuals in multiple locations and across time zones, etc.
- Impacts on Practice/ Interactions with Outside Counsel: Interactions with outside counsel are also changing, including practices such as having outside lawyers send written advice via in-person lawyer courier (rather than fax, email, overnight express), and going to outside counsel offices to receive legal advice.



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- Impacts on Practice/ Chilling Effect: Participants expressed concerns that the erosion of privilege is driving practices that aren't constructive and may also having a chilling effect on legal advice, most of which is provided in a preventive way to keep clients out of trouble (rather than trying to protect liability from failures).
- Impacts on Practice/ Lawyers as Witnesses: Participants discussed the notion that there may come a point where in-house counsel may be the only witness to get information that was exchanged.
- Impacts on Practice/ Growing Role of Chief Risk Officer: The growing role of CROs in overseeing the business and operational issues also raises issues. Participants discussed issues of in-house lawyers negotiating with CROs regarding what information to track, how to characterize it, and who gets access.
- Impacts on Practice/ Separate Compliance Investigations: Some companies have a separate group that conducts compliance investigations, and this can result in a situation where every internal investigation is non-privileged unless lawyers affirmatively assert the privilege.

CHANGING RELATIONSHIP WITH AUDITORS

- Impacts on Practice/ Changing Relationships with Auditors: Auditors are asking for more information on unasserted claims and on pending cases (e.g., litigation reserves), and companies are experiencing significant challenges in agreeing to auditor engagement letters. Participants discussed the topic of the rapidly changing relationship between auditors and in-house lawyers and several negative results.
- Impacts on Practice/ Ideas and Initiatives:
 - Pursue the extension of privilege in the auditor context (an initiative that is currently underway). This initiative involves efforts of a group of CLOs in NYC who have developed a proposal that ACC's Board has endorsed that combines proposed legislative and PCAOB regulatory changes to extend privilege to cover communications with auditors so that providing information in the audit context is not considered to be waiver. The GCs of the Big 4 accounting firms have signed off on this concept.
 - Explore the possibility of developing protocols and standards that would protect auditors and lawyers who make good faith efforts to navigate this issue.

BOARD'S ROLE

- Board's Role/ Experience: Participants described situations where there may be two sets of lawyers involved--one for the company and one for the Board—and noted the dynamics of the relationships among the lawyers. In addition, an experience where a special committee of Board was appointed to make determinations on waiver because of conflicts between outside and in-house advice on whether to waive privilege was also discussed.

PRIVILEGE AS PART OF CORPORATE GOVERNANCE

- Privilege as Part of Corp Governance/ Concept: The group discussed a range of public policy assertions supporting privilege, including concepts of solid and correct invocation of privilege benefiting companies and helping to foster open preventive law discussions between in-house lawyers and their clients, and the need and value of privilege in connection with preparing a legitimate defense. In addition, participants discussed the social benefits of privilege and the idea of not wanting to chill requests for legal advice. Also discussed were concepts regarding a connection between privilege and good governance: ideas relating to developing proactive measures or guidelines on the hows/whens of situations in which privilege protections may be used as part of good corporate governance, and on developing a description of why privilege is important to the business and how it helps protect shareholder value and the ability of the Board to adequately oversee the corporation's operations.



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DISCONNECT BETWEEN DOJ IMPRESSIONS AND CORPORATE EXPERIENCE

- Disconnect with DOJ/ Concept: DOJ says that waivers aren't being demanded; however, experiences suggest otherwise. There is a disconnect between what DOJ says its internal waiver process is for AGs and AUSAs (e.g., seek permission from supervisor) and what is happening in the field. What the DOJ refers to as the company's logical choice to waive is viewed by the company as the government's ultimatum to 'waive or die.'
- Disconnect with DOJ/ Scope of Requests: DOJ is asking for real time advice, strategic advice on how to handle the investigation, work product and privileged materials in control or possession, and investigation reports—broad scope.
- Disconnect/ Ideas on Initiatives: Suggestions on initiatives to address this disconnect and seek relief follow:
 - Approach Jim Comey's replacement at DOJ to commence dialogue with detailed examples (without attribution) of what is happening in practice.
 - Approach former DOJ lawyers who are now in corporate positions to determine interest in joining efforts to quash waiver requests pursuant to the Thompson memo.

PRIVILEGE IN THE EUROPEAN CONTEXT

- European Privilege/ Examples & Impacts on Other Jurisdictions: For civil litigation in Spain, discovery is very different- no right to documents, and the client cannot waive. In the criminal context in Europe, practices include dawn raids by government authorities with the first stop often being the General Counsel's office. Participants addressed the issue of what happens when the government takes everything from the GC's office- especially for global companies with global law departments where European GC's office may contain information/ intranets that is presumed to be protected in other jurisdictions. Participants noted the need for attention regarding offices in Europe so that they are not used to reach material in other jurisdictions (concern that subject matter waiver would be asserted in other jurisdictions). The group also noted the differing treatment of privilege with regard to outside counsel, and the potential impacts that can occur-- such as driving legal advice and services to outside counsel.

SARBANES-OXLEY 307 & INDEMNIFICATION ISSUES

- Sarbox 307/ Requests for Indemnification: Participants described issues involving in-house lawyer requests for indemnification for role and practices relating to Sarbox 307. They also queried the benefits of having a QLCC and impacts on the role of the CLO. Participants also discussed the fact that outside counsel is also likely have their own Sarbox 307 procedures (which often include bringing issues to the firm's ethics committee), and noted questions regarding the timing of when the CLO may hear about issues that are first identified by outside counsel (e.g., do they need to complete their 2-month firm review before telling the CLO or are other procedures negotiated and put in place?).

UPDATE ON ACC INITIATIVES AND OPTIONS

- ACC Initiatives/ Sentencing Guidelines: ACC helped create a coalition of 10 entities, and is one of four core groups working this issue. The coalition is poised to become more active on the Hill on the issue of the waiver language in the commentary on cooperation in the sentencing guidelines. Questions for consideration include:
 - Should action be at the congressional level before first trying the issue in the courts?



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- Once in the legislative arena, what should ACC ask for (e.g., modification to the US Sentencing Commission, SEC or DOJ waiver provisions, more general waiver protection, more specific action with regard to auditor/PCAOB initiatives)?
- Who else should join ACC in meeting with the legislature (Chamber, Business Round Table, National Association of Manufacturers, etc.)?; previous alliances with ACLU were helpful- ACLU was interested in waiver from perspective of individual rights when corporations waive privilege and individual rights may be in jeopardy plus concept of being at risk for losing a job if the employee doesn't cooperate. Making privilege a CLIENT issue, and not a lawyer issue.
- ACC Initiatives/ Extension of Privilege to Auditors: This initiative is described above, and relates to the proposal to extend attorney-client privilege protection to auditors. ACC's Board has endorsed the proposal which has also been endorsed by the GC's of the Big 4 accounting firms.
- ACC Initiatives/ ABA Task Force: ACC has played an active role in task force initiatives regarding privilege, particularly with regard to ABA House Recommendation 111 and resolutions recognizing the value of maintaining privilege.
- ACC Initiatives/ Educating the Bar: ACC is developing resources to help educate the bar on core aspects of privilege and its proper use, especially in light of the narrow scope of privilege protections.
- ACC Initiatives/ Media: ACC is exploring opportunities to obtain coverage on these issues and to help restore public opinion regarding corporations and their counsel; elevator speeches, etc..
- ACC Initiatives/Questions regarding policy statement on privilege: Should ACC develop a policy statement on privilege, and what should it say? Relatedly, who should be regulating privilege- should this be removed from the discretion of the profession and made a legislative issue or should it remain an evidentiary notion regulated by the courts?

CONCLUSION & PROPOSED ACTION ITEMS

The session ended with the CLOs confirming interest in the ACC CLO ThinkTank session format as a useful forum for discussions on issues of interest and importance to CLOs. Ideas on possible action items to prioritize and select for follow-up include:

- **Sentencing Guidelines Language:** Seek action to address application note in guidelines regarding waiver of privilege for cooperation. As part of this, also try to reverse the presumption that waivers need to be granted- notion that simply eliminating the language in the application note may not accomplish this and that affirmative language may be needed.
- **State and Federal Judiciary:** Determine whether there are individuals who previously served as judges, or are current judges who have been thoughtful on corporate issues, and explore possibility of contacting them to serve as possible spokespersons on this issue (i.e., Judge Judith Kaye or retired Justice Veasey).
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- **Educational Packets for outside entities:** Develop educational materials to educate a number of constituencies who have an interest in the privilege discussion- may include insurance companies, fiduciaries, Congress, press.
- **In-House Educational Tools:** Develop educational materials describing state of privilege to business clients (perhaps in the context of discovery) and to in-house lawyers. Also develop an 'elevator speech' to describe in a clear and crisp fashion the corporate interest in privilege and why it is important.



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- **Pursue Judiciary:** Encourage some pursuit of judiciary (acknowledgement of challenge to find right case and right facts). Find out if judicial conferences can be persuaded to get more involved by showing that their standards of practice and protections are being managed improperly by those who would destroy them.
- **DOJ Disconnect:** Approach senior justice department offices with more detailed information (without attribution) on experiences substantiating the reality of pressure to waive; consider approaching ex-DOJ lawyers who are now in-house regarding speaking out against current practices in application of Thompson memo; consider proposing a corporate re-draft of the Thompson Memorandum.
- **Auditors:** Pursue initiatives to extend privilege to auditors; consider developing protocols or standards regarding audit engagements and scope of requests.
- **Limited Waiver:** Cautiously engage in dialogue on limited waiver; practical concerns include: Is the adoption of limited waiver “protections” against third parties worth the possibility that privilege will no longer meaningfully exist in the governmental context? Is the codification of waiver the first step toward recognizing that privilege should not apply in the corporate context, or is it the best we can do to protect at least some confidences against the efforts of third parties who wish to gain access?