



Establishing Procedures for Internal Investigations and Litigation Holds

Establishing Procedures for Internal Investigations and Litigation Holds

ROBERTO SCALESE: Good afternoon, the Association of Corporate Council and SmartPros Legal and Ethics welcome you to today's webcast, "Establishing Procedures for Internal Investigations and Litigation Holds."

[The instructions provided here were intended for attendees of the live webcast when it was originally broadcast. You may submit questions and comments regarding the content of this course using the Questions and Comments link on the left side of your screen below the video.]

Our presentation today will be moderated by Miriam Smolen, associate general counsel for Fannie Mae. Now, I'm going to turn this program over to Miriam. Take it away.

MIRIAM SMOLEN: Thank you, Roberto. Welcome to the second presentation in the Litigation Masters Series sponsored by the ACC Litigation Committee and Lex Mundi. I'm Miriam Smolen, chair of the Litigation Committee for the Association of Corporate Counsel, and this Litigation Masters Series is a four-part series focusing on areas of importance to the in-house litigation community. Each presentation focuses on two key litigation-related issues, and we hope that the in-depth knowledge that our presenters bring makes a difference in your day-to-day practice.

I want to give a little advertisement for the two [other] webcasts that are coming up in our series. The next one is on November 12 and it's about D&O [directors and officers] insurance and then also disclosure issues. The final broadcast in our series will be on December 10, and it will be on arbitration and global litigation issues.

Also, you can access our first webcast, which was on litigation assessments and maximizing strategic relationships with outside counsel, on the ACC Web site. We hope you will join us for all four in our series.

I want to give many thanks to Lex Mundi and its Litigation, Arbitration, and Dispute Resolution Practice Group for their generous sponsorship of this series. Lex Mundi has 160 law firms worldwide and has a longstanding relationship with the ACC, providing legal expertise for the ACC members for many years. They invite you to stop by their booth—which is number 404 in the exhibit hall—if you are going to be at the upcoming annual conference in Boston.

[The CLE code and instructions provided here were for use only by attendees of the live webcast. To obtain your CLE certificate for this archived webcast when you have finished listening to it, click the EXIT COURSE button at the top right of the screen to return to your My Courses page and then click the certificate link or icon beneath the course listing. In the pop-up window, select the desired jurisdiction from the drop-down list and enter any requested data, such as your bar number and the CLE code that popped up while you were playing the archived webcast. (This code is required for New York and Ohio attorneys only.)]

MIRIAM SMOLEN: Let me go ahead and introduce the speakers for the first part of this presentation, Barbara Dawson and myself. Barb Dawson is a partner in the Phoenix office of Snell & Wilmer, and she is the chair-elect of Lex Mundi. Her practice concentrates in the areas of complex commercial litigation, financial institution matters, and international matters. Her areas of focus include tax disputes, business torts, class actions, and ADR [alternative dispute resolution]. She has plenty of experience in the corporate compliance area also.

As Roberto mentioned, my name is Miriam Smolen. I'm an associate general counsel in the litigation group for Fannie Mae. I manage outside commercial disputes and fraud litigations, and I also provide antifraud expertise to the company in their loss mitigation and risk assessment work. Prior to joining Fannie Mae, I was an assistant U.S. attorney in D.C. prosecuting complex financial frauds.

Well, today we're going to talk about internal investigations to start. And really, the most common advice you always hear about internal investigations is that you need to be prepared before anything ever comes to light. In my discussions with other in-house counsel, often the issue comes up: What does that mean? How can you prepare for an event that you don't know what the issue will be, what the scope will be, how many resources you're going to need? And then, of course, also, if you don't know what the issue is or how important it will be, how can you get the resources allocated to you to be prepared to do that?

Well, the answer is, happily, that much of the work that you would do to prepare for an internal investigation are efforts that you and the company have probably already put in place for general compliance and document retention and litigation hold efforts. And so, the goal here is to simply take the time and think through how you use the policies and procedures and counsel relationships that you already have, [and] how you will use them when it comes times to respond to an issue that needs an investigation.

The goal, of course, of properly performed investigations [is] to determine whether the issue that has arisen has substance, whether it's credible, who was involved, what level of wrongdoing was the involvement, what the company's proper responses should be, what the risks are with failing to respond, and then also how to minimize the regulatory, civil, criminal and reputational risks that can emerge as a result of a particular problem. And then, of course, investigations also give very important guidance to the company as to what preventative measures need to be put in place to prevent that type of issue or like issues from arising.

So, let's go directly to what some of the preliminary steps are. Obviously, having the right policies and procedures in place is key. A document retention policy is vitally important, and also having a litigation hold policy is vitally important, because when that issue comes up, one of the very first steps you're going to take is to issue some type of document hold. And you want to know that the procedures are in place so that your retention and collection and then ultimately destruction processes can be viewed as in accordance with those procedures and can be documented as such.

With regard to a corporate investigations policy, you may not have anything that has that name—there's certainly no requirement that there be a policy with that name—but what you're looking for [is] information out to the employees of the company about several things. One of them is to report problems, right? This can come through a hotline. This can come through, perhaps, a code of ethics, but that there be a public policy out there saying that the company cares about problems and they want employees to report them. And another piece of this, of course, is information out there in some form of policy procedure that says, "If there is an issue, if there is an investigation, we expect our employees to cooperate," that that's already been out there and public—information that the employees have and know are expectations of their jobs, so that it is in place when an issue arises. And then also, that there is some type of nonretaliation policy. I think that's what we mean by "policy for whistle-blowers"—that people are encouraged to come forward because they know it's part of their code of conduct and they also know that they will not be retaliated against.

Now, [there are] two other areas that are really key for your thinking before anything has happened. The first is: Who is your decision-making team? The key is to ensure that when something happens, you know who the key players are going to be and that they are the right people. If your compliance group is typically the one that conducts investigations but they are outside of legal (and therefore the privilege won't apply), you will have wanted to already think through, "OK, if an issue arises that's really important that counsel be involved, will it be somebody inside the counsel's office that's going to direct this investigation?" You want to make sure that your investigators and the people involved in making the decisions around the investigation will have independence from whatever the issues are. So, if you have particular business people that may be on a core decision-making team and an issue arises, you need to be prepared to look at the issue, look at your core team and say, "Is there any overlap here? We don't want there to be any appearance of a conflict of interest—that's somebody in a supervisory business relationship is also involved in an investigation in his or her unit or general area of business."

Another area that's really worth thinking through in advance is: What are your options for conducting investigations? And the answer obviously doesn't need to be the same for every investigation. Is it nonlawyers? Typically, it is lawyers that conduct the investigation, because, to the extent that we can protect the thoughtful process that goes on in an investigation, we do want it to be protected by privilege. But is it inside or outside counsel? We see more often than not, I think, that outside counsel is brought in, but I think those are really for probably the bigger or the more public investigations. Countless investigations are conducted by inside counsel and there's no reason why they shouldn't be, as long as you have the issue of independence having been confirmed and the fact that your inside counsel will have sufficient resources in order to do it properly.

The other thing that you want to think about, though, in advance is that if you think that you might want to use outside counsel, that you have the right one ready to go. It may be a firm that you have a relationship with, but do they have the right type of expertise to do an investigation? If the firm that you normally do most of your business with—or group of firms—on your business side doesn't have that type of expertise, it's very appropriate in advance to be thinking of: What is another firm out there that we could call in for these special circumstances? And let's do the conflicts check now, in advance, instead of when there's an emergency situation.

The final point I would note to you is to remember about your company's insurance coverage. While your company's insurance risk manager may not be part of the investigative response team, that person should absolutely be on the list to contact very soon after an investigation may be required. You just want to make sure that you don't miss any potential coverage that you may have because you missed the very simple steps of notification to the insurance company. So, I wanted to make sure that we're all on alert for that step.

All right, so, when do internal investigations come up? The source of tips can come from a variety of sources. I think we've all had experience with the different places that we learn information. Most companies now have in place some type of hotline or tip line, usually anonymous. Customers, employees, suppliers, auditors; you can get information from any of these sources. The goal is to make sure that there is a vehicle for them to provide the information.

Government tips: Now, unfortunately, I don't know that these even properly fall under the word "tips," since often the way you find out about this is because your company is the happy beneficiary of a document request or a subpoena. But even if that's already begun, you need to make sure that you want to get on top of what the government is looking at to make sure that you understand what it is that might be exposed that you're now finding out about because of the government contact.

Not every tip requires an investigation, and not every investigation has to be of the same size or level of intensity. The things to think about are: What is the nature of the allegation? What's the level of credibility of every tip, right? Not every tip is credible. What are the potential consequences if the allegation is accurate? What are the issues around time? How long will an investigation take? [You also have to consider] the complexity, the cost of doing it, and then, of course, the same analysis about the cost and the consequences of not doing it.

Barb, I wanted to turn to you and ask you your thoughts on how the source of the tip or the way you find out about the problem impacts how an investigation is conducted.

BARBARA DAWSON: Thank you, Miriam. Probably two points come to mind with respect to the source. One would tell you a little bit about whether there is anything in the motivation that you should be concerned about. And the second thing would relate to who your audience will be.

With respect to the first and the motivation, it would be very different if your source is an employee. That would give you more information about whether that individual might have some self-interest in play or not. And it would be very different if the source or the starting point was your internal audit team. That would tell you certain things versus

outside regulators or third parties who have interests. That all ties, too, to who your ultimate audience is, because how you want to go about all of this ultimately is to make sure that all that you're doing provides you with a complete investigation; an investigation that will satisfy the needs of any of the audiences that you might be dealing with, whether that be regulators, auditors, shareholders, or others.

MIRIAM SMOLEN: Great. Let's move on to the immediate steps that an investigation team would take upon discovery of a problem. Obviously, the first one is to preserve the evidence in place so that you have an opportunity to assess what is going on and the evidence will still be there when you need to go and look at it. And documents: It's the litigation hold. It's to make sure that regular deletion policies would be suspended for those areas where you think that there might be important evidence. At this point in the law of e-discovery, retaining backup tapes is not automatically required, but it is something that you need to think about and to weigh whether or not the evidence that's there will be relevant to your investigation and is not available elsewhere, and is reasonably accessible under the terms of how it's now defined in the case law.

At this point, it is always better to issue a broader litigation hold than a narrower one, but I would caution that you can't just leave it at that. This has to be an active and iterative process, where once you have scoped the topic, you say, "OK, our litigation hold is too broad. We can justifiably go back and narrow it." Because you want to continue to maintain the company's regular document retention policies for the vast universe of documents which are not going to be concerned with this particular investigation.

Now, if you have an insider who might be culpable and an insider who might be capable of deleting or destroying documents or other evidence, and you're concerned that that person possibly might take that action if they're notified that this issue has come to light through, let's say, a litigation document retention notice going out, you may want to make some secret efforts to retain that person's documents. [This could be] as simple as going in and simply imaging their whole hard drive. Perhaps it's a little more complicated if they have an office and you want to take a look at what their documents in their office are— their hard copy documents. But do think about whether or not a step as commonplace as issuing a notice is going to cause some kind of destruction of evidence that you would be concerned about.

One of the key steps, obviously, is scoping the problem. Sometimes you're lucky and the allegations are very specific to one person's misconduct or a set of transactions. Often, the allegations are very vague. And just because the allegations are broad does not mean that the investigation has to be this kind of amorphous, broad thing. It is inside counsel's goal—often working with outside counsel—to really try and get enough information up front from the business people about how the business runs in the area in which the allegation has arisen to identify, "OK, this, we think, is the scope of the problem. This is the scope of the timeframe. And this is where we're going to limit our investigation." And that scope needs to be documented up front in the instructions going forth, and then it will dictate what documents are reviewed and who is interviewed.

Now, we've also listed on here the issue of voluntary disclosure. Voluntary disclosure is a topic that obviously could take way more than an hour, but I just wanted to mention it here because it is a key factor to think about up front, because the government, depending on the type of case, will often look harshly upon what they view as a delayed disclosure in the type of matter in which a voluntary disclosure would really be the best way to go. And yet, what they may view as a delayed disclosure, we—inside counsel, the investigators—may view as simply barely enough time to get a handle on the scope of the problem.

Let's jump to collecting evidence. The key point, I would say, here: It's self-evident that documents are a key factor of evidence in internal investigations in corporations, but the point I would emphasize is how important it is to have a good audit trail. And often when you're working very quickly, you think, "Well, I can go back and create it." It is really worth putting the resources on up front to have that audit trail. That audit trail should start from the point at which you put out the litigation hold, when you go and—if there's any physical collection of documents, that there's a very clear record of what was taken, from whom, when, [and] what the folders were.

If it is electronic evidence, the nice thing about electronic evidence is that it leaves its own audit trail, but it's amazing how confusing and complicated it can get if you need to go back a second or third time or if you have overlapping custodians. So, I would just suggest to you to put the energy into ensuring that you have a good audit collection trail. And for many of us who either have in-house discovery tools or we use outside vendors, there's a lot of tools on that application that will allow for an audit trail, and you should involve the manager, if you're using a vendor, to ask them how to best use those tools. Hopefully that will take away some of the work and get you where you need to be.

Interviews: Personal interviews are obviously a key technique. The standard technique is to talk to an employee with at least two people so that one can take notes [and] one can listen. I'm going to let Barb talk about the privilege issues, but it's obviously key that if you're going in as counsel for the company that the employee understands that that is your role, and you are not that employee's private counsel. And sometimes that can be confusing to an employee, especially if the people who walk in the room are an in-house counsel paired with an outside counsel. Often, employees will think, "Well, the outside counsel must be the counsel for the company, but you, I know you, and you also represent me in the company." It's definitely worth it to clear that up and to document that you have given the proper warnings and that the person has indicated that they've understood.

One other factor to think about [is] counsel for employees. Many, many, many companies have indemnification agreements, but probably every single one of those agreements [is] different. It behooves you to know what your company's indemnification agreement provides or requires or is allowed. And you're going to need that answer because often it is much better for the company if the employees—or ex-employees, if they're covered—do not have their own personal counsel. It facilitates your investigation if you can go directly to the employee and not through counsel, but you need to make sure that the information that you're providing is consistent with your indemnification agreement.

[There are] two special categories of employees. What we're calling whistle-blowers sometimes has a negative connotation, but often it's simply people who are the ones who brought up the tip. You don't really know where they're going to end up, if they're going to end up somehow adverse to the company. It's important to get as much information from them as early on as you can, and also to get from them whatever documents that they've collected and hoarded somewhere, if they've done that.

And then, [there are] possible wrongdoers. Obviously, once the investigation has at least become public to the small group that it is going to become public to, probably the wrongdoer is going to know about that. The incentive, I think, is to interview that person as soon as possible, but I would caution you that sometimes you don't get that many shots at the person who you think was culpable, and you may want to wait at least long enough to be able to get information from other witnesses and review some of the important documentation in order to have a substantive and serious conversation with that person.

Let me turn it over to Barb and then we can talk some more about the attorney-client privilege issues.

BARBARA DAWSON: All right, we're going to talk a little bit about lessons learned from *Broadcom*. And when we speak of *Broadcom*, what we are talking about is the case law that came out of the Broadcom investigation relating to options backdating. And we're pleased to tell you that we have the very latest word in this area, as the Ninth Circuit came down with a decision in this case on September 30 [2009]. The decision we'd reference is *U.S. v. Ruehle*, and it's Ninth Circuit decision number 09-50161.

In that decision, it has caused an alarm to be rung within the communities that are working with internal investigations, because the district court decision provided some cautions and a result that ultimately was reversed by the Ninth Circuit, but certainly indicated that lawyers involved in internal investigations had heightened responsibilities and heightened risks when working in this area.

What you had is, at the district court level, a determination that evidence would need to be suppressed that came from Broadcom's outside counsel, and that evidence could not be used against a Broadcom executive—the CFO [chief financial officer]—based upon the fact that that CFO believed that he had an attorney-client privilege with counsel.

The facts of the case are fascinating, and, as Miriam had said early on, you really do need to think through the various relationships. But to tell you just in broad terms, what we get from this case is that there are hazards for counsel and for the company to the extent that you have counsel who is representing individuals, officers and directors, and also the company at the same time. There's the potential for confusion. There's the potential for the individual officers and directors to be able to say that evidence obtained during an internal investigation cannot be turned over to regulators—cannot be used with third parties—because of the attorney-client privilege, and that, indeed, there would at least need to be a written consent for that to happen.

In this case, what the Ninth Circuit ultimately held—and the decision is very well done and is quite in-depth and fascinating—is that in part the wrong legal standard had been used at the district court level, that the burden of proof in establishing the attorney-client privilege was on the individual asserting it—on the CFO—and that he did not have a reasonable expectation that the information that he was providing to counsel in an internal investigation on behalf of the company would be maintained as confidential, in large part because I believe they looked at his sophistication and realized that he knew that the investigation was going to be done in part to satisfy what the auditors needed in order to do their work for the company. So, he knew information would be provided at least to the auditors as the result of what he told the investigative team. So, that undercut his later claim when there was reporting to regulators that he would expect confidentiality.

The bottom line out of this case is that it's well worth considering the roles of the counsel and to absolutely ensure that the Miranda warnings are provided, but to go beyond that and know that warnings alone are not going to save the day if there are overlapping obligations of counsel. It cannot be fixed just with warnings.

What do we take away from that case? I think the first line of the Ninth Circuit decision is instructive as to the general hazards in this area and how critical it is to be very careful in proceeding. The first line says, "We here explore the treacherous path which corporate counsel must tread under the attorney-client privilege when conducting an internal investigation to advise a publicly traded company on its financial disclosure obligations. Indeed it's a complicated area." Next slide.

What we had talked about a bit and would just put on your radar for general considerations as you tick through ethical issues to be addressed when conducting an internal investigation would be, again, the payment of legal expenses. Is it OK to pay the legal expenses of individuals—officers [and] directors? A case-by-case analysis will provide you the answers on that.

If you have more than one set of outside counsel involved, do you want some sort of a joint agreement between them? Again, that's something that should be considered in each situation where there's more than one set of counsel and they potentially are sharing information that, down the road, plaintiffs or others might want to review.

Should you be memorializing interviews, and if so, how? Do you want that in the form of the handwritten notes? Do you want more than one person taking the notes? Probably not. Do you want that in a typed summary, or do you want to keep that in the handwritten notes that would be supported by a variety of documents, but not pulled together in a concise fashion? Again, that will vary depending upon the needs of the investigation. Next slide, please.

Factors that we would consider with respect to the final report would include everything from the cause or the issues that started the investigation to the third-party interests that would be involved, whether that be plaintiffs, regulators, [or] auditors. There are going to be variety of third parties who are interested in that final report. Whether it is a

document-intensive investigation—so documents need to be analyzed and reviewed as a part of a report—or whether it’s something that is not document-intensive and more information needs to be provided in the course of the report based upon oral reports.

What about the witnesses? How specific do you want to be in addressing who the witnesses are? What deliverable do you want and what are the potential consequences? Miriam, I’d ask you, at this point, what does in-house counsel want or need in a final written report?

MIRIAM SMOLEN: The only thing I was going to point out is that what is sufficient for the lawyers may not be sufficient for the business. And part of that reason is simply the way that the two work. And business people now tend to look for presentations in a very similar manner. Often it’s PowerPoint. Often it’s just highlights. And so, when we’re thinking about how we present a conclusion, first of all, we have to be aware that, more likely than not, whatever we present will end up being public, but also business people want something in their hands often. What can we provide them that satisfies them, that ensures that they feel that they’ve gotten sufficient information, but is something that we would be comfortable with if we had to turn it over? And there’s never one set answer to that.

BARBARA DAWSON: I think that’s absolutely right. If we go to the slide that shows the audiences, this is what we always tell our companies to consider, when they’re asking about a final report, is that in most cases all of the people who would ultimately want to see the final report go well beyond just the company or the company and the board. You might have special committees. You might have auditors involved, regulatory bodies, shareholders—in other words, plaintiffs’ lawyers. You might have the press involved. There [is] any number of audiences, and to the extent that any final report is given to one party that would remove the privilege—for example, auditors—and the privilege is, at that point, gone, then the company and the board should keep in mind that that privilege is gone with respect to all the rest of the audiences too, and that report potentially is available to everyone.

MIRIAM SMOLEN: So, let me just remind the audience that we welcome your questions and you should go ahead and forward them via the chat box. But we do have one question that I wanted to ask Barb, and that was if you have some specific recommendations you can make about how you scope a problem; how you scope an issue when it comes up.

BARBARA DAWSON: Absolutely. You clearly can only scope based upon the information you have, and I very much agree with what you said about just because it shows up in an amorphous fashion doesn’t mean that your investigation should follow suit. Again, I think when you think about the source of it and the audience, you want to make it tight as possible and define it as much as possible.

For example, many times the investigations will be triggered by inquiries by auditors. That’s usually pretty easy to scope because they will be relatively precise about what they want, what they need, and I’d encourage a back-and-forth in defining that scope before you do the work so you don’t have to do it again. If it’s an employee (a whistleblower [or] someone who is doing an anonymous report), then what you had talked about as far as judgment having to enter in and in-house counsel—with outside counsel, potentially—really needs to think through what’s the right scope, what’s defensible, what’s going to get you to the right answer for the various audiences who would be interested, to make sure that you did what you needed to do, but you don’t pull away company resources beyond what is appropriate.

MIRIAM SMOLEN: Thank you, Barb. Let me go ahead and turn this over now to the next topic on our presentation and that is litigation holds.

Let me introduce our two panelists today. The first is Evan Stolove, who is an associate general counsel in the litigation group at Fannie Mae, where he supervises a variety of commercial disputes and serves as the litigation group’s preservation program and e-discovery manager. Evan joined Fannie Mae in the fall of 2004, and since that

time he has supervised various aspects of the company's response to investigations by the SEC [Securities and Exchange Commission], by DOJ [Department of Justice], and by the company's regulators.

Joseph Adams is a partner in the Phoenix office of Snell & Wilmer, and his practice is concentrated in commercial and intellectual property litigation, including trademark, copyright, and unfair competition, securities and shareholder derivative litigation, and internal corporate investigation. Thank you, Evan and Joseph, and I'm going to turn the presentation over to you.

JOSEPH ADAMS: Great, thank you. This is Joe Adams, and, as Miriam mentioned, I'm an attorney at the firm of Snell & Wilmer in Phoenix. For this part of the presentation, we're going to be reviewing litigation holds, which is something that Miriam touched on but we're going to describe in a bit more detail.

Essentially, a litigation hold is a request that documents and data be preserved. And the request asks that people preserve and not destroy specific documents or categories of documents that relate to a litigation or some other dispute. At its core, a hold notice is designed to preserve items. It doesn't require that anyone actually go out and collect documents, so it is not a discovery request. In addition, it is not required that someone go through and review all the documents or data covered by the notice. Instead, the purpose is to take steps to preserve the material so they are kept and can be made available for review at a later date if they turn out to be evidence in a litigation or dispute. Nonetheless, it does require some work on the front end to ensure that the notice goes to the proper people and it prompts them to take appropriate steps to preserve things. We'll discuss that in more detail. Next slide, please.

And the initial question with litigation holds is really when to send them out. In other words, when does the duty to issue a hold arise? The test that you will often see in the case law and the commentary is that a hold notice should be sent when a party has reasonable notice of a litigation or dispute, whether that is potential or actual litigation. And the test reflected in leading cases, such as *Zubulake*, is when the party has notice that the evidence is relevant to the litigation, or when the party should have known that the evidence may be relevant to future litigation. In other words, you have a test that includes both a situation where you actually have notice as well as situations in which a court may conclude that a reasonable person would and should have had notice.

In interpreting whether notice is reasonable, courts do focus on the probability that litigation will occur. So, future litigation must be likely, not just possible, so if it is unclear whether a dispute will occur or if it's just an unlikely possibility, the obligation to send out a hold notice probably is not triggered. On the other hand, the obligation does arise before the dispute is imminent and before it's certain. And in reviewing these issues, courts will often use phrases such as "fairly foreseeable." And the expectation, in our experience, is that in most cases a party will have notice of litigation or a potential dispute before a complaint is actually filed with the court and before litigation actually ensues. Next slide, please.

So, what does this look like in practice? The clearest example, of course, is when a party is actually served with a complaint. At that point, it is very clear that there is litigation or a dispute and that a hold notice should be issued. If a hold notice wasn't already sent out beforehand, it absolutely should be sent out at that point, but usually the obligation arises before then. In the real world, litigation may be foreseeable if you receive a demand or some other request to take action to resolve a dispute. The demand doesn't have to be in writing or in letter form. It might be oral as well, so things like employee complaints, depending on the circumstances, could require a hold notice.

In addition, there may be communications that would put [a] party on notice of potential litigations, such as a significant accident or a public study announcing that a company's products are unsafe. And this will often depend on the particular industry that you're in.

And in cases where the party is a potential plaintiff or a challenger, the focus is really on the plaintiff's own determination to sue or to make some sort of challenge rather than on any external notice that the company receives.

And plaintiffs will often lose sight of the fact that they, too, like defendants, can face spoliation claims, so it's important for both sides of a dispute to keep these issues in mind.

In deals or transactions when a deal goes sour or breaks up, that might be notice as well. Likewise, a notice of investigation from a government agency might trigger the obligation. In fact, some notices that we've seen will often have express instructions from the government to preserve documents or to issue hold notices. In some cases, an agency may even request that a copy of that letter from the government be distributed to all document custodians. Next slide, please.

In determining whether there's reasonable anticipation of litigation, you should consider these factors. In terms of the nature of the claim, look at whether the claim is valid, if it appears to be a serious claim, if there is evidence presented in support of that claim. All of these things are reasonable to consider about whether you're actually going to be facing litigation or some other dispute. Also, too, the party making the claim will provide you with information about the seriousness. If you know information about the party, that certainly helps. If the party has a track record of litigation [and] the resources to prosecute a claim, these are all things to consider as well.

In terms of the relationship, if it's a close relationship with a company that you know, you probably have a good sense of how they do things and how serious to take what may or may not be a threat. If the history is good [or] if it's soured—these are all things you can look back on to determine what you think the party is likely to do.

In terms of the directness of the threat, it may depend on how it's communicated. If, in your view or the view of the business people, are they serious or are they just posturing? In terms of similar claims in the industry, there might be a lower threshold for claims that often arise in a particular industry. So, if a potential claim arises and you know that you've seen a bunch of them before [and] you're likely to see a bunch after, there might be a lower threshold for sending out a hold notice. Next slide, please.

It's also true that not every rumor or threat triggers the need to send out a hold notice. If you have what you would characterize as a vague rumor or a secondhand or third-hand threat, that's probably not enough. The threat really has to be concrete. You should be able to articulate the claim that would be asserted against the company. So, if you have communications and there is a reference to possible exposure, depending on the circumstances, that may or may not be enough. If there are communications and they focus primarily on potential resolutions outside of litigation, that may not be enough as well. Next slide.

We know that a corporation acts through its agents and employees, so if the party is a corporation, the company is on notice when its agents and employees reasonably anticipate litigation. However, it's not enough that several employees merely contemplate some sort of lawsuit. In evaluating what a company knows and when a company should have been on notice, courts will often look at who was involved and how the company treated a particular dispute. And one key indicator is whether counsel is involved, both in-house and outside counsel.

For in-house counsel, you will often be the first person to see these issues and be in the position to make an initial determination about whether a litigation hold might be necessary. In some cases, the fact that an employee consulted in-house counsel might be a fact that a court looks at, but it's also true that not every consultation means that litigation is imminent. It really depends on what the particular employee came to you about and mentioned.

Similarly, the involvement of outside counsel is something that the court is going to look at. But if outside counsel is focused on nonlitigation resolution, that's probably not enough. But if litigation is being discussed and there are communications with the other side that make it clear that's where this dispute is headed, that's probably the point where a hold notice ought to be issued.

One other indicator is the use of privilege or work-product legends on documents. If documents are labeled attorney-client privileged or, especially, work product, the court may take that as a sign that litigation was foreseen. So, for that reason, you may want to consider, if you are about to put a legend on a document, whether a hold notice has actually been sent out. If it hasn't been, think about whether this is something that would really be work product or not. And if it is, a hold notice might be appropriate.

For the next slide, I'm going to turn it over to Evan, who is going to walk you through some of the procedures for sending out hold notices.

EVAN STOLOVE: Thanks, Joe. First, I want to talk just generally about the risks of getting a litigation hold wrong, and why, in fact, you might want procedures, because the risks are significant for getting it wrong. They fall generally into three categories. You have headline risk. You can have sanctions within the proceeding. And then you have potential, actually, for criminal liability. I think, for the most part, we can put the criminal liability aside. Just know that it's not a good idea to purposely destroy documents in connection with a government investigation.

Turning just briefly to headline risk, most of us are running businesses or involved in businesses that don't run their business like they are celebrities in Hollywood, i.e., not all press is good press. Negative press reports have the potential to affect stock price. They can sour relationships with customers. They can interest the government, and, among other things, they can tick off your board and management. And press reports about getting this stuff wrong ends up sounding like scandals. I just took a quick look online today. A headline from the *Financial Times* a few years back when Morgan Stanley ran into trouble was, "Morgan Stanley charged with lying about e-mails." A more recent one in connection with the White House was, "Are the White House e-mails really lost?" from *Newsweek* magazine. These are prominent publications, and the implication of what they are saying can really have ramifications for you.

Similarly, when you're in court, regardless of what the sanction might be, whether it may be an admonishment from the judge or it might be an outright dismissal or an adverse finding of fact, presuming that you are on the defense side of things, generally speaking, this is not what you want to be litigating about. It's a waste of time. It's a waste of money. If you're dealing with the regulator, all you're really doing is ticking them off, and that is not going to inure to your benefit. You want to litigate about the merits.

So, with that in mind, procedures are a great idea, particularly because the litigation hold generally falls largely to the in-house counsel. You're the one who has first knowledge of triggering events. You have a better knowledge of systems and people and where documents may be located. You're obviously in a better position than outside counsel to help with monitoring compliance, and at the end of the day, when things go wrong, they're going to blame you. Regardless of whether or not you're dealing with small matters on a regular basis or you're dealing with big matters, it's a great idea to put procedures in place. You'll be ready when the bet-the-company case comes along. You'll have defined roles and responsibilities in advance so everybody knows what they're supposed to do, and it also helps to get people thinking proactively. Next slide, please.

So, some of the key issues I want to highlight for the procedures relate to the standard process and work flow. There is a standard method or timeline that most litigation holds follow. You have a triggering event, [and then] the issue of notice. There's implementation of the hold. There's managing the compliance and hopefully, at the end of the day, you can release the hold. And I think you want to be taking a look at that process or work flow, break each component part down, and be thinking about how you are going to address those in your procedures.

For instance, when you're talking about the triggering event, you want to make sure that there is something in your procedures for ensuring that legal finds about it [and] who is going to be the person responsible for determining if a hold should be put in place. With respect to a notice, there's probably going to be some boilerplate language. You've got issues of scope, custodians, who needs to sign off, and similar things along these lines for each step in the standard process flow.

Similarly, any successful hold is going to require a team of people. The lawyer can't do it by him or herself unless you're dealing with a very, very small organization. You're going to need paraprofessionals. You're going to need to work with your records managers, your business leaders, and your IT personnel. You're really going to want the support of management. So, it's important, again, when you are defining your procedures, to be thinking about all these folks, making them part of your team, and integrating them into your procedures, and identifying them, not by name but by title, so these procedures have longevity.

Similarly, there are going to be key electronic systems that you are going to go to time and time again and others that you will go to less frequently. You really want to think about things like your principal communications systems, such as your e-mail and instant messaging systems, your backup tapes, and hard drives, because those are the key repositories for electronic evidence. Next slide, please.

So, perhaps the most important facet of any preservation hold, as has been addressed both by the earlier presentation, and as Joe alluded to, is to get out a preservation hold notice—one that is timely, easily understood, that is sufficiently broad to cover the scope of what is at issue, and that it gets to the relevant universe of people.

To ensure that this happens, you want to answer the following questions in developing your procedures. You want to identify what sort of documents are going to be considered in determining the scope: things like pleadings, contracts, correspondence with the opposing side. You want to identify, at a very high level, that you are going to be consulting with key document custodians and relevant business people. You want to identify who is going to be responsible for drafting the notice. You need to sign off on the notice. [Also consider] whether you're going to want a different notice for different types of personnel. For instance, you are more likely than not going to want a different type of notice to go to your IT personnel than you're going to want to go to your board of directors. Similarly, you're going to want to consider coming up with a way for identifying your potential custodians and to ensure that you're picking up those custodians who may have documents over which you only have constructive possession or control, such as an Iron Mountain, outside counsel, or another contractor.

You should be thinking about how your notice is going to get delivered. Is it going to be by e-mail or are you going to post it on your company's intranet site? Are you going to post signs up in the hallway? What is your process going to be for following up? How are you going to ensure that people actually got your notice and that they're complying with your notice?

Who is going to identify the additional custodians? How frequently are you going to send out reminders? Who is going to keep charge of employees when they are joining the company, departing the company, or migrating between business units? And there's a possibility that someone new comes onboard for whom the notice needs to go to or someone's leaving a business area and you want to make sure you know where those documents are now going to reside. And ultimately you want to make sure someone's on the hook for keeping all the records; that you've followed all these steps. Next slide, please.

Technology, ultimately, though, is the bane of our existence with respect to the issue of preservation holds. Without a doubt, over the past decade, the explosion of the ways in which we can communicate, the advent of cheap storage, and the continual change in both of these and the built-in obsolescence of software and hardware has resulted not only in greater potential stores of data, but data that is harder to locate and is both easier and harder to mine. In addition, people keep coming up with ways for us to find, hold, and mine that data. So, when you're developing your procedures, again, and when you're revisiting them on a periodic basis, it's important that you think broadly and constantly re-evaluate. Where's my data? How's it being stored? How long is it going to be there? Can it accessed? And who is in charge of it?

Here, I've identified on the slide some key media challenges to think about. At a minimum, what I would recommend is that even if your procedures themselves do not include how to deal with each one of these individual ones, put them

on a sample notice. Just highlight and flag for yourself that you need to be thinking about these when a hold issue arises. In addition, as Joe mentioned earlier, your duty to preserve is often much greater than your duty to produce, so despite the fact that you may not think you have an obligation to produce some backup tapes, or your company doesn't have the technology or even is not aware of the technology to get data off maybe a BlackBerry, that doesn't mean you don't have to preserve these things. And don't underestimate the motivated plaintiff's lawyer who will take the opportunity to make your case about your failures to preserve.

I'm going to turn it back to Joe for a minute to talk about releasing the hold.

JOSEPH ADAMS: Sure. Once the litigation or dispute is completed, it is appropriate to release the hold and to let documents be disposed of or handled in accordance with your company's usual document retention policy. If you're faced with a court case or litigation after there is a judgment, whether that is some sort of award or dismissal, and the appeals process has played itself out, at that point it would be appropriate to release the hold. If you're dealing with a dispute that hasn't reached litigation, it might be appropriate to release the hold after a final settlement agreement is executed, and likewise, if you're dealing with a government agency, after you've received notice from that agency that they're done for good. The particulars of each situation would really depend on what you're facing.

If no litigation is filed or the person or challenger doesn't come back, and the situation is really left hanging, what you ought to do is [to] look at the applicable statute of limitations. And this would require you to determine which claims are at issue to determine what statutes of limitation apply, but after those statutes have run, it also would be appropriate to release the hold. Next slide, please.

In terms of the form of the notice, it should be in writing, just as the initial litigation hold was, just letting people know that the hold is no longer in effect.

EVAN STOLOVE: So, just a couple of final takeaways, and these go perhaps beyond the procedures themselves. It's great to get the procedures in place. You've got to let people know about them, and that goes for not only the people who might have a role in implementing your procedures, but you have to train your employees what to do when they get a notice. Otherwise, it's scary. It's got legalese in it. And the whole point of this is to make sure that your company is compliant with its obligation. So, I highly recommend you implement some sort of training to educate people about their roles and responsibilities.

KISS: Keep it simple, stupid. Basically, this goes with respect to everything here. This goes with respect to make your procedures easy to read and to follow, make your notices easy to read and follow, and make your document retention policies easy for people to follow. The last thing you want—and the point “take out the trash” here addresses this as well—you don't want more stuff sticking around because people don't know how to get rid of things and when they can get rid of things. You're trying to make your universe smaller, not larger, for you to potentially have to search and preserve.

Talk more. This applies in a lot of different ways. You want to talk to your IT staff early and often. You don't want the first time you call them up [to be] because you've got a major case and you need them to pull hard drives out of computers, tell them they can't reset or wipe BlackBerrys when they're reprovisioning them, and [have] them tell you, “Sorry, you're going to shut down our business. We can't do that.” You need to get them in the loop early so that they can make the provisions for things, and you want to develop a relationship, so you're speaking their language. You want to make them your partner. You want to make it so that they're bringing things to you proactively.

In addition, when we say “talk more,” what I would recommend for all companies: Pick up the phone more. Walk down the hall. Have a meeting. Not everything needs to be in writing. There seems to be a sense, generally, as communication seems to get less and less formal, that we can put anything in writing, and it's up there in the digital world and it will disappear. I think people are getting more savvy about that, but it's still an issue. We'd all do much

better to talk face to face.

Know your data sources. Nothing is going to serve you better than to map your data. Figure out where it is; where it resides. It will help you down the road in so many ways with respect to implementing the hold [and] with respect to delivering data in connection with a matter.

Negotiate early and often. There are a lot of burdens associated with doing all of this. Get opposing counsel on the phone. Get a face-to-face [meeting]. Figure out whether or not they're going to be reasonable and you can reach some agreement on what you are going to do and what you're not. If they're not, it's better that you know that in advance and you can go get a protective order.

Finally, and I don't think this needs to be belabored, adhere to your procedures. Once you put these in place, audit yourself on a periodic basis. See if people are following them. See how quickly you are meeting the goal of getting out that notice after learning of a triggering event and how quickly people are responding, and figure out what you can do better. With that, does anybody have any questions?

MIRIAM SMOLEN: Joe and Evan, thank you very much. We do have a few questions for both sides of the presentation. But for you guys, I hope I'm interpreting this question right, but the question is: Do inside counsel have an obligation to sign off of or at least have knowledge about documents that are being destroyed or being handled in the way that the document retention policy would be for a third-party vendor? So, your company, or whoever, you have a vendor that is working for you and they may have documents relevant to your litigation. What's your responsibility with regard to those documents?

EVAN STOLOVE: I'm not 100% sure I fully appreciate the question, but generally speaking, with respect to third parties that have "your" documents, I think it depends on: In what capacity do you have a relationship with that individual or entity? Are they an agent of yours, or are they a custodian of yours, or are they just a contractor who happens to come into possession of some things that are relevant?

MIRIAM SMOLEN: Let me ask this. Is there a difference between, let's say, a company you hired to consult on a particular project who are not contractors—they come in as consultants—than, let's say, your outside auditors? So the consultant's documents versus the auditor's work papers. Would there be any difference in how—

EVAN STOLOVE: And the question is: are we supposed to know what their document retention procedures are, generally?

MIRIAM SMOLEN: No, the question is: Is a litigation hold that is issued in connection with whatever the topic is that they were working on—a litigation hold issued inside the company—does the company have an obligation to control their documents that are outside the company with this consultant or with, let's say, an auditor?

EVAN STOLOVE: With respect to the latter, and Joe may differ with me, an auditor is not your agent, so it would be my opinion anyhow that you do not have an obligation there to make sure that they are preserving things. You may want to notify them that there's litigation and they should take whatever steps they deem necessary, but once documents are in their possession, first of all, they're likely to just be copies of what you have in terms of the company's own documents, and anything they generate are their documents, not yours.

With a consultant, again, it may be a very similar situation where what they're getting are just copies of what the company has. They're generating their own work product. It probably depends on how the relationship has been structured whether or not those are considered the company's documents or not. You'd probably have to take a look at how that relationship was established.

JOSEPH ADAMS: I do agree with that, and I think that it probably depends also if there are particular documents you know that will be at issue in the litigation that the third party has. And if there is something in particular in mind, then it probably makes a little bit more sense to notify them and to ask them to preserve it, but if they really are third parties, you don't really have any control. You can ask them, but you can't require them.

MIRIAM SMOLEN: OK. Barb, there was a question about what we call the corporate Miranda warning. Again, if you could repeat just the key takeaway from *Broadcom* with regard to how we should implement or how we should use the corporate Miranda warning. And we also had a request that you give the *Broadcom* cite once more.

BARBARA DAWSON: Absolutely. Let's start with the cite. It's *United of States of America v. William J. Ruehle*. It's a Ninth Circuit decision that came down September 30 [2009], and the number is 09-50161.

How to use the Miranda? I'd say early and often. What we mean by that—and the decision goes over what the Miranda is—is essentially making sure that who you're talking to as a witness understands who you represent and who you do not represent; that you are counsel—whether you're in-house or outside—for the company; that you do not represent the individuals; that you are conducting an investigation for the purposes of the company. To the extent appropriate, you should let them know that the information that is obtained will be disclosed or not disclosed potentially to third parties in the discretion of the company without consulting the individual witnesses. There are various nuances of that, given your factual situation, but that's it in short.

MIRIAM SMOLEN: Thank you to Barb, to Evan, and to Joe for participating in this webcast. I hope that the audience has found it as interesting as I have.

As I told you at the front end, we do have two more webcasts in this Litigation Masters Series. They are on the ACC Web page.

[The CLE code and instructions provided here were for use only by attendees of the live webcast. To obtain your CLE certificate for this archived webcast when you have finished listening to it, click the EXIT COURSE button at the top right of the screen to return to your My Courses page and then click the certificate link or icon beneath the course listing. In the pop-up window, select the desired jurisdiction from the drop-down list and enter any requested data, such as your bar number and the CLE code that popped up while you were playing the archived webcast. (This code is required for New York and Ohio attorneys only.)]

ROBERTO SCALESE: On behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thank you again for listening to today's program.

[The instructions provided here were intended for attendees of the live webcast when it was originally broadcast.]

This program is now concluded. Thank you again and have a great day.

© 2009 SmartPros® Legal & Ethics, Ltd. All rights reserved.