400 Ethical Issues Facing In-house Labor & Employment Counsel

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An electronic copy of the March 1999 version of these materials presented to N.J. ACCA is available at http://www.acca.com/protected/legres/program/newjersey/index.html. A complete copy of this material is available from the email address above or the Saul Ewing LLP booth in the exhibitors' area of the meeting.

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INTRODUCTION

In dealing with problems in a in-house counsel are often presented with a variety of ethical issues. In this program we will, through the use of a hypothetical problem, examine counsel's duty to warn employees when interviewed, counsel's ability to preserve privilege when conducting interviews, counsel's duty to the corporation or other business entity as opposed to the individuals who manage the business and other questions. These written materials provide some background in analyzing these questions.

The blurred line between legal advice and business decisions has resulted in court decisions that demonstrate a willingness to pierce the once sacred attorney-client privilege. A portion of the material will review the piercing and preservation of the privilege, in addition to presenting practical guidelines for maintaining it. Sarbanes-Oxley and the newest proposed Model Rule of Professional Conduct have also weakened client confidentiality.

I. UNAUTHORIZED PRACTICE OF LAW

Whether someone is engaged in the unauthorized practice of law is a highly fact-sensitive inquiry. While in-house counsel may consider the question based on where their office is, as states become more finicky about this they may argue that they have jurisdiction over in- house lawyers, wherever their office is, if those lawyers regularly provide advice to businesses within the state.

Because the phrase "practice of law" eludes definition, in-house counsel always face the possibility that their activities may be questioned. This is particularly true where in-house counsel are not admitted to practice in the state in which they are employed. Some counsel (and jurisdictions!) take the view that the rendering of advice to their "employer/client" does not constitute the "practice of law." However, case law belies that position. And, as we show below, that is not the end of the inquiry. Even jurisdictions with dissimilar approaches often develop very similar results, even when case law was friendly to in house counsel before the adoption of modern rules.

In order to help alleviate the uncertainty, in-house counsel arranged for special, limited licenses to be issued as part of the recent trend toward recognizing multi-jurisdictional practice (MJP). But the fees and regulatory overhead attached to MJP may make the cure worse than the disease. We turn first to an extraordinary case from California which compelled attention to the issue of the realities of today's practice of law in a corporate setting.

A. Birbrower

The California Supreme Court determined that a New York firm practiced law in California when they represented a California client in a dispute by making preliminary arbitration plans and by negotiating a settlement. Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Business Services, Inc., 949 P.2d 1, 17 Cal. 4th 119 (1998).

The dispute involved a California software developer, ESQ. ESQ retained the New York law firm of Birbrower, Montalbano, Condon & Frank, P.C. to review a software development and marketing agreement. The attorney retained to do the work was admitted to practice in New York, but not California. Two years later, ESQ contacted the same law firm to investigate claims for copyright infringement, antitrust violations and breach of contract under the agreement. The agreement called for binding arbitration in California.

Birbrower filed an arbitration on behalf of ESQ and a team of New York attorneys went to California to work on the case. ESQ eventually settled the matter before arbitration. ESQ was not happy with the legal advice received from Birbrower in the dispute and therefore sued the firm for malpractice. The California Supreme Court concluded that the out-of-state lawyers were unauthorized to practice law in the state and, therefore, were not entitled to recover fees for the services provided.

While Birbrower involved outside counsel, many in-house counsel have felt comfortable representing their employers in arbitrations nationwide. There are two separate worrisome aspects to Birbrower.

First, as the dissent points out, most jurisdictions to consider the question had concluded that representing a party in an arbitration is not the practice of law. 949 P.2d at 18. The legal reasoning that justified this conclusion was based on the well established doctrine that a judicial award cannot be vacated by a court solely because it is contrary to the law. Thus, because the arbitrator is not bound by the law, those presenting a case to the arbitrator are not acting as

lawyers. The practical reasoning that produced this result was that the most common form of arbitrator history is the labor arbitration; replacing the shop steward and foreman who usually represent the employee and employer with lawyers would revolutionize and complicate labor relations nation wide. Based partly on a statute that expressly excluded labor and international arbitrations from the definition of the practice of law, the Birbrower majority was apparently the first court to hold that representing a client in an arbitration constitutes the practice of law in California.

Second, the breadth of the decision may have much more significant ramifications for in-house counsel.

> What worry attorneys most is the breadth of the Birbrower decision, which did not simply involve a "foreign" lawyer practicing before a state tribunal. Instead, the California Supreme Court touched on fundamental aspects of any multi-state practice. One important ramification of the decision is that out-of-state lawyers may not even be in California when they tender advice, yet still be vulnerable to charges of unlawful practice. Law firms and in-house counsel doing business around the country fear that other states will soon retaliate if California's position is allowed to stand.

Lori Tripoli, Ill Wind From the West . . . State Efforts to Restrict Legal Practice Challenged By Lawyers Nationwide, 12 No. 9 Inside Litig. 10 (September 1998).

Thus, counsel in one state may be practicing law in another without ever setting foot there.

> [O]ne may be practicing law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.

Birbrower, 949 P.2d at 5-6. Under this analysis, counsel for a parent company stationed at its headquarters in New York or North Carolina or wherever may be practicing law in California if they regularly provide services to an affiliate there.

The California legislature responded to the Birbrower decision by amending the California Code of Civil Procedure. Section 1282.4 (b) of the Code now allows out-of-state attorneys to participate in arbitrations.

> Notwithstanding any other provision of law, . . . an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, timely files the certificate described in subdivision (c) and the attorney's appearance is approved by the arbitrator, the arbitrators, or the arbitral forum.

Sub-section (c) requires an attorney who is not admitted to the California Bar to submit a certificate to the arbitrator, the State Bar of California, and all other parties involved in the arbitration. A sample of the guidelines and form prepared for use in National Association of Securities Dealers arbitration is in Appendix B to these materials.

Sub-section (f) permits out-of-state attorneys to represent California clients in arbitrations taking place in other states.

> [A]n attorney who is a member in good standing of the bar of any state may represent the parties in connection with rendering legal services in this state in the course of and in connection with an arbitration pending in another state.

See also the implementing California Rules of Court, Rule 983.4 (1999).

Although ACCA filed an amicus brief asking the United States Supreme Court to grant a writ of certiorari to the Supreme Court of California, the petition was denied. Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Business Services, Inc., 525 U.S. 920 (1998). The

continuing effect of Birbrower remains to be seen. See Unauthorized Practice: The California Perspective, (editorial), New Jersey Lawyer Newspaper, February 1, 1999, p.6.

In an application of Birbrower, the 9th Circuit refused to award attorney's fees for services rendered in a state administrative proceeding by a lawyer who was not admitted to the California State Bar. See Z.A. v. San Bruno Park Sch. Dist., 165 F.3d 1273 (9th Cir. 1999). In this case, the lawyer was admitted to the United States District Court for the Northern District of California, but not admitted to the California State Bar. The attorney represented a child with a disability before a state agency to appeal a special education placement. This court said, "A person is or is not licensed to practice law in a particular forum. There is no halfway. If not licensed, one cannot practice in that forum, and cannot charge, or receive attorney's fees for such services under penalty of criminal law." Id. at 1276.

Birbrower has been rejected as "unduly restrictive" by the Restatement of the Law Governing Lawyers (Reporter's Note to Comment e, §3, Proposed Final Draft No. 2, 4/6/98). Criticism of Birbrower far exceeds its praise. See Mitchell, NY Lawyers Subject to California Discipline, NYLJ, June 15, 1999, quoting Cornell Professor C. Wolfstram that Birbrower "sets the legal field back a quarter of a century."

B. Special Admission for In-house Counsel

According to ACCA, thirty six jurisdictions currently have corporate counsel rules. They include: Arizona, Arkansas, California, Colorado, Delaware, District of Columbia Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina,, South Dakota, Virginia, Washington and West Virginia.. .

The corporate counsel rule represents a dramatic shift in policy and law. In Virginia, for example, the lengthy, complicated process of developing a rule added to the drama. Prior to 2003, attorneys could serve as in-house counsel even if they were not admitted to practice in Virginia or in any other jurisdiction because the activity of in-house counsel was not considered "the practice of law" as defined by the Supreme Court of Virginia. Now, Virginia Supreme Court Rule 1A:5 defines "corporate counsel" as a person employed in Virginia as a lawyer exclusively for a business entity (other than a law firm) for the primary purpose of providing legal services to such employer. An attorney who is not a member of the Virginia State Bar and who functions as corporate counsel in Virginia must either obtain a Corporate Counsel Certificate ("CCC") or register with the Virginia State Bar in order to serve as "corporate counsel."

If an attorney chooses to apply for and obtain a CCC, the attorney will be deemed a member of the Virginia State Bar The requirements to obtain a CCC include active, good-standing admission to practice in another jurisdiction, an affidavit from the attorney's employer, the attorney's certification of familiarity with the Virginia Rules of Professional Conduct, and payment of a fee. Thereafter, CCC-holders are subject to all of the requirements (CLE, annual fees, disciplinary authority) that apply to regularly-admitted members of the Virginia State Bar but only as to that employer.

In response to objections of in-house counsel who found the certification burdensome, the rule was modified to present an alternative. Accordingly, corporate counsel who choose not to

obtain a CCC may simply register with the Bar. Although they must comply with Virginia's Rules of Professional Conduct and are subject to the jurisdiction of the Bar, they may not represent their employers in court (other than General District Court) and, coming full circle, what they do is not considered the practice of law.

Some jurisdictions without corporate counsel rules permit out-of-state lawyers to serve as corporate counsel as an exception to their prohibitions against the unlawful practice of law. They are: Alabama, and Washington, DC. In addition, Delaware and Georgia now authorize corporate counsel licensed elsewhere to work in their states as part of their new MJP reform. However, these states may impose limitations on corporate counsel. For example, Maryland's lending statutes prohibit the award of attorney's fees to an attorney who is a salaried employee of the lender.

See Norman M. Krivosha et al. Busted: Unauthorized Practice in the Corporate Setting, ACCA Docket September/October 1999 at 70 n. 8; see also ACCA's infoPAKSM on unauthorized practice of law, entitled "States' Corporate Admission Rules," available at www.acca.com/infopaks/upl.html.

A good "overview" law review article on this topic is Wickerham, Behind Bars: Are Corporate Counsel Captive to State Licensure?, 44 Wm. & Mary L. Rev. 1913 (2003).

C. MJP

Another possible solution to the corporate counsel challenge is the ABA's 2002 adoption of new Model Rules of Professional Responsibility authorizing multi-jurisdictional practice (MJP). Rule 5.5(a) would seem to help in-house counsel. It provides:

> (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of jurisdiction.

This rule is in various stages of review and adoption in several states. ACCA's MJP material is at www.acca.com/mjp.php. ACCA's policy statement on this is in Appendix C. See also Appendix D, ACCA's recent amicus brief on an unauthorized practice matter for in-house counsel in New Hampshire.

D. Aiding and Abetting the Unauthorized Practice of Law.

There is no question that an attorney may delegate tasks to clerks, secretaries and other lay persons without aiding and abetting the unauthorized practice of law. Such delegation is proper, provided the lawyer maintains a direct relationship with the client, supervises the work product, and ultimately, has complete responsibility for the work product. However, it is equally unclear whether in-house counsel's supervision over attorneys not admitted to practice in a particular state may constitute aiding and abetting the unauthorized practice of law.

If the definition of the practice of law is stringently applied to in-house counsel, it appears that in-house counsel must be admitted to practice in each state in which the corporation does business. Although it is clear that admission is necessary (absent admission pro hac vice) to appear in court, providing legal advice also constitutes the practice of law. "Whether a person gives advice as to [local] law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice . . . To hold otherwise would be to state that a member of the [State] Bar only practices

law when he deals with local law, a manifestly anomalous statement." In re Roel, 3 N.Y.2d 224 (1975).

What happens if an attorney admitted in a jurisdiction works with or supervises an attorney not admitted in the state where they work?

RPC 5.5 explicitly prohibits a lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." See also ABA CPR 3-301. "A lawyer shall not aid a non-lawyer in the unauthorized practice of law"; See Disciplinary Action Against Attorney for Aiding. . . another. . . is Unauthorized Practice. . ., 41 A.L.R.4th 361 (1985).

In Attorney Grievance Comm'n v. Harper, 356 Md. 53, 737 A.2d 577 (1999), the Court of Appeals of Maryland imposed a three-year suspension on a Maryland attorney who assisted his "partner"---who was admitted in the District of Columbia but not Maryland---"in presenting himself to the public as a lawyer who was lawfully offering his legal services to all comers" out of the partners' Baltimore office. The Court also "disbarred" the District of Columbia lawyer from the practice of any type of law in Maryland. Although the Maryland attorney disputed that he was in partnership with the D.C. attorney, it was clear that the two shared an office in Baltimore City, and that the Maryland attorney allowed his name to be posted on the door of the office suite and on stationery shared by the two lawyers.

Permitting an employee not admitted to practice law in any state to consult with a client and prepare legal papers for the client constitutes aiding and abetting the unauthorized practice of law. In re Taub, 576 N.Y.S.2d 523 (N.Y. App. Div. 1991).

In perhaps the most publicized case on aiding and abetting the unauthorized practice of law, Crown Publishers, Inc., Doubleday & Co. Inc., and Brentano's Inc. were enjoined from reproducing, distributing, marketing and selling a legal self-help book entitled "How to Avoid Probate" by Norman F. Dacey. New York Cty. Lawyers' Ass'n. v. Dacey, 28 A.D.2d 161, 283 N.Y.S.2d 984 (N.Y. App. Div. 1967), rev'd 21 N.Y.2d 694 (1967). The court held that the publisher, distributor and retailer of the legal self-help book aided and abetted author and non-lawyer in the unauthorized practice of law. "The giving of legal advice and counsel, including instructions and advice as to the preparation and use of legal instruments, constitutes the practice of law which is forbidden in this State to all but duly licensed New York attorneys. This is well settled." Id. at 989.

II. IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

Just as the dual role of in-house counsel complicates liability as discussed below in Section V, communications with in-house counsel, ordinarily subject to the attorney-client privilege, have been challenged. The blurred line between in-house counsel as legal adviser and as business executive can threaten this once sacrosanct rule. See Amy L. Weiss, In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege, 11 Geo J. Legal Ethics 393 (Winter 1998).

The key question is: "when is an attorney acting as a legal adviser, so as to invoke the privilege?" Any failure to allow the privilege works indelibly against the underlying purpose of a privilege – to promote full and candid disclosure with counsel. The attorney-client privilege and the work-product doctrine are the primary means by which a corporation can protect its confidentiality. However, merely placing an attorney in charge of issues which a corporation wishes to keep confidential is not sufficient to establish the privilege. The complications and pitfalls facing corporations and their counsel in this area are discussed below. See also Basri and Kagan, Corp. Legal Depts., Chapter 9, and Corp. Counsel Guidelines, Chapter 1.

The issues surrounding the attorney-client privilege as they relate to in-house counsel have drawn increasing academic attention. For more on this topic, see Mark C. Van Deusen, Note, The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp., 39 Wm. & Mary L. Rev. 1397 (March 1998); Grace M. Giesel, The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations, 48 Mercer L. Rev. 1169 (Spring 1997).

A. General.

1. The Basis of the Privilege.

That the confidentiality of certain communications between client and attorney is to be protected is well-established in common law. Case law and statutes confirm this protection.

Case law establishes that the privilege applies to the confidential communications between an attorney and a client. In Upjohn, the Supreme Court reiterated that the protection of the privilege applies only to communications and not to facts. As the court in City of Philadelphia v. Westinghouse Electric Corporation, 205 F. Supp. 830 (E.D. Pa. 1962) noted: the client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated such statement of such fact into his communications with his attorney. *See also*, Gordon v. Newspaper Association of America, 51 Va. Cir. 183, 2000 Va. Cir. LEXIS 110 (2000), which involved a action by an executive terminated for allegations of sexual harassment. Therein the court held that certain written documents prepared by in-house counsel waived the privilege as to the information in the documents, but did not waive the privilege as to all communications and work product concerning the matters in the documents.

Whether the privilege is based on case law or statute, the burden of proving the privilege is clearly on the party asserting it. See United States v. Jones, 696 F. 2d 1069 (4th Cir. 1982) and United States v. Zolin, 491 U.S. 554 (1988) (in-camera review).

An example of statutory protection is **New Jersey**, N.J.S.A. 2A:84A-20(1) which states that "communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged . . . " The privilege applies where the lawyer is consulted for "legal service or advice from him in his professional capacity." See N.J.S.A. 2A:84A-20(3). In addition, there is a presumption in the last sentence of the rule that "the privilege shall be claimed by the lawyer unless otherwise instructed by the client . . . ." (emphasis added).

In **New York**, CPLR § 4503 provides that "unless the client waives the privilege, an attorney or his employee . . . shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action . . . ."

Likewise, the **Maryland** Code, Courts & Judicial Proceedings Article ("C.J.") § 9-108 (1999), provides that "[a] person may not be compelled to testify in violation of the attorney-client privilege."

2. Attorney-Client Privilege.

Perhaps one reason for the need to confirm the existence of an attorney-client privilege for corporate counsel is because the attorney-client privilege of a corporate client differs by necessity from the attorney-client privilege of an individual client. A statutory entity's communications and confidences funnel through directors, officers and employees. Further, because in-house counsel often provide both business advice and legal advice, courts historically have hesitated to recognize the privilege.

(a) Federal

The most notable federal case regarding the confidentiality of communications with in-house counsel is the Supreme Court decision in Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981). The in-house counsel conducted an investigation of questionable payments made to foreign government officials, and the IRS demanded production of the questionnaires and notes of interviews conducted as part of that investigation. Expanding the "control group" theory, the court explained that such a theory "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id. at 683.

Subsequently, federal courts have viewed the question of eligible in-house counsel expansively. For example, in Hertzog, Calamari & Gleason v. Prudential Insurance Co. of America, 850 F. Supp. 255 (S.D.N.Y. 1994) Judge Haight held that because partnerships, like corporations, must appear through counsel, the status of the lawyer of record as also being a partner or associate of the partnership does not bar the privilege.

The United States District Court for the District of New Jersey recently went to great lengths to protect privileged information possessed by a former in-house counsel. In Prudential Insurance Co. of America v. Nelson, 11 F. Supp. 2d 572 (D.N.J. 1998), the court recognized the importance of protecting Prudential's privileged information.

> Because Nelson through his employment possessed privileged information of substantial importance and has consented not to divulge it, to abrogate the attorney-client privilege without a full and fair opportunity to challenge the disclosure of the arguably privileged information would seriously undermine the privilege and inflict grave harm on Prudential.

Id. at 581-82. In this case, Nelson was a former in-house counsel who entered a consent decree with Prudential to not disclose privileged information. Nelson was subpoenaed to give deposition testimony, and Prudential sought to prevent Nelson from

appearing. The court established detailed guidelines allowing Prudential to challenge the disclosure of privileged information.

On the other hand, in Teltron v. Alexander, 132 F.R.D. 394 (E.D. Pa. 1990) the court held that Teltron failed to meet its burden of proof to sustain objections to deposition questions of a witness who had been Teltron's outside counsel, then its inside counsel, then its president, on grounds of attorney–client privilege.

In addition to discussing the distinction between in-house counsel acting as business persons and them acting as lawyers, Restatement (Third) Law Governing Lawyers Section 122 (T.D. No. 1) Reporter's Note, Comment C, observes:

> In-house counsel are professional legal advisers for purposes of the privilege, whether locally admitted or not. See, e.g., Bruce v. Christian, 113 F.R.D. 554, 560 (S.D.N.Y. 1987); Research Instit. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Foundation, 114 F.R.D. 672, 676 (W.D.Wisc. 1987); Valente v. Pepsico, Inc., 68 F.R.D. 361, 367 (D.Del.1975).
>
> For a contrary view, see, e.g., AM & S, Ltd. v. Commission of the European Communities, [1982] 2 E.C.R. 1575, 1612 (Ct. Just. of Eur. Comm.) (communications by client to lawyer who is "bound to his client by a relationship of employment" not covered by privilege otherwise recognized in European commission proceedings).

Government counsel can have privileged communications. In a very recent case, the Supreme Court of Ohio in State ex rel. Leslie v. Ohio Housing Finance Agency, 105 Ohio St. 3d261, 824 N.E. 2d 990 (2005), the court held that the privilege applies to communications between a state agency and its in-house counsel. See also Women in City Gov't v. City of New York, 112 F.R.D. 29 (S.D.N.Y. 1986); cf. Mitzner v. Sobol, 136 F.R.D. 359 (S.D.N.Y. 1991) (holding State Ed. Dept. Counsel memo to official of dept. reviewing question about school district privileged but waived); Bruce v. Christian, 113 F.R.D. 554 (S.D.N.Y. 1986) (Housing Authority Counsel); Nicolo v. Greenfield, 163 A.D.2d 837, 558 N.Y.S.2d 371 (N.Y. App. Div. 1990). A New York court extended the concept of "party" as represented by in-house counsel established in Niesig, to state employees represented by the Attorney General. See Schmidt v. State, 695 N.Y.S.2d 225 (N.Y. Ct. Cl. 1999).

As discussed more fully below, investigations conducted by in-house counsel sometimes present special challenges. For example, the New York Code of Professional Responsibility, EC 5-18 states that counsel representing a corporation does not represent its employees or other individuals affiliated with it. Strict adherence to this rule subjects an in-house attorney's investigation of potential liability to scrutiny. In Spectrum Systems International Corp. v. Chemical Bank, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991), the New York Court of Appeals allowed an investigative report prepared by outside counsel to remain privileged because it served as the foundation for the law firm's legal advice. Spectrum therefore provides an explicit warning to counsel – counsel directing an investigation should ensure that it is solely for the purpose of rendering legal advice. See generally Determination of whether a communication from a corporate client is entitled to privilege, 26 A.L.R. 5th 628 (1995) and What corporate communications are entitled to attorney-client privilege, 27 A.L.R. 5th 76 (1995)

(b) State

Recognition of the privilege by state courts has been an uneven journey. Courts have wrestled with the predominant purpose test, analyzing the consultations and negotiations between corporate counsel and the corporate client. Slowly courts are coming to the necessary conclusion that in-house counsel provide the most benefit to the corporate client when counsel is practicing preventive law and avoiding litigation.

In New York, the leading case is Rossi v. Blue Cross & Blue Shield of Grtr. N.Y., 73 N.Y.2d 588, 540 N.E.2d 703, 542 N.Y.S.2d 508 (1989). The defendants' in-house counsel had written a four paragraph memorandum to its Medical Director, the first paragraph of which described discussions between the author and plaintiff's attorney about a possible suit by plaintiff for defamation of plaintiff's product. The memo's second paragraph described conversations with the FDA; the third, the author's understanding of the Blues' reimbursement policy for products like plaintiff's, and the last gave the author's advice about language to be used in rejecting claims.

The court took as well established that corporations have an attorney-client privilege, and that in-house counsel are lawyers for this purpose. It held the memorandum privileged. Its holding on the question of legal advice and business advice being mixed in the same document is discussed below at p. 31. See also Kraus v. Brandstetter, 185 A.D.2d 300, 586 N.Y.S.2d 270 (2d Dept. 1992) (recognizing privilege between hospital law committee and a hospital); cf. New York State Bd. of Elections v. Fricano, 147 Misc. 2d 597, 558 N.Y.S.2d 464 (Albany Co. 1990) (holding that research director of Republican State Committee, although a lawyer, was used as a lobbyist, not a lawyer by the committee or its employees); Sackman v. Liggett Group, 920 F. Supp. 357 (E.D.N.Y. 1996) (spokesperson's role for lawyer in tobacco cases vitiates privilege).

A more recent pronouncement on this question is the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2004-02. The opinion outlines how an attorney should conduct an analysis of whether to embark on multiple representation, including how to collect information for that analysis. The opinion also identifies common risks and benefits that should be discussed with the corporate client and the constituent when seeking informed consent. In addition, the opinion describes measures that lawyers may deploy at the outset to minimize problems if an actual conflict later develops between the joint clients, including prospective conflict waivers, contractual limitations on the scope of representation, agreements about the use of privileged information, and the use of "shadow counsel."

In the typical case, the panel said, a corporate lawyer's first encounter with an employee will occur during a fact-gathering interview. A lawyer usually should advise the employee that the lawyer represents the corporation and not the employee. It may work against the corporation's interests, the panel noted, to advise the employee to consult with counsel; if the employee asks whether to consult counsel, it is typical and prudent for the interviewing lawyer to reiterate that she represents the corporation and therefore cannot advise the employee, the committee said.

The comment to American Bar Association Model Rule 1.13 provides additional guidance for situations in which the corporation's interests may be or become adverse to the employee's interests.

The committee advised that if a constituent makes a request before the initial interview to be represented by corporate counsel, counsel ordinarily should say no. The lawyer is unlikely at such an early point to have enough information to apply the disinterested lawyer test.

Typically, the panel said, an employee requests representation by corporate counsel when the government asks to interview or take testimony from the employee. If at that point the lawyer needs to get more information from the employee in order to apply the disinterested lawyer standard, the lawyer should make clear to the employee that information shared in the interview will be disclosed to the corporation and that the corporation will control the decision whether to further disclose such information, the opinion advises.

On the question of obtaining consent after full disclosure, the committee didn't catalogue all the pros and cons that should be discussed with the corporation and the constituent; but it identifies some of the most common advantages and risks.

The most serious risk to the corporation is that a conflict might arise that disables corporate counsel from continuing in that role.

According to the opinion, other disadvantages to the corporation include possibly losing credibility with the investigating agency, complicating corporate counsel's ability to report facts to the corporate client, and impairing the corporation's ability to disclose facts to the government.

The principal risks to the employee client, the committee said, are that corporate counsel may find it difficult—despite the best intentions—to protect the employee's interests as vigilantly as corporate counsel defends the corporate client's interests, or that a conflict may arise that requires the lawyer to withdraw from representing the employee.

Lawyers contemplating multiple representation should try to structure it to minimize potential drawbacks and avoid potential harm from an actual conflict if one develops.

A prospective waiver may be sought form the employee client, the panel suggested, to allow the lawyer to continue representing the corporate client in the event of a conflict, and to enable the lawyer to cross-examine the constituent if the constituent thus becomes a former client. Such an advance waiver should be seriously considered, the committee urged, whenever any reasonable possibility exists that the interests of the corporate client and the employee will diverge. Prospective waivers should be framed as specifically as possible and should be put in writing, it said.

As another safeguard, the committee continued, a lawyer may seek to contractually limit his representation of the employee client to the investigatory stage of the matter, or even to a single interview with the government about a narrowly circumscribed topic. Such a limitation is ethical, as long as the representation is not so limited as to be inadequate, the client can reasonably conclude that the arrangement serves the client's interests, the client gives informed consent, and the representation covers a discrete phase of a matter.

In addition, the committee encouraged lawyers to have a clear understanding with both the corporation and the constituent—reduced to writing—on the following points:

- whether and what kind of confidential information will be shared
- who will control the privilege for that information
- how the privilege will operate in the event that a dispute arises between the clients
- whether the lawyer will continue to represent the corporation if a conflict develops between the corporation and the constituent

Finally, the committee suggested that in some cases it may be appropriate to use co-counsel or "shadow counsel"—that is, separate counsel who is available to offer independent advice to the employee and, if necessary, to take over as the employee's sole counsel. This option should be considered, the panel said, where the need to withdraw would be likely to significantly disadvantage the employee client because, for example, the matter is time sensitive or especially complex.

While it would seem that the attorney-client privilege asserted by a corporation is strongest during litigation, the United States District Court for the Southern District of New York permitted discovery of legal advice rendered to Bristol-Myers Squibb Company during the course of litigation. See Bristol-Myers Squibb Co. v. Rhone-Polenc Rorer, Inc., 1999 WL 1021565

(S.D.N.Y. Nov. 10, 1999). The complaint alleged willful infringement, and the court determined that the "state of Bristol's 'willfulness' may change during the course of the litigation." Id. at *2. As a result, the court ordered Bristol to disclose the legal advice given to the corporate officers.

Under some circumstances, it may become difficult to determine who the client is when outside counsel is retained. In ING Financial Services Corp. v. Dolores Barrett, Christopher R. Wagner and W. King Grant, (Index No. 115254/99, August 24, 1999) William Dorson, a Managing Director at ING, sought the legal advice of Wechsler and Bursky ("W&B"). W&B delivered an eight-page legal opinion, which Dorson distributed to other employees at ING. Dorson paid the legal fee to W&B, and ING reimbursed Dorson. When W&B later represented parties adverse to ING in an arbitration on a similar matter, ING moved to disqualify. The court determined from the evidence that W&B believed that the legal advice it gave was for Dorson individually. The opinion noted W&B was generally hostile toward securities firms, including ING. As such, W&B did not represent ING and was therefore permitted to represent a party adverse to ING in a similar matter.

Whether the client is the individual or the entity the individual works for remains a controversial question. A similar issue was recently addressed in the New York Supreme Court – Appellate Division, Third Department. The State of New York sought discovery of materials in litigation involving the payment of counsel fees for a State employee under the Public Officers Law section 17. See Slate v. State of New York, 701 N.Y.S.2d 729 (N.Y.A.D.3 Dept. 2000). The court prohibited discovery of a majority of the material based upon application of the attorney-work-product rule and the attorney-client privilege. The court rejected the argument that since the State is obligated to pay the attorney's fees for the State employee, an attorney-client relationship is created between the attorney and the State.

In New York, DR 7-104(A)(1) the equivalent of RPC 4.2, prohibiting contact with a represented party, has been interpreted differently from New Jersey. In Niesig v. Team I, 76 N.Y.2d 363, 374 (1990) the New York Court of Appeals held the control group test too narrow, and defined "party" to include "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." The New York Court of Appeals expressly excluded former employees, making its definition in this regard narrower than New Jersey's. But even in New York, what is the "matter under inquiry" in a transaction?

In Miano v. AC & R Advertising, Inc., 148 F.R.D. 68, adopted and aff'd, 834 F. Supp. 632 (S.D.N.Y. 1993) the court held that, absent litigation, the mere presence of in-house counsel for an organization on the other side does not render it represented. The inquiring lawyer must know counsel has actually been consulted about the matter for the DR to be at issue.

In New Jersey, when the corporation is the client, the attorney-client privilege does not always apply merely because the communication occurs with in-house counsel. In New Jersey, the leading case on the attorney-client privilege for in-house counsel is United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984).

In Wolosoff, the court addressed two issues: (1) the extent to which confidential communications between corporate officers, in-house counsel and others are protected under the attorney-client privilege; and (2) when the privilege may be pierced. The court explained that the attorney-client privilege shield can be penetrated where the communications were made a material

issue by virtue of the client's allegations in the litigation. The privilege can be used as a shield, but not as a sword.

Specifically, in Wolosoff, the bank sought rescission of a settlement agreement with its borrower. The in-counsel participated in the settlement discussions. The court reversed the lower court's determination that none of the documents were subject to the privilege. Instead, the Appellate Division determined that an *in camera* inspection of the subject documents would be necessary to determine the nature and content of the communications with in-house counsel. See also United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991). In Bilzerian, the defendant was prosecuted and convicted of various securities violations. The defendant wanted to testify about his good faith defense without revealing attorney-client conversations. The court held that if the defendant testified about his good faith belief in the legality of his actions, it would open the door to cross examination of attorney-client communications. The court reasoned that the defendant could not use the privilege to deter discovery, then use the same "evidence" to defeat liability.

In National Utility Service v. Sunshine Biscuits, Inc., 301 N.J. Super. 610 (App. Div. 1997) the Appellate Division reversed the trial court's holding that because the analysis of a dispute embodied in a memorandum of in-house counsel differed from the position taken three years later by litigation counsel the crime-fraud exception to the attorney-client privilege was applicable and the memorandum was discoverable. The Appellate Division sustained the claim of privilege for in-house counsel's memorandum.

The Tax Court of New Jersey extended the definition of "client" in N.J.S.A. 2A:84A-20(3) to include the parent and subsidiaries of the company employing the attorney. Edison Corp. v. Town of Secaucus, 17 N.J. Tax 178 (1998). In this case, the court permitted an employee of the parent company to claim a privilege for discussions with an attorney employed by the subsidiary company. See id.

R.P.C. 1.13, 4.2 and 4.3 were amended to define more precisely which business people are the client for purposes of determining if they are off limits to opposing counsel unless their employer's counsel is present. R.P.C. 1.13 provides:

> (a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of R.P.C. 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

It remains to be seen if this "control group" test will be applied in New Jersey in determining who in the corporation can have privileged communications with counsel. Cf. Sicpa North America v. Donaldson Enterprises, 179 N.J. Super. 56 (Law Div. 1981). And these R.P.C.'s provide little if any guidance to in-house transactional counsel about with whom they may speak in negotiating deals or transactions because absent litigation the definition of a "litigation control group" is difficult. See Corp. Counsel Guidelines, §§ 3.21-3.29.

In Kramer v. CIBA-GEIGY, 2004 WL 1765522, App. Div. August 9, 2004, CIBA had contracted with two former employees that:

> Except for occurrences of your willful misconduct, CIBA-GEIGY will defend and indemnify you in connection with any claims

> asserted or litigation commenced after the date hereof and based on your prior employment by CIBA-GEIGY or this consultancy, provided that you give prompt notice to CIBA-GEIGY of such claim or litigation. In such instance, CIBA-GEIGY shall have the right to assume the defense thereof with counsel of its choice. You agree to cooperate with CIBA-GEIGY in the defense of any asserted liability and, in any event, shall have the right to participate at your own expense in the defense of asserted liability.

When the consultants were sued, CIBA affirmed the indemnity and offered to provide defense by its counsel. The former employees refused, citing a possible conflict of interest based on the willful misconduct exclusion. Other counsel were proposed and rejected. Ultimately, the former employees each used their own counsel. In its decision, the Appellate Division affirmed the trial Court's order that CIBA pay their counsel's fees and reversed the holding that they should have used joint counsel.

The opinion concludes that because the interests of CIBA and the former employees were not coextensive, a conflict existed. While not coextensive, since CIBA had agreed to pay any judgment on their behalf (subject to an exclusion not invoked and that its lawyers said they had no reason to conclude would apply), it's unclear why there was a present conflict.

In Virginia Electric and Power Company v. Westmoreland-LG& E Partners, 526 SE2d 750, 259 Va. 319 (2000), the Supreme Court of Virginia upheld the privilege and shielded a draft letter of corporate executive to in-house counsel from discovery. The letter in question memorialized a conversation between Westmoreland and Virginia Power executives regarding the potential liability of Virginia Power on forced outage days. Prior to sending the letter, the Westmoreland executive who prepared it sent it to in-house counsel for, as the executive later testified, for legal advice on its content and whether it should be sent, though the letter did not specify that intention. A group of Westmoreland and venture partner executives subsequently met with a partner corporation's in-house counsel and determined not to send the letter. Rejecting a narrow application of the privilege, the court held that the privilege attaches to a document even if the document does not contain, or is not accompanied by, a written request for legal advice, if the proponent of the privilege sustains its burden of proof to show that the document was prepared with the intention of securing legal advice on its contents. Further, in addressing the question of whether the privilege was waived because the letter was also sent to non-lawyer executives of partner corporations at the same time that it was sent to the attorney, the court, citing Upjohn and Owens-Corning, applied the concept that communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to the attorney-client privilege to companies that were partners on the project sharing a common concern.

3. Work Product Doctrine.

In contrast to the attorney-client privilege, the work-product doctrine provides broader protection. See, e.g., E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 406, 718 A.2d 1129, 1134 (Md. 1998) (stating that "[t]he attorney client privilege as applied in judicial proceedings is narrowly construed, whereas the work-product doctrine is broader in scope."). It typically exempts from disclosure all materials prepared by or on behalf of a party or its attorneys in anticipation of litigation.

The work-product doctrine is well laid out in Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the owners of a tugboat that sank retained counsel immediately after several crewmen drowned. The tug owners sought representation regarding potential liability. The plaintiffs then sought discovery of documents prepared by the tug owner's counsel regarding statements made by

surviving crewmen. The District Court held the defendants in contempt for failing to produce the documents. The Court of Appeals reversed and was affirmed by the United States Supreme Court which held that "an attempt . . . to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." Id. at 510.

See also Rossi, above at p. 19 (attorney's legal analysis and conclusions are immune from discovery as an attorney's work-product). In Rossi, plaintiff was denied access to a memorandum prepared by counsel for the insurance company regarding potential liability from the company's denial of claims for services performed by the plaintiff. Work Product is discussed at length in Corp. Counsel Guidelines, Chapter 2.

In Redvanly v. NYNEX Corp., 152 F.R.D. 460 (S.D.N.Y. 1993), former U.S. Magistrate Judge Sharon E. Grubin, ruled that corporate counsel's notes of a meeting regarding the anticipation of litigation must be produced to the other side in litigation. In determining whether or not the notes were work-product, the Judge determined that they sounded like factual recitations and not opinion or legal advice. See also United States v. Adlman, 1994 U.S. Dist. LEXIS 6393 (S.D.N.Y. May 16, 1994) (in-house counsel's memos regarding a corporate restructure, based upon reports by accountants, are not protected by the attorney-client privilege or work-product doctrine). The court in Adlman refused to protect the in-house attorney's memos, even though he argued that they were prepared in anticipation of the IRS challenging his client's change of corporate structure. The court held that "the possibility of future litigation based on a transaction which has not yet occurred . . . fails to establish that the work-product doctrine applies to a communication." Id. at 6-7.

The courts are hesitant to extend the work-product protection to documents that are obtained under suspect circumstances. In Harry Winston, Inc. v. Kerr, 72 F. Supp. 2d 263 (S.D.N.Y. 1999), U.S. District Judge Kaplan refused to extend work-product status to memoranda and transcripts obtained under "troublesome" circumstances. In this case, Kathleen A. Kerr, a former employee of Harry Winston, Inc. was hired by Bruce Winston to solicit information about the company that his brother Ronald was running. Harry Winston, Inc. claimed that Kerr breached her obligations to the company and misappropriated confidential information and trade secrets she obtained apparently while employed by Harry Winston, Inc. Kerr sought work-product protection for the memoranda and transcripts from interviews prepared by attorneys representing Bruce Winston. The court rejected the claim for protection partially because the materials were not prepared in anticipation of this case. The court further expressed concern about the circumstances under which the information was obtained. The court's concern about the circumstances surrounding the obtaining of the information parallels the factors affecting the crime-fraud exception to the attorney-client privilege.

In a recent Second Circuit opinion, the court permitted former corporate executives to assert a Fifth Amendment protection from answering a subpoena for corporate documents in the possession of the executives. See In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 1999 WL 692023 (2d Cir. Sept. 7, 1999). Here, the court rejected the application of Braswell v. United States, 487 U.S. 99 (1988). In Braswell, the Court refused to permit a current corporate employee to claim a Fifth Amendment act of production privilege. The Court said that the employee holds the documents as a representative for the corporation, and not in a personal

capacity. Since the corporation does not have a Fifth Amendment privilege, an agent of the corporation similarly may not assert the privilege.

The Second Circuit refused to extend Braswell in In re Three Grand Jury Subpoenas, concluding that the privilege may be asserted by a former employee. The court said that once the employee is no longer employed, he ceases to be an agent for the corporation and is no longer a custodian of the corporate records. Therefore, the Fifth Amendment privilege becomes personal when asserted by the former employee and may be used to protect corporate documents in the personal possession of the employee.

In Leonen v. Johns-Manville, 135 F.R.D. 94, 96 (D.N.J. 1990), the court noted that "opinion work-product, such as an attorney's legal strategy or evaluation of a case's strengths and weaknesses, is almost absolutely privileged." The party claiming the work-product privilege must show that the document was prepared in "anticipation of litigation." The court required a close connection in parties or subject matter for the documents to be protected. It could not be protected if the document was prepared for an unidentifiable specific claim. "The mere fact that litigation does eventually occur, does not by itself bring documents within the ambit of the work-product doctrine." Id. at 97. In this case, the court would not confer the privilege on the subject documents.

In Koch Materials Co. v. Shore Slurry Seal, 208 F.R.D. 109 (D.N.J. 2002), the court finessed the question whether a study commissioned by in-house counsel was work product by ordering all relevant information on the topic produced.

B. Communication Must Be Legal Advice.

The requirement that the relationship be strictly legal is key – the consultation must be in the lawyer's capacity as an attorney. See In re Grand Jury Subpoenas, 241 N.J. Super. 18 (App. Div. 1989); Rossi v. Blue Cross & Blue Shield of Greater N.Y., 73 N.Y.2d 588, 540 N.E. 2d 703, 542 N.Y.S.2d 508 (1989); Morris v. State, 4 Md. App. 252, 255, 242 A.2d 559, 561 (1968); and First Chicago Int'l v. United Exch. Co. Ltd., 125 F.R.D. 55 (S.D.N.Y. 1989).

New York, as articulated by the Court of Appeals in Rossi, above at p. 20, (73 N.Y.2d at 594) takes a broad view.:

> So long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain non-legal matters. Indeed, the nature of a lawyer's role is such that legal advice may often include reference to other relevant considerations. Here, it is plain from the contact and context of the communication that it was for the purpose of facilitating the lawyer's rendition of legal advice to his client. While we are mindful of the concern that mere participation of staff counsel not be used to seal off discovery of corporate communications, here "[nothing] suggests that this is a situation where a document was passed on to a defendant's attorney in order to avoid its disclosure." It appears that Blaney was exercising a lawyer's traditional function in counseling his client regarding conduct that had already brought it to the brink of litigation. (citations omitted)

Cf. Cooper-Rutter Assocs. v. Anchor Nat'l Life Ins. Co., 168 A.D.2d 663, 563 N.Y.S.2d 491 (N.Y. App. Div. 1990) (documents prepared by in-house counsel/corporate secretary concerned both business and legal aspects, were not primarily of a legal character, and, therefore, were not shielded by the attorney-client privilege.)

In Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp., 1996 WL 29392 (S.D.N.Y. Jan. 25, 1996), the court rejected the defendant's invocation of the attorney-client privilege to protect communications surrounding negotiations. The court said that the negotiations involved

"business judgments of environmental risks" and not legal advice protected by attorney-client privilege. Id. at *4. Note that while this opinion was not reported, it was significant enough to attract academic attention. See Van Deusen, cited at p. 13 above.

Similarly, in Fine v. Facet Aerospace Products Co., 133 F.R.D. 439 (S.D.N.Y. 1990), the court rejected a claim of privilege for a report drafted by the defendant's engineering department for purposes of risk management. The defendant sought to protect the documents because of information included in the report provided by their in-house counsel. However, the court determined that because the in-house counsel also serves as Assistant Secretary of the company, there is a higher "probability that the communications were made for general business purposes." Id. at 444.

In United States Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156 (E.D.N.Y. 1994) the court recognized the problem with in-house counsel frequently having multifaceted duties, including increased participation in day-to-day operations of large corporations. However, the court explained that it tended to find a dominant legal purpose in cases where the advice sought may have involved both business and legal considerations. The court reviewed each document to determine the character and legal nature of each. The conclusion – some documents were subject to the privilege and others were not. For instance, communications with an engineering firm regarding environmental studies to develop a remedial program were not privileged. Cf. EEOC v. Kidder Peabody & Co., 1992 U.S. Dist. LEXIS 3939 (S.D.N.Y. Apr. 2, 1992) (in-house counsel investigation in response to EEOC investigation privileged); Mendenhall v. American Booksellers Ass'n, 1990 U.S. Dist. LEXIS 5153 (S.D.N.Y. May 1, 1990) (privilege applies to in-house counsel collecting information about emerging legal dispute.) Cf. Cooper-Rutter Assocs. v. Anchor Nat'l Life Ins. Co., 168 A.D.2d 663, 563 N.Y.S.2d 491 (N.Y. App. Div. 1990) (documents prepared by in-house counsel/corporate secretary concerned both business and legal aspects, were not primarily of a legal character, and therefore, were not shielded by the attorney-client privilege).

The United States District Court for the Southern District of New York clarified the burden that a party carries to assert the privilege. In Ames v. Black Entertainment Television, 1998 WL 812051 (S.D.N.Y. Nov. 18, 1998) the court said that the company bears the burden of "clearly showing" that the in-house attorney gave legal advice and not business advice in order to claim the privilege.

Application of the attorney-client privilege is complicated in situations where communications claimed to be privileged involve in-house as opposed to outside counsel because "in-house attorneys are more likely to mix legal and business functions." Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002) (citation omitted). The Second Circuit has made clear that only those communications related to "legal, as contrasted with business, advice" are protected. In re: Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d at 1037; see In re: John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982). See also, TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143 (S.D.N.Y. 2003) noting that as to Senior Vice President of Business & Legal Affairs and Vice President of Business and Legal Affairs, "[a]s the titles indicate, these representatives served. . . .not only as lawyers, but as high ranking management executives. As such, it is not always readily discernable in what capacity they may have been functioning at the time they participated in particular communications. . . ."

In **New Jersey** to be privileged, the communication must be regarding legal advice from the attorney as an attorney. In Metalsalts Corp. v. Weiss, 76 N.J. Super 291, 297 (Ch. Div. 1962), counsel for the plaintiff corporation, who was also a stockholder, director and officer, was asked to conduct an investigation of certain acts regarding the removal of defendant as president. The defendant sought discovery of the investigation and the corporation asserted the attorney-client privilege as a bar. The court refused to permit the privilege, explaining that the general counsel "undertook to serve as an investigator and not as a lawyer . . . nor was he being called upon to render *legal* advice . . . [and] was not acting peculiarly within the province of an attorney at law, and therefore the attorney-client privilege cannot be asserted as a bar to discovery proceedings." Id. at 299. See also United Jersey Bank v. Wolosoff, 196 N.J. Super 553 (App. Div. 1984) (communications must fall strictly within the attorney's professional capacity and the shield may be pierced where communications are made a material issue and there is no less intrusive source); In re Grand Jury Subpoenas, 241 N.J. Super. at 30.

A Pennsylvania court limited the attorney-client privilege to communications between an attorney and an employee who

> is in a position of control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer. . .

City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962). To define who is the client, the court said that an employee who does not have actual authority to make the decision relevant to the communication is a witness providing information for the client. Id. at 484. This communication is not privileged. Id.

The distinction between the in-house lawyer in his role as an attorney and the in-house lawyer in his role as a business adviser was very important in granting a privilege to an in-house tax-lawyer. See Boca Investing P'ship v. United States, 31 F. Supp. 2d 9 (D.D.C. 1998). Here the District Court for the District of Columbia permitted an in-house counsel's tax advice with respect to his client's financial transactions to be protected by the attorney-client privilege. The court noted that there is a rebuttable presumption that an attorney working in a legal department or for a general counsel is most often giving legal advice, and an attorney who is not in a legal department organizationally is most often giving business advice. The tax-attorney here was in the tax department and did not report organizationally to either the legal department or the general counsel. However, the court was convinced that the tax-lawyer was in fact giving legal advice and therefore, the communications were protected by the attorney-client privilege.

This distinction was detrimental to an in-house counsel for Yellow Freight System, Inc. See Marten v. Yellow Freight Sys., Inc., 1998 WL 13244 (D. Kan. Jan. 6, 1998). The in-house lawyer recorded the minutes at an Employee Review Committee meeting. After an employee was fired, he sought discovery of those notes. The court rejected both the attorney-client privilege and the work-product privilege because the court found that the attorney was acting as a business advisor and not as an attorney. The court noted that the attorney participated in the discussions and voted at the meeting, but did not render legal advice.

In Scripps Health v. Haller, (CA Crt. Of Appeals 2003) a report created as part of the hospital's risk management self-insurance program was held to be principally for a legal purpose and thus privileged. In Burlington Industries v. Exxon Corporation and Amtech, Inc., 65 F.R.D. 26

(D. Md.), the court applied the privilege to documents which contained technical data and legal advice.

C. Waiver.

As shown above, the mere fact that the communication is made to an attorney does not make it privileged. The privilege is not absolute and the United States Supreme Court has held that it may be waived. Upjohn Co. v. United States, 449 U.S. 383 (1981) (the privilege is not absolute and may be expressly or impliedly waived by the clients conduct; internal investigations by in-house counsel are not necessarily privileged.). See also Pratt v. State, 284 Md. 516, 521 (Md. 1979) (client may waive attorney-client privilege, either expressly or impliedly). The power to waiver the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. Commodity Futures Trading Commission v. Weintraub, 471 U.s. 343, 105 S. Ct. 1986 (1985).

The informality sometimes inherent in e-mails can result in inadvertent waiver of the privilege. In Cellco Partnership v. Nextel Communications, Inc., 2004 WL 1542259 (S.D.N.Y. 2004), the court held that the client waived the privilege for e-mails by sharing them with a third party. However, e-mail will be protected by the privilege when it meets the tests of a communication made between a corporation and its in-house counsel acting in the capacity as such for the purpose of securing legal advice. Premiere Digital Access, Inc. v. Central Telephone Company et al., 360 F. Supp 2d 1168 (D. Nev. 2005).

An implied waiver usually arises when the holder of the privilege raises as a defense details about what transpired between a client and its counsel. In order to fall within this waiver, the holder of the privilege must voluntarily inject new facts, not just deny allegations. The court in Wolosoff, supra, would not allow the privilege to be used as a sword rather than a shield, refusing to permit a party to divulge whatever information was favorable, but to preclude disclosure of detrimental facts. Although the court did not rule that the privilege had been waived, it expressly recognized that a waiver could occur. Many federal district court decisions have defeated the claim of privilege by finding an implied waiver. See, e.g., Am. Home Assurance Co. v. Fremont Indem. Co., 1993 WL 426984 (S.D.N.Y. Oct. 18, 1993) (waiver because of belief of counterclaim for rescission); Dorr-Oliver Inc. v. Fluid-Quip Inc., 834 F. Supp. 1008 (N.D. Ill. 1993) (defendants could not rely upon undisclosed advice of counsel as part of their "good faith" argument in a trademark case); In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (waiver by disclosing to auditors and underwriters' counsel).

In United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991), the defendant was prosecuted and convicted of various securities violations. The defendant wanted to testify about his good faith defense without revealing attorney-client conversations. The court held that if the defendant testified about his good faith belief in the legality of his actions, it would open the door to cross examination of attorney-client communications. The court reasoned that the defendant could not use the privilege to deter discovery, then use the same "evidence" to defeat liability.

A recurring pattern of waiver issues arises after a former subsidiary, serviced by in-house counsel of its parent, is sold off and sues its former parent. The privilege is usually destroyed. Bass Pub. Ltd. v. Promus, 1994 U.S. Dist. LEXIS 5474 (S.D.N.Y. Apr. 26, 1994); Bowne v. Ambase Corp., 150 F.R.D. 465, 491 (S.D.N.Y. 1993). Likewise, a lender who plays the role of manager of a real estate investment becomes a fiduciary, and the real estate department's counsel's

communications loses his privilege. Quintel Corp. v. Citibank, N.A., 567 F. Supp. 1357 (S.D.N.Y. 1983).

But cf. Vermont Gas Systems Inc. v. United States Fidelity and Guaranty Co., 151 F.R.D. 268 (D. Vt. 1993) (no implied waiver); Chase Manhattan Bank, N.A. v. Drysdale Sec. Corp., 587 F. Supp. 57 (S.D.N.Y. 1984) (no implied waiver); Barr Marine Prods. Inc. v. Borg-Warner Corp., 84 F.R.D. 631 (E.D. Pa. 1979) (no waiver merely because party brings or defends lawsuit); Kraus v. Brandstetter, 185 A.D.2d 300, 586 N.Y.S.2d 270 (N.Y. App. Div. 1992) (no waiver); and Harrison v. State, 276 Md. 122, 345 A.2d 830 (1975) (defendant's statement on cross-examination that he told his attorney "all about" a confidential matter did not constitute an implied waiver of the attorney-client privilege).

Courts are split on whether a corporation can claim the privilege against its shareholders or against former officers or directors for information they might have, but did not actually see at the time. See Garner v. Wolfinburger, 430 F.2d 1093 (5th Cir. 1970) (stockholder class action – showing of good cause to override accountant privilege); Kirby v. Kirby, 1987 WL 14862 (Del. Ch. July 29, 1987) (because directors are in charge of corporate management, no privilege against them); but cf. Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454 (Colo. Ct. App. 2003) (corporate counsel not required to testify in suit by firm directors).

Similarly, in Coffman v. Metropolitan Life Ins. Co., 204 F.R.D. 296 (S.D. W. Va. 2001) the court held that ERISA's fiduciary duties barred the assertion of attorney-client privilege as to a former employee who was also a plan beneficiary.

Although implied waivers of the attorney client privilege occur, even where a waiver is upheld, it usually is limited to the specific issue and is not a waiver of all privileged communications. See Buck v. Aetna Life & Cas. Co., 1992 WL 130027 (E.D. Pa. June 5, 1992) (holder of privilege asserted bad faith failure to settle as an affirmative defense; the circumstances surrounding the settlement negotiations were known only to holder's counsel); North River Ins. Co. v. Phila. Reinsurance Corp., 797 F. Supp. 363 (D.N.J. 1992) (implied waiver where privilege holder has asserted a claim or defense that it intends to prove by disclosing attorney-client communications).

D. How to Protect Yourself and Your Communications.

1. General.

Giving legal advice must be distinguished from rendering business decisions. This is particularly important if an attorney is asked to make a business decision which may later be the subject of litigation in which the attorney could be called as a fact witness. An in-house attorney also does not want to risk being asked to issue a legal opinion on a decision or action on which he/she made a business decision. Such dual roles may present counsel with an ethical problem. In addition, in-house counsel must bear in mind that they have one client – the corporation. See Code of Professional Responsibility EC 5-18 (in-house/corporate counsel does not represent corporation's employees or other individuals). See also N.J. R.P.C. 1.13, R.P.C. 4.2 and MRPC 1.13. Although these situations may be difficult to identify and predict, any decision-making should be done after a careful analysis. Counsel should be sensitive to the problems their dual position presents to their client's assertion of privilege.

In-house counsel should also be alert to the situations in which a court may uphold an implied waiver of the attorney-client privilege. Being informed may avoid an inadvertent waiver, or at least identify circumstances in which special care must be taken. The holding in Redvanly v.

NYNEX Corp, 152 F.R.D. 460 (S.D.N.Y. 1993) clearly instructs in-house counsel to be wary of these traps. "[The notes] were taken merely as notes of a meeting are often taken by those who attend meetings -- to have some record of what occurred. They were not taken in anticipation of litigation." Id. at 467.

2. Precautions.

(1) Management should be instructed to consult with counsel as soon as it becomes apparent that an investigation is necessary for the express purpose of rendering legal advice.

(2) If interviews are required, no unnecessary documents should be created and the employees should be instructed that in-house counsel represents the corporation. If the interviews must be recorded in writing, the notes should be restricted to thoughts and opinions based on what was learned, as opposed to facts and statements. In this way, it is more likely to be deemed as "opinion" work product and, thus subject to broader protection than the attorney-client privilege. If facts must be recorded, put them in a separate memo. Pay attention to which titles (corporate or legal) are used in which context; do not blend them.

(3) Consideration of retaining outside counsel to conduct the investigation is important where it could be construed as a business decision, regardless of the fact that an attorney is conducting the investigation.

(4) Reports should not be circulated beyond those with a need to know. The more access employees have to the report, the less likely it will be protected.

(5) Most importantly, the communication with in-house counsel must qualify as predominantly legal advice. If management needs to consult counsel on issues which are legal and non-legal, they should be addressed separately to avoid losing the privilege.

E. The Effect of the Attorney-Client Privilege.

There are two rationales on how the attorney-client privilege affects criminal cases involving a general counsel. On the one hand, a corporation will have waived its attorney-client privilege and the in-house counsel must prepare for the case knowing that every statement made during his position as in-house counsel will be in possession of the prosecutor. On the other hand, the general counsel may want to reveal confidential information to provide a defense to criminal charges but the corporation may refuse to waive the attorney-client privilege.

Because many corporations are afraid of criminal indictments, few will risk the possibility of an indictment to preserve the attorney-client privilege. Thus, many companies waive the attorney-client privilege in fear, which could cause great damage to general counsel. In fact, in-house counsel who suggest correcting a company's wrongdoing by acting internally appear like they are hiding and covering up criminal activity.

If a general counsel is part of a criminal investigation, it is highly likely that the general counsel no longer works for the corporation. Because the ability to waive the attorney-client privilege lies with the corporation, the general counsel nor his defense attorney can stop the

company from waiving the privilege. Therefore, the general counsel must prepare his argument assuming that all of his conversations and memorandum during his employment with the company will be in the prosecutor's hands.

A less likely situation could occur where the general counsel wants to use privileged information to assert his defense in a criminal investigation. However, the corporation may refuse to waive the attorney-client privilege. But based on the ABA's Model Code of Professional Responsibility (DR 4-101(C)(4) and the ABA's Model Rules of Professional Conduct (Model Rule 1.6(b)(3)), attorneys are allowed to reveal confidential information of their clients in order to defend against criminal charges. In addition, courts have adopted a "self defense" exception to the attorney-client privilege in these types of situations.

It is not always wise for a general counsel to reveal confidential information based on the "self defense" exception to the attorney-client privilege. First, "the risks of the general counsel's testifying [may] outweigh the possible benefits." In addition, if the general counsel chooses to testify and reveal confidential attorney-client information, the general counsel is now denied his 5th Amendment right to decline to testify. Also, the in-house counsel's testimony may lack value without other information. For this reason, a jury may not believe such testimony without additional corroborating information. See, Litigation, Vol. 30, No. 4, Summer 2004, "Representing the General Counsel and the Impact of Attorney-Client Privilege," by Reid H. Weingarten & Brian M. Heberlig *available at,* http://www.abanet.org/litigation/tips/tactics.html (last visited July 13, 2005).

SARBANES-OXLEY AND IN-HOUSE COUNSEL

A. Introduction

To address some of the accounting and corporate governance issues raised by Enron, Worldcom and other recent scandals, President Bush signed into law the Sarbanes-Oxley Act (the "Act") on July 30, 2002. Seeking public comment, the United States Securities and Exchange Commission posted proposed rules on November 21, 2002. These rules are aimed at protecting the public interest and investors. Section 307 of the Act directed the Commission to establish "minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way, in the representation of issuers." 15 U.S.C. § 7245 (2003). The Act broadly defines the phrase "appearing and practicing before the Commission" to include:

> (i) [t]ransacting any business with the Commission, including communication in any form; (ii) representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request or subpoena; (iii) providing advice in respect to the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to the Commission, including the provision of such advice in the context of preparing or participating in the preparation of, any such document; or (iv) advising an issuer as to whether information or a statement, or other writing is required under United States securities laws or the Commission's rule or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission;
>
> *BUT*
>
> Does not include an attorney who: (i) [c]onducts the activities of paragraphs (i) through (iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or (ii) is a non-appearing foreign attorney.

17 C.F.R. § 205.2(a)(1)-(2)(ii) (emphasis added).

International companies should pay attention to the definitions of "non-appearing foreign attorney" to see the geographic scope of the Rule's obligations.

On its face, this definition includes in-house attorneys. It includes not just those who actually prepare SEC filings or personally appear before the Commission, but also those who participate in describing material legal events such as certain litigation or intellectual property that is mentioned in SEC filings. There is also some question whether the determination of appearing before the SEC is personal, or if any attorney appears before the SEC then everyone in that attorney's firm (or legal department) is considered to appear in front of the Commission.

Section 307 expressly called for the promulgation of a rule which would require an attorney to report evidence of a material violation by an issuer, of securities laws or breach of fiduciary duty or similar violation. 15 U.S.C.. § 7245. "Material Violation" includes a violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any other United States federal or state law. 17 C.F.R. § 205.2(i). What is material is determined by pre-existing securities law standards. In addition, this Section also authorized the Commission to propose additional rules that would "further the purposes of the up-the-ladder requirement and enhance investor confidence in the financial reporting process." See "Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys." Release No. 33-8186.

B. Part 205: "Standards of Professional Conduct for Attorneys"

In response to this command, the Commission issued its final rule, "Standards of Professional Conduct for Attorneys," on January 29, 2003. This Rule took effect on August 5, 2003 (180 days after publication in the *Federal Register*).

1. "Up the Ladder Reporting"

If an attorney (while appearing and practicing before the Commission in the representation of an issuer) becomes aware of any evidence of a material violation, which he reasonably believes was committed by the issuer, or any of its officers, directors, employees, or agents, the attorney *must* immediately report such evidence up-the-ladder within the issuer's company. 17 C.F.R. §205.3(b)(1). Under the Rule, "reasonably believes" means that an attorney, acting as a prudent and competent attorney, believes the matter in question and the circumstances are such that the belief is not unreasonable. See id. § 205.2(l), (m). This reporting is usually directed to the issuer's Chief Legal Officer (CLO), or the Chief Executive Officer (CEO), or to both Officers (or the equivalents thereof), or a Qualified Legal Compliance Committee (see below). See id. Any in-house lawyer who is not also the CLO would seem to have these same duties, unless that attorney is a "subordinate" attorney.

Section 205.5 defines the responsibilities of a subordinate attorney. It provides:

> (a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.
>
> (b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

> (c) A subordinate attorney complies with §205.3 if the subordinate attorney reports to his or her supervision attorney under §205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.
>
> (d) A subordinate attorney may take steps permitted or required by §205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under §205.3(b) has failed to comply with §205.3.

Typically thus, in a three or more tiered legal department, the working level will be subordinate attorneys. A subordinate attorney need not go up the ladder beyond that lawyer's supervisor, unless the subordinate believes the supervisor has failed to act appropriately.

Supervising attorneys are defined as:

> (a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

In addition to the general up the ladder obligation, a supervisory attorney also has an extra duty:

> (b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in §205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.
>
> (c) A supervisory attorney is responsible for complying with the reporting requirements in §205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

Following this report, the Officer must "cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur." Id. If the Officer concludes that a violation has occurred, then that Officer is required to take reasonable steps to "cause the issuer to adopt an appropriate response" and so advise the reporting attorney. See id. If the Officer concludes that no material violation has occurred (is ongoing or going to occur) he/she is required to notify and advise the reporting attorney of the basis of this determination. See id.

While the report is to the CLO, in practice the CLO may delegate the detailed investigation of the matter to a member of the legal department.

If the reporting attorney does not reasonably believe that the Officer provided an appropriate response to his/her report, then another set of mandatory reporting is triggered. The attorney must then report his/her reason (for the belief that an inappropriate response has occurred) to the Officer or to:

> [t]he audit committee of the issuer's board of directors; or another committee of the issuers board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons"; or the issuer's board of directors.

§ 205.3(b)(3)(i) – (iii).

However, in instances where the attorney believes that it would be useless to report the violation to the issuer's CLO or CEO, he/she may report the evidence directly to the above-mentioned committees or boards. § 205.3(b)(4).

An attorney who reasonably believes that he/she has received a timely and appropriate response to the report, has fulfilled his/her obligations under this rule. § 205.3(b)(8). An appropriate response would be one, which causes the attorney to reasonably believe:

> [t]hat no material violation has occurred, is ongoing, or is about to occur; that the issuer has, as necessary, adopted appropriate remedial measures…; or that the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to §205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either: (i) [h]as substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or (ii) [h]as been advised that such attorney may, consistent with his/her professional obligations, assert a colorable defense on behalf of the issuer (or its officer, director, employee or agent) in any investigation or judicial or administrative proceeding related to the reported evidence of a material violation.

§ 205.2(b)(1)-(3)(ii).

2. Alternative Reporting Procedures: Qualified Legal Compliance Committee

If an issuer has previously formed a qualified legal compliance committee, then an attorney is permitted to report such evidence of a material violation to this committee instead of to the Officers. § 205.3(c)(1). In order for this committee to be valid, it must "consist of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed (directly or indirectly) by the issuer and who are not…interested persons. § 205.2(k)(1). It is also required that this committee has adopted written procedures for the "confidential receipt, retention, and consideration of any report of a material violation…" See id. The issuer's board of directors must have granted the committee the authority and responsibility to: "inform the issuer's CLO and CEO of any report of evidence of a material violation; to determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate," to take additional action. § 205.2 (k)(3). As long as the attorney reports the violation to such a committee, he/she has satisfied his/her reporting obligation under the Rule and "is not required to assess the issuer's response to the reported evidence of a material violation." Id.

This raises the interesting question of whether in-house lawyers should advocate the creation of a Qualified Legal Compliance Committee. On the one hand, it relieves the CLO of responsibility; on the other, it denies the CLO control. It is unclear if the CLO can be a member of the committee, and whether that would be a good or bad thing.

3. Sanctions and Discipline

Attorneys who violate the up-the-ladder rules are subject to the civil penalties and remedies available to the Commission for violation of the federal securities laws. If the Commission initiates an administrative disciplinary proceeding, it could result in either censorship or temporary or permanent denial of the privilege to appear or practice before the Commission. The violating attorney will be subjected to the disciplinary authority of the Commission, regardless of whether the attorney is also subject to discipline in the jurisdiction in which he/she is admitted to practice. § 205.6.

4. Disclosure of Confidences

This new Rule has caused some great concern with regard to revealing client confidences or otherwise protected information. However, the Rule provides for specific circumstances in which an attorney may reveal confidential information to the Commission relating to his/her representation of an issuer, without the issuer's consent, but none in which the attorney must. § 205.3(d)(2).

This is permissive as long as an attorney reasonably believes that such disclosure is necessary to:

> [p]revent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors, or to prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, or committing any act that is likely to perpetrate a fraud upon the Commission; or to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§ 205.3(d)(2)(i)-(iii).

This section makes clear that an attorney may use confidential information in the course of fulfilling his/her reporting obligations or in defending himself/herself against charges of misconduct under the Rule. See "Final Rule: Implementation of Standards of Professional Conduct for Attorneys." Release No. 33-8185.

5. Model Rule

RULE 1.6: CONFIDENTIALITY OF INFORMATION

> (1). A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (2).
>
> (2) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (i). to prevent reasonably certain death or substantial bodily harm;
>
> (ii) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (iii) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (iv) to secure legal advice about the lawyer's compliance with these Rules;
>
> (v) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (vi) to comply with other law or a court order.

C. "Noisy Withdrawal"

On January 29, 2003, the Commission did not adopt, but instead postponed a decision regarding the more controversial section of the rule, the "noisy withdrawal" provision. As of July 2004, the Commission has yet to adopt the provision. The provision in its original form, required reporting attorneys, who did not receive an appropriate response, to take specific action. In-house attorneys employed by an issuer, while they are not required to resign, are required to

notify the Commission within one business day that they intend to disaffirm any submission whose preparation they have participated in, and disaffirm such submission. Outside counsel are required to withdraw from representation as well as notify the Commission within one business day, and disaffirm any submission that they have participated in preparing which is tainted by the violation. See "Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys." Release No. 33-8186, § 205.3(d).

On January 30, 2003, the Commission set forth a revised provision for "noisy withdrawal" and extended the comment period for 60 days (all comments were due by April 7, 2003). See id. Under this altered provision, if outside counsel reports evidence of material violations, and the issuer (in counsel's judgment) responds inappropriately, counsel is still required to resign, but is no longer required to report the resignation to the Commission or renounce any filings. Instead, the *issuer* is required to report the circumstances of counsel's resignation within 48 hours of its happening.[1] § 205.3(e). Under the revised provision, if the issuer has not informed the Commission of the withdrawal, than the attorney is permitted to inform the Commission that he/she has withdrawn from representation or provided the issuer with notice that he/she has received an inappropriate response to a report of a material violation. §205.3(f).

D. Policies for In-House Counsel

Saul Ewing has a committee, including Spencer Franck, Timothy Hoeffner and Adam Isenberg, that is available to provide advice on policies corporations can adopt both for in-house and outside counsel.

The ACCA website has a page, www.acca.com/practice/ethics.php that links to policies of GM, Hasbro and other samples, as well as models from several law firms. The introductory page is in Appendix E.

A pay website that many in-house counsel use, www.thecorporatecounsel.net, has a Sarbanes Oxley section. A copy of the opening page of that site is Appendix F. The website includes the policies of several corporations, such as Xerox, and memos by other law firms, as well as the transcript of a web cast on August 13, 2003 on "Designing Reporting-VP and Complaint Procedures".

E. Conclusion

There are a number of areas that will be significantly affected by the new Rule. Attorneys' professional conduct, which has historically been controlled by state law, is to some extent becoming federalized. The Commission has set forth its own set of rules to govern this area. Although some of the states have similar requirements, in the event of a conflict, the Commission has already provided that its Rule preempts state law.

Also, the Rule permits the attorney to reveal client confidences or otherwise privileged information to the Commission. This is likely to negatively affect attorney-client relationships and privileges involved, and the level of trust associated with these types of relationships.

To avoid the reporting of material violations, issuers may begin to exclude counsel from events where sensitive information will be discussed or important decisions made. This may result in issuers making many uniformed decisions, and could eventually have a negative affect on all financial interests involved.

[1] Form 8-K or a similar form should be used to report the facts and circumstances of counsel's resignation (making the withdrawal public).

See, Appendix G, Saul Ewing Power Point Presentation related to the Sarbanes-Oxley material discussed above.

III. APPENDIX

A. Table of Authorities

B. NASD Guidelines/Forms

C. ACCA's Policy Statement

D. ACCA's Amicus Brief

E. ACCA's Webpage With Links to Sarbanes Oxley Policies

F. www.thecorporatecounsel.net HomePage

G. Saul Ewing Power Point Presentation

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ACCA
American Corporate Counsel Association
the in-house bar association℠

ACCA Policy Statement on Admission to Practice

Corporate counsel must be able to represent their clients in all aspects of corporate legal affairs, including the conduct of litigation, regardless of the jurisdiction in which the matter arises. Although the law recognizes the ability of a corporation to represent itself legally through a salaried employee, admission to practice requirements which vary from jurisdiction to jurisdiction nevertheless do impede the ability of corporate attorneys to represent their clients fully in those jurisdictions.

Uniform standards for admission to practice, administered by the various states, would result in the more efficient delivery of legal services to the corporation while recognizing the states' legitimate interest in regulating the bar. The American Corporate Counsel Association will work with federal, state and local bar authorities to seek uniform standards for attorney licensing. The association will pursue uniform standards in several areas including qualifications for admission (e.g., minimum years of practice in another jurisdiction, passage of bar and ethics examinations), residency requirements, and scope of practice (e.g., limitation on practice based on the attorney's employment status).

In pursuing this policy, ACCA will seek equal treatment for all attorneys. Recognizing that this process will be a lengthy one, in the interim the association may support rules or amendments to rules which result in the more efficient delivery of quality legal services to the corporate client, or which otherwise represent a significant improvement in existing admission to practice rules. If such rules or amendments result in other-than-equal treatment for all attorneys, board approval will be sought before any action on behalf of the association is taken.

In carrying out these activities, the association will use its best efforts to consult with any local ACCA chapter in the jurisdiction and with groups of private practitioners who also are concerned with admission to practice requirements of the jurisdiction.

Adopted by ACCA's Board of Directors on May 13, 1986.

Reaffirmed on March 4, 1994

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The in-house bar association℠

September 17, 2003

The Supreme Court of the State of New Hampshire
One Noble Drive
Concord, NH 03301

Re: *In the Matter of Unnamed Applicant*, Case No. ADM-2003-0060
(CLO Working in New Hampshire without a New Hampshire License)

Honorable Members of the Court:

We write on behalf of the American Corporate Counsel Association (ACCA) and its Northeast Chapter, many of whose members practice law in the legal departments of companies with offices located in New Hampshire. We realize that the court did not solicit our comments on the above-referenced matter, but hope that you will nonetheless accept this letter and review its contents in the form of an informal "amicus curiae" to your consideration.

ACCA is a bar association with over 15,000 individual members who work as employed in-house counsel for private sector organizations (public and private, for-profit and non-profit entities). ACCA's Northeast Chapter is made up of 588 corporate counsel working in New Hampshire, Rhode Island, Vermont, Massachusetts, and Maine. Our interest in this matter, however, stems from more than the vocal concerns about this case raised by our local members, but from our long history of involvement in unauthorized practice of law cases involving in-house counsel. Since ACCA's inception in 1982, we have worked with states across the country, and most recently with the American Bar Association's Commission on Multijurisdictional Practice (MJP) of Law, toward the development of reforms that would better reflect the realities and client concerns of modern legal practice, which is certainly multijurisdictional, and indeed, almost "borderless" in its application. We have helped several states over the years craft in-house counsel registration rules, as well as our more recent service in promoting the reforms recommended by the ABA's MJP Commission.

The situation raised by this matter, namely, that of a corporate counsel who is licensed and in good standing in one state, but practicing exclusively and full time for a corporate client in offices located in another state, is surprisingly common. Indeed, in the course of our work, we have encountered hundreds, if not thousands, of in-house counsel who are operating in a similar fashion. It is relatively rare, however, for the matter of such a counsel to be raised as a complaint with the state bar or the high court of the host state. Thus, our interest in offering some thoughts to this Court as it proceeds in this matter.

Without passing any judgment on the facts specific to this case or the arguments made by and against the Unnamed Applicant, we offer the following:

The Movement Toward MJP Reforms that Would Authorize the Applicant's Behavior

The most important issue we wish the Court to consider is the policy impact of its ruling on the Applicant in light of the current momentum currently sweeping the states (and under consideration in New Hampshire) to amend the unauthorized practice rules of each state. A number of states have already passed reforms, including Colorado, Delaware, Georgia, New Jersey, Nevada, and North Carolina. Every other State, including New Hampshire, is either in the process of committee-type review (with an eye toward recommendations for reform), or has completed review and issued a report recommending reforms which is awaiting adoption by the State's high court. These States' reforms are moving in a direction consistent with the theories behind new ABA Model Rules 5.5, 8.5, and related model recommendations for admission on motion, foreign counsel improvements in law practice and temporary and permanent practice, pro hac vice reforms, and other reforms suggested and adopted in 2002 from the report of the Commission on Multijurisdictional Practice of the ABA.[1]

While not every state will adopt sweeping reforms across every topic listed, and while not all reforms passed will conform exactly to the language of the ABA models, the reasons for the ABA MJP reform movement's momentum are best described by the Conference of Chief Justices in their letter of endorsement to the ABA MJP Commission:

WHEREAS, the states' highest courts regard consumer protection and an effective system of professional regulation as one of their prime responsibilities; and

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WHEREAS, the Commission's report emphasizes and reaffirms the central role of the state courts in implementing professional responsibility.

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1. The Conference of Chief Justices commends the proposals of the MJP Commission as a good platform on which states can build a more effective and more predictable regulation; and

2. The Conference of Chief Justices asks its representatives in the ABA's House of Delegates to vote to adopt the recommendations of the MJP Commission.

(See http://www.abanet.org/cpr/mjp/comments_0602.html for the letterhead copy.)

[1] For complete information on the ABA MJP Commission, its proposals, testimony, commentary, academic resources, and the adopted recommendations to revise the Model Rules of Professional Conduct, see http://www.abanet.org/cpr/mjp-home.html.

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Fourteen jurisdictions have corporate counsel rules: Colorado, Florida, Idaho, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nevada, Ohio, Oklahoma, Oregon, South Carolina, and Washington. Six jurisdictions without corporate counsel rules permit out-of-state lawyers to serve as corporate counsel as an exception to their prohibitions against the unlawful practice of law: Alabama, Maryland, New Jersey, Texas, Virginia and Washington, DC. (The new in-house counsel rule just approved by the New Jersey Supreme Court is not effective until January 1, 2004, and Virginia's new corporate counsel admission and registration rule goes into effect July 1, 2004.) In addition, Delaware, Georgia, New Jersey and North Carolina now authorize corporate counsel licensed elsewhere to work in their states as part of their new MJP reform. As you can see, many states (recognizing that the practice of in-house counsel is a matter of risk only to the sophisticated corporate client, and that in-house lawyers are often transferred regularly from office to office) have adopted these rules to facilitate in-house counsel practices and effective corporate client services; these rules have the effect of ensuring that counsel who are otherwise "flying below radar" are subject to the jurisdiction of the state in which they are operating.

No Injury and no Harm

[2] The New Hampshire Bar Association Ethics Committee is chaired by Rolf Goodwin, (rolf.goodwin@mclane.com).

[3] The proposed reforms adopted or proposed to date in over 30 states offer provisions to authorize the practice of in-house counsel who are working in a state in which they are not licensed so long as they are licensed (and in good standing in every jurisdiction in which they are admitted), working solely for their employer, and not holding themselves out as licensed locally or attempting to represent their client in local courts without pro hac authorization or locally admitted co-counsel. Some of these reforms take the form of rule amendments; some take the form of a registration system which is administered by the bar to provide a limited license. The remaining states have not yet indicated what they are planning to do.

It is notable that bar counsel did not bring this action because of a public harm or complaint (indeed, the issue arose only because the Applicant filled out an application for Admission on Motion); the client is a sophisticated consumer of legal services who feels well and professionally represented by the Applicant; and there is no erosion or violation of the fundamental values of professionalism or client services under the rules of the state other than that of proper licensure. So while one can debate whether there was potentially a "foul," there certainly is no identified "harm." Thus, we respectfully suggest that making an example of this counsel rectifies no wrongs and unnecessarily places the court in the position of making an example of the Applicant while preparing to change the rules under which he or she is being prosecuted.

Further, the only remedy against this Applicant's license is a referral of the court's findings to the Applicant's home state bar of admission, since by definition his or her licensure is not subject to New Hampshire authority.[4] Experience tells us that this kind of referral will not receive a high level of attention at the bar of the Applicant's admission for several reasons, the most important being the backlog of cases that are considered higher priority (involving theft, charlatans, lawyer substance abuse and impairment, and other high threat issues), and the fact that there is no complaint of client injury or belief that the Applicant is not competent to practice. The National Organization of Bar Counsel (NOBC) has attested to this problem and this is part of their reasoning for endorsing the MJP reforms we've referenced.

Accordingly, ACCA respectfully suggests that the court may wish to stay its consideration of this case until the committee of your state bar examining MJP reforms is able to issue its recommendations. We are confident that they will offer an exception to the UPL rules that would cover the Applicant's situation and allow the court the capacity to resolve this matter consistent with the direction it sees the rules moving. If for some reason your state bar committee becomes the first to endorse MJP reforms which would not provide an exception for the Applicant's behavior, you may always reinstate your case. We are further pleased to offer our assistance to this court or the bar if the result of this matter's consideration is a decision to pursue the adoption of a corporate counsel limited admission registration system, in support of which we can provide copies of rules adopted by other states and our own recommended model, which Virginia is the most recent state to adopt.

Please feel free to contact us if you have questions or if we may be of service in providing information necessary to your review of this matter. Thank you for your consideration of our perspectives.

[4] It is notable that the MJP reforms offered by the ABA models would help remedy just this issue; in the future, a corporate counsel not licensed in your state, but working there under the rule's limited licensure, would be subject to the authority of this Court and the State's rules and disciplinary processes for any violation of local rules.

Sincerely,

The Northeast Chapter of the American Corporate Counsel Association
By:

Scott E. Squillace
Chapter President
European Counsel, Cabot Corporation

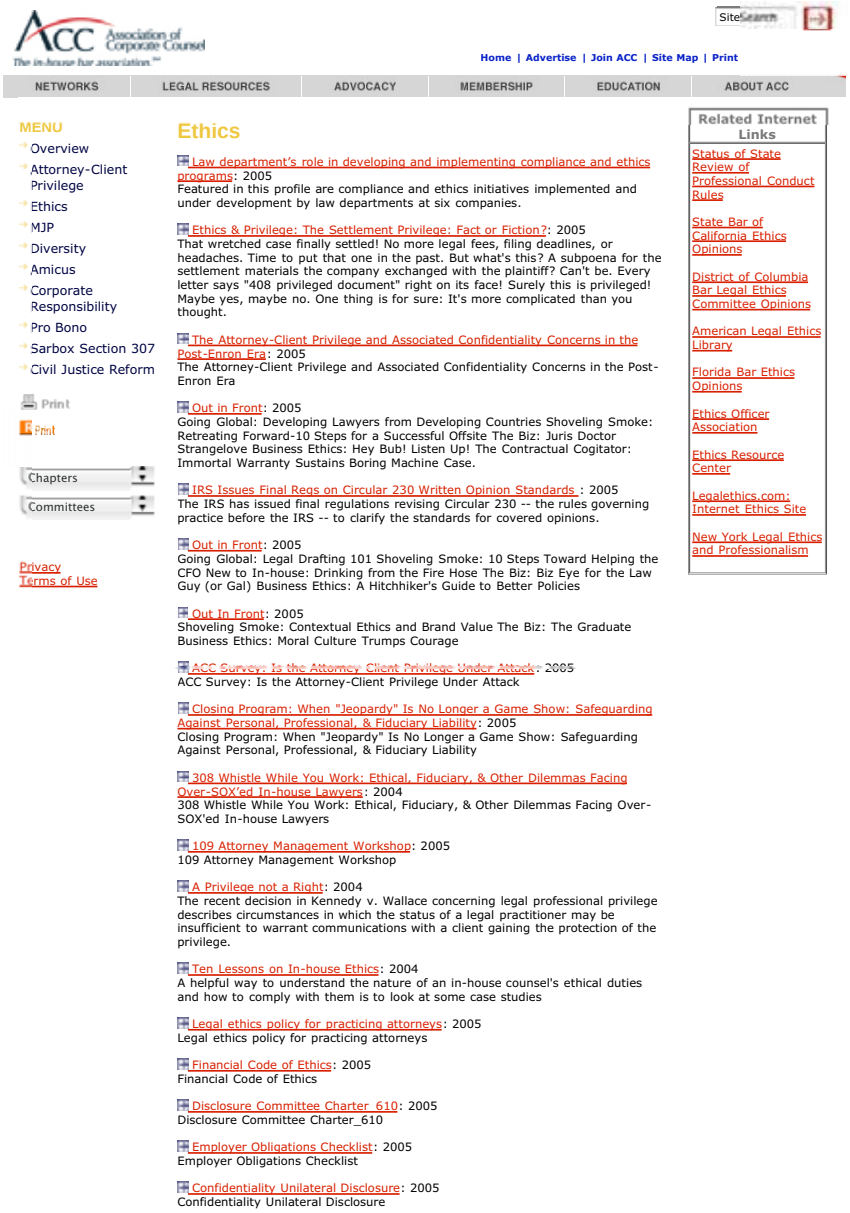
The American Corporate Counsel Association (ACCA)

By:

Frederick J. Krebs
President
ACCA

Susan Hackett
Senior Vice President and General Counsel
ACCA

cc: Office of the Attorney General, New Hampshire
New Hampshire Bar Association



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ACC Survey: Is the Attorney-Client Privilege Under Attack

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A Privilege not a Right: 2004
The recent decision in Kennedy v. Wallace concerning legal professional privilege describes circumstances in which the status of a legal practitioner may be insufficient to warrant communications with a client gaining the protection of the privilege.

Ten Lessons on In-house Ethics: 2004
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Association of Corporate Counsel. 1025 Connecticut Ave, NW, Suite 200, Washington, DC 20036-5425. 202/293-4103. webmistress@acca.com.

APPENDIX E

ACCA
American Corporate Counsel Association

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p 202.293.4103
f 202.293.4701
www.acca.com

The in-house bar association℠

September 17, 2003

The Supreme Court of the State of New Hampshire
One Noble Drive
Concord, NH 03301

Re: *In the Matter of Unnamed Applicant*, Case No. ADM-2003-0060
(CLO Working in New Hampshire without a New Hampshire License)

Honorable Members of the Court:

We write on behalf of the American Corporate Counsel Association (ACCA) and its Northeast Chapter, many of whose members practice law in the legal departments of companies with offices located in New Hampshire. We realize that the court did not solicit our comments on the above-referenced matter, but hope that you will nonetheless accept this letter and review its contents in the form of an informal "amicus curiae" to your consideration.

ACCA is a bar association with over 15,000 individual members who work as employed in-house counsel for private sector organizations (public and private, for-profit and non-profit entities). ACCA's Northeast Chapter is made up of 588 corporate counsel working in New Hampshire, Rhode Island, Vermont, Massachusetts, and Maine. Our interest in this matter, however, stems from more than the vocal concerns about this case raised by our local members, but from our long history of involvement in unauthorized practice of law cases involving in-house counsel. Since ACCA's inception in 1982, we have worked with states across the country, and most recently with the American Bar Association's Commission on Multijurisdictional Practice (MJP) of Law, toward the development of reforms that would better reflect the realities and client concerns of modern legal practice, which is certainly multijurisdictional, and indeed, almost "borderless" in its application. We have helped several states over the years craft in-house counsel registration rules, as well as our more recent service in promoting the reforms recommended by the ABA's MJP Commission.

The situation raised by this matter, namely, that of a corporate counsel who is licensed and in good standing in one state, but practicing exclusively and full time for a corporate client in offices located in another state, is surprisingly common. Indeed, in the course of our work, we have encountered hundreds, if not thousands, of in-house counsel who are operating in a similar fashion. It is relatively rare, however, for the matter of such a counsel to be raised as a complaint with the state bar or the high court of the host state. Thus, our interest in offering some thoughts to this Court as it proceeds in this matter.

Without passing any judgment on the facts specific to this case or the arguments made by and against the Unnamed Applicant, we offer the following:

The Movement Toward MJP Reforms that Would Authorize the Applicant's Behavior

The most important issue we wish the Court to consider is the policy impact of its ruling on the Applicant in light of the current momentum currently sweeping the states (and under consideration in New Hampshire) to amend the unauthorized practice rules of each state. A number of states have already passed reforms, including Colorado, Delaware, Georgia, New Jersey, Nevada, and North Carolina. Every other State, including New Hampshire, is either in the process of committee-type review (with an eye toward recommendations for reform), or has completed review and issued a report recommending reforms which is awaiting adoption by the State's high court. These States' reforms are moving in a direction consistent with the theories behind new ABA Model Rules 5.5, 8.5, and related model recommendations for admission on motion, foreign counsel improvements in law practice and temporary and permanent practice, pro hac vice reforms, and other reforms suggested and adopted in 2002 from the report of the Commission on Multijurisdictional Practice of the ABA.[1]

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Sincerely,

The Northeast Chapter of the American Corporate Counsel Association
By:

Scott E. Squillace
Chapter President
European Counsel, Cabot Corporation

The American Corporate Counsel Association (ACCA)

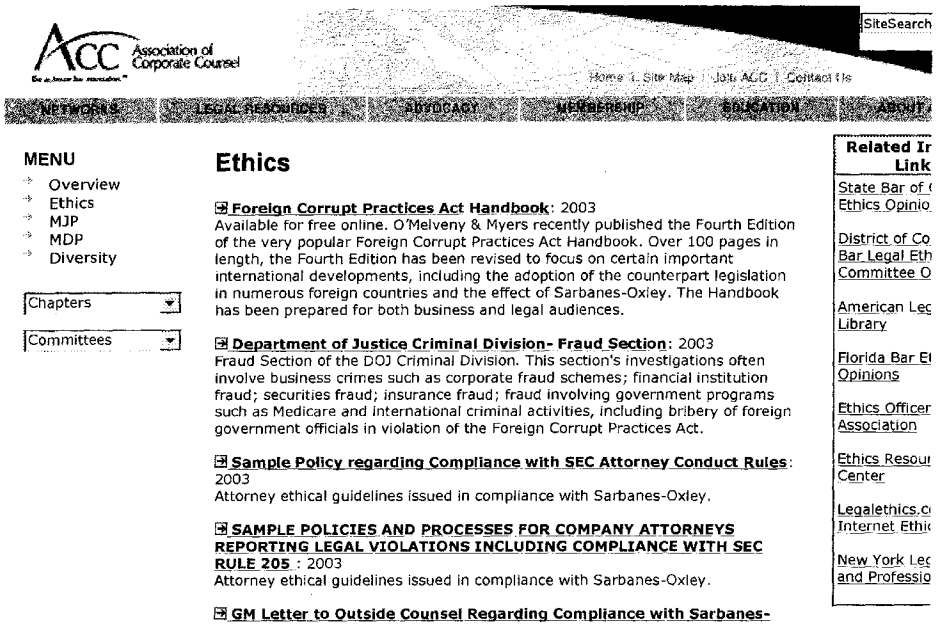
By:

Frederick J. Krebs
President
ACCA

Susan Hackett
Senior Vice President and General Counsel
ACCA

cc: Office of the Attorney General, New Hampshire
New Hampshire Bar Association

APPENDIX F



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Foreign Corrupt Practices Act Handbook: 2003
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Department of Justice Criminal Division- Fraud Section: 2003
Fraud Section of the DOJ Criminal Division. This section's investigations often involve business crimes such as corporate fraud schemes; financial institution fraud; securities fraud; insurance fraud; fraud involving government programs such as Medicare and international criminal activities, including bribery of foreign government officials in violation of the Foreign Corrupt Practices Act.

Sample Policy regarding Compliance with SEC Attorney Conduct Rules: 2003
Attorney ethical guidelines issued in compliance with Sarbanes-Oxley.

SAMPLE POLICIES AND PROCESSES FOR COMPANY ATTORNEYS REPORTING LEGAL VIOLATIONS INCLUDING COMPLIANCE WITH SEC RULE 205 : 2003
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GM Letter to Outside Counsel Regarding Compliance with Sarbanes-Oxley: 2003
Sample letter from GM General Counsel to outside counsel regarding compliance with Sarbanes-Oxley.

GM Attorney Standards of Professional Conduct: 2003
Attorney ethical guidelines issued in compliance with Sarbanes-Oxley.

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GENERAL MOTORS CORPORATION QUALIFIED LEGAL COMPLIANCE COMMITTEE PROCEDURES: 2003
Sample charter for qualified legal compliance committee in compliance with Sarbanes-Oxley.

Hasbro 307 policy: 2003
Attorney ethical guidelines issued in compliance with Sarbanes-Oxley.

Standards of Professional Conduct for Attorneys Appearing and Practing before the SEC: 2003
This is a copy of the CFR section stating the rule.

Guidelines Regarding SEC Standards of Professional Conduct for Attorneys: 2003
Attorney ethical guidelines issued in compliance with Sarbanes-Oxley.

Heller QLCC Model Charter: 2003
Attorney ethical guidelines issued in compliance with Sarbanes-Oxley.

Wilmer Model QLCC Charter: 2003
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Financial and Accounting Officer and Accounting Manager Representation Letter: 2003
Sample form of letter issued by Financial and Accounting Officer and Accounting Manager to CEO or CFO in order for CEO to comply with Sarbanes-Oxley certification requirement.

LETTER OF REPRESENTATION FOR COVERED REPORTS: 2003
Sample letter from senior counsel to chief legal officer regarding reports covered in CLO's certification to CEO pursuant to Sarbanes-Oxley.

SEGMENT, SUBSIDIARY AND DIVISION MANAGER'S REPRESENTATION LETTER TO CEO & CFO: 2003
Sample form, part of certification process pursuant to Sarbanes-Oxley. Certification from manager to CEO/CFO

AMERICAN BAR ASSOCIATION'S REVISED MODEL RULES OF PROFESSIONAL CONDUCT 1.6 & 1.13: 2003
Updated ABA model rules 1.6 and 1.13 (8/11/03)

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Rule 144 Q&A Forum with Jesse Brill and Bob Barron

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- David Hardison on the SEC's Independence FAQs

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- SEC Proposal - Shareholder Access (10/14/03) NEW
- PCAOB Proposal Re: Attestations (10/7/03) NEW

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SOX Scorecard and Timeline for Small Business Issuers NEW

The Best of Client Memos

- NYSE Proposed Amendment No. 2 Governance Listing Standards (10/8/03) NEW
- SEC Proposal Re: Shareholder Access (10/8/03)
- GAO Study – Audit Firm Consolidation (9/03)
- PCAOB Final Rules – Investigations/Adjudications (9/29/03)
- PCAOB Final Rules – Registration Withdrawals (9/29/03)
- Final ABA Task Force on Corporate Responsibility Report (9/23/03)
- Amended Nasdaq Corporate Governance Proposals (9/10/03)
- Proposed SEC Rule: Foreign Bank Exemption under 402 (9/18/03)
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