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ACC NATIONAL CAPITAL REGION CORPORATE GOVERNANCE INTENSIVE:

## **Practical Privilege Issues for In-House Lawyers**

# Panelists

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# Agenda

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- How to maintain privilege when recording corporate meetings and decisions
- How to reduce the risk of losing privilege when wearing multiple hats
- How to satisfy auditor demands without waiving privilege

# Maintaining Privilege When Recording Corporate Meetings and Decisions: *Discussion*

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- Business Transaction Hypothetical
  - Board Discussions
  - Press Releases
- Litigation
- Whistleblower Complaints
- Internal Investigations

# Maintaining Privilege When Recording Corporate Meetings and Decisions: *Case Law*

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## ➤ ***Neuder v. Battelle Pac. Nw. Nat. Lab.* (D.D.C. 2000):**

- Held documents prepared in connection with meetings of employer's personnel review committee were not privileged
- Attorney's presence in a meeting does not render the meeting (or any notes or minutes from it) privileged
- “[A] corporate client should not be allowed to conceal a fact by disclosing it to the corporate attorney . . . . [T]he mere fact that in-house counsel is present at a meeting does not shield otherwise unprivileged communications from disclosure.”

## ➤ ***Kodish v. Oakbrook Terrace Fire Protection District* (N.D. Ill. 2006):**

- Closed session of board, where decision to terminate plaintiff was discussed
- Held discoverable: discussions re: plaintiff's work history; reasons for decision to terminate plaintiff; discussion of what company expects of its employees
- Held privileged and not discoverable: conversations “among the board members and their attorney about potential litigation risk and legal strategy” and those “among the board members discussing their attorney's legal advice”

# Maintaining Privilege When Recording Corporate Meetings and Decisions: *Best Practices*

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- Consider separate sessions
- If not separate sessions, consider preparing separate materials
- Document that company counsel attended in role as legal counsel, for purpose of providing legal advice
  - Involvement of outside counsel helps bolster privilege claim
- Document the main issues discussed
- Limit distribution of privileged materials
- Bear in mind that should you later choose to disclose legal analysis or conclusions to defend the company's actions, waiver will likely extend to all related communications

# Maintaining Privilege While Wearing Multiple Hats: *Discussion*

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- In-house counsel investigations
- In-house counsel analysis
- Training lawyers and non-lawyers
- Cross-border privilege issues

# Maintaining Privilege While Wearing Multiple Hats: *Case Law*

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- **Different articulations of the test**
  - Is the “primary purpose” of the document a legal rather than business purpose?
  - Is the document “for the purpose of legal advice and not predominately for another purpose?”
  - Is asking for/providing legal advice “a primary purpose of the communication, meaning one of the significant purposes of the communication?”
  
- **Example: *RCHFU, LLC v. Marriott Vacations Corp.* (D. Colo. 2018)**
  - Strategic planning memo not privileged, even though various in-house attorneys worked on it over 6 months
  - Memo’s “primary purpose” was to develop a successful business strategy and put company on better financial footing
  - Court noted company could have better protected the privilege by “blocking the advice into separate paragraphs or pages, including it in a confidential addendum or even a separate memorandum”



# Maintaining Privilege While Wearing Multiple Hats: *Best Practices*

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- Beyond privilege label/header, specify the legal request or legal issue involved
- Cite/mention legal sources or documents
- If the communication is more business-related, consider separating the legal advice into its own section or an addendum
- Limited distribution involving attorneys
  - Where possible, include only those who are authorized decision-makers, meeting both the control group test and the *Upjohn* test

# Communications with Auditors: *Discussion*

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- Hypothetical: Auditor requests meeting with outside counsel
- Navigating sensitive requests from auditors
- Internal discussions re: auditor requests

# Communications with Auditors: *Case Law*

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- Typically not protected by privilege, although some courts hold that disclosing pre-existing work product to auditors does not waive work product protection
- ***U.S. v. Deloitte LLP (D.C. Cir. 2010) – no waiver***
  - Company had reasonable expectation of confidentiality
  - Fact that auditor might disclose some relevant information to the government did not change this conclusion
- ***United States v. Hatfield (E.D.N.Y. 2010) – waiver***
  - Auditor was potentially adversarial “as the possibility always existed that its investigation would reveal that [the client] acted fraudulently or negligently”; at least did not share a common interest
  - Evidence indicated that the auditor had concerns regarding the company’s management

# Communications with Auditors: *Best Practices*

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- Assume that what you provide to outside auditors will not be privileged
  - Both oral and written communications likely to be documented by auditors
  
- For work product materials, consider the scope of any common interest and the possibility of a potentially adverse relationship
  - For example, do any current or potential litigations implicate the auditor's work?

**Questions?**

# Panelists

# Stefanee Handon

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Stefanee Handon is an Assistant General Counsel for CoStar Group Inc., commercial real estate's leading provider of information, analytics, and online marketplaces such as Apartments.com. Ms. Handon advises the business on all aspects of employment law compliance and employment litigation regarding the company's operations in the United States, Canada, and Europe. Prior to joining CoStar Group, Ms. Handon was a Senior Associate in the Employment Law department of Paul Hastings LLP. Ms. Handon received a J.D. from the University of Virginia School of Law and a B.A. from the University of Virginia.

# Atul Saran

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Mr. Saran has served as executive vice president, corporate development and general counsel, since May 2017. Prior to joining Emergent, Mr. Saran served as senior vice president and general counsel at MacroGenics from April 2014 to May 2017.

Previously, Mr. Saran served in various leadership roles at AstraZeneca and MedImmune from 2003 through 2014, including vice president, corporate development and ventures at AstraZeneca and chairman of the MedImmune Ventures investment committee from May 2013 to January 2014; senior vice president, corporate development and ventures from January 2011 to May 2013; and positions of increasing responsibility in the MedImmune legal department from 2003 through 2010, culminating as vice president and deputy general counsel. Before his time at MedImmune, Mr. Saran was an associate attorney in the business and finance group at Hogan & Hartston.

Mr. Saran is an active board member of LogicNets, Inc. He has served on the board of directors for several other companies including VentiRx Pharmaceuticals, Xencor, Inotek Pharmaceuticals and Arriva Pharmaceuticals.

Mr. Saran holds a J.D. from the University of Illinois College of Law, an M.B.A. from the MIT Sloan School of Management and a B.S. in Biological Sciences from Stanford University



# Vidya Atre Mirmira

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Vidya Atre Mirmira has extensive experience in complex corporate litigation, ERISA litigation and employment-related issues, whistleblower issues, and legal ethics.

Illustrative of her practice, Vidya has represented global corporations in ERISA litigation and financial services litigation; corporations and individuals in a number of employment-related disputes; and leading law firms and their attorneys in proceedings before the District of Columbia Office of Bar Counsel. Vidya also advises on whistleblower issues and represents clients in related litigations and proceedings.

Born in India, Vidya grew up in Fort Wayne, Indiana. She graduated Purdue University, *summa cum laude*, in 1996, earning a B.S. in electrical engineering and a minor in economics. Vidya received her J.D., *cum laude*, from the University of Chicago Law School, where she was co-founder and executive editor of the *Chicago Journal of International Law*. She joined Williams & Connolly in 2001 after clerking for Chief Judge Carolyn Dineen King of the U.S. Court of Appeals for the Fifth Circuit.

Vidya served on the Williams & Connolly Hiring Committee from 2004 to 2009 and once again from 2012 to 2015. She is currently a member of Williams & Connolly's Associate Evaluation and Discovery Attorneys committees. Vidya began serving as a member of the firm's Diversity and Inclusion Committee in 2018.

# Colette Connor

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A trial lawyer, Colette Connor has tried both bench and jury trials in courts around the country. The cases she has tried, and prepared for trial, have covered diverse industries and a range of legal issues, including alleged antitrust violations and securities fraud.

Colette has significant experience handling bet-the-company litigation, having defended numerous corporations and law firms in high-dollar cases. Most recently, Colette represented a Fortune 50 technology company in litigation arising from disclosure of security vulnerabilities. In all of her matters, Colette brings her trial mindset to bear in developing the factual record effectively and efficiently, and then distilling and presenting that record—whether in dispositive motions, mediation, or trial—in a clear, understandable, and persuasive manner. She also brings to each of her matters her substantial experience leading teams.

Colette was selected as a “Rising Star” in the 2014 through 2019 Washington, D.C. editions of *Super Lawyers*. She currently serves as a member of the firm’s Hiring Committee.

Colette is from just outside Atlantic City, New Jersey. She received her undergraduate degree, *summa cum laude*, from the University of Richmond in Richmond, Virginia and her JD from Harvard Law School. Before joining Williams & Connolly, Colette served as a law clerk to the Honorable Stephanie K. Seymour of the Court of Appeals for the Tenth Circuit in Tulsa, Oklahoma.

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