611:Attorney-Client Privilege & Attorney Work-Product Doctrines in an In-house Setting

Michael G. McCarty
Vice President & General Counsel-Controls
Johnson Controls, Inc.

Cisselon S. Nichols
Senior Litigation Counsel
Shell Oil Company

Laura Stein
Senior Vice President & General Counsel
H.J. Heinz Company

Faculty Biographies

Michael G. McCarty

Michael G. McCarty is currently vice president & general counsel for controls–Americas of Johnson Controls, Inc. Based in Milwaukee, he oversees the legal affairs of the building controls, building automation systems, total energy management, facilities management, federal sector, and security businesses of the controls group of Johnson Controls, Inc.
Prior to assuming his current position, Mr. McCarty was a partner with Foley & Lardner, practicing commercial litigation.

Mr. McCarty has given presentations on attorney client privilege issues for the State Bar of Wisconsin, the State Bar of California, ACCA's Wisconsin Chapter, and other organizations.

He graduated from Syracuse University College of Law. He is admitted in the U.S. Courts of Appeal for the Fifth, Seventh and Ninth Circuits and the United States Supreme Court.

Cisselon S. Nichols

Cisselon S. Nichols currently serves as senior litigation counsel for Shell Oil Company in Houston, where she handles environmental litigation.

Prior to joining Shell, she served as senior counsel at ConocoPhillips, formerly Conoco Inc., where she managed mass toxic tort litigation matters. Ms. Nichols also previously served in a variety of governmental positions in the U.S. Virgin Islands including counsel to the attorney general and assistant attorney general for environmental enforcement. Prior to her work in the Virgin Islands, Ms. Nichols clerked for U.S. Magistrate Judge Harry W. McKee in the Eastern District of Texas. She also worked at the U.S. Department of Justice in the Attorney General's Honors Program as a trial attorney in the environment and natural resources division and as an assistant United States attorney in the Eastern District of Texas where she prosecuted environmental crimes.

Ms. Nichols obtained her BA and BS degrees from the University of Texas at Austin. She also received her law degree from the University of Texas.

Laura Stein

Laura Stein is senior vice president and general counsel of H. J. Heinz Company, a global branded food products company with sales approaching $10 billion. She is responsible for Heinz's global legal, compliance, and corporate secretary matters. As a member of the Heinz management committee, Ms. Stein is involved in increasing shareholder value, setting strategic direction and corporate policies, and overseeing Heinz's global business operations. She is involved in shaping the corporate governance policies and practices relating to the H. J. Heinz Company board of directors and board committees. Ms. Stein is a director of the H. J. Heinz Company Foundation and the Heinz political action committee and is a member of the Heinz ethics and compliance, crisis management, investment management, and disclosure policy committees. Ms. Stein is president of Heinz's Global Organization for the Advancement of Leadership for Women.

Previously, Ms. Stein was assistant general counsel - regulatory affairs with The Clorox Company. At Clorox, she was a member of the legal management committee, glad management committee, worldwide leadership team, 2005 strategy team, and the executive women's group. She was also the legal liaison to the Clorox Latin American management committee, and participated in an executive development program. Prior to joining Clorox, she was a lawyer in the business department of Morrison & Foerster in San Francisco, involved in mergers and acquisitions, securities and general corporate law, financial business transactions, international business transactions, and nonprofit corporate law.

Ms. Stein is a member of the board of directors of Nash Finch Company and is the chairperson of the commission on domestic violence of the ABA. She is a member of the board of directors of ACCA. She was previously a director of the Center for Human Rights of the ABA, the vice chair of the board of directors of the East Bay Community Law Center, and on the board of directors of Global Education Partnership. Ms. Stein was elected to the American Law Institute, was named one of Pennsylvania's "50 Best Women in Business" by the Governor of Pennsylvania, and has attended *Fortune Magazine's* Most Powerful Women in Business Conferences. Ms. Stein is a member of the corporate counsel committee of the business law section of the ABA, the general counsel roundtable of the Corporate Executive Board, the general counsel committee of the National Center for State Courts, the law council I of MAPI, the legal committee of the Grocery Manufacturers of America, the California State Bar Association, the American Society of Corporate Secretaries, the Pittsburgh General Counsel Group, the Pittsburgh Pro Bono Partnership, and the Duquesne Club.

Ms. Stein received her undergraduate degree from Dartmouth College, *Phi Beta Kappa,* and her JD from Harvard Law School. She also has an MA from Dartmouth College.

THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES IN AN IN-HOUSE SETTING

MICHAEL G. MCCARTY
General Counsel – Controls Americas
Johnson Controls, Inc.

I. PRELIMINARY ISSUE - WHAT LAW GOVERNS?

A. The Attorney Client Privilege is a rule of Evidence. Thus, each state's evidence code and case law governs these issues.

B. Federal Court - Fed. R. Evid. 501

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. (Emphasis added)

C. Conflict of Law Questions

Thus, in Federal Court, the law of privilege will depend on whether the case is based on federal question or diversity jurisdiction.

See Colton v. U.S. , 306 F.2d. 633 (2d Cir. 1962)

Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97, 100-101 (D.N.J. 1994).

See also U.S. v. Moore, 970 F.2d 48 (5th Cir. 1992)(Federal Common Law, not state physician/patient privilege, applies in I.R.S. enforcement proceeding).

II. THE ELEMENTS OF THE ATTORNEY-CLIENT PRIVILEGE

A. Policy Justifications - and Limitations

The purpose behind the attorney-client privilege is to foster free and open communication between the client and the attorney with the hopes that full disclosure of information will ultimately benefit the judicial system as well as

society in general. It must always be remembered, however, that the privilege is an impediment to a full search for the truth and, as such, is narrowly construed to foster its purpose.

B. Restatement of The Law Third, The Law Governing Lawyers § 68 (2000).

1. **A communication; (§ 69)**

2. **made between privileged persons; (§ 70)**

3. **in confidence; (§ 71)**

4. **for the purpose of seeking, obtaining, or providing legal assistance for the client (§ 72)**

5. **In addition, the privilege must be affirmatively raised (§ 86) and not waived (§ 78 – 80).**

III. APPLICATION OF THE ELEMENTS

A. "Made Between Privileged Persons"

1. The attorney acting as attorney

   a. privilege applies to "in-house" counsel as well as "outside" counsel

      United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D. Mass. 1950)

   b. The attorney must be acting as an attorney in connection with the communication.

      1) "business advice" or "technical advice" not privileged:

         Burlington Corp. v. Exxon Industries, 65 F.R.D. 26, 39 (D. Md. 1974)

         United States v. International Business Machs. Corp., 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974)

      2) "business negotiation" not privileged

         United States v. Wilson, 798 F.2d 509, 513 (1st Cir. 1986)

      3) Special concern for "in-house" counsel who also serve corporate functions

In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (in-house counsel who also served as company v.p. had burden of making "clear showing" he acted as an attorney with regard to matter at issue)

Cooper-Rutter Assoc., Inc. v. Anchor Nat'l Life Ins. Co., 563 N.Y.S. 2d 491 (App. Div. 1990)(memos written by in-house counsel who was also corporate secretary ordered to be produced)

Hardy v. New York News, Inc., 114 F.R.D. 633 643-44 (S.D.N.Y. 1987) (when questions of law and business policy are mixed the business aspects of the discussion are NOT protected. Attorney who also served as director of employee relations had to testify re: affirmative action program)

Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d 588, 592-93 (1989)(difficult to sort out legal and non-legal communications)

Handgards, Inc. v. Johnson & Johnson, 69 F.R.D. 451, 454 (D.C. Cal 1975)(a higher standard may apply to in-house counsel to prevent abuse of the privilege)

See also, Research Institute for Medicine and Chemistry v. Wisconsin Alumni Research Foundation, 114 F.R.D. 672, 676 (W.D. Wis. 1987)("careful scrutiny" is applied to claims made by in-house counsel)

North American Mortgage Investors v. First Wisconsin National Bank of Milwaukee, 69 F.R.D. 9, 11 (E.D. Wis. 1975)(A lawyer who held title of "Mortgage Banking Officer" might not be acting as an attorney in authoring an analysis of a proposed agreement)

4) "Political Advice" not privileged

Republican Party of North Carolina v. Martin, 136 F.R.D. 421, 426 (E.D.N.C. 1991)(Subpoena for files of Governor of North Carolina in case challenging system of electing Superior Court judges).

5) Factual reports concerning lobbying efforts not privileged

North Carolina Electric Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986);

United States Postal Service v. Phelps Dodge Refining Corporation, 852 F.Supp 156, 164 (E.D.N.Y. 1994).

Burton v. R.J. Reynolds Tobacco Co., Inc., 170 F.R.D. 481, 484 (D. Kan. 1997).

B. Communication With A "Client"

1. For Corporations - who is the client?

Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981)(allowed privileged communications even with low level employees)

The significant factual issues are:

The communications were made by then corporate employees to corporate counsel upon order of superiors in order for the corporation to secure legal advice

The Court refused to decide if communications from former employees could have been covered at the time of the investigation. 101 S.Ct. at 685, n. 3.

The information needed by counsel to formulate legal advice was not available to upper level management. Id.

The information communicated concerned matters within the scope of the employees' corporate duties. Id.

The employees were aware that the reason for the communication with counsel was so that the corporation could secure legal advice. Id.

The communications were ordered to be kept confidential and they were so kept. Id.

2. Not all jurisdictions have adopted such a broad rule. There are several, more restrictive, approaches that can arise.

a. "Control Group" test- only those employees who are within the group that have decision-making authority with respect to taking action based on attorney advice. This is not necessarily limited to officers. Lower level employees who can make decisions are also covered.

Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962)

Note, The Attorney-Client Privilege: Identifying the Corporate Client, 48 Fordham L. Rev. 1281 (1980)

Comment, Attorney-Client Privilege for Corporate Clients: the Control Group Test, 84 Harv. L. Rev. 424 (1970)

b. "Subject Matter" Tests

1) original - Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd, by an equally divided court, 400 U.S. 348 (1971)

a) employee made communications at direction of superior.

b) the subject matter of the problem needing attorney advice had to be the employee's performance of his corporate duties.

c) the subject matter of the communication was the employee's performance of his corporate duties.

c. "Modified" subject matter tests

Duplan v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) (combined parts of control group and subject matter tests)

Diversified Indus. v. Meredith, 572 F.2d 5966 (8th Cir. 1977) (added requirements that superior ordered employee to talk for the purpose of obtaining corporate legal advice and that the information was only distributed on a "need to know" basis.

In re Ampicillin Antitrust Litig., 81 F.R.D. 377 (D.D.C. 1978) (only communications "reasonably believed to be necessary to the decision making process" are covered).

3. Issues After Upjohn

a. Upjohn did not set a broad rule and would only apply in federal courts applying federal law in any event.

b. Several states have evidence statutes codifying the "control group" test

1) Ark. Rules of Evidence, Rule 502a(2)

2) Maine Rules of Evidence, Rule 502a(2) (1988)

3) Nev. Rev. Stat. ə 49.075 (1987)

4) N.D. Rules of Evidence, Rule 502a(2) (1987)

5) Okla. Rules of Evidence, Rule 502a(2) (1987)

6) Or. Rules of Evidence, Rule 503(1)(d)

7) S.D. Compiled Laws Ann. ə 19-13-2(2) (1987)

See also Comments to Alaska Rule of Evidence 503(a)(2) and Langdon v. Champion, 752 P.2d 999 (Alaska 1988)

c. Several state courts have refused to follow Upjohn preferring the "control group" test or subject matter tests.

1) Illinois - Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250 (Ill. 1982) (control group)

CNR Investments v. Jefferson Trust & Sav. Bank, 115 Ill. App. 3d 1071, 451 N.E.2d 580 (Ct. App. 1983) (same)

2) Georgia - Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (Ct. App. 1981) (Diversified Industries modified subject matter approach)

but see Eglin Fed. Credit Union v. Cantor, Fitzgerald Sec. Corp., 91 F.R.D. 414 (N.D. Ga. 1981) (Upjohn approach)

3) New Jersey - this state has arguably adopted an even broader test than Upjohn. See Macey v. Rollins Environmental Servs., Inc., 179 N.J. Super. 535, 432 A.2d 960 (Super. Ct. App. Div. 1981)

4) See also, Upjohn Co. v. U.S.: The Attorney-Client Privilege in the Corporate Setting, 65 Marq. Law R. No. 2 241 (1981)

d. Unresolved issues

1) Are communications from former employees covered?

a) See Justice Burger's concurring opinion in Upjohn, 449 U.S. 383, 403, 101 S.Ct. 677, 689 (1981) (yes)

b) United States v. King, 536 F. Supp. 253, 259 (C.D. Cal. 1982), overruled on other grounds, 842 F.2d 1135, 1136 (9th Cir. 1988) (yes)

c) In re Coordinated Pretrial Proceedings, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982) (probably yes)

d) EEOC v. Lutheran Social Services, 1999 WL 639208 (D.C. Cir. 8/24/99).(yes)

e) Allen v. McGraw, 106 F.3rd 582 (4th Cir. 1997)(yes)

2) Can an "outside consultant" be considered an "employee" for purpose of the privilege?

Rager v. Boise Cascade Corp., No. 88-C-1436, Slip op. (N.D. Ill. Aug. 1, 1988) (1988 U.S. Dist. Lexis 8888) (outside unemployment compensation agent held covered by privilege)

In re Bieter Co., 16 F.3d 929 (8th Cir. 1994)(consultant to real estate developer "functional equivalent of an employee" for purposes of the privilege)

But see Dyson v. Hempe, 140 Wis. 2d 792, 818 (Ct. App. 1987)(conversations with vocational counselor at counsel's request not protected).

4. Distinguish the corporate client from the individual officers, employees and shareholders

a. The corporation is the client and has the privilege not the individual officer or employee

Some state ethics rules require a "Miranda" warning to corporate "constituents" who may be confused as to who corporate counsel represents or whose interests may be different from the corporation's. See Wis. SCR 20:1.13 (d).

1) Meehan v. Hopps, 144 Cal.App.2d 284 (1956); Ward v. Superior Ct., 70 Cal. App.3d 23, 32-33 (1977).

2) United States v. Keplinger, 776 F.2d 678, 699-701 (7th Cir. 1985), cert. denied, 476 U.S. 1183 (1986) (attorneys had

represented only the corporation in absence of express agreement to the contrary and no evidence of reasonable belief on part of individuals that attorney was representing them).

3) In re Grand Jury Proceedings, 434 F. Supp. 648, 650 (E.D. Mich. 1977), aff'd, 570 F.2d 562 (6th Cir. 1978) (a corporate officer may only claim privilege where he has informed counsel of his intent to seek individual representation and counsel has agreed to represent him after considering possible conflicts between the officer and the corporation.

4) In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1033-34 (S.D.N.Y. 1975) (one firm represented corporation and Vesco individually in SEC investigation. In consent decree, corporation agreed to waive the privilege. In subsequent civil suit only advice given to Vesco individually was covered, not advice given in his corporate capacity.

b. Remember that control of a corporation can change and with it control of the privilege.

1) Takeover - new management can waive privilege as to advice given to old management.

Bass Public Limited Company v. Promus Companies, Inc.,868 F. Supp. 615, 619-21 (S.D.N.Y. 1994)

Medcom Holding Co. v. Baxter Travenol Laboratories, 689 F. Supp. 841, 842 (N.D. Ill. 1988)

Polycast Technology Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989)

In Re Grand Jury Subpoenas 89-3 and 89-4, 734 F.Supp 1207, 1211-1212 (E.D. Va. 1990)

These cases involved stock deals. A sale of assets is not sufficient to invoke this rule. Sobol v. Dutton, Inc., 112 F.R.D. 99 (S.D.N.Y. 1986); In Re Grand Jury Subpoenas, 734 F.Supp. at 1211, n. 3. But the terms of the deal might convey "all rights and privileges" attaching to the assets or similar language, raising an issue as to whether the privilege is transferred.

2) In Bankruptcy the privilege is a corporate asset that transfers to the trustee - who can waive it as to advice to former management.

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 346-47 (1985)

5. Parent and Subsidiary Issues - When is the "Client" another corporation in the same corporate "family"?

Notwithstanding the technically separate "legal" existence of parent and subsidiary corporations, courts have taken a very practical approach to the relationship between affiliated entities and have extended the protections of a "client" to other closely related entities.

a. See e.g., Leybold - Heraeus Technologies, Inc. v. Midwest Instrument Co., 118 F.R.D. 609, 613 (E.D. Wis. 1987)(disclosure of information from subsidiary to parent - no waiver of privilege)

b. Gould Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp 1121 (N.D. Ohio 1990)(Attorneys disqualified from representing plaintiff against parent corporation where they had previously represented subsidiary corporation of parent)

c. Telesat Cable Vision, Inc. v. Opryland U.S.A., No. 90-137-CIV-ORL-19, M.D. Fla. (July 20,1990) (Attorneys prohibited from representing plaintiff while at same time representing Parent whose subsidiary's subsidiary would be adversely affected by judgment, even though second level subsidiary was not a party to the case).

d. Stratagem Development Corp. v. Heron Int'l, 756 F. Supp 789 (S.D.N.Y. 1991)(Firm disqualified from representing long time client against parent corporation where it had represented a subsidiary of the defendant parent at the same time it was preparing to sue the parent).

C. Confidentiality at time of communication

1. The Basic Factors of Confidentiality

a. **Intent** of the client is important - for an individual this is usually not a problem. For the corporation, it is helpful to have a record that employee was informed of the privilege and understood that communication would be held in confidence.

b. The **fact** of confidentiality is important and must be established by the party asserting the privilege, therefore it is good practice to make note of everyone who was present for any client meeting, everyone who was on a phone call with the client, everyone who was copied on a confidential letter or memorandum.

c. The **location** of the communication can be important if it evidences a lack of concern over confidentiality. Thus conversations in restaurants, airplanes, in public areas like halls or elevators should be carefully considered.

d. The **means** of communication can be important. The more public or likely to become public the means, the less likely the privilege will be upheld.

2. **Involvement of third persons in conversation**

See generally, Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 A.L.R.4th 549 (1982)

a. Board meetings

What if "outside experts" attend a board of directors meeting and stay to hear attorney advice or communications by client to counsel?

See New Orleans Saints v. Griesedieck, 612 F. Supp. 59, 63 (E.D. La. 1985), aff'd 790 F.2d 1249 (5th Cir. 1986) (minutes of partnership meeting were not privileged because persons who were neither partners, clients or attorneys attended).

See also, New York Hotel and Motel Trades Council AFL-CIO v Hotel Assoc. of New York City, Inc., No. 85 Civ. 216 et al S.D.N.Y. October 17, 1989 (1989 U.S. Dist. Lexis 12289 (presence of consultants raised "serious issue" but question not addressed on these facts. This case shows the importance of noting in the board minutes who was present during privileged discussions, not just who was at the board meeting.

Eglin Federal Credit Union v. Cantor, Fitzgerald, 91 F.R.D. 414, 419 (N.D. Ill. 1981)(outside accountants could attend board meeting to "assist Board and legal

counsel in understanding transactions." They were thus "experts" assisting client and attorney.

b. Parent subsidiary issues - what if a representative of one is present for discussion with counsel for the other?

1) Medcom Holding Co. v. Baxter Travenol Laboratories, 841 F.Supp. 841 (N.D. Ill. June 28, 1988) (conversations between Officers and attorneys for parent and employees of subsidiary initially privileged. Two different issues addressed. One is privilege regarding transaction were parent sold stock of subsidiary to another corporation. Counsel for the parent also represented the subsidiary in the deal. Held, privilege relating to these conversations was transferred to buyer who could waive it. The second issue was over communications between parent and subsidiary involving "joint defense" of parent and subsidiary in litigation Held: these communications were privileged and new owner of sub. could not waive joint privilege of parent.

2) United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950) (parent and all subsidiaries and affiliates were so closely related that court treated them as one client).

3) Insurance Co. of North Am. v. Superior Court, 166 Cal. Rptr. 880 (Cal. App. 1980) (meeting between attorney for subsidiary and its officers. Also present were general counsel of the parent and an officer of another subsidiary. Court carefully analyzed the reason for the meeting and the necessity of all parties being present and upheld privilege).

4) See also In re Diasonics Sec. Litig., 110 F.R.D. 570 (D. Colo. 1986); United States v. AT&T, 86 F.R.D. 603, 616 (D.D.C. 1979) (wholly or majority owned subsidiaries but not minority holdings); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 1184-85 (D.S.C. 1974); Bailey v. Meister Brau, 55 F.R.D. 211 (N.D. Ill. 1972).

5) See generally; Who is "Representative of the Client" Within State Statute or Rule Privileging Communications Between an Attorney and the Representative of the Client, 66 A.L.R. 4th 1227

IV. EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE

A. The Fiduciary Exception in corporate disputes

1. Management is supposed to work for the benefit of shareholders - so, legal advice received by management is for the ultimate benefit of shareholders and there should be no privilege as against the shareholders. On the other hand, a complete lack of privilege would impede effective corporate management

2. **Garner v. Wolfinbarger,** 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971)

   The Court relied on four general rules:

   a. legal advice to a fiduciary under trust law is for the benefit of the beneficiary who should be able to find out what it was.

   b. there is a "crime/fraud" exception to the attorney-client privilege.

   c. an attorney who represents two parties cannot later assert a privilege in a dispute among them.

   d. most states allow some shareholder access to "corporate records."

3. Relying on these principles the Court established factors to determine whether shareholders are entitled to discovery of legal advice given to management or the board.

   a. The number of shareholders seeking discovery and the number of shares they represent.

   b. The nature of their claim.

   c. The necessity of obtaining the information and its availability from other sources

   d. Whether the alleged misconduct of the corporation was criminal, illegal but not criminal, or of doubtful legality

   e. Whether the communication related to past or prospective actions

   f. Whether the communication was advice relating to the litigation itself

   g. Whether the shareholders are "fishing"

   h. The risk of revealing trade secrets or other confidential information

See also, Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 352 n. 20 (4th Cir. 1992)(citing cases applying Garner analysis)

B. The "crime or fraud" exception

1. Because the policy justification for the privilege is to further the open exchange of information in the hopes that this will benefit society and the justice system, any use of this protection for improper purposes does not further the policy and the privilege will not be recognized.

   Petition of Sawyer, 229 F.2d 805 (7th Cir. 1956) aff'd. 351 U.S. 966.

   In Re Witness Before the Grand Jury, 631 F. Supp 32, 33-34 (E.D. Wis 1985)

   Haines v. Liggett Group Inc., 975 F.2d 81 (3d Cir. 1992)

2. The communication must relate to the then future intent to commit a crime or wrong, not to a past act.

3. Other issues also arise. Does the exception extend to other types of "wrongs" such as torts?

   In re Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d 1032, 1038-1041 (2d Cir. 1984)(advice attorney rendered regarding alleged fraudulent conveyance of stock in debtor company to avoid collection not privileged. Government only had to present a "prima facie" case of a fraudulent conveyance to invoke the exception.

   Laser Industries v. Reliant Technologies, Inc., 167 F.R.D.. 417, 422-23 & n.8 (N.D. Cal. 1996)(fraud on the Patent and Trademark Office)

4. Special concern for inhouse counsel. The "client" is also the employer. What happens if inhouse counsel feels compelled to "blow the whistle" on the employer/ client and the employer/client fires the attorney?

   See, Balla v. Gambro Inc., No. 70942 (Ill. Sup. Ct. 12/19/91) (Counsel had no choice. Counsel must follow the Rules of Professional Conduct and disclose the intent to commit a future wrong to regulatory agency. No action allowed for retaliatory discharge because to do so would discourage open attorney/client communication). See also Herbster v. North American Co., 501 N.E.2d 343 (l986).

   Willy v. Costal Corp., 647 F.Supp. 116, 118 (S.D. Tex. 1986)(Counsel should "withdraw" from representation, i.e. quit. If employer fires attorney, no action for wrongful discharge.

See also, Nordling v. Northern States Power Co., No. C7-90-1499 (Minn. Sup. Ct. 12/27/91)(Inhouse counsel who reported questionable activities to other corporate officers allowed to bring action for breach of "employee handbook" provision regarding termination. Court noted that no issue of Attorney Client Privilege was presented).

V. Selected waiver

A. Can a company divulge privileged materials to a government agency and still maintain the privilege as against third parties?

1. "Yes" Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (a policy based decision, seeking to foster cooperation with governmental agency investigation

2. "No" Permian Corp. v. U.S., 665 F.2d 1214 (D.C. Cir. 1981)(rejecting Diversified analysis as to attorney client privileged materials, but not work product)

3. "No" In re Subpoena Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984)(Work Product waived by disclosure as well)

B. Does a Confidentiality Agreement with the government protect the privilege if the company disclosures otherwise privileged materials?

1. "No" Westinghouse Electric Corp. v. Republic of Philippines, No. 90-5920, 12/19/91 (3d Cir.), 60 U.S.L.W. 2424 (also rejecting Diversified rationale as to why no waiver should occur and holding that a confidentiality agreement made no difference)

2. "Maybe" In re Steinhardt Partners, L.P., 9 F.3d 230, 236 (2nd. Cir. 1993)(rejecting selective waiver in the absence of a confidentiality agreement but finding no reason to address whether an agreement would have changed the outcome).

3. "No" United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st Cir. 1997)(also rejecting selective waiver in sweeping terms).

4. "No." In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002).

C. Subject matter waiver

If a waiver occurs how much is waived?

1. Wigmore took position that a waiver extended to all communications on the same subject matter 8 J. Wigmore, Evidence § 2328

2. Some cases have agreed

a. Sylgab Steel & Wire Corp. v. IMOCO-Gateway Corp., 62 F.R.D. 454, 457-58 (N.D. Ill. 1974), aff'd without opinion, 534 F.2d 330 (7th Cir. 197)

b. Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977)

c. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1162 (D.S.C. 1974)

d. Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 222 (D. Del. 1970)

e. United States v. Shibley, 112 F. Supp. 734, 742 (S.D. Cal. 1953)

D. Some courts have been careful to determine that the "same subject matter" is not taken too broadly

1. First Wisconsin Mortgage Trust v. First Wisconsin Corp., 86 F.R.D. 160, 173-74 (E.D. Wis. 1980)

2. FTC v. Lukens Steel Co., 444 F. Supp. 803, 807 (D.D.C. 1977)

3. W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 776 (W.D. Okla. 1976)

4. In re Sealed Case, 676 F.2d 793, 809 N.54 (D.C. Cir. 1982)

5. Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981)

6. In re Von Bulow, 828 F.2d 94, 102-03 (2d Cir. 1987), rev'g, 114 F.R.D. 71 (S.D.N.Y. 1987)

7. AMCA Int'l Corp. v. Phipard, 107 F.R.D. 39, 44 (D. Mass. 1985)

8. Starsight Telecast v. Gemstar Development Corp., 158 F.R.D. 650, 654-655 (N.D. Cal. 1994)

9. Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992)

VI. WORK PRODUCT DOCTRINE

A. Hickman v. Taylor, 329 U.S. 495 (1947)

1. Material collected by counsel in the course of preparing for litigation is protected from disclosure in discovery

2. The protection is qualified, not absolute, and adversary can make a showing of need for the material

3. The thought process of the attorney is at the "core" of the doctrine and so even a showing of need should not justify invasion of the attorney thought process.

B. Fed. R. Civ. P. 26(b)(3) (civil proceedings)

C. Fed. R. Crim. P. 16(a) (criminal proceedings)

D. Restatement of the Law Governing Lawyers, § 87-92

E. Elements

1. Documents and tangible things otherwise discoverable

2. Prepared in anticipation of litigation or trial.

   a. Doctrine does not protect everything a lawyer does, only those things prepared in anticipation of litigation or trial

   b. The anticipated proceeding must be adversarial and, as a result, materials prepared about mere "disputes" or proposed settlements are not privileged

   c. What is "anticipation"?

      1) For a plaintiff, when one is on notice of facts giving rise to a claim and when one has tentatively formulated a claim, demand or charge

      2) For a defendant, when one receives a demand or warning or information that a claim, demand or charge is in prospect.

      3) Actual litigation need not have started

      4) How likely does litigation have to be and how specific the threat?

         There is no agreement on this aspect

3. Prepared by or for another party or by or for that party's representative.

Resources available at ACCA.com:

INFOPAC ON IN-HOUSE COUNSEL ETHICS

http://www.acca.com/infopaks/ethics

PROTECTING PRIVILIGED INFORMATION – A GUIDE FOR CORPORATE EMPLOYEES
http://www.acca.com/protected/reference/attyclient/privileged.pdf

Other useful resources:

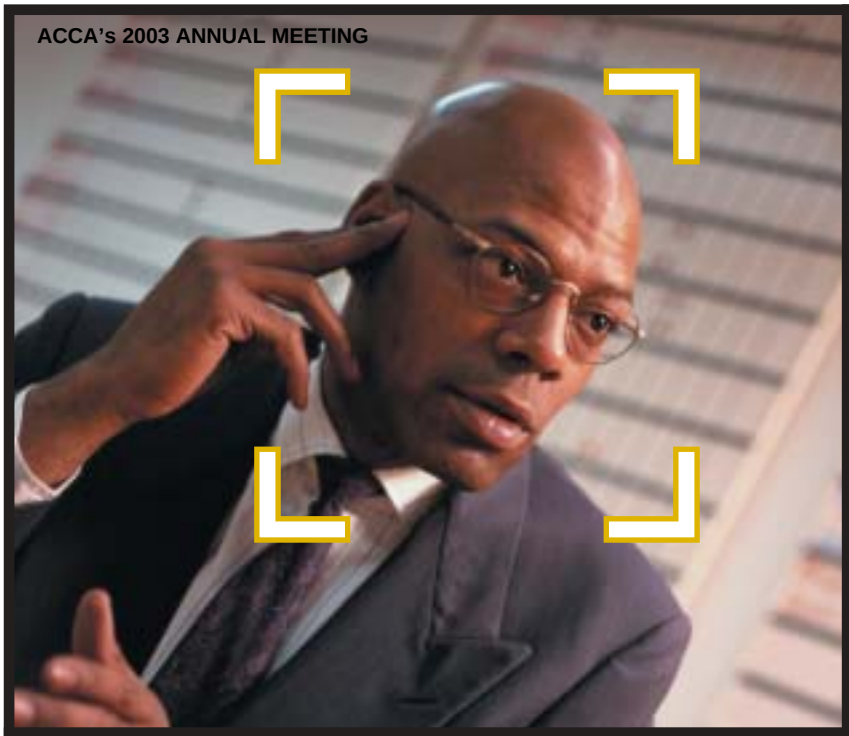
Rice, ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES (2nd Ed.) West Group Publishers.

American Bar Association Section of Litigation, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (3rd Ed.)

Gergacz, ATTORNEY-CORPORATE CLIENT PRIVILEGE (Garland Publishing)

EUROPEAN COMMISSION HOSTILITY TO ATTORNEY-CLIENT PRIVILEGE

Creates Trap for Unwary



By Martine A. Petetin and Willard K. Tom

You are the U.S.-based assistant general counsel for a multinational corporation. You are awakened early one morning by a phone call from a counterpart at your company's European division. "We have a problem," she says. "We think that some of our employees may have been fixing prices with competitors. It is possible that employees in Europe, Asia, and the United States were involved." You dress hurriedly, hop into the car, and dash to the office, dictating furiously as you go. Within hours, a global team of in-house and outside lawyers has been assembled, and a memo outlining a strategy for an internal investigation is speeding across the globe by email. Within days, memos summarizing employee interviews and attaching "hot" documents is in the hands of every team member, the general counsel, and key executives. As a result, the company is in a position to make intelligent decisions about how to proceed.

You think that you've covered your bases in record time. You feel good about what you did. But the truth is that you may have just created a roadmap for the European Commission's investigation into the cartel.

Now suppose that you are in-house counsel for a major consumer products manufacturer. The European marketing division has just sent you an email outlining a plan to revamp the company's distribution system so that distributors would have assigned territories and would not be able to sell outside those territories, even in response to a customer request. You have serious qualms about the plan, and you write back a detailed email

Martine A. Petetin holds the legal privilege chair on the board of Global Corporate Counsel Association–Europe ("GCCA"), ACCA's European chapter. She is general counsel Europe at British American Tobacco in London, England. She is available at Martine_Petetin@bat.com.

Willard K. Tom assisted ACCA in its efforts to enlist the aid of the U.S. competition authorities on the issue of attorney-client privilege for in-house counsel. A partner in the Washington, DC, office of Morgan, Lewis & Bockius LLP, he has 22 years of antitrust experience, having served in high positions in both the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice. He serves as chair of the FTC Committee of the American Bar Association Section of Antitrust Law and chair of the Antitrust Committee of the Section of Business Law, and he has spoken and written on a wide variety of antitrust topics. He is available at wtom@morganlewis.com.

outlining all of the potential risks. The business people make some minor modifications to deal with your most serious problems, but the initiative is important enough to them that, after having weighed the risks that you had outlined, they implement the rest of the plan, leaving in some features that you had flagged as carrying moderate risks.

Again, it is very likely that your memo will be used against your client by European Commission officials in their investigation of the restraints.

Lawyers who have spent their entire careers practicing in the United States might be forgiven for seeing their actions in these two scenarios as textbook examples of how the lawyer-client relationship should work. In a global economy, however, such easy assumptions can be expensive. U.S. courts treat communications between corporate counsel and company officers as privileged if the communication is intended to be confidential and is made for the purpose of securing legal advice from a legally trained person. In a European Commission investigation, however, no such privilege is recognized unless the communication is with outside counsel who are entitled to practice in one of the member states. Communications with in-house counsel are unprotected, regardless of that counsel's status as a member of the bar or equivalent entity within a member state and regardless of whether the member state itself would recognize in its jurisdiction a privilege with respect to in-house counsel. Communications with non-European outside counsel are also unprotected. These facts make it imperative that in-house counsel whose companies do business in Europe be aware of the limitations of attorney-client privilege in antitrust matters and take measures to protect their internal communications.

This article will describe the problems that the Commission's approach to the attorney-client privilege creates and what counsel should do to ameliorate those problems. We begin with a description of European competition law and the institution charged with its enforcement: the European Commission. We then describe the European Commission's position on attorney-client privilege in competition investigations, its articulated reasons for that position, and the problems that its position causes for companies and competition enforcement alike. We end with an action plan for how counsel can best protect their companies' communications—and do their jobs—under the circumstances.

EUROPEAN COMPETITION LAW

You need to know two aspects of European competition law: the competition law itself and the modernization proposal.

Competition Law

Articles 81 and 82 of the treaty establishing the European Community are the principal competition provisions of European law. Article 81 addresses agreements and concerted practices that "have as their object or effect the prevention, restriction or distortion of competition within the common market." Article 82 deals with actions of a dominant firm that "abuse" its dominant position. The European Commission is responsible for investigating and punishing violations of Articles 81 and 82. (See sidebar on pages 78–79 for a nutshell explanation of the European Union and its institutions.) The European Commission can impose substantial fines for such violations, up to 10 percent of a company's annual turnover, which is the European Union competition (antitrust) law term for revenues. Although the European Commission has never exercised this power in full, it has posed a number of substantial

fines, including a euro 462 million (approximately U.S.$400 million) fine on Hoffman-Laroche for its role in the vitamins cartel. Since 1990, mergers and acquisitions have been subject to a separate system of review known as the merger control regulation,[1] which the European Commission also administers.

The European Commission's investigatory powers and methods differ significantly from those of U.S. antitrust enforcers. In general, the European Commission relies more on documentary evidence, whereas U.S. enforcers rely on other evidence, such as that derived from their broader powers to compel testimony. In cartel matters, for example, the European Commission typically begins with dawn raids, which are unannounced visits to company premises to seize documents,[2] and follows up with Article 11 letters, which are requests for information addressed to all subjects of the investigation. These requests may lay out the dates of and participants in suspected cartel meetings and demand detailed explanations of incriminating documents. In the United States, where naked cartels are crimes and prosecutors will be trying to build a case that will prove a violation beyond a reasonable doubt, search warrants afford a similar opportunity to seize documents in a surprise visit.[3] Such a visit might be preceded, however, by surreptitious audiotaping and videotaping of cartel participants, working through an informant who is hoping to receive a lighter sentence or to avoid criminal prosecution entirely. Following the seizure of documents, U.S. prosecutors can use the power of grand jury sub-

THE EUROPEAN UNION AND ITS INSTITUTIONS

THE EUROPEAN UNION

The European Union ("EU") consists of 15 independent member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The EU has grown both in members and in the extent of integration over time, beginning with the European Coal and Steel Community established by the original six member states (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands) in 1951 under the Treaty of Paris and the European Economic Community established by the same six members in 1957 under the Treaty of Rome. These two treaties have subsequently been supplemented and amended, notably by the 1992 Treaty of Maastricht, which established the EU based on the three pillars of (1) economic and monetary union, (2) intergovernmental cooperation on justice and home affairs, and (3) common foreign and security policy. The 1997 Treaty of Amsterdam further amended some of the governing rules of the European institutions.

The main governing institutions of the EU are (1) the European Commission, which is the European executive branch, (2) the European Council, which has final decision-making power and consists of the president of the European Commission and ministerial level representatives of each member state empowered to commit their respective governments, (3) the European Parliament, which consists of 626 members ("MEPs") directly elected for five years, and (4) the Court of Justice, which ensures that European Community law is uniformly interpreted and effectively applied.

THE EUROPEAN LEGISLATIVE PROCESS

The legislative process in the EU seeks to achieve a balance of power between the European executive and legislative branches and between the European institutions and the national governments as represented in the European Council.

The European Commission initiates draft legislation, presenting its proposals to the European Council and the European Parliament. The most common legislative procedure is codecision, which leads to the adoption of joint European Council and European Parliament acts. In some matters, however, the European Parliament has only an advisory role, and the European Council makes decisions,

poenas to compel documents and testimony from potential witnesses, but not from the targets of the investigation, who may invoke their right against self-incrimination.

In noncartel matters, such as territorial or pricing restraints imposed by manufacturers and distributors, the European Commission, unlike its U.S. counterparts, can also use dawn raids. They can also demand production of documents. As with cartel investigations, it can follow up with requirements that the parties explain and defend themselves in writing. If it is persuaded that a violation has occurred, the European Commission will issue a statement of objections, which informs the parties of the charges and evidence against them, and affords them the opportunity to rebut the charges in writing and ultimately at a hearing. The European Commission does not currently use dawn raids in merger cases, but it does have the power to compel answers to written questions and the production of documents. In its proposals to modernize the merger regulation, however, the Commission has suggested that it has a right to carry out such raids and has proposed that it "increase the potential effectiveness of these provisions along the same lines as for Articles 81 and 82."[4]

The Modernization Proposal

Article 81 shares with its U.S. counterpart, § 1 of the Sherman Act, a significant characteristic: the overbreadth of its key language. The U.S. Supreme Court long ago concluded that the Sherman Act could not possibly mean what it says when it

acting either by unanimity or by qualified majority, after having consulted the European Parliament. One such matter is the adoption, by qualified majority in this case, of regulations to give effect to the principles set out in articles 81 and 82 of the Treaty—that is, the main provisions enshrining the basic rules of European competition policy.

Regardless of whether the European Parliament has a consultative or a codecision role, draft legislation initiated by the European Commission is first debated in specialist parliamentary committees of MEPs who usually adopt a number of amendments to the draft proposal. In plenary session, the MEPs vote on those amendments before coming to a decision on the text as a whole.

Members of the European Commission attend plenary sessions of the European Parliament, and other European Commission officials attend meetings of the parliamentary committees, thus maintaining a continuous dialogue between the two institutions.

THE EUROPEAN COMMISSION

The European Commission is the driving force in the European integration process and plays a particularly important role in competition policy, such as by monitoring mergers and restrictive practices and by enabling the operation of the single market among the 15 member states. The European Commission initiates draft legislation and implements the measures decided on by the European Parliament and the European Council.

The European Commission is headed by a collegiate body of 20 members: the president, two vice-presidents, and 17 other members of the European Commission. The appointment of this collegiate body occurs in two steps: (1) the president is nominated by the member states and approved by the European Parliament, and then (2) the president, in close collaboration with the member states, nominates a team that is subject, en bloc, to parliamentary approval. Once the European Parliament has approved the nomination, the European Commission is in power for five years, assisted by the following administrative services: general services, such as legal service, and the directorates general ("DGs"), each of which is headed by a director general answerable to the relevant commissioner. Currently, the competition commissioner is Mario Monti, and the director general for competition is Alexander Schaub.

condemns "[e]very contract, combination . . . or conspiracy . . . in restraint of trade," because every contract is intended to restrain competition in some manner and degree.[5] The U.S. courts solved this problem by developing the rule of reason, under which a restraint is unlawful only if it has an adverse effect on competition that is not outweighed by a procompetitive effect or if it falls within narrow categories of restraints that are unlawful per se. The drafters of Article 81 chose a different solution. Recognizing that the prohibition in Article 81(1) against the "prevention, restriction or distortion of competition" is extremely broad, Article 81(3) allows agreements that satisfy certain procompetitive criteria to be exempted from the prohibition. Unlike the rule of reason, however, a restrictive agreement is void ab initio unless affirmatively exempted. Under the current implementing regulations, the European Commission is the only institution with the power to exempt agreements.

UNDER THE CURRENT IMPLEMENTING REGULATIONS, THE EUROPEAN COMMISSION IS THE ONLY INSTITUTION WITH THE POWER TO EXEMPT AGREEMENTS

The European Commission set up a notification system to allow companies seeking legal certainty about the validity of their agreements to seek exemption or negative clearance—that is, a formal decision stating that the agreement does not infringe Article 81(1). Companies that do so are guaranteed immunity from fines, except in cases of blatant violations, such as cartels. With the growth of the European Community and the development of European Community competition law, the European Commission quickly became overwhelmed by the volume of agreements that were notified. One solution that the European Commission adopted early on was to issue block exemptions that automatically exempt certain categories of harmless or beneficial contracts from the application of Article 81(1). Although the block exemption system has had a significant effect on reducing the scope of the agreements that are notified, the European Commission still receives far more notifications than it can handle. Although the European Commission has been able to further reduce its case load through a system of issuing informal comfort letters, the whole structure has come to be seen as too cumbersome.

To address this problem, along with some others, the European Commission proposed to the European Council and the European Parliament what is generally known as the modernization proposal. One major feature of this proposal is the abolition of the system of prior notification by allowing member state courts and competition authorities to apply the Article 81(3) exemption criteria. The European Parliament was critical of certain elements of this proposal, particularly relating to the European Commission's proposed power to require certain categories of agreements to be registered with the European Commission. The European Council has not yet decided on the proposed legislation.

THE EUROPEAN COMMISSION'S POSITION ON ATTORNEY-CLIENT PRIVILEGE

In the *AM&S* case[6] of 20 years ago, the European Court of Justice established the following criteria for a lawyer to benefit from the attorney-client privilege:

- Lawyer must be a member of a relevant member state professional association.
- Association must have a code of conduct with rules for ethical behavior.
- Association's code of conduct must be enforced by disciplinary sanctions.
- Lawyer must be independent.

The European Court of Justice further held that in-house counsel could not be considered independent because in-house counsel would be bound to their client by a contract of employment.

Since then, many in-house counsel have called for re-examination of this system. The American Corporate Counsel Association and its European chapter, the Global Corporate Counsel

Association–Europe ("GCCA"), have been in the forefront of these efforts. (See sidebar below about these advocacy efforts.) Five factors in particular have fed the activism on this subject:

- The European Commission has used documents embodying in-house counsel advice in ways that greatly discourage the giving of candid advice.
- Increasing numbers of member states have begun to recognize the privilege for in-house counsel.
- The European Commission, at least on an interim basis, has successfully defended the right of its own in-house lawyers to assert the privilege.[7]
- Globalization has multiplied the practical problems posed by the absence of an attorney-client privilege for such counsel.
- Changes in competition policy and procedure have increased the need for legal advice from in-house counsel.

The European Commission's Use of Documents

In *John Deere,*[8] the European Commission used a memorandum from an in-house lawyer to establish that corporate officials knew that the conduct was potentially illegal and therefore that the violation was deliberate and flagrant and warranted a higher fine. Similarly, in *London European/Sabena*,[9] the European Commission found Sabena guilty of a deliberate infringement of Article 86 (now Article 82), based on a warning from a member of its legal department that the conduct "could give rise to penalties imposed by the Commission pursuant to Article 86." There is also a perception among some lawyers that, although the European Commission had been exercising self-restraint in the years since the 1988 *Sabena* case, that restraint ended with a 1995 raid on the British offices of an American multinational, in which lawyers' offices were targeted even though British law would have recognized the privilege for those lawyers.[10]

THE ASSOCIATION'S ADVOCACY EFFORTS

The American Corporate Counsel Association ("ACCA") and its European chapter, the Global Corporate Counsel Association–Europe ("GCCA"), have been in the forefront of efforts to persuade the European Commission to recognize the attorney-client privilege for in-house lawyers. Beginning in 1999, when the European Commission first published its modernization proposal, which seeks to strengthen its investigatory powers and do away with the system of prior notification, ACCA/GCCA published a position paper advocating legal privilege for in-house counsel as a balance to those developments. The ACCA/GCCA position paper was widely circulated and submitted to the European Commission and to the European Parliament. Following representations made by ACCA/GCCA, the European Company Lawyers Association ("ECLA"), and various business organizations, the Committee on Economic and Monetary Affairs of the European Parliament amended the European Commission's proposal to include recognition of legal privilege for in-house counsel.[1] After Commissioner Monti had weighed in, however, the European Parliament rejected that amendment in plenary session.

Nonetheless, Commissioner Monti made a significant concession during those debates. To respond to concerns that had been raised by the *John Deere* case, in which the European Commission had used a lawyer's advice to establish that corporate officials knew that the conduct was potentially illegal and therefore should receive a higher fine, Commissioner Monti stated to the European Parliament:

> For my part, I can assure you that if Amendment No 10 is rejected, the Commission will cease to regard evidence contained in such documents as an aggravating circumstance in determining financial sanctions. In that eventuality, I can give an assurance to propose the following form of words to the Commission: "in determining what financial sanction to impose on a company in future cases, the Commission will not regard as an aggravating circumstance, under the guidelines for calculating fines imposed in implementation of Article 15(2) of Regulation 17 and

Evolution in Member States

Either as a matter of law or practice, the attorney-client privilege is now recognized in a significant number of member states: Belgium, Denmark, Germany, Ireland, Norway, Portugal, Spain, and the United Kingdom.[11] Because European Union law overrides that of member states in the conduct of European Commission investigations, this evolution brings European Commission practice into increasing tension with local law.

Sauce for the Goose

In 1998, the president of the Court of First Instance issued his order in *Hanne Norup Carlsen and Others v. Council*.[12] The case concerned a group of Danish citizens who sought access to documents of the European Commission's and European Council Legal Service in order to establish that the Maastricht Treaty was illegal. The European Council refused to release those documents, stating that disclosure could, among other things, be detrimental to the public interest in the European Council's being able to obtain independent legal advice. The Danish citizens brought an action against the European Council and applied for interim relief. The president of the Court of First Instance denied the relief, noting that, at least on initial examination, the refusal to grant access did not appear to be improper "in so far as that refusal is based on the requirement of ensuring 'maintenance of legal certainty and stability of Community law' and also of ensuring that 'the Council [is] able to obtain independent legal advice."[13] Those reasons, of course, precisely parallel the policy arguments that have long been made for recognizing a privilege for corporate in-house counsel.

Globalization

The failure to recognize the privilege for in-house counsel was counterproductive for competition pol-

Article 65(5) of the ECSC Treaty, the existence of texts demonstrating that the company's in-house lawyers have alerted the directors to the unlawfulness of conduct covered by the Commission's decision."[2]

More recently, ACCA/GCCA has sought to enlist the aid of the U.S. antitrust authorities to make clear to their European counterparts the great benefits that recognition of the privilege yields for antitrust enforcement. (See www.acca.com/advocacy/europrivilegememo.html.) The U.S. antitrust authorities have long recognized that one of the most effective ways to improve antitrust compliance, given the enforcement agencies' limited resources, is to educate both outside and in-house counsel and thereby prevent violations. They see in-house counsel as allies, not enemies, in the fight against anticompetitive practices. For this reason, the U.S. authorities devote a great deal of time and effort to speaking and teaching at bar conferences and continuing legal education programs, including corporate counsel institutes and other programs that draw large attendance from in-house lawyers. ACCA/GCCA is continuing its work to ensure that the European Commission, too, will someday see the light and grant full attorney-client privilege to in-house counsel.

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1. The amendment stated: "communications between a client and outside or in-house counsel containing or seeking legal advice shall be privileged provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline, which are laid down and enforced in the general interest by the professional associations to which the legal counsel belongs."
2. Speech by Commissioner Mario Monti to the Plenary Session of the European Parliament, Sept. 5, 2001, at http://www3.europarl.eu.int/omk/omnsapir.so/debats?FILE=01-09-05&LANGUE=EN&LEVEL=DOC&GCSELECTCHAP=12&GCSELECTPERS=352.

icy even in a purely European context. One of the most effective ways to improve antitrust compliance, given the enforcement agencies' limited resources, is to educate both outside and in-house counsel and thereby to prevent violations. Moreover, in U.S. cases in which employees of a company nonetheless violate the law, in-house counsel have played a significant role in ferreting out the wrongdoing and helping the company take advantage of leniency programs, under which the company turns itself and its coconspirators in and receives in exchange a reduced fine or no prosecution at all. In a global economy, however, the inefficiencies imposed by the lack of privilege are multiplied many fold. As discussed below, not only does the European situation require curtailment of efficient practices for the collection of information needed by the lawyers and for the dissemination of legal advice on a company-wide basis, but also by discouraging the reduction of advice to writing, it exacerbates the problems posed by language barriers.

THE FAILURE TO RECOGNIZE THE PRIVILEGE FOR IN-HOUSE COUNSEL WAS COUNTERPRODUCTIVE FOR COMPETITION POLICY EVEN IN A PURELY EUROPEAN CONTEXT.

Changes in Competition Policy and Procedure

The modernization proposal heightens the importance of the attorney-client privilege. As noted above, a great many practices, both harmful and innocuous, fall under the broad definition in Article 81(1) of agreements or concerted practices that "have as their object or effect the prevention, restriction or distortion of competition within the common market." In the past, counsel would evaluate whether a particular such practice fell within a block exemption immunizing a broad category of conduct and, if it did not, would advise on whether the practice should be notified to the European Commission for the purpose of securing an individual exemption.

Under modernization, the system of prior notification would be abolished. Actions that fall within Article 81(1) but that satisfy the conditions for an exemption under Article 81(3) are permitted, without the need for notification to the European Commission. In this environment, it is up to the company itself to consider whether an intended agreement violates Article 81 or not. Counsel must now do more than simply identify conduct that might require notification; they must opine on the substantive lawfulness of the intended action. Without the protection of legal privilege, they may well give their advice only orally. Given the complexity of competition law, this delivery method may lead to confusion, inefficiency, and increased risk of violation.

The European Commission's Response

The European Commission has had two principal responses to those who have called for it to recognize the privilege. First, European Commission staff have contended that they are bound by the European Court of Justice's decision in *AM&S.* In a 1997 speech, Jonathan Faull, then a director of what is now Directorate General—Competition, declared: "The Court's case law is thus clear and it is not open to the Commission to alter it by administrative fiat."[14] Second, Commissioner Monti has repeatedly expressed the concern that European Commission investigations would be hampered by recognition of the privilege. For example, in a speech to the Plenary Session of the European Parliament on September 5, 2001, Commissioner Monti said:

> We have to recognize that, unlike external lawyers, in-house lawyers are employees of the company and take their orders from it. They are in a position of occupational dependence and may face a conflict of interest between loyalty towards their employers and respect for ethical standards. Furthermore, internal communications between a company lawyer and his employer are so numerous and indistinguishable from purely company advice—which differs from legal advice—that duty of secrecy for in-house lawyers could create conditions ripe for concealing documentary evidence. If the communications between in-house lawyers and other employees became confidential, the Commission's powers to apply the standards would be seriously compromised.[15]

One might question the sufficiency of these responses. As to the first, it is well established that the European Commission is free not to exercise its enforcement or its investigatory powers to the full extent permitted by law and to adopt statements explaining to the public the manner in which it will refrain from doing so. The European Commission has done so, for example, in creating its leniency program and in adopting fining guidelines. As to the second, it is based on a gross misconception of the role and ethics of in-house counsel, which Commissioner Monti himself recently acknowledged when he recognized, before the European Parliament, the positive role that in-house counsel play in advising companies with respect to competition rules. The U.S. experience strongly suggests that the benefits of legal advice in securing antitrust compliance greatly outweigh any hindrance to governmental investigations that may result from legal privilege. Although there are certainly differences in investigative procedures between the two jurisdictions, the power to carry out a dawn raid is substantial, and the U.S. experience with search warrants certainly indicates that, even in a jurisdiction that recognizes privilege for in-house counsel, if there is wrongdoing, such a raid of executives' files will yield ample evidence to sustain an administrative fine.

Regardless of one's views as to the logic and evidentiary support for the European Commission's position, however, it is a fact of life, and prudent counsel will both identify the problems that it causes and develop a strategy for coping with it.

REGARDLESS OF ONE'S VIEWS AS TO THE LOGIC AND EVIDENTIARY SUPPORT FOR THE EUROPEAN COMMISSION'S POSITION, HOWEVER, IT IS A FACT OF LIFE, AND PRUDENT COUNSEL WILL BOTH IDENTIFY THE PROBLEMS THAT IT CAUSES AND DEVELOP A STRATEGY FOR COPING WITH IT.

THE PROBLEMS

For companies, the European Commission's position poses obvious problems. The most obvious are the ones set out in our opening scenarios: creating evidence that would then be used against the company. Thankfully, Commissioner Monti has stated that the European Commission will no longer use internal lawyers' memos to show deliberateness and thus increase the level of fines. See sidebar on pages 82–83 regarding ACCA/GCCA's advocacy efforts. Such documents can, however, give the European Commission a roadmap to its investigation and be used as admissions to establish liability.

Avoiding the Scylla of creating evidence against your company is of little benefit, however, if it sucks you into the Charybdis of failing to do your job. One could, of course, preserve the privilege by relying only on—or routing all communications through—outside European counsel. But that tactic would be both inefficient and ineffective. The team is likely to include both in-house and U.S. outside counsel, who must talk with one another, as well as with the business people. Their roles will be quite different and complementary. Except at companies with very large legal departments or extremely specialized in-house counsel, outside counsel may well have more opportunity to specialize and to develop deep expertise in the fine nuances of a particular area of competition law. But almost invariably, outside counsel do not know the company and its people as well as in-house counsel do. They do not have the long history and frequent contact enjoyed by in-house counsel who have developed trusting relationships with the company's employees that enable them to discover and remedy problematic conduct before it occurs. And it is frequently more difficult and more expensive, at least on an incremental basis, to consult outside counsel, giving company employees a disincentive to seek advice when they should. Similarly, in today's world, issues often have a global dimension that requires the participation of non-European counsel. These problems are clearly exacerbated when one must put together a crisis management team. The speed at which the team must operate makes communi-

From this point on . . .
Explore information related to this topic.

ONLINE:

- American Corporate Counsel Association website, ACCA Online℠ at www.acca.com.
- Case T-610/97 R, *Hanne Norup Carlsen v Council*, Mar. 3, 1998, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997B0610.
- EUROPA, the website of the European institutions, at www.europa.eu.int.
- European Company Lawyers Association ("ECLA") website, at www.ecla.org.
- Jonathan Faull, *In-House Lawyers and Legal Professional Privilege: A Problem Revisited,* Aug. 10, 1997, available at http://europa.eu.int/comm/competition/speeches/text/sp1997_049_en.html.
- Anna-Maria Leonard, A Change of Status, GLOBAL COUNSEL, vol. 4 (Dec. 1999), available on ACCA Online℠ at www.lawdepartment.net/scripts/article.asp?Article_ID=12211&Action=AuthenticateMe.
- Press release 8/98 of Mar. 3, 1998, of the Court of Justice announcing the *Carlsen* decision, at http://curia.eu.int/en/cp/cp98/cp9808en.htm.
- Speech by Commissioner Mario Monti to the Plenary Session of the European Parliament, Sept. 5, 2001, at http://www3.europarl.eu.int/omk/omnsapir.so/debats?FILE=01-09-05&LANGUE=EN&LEVEL=DOC&GCSELECTCHAP=12&GCSELECTPERS=352.
- White Paper on Modernization of European Competition Law and Legal Privilege for In-House Counsel, available on ACCA Online℠ at www.acca.com/vl/europe/eichler.html.

ON PAPER:

- Case 155/79, *AM&S v Commission,* (1982) ECR 1575, 1646-47.
- *"Dawn Raids" Spark Controversy for Europe's Antitrust Regulators*, WALL ST. J., Mar. 1, 2002.
- Maurits Dolman, *Sauce for the Goose Is Sauce for the Gander*, EUROPEAN COUNSEL, Feb. 1999 (contrasting the grant of legal privilege to lawyers of the legal service of the European Commission under *Carlsen* with the lack of privilege for in-house counsel).
- *Renfeld Corp. v. Remy Martin SA*, 98 F.R.D. 442 (D. Del. 1982) (recognizing that a French in-house counsel who was not a member of the bar enjoyed legal privilege in the United States).

cating only through European outside counsel all the more cumbersome and impractical.

Not only must in-house and U.S. outside counsel be involved, but also they must be able (1) to be candid, (2) to put their advice in writing, especially with respect to complex, rule of reason type analyses of vertical arrangements, licensing arrangements, and joint ventures, and (3) to develop trusting relationships with the company's employees that ensure a bilateral information flow so that ongoing compliance efforts can be successful and risky conduct is discovered early and fully addressed and corrected.

In matters with a global dimension, the importance of putting things in writing is even greater. Where language differences are a fact of life, it is often important to provide complex information in writing, because the recipients would likely understand the written word more easily than the spoken.

The European Commission's position also makes it more difficult to take advantage of such technology as email and intranets to facilitate the communications process among far-flung employees and lawyers. In an ideal world, such technology could be employed to permit confidential communications

between in-house counsel and the precise employees whose conduct could get the company in trouble or keep them out of it. Access to such communications would be controlled by the identity of the employee and his or her function, without regard to geography. In responding to questions, such lawyers would feel free to give simplified answers that could be readily understood by the employees who are charged with actually carrying out the business from day to day.

In the world as it exists, however, in-house counsel must pay attention both to geography and to the possibility that the materials in question may be subject to seizure and to being used as admissions. And they may have to phrase their communications, especially their written communications, in more careful, hedged terms, even at some cost in clarity and effectiveness.

GIVEN LANGUAGE BARRIERS, HOWEVER, A STRICT RULE AGAINST WRITTEN COMMUNICATIONS IS IMPRACTICAL.

A STRATEGY FOR COPING: THE BALANCING ACT

As the above list of problems suggests, coping with the situation in Europe requires a balancing among potential evils:

- Creating harmful evidence.
- Reduced efficiency and increased costs.
- Misunderstandings based on oral communications.
- Compromised trust in dealing with business executives.
- Increased risk of law violations due to misunderstanding of legal requirements.
- Hampered fact-gathering during the course of an internal investigation.

Because solving one problem may make another problem worse, experienced counsel engaged in counseling or compliance or those responsible for organizing the defense of a major cartel or other multinational antitrust investigation recognize that there is no single cookie-cutter strategy that will solve all problems. Instead, they will carefully plan and coordinate an internal communications strategy tailored to the particular circumstances. The following are some suggestions to guide your planning in various contexts.

The Multijurisdictional Cartel Case

The problems are most acute in multijurisdictional cartel cases. The stakes are highest, the dawn raids are most likely, and the need for communication among European in-house counsel, U.S.-based in-house counsel, U.S. and European outside counsel, and company officials is greatest. In such circumstances, efficiency must take a back seat. One possible solution is to limit briefings of company officials and European in-house counsel to oral communications only.[16]

Given language barriers, however, a strict rule against written communications is impractical. For important decisions, the options and key information will have to be laid out in writing. A decision to seek leniency in one or more jurisdictions, for example, has so many cross-jurisdictional differences and ramifications that it is hard to imagine communicating the issues fully without at least some writings. A second safeguard, therefore, is to have written communications to company officials and European in-house counsel come from European outside counsel only. A third safeguard even with respect to clearly privileged communications with European outside counsel is not to circulate copies unduly widely; European Commission officials may be less respectful of claims of privilege if the documents turn up repeatedly in the offices of nonlegal employees. Finally, assuming that all of the safeguards will fail, in-house and U.S. outside counsel should prepare any documents that will be shared with company officials or other counsel with the expectation that it might be disclosed to an enforcement official.

Compliance Programs to Prevent Hard-Core Violations

The early stages of compliance programs do not raise the same types of problems. Most written

materials designed to educate employees about the nature and risks of antitrust violations will cause the company no embarrassment if seized in a dawn raid. That a company made diligent efforts to avoid violating competition laws in the first place is, if anything, something to be proud of, and in the United States, it is even the basis for a reduced corporate sentence under the federal sentencing guidelines.

Things get more complicated, however, when the compliance program begins to unearth troubling information. At that point, the issues quickly metamorphose into those present when a multijurisdictional cartel investigation is on the horizon. Here, the rules should be (1) to keep communications oral to the maximum extent possible until a team and a strategy are in place and (2) to engage outside counsel from all relevant jurisdictions sooner rather than later so that a risk assessment can take place and a strategy can be developed. Speed may be of the essence in getting on top of the situation, however, so some risks may have to be taken in order to get information quickly.

Counseling on Distribution, Licensing, and Joint Ventures

Although dawn raids are generally associated with cartel investigations, they are not limited to such investigations. Dawn raids have been used in investigations of vertical restraints—that is, relations between manufacturers and distributors—and large fines have been imposed.[17] Such matters can raise tricky problems for in-house counsel. On the one hand, the lawyers are not as fully in control of the timing and procedures as in the case of a full-blown cartel investigation in which the gravity of the situation forces the business people to give the lawyers their full attention. On the other hand, competition analysis of distribution, licensing, and joint ventures is complex and fact-specific, and it is often necessary to put at least some of the communications in writing, both from client to lawyer and lawyer to client. And it may not be practical to engage outside counsel qualified to maintain the privilege.

In many cases, both lawyer and client are going to have to go ahead and write some things down, but with the knowledge that those words may be in the hands of an investigator some months or years down the road. They can talk orally first to get a sense of the general parameters of the issue, and they can talk afterwards to discuss things that are best not said in writing. But the important thing is first to get enough information to analyze the substantive problem correctly and then to be sure that the advice is communicated adequately so that the company understands accurately the level of risk, if any, and makes its decisions accordingly.

Mergers and Acquisitions

As noted above, the European Commission does not currently use dawn raids in merger cases but has proposed expanding its right to do so. It is probably a fairly safe assumption that the European Commission will not reverse its current practice without warning, but will instead await comments on its current green paper on the review of the merger control regulation. At the current time, therefore, it is reasonable for in-house counsel to proceed as they would in the United States, particularly given the complexities of merger analysis and the tight time frames in which it generally takes place. A close watch should be kept on future developments in this area, however.

CONCLUSION

For the moment, the European Commission appears wedded to the view that the attorney-client privilege should apply neither to non-European lawyers nor to in-house European counsel. It believes itself bound by the decision in *AM&S,* and it has expressed the conviction that European Commission investigations would be hampered by recognition of the privilege. Although ACCA/GCCA remains committed to advocacy and education on this subject, it is sure to be a long, slow process.

Companies therefore need to conduct their affairs in ways that take account of these realities. Thus, as in-house counsel, you should not count on the confidentiality of communications, particularly written communications, passing among European in-house counsel, U.S.-based in-house counsel, and U.S. outside counsel. Instead, you should have an internal communications strategy in place, sensitive to the context, such as cartel investigation, compliance program, counseling, or mergers and acquisitions, in which those communications occur. As appropriate, you should limit briefings of European in-house

counsel or of executives to oral communications or have communications come from outside European counsel only. You should not circulate copies of even concededly privileged documents unduly widely. To guard against the possibility that all of these safeguards will fail, you should prepare documents with the expectation that they might be disclosed to an enforcement official. And finally, you should balance appropriately the need for confidentiality against the need to ensure that necessary information is communicated at the right time to the right people.

These steps may seem strange to U.S. in-house counsel and executives and even to counsel in the growing number of European member states that recognize the privilege for in-house counsel in matters before the member state courts. For companies that may come under the scrutiny of the European Commission, however, gaining familiarity with the issue and with the steps to deal with it is becoming an essential element of conducting business on a European stage.

NOTES

1. Regulation 4064/89 on the Control of Concentrations between Undertakings, 33 O.J. (No. L.257) 1 (1990); *see* Dr. Kim Möller and David W. Hull, "EU Merger Control: A Deal Lawyer's Compass for Ensuring Safe Passage," *ACCA Docket* 19, no. 8 (2001): 24–40, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/so01/eumerge1.php.
2. The Commission's investigatory powers, including the authority to carry out "dawn raids," are derived from Regulation 17, 5 O.J. (No. 13) 204 (1962).
3. There are a number of procedural differences. For example, the Commission does not need to obtain a search warrant from a judge in order to carry out a dawn raid.
4. *Green Paper on the Review of Council Regulation (EEC) No. 4064/89,* ¶ 225.
5. Standard Oil Co. v. United States, 221 U.S. 1, 60–70 (1911).
6. Australian Mining and Smelting Europe Ltd v. Commission, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264.
7. Hanne Norup Carlsen and Others v. Council, Case T-610/97 R (Order of the President of the Court of First Instance, Mar. 3, 1998), at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997B0610.
8. O.J. L 35/58, Feb. 7, 1985.
9. O.J. L 317/47, Nov. 24, 1988.
10. *See* American Chamber of Commerce, *EU Committee Position Paper on Legal Privilege* (Mar. 11, 1997), at www.ecla.org/gb/paper/eucommittee.htm.
11. *See* European Company Lawyers Ass'n, *Position Paper: Legal Privilege for In-House Lawyers* (Dec. 2000), at www.ecla.org/gb/paper/position.htm; European Company Lawyers Ass'n, *Legal Privilege before National Competition Authorities,* at www.ecla.org/gb/paper/authorities.htm.
12. Case T-610/97 R, *Hanne Norup Carlsen v Council*, Mar. 3, 1998, at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997B0610.
13. *Id*.
14. Jonathan Faull, *In-House Lawyers and Legal Professional Privilege: A Problem Revisited* (Aug. 10, 1997), at http://europa.eu.int/comm/competition/speeches/text/sp1997_049_en.html.
15. Speech by Commissioner Mario Monti to the Plenary Session of the European Parliament, Sept. 5, 2001, at http://www3.europarl.eu.int/omk/omnsapir.so/debats?FILE=01-09 05&LANGUE=EN&LEVEL=DOC&GCSELECTCHAP=12&GCSELECTPERS=352. Similarly, in a letter to the president of the European Company Lawyers Association on April 11, 2000, Commissioner Monti wrote:

    > Because in-house lawyers are not independent and have to follow the instructions given by the management of the company, they could be used as an instrument to commit infringements and conceal documentation on such infringements if they were to benefit from a legal professional privilege. Granting them privilege could lead to the creation of real sanctuary within companies and would hinder the efficiency of investigations.

16. Writings shared only among U.S.-based in-house or outside counsel and European outside counsel are generally not a problem, even though the European Commission does not recognize a privilege as to the first two, because documents in European Commission investigations are seized rather than required to be produced pursuant to subpoena.
17. *See, e.g.,* Opel Nederland B.V., Case COMP/36.653 (No. L 59) (Sept. 20, 2000), at http://europa.eu.int/eurlex/pri/en/oj/dat/2001/l_059/l_05920010228en00010042.pdf, at ¶ 2 (European Commission ordered investigations to be carried out), Art. 3 (imposing euro 43 million fine); JCB Service, Case COMP.F.1/35,918 (No. L 69) (Dec. 21, 2000), at http://europa.eu.int/eur-lex/en/dat/2002/l_069/l_06920020312en00010049.pdf, at ¶ 3 (inspections carried out), Art. 4 (imposing euro 39.6 million fine). *See generally* Billie Munro Audia, Philipp Tamussino, and David W. Hull, "Recent Developments in European Competition Law: Vertical and Horizontal Agreements," *ACCA Docket* 19, no. 7 (2001): 52–72, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/ja01/eucompete1.php.

JOHNSON CONTROLS

Inter-Office Correspondence

Date August 19, 2003

Subject Sarbanes-Oxley "Up the Ladder" Reporting

From The Office of the General Counsel

To All Members of the JCI Legal Team

As you all are aware, Section 307 of the Sarbanes-Oxley Act required the U.S. Securities and Exchange Commission ("SEC") to adopt "standards of professional conduct for attorneys." The SEC has issued final rules, codified at 17 CFR Part 205, which become effective August 5, 2003. The full text of the rules are available at www.sec.gov/rules/.

This memo is for the purpose of making you aware of these rules and informing you of Johnson Controls, Inc.'s (including any subsidiary) policies in this regard.

1. The SEC rule requires attorneys who become aware of "evidence of a material violation" by the company or "any officer, director, employee or agent" of the company to report that matter as required by the rule. See 17 CRF § 205.3(b)(1).

2. There are two alternative methods of reporting set forth in the rules.

A. An attorney should report evidence of a material violation to a "supervisory attorney." For Johnson Controls, this would mean that outside counsel and our in-house Group Counsels, Staff Attorneys or other attorneys should report violations to the appropriate business unit General Counsel. A list of the business unit General Counsels with contact information, is attached. If the business unit General Counsel cannot provide an "appropriate response" within a reasonable time, either the business unit General Counsel or the reporting attorney should report the matter to the Office of General Counsel of the Corporation.

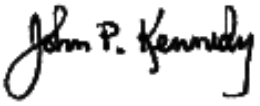
B. An attorney may also report evidence of a material violation directly to the Qualified Legal Compliance Committee (QLCC) of the Board of Directors. A list of the current members of this committee are also attached.

Although the QLCC is an alternative allowed under the rules, it is our expectation (and strong preference), that most matters be reported up through the Law Department as outlined in the first alternative.

3. The SEC rule applies to all in-house lawyers employed by Johnson Controls, Inc. or any of its subsidiaries and to U.S. admitted outside counsel. There are certain exceptions which may exempt non-US admitted outside counsel. However, the principles reflected in the new SEC rule are consistent with Johnson Controls' policy and we expect our outside lawyers in all jurisdictions to report matters of serious concern they encounter in the course of their representation to appropriate members of JCI management and to the local representative of the JCI Law Department.

4. We will require annual certifications from all of our in-house attorneys that they are familiar with the SEC rules (as amended and modified from time to time) and agree to abide by

them. **Please sign the attached certification and return it to Sue Christianson by September 30, 2003.**



John P. Kennedy, Senior Vice President, Secretary and General Counsel

Jerome D. Okarma, Deputy General Counsel and Assistant Secretary

SEC RULE 205 CERTIFICATION

I hereby certify the following:

1. I am familiar with the rules of the U.S. Securities and Exchange Commission concerning Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer in effect as of the date of this certification.

2. I agree to abide by these rules during the course of my employment in the representation of Johnson Controls, Inc. and any of its subsidiaries or related entities.

Dated this ____ day of _____, 2003.

_____

[Type or print full name]

A-C PRIVILEGE OVERVIEW

Michael G. McCarty
Johnson Controls, Inc
October 9, 2003

WHAT LAW GOVERNS?

- The A-C Privilege is a rule of evidence, not substantive law
- State evidence rules or statutes govern
- Fed. R. of Evid. 501
  - Follow state law in diversity cases
  - Federal Common Law in Fed. Question cases
- Varies Country to Country

Basic Elements - Restatement § 68

- A "Communication"
- Between "Privileged Persons"
- Made "in confidence"
- For the purpose of seeking, obtaining or providing legal assistance for the client
- Affirmatively raised by the claimant; and
- NOT waived

IN-HOUSE CONCERNS

- Sometimes hard to separate legal and "business" advice
- We sit on management teams or groups
- We have non-legal titles and functions
- Assume a court will be skeptical of broad claims of privilege for all activities - document the lawyer's role as lawyer.
- D&O coverage issues

PRIVILEGED PERSONS

- For Corporations - Who is the "Client"?
  - The "entity" is always the client C.F.T.C . v. Weintraub, 471 US 343 (1985)
  - A corporate employee (even an officer) is NOT an individual client automatically. BEWARE of "dual representation" claims.
  - Communications with corporate "constituents" may or may not be privileged under different tests.

PRIVILEGED PERSONS

- Control Group Test
- Subject Matter Tests

UPJOHN V. U.S.

- Limited precedent. Federal Question case
- Recognized privilege for in-house counsel
- Recognized privilege for communications with non-control group employees
- Established several factors relevant to application of the privilege

UPJOHN FACTORS

- Communications made by corporate employees
- To counsel for the corporation
- At the request of superiors
- For the purpose of allowing the corporation to receive legal advice
- Upper Management did not have the info

UPJOHN (CONT.)

- Information concerned matters within the scope of employee's duties (not a mere witness)
- Employees were aware of the purpose of the communication
- Corporation instructed employees to keep communications confidential and they were.

"Privileged Person" v "Client"

- Although you can have a privileged conversation with a corporate employee, the employee is not your "client."
- The corporation is the client
- Ethical obligation to disclose substance of communication "up the ladder."
- The employee does not control the privilege relating to the conversation

CONTROL OF PRIVILEGE

- The corporation holds the privilege
- If control of the corporation changes, new owner or management controls the privilege for previous communications
- If corporation goes bankrupt, the trustee controls the privilege
- C.F.T.C. v. Weintraub

Parent/Subsidiary Issues

- Most courts extend "client" status to related fully owned corporate entities
- Less than 100% ownership does present potential problems for assertion of the privilege or possible waiver.
- Joint Ventures as a risk

Transactions

- In a stock deal, the "client" does not change, but control does. New owner controls the privilege, even for this deal.
- Not true in an asset deal. The privilege may or may not transfer with transferred assets.
- "All privileges and immunities" language?
- Expressly address this issue in APA?

ETHICAL ASPECTS

- Avoid any impression that we represent individual employees
- Stress representation of corporation only
- Avoids possibility of employee seeking to assert individual privilege
- State ethical rules may require a "Miranda Warning" (See e.g. Wis SCR 20:1.13(d)

Exceptions to A-C Privilege

- Even where the privilege would otherwise apply, the law does not recognize its assertion against some persons or parties
- The "fiduciary" exception
- Basic Trust Law doctrine. The trustee must act for the benefit of beneficiary of the trust. Trustee cannot assert privilege for legal advice against beneficiary of the trust

ERISA

- Considerable case law that "fiduciaries" of ERISA plans cannot assert privilege as to legal advice concerning administration of the plan against beneficiaries of the plan.
- Distinguish advice to company as "settlor" of the plan.
- Watch Enron and other cases for expanding definition of who is a "fiduciary."

Fiduciary vs. Shareholder Suits

- Garner v. Wolfinbarger "cause" factors
  - Number of shareholders / shares
  - Nature of the claim (derivative or individual)
  - Necessity and availability of information
  - Alleged corporate mis-conduct
  - Advice re: past or prospective actions
  - Confidential or "trade secret" information
  - Not advice as to shareholder suit itself

Crime or Fraud Exception

- Policy to foster open communications with counsel so client can conform to the law
- Any "abuse" of this policy = the privilege does not apply
- Can not hide behind privilege to commit a crime or further a fraud

Crime - Fraud Elements

- Vary somewhat state to state
- A "prima facie" showing that:
  - Client was engaged in crime when advice sought; or
  - Client was planning such conduct; or
  - Client committed crime after consult (infer); **and**
  - Advice was "in furtherance" of the crime

Trend to Watch

- Attorney liability for "securities fraud"
  - Legislate overturn of ***Central Bank of Denver***, 511 U.S. 164 (1993) (no liability for "aiding and abetting" securities fraud).
  - Expand definition of "primary actor" for securities fraud to include attorneys ***In re Enron*** 235 F. Supp.2d 549 (S.D. TX . 2003)(refusing to dismiss Vinson & Elkins)

Prosecutor's View

- January 20, 2003 Memorandum, from Deputy Attorney General Larry Thompson, to US Attorneys and other DOJ lawyers
- Sets forth a variety of factors to consider in deciding whether to charge the Corporation, rather than individuals, with crimes

Prosecutor's View

- Factor 4 of "Thompson Memorandum"
  - The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.
- 1999 DOJ Guidelines also list voluntary disclosure and "cooperation" as a factor.

Other Agencies

- Federal Sentencing Guidelines formula for reduction of sentence in exchange for full cooperation. § 8C2.5(g)
- SEC October 2001 Report and Press Release
- EPA 63 Fed. Reg. 58,399
- HHS 65 Fed. Reg. 19,618

Selective Waiver

- What if the company decides to share A-C materials with a prosecutor or agency and then a civil plaintiff asks for the same materials, arguing that the privilege has been waived?
- Clear trend in recent years has been to disallow "selective waiver" (Eighth Circuit only now allows it)

Selective Waiver

- Does a confidentiality agreement with the government make a difference?
  - First, Third and Sixth circuits say "no"
  - Second leaves the door open
- District Court rulings all over the place and SEC supports "selective waiver" with an agreement in place.

Compare: State Ethics Rules

- 4 States require a lawyer to disclose a client's intent to commit a **future** crime/fraud that is likely to result in serious financial harm to another (FL; NJ; VA; WI)
- Some states allow a lawyer to do so, under some circumstances
- Some states prohibit the lawyer from disclosing (CA; WA)

Claims by In-House Counsel

- Can in-house counsel reveal confidential info to assert or defend employment or other "claims"? Model Rule 1.6(b)(3)
  - **No: Willy v. Coastal Corp., 647 F.Supp. 116, 118 (S.D. Tex. 1986); Balla v. Gambro Inc., 584 N.E.2d 104 (IL 1991)**
  - **Yes: Spratley v. State Farm Mutual, 2003 UT 31, __ P.3d __ (8/22/2003); Burkhart v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000); Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002); ABA Formal Ethics Opinion 01-424.**

ACCA RESOURCES

- **INFOPAK ON IN-HOUSE COUNSEL ETHICS**
  - http://www.acca.com/infopaks/ethics.html
- PROTECTING PRIVILEGED INFORMATION—A GUIDE FOR CORPORATE EMPLOYEES
  - http://www.acca.com/protected/reference/
  - attyclient/privileged.pdf

Electronic Discovery Sanctions Cases of Interest in 2002-2003

By
Cisselon S. Nichols
Sr. Litigation Counsel
Shell Oil Company
910 Louisiana, OSP 4842
Houston, Texas 77002
713-241-0979
Email: cisselon.nichols@shell.com

John M. Barkett
Shook Hardy & Bacon, LLP
201 S. Biscayne Boulevard
Miami, Florida 33131
Telephone: 305-960-6931
Email: jbarkett@shb.com

Sanctions for electronic discovery failures remains a "hot topic" in the E-Discovery arena. The table below contains a selection of electronic discovery cases where sanctions were sought or awarded in state or federal courts in 2002-2003.

Sanctions Case Law Table

Wheelbarrow of Sins	Citation	Discussion
Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union et al (defamation, violation of the Lanham Act, trade libel and other claims) Judgment entered on liability as a sanction for a variety of misdeeds.	212 F.R.D. 178 (S.D. N.Y. 2003)	This case involved a dispute over the use of the Met's name to obtain benefits for Union in a dispute with a provider to the Met. The union had committed a number of discovery "sins" that went beyond electronic discovery issues. The Met sought a judgment of liability and attorneys' fees as sanctions for the union's conduct. The district court granted the Met's motion and summarized the union's malfeasance or misfeasance: Failure to explain that "documents" includes electronic documents; Failure to look for electronic documents; Mistaken belief that emails were automatically stored on the user's server; Instructions that were allegedly given by a lawyer were not supported by evidence as to where, when and to whom the instructions were given; Failure to preserve electronic documents; Failure to contact ISPs to attempt to retrieve deleted emails despite representations to court they would be contacted; Representation in a letter that the Union had provided all responsive documents in its computers was false; Emails that were produced should have been produced earlier; Replacement of computers without notice after Met's counsel wanted to hire forensic experts to examine the hard drives to attempt to retrieve emails deleted.

Essex Group, Inc. v. Express Wire Services, Inc. (misappropriation of trade secrets and other claims) Striking answer and entry of default judgment as a sanction plus an order to pay costs and attorneys' fees in the amount of $7,000 affirmed.	578 S.E.2d 705 (N.C. App. 2003)	Defendants were former employees who resigned and formed a competing company. Defendant Searcy had deleted emails from his computer but testified he did not believe he was forbidden from doing so. Defendant Ramsey removed documents (but had the misfortune of being observed and followed by plaintiff's private investigator), testified in his deposition he had not removed any documents, apparently tried to return the documents (to make his "lie" true), was caught by the private investigator, and then admitted that he had lied about the removal of documents. The trial court then ordered the production of the records. The trial court entered a default judgment as a sanction and awarded costs and attorneys' fees in the amount of $7,000 to plaintiff. The appellate court affirmed without any specific discussion of the deleted e-mails. It focused instead on the dilatory and dishonest actions of defendants.
Fabrication		
Premier Homes and Land Corporation v. Cheswell, Inc. (summary process to evict a tenant removed to federal court) Fees granted as part of unopposed motion to dismiss.	240 F.Supp.2d 97 (D. Mass. 2002) December 19, 2002	Fabricating a lease addendum and an email. A request was made by Defendant to image Premier's hard drives, back up tapes, and other data storage devices. The Court permitted this work. After it was begun, Premier's counsel disclosed that Mr. Kenney of Premier admitted that the lease addendum was not in existence on the data the ground lease was signed and the email was fabricated. The motion to dismiss that followed was not opposed and the only issue was recovery of fees and costs which were permitted for defendant's attorneys (about $18,000 with a $760 reduction for spending two days watching the imaging) and $5,650 for the computer consultants charges reducing their rate to $100 per hour from $200 per hour.
Jimenez v. Madison Area Technical College (employment discrimination claim) Sanction of dismissal affirmed.	321 F.3d 652 (7th Cir. 2003)	This was a Section 1981 and 1983 case in which Jimenez was found to have fabricated emails containing derogatory statements about her. Jimenez denied that the communications were fraudulent and her lawyer supported those denials. After a hearing, the district court found otherwise. (The statements were quite blatant and the district court found that persons holding professional positions in human resources would make them and write them down.) Citing Rule 11, the district court dismissed the case and awarded defendants $16,473 against Jimenez and her lawyer. The 7th Circuit affirmed. Jimenez did not challenge the factual finding but sought reversal based on the severity of the sanction. The 7th Circuit was unsympathetic, calling her claim "so unmeritorious and her behavior so deceptive that the filing of her baseless claim amounted to a veritable attack on our system of justice." It also awarded sanctions on appeal under F.R.App.P. 38. The Court of Appeals did require counsel to submit better documentation of time, however, before permitting recovery for 125 hours of time allegedly spent on the appeal. (The Court of Appeals noted that appellant's brief contained only one page of legal argument.)
Natron Corp. v. General Motors, Corp. (breach of contract claim) Sanction of dismissal affirmed.	2003 Mich. App. LEXIS 1059 (Mich. App. 2003) (unpublished)	The case arose of out of a claim that General Motors owed plaintiff money for research and development costs associated with a device that plaintiff produced for General Motor's Delco division. Plaintiff claimed that General Motors discontinued use of the device before it could recoup its costs and sought damages. The key to plaintiff's damages claim was its research and development payroll. Plaintiff calculated its damages from hard copy time sheets where available and otherwise from wage projections. Defendant argued the hard copy time sheets were back dated and unreliable. General Motors further argued that plaintiff used the fabricated timesheets and hid, altered, or destroyed corroborating or contradictory evidence such as computer

		data. During a four-day evidentiary hearing on a motion for sanctions, the debate between the parties centered on three versions of a database produced by plaintiff during discovery: a printout, a diskette, and a backup tape. Defendant argued that the multiple versions established that data in the FoxPro software that was being used had been deliberately altered or removed. General Motors also complained about the failure of plaintiff to produce the "original" FoxPro backup tape, which plaintiff claimed could not be located. At a later oral argument on the sanctions motion, plaintiff produced "a supposed original backup tape." The trial court ordered an independent examination of the tapes to determine "their authenticity in light of the questions concerning evidence tampering." The trial court found that the database as produced "contained alternations and/or deletions." The appellate court found no error in this conclusion or in the conclusion that the plaintiff failed to disclose in a timely manner the existence of the database. The appellate court also credited the district court's determination not to accept an affidavit of a vice-president of plaintiff which explained that he had copied the original application onto a backup tape. This explanation was contrary to the view of the court-appointed expert and was contrary to the affiant's deposition testimony, however. The appellate court also accepted the district court's findings that names and customer data were deleted from the database and that this information was material because of the allegations that the hard copy timesheets were altered or missing and did not allocate time to specific projects. The court-appointed expert had also supported this determination. The appellate court affirmed the sanctions order saying it was warranted based on the "discovery abuses and evidence tampering."
Spoliation		
Kucala Enterprises, Ltd v. Auto Wax Co., Inc. (patent validity/infringement litigation) Magistrate's report and recommendation to impose the sanction of dismissal's for Kucala's destruction of data.	2003 U.S. Dist. LEXIS 8833 (N.D. Ill. 2003) (Magistrate Report and Rec.)	In the course of this patent infringement case, Kucala installed and used software called "Evidence Eliminator" on a computer, just hours before it was to be examined by Auto Wax's computer specialist. Evidence Eliminator is a program designed to clean computer hard drives of data that may have been deleted by the user but still remain on the hard drive. Kucala also threw two other computers away during the litigation. He did so because they crashed and were of no use to him. Kucala also admitted destroying documents, contrary to his attorney's advice, because he was afraid the defendant would not honor a protective order that was in place. Auto Wax's computer specialist inspected the computer on which Kucala had installed "Evidence Eliminator" and confirmed that the software had been used to delete and overwrite more than 14,000 files. Auto Wax filed a motion for sanctions alleging prejudice as a result of Kucala's destruction of one computer and deletion of relevant discovery from two others. Auto Wax sought a default judgment, attorneys' fees, expert fees, and costs. The Magistrate found that Kucala had acted unreasonably, with gross negligence, and in flagrant disregard of the Court's order by deleting files just hours before Auto Wax's computer specialist was to inspect his computer. The Magistrate recommended that the district court dismiss the action and require Kucala to pay the costs and attorney fees incurred by Auto Wax from the time Kucala deleted the files until the hearing. The Magistrate's summary of the evidence was telling: "The case law in this circuit is clear that Kucala's subjective state of mind is of no consequence to the issue of fault. The Court finds that Kucala was at fault by acting unreasonably as well as acting with gross negligence and in flagrant disregard of the court order by speciously

		deleting files, in "the wee hours" of the morning, hours before Auto Wax's computer specialist was to take an image of Kucala's computer - and likely even before this time. Kucala entreats the Court to believe him - that he provided all the relevant information to Auto Wax. But, given all of the evidence before the Court, how is the Court to substantiate the veracity of his claim? Like in *Methe* (1999 U.S. Dist. LEXIS 10702 (N.D. Ill. July 2, 1999)), the Court may never find out what files were deleted. The possible prejudice to Auto Wax is enormous, or perhaps inconsequential. Kucala's actions have all but prevented adequate discovery in this case, and severely limited the fact finder's ability to do its job. Kucala argues that a default judgment would serve as a windfall to Auto Wax, but the opposite result, allowing Kucala to proceed with his case, would benefit him and would result in a slippery slope of future egregious behavior by litigants. Kucala cannot now claim that he would be prejudiced - he is represented by counsel and went against counsel's advice by using Evidence Eliminator on his computer. Why he strayed from his attorney's opinion perplexes the Court, but he should be sanctioned for destroying evidence."
Liafail, Inc. v. Learning 2000, Inc. et al (contract action and trademark action) Motion for sanction in the form of an adverse inference jury instruction tentatively granted if plaintiff failed to comply with production order.	2002 U.S. Dist. LEXIS 24803 (D. Del. 2002)	Two incidents of laptop spoliation are involved in this order. Liafail's vice president purged all the files from the laptop used by the company's national sales manager, who had been identified as a person with relevant information concerning the litigation. The sales manager had given the laptop to the vice-president in response to discovery requests. L2K alleged that no effort was made to preserve the files on this laptop before they were purged. L2K was able to reconstruct some but not all of the files and argued that incriminating information was contained on the files, including e-mails with a person named Frank Stucki. Stucki was then deposed. He testified that he "trashed" two laptops (dropping one and having the other one slip out of his hands) within the past seven months. He said all of the data on the laptops was lost. In response to a sanctions motion, Liafail, claimed that all of the relevant information was removed from the three laptops, saved, and produced. The district court noted that Liafail had previously taken the position that data was inadvertently destroyed and no longer available. It characterized Liafail's "current position" by saying Liafail "may have engaged in questionable discovery tactics." Because the record before the district court was unclear on what existed and was produced, the district court declined to immediately award sanctions. Instead, it allowed Liafail "to correct or clarify the discovery record by producing the requested documents which it has claimed are available, or by producing the Bates numbers of documents it which it claims it has already produced." If Liafail failed to comply with this order, the district court said it "will order sanctions against" Liafail "in the form of an adverse inference jury instruction." The district court justified this determination by explaining that Liafail's prior versions of events "tend to demonstrate bad faith on its part."
Trigon Insurance Company v. United States (case involved a tax refund claim) Fee award made.	234 F.Supp.2d (E.D. Va. 2002) December 17, 2002	The Government had erased computer generated communications between a litigation coordinator for the United States and the United States. The Court earlier had directed the United States to retain an expert to recover the evidence "which ostensibly had been destroyed by erasure." Deloite & Touche was retained and was able to recover a "goodly amount of erased evidence." The case on the merits is apparently reported at 215 F.Supp.2d 687 (E.D. Va. 2002). The Court also had directed Trigon to receive its attorney fees and costs as a result of spoliation. That was the purpose of this decision. Trigon sought

		and received $179,725.70 after the Court rejected arguments that Trigon should not recover for the cost of documenting the spoliation and seeking judicial redress; the record was insufficient to show the fees and expenses and incurred; and the fees and costs were not excessive. The Court also held that whether the retrieved documents were used at trial "is not particularly significant in assessing the cost to Trigon of uncovering the spoliation, bringing it to the Court's attention, and securing relief from it." "The value of having disclosed the spoliation and having recovered some of that evidence transcends use of the evidence to cross examine the experts at trial."
Hildredth Mfg. LLC v. Semco, Inc. (misappropriation of trade secrets) Motion for contempt denied.	2003 WL 359309 (Ohio App. 3rd Dist.) Feb. 20, 2003	This matter involved a claim that defendant had taken trade secrets on a computer file. A TRO was in place to preserve all evidence. Plaintiff wanted to image Defendant's computers. Defendant permitted the imaging for desktop computers but not for "Mazak" drives (that operated the lathe equipment) because it feared that imaging them could damage them, which may lead to injury of employees operating the lathe equipment. The court was made aware of this concern. But prior to resolving the issue, the manufacturer of the drives removed them and replaced them with different ones without any protest by defendant. The manufacturer then erased the drives and redistributed them to other customers. A motion for contempt was brought but not granted. The Mazak drives were purchased *after* the lawsuit was brought. The court reasoned that it was nonsensical to believe that Hildreth would put purloined information on a drive obtained after the TRO knowing that Semco was seeking to image the hard drives.
Katt v. Titan Acquisitions, Inc. (Securities Exchange Act class action) Motion for sanctions does defeat a summary judgment.	2003 WL 131700 (M.D. Tenn.) January 10, 2003	The district court granted defendants' summary judgment motion. Apparently in response to the motion for summary judgment, plaintiffs had filed a motion for sanctions because of spoliation of electronic evidence. The district court reserved judgment on the motion even though it granted the motion for summary judgment. The alleged destruction could not defeat the summary judgment motion because it did not undercut the "many grounds supporting the summary judgment." It cited a Second Circuit opinion to the effect that destruction of evidence is not enough to allow a party who has produced no evidence or inadequate evidence in support of a claim to survive summary judgment on that claim. On the motion for sanctions, the district court explained that it has the power to hear a collateral matter that is incidental to the underlying claim even after a judgment on the merits.

Lombardo v. Broadway Stores, Inc. (suit over a failure to pay accrued vacation benefits to a class of employees) Sanctions order requiring compilation or records and payment of attorneys' fees affirmed.	2002 WL 86810 (Cal. App. 4th Dist.) January 22, 2002 (not for publication under Cal. Rules of Court 977(a))	Lombard filed suit in 1995 in federal court (which was later "remanded" to state court in May 1996). In January 1995 and in July 1995, Lombardo had sent Broadway letters requesting that Broadway preserve all writings that had an effect on the conduct of Broadway's business. In February 1996, Broadway ceased business operations. It copied its data processing company's payroll records on storage devices and shipped them to a data center in Georgia and later moved them to another storage facility. In late spring or summer of 1996, it took some of the devices out of storage. It was determined that they could not be read because they were damaged or the software to read them no longer could be obtained. So they were destroyed. All of this occurred before Lombardo sought formal discovery in January 1997 in the state court. Broadway did not, however, tell Lombardo about the destruction until July 1999 after Broadway had promised Lombardo on several prior occasions that it was working on her discovery requests related to information on the payroll records and had been ordered to produce the information. When it finally told Lombardo what happened, it offered five million hard copy records for review. Lombardo moved for sanctions in the amount of $31,250 in attorneys' fees and an order requiring Broadway to recompile the records. While the motion was pending, Broadway informed Lombardo it had found a data conversion company to convert the hard copy records into electronic records at a cost of $100,000 which it was spending and that it would have the project completed with a month. The discovery referee recommended that Broadway recompile the records as planned and pay the attorney fee sanction. The trial judge accepted the recommendation. On appeal, the Fourth District held that spoliation occurred even if hard copies are available. The Fourth District noted that Lombardo had put Broadway on notice in 1995 she wanted the evidence preserved and that after litigation commenced and knowing Lombardo wanted the data, "Broadway intentionally destroyed it." And it was virtually impossible to extract the relevant data from five million pages of records, the Fourth District said. Broadway's (a) numerous agreements to produce the records and (b) its statement that it had produced all of them and (c) later that it would produce them when it knew they had been destroyed, and (d) then still later claiming it was having problems compiling the data and (e) then saying they were lost or misplaced and (f) then it did not know where they were, "smacks of an intentional destruction of evidence followed by a cover up." In response to an argument that it did not destroy evidence in anticipation of or in response to a discovery request, the Fourth District emphasized again that Lombardo had written Broadway twice in 1995 advising it "under federal law to preserve relevant evidence."
Kormendi v. Computer Associates Int'l, Inc (gender discrimination termination claim) Order clarifying discovery rulings including one relating to e-mail production	2002 U.S. Dist LEXIS 20768 (S.D.N.Y. 2002) (Magistrate order)	A Magistrate's discovery order required: (1) defendant to produce all email messages that were created during a specified time-period and mentioned the plaintiff and (2) the plaintiff to pay for the search. Defendant explained in its request for reconsideration that it had no method to locate and reconstruct e-mails mentioning the plaintiff for the listed time period, and that its document retention policy called for employees to retain e-mails for only 30 days. Further defendant explained that it had sought to collect e-mails from persons involved in the termination and had produced what it had found. The Magistrate said that plaintiff could ask for the names of the persons from whom e-mails were sought and was free to suggest others who might have saved relevant e-mails. Plaintiff asked the district court to hold that if defendant did not produce the requested emails, the defendant would

		be precluded from using them in evidence at a trial "as well as a missing evidence charge." The Magistrate determined that if defendant "should seek to offer testimony describing the contents of a destroyed e-mail," plaintiff could apply then to the district court for "whatever relief she seeks."
Scope of Electronic Discovery		
The Antioch Co. v. Scrapbook Borders, Inc. et al (action for copyright infringement and unfair competition) Motion to compel production of computer storage data granted.	210 F.R.D. 645 (D. Minn. 2002)	One of the individual defendants (Lisa DeBonoPaula) was a former creative consultant for plaintiff Antioch, which creates and produces original scrap book accessories. The other individual defendant (Luis DeBonoPaula) published products made by the corporate defendant. Antioch was afraid that the defendants would destroy records and sought a preservation order. Lisa had previously agreed to show plaintiff Scrapbook's records but when plaintiff's counsel appeared with a computer professional to copy computer hard drives, Lisa refused to permit the copying. Nonetheless, defendants told the district court they had not destroyed any documents and did not oppose a preservation order so the preservation order was entered. Plaintiffs also sought the appointment of a neutral expert in computer forensics to copy computer storage data because it feared that "data from a computer which has been deleted remains on the hard drive, but is constantly being overwritten, irretrievably, by the Defendants' continued use of that equipment." It offered the name of an expert and offered to pay the costs of this expert. The district court accepted the premise that stored data or deleted files that were retrievable but subject to being overwritten could be relevant. Hence, it granted plaintiff immediate access following this procedure: "First, Antioch will select an expert of its choice, in the field of computer forensics ("the Expert"), to produce the "mirror image" of the Defendants' computer equipment. Once the Expert is chosen, Antioch will notify the Defendants, and the Defendants will make available to the Expert, at their place of business, and at a mutually agreeable time, all of their computer equipment. The Expert will use its best efforts to avoid unnecessarily disrupting the normal activities or business operations of the Defendants while inspecting, copying, and imaging, the Defendants' computer equipment, up to and including the retention of the computer equipment on the Defendants' premises. Moreover, the only persons authorized to inspect, or otherwise handle such equipment, shall be employees of the Expert assigned to this project. No employee of Antioch, or its counsel, will inspect or otherwise handle the equipment produced. The Expert will also maintain all information in the strictest confidence." "Within ten days of its inspection, copying, and imaging, of the computer equipment produced by the Defendants, the Expert shall provide the parties with a report as to what computer equipment was produced by the Defendants, and the actions taken by the Expert with respect to each piece of computer equipment. This report shall include a detailed description of each piece of computer equipment inspected, copied, or imaged, by the Expert, including the name of the manufacturer of the equipment and its model number and serial number; the name of the hard drive manufacturer and its model number and serial number; and the name of any network card manufacturer and its model number, serial number, and MAC address wherever possible. The Expert shall document the chain of custody for any copies and images drawn from the equipment. These reports shall be produced to

		both of the parties." "Once the Expert has created copies and images of the Defendants' hard drives, it will produce two copies of the resulting data. One copy will be transmitted to the Court, and the other copy will be transmitted to the Defendants. Thereafter, once Antioch propounds any document requests, the Defendants will sift through the data provided by the Expert to locate any relevant documents. The Defendants shall then produce to Antioch all responsive documents that are properly discoverable, as well as a privilege log, which describes the nature of any privileged documents or communications, in a manner that, without revealing information that is privileged or protected, will enable Antioch to assess the applicability of the privilege or protection claimed. At that time, the Defendants shall also forward the privilege log to the Court for potential in camera review." "Once it has reviewed the documents produced by the Defendants, as well as the privilege log, if the Plaintiff raises a dispute as to any of the documents, by providing a cogent basis for doubting the claim of privilege, or for believing that there are further relevant documents, the Court will conduct an in camera review, limited to the issues raised. This procedure will govern the recovery of deleted information from the Defendants' computers unless and until modified by a Court of competent jurisdiction." "With this procedure in mind, we direct the parties to "meet and confer" on an appropriate time for the Expert to access the Defendants' computer equipment, keeping in mind our directive to minimize the burden and inconvenience caused to the Defendants. To that extent, we grant the Plaintiff's Motion to Compel, and to Appoint a Neutral Expert in Computer Forensics."

Commissioner of Labor of North Carolina v. Ward et al (wage and hour litigation) Sanction of default judgment affirmed.	2003 N.C. App. LEXIS 1099 (N.C. App. 2003)	A trial court order required defendant to allow plaintiff to examine, inspect, and copy all information stored on computers, and computer storage systems, and to remove the systems off-site, to be downloaded and deciphered. Defendant initially would not let the plaintiff take any of its computer equipment, "DAT" tapes, or other storage system off-site to be accessed. Ultimately, some of the materials were produced pursuant to a second court order but, even after they were produced, the plaintiff could not access the information on the DAT tapes. In his deposition, defendant Ward refused to answer most of the questions about the software used to create the DAT tapes. None of the information on the DAT tapes could be copied in an accessible way before trial. Plaintiff then filed a motion for sanctions or for compliance with the trial court's discovery orders and a continuance. Defendants claimed they had complied with all discovery orders. The trial court then found that defendants had "intentionally and willfully refused to comply" with prior discovery orders "by failing to provide plaintiff with copies of electronically stored information and by failing to answer deposition questions regarding the method of access to information stored on the DAT tapes." Default judgment was entered against the defendants on Wage and Hour Act claims and defendants were prohibited from defending against the proof of unpaid wages, liquidated damages, and interest offered in plaintiff's claims. The appellate court affirmed saying, in part, that defendants' conduct to thwart plaintiff's efforts to obtain records was willful, deliberate and egregious, and that there was no evidence that defendants were ordered to produce information that they could not provide.
Tulip Computers International B.V. v. Dell Computer Corporation (patent infringement action) Sanctions not granted but discovery obligations were imposed on Dell.	52 Fed.R.Serv.3d 1420, 2002 WL 818061 (D. Del. 2002) April 30, 2002	In response to a motion to compel and for sanctions, the district court held that Dell failed to fulfill many of its basic discovery obligations in the case and Tulip seeks relief that is too broad. It held as follows. (1) With respect to a data warehouse, Tulip and its consultant were, before the motion was ruled on, given access to the Dell database and working with Dell's in house data warehouse manager, were able to conduct searches appropriate for Tulip's discovery purposes. Thus the district court said it did not have to impose this solution (which it would have imposed). (2) Tulip wanted email discovery on a number of persons. Dell limited email discovery to certain persons. The district court ordered Dell to provide emails from the hard disks of identified executives in electronic form to Tulip's consultant. That consultant would search them based on an agreed upon list of search terms. Tulip will give Dell a list of the emails that contain those search terms. Dell will then produce them subject to its own review for privilege and confidentiality designations, the district court held. (3) As for Michael Dell, the district court held he could be excluded from this search effort unless Tulip obtains additional information that leads it to believe that a search of Michael Dell's email will produce responsive documents in which case it could come back to the court. (4) (Certain documents were destroyed pursuant to Dell's document retention policy, *after* suit was brought. There was no evidence of bad faith. It was one box. Dell had to try to recreate the contents of the document and make the person knowledgeable of the documents testify about the contents. It also had to give notice to Tulip before destroying other documents.)
Corbell v. Norton (mismanagement of	206 F.R.D. 324 (D. D.C. 2002)	Defendants file a motion to clarify its duties to produce email records. They wanted to produce email from paper records of email messages rather than from back up tapes and wanted to overwrite backup tapes in

funds held by the Department of the Interior in trust for Indian tribes) Attorneys' fees awarded.		accordance with Department of Interior directives. However, this was the third time that the defendants had sought this relief, having lost similar motions the first two times. The Special Master hearing the motion initially, therefore, recommended that it be denied and that defendants pay plaintiffs' reasonable expenses, including attorneys' fees. The district court accepted the recommendation.
Delay in Production		
Residential Funding Corporation v. DeGeorge Financial Corp. (plaintiff won a $96 million jury verdict) Refusal to sanction plaintiff order vacated and remanded for hearing based on sluggish production.	306 F.3d 99 (2nd Cir. 2002)	Defendant challenged the failure of the district court to give it an adverse inference jury instruction as a sanction for plaintiff's failure to produce certain emails in time for trial. The district court had denied the motion because it was not caused by action of the plaintiff that was taken in bad faith or with gross negligence and because DeGeorge had not shown that the missing emails would be favorable to its case. The Second Circuit held that where non production has occurred, the district court has broad discretion to fashion an appropriate sanction, including delaying the start of trail at the expense of the party that breached its obligation, to declare a mistrial if trial has commenced, or to proceed with a trial with an adverse inference instruction. It held further than an adverse inference instruction may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence. It also held that a judge's finding that a party acted with gross negligence or in bad faith with respect to discovery obligations is ordinarily sufficient to support a finding that the missing or destroyed evidence would have been harmful to that party, even if the destruction or unavailability of the evidence was not caused by the acts constituting bad faith or gross negligence. RFC had delayed in the production of emails during discovery until just before trial started. In August 2001 in produced a number of emails but none from a critical October – December 1998 time period. DeGeorge asked for back up tapes to search for emails itself. RFC agreed to produce the backup tapes on the condition that any emails identified by DeGeorge's consultant be sent to RFC for review first. Jury selection was starting at this time. RFC turned over the back up tapes. It refused to answer questions about what type of tapes had been produced and their technical characteristics, which would have assisted DeGeorge in reading the tapes. This was brought to the Court's attention and RFC agreed to answer the questions. Within four days, DeGeorge's contractor found 950,000 emails in the relevant time period. Of these, 4,000 were printed out in the limited time available (trial was ongoing) and 30 of these were determined to be responsive to discovery requests, "though none appear to be damaging to RFC." DeGeorge moved for sanctions seeking a presumption that the emails from October to December 1998 which have not been produced "would have disproved RFC's theory of the case." After hearing argument, the district court denied the motion. The jury returned a $96.4 million verdict four days later. The Court of Appeals first noted that an adverse inference instruction usually is employed when spoliation occurs. Here, this was not the case; rather RFC failed to produce the emails or back up tapes in time for trial. The Second Circuit said that RFC's acts (failing to produce emails from the critical time period, missing a Federal Express deadline for sending back up tapes so they could be forwarded to DeGeorge's vendors, and resistance in responding to technical questions) – "purposeful sluggishness" as it was called by the district court – could support a claim that the emails were likely harmful to RFC (just as a finding that

		destruction of evidence occurred in bad faith or gross negligence would have). The point of the case is that now, intentional or grossly negligent acts that hinder discovery support an inference that the evidence not produced is harmful even if those acts are not ultimately responsible for the unavailability of the evidence. "Thus if any of RFC's acts that hindered DeGeorge's attempts to obtain the emails was grossly negligent or taken in bad faith, then it could support an inference that the missing emails are harmful to RFC." In reviewing the evidence on bad faith or gross negligence, the Court of Appeals said that the district court did not consider whether the late retention of a consultant by RFC in relation to RFC's internal determination that it could not retrieve emails with its own resources, supported a finding of bad faith or gross negligence. Continued reliance on its outside vendor for months when the efforts to retrieve documents were fruitless and careless, if not intentionally misleading, statements by RFC to DeGeorge and to the district court, also should be studied by the district court on remand, the Court of Appeals said. The Court of Appeals also suggested that the timing of RFC's sluggish action – on the eve of trial – created an obligation "to be as cooperative as possible." That conduct may be sanctionable in its own right, the Court of Appeals said. On remand, DeGeorge was permitted to renew its motion for sanctions with the benefit of discovery, including reexamination of the back up tapes and depositions and, if appropriate an evidentiary hearing. The judgment should be vacated if the district court determines that RFC acted with a sufficiently culpable state of mind and that DeGeorge was prejudiced by the failure to produce the emails. If there is a culpable state of mind found, but no prejudice, the district court should consider awarding lesser sanctions, including awarding DeGeorge the costs of its motion for sanctions and this appeal. The district court should also consider whether as a sanction for discovery abuse, RFC should forfeit post judgment interest for the time period from the date of the entry of judgment until the entry of the district court's decision on remand. Finally, the Second Circuit said that if there was no culpable state of mind, it should still consider whether the purposeful sluggishness warrants the imposition of sanctions.
Williams v. Saint –Gobain Corporation (employment termination claim) Motion for sanction (adverse inference instruction) rejected	53 Fed.R.Serv.3d 360; 2002 WL 1477618 (W.D. N.Y.)	Plaintiff Williams was terminated by defendant Saint-Gobain. A 1998 reorganization was material to plaintiff's claims. Saint-Gobain had switched to a new e-mail software in late 1998 rendering old e-mails – including those related to the reorganization – irretrievable. Five days before trial was scheduled to start (but it was postponed), Saint-Gobain produced 1998 e-mails obtained from the personal computer of Gregory Silvestri, a former Vice-President. These e-mails had not previously been produced because Mr. Silvestri thought that Saint-Gobain had them. (He had given his former employer a copy of his hard drive on a CD-ROM and thought the e-mails were on the CD-ROM but they were not.) In the course of preparing for Mr. Silvestri's deposition which was to be taken on the eve of trial, Saint-Gobain learned of the e-mails and immediately produced them. Plaintiff sought to evidence preclusion sanction against Saint-Gobain for delayed production of e-mails, destruction of e-mails, and selective retrieval and production of e-mails. The district court denied the motion. It held that defendant produced the e-mails "as soon as it received them – albeit on the eve of trial – and there is no evidence of any bad faith as to any withholding or destruction of the same. In any event, late production of the 1998 e-mails provides no basis for

		precluding testimony concerning the 1998 reorganization especially inasmuch as plaintiff could have deposed Silvestri on this topic before the initial discovery deadline but chose not to. Finally, there is no basis for an adverse inference with respect to the 1998 e-mails to the extent that they have been produced." (Footnotes omitted.) 2002 WL 1477618, *2. In a footnote the district court noted that the parties have had ample time since the production to prepare for trial. Saint-Gobain was ordered to produce the CD-ROM. Williams was ordered to produce to Saint-Gobain documents in his possession. The district court noted that Williams had what apparently were hard copies of e-mails which he had failed to produce.
Eichman v. McKeon (negligence action by a tenant against a landlord and a furnace repairman for fire damage) Trial court's refusal to sanction defendant for late production of a "computer log" affirmed	824 A.2d 305 (Pa. Super. Ct. 2003)	Hartford Insurance Co. had lost a file that related to first party benefits paid to landlords following a fire that damaged tenants' leaseholds. During trial, tenants learned that Hartford had a computer log of activity pertaining to the first party claim. A Hartford claim consultant was deposed over a lunchtime recess of the trial to discuss the log. The log was provided to counsel for tenants later that day. It turned out the landlords' counsel had had a copy of the log in his possession for over a year. Tenants claimed that the failure to produce the log earlier constituted a violation of a previous discovery order. They asked for an adverse inference jury instruction and requested a continuance of one day to investigate the substance of the computer logs (tenants thought they would show a change in opinion by one of landlords' experts on the cause of the fire). The trial court "reviewed the contents of the logs" and "found no continuance was necessary" because there was no new information in the logs. Tenants did not make the logs part of the record so that they were not before the appellate court. Hence, the appellate court held that tenants waived any argument related to the contents of the logs. In any event, the appellate court said that the trial court reviewed the logs and found nothing new which would warrant a sanction and there was no showing that this decision represented an abuse of discretion.
Lakewood Engineering and Manufacturing v. Lasko Products, Inc. (patent infringement action) Motion to compel e-mail discovery granted but costs were not awarded.	2003 U.S. Dist. LEXIS 3867 (N.D. Ill. 2003)	In this patent infringement matter, Lakewood produced a number of documents and emails between an inventor and the company, in electronic form, after the close of discovery. The district court viewed the late production as an indication that Lakewood was not acting in a good faith effort to produce documents. It declined, however, to require Lakewood to reimburse Lasko for the costs of requesting production of the late documents because the costs of adding this request for relief to its other discovery requests was negligible. On the other hand, to the extent that Lakewood had not produced all e-mails generated or received by the inventor related to the patent, it ordered Lakewood to produce the emails.

/jmb

ACCA's 2003 ANNUAL MEETING

ELECTRONIC DOCUMENTS

Presented by
Cisselon S. Nichols
Senior Litigation Counsel

ELECTRONIC DOCUMENTS

Despite popular belief, especially by your clients, electronic documents are no less subject to disclosure than paper records.

E-MAIL

All e-mail between in-house counsel and clients is not necessarily privileged.

E-mail is protected by attorney client privilege only to the extent it includes legal strategy or advice as opposed to discussions of business strategy and negotiations.

E-MAIL

BEWARE of sending e-mails devoid of legal advice and packed with confidential information!

BEWARE of forwarding e-mails containing information that you want to remain privileged and/or confidential.

Zubulake v. UBS Warburg

2003 WL 21087884

- Gender discrimination and illegal retaliation case against investment bank .
- Plaintiff claimed key evidence was located in various e-mails that only existed on backup tapes and archived media.
- Defendant UBS claimed restoring e-mail would cost $175K.
- Agreement worked out, but UBS produced no additional e-mails and insisted its initial production was complete.
- Plaintiff filed motion to compel UBS to produce relevant e-mails at its expense.

Cost Shifting

Presumption exists that responding party must bear the expense of complying with discovery requests.

Cost shifting should be considered only when Electronic Discovery imposes an "undue burden or expense" on responding party.

Courts no longer assume "undue burden" exists because Electronic Discovery is involved.

Data Format is Key

Accessible Data does not need to be restored or manipulated to be usable and access takes seconds or perhaps a few days.

Inaccessible Data is not usable and must be restored, fragmented data has to be reprocessed (de-fragmented) and data that has been erased has to be reconstructed prior to being usable.

"ACCESSIBLE" DATA

- Active, online data:
  - Online storage generally provided by magnetic disk – real time useable information.
- Near-line data:
  - Typically, a robotic storage device that houses removable media, uses robotic arms to access the media and uses multiple read/write devices to store and retrieve records. E.g. optical disks
- Offline storage/archives:
  - Removable optical disk (e.g., CD – ROM or DVD) or magnetic tape media, which can be stored in a shelf or rack . . . Disaster copies and archival storage. Requires manual intervention and management.

"INACCESSIBLE" DATA

- Backup tapes
  - Device reads data and writes it to tape. These devices are sequential access—to read any particular block of data, you have to read all the preceding blocks. Data organization mirrors the computer's structure and data is typically compressed. Restoration is time-consuming and expensive.

- Erased, fragmented or damaged data
  - Data that has been erased and overwritten, separated from its file markers or damaged due to media corruption or other deterioration.

7 Step Cost-Shifting Analysis

1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production compared to the amount in controversy;

4. The total costs of production compared to the resources available to each party;

7 Step Analysis Con't

5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Zubulake Con't

Court ordered UBS to:

- produce all responsive emails that were "accessible" at its expense
- restore and produce emails from 5 of the 94 back-up tapes identified as containing responsive documents

Zubulake II

Final Ruling: 216 FRD 280

- Some cost-shifting appropriate.

  25% of restoration costs shifted to Zubulake

- None of production costs shifted.

Zubulake Con't

Must thoroughly understand responding party's computer system:

- Usual rules of discovery apply to "accessible data"
- Courts should consider cost shifting only if electronic data is "inaccessible"

Should require responding party to restore and produce a small sample if data is deemed "inaccessible."

Sanctions

Courts have broad discretion in fashioning appropriate sanctions.

Sanctions may be imposed on litigants and/or their attorneys for failure to retain, collect and produce relevant electronic documents.

Examples of Recent Sanctions

- Dismissals
- Default judgments
- Payment of costs and attorneys' fees
  Theofel v Farey-Jones, 2003 WL 22020268
- Adverse inference jury instructions
  Residential Funding Corp. v. DeGeorge Fin.,
  306 F.3d 99 (2nd Cir. 2002)

10 Tips on Handling Electronic Discovery

1. Try to reach an agreement with opposing counsel.
2. If Court becomes involved, focus on "relevance" do not whine about "undue burden."
3. Remember the court may appoint its own computer forensics expert.
4. Understand your client's computer system.
5. Ensure that Company Policies are followed.

10 Tips Con't

6. Involve your IT staff and/or consultants early on.
7. Be careful what you ask for yourself.
8. Remember the presumption and don't assume costs will be shifted.
9. Avoid sanctions.
10. Remember criminal sanctions are provided for under Sarbanes Oxley.

Final Rule:
Implementation of Standards of Professional Conduct for Attorneys

Securities and Exchange Commission

17 CFR Part 205

[Release Nos. 33-8185; 34-47276; IC-25919; File No. S7-45-02]

RIN 3235-AI72

Implementation of Standards of Professional Conduct for Attorneys

Agency: Securities and Exchange Commission

Action: Final rule

Summary: The Securities and Exchange Commission ("Commission") is adopting a final rule establishing standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. Section 307 of the Sarbanes-Oxley Act of 2002 requires the Commission to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. The standards must include a rule requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer up-the-ladder within the company to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors. Proposed Part 205 responds to this directive and is intended to protect investors and increase their confidence in public companies by ensuring that attorneys who work for those companies respond appropriately to evidence of material misconduct. We are still considering the "noisy withdrawal" provisions of our original proposal under section 307; in a related proposing release we discuss this part of the original proposal and seek comment on additional alternatives.

Effective Date: 180 days after the date of publication in the *Federal Register*.

For Further Information Contact: Timothy N. McGarey or Edward C. Schweitzer at 202-942-0835.

I. Executive Summary

Section 307 of the Sarbanes-Oxley Act of 2002 (the "Act") (15 U.S.C. 7245)1 mandates that the Commission issue rules prescribing minimum standards of professional conduct for attorneys appearing and practicing before it in any way in the representation of issuers, including at a minimum a rule requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer or any agent thereof to appropriate officers within the issuer and, thereafter, to the highest authority within the issuer, if the initial report does not result in an appropriate response. The Act directs the Commission to issue these rules within 180 days.2

On November 21, 2002, in response to this directive, we published for comment proposed Part 205, entitled "Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission in the Representation of an Issuer." The proposed rule prescribed minimum standards of professional conduct for attorneys appearing and practicing before us in any way in the representation of an issuer. The proposed rule took a broad view of who could be found to be appearing and practicing before us. It covered lawyers licensed in foreign jurisdictions, whether or not they were also admitted in the United States. In addition to a rigorous up-the-ladder reporting requirement, the proposed rule incorporated several corollary provisions. Under certain circumstances, these provisions permitted or required attorneys to effect a so-called "noisy withdrawal" by notifying the Commission that they have withdrawn from the representation of the issuer, and permitted attorneys to report evidence of material violations to the Commission.

Our proposing release3 generated significant comment and extensive debate. We received a total of 167 timely comment letters: 123 from domestic parties and 44 from foreign parties. In addition to soliciting comments, on December 17, 2002 the Commission hosted a Roundtable discussion concerning the impact of the rules upon foreign attorneys. Many of these comments focused on the following issues: the scope of the proposed rule (including, particularly, its application to attorneys who either are not admitted to practice in the United States, or are admitted in the United States but who do not practice in the field of securities law); the proposed rule's "noisy withdrawal" provision (including the Commission's authority to promulgate this portion of the rule and the provision's impact upon the attorney-client relationship); and the triggering standard for an attorney's duty to report evidence of wrongdoing. In light of the compressed time period resulting from the 180-day implementation deadline prescribed in the Act, a number of commenters requested that the Commission allow additional time for consideration of several aspects of the proposed rule, including the application of the rule to non-United States lawyers and the impact of the "noisy withdrawal" and related provisions.

The thoughtful and constructive suggestions we have received from a broad spectrum of commenters have enabled us better to understand interested parties' views concerning the operation and impact of the proposed rule. As more specifically discussed below, the final rule we adopt today has been significantly modified in light of these comments and suggestions. Thus, the triggering standard for reporting evidence of a material violation has been modified to clarify and confirm that an attorney's actions will be evaluated against an objective standard. The documentation requirements imposed upon attorneys and issuers under the proposed rule have

been eliminated, and a "safe harbor" provision has been added to protect attorneys, law firms, issuers and officers and directors of issuers. In response to the large number of comments requesting that we defer the immediate implementation of a final rule to accord affected persons adequate time to assess the duties imposed thereunder, we have deferred the effective date of the rule until 180 days after publication in the Federal Register.

We believe that the final rule responds fully to the mandate of Section 307 to require reporting of evidence of material violations up-the-ladder within an issuer, thereby allowing issuers to take necessary remedial action expeditiously and reduce any adverse impact upon investors. The final rule strikes an appropriate balance between our initial rule proposal on up-the-ladder reporting and the various views expressed by commenters while still achieving this important goal.

At the same time, the Commission considers it important to move forward in its assessment of rules under Section 307 requiring attorney withdrawal and notice to the Commission in cases where an issuer's officers and directors fail to respond appropriately to violations that threaten substantial injury to the issuer or investors. Accordingly, we are extending the comment period on the "noisy withdrawal" and related provisions of the proposed rule and are issuing a separate release soliciting comment on this issue. In that release, we are also proposing and soliciting comment on an alternative procedure to the "noisy withdrawal" provisions. Under this proposed alternative, in the event that an attorney withdraws from representation of an issuer after failing to receive an appropriate response to reported evidence of a material violation, the issuer would be required to disclose its counsel's withdrawal to the Commission as a material event. In the same release, we are soliciting additional comment on the final rules we are adopting, particularly insofar as adoption of the "noisy withdrawal" provisions of the proposed alternative might require conforming changes to the final rule.

Interested parties should submit comments within 60 days of the date of publication of the proposing release in the Federal Register. This will provide additional time for interested parties to comment on the impact of these provisions while still allowing for their implementation as of the effective date of the final rule.

II. Section-by-Section Discussion of the Final Rule

Section 205.1 Purpose and Scope

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

Proposed Section 205.1 stated that this part will govern "[w]here the standards of a state where an attorney is admitted or practices conflict with this part." In the proposing release, we

specifically raised the question whether this part should "preempt conflicting state ethical rules which impose a lower obligation" upon attorneys.4

A number of commenters questioned the Commission's authority to preempt state ethics rules, at least without being explicitly authorized and directed to do so by Congress.5 Another comment letter noted that the Constitution's Commerce Clause grants the federal government the power to regulate the securities industry, that the Sarbanes-Oxley Act requires the Commission to establish rules setting forth minimum standards of conduct for attorneys appearing and practicing before it, and that, under the Supremacy Clause, duly adopted Commission rules will preempt conflicting state rules.6 Finally, several commenters questioned why the Commission would seek to supplant state ethical rules which impose a higher obligation upon attorneys.7

The language which we adopt today clarifies that this part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part. At the same time, the Commission reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices.

Section 205.2 Definitions

For purposes of this part, the following definitions apply:

(a) *Appearing and practicing* before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications 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 of 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, opinion, or other writing is required under the United States securities laws or the Commission's rules 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

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(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.

The definition of the term "appearing and practicing" included in the proposed rule was based upon Rule 102(f) of our Rules of Practice, and covered, *inter alia*, an attorney's advising a client (1) that a statement, opinion, or other writing does not need to be filed with or incorporated into any type of submission to the Commission or its staff, or (2) that the issuer is not required to submit or file any registration statement, notification, application, report, communication or other document with the Commission or its staff. This broad definition was intended to reflect the reality that materials filed with the Commission frequently contain information contributed, edited or prepared by individuals who are not necessarily responsible for the actual filing of the materials, and was consistent with the position the Commission has taken as *amicus curiae* in cases involving liability under Section 10(b) of the Exchange Act (15 U.S.C. 78j(b)).

A number of commenters argued that the proposed definition of "appearing and practicing" was overly broad. The American Bar Association ("ABA") stated that the definition in the proposed rule would unfairly:

subject to the rules attorneys who do not practice securities law and may have only limited or tangential involvement with particular SEC filings and documents. For example, it could inappropriately encompass non-securities specialists who do no more than prepare or review limited portions of a filing, lawyers who respond to auditors' letters or prepare work product in the ordinary course unrelated to securities matters that may be used for that purpose, and lawyers preparing documents that eventually may be filed as exhibits. . . . We also believe it is inappropriate for the Commission to include lawyers who simply advise on the availability of exemptions from registration.8

The ABA recommended that the definition be modified to apply "only to those lawyers with significant responsibility for the company's compliance with United States securities law, including satisfaction of registration, filing and disclosure obligations, or with overall responsibility for advising on legal compliance and corporate governance matters under United States law."9

On the other hand, several commenters supported the more expansive definition set forth in the proposed rule. A comment letter submitted by a group of 50 academics specifically affirmed their:

support [for] the Commission's inclusion of lawyers who advise and/or draft, but do not sign, documents filed with the Commission, as well as lawyers who advise that documents need not be filed with the Commission. Any other rule would facilitate circumvention of these rules by encouraging corporate managers and corporate counsel to confine lawyer signatures on Commission documents or filings to a bare minimum to ensure no up-the-ladder reporting of wrongdoing. That would risk gutting these rules and §307.10

The definition contained in the final rule addresses several of the concerns raised by commenters. Attorneys who advise that, under the federal securities laws, a particular document need not be incorporated into a filing, registration statement or other submission to the Commission will be covered by the revised definition. In addition, an attorney must have notice that a document he or she is preparing or assisting in preparing will be submitted to the Commission to be deemed to be "appearing and practicing" under the revised definition. The definition in the final rule thereby also clarifies that an attorney's preparation of a document (such as a contract) which he or she never intended or had notice would be submitted to the Commission, or incorporated into a document submitted to the Commission, but which subsequently is submitted to the Commission as an exhibit to or in connection with a filing, does not constitute "appearing and practicing" before the Commission.

As discussed below, commenters also raised concerns regarding the potential application of the rule to attorneys who, while admitted to practice in a state or other United States jurisdiction, were not providing legal services to an issuer. Under the final rule, attorneys need not serve in the legal department of an issuer to be covered by the final rule, but they must be providing legal services to an issuer within the context of an attorney-client relationship. An attorney-client relationship may exist even in the absence of a formal retainer or other agreement. Moreover, in some cases, an attorney and an issuer may have an attorney-client relationship within the meaning of the rule even though the attorney-client privilege would not be available with respect to communications between the attorney and the issuer.

The Commission intends that the issue whether an attorney-client relationship exists for purposes of this part will be a federal question and, in general, will turn on the expectations and understandings between the attorney and the issuer. Thus, whether the provision of legal services under particular circumstances would or would not establish an attorney-client relationship under the state laws or ethics codes of the state where the attorney practices or is admitted may be relevant to, but will not be controlling on, the issue under this part. This portion of the definition will also have the effect of excluding from coverage attorneys at public broker-dealers and other issuers who are licensed to practice law and who may transact business with the Commission, but who are not in the legal department and do not provide legal services within the context of an attorney-client relationship. Non-appearing foreign attorneys, as defined below, also are not covered by this definition.

205.2(b) provides:

(b) *Appropriate response* means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any

material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

(3) 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) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

The definition of "appropriate response" emphasizes that an attorney's evaluation of, and the appropriateness of an issuer's response to, evidence of material violations will be measured against a reasonableness standard. The Commission's intent is to permit attorneys to exercise their judgment as to whether a response to a report is appropriate, so long as their determination of what is an "appropriate response" is reasonable.

Many of the comments on this paragraph focused on the proposal's standard that an attorney has received an appropriate response when the attorney "reasonably believes," based on the issuer's response, that there either is or was no material violation, or that the issuer has adopted appropriate remedial measures. They suggested, among other things, that the paragraph be amended to state that the attorney could rely upon the factual representations and legal determinations that a reasonable attorney would rely upon,11 or that the Commission adopt the ABA's Model Rules' definition of "reasonably believes."12 Others opined that the "reasonably believes" standard was inappropriate because it would impose on lawyers who are not expert in the securities laws a standard based on the "reasonable" securities law expert.13 Others opined that the standard should be modified to require the lawyer's "actual understanding," rather than reasonable belief, regarding a "clear" material violation,14 while others urged that the standard must be objective.15

Other commenters felt that the paragraph did not properly address situations, which the commenters felt would be frequent, where an issuer's inquiry into the report of a possible material violation would be "inconclusive."16 Others expressed the belief that the rule did not give a reporting lawyer sufficient guidance "such that a reporting attorney can with confidence, and without speculation, determine whether he or she has received an appropriate response."17 Some comments questioned whether reporting attorneys would be able to judge whether discipline or corrective measures were sufficient to constitute an appropriate response.18 One suggested that the paragraph be modified to provide that an attorney has received an appropriate response when the chief legal officer ("CLO") states that he or she has fulfilled the obligations set forth in Section 205.3(b)(3), unless the attorney is reasonably certain that the representations are untrue.19 Some commenters found the term "and/or" in subparagraph (b)(2) of the proposed

paragraph confusing.20 Others questioned whether the provision that the issuer "rectify" the material violation should be read to contemplate restitution to injured parties, with one stating that it did not believe Congress intended to impose upon attorneys an obligation to require issuers to make restitution,21 while others read the proposed rule as "impl[ying] that the appropriateness of a response need not include compensation of injured parties," and accordingly supported this standard.22 A few commenters noted that under subparagraph (b)(2) a response is appropriate only if the issuer has already "adopted remedial measures," and thus apparently does not apply if the issuer is in the process of adopting them. They urged that the Commission provide that an appropriate response includes ongoing remedial measures.23

A few comments were directed at the discussion accompanying the proposed rule. One suggestion was that the Commission make clear that the factors it will consider in determining whether an outside law firm's response that no violation has occurred constitutes an appropriate response include a description of the scope of the investigation undertaken by the law firm and the relationship between the issuer and the firm. They also urged the Commission to expressly state that the greater or more credible the evidence that triggered the report, the more detailed an investigation into the matter must be.24 One commenter also suggested that the Commission withdraw the statement in the release of the proposed rule that Section 205.2(b) "permits" attorneys "to exercise their judgment," finding that language both superfluous and conveying a signal that the Commission will be loathe to second-guess a lawyer's judgment that a response is "appropriate." 25

Several commenters suggested that the proposed rule should exempt internal investigations of reported evidence of a material violation.26 Commenters were concerned that the reporting and disclosure requirements in the proposed rules might discourage issuers from obtaining legal advice and undertaking internal investigations and that, as a result, some violations might not be discovered or resolved.27 Thus, some commenters urged that an issuer must be permitted "to retain counsel to investigate the claim and respond to it, including defense in litigation, without being at risk of violating the rule."28 Some commenters stated that "counsel conducting an internal investigation" should not be subject to the rule's reporting and disclosure requirements.29

The proposing release stated that "[i]t would not be an inappropriate response to reported evidence of a material violation for an issuer's CLO to direct defense counsel to assert either a colorable defense or a colorable basis for contending that the staff should not prevail. Such directions from the CLO, therefore, would not require defense counsel to report any evidence of a material violation to the issuer's directors."30 Several commenters were concerned over a possible chilling effect on an attorney's representation of an issuer in a Commission investigation or administrative proceeding if the attorney were subject to reporting and disclosure requirements.31 Some noted that an issuer's disagreement in good faith with the Commission over a matter in litigation should not raise a reporting obligation under the rules.32 Others suggested that the definition of "appropriate response" include the assertion of "a colorable defense or the obligation of the Commission staff to bear the burden of proving its case." 33 Some commenters stressed that an attorney representing an issuer should be able to take any position for which there is an evidentiary foundation and a nonfrivolous legal basis.34 The commenters did not want the final rules to impair an advocate's ability to present non-frivolous

arguments. Some commenters noted that an issuer has no right to use an attorney to conceal ongoing violations or plan further violations of the law.35

The standard set forth in the final version of Section 205.2(b) requires the attorney to "reasonably believe" either that there is no material violation or that the issuer has taken proper remedial steps. The term "reasonably believes" is defined in Section 205.2(m). In providing that the attorney's belief that a response was appropriate be reasonable, the Commission is allowing the attorney to take into account, and the Commission to weigh, all attendant circumstances. The circumstances a reporting attorney might weigh in assessing whether he or she could reasonably believe that an issuer's response was appropriate would include the amount and weight of the evidence of a material violation, the severity of the apparent material violation and the scope of the investigation into the report. While some commenters suggested that a reporting attorney should be able to rely completely on the assurance of an issuer's CLO that there was no material violation or that the issuer was undertaking an appropriate response, the Commission believes that this information, while certainly relevant to the determination whether an attorney could reasonably believe that a response was appropriate, cannot be dispositive of the issue. Otherwise, an issuer could simply have its CLO reply to the reporting attorney that "there is no material violation," without taking any steps to investigate and/or remedy material violations. Such a result would clearly be contrary to Congress' intent in enacting Section 307. On the other hand, it is anticipated that an attorney, in determining whether a response is appropriate, may rely on reasonable and appropriate factual representations and legal determinations of persons on whom a reasonable attorney would rely.

Some commenters expressed confusion over the "and/or" connectors in the proposed subparagraph (b)(2), and they have been eliminated in the final rule. The Commission believes that the revisions to this subparagraph make clear that the issuer must adopt appropriate remedial measures or sanctions to prevent future violations, redress past violations, and stop ongoing violations and consider the feasibility of restitution. The concern that under subparagraph (b)(2) any issuer's response to a reporting attorney that remedial measures are ongoing but not completed must be deemed to be inappropriate, thereby requiring reporting up-the-ladder, appears to be overstated. Many remedial measures, such as disclosures and the cessation of ongoing material violations, will occur in short order once the decision has been made to pursue them. Beyond this, the reasonable time period after which a reporting attorney is obligated to report further up-the-ladder would include a reasonable period of time for the issuer to complete its ongoing remediation.

By broadening the definition of "appropriate response," subparagraph (b)(3) responds to a variety of concerns raised by commenters. Subparagraph (b)(3) permits an issuer to assert as an appropriate response that it has directed its attorney, whether employed or retained by it, to undertake an internal review of reported evidence of a material violation and has substantially implemented the recommendations made by an attorney after reasonable investigation and evaluation of the reported evidence. However, the attorney retained or directed to conduct the evaluation must have been retained or directed 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.

Subparagraph (b)(3) also explicitly incorporates into the final rule our view, expressed in the proposing release, that "[i]t would not be an inappropriate response to reported evidence of a material violation for an issuer's CLO to direct defense counsel to assert either a colorable defense or a colorable basis for contending that the staff should not prevail."36 Subparagraph (b)(3) incorporates this standard into the definition of "appropriate response" by permitting an issuer to respond to a report that it has been advised by its attorney that he or she may assert a colorable defense on behalf of the issuer in response to the reported evidence "in any investigation or judicial or administrative proceeding," including by asserting a colorable basis that the Commission or other charging party should not prevail.37 The provision would apply only where the defense could be asserted consistent with an attorney's professional obligation. Once again, the attorney opining that he or she may assert a colorable defense must have been retained or directed to evaluate the matter with the consent of the issuer's board of directors, a committee thereunder to whom a report could be made pursuant to Section 205(b)(3), or a qualified legal compliance committee.

We noted in our proposing release our intention that the rule not "impair zealous advocacy, which is essential to the Commission's processes."38 The attorney conducting an internal investigation that is contemplated under subparagraph (b)(3) may engage in full and frank exchanges of information with the issuer he or she represents. Moreover, as noted above, subparagraph (b)(3) expressly provides that the assertion of colorable defenses in an investigation or judicial or administrative proceeding is an appropriate response to reported evidence of a material violation. Concerns over a chilling effect on advocacy should thus be allayed. At the same time, by including a requirement that this response be undertaken with the consent of the issuer's board of directors, or an appropriate committee thereof, the revised definition is intended to protect against the possibility that a chief legal officer would avoid further reporting "up-the-ladder" by merely retaining a new attorney to investigate so as to assert a colorable, but perhaps weak, defense.

The term "colorable defense" does not encompass all defenses, but rather is intended to incorporate standards governing the positions that an attorney appropriately may take before the tribunal before whom he or she is practicing. For example, in Commission administrative proceedings, existing Rule of Practice 153(b)(1)(ii), 17 CFR 201.153(b)(1)(ii), provides that by signing a filing with the Commission, the attorney certifies that "to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." An issuer's right to counsel is thus not impaired where the attorney is restricted to presenting colorable defenses, including by requiring the Commission staff to bear the burden of proving its case. Of course, as some commenters noted, an issuer has no right to use an attorney to conceal ongoing violations or plan further violations of the law.

205.2(c) provides:

(c) *Attorney* means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

Commenters suggested that the proposed rule's definition of the term "attorney" was unnecessarily broad. A number of commenters suggested that it was inappropriate to apply the rule to foreign attorneys, arguing that foreign attorneys, and attorneys representing or employed by multijurisdictional firms, are subject to statutes, rules, and ethical standards in those foreign jurisdictions that are different from, and potentially incompatible with, the requirements of this rule.39 These points were amplified by foreign attorneys who attended a December 17, 2002 Roundtable discussion hosted by the Commission to address the issues raised by the application of the rule to foreign attorneys.

As noted above, and as set forth more fully below, the rule we adopt today adds a new defined term, "non-appearing foreign attorney," which addresses many of the concerns expressed regarding the application of the rule to foreign attorneys. In addition, other commenters argued that the proposed rule's definition of "attorney" applied to a large number of individuals employed by issuers who are admitted to practice, but who do not serve in a legal capacity. By significantly narrowing the definition of the term "appearing and practicing" as set forth above, we have addressed many of the concerns expressed by commenters concerning the application of the rule to individuals admitted to practice who are employed in non-legal positions and do not provide legal services.

205.2(d) provides:

(d) *Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable federal or state statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

The definition we adopt today has been slightly modified from the definition included in the proposing release. Several commenters suggested that the definition in the proposing release should be amended to include breaches of fiduciary duty arising under federal or state statutes.40 The phrase "under an applicable federal or state statute" has been added to clarify that breaches of fiduciary duties imposed by federal and state statutes are covered by the rule.

205.2(e) provides:

(e) *Evidence of a material violation* means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

This revised definition of "evidence of a material violation" clarifies aspects of the objective standard that the Commission sought to achieve in the definition originally proposed.41 The definition of "evidence of a material violation" originally proposed prompted extensive comment because (read together with the rule's other definitions) it defines the trigger for an attorney's obligation under the rule to report up-the-ladder to an issuer's CLO or qualified legal compliance committee ("QLCC") (in section 205.3(b)). Some commenters, including some practicing attorneys, found the proposed reporting trigger too high.42 Many legal scholars endorsed the framework of increasingly higher triggers for reporting proposed by the Commission at

successive stages in the reporting process but considered the Commission's attempt at articulating an objective standard unworkable and suggested changes to the language in the proposed rule.43 Nearly all practicing lawyers who commented found the reporting trigger in the rule too low and called instead for a subjective standard, requiring "actual belief" that a material violation has occurred, is ongoing, or is about to occur before the attorney would be obligated to make an initial report within the client issuer.44 The revised definition incorporates suggested changes into an objective standard that is designed to facilitate the effective operation of the rule and to encourage the reporting of evidence of material violations.

Evidence of a material violation must first be credible evidence.45 An attorney is obligated to report when, based upon that credible evidence, "it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." This formulation, while intended to adopt an objective standard, also recognizes that there is a range of conduct in which an attorney may engage without being unreasonable.46 The "circumstances" are the circumstances at the time the attorney decides whether he or she is obligated to report the information. These circumstances may include, among others, the attorney's professional skills, background and experience, the time constraints under which the attorney is acting, the attorney's previous experience and familiarity with the client, and the availability of other lawyers with whom the lawyer may consult. Under the revised definition, an attorney is not required (or expected) to report "gossip, hearsay, [or] innuendo." 47 Nor is the rule's reporting obligation triggered by "a combination of circumstances from which the attorney, in retrospect, should have drawn an inference," as one commenter feared.

On the other hand, the rule's definition of "evidence of a material violation" makes clear that the initial duty to report up-the-ladder is not triggered only when the attorney "knows" that a material violation has occurred48 or when the attorney "conclude[s] there has been a violation, and no reasonable fact finder could conclude otherwise."49 That threshold for initial reporting within the issuer is too high. Under the Commission's rule, evidence of a material violation must be reported in all circumstances in which it would be unreasonable for a prudent and competent attorney not to conclude that it is "reasonably likely" that a material violation has occurred, is ongoing, or is about to occur. To be "reasonably likely" a material violation must be more than a mere possibility, but it need not be "more likely than not."50 If a material violation is reasonably likely, an attorney must report evidence of this violation. The term "reasonably likely" qualifies each of the three instances when a report must be made. Thus, a report is required when it is reasonably likely a violation has occurred, when it is reasonably likely a violation is ongoing or when reasonably likely a violation is about to occur.

205.2(f) provides:

(f) *Foreign government issuer* means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*, Schedule B).

We adopt the definition for this new term prescribed under Rule 405.

205.2(g) provides:

(g) *In the representation of an issuer* means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

The definition we adopt today has been modified from the definition included in the proposing release. The phrase "providing legal services" has been substituted for the term "acting." Some commenters objected that the term "acting" was both imprecise and overly broad, and that the concept of "representation of an issuer" should "apply only to attorneys who are rendering legal advice to the organizational client . . . . and therefore have the professional obligations of an attorney."51 The substitution of the term "providing legal services" responds to these concerns. We believe that this change, combined with the narrowing of the definition of the term "appearing and practicing" as set forth above, addresses the concerns expressed by the ABA and others.52

For the reasons explained in the proposing release,53 an attorney employed by an investment adviser who prepares, or assists in preparing, materials for a registered investment company that the attorney has reason to believe will be submitted to or filed with the Commission by or on behalf of a registered investment company is appearing and practicing before the Commission under this definition.

Although some commenters objected to this construction of the definition of "in the representation of an issuer,"54 those commenters did not contest either the fact that such an attorney, though employed by the investment adviser rather than the investment company, is providing legal services for the investment company or the logical implication of that fact: that the attorney employed by the investment adviser is accordingly representing the investment company before the Commission.55 Indeed, the Investment Company Institute ("ICI") opposes the Commission's construction of its rule because, the ICI asserts, the Commission's construction might make investment advisers limit the participation of attorneys employed or retained by the investment adviser in preparing filings for investment companies, thereby forcing the investment companies "to retain their own counsel" to do exactly the same work now performed by attorneys for the investment adviser.56

205.2(h) provides:

(h) *Issuer* means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

The definition for the term "issuer" we adopt today incorporates the definition set forth in Section 2(a)(7) of the Act, which in turn incorporates the definition contained in the Exchange Act. The definition has been modified to specifically exclude foreign government issuers, defined above.57

The definition also has been modified to make clear that, for purposes of the terms "appearing and practicing" before the Commission and "in the representation of an issuer," the term "issuer" includes any person controlled by an issuer (*e.g.*, a wholly-owned subsidiary), where the attorney provides legal services to that person for the benefit of or on behalf of an issuer. We consider the change important to achieving the objectives of Section 307 in light of the statutory reference to appearing and practicing "in any way" in the representation of an issuer. Under the revised definition, an attorney employed or retained by a non-public subsidiary of a public parent issuer will be viewed as "appearing and practicing" before the Commission "in the representation of an issuer" whenever acting "on behalf of, or at the behest, or for the benefit of" the parent. This language, consistent with the Commission's comment in the proposing release (although now limited to persons controlled by an issuer) would encompass any subsidiary covered by an umbrella representation agreement or understanding, whether explicit or implicit, under which the attorney represents the parent company and its subsidiaries, and can invoke privilege claims with respect to all communications involving the parent and its subsidiaries. Similarly, an attorney at a non-public subsidiary appears and practices before the Commission in the representation of an issuer when he or she is assigned work by the parent (*e.g.*, preparation of a portion of a disclosure document) which will be consolidated into material submitted to the Commission by the parent, or if he or she is performing work at the direction of the parent and discovers evidence of misconduct which is material to the parent. The definition of the term is also intended to reflect the duty of an attorney retained by an issuer to report to the issuer evidence of misconduct by an agent of the issuer (*e.g.*, an underwriter) if the misconduct would have a material impact upon the issuer. 58

205.2(i) provides:

(i) *Material violation* means a material 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 United States federal or state law.

The definition we adopt today modifies the definition set forth in the proposed rule by adding the phrases "United States federal or state" and "arising under United States federal or state law." This modification clarifies that material violations must arise under United States law (federal or state), and do not include violations of foreign laws. The final rule does not define the word "material," because that term has a well-established meaning under the federal securities laws59 and the Commission intends for that same meaning to apply here.

205.2(j) provides:

(j) *Non-appearing foreign attorney* means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

The final rule provides that a "non-appearing foreign attorney" does not "appear and practice before the Commission" for purposes of the rule. In brief, the definition excludes from the rule those attorneys who: (1) are admitted to practice law in a jurisdiction outside the United States; (2) do not hold themselves out as practicing, or giving legal advice regarding, United States law; and (3) conduct activities that would constitute appearing and practicing before the Commission only (i) incidentally to a foreign law practice, or (ii) in consultation with United States counsel. A non-United States attorney must satisfy all three criteria of the definition to be excluded from the rule.

The effect of this definition will be to exclude many, but not all, foreign attorneys from the rule's coverage. Foreign attorneys who provide legal advice regarding United States securities law, other than in consultation with United States counsel, are subject to the rule if they conduct activities that constitute appearing and practicing before the Commission. For example, an attorney licensed in Canada who independently advises an issuer regarding the application of Commission regulations to a periodic filing with the Commission is subject to the rule. Non-United States attorneys who do not hold themselves out as practicing United States law, but who engage in activities that constitute appearing and practicing before the Commission, are subject to the rule unless they appear and practice before the Commission only incidentally to a foreign law practice or in consultation with United States counsel.

Proposed Part 205 drew no distinction between the obligations of United States and foreign attorneys. The proposing release requested comment on the effects of the proposed rule on attorneys who are licensed in foreign jurisdictions or otherwise subject to foreign statutes, rules and ethical standards. The Commission recognized that the proposed rule could raise difficult issues for foreign lawyers and international law firms because applicable foreign standards might be incompatible with the proposed rule. The Commission also recognized that non-United States lawyers play significant roles in connection with Commission filings by both foreign and United States issuers.

On December 17, 2002, the Commission hosted a Roundtable on the International Impact of the Proposed Rules Regarding Attorney Conduct. The Roundtable offered foreign participants the opportunity to share their views on the application of the proposed rule outside of the United States. The participants consisted of international regulators, professional associations, and law firms, among others. Participants at the Roundtable expressed concern about many aspects of the proposed rule. Some objected to the scope of the proposed definition of "appearing and practicing before the Commission," noting that a foreign attorney who prepares a contract or other document that subsequently is filed as an exhibit to a Commission filing might be covered by the rule. In addition, some of the participants stated that foreign attorneys with little or no experience or training in United States securities law may not be competent to determine whether a material violation has occurred that would trigger reporting requirements. Others stated that the "noisy withdrawal" and disaffirmation requirements of the proposed rule would conflict with the laws and principles of confidentiality and the attorney-client privilege recognized in certain foreign jurisdictions.

The Commission received more than 40 comment letters that addressed the international aspects of the proposed attorney conduct rule. Many suggested that non-United States attorneys should be exempt from the rule entirely, arguing that the Commission would violate principles of international comity by exercising jurisdiction over the legal profession outside of the United States. Others recommended that the Commission take additional time to consider these conflict issues, and provide a temporary exemption from the rule for non-United States attorneys. The majority of commenters asserted that the proposed rule's "noisy withdrawal" and disaffirmation requirements would conflict with their obligations under the laws of their home jurisdictions.

Section 205.2(j) and the final definition of "appearing and practicing before the Commission" under section 205.2(a) together address many of the concerns expressed by foreign lawyers. Foreign lawyers who are concerned that they may not have the expertise to identify material violations of United States law may avoid being subject to the rule by declining to advise their clients on United States law or by seeking the assistance of United States counsel when undertaking any activity that could constitute appearing and practicing before the Commission. Mere preparation of a document that may be included as an exhibit to a filing with the Commission does not constitute "appearing and practicing before the Commission" under the final rule, unless the attorney has notice that the document will be filed with or submitted to the Commission and he or she provides advice on United States securities law in preparing the document.

The Commission respects the views of the many commenters who expressed concerns about the extraterritorial effects of a rule regulating the conduct of attorneys licensed in foreign jurisdictions. The Commission considers it appropriate, however, to prescribe standards of conduct for an attorney who, although licensed to practice law in a foreign jurisdiction, appears and practices on behalf of his clients before the Commission in a manner that goes beyond the activities permitted to a non-appearing foreign attorney. Non-United States attorneys who believe that the requirements of the rule conflict with law or professional standards in their home jurisdiction may avoid being subject to the rule by consulting with United States counsel whenever they engage in any activity that constitutes appearing and practicing before the Commission. In addition, as discussed in Section 205.6(d) below, the Commission is also

adopting a provision to protect a lawyer practicing outside the United States in circumstances where foreign law prohibits compliance with the Commission's rule.

205.2(k) provides:

(k) *Qualified legal compliance committee* means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists 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, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under §205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in §205.3(b)(4));

(ii) 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:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

A QLCC, as here defined, is part of an alternative procedure for reporting evidence of a material violation. That alternative procedure is set out in Section 205.3(c) of the rule.

The definition of a QLCC in Section 205.2(k) of the final rule contains a few modifications from the definition in the proposed rule. In the first clause of the definition, the final rule provides that an audit or other committee of the issuer may serve as the QLCC. As a result, the issuer is not required to form a QLCC as a new corporate structure, unless it wishes to, so long as another committee of the issuer meets all of the requisite criteria for a QLCC and agrees to function as a QLCC in addition to its separate duties and responsibilities. This change responds to comments that issuers should not be required to create a new committee to serve as a QLCC, so long as an existing committee contains the required number of independent directors.60

Subsection 205.2(k)(1) of the final rule, which addresses the composition of the QLCC, provides that if an issuer has no audit committee, the requirement to appoint at least one member of the audit committee to the QLCC may be met by appointing instead a member from an equivalent committee of independent directors. The Commission does not intend to limit use of the QLCC mechanism only to those issuers that have an audit committee. However, the Commission believes that the requirement that the QLCC be comprised of members who are not employed directly or indirectly by the issuer is warranted and appropriate, and thus disagrees with a commenter's suggestion to permit non-independent board members to be on the QLCC.61

Subsection 205.2(k)(3)(iii)(A) has been modified to clarify that the QLCC shall have the authority and responsibility to recommend that an issuer implement an appropriate response to evidence of a material violation, but not to require the committee to direct the issuer to take action. This modification responds to comments that the proposed rule would be in conflict with established corporate governance models insofar as the QLCC would have the explicit authority to compel a board of directors to take certain remedial actions.62

The proposed rule did not specify whether the QLCC could act if its members did not all agree. In response to comments expressing concern over this point,63 language has been included in subsections 205.2(k)(3) and (4) of the final rule to clarify that decisions and actions of the QLCC must be made and taken based upon majority vote. Unanimity is not required for a QLCC to operate; nor should an individual member of a QLCC act contrary to the collective decision of the QLCC. Accordingly, the final rule specifies that a QLCC may make its recommendations and take other actions by majority vote.

Commenters suggested both that issuers would have great difficulty finding qualified persons to serve on a QLCC because of the burdens and risks of such service,64 and that many companies will utilize a QLCC because reporting evidence of a material violation to a QLCC relieves an attorney of responsibility to assess the issuer's response.65 The Commission does not know how widespread adoption of the QLCC alternative will be, but encourages issuers to do so as a means

of effective corporate governance. In any event, the Commission does not intend service on a QLCC to increase the liability of any member of a board of directors under state law and, indeed, expressly finds that it would be inconsistent with the public interest for a court to so conclude.

As in the proposed rule, the final rule provides that members of the QLCC may not be "employed, directly or indirectly, by the issuer." This language, which is also included in Section 205.3(b)(3), is drawn directly from Section 307 of the Sarbanes-Oxley Act. The Commission considers it appropriate and consistent with the mandate of the Act to ensure a high degree of independence in QLCC members and members of committees to whom reports are made under Section 205.3(b)(3). Accordingly, the Commission anticipates that these provisions will be amended to conform to final rules defining who is an "independent" director under Section 301 of the Act, upon adoption of those rules.

205.2(l) provides:

(l) *Reasonable* or *reasonably* denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

The definition of "reasonable" or "reasonably" is based on Rule 1.0(h) of the ABA's Model Rules of Professional Conduct, modified to emphasize that a range of conduct may be reasonable.

205.2(m) provides:

(m) *Reasonably believes* means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

This definition is based on the definition of "reasonable belief" or "reasonably believes" in Rule 1.0(i) of the ABA's Model Rules of Professional Conduct, modified to emphasize that the range of possible reasonable beliefs regarding a matter may be broad -- limited for the purposes of this rule by beliefs that are unreasonable. Because the definition no longer is used in connection with the definition of "evidence of a material violation," the proposed rule's attempt to exclude the subjective element in "reasonable belief" has been abandoned.

205.2(n) provides:

(n) *Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

The definition for this term has not been changed from the one included in the proposed rule.

Section 205.3 Issuer as client.

205.3(a) provides:

(a) *Representing an Issuer.* An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an

organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

This section makes explicit that the client of an attorney representing an issuer before the Commission is the issuer as an entity and not the issuer's individual officers or employees that the attorney regularly interacts with and advises on the issuer's behalf. Most commenters supported the second sentence of the subsection as it is consistent with a lawyer's recognized obligations under accepted notions of professional responsibility.66 Thus, this sentence remains unchanged in the final rule.

The proposed rule provided that an attorney "shall act in the best interest of the issuer and its shareholders." Commenters raised three principal concerns regarding that provision: it misstates an attorney's duty under traditional ethical standards in charging an attorney with acting in the "best interest" of the issuer; it suggests attorneys have a duty to shareholders creating a risk that the failure to observe that duty could form the basis for a private action against the attorney by any of these shareholders;67 and it appears to contradict the view expressed by the Commission in the proposing release that "nothing in Section 307 creates a private right of action against an attorney."68 As the Commission agrees, in part, with these comments, it has modified language in the final rule.

As to the first concern, the Commission recognizes that it is the client issuer, acting through its management, who chooses the objectives the lawyer must pursue, even when unwise, so long as they are not illegal or unethical. However, we disagree with the comment to the extent it suggests counsel is never charged with acting in the best interests of the issuer. ABA Model Rule 1.13 provides that an attorney is obligated to act in the "best interests" of an issuer in circumstances contemplated by this rule: that is, when an individual associated with the organization is violating a legal duty, *and* the behavior "is likely to result in substantial injury" to the organization. In those situations, it is indeed appropriate for counsel to act in the best interests of the issuer by reporting up-the-ladder.69 However, the Commission appreciates that, with respect to corporate decisions traditionally reserved for management, counsel is not obligated to act in the "best interests" of the issuer. Thus, the reference in the proposed rule to the attorney having a duty to act in the best interests of the issuer has been deleted from the final rule. The sentence has also been modified to make it clear the lawyer "owes his or her professional and ethical duties to the issuer as an organization."

As to the second concern, the courts have recognized that counsel to an issuer does not generally owe a legal obligation to the constituents of an issuer -- including shareholders.70 The Commission does not want the final rule to suggest it is creating a fiduciary duty to shareholders that does not currently exist. Accordingly, we have deleted from the final rule the reference to the attorney being obligated to act in the best interest of shareholders. This modification should also address the third concern as the Commission does not intend to create a private right of action against attorneys or any other person under any provision of this part. Indeed, the final rule contains a new provision, 205.7, that expressly provides that nothing in this part is intended to or does create a private right of action.

205.3(b) provides:

(b) *Duty to report evidence of a material violation*. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

Section 205.3(b) clarifies an attorney's duty to protect the interests of the issuer the attorney represents by reporting within the issuer evidence of a material violation by any officer, director, employee, or agent of the issuer. The section was broadly approved by commenters. Paragraph (b)(1) describes the first step that an attorney representing an issuer is required to take after he or she becomes aware of evidence of a material violation, now defined in Section 205.2. The definition of "evidence of a material violation" originally proposed was controversial and has been modified (as discussed above). Paragraph (b)(1), however, was otherwise generally approved. 71

Section 205.3(b)(2) in Proposed Rule: Withdrawn

(2) The attorney reporting evidence of a material violation shall take steps reasonable under the circumstances to document the report and the response thereto and shall retain such documentation for a reasonable time.

The language set forth from proposed subsection 205.3(b)(2) of the proposed rule has been withdrawn.

In the final rules we have eliminated all requirements that reports and responses be documented and maintained for a reasonable period. Under the proposed rule, a lawyer would have been required to document his or her report of evidence of a material violation (205.3(b)(2)); the CLO would have been required to document any inquiry in response to a report (205.3(b)(3)); a reporting attorney would have been required to document when he or she received an appropriate response to a report (205.3(b)(2)); and an attorney who believed he or she did not receive an appropriate response to a report would have been required to document that response (205.3(b)(8)(ii)).

The Commission proposed the documentation requirements because it believed that up-the-ladder reporting would be handled more thoughtfully if those involved memorialized their decisions. It was also the Commission's view that documentation would benefit reporting attorneys as it would provide them with a contemporaneous written record of their actions that they could use in their defense if their up-the-ladder reporting subsequently became the subject of litigation. To that end, the Commission proposed 205.3(e)(1) (which is codified in the final rule as section 205.3(d)(1)) that specifically authorizes an attorney to use "[a]ny report under this section . . . or any response thereto . . . in connection with any investigation, proceeding, or

litigation in which the attorney's compliance with this part is in issue." Moreover, the Commission noted (*see* note 52 to the proposing release) that in at least one reported judicial decision, an associate at a law firm who had memorialized his reasons for resigning from the firm over a dispute regarding the adequacy of disclosures in a registration statement, was dismissed as a defendant in subsequent litigation over the appropriateness of those disclosures because his contemporaneous record demonstrated he had not participated in the fraud.

Nevertheless, the comments that the Commission received to the proposed documentation requirements were almost unanimously in opposition to its inclusion in the final rule. A number of commenters expressed concern that the documentation requirement could be an impediment to open and candid discussions between attorneys and their issuer clients. Those commenters were of the view it would stultify the consultation process because if the client knows the lawyer is documenting discussions regarding a potential material violation, managers are less likely to be honest and forthcoming.72

Other commenters expressed concern that the documentation requirement has the potential to create a conflict of interest between the lawyer and his or her client. For example, one commenter stated that it "places counsel to the issuer in the untenable position of having to protect himself or herself while trying to advise his or her client."73 Similarly, another commenter pointed out that documentation would "occur at exactly the time when there was disagreement between an attorney and the client. At the very least, requiring the attorney to produce such product by virtue of his or her separate obligation to the Commission is bound to present potential for conflict of interest."74 Indeed, it was pointed out, there may be occasions where the preparation of documentation is not in the best interests of the client.75

Additionally, commenters opined that the documentation requirement might increase the issuer's vulnerability in litigation. They noted that a report will be a "treasure trove of selectively damning evidence"76 and, while the Commission may be of the view that such documentation should be protected by the attorney-client privilege, the applicability of the privilege will be decided by the courts. Thus, there is considerable uncertainty as to whether it will be protected. At a minimum, it was contended, assertions of privilege will be met with significant and prolonged legal challenges.77

At least at the present time, the potential harms from mandating documentation may not justify the potential benefits. In all likelihood, in the absence of an affirmative documentation requirement, prudent counsel will consider whether to advise a client in writing that it may be violating the law.78 In other situations, responsible corporate officials may direct that such matters be documented. In those situations, the Commission's goal will be met, but not in an atmosphere where the issuer and the attorney may perceive that their interests are in conflict.

205.3(b)(2) provides:

(2) The chief legal officer (or the equivalent thereof) shall 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. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is

ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

Paragraph (b)(2) (corresponding to paragraph (b)(3) of the proposed rule, as revised) describes the responsibilities of the issuer's CLO (or the equivalent thereof) in handling reported evidence of a material violation. The final rule adds a provision expressly allowing the CLO to make use of an issuer's QLCC. The revision eliminates the CLO's documentation requirement and, for the time being, the CLO's obligation, as part of the QLCC process, to notify the Commission in the unlikely event that the issuer fails to take appropriate remedial actions recommended by the QLCC after a determination by the QLCC that there has been or is about to be a material violation. It also changes language that would have required a CLO who reasonably believed that a material violation had occurred, was ongoing, or was about to occur to "take any necessary steps to ensure that the issuer adopts an appropriate response" to language that would, under the same circumstances, require the CLO to "take all reasonable steps to cause the issuer to adopt an appropriate response." These are the points on which the corresponding paragraph in the proposed rule was criticized.79 Reporting up-the-ladder was otherwise consistently supported. The CLO is responsible for investigating the reported evidence of a material violation for the reasons set out in the proposing release.80 The second sentence of this paragraph has been modified to clarify the circumstances under which the CLO must advise a reporting attorney that no violation has been found. Thus, the term "determines" has been substituted for "reasonably believes" in the second sentence. This change makes the second sentence consistent with the first sentence which requires the CLO to cause an inquiry to be conducted "to determine" whether a violation has occurred, is ongoing, or is about to occur. Other minor textual changes have been made to the paragraph that do not alter its substantive requirements.

205.3(b)(3) provides:

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's 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" as defined in section 2(a)(19) of the Investment

Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee 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" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

This paragraph describes the circumstances under which an attorney who has reported evidence of a material violation to the issuer's CLO and/or CEO is obliged to report that evidence further up-the-ladder within the client issuer. The paragraph tracks the statutory language in Section 307 of the Act, is not controversial, and is adopted without change from the corresponding paragraph in the proposed rule - (b)(4) - for the reasons set out in the proposing release.81

205.3(b)(4) provides:

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

The basis for paragraph (b)(4) is implicit in Section 307 of the Act. This bypass provision, however, is not controversial, was not the subject of comment, and is adopted without any substantive change from the corresponding paragraph -- (b)(5) -- of the proposed rule for the reasons set out in the proposing release.82

205.3(b)(5) provides:

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

Paragraph (b)(5) addresses circumstances in which those to whom evidence of a material violation is reported direct others, either in-house attorneys or outside attorneys retained for that purpose, to investigate the possible violation. It elicited only a few comments, all of them negative.83 The thrust of these comments was that issuers would be reluctant to retain counsel to investigate reports if those attorneys might trigger up-the-ladder reporting that could result in reporting out to the Commission. The definition of "appropriate response" in section 205.2(b) of the final rule has been modified to address these comments. Further, the modifications to the proposed rule reflected in final rule sections 205.3(b)(6) and (b)(7) below, will relieve attorneys retained or directed to investigate or litigate reports of violations from reporting up-the-ladder in a number of instances.

Paragraph (b)(5) is adopted essentially as proposed. This paragraph -- numbered (b)(6) in the proposed rule - makes two points: first, that the investigating attorneys are themselves appearing and practicing before the Commission and are accordingly bound by the requirements of the proposed rule; and, second, that the officers or directors who caused them to investigate remain obligated to respond to the attorney who initially reported the evidence of a material violation that other attorneys have been directed to investigate.

205.3(b)(6) and (b)(7) provide:

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

As noted above in our discussion of paragraph (b)(5) of the final rule, a number of commenters expressed the view that the final rule should eliminate any requirement that attorneys report up-the-ladder when they are retained or directed to investigate a report of a material violation or to litigate whether a violation has occurred. New paragraphs (b)(6) and (b)(7) respond to these legitimate comments, and narrow considerably the instances when it is likely to be necessary for such an attorney to report up-the-ladder. Paragraph (b)(6) addresses the responsibilities of attorneys retained or directed to investigate or litigate reported violations by the chief legal officer (or the equivalent thereof); paragraph (b)(7) addresses circumstances where attorneys are retained or directed to investigate or litigate reported violations by a qualified legal compliance committee. Where an attorney is retained to investigate by the chief legal officer, the attorney has no obligation to report where the results of the investigation are provided to the chief legal officer and the attorney and the chief legal officer agree no violation has occurred and report the results of the inquiry to the issuer's board of directors or to an independent committee of the board. An attorney retained or directed by the chief legal officer to litigate a reported violation does not have a reporting obligation so long as he or she is able to assert a colorable defense on behalf of the issuer and the chief legal officer provides reports on the progress and outcome of the litigation to the issuer's board of directors. An attorney retained or directed by a qualified legal compliance committee to investigate a reported violation has no reporting obligations. Similarly, an attorney retained or directed by a qualified legal compliance committee to litigate a reported violation has no reporting obligation provided he or she may assert a colorable defense on behalf of the issuer.

205.3(b)(8) and (b)(9) provide:

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

As proposed, paragraphs (b)(8) and (b)(9) - numbered (b)(7) and (b)(8) in the proposed rule - elicited no comment (apart from negative comments on documentation provisions that have been eliminated in the final rule). They are adopted without any other substantive change for reasons explained in the proposing release.84

205.3(b)(10) provides:

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for

so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

Paragraph (b)(10) authorizes an attorney to notify an issuer's board of directors or any committee thereof if the attorney reasonably believes that he or she has been discharged for reporting evidence of a material violation under this section. This provision, an important corollary to the up-the-ladder reporting requirement, is designed to ensure that a chief legal officer (or the equivalent thereof) is not permitted to block a report to the issuer's board or other committee by discharging a reporting attorney.

This provision is similar in concept to paragraph (d)(4) of the proposed rule (as to which, as noted above, the Commission is seeking further comment), although it does not provide for reporting outside the issuer.

205.3(c) provides:

(c) *Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee*. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under §205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

This alternative to the reporting requirements of section 205.3(b) would allow, though not require, an attorney to report evidence of a material violation directly to a committee of the board of directors that meets the definitional requirements for a QLCC. It would also relieve the reporting attorney of any further obligation once he or she had reported such evidence to an issuer's QLCC.

Under this alternative, the QLCC - itself a committee of the issuer's board of directors with special authority and special responsibility - would be responsible for carrying out the steps required by Section 307 of the Act: notifying the CLO of the report of evidence of a material violation (except where such notification would have been excused as futile under section

205.3(b)(4)); causing an investigation where appropriate; determining what remedial measures are appropriate where a material violation has occurred, is ongoing, or is about to occur; reporting the results of the investigation to the CLO, the CEO, and the full board of directors; and notifying the Commission if the issuer fails in any material respect to take any of those appropriate remedial measures.

More generally, the QLCC institutionalizes the process of reviewing reported evidence of a possible material violation. That would be a welcome development in itself. It may also produce broader synergistic benefits, such as heightening awareness of the importance of early reporting of possible material violations so that they can be prevented or stopped.

Probably the most important respect in which Section 205.3(c) differs from Section 205.3(b) is, as noted, that Section 205.3(c) relieves an attorney who has reported evidence of a material violation to a QLCC from any obligation "to assess the issuer's response to the reported evidence of a material violation." If the issuer fails, in any material respect to take any remedial action that the QLCC has recommended, then the QLCC, as well as the CLO and the CEO, all have the authority to take appropriate action, including notifying the Commission if the issuer fails to implement an appropriate response recommended by the QLCC.

Commenters generally approved of the QLCC in concept, although several proposed changes in how it would work. The American Bar Association agreed with the need for corporate governance mechanisms to ensure legal compliance once a material violation is reported to an issuer's board, but suggested that existing corporate governance reforms should be given time before new reforms are added.85 Another commenter suggested that the QLCC should be only one of a number of acceptable governance models, with issuers having freedom to craft techniques suitable to their own circumstances.86 The Commission recognizes these concerns, but believes the benefits of the QLCC model, as described above, and the absence of any requirement that an issuer form or utilize a QLCC, justify inclusion of this alternative in the final rule.

One commenter suggested that the Commission's final rules should make clear that, for a matter to be referred to a QLCC, the issuer must have a QLCC in place and is not permitted simply to establish a QLCC to respond to a specific incident.87 This comment has been addressed in Section 205.3(c), which authorizes referral only to a QLCC that has been previously formed.

Commenters made a number of other suggestions regarding the QLCC provisions in the proposed rule. One commenter proposed that the Commission consider making creation of a QLCC mandatory for each issuer.88 The Commission believes that keeping the QLCC as an alternative reporting mechanism is preferable, and that attorneys should be permitted to report up-the-ladder through their chief legal officers. Another commenter suggested that the QLCC proposal be modified to remove the "noisy withdrawal" provision.89 The Commission has concluded that, in the extraordinary circumstance in which an appropriate response does not follow a QLCC's recommendation in response to evidence of a material violation, the QLCC should have the authority to take all appropriate action, including notifying the Commission, although it is not required to do so in every case. Another suggestion from a commentator was that the Commission offer a "safe harbor" for a chief legal officer who reports to a QLCC.90 The

Commission has provided a form of "safe harbor" against any inconsistent standard of a state or other United States jurisdiction in Section 205.6(c), and against a private action in Section 205.7.

Section 205.3(d) Issuer Confidences

205.3(d)(1) provides:

(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

Paragraph (d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct. It is effectively equivalent to the ABA's present Model Rule 1.6(b)(3) and corresponding "self-defense" exceptions to client-confidentiality rules in every state. The Commission believes that it is important to make clear in the rule that attorneys can use any records they may have prepared in complying with the rule to protect themselves.

One comment expressed concern that this provision would empower the Commission to use such records against the attorney. That concern misreads this paragraph, which expressly refers to the use of these records "by an attorney" in a proceeding where the attorney's compliance with this part is in issue.

205.3(d)(2) provides:

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent 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;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) 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.

This paragraph thus permits, but does not require, an attorney to disclose, under specified circumstances, confidential information related to his appearing and practicing before the

Commission in the representation of an issuer. It corresponds to the ABA's Model Rule 1.6 as proposed by the ABA's Kutak Commission in 1981-1982 and by the ABA's Commission of Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") in 2000,91 and as adopted in the vast majority of states.92 It provides additional protection for investors by allowing, though not requiring, an attorney to disclose confidential information relating to his appearing and practicing before the Commission in the representation of an issuer to the extent the attorney reasonably believes necessary (1) to prevent the issuer from committing a material violation that the lawyer reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors; (2) to prevent the issuer from perpetrating a fraud upon the Commission; or (3) to rectify the consequences of an issuer's material violations that caused or may cause substantial injury to the issuer's financial interest or property in the furtherance of which the attorney's services were used.

The proposed version of this rule provided that the attorney appearing or practicing before the Commission could disclose information to the Commission:

(i) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of the issuer's illegal act in the furtherance of which the attorney's services had been used.

Several comments stated that permitting attorneys to disclose illegal acts to the Commission, in the situations delineated by the proposed rule, would undermine the relationship of trust and confidence between lawyer and client, and may impede the ability of lawyers to steer their clients away from unlawful acts.93 Other comments expressed concern that this provision conflicts with, and would (in their eyes impermissibly) preempt, the rules of professional conduct of certain jurisdictions (such as the District of Columbia) which bar the disclosure of information which an attorney is permitted to disclose under this paragraph, particularly where it permits the disclosure of past client misconduct.94 Some aver that "it is not a lawyer's job" in representing an issuer before the Commission "to correct or rectify the consequences of [the issuer's] illegal actions, or even to prevent wrong-doing."95

Other commenters noted that these disclosure provisions should be limited to illegal acts that are likely to have a material impact on the market for the issuer's securities,96 or to ongoing criminal or fraudulent conduct by the issuer,97 while others suggest that attorneys should only be permitted to disclose information where there is a risk of death or bodily harm, and not where only "monetary interests" are involved.98 Many of the commenters voicing objections to this paragraph suggested that the Commission defer its promulgation until after further developments by state supreme courts99 or further discussion.100 Others, while criticizing the rule, noted that an attorney practicing before the Commission could comply with this permissive disclosure

provision, but would have a duty to explain to the client at the outset this limitation on the "normal" duty of confidentiality.101

Commenters supporting the paragraph, however, noted that at least four-fifths of the states now permit or require such disclosures as pertain to ongoing conduct,102 and that those states that follow the minority rule "narrow[] the lawyer's options for responding to client conduct that could defraud investors and expose the lawyer to liability for legal work that the lawyer has already done."103 Several of these comments noted that the Commission could or should have required that lawyers make these disclosures to it when the client insists on continuing fraud or pursuing future illegal conduct,104 and urged the Commission to make clear that this paragraph does not override state ethics rules that make such disclosures mandatory.105 Many commenters also stated that it was proper for this paragraph to preempt any state ethics rule that does not permit disclosure.106 They also noted that the confidentiality interests of a corporate client are not infringed by lawyer disclosure under the circumstances required by the paragraph, as the paragraph addresses a situation where the lawyer reasonably believes that agents of an issuer are engaged in serious illegality that the issuer has failed to remedy; in that situation, an instruction by an officer or even the board of the issuer to remain silent cannot be regarded as authorized.107 Others generally supported the provision as injecting vitality into existing ethics rules, and stated that the Commission should not delay action on this provision.108 One commenter emphasized the need to protect from retaliation attorneys who engage in the reporting mandated by Part 205.109

The final version of this paragraph contains modifications or clarifications of the paragraph as proposed. In paragraph (2), the description of when an attorney may disclose client confidences is limited "to the extent the attorney reasonably believes necessary" to accomplish one of the objectives in the rule. In subparagraph (i), the term "material violation" has been substituted for "illegal act" to conform to the statutory language in Section 307. In subparagraph (ii), the final version identifies the illegal acts that might perpetrate a fraud upon the Commission in an investigation or administrative proceeding; each of the statutes now referenced in subparagraph (ii) were referenced in the release accompanying the proposed rule.110 The term "perpetrate a fraud" in this paragraph covers conduct involving the knowing misrepresentation of a material fact to, or the concealment of a material fact from, the Commission with the intent to induce the Commission to take, or to refrain from taking, a particular action. Subparagraph (iii) has been modified to cover only material violations by the issuer, and now this material violation must be one that has "caused, or may cause, substantial injury to the financial interest or property of the issuer or investors" before the provision may be invoked.

With regard to the issues raised by the comments on this paragraph, as explained below, the Commission either has addressed the concerns voiced by the commenters, believes that the concerns are adequately addressed by the paragraph, or has found the concerns to be insufficient to warrant further modification. Although commenters raised a concern that permitting attorneys to disclose information to the Commission without a client's consent would undermine the issuers' trust in their attorneys, the vast majority of states already permit (and some even require) disclosure of information in the limited situations covered by this paragraph,111 and the Commission has seen no evidence that those already-existing disclosure obligations have undermined the attorney-client relationship. In addition, the existing state law ethics rules

support the proposition that generalized concerns about impacting the attorney-client relationship must yield to the public interest where an issuer seeks to commit a material violation that will materially damage investors, seek to perpetrate a fraud upon the Commission in enforcement proceedings, or has used the attorney's services to commit a material violation.

With regard to the comments that this paragraph would preempt state law ethics rules that do not permit disclosure of information concerning such acts, or the concerns expressed by commenters at the other end of the spectrum that this paragraph could be misread to supplant state ethics rules that require rather than permit disclosure,112 the Commission refers to Section 205.1 and the related discussion above. Section 205.1 makes clear that Part 205 supplements state ethics rules and is not intended to limit the ability of any jurisdiction to impose higher obligations upon an attorney not inconsistent with Part 205. A mandatory disclosure requirement imposed by a state would be an additional requirement consistent with the Commission's permissive disclosure rule. The Commission also notes that, as this paragraph in most situations follows the permissive disclosure rules already in place in most jurisdictions, the conflict raised by these commenters is unlikely to arise in practice.

As for the comments suggesting that attorneys be permitted to disclose only information that would appear to have a material impact on the value of the issuer's securities, the Commission has, where appropriate, modified the paragraph in a manner that responds to that concern. Subparagraph (iii) has been limited to material violations, and subparagraph (i) limits its application to material violations that are likely to cause substantial injury to the financial interest or property of the issuer or investors.

Finally, the Commission concludes that it is not appropriate for it to wait for further developments. The Commission believes there has been ample discussion of this paragraph in the comments received, and that the major issues concerning this paragraph have been well identified. In addition, delay pending further developments does not promise to be fruitful: most state supreme courts already have rules in place that are consistent with this paragraph, and there is no evidence when, if ever, state supreme courts (or legislative bodies) will revisit these issues, and the public interest in allowing lawyers appearing and practicing before the Commission to disclose the acts covered by this paragraph counsels against waiting indefinitely for further refinement of state ethics rules.

Subsection 205.3(e)(3) in Proposed Rule: Withdrawn

The proposed paragraph read:

Where an issuer, through its attorney, shares with the Commission information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons.

Several commenters stated that it was uncertain if the Sarbanes-Oxley Act granted the Commission the authority to promulgate a rule that would control determinations by state and federal courts whether a disclosure to the Commission, even if conditioned on a confidentiality agreement, waives the attorney-client privilege or work product protection,113 and a few

suggested that the proposed paragraph would conflict with Federal Rule of Evidence 501.114 They noted that this is an unsettled issue in the courts, or suggested that the Commission's proposed rule runs contrary to the bulk of decisional authority on this issue.115 A few also noted that proposed legislation before Congress in 1974, supported by the Commission, that would have enacted a provision permitting issuers to selectively waive privileges in disclosures to the Commission was ultimately not passed by Congress.116 The concern was expressed that attorneys might disclose information to the Commission in the belief that the evidentiary privileges for that information were preserved, only to have a court subsequently rule that the privilege was waived.117

The Commission has determined not to adopt the proposed rule on this "selective waiver" provision. The Commission is mindful of the concern that some courts might not adopt the Commission's analysis of this issue, and that this could lead to adverse consequences for the attorneys and issuers who disclose information to the Commission pursuant to a confidentiality agreement, believing that the evidentiary protections accorded that information remain preserved.

Nonetheless, the Commission finds that allowing issuers to produce internal reports to the Commission - including those prepared in response to reports under 205.3(b) - without waiving otherwise applicable privileges serves the public interest because it significantly enhances the Commission's ability to conduct expeditious investigations and obtain prompt relief, where appropriate, for defrauded investors. The Commission further finds that obtaining such otherwise protected reports advances the public interest, as the Commission only enters into confidentiality agreements when it has reason to believe that obtaining the reports will allow the Commission to save substantial time and resources in conducting investigations and/or provide more prompt monetary relief to investors. Although the Commission must verify that internal reports are accurate and complete and must conduct its own investigation, doing so is far less time consuming and less difficult than starting and conducting investigations without the internal reports. When the Commission can conduct expeditious and efficient investigations, it can then obtain appropriate remedies for investors more quickly. The public interest is thus clearly served when the Commission can promptly identify illegal conduct and provide compensation to victims of securities fraud.

The Commission also finds that preserving the privilege or protection for internal reports shared with the Commission does not harm private litigants or put them at any kind of strategic disadvantage. At worst, private litigants would be in exactly the same position that they would have been in if the Commission had not obtained the privileged or protected materials. Private litigants may even benefit from the Commission's ability to conduct more expeditious and thorough investigations. Indeed, many private securities actions follow the successful completion of a Commission investigation and enforcement action. Consequently, allowing the Commission access to otherwise privileged and inaccessible internal reports but denying access to others would not be unfair to private litigants but is appropriate in the public interest and for the protection of investors.

For these reasons, the Commission will continue to follow its policy of entering into confidentiality agreements where it determines that its receipt of information pursuant to those

agreements will ultimately further the public interest, and will vigorously argue in defense of those confidentiality agreements where litigants argue that the disclosure of information pursuant to such agreements waives any privilege or protection.

Section 205.4 Responsibilities of Supervisory Attorneys

(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.

(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.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under §205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

Section 205.4 prescribes the responsibilities of a supervisory attorney, and is based in part upon Rule 5.1 of the ABA's Model Rules, which (1) mandates that supervisory attorneys (including partners at law firms and attorneys exercising similar management responsibilities at law firms) must make reasonable efforts to ensure that attorneys at the firm conform to the Rules of Professional Conduct; and (2) provides that a supervisory attorney may be held liable for violative conduct by another attorney which he or she knowingly ratifies or which he or she fails to prevent when able to do so.

Several commenters objected that the articulation of the responsibilities of supervisory attorneys included in the proposed rule rendered senior attorneys responsible for the actions of more junior attorneys whose activities they might not actually supervise or direct. For example, the ABA argued that defining a supervisory attorney to include individuals "who have supervisory authority over another attorney" would unfairly cover "all partners in a law firm and even senior associates," many of whom might not exercise actual supervisory authority regarding, or have any involvement with, the matter in question.118 On the other hand, comments submitted by a distinguished group of academics stated that the sections of the proposed rule prescribing the responsibilities of supervisor and subordinate attorneys were "necessary" and appropriate.119

The language we adopt today confirms that a supervisory attorney to whom a subordinate attorney reports evidence of a material violation is responsible for complying with the reporting requirements prescribed under the rule. This language modifies the proposed rule by clarifying

that only a senior attorney who actually directs or supervises the actions of a subordinate attorney appearing and practicing before the Commission is a supervisory attorney under the rule. A senior attorney who supervises or directs a subordinate on other matters unrelated to the subordinate's appearing and practicing before the Commission would not be a supervisory attorney under the final rule. Conversely, an attorney who typically does not exercise authority over a subordinate attorney but who does direct the subordinate attorney in the specific matter involving the subordinate's appearance and practice before the Commission is a supervisory attorney under the final rule. The final rule eliminates the proposed requirement that a supervisory attorney who believes that evidence of a material violation presented by a subordinate attorney need not be reported "up-the-ladder" document the basis for that conclusion. The final rule also eliminates the requirement that a supervisory attorney ensure a subordinate's compliance with the federal securities laws.

Section 205.5 Responsibilities of a Subordinate Attorney

(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 supervising 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 the 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.

Section 205.5 is based, in part, on Rule 5.2 of the ABA's Model Rules (which provides that subordinate attorneys remain bound by the Model Rules notwithstanding the fact that they acted at the direction of another person). This section confirms that a subordinate attorney is responsible for complying with the rule. We do not believe that a subordinate attorney should be exempted from the application of the rule merely because he or she operates under the supervision or at the direction of another person. We believe that creation of such an exemption would seriously undermine Congress' intent to provide for the reporting of evidence of material violations to issuers. Indeed, because subordinate attorneys frequently perform a significant amount of work on behalf of issuers, we believe that subordinate attorneys are at least as likely (indeed, potentially more likely) to learn about evidence of material violations as supervisory attorneys.

This section attracted far less comment than section 205.4, and those comments which were received typically supported the concept of allowing a subordinate attorney to satisfy his or her

obligations under the rule by reporting evidence of a material violation to a supervisory attorney.120 The language we adopt today clarifies that a subordinate attorney must be appearing and practicing before the Commission to come under the rule, and conforms this section to the language in section 205.4 by providing that a senior attorney must actually direct or supervise the actions of a subordinate attorney (rather than have supervisory authority) to be a supervisory attorney under the rule.

New language has been added to this section to provide that an attorney who appears and practices before the Commission on a matter in the representation of an issuer under the supervision or direction of the issuer's CLO (or the equivalent thereto) is not a subordinate attorney. Accordingly, that person is required to comply with the reporting requirements of Section 205.3. For example, an issuer's Deputy General Counsel, who reports directly to the issuer's General Counsel (CLO) on a matter before the Commission, is not a subordinate attorney. Thus, the Deputy General Counsel is not relieved of any further reporting obligations by advising the CLO of evidence of a material violation. Further, in the event the Deputy General Counsel does not receive an appropriate response from the CLO, he or she is obligated to report further up-the-ladder within the issuer.

Section 205.6 Sanctions and Discipline

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

Paragraph 205.6(a) of the proposed rule tracked the language of Section 3(b) of the Act (which expressly states that a violation of the Act and rules promulgated thereunder shall be treated as a violation of the Exchange Act, subjecting any person committing such a violation to the same penalties as are prescribed for violations of the Exchange Act). Similarly, paragraph 205.6(b) of

the proposed rule was based on Section 602 of the Act (adding Section 4C(a) to the Exchange Act, which incorporates that portion of Rule 102(e) of the Commission's Rules of Practice prescribing the state-of-mind requirements for Commission disciplinary actions against accountants who engage in improper professional conduct). Finally, paragraph 205.6(c) of the proposed rule stated that the Commission may discipline attorneys who violate the rule, regardless of whether the attorney is subject to prosecution or discipline for violation of a state ethical rule that applies to the same conduct.

Collectively, proposed section 205.6 (originally entitled "Sanctions") generated a number of comments. One commenter complained that sections 3(b) and 307 of the Act did not authorize Commission enforcement action against violators of the rule, and that violations should be handled in Commission disciplinary proceedings.121 Several other commenters argued that paragraph 205.6(a) should specifically state that the Commission will not seek criminal penalties for violations of the rule.122 Commenters also suggested that the juxtaposition of paragraphs 205.6(a) and (b) created confusion as to whether the Commission would treat violations of the rule as an Exchange Act violation or a violation of Rule 102(e). A number of commenters also suggested that the Commission should create a safe harbor, protecting attorneys who make a good faith attempt to comply with the rule and explicitly stating that the rule is only enforceable by the Commission and does not create a private right of action.123

The language we today adopt in Section 205.6 has been extensively modified in light of these comments. The amended section is now titled "Sanctions and Discipline," emphasizing that the Commission intends to proceed against individuals violating Part 205 as it would against other violators of the federal securities laws and, when appropriate, to initiate proceedings under this rule seeking an appropriate disciplinary sanction. Paragraph 205.6(a) has been amended to clarify that only the Commission may bring an action for violation of the part. Paragraph 205.6(b) incorporates the language of paragraph 205.6(c) of the proposed rule, and adds new language specifying the sanctions available to the Commission in administrative disciplinary proceedings against attorneys who violate the part.

New paragraph 205.6(c), consistent with section 205.1, provides that attorneys who comply in good faith with this part shall not be subject to discipline for violations of inconsistent standards imposed by a state or other United States jurisdiction. Paragraph 205.6(c) has been drafted to apply only to an attorney's liability for violating inconsistent standards of a state or other U.S. jurisdiction. Thus, it is not available where the state or other jurisdiction imposes additional requirements on the attorney that are consistent with the Commission's rules. Moreover, this paragraph has no application in actions or proceedings brought by the Commission relating to violations of the federal securities laws or the Commission's rules or regulations thereunder. Further, the fact that an attorney may assert or establish in a state professional disciplinary proceeding, or in a private action, that he or she complied with this part, and complied in good faith, does not affect the Commission's ability or authority to bring an enforcement action or disciplinary proceeding against an attorney for a violation of this part. Indeed, even if a state ethics board or a court were to determine in an action not brought by the Commission that an attorney complied with this part or complied in good faith with this part, that determination would not preclude the Commission from bringing either an enforcement action or a disciplinary proceeding against that attorney for a violation of this part based on the same conduct.

New paragraph 205.6(d) addresses the conduct of non-U.S. attorneys who are subject to this part, because they do not meet the definition of non-appearing foreign attorney. As noted above, the new definition of non-appearing foreign attorney in paragraph 205.2(j) responds to the large number of comments received from lawyers practicing in other jurisdictions stating that attorneys practicing in many foreign countries are subject to rules and regulations that render compliance with the part impossible. This point was also made at the December 17 Roundtable discussion. Several commenters also stated that attorneys who are admitted in United States jurisdictions but who practice in foreign countries are subject to similar restrictions. New paragraph 205.6(d) provides that attorneys in that situation must comply with the part to the maximum extent allowed by the regulations and laws to which they are subject.

Section 205.7 No Private Right of Action

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

In the proposing release, the Commission expressed its view that: "nothing in Section 307 creates a private right of action against an attorney. . . . Similarly, the Commission does not intend that the provisions of Part 205 create any private right of action against an attorney based on his or her compliance or non-compliance with its provisions."124 Nevertheless, the Commission requested comments on whether it should provide in the final rule "a 'safe harbor' from civil suits" for attorneys who comply with the rule.125 Numerous commenters agreed that the final rule should contain such a provision.

Several commenters suggested that the final rule contain a safe harbor similar to that provided for auditors in Section 10A(c) of the Exchange Act, 15 U.S.C. 78j-1(c), which provides that "[n]o independent public accountant shall be liable in a private action for any finding, conclusion, or statement expressed in a report" to the Commission made by an issuer whose auditor has reported to its board a failure to take remedial action.126 Other commenters recommended that the Commission adopt language similar to that in the Restatement (Third) of Law Governing Lawyers, Standards of Care §52, which provides that "[p]roof of a violation of a rule or statute regulating the conduct of lawyers . . . does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty . . . ."127 And others noted that the ABA Model Rules, Scope, & 20, provides that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."128 Finally, numerous other commenters were of the view that a safe harbor should be created to protect lawyers from liability where they have attempted in good faith to comply with this part.129

The Commission is persuaded that it is appropriate to include an express safe harbor provision in the rule, which is set forth in new Section 205.7, No Private Right of Action. Paragraph (a) makes it clear that Part 205 does not create a private cause of action against an attorney, a law

firm or an issuer, based upon their compliance or non-compliance with the part. The Commission is of the view that the protection of this provision should extend to any entity that might be compelled to take action under this part; thus it extends to law firms and issuers. The Commission is also of the opinion that, for the safe harbor to be truly effective, it must extend to both compliance and non-compliance under this part.

Paragraph (b) provides that only the Commission may enforce the requirements of this part. The provision is intended to preclude, among other things, private injunctive actions seeking to compel persons to take actions under this part and private damages actions against such persons. Once again, the protection extends to all entities that have obligations under this part.

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")130 requires the agency to obtain approval from the Office of Management and Budget ("OMB") if an agency's rule would require a "collection of information," as defined by the PRA. As set forth in the proposing release, certain provisions of the rule, such as the requirement of written procedures for QLCCs, meet the "collection of information" requirement of the PRA. The information collection is necessary to implement the Standards of Professional Conduct for Attorneys prescribed by the proposed rule and required by Section 307 of the Sarbanes-Oxley Act of 2002. Specifically, the collection of information is intended to ensure that evidence of violations is communicated to appropriate officers and/or directors of issuers, so that they can adopt appropriate remedies and/or impose appropriate sanctions. In the rare cases in which a majority of a QLCC has concluded that an issuer did not act appropriately, the information may be communicated to the Commission. The collection of information is, therefore, an important component of the Commission's program to discourage violations of the federal securities laws and promote ethical behavior of attorneys appearing and practicing before the Commission.

The final rule would impose an up-the-ladder reporting requirement when attorneys appearing and practicing before the Commission become aware of evidence of a material violation by the issuer or any officer, director, employee, or agent of the issuer. An attorney must report such evidence to the issuer's CLO or to both the CLO and CEO. A subordinate attorney complies with the rule if he or she reports evidence of a material violation to his or her supervisory attorney (who is then responsible for complying with the rule's requirements). A subordinate attorney may also take the other steps described in the rule if the supervisor fails to comply.

If the CLO, after investigation, determines that there is no violation, he or she must so advise the reporting attorney. Unless the CLO reasonably believes that there is no violation, he or she must take reasonable steps to cause the issuer to adopt an appropriate response to stop, prevent or rectify any violation. The CLO must also report on the remedial measures or sanctions to the reporting attorney.

The rule also requires attorneys to take certain steps if the CLO or CEO does not provide an appropriate response to a report of evidence of a violation. These steps include reporting the evidence up-the-ladder to the audit committee, another committee consisting solely of independent directors if there is no audit committee, or to the board of directors if there is no

such committee. If the attorney believes that the issuer has not made an appropriate response to the report, the attorney must explain the reasons for his or her belief to the CEO, CLO or directors to whom the report was made.

Alternatively, if an attorney other than a CLO reports the evidence to a QLCC, he or she need take no further action under the rule. The QLCC must have written procedures for the receipt, retention and consideration of reports of material violations, and must be authorized and responsible to notify the CLO and CEO of the report, determine whether an investigation is necessary and, if so, to notify the audit committee or the board of directors. The QLCC may also initiate an investigation to be conducted by the CLO or outside attorneys, and retain any necessary expert personnel. At the conclusion of the investigation, the QLCC may recommend that the issuer adopt appropriate remedial measures and/or impose sanctions, and notify the CLO, CEO, and board of directors of the results of the inquiry and appropriate remedial measures to be adopted. Where the QLCC decides, by a majority vote, that the issuer has failed to take any remedial measure that the QLCC has directed the issuer to take, the QLCC has the authority to notify the Commission. A CLO may also refer a report of evidence of a material violation to a QLCC, which then would have responsibility for taking the steps required by the rule.

The respondents to this collection of information would be attorneys who appear and practice before the Commission and, in certain cases, the issuer, and/or officers, directors and committees of the issuer. We proposed to require attorneys to document communications contemplated by the proposed rule. In response to commenters concerns, we are not specifying that the communications must be documented. We continue to believe that, in providing quality representation to issuers, attorneys report evidence of violations to others within the issuer, including the CLO, the CEO, and, where necessary, the directors. In addition, officers and directors already investigate evidence of violations and report within the issuer the results of the investigation and the remedial steps they have taken or sanctions they have imposed. Attorneys who believe that they were discharged for making a report under the proposed rule might notify the issuer of that fact. Except as discussed below, we therefore believe that the reporting requirements imposed by the rule are "usual and customary" activities that do not add to the burden that would be imposed by the collection of information.131

Certain aspects of the collection of information, however, impose a new burden. For an issuer to choose to establish a QLCC, the QLCC must adopt written procedures for the confidential receipt, retention and consideration of any report of evidence of a material violation. We are adopting this requirement and its collection of information requirement largely as proposed.

We estimate for purposes of the PRA that there are approximately 18,200 issuers that would be subject to the proposed rule.132 We are unable to estimate precisely how many issuers will choose to form a QLCC. For these purposes, we estimate that approximately 20%, or 3,640, will choose to establish a QLCC. Establishing the written procedures required by the proposed rule should not impose a significant burden. We assume that an issuer would incur a greater burden in the year that it first establishes the procedures than in subsequent years, in which the burden would be incurred in updating, reviewing, or modifying the procedures. For purposes of the PRA, we assume that an issuer would spend six hours every three-year period on the procedures.

This would result in an average burden of two hours per year. Thus, we estimate for purposes of the PRA that the total annual burden imposed by this collection of information would be 7,280 hours. We assume that half of those hours will be incurred by outside counsel at a rate of $300 per hour. Using these assumptions, we estimate the collection of information would result in a cost of $1,092,000.

We are not adopting at this time a requirement that attorneys make a "noisy withdrawal." We have amended the PRA submission to remove any burden from that collection of information. We are still considering that provision and, in a separate proposing release, we are requesting additional comments on it. In addition, we are separately proposing an alternative that, along with the "noisy withdrawal" proposal, also constitutes a collection of information under the PRA.

The Commission received two comments regarding the Paperwork Reduction Act section of the proposing release. One commenter indicated that the Commission has not considered the paperwork burdens of Part 205 on attorneys who do not specialize in securities law, but who may be considered to be appearing and practicing before the Commission under the rule.133 The Commission believes that as adopted, the rule imposes little, if any, paperwork burdens on attorneys regardless of whether they specialize in securities law, especially in light of clarification to the rule's scope in the definition of "appearing and practicing." Another commenter suggested that the Commission's original estimate that one quarter of the 18,200 issuers subject to the rule will form QLCCs may be understated, but offered no alternate estimate.134 The Commission estimated in the proposing release that one quarter of issuers would form QLCCs and received comments suggesting both that it would be difficult to find people to serve on QLCCs135 and, on the other hand, many companies would use QLCCs.136 Moreover, the Commission is not adopting at this time the "noisy withdrawal" proposal, which may tend to cause fewer companies to form QLCCs. Accordingly, the Commission estimates that under the rule, as adopted, 20% of issuers will form QLCCs.

The Commission submitted the collection of information to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, under the title of "Reports of Evidence of Material Violations." Because of the changes to the nature of the information collected and because of the separate proposal for an alternative to "noisy withdrawal," we have changed the name of the submission to "QLCC and Other Internal Reporting." OMB has not yet approved the collection; we will separately publish the OMB control number. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Compliance with the collection of information requirements is in some cases mandatory and in some cases voluntary depending upon the circumstances. Responses to the requirements to make disclosures to the Commission will not be kept confidential.

IV. Costs and Benefits

Part 205 implements Section 307 of the Sarbanes-Oxley Act. Part 205 will affect all attorneys who appear and practice before the Commission in the representation of an issuer and who become aware of evidence that tends to show that a material violation of federal or state securities laws, a material breach of fiduciary duty, or a similar material violation by the issuer or an officer, director, agent, or employee of the issuer has occurred, is ongoing, or is about to

occur. The rule we are issuing today implements a Congressional mandate to prescribe "minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers . . . ." Prior to passage of the Sarbanes-Oxley Act, attorneys appearing and practicing before the Commission were regulated as to their professional conduct primarily by the ethics standards of the various states where attorneys happened to practice. By passing the Sarbanes-Oxley Act, Congress has implicitly concluded that the benefits of setting such minimum federal standards justify their costs. We enumerate and discuss these costs and benefits below.

Part 205 implements an up-the-ladder reporting requirement upon attorneys representing an issuer before the Commission who become aware of a potential material violation about which a reasonably prudent investor would want to be informed. It is expected that, in the vast majority of instances of such reports, the situation will be addressed and remedied before it causes significant harm to investors.

In addition to these requirements, the rule would authorize a covered attorney to reveal to the Commission confidences or secrets relating to the attorney's representation of an issuer before the Commission to the extent the attorney reasonably believes it necessary to: (i) prevent the issuer from committing a material violation likely to cause substantial harm to the financial interest or property of the issuer or investors; (ii) prevent the issuer from perpetrating a fraud upon the Commission; or (iii) rectify the consequences of the issuer's illegal act that the attorney's services had furthered.

A. Benefits

Part 205 is designed to protect investors and increase their confidence in public companies by ensuring that attorneys who represent issuers report up the corporate ladder evidence of material violations by their officers and employees. The Commission recognizes that some attorneys may already follow up-the-ladder reporting procedures, especially where the conduct at issue is directly related to the matter on which the attorney represents the issuer, but believes it will prove beneficial if all attorneys who appear and practice before the Commission comply with this requirement.

Part 205 should protect investors by helping to prevent instances of significant corporate misconduct and fraud. The rule requires that attorneys report up-the-ladder when they become aware of evidence of a material violation. Although many attorneys already do this, some may not, especially if the violation is unrelated to the purpose for which they were retained. The rule gives issuers the option of forming a QLCC, consisting of at least one member of the issuer's audit committee and two or more independent directors, which would investigate reports of material violations and would be authorized to recommend that the issuer adopt appropriate remedial measures. The Commission believes that these requirements will make it more likely that companies will address instances of misconduct internally, and act to remedy violations at earlier stages.

Part 205 is intended to increase investor confidence. By requiring attorneys to report potential misconduct up-the-ladder within a corporation, the rule provides a measure of comfort to

investors that evidence of fraud will be known and evaluated by the top authorities in a corporation, including its board of directors, and not dismissed by lower-level employees. Furthermore, investors will know that a company that forms a QLCC will have reports of misconduct evaluated by at least one member of the company's audit committee as well as two or more of its independent directors. Investors will also know that if an issuer fails to implement a recommendation that the QLCC has recommended, the QLCC, after a majority vote, may notify the Commission.

Part 205 should serve to deter corporate misconduct and fraud. Corporate wrongdoers at the lower or middle levels of the corporate hierarchy will be aware that an attorney who becomes aware of their misconduct is obligated under the rule to report it up-the-ladder to the highest levels of the corporation. In the event that wrongdoing or fraud exists at the highest levels of a corporation, those committing the misconduct will similarly know that the corporation's attorneys are obligated to report any misconduct of which they become aware up-the-ladder to the corporation's board and its independent directors.

Part 205 may improve the governance of corporations that are subject to the rule. By mandating up-the-ladder reporting of violations, the rule helps to ensure that evidence of material violations will be addressed and remedied within the corporation, rather than misdirected or "swept under the rug." The formation of QLCCs may also serve to improve corporate governance. The Commission believes that some issuers will choose to adopt QLCCs, and that they may prove to be a recognized and effective means of reviewing reported evidence of material violations. Because a QLCC must consist of at least two independent directors (as well as one member of the corporation's audit committee), it will give greater authority to independent directors. This should serve as an important check on corporate management.

Part 205 will give attorneys who appear and practice before the Commission guidance and clarity regarding their ethical obligations when confronted with evidence of wrongdoing by their clients. Part 205 requires that attorneys report up-the-ladder when they become aware of potential material violations and thus complies with an express Congressional directive to set minimum standards of professional conduct for attorneys who appear and practice before it. These benefits are difficult to quantify.

B. Costs

Part 205 will impose costs on issuers and law firms representing them. For issuers, the rule will require the chief legal officer of an issuer to investigate and, where necessary, cause remedial actions and/or sanctions to be taken and/or imposed. It also will cause the CEO, QLCC, and board of directors of the issuer to review evidence of material violations. We believe that most issuers already have procedures for reviewing evidence of misconduct. Similarly, we expect that most issuers already incur costs with investigating such reports.

Those companies that choose to form a QLCC to implement this provision will incur costs. These costs might include increased compensation and insurance for QLCC members, and administrative costs to establish the committee. Additionally, for purposes of the PRA, we assume that 20% of issuers will form such a committee and incur an annualized paperwork cost

of two hours for a total annual burden of 7,280 hours. Assuming outside counsel accounts for half of these hours at a cost of $300 per hour,137 and inside counsel accounts for the other half at $110 per hour,138 this would result in a cost of $1,492,400.

For lawyers, the rule could have an effect upon malpractice insurance premiums, which could, in turn, increase the cost of attorney services to issuers. The Commission received three comments suggesting that the rule, and particularly the provisions requiring mandatory withdrawal and reporting to the Commission, would lead to an increase in the number of malpractice suits brought against attorneys.139 One of these comments, from an insurance carrier, indicated that the rule could cause malpractice insurance premiums for attorneys to rise by 10% to 50%.140 The Commission has made a number of changes to the rule in light of these comments. The Commission has clarified and made explicit in Section 205.7 that no private right of action exists based on compliance or non-compliance with the rule. In addition, the Commission has made it clear in Section 205.6(c) that an attorney who complies in good faith with the rule will not be subject to discipline or otherwise liable under an inconsistent state standard. Moreover, the rule, as adopted, will not require attorneys to withdraw or report to the Commission, but will only require reporting to the Commission in the very limited circumstances occurring when a majority of a QLCC determines that an issuer has failed to take remedial action that was directed by the QLCC. Accordingly, the Commission believes that the rule will not have as great an effect on malpractice insurance premiums as suggested by commenters in response to the proposed rule.

Part 205 may also encourage some issuers to handle more legal matters in-house and may cause other issuers to limit the use of in-house counsel and rely more heavily on outside counsel, possibly increasing the cost of legal services. The Commission received one comment indicating that issuers would refer more matters to in-house counsel141 and four comments indicating that the rule would result in more matters referred to outside counsel.142 None of the commenters attempted to quantify the costs associated with these shifts. To the extent that the rule, as originally proposed, provided some perceived incentives to transfer functions to or from outside counsel, principally because of the "noisy withdrawal" requirements, we believe that those perceived incentives are not present in the rule as adopted.

There may also be some additional costs of the rule imposed on the market that are exceedingly difficult to predict or quantify. The Commission received comments indicating that the rule, and particularly the proposal regarding "noisy withdrawal," would cause issuers to be less willing to seek legal advice and would result in issuers being less forthcoming with their counsel.143 However, no commenters presented data or attempted to quantify any costs associated with this effect. The Commission also received comments indicating that the rule would not cause any decrease in attorney-client communication.144 Since the rule, as adopted, will not require mandatory withdrawal or disclosure to the Commission, we believe that Part 205 will not have any adverse impact on attorney-client communications.

V. Effect on Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act (15 U.S.C. 78w(a)(2)) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b) of the Securities Act (15 U.S.C. 77b(b)), Section 3(f) of the Exchange Act (15 U.S.C. 78c(f)), and Section 2(c) of the Investment Company Act (15 U.S.C. 80a-2(c)), require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

Part 205 is intended to ensure that attorneys representing issuers before the Commission are governed by standards of conduct that increase disclosure of potential impropriety within an issuer so that prompt intervention and remediation can take place. Doing so should boost investor confidence in the financial markets. We anticipate that this rule will enhance the proper functioning of the capital markets and promote efficiency by reducing the likelihood that illegal behavior would remain undetected and unremedied for long periods of time. Part 205 will apply to all issuers and attorneys appearing before the Commission and is therefore unlikely to affect competition.

The Commission invited comment on this analysis, and received one comment on it.145 The commenter suggested that the rule could result in a large quantity of information being sent to a CLO or QLCC, which would be expensive and unwieldy to process, and would thus conflict with the goal of promoting efficiency, competition and capital formation. The Commission believes that Part 205 is consistent with the statutory goals and will substantially assist in attaining them by preventing corporate misconduct, restoring investor confidence and lowering the cost of capital.

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601. An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with 5 U.S.C. 603 and was made available to the public.

A. Need for the Rule

Part 205 complies with Section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7245), which requires the Commission to prescribe "minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers . . . ." The standards must include a rule "requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof" to the CLO or the CEO of the company (or the equivalent thereof); and, if they do

not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors.

B. Significant Issues Raised by Public Comment

The Commission received no comments in response to the IRFA.

C. Small Entities Subject to Part 205

Part 205 would affect issuers and law firms that are small entities. Exchange Act Rule 0-10(a) (17 CFR 240.0-10(a)) defines an issuer, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. As of October 23, 2002, we estimated that there were approximately 2,500 issuers, other than investment companies, that may be considered small entities. For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.146 We estimate that there are 211 small investment companies that would be subject to the rule. The revisions would apply to any small entity that is subject to Exchange Act reporting requirements.

Part 205 also would affect law firms that are small entities. The Small Business Administration has defined small business for purposes of "offices of lawyers" as those with under $6 million in annual revenue.147 Because we do not directly regulate law firms appearing before the Commission, we do not have data to estimate the number of small law firms that practice before the Commission or, of those, how many have revenue of less than $6 million. We sought comment on the number of small law firms affected by the rules, but received none.

D. Reporting, Recordkeeping and Other Compliance Requirements

Paragraph 205.3(b) prescribes the duty of an attorney who appears or practices before the Commission in the representation of an issuer to report evidence of a material violation that has occurred, is ongoing, or is about to occur. The attorney is initially directed to make this report to the issuer's CLO, or to the issuer's CLO and CEO.

When presented with a report of a possible material violation, the rule obligates the issuer's CLO to conduct a reasonable inquiry to determine whether the reported material violation has occurred, is occurring or may occur. A CLO who reasonably concludes that there has been no material violation must advise the reporting attorney of this conclusion. A CLO who concludes that a material violation has occurred, is occurring or is about to occur must take reasonable steps to ensure that the issuer adopts appropriate remedial measures and/or sanctions, including appropriate disclosures. Furthermore, the CLO is required to report up-the-ladder within the issuer and to the reporting attorney what remedial measures have been adopted.

A reporting attorney who receives an appropriate response within a reasonable time has satisfied all obligations under the rule. In the event a reporting attorney does not receive an appropriate response within a reasonable time, he or she must report the evidence of a material violation to the issuer's audit committee, to another committee of independent directors if the issuer has no audit committee, or to the full board if the issuer has no such committee. Similarly, if the attorney reasonably believes that it would be futile to report evidence of a material violation to the CLO and CEO, the attorney may report directly to the issuer's audit committee, another committee of independent directors, or to the full board.

Alternatively, pursuant to paragraph 205.3(c), issuers may (but are not required to) establish a QLCC, consisting of at least one member of the issuer's audit committee and two or more independent members of the issuer's board, for the purpose of investigating reports of material violations made by attorneys. Such a QLCC would be authorized to recommend to the issuer that it adopt appropriate remedial measures to prevent ongoing or alleviate past material violations, and empowered to notify the Commission of the material violation if the QLCC decides, by a majority vote, that the issuer has failed to take any remedial measure that the QLCC has directed the issuer to take. The QLCC would be required to notify the board of the results of any inquiry. An attorney other than a CLO may satisfy entirely his or her reporting obligations under the rule by reporting evidence of a material violation to a QLCC. Further, a CLO to whom a report of a material violation has been made may refer the matter to a QLCC.

Paragraph 205.3(d) sets forth the specific circumstances under which an attorney is authorized to disclose confidential information related to his or her appearance and practice before the Commission in the representation of an issuer. Pursuant to this provision, an attorney may use any contemporaneous records he or she creates to defend against charges of attorney misconduct. Paragraph 205.3(d)(2) also allows an attorney to reveal confidential information to the extent necessary to prevent the commission of a material violation that the attorney reasonably believes will result either in perpetration of a fraud upon the Commission or in substantial injury to the financial or property interests of the issuer or investors. Similarly, the attorney may disclose confidential information to rectify an issuer's material violations when such actions have been advanced by the issuer's use of the attorney's services.

We expect that the various reporting requirements required by Part 205 would, at least to a limited extent, increase costs incurred by both small issuers and law firms. We believe that many of these reports are, however, already being made by those affected by the rule. We are unable to estimate the frequency with which reports would have to be prepared by small entities. The time required for the actual preparation of a report would vary, but should not be extensive. Small issuers and law firms may bolster, and in some instances institute, internal procedures to ensure compliance - although the rule does not dictate how these procedures should be implemented.

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the rule, we considered the following alternatives: (a) the establishment of differing compliance or reporting requirements that take into account the

resources available to small entities; (b) the clarification, consolidation, or simplification of the reporting requirements for small entities; (c) an exemption from coverage of the requirements, or any part thereof, for small entities; and (d) the use of performance rather than design standards. As discussed above, the Sarbanes-Oxley Act directs the Commission to implement rules requiring up-the-ladder reporting. The Act does not contain any exemption or other limitation for small entities. Small business issuers may have some difficulty staffing a QLCC, as we presume that they may have fewer independent directors. We note that issuers are not required to have a QLCC under the rule.

The rule uses some performance standards and some design standards. While the rule establishes a framework for reporting evidence of material violations up-the-ladder, it does not set specific standards for how to comply with the rule's requirements. For the most part, rather than requiring reports to contain specific, detailed disclosures, the rule prescribes general requirements for reporting. This should give small entities flexibility in complying with the rule.

By permitting issuers to establish QLCCs as an alternative mechanism for attorneys to report evidence of misconduct or fraud, the rule presents a performance standard (as opposed to a design standard). A performance standard is characterized by the provision for alternative means of fulfilling the regulatory standard. It has the advantage of permitting market participants to choose the method of meeting the standard that presents the least cost to them. The provision of alternative reporting mechanisms within this rule should serve to lower overall costs to issuers attributable to the rule in precisely this manner.

We believe that utilizing different reporting or other compliance requirements for small entities would undermine the effective functioning of the reporting regime. The rule is designed to restore investor confidence in the reliability of the financial statements of the companies they invest in -- if small entities were not subject to such requirements, investors might be less inclined to invest in their securities. Further, we see no valid justification for imposing different standards of conduct upon small law firms than would apply to others who choose to appear and practice before the Commission. We also believe that the reporting requirements will be at least as well understood by small entities as would be any alternate formulation we might formulate to apply to them. Therefore, it does not seem necessary or appropriate to develop separate requirements for small entities.

VII. Statutory Authority

The Commission is adding a new Part 205 to Title 17, Chapter II, of the Code of Federal Regulations under the authority in Sections 3, 307, and 404 of the Sarbanes-Oxley Act of 2002,148 Section 19 of the Securities Act of 1933,149 Sections 3(b), 4C, 13, and 23 of the Securities Exchange Act of 1934,150 Sections 38 and 39 of the Investment Company Act of 1940,151 and Section 211 of the Investment Advisers Act of 1940.152

Text of Rule

List of Subjects in 17 CFR Part 205

Standards of conduct for attorneys.

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II, of the Code of Federal Regulations by adding Part 205 to read as follows:

PART 205 - STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.

205.1 Purpose and scope.

205.2 Definitions.

205.3 Issuer as client.

205.4 Responsibilities of supervisory attorneys.

205.5 Responsibilities of a subordinate attorney.

205.6 Sanctions and discipline.

205.7 No private right of action.

Authority: 15 U.S.C. 77s, 78d-3, 78w, 80a-37, 80a-38, 80b-11, 7202, 7245, and 7262.

§205.1 Purpose and scope.

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

§205.2 Definitions.

For purposes of this part, the following definitions apply:

(a) Appearing and practicing before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications 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 of 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, opinion, or other writing is required under the United States securities laws or the Commission's rules 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

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(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.

(b) Appropriate response means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

(3) 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) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) Attorney means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) Breach of fiduciary duty refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable federal or state statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(f) Foreign government issuer means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a et seq., Schedule B).

(g) In the representation of an issuer means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) Issuer means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) Material violation means a material 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 United States federal or state law.

(j) Non-appearing foreign attorney means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) Qualified legal compliance committee means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists 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, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under §205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in §205.3(b)(4));

(ii) 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:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(l) Reasonable or reasonably denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

§205.3 Issuer as client.

(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) Duty to report evidence of a material violation. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall 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. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's 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" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee 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" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under §205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) Issuer confidences. (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent 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;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) 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.

§205.4 Responsibilities of supervisory attorneys.

(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.

(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.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under §205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

§205.5 Responsibilities of a subordinate attorney.

(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 supervising 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 the 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.

§205.6 Sanctions and discipline.

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

§205.7 No private right of action.

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

By the Commission.

Jill M. Peterson
Assistant Secretary

Date: January 29, 2003

Endnotes

1 Section 307 of the Sarbanes-Oxley Act of 2002 (the "Act") (15 U.S.C. 7245) mandates that the Commission:

shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule --

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

2 President Bush signed the Act on July 30, 2002.

3 *See* Release 33-8150 (Nov. 21, 2002), 67 FR 71669 (Dec. 2, 2002).

4 67 FR 71670, 71697 (Dec. 2, 2002).

5 *See* Comments of the Association of the Bar of the City of New York, at 28 ("There is nothing in Section 307 to suggest that Congress authorized the Commission to preempt state law and rules governing attorney conduct."); *see also* Comments of the American Bar Association, at 32; Comments of 77 law firms, at 2. While questioning the Commission's authority in this area, the American Bar Association ("ABA") nevertheless recognized that "the federal system of the United States may provide an arguable basis for the pre-emption of attorney-client and confidentiality obligations applicable to United States attorneys." *See* Comments of the American Bar Association, at 37.

6 *See* Comments of Susan P. Koniak *et al.*, at 28-29.

7 *See, e.g.*, Comments of Susan P. Koniak *et al.*, at 32; Comments of Richard W. Painter, at 8; Comments of Nancy J. Moore, at 3.
8 *See* Comments of the American Bar Association, at 12.
9 *Id.*; *see also* Comments of Sullivan & Cromwell, at 12-14; Comments of 77 law firms, at 7 (arguing that the scope of the definition of the term may incite efforts by attorneys to limit their involvement in certain matters in an effort to avoid coming within the purview of the rule).
10 *See* Comments of Susan P. Koniak *et al.*, at 33.
11 Comments of Thomas D. Morgan, at 5-6; Comments of Morrison & Foerster and eight other law firms, at 14 (paragraph 205.2(b) should be revised to read that in all situations it would be an appropriate response for an issuer to assert a colorable defense to any claim of material violation).
12 Comments of Palmer & Dodge, Attachment at 2 ("The Model Rules state that 'reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Model Rule 1.0(i)). "Reasonable" and "reasonably," in turn, are defined as "denot[ing] the conduct of a reasonably prudent and competent lawyer." Model Rule 1.0(h). Along similar lines, one group of commenters suggested that the paragraph include language paralleling the Model Rule definition, setting as the standard the conclusion of "a prudent and competent attorney, acting reasonably under the same circumstances" that a response was appropriate. Comments of Susan P. Koniak *et al.*, at 12-13, 15; *see also* Comments of the SIA/TBMA, at 18 (urging that the Commission modify this paragraph to protect an attorney whose judgment that an issuer's response was appropriate was "reasonable under the circumstances").
13 Comments of the American Corporate Counsel Association, at 10. This concern was also expressed by commenters who asserted that foreign lawyers, in particular, would not have sufficient practical knowledge of United States laws to determine what constitutes an appropriate response. *See, e.g.*, Comments of Nagashima Ohno & Tsunematsu, at 7; Comments of the SIA/TBMA, at 13 (reporting attorney's judgment should be evaluated in light of that attorney's training, experience and position).
14 Comments of Covington & Burling, at 3.
15 Comments of Susan P. Koniak *et al.*, at 12-13.
16 Comments of Covington & Burling, at 3.
17 Comments of Richard Hall, Cravath Swaine & Moore, at 6-7; Comments of the Association of the Bar of the City of New York, at 12; Comments of Carter, Ledyard & Milburn, at 3 (stating that requiring an attorney, in deciding whether an issuer has made an appropriate response, to determine whether a material violation is about to occur, is an "impossibly predictive standard"); Comments of the Japan Federation of Bar Associations, at 3 (opining that the term "appropriate response" cannot be easily construed on its face).
18 Comments of the SIA/TBMA, at 18; Comments of the Association of the Bar of the City of New York, at 12 ("[o]nce an attorney has reported and documented a possible violation, the attorney should be assured that good faith reliance upon the response protects the attorney).
19 Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 14; Comments of the American Bar Association, at 22 ("[w]e believe it is important that the Commission recognize that a reporting attorney may rely on the considered judgment of the CLO so long as that judgment is in the range of reasonableness even though the attorney would not necessarily come out that way"); Comments of Skadden, Arps, Slate, Meagher & Flom, at 9-10 (reporting attorney should be able to rely upon the stated belief of the

officer to whom he has reported the evidence of material violation that no material violation has occurred).
20 Comments of JP Morgan & Chase, at 10-11; Comments of Debevoise & Plimpton, at 5.
21 Comments of JP Morgan & Chase, at 11; Comments of Debevoise & Plimpton, at 5-6.
22 Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 14.
23 Comments of Carter, Ledyard & Milburn, at 3; Comments of Skadden, Arps, Slate, Meagher & Flom, at 9-10 (appropriate response should include a timely response that adequate measures are being taken).
24 Comments of Susan P. Koniak *et al.*, at 13; Comments of Schiff Hardin & Waite, at 4-5 (criticizing the examples in the release of the proposed rule as undercutting the proposition that attorneys will be permitted to exercise their reasonable judgment, and stating that the Commission should clarify that the reasonableness of an issuer's response will vary depending on the circumstances and will not necessarily depend on the existence of a written legal opinion from outside counsel to the issuer); Comments of the SIA/TBMA, at 18 (suggesting revisions to Section 205.2(b) that would state that an appropriate response should be reasonable under the circumstances, measured by the magnitude and quality of the evidence of the violation, the severity of the violation, and whether there is a potential for ongoing or recurring violation).
25 Comments of Susan P. Koniak *et al.*, at 12.
26 Comments of the SIA/TBMA, at 11 (stating that the Rules "should exempt outside counsel whom securities firms retain to conduct internal investigations").
27 Comments of Carter, Ledyard & Milburn, at 6 (noting risk that proposed rules "might discourage persons from seeking legal representation"); Comments of the SIA/TBMA, at 11.
28 Comments of Weil Gotshal & Manges, at 7.
29 Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 4; Comments of the American Bar Association, at 30.
30 67 FR at 71683.
31 Comments of Akin Gump Strauss Hauer & Feld, at 7-8; Comments of Cleary, Gottlieb, Steen & Hamilton, at 9 ("There would be an unavoidable chilling effect on the advocacy of lawyers who represent clients before the Commission in investigations and administrative proceedings if Rule 205 applies to them."); Comments of the Association of the Bar of the City of New York, at 19-20 (stating that it would be "unfair[] to include attorneys who are adverse parties in enforcement or administrative proceedings within the reporting and withdrawal requirements of the proposed rules"); Comments of Susan P. Koniak *et al.*, at 36 (final rules should "avoid chilling legitimate and vigorous advocacy").
32 Comments of Richard Hall, Cravath, Swaine & Moore, at 3.
33 Comments of Morrison & Foerster and eight other law firms, at 14.
34 Comments of Securities Regulation Committee, Business Law Section, New York State Bar Association, at 6 (stating that "a lawyer need not subjectively believe that he or she has the 'better side of the argument' or that it is a position likely to prevail. The attorney is permitted to undertake the representation if he or she, after a reasonable investigation, believes that there is (or will be) evidentiary support for the position and that the assertions of law are nonfrivolous. *See, e.g.*, Rule 11, Fed. R. Civ. P."). *See also* Comments of Cleary, Gottlieb, Steen & Hamilton, at 9 ("Lawyers representing clients before the Commission must be free to make all non-frivolous arguments to the staff.").

35 Comments of Susan P. Koniak, *et al.*, at 37.
36 The text of the final rule does not specifically include a reference to a "colorable basis for contending that the staff [or other litigant] should not prevail," nor does it specifically refer to requiring the Commission staff or other litigant to bear the burden of its case. The Commission, however, considers these and related actions permitted to an attorney, consistent with his or her professional obligations, to be included within the reference to asserting a "colorable defense."
37 Subparagraph (b)(3) thereby also addresses the concern of some commenters that an attorney representing an issuer in connection with a Commission investigation or administrative proceeding not be required to report the information. Under subparagraph (b)(3), asserting a colorable defense on an issuer's behalf in an investigation or administrative proceeding may constitute an appropriate response, and no further reporting would be required.
38 67 FR at 71673.
39 *See, e.g.*, Comments of Skadden, Arps, Slate, Meagher and Flom, at 16 (noting that foreign private issuers usually consult with United States counsel on securities matters, and suggesting that limiting the definition of "attorney" to lawyers licensed in United States jurisdictions "will avoid the unfairness of subjecting foreign lawyers to the Proposed Rules without compromising the effectiveness of the rules.").
40 *See* Comments of Richard W. Painter, at 10-11 ("Breaches of fiduciary duty to pension funds under federal law such as ERISA, and other similar violations would thus clearly be covered, whereas arguably they are not under the current definition in the Proposed Rules.").
41 The proposed rule defines *evidence of a material violation* as "information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur" and *reasonable belief* as what "an attorney, acting reasonably, would believe."
42 *E.g.*, Comments of John Bullock, at 1 ("the threshold for mandatory reporting by an attorney should be the level of evidence that a responsible corporate officer should want to know, so that the client can pursue an investigation and take appropriate action. The standard should therefore be 'some credible information that a material violation may have occurred, may be occurring, or may be about to occur.'").
43 Comments of Richard W. Painter, at 6 (suggesting that "evidence that a violation is `possible' could trigger the duty to report to the Chief Legal Officer, whereas evidence that a violation is `likely' could trigger the duty to report to the full board or to the QLCC. Evidence that a violation was `highly likely' or a `near certainty' could trigger the requirement of a noisy withdrawal."); Comments of Susan P. Koniak *et al.*, at 9-11, 15-17 (emphasizing the importance of distinguishing between a violation and evidence of one and suggesting the use of the phrase "credible evidence").
44 Comments of Skadden Arps, Slate, Meagher & Flom, at 10 (proposing to define "*evidence of a material violation*" as "facts and circumstances known to an attorney which have caused the attorney to believe that a material violation has occurred, is occurring or is about to occur"); Comments of Chadbourne & Parke, at 7 (proposing "a subjective standard that an attorney 'knows' that a material violation has occurred, is occurring or is about to occur"); Comments of Sullivan & Cromwell, at 11 ("Evidence of a material violation means information of which the attorney is consciously aware that would, in the attorney's judgment, constitute a material violation that has occurred, is occurring, or is about to occur."); Comments of the American Bar Association, at 17 (recommending use of "the knowledge standard").
45 *See* Comments of Susan P. Koniak *et al.*, at 18.

46 Comments of Richard W. Painter, at 5-6.
47 Comments of the Association of the Bar of the City of New York, at 10.
48 The standard was suggested, *e.g.*, in Comments of the American Bar Association, at 5, 16-17.
49 Comments of Cleary, Gottlieb, Steen & Hamilton, at 5-6 (any lower trigger for reporting would be equivocal, would lead to disparate application of the rule, and would "chill" the attorney-client relationship).
50 The Commission intends the definition of the term "reasonably likely" to be consistent with the discussion of the term included in the adopting release for the recently adopted final rule governing disclosure of off-balance sheet arrangements, enacted pursuant to §401(a) of the Sarbanes-Oxley Act.
51 Comments of the American Bar Association, at 14 ("It is not uncommon for persons who were attorneys and may still retain their license to move into other non-legal capacities in the organization. . . .These persons should be subject to no greater obligations to the organization than someone who is not an attorney."). However, the ABA stated that it believed that the rule "appropriately applied to any attorney for the issuer" who renders legal advice to the issuer. *Id.*
52 We also note that the change should address concerns expressed that counsel to underwriters or similar persons might be covered by the rule.
53 67 FR at 71678-79.
54 *See, e.g.*, Comments of the Investment Company Institute at 1-5 (asserting that the Commission's construction of its rule may cause investment advisers to "limit or even eliminate the participation of their internal and outside lawyers in the preparation of fund filings and materials, and in providing day-to-day advice to advisory personnel responsible for managing funds, in order to ensure that such lawyers are not `involved in the representation of an issuer' or `practicing before the Commission' within the meaning of the proposed rule.").
55 On the correctness of this inference, *see, e.g.*, Comments of Thomas D. Morgan at 3-4 (pointing out that "current law" makes an attorney employed by an investment adviser the "legal representative" of an investment company under these circumstances, although one has to take "a logical step" to reach that conclusion) (citing *Restatement (Third) of the Law Governing Lawyers* § 51(4)(2000)). An attorney-client relationship does not depend on payment for legal services performed. However, the legal services provided by an investment adviser to an investment company are usually performed pursuant to an advisory contract along with other services (such as investment advice) and are covered by the overall investment advisory fee.
56 Comments of the Investment Company Institute, at 4. As noted in the proposing release, 67 FR at 71678-79, and below in the discussion of Section 205.3(b), an attorney employed by an investment adviser who becomes aware of evidence of a material violation that is material to an investment company while thus representing that investment company before the Commission has a duty to report such evidence up-the-ladder within the investment company. For the reasons explained in the proposing release and noted below, however, such reporting does no violence to the attorney-client privilege. *See Restatement (Third) of the Law Governing Lawyers*, § 75 and cmt. d (explaining that in a subsequent proceeding in which the co-client's interests are adverse there is normally no attorney-client privilege regarding either co-client's communications with their attorney during the co-client relationship).
57 We also note that the changes should address concerns expressed that counsel to underwriters or similar persons might be covered by the rule.
58 An attorney who represents a subsidiary or other person controlled by an issuer at the behest, for the benefit, or on behalf of a parent issuer who becomes aware of evidence of a material

violation that is material to the issuer should report the evidence up-the-ladder through the issuer, as set forth in Section 205.3(b) of the rule.

59 *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231-36 (1988); *TSC Indus. v. Northway, Inc*, 426 U.S. 438 (1976).

60 Comments of the American Corporate Counsel Association, at 9-10; Comments of Association of the Bar of the City of New York, at 42; Comments of Corporations Committee, Business Law Section, State Bar of California, at 12; Comments of Skadden, Arps, Slate, Meagher & Flom, at 12, 20, 25.

61 *See* Comments of America's Community Bankers, at 5-6.

62 Comments of Business Law Section, New York State Bar Association, at 14-15; Comments of the Business Roundtable, at 2-3.

63 Comments of the American Bar Association, at 27; Comments of Business Law Section, New York State Bar Association, at 15.

64 Comments of Clifford Chance, at 4-5; Comments of Emerson Electric Co., at 5.

65 Comments of Susan P. Koniak *et al.*, at 11; Comments of Richard W. Painter, at 5; Comments of Thomas D. Morgan, at 12.

66 *See* ABA Model Rule 1.13, "Organization as Client," at 1:139.

67 *See, e.g.*, Comments of Cleary, Gottlieb, Steen & Hamilton, at 3-4; Comments of Corporations Committee, Business Law Section, The State Bar of California, at 7; Comments of the American Corporate Counsel Association, at 11; Comments of Task Force on Corporate Responsibility of the County of New York Lawyers' Association, at 2-3.

68 *See* Comments of the Association of the Bar of the City of New York, at 47-50.

69 *See* ABA Model Rule 1.13, at 1:139.

70 Decisions in a number of states recognize that, under state law, an attorney for an issuer does not owe a fiduciary duty to shareholders. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1491-92 n.60 (11th Cir.) *cert. denied*, 502 U.S. 955 (1991) (Under Georgia law "[I]t is a black letter principle of corporation law that a corporation's counsel does not owe . . . [a] fiduciary duty to the corporation's shareholders"). *See also Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 703 (1991) (Under California law, "[a]n attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation."); *Egan v. McNamara*, 467 A.2d 733, 738 (DC 1983) ("According to the District of Columbia Code of Professional Responsibility (Code), an attorney represents, and therefore owes a duty to, the entity that retains him. . . . When retained to represent a corporation, he represents the entity, not its individual shareholders, officers, or directors.").

71 The Comment of Federal Bar Counsel, at 12-13, for example, objected to "becomes aware" in (b)(1) but appears to have done so in connection with the proposed definition of "evidence of a material violation." The revisions made to that definition appear to address those objections.

72 *See, e.g.*, Comments of the American Bar Association, at 22; Comments of the American Corporate Counsel Association, at 5; Comments of the Association of the Bar of the City of New York, at 16; Comments of Cleary, Gottlieb, Steen & Hamilton, at 6.

73 Comments of Skadden, Arps, Slater, Meagher & Flom, at 23.

74 Comments of Corporations Committee, Business Law Section, the State Bar of California, at 10.

75 *Id*.

76 Comments of the American Corporate Counsel Association, at 5.
77 *See* Comments of Corporations Committee, Business Law Section, the State Bar of California, at 10.
78 *See* Comments of Cleary, Gottlieb, Steen & Hamilton, at 6.
79 *E.g.*, Comments of the SIA/TBMA, at 16 (CLO should be able to make use of the QLCC); Comments of J.P. Morgan Chase & Co., at 3 (CLO should not be required to notify the Commission that a material violation has occurred and disaffirm documents that the issuer has submitted to or filed with the Commission that the CLO believes are false or materially misleading); Comments of Compass Bancshares, at 2-3 (requiring CLO "to issue a response in writing to the attorney creates an undue burden on the CLO [in] responding to an issue which the CLO may not feel is warranted"); Comments of Charles Schwab & Co., at 1-2 (CLO "typically does not have authority to sanction employees outside of his or her chain of command, to require the business units to adopt new procedures, or even to make disclosure on behalf of the company without the concurrence of other executives").
80 67 FR at 71685-86.
81 67 FR at 71686.
82 67 FR at 71686.
83 *See* Comments of Schiff Hardin & Waite, at 4 (paragraph (b)(5) as proposed goes "too far" in deeming a lawyer engaged by an issuer to conduct an internal investigation of a possible material violation of the securities laws to be appearing and practicing before the Commission and that issuers will be reluctant to retain independent counsel to investigate if the independent counsel have "an obligation to effect a noisy withdrawal if they disagree with the client's response to the finding or recommendation resulting from the investigation"); Comments of the Chicago Bar Association, at 3 (paragraph as proposed is overbroad in requiring an outside lawyer engaged to investigate whether a violation has occurred to withdraw and notify the Commission if it disagrees with the issuer); Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 4-5 ("attorneys conducting an internal investigation, and not otherwise interacting with the Commission or even known to the Commission at that point, do not have a sufficient nexus with the Commission's processes" to be covered by the Commission's rules; making them subject to the Commission's rules will "make issuers less willing to retain, and attorneys less willing to conduct, such investigations"; and is unnecessary because section 205.3(b)(2) requires an issuer's CLO "to assess the timeliness and appropriateness of the issuer's response").
84 67 FR at 71687.
85 Comments of the American Bar Association, at 27-28.
86 Comments of the American Corporate Counsel Association, at 9-10.
87 Comments of Richard W. Painter, at 5.
88 Comments of Edward C. Brewer III, at 4.
89 Comments of the Association of the Bar of the City of New York, at 41-42.
90 *Id.*, at 42-43.
91 ABA, *Report of the Commission on Evaluation of the Rules of Professional Conduct* (November 2000), recommended permitting a lawyer to disclose confidential "information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . 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."

92 Thirty-seven states permit an attorney to reveal confidential client information in order to prevent the client from committing criminal fraud. *See Restatement (Third) of the Law Governing Lawyers* (2000) ' 67, Cmt. f, and Thomas D. Morgan & Ronald D. Rotunda, *Model Code of Professional Responsibility, Model Rules of Professional Conduct, and Other Selected Standards*, at 146 (reproducing the table prepared by the Attorneys' Liability Assurance Society ("ALAS") cited in the Restatement). The ABA's Model Rule 1.6, which *prohibits* disclosure of confidential client information even to prevent a criminal fraud, is a minority rule. In its *Carter and Johnson* decision (1981 WL 384414, at n.78), the Commission expressly did not address an attorney's obligation to disclose a client's intention to commit fraud or an illegal act.
93 *See* comments of Joseph T. McLaughlin, Heller Ehrman, at 2; Comments of the Los Angeles County Bar Association, at 2.
94 Comments of Eleven Persons or Law Firms, at 8-9; Comments of the American Bar Association, at 33 (urging the Commission to refrain from considering the proposed disclosure provisions unless and until it receives express Congressional authority to preempt state privilege rules); Comments of 77 law firms, at 2; Comments of Latham & Watkins, at 5-6; Comments of Theodore Sonde, at 2; Comments of Schiff Hardin & Waite, at 7-8; Comments of Sheldon M. Jaffe, at 7-9; Comments of Emerson Electric, at 2; Comments of the Federal Bar Council, at 9-10 & n.9; Comments of JP Morgan & Chase, at 11 & n.3 (citing treatise for proposition that only six states permit disclosure to rectify past fraud).
95 Comments of the Law Society of England and Wales, at 12.
96 Comments of the Los Angeles County Bar Association, at 2; Comments of Edward C. Brewer, III at 8; *see also* Comments of the Association of the Bar of the City of New York at 5 (supporting attorney disclosure of materials facts to avoid assisting a criminal or fraudulent act by the client, or to correct prior representations made by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud).
97 Comments of Theodore Sonde, at 2.
98 Comments of the American College of Trial Lawyers, at 6.
99 Comments of Conference of Chief Justices, at 4.
100 Comments of the Federal Bar Council, at 14.
101 Comments of the Law Society of England and Wales, at 12.
102 Comments of Morrison & Foerster and eight other law firms, Exhibit B (listing jurisdictions whose ethics rules permit or require attorneys to disclose clients' past and/or ongoing fraud); Comments of Edward C. Brewer, III, at 8 (the proposed rule for permissive disclosure of an issuer's "illegal act" is essentially no different than the existing Model Code provision).
103 Comments of Richard W. Painter, at 6.
104 Comment of Edward C. Brewer, at 8.
105 Comments of Susan P. Koniak *et al.*, at 26-27; Comments of Nancy J. Moore, at 2-3.
106 Comments of Susan P. Koniak *et al.*, 27, 31-32.
107 Comments of William H. Simon, at 3.
108 *See, e.g.*, Comments of Manning G. Warren III, at 1; Comments of Douglas A. Schafer, Comment of Elaine J. Mittleman at 2; Comments of Thomas Ross *et al.*, at 6-8.
109 Comment of Elaine J. Mittleman at 2.
110 *See* 67 FR at 71693.

111 Comment of the American Corporate Counsel Association, at 7 (noting that permissive disclosure standards are "more in line with a majority of state professional rules of conduct").
112 Specifically, New Jersey requires an attorney to reveal confidential "information relating to the representation of a client to the proper authorities . . . to the extent the lawyer reasonably believes necessary to prevent the client: (1) [f]rom committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interest or property of another" or (2) such an act that "the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal." New Jersey Rule of Professional Conduct 1.6(b). Wisconsin's corresponding rule is virtually identical to New Jersey's, except that it makes no reference to "proper authorities." Wisconsin Supreme Court Rule 20:1.6. Florida requires a lawyer to reveal confidential information "to the extent the lawyer reasonably believes necessary . . . to prevent a client from committing a crime." Florida Rule of Professional Conduct 4-1.6.
113 Comments of Richard W. Painter, at 9 ("the only effective method" of assuring lawyers that the attorney-client privilege is not waived by disclosure to the Commission "is to seek an act of Congress establishing selective waiver and preempting inconsistent state law"); Comments of the American Bar Association, at 32; Comments of Susan P. Koniak *et al.*, at 44.
114 Comments of Sheldon Jaffe, at 10. Fed. R. Evid. 501 provides that "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."
115 Comments of the American Bar Association, at 32 n. 21; Comments of Sheldon M. Jaffe, at 9-11; Comments of Edward C. Brewer, III, at 11; Comments of Latham & Watkins, at 5; Comments of Morrison & Foerster and eight other law firms, at 19.
116 Comments of the American Bar Association, at 32 n. 22; Comments of Morrison & Foerster and eight other law firms, at 19. The Commission notes that the proposal in Congress to which these commenters refer would have applied the selective waiver doctrine to *all* documents produced to the Commission, and was not limited to productions conditioned upon an express confidentiality agreement. *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991). Also, Congress did not reject the Commission's proposal; rather, the House Committee to which the proposal was submitted took no action. *See* SEC Oversight and Technical Amendments: Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 2d Sess 341 at 34, 51 (1984). Therefore, that the proposal before that House Committee in 1984 was not ultimately enacted carries no significance. *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 299 (7th Cir. 1992) ("unsuccessful proposals to amend a law, in the years following passage, carry no significance").
117 Comments of Richard W. Painter, at 9; Comments of Susan P. Koniak *et al.*, at 6; Comments of Latham & Watkins, at 5 ("[g]iven the high stakes associated with waiver of privilege, uncertainty as to interpretation of [Paragraph 205.3(e)(3)'s] requirements in this regard is troubling"); Comments of the SIA/TBMA at 15 ("[a]lthough we welcome this positive statement of Commission policy, given sharp disagreements among courts on the question of selective

waiver, issuers and attorneys cannot be secure in their disclosures absent a statutory statement of express preemption").
118 *See* Comments of the American Bar Association, at 22-23. *See also* Comments of Skadden, Arps, Slate, Meagher & Flom, at 27 (arguing that the section should be eliminated entirely, or, alternatively, "narrowed to apply only to the supervisory attorney within a law firm or a law department who is directly responsible for the supervision of a subordinate attorney in connection with the representation of the issuer in the specific matter, regardless of whether the attorney supervises such subordinate attorney in other unrelated matters.").
119 *See* Comments of Susan P. Koniak *et al.*, at 42.
120 *See* Comments of the American Bar Association, at 22 ("We believe the Commission correctly approaches in Rule 205.5 the treatment of subordinate lawyers who report to a supervisory attorney and in Rule 205.4(c) the shifting of responsibility for compliance to the supervisory attorney to which the matter was reported").
121 *See* Comments of the Association of the Bar of the City of New York, at 43-44.
122 *Id.* at 46-47. *See also* Comments of Morrison & Foerster and eight other law firms, at 21.
123 *See* Comments of Skadden, Arps, Slate, Meagher and Flom, at 29; Comments of the SIA/TBMA, at 16; Comments of the American Bar Association, at 33; Comments of Sullivan & Cromwell, at 16-17.
124 67 FR 71697.
125 67 FR 71691.
126 *See* Comments of Attorney's Liability Assurance Society, Inc., at 20; Comments of the Association of the Bar of the City of New York, at 5.
127 *See* Comments of the American Bar Association, at 33-34; Comments of Morrison & Foerster and eight other law firms, at 21.
128 *Id.* Comments of the American Bar Association, at 33-34.
129 *See, e.g.*, Comments of Skadden Arps Slate Meagher & Flom, at 29; Comments of the SIA/TBMA, at 21; Comments of the Investment Company Institute, at 7.
130 44 U.S.C. 3501 *et seq.*
131 *See* 5 CFR 1320.3(b)(2).
132 This estimate is based, in part, on the total number of operating companies that filed annual reports on Form 10-K (8,484), Form 10-KSB (3,820), Form 20-F (1,194) or Form 40-F (134) during the 2001 fiscal year, and an estimate of the average number of issuers that may have a registration statement filed under the Securities Act pending with the Commission at any time (100). In addition, we estimate that approximately 4,500 investment companies currently file periodic reports on Form N-SAR.
133 Comments of the Mid-America Legal Foundation, at 3-4.
134 Comments of Robert Eli Rosen, at 3.
135 Comments of Clifford Chance, at 4-5; Comments of Emerson Electric Co., at 5.
136 Comments of Susan P. Koniak *et al.*, at 11; Comments of Richard W. Painter, at 5; Comments of Thomas D. Morgan, at 12.
137 Estimate of outside counsel rate was obtained by contacting a number of law firms regularly involved in completing Commission documents. *See* Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release Nos. 33-8138 (Oct. 22, 2002) and 33-8177 at n.69 (Jan. 23, 2003).

138 Estimate of inside counsel rate is derived from the Securities Industry Association "Report on Management & Professional Earnings in the Securities Industry 2002," and represents the SIA value for an Assistant General Counsel in New York City.
139 Comments of Chubb Specialty Insurance, at 2-3; Comments of the American Bar Association, at 26-7; Comments of Attorneys' Liability Assurance Society, Inc., at 8, 11.
140 Comments of Chubb Specialty Insurance, at 5.
141 Comments of Carter, Ledyard & Milburn, at 2.
142 Comments of Committee on Investment Management Regulation, Association of the Bar of the City of New York, at 4; Comments of the American Corporate Counsel Association, at 4-5; Comments of Investment Company Institute, at 4; Comments of Debra M. Brown, at 2.
143 *See, e.g.*, Comments of the American Bar Association, at 26.
144 *See, e.g.*, Comments of Susan P. Koniak *et al.*, at 24.
145 Comments of Los Angeles County Bar Association, at 7-8.
146 17 CFR 270.0-10.
147 13 CFR 121.201.
148 15 U.S.C. 7202, 7245, 7262.
149 15 U.S.C. 77s.
150 15 U.S.C. 78c(b), 78d-3, 78m, 78w.
151 15 U.S.C. 80a-37, 80a-38.
152 15 U.S.C. 80b-11.

http://www.sec.gov/rules/final/33-8185.htm

1025 connecticut avenue, nw
suite 200
washington, dc 20036-5425
p 202.293.4103
f 202.293.4701
www.acca.com

The in-house bar association℠

April 7, 2003

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609
Submitted Electronically: rule-comments@sec.gov

Re: File Number S7-45-02

On behalf of the American Corporate Counsel Association[1] (ACCA), we respectfully respond to the Commission's request to offer both our perspectives regarding the final rule regulating attorney conduct (promulgated under 17 CFR Part 205), as well as the Commission's ongoing and additional proposals regarding noisy withdrawal

[1] The American Corporate Counsel Association ("ACCA") is a bar association for lawyers who are employed by corporations as in-house counsel. With 14,000 individual members in 40 countries, ACCA members represent over 6,500 organizations worldwide. ACCA members' employers include the Fortune 1000, as well as small and mid-sized businesses and non-profits engaged in every conceivable industry. According to ACCA's 2001 census of the in-house legal profession, approximately 40% of in-house lawyers work in law departments of fewer than 5 people; within the ACCA membership, while the largest single segment of our members "by title" is constituted by those who serve as their company's chief legal officer, the majority of our members work in positions that report to the CLO. We have worked carefully to insure that the information and perspectives we bring to the Commission with this submission fairly represent the opinions and concerns of in-house lawyers at all levels of the law department.

and alternative 8-K reporting, all flowing from Section 307 of the Sarbanes-Oxley Act of 2002.[2]

Executive Summary of This Letter's Comments

Noisy withdrawal and alternative 8K reporting proposals:

1. We urge the Commission to forego both the noisy withdrawal and alternative 8-K proposals. These proposals will damage lawyer-client relationships and discourage clients from seeking legal counsel. While no rule can make lawyers more ethical or prevent clients who possess a criminal bent from doing wrong, these proposals may cause currently healthy lawyer-client relationships irreparable harm or discourage clients from consulting either honestly or at all with lawyers. Clients will be wary of welcoming lawyers into their businesses if the lawyer's exposure to almost any "credible" (even if unlikely) allegation could trigger a complicated process of mandated internal investigations leading to a possibly unwarranted report to the Commission. The resulting damage to the lawyer-client relationship (or its elimination) benefits no one – including the corporate entity, the company's stakeholders, or the public – and will likely preclude the very kind of preventive compliance initiatives that the Sarbanes-Oxley Act seeks to advance.

2. Alternatively, if the Commission nonetheless proceeds with either the noisy withdrawal or 8-K proposal, it should consider making them more appropriate and effective. In the case of noisy withdrawal, these amendments should include better defined triggering language, a reassessment of the roles of supervisory, subordinate and reporting attorneys, and safeguards that a company might put in place to protect itself against a lawyer determined to report an unfounded allegation, or blackmail or retaliation against the company or supervisors in the law department. In the case of the alternative 8-K proposals, we request a longer period before required reporting (including a period during which the company could consult offline with the Commission prior to any filing requirements) and the option of obtaining a second opinion from an independent counsel which could obviate the requirement to report at all in the event that the independent second opinion affirms that the allegation is unfounded or does not trigger this rule's application.

Clarifications and reconsiderations to Part 205 as promulgated in the final rule:

[2] ACCA's comments to the Commission on the Commission's initial proposal can be found at ww.sec.gov/rules/proposed/s74502/bnagler1.htm. We reaffirm those salient portions our previous comments regarding noisy withdrawal to avoid repeating them in detail in this letter.

1. The Commission should narrow and clarify the triggers that activate the rule's application: the language in several places is far too broad, confusing in its lack of definition, and places the Commission in the position of regulating attorney behaviors completely unrelated to securities violations. We recognize that much of this language is drawn from Section 307 of the Act, but for an attorney conduct rule to be effective and appropriate in its guidance, lawyers have to be able to understand how to apply the rule. As written, the rule can be triggered by virtually any and all allegations, which is not a proportionate or appropriate guideline to focus lawyers' attention on the most serious matters facing the client. We also request the Commission to additionally clarify some appropriate up-the-ladder reporting issues.

2. The rules regulating reporting and subordinate attorney responsibilities should be revised to provide a clear-cut end to junior attorneys' responsibilities under the rule after they report and receive confirmation of a supervisory attorney's (or CLO's) actions taken in response. Subordinate or reporting attorneys may not be vested with the full knowledge or capacity required to evaluate the supervisory attorney's or CLO's decisions. It is appropriate to focus the rule's attention on the judgment and responsibility of the CLO and other supervisory attorneys in addressing the report, but not to force the subordinate or reporting attorney into a showdown over whose judgment should prevail if a difference of opinion between the CLO and the reporting or subordinate attorney ensues. Of course, ACCA supports the creation of a limited exception to this provision if there is an allegation that the CLO or supervisory attorney is complicit in the alleged fraud or wrongdoing.

3. We propose suggestions to improve the function of the QLCC to promote a more cooperative and less adversarial relationship between the QLCC and the CLO. Additionally, we urge the Commission to drop the requirement that the QLCC pre-exist the onset of a problem that may be reported to it.

I. Introduction / Overview

We compliment the Commission for its careful consideration of the concerns presented to it in the promulgation of the final rule constituting Part 205. We appreciate the Commission's considerable efforts and success in addressing a number of matters raised by the bars and others. The final rule is a far better rule than was the initial proposal. We also appreciate the opportunity to address not only the proposals yet to be decided, but our ongoing concerns in the final rule so that any issues or questions can be resolved before the rule goes into effect in August of 2003. Those concerns that we wish to bring before the Commission on behalf of the in-house bar are offered below.

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Corporate counsel are uniquely positioned to promote their corporate clients' culture of responsibility and compliance initiatives. They are acutely aware of the need for the in-house lawyer to carefully navigate the dual roles of independent professional counselor and member of the executive business team.

This is true for in-house counsel who work in both public and private corporations. While the Commission and these rules focus on certain lawyers working for issuers, lawyers for issuers who are not "appearing and practicing before the Commission," as well as lawyers working in private companies are watching this process and its results very closely. They know that their work is just a short step removed from the work of lawyers governed by these regulations: perhaps their next job will subject them to the Commission's regulation, or maybe they will handle a difficult matter that involves an issuer, exposing them to the application of these rules in a practical setting. They also know that for purposes of future professional rules adopted by the state bars, these rules will likely have an influence in directing the regulation of all lawyers working for any kind of corporate client.

Some suggest that the passage of these rules merely re-codifies already existing regulation common to a majority of states' bars; we do not agree. We believe that the promulgation of these rules represents a significant sea change. Accordingly, we need to examine the Commission's proposals with an equivalent scrutiny on their practical impact. Existing rules regulating lawyer conduct at the state level give the lawyer guidance in the exercise of professional behavior; in addition to removing the discretion exercised by the lawyer in the state rules, the Commission's final and proposed rules move us into new waters by assigning lawyers the professional responsibility for regulating not just their own behavior, but the behavior of their clients.

We believe that lawyers should play the role of learned and ethical counselors who exercise professional discretion and judgment, and that clients are ultimately vested with the power to choose to accept or reject their lawyer's advice. We do not support promulgating professional rules making lawyers responsible (and liable) for coercing clients to accept legal advice. The vast majority of the states' ethics rules *mandate* only that the lawyer withdraw in the face of continued client intransigence and malfeasance; this embodies an understanding that the better part of a lawyer's professionalism lies in the knowledge that he is not the client, but rather the client's counselor and legal confidante. In the end, while lawyers are responsible for doing their best to convince clients of what is right, the client must decide to do the right thing, or our system of professional legal representation fails. If we move toward regulations that turn lawyers into cops on the beat, we will be making a decision to fundamentally change the lawyer-client relationship from one based on trust and advice, to one inclined toward prosecutorial responsibilities.

ACCA believes that recent events require lawyers to play a significant and heightened role in preventing future corporate misconduct and helping clients create a culture of corporate responsibility. Indeed, we agree with those commentators at the Commission and within our membership who argue that that the bar risks missing the lessons of the entire Sarbanes-Oxley exercise if it continues to object to all efforts to heighten the responsibility of lawyers in the post-Enron world, especially if it does not have viable and preferable alternatives to suggest.

A number of critics even maintain that the exercise of the bars' concerns in letters such as these somehow indicates that the bars "just don't get it." ACCA's effort to embrace the larger issue of corporate governance reforms and aggressively look for a heightened role for corporate lawyers does not mean that we will support any reform proposed. Our duty is to assess whether the Commission's proposals help to fulfill the goals of offering practical, effective and professional guidance for lawyers who want to work more effectively with their clients in pursuit of their client's better corporate legal health and culture; where we are concerned that the Commission's proposals fall short of preparing our members to meet that goal, our letter will offer our suggestions for improvement.

II. The Commission's Noisy Withdrawal and Alternate 8-K Reporting Proposals

A. The Commission's ongoing noisy withdrawal proposal

We incorporate by reference our previous comments on the initial proposal. In summary, our concerns are:

1. Sometimes lawyers need to be reminded that clients do not have to hire or consult lawyers at all if they are unsure of the value that lawyers add or are wary of the headaches that working with lawyers may entail. If the effect of this rule is to suggest to some clients that their lives will be much easier if they simply forego legal counseling, then the purpose of encouraging more aggressive lawyer involvement under the Act is completely frustrated.

2. Complex frauds perpetrated on the company by rogue managers will never be prevented by this rule or others. Such frauds are less likely to be discovered and remedied by a corporate counsel shut out of the client's inner circle because the client perceives him to be a reporter or policeman for the government.

3. The majority of state bar ethics rules already provide for discretionary or permissive disclosure of certain kinds of financial frauds. Further, it is likely that the American Bar Association will push for the amendment of Model Rule 1.6 to

encourage permissive disclosure in those jurisdictions that have not adopted it. Permissive disclosure through existing and future state bar rules offers the lawyer both a carrot and stick approach in working to resolve matters with a reticent client. Mandatory disclosure requirements remove the valuable tool of the carrot, and leave the lawyer little or no discretion in how to address a situation. The lone presence of the stick also sends a perverse message to the client: even if the client wants to correct its behavior, the lawyer may nonetheless be obligated to report a matter to the authorities, thus providing the client with a stronger incentive to cover up problems in the future, rather than risk working with lawyers to correct or prevent them. The Commission's mandatory disclosure approach is thus not a better or more effective replacement for the state bar's rules.

4. Further, the creation of a Commission-mandated noisy withdrawal requirement that trumps state regulation may discourage the minority of states without a permissive "reporting out" rule from joining the majority of jurisdictions in creating a consistent standard of permissive disclosure that regulates and improves the standards applicable to the behavior of *all* attorneys, and not just those appearing and practicing before the Commission.

5. An additional standard of mandatory reporting by the Commission adds yet another layer of confusion to the current patchwork by regulating only certain lawyers for certain kinds of corporate clients who are engaged in certain kinds of work at any given time. If ethics experts who have spent many hours studying these rules in detail are confused about how the rules should be interpreted, how can we expect the average overworked and time-pressured lawyer to successfully navigate the complexities of their competing obligations in multiple states and under the occasional regulation of the Commission's rules? The result may well be a focus on "C.Y.A." activity by lawyers who want to prove in 20/20 hindsight that their efforts complied with the uncertain standards of the rule, rather than reporting activity intended to encourage clients to right their wrongs and prevent costly problems and future corporate failures.

6. Sarbanes-Oxley seeks to define and promote more appropriate roles for management and the board in safeguarding the company and its stakeholders from illegal actions of senior management. Lawyers (and especially in-house lawyers) should be empowered by the Act and the rules to do the job that only they can do and that Congress explicitly mandated for them within the provisions of Section 307. The legislative record of the Act shows us that Congress did not intend Section 307 to diminish the attorney-client privilege. Indeed, the legislative history specifically points to the importance of supporting the lawyer-client relationship. Lawyers play a crucial role in *contributing to corporate compliance* as confidential counselors. Lawyers can improve their performance in that role. But improvements to corporate compliance efforts led by lawyers will be possible only

where a strong foundation of a trusting and confidential lawyer-client relationship exists.

If the Commission nonetheless adopts a noisy withdrawal rule, it should consider:

• limiting such withdrawal to matters that involve a material violation of the securities law (as opposed to the wider definition of triggering violations);

• adopting a higher standard of certainty on the part of the lawyer that the violation was material and ongoing or about to occur before a noisy withdrawal is required;

• limiting the application of the rule regarding noisy withdrawal only to those matters in which the attorney's services would be used in the commission of the fraud; and

• extending the artificially short time periods in which the noisy withdrawal must be tendered (so as to allow the threat of withdrawal to provide one last meaningful sanity check opportunity for the reticent client).

B. The Commission's Alternative 8-K Proposal

The alternative proposal suffers from the same core deficiencies of the original noisy withdrawal proposal. We therefore oppose it. Admittedly, the alternative proposal provides a device by which a lawyer can avoid directly reporting a client's intransigence to remedy an allegation of fraud, and purportedly removes concerns about the lawyer thereby unilaterally breaching the client's confidences. But while the lawyer may not be the one who physically files the 8-K report, it is nonetheless the lawyer's action that triggers the board's responsibility for filing.

Clients will see this for what it is: a distinction without a difference. They will have the same concerns they would under the original noisy withdrawal proposal. Indeed, clients may have an even stronger negative reaction, for two reasons. First, the alternative proposal distorts the proper balance between the company's directors and the company's lawyers in deciding which group is appropriately responsible for making decisions about the company's reports to the SEC. Second, the 48-hour 8-K reporting requirement of the alternative proposal denies the board any meaningful opportunity to assess and address the withdrawal with the Commission prior to the notice of the lawyer's withdrawal being widely publicized (as it will shortly after the posting of the 8-K hits the Internet and markets). Clients may need more time to meet with the Commission in order to discuss the reasons the board may have declined to take the lawyer's advice, including possible plans to pursue a colorable defense. It is not inconceivable that a board that refuses to take a lawyer's advice

(knowing the significant consequences involved in that decision), could have a very important reason for choosing to accept the lawyer's departure rather than conform to the lawyer's demands, including the possibility that the lawyer involved was somehow inappropriately blackmailing the company as a result of personal grievances or dissatisfactions. Given the high likelihood of unproductive public speculation about the withdrawal, and the extreme potential impact of the 8-K report of a lawyer withdrawal on the company's stock and even its future viability, it seems only prudent to protect shareholders and other stakeholders from this kind of misdirected result.

If the Commission decides to proceed with the alternative proposal, then – in addition to the requests made of the Commission above regarding noisy withdrawal – the Commission should amend the provision to allow a board in receipt of a lawyer's withdrawal to have:

- more time to assess the lawyer's withdrawal (since the board may not have all the facts at their disposal) or the option of reporting privately to the Commission first if they wish to convince the Commission that a material violation has not actually occurred as reported by the withdrawing attorney; or

- an alternative option of obtaining a second opinion by an independent counsel (to determine if the withdrawing lawyer's assertion of a material breach has merit and if the lawyer has meaningfully pursued up-the-ladder remedies that might have adequately attended to the problem).

A company flagrantly ignoring good advice from its lawyers will not likely bother with another opinion; it will either comply with the Commission's requirements or ignore the requirements of the law at the risk of its directors' and senior managers' liability. If they are pursuing a colorable defense, presumably that case will be presented to the public and shareholders in the form of notice of a litigation pending. But if the company is truly in the grip of a rogue or inept lawyer or has not had time to meaningfully explore the lawyer's allegations, it will not be forced into a corner of reporting an unjustified withdrawal to the extreme and irreversible prejudice of the company's (and thus, the shareholders') interests.

We request that Commission forego both the noisy withdrawal and alternative proposals. These proposals do not facilitate the kind of lawyer-client relationships that encourage clients to seek legal counsel in an open and honest fashion, and indeed, may cause currently healthy relationships irreparable harm. The results of this damage will not benefit corporations, their stakeholders, or the public interest, and may have the impact of precluding the very kind of preventive compliance initiatives that the Sarbanes-Oxley Act seeks to advance.

III. Clarifications Requested to Part 205:

A. Requested Changes to the Triggering Language and Definitions

Part 205.2(i) defines a material violation triggering the rule as one that involves a material violation of a state or US securities law, a material breach of fiduciary duty arising under a US or state law, or a similar material violation of any US federal or state law. Sarbanes-Oxley was clearly created to propose regulations to limit fraudulent financial activities. It was not intended to grant the Commission oversight of the lawyer's behavior in matters unrelated to the Commission's general authority. Under the language of the rule as currently written, the Commission's rules would trigger a lawyer's response for matters that are not related to financial fraud, securities law or even fiduciary duty.

Combined with language appearing elsewhere in the Rule – for instance, the definition of credible evidence in Part 205.2(e) – such a broad categorization of covered activities creates a trigger for nearly any kind of allegation brought to a lawyer's attention, even those that are improbable, but from a marginally credible source. While we all agree that illegal behavior is always an appropriate focus for a lawyer, not all matters brought to the attention of a lawyer should be investigated and pursued with the same level of priority and to the same standards of mandated behavior as this rule requires.

We request a corresponding amendment to Part 205.3(b)(1) to limit reporting responsibility to reports of evidence of a material violation that is based on information relating to the lawyer's representation. This means that tax lawyers aren't formally responsible for assessing the likelihood of a potential material violation stemming from a conversation overheard at the water cooler regarding a patent claim.[3] A good lawyer will always take the troubling conversation overheard at the cooler down the hall to an IP colleague or the CLO, but such an amendment of the rule appropriately limits the lawyers' responsibility for formally pursuing matters totally outside of his expertise or authority.

We join the American Bar Association in suggesting that a company be allowed to choose who will be in charge of matters relating to the reporting up-the-ladder requirements of this rule. This provides additional options for departments to designate a resident expert – who may not be the CLO – who is responsible for handling and ensuring the department's compliance with the complex technicalities

[3] This example has been widely discussed at several recent programs and was formulated by Professor Thomas Morgan of the National Law Center at George Washington University.

of this rule's reporting requirements. Likewise, the Commission should allow the department the flexibility of designating additional representatives as supervisory attorneys if such is helpful to shaping a larger compliance initiative that builds-in the capacity to facilitate lawyer reporting consistent with the Commission's rules.

B. Supervising/Subordinate/Reporting Attorney Issues

The Commission's rule designates certain attorneys as "subordinate," others as "supervisory" and still others as "reporting." Each designation carries with it certain responsibilities, some of which are not yet fully explored or understood. Clearly, we all agree with the general concept that subordinate and reporting attorneys should be offered a pathway to insure that supervisory counsel and the CLO (as well as potentially others) hear and then address the subordinate or reporting attorney's concerns. Our interests lie in discerning how more junior subordinate or reporting attorneys will know when they have fulfilled their professional obligations and when they can presume that those who have been vested with greater seniority are appropriately responsible for making any further decisions about the merits of the report and how to proceed.

We recognize that Section 307 requires the Commission to create a rule governing all lawyers practicing before the Commission which instructs those lawyers to follow an up-the-ladder pathway of reporting that leads all the way to the board of directors, if necessary. The Commission chose to pursue this mandate by creating distinct roles for a variety of attorneys working in the corporate legal chain of command, rather than simply creating a single rule that applies equally to all lawyers who come across a triggering allegation. By writing a rule that creates separate roles for attorneys, however, the Commission has created some practical problems that we wish to address.

ACCA supports the permissive and discretionary reporting required of all attorneys under ABA Model Rules 1.13 and 1.6 (including the financial reporting permissions present in the majority of the states' rules, but not in Model Rule 1.6). We do not support the Commission's decision to invest junior attorneys with a mandate to assess and contest the CLO's final decisions. Giving such discretion to the role of a junior attorney does not further the operation of the rule as intended (to make sure that responsible lawyers take a matter to its proper level of attention within management and the board) while having a deleterious effect on the structure and smooth operation of law departments in general, and larger law departments specifically.

In smaller law departments,[4] issues sufficiently "material" to trigger reporting under this provision will probably be shared knowledge within the department. In-house counsel in smaller departments will more likely engage in consensus-building around a commonly-agreed-upon-course of action, internal investigation procedures, and any necessary "up-the-ladder" plans. It is likely in the smallest departments that either only the CLO will be considered a supervisory attorney, or that everyone will be considered a supervisory attorney. Clearly, no matter how designated, there is less likelihood that divisions will exist between "decision-making supervisors" and those whose primary function should be the report of credible evidence to a supervisory attorney or the CLO.

Small department practitioners may not like that Part 205 will create differing standards of appropriate behaviors based on one's rank within the department; it contradicts and frustrates the creation of a department unified by common principles and standards. But the impact of the rule's disparate application between attorneys in small departments may not have as profound an impact on the way that these lawyers ultimately continue to relate to each other: these lawyers' relationships will continue to be founded upon the daily trust and communication that springs naturally from working closely together, all day, every day.

In larger departments, however, (or de-centralized departments where counsel are geographically dispersed) there is greater likelihood for the supervisory / subordinate / reporting attorney distinctions to have what we believe are unintended and deleterious effects on the department's efficient and effective operation in pursuit of the highest standards of client service.

First, while we agree that the CLO should report back to the reporting or subordinate attorney so that they will be aware that the matter is on track for resolution, it is not realistic to mandate that the CLO should report back the result *with the requirement* that the junior lawyer be allowed to judge whether the CLO's decisions and actions are appropriate. (In the case of a reporting attorney, a dissatisfied lawyer *must* report over the CLO's head to the board or its committees under Part 205.3(b)(3); in the case of a dissatisfied subordinate attorney, the subordinate attorney is *permitted* to not only question the response of the supervisory attorney to whom she reported, but to report over the CLO's head, if she believes it appropriate and necessary. The subordinate attorney's permissive right is authorized under the rule in Part 205.5(d).

[4] Indeed, a surprisingly large number of legal departments in the United States are one-person shops; the next largest category is departments with 5 or fewer lawyers. It is unlikely that such tightly knit smaller departments (unless perhaps the few members are geographically dispersed) will be interested or practically able to seal off information of a report or its investigation.

The CLO of a larger department may have responsibility for a legion of attorneys (including outside counsel), many of whom do not regularly interact with the CLO or even with her direct reports. Many of these attorneys likewise serve a role of supervising attorneys under the rule. The information possessed by the CLO or other supervisory attorneys about the investigation of a reported allegations, the persons and processes included in that investigation, the superior experience and judgment which makes the CLO the Chief Legal Officer (and makes the reporting or subordinate attorney her junior), and the executive hierarchy necessary to facilitate making decisions on behalf of a large team, all combine to make reporting over the head of supervisory attorneys quite a potentially divisive and ill-considered event in the internal operation of a law department.

The CLO or supervisory attorney should provide a subordinate or reporting attorney with a report that the allegation was without merit, was appropriately remedied, is the subject of a continuing and significant investigation, or is the subject of the corporation's decision to pursue a colorable defense. We believe that the subordinate or reporting attorney's obligations and discretion under the Rule should be fully satisfied at this point in the process. It is illogical to acknowledge that seniority matters, but then insert a permissive or mandatory "override" function for a junior subordinate or reporting attorney to disagrees with the adequacy of the CLO's or supervisory attorney's actions. In addition to being disruptive to a chain of command that the Commission infers is appropriately in place, such a rule is not logically connected to a presumption that superior legal judgment is being exercised when the junior is allowed to override the senior to whom she reports. It is a common necessity of practice for senior lawyers direct the behavior junior lawyers; such is part of the learning curve and apprenticeship we all serve at the bar. This supervision of behavior and executive control of the client's work is presumed acceptable so long as the senior lawyer accepts responsibility for what he directs the junior to do, and does not ask the junior lawyer to violate the laws or rules of professional responsibility.

Model Rule 1.13, already governs the behavior of all lawyers, allowing them to report up-the-ladder in whatever fashion they believe is necessary in order to remedy client wrong-doing.[5] It is therefore unnecessary for the Commission to codify this rule again, but to do so in a fashion that is inefficient, inappropriate, and confusing to subordinate and reporting attorneys and the often-superior wisdom of their supervisors. The Commission's rule inappropriately burdens junior lawyers by encouraging or forcing them to question the results of an investigation (the facts

[5] Note that these up-the-ladder reporting responsibilities will likely become even more specific and meaningful in regulating an attorney's response under the proposed reforms to Model Rule 1.13 as suggested by the report of the ABA Corporate Responsibility Task Force; the Task Force's has only recently issued its final report.

of which they may not know) or the judgment of a supervisory attorney (which they may not be sufficiently expert to do).

A prudent CLO or other supervisory lawyer who reports her decision and actions to a subordinate or reporting attorney may correctly wish to limit the report to only general information. The rule – in that it presumes that subordinate or reporting attorneys must be convinced of the appropriateness of the handling of a matter – may in some situations work in contradiction to other legal obligations to the client. For example, to convince a skeptical reporting or subordinate attorney, the CLO may have to divulge details, for instance, on the termination or censure of an employee. If the reporting attorney is considered an uninvolved third party to the employee's evaluation process, employment law would create an additional and unnecessary exposure for the company, by opening it to claims of "excessive publication" by the disgruntled employee. In-house lawyers are trained to exercise extreme discretion in parsing out information about ongoing and even settled legal matters to anyone outside of the "need to know" management team or control group. This rule thus puts the CLO or supervisory attorney in the tight spot of trying to balance which obligation is more important.

An exception appropriately may be made when the CLO is suspected of complicity in the alleged violation. Obviously, in such a circumstance, a reporting lawyer should go over the CLO's head to the CEO, the board, or the QLCC with her report. But the Commission should not create a general rule that elevates in the institutional knowledge, legal acumen or professional discretion of junior attorneys over that of the CLO or supervisory attorneys when the issue rotates around a disagreement over the proper legal course to pursue or the correct interpretation of company activities or corrective actions. By definition, the CLO or a supervisory are charged to make the executive decisions that move the department out of discussion and into action. Likewise, those same actors should be fully accountable for the exercise of proper discretion, legal judgment, and leadership decisions made in execution of their responsibilities.

We respectfully request the Commission to accordingly amend the reporting and subordinate attorneys' obligations currently articulated in 205.3(b)(3) and 205.5(d).

C. Regarding the Operation of the QLCC

When the Commission first introduced the QLCC concept, a number of corporate counsel initially responded with pleasure that an alternative reporting mechanism might be available to them. As the in-house community discussed the concept in greater detail, however, amazingly similar concerns have been repeatedly voiced.

First, quite a few general counsel worry that should they ask the board to designate a QLCC, the board may presume that the QLCC creates (at the CLO's request) an alternative route for reporting and investigating matters that completely bypasses the CLO's office. Thus, rather than presuming that the committee's work will be premised on a cooperative relationship with the CLO, the QLCC may presume that their first course of response should be to hire their own outside counsel to conduct investigations and make recommendations.[6]

Because board members assigned to the QLCC can only focus on legal matters intermittently and will need to rely extensively on *someone* for assistance in sifting reports, investigating facts, proposing remedial actions, and so on, in-house counsel inclined to suggest a QLCC to their board would welcome some suggestion in the rules that that "*someone*" might appropriately include the CLO and the company's legal staff. Otherwise, many CLOs will be reticent to support the creation of a QLCC as it is currently outlined; they will not want to appear to be abdicating their responsibilities. In those cases that should be conducted by an outside firm, the CLO may prefer to hire and supervise his own choice of counsel, rather than simply sending it to the QLCC so that they can hire their own.

Indeed, CLO's regularly voice their concern that outside counsel hired by the QLCC might have little guidance or commitment to working sensitively and productively with managers to uncover and remedy allegations. Such firms can mistakenly believe that their retention by a group of directors indicates a presumed hostility to any cooperation with or presumption of good faith behavior on the part of management. In the pursuit of their mission to uncover evidence of the reported allegations, they may employ scorched-earth investigation tactics that could unnecessarily degrade employee morale and dignity, inappropriately disrupt the ongoing business of the organization, or permanently burn bridges to any future relationship between "surviving" managers and lawyers who seek to work cooperatively with them.

When sensitive matters are on the table, unless there is an assertion that the CLO is complicit in an alleged wrongdoing or the board or QLCC believes that the CLO is

[6] In light of current events, boards are more likely than ever to forego additional consultation with company executives and staff, including existing company lawyers, in favor of retaining independent advisors to consult on virtually every aspect of the company's governance and compliance agenda. While in many cases, hiring outside advisors is most prudent, the practice has become almost mandatory even when no suspicion of executive incompetence or malfeasance exists: in today's climate, retaining outside advisors is considered necessary "cover" for directors concerned with their own liabilities and possible hindsight judgments made by shareholders and other stakeholders.

inept or not properly expert to handle the matter, the in-house CLO and his team is almost always better equipped to sift the merits of an allegation, conduct an investigation, propose and enact appropriate remedies, or supervise the conduct of an inquiry into the matter by an outside firm. The CLO has a fiduciary duty, a professional responsibility, and the same ethical mandates to the corporate client as any other member of the bar to provide independent, on-point, and superior legal advice. Yet, as it stands, the implicit assumption one would make of the QLCC as described by the Commission's rule is that it exists to bypass (rather than further employ) the services of the Office of the General Counsel in the furtherance of the client's legal representation.

Indeed, those CLOs we know who are ready to support the creation of a QLCC premised their support on the creation of some operational guidelines for the committee, including strategies for properly deploying the CLO's services in the conduct of the committee's work. Those committees that do not do so may suffer unintended and unpleasant consequences. For instance, in companies where the nature of the business includes sophisticated compliance efforts such as employee hotlines or other formal reporting mechanisms, there are correspondingly large numbers of complaints or allegations from the company's employees, suppliers, and others for someone to sift through and handle – often in the thousands every year. The unwary QLCC in such a company might find itself the recipient of an overwhelming number of reports (covering everything from trivial gripes to allegations of entity-threatening frauds), all made by folks who would much rather report their concerns directly to the top than to a tip line.

Since the rules allow anyone to report directly to the QLCC, this is not an unlikely result, and may seriously detract from the QLCC's ability to function and the willingness of board members to place themselves in the middle of such an arduous and time-consuming process. It is not unreasonable to assume that even a QLCC in a company without a history of soliciting employee reports could easily receive 25-50 complaints every year . . . for a board committee meeting only a few times each year, even this could be an extraordinary oppressive workload that the committee is unprepared to meet.

For these reasons and more, the QLCC would be well served to work cooperatively with the general counsel to create guidelines that suggest the proper paths and processes for the resolution of matters brought before them, including, for instance, the creation of a preferred outside counsel list (offering a pre-screened group of independent firms that would not be used by the company for any other general matters, guidance on the types of matters that the in-house legal department will be presumed best situated to pursue, pre-arranged law firm retention terms (regarding billing / fees / disbursements, the establishment of reporting structures, staffing, investigation procedures), document and communications standards for

maintaining attorney-client privilege, a "triage" process that allows the QLCC to determine which matters it will consider in what order and with what level of attention, and so on.

Board members meeting only intermittently may not have the time, interest or expertise to develop these guidelines, cull through reports sent to the Committee's attention, and supervise law firms operating under the Committee's retention. Especially when it comes to law firms working for the QLCC in an uncoordinated and unsupervised fashion, CLOs fear firms that may behave much like the proverbial bull in the china shop. An invasion of unsupervised and uncoordinated law firms conducting investigations can be more than cost-inefficient and disruptive; it can be totally counterproductive to the purpose of discovering fraudulent behavior and remedying improper management activities.

It is not our intention to suggest any guidelines which would serve to preclude the QLCC from addressing situations that require extraordinary measures or that they would prefer to conduct without the participation of the CLO. Indeed, on any given matter wherein the QLCC or an outside firm wished to override a pre-approved guideline, the full discretion to do so would reside with the QLCC.

While it is certainly possible for the QLCC and the CLO to establish such a relationship on their own without mandates from the Commission or the rule, the very act of creating a QLCC might suggest to some that it is necessary or appropriate policy to by-pass to the company's regular in-house counsel. The likelihood of that misperception arising could be minimized by the Commission's attempt to suggest means by which a natural cooperation between the CLO and the QLCC can develop.

Accordingly, we encourage the Commission to consider amending the QLCC portions of Part 205 to:

• offer commentary to the rules regarding the establishment of operational standards that suggest that the QLCC may wish to enlist the CLO in creating the committee's guidelines and resources.

• limit those who may make a report directly to the QLCC to the CLO, those whom the CLO or CEO recommend to it, or those whose allegations include a claim that the CLO is complicit in the alleged fraud reported. This will encourage those with "normal" legal concerns to make the CLO's offices the offices of first resort, encourage a cooperative relationship between the CLO and the QLCC which suggests that the CLO is a helpful resource to the QLCC's regular work, and preserve the time, resources, and attention of this board-level committee for those matters that either have been vetted by the CLO or may involve inappropriate activity amongst the company's top legal leaders. Given the additional pressures that many directors

face in the post-Enron world, we believe that such an option not only serves the interests of the CLO, but also will be viewed as an incredibly important service to directors. If such a service is not performed, it is not hard to imagine the QLCC being swamped with issues that effectively negate its ability to provide any meaningful service.

• remove the "pre-existing" requirement in the rules that mandates that the QLCC must be in place prior to the report of an allegation that would be made to it. There is no reason to assume that the pre-existence of the QLCC does anything to change the appropriateness or ability of a board committee to perform a legal auditing role of this kind. To require that the QLCC be created prior to any experience with the kinds of problems and issues that this committee is intended to cover, means that some CLOs will be less likely to support the adoption of a QLCC without a clear sense of its need or the practicalities of its operation. And for the reasons set out above, most CLOs are unwilling to "casually" suggest that an existing (qualified) committee of the board be designated as a QLCC should a matter arise in the future that needs board attention. To do so would forego the kind of preparation and support that the QLCC will need. Should everyone (including, obviously, the board) decide that a matter has arisen is most properly handled by a QLCC, what is the harm in creating one at that time and supporting its work in a fashion that is consistent with the needs of the matter at hand? The point of the QLCC is to ensure board consideration of serious legal matters and to create more flexibility in how the report will reach the board. Removing the pre-existing requirement does no harm to the efficacy of the rule or the committee's function, and offers even more flexibility to those struggling to assess the practical issues involved in navigating the unexplored territory covered by this rule.

IV. Conclusion

We thank the Commission for the opportunity to comment on these proposed regulations and the final rule. We stand ready to assist the Commission to ensure that the final rules are both practical and useful, and understood by corporate counsel who need to apply them to their practices. Please feel free to contact us to discuss any of these issues further.

On Behalf of the Board of Directors of the American Corporate Counsel Association:

Submitted by,

Barry Nagler
Chairman of the Advocacy Committee of ACCA's Board of Directors
Senior Vice President and General Counsel
Hasbro, Inc.
401/727-5008
bnagler@hasbro.com

M. Elizabeth Wall
Chair, ACCA's Board of Directors
General Counsel
The European Lawyer

ACCA Staff Contacts:
Frederick J. Krebs, President and Chief Operating Officer (krebs@acca.com)
Susan Hackett, Senior Vice President and General Counsel (hackett@acca.com)
American Corporate Counsel Association
1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
202/293-4103
http://www.acca.com

cc: The Honorable William H. Donaldson
Chairman, Securities and Exchange Commission
The Honorable Paul S. Atkins
Commissioner
The Honorable Roel C. Campos
Commissioner
The Honorable Cynthia A. Glassman
Commissioner
The Honorable Harvey J. Goldschmid
Commissioner
Giovanni P. Prezioso
General Counsel
Alan L. Beller
Director, Division of Corporate Finance

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 20, 2003

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Larry D. Thompson
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

As the Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud. While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself.

Attached to this memorandum are a revised set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization. These revisions draw heavily on the combined efforts of the Corporate Fraud Task Force and the Attorney General's Advisory Committee to put the results of more than three years of experience with the principles into practice.

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

Further experience with these principles may lead to additional adjustments. I look forward to hearing comments about their operation in practice. Please forward any comments to Christopher Wray, the Principal Associate Deputy Attorney General, or to Andrew Hruska, my Senior Counsel.

Federal Prosecution of Business Organizations[1]

I. Charging a Corporation: General

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

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[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the court affirmed the corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Similarly, in *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982), the court held, "criminal liability may be imposed on the corporation only where the agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated -- at least in part -- by an intent to benefit the corporation." Applying this test, the court upheld the corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name. As the court concluded, "Mystic--not the individual defendants--was making money by selling oil that it had not paid for."

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), cert. denied, 326 U.S. 734 (1945)).

II. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq.* Thus, the prosecutor should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial,; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See* id. However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (*see* section III, *infra*);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (*see* section IV, *infra*);

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (*see* section V, *infra*);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection (*see* section VI, *infra*);

5. the existence and adequacy of the corporation's compliance program (*see* section VII, *infra*);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (*see* section VIII, *infra*);

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (*see* section IX, *infra*); and

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance;

9. the adequacy of remedies such as civil or regulatory enforcement actions (*see*

section X, infra).

B. Comment: As with the factors relevant to charging natural persons, the foregoing factors are intended to provide guidance rather than to mandate a particular result. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. The nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of Federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

III. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*,voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the

heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors should consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

IV. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

USSG §8C2.5, comment. (n. 4).

V. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and yet it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.*, subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment. (n. 6).

VI. Charging a Corporation: Cooperation and Voluntary Disclosure

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence.

In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the SEC and the EPA, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions.[2] Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.[3] The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either

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[2] In addition, the Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5)g).

[3] This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.

through the advancing of attorneys fees,[4] through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

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[4] Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior. See United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act."[5] It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *See also United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program

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[5] Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the Hilton case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[6] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonable designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark,* 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department

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[6] For a detailed review of these and other factors concerning corporate compliance programs, see United States Sentencing Commission, GUIDELINES MANUAL, §8A1.2, comment. (n.3(k)) (Nov. 1997). *See* also USSG §8C2.5(f)

of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

VIII. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution.[7] A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

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[7] For example, the Antitrust Division's amnesty policy requires that "[w]here possible, the corporation [make] restitution to injured parties...."

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

IX. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue

was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

X. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Although non-criminal alternatives to prosecution often exist, prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on Federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on Federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XI. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. *See* section VII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. *See* generally section VIII, *supra*.

August 20, 2003

The Honorable Eric Holder
Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Room 4104
Washington, DC 20530

Via Federal Express

Re: June 16, 1999, Memorandum to U.S. Attorneys re "Bringing Criminal Charges Against Corporations"

Dear Deputy Attorney General Holder:

The American Corporate Counsel Association (ACCA) wishes to raise concerns regarding portions of the above-captioned memo setting forth 12 principles to be considered by United States Attorneys prosecuting corporate offenders. I refer in specific to the below-cited sections of two of the principles that are of principle concern to ACCA members and their clients.

> • **Principle II**, "Charging Corporations – Factors to be Considered" Factor No. 4: "[T]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."

and

> • **Principle VI**, "Charging the Corporation: Cooperation and Voluntary Disclosure," which, in pertinent part reads: "[I]n determining whether to charge a corporation . . . its willingness to cooperate with the government's investigation may be [a] relevant factor. . . . [I]n gauging the . . . cooperation, the prosecutor may consider the corporation's willingness to . . . disclose the complete results of its internal investigation, and to waive the attorney-client privilege and work product privileges."

ACCA fully supports the Department's objective of corporate compliance with federal, state and local laws and regulation. Legal compliance is a critical aspect of the corporate counsel's job. However, these statements suggest that corporations which wish to cooperate with government investigations and prosecution must abandon their attorney-client and work product privileges in order to do so. ACCA

believes this is bad public policy, which will undercut, not strengthen, our mutual efforts for corporate compliance.

ACCA participated in the extensive process of drafting and commentary which created the Sentencing Guidelines. Requiring waiver of the attorney-client and work product privileges to prove cooperation was never an intention of the drafters of the Corporate Sentencing Guidelines. Indeed, the Sentencing Guidelines do not require or even suggest the disclosure of attorney-client information as a prerequisite or even an appropriate standard for judging the cooperation of a corporate defendant. The issue of waiver was discussed rather extensively, and was specifically *not* included as one of the appropriate criteria or requirements for use by prosecutors operating under the Guidelines.

The Sentencing Commission was persuaded, as we hope that you will be persuaded, that to require waiver of the privilege as a prerequisite of "cooperation with the government's investigation" is entirely inconsistent with the goal of encouraging and rewarding corporate good faith efforts. Indeed, to require a waiver of the privilege works against -- and not in favor of -- sound policy designed to protect the public and encourage good corporate citizenship.

The attorney-client privilege (and its related and attendant work product protections) is the foundation and linchpin of any lawyer-client relationship. Courts, government, and the legal profession have all honored this principle for the inherent benefits we believe it offers to society: namely, to encourage clients to candidly seek legal advice in the security of knowing that such counsel will not be used against them. In the extensive and often complex realm of corporate compliance, the existence and protection of the privilege encourages clients -- who might otherwise act furtively and against the public or corporation's interests -- to seek out preventive legal advice regarding their actions. Thus, in our experience, involving a trusted attorney as a part of the corporation's compliance strategy provides not only meaningful remediation when wrongdoing occurs, but even more importantly, provides a meaningful opportunity to prevent violations of the law in the first place.

Our members indicate that it is the regular practice of US Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with a prosecutor's investigation. The greatest irony is that those companies which wish to cooperate with the government to redress noncompliance and strengthen their compliance processes in the future face greater civil liability as a result. Once the privilege has been broken, all third parties, not just the government, will have access to those sensitive and candid discussions, and such information will be welcome fodder for

the use of plaintiffs' counsel in what will surely be endlessly ensuing civil litigation and massive attorneys' fees for a company which accepted the policy of confession, contrition and cooperation embodied in the Sentencing Guidelines.

This damage will have dire long term consequences. Knowing that sensitive and confidential conversations with their lawyers will be used as bargaining chips by the government, clients will probably presume it is wise to avoid creating such chips for the government's use. They'll simply stop talking with their lawyers. Lawyers who are still privy to confidences will stop keeping any written record or paper trails of their work. Investigations into possible corporate wrong-doing, long before the government gets a whiff of criminal behavior, will be either abandoned or prohibited since such will surely work against, and never in favor, of the company's interests. Corporate officials at the top, as well as clients throughout the corporation, may well exclude lawyers from critical meetings concerning product development, regulatory compliance issues, marketing and consumer initiatives, facility and employee management issues, and any other sensitive business since a lawyer's presence will be seen as adding little value (at best) and as untrustworthy (at worst).

We believe the result of these policies will be to punish clients who hire and consult attorneys to encourage compliance, promptly address noncompliance and help improve the quality and legality of the work of the corporation. These policies strip a corporate client of its fundamental rights to counsel and prevent both in-house and outside attorneys from playing an important and constructive role in the compliance effort the Government wishes to encourage.

ACCA urges reconsideration of the procedural advice to prosecutors.

We welcome the opportunity to meet with you to discuss this issue and thank you in advance for your consideration of our concerns. Please feel free to contact me at 703/903-2800, or call Susan Hackett, ACCA's General Counsel, at 202/2903-4103, ext. 318, to discuss how we might further our mutual interests in encouraging, rather than discouraging, corporate compliance and cooperation.

Sincerely,

Maud Mater
Executive Vice President, General Counsel, and Secretary
Freddie Mac
Chair, Board of Directors
American Corporate Counsel Association

American Corporate Counsel Association

1025 connecticut avenue, nw
suite 200
washington, dc 20036-5425
p 202.293.4103
f 202.293.4701
www.acca.com

The in-house bar association[SM]

August 15, 2003

ABA Adopts New Model Rules Affecting In-House Practice

At the American Bar Association Annual Meeting in San Francisco (on August 11 and 12), the ABA House of Delegates approved the recommendations of the ABA's Corporate Responsibility Task Force, otherwise known as the "Cheek Commission." ACCA supported these changes and worked hard for their passage. The floor debate was intense and the voting highly contentious, but the resolutions carried. What's the practical impact that the passage of these recommendations on you and your department, as well as on your client relationship? Here are a few thoughts from ACCA:

(Please see http://www.acca.com/public/newmodelrules.pdf for the full text of the new model rules referenced below. Remember – we're only hitting the highlights!)

1. The ABA Task Force on Corporate Responsibility, after over a year of assessing how to improve the role of corporate lawyers post-Enron, issued a report from which three recommendations were presented to the ABA House for passage. The full report, information on the Task Force, the testimony of those who presented comments, and more are available at http://www.abanet.org/buslaw/corporateresponsibility/home.html.

   The three recommendations before the House were an amendment to ABA Model Rule of Professional Conduct 1.6, an amendment to ABA Model Rule of Professional Conduct 1.13, and a series of best practices recommendations to improve the role of lawyers in governance matters important to the responsible functioning of the board and senior management. ACCA supported all three recommendations (http://www.acca.com/public/accapolicy/aba_corpresp.pdf), and all three passed the House, although through a series of close and highly contested votes. While the governance best practices are laudable, it is the changes to the Model Rules that have been the focus of most of the attention.

2. The Model Rules of Professional Conduct are highly influential in shaping states' rules of professional conduct, especially over time. But remember that amending the Model Rules is relatively meaningless in terms of immediate impact on you. A "model" rule regulates no one – the rules of professional conduct that regulate you must be adopted by the states in which you practice law (which may include states in which you are not admitted).

3. The ABA model rule changes create new a Model Rule 1.6 and a new Model Rule 1.13; these rules set lawyer conduct standards for confidentiality and reporting up the ladder within an organizational client, respectively. The amendments allow additional "reporting out" opportunities for lawyers in certain closely defined situations involving client malfeasance that cannot be corrected. For a fuller explanation, see Footnote 1, at the end of this summary.

4. The primary concerns raised in opposition to these new rules are that they will further erode client confidentiality (any exceptions to which some believe to be inappropriate on their face) and potentially increase lawyer liability. We do not agree. See Footnote 2 for more on why.

5. It is important to separate the confidentiality exceptions of the Model Rules of Conduct from changes to the evidentiary standards of the attorney-client privilege They are two separate, and – for purposes of these rules – unrelated things.

6. ACCA made its decision to support the Task Force reforms to the Model Rules based on a number of reasons. Two important ones are: We believe that taking this action voluntarily sends the message that the bars are willing to regulate themselves in a manner that is responsive to questions raised about the appropriate role of lawyers (and their absence) in preventing a number of recent corporate failures. Thus, we hope that this action will forestall the perceived need for additional attorney conduct regulation by federal authorities such as Congress, the FTC, and the SEC. Second, we believe that these changes are consistent with what we understand from ACCA members and others about what clients really want. (See footnote 3 below for more information.)

7. There is obvious interplay and a number of parallels between the content and passage of these rules, and the content and passage of new rules by the SEC governing the conduct of attorneys for issuers who are "appearing and practicing" before the Commission. One important thing to remember is that while the SEC's Sarbox Section 307 rules (codified as Part 205 in the CFR) only apply to certain lawyers for issuers, these new Model Rules, if adopted by states, will apply to all lawyers, regardless of their practice and regardless of whether the client is public, private, a partnership, a non-profit, and so on.

8. You might take advantage of the adoption of these new model rules to raise the issue of client confidentiality for re-examination with both lawyers you work with and clients you serve: perhaps this might be an agenda item at a future ethics program for the department retreat, or the subject of a discussion with senior management and the board in the form of a report reiterating your department's policies and procedures in protecting client confidentiality and the realistic limits of its application. Sometimes client expectations regarding confidentiality are erroneously shaped to a greater degree by TV dramas than by a clear understanding of realistic expectations, especially given the number of new and ongoing government initiatives to violate confidentiality or seek waiver of the privilege in the course of the investigation of alleged corporate

wrongdoing. Need help developing a program or policy on confidentiality? Call us! (202/293-4103, ext 318, or email hackett@acca.com)

9. These new Model Rule amendments will be added to the pile of rule amendments under consideration by the states. As you know, ACCA has been pushing for states to adopt Model Rule 5.5, which is a new rule (as of August of 2002) authorizing multijurisdictional practices (MJP). Some states have already taken action on the new 5.5 and other rule changes proposed a year ago by the ABA's Ethics 2000 Commission (and they may not jump to open the rule amendment process again immediately); other states are in process and will probably add these changes to the line-up under consideration; still others may ignore the process altogether until they come to these issues in their own good time. You can check out your state's MJP progress to date on our "state scorecard" and related charts at http://www.acca.com/practice/mjp.php.

For more information on these rules and how they impact in-house practice, call Susan Hackett, ACCA's General Counsel, at 202/293-4103, ext. 318 or email hackett@acca.com.

FOOTNOTES

Footnote 1.

Model Rule 1.6 is the "Confidentiality" Rule. It generally notes that lawyers have a duty of confidentiality to clients and then sets out the exceptions to that duty. Depending on your state, your state's version of 1.6 might include a mix of exceptions from the general duty of confidentiality, including mandatory reporting requirements, or "permissive" (optional to the lawyer in her discretion) reporting opportunities. Every state has an exception for the lawyer to report and thus help prevent client acts which would result in an imminent bodily harm. There are also a few exceptions in every state for lawyers to use confidential information to the extent necessary to provide their own defense if sued by the client or to collect a fee if the client does not pay. Some states allow or mandate lawyers to report additional kinds of client wrongdoing of one sort or another. Thus, the state equivalents of Model Rule 1.6 are probably the least consistent in their application from state to state of all the rules of professional conduct.

The new ABA Model Rule adds an exception to the Model which already exists in 42 states' rules in some form or another. (Thus, in a sense, the change in the ABA Model Rule just passed simply makes the ABA Model consistent with the majority of state rules already on the books.) The new exception permits (but does not mandate) a lawyer to report client confidences to (unspecified) outsiders, if and only if: the fraud is reasonably likely to have a significant financial impact on innocent third parties; and if the lawyer's services have been abused by the client so as to have been used in the commission of the fraud.

The classic situation in which this rule applies is when the lawyer working on a client matter discovers new information about the matter that was withheld from him

previously. He realizes that his services are thus unwittingly assisting the client in the commission of a fraud. He confronts the client and the client says it's not interested in changing course or correcting the underlying illegalities. The lawyer now has a permissive, not mandatory, option, to report that the client has used the lawyer's services in the commission of a fraud. (Most lawyers, when confronted with this unfortunate situation, find that the client, upon learning that the lawyer may disclose the illegal conduct to a regulator or court or other parties, will change course and conform. Thus, the disclosure option is often used not to disclose, but to carrot and stick the client into conformity with the law. This permissive disclosure and prohibition against lawyers aiding client wrongdoing is consistent with other portions of the model rules which prohibit lawyers from allowing clients to use their services to commit crimes.

The language of the amended rules is very conservative in that many of the 42 states with some kind of mandatory or permissive disclosure rule in response to client crimes or frauds are triggered more easily. Because we have the long-time experience of so many states with this rule on the books, we think it unlikely that the adoption of this rule in jurisdictions where it currently does not exist will not have a deleterious impact on you or your client relationships since it has not had such an impact in those states where it has been the rule for many years.

Model Rule 1.13 is the "Organization as Client" Rule – otherwise colloquially known as the "reporting up the ladder" rule. It generally reminds us that the client is the entity and not any one of its officers or agents. The previous Model Rule which is codified verbatim in most states suggests that lawyers who discover allegations of wrongdoing should report up the ladder, all the way to the board if necessary; in the event of client intransigence, the lawyer may need to resign. The old rule was not very helpful in providing practical guidance on how or when these responsibilities should be fulfilled.

The new model rule is significant in its changes. It not only clarifies and mandates stronger responses to allegations which must be reported up the ladder within the organization, but then offers lawyers the option (permissive, not mandatory) to report client wrongdoing outside of the company, but if and only if: the lawyer has exhausted all possible attempts to get the client (including the board) to remedy the wrongdoing, and the client refuses; and the harm to the *client* (and not to innocent third parties, as in new Model Rule 1.6) by not reporting would be substantial. This rule's optional reporting out amendment is thus consistent with the rule's first message: that the client represented by the lawyer is the entity and its best interests; when the agents of the client show that they are not appropriately fulfilling their fiduciary duties, the lawyer may act in a reasonable fashion to protect the entity client's best interests.

Footnote 2.

First, the confidentiality standards proposed by the amended rules are consistent with standards already applicable in 42 states; there has been no reported diminution of the attorney-client relationship in those states (where many of you already practice!), and many other portions of the Model Rules also prohibit the willing use of the lawyer's

services in the commission of a client fraud (sometimes offering permissive reporting as a remedy, as well), again without any reported chill on the health of the lawyer-client relationship or any sign that this reporting out option is being exercised in an abusive fashion.

Second, while it is possible that lawyers who could have reported under these rules but did not could be held up to ridicule if their decision to not report "contributes" to the next major corporate financial debacle, such a decision, if reasonable, is not grounds for a finding of negligence or other liability. If there is an attempt to show that a lawyer's decision to not report was "unreasonable" in light of subsequent disaster, you can be sure that the fact that there was a permissive option to report or not will have little to do with shielding such a lawyer from warranted or unwarranted scrutiny. Times have simply changed. Any lawyer at the center of the next major corporate investigation will receive harsh scrutiny if regulatory agencies, the courts, shareholders or the public believe that the lawyer could have done something that she didn't to prevent a corporate collapse . . . unfortunately, 20/20 hindsight and outraged morality alone will be dispositive in such cases.

Footnote 3.

See ACCA's recent survey of corporate directors, conducted in cooperation with the National Association of Corporate Directors (NACD), a summary of which is online at http://www.acca.com/practice/stats.php (click open the NACD/ACCA survey link on this survey page). The hands down top response of board members when asked "what is the most valuable service offered by lawyers" was "Warning the board of significant legal risks to the company." We believe the amendment of these rules works to that purpose most directly by firmly focusing a lawyer's attention on reporting up and exhausting all possible remedial actions. The fact that so few lawyers ever choose to report out under permissive disclosure systems suggests to us that such an option is used more as a carrot/stick to convince clients to correct illegal behaviors and is only exercised with an understanding that the lawyer who discloses but has not considered and sought out all possible remedial measures to avoid divulging client confidences will be judged most harshly for his rash actions and poor discretion.

American Corporate Counsel Association

1025 connecticut avenue, nw
suite 200
washington, dc 20036-5425
p 202.293.4103
f 202.293.4701
www.acca.com

The in-house bar association[SM]

To: The American Bar Association Task Force on Corporate Responsibility
Chairman, James H. Cheek, III
Reporter, Lawrence A. Hammermesh

From: American Corporate Counsel Association (ACCA)

Re: Support of the Task Force's Final Report and Recommendations to the ABA House of Delegates, Report Nos. 119A, 119B, and 119C.

Date: July 29, 2003

The American Corporate Counsel Association has reviewed carefully your Report and Recommendations to the American Bar Association's House of Delegates. For the reasons set forth in this memorandum, ACCA strongly supports the Recommendations of the Task Force, and urges members of the ABA House of Delegates to vote for each of them. We believe that the adoption of the Recommendations is critically important, not only for in-house corporate counsel, but also for the professional integrity and independence of all lawyers seeking to act with the highest ethical standards in the best interests of their clients.

ACCA is a bar association for corporate counsel, with over 14,000 individual members who represent over 6,000 organizational clients across the United States. ACCA is founded on and committed to supporting the highest standards of professionalism for our members and the outside counsel they retain. Since in-house counsel are singularly and intimately committed to the professional representation of the single organizational client that employs them, they are perhaps even more focused than the lawyer for many clients on the need for constant attention to the professional responsibilities they owe to the clients they serve. Accordingly, we have followed the progress of this Task Force and assessed the value of its ensuing recommendations with close scrutiny. We were prepared to protest the Task Force's findings; we are pleased, however, to instead heartily support their report.

The Task Force Recommendation to amend Model Rule 1.6(b) is necessary and appropriate to prevent a client from using a lawyer's services to commit a crime or fraud that results in substantial financial injury to innocent third parties. This amendment would apply in extremely limited situations, and does not impact the daily relationship between lawyers and clients, even when clients have significant remedial needs. Underlying this policy is our fundamental belief that clients, whether corporations or individuals, should not be able to abuse a lawyer's services under the cloak of the duty of confidentiality; the proposed amendment of Model Rule 1.6(b) permits a lawyer caught in this unlikely and unhappy circumstance to *exercise professional*

discretion in deciding whether or not to disclose a client's confidence in the pursuit of a remedy to a wrongdoing that unwittingly involved the lawyer's services. The correctness of this policy is even clearer in the glaring hindsight of the Enron-type financial frauds. The fact that the Task Force Recommendation is consistent with the current rules of ethics in 42 states only adds support to our contention that it represents what is already in fact an accepted standard of professionalism at the bar. Indeed, the experience of ACCA members practicing in these 42 States indicates that the adoption of this rule nationwide will do no damage to the preservation of an appropriate and trusting relationship between a lawyer and her client, and will not result in any increased liability concerns for lawyers, either. Indeed, we believe that in *not* adopting the rule, the remaining jurisdictions are doing a disservice to their clients, their bar, and the professional standards upon which we stake our professionalism. The ABA should not be out of step with the practical experience and policy dictates of the State bars its Model Rules serve.

Regarding the Recommendation to amend Model Rule 1.13, we believe the proposal will help to overcome the current rule's lack of clarity and usefulness. The proposed revisions to the "up-the-ladder" reporting elements of the rule provide needed guidance, yet still preserve the lawyer's necessary discretion to assess and react to each client's situation with a uniquely tailored action plan, permitting – but not mandating – any one particular course. We are confident that the amendment will assist our members and all lawyers representing an organizational client in protecting the organization against illegal conduct that would substantially injure it.

We also note that passage of this Task Force's Recommendations regarding Model Rules 1.6 and 1.13 are important for additional reasons that may not be apparent from the face of the recommendations themselves. Many ACCA members have watched very closely, and with great concern, the entrance of the Securities and Exchange Commission (SEC) into the regulation of lawyer conduct, pursuant to the mandates of Sarbanes-Oxley Section 307 (now codified as SEC rules in 17 CFR, Part 205). We are particularly concerned about still-threatened SEC rules that would expand further the SEC's authority over attorney conduct in such a way as to completely remove lawyer discretion, replacing it with a requirement of a noisy withdrawal and an inappropriate "policing" role. Like it or not, the organized bars, responsible for the self-regulation of our profession, must consider the concerns of Congress, the SEC, and the investing public, which concerns led to this federally imposed rule governing public company attorney conduct. We believe that the Task Force Recommendations effectively address these concerns, and, according to statements made by SEC officials, may go a long way toward alleviating the need for further lawyer conduct rulemaking by the SEC.

Perhaps most importantly to our members, ACCA commends this Task Force for its vision in including a final proposal on recommended governance policies and procedures. These proposals have not received the attention they deserve. While not everyone may agree about the appropriate application of each of the Task Force's governance recommendations in every corporate client environment, it is our belief that history may look back at the this Task Force's contributions and cite as foremost amongst them their focus on the importance of the lawyer's role – and in particular, the in-house lawyer's role – vis a vis the Board, the corporation's culture of ethics and compliance, and the organizational client's governance processes.

The Recommendations made by this Task Force to the House of Delegates are timely, meaningful, reasonable, and – most importantly – balanced in their effort to move the bar and the role of lawyers forward in promoting corporate responsibility in the post-Enron world, while still holding high the principles which singularly define us as lawyers.

American Corporate Counsel Association

1025 connecticut avenue, nw
suite 200
washington, dc 20036-5425
p 202.293.4103
f 202.293.4701
www.acca.com

*The in-house bar association*SM

August 20, 2003

AMERICAN BAR ASSOCIATION'S REVISED MODEL RULES OF PROFESSIONAL CONDUCT 1.6 & 1.13

RULE 1.6: CONFIDENTIALITY OF INFORMATION (AS REVISED ON 8/11/2003)[1]

(a) 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 (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;

(2) 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;

(3) 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;

(42) to secure legal advice about the lawyer's compliance with these Rules;

(53) 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

(64) to comply with other law or a court order.

[1] Additions are underlined; stricken text indicates deletions.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice,

disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9~~7~~] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized,

paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10~~8~~] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5~~3~~) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11~~9~~] A lawyer entitled to a fee is permitted by paragraph (b)(5~~3~~) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12~~10~~] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6~~4~~) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13~~11~~] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6~~4~~) permits the lawyer to comply with the court's order.

[14~~12~~] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15~~13~~] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6~~4~~). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

~~Withdrawal~~

~~[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).~~

Acting Competently to Preserve Confidentiality

[16~~15~~] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17~~16~~] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18~~17~~] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.13: ORGANIZATION AS CLIENT (AS REVISED ON 8/12/2003)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.~~
~~Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~
~~(1) asking for reconsideration of the matter;~~
~~(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and~~
~~(3) referring~~

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, ~~seriousness of the matter, referral~~ to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if~~,~~

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law ~~and is likely to result in substantial injury to the organization~~, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may~~: resign in accordance with Rule 1.16,~~ reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but

only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

~~(d)~~ (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

~~(e)~~ (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. ~~However, different considerations arise~~ Paragraph (b) makes clear, however, that when the lawyer knows that the organization ~~may~~ is likely to be substantially injured by action of ~~a~~ an officer or other constituent that violates a legal obligation to the organization or is in violation of law ~~In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.~~ that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" imply a range within which the lawyer's conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client. For example, the facts suggesting a violation may be part of a large volume of information that the lawyer has insufficient time to comprehend fully. Or the facts known to the lawyer may be sufficient to signal the likely existence of a violation to an expert in a particular field of law but not to a lawyer who works in another specialty. Under such circumstances the lawyer would not have an obligation to proceed under Paragraph (b).

[4] In determining how to proceed under Paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not

obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

~~[4]~~ [5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority repose elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

~~[5]~~ [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules ~~1.6,~~ 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) – (6). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) ~~can~~ may also be applicable, in which event,
withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in Paragraph (c) does not apply with respect to information
relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim
arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraph (b) or (c), or who withdraws in circumstances that require or permit the
lawyer to take action under either of these Paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's

discharge or withdrawal, and that the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

Government Agency

~~[6]~~ [9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct o government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

~~[7]~~ [10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

~~[8]~~ [11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

~~[9]~~ [12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[~~10~~][13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an

action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

~~[11]~~ [14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

ATTORNEY-CLIENT PRIVILEGE: NEW SEC RULES AND ABA MODEL RULES

Laura Stein
H. J. Heinz Company
SVP & General Counsel
October 2003

WHAT'S AN IN-HOUSE LAWYER TO DO? REPORT UP? REPORT OUT? WITHDRAW NOISILY?

- New SEC Rules
- New ABA Model Rules of Prof'l Conduct
- State Bar Ethics & Prof'l Rules
- Company Policies
- Role of In-House Lawyers

Sarbanes-Oxley and SEC Rules

- SOX Minimum Standards of Attorney Professional Conduct
- SEC Rules
  - Up Ladder Reporting of Violations
  - Permissive Reporting Out Under Certain Circumstances
  - Proposed "Noisy Withdrawal" Under Consideration

New SEC Reporting Up Rules

- Effective August 2003
- Attorneys Appearing and Practicing Before SEC in Representation of Issuer
- If Credible Evidence of Material Violation of Securities Law, Breach of Fiduciary Duty, or Similar Violation
- Must Report to CLO or CEO and, If No Appropriate Action Taken, to Board

Reporting Up - What is Appearing/Practicing Before SEC?

- Broad Standard
  - Not Just Representing Issuer in SEC Proceeding, Investigation, Info Request, Correspondence
  - But Also Providing Advice for Document that Attorney Knows Will Be Filed (or Incorporated by Reference)
- Many Company Policies Are Requiring All In-House Attorneys to Report Up

Reporting Up - What Is Credible Evidence of a Material Violation?

- Reasonably Likely
- That Material Violation or Breach of Federal or State Securities Law, Fiduciary Duty, etc.
- Has Occurred, Is Occurring or Will Occur
- When In Doubt, Report Up

To Whom Do I Report Up?

- If "Subordinate Attorney" Report to Supervisor
- If "Supervisory Attorney" Report to
  - CLO or CEO
  - Their Appropriate and Timely Response Is Required, May Include Remedial Measures or Sanctions
  - If Futile, Report to Board or Independent Committee
- Many Company Policies Are Requiring Reporting to CLO

New SEC Reporting Up Rules Do Not Impact Privilege

- Issuer Is Client
- Officers, Directors and Employees Advised While Representing Issuer – NOT the Client
- Communicating Evidence of Material Violation to CLO, CEO or Board Does Not Waive Privilege

New SEC Reporting Up Rules – Penalty for Non-Compliance

- Compliance Should Not Be an Issue: In-House Lawyers Have Always Had Fiduciary/Ethical Duty to Protect Client
- Attorney Violating Up-Ladder Required Reporting Rules Subject to SEC Discipline Regardless of Any State Discipline or Lack Thereof
- SEC Can Censure Attorney or Temporarily or Permanently Deny Privilege of Appearing before SEC

Company Policies for Up-Ladder Reporting Compliance

- Recommended for Companies to Have Written Policies
- Extend to All Attorneys
- Report to CLO But May Report to Supervisory Attys First
- Provide Internal Resource for Guidance
- Training
- Consider Certification
- Include Outside Counsel
- Clearly Provide Reporting Attorney Will Be Protected from Retaliation
- www.acca.com/vl/practiceprofiles.php 9/4/03 - Examples of What Some Companies Are Doing

New SEC Permissive Reporting

- Allows Attorneys to Reveal Confidences to SEC without Client Consent:
  - To Prevent Issuer from Committing Material Violation Likely to Cause Substantial Injury
  - To Prevent Issuer from Committing Perjury, Suborning Perjury or Committing Fraud
  - To Rectify Consequences of Material Violation that Cause Substantial Injury If Attorney's Services Used to Further Violation

SEC: Permissive Reporting Rules Preempt State Rules

- New SEC Rules Supplement State Professional Standards
- New SEC Rules Not Intended to Limit Any State from Imposing Additional Obligations
- Re SEC, If State Rules Less Rigorous, SEC Rules Preempt

Some States: SEC Permissive Disclosure Rules Do Not Preempt

- Washington State and California State Bar Business Law Section: SEC Permissive Disclosure Does Not Preempt State Rules
- If You Are an Attorney in State Prohibiting Certain Permissive Disclosures, Should Wait for Preemption Issue Resolution

Permissive Reporting of Material Violation?

- If You Are in 40-Plus States Permitting Disclosure and Have Disclosure Issue
- Goal Should Be to Get Client Not to Violate or to Rectify Consequences Without Going Public
- Ability to Permissively Disclose Should Encourage Client to Do What's Right

Permissive Disclosure to SEC May Waive Privilege

- SEC Original Position - No Waiver of Privilege
- SEC Final Rule Dropped No-Waiver Language
- Selective Privilege Waiver Issues, Including Risk Information Could Be Used Against Client in Private Litigation
- Note Selective Waiver Issue Also Arises If Corporation Discloses to Government

Protection to Attorneys for Reporting to SEC

- If Attorney Believes She or He Was Discharged for Reporting a Violation, Attorney May Notify Board of Directors
- Section 806 of Sarbanes-Oxley Prohibits Retaliation Against Whistleblowers
- Attorney May Disclose Records Made in Course of Fulfilling Reporting Duties to Defend Self against Misconduct Charges

SEC Proposed Noisy Withdrawal Rule Still Under Consideration

- Would Mandate Disclosure If No Appropriate Response by Board to Up-the-Ladder Report of Material Violation
- 8-K Alternative Being Studied by SEC
- Significant Privilege Issues with Noisy Withdrawal and 8-K Proposals
- ACCA Comment Letter to SEC

Amendments to ABA Model Rules 1.6 and 1.13

- April 2003 - ABA Task Force on Corporate Responsibility Recommended Amendments to ABA Model Rules of Professional Conduct
- August 2003 ABA Approved in Close Vote
- ACCA Endorsed These Amendments
- ABA Model Rules Not Limited to SEC Attorneys

Amendments to ABA Model Rules 1.6 and 1.13 (Cont.)

- Changes to Model Rule 1.6 (Confidentiality of Information) Allow, But Do Not Require, Attorneys to Reveal Matters Related to Representation If Client Has Used Advice
  - To Commit Crime or Fraud Reasonably Certain to Result in Substantial Injury to Financial Interests
  - To Prevent, Mitigate or Rectify Substantial Injury to Financial Interests of Another

Amendments to ABA Model Rules 1.6 and 1.13 (Cont.)

- Amendments to Model Rule 1.13 (Organization as Client)
  - If Internal Up the Ladder Reporting Insufficient to Protect Client from Substantial Injury
  - Attorney May Report Out (Not Required)
  - Only to Extent Attorney Believes Reasonably Necessary to Prevent Substantial Injury to Organization

Attorney-Client Privilege, Reporting and Role of Lawyer

- Lawyers as Proactive Partners Must Promote Corporate Responsibility and Compliance
- Reporting Up Should Have Been Done All Along
- Attorneys Need to Be Trusted Counselors
- "Stick" of Permitted Disclosure If Advice Used to Further Material Violation Can Further Help Ensure that Corporations Will Do What's Right
- Noisy Withdrawal Would Damage Attorney-Client Relationship

Remember…

- All In-House Attorneys Should Understand the New SEC Mandatory Reporting Up Rules
- Companies Should Have Written Reporting-Up Policy and Training/Resources for Attorneys to Understand Obligations
- When in Doubt or Uncomfortable, Report Up!

Take Aways

- All In-House Attorneys Should Understand Selective Privilege Waiver Issues of Permissive Disclosures
- If You Practice in WA, CA, DC or Other States Prohibiting Certain Disclosures, Wait for Preemption Issue to Be Resolved
- Follow Outcome of Noisy Withdrawal or 8-K Alternative Proposed Rule

In-House Counsel and the Attorney-Client Privilege

A Lex Mundi Multi-Jurisdictional Survey

LEX MUNDI
THE WORLD'S LEADING ASSOCIATION
OF INDEPENDENT LAW FIRMS

In-House Counsel and the Attorney-Client Privilege

About This Survey

This Lex Mundi multi-jurisdictional survey presents a country-by-country overview of the availability of protection from disclosure of communications between in-house counsel and the officers, directors or employees of the companies they serve. Each Lex Mundi member firm was asked to describe briefly the applicability of the attorney-client privilege to communications with in-house counsel in its jurisdiction. The summaries presented below -- covering virtually all of the jurisdictions of the world -- address the following questions:

> *Are communications between in-house counsel and officers, directors and employees of the company they serve privileged?*
>
> *If so, are there limitations on the privilege?*
>
> *If not privileged in and of themselves, are there alternative methods of protecting the information?*

The descriptions set forth below are, of course, intended only as a general overview of the law as of July 1, 2002. No summary can be complete, and the following is not intended to constitute legal advice as to any specific case or factual circumstance. Readers requiring legal advice on any such case or circumstance should consult with counsel admitted in the relevant jurisdiction.

The editor-in-chief for this survey is Samuel Nolen, a member of Lex Mundi's Board of Directors and a member of Richards, Layton & Finger, P.A., Wilmington, Delaware. The survey's coordinator is Kimberly Heye, Lex Mundi's Membership and Events Coordinator.

Anguilla, British West Indies
Webster Dyrud Mitchell

Since there is no domestic law governing privilege, the position will broadly follow English common law principles, which are well summarized in the sections below on the British Virgin Islands and the Cayman Islands. There is no difference between the application of those principles to employed ("in-house") counsel and their application to lawyers in private practice.

As regards an in-house lawyer qualified in foreign law, the principles will apply to advice given in respect of that foreign law, but it is not clear that they would apply to advice given on domestic law unless the lawyer concerned was also called to the Anguilla bar. The principles do not apply to non-lawyer professionals who may purport to advice on legal issues.

As in most jurisdictions these days, whether onshore or offshore, there is a body of anti-money laundering legislation which may in certain circumstances override or at least make inroads into the general common law principles. As this statutory framework is currently in flux, no attempt will be made to summarize its provisions.

The normal grounds upon which disclosure may be resisted apply, e.g., irrelevance, the privilege against self-incrimination, public interest immunity and diplomatic immunity.

The Confidential Relationships Act, Revised Statutes of Anguilla 2000, Chapter C85, protects confidential information concerning any property or commercial transaction that has taken place, or that any party concerned contemplates may take place that the recipient thereof is not, otherwise than in the normal course of business or professional practice, authorized by the principal to divulge. There are certain exceptions, including confidential information given to or received by a professional person acting in the normal course of business or professional practice or with the consent, express or implied, of the relevant principal, and including certain specific statutory disclosure requirements. Infringement of the Act is a criminal offence.

Argentina
Marval, O'Farrell & Mairal

Under Argentine legislation all attorney-client communications are protected from disclosure; no distinction is made between inside and outside counsel. Argentine law only requires that the communications relate to legal matters entrusted to lawyers and protection is automatically granted to them. Attorneys have both the right and the obligation not to disclose these communications. Clients can also refuse disclosure on the basis of the constitutional right not to declare against themselves.

Australia
Clayton Utz

In Australia, communications between in-house counsel and officers, directors and employees of the company are treated no differently than communications between external attorneys. The protection, known as 'legal professional privilege' provides that confidential communications passing between a client and a legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser, if made either:

1. to enable the client to obtain, or the adviser to give, legal advice; or
2. with reference to litigation that is actually taking place or was in the contemplation of the client.[1]

Only those communications made or documents brought into existence for the dominant purpose of one of the two purposes above are entitled to immunity from production.[2]
In some jurisdictions[3] the parliament has enacted legislation providing a 'client legal privilege' which operates in a similar way to 'legal professional privilege'. In these jurisdictions, evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in the disclosure of:

> *a confidential communication made between the client and a lawyer, or*
> *a confidential communication made between two or more lawyers acting for the client, or the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer.[4]Under the legislation the protection will attach to communications if they were made for the dominant purpose of providing legal advice to the client.*

Central to these approached is the existence of a legal adviser. Where the lawyer is an "in-house" counsel employed by the client it will be necessary to analyze precisely in what capacity that person deals with the communication for it is only a communication which is sent or received by a lawyer that is entitled to protection.[5] That is to say, to invoke the privilege, the communications must be made or received by the in-house counsel in their capacity as a lawyer, which necessarily invokes obligations of competence, (through qualification to practice), and independence. Provided these obligations are met, the mere fact that a lawyer is a salaried employee of the client, is not sufficient to deny to communications between them and that company, or other officers within it, legal professional privilege if such privilege would otherwise be attracted.[6]

Austria
Cerha, Hempel & Spiegelfeld

The attorney-client privilege protects correspondence in hands of a lawyer and grants the right and establishes the duty to refuse to testify in courts as to all information confided in course of the mandate. It is applicable only to self-employed lawyers (Rechtsanwälte).

The attorney-client privilege is not applicable to in-house counsels as they are not Professionals (Rechtsanwälte). There are different criteria, which have to be fulfilled in order to be deemed as a Professional. Only Professionals are members of a bar and subject to a disciplinary control by the Bar Association. They need to be independent and not under control of the client. This does not apply to an in-house counsel who is integrated in the organization of his client (legal department). He/she usually has various functions, which extend beyond his consultancy services, sometimes including management functions. In-house counsels are not subject to any disciplinary control. This principle is in accordance with the AM&S-decision of the European Court of Justice.

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[1] Heydon JD, Cross on Evidence, Sixth Australian Edition, Butterworths (2000) at 704
[2] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 per Gleeson CJ, Gaudron, Gummow and Callinan JJ (McHugh and Kirby JJ dissenting).
[3] Federal Courts, the Australian Capital Territory and New South Wales
[4] s118, *Evidence Act* 1995 (Cth), *Evidence Act* 1995 (NSW)
[5] Heydon JD, *Cross on Evidence*, Sixth Australian Edition, Butterworths (2000) at 715
[6] *Ritz Hotel Ltd v Charles of the Ritz Ltd and anor* (1987) 14 NSWLR 100

There is no protection of communications between in-house counsels and officers, directors or employees of the company. However, Austrian labor law establishes a general duty of loyalty of the employees towards the employer. This means that all employees of a company (including the in-house-counsels) are obliged to protect the employer's business interests. This duty can be deduced from various statues (e.g. Art. 27 subpara. 1 *Angestelltengesetz*, Austrian Employment Act: Disloyalty while on duty may be a ground for dismissal). It includes the obligation to keep secret relevant information concerning the enterprise towards third persons.

This duty of secrecy lasts for the period of employment. At a later stage, the employee is only committed to secrecy if this is especially agreed with the employer. Communications between in-house-counsels on one hand and officers, directors or employees of the company on the other are subject to this general duty of secrecy if this is in the interest of the employer. There is no legal or statuary protection of that purely internal duty of loyalty.

Under Art. 15 DSG, Austrian Data Protection Act, data which have been accessible during and by virtue of one person's employment, have to be treated as confidential as far as there is no legal reason for the transmission of these data.

Azerbaijan
Baker Botts L.L.P.

Under the legislation of the Azerbaijan Republic, the concept of attorney-client privilege with respect to the communications of in-house counsel is not developed and there appears to be no method of protecting the contents of such communications from disclosure in court proceedings.

Both the Law on Advocates and Advocates' Activity (1999) and the Criminal Code (2000) include provisions that protect the professional secrets of *advocates*. Advocates are lawyers who are members of the Advocates' Association. Advocates have the full right to represent clients in court proceedings and cannot be employed as in-house lawyers. The provisions on attorney-client privilege in those laws do not apply to the activities of lawyers who are not advocates.

There are no other laws of the Azerbaijan Republic that provide for attorney-client privilege, and thus lawyers who are not advocates, including in-house counsel, do not benefit from the privilege. To protect their communications from disclosure, in-house counsel in Azerbaijan may only rely upon general protection methods (such as confidentiality clauses).

Bahamas
McKinney, Bancroft & Hughes

Communication between in-house council and officers, directors, servants and agents of their employer attract the same legal/professional privilege as communications between attorneys and their clients. The privilege extends to communications between in-house council and their employer for the purposes of securing legal advice and also for communications in anticipation of litigation so as to provide evidence and information for the arbitration. Accordingly, memoranda, notes, minutes, correspondence, reports and schedules passing between the employer, (including its officers, servants and agents) and in-house council, which are prepared sent or received confidentially for the purpose of obtaining or furnishing information or for the evidence with reference to or for the purpose of pending or contemplated litigation, will be privileged. The privilege does not extend to casual conversations with in-house council or communications outside the scope of securing advice or anticipated litigation.

Bahrain
Hassan Radhi & Associates

A reference is made to attorney-client privilege in Article 29 of the Legal Practice Act promulgated by Legislative Decree No. 26 of 1980 in Bahrain. It reads as follows:

> *Any lawyer, who acquires in the course of his practice knowledge or any incident or information, may not disclose it* even *after the expiry of his appointment as attorney unless he intends to prevent any crime or misdemeanor or report its occurrence. A lawyer may not be asked to testify in respect of any dispute for which he has been appointed as attorney or asked to give advice with regard thereto unless he obtains the client's prior written consent.*

The Legal Practice Act permits only Bahraini nationals whose names are in the Rolls to practice in Bahraini Courts. Thus the Bahraini law imposes an obligation on a lawyer who is on the Rolls not to disclose information he acquires in the course of his legal practice except for the purpose of preventing any crime or misdemeanor or reporting its occurrence.

Many of the in-house lawyers in Bahrain are non-Bahrainis or Bahrainis not on the Rolls. Consequently, the aforesaid protection is not available to them. Thus, there is no specific law in Bahrain that gives protection to an in-house lawyer from disclosure of communications between in-house lawyers and officers, directors or employees of the companies they serve. The company is, however, entitled to include in its conditions of employment a confidentiality clause whereby the communications between in-house lawyers and officers, directors or employees shall be confidential and privileged and shall not be disclosed to others. However, if there is an enquiry by a government official, or if a case is filed in the Court, then, nobody can take shelter behind the confidentiality clause.

Also Article 67 of Legislative Decree No. 14 of 1996 with respect to the Law of Evidence prohibits lawyers and attorneys who have become aware of some events or information through their practice or capacity from divulging it even after their period of service is over or they no longer serve in that capacity, unless it was told to them for the sole purpose of committing a felony or misdemeanor. This article further stipulates that the lawyer or attorney must give evidence concerning the event or information when asked to do so by the person who confided in them, provided it does not jeopardize the provisions of special laws regarding them. This prohibition is pursuant to the practice or capacity of the person. Therefore, I am of the opinion that this provision is applicable to both in-house counsel who is non-Bahraini and Bahraini not on the Rolls.

Bangladesh
The Law Associates

Professional Communication is protected under Bangladesh Law. No barrister, Advocate, or Attorney shall at any time be permitted unless with his/her client's express consent, to disclose any communication made to him/her in the course and for the purpose of his/her employment as such. He/She can not be permitted to state the contents or conditions of any document with which he/she has become acquainted in the course and for the purpose of his/her professional employment or to disclose any advice given by him/her to his/her client in the course and for the purpose of such employment.

This protection will not however extend to:

a) any such communication made in
b) furtherance of any illegal purpose
c) any fact observed by any lawyer in the course of his/her employment as such, showing that any crime of fraud has been committed since the commencement of his employment.

The same principle will apply to an in house lawyer. The communication however needs to be for legal purpose as distinct from administrative.

Professional Communication is protected both under Evidence Act as well as under cannons of Professional conduct and the Rules framed by Bangladesh Bar Council.

Barbados
Clarke Gittens & Farmer

In Barbados the law does not differentiate between in-house counsel and outside counsel. The Legal Profession Code of Ethics Chapter 370 of the laws of Barbados provides that attorney-client privilege is available to protect from disclosure, communications between attorneys-at-law and clients.

Attorney-client privilege does not extend to circumstances where a statute or an order of the court requires the attorney-at-law to disclose what has been communicated to him in his capacity as an attorney-at-law by his client. The duty not to disclose extends to the attorney's partners, to junior associates at law assisting him and to his employees.

Attorneys-at-law are permitted to reveal confidences or secrets where it is necessary to establish or collect fees or to defend themselves or their employees or associates against an acquisition of wrongful misconduct.

Belize
Barrow & Williams

In Belize, all communications between attorneys and their clients, in the course of giving or seeking legal advice within the scope of the professional work as a legal advisor, are privileged at the instance of the client. Such communications are also protected from discovery under civil or criminal proceedings. By statute a legal advisor or his client shall not be compelled to disclose any confidential communications, oral or written which passed between them, directly or indirectly through an agent of either, if such communication was made for the purpose of obtaining or giving legal advice. Therefore, attorney-client privilege is available in Belize to protect from disclosure communications between in-house counsel and officers, directors or employees of the companies they serve.

Bolivia
C.R.& F. Rojas, Abogados

Based on Articles 10 and following of the Professional Ethics Code for the Legal Profession approved through Executive Decree 11788 dated September 9, 1974, we consider that the availability of the attorney client privilege to protect from disclosure communications between in-house counsels and officers, directors or employees of the companies they serve are privileged. Under Bolivian Law there are no limitations on the privilege but those mentioned above.

Specifically, Articles 10 and following of the Professional Ethics Code for the Legal Profession approved through Executive Decree 11788 dated September 9, 1974 establish as follows:

> In his relationship with clients, attorney client privilege is a right and obligation of the lawyer. In his relationship with judges, it is a right, as the lawyer cannot be obliged to disclose confidential information received from his clients.

Should the lawyer be summoned to testify in a lawsuit as a witness, he must comply but at his own option he can refuse to answer to the examination, whereby he cannot be obliged to violate the attorney- client privilege.

This obligation of observing attorney client privilege also applies to confidential information received by the lawyer, third persons, colleagues or necessary conversations to reach an agreement that was not achieved.

The lawyer who receives confidential information from his client cannot accept defense in other trials without the previous consent of his client.

However, should a lawyer be accused by his client, he will have the right to disclose the attorney client privilege in honor of the truth. When the client informs his lawyer on his intention to commit a crime or offense, this confidence is not protected by professional secret and the lawyer is obliged to tell this information to those in danger so as to avoid the crime or offense is committed.

Brazil
Demarest e Almeida

The relationship between attorney and client is regulated in Brazil by the Federal Law no. 8.906/94 (Brazilian Bar Association Statute), by the General Regulations of the Brazilian Bar Association Statute and also by the Brazilian Bar Association Code of Ethics and Discipline. These provisions apply to all Brazilian lawyers, including in-house attorneys.

There are express and specific provisions in the Statute and in its Regulations about the attorney-client privileged relationship, which guarantee the attorney the right to protect, and not disclose, the information received from its clients.

All the information supplied to the attorney by the client, including written communication, is confidential. As per this privilege, it cannot be revealed, unless if used in the defense limits, when authorized by the client. The confidentiality privilege is extended to the attorney's office, files, data, mail and any kind of communication (including telecommunications), which are held inviolable.

The privilege of confidential communication between the attorney and his client applies even when the client is arrested and imprisonment is considered incommunicable.

The attorney has the right to refuse making deposition as witness (i) in a question in which the attorney has acted or may act, or (ii) about facts qualified as professional secrecy related to a person who is or has been his/her client, even if authorized by the last.

The Code of Ethics, in its Chapter III, also provides that the attorney-client relationship is protected by professional secrecy, which can only be violated in the cases of (i) severe threat to life or honor; or (ii) when the attorney is insulted by its own client; and (iii) in self defense. The violation of the professional secrecy must be restricted to the interest of the question under discussion.

British Virgin Islands
O'Neal Webster O'Neal Myers Fletcher & Gordon

In the British Virgin Islands (BVI) the law on attorney-client privilege is based primarily on the common law principles, which in turn are derived from the English common law. Under BVI law the principles and rules applicable to independent attorneys apply equally to in-house counsel and their clients.

Hence, any communication verbal or written passing between a party (including his predecessor-in-title) and his attorney or other legal professional adviser is privileged from disclosure if the following circumstances exist:

- the communication is confidential;
- the communication is to or by the attorney or other legal adviser in his professional capacity; and
- the purpose of the communication is to obtain or provide legal advice or assistance.

It should be noted that if the communication were made through an employee or agent of either the attorney or his client, that fact alone would not affect any privilege that would otherwise apply to the communication. In other words, provided the above conditions are fulfilled attorney-client communications via agents are also privileged.

The privilege is not absolute and there are limitations. No protection will apply to situations where -

- the communication is made for some fraudulent or illegal purpose;
- the client waives the privilege and permits disclosure, or
- the communication is made for the purpose of being repeated to a particular party, for instance an instruction to settle a claim for a specified sum.

However, the common law position must be viewed against the background of the statutory regime in the British Virgin Islands, which is aimed at preventing and detecting money laundering, and drug trafficking and which regulates to some degree providers of financial services (which includes attorneys-at-law). The statutory regime consists of a wide body of legislation. As a result, there is a degree of overlap that renders the determination of whether an in-house attorney can be required to disclose information protected by the attorney-client privilege, a complex matter. Relevant legislation includes: the Anti-money Laundering Code of

Practice, 1999; the Drug Trafficking Offences Act, 1992; the Financial Services (International Co-operation) Act, 2000, and; the Proceeds of Criminal Conduct Act, 1997. By and large the legislation does not attempt to strip away the attorney-client privilege and in some cases such as the Drug Trafficking Offences Act, legally privileged material is expressly excluded from its disclosure provisions.

However, the legislative regime does seek to restrict secrecy for unlawful purposes. For instance, the Proceeds of Criminal Conduct Act encourages 'whistle-blowing' where an attorney suspects that funds he holds on his client's behalf are derived from criminal conduct. In such a case, any report made by an attorney under the circumstances outlined in the Act will not amount to a breach of any restriction on disclosure of information imposed by statute or otherwise, and will not give rise to any civil liability.

One obvious in-road into the attorney-client privilege is contained in the provisions of the Financial Services (International Co-operation) Act. Under this Act an attorney may be required, in order to assist a foreign regulatory body within the meaning of the Act, to disclose the name and address of his client, though he cannot be required to produce any other privileged information.

Finally, it must be emphasized that the foregoing is intended only as a general overview of the law in the British Virgin Islands. Each case should be considered on its own merits. Any person who requires advice on his/her own legal position should seek the opinion of a British Virgin Islands attorney.

Bulgaria
Lega InterConsult Penkov, Markov and Partners, Law Offices

The attorney-client privilege is regulated in Bulgarian legislation by article 18 of the Law on Advocacy, which contains the regime of attorneys-at-law (advocates). This provision states that the files and documentation of the attorneys-at-law, as well as the client-attorney correspondence are inviolable and cannot be used as evidence either.

The in-house counsel activities on the other hand are very scarcely regulated. The most important provision in this regard is Article 20 from the Civil Procedure Code, paragraph 1, which gives in-house counsel the right to appear before the court as legal representatives of the company, something, which in principle is exclusive privilege of the attorney-at-law. There are few regulations, the existing related mainly to the legal qualification of the in-house counsel.

There is no legal provision concerning privilege or any other aspect of communication between in-house counsel and the other officers and employees of the company. The in-house counsel in principle is treated as a regular employee of the respective company and the information he keeps as well as his correspondence within the company is subject to the general regime of internal company information, except as where the company has elaborated a special regime.

Still, even in these cases, the information and correspondence of the in-house counsel is not especially protected against intrusion from outside except for as a part of the company internal information to the extent of:

> General protection of correspondence- pursuant to Article 34 of the Constitution stating that the freedom and privilege of correspondence are inviolable, except where otherwise is necessary for revealing and preventing a grave crime and

> permission is obtained by the judicial authorities; Special protection, provided by various laws of the so called state secret, official secret, commercial secret and banking secret- such provisions are spread over a number of acts, but the common feature is that all of them (with certain exclusions of state secrets) are to one or another extent protected, except for where the state through its authorities requires this information for taxation, crime prevention, dispute resolution and some other purposes, which makes such secrets protected against third parties but not that much against the state, which could hardly qualify as client-attorney privilege as regulated in the Law on Advocacy.

With regard to the above we could conclude that pursuant to Bulgarian legislation attorney-client privilege of communication is provided only for attorneys-at-law but not for in-house counsel.

Canada

Privilege attaches to communications between a solicitor and client or their agents/employees made in order to obtain professional legal advice[7]. Privilege also attaches in a number of other circumstances, including to certain communications made to non-clients in contemplation of litigation[8]. As a matter of principle there is no difference between in-house and outside counsel when it comes to privilege; rather the difficulties and therefore the case law deal with sensitivities inherent in the role(s) in-house counsel are called on to play-often a mix of legal and managerial responsibilities, and the potential for conflict between the corporation and its managers.

Communications between in-house counsel and directors, officers and employees of the companies they serve are privileged provided that they are undertaken by in-house counsel in their capacity as a solicitor of the company, they occur in the course of either requesting or providing legal advice, and they are intended to remain confidential. Solicitor-and-client privilege does not extend to work or advice provided by in-house counsel that is outside their role as counsel. As with any lawyer, the privilege does not apply to communications of in-house counsel in some other capacity, such as that of an executive. It is the greater opportunity for blurring of the lines between in-house counsel's legal function and their role on the executive and involvement in business issues that may give rise to issues of privilege. In determining whether or not privilege is applicable the character of the work performed will be examined.

Even where litigation is not contemplated, communications between an in-house counsel and corporate client are privileged if undertaken in the capacity as a solicitor for the purpose of giving professional legal advice[9]. However, privilege does not attach to portions of communications made in another capacity, which the in-house counsel holds, such as executive or director[10]. The capacity, in which the solicitor is acting, must be determined based on the facts of each case.

Canadian cases have found privilege to apply to in-house counsel's notes of advice given, legal research, draft documents, working papers, documents collected for the purpose of giving legal advice, documents between employees commenting upon or transmitting privileged communications with counsel, copies of documents not otherwise privileged upon which the

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[7] R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* [Toronto: Butterworths, 1993] at 7-8.
[8] Manes & Silver, *supra* at 8-9.
[9] Manes & Silver, *supra* at 53-55
[10] Manes & Silver, *supra* 53-55; A.W. Bryant, S.N. Lederman & J. Sopinka, *The Law of Evidence in Canada*, 2d ed. ;Toronto: Butterworths, 1999] at 743-744

lawyer has made notes, and communications between in-house counsel and outside lawyers for the company, copies of which were sent to employees of the company. Canadian courts have extended a broad protection to communications between an employee and in-house counsel, regardless of the employee's level in the corporate hierarchy. Lawyers can be sued for breach of confidentiality and may face disciplinary action.

Specifics on the province levels:

Alberta
Blake, Cassels & Graydon LLP

Alberta continues to follow the common law regarding in-house counsel as set out by Lord Denning M.R. in *Alfred Crompton Amusement Machines Limited* v. *Commissioners of Customs and Excise (No. 2)*[11]. Communications between in-house counsel and directors, officers and employees of the companies they serve are privileged provided that they are undertaken by in-house counsel in their capacity as a solicitor of the company, they occur in the course of either requesting or providing legal advice, and they are intended to remain confidential. Solicitor-and-client privilege does not extend to work or advice provided by in-house counsel that is outside their role as counsel. This may include work that would normally be done by in-house counsel but is not in fact legal work (e.g. investigation)[12]. In instances where in-house counsel perform a dual role in the corporation, communications made by in-house counsel in an executive or capacity other than as solicitor will not be protected by privilege. In determining whether or not privilege is applicable, the character of the work performed will be examined.

The privilege, and thus the right to have the confidential communication protected, comes into existence at the time that the communication is made and does not require the commencement of litigation. As long as the counsel is acting as a lawyer and providing legal advice, the communications will be privileged. However, a lawyer employed in a non-legal capacity (e.g. a manager) will not have communications protected by privilege, even if the lawyer is providing legal advice[13].

In Alberta, in-house counsel are also bound by Chapter 12 of the Code of Professional Conduct (the "Code"), which sets the rules applicable to lawyers in corporate and government service, and Chapter 15 of the Code which sets out a lawyer's obligations when engaging in activities outside the practice of law. The Code is clear that in-house counsel are still bound by the same ethical obligations as all lawyers. The Code further states that the client of the in-house counsel is the corporation itself, and not the board of directors, shareholders, officers, employees, or any other component of the corporation

[11] [1972] 2 All E.R. 353 at 376 (C.A.)("Alfred Crompton"); see also Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records), [1981] 2 S.C.R. 494 for general approval of Alfred Crompton principles
[12] Gainers Inc. v Canadian Pacific Ltd., [1993] 4 W.W.R. 609 (Alta.Q.B.).
[13] Husky Oil Operations Ltd. et al v. MacKimmie Matthews et al (1999), 271 A.R. 115 (Alta.Q.B.).

British Columbia
Farris, Vaughan, Wills & Murphy

In Canada, privilege attaches to communications between a solicitor and client or their agents/employees made in order for the client to obtain professional legal advice.[14] Privilege also attaches in a number of other circumstances, including to certain communications made to non-clients in contemplation of litigation.[15]

Even where litigation is not contemplated, communications between an in-house counsel and the corporate client are privileged if undertaken in the former's capacity as a solicitor for the purpose of giving professional legal advice.[16] However, privilege does not attach to portions of communications made in another capacity, which the in-house counsel holds, such as executive or.[17] The capacity in which the solicitor is acting, and thus the question of whether privilege attaches, must be determined based on the facts of each case.

Manitoba
Thompson Dorfman Sweatman

The law in Manitoba (and Canada for that matter) is well settled that in-house counsel enjoys the same professional privileges and shares the same professional duties as does a lawyer in private practice. Accordingly, with respect to the issue of attorney-client privilege there is no distinction between the two.

The leading Anglo-Canadian case is *Crompton (Alfred) Amusement Machines Ltd.* v. *Commissioners of Customs and Excise* (No.2) [1972] 2 All E.R. 353 (CA) in which Lord Denning, M.R, said at page 376:

> They [in-house counsel] are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges….

This principle has been adopted in Canada most recently by the Supreme Court of Canada in *R.* v. *Campbell* [1999] 1 S.C.R. 565, per Binnie J. who, speaking for the court, said at page 602:

> A comparable range of functions [to those undertaken by lawyers in private practice] is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems.

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[14] R.D. Manes & M.P. Silver, Solicitor-Client Privilege in Canadian Law [Toronto: Butterworths, 1993] at 7-8.
[15] Manes & Silver, supra at 8-9
[16] (Manes & Silver, supra at 53-55)
[17] director (Manes & Silver, supra at 53-55; A.W. Bryant, S.N. Lederman & Sopinka, The Law of Evidence in Canada, 2d ed. [Toronto: Butterworths, 1999] at 743-744

While Binnie J. did not elaborate upon the "corporate context", it would include the following:

a. There is a multiplicity of corporate actors, which can contribute to considerable confusion over the identity of corporate counsel's actual client;
b. Corporate counsel may be involved in managerial matters, either pursuant to formal job responsibility, or informally as part of day to day operations;
c. The structure of many organizations, their way of operating and the desire to broaden in-house counsel's knowledge and reach contributes to confusion of counsel's role
d. from time to time, and adoption of careless practices in circumstances to which attorney-client privilege would otherwise attach;
e. As a practical matter, corporate decisions are often made by executives after consultation with, and consideration by, employees and other persons. Attorneys are often part of that group. Some matters are considered and reconsidered over a period of time and those involved at any stage are usually kept informed of the progress of the matter by receiving copies of correspondence, memoranda and so on.

It is in this context that the "special problems" referred to above arise. The two most frequently encountered (and in relation to which recent privilege litigation has dealt) are:

1. who is the client;
2. attorney acting in his legal advisory capacity (as distinct from some other capacity).

With regard to the identity of the client the law here is clear that the client is the corporation and accordingly the privilege is for its benefit and may be only waived by it. However, a corporation essentially only acts through its officers and employees and in this jurisdiction the United States Supreme Court decision in *Upjohn Co.* v. *United States* 449 U.S. 383 (C.A. 6th CIR., 1981) has been adopted. Accordingly Canadian Courts will extend broad protection to communications with employees regardless of the level of the employee in the corporate hierarchy (assuming the general attorney-client privilege tests are otherwise met).

Regarding the second issue given the multiplicity of roles, and role confusion referred to above, privilege will only attach where in-house counsel is acting in his legal capacity, and as a consequence care must be taken in terms of day to day practice as well as the structuring of things like internal investigations to ensure that communications are accorded the privilege.

A third "special problem" flows from the first, and that is the increased possibility for conflicts of interest to arise. Counsel must be mindful, and employees must know, that counsel's obligations are to the corporation and not to the employees.

In summary there is no "structural" distinction to be drawn between in-house and private practice counsel in terms of the availability of attorney client privilege to their client communications. The difficulties arise however given the context in which they operate.

New Brunswick
Clark Drummie

In New Brunswick, there is no distinction between in-house and outside counsel with respect to communications between in-house counsel and directors, officers and employees of their company. Provided that any communication is confidential, is made to such in-house counsel in his or her capacity as legal advisor and the reason for such communication is to receive professional legal advice, then such communication is privileged from disclosure in accordance with the well-established common law principles and rules of solicitor-client privilege.

In Daly v. Petro-Canada (1993) 132 N.B.R. (2d) 346, Jones J. referred to "The Law of Evidence in Canada" by Sopinka, Lederman and Bryant, 1992. To summarize, the situation is as follows: "Lawyers who are employed by a corporation and therefore have only one client are covered by the privilege provided that they are performing the function of a solicitor. Lawyers, however, whether in-house counsel or not, often occupy a dual function and only the portions of the communications made in the capacity of solicitor are protected.

Newfoundland and Nova Scotia
McInnes Cooper

In Nova Scotia and Newfoundland, solicitor-client privilege applies to in-house counsel and their corporate employers as long as the in-house counsel is acting in that role. If in-house counsel is acting in some other role, and communication arises out of that other role, it is doubtful that solicitor-client privilege would apply.

The law in Nova Scotia and Newfoundland with respect to the application of solicitor/client privilege to in-house counsel stands on the same footing. In *Quinn* v. *Federal Business Development Bank* (1997), 151 Nfld. & P.E.I.R. 212 (Nfld.S.C.T.D.), Hickman C.J. reviewed the law pertaining to solicitor/client privilege, and particularly as it applies to in-house counsel, at paragraph 18:

> While the position of in-house counsel insofar as solicitor and client privilege is concerned has not been the subject matter of adjudication by this Court, the principle has been reviewed and well defined by Courts on many occasions. Solicitor-Client privilege attaches to all communications between in-house counsel and their fellow employees if such communications contain legal advice, to the same extent, as it attaches to communications between private practitioners and their clients.

In *Nova Aqua Salmon Ltd. Partnership (Receiver and Manager of) v. Non-Marine Underwriters, Lloyd's London*, [1994] N.S.J. No. 418 (S.C.), Tidman J. denied an application for an Order compelling discovery of in-house counsel and the filing of a list of all communications with "in-house" counsel. In arriving at this decision, Tidman J. stated at paragraph 6:

> The question arose whether Mr. Soward attracts solicitor/client privilege. Several previous cases have decided that communications with 'in house' counsel are entitled to the same solicitor/client privilege as accorded other legal counsel. Ms. Arab on behalf of the plaintiff in arguing that such is not always the case refers me to *Scallion v. Halifax Insurance Co.* (1993), 117 N.S.R. 2d 213 (T.D.). In that case I decided that a solicitor employed by one of the parties was not entitled to solicitor/client privilege. In Scallion*, supra,* however, the solicitor in question

> was employed as a claims adjuster and was acting in that capacity in relation to the document in question. That is not the case here where Mr. Soward is employed as and clearly acts as 'in house' legal counsel to the defendant.

Both the *Nova Aqua, supra,* and *Quinn, supra,* cases refer to *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise* (No. 2), [1972] 2 All E.R. 353 (C.A.) where Lord Denning very clearly discussed the role of in-house counsel at p. 376:

> They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges. I have myself in my early days settled scores of affidavits of documents for the employers of such legal advisers. I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege: and I have never known it questioned.

Quinn, supra, also mentioned the Federal Court of Appeal decision in *IBM Canada Ltd. v. Xerox Canada Ltd.*, [1978] 1 F.C. 513 (C.A.). In that case, the Federal Court of Appeal also relied on the decision in the *Alfred Crompton, supra,* case. At page 516, Urie J. stated:

> There appears to be no doubt that salaried legal advisers of a corporation are regarded in law as in every respect in the same position as those who practise on their own account. They and their clients, even though there is only the one client, have the same privileges and the same duties and their practising counterparts.

In *Quinn, supra,* Hickman C.J. summarizes at paragraph 22:

> *In summary, communications between in-house corporate counsel and their co-employees which contains legal advice is entitled to the same privilege as that which prevails over documents between practicing solicitors and their clients.*

Ontario
Blake, Cassels & Graydon LLP

In Ontario, communications between in-house counsel and directors, officers and employees of the companies they serve are privileged provided that they are undertaken by in-house counsel in their capacity as a solicitor of the company, they occur in the course of either requesting or providing legal advice, and they are intended to remain confidential. Solicitor-and-client privilege does not extend to work or advice provided by in-house counsel that is outside their role as counsel. In instances where in-house counsel plays a dual role in the corporation, any communications made by in-house counsel in an executive or other capacity will not be protected by privilege. In determining whether or not privilege is applicable the character of the work performed will be examined.

The privilege, and thus the right to have the confidential communication protected, comes into existence at the time that the communication is made and does not require the commencement of litigation. As long as the counsel is acting as a lawyer, the communications will be privileged.

In Ontario, in-house counsel is also bound, under the Rules of Professional Conduct, by an ethical rule of confidentiality that is wider than the rule regarding solicitor-and-client privilege. They are required to hold all information concerning the business and affairs of their corporate client acquired in the course of the professional relationship in the strictest of confidence without regard to the nature or source of the information or the fact that others may share the knowledge. Such information can only be divulged if in-house counsel is expressly or impliedly authorized by their client or required by law to do so.

However, if in-house counsel becomes aware that a dishonest, fraudulent, criminal, or illegal act, may be committed they are obligated to recognize that their duties are owed to the corporation and not to the officers, employees, or agents thereof.

Prince Edward Island
Patterson Palmer

The law relating to privileged communications between solicitor and client falls into two categories: solicitor-client privilege and litigation privilege.

In general, communications between a solicitor and his or her client for the purpose of giving or receiving legal advice are privileged. The privilege relates to confidential communications, and a formal retainer is not a prerequisite. What is important is the purpose of the communications: so long as the purpose of the contact is to seek legal advice, the communications between solicitor and client are protected. Client communications with a solicitor's secretary or clerk are included in this protection.

Not every communication between solicitor and client is privileged. The communication must be made with a view to obtaining legal advice. For example, communications between a client and his or her solicitor regarding business matters, not related to legal advice, are not privileged communications. In addition, a document that is simply copied to a solicitor is not privileged if it would not otherwise have attracted privilege.

Solicitor-client privilege is determined document by document, and can only be legitimized if there is a communication between solicitor and client; with a view to obtaining legal advice, and which is intended by the parties to be confidential.

Privilege does not apply to documents that existed prior to the solicitor-client relationship, with one exception: Prince Edward Island case law demonstrates that privilege attaches to some insurance adjuster documents prepared before a solicitor is retained, as an of extension of litigation privilege (which is discussed below). Nor does privilege attach to physical objects, although communications regarding physical objects that take place between solicitor and client are privileged. Therefore it is the communication, and not positive acts or physical objects, that is protected by solicitor-client privilege.

Canadian courts have opted for flexibility over certainty in determining whether privilege can be overridden. Although the approach in the United States and Britain dictates that "once privileged, always privileged", the Canadian courts have taken a more flexible approach, allowing exceptions to this rule. Normally privilege survives the confidential relationship, and even the death of the clients. Solicitor-client privilege may be overridden, however, when the public interest so demands. No privilege is absolute. Public interest can override solicitor-client privilege in two situations: To prove guilt or innocence in criminal cases; and When public safety is at risk.

In *Smith* v. *Jones*, Justice Cory describes what constitutes a public safety risk that warrants setting aside solicitor-client privilege: "…situations where the facts raise real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm." [(1999), 132 C.C.C. (3d) 225 at 251 (S.C.C.)]

Litigation Privilege

Communications between a solicitor and third persons attract litigation privilege if the primary or dominant purpose of the communications was for use in the contemplation of litigation. This form of privilege is based on the rationale that opposing parties must be given the opportunity to prepare their respective cases as best they can.

Rules of Court

Rule 30.02 of the Prince Edward Island Rules of Court addresses privileged documents.

Under Rule 30.02 every document must be disclosed, in order that the opposing party may ascertain as to what documents privilege is claimed, and on what basis. Pursuant to Rule 30.04(6) the Court, on motion, may inspect a document to determine the validity of the privilege claimed.

Under the P.E.I. Rules of Court, every document must be disclosed (but not necessarily inspected, due to privilege) to the other party. The relevant section states:

> 30.02 (1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in Rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. [emphasis added]

Pursuant to Rule 30.03 (1), within 10 days after the closing of pleadings a party must serve an Affidavit of Documents disclosing all documents in the party's knowledge. The relevant section states:

> 30.03 (1) A party to an action shall, within ten days after the close of pleadings, serve on every other party an affidavit of documents disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

For privileged documents in particular, the Rules state that unless a privileged document is produced within 10 days after the action is set down for trial, it may not be used except to impeach a witness, or with leave of the trial judge. The relevant section states:

> 30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection not later than ten days after the action is set down for trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

The foregoing must be read in light of the recent decision by the New Brunswick Court of Appeal in *Lamey (Litigation guardian of)* v. *Rice*. Apart from the privilege that may attach to adjuster's reports in the contemplation of litigation (litigation privilege), the Court's commentary in *Lamey* opens up the possibility that insurance adjuster's reports may be subject to solicitor-client privilege as well. This possibility is premised on the principle of agency, providing that the

communications of an adjuster to a client's solicitor, when acting as an "intermediary" agent for the client, may be privileged. It will be important to note how other Appellate courts treat this case in the future. [18]

Québec
Desjardins Ducharme Stein Monast

In Québec, the attorney-client privilege is considered as a fundamental right. Indeed, section 9 of the *Charter of Human Rights and Freedoms*[19] (hereinafter "The Charter") states:

> Every person has a right to non-disclosure of confidential information. No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

Furthermore, even if the person who has the right to claim the attorney-client privilege or the professional concerned fails to raise the privilege, paragraph 2 of section 9 of The Charter provides that the tribunal must *ex officio* ensure the respect of professional secrecy.

> The tribunal must, *ex officio*, ensure that professional secrecy is respected.

As well, the *Civil Code of Quebec* (hereinafter "The Civil Code") provides that "the court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute"[20].

We also find dispositions related to the attorney-client privilege in the *Professional Code*[21] (which refers to regulations of each profession). Insofar as attorneys are concerned, we have to look as the *Code of ethics of advocates*[22] and *An Act respecting The Barreau du Québec*[23]. Section 131 of the latter states that:

1. An advocate must keep absolutely secret the confidences made to him by reason of his profession.
2. Such obligation, however, shall not apply when the advocate is expressly or implicitly relieved there from by the person who made such confidences to him.

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[18] *Sources:* D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 2nd ed. (Toronto: Irwin Law, 1999), online: QL.; *Breau* v. *Naddy*, [1995] P.E.I.J. No. 108 (P.E.I.S.C.T.D.), online: QL.; *Cormier* v. *Compton*, [1995] P.E.I.J. No. 44 (P.E.I.S.C.T.D.), online: QL.; *Lamey (Litigation guardian of)* v. *Rice*, [2000] N.B.J. No. 271 (N.B.C.A.), online: QL

[19] R.S.Q., c. C-12.
[20] Civil Code of Quebec, L.Q. 1991, c. 64, art. 2858 al. 1.
[21] R.S.Q., c. C-26, art. 60.4.
[22] R.R.Q., 1981, c. B-1, r. 1, 3.06.01, 3.06.02 et 3.06.03.
[23] R.S.Q., c. B-1.

The Supreme Court of Canada[24] has established three conditions for the application of the attorney-client privilege:

1. The professional has to be a member in good standing of the Quebec Bar Association;
2. The client must wish the communication to be confidential;
3. The lawyer has to be consulted in his capacity as an attorney, to obtain legal advice.

Attorney-client privilege requires the consultation to be related to his practice: if the attorney is consulted simply as a friend or administrator or director of a company, there would be no privilege of confidentiality[25].

Consequently, communications between in-house counsel and officers, directors or employees of the company will be protected only if the purpose or the consultation or communication is to obtain legal advice[26] and is intended to be confidential.

On the other hand, communications will not be protected where in-house counsel fulfils administrative functions, such as participating to administrators or shareholders meetings[27].

These conditions have been reiterated by the Quebec Court of Appeal: the fact that the attorney is a full-time employee does not render inapplicable the privilege of confidentiality considering provisions of section 9 of the The Charter and section 131 of *An Act respecting The Barreau du Québec*[28], respecting confidential information obtained by that attorney for the purpose of obtaining legal advice[29].

Section 9 of The Charter provides that confidential information can be disclosed in spite of the existence of a privilege of confidentiality where provided by an express provision of a specific law: laws of public interest, such as the *Youth Protection Act*[30] and the *Public Health Protection Act*[31], may provide for such limitations. A new federal law to fight money laundering contains specific provisions encroaching on the professional secrecy. This law is presently challenged before the Courts.

Also, any consultation related to inappropriate or illegal purpose or involving fraud will not be protected.

Furthermore, it has to be reminded that the attorney-client privilege belongs to the client. Thus, a client may decide to relieve the attorney from his obligation.

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[24] Descôteaux c. Mierzwinski, [1982] 1 R.C.S. 860; Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc c. Société d'énergie Foster Wheeler ltée, J.E. 2001-1973 (C.A.)
[25] Sous-ministre du Revenu du Québec c. Legault, [1989] R.J.Q. 229 (C.A.); Raymond Doray, « Le devoir de confidentialité », dans Collection de droit 2001-2002, Barreau du Québec, Éthique, déontologie et pratique professionnelle, Cowansville, Éditions Yvon Blais, p. 100.
[26] Targau Construction Inc. c. Dominion Bridge Co. Ltd., [1979] R.P. 118 (C.A.).
[27] Purzon du Canada c. La Cour municipale de Montréal, [1976] R.P. 152 (C.A.); Duncan c. City of Vancouver, 36 D.L.R. 218 (B.-C.C.A.); A. Amyot et Fils c. Lauzon, J.E. 93-681 (C.S.); Côte-St-Luc (Cité de) c. Vecsei, J.E. 89-544 (C.Q.); Re Sokolov, (1968) 70 D.L.R. (2d) 325 (Man. Q. B.).
[28] Précité, note 5.
[29] Compagnie Montreal Trust c. American Home Assurance Co., (1993) 56 Q.A.C. 158
[30] R.S.Q., c. P-34.1.
[31] R.S.Q., c. P-35.

Finally, when an attorney appears before the Bar, he cannot raise the attorney-client privilege. Indeed, the *Professional Code*[32] provides that a professional testifying before the Disciplinary Committee or being under inquiry by such committee is bound to answer all questions and may not invoke his obligation to protect the attorney-client privilege as a ground for refusing to answer. This limit only occurs when the attorney is testifying before the Disciplinary Committee with regard to an ethical question. In other circumstances, the attorney-client privilege would still apply before this Committee.

When evidence is given in violation of the attorney-client privilege, the *Civil Code* provides that such evidence will not be considered[33]. The attorney who breaks his duty with regard to the privilege of confidentiality may be sued by his client (or the company for which he acts as in-house counsel). He may even be condemned to punitive damages where conditions of section 49 of The Charter are met:

> 1. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting there from.
>
> 2. Punitive damages.
>
> 3. In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

The attorney may also have to answer for this breach of his duties before the Disciplinary Committee[34].

Saskatchewan
MacPherson Leslie & Tyerman

Attorney-client privilege (known in Canada as solicitor-client or lawyer-client privilege) is available in Saskatchewan to protect communications between in-house counsel and officers, directors or employees of their companies. The test for privilege and the scope of the privilege is essentially the same as that applied to communications with outside counsel. Privilege will arise if the lawyer was at the time of the communication acting wholly or primarily in their capacity as a lawyer and the dominant purpose of the communication was to obtain or provide legal advice. As with any lawyer, the privilege does not apply to communications of in-house counsel in some other capacity, such as that of an executive. It is the greater opportunity for blurring of the lines between in-house counsel's legal function and their role on the executive and involvement in business issues that may give rise to issues of privilege.

In this area of the law, two issues of significance appear to remain unsettled. First, it is not clear in Saskatchewan that portions of documents (such as meeting minutes) reflecting legal advice may be severed or redacted from a document that substantially deals with other business matters and is therefore relevant and producible. It is therefore advisable to create a separate document dealing with such issues, under a heading such as "Legal Issues" or "Legal Report" and treat the legal document as an attachment to the other document. Second, it is not clear whether privilege

[32] Précité, note 3, art. 14.3(2) et 149.
[33] Léo Ducharme, Précis de la preuve, 5e édition, Montréal, Wilson & Lafleur, 1996, p. 233.
[34] Alain Cardinal, « Quelques aspects modernes du secret professionnel de l'avocat », (1984) 44 R. du B. 237, p. 257.

will attach where the matter upon which advice was given was a matter governed by the law of a jurisdiction in which the in-house counsel is not licensed to practice. Again, this is an issue that would arise in connection with communications by outside lawyers, but may be faced more often by in-house counsel for companies with multi-national operations. It is likely that this approach would be considered by a court to be too restrictive.

Canadian cases, which would likely be applied in Saskatchewan, have found privilege to apply to in-house counsel's notes of advice given, legal research, draft documents, working papers, documents collected for the purpose of giving legal advice, documents between employees commenting upon or transmitting privileged communications with counsel, copies of documents not otherwise privileged upon which the lawyer has made notes, and communications between in-house counsel and outside lawyers for the company, copies of which were sent to employees of the company. Canadian courts have extended a broad protection to communications between an employee and in-house counsel, regardless of the employee's level in the corporate hierarchy.

Cayman Islands
Walkers

To date, there has been no reported Cayman Islands case dealing with the idea of attorney-client privilege; however, the courts of the Cayman Islands would be more than likely to apply the English common law principle. This is summarized in *Alfred Compton Amusement Machines Limited v. Commissioners of Customs and Excise (No. 2)* [1972] 2 QB 102 at 129 (in the Court of Appeal) in which Lord Denning M.R. confirmed that salaried legal advisors are regarded by the law as in every respect in the same position as those who practice on their own account and that they and their clients have the same privileges. In the Cayman Islands, the position is likely to be that legal privilege will apply to employed ("in-house") attorneys as well as those in private practice, therefore protecting confidential communications of this nature exchanged in the course of and for the purpose of seeking or giving legal advice.

The privilege will be subject to the same limitations as those imposed on legal advice privilege generally. (For example, communications in furtherance of a criminal purpose will not be protected.)

In addition, the privilege covers only confidential communications and not all documents prepared by the in-house counsel or all information which the in-house counsel knows about his employer. The test set out above must be applied. The rule applies in relation to work done by the in-house counsel in his capacity as a legal advisor and not to work that is simply executive in nature (again, per Lord Denning in *Alfred Compton*).

It is also important to note that in house counsel in the Cayman Islands (as are all other professionals) are subject to statutory requirements[35] to report knowledge/suspicion of money laundering to the relevant authority and such reporting will not constitute a breach of privilege.

There are alternative methods to protect communications. Even where the material in question does not attract legal advice/professional privilege, production of documents may still be resisted on other grounds if and when applicable. These other grounds are: irrelevance; the privilege against self incrimination; public interest immunity; diplomatic immunity. The last two grounds are likely to be rare in the Cayman Islands.

[35] The Proceeds of Criminal Conduct Law (2001 Revision) and the Money Laundering Regulations 2000

In addition, the Cayman Islands Confidential Relationships (Preservation) Law (1995 Revision) ("the CRPL") prohibits the disclosure of "confidential information". Confidential information is defined in the CRPL as information concerning any property which the recipient thereof is not, other than in the normal course of business, authorized by the principal to divulge. This statute is likely to apply to communications between an in-house counsel and his employer. Disclosure in breach of the CRPL constitutes a criminal offence for which penalties are prescribed. Section 4 of the CRPL outlines a procedure whereby directions may be obtained from the Cayman Islands Grand Court where a person is required to give, or intends to give, confidential information in evidence in legal proceedings.

Channel Islands-Guernsey
Carey Langlois

The situation in Guernsey is the same as that in England: communications between in-house counsel and their employer-client are protected by the same privilege as those of any lawyer and client. Therefore, as long as the communication is made as part of the Counsel's legal function, it is privileged. Further, any communication by a non-legally qualified person may be privileged if the in-house legal department under the direction of the in-house counsel produces it.

Channel Island -Jersey
Mourant du Feu & Jeune

The situation in Jersey is the same as that in England. Communications between in-house counsel and officers, directors or employees of the company they serve are protected by the same privilege as those in any lawyer/client relationship and therefore as long as the communication is part of the Counsel's legal role, it is privileged. Furthermore, any communication by a non lawyer may be privileged if produced by an in house legal department under the direction of in-house counsel. It should be noted however that the privilege is subject to certain limitations as it is in England but it would be inappropriate to endeavor to provide an exhaustive list, rather suggest that specific enquiry be made if circumstances so require.

Chile
Claro & Cía.

The attorney-client privilege is governed in Chile by the Professional Ethics Code for the Legal Profession approved by the Chilean Bar Association (the "Code"). Pursuant to the Code, professional secrecy is a right and a duty of all legal counsels. It does not differentiate between in-house counsels and outside counsels or self-employed counsels.

As provided by the Code, legal counsels are committed vis-à-vis their clients to strictly keep in secret and confidence all the professional matters brought to their attention, duty which has no time limit and extends even after the legal services have been rendered.

Legal counsels are entitled and have full right to maintain and protect their professional secrecy before the courts and judges and other authorities, when called to depose in any legal proceedings or to participate in any action that may lead or expose them to reveal or disclose professional confidential information.

Consequently, should a legal counsel be summoned to testify in a legal proceeding, he must attend the audience convened but he must refuse to answer to the examination, if by doing so he may violate the attorney-client privilege.

This duty of honoring attorney-client privilege applies also to confidential information received by legal counsels from third parties and colleagues, as well as to that information that derive from negotiations towards certain agreement that failed to succeed.

A legal counsel who receives confidential information from a client cannot undertake any case or defense in trial that directly or indirectly involves such information, unless the previous consent of the client is obtained.

If an attorney is accused or sued by his client for alleged malpractice or other matter related with the legal services thus rendered, the attorney may reveal or divulge confidential information that such client or a third party had entrusted him to the extent that the rendering of such information is directly necessary to defend his case.

The attorney-client privilege does not extend to information or communications which are made in furtherance of a criminal purpose, in which case the legal counsel must reveal the necessary information in order to prevent a criminal act or protect a person that may be in danger.

In-house counsels are entitled to the same privileges and are subject to the same obligations as all other legal practitioners, provided that the former are acting in their capacity as lawyers and not in some other capacity, as would be the case when they provide business or investment advice to their employer.

Colombia
Brigard & Urrutia

Colombian regulations on the professional duties of legal practitioners, as contained in article 47 of Decree No. 196 of 1971, impose on all lawyers the generic duty of keeping and safeguarding attorney-client privilege. This regulation does not make a distinction between in-house counselors and external lawyers; thus, by virtue of their status as lawyers, in-house counsels are also bound to maintain and respect professional secrecy.

Furthermore, article 74 of the Colombian Constitution establishes that professional secrecy is inviolable. This formulation, which is phrased in absolute terms, has been interpreted by the Colombian Constitutional Court as imposing a very strict duty of non-disclosure upon all professionals that are legally bound to maintain such secrecy, since it is directly related to the protection of the fundamental right to privacy and of private communications and correspondence.

As regards legal practitioners, the duty to respect attorney-client privilege (regardless of the type of counseling that they carry out) has certain legal consequences, especially in connection to criminal matters. Thus, article 28 of the Code of Criminal Procedure exonerates persons who are bound to keep professional secrecy from the duty to inform judicial authorities of criminal conducts that they have known by reason of the exercise of their profession; and article 268 of the same Code establishes that lawyers are not bound to declare before judicial authorities on matters of which they have knowledge by virtue of the exercise of their profession. Furthermore, article 258 of the Criminal Code (Law 599 of 2000) qualifies as a criminal offense punishable by a fine, the act of using, in an undue manner and with the purpose of obtaining benefits, non-public information that has been known by the employees of private entities by reason of their functions, a figure that would be relevant for in-house counsels who unduly disclose protected information with a view to obtaining benefits from it.

Costa Rica
Facio & Canas

In Costa Rica, the attorney-client privilege (secreto profesional) is not properly regulated by law. It is governed by sections 33 and 34 of the Lawyer´s Professional Moral Code (Código de Moral Profesional del Abogado) enacted by the Costa Rican Bar Association on February 16, 2002 and by general principles.

Communications among attorneys and their clients, colleagues, counterparts or any third party related with the attorney due to his profession are protected. Consequently, if called as a witness, a lawyer may refuse to answer any question that could violate privileged information.

There are some exceptions to this rule: i) If the attorney is accused he is authorized to disclose any information that directly benefits his defense; ii) Limited information pertaining to academic publications or collection of unpaid legal fees may also be revealed; iii) If a client informs a lawyer about his intention to commit a crime such communication is not deemed privileged and the attorney shall make proper disclosure to prevent the crime; and iv) In restricted cases, the attorney may reveal privileged information to prevent the conviction of an innocent person.

Even though the Code makes no distinction between in-house lawyers and external counsel, we are of the opinion that section 33 of the Code protects communications to both in-house and external lawyers. An alternative method to enhance the protection of the communications between in-house counsel and officers, directors or employees of the companies they serve contractually, could be by means of confidentiality agreements.

Cyprus
Dr. K. Chrysostomides & Co.

In Cyprus, unlike England, the distinction between solicitors and advocates does not exist. All persons that are admitted to the Bar are permitted to practice both as an advocate and as a solicitor and they are both considered to be attorneys. The attorney – client privilege applies to all attorneys. The strict adherence to the confidentiality of a case through this privilege is sought because it creates the important pre- requisite to the attainment of trust between an attorney and his client. In this regard, an attorney is regarded as a custodian of the confidential information and of the secrets that have been entrusted to him by his client. This privilege has been established in Cyprus with The Advocates Law (Cap. 2) and the recently amended Advocates Professional Etiquette Regulations (17.05.2002).

A fundamental right and duty that an attorney possesses and is protected by the Cypriot Court System is that of professional confidentiality. A lawyer has the privilege not to disclose any confidential information, which has arisen from communications with his client, whether at a trial or at a discovery process. Having said that, it is clear that the attorney – client privilege can generally be invoked by an attorney whenever he is dealing with a judicial or any other authority. However, if a client wishes to raise any charges against his attorney, or if an attorney is facing either a criminal or disciplinary action, then, he is allowed to divulge any information entrusted to him regarding either the charges or the case, even if this results in the disclosure of entrusted information given by the client.

If an attorney practices in a firm or partnership the rules of confidentiality and professional privilege apply to all members of the firm or partnership. Confidential information arising from

another attorney is also regarded as privileged. Included in this privilege is also any entrusted confidential information, which has resulted from constructive discussions that were geared towards an agreement which subsequently failed to materialize.

Czech Republic
Prochazka Randl Kubr

Czech law strictly distinguishes between external and internal counsel as regards the availability of privilege to protect from disclosure of communication. Only the external counsel, members of the Czech Bar Association, are subject to the Czech Advocacy Act which provides for the right and obligation of attorneys not to divulge any information obtained in the course of providing legal services.

As to in-house counsel, no generally applicable legislation exists, which would classify the communication between the counsel and its employer as privileged. In a limited number of cases, the communication may be subject to a special duty to maintain confidentiality (typically, in-house counsel at state organisations or regulated businesses may be subject to non-disclosure requirements). Attempts are sometimes made to strengthen restrictions on disclosure by incorporating confidentiality clauses into employment agreements with in-house counsel or corporate by-laws; however, the proposition that such arrangements will create a privileged relationship is unsustainable.

Denmark
Kromann Reumert

The communication (at least with respect to confidential information) between a qualified attorney, including an in-house attorney, and his client (in case of an in-house attorney the employer) is generally subject to the attorney-client privilege.

The Danish Administration of Justice Act and the Danish Penal Code set out provisions governing attorney-client privilege. The rules apply to all Danish attorneys, whether in-house, self-employed or otherwise, provided that the attorney is qualified as such in Denmark, i.e. has obtained a formal practicing certificate from the Ministry of Justice on the basis of having fulfilled the requirements for this.

It follows from the Danish Administration of Justice Act and the Danish Penal Code that an attorney who illegitimately discloses or exploits information, which is confidential due to private interests, is punishable by fine or detention of up to six months. However, this does not apply in cases where the attorney is obliged to disclose information or is acting under the legitimate safeguarding of clear common interests or in that of his own or others. Information is confidential if deemed as such by valid stipulation, or if the information must be kept confidential in order to safeguard conclusive consideration of private interests.

The attorneys' own code of professional and ethical rules of conduct state that trust and confidentiality are necessary prerequisites for the performance of the attorney, that discretion is a basic both legal and ethical duty for attorneys, which is to be respected not only in the interest of the single individual but also in the interest of society, and that an attorney must treat all information learned of in his course of business as confidential.

The main legal rule on attorneys' duty to give evidence in legal proceedings is section 170 of the Danish Administration of Justice Act according to which evidence cannot be demanded from

attorneys regarding matters communicated to them in the course of carrying on their profession, if the party who has a right to confidentiality does not want this. The court may, however, order attorneys (apart from defense counsel in criminal cases) to give evidence, when the evidence is deemed decisive for the outcome of the case, and the nature of the case and its importance to the party in question or society is considered to justify such evidence being given.

Further, according to section 299 of the Danish Administration of Justice Act a court may - at the request of a party - order a third party, including an attorney, to produce or surrender documents which are at his disposal and which are important to the case, unless this will result in the disclosure of matters, on which he would otherwise be excluded or exempted from giving evidence.

In 1999, a council under the Danish Ministry of Justice made a report (report no. 1379/1999) on inter alia the role of attorneys in relation to white-collar crime, including the attorney-client privilege, duty to give evidence, duty of disclosure and duty of notification. The council found that attorneys who act as counsel for the defendant or represent a party has an attorney-client privilege, and that attorneys should not be subject to a duty to report white-collar crime, including laundering of profits from crimes already committed.

Under the auspices of EU, an agreement has now been reached to amend the directive on prevention of the use of the financial system for the purpose of money laundering (Council Directive 91/308). This amendment implies that attorneys in Denmark will probably be subject to a duty to report clients where there is a probable cause to believe that laundering has taken place.

Dominican Republic
Pellerano & Herrera

Confidential communications between attorneys and clients in the Dominican Republic generally are protected under an attorney-client privilege. Indeed, a statute specifically provides that attorneys may not disclose information given to them in confidence by a client. The exceptions to this rule relate primarily to criminal matters and typically do not apply in situations involving business clients or civil litigation.

Ecuador
Pérez Bustamante & Ponce, Abogados

The laws of Ecuador do not establish specifically the confidentiality of relations between client and attorney or between companies and their in-house counsel. All attorneys, including in-house counsel, are subject to the Professional Code of Ethics approved by the National Lawyers Federation in 1969. According to the Code, maintaining professional secrecy is a right and a duty of all lawyers; it is an obligation, which continues even when the attorney receives a fee to render his/her services. It is a right vis-à-vis the judges and court and other authorities when a lawyer is called to declare as a witness and is asked to reveal a professional secret. The Code also forbids lawyers from participating in matters that can lead them to reveal professional confidential information, or use such information for their own benefit or for the benefit of other clients. According to the Law on the National Lawyers Federation, the Courts of Honor at the Bar Association are competent to decide on matters of violations and professional secrecy.

It would be valid for the company and its in-house counsel to sign a confidentiality agreement in addition to the above mentioned provisions.

Egypt
Shalakany Law Office

Protection of client information or secrets from disclosure is a fundamental principle of the Egyptian Bar Association Law. According to article 79, each attorney is obliged to keep all client's information and secrets confidential and prevent any disclosure, unless otherwise permitted by the client.

Articles 79 and 80 of the above-mentioned law, concerning the obligation of an attorney to protect client information or secrets from disclosure and to abstain from giving guidance or advice to any party having conflicting interests with his client, apply to an in-house counsel who is subject to the regulations of the Egyptian Bar Association Law. An attorney cannot disclose information to anyone other than his client. In the case of an in-house counsel, his client is the person with the authority to appoint him and to represent the entity he serves.

Pursuant to the provision of the Egyptian Bar Association Law any attorney who deliberately violates the provisions of this law shall be subject to certain disciplinary sanctions as described under article 98 of the same law. These disciplinary sanctions varies according to the severity of the violations committed by the defaulting attorney from the practicing law for a period of not more than three years as well as deleting the attorney's name from the Bar Association Registry. Such sanctions shall not prejudice the right of the client to claim for damages.

Estonia
Lepik & Luhaaar

The attorney-client privilege does not apply to the communications between in-house counsels and officers, directors or employees of the companies they serve. Only the communication between the in-house counsel and the attorney is protected by the attorney-client privilege.

According to the Estonian Bar Association Act, the attorney-client privilege is available only to attorneys who are members of Estonian Bar Association. According to the Bar Association Act, working as in-house counsel under an employment contract or a contract of service is not allowed. In addition to working as an attorney, members of the Bar Association may only engage in teaching or research.

Therefore the communication between in-house counsels and officers, directors or employees of the companies they serve is not privileged. But if that communication is forwarded to the attorney and the related documents are put to a file bearing a heading "communications with a law office," then that file should be protected with attorney-client privilege.

Finland
Roschier Holmberg Attorneys Ltd.

The communications between in-house counsels and officers, directors or employees of the companies they serve are not privileged in the same scope as communications between bar members (advocates) and their clients. However, there are some general provisions that entitle in-house counsels to protect these communications in certain situations and within certain scope.

A Finnish bar member has a general duty to keep information of whatever nature entrusted to him in the course of an assignment confidential, and the provisions on confidentiality also, as a rule,

prevent the bar members from being compelled to reveal such information. An in-house counsel is not entitled to invoke such general privilege. However, an in-house counsel may refuse to give evidence on business secrets and lawfully object to confiscation of documentation relating to such secrets if such information has been obtained in connection with correspondence with a client regarding a lawsuit, which the in-house counsel has handled. If the in-house counsel is heard as a witness in court, in police investigations or in tax matters he or she may lawfully refuse to give evidence, which would disclose business secrets.

France
Gide Loyrette Nouel

Contrary to Common law which provides that in-house lawyers (juristes d'entreprise) enjoy the same status as private practitioners (avocats), French law still considers these two professions as totally separate.

According to the French Bars Harmonized Regulations (Règlement Intérieur Harmonisé des Barreaux de France), which provide for professional rules of conduct, lawyers are subject to an obligation of absolute professional secrecy. Indeed, a lawyer must not reveal to a third party neither her/his client's secret information, nor the legal opinions she/he expresses to the client. A breach of such a duty by lawyers constitutes a professional misconduct and a criminal offense under the French Criminal Code. The lawyer can solely be released from this obligation in the exclusive case of defending herself/himself against a charge alleged by her/his client.

These texts also provide that communications between a lawyer and her/his client whether to advise or to defend are covered by legal privilege. Therefore, a lawyer is entitled in the event of an investigation by public authorities or Court to assert confidentiality over communications, written or verbal between herself/himself and her/his client.

Besides, a lawyer can decline to testify on such confidential information.

Under French law, in-house counsel are obliged to respect professional secrecy regarding the information qualified as «business secrets» they receive within the framework of their position with the company. Professional secrecy also applies to legal opinions they render to their «client», i.e. the company. A breach of this obligation is deemed as a criminal offense.

Nevertheless, as only lawyers are covered by a strict code of professional conduct, legal privilege is not extended to communications between in-house counsel and employees, officers or directors of a company that aim at obtaining legal opinions on subject related to their work.

At Community law level, both the Court of Justice and the European Commission reject for the same reasons the concept that the confidentiality privilege should apply to in-house counsels.

Consequently, in a legal procedure, the prosecuting authority has the right and the ability to use documents communicated between the in-house counsel and her/his «client». Therefore, an in-house counsel can neither resist an investigation by public authorities (either EU or national public authorities), nor refuse a domiciliary visit in the business premises, nor oppose a seizure related to evidence. For instance, French or EU trade Administrations for an inquiry into unfair trading practice may use internal memos against the company.

In addition, unlike lawyers, in-house counsel can be called to testify or to provide evidence against the company they work for. However, they have no access to criminal files, which is not the case for lawyers who have full and free access to criminal files.

The major problem is that privilege may be lost when the communication is made with the in-house counsel in a country that does not recognize legal privilege with in-house counsels. A remedy may consist for in-house counsels in avoiding giving written advice especially on competition law. Furthermore, legal advice of major importance should be provided by outside counsels in order to ensure the protection of legal privilege. Outside counsel may always undertake to himself write what the in-house counsel would normally write in order to have full confidentiality applicable to a legal opinion.

Germany
Nörr Stiefenhofer Lutz

Today it is commonly acknowledged that an in-house counsel acting in his capacity as his employer's legal adviser can have the right to refuse to give evidence of information obtained from his employer, its directors, employees or agents in civil and criminal cases if (i) the in-house counsel is permitted to practise as an attorney in Germany and (ii) the information is obtained in the course of providing legal advice and not in the course of management, controlling, accounting or similar services. Therefore, it is essential that an in-house counsel keeps separate files for affairs where he provides legal services and for all other affairs. An in-house counsel who is not permitted to practise as an attorney (legal officer) has no more rights to secrecy than any other third party.

§ 43a (2) BRAO [Federal Regulation concerning Attorneys] and § 2 BORA [Regulations concerning the Legal Profession] provide a duty for attorneys and in-house counsel to observe confidentiality in regard to all information received from their clients. A breach of that confidentiality obligation constitutes a criminal offence under § 203 (1) (1) StGB [Criminal Code] and is punishable with imprisonment for not more than one year or a fine. This also applies to assistants and staff of an attorney or in-house counsel (§ 203 (3) StGB).

In civil cases, pursuant to § 383 (1) (6) ZPO [Code of Civil Procedure] attorneys and in-house counsel acting in their capacity as legal advisors are entitled to refuse to give evidence on any information provided to them while performing such services. However, this does not apply to information obtained while performing management or similar duties or obtained before they were instructed as legal advisor. This right is also extended to personnel assisting the in-house counsel in the performance of legal work (§ 383 (1) (6) ZPO). It is not yet decided, whether in-house counsel admitted to practice abroad should have the same rights.

Legal officers do not have a right to refuse testimony in general. Nevertheless, according to § 384 (1) (3) ZPO they may refuse to answer questions by which they would have to reveal their own or a third party's trade secrets. But this does not cover any trade secrets of the parties in the proceeding (Damrau, in: Munich Commentary, 2nd. ed., Code of Civil Procedure, § 384 margin no. 13).

Under German law the duty to produce documents is restricted to a limited number of cases: (i) if a party refers to a document in order to furnish evidence or in the pleadings if such document is in his own (§ 420 ZPO) or the opposing party's (§ 423 ZPO) possession or (ii) if pursuant to provisions of civil law a party has a duty to surrender a document (§ 422 ZPO). That applies inter alia to documents which are drawn up in the requesting party's interests, record legal relations

between the requesting party and the other party or negotiations on the legal transaction between the requesting party and the other party or an intermediary (§ 810 BGB [Civil Code]), to documents in the possession of an agent in relation to his principal (§§ 675, 680 BGB), to business letters and books of account (§§ 258 et seq. HGB [Commercial Code]). The same applies to documents which are in the possession of a third party (§ 429 ZPO). There is no duty of a party to disclose any communication or information between itself and its in-house counsel. Beside this, an in-house counsel has the right to refuse to produce documents to the same extent as he is entitled to refuse testimony (§ 142 (2) ZPO).

In criminal cases, in-house lawyers admitted to practise as attorneys in Germany are entitled to refuse testimony on matters entrusted to them or on information which they have obtained in their capacity as attorneys (§ 53 (1) (3) StPO [Code of Criminal Procedure]). The same applies to assistants and office personnel. However, in-house lawyers not admitted to practise as attorneys in Germany or legal officers do not have such privilege. As far as an in-house lawyer is entitled to refuse testimony, memos, documents and communications with his clients in his possession are also privileged from seizure (§ 97 StPO). But such documents can be seized by the public prosecutor as far as they are in the possession of the company. There are exceptions to the privilege from seizure rule: if (i) the documents or materials have been used in the commission of a crime or obtained as a result of a crime or (ii) the in-house counsel himself is suspected of having committed or participated in a crime or of being an accessory after the fact or of acting to obstruct criminal proceedings.

In civil and criminal cases the right of the in-house counsel and his assistants to refuse testimony extinguishes if the employer waives its right to keep the information secret (section 385 (2) ZPO, section 53 (2) StPO).

Gibraltar
Marrache & Co.

The relationship between a lawyer and the client and the preparation of documents and other materials for litigation are privileged from disclosure. This privilege extends to two classes of documents (a) communications between the lawyer and the client made in the course of seeking and the giving of advice or assistance by the lawyer to his client within his professional capacity, when no litigation is contemplated and (b) communications passing between the client or lawyer and third parties when litigation is contemplated, provided that the dominant purpose of the communication is for litigation.

Communications between a client and his solicitor made through a clerk or agent employed by a solicitor are also privileged.

Not ever communication is privileged, there are limitations to the general rule. Legal professional privilege may not extend to the following

(i) documents which are in the public domain
(ii) where the communication is a step in a criminal or illegal act
(iii) where a party has a proprietary right to documents and asserts this right

Under the Civil Procedure Rules which are in force in Gibraltar, parties have the right to inspect and take copies of relevant documents from their opponents and third parties. If one party claims privilege over a document, this document may be put before a Judge in private in order that the Court can rule whether the claim for privilege is a legitimate one.

Greece
Zepos & Yannopoulos

The privilege of the attorney-client communications is a well-established principle in Greek legislation. There is no distinction between the protection of the communication between in house counsel and independent legal counsel with corporate officers and employees. All communications held within the scope of the professional relationship of attorney-client are regarded as privileged. The Attorney Code of Conduct, the Code that regulates the practice of Law, the Code of Civil Procedure, the Code of Criminal Procedure and the Criminal Code, are sources that contain specific provisions, granting protection from disclosure of the content of such communications. All information (oral, written, electronic etc.) obtained in the course of legal practice is treated by the law as strictly confidential, even after the termination of the attorney client relationship, and cannot be used even for the purposes of judicial proceedings. Infringement of the above confidentiality constitutes a criminal offence.

Disclosure is legal, however, if it is the ultimate means of protection against potential harm, or the single option of prevention of illegal activity.

Guatemala
Mayora & Mayora

In Guatemala there are two basic sources of law relating to the attorney-client privilege question. One is article 2033 of the Civil Code, the Code of Ethics of the Bar Association (Colegio de Abogados). The basic proposition is the same, namely, that the attorney is liable for revealing the secrets of his/her client. In the Code of Ethics, it is viewed, both as a right and a duty of the attorney. The scope of these provisions is rather undefined, but the Code of Ethics makes it clear that the professional secret may be alleged before judicial or other authorities.

There is no distinction whether the attorney exercises his/her profession independently or "in-house," and therefore, it is understood that the same standards apply in both cases, as regards the attorney-client privilege matters, or more specifically, the professional secret.

Honduras
Bufete Gutierrez Falla

According to the Honduran code of Professional Ethics for Law (Código de Etica Profesional Hondureño del Derecho") adopted by the Honduran Bar Association on April 30, 1966, which does not differentiate between in-house and independent counsel, any member of the Bar Association of Honduras, as well as procurators who may not be members of the Bar, are obligated to observe the most rigorous professional secrecy, even after providing services to the client, and have the right to refuse to testify against their client and can abstain from answering any question which would involve revealing a secret or would violate any client's confidence (Articles 23 and 60 of said Code). An exception thereto being the right that counsel has, if accused by a client before a court of law, to reveal the client's secrets within the limits necessary for the counsel's own defense (Article 25 of said Code). As the Code of Professional Ethics does not differentiate between in-house and independent counsel, we are of the opinion that the conduct required by said Code with respect to professional secrecy would include in-house counsel, and would cover communications between in-house counsel and officers and directors of the companies they serve, as well as (ex Article 24 of the same Code) the communications between in-house counsel and the employees of said companies.

Hong Kong
Johnson Stokes & Master

In general, for communications between lawyers and clients to be privileged, the following requirements must be satisfied:

- the communications must be made in the course of the client's obtaining legal advice from the lawyer, in his professional capacity (even if no formal retainer is entered into, i.e. merely seeking advice by the client and the lawyer responding to them is sufficient);
- the communications must be given in confidence, i.e. not in front of any third party and no instruction has been given by the client to the lawyer to inform a third party of the content of the communications; and
- whether or not in connection with pending legal proceedings.

The legal position of in-house counsel is that salaried legal advisers are regarded by law in every respect as being in the same position as those who practice on their own account. Thus, they owe to their clients the same duty of confidentiality and the duty to assert privilege on behalf of their clients as those in private practice do. Likewise, communications between in-house lawyers and the employees of the company they serve enjoy the same privileges.

Exceptions to the privilege exist where the communication was made before the attorney was employed as such, or after his employment had ceased; or where, although consulted by a friend because he was an attorney, yet he refused to act as such and was therefore only applied to as a friend. Privilege is inapplicable if the communications were made in furtherance of a crime or fraud. Privilege can be overridden by law, e.g. the Prevention of Bribery Ordinance and the Inland Revenue Ordinance. It can also be overridden by a Court Order which clearly purports to do so.

In any case, when disclosure is required by law or by court order, care must be taken such that no more information than is required is divulged.

It is possible to argue that although the communications are not privileged, yet they are confidential. The client can either rely on a contractual duty not to disclose confidential information to protect the information, or he may rely on the broad principle of equity that he who has received information shall not take unfair advantage of it and thus claim breach of confidence.

Hungary
Cerha, Hempel & Spiegelfeld, Austria

The attorney-client privilege is not available to in-house counsel in Hungary. If an in-house counsel is a Bar member (and thus an attorney), the privilege is applicable. In general in-house counsels are not self-employed attorneys and not Bar members but employed trained lawyers who are permitted to represent only the company they work for in court proceedings.

The Law-Decree No 3 of 1983 on In-house Counsels previously regulated the activity of in-house counsels under Hungarian law. However, the provisions on confidentiality contained in this Law-Decree were abolished in 1991 when the Law-Decree was subject to a major change. The change eliminated the old style "collectives of in-house counsels" causing every in-house counsel thereafter to act as an employee of a company, association or state institution, etc. Therefore the

employers regulate the duty of confidentiality of in-house counsels in the contract of employment.

In general, there is not any protection of communication between in-house counsels and officers, directors or employees of the company. The Labour Code Act XXII of 1992 (hereinafter "Labour Act") contains the general provisions regarding the duty of confidentiality of employees of a company. According to Section 3 Paragraph 5 of the Labour Act, in the course of the existing employment, the employee shall not behave in such a way that could endanger the lawful economic interests of the employer. This duty may continue after the termination of the employment, up to three years if the parties so agree, for which the employee shall be compensated. According to Section 103 Paragraph 3 of the Labour Act, the employee is obliged to keep confidential all information about the employer or its activity, which he learned during the course of his employment. In addition, the employee shall not inform unauthorized persons about data which he has learned in connection with his work and which could result in negative effects to the employer.

Iceland
Logos

Under Icelandic law, communications between in-house counsel and officers, directors or employees of the companies they serve enjoy in principle the privilege of protection from disclosure. This privilege is, however, not absolute. Firstly, by the order of a court ruling, an in-house counsel (as well as external counsel) may be obligated to disclose information that becomes known to the interests at stake; the specific interests of having the information disclosed are deemed to outweigh the private interests of the attorney-client relationship of not disclosing the information. Secondly, the attorney-client privilege would not be available to in-house counsel if the in-house counsel would have obtained the information in a different capacity within the company.

Indonesia
Ali Budiardjo, Nugroho, Reksodiputro

It is common with companies in Indonesia that in-house counsel is very close to the management of the company and is directly consulted on all matters including confidential policy matters. As such, it is required that in-house counsel shall keep all privileged communication with the management of the company strictly confidential. Often the company has a policy that binds its employees, including in-house counsel, to keep privileged information concerning the company confidential. However, in cases when so required by law, the in-house counsel will have to disclose the privileged communication and information of which he/she has knowledge.

The respective company itself will, in general determine the privileged character of communications with respect to a company involving in-house counsel. Such communications could therefore be determined to be privileged to certain levels of personnel within the company only and not to be disclosed to other levels of personnel of the company, but it can also be that it is confidential only for outsiders.

In-house counsel will have to disclose privileged information in the event that the court in hearing a case requires the in-house counsel as one of the witnesses in the case, to do so. The in-house counsel can in such case, however, ask the court to have the disclosure made in a court session that is closed for the public.

Ireland
Arthur Cox

Privilege can be defined as the entitlement to refuse to disclose the contents of a document the existence of which is discoverable. It is an objection to the production of a relevant document, which has been disclosed in an Affidavit of Discovery. The party making discovery must disclose the existence of a document subject to privilege in his list of documents. Where the claim of privilege is upheld, the document is immune from production. Only the courts may decide if a claim of privilege is justified.

Legal professional privilege is just one of the categories of privilege recognized in Ireland. It is a well-established principle and includes two distinct categories of communication between lawyer and client: confidential legal advice and confidential documents created in contemplation of litigation.

The former refers to the privilege that exists over certain confidential communications between a legal professional advisor and his client. It has long been accepted by the Irish courts that where a legal adviser and his client communicate with each other for the purpose of giving or obtaining confidential legal advice that such advice is private between parties and cannot be disclosed to another person without the consent of the client.

The second category concerns confidential documents created because of an apprehension or contemplation of litigation or for the purpose of the litigation. A claim that privilege exists over such documents will be accepted by the courts where it can be shown that the documents were made in the apprehension or contemplation of and for the purpose of litigation.

The privilege is that of the client not of the lawyer and consequently, if the client wishes, it may be waived.

The privilege does not extend to communications which are made in furtherance of a criminal purpose, fraud, abuse of statutory powers, etc., such communications do not come into the scope of professional legal advice.

The rule of legal privilege extends to communications from solicitors in private practice, solicitors employees acting on his behalf, barristers and, with one exception applies to employed ("in-house") lawyers. The single exception relates to the European Commission's power to require production of documents in the course of an investigation into the infringements of Article 81 and 82 of the Treaty of Rome. That power is limited by lawyer/client privilege where the lawyer is independent of the client, but not where the lawyer is an employee of the client, as decided in AM & S Limited -v- EC Commission (1982). In that case the European Court of Justice ruled that legal privilege applies to correspondence between an undertaking and its external lawyer entitled to practise in an EU Member State following the start of formal proceedings by the Commission, or before that date but relating to the subject-matter of the proceedings. The privilege does not extend to advice from in-house lawyers. The Commission has upheld that decision on several occasions; and has gone as far as using advice from in-house lawyers as evidence of an infringement or of intention.

In practical terms, where there is a dispute concerning the privilege of a document, the undertaking should refuse to hand over the document concerned, then challenge the Commission's decision before the Court of First Instance.

While new arguments in favor of privilege for in-house lawyers are to be found in the United Kingdom decision of General Mediterranean SA –v- Patel and another (1999) these have yet to be applied by the European Commission. In that case it was upheld that inference with the right to consult a lawyer of one's choosing may constitute a violation of the European Convention on Human Rights: in particular, Article 6, the right to a fair trial and also Article 8, the right to privacy.

Isle of Man
Cains Advocates Limited

Under Isle of Man law, certain communications between a lawyer and his client are privileged from production for inspection in legal proceedings before the courts of the Isle of Man. There are two heads of legal professional privilege. These are generally referred to as "advice" privilege and "litigation" privilege.

Communications between a lawyer in his professional capacity and his client attract advice privilege if they are confidential and made for the purposes of seeking or giving legal advice.

Advice privilege will also protect communications by or with an agent of the lawyer or client if that agent was appointed for the purpose of communicating with the other in order to seek or to give legal advice.

Certain communications by or with a lawyer attract litigation privilege if they are: confidential; made after litigation has been commenced or contemplated; and, made for the sole or dominant purpose of such litigation.

Litigation privilege will extend to communications that meet the afore-mentioned criteria if they are made between the lawyer and his client, between the lawyer and either his agent or the agent of his client, and between the client and either his agent or that of the lawyer. In order for litigation privilege to apply, litigation must have been reasonably in prospect, although it need not have be the same litigation as those proceedings in which inspection of documents is being sought.

Both heads of legal professional privilege are equally applicable to an employed solicitor's relationship with his employer. Thus communications between an in-house lawyer and other persons within the firm will be protected if they meet the other conditions described above; the communications will not be protected if they merely relate to administrative matters. Communications between two in-house lawyers employed by the same firm will also be protected if they meet the other conditions described above. Communications by or with a non-qualified employee working under the supervision of an in-house lawyer will be protected if the non-qualified employee is effectively acting as the agent of the in-house lawyer, but not if he works independently of him.

Israel
S. Horowitz & Co.

According to Israeli law (under both the Bar Association Law, 1961 and the Evidence Ordinance [New Version], 1971), all matters or documents exchanged between a client (or someone on his behalf) and his attorney, pertaining to the professional service granted by the attorney to his client, are privileged. Accordingly, communications between in-house counsel of a company and officers, directors or employees of the same company, pertaining to legal services rendered by the

in-house counsel to his client - the company - are privileged. The fact that the in-house counsel is an employee of the company is irrelevant and does not influence the privilege. The communication is privileged only if both the officers, directors or employees are acting on behalf of the company and the communication it relates to the professional attorney-client relationship between the in-house counsel and the company. In instances where the privilege applies, it is absolute, and can only be waived by the client.

Italy
Chiomenti Studio Legale

Pursuant to Article 200 of the Italian Code of Criminal Procedure concerning witness testimony, a few professional categories have the right to invoke some form of privilege, and are allowed to refuse to witness on circumstances concerning their relationship with clients and, more generally, information acquired in the course of their profession.

Attorneys are expressly named as one of said categories. However, this rule is not applicable to in-house counsel, although the activity of in-house counsel is similar to the activity of attorneys.

In Italy, the two roles are technically distinct. In fact, those who have been practicing as attorneys in a law firm and are subsequently hired by a company to serve in-house, are obliged to quit the Bar Association pursuant to the Italian Professional Law (R.D.L. n. 1578/1933). This implies that in-house counsels do not have the status of a professional attorney and, as a consequence, confidentiality rules applicable to in-house counsel are the same applicable to any other employee.

Therefore, if requested to testify before a Court, an in-house legal counsel, as any other employee, will not have the right to be exempted from the duty to witness under the attorney-client privilege rules.

Apart from the issue of a specific duty of confidentiality applying to attorneys, under Italian law all employees are bound to an obligation of faithfulness towards their employer under Article 2105 of the Italian Civil Code. This provision, concerning the obligation to maintain confidentiality on the organization and production methods of employers and providing a mean of protection of know-how and trade secrets from unlawful dissemination by employees, is of great importance if considering that as our system does not protect such information otherwise (e.g. very often the content of company information, even if commercially valuable, is not patentable).

Therefore, if an employee, in breach of his confidentiality obligation as to any information acquired in carrying out his service for the company, reveals to third parties the content of confidential information or communications, then the employer shall have the right (pursuant to Articles 2105 and 2106 of the Italian Civil Code) to apply disciplinary sanctions proportioned to the seriousness of breach (in some cases termination for cause is permitted).

Finally, criminal remedies are also available for breach of confidentiality on general secret information (Article 622 of the Italian Criminal Code) or, more specifically, for breach of confidentiality on secret information having a scientific or industrial value (Article 623 of the Italian Criminal Code).

Ivory Coast
Dogué, Abbé Yao & Associés

The applicable legislation in Côte d'Ivoire is based on French law. So the provisions of the both are the same in many fields. This is the case about the protection of the communication between attorney and client.

Ivorian law considers provides the in-house lawyers (juristes d'entreprise) as a totally separate profession from the one of the private practitioners (avocats). The Ivorian Bar Association Regulations (Règlement Intérieur du Barreau Ivoirien) provides for professional rules of conduct, lawyers are subject to. According to these Regulations lawyer is submitted to an obligation of absolute professional secrecy. That is the reason why, a lawyer cannot, except to engage his responsibility, reveal to a third party neither his client's secret information, nor the legal opinions he expresses to the client.

Failure to comply with this obligation is a professional misconduct and a criminal offence. So the lawyer who does not respect this rule can be brought before the disciplinary committee of the Ivoirian Bar Association or the criminal court.

The only way to be released from this obligation is the exclusive case of defending himself against a charge alleged by his client.

This confidentiality also applies for communications between a lawyer and his client whether to advise or to defend are covered by legal privilege. Therefore, a lawyer is entitled in the event of an investigation by public authorities or Court to assert confidentiality over communications, written or verbal between himself and his client. Besides, a lawyer can decline to testify on such confidential information.

Under Ivorian law, in-house counsels are obliged to respect professional secrecy regarding the information qualified as «business secrets» they receive within the framework of their position with the company. Professional secrecy also applies to legal opinions they render to their «client», i.e. the company. A breach of this obligation is deemed as a criminal offence.

Nevertheless, as only lawyers are covered by a strict code of professional conduct, legal privilege is not extended to communications between an in-house counsel and employees, officers or directors of a company that aim at obtaining legal opinions on subject related to their work.

Jamaica
Myers, Fletcher & Gordon

All communications between a legal adviser and his/her client, made for the purposes of giving or receiving legal advice are privileged[36]. In this context, legal advisors include both foreign lawyers and in-house lawyers[37]. Once the communication is for the purpose of giving legal advice, privilege applies. Where in-house counsel is concerned, it becomes necessary to distinguish between situations where that lawyer is acting either as legal adviser to his/her employer, or as a client to external lawyers, or in his executive capacity within his client company. If it is

[36] Anderson v Bank of British Columbia [1876] 2 Ch.D 644, Balabel v Air India [1988] 2 WLR 1036.
[37] *Re: Duncan* [1986] P 306; *Alfred Crompton Amusement Machines Limited v Customs & Excise Commissioners* [1974] AC 405.

determined that he was acting in his executive capacity, then the communications will not be privileged.[38]

Japan
Asahi Law Offices

Under the laws of Japan, the concept of an attorney-client privilege does not exist. However, there are other options in-house counsel can use to protect confidential communications with the officers, directors and employees of the companies they serve from disclosure orders by the Japanese court in a civil litigation and from criminal proceedings.

Current and former *Bengoshi* (lawyers admitted in Japan) and *Gaikokuho Jimu Bengoshi* (foreign law business lawyers registered in Japan) have the right and obligation under statutory law to hold in confidence secret information obtained during the course of their professional duties (Article 23 of Lawyers Law [Law No. 205 of 1949, as amended]; Article 50, paragraph 1 of Special Measures Law concerning the Handling of Legal Business by Foreign Lawyers [Law No. 66 of 1986, as amended]).

Japan's Code of Civil Procedure (Law No. 109 of 1996, as amended) (the "Civil Procedure Code") further provides that current and former *Bengoshi* and *Gaikokuho Jimu Bengoshi* may refuse to testify as a witness in a civil court when questioned about their knowledge of facts obtained during the course of their professional duties, so long as such facts are still considered confidential (Article 197, paragraph 1, item 2).

In order for lawyers to be able to comply with their duties of confidentiality in relation to clients' documents which include such confidential information (referred to in Article 197, paragraph 1, item 2 of the Civil Procedure Code), the Civil Procedure Code also provides that the holder of such documents may refuse to produce them to a civil court, provided the duty of confidentiality has not been exempted or waived (Article 220, item 4-c). This means that a civil court cannot issue an Order to Produce Documents (*Bunsho Teishutsu Meirei*) to current or former *Bengoshi* or *Gaikokuho Jimu Bengoshi* concerning documents which contain their client's confidential information, unless such information is no longer confidential.

Japan's Code of Criminal Procedure (Law No. 131 of 1948, as amended) (the "Criminal Procedure Code") provides that current and former *Bengoshi* and *Gaikokuho Jimu Bengoshi* may forbid the seizure of items containing confidential information of a third party if the lawyer kept or held such items because they were entrusted to the lawyer during the course of the lawyer's business. Exceptions to this rule apply when the third party consents to the seizure, or when the lawyer's refusal to relinquish such items is considered to be an abuse of the attorney's power and made solely in the interest of the accused or the defendant, unless the said third party is the accused or the defendant (Article 105; Article 222, paragraph 1).

The Criminal Procedure Code also provides that current and former *Bengoshi* and *Gaikokuho Jimu Bengoshi* may refuse to testify as a witness in a criminal court concerning confidential information of a third party which the lawyer obtained because it was entrusted to the lawyer during the course of the lawyer's business. Exceptions to this rule apply when the third party consents to such attorney's testimony, or when the lawyer's refusal to testify is considered to be an abuse of the attorney's power and made solely in the interest of the defendant, unless the said third party is the defendant (Article 149).

[38] *Blackpool Corporation v Locker* [1948] 1 All ER 85.

However, all the protection described above are limited by its nature, because unlike the attorney-client privilege recognized in the United States, which is essentially the client's privilege, the rationale behind this protection in Japan comes from the need to assist the lawyers to uphold their statutory duty of confidentiality.

Also, all the protection described above can only be applied if the in-house counsel is either a *Bengoshi* or a *Gaikokuho Jimu Bengoshi*. This is important because while the number of in-house counsel in Japan has dramatically increased in recent years, there are still many legal departments in Japanese companies that do not have in-house counsel, and they are usually staffed by employees who have only majored in or studied law as college undergraduates.

Even if the company does not have in-house counsel, there are still other ways to protect confidential corporate information.

For example, the Civil Procedure Code provides that a civil court witness may refuse to testify when questioned regarding matters relating to technical or professional secrets, so long as such matters are still considered confidential (Article 197, paragraph 1, item 3).

In order for such secrets to remain confidential, the Civil Procedure Code also provides that the holder of documents which include matters referred to in Article 197, paragraph 1, item 3 of the Civil Procedure Code may refuse to produce them to a civil court, provided the duty of confidentiality has not been exempted or waived (Article 220, item 4-c). Case law indicates that in order for the holder of documents containing such secrets to successfully refuse their disclosure, the importance of withholding such secret information must be very substantive and important enough to justify the hindrance to the judicial process as a result of excluding such information.

In addition, the Civil Procedure Code provides that the holder of documents which were intended for use strictly by the holder may refuse to produce them to a civil court (Article 220, item 4-d). Case law indicates that in order for a company which holds such documents to successfully refuse their disclosure, the court must determine that such documents were made strictly for the company's internal use, and that no person outside the company had ever seen nor had the opportunity to see such documents.

If a civil court considers it necessary to determine whether a document containing attorney-client communications and other confidential information should be excluded from any motion for an Order to Produce Documents, the court may cause the holder of the document to make the document available for its review. In that case, no one may request disclosure of the document presented to the court (Civil Procedure Code, Article 223). This procedure gives added protection to confidential information by allowing the judge to review the document in private, without having to disclose the document to the petitioner prior to the judge's ruling on the motion.

Finally, a witness may refuse to testify in a civil or criminal court when the testimony relates to matters that could be self-incriminating or incriminate close relatives of the witness if disclosed (Civil Procedure Code, Article 196; Criminal Procedure Code, Articles 146 and 147). A witness may also refuse to testify in a civil court when the testimony relates to matters that would be harmful to the honor of the witness or close relatives of the witness if disclosed (Civil Procedure Code, Article 196). One may also refuse to produce documents it holds to a civil court that (i) could be self-incriminating or would be harmful to the honor of the holder; or (ii) could

incriminate, or would be harmful to the honor of, the holder's close relatives (Civil Procedure Code, Article 220, item 4-a).

Jordan
Ali Sharif Zu'bi & Sharif Ali Zu'bi

Attorney-client communications lack legal protection under the Jordanian law. With the absence of such statutory protection, the tendency of the Jordanian courts does not indicate that they are willing to offer such protection to this type of communications.

There is no rule of law that offers protection to attorney-client communications. Although the Evidence Law gives a lawyer, agent and physician the right to abstain from disclosing information relating to his client, the said law is silent as to whether information is privileged information.

As a solution to this intricate legal issue, we suggest that the relevant Jordanian Bar Association Law should be amended to include an Article expressly classifying such communications as privileged communications.

Kazakhstan
McGuire Woods Kazakhstan

Advocates are not allowed to work as in-house counsel. The obligations of in-house lawyers stem from their business ethics and internal policies that a company may have. They have no privileges they can invoke in terms of being called as a witness or being bound not to disclose information obtained from officers, directors, or employees of their company.

Kazakhstan has enacted a law "On Advocacy" (December 5, 1997). This law set forth almost all of the privileges allowable in Kazakhstan that would be categorized as "attorney-client privilege." But this law only applies to licensed advocates (by analogy to barristers in the UK) and not to attorneys in the general sense (solicitors). Advocates are specifically court attorneys and although they have a special license, nothing prevents a non-advocate attorney from representing clients in court - all that is needed is a power of attorney. The result is that advocates have obligations and privileges made available to them because of the above-mentioned law, while a state-licensed attorney (non-advocate) has none.

Due to this lack of regulation, there have been some efforts to impose a code of conduct or law applying to obligations and privileges. One result was a self-adopted code of conduct that applies to judges. Nonetheless, no code of conduct or law exists at the present time that relates to in-house counsel in the Republic of Kazakhstan.

Kenya
Kaplan & Stratton

While the advocate/client communication is respected still in evidence in our Courts, the extent to which it extends to the advocate/client relationship, as far as in-house counsel in concerned, is unclear.

Korea
Hwang Mok Park P.C.

In Korea, there is no such system such as attorney-client privilege.

Kuwait
Abdullah Kh. Al-Ayoub & Associates

Issues addressing attorney-client privilege are dealt with under Law No. 42/1964 organizing the legal profession. These issues are also considered under the Civil Code, Law No. 67/1980, governing the relationship between principal and agent.

The relationship between an attorney and a client enjoys privilege because the parties thereto are independent entities. The same privilege cannot apply to in-house counsel advising officers, directors or employees of the company where they serve; in-house counsel are not independent attorneys. They are also employees of the same company and hence do not enjoy the same privilege accorded to attorneys. To differentiate this point further, we give the following example. Article 25 of Law No. 42/1964 prohibits an attorney from acting as a witness in his own case. However, in-house counsel can appear as a witness in a case involving his company.

Latvia
Klavins, Slaidins & Loze

In the jurisdiction of Latvia, communications between in-house lawyers and officers, directors and employees of the companies, which they serve, are not legally protected from disclosure. Attorney-client privilege extends only over the members of the Latvian Bar Association - sworn advocates and assistant advocates, a minority of all graduates from law schools in Latvia, who practice independently or collectively in law firms.

To protect communications from the requirement of disclosure, companies can either conclude assistance and service agreements with sworn advocates or law firms where sworn advocates practice in teams, or sign internal confidentiality agreements between the employer and in-house lawyer. In Latvian practice, many companies utilize the services of an outside advocate or law firm that, for all effective and practical purposes, serves as in-house legal counsel. Often, in-house lawyers, who are not sworn advocates, faced with a request for sensitive or potentially detrimental information for the company may refer the request to their employer. However, even in this case they are not protected by a formal client-attorney privilege, but rather a regular employment relationship, where issues above and beyond the competence of employee are traditionally referred to a higher managerial instance.

In-house lawyers in Latvia are particularly vulnerable vis-à-vis the office of prosecutors. In accordance with Article 17(1) of the law "On the Office of Prosecutors" (adopted in 1994), prosecutors have broad legal powers to request and obtain legal acts, documents and other information from state administrative institutions, banks, State Controller, municipal governments, enterprises, organizations, and other institutions as well as gain uninhibited entry in the facilities of these institutions. In theory and practice, in-house lawyers cannot maintain the confidentiality of in-house communications faced with a request for information from the office of prosecutor.

Lawyers who are not members of the Latvian Bar Association, such as in-house counsel, employees of legal departments, and legal counselors are not protected by the attorney-client privilege.

Lebanon
Moghaizel Law Offices

Our laws do not regulate this matter, and therefore, there is no privilege by law for communications between in-house counsel and officers or employees of the company they serve.

It is possible, however, to have a confidentiality agreement between the employer and the employed in-house counsel. This would be treated as any other confidentiality agreement between an employer and an employee, since the in-house counsel status is not regulated under Lebanese law because the law governing our legal profession provides that legal counsels must be self-employed.

Turning to the protection of business secrets, such protection can be afforded by agreement and nothing prevents that such agreement be applied to in-house counsel communications, provided this is specifically stated in the agreement in question.

Lithuania
Lideika, Petrauskas, Valiunas ir partneriai

Under Lithuanian legislation an attorney-client privilege is granted only in respect to communications among advocates, assistant advocates and clients. In general in-house counsels do not enjoy such privilege, and the communications between an in-house counsel and officers, directors or employees of the companies they serve are not protected against disclosure. Notably, advocates and assistant advocates are not entitled to work or on any other basis serve as in-house counsels, except the legal assistance they render under the signed Retainer Agreement.

However, certain guaranties which relate to the attorney-client privilege may be enjoyed by in-house counsels during civil or administrative proceedings. It shall be prohibited to summon representative of the company as a witness and interrogate him/her on the circumstances he/ she has become aware of while performing his/her obligations as the representative of the company. Notably, this rule is not applicable in criminal proceedings. An in-house counsel shall be supposed to be the representative of the company only if he/she is duly authorized to act as a representative of the company in the trial.

The law is silent on in-house counsel's rights to use any alternative methods of protecting the information. However, the in-house counsel may insist on a closed trial on the basis that such communication contains commercial or professional secret. However, the scope of commercial or professional secret in this respect is rather limited and it would be difficult for the in-house counsel to persuade judge to proclaim closed trial (for example, on the basis of confidentiality clause included in the employment contract, *etc*.).

Luxembourg
Bonn Schmitt Steichen

In Luxembourg, in-house counsels are not bound by any attorney-client privilege. As a result, employees of legal departments can disclose information given by another employee to officers, directors or other employees of the company they serve. The attorney-client privilege is set forth

in section 5 of the internal rules of the Luxembourg bar association, which is not applicable to in-house counsels, as the functions of legal advisors for a company and attorney-at-law admitted to the bar are incompatible.

Pursuant to article 458 of the Luxembourg Criminal Code, which is the general provision on professional secrecy, a person who discloses a professional secret must be disclosed to the latter in order to enable him to perform his function (i.e. expert). An in-house counsel may in certain cases be a "necessary" and "obligated" confident and may therefore be bound by this provision with regard to his relations with the officers, directors and employees of the company. His function must consist of giving legal advice to the company itself, as opposed to helping employees, officers and directors in private matters.

In order to clarify the position of the in-house counsel, it may be useful to provide for a specific clause in his employment contract or an addendum to his contract, which would identify the categories of information which are confidential and may not circulate within the personnel of the company.

In general, we might say that every time some information is revealed to the in-house counsel with regard to his function, he is bound by professional secrecy. However, any information that is given to him without regard to his function as in-house counsel to the company is not privileged.

Every employee of a company is prohibited to disclose to third persons any trade secrets and any professional secrets pursuant to article 309 and article 458 of the Criminal Code.

Malta
Ganado & Associates

Generally, the provisions of the Professional Secrecy Act reiterate the basic principle that certain professionals, including advocates, are bound by the duty of confidentiality by reason of their profession. The law goes on to regulate other areas such as when disclosure may be compelled by law or by a Court Order. The Professional Secrecy Act does not address the in-house/ employer relationship and hence one is to assume that an in house lawyer is given similar status to a private practitioner irrespective of the relationship with the client.

Under the Code of Ethics and Conduct for Advocates, it is stated categorically that an advocate in employment is bound by the norms of professional conduct in the same manner as an advocate in private practice. Consequently it follows that communications between in-house lawyers and officers of the company, including directors and/or employees would be protected by professional secrecy as it can normally be expected that in the performance of his duties, the in-house lawyer would ordinarily have various communications with the staff and officers of the Company he serves Certain limitations do exist to the above rule. Thus, the duty to keep a client's matters confidential can be overridden in certain cases, such as when an advocate is required to disclose confidential information in terms of law or if ordered to do so by a Court. Similarly such information may be divulged if it is essential for an advocate to defend himself in proceedings, which are taken against him either by or upon the complaint of the client. In the latter case, the disclosure should be limited to what is absolutely essential and indispensable to the defense.

Mauritius
De Comarmond & Koenig

The situation in Mauritius is the same as that in England. Communications between in-house Law Practitioner and their employer-client are protected by the same privilege as those of any lawyer and client. Therefore as long as the communication is part of Law Practitioner's legal function it is privileged. Furthermore the privilege will also cover any communication by a non-legally qualified person if same is produced by the in-house Law Practitioner.

Communications between lawyer and his client are covered by legal privilege. A Law Practitioner is entitled in the event of an investigation by public authorities or by the court to assert confidentiality over communications, written or verbal between himself and his client. The Law Practitioner can decline to testify on such confidential information. A breach of this obligation of secrecy is deemed as a criminal offense under the Mauritius Criminal Law unless such disclosure is compelled by law. The Money Laundering Act provides for specific circumstances where the Law Practitioner may be compelled to reveal certain information.

Mexico
Goodrich, Riquelme y Asociados

The rendering of professional services within the Mexican framework is defined as an agreement in the professional is obliged to render specific services that require, in most of the cases, a professional degree.

The Law of Professions and the Federal Civil Code govern this agreement, as well as the availability of the attorney-client privilege to protect from disclosure communications between in-house counsel and officers, directors or employees of the companies they serve. The Federal Criminal Code determines the civil liability of the attorney whenever he/she reveals the attorney-client communications to its contrary or if he/she provides documents of information that could harm his/her client.

More over, the Law of Professions establishes that every professional is committed to strictly keep the secret of the cases that the clients entrust, except for the pleadings set up on the law. Accordingly, the general Office of Professions may impose administrative fines when the professional conducts himself/herself in violation of this law. In addition, the Federal Penal Code imposes different criminal sanctions for the violations of the attorney-client privilege.

The applicable laws do not establish exceptions to said privilege. However, federal and local penal codes establish that some conducts may be considered as an act of complicity with the delinquent (see Federal Penal Code, art. 400). In such cases, the general principle has an exception.

Furthermore, professional organizations such as the Mexican Bar Association (see a. 27 – 30) the attorney is allowed to stop the representation of the client if there is a conduct, which should be considered as ethically unacceptable.

The Professional Ethic Code also points out two exceptions for the attorney/client principle:

a) The lawyer who is severely attacked by his client is excused from the obligation of keeping the secret and may reveal it for his defense;

b) When a client acknowledges the attorney his intention of committing a crime, the lawyer may reveal the necessary information in order to prevent a criminal act or a person who may be in danger.

Monaco
Berg and Duffy, LLP

Article 16 of Monaco Law No. 1047 of July 28, 1982, specifically declares that the legal profession is incompatible with holding a salaried position. Thus, members of the Monegasque Bar may not be employed in any capacity and remain a member of the Monegasque Bar. Consequently, in-house counsel may not become a member of the Monegasque Bar; nor would his client be protected by the attorney's obligation of professional secrecy. Similarly, if a member of the Monegasque Bar becomes employed as an in-house counsel, he may not remain a member of the Monegasque Bar while so employed, which produces the same consequences.

There are no regulations in Monaco that deal with in-house counsel per se. However, in-house counsel may, nevertheless, be subject to rules governing employees and/or the industry in which he is employed. Thus, an in-house attorney would be subject to any rules applicable to his employer, such as, in the case of banking institutions, regulations requiring banks to hold banking customers' information confidential. This would not necessarily correspond to an attorney's obligation of professional secrecy and may not even be similar in nature or scope, as the purpose of these rules may be different that the purpose for the attorney's obligation of professional secrecy. In many cases, however, the result would be essentially the same, because there would be obligations of secrecy that must be observed formally.

In this connection, Article 308 of the Monegasque Penal Code subjects certain professionals who disclose, except when required by law, confidential information they have gathered or received because of their professional status or their professional activity to penalties ranging from one to six months imprisonment.

In addition, Article 135 of the Penal Procedure Code, which applies to attorneys as well as to certain other categories of independent professionals, states that any such persons who hold "confidential information by reason of their activities" may not give evidence about the same, unless the law explicitly requires disclosure. However, these above mentioned independent professionals may testify and reveal information gathered in their professional capacity when specifically authorized by those who have confided in them.

In-house counsel, similar to any other employee, is therefore ethically obligated to protect and keep confidential communications arising out of his employment with the company, but a Court may oblige in-house counsel to disclose this information when the court considers it necessary. Thus, the standard of protection is considerably less than would apply in the case of an attorney's obligation of professional secrecy.

Netherlands Antilles
Promes Van Doorne

A lawyer must avoid obligations, which can endanger freedom and independence in his or her profession. Attorney-client privilege is available for all confidential information for the benefit of the client.

A lawyer has a right to withhold evidence before a Court because of his occupation but only for the facts which are entrusted to him as a lawyer (this is a statutory regulation, mentioned in Civil Code article 1928 paragraph 2 sub 3). All confidential information between the client and lawyer is protected by attorney-client privilege if the lawyer acts in the capacity of a lawyer and used his expertise for the benefit of the client, and thus the lawyer may claim exemption from giving evidence.

Limitations to this privilege exist. A lawyer has an obligation of secrecy for everything involving the case, including all information pertaining to his or her special function as a lawyer. A client can impose secrecy upon the lawyer, even when it goes against the lawyer's legal interest. The client has to express this emphatically. The obligation of secrecy will continue even after termination of the contract/relation with the client. The lawyer has to impose secrecy on his employees and staff as well. He must separate his own private interests from his client's interests; obtaining financial interest or goods in a case in which the lawyer is advising is not permitted. The lawyer is obligated to obey a summons of the supervisory board and the dean of the national Bar. He cannot invoke privilege when a case is under the competence of the supervisory board or the dean of the national Bar; he is obligated to give all the information they ask for, except in some special cases.

New Zealand
Simpson Grierson

In-house counsel are entitled to the same legal privileges and are subject to the same obligations as all other legal practitioners. It is inappropriate to draw distinctions between in-house counsel and those practicing privately, provided that the former are acting as lawyers and not in some other capacity. In-house solicitors can, therefore, rely on both solicitor/client privilege and litigation privilege ("legal professional privilege") if acting in their capacity as a lawyer at the relevant time.

The proper approach, where an issue arises as to whether an in-house counsel was acting in their capacity as a lawyer, is for the solicitor to demonstrate affirmatively that he or she was acting as a lawyer and not simply as an employee possessing specialist skills. If, for example, in-house counsel provide business advice then they can not be said to be acting in their capacity as a lawyer.

In the event that communications with in-house counsel are not covered by legal professional privilege, it may be possible to restrict inspection and the use of certain documentation on the basis that the information is commercially sensitive. Examples of such commercially sensitive information would be documents showing the detailed cost of products or services which are provided in a competitive market, the marketing plans for a proposed new product or a patent specification during the period before the application has been accepted and made available for inspection.

The protection that the Court may provide to commercially sensitive information can take many forms. The inspection of the documents may be limited to those persons who require inspection for the purposes of the proceeding such as solicitors, counsel and expert witnesses; confidential parts of documents may be sealed; references to third parties may be replaced by initials; and the Court may require an undertaking that there be no removal, copying or use of the information.

Orders for non-disclosure of such information will only be granted by the Court in situations where it considers that this is necessary and that disclosure would be likely to prejudice the party making discovery in some significant way.

Nicaragua
Alvarado y Asociados

In our country there are not any specific laws or regulations related to the attorney/client privilege. However there are a few disperse dispositions that can be taken into consideration and be applied to the matter in discussion. For instance, in the Manual for the Public Notary in the Section related to the actions that originate Criminal Responsibilities, its subsection *f* "Disclosure or Breach of the Professional Secret" expresses that the Public Notary is a depositary of the trust of its clients, that come to him/her in demand of a consultation and consequently he/she cannot defraud the trust that carries with his/her profession. The Public Notary has access to information and news revealed by the client for necessity reasons, therefore the notary has the obligation to respect all information that has been granted to him/her.

Additionally, our Political Constitution under "individual rights", article 26 (2) provides for the inviolability of correspondence, and all types of communications. An article 34 (7) establishes that no one can be forced to declare against him/herself, principle that could be interpreted to be applicable to the attorney of such person considering that the person could reveal, based on the professional trust, to his/her legal counselor very valuable information that could or could not affect the person's situation in the process and thereinafter.

Norway
Thommessen Krefting Greve Lund AS

The general rule relating to attorney-client privilege is also applicable to in-house attorneys, i.e. such information is privileged. The attorney-client privilege applies to attorneys as well as their juniors. The same principle will apply to in-house legal departments. However, in order to be considered privileged, the information must be entrusted to the in-house counsel in his capacity as an attorney. However, an attorney may testify if the client gives waives the attorney-client privilege – which he is free to do.

Attorney-client information is regarded as privileged regardless of the attorney's nationality. In a case where an in-house counsel of an US-corporation had prepared certain strategy documents in connection with a dispute, the Norwegian Supreme Court held that sections containing legal considerations and evaluations of the litigation risk were to be considered "attorney-client privileged" – cf. decision by the Selection Committee of the Supreme Court 22 December 2000.

However, if an attorney is sued by his client for alleged malpractice, the attorney must be free to divulge entrusted information to the extent that the rendering of such information is necessary to defend his case. In addition, information received under a specific confidentiality agreement cannot be divulged, and it has been argued if special limitations of the attorney-client privilege will apply in anti-trust or competition cases. (The prevailing theory in Norwegian jurisprudence is that the attorney-client privilege shall prevail over competition rules. In particular a unanimous the jurisprudence does not acknowledge any difference between in-house counsel and

independent attorneys[39].) Information received by the in-house counsel from third parties will normally fall within the ambit of the privilege; to the extent such information is received in his capacity as attorney. However, information privately received from an opposing party during a case, will not be covered by the privilege, cf. Rt. 1967, p. 847.

Pakistan
Afridi Angell & Khan

Broadly speaking, Pakistan Law confers attorney-client privilege upon certain communication/information in two situations: communications with an "advocate" and communications with a "legal adviser."

In Pakistan, an "advocate" is defined as a lawyer who is registered with a bar council. The law prevents an advocate from disclosing or stating any communication, document or advice that the former has received from, become acquainted with or given to his client during the course of and for the purpose of his employment/engagement as such, unless the client expressly consents otherwise. This obligation continues even after the engagement/employment ceases. However, there are limitations on the extent of this privilege as it does not extend to: (1) any such communications made in furtherance of any illegal purpose, and (2) any fact observed by an advocate, in the course of his employment/engagement as such, showing that any crime or fraud has been committed since the commencement of his employment/engagement, whether his attention was or was not directed to such fraud by or on behalf of his client

The term "legal adviser" is broader than the term "advocate" as it may include any professionally qualified lawyer even if he is not registered with Bar Council. Under Pakistan Law, a client may not be compelled to disclose to the Court or any judicial authority any confidential communication that took place between him and his legal adviser. However, where such a client offers himself as a witness he may be compelled to disclose only such communications as may appear to the court necessary in order to explain any evidence which he has given.

When the in-house counsel is an "advocate," professional communications between him and his client would be protected under both the above-mentioned types of privileges. In the event that the in-house counsel is not an advocate, then only the second category of the attorney-client privilege, as mentioned above, may be conferred upon communications/information passed between the counsel and his client.

It is necessary that the communications must have been made in the course of and for the purpose of professional engagement/employment. Also, the privilege extends only to those communications which are confidential and circumstances have to be examined in order to see whether the presumption of confidentiality has been raised or not.

Pakistan Law in this area is developing and, therefore, whether attorney-client privilege regarding any connection/information can be invoked requires a contextual examination.

[39] Åge Karlsen in *Commentary to the Competiton Act,* p.469; Tore Schei, *Commentary to the Civil Procedure Act,* (1998) II p.692-693; Hans Kristian Bjerke/Erik Keiserud *Commentary to the Penal Procedure Act* (1996) I p. 371–372; Knut Svalheim *The legal privilege of Lawyers* (1996) p. 39-42.

Panama
Arosemena Noriega & Contreras

No rules governing or protecting attorney-client confidentiality exist in Panama. However, these rules are primarily directed towards third parties and not in regard to in-house communications. In Panama there are no specific rules or regulations protecting communications between in-house counsel and officers, directors or employees of the companies they serve. However, a company or institution can adopt internal regulations that specify to whom within the company or institution the in-house counsel can divulge information.

Paraguay
Peroni, Sosa, Tellechea, Burt & Narvaja

As a rule, professional secrecy is expected of attorneys in their relationship with clients, and protected by law. There is not any distinction whether the attorney is part of an organization acting within or an independent professional giving advice to the corporation. The Attorney-client privilege protects from disclosure communications between in-house counsel and officers, directors or employees of the companies they serve.

Documents and communications belonging to private persons and institutions are protected from disclosure, seizure or violation, under article 36 of the Paraguayan Constitution; provided that in specific cases, determined by law, a court may order the examination, reproduction, interception or seizure of documents if such are determined to be indispensable for the clarification of judicial matters.

The norm is applied by article 141, 142, 143, 144, 145 and 146 of the Paraguayan Penal Code. Specifically, in Article 147, the Code penalizes the attorney for revealing the secrets of a client that the attorney has learned in a professional capacity, defined as any event, data or information of restricted access that if divulged to third parties may affect legitimate interests of the client.
Officers of a corporation may withhold documents pertaining to professional advice received from its attorneys. We believe that the court will exonerate such production. There are no cases in Paraguay where this issue has been adjudicated.

The Code of Civil Procedure exonerates that attorney from revelation of information and documents received or given in a professional capacity.

Peru
Estudio Olaechea

Under Peruvian law, attorney-client confidentiality is protected by the Code of Ethics issued by the Peruvian Bar Association. These rules are directed towards any attorney representing a client and no distinction is made as to whether he/she is acting as in-house counsel or not. By extension, any of these rules would also apply to any in-house counsel as well. Moreover, it is advisable that in-house counsel executes confidentiality agreements with the employer whereby the terms are expressly defined to avoid misunderstandings.

Article 10 of The Code of Ethics establishes that attorneys have as obligation and right to keep professional secret. The attorney has this obligation before his/her clients and will be in force even though he/she is no longer rendering legal services. The attorney also has the right to not reveal any confidentiality. Even if the attorney is called to serve as witness, he/she may attend the

meeting with independent criteria and decide whether he/she answers any question that may violate the professional secret or expose him/her to do so.

Likewise, article 11 of The Code of Ethics provides that the attorney's obligation to keep professional secret also includes any confidences made to him/her by any third party, by means of his/her condition as attorney and the ones resulting from conversations to perform a transaction that did not succeed. The secret also covers any confidences made by his/her colleagues.

Article 12 of the Code of Ethics establishes that the attorney that is subject of accusation by his/her client or by other attorney may reveal the professional secret that the accused or third party has trusted to him/her, if this revelation favors his/her defense. Moreover, if the client informs his/her attorney of the intention to commit a crime, such confidence is not protected by the professional secret. Therefore, the attorney must make the necessary revelations to prevent an act of crime or to protect persons in danger.

Article 14 of the Code of Ethics rules that the attorney may not make public any pendant lawsuit, but only to rectify when justice and moral requires it.

The Criminal Code, in its article 165 has contemplated that any violation of the professional secret without the consent of the interested party is subject to prison for at most 2 years and 60-120 days-fine.

Finally, the Code of Civil Procedure provides that no one could be compelled to declare over facts that he/she knew under professional secret and when by disposition of the law he/she may or must keep the secret.

Philippines
Romulo, Mabanta, Buenaventura, Sayoc & De Los Angeles

It is the duty of a lawyer to maintain inviolate the confidence and to preserve the secrets of his client[40]. An in-house counsel is engaged in the practice of law because he handles the legal affairs of a corporation. He renders services requiring the knowledge and the application of legal principles and techniques to serve the interests of another. He gives advice on matters connected with the law and the legal implications involved in business issues[41]. There is professional employment when a client employs a lawyer in his capacity as legal adviser for the purpose of obtaining from him legal advice and opinion concerning his rights and obligations concerning the subject matter of the communication[42]. Hence, communications between the officers, directors and employees of a corporation and its in-house counsel made to seek legal advice are privileged.

A lawyer (including in-house counsel) may reveal the confidence or secrets of his client in the following instances:

- When it is authorized by the client after acquainting him of the consequences of the disclosure.
- When it is required by law.

[40] Section 20(e), Rule 138 of the Rules of Court; Canon 21 of the Code of Professional Responsibility.
[41] Cayetano vs. Monsod, 201 SCRA 210, 212-219.
[42] Francisco, The Revised Rules of Court in the Philippines, Evidence, Vol. VII, Part I, 1997 ed., pp. 272-273.

- When it is necessary to collect his fees or to defend himself, his employees or associates or by judicial action[43].
- When the communication by the client to his lawyer was made for the purpose of its communication to a third person[44].
- When the communication was made by a client to his lawyer in contemplation of a crime he intends to commit[45].

Portugal
Morais Leitao, J. Galvao Teles & Associados

Pursuant to article 81º of the *Estatuto da Ordem dos Advogados* (EAO, which establishes the professional ethics rules for lawyers), the Portuguese legal system binds lawyers to the attorney-client privilege. The attorney-client privilege has always been considered a sign of the dignity of the Portuguese legal profession and is one of the most delicate issues in the area of attorney professional ethics. The essential rule is that the lawyer is bound by the attorney-client privilege, which means absolute confidentiality.

Based on article 81º of the EOA, any lawyer exercising his professional duties is covered by the attorney-client privilege in everything relating to the facts concerned with professional matters that are disclosed by the client to him.

In this specific situation, the client is the company itself. Its directors, officers or employees represent the company's will and are the company's mode of communication with the lawyer. As a consequence, all the facts that officers, directors or employees disclose to the company's in-house attorney during the exercise of his professional duties are under the protection of article 81 EOA.

Thus, the client-attorney privilege covers: all the facts that the attorney has gained knowledge of through officers, directors or employees of the company (while representing the will of the company), for the purpose of professional matters and relative to carrying out legal proceedings; all the facts that the attorney has knowledge of, through the individuals that occupy the functions of officers, directors or employees of the company (even if it is not a clear situation of the professional exercise of an act in the performance of his duties), as long as they are connected with the legal services provided by the attorney to that company; all documents and other information connected with the protected information of which the attorney has knowledge.

There are limitations on the protection given by the article 81ºEOA. The attorneys of a Company can request a waiver of the attorney-client privilege as long as all the following requirements are met:

- Previous authorization of *the President of the Counselor* Distrital with appeal to the *Bastonário* (President) of the Bar Association
- Allegation and proof that waiver of the attorney-client privilege is absolutely necessary for the defense of the personal dignity, rights and legal interests of the attorney, his client, or the clients' representatives. (Included here is the situation of calling the lawyer to appear in court to make a statement about the protected facts without any discharge request on his part).

[43] Rule 21.01 of the Code of Professional Responsibility.
[44] Uy Chico vs. Union Life Assurance Society, Ltd., 29 Phil. 163, 165.
[45] People vs. Sandiganbayan, 275 SCRA 505, 519.

The Portuguese legal system is based on the principal of freedom of contract. The parties are free to contract with no restrictions (freedom of celebration), to select the type of business that best meets their interests (freedom of selection of the type of business), and to stipulate the clauses that they consider useful for their purposes (freedom of stipulation). Therefore, based on these underlying principles of our system, nothing impedes the celebration of a contract that guarantees the protection of information not covered by the client-attorney privilege.

Romania
Nestor Nestor Diculescu Kingston Petersen

Under Romanian law, an attorney who is a member of the Bar may only be "employed" professionally by a law firm. To the extent that a member of the Bar provides services to a commercial company, such services shall be provided pursuant to a legal assistance contract, under the form approved by the Bar association. Such employment can be interpreted as an "independent contractor" status and not an employment relationship.

The attorney-client privilege is provided under Law 51/1995 and is applicable to only those persons licensed to practice by the Bar. An "Attorney," member of the Bar may not be an "employee" of a commercial company, but rather an "independent contractor" equivalent to "outside counsel." A person who is not a member of the Bar does not have such obligations or the right to refuse to divulge information believed to be privileged. A law school graduate, who is not a member of the Bar may be an employee of a commercial company, providing advice on the legal aspects of the company business.

Romanian law does not embrace the concept of "in house counsel," where the attorney is an employee. An attorney may work exclusively for a commercial company under a legal assistance agreement, but the relationship is one of independent contractor and not employee. This, however, is the only manner in which the confidentiality privilege may be maintained.

St. Kitts & Nevis
Kelsick, Wilkin & Ferdinand

Attorney-client professional privilege extends to communications with in-house counsel but only communications made with them in their capacity as legal advisors. If the legal adviser also acts in another capacity, communications relating to that capacity are not privileged.

If there is any doubt as to whether communications with in-house attorney are privileged, the judge or master will himself inspect the documents.

Saudi Arabia
Baker Botts L.L.P.

In the Kingdom of Saudi Arabia ("KSA"), almost all licensed "advocates" (who may appear before the courts of the KSA) are KSA nationals, while legal consultants (largely foreigners) are not extended this privilege. The distinction is somewhat akin to the distinction between "solicitors" and "barristers" under the legal system in England.

The KSA recently promulgated legislation regulating the conduct of lawyers in the KSA. This legislation also covers what is referred to in other jurisdictions as the "attorney-client privilege" in the form of a new law called "Regulation of the Legal Profession" (the "Regulation"). The

Regulation was published on 24/08/1422 H. (corresponding to November 9, 2001 in the Gregorian calendar). According to Article 43 of the Regulation it came into effect 90 days after the Regulation was published.

Also, the attorney-client privilege is interpreted in the KSA under Islamic Law, as the fundamental law or constitution of KSA is Islamic Law/*Shari'ah* consisting primarily of the Qur'an and the sayings (*hadith*) of the Prophet Mohammed. The Shari'ah in this respect does note refer to lawyers but refers to one who has been given a power of attorney (*wikalah*).

The Regulation provides for a limited attorney-client privilege between a lawyer and his client. According to Article (1) of the Regulation, the Regulation would be applicable to anyone deemed a "lawyer" which is defined as someone that "defends others before courts, the Bureau of Grievance and the committees formed under regulations, orders and resolutions to hear cases within a particular jurisdiction and those who practice legal and Islamic Shari'ah Consultation". Article (23) of the Regulation prohibits a lawyer from disclosing "any secret entrusted with him or he has become aware of through his profession even after termination of his power of attorney, unless this violates a principle of Islamic Law." Therefore, in the event a lawyer's client violates a "principle of Islamic Law", then no attorney-client privilege would exist and the lawyer would be obligated to report his client's actions to the appropriate local authorities. Since the Regulation is relatively new, it is still difficult to gauge what actions by a lawyer's clients would fall under the category of being a violation of a "principle of Islamic Law". Note it is widely believed that only egregious crimes would be deemed a violation of "a principle of Islamic Law" (e.g., a client who admits to raping a child) warranting a break in the attorney-client privilege and requiring affirmative action on behalf of the lawyer.

The above rules would not necessarily include in-house counsels who are considered to be providing their services on an employment basis. The Saudi Labor and Workmen Regulations, Royal Decree No. M/21 dated 6 Ramadan 1389 H. (the "Labor Regulations"), governs all employment relationships. The Labor Regulations are devoid of any provisions relating to privileges. While the Labor Regulations does provide that an employee has a duty to not reveal the secrets of his employer, this does not amount to a privilege. In any case, note that most in-house counsel in the KSA are foreign legal consultants, and they would accordingly be subject to the professional obligations of their home countries (although it is possible that KSA nationals who are also licensed advocates may fall under the Regulation). Of course, it is not clear whether many of these legal consultants actually keep their home bar memberships active. The labor permit that categorizes one as a "legal consultant" is based on the legal consultant's law diploma, not a certificate of admission, so there are potentially many legal consultants acting in the capacity of in-house counsel here in the KSA who are beyond the scope of the Regulation as well as the professional rules of their putative "home" jurisdictions.

Scotland
Maclay Murray & Spens

In Scotland, at a national level, there is no distinction between the position of a solicitor in private practice and that of an in-house lawyer regarding legal privilege. Privilege stems from the duty of confidentiality owed by the lawyer to his client. Both the solicitor's client and the in-house lawyer's employer are therefore entitled to invoke privilege.

The general position, from which there are a number of exceptions, is that all communications between lawyers and clients that are associated with the giving of advice are subject to legal professional privilege. For example, Scottish litigation procedure allows the parties to recover relevant documents from their opponents and from third parties. It is not the case, as some have

suggested, that legal privilege is limited to client-attorney communications in relation to legal proceedings, whether actual or anticipated.

At common law this general rule is only superseded where an illegal activity is alleged against a client and where the lawyer has been directly concerned in the carrying out of such activities. A number of other statutory exceptions also exist. These are, principally, in relation to drug trafficking, money laundering, documents specifically covered by search warrants and court orders, examinations in bankruptcy and corporate insolvency and rules made under statute that govern the conduct of the legal profession. Finally, at a national level, it should be noted that the Courts have a discretionary power to require disclosure of communications overriding privilege.

As a general principle, communications with a Scottish or English lawyer (whether a solicitor or an advocate) for the purpose of obtaining legal advice are privileged. The purpose of the communication is the determining factor, and so a communication does not become privileged simply by being copied to a solicitor if it would not otherwise have attracted privilege. Similarly, documents deposited with a solicitor do not attract any privilege, which they would not otherwise have had. The same privilege attaches to communications with an in-house lawyer working for one of the parties, provided that the communications relate to legal as distinct from administrative matters.

Communications, which do not fall within the strict ambit of solicitor-client confidentiality, will often fall within the related doctrine of communications *post litem motam*. This doctrine confers privilege on any documents prepared for the purposes of or in contemplation of litigation (including internal reports, communications with non-legal advisers etc).

An important limitation of client-attorney privilege exists in relation to investigations undertaken by the European Commission in competition matters. Following a decision of the European Court of Justice, in-house lawyers are unable to claim that privilege attaches to communications between themselves and their employers when faced with a demand for disclosure under Article 14 of Regulation 62/17.

In contrast with the position at EU level, under UK domestic law enacted to mirror European competition provisions, the Competition Act 1998 expressly provides in Section 30 that communications between a professional legal advisor and his client are privileged. Under UK competition law therefore in-house lawyers' communications with their clients attract privilege.

Singapore
Donaldson & Burkinshaw

In Singapore, privilege of communications between a client and his advocate and solicitor is conferred by section 128 of the Evidence Act (Chapter 97) ("Evidence Act"). Section 128 of the Evidence Act states the three (3) categories of privileged communications, as follows: (i) communications made to the advocate and solicitor in the course and for the purpose of his employment as such by or on behalf of the client; (ii) the contents or condition of any document with which the solicitor has become acquainted in the course and for the purpose of his professional employment; and (iii) any advice given by the solicitor in the course and for the purpose of such employment.

Unless an in-house legal counsel satisfies the qualifications specified in the Legal Profession Act (Ch161) ("LP Act"), he/she is not an advocate and solicitor and the legal profession privilege conferred by section 128 of the Evidence Act would not extend to him/her.

The legal profession privilege is also a rule of English common law. The rule provides that confidential communications passing between a client and his legal advisor and made for the purpose of obtaining or giving legal advice are privileged from disclosure. The English case of *Alfred Crompton Amusement Machines Ltd. v Customs and Excise Commissioners (No.2) [1972] 2 QB 102, [1972] 2 All ER 353 at p. 371, CA; affirmed on other grounds [1973] 2 All ER 1169, HL* took the view that salaried in-house legal counsel acting as such are in the same position for the purposes of this rule as independent legal advisors.

To our knowledge, there has been no Singapore reported cases on the issue whether the legal profession privilege extends to salaried in-house legal counsel. English cases are however persuasive on Singapore Courts. In our view, if the communications passing between a client and his salaried in-house legal counsel is for the purpose of obtaining or giving legal advice, or more specifically falls within the three (3) categories of privileged communications under section 128 of the Evidence Act, such communications are likely to be considered by Singapore Courts as privileged from disclosure.

Slovak Republic
echová Rakovsk

The express privilege of confidentiality is provided by the Slovak law only in respect to the attorney-client relationship. Any privilege in respect to the in-house counsel should be derived from the regulation of business secrets or employment relationships. Generally, the consequences of the disclosure of internal communication depend upon other aspects of the breach, in particular the nature of disclosed information, its importance, damages caused by the disclosure, etc.

Based on the Labor Code, the employee is obliged to follow the rules relating to the performance of his work (working order) and conduct his work in accordance with the instructions of the employer. The employee shall be liable for any damage caused to the employer by the breach of the employee's obligation in performing the work tasks or in direct connections therewith, as well as for damage caused by the intentional actions contrary to the good manner. The employer is obliged to prove the employee's intention.

Disclosure of internal communication might be a ground for termination of the employment contract by the employer (either by notice with two months' notice period or by immediate termination, depending on the intensity of the breach). Generally, it is recommended for the employer to specifically stipulate such confidentiality amongst the other obligations of the employees in internal rules (work order), including determination, breach of which obligations would be deemed to be a gross violation of work discipline (and thus being a ground for immediate termination).

In respect to the external protection, such communication might be also protected by the provisions of the Commercial Code regulating business secret, which is defined as any information of business, production or technical nature related to the enterprise, having real or potential value, not being normally available at the respective commercial circles, provided that the entrepreneur intends to keep it protected and secures such protection by appropriate manner. Entrepreneur, whose business secrecy was impaired or endangered, may request the perpetrator to abstain from his conduct, to compensate the damage and may ask for an appropriate satisfaction, which may be granted also in cash. Intentional disclosure of business secrecy could be treated also as a criminal action, which could be punished by an imprisonment or ban of activity.

South Africa
Bowman Gilfillan Inc

The South African High Court has recently affirmed that legal professional privilege can be claimed in respect to confidential communications between private corporations and their salaried in-house legal advisers when they amount to the equivalent of an independent legal adviser's confidential advice. The requirements for claiming legal professional privilege are that (a) the legal adviser must be acting in a professional capacity (b) the communication, whether written or oral, must be made in confidence (c) the legal adviser must be approached for the purpose of delivering legal advice; and (d) the communication may not be used for the purpose of the commission of a crime or fraud.

To determine if a communication is confidential it will be decided whether or not it was intended to be disclosed to the other party or not. Confidentiality will be inferred but may be rebutted. The communication must be made with the intention of obtaining legal advice; there is no need for the legal advice to be concerned with actual or contemplated litigation.

No privilege will attach to a communication used in the commission of a crime or fraud even if the legal advisor had no knowledge of the purpose for which his/her advice was sought.

Our courts have not ruled on whether privilege may only be claimed where the in-house legal advisor holds the necessary qualifications for admission to private practice, and this remains an open question.

Spain
Uría & Menéndez

The attorney-client relationship as well as the documents and communications exchanged by them are protected in Spain by the general rule of professional confidentiality or secrecy, established generally in article 437.2 of Organic Law 6/1985, on the Judiciary (the "Judiciary Law"), and article 32 of the recently enacted General Regulation of the Law Profession (Royal Decree 658/2001 of 22 June 2001) (the "GRLP"). There are, however, no express regulations in Spanish Law governing "privileged" or "without prejudice" documents or communications, as may be the case in common law or other jurisdictions

The general rule is that professional confidentiality is to be kept with respect to any information received as a consequence of the attorney-client relationship from the client, opposing parties and other attorneys. It is worth pointing out that the attorney is afforded both a privilege and a legal obligation to maintain confidentiality. Indeed any breach of this obligation would leave an attorney open to criminal liability as well as sanctions by the Bar Association. The privilege covers any spoken or written communications, documents or correspondence exchanged by attorney and client.

As to in-house counsel, article 27.4 of the GRLP sets out that the law profession can also be engaged in under a labor relationship governed by an applicable written labor contract. In such a case, internal or in-house counsel enjoys the same rights and obligations as external counsel to carry out their professional tasks according to the general principles of freedom and independence. Accordingly, although there are no specific provisions on this subject, it can be understood that in-house counsel should also bear the same obligation of confidentiality and secrecy.

In fact, article 437. 2 of the Judiciary Law establishes that all attorneys are obliged to keep confidential all the facts or news of which they have knowledge as a result of "*any of the possible ways to carry on their professional activity* and cannot be required to testify with regard to those facts or information". In addition, Article 52 of the Ethical Code approved by the General Council of the Spanish Legal Profession on 30 June 2000 expressly states that "the obligation and right of legal professional confidentiality consists of the confidences and proposals from the client, opposing parties, other attorneys and all facts and documents which have been known or have been received due to *any of the different types of professional activity".* Consequently, these provisions can be interpreted, in the lack of other express provisions, to establish a general rule applicable to all attorneys, irrespective of whether they are external or in- house counsel.

Sweden
Vinge KB, Advokatfirman

Communications between in-house counsels and officers, directors, and employees of the companies they serve are not protected from disclosure by attorney-client privilege according to Swedish law. An alternative method of protecting the information might be to use outside counsel, provided they are members of the Swedish Bar Association, "advokat".

Switzerland
Pestalozzi Lachenal Patry

According to the traditional understanding in Switzerland, the attorney-client privilege is only available to external counsel, but not to an in-house counsel admitted to the bar. The main argument for this differentiation is that the in-house counsel is not independent from his employer. However, information of a confidential nature entrusted to the in-house counsel may be protected by the general business secret of their employer or special business secrets, such as bank and securities dealers' secret. Critics argue that the differentiation between the external counsel and the in-house counsel is not justified because the diligent in-house counsel must meet the same professional standards when representing his or her own employer. In addition, a company's director or employee confiding in the in-house counsel should also have the assurance that his or her communication be privileged. Therefore, many legal scholars have a more modern view of the attorney-client privilege and advocate also communications with the in-house counsel should also be covered and protected by the privilege.

Despite these sound and reasonable arguments for a protection of the communication with the in-house counsel, it is still the prevailing opinion in Switzerland that an in-house counsel does not enjoy the attorney-client privilege. Therefore, Swiss State courts do not exclude from evidence the production of documents drafted by an in-house counsel or the testimony of an in-house counsel.

The question whether attorneys admitted to the bar working for MDPs can call upon the attorney-client privilege is unsettled. It is the prevailing view that, while the MDPs as such have a contractual confidentiality obligation, the attorneys employed by them cannot call upon the attorney- client privilege and cannot refuse to testify in court, unless the mandate was not entrusted to the MDP, but to an attorney ad personam.

Lastly, attorneys in private practice or employed by MDPs who act as directors in Swiss or foreign corporations cannot call upon the attorney-client privilege for their directorship activities.

Companies should think about alternative methods of protecting confidential and sensitive information. While there is no general recipe against the non-existence of the privilege for in-house counsels, some precautions may prove helpful:

- If a company, in preparation for litigation, has to gather sensitive information from its employees, an external lawyer should conduct the investigation and, in particular, the interviews with the company's directors and officers.
- An external lawyer should draft memoranda assessing the company's chances and risks related to a pending or threatening case.
- International contracts usually contain an arbitration clause. Very often, the arbitral tribunal follows the IBA Rules on Taking Evidence in International Commercial Arbitration (Adopted by the IBA Council on June 1, 1999, hereinafter referred to as "the Rules on Taking Evidence") or takes these rules as a general guideline. Article 9 of the Rules on Taking of Evidence excludes from evidence or production any document or oral testimony for reasons of legal impediment or privilege under legal or ethical rules determined by the arbitral tribunal to be applicable. If the parties stipulated in the arbitration clause that the arbitral tribunal should provide the full protection of the attorney-client privilege to in-house counsels, the arbitral tribunal is likely to respect the parties' agreement on the scope and the availability of the privilege.

At first sight, some of the suggested steps may seem to be complicated and overly precautionary. However, as long as the protection of the attorney-client privilege is not enlarged by Swiss legislation and case law, and as long as the privilege is not available to the in-house counsel, it is wise for a company to take the adequate precautionary measures.

Taiwan
Tsar & Tsai Law Firm

In Taiwan, the attorney-client privilege to protect communications from disclosure is available only in civil discovery proceeding. For example, in a criminal investigation proceeding, though an attorney may decline to testify to the court against his client, he is not immune from the compulsory search or raid which the public prosecutor may conduct. To be forced to disclose communications between himself and officers, directors or employees of the company he serves would depend on whether the in-house counsel is an attorney admitted to bar. If not, then such limited attorney-client privilege would not be available.

There appears to be no alternative methods to provide protection for communications between an in-house counsel not admitted to bar and his client.

Thailand
Tilleke & Gibbins International Ltd.

Under the Lawyers Act B.E. 2528 (A.D. 1985), the Law Society of Thailand is authorized to issue Regulations regarding attorney ethics. Under Regulation Number 11 of the Regulations on Attorney Ethics B.E. 2529 (A.D. 1986), it is a breach of attorney ethics to reveal a client's confidential information obtained while representing the client, unless the client or the Court grants permission.

Any licensed, in-house counsel must also comply with the above Regulations. Communications regarding a company between its licensed in-house counsel and its directors, officers or

employees, must be kept confidential by the attorney unless the company or the Court grants permission.

There are some law school graduates providing legal advice in Thailand without an attorney license. Strictly speaking, these persons are not governed by the Lawyers Act or the Law Society regulations. Consequently, there is some question as to whether they or their clients can claim the attorney-client privilege, but we are not aware of any case law involving this situation.

The Thai legal system does not generally provide for court-supervised pre-trial discovery, and for the most part, the parties to Thai litigation are expected to investigate and uncover supporting evidence without judicial assistance. However, once proceedings commence, a party may petition the Court to issue a subpoena for documents or a witness.

Any person who is subpoenaed to disclose attorney-client confidential information or documents may object and refuse under the attorney-client privilege. In that event, the Court is empowered to delve further into the matter to determine whether the objection is well grounded. If the Court concludes that the privilege is not applicable, it may issue an order to compel disclosure.

The Thai Courts will not abide "fishing expeditions." A party requesting the Court to subpoena documents or information usually must identify those items with some specificity. Consequently, if the attorney and his client have properly maintained confidentiality, it is unlikely that the requesting party will be able to meet this burden.

In summary, Thai law protects the confidentiality of attorney-client communications, including communications involving licensed in-house counsel. However, since the Courts are reluctant to subpoena unspecified documents or other unspecified evidence, the concept of protecting documents and information by declaring them attorney-client privileged is probably not as pertinent at present in Thai litigation as it might be elsewhere.

Trinidad & Tobago
M. Hamel-Smith & Co.

As a matter of public policy, the law of Trinidad and Tobago treats certain communications whether oral or documentary, as privileged. Where this is the case, the general rule is that the client cannot be compelled (either by discovery process, at a trial, or otherwise) to disclose any such communications. It should be noted that there are narrow exceptions to this rule, such as communications made in furtherance of a fraud or crime. Further, the privilege is that of the client who may, either expressly or by its conduct, waive any claim for privilege.

Insofar as communications between an attorney and client are concerned, the privilege again at disclosure is defined in fairly broad terms and the requirements to secure protection from disclosure are relatively easy to satisfy. In essence, all such communications are protected, so long as they are made confidentially and are referable to the lawyer-client relationship.

In Trinidad and Tobago, attorneys are required to obtain a practicing certificate (for which they pay an annual subscription). There might be a tendency among in-house counsel not to pay this annual subscription and therefore, not to hold valid certificates. This may create a lacuna insofar as privilege is concerned as, it may be possible to argue that in-house counsel who do not have such cannot practice as an attorney at law, and accordingly, when giving their advice/counsel they may not be covered by the cloak of privilege.

It may also be important for in-house counsel, when dealing with sensitive matters, to ensure that all documentation is headed/labeled appropriately, for example, by stating that it is a request for legal advice. Lastly, the distribution of sensitive memoranda and other documents should be kept to a minimum of recipients in order to deflect an argument that the privilege has been waived.

Insofar as communications between the attorney and third parties (on behalf of the client) are concerned, the privilege against disclosure is defined in substantially narrower terms. Essentially oral and documentary communications between a lawyer and his third party will only be protected from disclosure as privileged communications where both of the following criteria are satisfied, i.e.:

- Such communications were made in contemplation of litigation; and
- The sole purpose or predominant purpose of such communication was for use by a lawyer in order to advise or represent his client in relation to litigation that is contemplated.

Turkey
Pekin & Pekin

Under the laws of the Republic of Turkey, communications between an in-house counsel and the officers, directors, or employees of the company they serve are not treated any differently than communications between an attorney and his or her client. Communications between an attorney and his or her clients are privileged to the extent that they cannot be disclosed by the attorney, but are not privileged to the extent that such communications are deemed not to be privileged evidence before a court of law.

Article 36 of the Law Governing the Legal Profession (Law No. 1136) indicates that information an attorney obtains from a client in the course of the attorney's practice is deemed confidential and enjoys a privilege of non-disclosure by the attorney.

Confidential information within the scope of the attorney-client privilege may be disclosed by an attorney only if the client revokes such privilege or if a law requires such information to be disclosed to government bodies and offices specifically identified in such law. As such communications include legal opinions of the attorney, such information is deemed secondary evidence before a court of law in the event its disclosure by the attorney is permissible. Furthermore, Article 36 of the said Law provides to attorneys a right to refuse to testify with regard to such information before a court of law even if the client has revoked the confidentiality privilege otherwise granted to attorney-client communications.

The attorney-client privilege with respect to the practice of in-house counsel of banks are additionally governed by the relevant provisions of the Banks Act (Law No. 4389, as amended) and the attorney-client privilege with respect to the practice of in-house counsel of corporations are additionally governed by the relevant provisions of the Penal Code (Law No. 765). Specifically, Article 22.8 of the Banks Act requires in-house counsel and all other employees of banks not to disclose any confidential information about the bank, except as otherwise required under the laws and regulations of the Republic of Turkey. Article 198 of the Penal Code indicates that it is a crime punishable by imprisonment and/or a fine for anyone to disclose confidential information legally harmful to another person and obtained in the course of conducting their business practice, in the event such disclosure is not legally required.

Turks and Caicos Islands
Misick and Stanbrook

In the Turks and Caicos Islands there is no legislation or codes of professional conduct that specifically addresses the disclosure of communications between in-house counsel and officers, directors or employees of the companies that they serve. However under the Code of Professional Conduct, all attorneys are required to hold in strict confidence all information acquired in the course of their professional relationship with their clients. An attorney may not divulge such information unless he is expressly or impliedly authorized by his client to do so or as required by law to do so. "Client" is not defined in the Code of Professional Conduct or the Legal Profession Ordinance. In England "client" is defined as "any person who, as a principal or on behalf of another person, retains or employs a solicitor; and any person who is or may be liable to pay the bill of a solicitor", and the clients of in-house solicitors are their employers. This no doubt would also be the case in the Turks and Caicos Islands.

United Arab Emirates
Afridi & Angell

Law No. 23 of 1991 regarding Regulation of the Advocacy Profession (the "Advocacy Law") provides for attorney-client privilege between an advocate and his client. Article (41) of the Advocacy Law prohibits an advocate from giving testimony in respect of any matters, which come to his knowledge "in the course of practicing his profession without the consent of the person who has supplied the relevant information unless the client intends to commit a crime." Article (42) prohibits an attorney from revealing confidential information unless revealing such information will prohibit commission of a crime, and Article (44) prohibits interrogating an advocate or searching his office without the knowledge of the Public Prosecutor.

Please note that in the U.A.E., licensed "advocates" may appear before the courts of the U.A.E., while legal consultants are not extended this privilege. The distinction is similar to the distinction between "solicitors" and "barristers" under the legal system in England.

The above rules would not necessarily include in-house counsel who is considered to be providing their services on an employment basis. All employment relationships are governed by Law No. 8 of 1980 (the "Labor Law"), which is devoid of any provisions relating to privileges. The implication of Article 120 of the Labor Law is that an employee does have a duty to not reveal the secrets of his employer, but this does not amount to a privilege.

Also, the Advocacy Law, of course, does not apply necessarily to legal consultants or other members of the profession who are not admitted to appear before the courts. Most such persons are foreign attorneys, and they would accordingly be subject to the professional obligations of their home countries. Of course, it is not clear whether many of these legal consultants actually keep their home bar membership active. The labor permit that categorizes one as a "legal consultant" is based on the legal consultant's law diploma, not a certificate of admission, so there are potentially many legal consultants here in the U.A.E. who are beyond the scope of the Advocacy Law as well as the professional rules of their putative "home" jurisdictions.

Uruguay
Guyer & Regules

In Uruguay, all the information received by an attorney from his/her clients is protected from disclosure by means of section 302 of our Criminal Code, which punishes with fines such disclosure when it occurs without just cause.

Venezuela
Hoet Pelaez Castillo & Duque

Under Venezuelan Law the attorney/client privilege covers all communication between an attorney and his client, including the matters the attorney deals with the other party and all conversations to reach to an agreement. The duty to keep the professional secret remains fully in force even after the attorney is no longer assisting the client. The attorney may refuse to testify on matters he has knowledge because of his profession and is released by the Code of Criminal Procedures from the obligation to give notice to the authorities of the knowledge he may have through the explanations of his clients that a crime has been committed.

The legal basis for the attorney client privilege in our legislation is rather a duty and is found in the Code of Professional Ethics approved by the Federation of Bar Associations, which establishes the obligation for the attorney to keep secret of all the matters submitted to him by his clients. The Bar Association may sanction attorneys when they reveal matters that may be considered as professional secret. The Code of Criminal Procedures, the Code of Civil Procedures and other legislation recognize the right and duty of the attorney to keep his professional secret.

The law does not make distinction between in-house counsel and other attorneys, so we believe all attorneys will be covered by the privilege. Nonetheless, with respect to tax matters, the Organic Tax Code expressly excludes from the attorney/client privilege those attorneys who work as employees of the taxpayer.

Vietnam
Tilleke & Gibbins Consultants Ltd.

The common law principal of attorney-client privilege is not known or granted by custom, law, rule or regulation in Vietnam. Generally, the Constitution of Vietnam assures the availability of communication privilege of Vietnamese citizens: "Confidentiality and safety of mails, telephones and communication of citizen is ensured. The opening, control, confiscation of mails and communication of citizen will only be made by authorized persons in accordance with stipulations of laws." Note that authorized persons may obtain access to otherwise confidential communication including telephone conversation.

With respect to in-house counsel, in Vietnam a lawyer may practice law only as a member of a law firm or a law office. A lawyer may not practice law as an employee of a commercial firm. Thus there can be no in-house counsel, as the term is generally known.

Ordinance On Lawyers of 2001 prohibits a lawyer from disclosing any client information whether or not the client communicated that information to him/her. However there is no provision protecting this information from the demands of government or judicial authorities.

A lawyer, who is defending a person on criminal charges or accused under the Criminal Law, may rely on the provisions of the Criminal Procedures Law which specifically prohibit lawyers or defenders from disclosing any confidential information that the lawyers or defenders know or obtain while carrying their defending duties. However, there is no law or rule that specifically allows the lawyer to refuse to divulge information demanded by the court or government entity.

There is no law, rule or regulation that would allow a client to refuse to divulge information to a court just because the client had divulged that information to his lawyer.

United States of America

The prevailing American rule as to the treatment of communications between in-house counsel and corporate employees is as follows:

> *Conversations between a corporation's employees and in-house counsel are protected by the privilege. Nonetheless, because in-house counsel may be involved in giving advice on many issues that are more business, rather than legal, in nature or may be involved in such discussions as a matter of course, conversations in which in-house counsel is a participant , as well as documents addressed to or from in-house counsel, are readily susceptible to challenge on the ground that it is business advice that is being given and not legal advice. Epstein, The Attorney-Client Privilege and the Work Doctrine (4th ed.), Section of Litigation, American Bar Association.*

In *Upjohn Company v. United States*, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981), the United States Supreme Court decided that the attorney/client privilege protects communications between a corporation's employees and the corporation's lawyers provided certain criteria are satisfied:

- Corporate employees must have made the communication to corporate counsel acting as such, for the purpose of providing legal advice to the corporation.
- The substance of the communication must involve matters that fall within the scope of the corporate employee's official duties.
- The employees themselves must be sufficiently aware that their statements are being provided for the purpose of obtaining legal advice for the corporation.
- The communications also must be confidential when made and must be kept confidential by the company[46].

If these criteria are satisfied, the attorney/client privilege will protect statements made by corporate employees to corporate attorneys[47].

Two tests have developed in the federal courts to determine if a corporate employee's communications with the corporation's legal counsel are privileged. (*Diversified Industries Inc. v. Meredith*, 572 F.2d 596, 608-609 (8th Cir. 1977).) The first test focuses upon the employee's position and his ability to take action upon advice of the attorney on behalf of the corporation. (*City of Philadelphia v. Westinghouse Electric Corp*., 210 F.Supp. 438 (E.D. Pa. 1962).) The second test focuses upon why an attorney was consulted, rather than with whom the attorney communicated[48].

Because in-house counsel may be involved in giving advice on many issues that are more business, rather than legal, in nature or may be involved in such discussions as a matter of course, conversations in which an in-house counsel is a participant, as well as documents addressed to or from in-house counsel, are readily susceptible to challenge on the ground that it is business advice that is being given and not legal advice. However, "client communications intended to keep the attorney apprised of business matters may be privileged if they embody 'an implied request for

[46] *Upjohn*, 449 U.S. at 394.
[47] See also, In re International Systems & Controls Corp. Securities Litigation, 91 F.R.D. 552, 556 (S.D.Tex. 1981); U.S. v. Mobil Corp., 149 F.R.D. 533, 537 (N.D.Tex. 1993)
[48] Harper and Row Publishers, Inc. v. Decjer, 423 F2d 487 (7TH Cir. 1970).

legal advice based thereon'[49]." Thus, "if an in-house counsel has other non-legal responsibilities, the party invoking the privilege has the burden of producing evidence in support of its contention that in-house counsel was engaged in giving legal advice and not in some other capacity at the time of the disputed conversation." *Id.*

The attorney/client privilege, although recognized, is recognized to a very limited extent since it interferes with "the truth-seeking mission of the legal process," and conflicts with the predominant principle of utilizing all rational means for ascertaining truth[50]. As such, it "is in derogation of the public's right to every man's evidence," and therefore, is not favored by federal courts and must be strictly confined within the narrowest possible limits consistent with the logic of its principle[51]. Keeping in mind its very strict construction and narrow application, the party asserting the application of the attorney/client privilege to information, which it seeks to conceal, bears the burden of proving each and every element essential to its application[52].

> The elements essential to the application of the attorney/client privilege are:
> (1) The asserted holder of the privileges is or sought to become a client; (2) the communication is made to an attorney or his subordinate, in his professional capacity; (3) the communication is made outside the presence of strangers; (4) for the purpose of obtaining an opinion on the law or legal services; and (5) the privilege is not waived.[53]

While trying to meet the essential elements of the attorney/client privilege, several problems can be encountered. First of all, a corporation cannot prevent a document or communication from disclosure if that document was prepared in the ordinary course of business, even if an attorney prepared it[54]. Further, attorney/client privilege only protects confidential communications by an employee to an attorney when it includes and/or seeks legal advice and opinions. This privilege is not applied to factual information that is discovered and reported by an attorney[55]. Thus, a document created by corporate counsel and sent to an employee, who does not relay any legal advice but merely discusses factual information is potentially not subject to the attorney/client privilege[56]. Stated simply, merely because factual information is transmitted through an attorney does not mean that it takes on a confidential character[57].

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[49] *Id.* at 14 citing *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 404 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987), quoting from *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal., 1971).
[50] *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980); *Hawkins v. Stables*, 148, F.3d 379 (4th Cir. 1998); *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986), *cert. den.,* 480 U.S. 938, 107 S.Ct. 1585, 94 L. Ed.2d 775 (1987); *U.S. v. Aramony*, 88 F.3d 1369 (4th Cir. 1996).
[51] *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984).
[52] Hodges, Grant & Kaufmann v. U.S., 768 F.2d 719 (5th Cir. 1985); Texaco, Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385 (M.D. La. 1992).
[53] *In re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir. 1975); *New Orleans Saints v. Griesedieck*, 612 F.Supp. 59, 62 (E.D. La. 1985), *aff'd*, 790 F.2d 1249 (5th Cir. 1986).
[54] *In re Hutchins*, 211 B.R. 330 (Bkrtcy. E.D.Ark. 1997), on reconsideration in part, 216 B.R. 11 (Bkrtcy. E.D.Ark. 1997).
[55] *American Standard, Inc. v. Bendix Corp.*, 80 F.R.D. 706 (D.C. Mo. 1978).
[56] *U.S. v. Davis*, 132 F.R.D. 12 (S.D.N.Y. 1990).
[57] *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198 (E.D.N.Y 1998); *Union Carbide Corp. v. Dow Chemical Co.*, 619 F. Supp. 1036, 1047 (D.Del. 1985).

Specific on the State/Territories levels:

Arizona
Snell & Wilmer LLP

Arizona expressly recognizes corporations as clients for purposes of attorney-client privilege protection.[58] Communications made by or to in-house counsel are privileged if those communications are made for the purpose of either providing legal advice to the corporation or obtaining information in order to provide legal advice to the corporation.[59] Arizona uses a functional approach to determine whether communications are protected between in-house counsel and other corporate employees.[60] This approach focuses on the nature of the communication rather than the status of the communicator.[61] Therefore, all communications initiated by the employee, made in confidence to in-house counsel, and which directly seek legal advice are protected, regardless of the employee's position in the corporate hierarchy.[62]

But where an investigation is initiated by the corporation and factual communications are made between in-house counsel and other corporate employees, the privilege does not apply to the communications unless they concern the employee's own conduct, that conduct is within the scope of employment and the inquiry is made to investigate the legal consequences of the employee's conduct for the corporation.[63] If the employee's conduct cannot be imputed to the corporation, then the attorney-client privilege does not apply to communications initiated by in-house counsel because the employee can be characterized more as a witness than a client.[64]

Arkansas
Rose Law Firm, a Professional Association

Rule 502 of the Arkansas Rules of Evidence governs Arkansas law on the attorney-client privilege.[65] Under the rule, a client is defined to include a "corporation, association, or other organization or entity, either public or private."[66]

A corporate attorney will often have to obtain information about the actions and observations that occur within the scope of an employee's corporate duties. Acquiring such information by an attorney is a "necessary part of the corporate attorney's process of advising and protecting the corporate-employer client and is within the privilege."[67] Thus, statements made by clients, i.e., officers, directors or employees of a corporation, that are made "at the request of and to inform . . . their corporate employer's attorney for the purpose of facilitating her rendition of legal advice" are protected under the attorney-client privilege.[68]

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[58] A.R.S. 12-2234(B).
[59] Id.
[60] Samaraitan Foundation v. Goodfarb, 176 Ariz. 497, 499, 862 P.2d 870, 872 (1993).
[61] Id.
[62] Id.
[63] Id. at 500.
[64] Id. at 504.
[65] ARK. R. EVID. 502.
[66] ARK. R. EVID. 502(a)(1)
[67] *Courteau v. St. Paul Fire & Marine Ins. Co.*, 307 Ark. 513, 516; 821 S.W.2d 45, 47 (1991) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981))
[68] *Courteau*, 307 Ark. at 518, 821 S.W.2d at 48.

Purely business or transactional advice given by in-house counsel is not protected. Because legal and business considerations may be frequently intertwined, a privilege argument should not be lost if the confidential communication is made for the purpose of facilitating to the client the rendering of professional legal services.

California
Morrison & Foerster LLP

In California, the attorney-client privilege applies to communications between a client and in-house counsel in the same way that the privilege applies to such communications between a client and outside counsel. *See State Farm Fire & Cas. Co. v. Superior Court,* 54 Cal. App. 4th 625, 639 (1997). However, unlike outside counsel, in-house counsel are often asked to provide advice that is more business-oriented, rather than legal, in nature. Accordingly, while California recognizes that in-house counsel may serve as an attorney for purposes of the attorney-client privilege, the existence of the privilege depends on the nature and substance of the communication. The privilege applies to confidential communications seeking or providing legal advice. By contrast, in circumstances where a communication is for business purposes, or where the business and legal portions of a communication are not clearly separable, the attorney-client privilege is inapplicable. *See*, *e.g.*, *Chicago Title Ins. Co. v. Superior Court*, 174 Cal. App. 3d 1142, 1151 (1985) ("attorney client privilege is inapplicable where the attorney acts as a negotiator for the client, gives business advice or otherwise acts as a business agent").

Colorado
Gorsuch Kirgis LLP

In Colorado, the common law attorney-client privilege is codified by Colo. Rev. Stat. § 13-90-107(b) which states, in relevant part, "[a]n attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment..." In Colorado, a corporation may use the protections granted by the attorney-client privilege, and this privilege extends to a corporation's in-house counsel as well as a corporation's outside counsel.[69] However, the Colorado courts have not established a definitive minimum set of factors that will determine if the communications of a corporation's attorney and a corporation's employees are covered by the attorney-client privilege.

Colorado follows Upjohn Co. v. U.S., 449 U.S. 383, 394-95 (1981), and will extend the attorney-client privilege further than a corporation's "control group" to the employees who do not have ultimate decision-making authority.[70] If the four factors outlined by the Court in Upjohn are present in the communications between a corporation's counsel and a corporation's employees, the communications are covered by the attorney-client privilege.[71] The Upjohn factors outlined by the Colorado Supreme Court are as follows: 1) whether the corporate employees, following the directions of supervisors, provided the information to counsel acting as counsel for the corporation; 2) whether the communication's purpose was to enable counsel to provide legal advice to the corporation; 3) whether the employees were cognizant that counsel's questions were for the purpose of securing legal advice for the corporation; and 4) whether the employees were

[69] Shriver v. Baskin-Robbins Ice Cream Company, Inc., 145 F.R.D. 112, 114 (D. Colo. 1992); *In re* Grand Jury 758 F. Supp. 1411-12 (D. Colorado. 1991) applying attorney/client privilege to communications made between president of corporation and outside counsel).
[70] National Farmers Union Property and Casualty Co. v. District Court for the City and County of Denver, 718 P.2d 1044, 1049 (Colo. 1986)(citing Upjohn).
[71] Id.

told of the highly confidential nature of the communications.[72] Neither the state nor federal courts of Colorado have directly discussed whether some or all of these factors need to be present for the communication to qualify for the attorney-client privilege.

Colorado case law supports the conclusion that all four of the Upjohn factors need not be present for the attorney-client privilege to exist. The District Court of Colorado has held that the privilege exists when corporate employees communicate to corporate counsel concerning matters within that employee's scope of employment.[73] Additionally, this privilege in not lost when a corporate agent conveys the advice given by corporate counsel to those individuals responsible for acting on the issue at hand.[74] The Colorado courts have also recognized that the attorney-client privilege serves an attorney's need to collect the necessary information to form competent legal opinions.[75] Therefore, it has been held that if an employee makes a communication to convey information needed by corporate counsel to render legal advice, such communication is covered by the attorney client privilege.[76]

The usual limitations accompanying the general attorney-client privilege apply to communications between a corporation and its corporate counsel. To benefit from the attorney-client privilege, the individual claiming the benefit must show the following five elements: 1) that the holder of the privilege is or was seeking to become a client; 2) the person receiving the communication is an attorney or the attorney's subordinate; 3) the communication is made in connection with the individual's role as an attorney; 4) the communication was made not in the presence of strangers for the purpose of securing legal advice or services and not to commit a crime or a tort; and 5) the privilege has not been waived by the privilege holder.[77] Therefore, the Colorado courts extend the attorney-client privilege only when the communication between a corporate attorney and a corporate employee occurred as a result of the corporation seeking professional advice from an attorney acting as a legal advisor at that present time.[78]

Connecticut
Murtha Cullina LLP

While the Connecticut Supreme Court has not squarely confronted the issue, the broad sense of Connecticut law is supportive of the application of the attorney-client privilege to protect communications between employees of a corporation and the corporation's in-house counsel.[79]

To be protected by the attorney-client privilege, communications with in-house counsel must be made in confidence and for the purpose of obtaining legal, and not business, advice.[80] Technical

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[72] Id.
[73] Shriver, 145 F.R.D. at 114
[74] Id.
[75] *In re* M & L Business Machine Co., 161 B.R. 689, 692-93 (D. Colo. 1993).
[76] Id.
[77] *In re* Grand Jury, 758 F.Supp. 1411, 1413 (D. Colo. 1991)
[78] See Kay Laboratories, Inc. v. District Court, 653 P.2d 721, 723 (Colo. 1982)
[79] See Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 249 Conn. 36, 42 n. 5 (1999)(reversing trial court's order to disclose numerous documents, including those authored or received by a corporation's in-house legal department); PAS Assoc. v. Twin Lab., Inc., No. CV 990174428S, 2001 Conn. Super. LEXIS 3392, at *9 (Conn. Super. Ct. Dec. 5, 2001)(Mintz, J.)(protecting communications with in-house counsel for the purpose of obtaining legal advice on either corporate or litigation matters); Morganti Nat'l, Inc. v. The Greenwich Hosp. Assoc., No. X06CV0016454S, 2001 Conn. Super. LEXIS 1751, at *1 (Conn. Super. Ct. June 27, 2001)(McWeeny, J.).

and business information communicated to in-house counsel may also be protected, but only if those communications are for the purpose of seeking legal advice.[81] In addition, a Connecticut Superior Court recently applied the work product doctrine to protect from discovery documents prepared by in-house counsel in anticipation of litigation.[82]

Delaware
Richards, Layton & Finger, P.A.

The attorney-client privilege as applied under Delaware law protects the confidentiality of communications made between lawyer and client for the purpose of facilitating the rendition of professional legal advice. These communications are protected regardless of whether the lawyer involved is in-house or outside counsel.

The purpose of the attorney-client privilege is to promote full and frank discussion between clients and their attorneys. 8 Wigmore on Evidence, 2290-2292 (McNaughton ed.). The privilege was recognized at common law in Delaware and is formally codified as Rule 502 of the Delaware Uniform Rules of Evidence. Rule 502 provides:

> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client….
>
> (c) Who may claim the privilege? The privilege may be claimed by the client…trustee or similar representative of a corporation, association or other organization, whether or not in existence.

The attorney client privilege finds full application where a corporation is the client seeking professional advice. Zirn v. VLI Corp., Del Supr. 621 A.2d773, 781 (1993) (citing Upjohn Co v. United States, 449 U.S. 383 (1981)). Whether the advice was rendered by outside counsel or in-house counsel is in apposite. Grimes v. LCC International, Inc., Del. Ch., C.A. No. 16957, 1999 WL 252381, Jacobs, V.C. (Apr. 23, 1999); see also Texaco v. Phoenix Steel Corp., Del. Ch., 264 A.2d 523, 525-26 (1970) (assuming without deciding that the attorney-client privilege extends to advice rendered by in-house counsel) (citing American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D.Del. 1962)). The corporation can assert the privilege through its agents, i.e., its officers and directors, who must exercise the privilege in a manner consistent with their fiduciary duties to the corporation and its stockholders. Zirn, 621 A.2d at 781 (citing Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985)).

The attorney-client privilege does not extend to business advice, even if rendered by an attorney. Lee v. Engle, Del. Ch., C.A. Nos. 13323, 13284, 1995 WL 761222, at *2, Steele, V.C. (Sept. 13, 1979). Similarly, a party cannot claim attorney-client privilege to insulate specific documents

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[80] Morganti National, 2001 Conn. Super. LEXIS 1751, at * legal3 (noting that memoranda and notes authored and received by in-house counsel were "fairly characterized as predominantly."); See also Metropolitan Life Ins., 249 Conn. at 52; Shew v. FOIC, 245 Conn. 149, 157 (1998).

[81] See Olson v. Accessory Controls & Equip. Corp., 254 Conn. 145, 159-168 (2000) (protecting communications between outside counsel (not in-house counsel) and an environmental consultant on technical matters because those communications were made for the purpose of defending an environmental claim).

[82] See PAS Assoc., 2001 Conn. Super. LEXIS 3392, at *15-20; See also Connecticut Practice Book § 13-3.

from discovery merely by asserting that the documents were reviewed by a director who is also an attorney. The director/attorney's review must be shown to have been in his capacity as a lawyer and for the purpose of rendering legal services on behalf of the corporation, rather than in his directorial capacity. See Lee, 1995 WL 761222, at *3.

This limitation on confidentiality can have significant practical consequences where corporations choose to allow their in-house counsel to serve in capacities beyond those related specifically to the legal function. In many instances it may be unclear whether communications with in-house counsel who also serves business-related purpose. Where such ambiguity exists the court may conclude that any doubt should be resolved against application of the privilege, since those asserting the privilege created the ambiguity by placing counsel in multiple roles, and thus should not be permitted to benefit from the ambiguity created.

Other exceptions to application of the attorney-client privilege in the corporate context exist (e.g. one faction of board cannot claim privilege vis-à-vis another faction of board in respect of lawyer-client communications in which the corporation is the client; attorney-client privilege may, in limited cases where particularized good cause is shown, be pierced to allow discovery by a derivative plaintiff of otherwise privileged advice to the corporation). These exceptions are not, however, particular to the in-house/outside counsel distinction and are not further discussed here.

Florida
Steel Hector & Davis LLP

Florida law recognizes the availability of the attorney-client privilege in communications between in-house legal counsel and its employees. In Florida, lawyer-client privilege is regulated by Florida Statutes § 90.502. This regulation states that the "communication between lawyer and client is confidential if it is not intended to be disclosed." A client is defined as any "corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." A lawyer, on the other hand, is "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation."

Florida regulations clearly extend the lawyer-client privilege to in-house counsel:

> *Confidential communications between lawyers and clients are privileged from compelled disclosure to third persons. See section 90.502(2), Florida Statutes (1993). This privilege covers communications on legal matters between corporate counsel and corporate employees.* [83]

Furthermore, the lawyer-client privilege covers any oral statement made by witnesses in an interview, and involves a lawyer's impressions, conclusions, opinions or theories of his or her client's case.[84]

The attorney-client privilege for in-house counsel is based on the following: (i) a communication between attorney and client; (ii) the purpose of the communication is to obtain legal services; and (iii) this communication is intended to be confidential. When applying the lawyer-client

[83] Shell Oil Company v. Par Four Partnership, 638 So.2d 1050, 1050 (Fla. 5th DCA 1994).
[84] Faith O. Horning-Keating v. State of Florida, 777 So.2d 438 (Fla. 5th DCA 2001).

privilege, therefore, Florida law makes no distinction between in-house counsel and other attorneys.

The difficulties affecting the applicability of the client-attorney privilege to in-house counsel arises when it is difficult to ascertain in what role the in-house counsel is acting. The in-house counsel may be acting under his or her legal capacity or his or her business capacity. This distinction is essential for understanding when the privilege may be claimed. In order to clarify this issue, the Florida Supreme Court in Sourthern Bell Tel. & Tel., Co. v. Deason has stated the following:

> *The attorney-client privilege applies to confidential communications made in the rendition of legal services to the client.*[85]

The Court, furthermore, is interested in preventing corporations from using in-house counsels as shields to thwart discovery. In order to avoid this threat, the Supreme Court of Florida stated:

> *Thus, to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny"*[86]

The criteria used to determine whether corporate communications are indeed protected by the attorney-client privilege are:

> *1) the communication would not have been made but for the contemplation of legal services;*
> *(2) the employee making the communication did so at the direction of his or her corporate superior;*
> *(3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;*
> *(4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;*
> *(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents"*[87]

The client-attorney privilege, therefore, is only applicable when the in-house counsel is acting exclusively under his or her legal capacity and the communication meets certain requirements.

Georgia
Alston & Bird LLP

The attorney-client privilege is available in Georgia (and in the U.S. generally) to protect from disclosure communications between in-house counsel and officers, directors or employees of the

[85] Sourthern Bell Tel. & Tel., Co. v. Deason, 632 So.2d 1377, 1380 (Fla. 1994).
[86] Id, 1383.
[87] Id, 1383.

companies they serve, so long as the communications constituted the seeking or giving of legal advice. Often, disputes arise as to whether such statements constitute the seeking or giving of legal advice or were simply statements made, for example, by in-house counsel in their additional capacity of businessperson.

In addition to the attorney-client privilege, the work product doctrine may protect the work product of in-house counsel, including memoranda made in anticipation of litigation, where the other party cannot show a particularized need for the information.

Guam
Klemm, Blair, Sterling & Johnson, P.C.

Guam law with respect to availability and scope of the attorney-client privilege with respect to communications with in-house counsel is undeveloped. There is no controlling precedent dealing with the matter yet handed down by the Guam Supreme Court.

The Guam Rules of Evidence recognize "the attorney-client privilege." 6 G.C.A. Section 503(c) provides:

> Section 503. Particular Privileges. Except as otherwise required by the Organic Act of Guam [48 U.S.C. 1421 et seq.] or provided by Act of the Guam Legislature, the privileges of a witness, person, government, State or political subdivision thereof shall include: . . . (c) the attorney-client privilege

No definitions are provided, but it may be assumed that a corporation or other business entity would be considered a "person" under the statute. Guam has adopted the American Bar Association's Model Rules of Professional Conduct to govern the conduct of attorneys admitted to practice law in Guam. Model Rules 1.13 and 1.6, dealing with the Organization as Client and Confidentiality of Information, provide some guidance as to the ethical responsibilities of attorneys, and it is presumed the Guam Supreme Court would recognize those responsibilities in dealing with the attorney-client privilege in matters involving in-house counsel.

In general, Guam follows applicable U.S. federal precedent when interpreting the Guam Rules of Evidence, which where patterned after the Federal Rules of Evidence. Because, however, FRE 503, dealing with the attorney-client privilege, was rejected by the U.S. Congress, there is no applicable precedent. Guam has also historically followed California precedent in matters involving statutes borrowed from California, but there are no Guam equivalents to Cal. Evid. C. Section 950 et seq. Thus, there is no clear body of case authority to which one can confidently turn for guidance in the area.

It is believed the Guam Supreme Court would likely follow the general principles that have developed under California case-law precedent in matters related to the attorney-client privilege in cases involving in-house counsel. Pending development of Guam law on the issues related to the privilege, however, clients would be best advised to take a conservative view on the scope of the protections afforded by it in Guam.

Hawaii
Case Bigelow & Lombardi

Rule 503 of the Hawaii Rules of Evidence provides for the attorney-client privilege under Hawaii law. There is no Hawaii case law addressing the availability and scope of the attorney-client privilege with respect to communications between in-house counsel and officers, directors and employees of the company they serve. In general, the Hawaii Supreme Court will likely follow California case law on the subject. However, due to the lack of reported Hawaii case law on the subject, it would be wise to take a conservative approach to communications between in-house counsel and company officers, directors and employees.

Idaho
Hawley Troxell Ennis & Hawley

Pursuant to Rule 502 of the Idaho Rules of Evidence ("I.R.E."), a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another concerning a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.[88]

The communication must be confidential within the meaning of the rule. The communication must be made between persons described in the rule for the purpose of facilitating the rendition of professional legal services to the client.[89]

A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him or her.[90] A "representative of the client" is one having authority to obtain professional legal services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client.[91] A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.[92]

The rule extends the privilege only to confidential communications. It does not apply to articles of evidence and does not permit a client to immunize evidence by delivering it to a lawyer.[93] The privilege belongs to the client, whether or not the client is a party to the proceeding in which the privileged communication is sought. It survives the death of an individual and the dissolution of a corporation.[94] The person claiming the privilege must first show the relation that existed between the attorney and the client at the time of the communication, the circumstances under which the attorney came into possession of the communication or information, and that the same

[88] Rule 502(b), I.R.E.
[89] State v. Allen, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993), overruled on other grounds, State v. Priest, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995), rev. den. (1996).
[90] Rule 502(a)(1), I.R.E.
[91] Rule 502(a)(2), I.R.E.
[92] Rule 502(a)(3), I.R.E.
[93] See Comment to Rule 502(b), I.R.E.
[94] Rule 502(c), I.R.E.

was obtained by the attorney while acting as attorney for the client and in furtherance of the professional engagement.[95] *The exceptions to the rule are: crime or fraud, claims through same deceased client, breach of duty by lawyer or client, attested document,* and common interest or defense of joint clients. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.[96] A communication relevant to an issue between parties who claim through the same deceased client, regardless whether the claims are by testate or intestate succession or by inter vivos transaction.[97] There is no privilege under the rule as to a communication relevant to an issue of breach of duty by the lawyer to his or her client or by the client to his or her lawyer.[98] There is no privilege under the rule as to a communication relevant to an issue concerning an attested document in which the lawyer is an attesting witness.[99] There is no privilege under the rule as to a communication relevant to the matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.[100]

Unfortunately, we do not have the benefit of any Idaho case law interpreting Rule 502 in relation to in-house counsel and the scope of the attorney-client privilege. Without any cases on point in Idaho or in other federal jurisdictions applying Idaho law, one can only speculate as to the scrutiny with which Idaho courts may review the attorney-client privilege in relation to in-house counsel. Nevertheless, there is guidance within Rule 502, as well as authorities from other jurisdictions.

The United States Supreme Court has held that the attorney-client privilege applies to communications with attorneys, regardless of whether the attorney is outside counsel or corporate staff counsel.[101] Despite this holding, commentators agree that the attorney-client privilege is muddied when examining the role of in-house counsel. "Defining the scope of the privilege for in-house counsel is complicated by the fact that these attorneys frequently have multi-faceted duties that go beyond traditional tasks performed by lawyers. In-house counsel have increased participation in the day-to-day operations of large corporations."[102]

Moreover, it is commonly accepted that "[t] he attorney-client privilege attaches only when the attorney acts in that capacity."[103] It does not apply when in-house counsel is engaged in "nonlegal work."[104] Such "nonlegal work" would include the rendering of business or technical advice unrelated to any legal issues.[105] However, "[c]lient communications intended to keep the attorney apprised of business matters may be privileged if they embody 'an implied request for legal

[95] See Comment to Rule 502(c), I.R.E.
[96] Rule 502(d)(1), I.R.E.
[97] Rule 502(d)(2), I.R.E.
[98] Rule 502(d)(3), I.R.E.
[99] Rule 502(d)(4), I.R.E.
[100] Rule 502(d)(5), I.R.E.
[101] Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).
[102] U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156 (E.D. N.Y. 1994).
[103] Borase v. M/A Com, Inc., 171 F.R.D. 10, 13 (D.Mass. 1997) citing Texaco Puerto Rico v. Dept. of Consumer Affairs, 60 F.3d 867, 884 (1st Cir. 1995).
[104] Id. citing Burlington Indus. v. Exxon Corporation, 65 F.R.D. 26, 33 (D. Md. 1974); Oil Chemical and Atomic Workers International Union v. American Home Products, 790 F. Supp. 39, 41 (D.P.R. 1992).
[105] Id. at 13-14 citing Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491, 510-511 (D.N.H. 1996).

advice based thereon.'"[106] Thus, "if an in-house counsel has other nonlegal responsibilities, the party invoking the privilege has the burden of producing evidence in support of its contention that in-house counsel was engaged in giving legal advice and not in some other capacity at the time of the disputed conversations."[107]

Courts have held that when in-house counsel acts as a business advisor or addresses business issues, then the attorney-client privilege is not invoked.[108] ("The attorney-client privilege is triggered only by a client's request for legal, as contrasted with business advice, and is 'limited to communications made to attorneys solely for the purpose of the corporation seeking legal advice and its counsel rendering it.' When the ultimate corporation decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.").[109] Furthermore, the mere fact that in-house counsel is present at a meeting does not shield otherwise unprivileged communications from disclosure.[110] For communications at such meetings to be privileged, they must have related to the acquisition or rendition of professional legal services.[111]

With this precedent in mind, the following observations are made with regard to Idaho law. In-house counsel does fit within the definition of "lawyer" pursuant to Rule 502(a)(3), I.R.E., as "a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation." Thus, the only concern here is that in-house counsel be a member in good standing of a bar of any state or nation.

The greater concern in the in-house counsel situation is with regard to who the client is. The attorney-client relationship exists between house counsel and the business entity with which he or she is employed. It does not extend to communications with employees, officers or directors as individuals in their individual capacities.[112]

The greatest threat to the preservation of the privilege is technology and the ease with which otherwise privileged information may be disseminated beyond the eyes of the client or the client's representatives through e-mail, facsimile or other mass-distribution and electronic means. With relative ease, but diligence, the business entity may limit dissemination only to those parties who have need for such information or advice. Of utmost importance in preserving the attorney-client privilege is to properly ensure and communicate to all persons receiving the information that the communication is privileged and confidential. This is best accomplished through a notation at the top of the document, whether preserved and distributed in hard copy or by electronic means. Moreover, when advice is sought of house counsel, it must be clearly communicated that the advice sought is legal, not business. Normally, such information is sought and the response conveyed in written form. The memorandum may briefly confirm that legal advice was sought

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[106] Id. at 14 citing Simon v. G.D. Searle & Co., 816 F.2d 397, 404 (8th Cir. 1987), cert. denied, 484 U.S. 917 (1987), quoting from Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal., 1971).
[107] Id.
[108] Hardy v. New York News, Inc., 114 F.R.D. 633, 643-644 (S.D.N.Y. 1987).
[109] U.S. v. International Business Machines Corp., 66 F.R.D. 206 (S.D.N.Y. 1974). U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156 (E.D. N.Y. 1994).
[110] Neuder v. Battelle Pacific Northwest Natl. Lab, 194 F.R.D. 289, 292 (D.D.C. 2000) citing Great Plains Mutual Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 197 (D. Kan. 1993).
[111] Id. at 292.
[112] "When a corporate employee or agent communicates with corporate counsel to secure or evaluate legal advice for the corporation, that agent or employee is, by definition, acting on behalf of the corporation and not in an individual capacity. These kinds of communications are at the heart of the attorney-client relationship." Samaritan Found. v. Goodfarb, 862 P.2d 870, 876 (Arizona 1993).

and include the notation that the document is an "Attorney-Client Privileged and Confidential Communication."

Furthermore, when house counsel also serves in the capacity of officer or business advisor for the entity, legal and business advice should be given separately, and the capacity with which the advice is given be documented as discussed above.

Illinois
Sonnenschein Nath & Rosenthal

Illinois courts apply the control group test to determine if the attorney client privilege applies to communications between an in-house counsel and officers, directors or employees of the companies they serve.[113] Under Illinois Law, the attorney-client privilege protects an employee's communications with an in house counsel under the umbrella of the "control group" when (1) the employee is in an advisory role to top management such that the top management would normally not make a decision in the employee's particular area of expertise without the employee's advice or opinion; and (2) that opinion does in fact form the basis of the final decision by those with actual authority.[114] Other requirements include a showing that the communications originated in a confidence that it would not be disclosed; was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential. The burden of showing these facts is on the party claiming the exemption.[115]

By adopting the control group test, the Illinois courts try to strike a balance between the need to deter extensive insulation of vast amounts of materials from the discovery process by limiting the privilege for the corporate client to the extent reasonably necessary and the basic purpose of the privilege.[116] Under the test, an Illinois appellate court has refused to find senior product engineer to be within the control group.[117] The focus of the court for finding the privilege is "on individual people who substantially influenced decisions, not on facts that substantially influenced decisions."[118] Under some circumstances, an in-house counsel's oral statements may be protected by the work product doctrine in Illinois even though the employees might not be within the control group.[119]

[113] Consolidated Coal v. Bucyrus-Erie Co., 89 Ill. 2d 103; 432 N.E.2d 250 (Ill. 1982); Day v. Illinois Power Co., 50 Ill. App. 2d 52; 199 N>E>2d 802 (Ill. App. Ct. 1964).
[114] Consolidated Coal Co., 89 Ill. 2d at 119-20; 432 N.E.2d at 257-58.
[115] Id. At 1191 432 N.E.2d at 257.
[116] Consolidated Coal Co., 89 Ill. 2d at 118-191 432 N.E.2d at 257.
[117] Archer Daniels Midland Co. v. Koppers Co., Inc., 138 Ill. App. 3d 276; 485 N.E.2d 1301 (Ill. App. Ct. 1985).
[118] Id., 138 Ill. App. 3d at 280; 485 N.E.2d at 1304 (relying on Consolidated Coal Co.)
[119] See, e.g., Consolidated Coal Col, 89 Ill.2d at 108-10; 432 N.E.2d at 252-53.

Indiana
Baker & Daniels

We have examined Indiana cases, Indiana ethics opinions, and all other materials available to us on this subject, and we have found no discussion of this issue in any Indiana authority. We therefore assume that this is a matter of common law development and that Indiana courts would at least consider the possibility of entertaining the various limitations on the privilege that some jurisdictions have placed on the relationship between in-house counsel and their officers and directors.

Kansas
Foulston Siefkin LLP

Kansas law recognizes the attorney-client privilege.[120] The general rule, set forth in K.S.A. 60-426, is summarized as follows:

> (1) Where legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) communications made in the course of that relationship (4) made in confidence (5) by the client (6) are permanently protected (7) from disclosures by the client, the legal advisor, or any other witnesses (8) unless the privilege is waived. *Maxwell*, 10 Kan. App. 2d at 63.

Kansas state courts have not addressed whether the privilege applies to communications between in-house counsel and the directors, officers, or employees of the company the in-house counsel serves. The federal district courts in Kansas, however, have applied the privilege to protect such communications.[121]

In *Boyer*, the federal district court held that the application of the attorney-privilege in the corporate context "involves not only consideration of the position of the employee with whom the communication is had, but also the context of the communication."[122] "[T]he focus of the inquiry clearly must be whether the communications were made at the request of management in order to allow the corporation to secure legal advice."[123] The court indicated that, under this test, even communications between in-house counsel and lower-level employees may be protected.[124]

It is likely that the Kansas state courts would follow the federal courts and apply the privilege to protect communications between in-house counsel and company directors, officers, and employees when appropriate. Whether it is appropriate to apply the privilege to protect a communication between in-house counsel and a director, officer, or employee will depend upon the facts of each case.

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[120] See K.S.A. 60-426. See also, Cypress Media, Inc. v. City of Overland Park, 268 Kan. 407, 418, 997 P.2d 681, 689 (2000); State of Kansas v. Maxwell, 10 Kan. App. 2d 62, 63, 691 P.2d 1316, 1319 (1984).
[121] See Burton v. R.J. Reynolds Tobacco Co., Inc., 170 F. R. D. 481, 484 (D. Kan. 1997) (citing Upjohn Co. v. United States, 449 U. S. 383, 390, 101 S. Ct. 677, 683, 66 L. Ed.2d 584 (1981)); Boyer v. Board of County Comm'rs, 162 F. R. D. 687, 689-90 (D. Kan. 1995).
[122] Boyer, 162 F. R. D. at 689-90.
[123] Id. at 689.
[124] Id. at 690.

Kentucky
Wyatt, Tarrant & Combs, LLP

Attorney-client privilege in Kentucky is governed by Rule 503 of the Kentucky Rules of Evidence ("KRE"). This general rule states that [a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client: (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer; (2) Between the lawyer and a representative of the lawyer; (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein; (4) Between representatives of the client or between the client and a representative of the client; or (5) Among lawyers and their representatives representing the same client.[125]

KRE 503 does not distinguish between outside and in-house counsel. Moreover, corporations, associations and other organizations are included in the definition of "client." Thus, there is no reason in the rule why in-house and outside counsel should be treated differently in situations involving the attorney-client privilege.

While there are no Kentucky cases directly addressing attorney-client privilege in the context of in-house counsel, in one case the Kentucky Court of Appeals briefly touched on the issue.[126] In *Morton*, decedent's surviving spouse sued the defendant life insurance company claiming improper removal of decedent from the certificate of group credit life insurance.[127] As part of the lawsuit, the plaintiff moved to depose the defendant company's current in-house counsel and its former assistant in-house counsel.[128] The court reversed the trial court's denial of the motion, stating that the attorney-client privilege claimed by the defendant was inapplicable where advice was sought in contemplation of committing a crime or fraud.[129] The court cited as authority *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*,[130] a case that dealt in part with the attorney-client privilege in the context of communications with outside counsel.[131] Given that the court in *Morton* did not distinguish between in-house and outside counsel, it is likely that Kentucky courts will apply the attorney-client privilege rules in situations involving in-house counsel the same way as they will in situations involving outside counsel. This is true especially in light of the U.S. Supreme Court's decision in *Upjohn Co. v. United States*,[132] the leading federal case on attorney-client privilege in the corporate context, and state court decisions along the same lines.[133] One must bear in mind that as the law of attorney-client privilege relating to in-house counsel develops in Kentucky it is also possible for Kentucky courts to take a somewhat different position. In order to avoid the use of in-house counsel to shield otherwise discoverable information by asserting the attorney-client privilege, Kentucky courts may, as some other courts have done,[134] require the company asserting the privilege to prove that the communication was

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[125] KRE 503(b).
[126] See Morton v. Bank of the Bluegrass and Trust Co., 18 S.W.2d 353, 360-61 (Ky. Ct. App. 2000).
[127] See id. at 355-56.
[128] See id. at 360.
[129] See id.
[130] 807 S.W.2d 476 (Ky. 1991).
[131] See Morton, 18 S.W.3d at 360.
[132] 449 U.S. 383 (1981).
[133] See JEROME G. SNIDER AND HOWARD A. ELLINS, CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 2.05[2][c] (2001) [hereinafter SNIDER AND ELLINS].
[134] See, e.g., Avianca, Inc. v. Corriea, 705 F. Supp. 666 (D.D.C. 1989) (corporation must clearly demonstrate that the communication involved giving advice in a professional legal capacity); Ames v.

for the purpose of obtaining legal advice, or require the company to overcome a presumption that the communication to the in-house counsel was not for some other, non-legal purpose.

Finally, regardless of whether Kentucky courts take the stricter position discussed above, there is no indication that that the rules relating to the exceptions to the privilege will change, i.e. even in the in-house counsel context the privilege will not be allowed in the following cases: (1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; (2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos; (3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer; (4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and (5) Joint clients. As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.[135]

Louisiana
Lemle & Kelleher, LLP

In *Up John Company v. United States*, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981), the United States Supreme Court decided that the attorney/client privilege protects communications between a corporation's employees and the corporation's lawyers provided certain criteria are satisfied. The communication must have been made by corporate employees to corporate counsel acting as such, for the purpose of providing legal advice to the corporation. The substance of the communication must involve matters which fall within the scope of the corporate employee's official duties, and the employees themselves must be sufficiently aware that their statements are being provided for the purpose of obtaining legal advice for the corporation. The communications also must be confidential when made and must be kept confidential by the company.[136] If these criteria are satisfied, the attorney/client privilege will protect statements made by corporate employees to corporate attorneys.[137]

The attorney/client privilege, although recognized, is recognized to a very limited extent since it interferes with "the truth-seeking mission of the legal process," and conflicts with the predominant principle of utilizing all rational means for ascertaining truth.[138] As such, it "is in derogation of the public's right to every man's evidence," and therefore, is not favored by federal

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Black Entertainment Television, 1998 WL 81205, at *8 (S.D.N.Y. Nov. 18, 1998) (stating that "the company bears the burden of 'clearly showing' that the in-house attorney gave advice in her legal capacity"); Rossi v. Blue Cross & Blue Shield of Greater New York, 540 N.E.2d 703 (N.Y. 1989) (in order to avoid sealing off disclosure by the mere participation of the in-house counsel, the need for cautious and narrow application of the attorney-client privilege is heightened). See generally, SNIDER AND ELLINS, supra note 10, § 2.05[2][c] (2001).

[135] KRE 503(d).

[136] Up John, 449 U.S. at 394.

[137] See also, In re International Systems & Controls Corp. Securities Litigation, 91 F.R.D. 552, 556 (S.D.Tex. 1981); U.S. v. Mobil Corp., 149 F.R.D. 533, 537 (N.D.Tex. 1993)

[138] Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906 (1980); Hawkins v. Stables, 148, F.3d 379 (4th Cir. 1998); United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986), cert. den., 480 U.S. 938, 107 S.Ct. 1585, 94 L. Ed.2d 775 (1987); U.S. v. Aramony, 88 F.3d 1369 (4th Cir. 1996).

courts and must be strictly confined within the narrowest possible limits consistent with the logic of its principle.[139] Keeping in mind its very strict construction and narrow application, the party asserting the application of the attorney/client privilege to information, which it seeks to conceal, bears the burden of proving each and every element essential to its application.[140]

The elements essential to the application of the attorney/client privilege are:

> (1) The asserted holder of the privileges is or sought to become a client; (2) the communication is made to an attorney or his subordinate, in his professional capacity; (3) the communication is made outside the presence of strangers; (4) for the purpose of obtaining an opinion on the law or legal services; and (5) the privilege is not waived.[141]

While trying to meet the essential elements of the attorney/client privilege, several problems can be encountered. First of all, a corporation cannot prevent a document or communication from disclosure if that document was prepared in the ordinary course of business, even if an attorney prepared it.[142] Further, attorney/client privilege only protects confidential communications by an employee to an attorney when it includes and/or seeks legal advice and opinions. This privilege is not applied to factual information that is discovered and reported by an attorney.[143] Thus, a document created by corporate counsel and sent to an employee, who does not relay any legal advice but merely discusses factual information is potentially not subject to the attorney/client privilege.[144] Stated simply, merely because factual information is transmitted through an attorney does not mean that it takes on a confidential character.[145]

In Louisiana, Article 506 of the Louisiana Code of Evidence provides for the attorney/client privilege against discovery of confidential information. In pertinent part the article states:

> A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral written or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client… when the communication is:
>
> (1) Between the client or a representative of the client and the client's lawyer…
>
> (4) Between representatives of the client or between a client and a representative of the client.[146]

The United States District Court for the Eastern District of Louisiana has held that when

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[139] In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984).
[140] Hodges, Grant & Kaufmann v. U.S., 768 F.2d 719 (5th Cir. 1985); Texaco, Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385 (M.D. La. 1992).
[141] In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975); New Orleans Saints v. Griesedieck, 612 F.Supp. 59, 62 (E.D. La. 1985), aff'd, 790 F.2d 1249 (5th Cir. 1986).
[142] In re Hutchins, 211 B.R. 330 (Bkrtcy. E.D.Ark. 1997), on reconsideration in part, 216 B.R. 11 (Bkrtcy. E.D.Ark. 1997).
[143] American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (D.C. Mo. 1978).
[144] U.S. v. Davis, 132 F.R.D. 12 (S.D.N.Y. 1990).
[145] Cuno, Inc. v. Pall Corp., 121 F.R.D. 198 (E.D.N.Y 1998); Union Carbide Corp. v. Dow Chemical Co., 619 F. Supp. 1036, 1047 (D.Del. 1985).
[146] LSA-C.E. §506

determining if the attorney/client privilege will protect against the discovery of documents, "[t]he first issue is whether the documents are privileged. (Mere transmittal letters, without more, held not to be confidential communications, and thus, no privilege existed.)[147]

In order for a document to be considered privileged, the information it contains must be confidential. In a recent case, the Eastern District held, "[a] communication is confidential if it is not intended to be disclosed except in furtherance of obtaining or rendering professional legal services for the client."[148]

The second issue to be raised is whether the privilege has been raised. The United States District Court for the Eastern District of Louisiana has discussed two instances when a client can waive the attorney/client privilege and allow production of otherwise protected information.[149] The court in *Landry-Scherer* identified the following as the two means by which the privilege may be waived. "First, a privilege is waived when the person upon whom the privilege is conferred "voluntarily discloses or consents to disclosure of any significant part of the privileged matter."[150]

The second instance a waiver can occur is when "a party places privileged communications at issue".[151] The *Landry-Scherer* court clarified this by stating, "this kind of waiver occurs only when the party waiving the privilege has committed himself to a course of action that will require the disclosure of a privileged communication."[152]

In *Landry-Scherer*, the defendant claimed that the plaintiff had placed privileged communications at issue by naming her attorney as a witness to the transaction, which was the subject of the underlying controversy.[153] The court rejected this contention by relying on the fact that although the plaintiff listed her attorney as a witness to the transaction in question, she did not list him as a witness to be called at trial.[154] The court held, "*Scherer* (plaintiff) has specifically avoided naming LaNasa (attorney) as a trial witness and she has not indicated in any way that she intends to rely on his advice, opinions or testimony to prove any element of her claim."[155]

Maine
Bernstein Shur Sawyer & Nelson

There is no case law in Maine on the subject of the attorney-client privilege with regard to communications with in-house counsel.

Maryland
Piper Rudnick LLP

The law in Maryland is somewhat unsettled regarding the availability of the attorney-client privilege to protect communications between in-house counsel and officers, directors, and

[147] Exxon Corporation v. St. Paul Fire & Marine Insurance, 903 F.Supp. 1007 (E.D.La. 1995), see also, Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc., 1998 WL 310779 (E.D.La. 1998).
[148] LGS Natural Gas Co. v. Latter, 1998 WL 205417.
[149] See, Landry-Scherer v. Latter, 1998 WL 205417 (E.D.La. 1998).
[150] Landry-Scherer, 1998 WL 205417.
[151] Landry-Scherer, 1998 WL 205417, *3.
[152] Landry-Scherer, 1998 WL 205417, *3.
[153] Landry-Scherer, 1998 WL 205417, *4.
[154] Landry-Scherer, 1998 WL 205417, *5.
[155] Landry-Scherer 1998 WL 205417, *5.

employees of the companies the in-house counsel serve. The Maryland Court of Appeals — Maryland's highest court — addressed this issue about three years ago in *E.I. duPont deNemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129 (Md. 1998), a case involving communications between in-house counsel and an outside debt collection agency. After reviewing the criteria for invocation of the attorney-client privilege in a corporate setting articulated by courts from other jurisdictions, including by the Supreme Court in its *Upjohn v. United States*, 449 U.S. 383 (1981) decision, the Maryland Court of Appeals concluded:

> Thus, it is clear that a corporation can be a client for purposes of the attorney-client privilege; what is unclear is exactly how far this protection extends regarding the corporation's employees and agents. While we decline to adopt a particular set of criteria for the application of the privilege in the corporate context until we are required to do so, the communications in the instant case are not protected under any of the tests.[156]

No subsequent decision by the Maryland appellate courts has addressed the issue.
Although the question is thus somewhat unsettled, it is noteworthy that the Court of Appeals in *Forma-Pack* discussed in considerable detail the criteria articulated by the Florida Supreme Court in *Southern Bell Telephone & Telegraph Company v. Deason*[157] namely: (1) [T] he communication would not have been made but for the contemplation of legal services; (2) the employee making the communication did so at the direction of his or her corporate superior; (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; [and] (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[158] It is, accordingly, a fair inference that the Maryland Court of Appeals is favorably inclined toward the criteria articulated in *Deason*, and is awaiting a case in which it would be appropriate for the court to adopt them as the law of Maryland.

Massachusetts
Foley Hoag

The treatment of communications between in-house counsel and corporate employees in Massachusetts is in accord with the prevailing American rule, as follows:

> Conversations between a corporation's employees and in-house counsel are protected by the privilege. Nonetheless, because in-house counsel may be involved in giving advice on many issues that are more business, rather than legal, in nature or may be involved in such discussions as a matter of course, conversations in which in-house counsel is a participant, as well as documents addressed to or from in-house counsel, are readily susceptible to challenge on the ground that it is business advice that is being given and not legal advice.[159]

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[156] 718 A.2d at 1141.
[157] 632 So. 1377 (Fla. 1994)
[158] *Forma-Pack*, 718 A.2d at 1141.
[159] Epstein, The Attorney-Client Privilege and the Work-Product Doctrine (4th ed.), Section of Litigation, American Bar Association.

Michigan
Butzel Long

In Michigan, the attorney-client privilege has largely developed through case law. With some small variations, the Michigan courts have adopted this definition of the privilege:

> The attorney-client privilege attaches to communications made [in confidence] by a client to his or her attorney acting as a legal advisor and made for the purpose of obtaining legal advice on some right or obligation.[160]

The attorney-client privilege applies to both written and oral communications.[161] The privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[162]

The privilege attaches only to confidential communications.[163] It attaches to communications that have been expressly made confidential, as well as to those reasonably understood to be so intended.

The communication must be with the client. As a general proposition, the attorney-client privilege does not extend to information received by the attorney from third parties, such as potential witnesses.[164] An exception to this principle applies where the third party is an agent of the client,[165] and the courts have recognized that "[c]ommunications made through a client's agent are privileged."[166]

These issues become more complex when the client is a corporation. On one hand, a corporation is a legal entity separate and distinct from its officers, directors, and employees. On the other hand, a corporation cannot communicate except through its officers, directors, and employees. For many years, a large number of courts held that the privilege attached only to communications between the attorney and the "control group" of the corporation.[167] Such a group would include

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[160] See, e.g., Alderman v The People, 4 Mich 414, 422 (1857); Ravary v Reed, 163 Mich App 447, 453; 415 NW2d 240 (1987); Kubiak v Hurr, 143 Mich App 465, 472-473; 372 NW2d 341 (1985); Grubbs v K Mart Corp, 161 Mich App 584, 589; 411 NW2d 477 (1987); Taylor v BCBSM, 205 Mich App 644, 654; 517 NW2d 864 (1994).

[161] In re Bathwick's Estate, 241 Mich 156, 158-159; 216 NW 420 (1927).

[162] Upjohn Co v United States, 449 US 383, 395 (1981); Fruehauf Trailer v Hagelthorn, 208 Mich App 447, 452; 528 NW2d 778 (1995); (technical facts underlying communications were not protected just because they were communicated to attorney); Hubka v Pennfield Twp, 197 Mich App 117, 121; 494 NW2d 800 (1992); rev'd in part on other grounds, 443 Mich 864; 504 NW2d 183 (1993); In re Grand Jury subpoena, 1991 US App LEXIS 26484, *7 (6th Cir Sept 5, 1991) (records and ledger sheets in the possession of attorney pertaining to disbursements from client's escrow account were not themselves communications relating to legal advice).

[163] Cady v Walker, 62 Mich 157, 158; 28 NW 805 (1886); People v Andre, 153 Mich 531, 540; 117 NW 55 (1908); Schenet v Anderson, 678 F Supp 1280, 1282 (ED Mich 1988); Fruehauf Trailer v Hagelthorn, 208 Mich App 447, 452; 528 NW2d 778 (1995); Hubka v Pennfield Twp, 197 Mich App 117, 122; 494 NW2d 800 (1992); rev'd in part on other grounds, 443 Mich 864; 504 NW2d 183 (1993).

[164] In re Dalton Estate, 346 Mich 613, 619; 78 NW2d 266 (1956).

[165] Id. Cf Parker v Associates Discount Corp, 44 Mich App 302, 306; 205 NW2d 300 (1973) ("Attempting to claim the attorney-client privilege for a communication made by a party's agent after that agent has been in contact with an attorney is getting rather far afield").

[166] Grubbs v K Mart Corp, 161 Mich App 584, 589; 411 NW2d 477 (1987). See also People v Bland, 52 Mich App 649, 653; 218 NW2d 56 (1974).

[167] See, eg, United States v Upjohn Co, 600 F2d 1223 (6th Cir 1979).

(but would not necessarily be limited to) members of controlling administrative bodies, such as the corporate board of directors.

In the 1981 case of *Upjohn v United States*,[168] however, the United States Supreme Court rejected the "control group" test. It did so because (1) middle and lower level employees, who were not within the corporate control group, could "embroil the corporation in serious legal difficulties" and might "have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to actual or potential difficulties;" (2) "the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy;" and (3) the control group test "is difficult to apply in practice" and is "unpredictab[le]" in application. *Upjohn* applied a "subject matter" test to determine whether privilege applied to the communications, listing several factors:

> (1) the communications were made by Upjohn employees at the direction of corporate superiors, (2) so that Upjohn could receive legal advice from counsel; (3) the communications concerned matters within the scope of the employees' duties, (4) which were not available from upper-level directors; (5) the employees were told the purpose of the communications; and (6) the communications were considered confidential when made and were not disseminated outside the corporation.

In the *Fassihi* case, the Michigan Court of Appeals held that "the attorney-client privilege belongs to the [corporate] control group."[169] This case probably should not be read to indicate, however, that *Fassihi* deliberately ignored *Upjohn* and consciously retained the "control group" test. This is so for several reasons. First, *Upjohn* was decided less than a month before *Fassihi* was submitted and, therefore, the Court of Appeals may simply have been unaware of the *Upjohn* decision. Second, *Fassihi* does not discuss *Upjohn* or state that it is rejecting the *Upjohn* analysis. And, finally, there may be nothing technically inconsistent between *Fassihi* and *Upjohn*; after all, even under the "case-by-case" analysis employed by the Supreme Court, communications with the corporate "control group" will often be privileged.

In 1988, the Michigan Supreme Court adopted new professional ethics rules which included Rule 4.2, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The legislative history of the rule makes it clear that the drafters had *Upjohn* in mind. The Comment to the Rule addresses the Rule's application for corporate entities as follows:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.

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[168] 449 US 383 (1981).
[169] Fassihi v Sommers, Schwartz, 107 Mich App 509, 518; 309 NW2d 645 (1981).

More recently, in *Hubka v Pennfield Twp*, a case interpreting the Michigan Freedom of Information Act, the Michigan Court of Appeals held that "where the attorney's client is the organization, the privilege extends to those communications between attorneys and all agents or employees of the organization *who are authorized to act or speak for the organization in relation to the subject matter* of the communication."[170]

Thus, under both the ethics rules and *Hubka*, it appears that Michigan follows the *Upjohn* formulation with regard to privilege and entity clients.

One additional point of clarification is in order. A lawyer who is employed or retained to represent a corporation represents the corporation as distinct from its directors, officers, employees, members, shareholders, or other constituents.[171] Thus, when a representative of a corporation confers with the attorney for the corporation, the privilege attaches because the corporation is the client and not because the representative is the client.

Minnesota
Briggs and Morgan, P.A.

Minnesota courts have only peripherally addressed the issue of the attorney-client privilege as applied to in-house counsel. In a footnote to the Minnesota Supreme Court's opinion in Kahl v. Minnesota Wood Specialty, Inc., the Minnesota Supreme Court states, "the privilege may be claimed in connection with communications to 'house counsel'."[172] In Kahn, the court held that certain provisions of the Minnesota workers' compensation laws did not abrogate the attorney-client privilege. Subsequent to the Kahn case, the United States Supreme Court held that the attorney-client applies to certain communications to and from in-house counsel.[173]

Because the applicability of the attorney-client privilege to in-house counsel is highly dependent on the specific facts and circumstances involved, and because Minnesota does not have a well developed body of case law on the issue, the above statement should not be read to imply that Minnesota has broadly adopted the attorney-client privilege in the context of in-house counsel.

Mississippi
Butler, Snow, O'Mara, Stevens & Cannada, PLLC

Mississippi Rule of Evidence 502 addresses the issue of whether the attorney-client privilege applies to communications between in-house counsel and the officers, directors, or employees of the company.

Rule 502 protects certain confidential communications made by the client or the client's representative to the lawyer or the lawyer's representative "for the purpose of facilitating the rendition of professional legal services to the client."[174] Under Rule 502, person or corporation,

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[170] hubka v Pennfield Twp, 197 Mich App 117, 121; 494 NW2d 800 (1992); rev'd in part on other grounds, 443 Mich 864; 504 NW2d 183 (1993) (quoting Mead Data Central, Inc v United States Dep't of Air Force, 566 F2d 242, 361 n 24 (CA DC 1977)).
[171] See Michigan Rule of Professional Conduct 1.13(a).
[172] See Kahl v. Minnesota Wood Specialty, Inc. 277 N.W. 2d 395 (Minn. 1979), footnote 5 (citing United States v. United Shoe Machinery Corp., 89 F.Supp. 357 (D.Mass.1950).
[173] See Upjohn Co. v. United States, 449 U.S. 383 (1981) (setting forth a multi-factor test for determining when the attorney-client privilege applies to in-house counsel). Minnesota courts have not addressed the issue since the Upjohn decision.
[174] Miss. R. Evid. 502(b).

whether public or private, "rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from" the lawyer is a "client" entitled to claim the protection of the privilege.[175] A "representative" of the client is "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or an employee of the client having information needed to enable the lawyer to render legal services to the client."[176] An attorney must not reveal the confidences of the client.[177] The privilege does not attach to any communication (1) made in the furtherance of a crime or fraud; (2) relevant to an issue between parties who claim through the same deceased client; (3) relevant to a claim of breach of duty by the lawyer or client; (4) relevant to a matter of common interests among two or more clients when offered in an action between or among any of the clients.[178]

Based on the foregoing authorities and subject to the exceptions noted, privilege may attach to certain types of confidential communications between corporate in-house counsel and a corporate officer, director, or employee when the communication is related to furthering the rendition of professional legal services on behalf of the corporation and is solely of a personal or a business nature.[179]

Missouri
Armstrong Teasdale LLP

Under Missouri law, the attorney-client privilege is to be construed broadly to promote its fundamental policy of encouraging uninhibited communication between the client and his or her attorney.[180] Generally, communications will be held to be privileged if the following elements are present: 1) The information is transmitted by a voluntary act of disclosure, 2) between a client and his lawyer, 3) in confidence, 4) by means which, so far as the client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is transmitted.[181] All four of the above elements must be present for the privilege to apply.[182] If a question exists as to whether one of the four elements has been satisfied, the court will look to the surrounding circumstances to assist it in its determination.[183]

Additionally, it is by now well established that the attorney-client privilege applies to corporations as well as to individuals.[184] Because a corporation can speak only through its agents, two tests have developed in the U.S. Federal Courts to determine whether a corporate employee's communications with the corporation's legal counsel are privileged.[185] The first test is referred to as the "control group" test, and focuses upon the employee's position and his ability to take action upon the advice of the attorney on behalf of the corporation.[186] The second test,

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[175] Miss. R. Evid. 502(a)(1) & (c).
[176] Miss. R. Evid. (a)(3).
[177] Miss. R. Evid. 502cmt.; Mississippi Rules of Prof'l Conduct R.1.6; and Miss. Code73-3-37(4) (1972).
[178] Miss.R. Evid. 502(d).
[179] Miss.R. Evid. 502 & cmt.
[180] State ex rel. Great American Insurance Co. v. Smith, 574 S.W.2d 379, 382 (Mo. Banc 1978).
[181] State v. Longo, 789 S.W.2d 812, 815 (Mo. App. E.D. 1990).
[182] Id.
[183] Id.
[184] Upjohn Co. v. United States, 449 U.S. 383 (1981).
[185] Diversified Industries Inc. v. Meredith, 572 F.2d 596, 608 (8th Cir. 1977).
[186] Id. (citing City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483 (E.D. Pa. 1962), *criticized in* Upjohn Co. v. United States, 449 U.S. 383 (1981), *and* Diversified Industries Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)).

formulated in *Harper and Row Publishers, Inc. v. Decker,* focuses upon why an attorney was consulted, rather than with whom the attorney communicated.[187]

Missouri law applies a modified version of the second, or Harper and Row test, to determine whether an employee's communications are privileged.[188] Under Missouri law, communications between a corporation's in-house counsel and its directors, officers and employees will be privileged if the following elements are present: 1) The communication was made for the purpose of securing legal advice; 2) the employee making the communication did so at the direction of his corporate superior; 3) the superior made the request so that the corporation could secure legal advice; 4) the subject matter of the communication is within the scope of the employee's corporate duties; and 5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[189] Under this modified Harper and Row test, it is the corporation that has the burden of showing that the communication in issue meets all of the above requirements.[190]

Finally, in Missouri, the attorney-client privilege is not without limitation. While the purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients so that clients may obtain complete and accurate legal advice, the privilege protecting attorney-client communications does not outweigh society's interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing.[191] Thus, it is well established that the attorney-client privilege does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.[192] This limitation is commonly referred to as the "crime-fraud exception" to the attorney-client privilege.[193]

Montana
Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P.

The attorney-client privilege in Montana is codified in Montana Code Annotated Section 26-1-803 which provides a privilege to communications between an attorney and client in the course of the attorney's professional employment. This statute has been found by the Montana Supreme Court on several occasions to protect communications between in-house counsel and the corporation.

In *Union Oil Co. of California v. District Court*, 160 Mont. 229, 503 P.2d 1008 (1972) the Montana Supreme Court held that the attorney-client privilege applies to legal memoranda between in-house counsel and members of the corporation's management where in-house counsel were acting solely in their capacity as attorneys, the memoranda were addressed only to members of the corporation's management, and the memoranda were intended to be confidential. The court cited with approval a three part test contained in *United States v. United Shoe Machinery Corporation*, 89 F.Supp. 357(d. Mass., 1950), which provided the privilege to documents meeting the following criteria:

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[187] Id. (citing Harper and Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) *aff'd by a divided court*, 400 U.S. 348 (1971), *criticized in* U.S. v. Lipshy, 492 F.Supp. 35, (N.D. Tex. 1979), *and* Jarvis, Inc. v. American Tel. & Tel. Co., 84 F.R.D. 286, (D.Colo. 1979)).
[188] Id. at 609.
[189] Id.
[190] Id.
[191] In Re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 641 (8th Cir. 2001).
[192] Id.
[193] Id.

(a) The exhibit was prepared by or for either independent counsel or the corporation's general counsel or one of his immediate subordinates; and

(b) As appears upon the face of the exhibit, the principal purpose for which the exhibit was prepared was to solicit or give an opinion on law or legal services or assistance in a legal proceeding; and

(c) The part of the exhibit sought to be protected consists of either (1) information which was secured from an officer or employee of the corporation and which was not disclosed in a public document or before a third person, or (2) an opinion based upon such information and not intended for disclosure to third persons.

In *Kuiper v. District Court of Eighth Judicial District*, 193 Mont. 452, 632 P.2d 694 (1981), the Montana Supreme Court confirmed that the attorney-client privilege relates to legal advice given by in-house counsel to the corporate employer, but held that communications not relating to the provision of legal advice were not privileged.

In addition to the attorney-client privilege, the work product doctrine, contained in Montana Rules of Civil Procedure 26(b)(3), may protect the work product of in-house counsel prepared in anticipation of litigation.

Nebraska
Baird, Holm, McEachen, Pedersen, Hamann & Strasheim LLP

There is little Nebraska law, which deals with the attorney-client privilege in the context of the corporate setting. Although the Nebraska Supreme Court has held that it is vested with the inherent power and authority under the Nebraska Constitution to admit lawyers to the practice of law and to discipline and regulate them, *State ex rel. Nebraska State Bar Ass'n v. Krepela*, 259 Neb. 395, 398, 610 N.W.2d 1, 3 (2000) and *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937), a variety of Nebraska statutes nonetheless define certain duties of a lawyer. Principal among them are Neb. Rev. Stat. § 7-105 (Reissue 1997) and Neb. Rev. Stat. § 27-503 (Reissue 1995). The first imposes upon lawyers the duty to, among other things, "maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his clients." The second grants a client the privilege to refuse to disclose, and to prevent others from disclosing, confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. However, the statute exempts a number of communications from the privilege, including those sought or obtained to enable or aid anyone to "commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud," those "relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer," those relevant to an issue concerning a document which the lawyer attested as a witness, and those "relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients."

Doyle v. Union Insurance Co., 202 Neb. 599, 277 N.W.2d 36 (1979), presented a class action filed on behalf of the policyholders of a mutual insurance company which had been sold to a stock insurance company. The plaintiff alleged that the defendant directors had acted in their own interests, breached their fiduciary duties to the policyholders, and failed to make proper disclosures in the proxy statements soliciting the policyholders' approval of the sale. A money judgment was entered against certain of the defendants, who appealed to the Nebraska Supreme

Court. One of the claims of error by the trial court was the admission into evidence of certain communications between the director-president of the mutual company, who had acquired a substantial equity interest in the stock company and other benefits in exchange for the payment of a nominal consideration, and counsel for the mutual company. Both the mutual company and the president claimed that the communications came within the attorney-client privilege. In rejecting that claim, the Supreme Court concluded that as the facts clearly demonstrated that the president's conduct was fraudulent and violated his fiduciary duties, the communications were not privileged. The Court wrote:

> We hold, under the provisions of section 27-503 . . . a communication between a lawyer and a client is not privileged if the services of the lawyer are sought or obtained to enable or aid anyone to commit a plan to commit what the client knew, or reasonably should have known, to be a fraud.

Two of the seven judges[171] concurred in the result, writing that they would restrict the holding to the particular corporate context of this case. Accordingly, they would:

> hold that where a corporation and its officers are charged with actions inimical to the interests of stockholders, the fiduciary obligations owed to stockholders are stronger than the policy favoring privileged communications, and that the facts in this case established good cause for holding that the attorney-client privilege was not available here.

In their view, notwithstanding the specific language of § 27-503, a holding that the lawyer-client privilege is not available in any case where the attorney's services are obtained in order to commit or plan to commit what the client knew to be a fraud, "is far too broad." No other published Nebraska appellate case dealing with the crime-fraud exception was found[172].

The Nebraska Supreme Court has explained that fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the attorney-client privilege, noting that it exists only as an aid to the administration of justice. When it is shown that the privilege frustrates the administration of justice, a communication may be disclosed. Accordingly, it ruled that a minority shareholder who sued a corporate president asserting breach of duty in connection with variety of transactions had waived the attorney-client privilege by alleging, in order to overcome the periods of limitations, that the president had concealed relevant facts. The Court reasoned that the shareholder could not rely on the state of his knowledge and at the same time use the attorney-client privilege to frustrate proof of that state.[173]

On a related matter, the Nebraska Supreme Court affirmed in *Detter v. Schreiber*, 259 Neb. 381, 388-389, 610 N.W.2d 13, 18 (2000) the trial court's ruling that an attorney who had rendered legal services to a closely held corporation in connection with a lease and shareholder agreement was disqualified from defending one shareholder in an action brought by the only other shareholder over promissory notes executed in connection with the formation of the corporation.

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[171] The Nebraska Supreme Court consists of seven members; of the seven judges who sat and decided this case, two_including one of the dissenting judges_was a trial court judge sitting by invitation.

[172] In an unpublished opinion, and thus an opinion which cannot be cited as precedent, Neb. Ct. of Prac. 2E(4) (Rev. 1999), the Nebraska Court of Appeals noted in a non-corporate setting that the trial court relied upon the crime fraud exception in determining the privilege to be inapplicable. The appellate court, however, rested its affirmance on the attestation exception. Smith v. Smith, 2000 WL 228651 (Neb. App. Feb. 29, 2000).

[173] League v. Vanice 221 Neb. 34, 44-45, 374 N.W.2d 849, 855-856 (1985).

The Court rested its decision on the fact that in preparing the shareholder agreement, which governed the evaluation of the corporation and the acquisition and disposition of stock, the attorney was required to work with both shareholders and ascertain their financial and personal interests. As it could be inferred that the attorney had knowledge of the notes and of the management duties, which were at issue in the litigation, it could not be said that the trial court's ruling was clearly erroneous. The Supreme Court rested its decision on Canon 5 of the Nebraska Code of Professional Responsibility (Rev. 1996) which requires that an attorney "exercise independent professional judgment on behalf of a client," Ethical Consideration 5-18, providing that an attorney employed by a corporation owes allegiance to the corporation and must exercise professional judgment uninfluenced by the desires of others, and Ethical Consideration 5-14, which prohibits the acceptance of employment where two or more clients have differing interests[174].

In *Centra Inc. v. Chandler Insurance Co. Ltd.*, 248 Neb. 844, 540 N.W.2d 318 (1995), the Nebraska's Department of Insurance denied the applicant corporations' effort to acquire an insurance company. That ruling was affirmed on appeal to the district court. Both the department and the district court had overruled the applicants' motion to disqualify the insurance company's counsel on the grounds they had a variety of conflicts. On further appeal, the Nebraska Supreme Court affirmed, in part on the basis that no contention was made that the evidence did not support the decision of the department and district court on the merits, and in part on the basis that the applicants had sat on their rights with the result that any facts found by virtue of any breach of client confidences would remain facts available as evidence on remand. The Court noted that the proper means of addressing perceived attorney conflicts of interest is by mandamus. In reaching its decision, the Court observed that while courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship, they also recognize that disqualification can disrupt a party's efforts to resolve a dispute and thus the Courts cannot permit motions to disqualify counsel to become a tool to frustrate adjudication.
While the Nebraska Supreme Court's pronouncements on the matter of attorney disqualification may give further insight as to the application of the attorney-client privilege in the corporate setting, such as the need to assert the privilege in a timely manner, the case law of Nebraska does not address questions such as which communications are privileged, who in the corporate hierarchy may invoke the privilege, who may waive it, or to whose benefit it operates in the event of a dispute as to its application between the shareholders and the corporation's present and former directors, officers, employees, or representatives.

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[174] Ethical Consideration 5-18 reads:

> A lawyer employed or retained by a corporation or similar entity owes his or her allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder director, officer, employee, representative, or other person connected with the entity to represent him or her in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Ethical Consideration 5-14 reads:

> Maintaining the independence of professional judgment required of a lawyer precludes the lawyer's acceptance or continuation of employment that will adversely affect his or her judgment on behalf of or dilute loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Nevada
Lionel Sawyer & Collins

Nevada' s general rule regarding the attorney-client privilege states that:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
> 1. Between himself or his representative and his lawyer or his lawyer's representative.
> 2. Between his lawyer and the lawyer's representative.
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest. NRS 49.095.

"Client" is defined to include a "corporation, association or other organization or entity." NRS. 49.045. "Lawyer," as defined for the purposes of the attorney-client privilege in Nevada, is sufficiently broad to include in-house counsel. *See* NRS 49.065. No reported Nevada case, however, specifically addresses the issue of whether or not communications to in-house counsel fall within the privilege.

The Nevada Supreme Court considered when the attorney-client privilege exists in a corporate setting in *Wardleigh v. Second Judicial Dist. Court*.[195] In *Wardleigh,* the Court considered both the "control group" test and the test adopted by the United States Supreme Court in *Upjohn Co. v. United States*.[196] The Nevada Supreme Court expressed approval of the *Upjohn* test but held that, under the facts of *Wardleigh*, neither the "control group" test nor the *Upjohn* test would render the subject communications privileged. *Wardleigh* did not consider the applicability of the privilege to in-house counsel.

It is likely in Nevada that communications to in-house counsel are protected by the attorney-client privilege *provided* the requirements of NRS 49.035-49.115 and the *Upjohn* test are satisfied. Particularly in the circumstances of in-house counsel, it is important to consider the purpose of the communication and the role the in-house attorney is serving. A Nevada Discovery Commissioner opinion has considered the applicability of the attorney client-privilege for communications to in-house counsel and, although assuming that such communications *could* be covered by the privilege, rejected the claim of privilege because, *inter alia*, the subject communications had not been given to the in-house counsel for the purpose of obtaining legal advice.[197]

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[195] *Wardleigh v. Second Judicial Dist.Court.,*111 Nev. 345, 891 P.2d 1180 (1995).

[196] *Upjohn Co. v. United States*, 449 U.S. 383, 389-97, 101 S.Ct. 677, 682-86, 66 L.Ed.2d 584 (1981)

[197] *See Discovery Commissioner Opinion No. 2, Grassinger v. Trudel* (August, 1988), *available at* http://www.nvbar.org/publicServices/DisCommOpionion_Southern.html.

New Hampshire
Sheehan Phinney Bass + Green, P.A.

The attorney-client privilege is available in New Hampshire to protect from disclosure communications between in-house counsel and the company for which such counsel is employed. The communications in and of themselves are privileged and cannot be waived either by error (i.e. information disclosed by court order later found improper) or inadvertently (i.e. a mistake in the course of discovery).

New Hampshire codified all of its statutory and common law privileges in the New Hampshire Rules of Evidence, Effective July 1, 1985 ("Rules"). The rule at issue is Rule 502. LAWYER-CLIENT PRIVILEGE ("the rule"). By its terms the rule protects confidential communications made between client and lawyer made for the purpose of facilitating the rendition of professional legal services to the client. The rule protects all such communications except for certain exceptions such as those involving crime or fraud, for example. There is no corresponding federal rule so that a practioner should assume that the federal court in New Hampshire would look to state law and rules in matters of privilege except in a case where a specific federal statute applies.

In-house counsel should note when looking at the rule that there are definitions of a number of terms which can be used as a guide in determining what is privileged and what is not. For instance the rule defines what a client is but provides no such definition for the term communication. The rule itself; however, taken as a whole provides guidance that should give in-house counsel assurance that certain communications with officers, directors and employees who need to know and act on behalf of the client will be protected in New Hampshire.

What follows are some guidelines for these types of communications. In New Hampshire the privilege extends to certain representatives of the client. In the case of in-house counsel all of the representatives may be employed by the same entity, namely, the client. The client is broadly defined by the rule as any conceivable entity that might seek to obtain legal services. Legal services are necessarily delivered by communications which are not intended to be disclosed to third parties who are not involved on one side or another of the delivery of the legal services. The entire in-house legal staff is covered by the privilege to the benefit of the client. Those who are receiving the legal services are generally known as "privileged persons." In a corporate setting in-house counsel can share privileged communications with such "privileged persons" and other such individuals who are presumed to need to know of the communication in order to act for the organization[198].

The Reporter's notes to the Rules state that the definition of the term "representative of the client" as provided in section 502(a)(2) as one authorized to obtain legal services or act upon it, is the adoption by this state of the so-called "control group" test. The significance of this is discussed at length at Comment b. (Rationale) to Restatement Section 73. The difference between a narrow standard and a broad standard, sometimes referred to as "control-group" versus "subject-matter" tests exists because of the view that the broader the standard the easier it is to abuse the privilege. This argument is countered by the argument that those within the "control-group" often do not know the relevant facts and those who do often cooperate with the organization's lawyer separate and apart from the decision makers. Including such lower-level employees within the privilege so long as the communication relates to the legal matter at hand is essentially what the drafters

[198] (see Restatement of the Law Governing Lawyers, 3d Edition, 1998, Section 73 (Restatement Section 73)).

intended in the case of Restatement Section 73. Including such lower-level employees who have the authority to obtain legal services or act on the advice rendered is consistent with the Rules.[199]

The last requirement to be discussed in this Note is the universal requirement that the communication is intended to be "confidential" from its inception. Rule 502 is identical to revised Uniform Rule 502. Under either rule the communication must not be intended to be disclosed to third persons unless to do so would be in furtherance of the stated purpose of rendering legal services to the organization.

New Hampshire has appeared to follow the national trend by following the revised Uniform Rules of Evidence (1974) and in so far as common law privileges are concerned has adopted these rules essentially verbatim. Outside of the Rules there is little guidance for in-house counsel in New Hampshire on the issue of attorney-client privilege. The leading case in New Hampshire is *Riddle Spring Realty v. State*, 107 NH 271 (1966) which recognized the privilege between lawyer and client and held that privileged matters are governed by the rules of evidence. The Supreme Court also recognized and held that even if the privilege did not apply in a particular case, information may still be exempt from discovery under the work product doctrine. The work product doctrine protects the conclusions, opinions and mental impressions of an attorney, such as in-house counsel, and this part of the decision may not be good law today in light of the subsequent adoption of Superior Court Rule 35. The idea that New Hampshire is a "control group" state was apparently not adopted by the drafters of Superior Court Rule 35. This rule sets out the ultimate question for in-house counsel, which is what must in-house counsel produce and what may such counsel protect when a when an opposing party to a litigation makes a request for documents and tangible things under Superior Court Rule 35? The Rule, at Section b, defines the scope of discovery and at Section (b)(1) provides that the party-seeking discovery may not obtain discovery regarding matters which are privileged. With the Lawyer-Client Privilege expressly provided for in Rule 502 this should give in-house counsel comfort that so long as the requirements of this rule are satisfied the documents and tangible things will be protected. This conclusion is subject to the provisions of Section (b)(2) relating to certain documents and things prepared in anticipation of litigation.

New Jersey
Pitney, Hardin, Kipp & Szuch LLP

The attorney-client privilege extends to confidential communications between in-house counsel and officers, directors or employees of the companies they serve who are deemed members of its so-called "litigation control group." Members of the "litigation control group…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."[200]

Although the attorney-client privilege exists between a company and its in-house counsel, this privilege has limitations. Communications to an attorney are privileged when made to the attorney in his or her professional capacity.[201] Communications are protected only to the extent that they are 'legal' in nature and are not merely 'business' in nature, such as where a non-lawyer

[199] (see Rule 502(a) Definitions, 55 (2) "representative of a client").
[200] New Jersey Rules of Professional Conduct 1.13.
[201] See, e.g., United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 562 (App. Div. 1984).

could have acted. Therefore, the nature of the relationship and the communication involved are relevant in determining whether a protectable relationship of attorney and client exists.[202]

The attorney-client privilege does *not* extend "(a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer."[203]

A communication also will not receive the protection of the attorney-client privilege where such "grave circumstances" exist that public policy concerns compel disclosure.[204] A three-part test has been adopted in order to determine whether a privilege must yield to other significant societal concerns: (1) there must be a legitimate need to reach the evidence sought; (2) there must be a showing of relevance and materiality of that evidence to the issue before the court; and (3) the party seeking to bar assertion of the privilege must show by a fair preponderance of the evidence including all reasonable inferences that the information cannot be secured from any less intrusive source.[205]

New York
Pitney, Hardin, Kipp & Szuch, LLP

Corporations, as clients, may avail themselves of the attorney-client privilege for confidential communications with attorneys that relate to their legal matters.[206] The attorney-client privilege applies to communications with attorneys, whether those attorneys are corporate staff counsel or outside counsel.[207]

The inquiry as to whether a communication between staff counsel and a corporation's employees is privileged is fact-specific.[208] The test to determine if the attorney-client privilege applies to such a communication is whether the communication was "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship."[209]

Communications between an attorney and a client about the "substance of imminent litigation generally will fall into the area of legal rather than business or personal matters" and, therefore, will usually be considered privileged communications.[210] As long as a communication between a company and its staff counsel is "predominantly of a legal character" the fact that the legal advice may refer to non-legal matters does not mean that the communication is not privileged.[211]
Although a "confidence" or "secret" between a company and its staff counsel is generally privileged, an attorney "may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them; (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order; (3) The intention of a client

[202] Id.
[203] N.J.S.A. 2A:84A-20.
[204] See Dontzin v. Myer, 301 N.J. Super. 501, 508 (App. Div. 1997).
[205] See In re Kozlov, 79 N.J. 232, 243-44 (1979).
[206] See Rossi v. Blue Cross & Blue Shield of Greater N.Y., 542 N.Y.S.2d 508, 509 (N.Y. 1989).
[207] Id.; C.P.L.R. 4503.
[208] Id. at 510.
[209] Id. at 511.
[210] Id.
[211] Id.

to commit a crime and the information necessary to prevent the crime; (4) Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct; (5) Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."[212] Additionally, the attorney-client privilege may yield where "where strong public policy requires disclosure."[213]

North Carolina
Womble Carlyle Sandridge & Rice, PLLC

Under North Carolina law, the attorney-client privilege functions as an absolute shield to protect from disclosure communications between attorneys and their clients. *Evans v. United Serv. Auto. Ass'n*, 541 S.E.2d 782, 790 (N.C. App. 2001), *cert. denied*, 547 S.E.2d 810 (N.C. 2001); *Willis v. Duke Power Co.*, 229 S.E.2d 191, 201 (N.C. 1976). Since this privilege may exclude relevant evidence, North Carolina courts limit application of the privilege strictly to those situations in which it is necessary to promote "'full and frank'" discussions between attorneys and clients. *Evans*, 541 S.E.2d at 790; *State v. Smith*, 50 S.E. 859, 860 (N.C. 1905) (specifically stating that the privilege only extends to "such confidential communications as are made to the attorney by virtue of his professional relation to the client").

North Carolina courts apply the protection of the attorney-client privilege to in-house counsel in the same way that they do to other attorneys. *Evans*, 541 S.E.2d at 791. The party seeking to claim the privilege has the burden of establishing the existence of it. *Id.* The privilege exists if "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated and (5) the client has not waived the privilege." *State v. McIntosh*, 444 S.E.2d 438, 442 (N.C. 1994).

A company and its in-house counsel may only benefit from the protection of the attorney-client privilege if the attorney is functioning as a legal advisor when the communication occurs. *See Evans*, 541 S.E.2d at 791. For example, the North Carolina Court of Appeals held that an insurance company's claim diary entries that contained either requests for advice from in-house counsel or counsel's responses to such requests were protected from disclosure by the attorney-client privilege. *Id.*

If the requirements for the attorney-client privilege are not met, the communications may still be protected by the work-product immunity if the document was generated in anticipation of litigation unless the party seeking discovery can show a "substantial need" for the information and "undue hardship" in otherwise obtaining the substantial equivalent. N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2001).

[212] New York Disciplinary Rule 4-101.
[213] See Priest v. Hennessy, 431 N.Y.S.2d 511 (N.Y. 1980).

North Dakota
Nilles, Hansen & Davies, Ltd.

In North Dakota, the common law attorney-client privilege is provided for in the Rules of Evidence. Rule 502 provides that under certain enumerated circumstances, "a client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for purpose of facilitating the rendition of professional legal services to the client."[214] The privilege only protects confidential communications, which are defined as those made in furtherance of the rendition of professional legal services and not intended to be disclosed to third persons.[215] Generally, the client may claim the privilege or the client's representative, including the client's attorney asserting the privilege on behalf of the client. North Dakota courts narrowly construe the attorney-client privilege because, by its nature, the privilege is in derogation of the truth.[216]

There currently are no North Dakota cases interpreting Rule 502 in the context of its availability to protect from disclosure communications between in-house counsel and officers, directors, or employees of the companies they serve. Nevertheless, the plain text of the Rule does provide for such protection.

The rule broadly defines the terms "client" and "lawyer." First, a corporation, association or other organization are included within the definition of "client."[217] Next, a "lawyer" includes a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.[218] This definition encompasses in-house counsel who meet the definition. Thus, a corporate client may assert that attorney-client privilege in connection with confidential communications to in-house counsel. The rule also extends the attorney-client privilege to confidential communications made by a "representative of the client." A "representative of the client" is not limited to the "control group," i.e., people who have authority to obtain professional legal services, or to act on the advice rendered on behalf of the client. Rather, a "representative of the client" also extends to people who are specifically authorized to provide the client's lawyer with information or receive information relating to the legal services being rendered.[219] However, in order to come within the privilege, the information revealed by the "representative of the client" must be that which was acquired either during the course of, or as a result of, his or her relationship with the client as a principle, employee, officer or director and must be provided to the lawyer for purposes of obtaining legal advice or services for the client.

In sum, subject to waiver and certain exceptions, those communications which fall within the scope of the privileged and are made between in-house counsel and the corporate client, or those that meet the definition or "representative of the client," are protected by Rule 502.

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[214] See N.D. R. Evid. 502(b).
[215] N.D. R. Evid. 502(a)(5).
[216] See Knoff v. American Crystal Sugar, Co., 380 N.W.2d 313, 319 (N.D. 1986). It is recognized that the privilege is subject to waiver and certain exceptions, for example, the crime or fraud exception. See N.D. R. Evid. 502(d).
[217] N.D. R. Evid. 502(a)(1).
[218] N.D. R. Evid. 502(a)(3).
[219] See N.D. R. Evid. 502(a)(2)(B).

Northern Mariana Islands
White Pierce Mailman & Nutting

No specific statutory or case decision controls the issue. Pursuant to Commonwealth Rules of Evidence 501, except as otherwise required by law or rule, "the privilege of a witness, person, government or political subdivision thereof shall be governed by the principle of the common law as they may be interpreted by the courts of the United States and of the Commonwealth in the light of reason and experience." The rule is primarily a mirror image of Rule 501, Fed. R. Evid., and should therefore be applied by reference to the common law as developed in the fifty USA states and the USA federal judicial system.

In general, the attorney-client privilege in the CNMI will apply to confidential communications concerning legal matters made between a corporation and its in-house counsel. The extent of the privilege's attachment to any particular communication depends upon the circumstances of the communication. The attorney-client privilege may be invoked by the corporation, generally, when the communication was made for the purpose of securing legal advice for the corporation, the employee made the communication at the direction of a corporate superior, the subject matter of the communication is within the scope of the employee's corporate duties, and the dissemination of the communication within the corporation shows an intent to maintain confidentiality.

Ohio
Calfee, Halter & Griswold LLP

Ohio law generally recognizes the availability of the attorney-client privilege to communications between corporate counsel and its employees. The attorney-client protections recognized under Ohio law arise from two sources: one arises from the common law, and the other is statutorily created. The statutory attorney-client privilege affords greater protections than the common law privilege but to a smaller scope of protected communications. While there is some overlap between the statutory and common law attorney-client privilege, this memorandum will discuss them as separate and independent protections.

The statutory attorney-client privilege in Ohio is set forth in Ohio Revised Code Section 2317.02, which defines privileged communications. Section 2317.02 states, in pertinent part, that:

> The following persons shall not testify in certain respects: An attorney, concerning a communication made by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the expressed consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by section 2151.421[220] of the Revised Code to have waived testimonial privilege under this division, the attorney may be compelled to testify on the subject…

Ohio Rev. Code § 2317.02(A). The term "client" used in Section 2317.02(A) is defined in Ohio Revised Code Section 2317.021 as follows:

[220] Ohio Revised Code § 2151.421 deals with duties to report child abuse or neglect.

> "Client" means a person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him in his professional capacity, *or consults an attorney employee for legal service or advice*, and who communicates, either directly or through an agent, employee, or other representative, with such attorney; and includes an incompetent whose guardian so consults the attorney in behalf of the incompetent.
>
> Where a corporation or association is a client having the privilege and it has been dissolved, the privilege shall extend to the last board of directors, their successors or assigns, or to the trustees, their successors or assigns.

Ohio Rev. Code. § 2317.021 (emphasis added). Accordingly, the statute itself provides that the definition of client includes any person who "consults an attorney employee for legal service of advice."[221] As such, communications between an in-house counsel and an employee fall within the statutory attorney-client privilege.[222]

In addition to the attorney-client privilege created by statute, Ohio courts also recognize the common law privilege. The common law attorney-client privilege encompasses a broader class of communications than the statutory privilege, including, for example, communications between a client and an attorney's agents.[223]

Ohio courts follow the United States Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1979), recognizing that the common-law attorney-client privilege extends to communications between a corporate counsel and its employees under certain circumstances.[224] The *Bennett* court emphasized that protected communications under *Upjohn* are:

> [C]ommunications . . . made by the employees to corporate counsel who was acting as such at the direction of corporate supervisors in order to secure legal advice [which] concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.

Id. at *42 (finding communications between a corporation's general counsel and a secretary were protected); *see also Baxter Travenol Labs. v. Lemay*, 89 F.R.D. 410, 414 (S. D. Ohio 1981) (extending the attorney-client privilege under *Upjohn* to communications between a corporate counsel and an employee which were obtained before the communicator became an employee because the communications were in order to secure legal advice). **[225]**

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[221] See id..

[222] See also State v. Today's Bookstore, Inc., 86 Ohio App. 3d 810, 817 (Montgomery Cty. 1993) (finding that the communications between the City of Dayton and its Law Director fell within the statutory definition of attorney-client communications under Ohio Rev. Code. § 2317.02 and § 2317.021).

[223] State v. McDermott, 72 Ohio St. 3d 570, 574 (1995).

[224] See Baxter Travenol Labs. v. Lemay, 89 F.R.D. 410, 413 (S. D. Ohio 1981); Bennett v. Roadway Express, Inc., 2001 Ohio App. LEXIS 3394 (Summit Cty. 2001).

[225] (For further information, please contact Mark I. Wallach, Esq. or Caroline A. Saylor, Esq. at Calfee, Halter & Griswold LLP, 1800 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114, (216) 622-8200)

Oklahoma
Crowe & Dunlevy

12 Okla. Stat. § 2502(B) provides, in relevant part, that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . Between himself or his representative and his attorney or his attorney's representative." The statute defines "attorney" as "a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation," and defines "client" as "a person, public officer, or corporation, association, or other organization or entity, either public or private, who consults an attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney." 12 Okla. Stat. § 2502(A)(1) and (2).

The law in Oklahoma is not well developed on the attorney-client privilege generally, much less on the specific nuances presumably created in the context of in-house counsel. Federal courts within Oklahoma have recognized that the "privilege applies where the client is a corporation and the attorney is in-house counsel," *LSB Industries, Inc. v. Commissioner of Internal Revenue, Internal Revenue Service*, 556 F. Supp. 40, 42 (W.D. Okla. 1982), and the language in 12 Okla. Stat. § 2502(A)(1) and (2) defining "attorney" and "client" supports that conclusion. One federal court within Oklahoma held, without significant discussion, that a memorandum from a non-lawyer employee of the defendant corporation to another non-lawyer employee of the corporation, which was carbon copied to two in-house lawyers but did not invite the in-house lawyers to make any response, "was not generated for the primary purpose of obtaining legal advice, but rather was generated in the course of making a business decision . . . As such, it does not come within the gambit of the attorney-client privilege." *Samson Resources Co. v. Internorth, Inc.*, 1986 U.S. Dist. LEXIS 30971, * 2 (N.D. Okla. 1986). This decision would suggest that Oklahoma courts, like courts from other jurisdictions, will closely scrutinize communications involving in-house counsel to ensure that the communication in question was made for the primary purpose of "facilitating the rendition of professional legal services," and thus to prevent corporations from shielding from discovery ordinary business transactions merely by funneling their communications through an attorney. Unfortunately, no Oklahoma case law expounds this issue.

Likewise, no Oklahoma law discusses how far down the corporate ladder the cloak of the attorney-client privilege extends, *i.e.*, when the client is a corporation, which corporate employees' communications with counsel will be privileged. However, Oklahoma law regarding *ex parte* communications may provide a useful analogy. The Oklahoma Rules of Professional Conduct prohibit a lawyer from communicating *ex parte* with a "party" the lawyer knows to be represented by counsel without the consent of the opposing attorney. *See* 5 Okla. Stat. Ch. 1, App. 3-A. Thus, in the context of ethical rules governing *ex parte* communications, Oklahoma courts have considered the parameters of an organizational "party."

Rule 4.2 of the Oklahoma Rules of Professional Conduct, in the case of an organizational client, "prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Official Comment to Oklahoma Rule of Professional Conduct 4.2.

In *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992), the plaintiff's attorney conducted *ex parte* interviews with employees of the defendant nursing home. In determining whether these interviews were prohibited under Rule 4.2, the *Fulton* court noted that

> Rule 4.2 does not prohibit communications with all of [defendant's] employees and former employees. However, its application may extend beyond those employees controlling the corporation. In litigation involving corporations, Rule 4.2 applies to only those employees who have the legal authority to bind a corporation in a legal evidentiary sense, *i.e.*, those employees who have "speaking authority" for the corporation.

Fulton, 829 P.2d at 860 (*citations omitted*). The court concluded that the plaintiff's attorney "is prohibited from conducting *ex parte* interviews with [defendant's] employees if they have managing authority sufficient to give them the right to speak for, and bind, the corporation." *Id.* *See also Weeks v. Independent School District No. I-89*, 230 F.3d 1201, 1208-1209 (10th Cir. 2000) (finding that Rule 4.2 "includes employees below the level of corporate management," and affirming district court's interpretation of Rule 4.2 to apply to organizational employees who had "speaking authority" such that they could bind the organization in a legal evidentiary sense).
It is possible, based on the foregoing authority, that Oklahoma courts would consider privileged communications between in-house counsel and employees with "speaking authority" for the company, as long as the communications were made for the primary purpose of obtaining legal advice.

Oregon
Davis Wright Tremaine LLP

Under Oregon law, the rules governing the attorney-client privilege between in-house counsel and employees of their company are the same as those that apply to outside counsel and their corporate clients. Under Oregon Evidence Code Rule 503(2), "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client [b]etween the client or the client's representative and the client's lawyer or a representative of the lawyer." The three key aspects of this rule are that the communication must be confidential, it must be made for the purpose of facilitating the rendition of legal services to the client, and the communication must be between the proper individuals listed in the Rule. State ex rel. Oregon Health Sciences Univ. v. Haas, 325 Or. 492, 501 (1997). The main area where Oregon law differs from federal law involves who may be a "representative of the client." Under Oregon law,
"'Representative of the client' means a principal, an employee, an officer or a director of the client: (A) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as principal, employee, officer or director, and is provided to the lawyer for the purpose of obtaining for the client legal advice or other legal services of the lawyer; or (B) Who, as part of such person's relationship with the client as principal, employee, officer or director, seeks, receives or applies legal advice from the client's lawyer." Or. Ev. Code 503(1)(d). "[A]ny employee of a client may be a representative of the client and . . . interaction with the client's lawyer need not be a regular part of the employee's job for the employee to qualify as a representative of the client." Haas, 325 Or. at 509.

Pennsylvania
Eckert Seamans Cherin & Mellott, LLC

In Pennsylvania, the attorney-client privilege has been codified at 42 PA. CON. STAT. § 598 (West 2001), which provides that "[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."[226] Because in-house counsel can play many roles within a corporation such as corporate secretary, business negotiator, or vice president, application of the privilege becomes complicated when the client is a corporation and the attorney is in-house counsel. Courts are often faced with two issues involving employee communications with in-house counsel: Is a corporation, which can act only through its employees and agents, entitled to claim privilege whenever any corporate employee, regardless of rank, communicates with counsel for the purpose of securing legal advice for the corporation, or whether the communicating employee has to be in a position of control within the organization?[227]

Pennsylvania courts have traditionally followed the "control group test" approach since its adoption in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa. 1962). However, the United States Supreme Court sharply criticized the "control group test" approach in *Upjohn Company v. United States*, 449 U.S. 383 (1981), for its narrow interpretation. Since *Upjohn*, Pennsylvania courts have been reluctant to endorse a single test to determine where the privilege applies. Nonetheless, corporations continue to successfully claim attorney-client privilege under Pennsylvania law for communications between its in-house counsel and its employees who have authority to act on its behalf.[228]

Under Pennsylvania Corporation Law, the authority to act on behalf of a corporation rests with its officers and directors. 15 PA. CON. STAT. § 1721 (West 2001). As such, communications by corporate employees to corporate counsel are privileged as to the corporation[229], but not necessarily to employees who qualify as corporate representatives individually.[230]

Pennsylvania courts will not protect communications unless they are made for the purpose of obtaining legal advice.[231] Additionally, Pennsylvania recognizes several exceptions to the attorney-client privilege. The following are applicable in the context of in-house counsel. A communication between an attorney and his or her client is not privilege: if it occurs in the presence of a non-privileged third party or of the adverse party, *In re Beisgen's Estate*, 128 A.2d

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[226] Id.
[227] An employee in a position of control within the organization is referred to as a member of the "control group," which has been defined by one court as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." United States v. Upjohn Co., 600 F.2d 1223, 1226 (6th Cir. 1979).
[228] In re Ford Motor Co., 110 F.3d 954 (3rd Cir.); Maleski by Chronister v. Corporate Life Ins. Co., 641 A.2d 1 (Pa. Cmwlth. 1994).
[229] Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D. 631 (E.D. Pa. 1979),
[230] Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985); cf. Maleski, 641 A.2d 1 (Pa. Cmwlth.1994) (Former directors and officers held attorney-client privilege separate and distinct from corporation's privilege).
[231] Maleski by Chronister v. Corporate Life Ins. Co., 641 A.2d 1 (Pa. Cmwlth. 1994); Yi v. Commonwealth, 646 A.2d 603 (Pa. Cmwlth. 1994) (attorney was asked to translate, not to provide legal advice); Okum v. Commonwealth, 465 A.2d 1324 (Pa. Cmwlth. 1983) (attorney was asked by administrator to clarify his administrative authority, not for legal advice); Leonard Packel & Anne Bowen Poulin, PENNSYLVANIA EVIDENCE § 521-1(c), at 391.

52 (Pa. 1956); where the client challenges the attorney's professional conduct or competence, *Commonwealth v. Warren,* 399 A.2d 773 (Pa. Super. 1979); or where the client's rights will not be adversely effected by revealing a communication, but justice will be furthered with its disclosure, *Cohen v. Jenkintown Cab Co.,* 357 A.2d 689 (Pa. Super. 1976); *see also* Charles B. Gibbons, *Privileges* in PENNSYLVANIA EVIDENCE § III. B. (Pennsylvania Bar Institute 1998).

Puerto Rico
McConnell Valdés

Corporate clients in Puerto Rico may invoke the attorney-client privilege to protect confidential communications between their in-house counsel and the officers, directors, or employees of the companies they serve. Although there are no Puerto Rico Supreme Court decisions specifically addressing whether or not the attorney client privilege applies to in-house counsel, certain local case law on the attorney client privilege and persuasive United States federal authority help support the conclusion that in-house attorney-client communications should be privileged.

Moreover, Rule 25 of the Rules of Evidence of Puerto Rico, which defines the attorney-client privilege, provides a very broad definition of attorney. According to this rule, an attorney is any "person authorized or reasonably believed by the client to be authorized to practice law. This includes such person and his partners, aids and office employees." It can be reasonably argued that in-house counsel fall under this definition.

Finally, in applying Rule 25 to in-house counsel, the United States District Court in Puerto Rico has applied the privilege rule to only those communications between in-house counsel and corporate client related to the legal advice being sought by the corporate client. Is has not applied the attorney-client privilege to business documents and agendas, interoffice business memos, memos between in-house counsel and the corporate client that do not include legal advice, and business communications with third parties. Factors used by federal district court in considering whether documents fall under privilege are: whether the communication was offered by in-house counsel in his/her professional capacity as lawyer and whether the tasks performed by in-house counsel could be readily performed by non-lawyer. Other factors considered are whether the communication was addressed to the client's attorney or in-house counsel, whether the purpose of communication was to obtain legal advice, and whether the communication renders a legal opinion.

Rhode Island
Tillinghast Licht Perkins Smith & Cohen, LLP

There is no reported Rhode Island federal or state court decision that addresses the specific circumstances in which a corporation may invoke the attorney-client privilege regarding communications with its in-house counsel.

The Rhode Island Supreme Court has adopted the Rules of Professional Conduct. Rule 1.13 prescribes that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The commentary to Rule 1.13 states as follows:

> When one of the constituents of an organizational client communicates with organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6 [confidentiality of information]. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation

> between the lawyer and the client's employees or other constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Under Rhode Island case law, "[t}he general rule is that communications made by a client to [an] attorney seeking professional advice, as well as the response by the attorney to such inquiries, are privileged communications not subject to disclosure."[232] Only communications between a client and an attorney that are executed for the purpose of securing legal service, opinions of law, or assistance with some legal proceeding, are considered privileged.[233] Thus the "mere existence of a relationship between an attorney and client does not raise the presumption of confidentiality."[234] Further, any information given by the client to an attorney in the presence of a third person who is not an agent of either the client or the attorney is not considered privileged.[235] However, an inquiry may be made to determine whether the client reasonably understood the communication to be confidential, even though third parties were present.

Based on our reading of Rhode Island law on attorney-client privilege issues, a Rhode Island court would likely hold that a corporation's communications with its in-house attorney are privileged only if they were made for the purpose of obtaining legal advice. Thus, if an in-house counsel also serves as a business advisor, any communications made to the attorney while acting in that role are likely not privileged. Further, routine, non-privileged communications between corporate officers or employees do not become privileged by sharing them with in-house counsel.

South Carolina
Wyche, Burgess, Freeman & Parham, P.A.

Communications with in-house counsel who are either full members of the South Carolina Bar or who hold Limited Certificates of Admission under Rule 405, are generally within the attorney client privilege to the same extent as communications with outside counsel. However, the privilege would only attach to confidential communications made for the purpose of giving or obtaining advice that is predominantly legal in nature, as opposed to business advice such as financial advice or discussions concerning business negotiations.

There are no reported South Carolina cases specifically addressing this issue. The above statement is based on our understanding of general law.

South Dakota
Lynn, Jackson, Shultz & Lebrun, P.A.

Neither the Legislature nor the Supreme Court in South Dakota has specifically addresses the issue of the attorney-client privilege in the context of communications between an in-house lawyer and a corporate client. The statutory lawyer-client privilege SDCL 19-13-2 through 19-13-4 makes to distinction between communications between outside counsel and in-house counsel. The issue would revolve on the question of the "communication" is confidential. It is if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably

[232] Callahan v. Nvstedt, 641 A.2d 58, 61 (1994) (citations omitted).
[233] Id.
[234] Id.
[235] State v. Driscoll, 360 A.2d 857, 861 (1976).

necessary for the transmission of the communications. The statutory relationships in which such confidential legal service communications are covered by the privilege are: between the client or his representative and his lawyer or the lawyers' representative; between the client's lawyer and the lawyer's representative; by the client or his representative or the lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client, or among lawyers and their representatives representing the same client.

There is no reason to believe the these criteria would be applied differently or not at all in the case of an in-house lawyer's legal services confidential communication to the employer corporate client. Communications of the in-house lawyer that do not constitute professional legal services that may be made by or in the presence of the same individual when such individual may be acting in some non-lawyer capacity, such as a vice president or member of a board of directors, would not be a privileged attorney-client communication.

The "work product" of an in-house lawyer would be subject to the same tests of discoverability as the "work product" of outside counsel or other employees of the client.

Tennessee
Bass, Berry & Sims, PLC

The attorney-client privilege in Tennessee has been codified in Section 23-3-150.[236] Requirements for Tennessee's attorney-client privilege to apply are:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

As with most jurisdictions, communications between in-house counsel and officers, directors or employees are protected by the attorney-client privilege when the purpose of communications is to secure legal advice from counsel.[237]

In the in-house context, courts will pay special attention to the requirement that the communication be for the purpose of securing legal advice.[238] This analysis recognizes that in-

[236] See Tenn. Code. Ann. § 23-3-150 (West 2001).
[237] See Miller v. Federal Express Corp., 186 F.R.D. 376, 388 (W.D. Tenn. 1999) (applying Tennessee's statute on attorney-client privilege and holding that attorney-client privilege would apply to communications between defendant and in-house counsel if the defendant had explained how including the attorney in communication was for the purpose of securing legal advice); see also Royal Surplus Lines Ins., Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 463, 474-75 (W.D. Tenn. 1999) (applying Tennessee's statute on attorney-client privilege and holding that communications between senior-vice president of company, and company's in-house counsel were protected by the attorney-client privilege); Marine Midland Bank, N.A. v. General Motors acceptance Corp., 1995 WL 417047 (Tenn. Ct. App. July 17, 1995) (providing no discussion or distinction in application of attorney-client privilege to in-house counsel).

house counsel may perform multiple roles. Heightened scrutiny will be paid to in-house communications with corporate employees to ensure that a legal role, as opposed to a business role, was being assumed when the communication was made.

If the communication is not privileged in and of itself, it is possible to argue that the communications are "confidential." By classifying the communicated information as "confidential" one could prevent disclosure by seeking a protective order or injunction.[239]

Utah
Van Cott, Bagley, Cornwall & McCarty

The attorney-client privilege is established in Utah according to rule, specifically Rule 504 of the Rules of Evidence. The corporate attorney-client privilege is not restricted to "control" groups. The corporate attorney-client privilege applies to communications where legal advice is sought and the communications take place between the lawyer and an authorized employee.

The attorney-client privilege attaches to communications between counsel and any officers, directors, employees, or others acting on behalf of and authorized to act on behalf of the corporate entity. The privilege can attach to communications with virtually any employee of the corporate entity as long as that employee either by position or special authorization is communicating with the lawyer on behalf of the corporation. The privilege may also attach where the authorized corporate representative is not actually an employee of the corporation.

The privilege also attaches to communications with lawyers representing other parties "in matters of common interest."

Nothing in the rule suggests any particular restriction on the privilege because the communications are with in-house counsel. Sections 5 and 6 of Rule 504(a) make clear that a confidential communication is protected if it meets the requirements of those two sections; the communication must concern the rendering of professional legal services by a lawyer and the communication must be intended to be confidential.

The rule also attaches the privilege to communications not with the lawyer, but with the "lawyer's representative." In the in-house context, this language extends the privilege at least to communications with paralegals.

Utah recognizes a work-product privilege. This privilege applies to documents prepared by lawyers and other corporate representatives in anticipation of litigation. The Utah privilege also protects lawyer opinion work product, whether in written form or not.

The work product rule is more a limitation on discovery rather than a rule of evidence. If the other side gets the information, presumably it will be admitted into evidence. Work product can

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[238] See Miller, 186 F.R.D. at 388; see also Royal Surplus Lines, 190 F.R.D. at 475 (stating that "simply sending a carbon copy [of a memorandum] to in-house counsel does not cloak a business communication with [the] attorney-client privilege).
[239] See Loveall v. American Honda Motor Corp., 694 S.W.2d 937, 939-40 (Tenn. 1985) (granting a protective order where the information sought by plaintiff, confidential business information, would have caused the defendant irreparable harm and competitive disadvantage).

also be obtained in the other side makes sufficiently strong showing that it needs the work product information.

Vermont
Downs Rachlin Martin PLLC

In Vermont, the attorney-client privilege extends to corporations and other organizations.[240] While the Vermont Supreme Court has never addressed whether in-house lawyers can assert the privilege, the Reporters Notes to Vermont Rule of Evidence 502 make clear that "lawyer employees of a corporation" may assert "the privilege if they provide legal services similar to those that would be rendered by outside counsel."
The general rule in Vermont is that

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of legal services to the client (1) between himself or his representative and his lawyer and the lawyer's representative. . . .

V.R.E. 502(b). As originally enacted, Rule 502 did not define who was considered a representative of a corporate client for purposes of the privilege. By omitting this essential definition, the rule adopted the approach of *Upjohn Co. v. United States*,[241] leaving the issue to case law development.

Effective January 1, 1994, the Vermont Legislature enacted an attorney-client privilege statute, which restricts the privilege to communications with a "representative of a client" to two categories: (a) communications with a member of the corporate "control group" acting in his or her official capacity; and (b) communications with a person who is not a member of the "control group" to the extent necessary to effectuate legal representation of the corporation. The "control group" includes (1) officers and directors of a corporation, and (2) persons who (a) have the direct authority to control or substantially participate in a decision to be taken on the advice of a lawyer, or (b) have the authority to obtain legal services or act on the legal advice rendered, on behalf of the corporation. 12 V.S.A. § 1613. Rule 502 of the Vermont Rules of Evidence was amended in 1995 to correspond with this statute.[242]

One final consideration is that the Vermont Rules of Professional Conduct depart significantly from the Model Rules. Rules 1.6(b)(1) and (2) require a lawyer to disclose information (a) when necessary to prevent a crime that involves the risk of death or substantial bodily harm, and (b) when the lawyer reasonably believes that failure to disclose a material fact to a third person will assist a criminal or fraudulent act by a client.

Virgin Islands
Dudley, Topper and Feuerzeig, LLP

In the absence of local laws to the contrary, the Restatements of Law approved by the American Law Institute are the rules of decision in the U.S. Virgin Islands. The U.S. Virgin Islands has no statutory law specifically addressing the applicability of the attorney-client privilege to communications with in-house counsel, therefore, a Virgin Islands court would likely look to the

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[240] Baisley v. Missisquoi Cemetery Ass'n, 167 Vt. 473 (1998).
[241] 449 U.S. 383 (1981).
[242] See Reporter's Notes to V.R.E. 502(a)(2).

Restatement (Third) of the Law Governing Lawyers (1998) to determine the extent to which the privilege applies to such communications.

The *Restatement (Third) of the Law Governing Lawyers* §72 cmt. c, §73 cmt. i (1998) provides that the attorney client privilege extends to communications between organizations and their in-house counsel. The privilege is subject to the same restrictions as are communications between a client and its outside counsel: the communication must be made in confidence and for the purpose of obtaining or providing legal assistance. The mere fact that the communication is made to or from a person who is a lawyer is not sufficient. For example, if a corporate officer asks in house counsel to assess an employee's performance, this communication is not privileged. If the officer asks her in house counsel about the corporation's potential liability if the employee is terminated, that communication is privileged, provided it is made in confidence.

Virginia
McGuireWoods LLP

The Virginia Supreme Court has recognized that in-house lawyers can have privileged conversations with employees of companies they represent.[243] A Virginia Circuit Court has also confirmed this principle.[244] Both Federal District Courts in Virginia have also recognized that in-house lawyers may have privileged communications. [245]

Virginia law contains an unusual definition of the "practice of law," which by its terms seems to exclude from the definition of the practice of law a "regular employee" acting for his or her employer.[246] The Virginia State Bar has carried this odd definition to its logical conclusion, holding in one unauthorized practice of law opinion that someone who did not have a law degree could nevertheless give legal advice to his or her employer, and even use the term "general counsel" when doing so.[247] One Virginia Circuit Court cited this strange rule in holding that the attorney-client privilege did not protect communications between in-house lawyers and their clients.[248] However, that decision seems to have been an aberration, and no other courts have taken the same approach.

Washington
Davis Wright Tremaine LLP

Washington law does not make a distinction between in-house counsel and other attorneys for purposes of the attorney-client privilege. Washington's statutory enactment of the attorney-client privilege states, "An attorney or counselor shall not, without the consent of his or her client, be

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[243] Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992).
[244] Inta-Roto, Inc. v. Aluminum Co., 11 Va. Cir. 499, 500 (Henrico 1980) ("[t]hat such [attorney-client] privilege does apply to in-house counsel is clear"); *Gordon v. Newspaper Ass'n of Am*., 51 Va. Cir. 183, 186 (Richmond 2000) (" '[T]he privilege exists between a corporation and its in-house attorney.' . . . The communications protected are those between employees and in-house counsel which aid counsel in providing legal services to the corporation." (citation omitted))
[245] *Henson v. Wyeth Lab., Inc.,* 118 F.R.D. 584, 587-88 (W.D. Va. 1987) (recognizing that Wyeth's in-house lawyer may have privileged communications with corporate employees); *Jonathan Corp. v. Prime Computer, Inc.,* 114 F.R.D. 693, 696 (E.D. Va. 1987) ("It is well-settled that the attorney-client privilege does attach to corporations as well as to individuals. Furthermore, communications between a corporation's in-house counsel and employees of that corporation may be protected by the attorney-client privilege.")
[246] Va. R., pt. 6, § I(B).
[247] Virginia UPL Op. 178 (August 12, 1994).
[248] Belvin V. H.K. Porter Co., 17 Va. Cir. 303, 307-08 (Norfolk 1989).

examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."[249] The two key components of this provision are that there must be an attorney-client relationship and the communication must be given in the course of legal representation. "'An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists.' However, the belief of the client will control only if it 'is reasonably formed based on the attending circumstances, including the attorney's words or actions.'"[250] Once an attorney-client relationship has been established, in order for the communication to be protected it must be legal in nature, and cannot be simply business or financial advice.[251]

Washington, DC
Steptoe & Johnson LLP

It is well-established that the attorney-client privilege extends to communications with in-house counsel. See, e.g., Paul R. Rice, Attorney – Client Privilege In the United States § 3.14, at 53 (2d ed. 1999) (noting that "[t]he confidential communications between in-house counsel and [the] client are privileged to the same extent as communications between outside retained counsel and the clients who have consulted him for legal advice or assistance."). Federal courts in Washington, D.C. have followed this general rule. E.g., Avianca, Inc. v. Corriea, 70 F.3d 637 (D.C. Cir. 1995) (memo) (unpublished opinion subject to D.C. Cir. R. 28(c)), full text available at 1995 U.S. App. LEXIS 30863; Neuder v. Battelle Pac. Northwest Nat'l Lab., 194 F.R.D. 289 (D.D.C. 2000).

Neither the District of Columbia Court of Appeals nor the District of Columbia Superior Court (which are, respectively, the equivalent of state appellate and trial courts in Washington, D.C.) has addressed whether the attorney-client privilege extends to communications made to in-house counsel. However, Rule 49(c)(6) of the District of Columbia Court of Appeals Rules authorizes in-house counsel to practice in the District without first becoming a member of the District bar. It would be reasonable to infer from the rule that because it clearly contemplates an in-house attorney acting as a lawyer to receive information for the purpose of giving advice, and to give such legal advice, such communications would be protected under the attorney-client privilege.

A common, and sometimes difficult, question that arises in the context of the attorney-client privilege and in-house counsel is whether a communication by an in-house attorney is of a legal or business nature. E.g., Boca Investerings P'ship v. United States, 31 F. Supp. 2d 9, 12 (D.D.C. 1998) (noting that "[b]ecause an in-house lawyer often has other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be self-evident as it usually is in the case of outside counsel."); United States v. Philip Morris, Inc., 209 F.R.D. 13 (D.D.C. 2002), available at 2002 U.S. Dist. LEXIS 15787, at *14 (holding that testimony on "substantial non-legal, non-litigation responsibilities, including corporate, business, managerial, public relations, advertising, scientific, and research and development responsibilities" by an in-house counsel was not subject to the attorney-client or work product privilege protections). However, the applicable principles for resolving that issue – namely, the standard elements of the attorney-client privilege, including the requirements that the advice sought and provided is of a

[249] Wash. Rev. Code 5.60.050(2)(a).
[250] Dietz v. Doe, 131 Wn.2d 835, 843-44 (1997) (internal citations omitted).
[251] Karl B. Tegland, Courtroom Handbook on Washington Evidence 254 (2001 ed.) (citing Kammerer v. Western Gear Corp., 96 Wn.2d 416 (1981)). In addition, the communication must have been intended to be confidential. Seattle Northwest Sec. Corp. v. SDG Holding Co., Inc., 61 Wn. App. 725, 742 (1991).

legal nature – will be the same for in-house and outside counsel, although the hazards with respect to in-house counsel may be more pronounced.

West Virginia
Jackson & Kelly PLLC

To assert the attorney-client privilege in West Virginia: (1) Both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in their capacity as a legal advisor; and (3) the communication between the attorney and client must be identified to be confidential. Syl. pt. 2, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).[252] Whether communications between a company's in-house lawyer(s) and its officers, directors, or employees are subject to the privilege depends upon whether the three minimum requirements of *Burton* can be established. *See, e.g., State ex rel. Westbrook Health Services, Inc.*, 209 W.Va. 668, 672, 550 S.E.2d 646, 650 (2001); *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W.Va. 316, 326, 484 S.E.2d 199, 209 (1997). The protection of the attorney-client privilege is not automatically extended to any corporate employee or agent, even management, where the requirements of *Burton* are not met. *See, e.g., Westbrook Health Services, In*c. at 672, 550 S.E.2d at 650. In-house counsel cannot invoke the privilege simply by asserting that the employee "'is' [the entity]" for purposes of a deposition or by stating that the employee is "part of management of [the entity]." *See Westbrook, id.* The privilege does not even extend to conversations specific to the entity's defense of a particular case where the corporate officer, director, or employee and in-house counsel did not contemplate that the attorney-client relationship existed between them and the officer, director, or employee did not seek advice from in-house counsel in counsel's capacity as a legal advisor. *See Westbrook* at 670-72, 550 S.E.2d at 648-50.

A corporation's internal documents, kept "as a matter of course" and forwarded to management per corporate policy, do not become privileged communications simply because they end up in the hands of in-house counsel. *See Bedell* at 326 & 330, 484 S.E.2d at 209 & 213. An investigative report prepared by in-house counsel containing documentation of conversations with employees about an incident to which liability may attach is not protected by the attorney-client privilege where the entity asserting the privilege cannot demonstrate that (1) the employee(s) contemplated the existence of an attorney-client relationship between the employee and in-house counsel and (2) the employee(s) sought legal advice from in-house counsel. *Bedell* at 326, 484 S.E.2d at 209.[253]

When a business organization makes its attorney the corporate designee for purposes of responding to matters set forth in a notice of deposition, the attorney-client privilege is waived with regard to matters about which the attorney is designated to testify. *Bedell* at 333, 484 S.E.2d at 217.

Related to the evidentiary attorney-client privilege is a lawyer's ethical duty of confidentiality. *See Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 797, 461 S.E.2d 850, 859 (1995).

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[252] Whether the communication arises from the attorney or the client is not important, as long as the communication is intended to be confidential and is made for the purpose of securing legal advice. State ex rel. United States Fidelity and Guaranty Co. v. Canady, 194 W.Va. 431, 441 n.13, 460 S.E.2d 677, 687 n.13 (1995).

[253] The same report may qualify for protection under the work product doctrine if the "primary motivating purpose" behind the attorney's creation of the investigative report was to assist in "probable future litigation." See Bedell at 330-31 & 334, 484 S.E.2d at 213-14 & 217.

While the evidentiary privilege "exists apart from, and is not co-extensive with, the ethical confidentiality precepts," *McGraw* at 797, 461 S.E.2d at 859 (citing *United States v. Ballard*, 779 F.2d 287, 293 (5th Cir. 1986)); *see also State ex rel. Charleston Area Medical Ctr. v. Zakaib*, 190 W.Va. 186, 437 S.E.2d 759 (1993), the definition of "party" in the corporate setting, as it pertains to communications with opposing counsel, is, along with the requirements of *Burton*, practically relevant.

According to the West Virginia Rules of Professional Conduct, a lawyer may not communicate about the subject matter of representation with a party the lawyer knows to be represented by another lawyer in the matter, without the consent of the other lawyer or legal authorization. *See* W.Va. R.P.C. 4.2. For purposes of Rule 4.2, a corporate "party" includes:

> 1. Officials of the organization (those having a managerial responsibility);
>
> 2. Other persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability (those who have the legal power to bind the organization in the matter);
>
> 3. Those who are responsible for implementing the advice of the organization's lawyers;
> 4. Any members of the organization whose own interests are directly at stake in a representation (i.e., any person who is independently represented by counsel directly or indirectly by membership in a class, partnership, joint venture, or trust); and
>
> 5. An agent or servant whose statement concerns a matter within the scope of the agency or employment, which statement was made during the existence of the relationship and which is offered against the organization as an admission.

Cole v. Appalachian Power Co., 903 F.Supp. 975, 979 (1995); *Dent v. Kaufman*, 185 W.Va. 171, 174-75, 406 S.E.2d 68, 71-72 (1991) (adopting the rule of *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990)). All other employees, characterized as mere witnesses or "holders of factual information" with regard to the event for which the organization is sued, are not "parties." *See Cole*, 903 F.Supp. at 979; *Dent*, 185 W.Va. at 176, 406 S.E.2d at 73.

Wisconsin
Michael Best & Friedrich LLP.

In Wisconsin, the lawyer-client privilege is largely governed by statute. Section 905.03 *Wis. Stats.* reads as follows:

> (1) DEFINITIONS. As used in this section:
>
> (a) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
>
> (b) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

(3) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

(4) Exceptions. There is no privilege under this rule:

(a) *Furtherance of crime or fraud*. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) *Joint clients*. As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Wyoming
Brown, Drew & Massey, LLP

Upjohn Co. v. U.S., 101 S.Ct. 677 (1981), established the existence of the attorney client privilege with respect to communications between in-house counsel and individuals within the organization for which they serve.[254] In determining specifically which employees could speak on behalf of the organization to the lawyer so that the privilege would apply to their communication, the court in *Upjohn* rejected the "control group" test as being too limited. *See id.* (Approach in which only the communications between counsel and senior management are privileged because these are the only individuals which can be said to possess identity analogous to corporation as a whole). Instead, the *Upjohn* court adopted the subject matter approach. *See id.* at 631-632 (attorney client privilege applicable to communications not available from upper-echelon management that are necessary to provide basis for legal advice "concerning matters within the scope of the employees' corporate duties"). However, the Supreme Court declined to establish "a broad rule or series of rules to govern all conceivable future questions in this area." *Id.* (quoting *Upjohn*, 101 S.Ct. at 677).

In *Strawser v. Exxon Co., U.S.A., a Div. Of Exxon Corp*., 843 P.2d 613 (Wyo. 1992), the Wyoming Supreme Court addressed the issue of who is a party in the corporate context and thus able to benefit from the attorney client privilege and not be subject to ex parte interviews with opposing counsel. The court in *Strawser* similarly rejected the above-mentioned "control group" test. *See id.* at 620-621. The test adopted by the Wyoming Supreme Court, however, was the "alter ego" or "binding admission" approach. *See id.* at 621. This approach "defines '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." *Id.*

[254] See Newport Pacific Inc. v. County of San Diego, 200 F.R.D. 628, 631 (S.D. Cal. 2001).

AUTHOR APPENDIX:

Anguila
Pam Webster
Webster Dyrud Mitchell

Argentina
Alfredo M. O'Farrell
Marval, O'Farrell & Mairal

Australia
Colin Loveday
Clayton Utz

Australia, New South Wales
Colin Loveday

Australia, Victoria
Andrew Morrison

Australia, Capital Territory
Robert Cutler

Australia, Queensland
Michael Klug

Australia, Western Australia
Doug Bishop

Australia, Northern Territory
Mark Spain

Austria
Dr. Karl Hempel
Cerha, Hempel & Spiegefeld

Azerbaijan
Bakhtiyar Mammadov
Baker Botts L.L.P.

Bahamas
Michael F.L. Allen
McKinney Bancroft & Hughes

Bahrain
Jalila Sayed Ahmed
Hassan Radhi & Associates

Bangladesh
M. Amir-Ul Islam
The Law Associates

Barbados
Rosalind Bynoe
Clarke Gittens & Farmer

Belize
Rodwell R.A. Williams
Barrow & Williams

Bolivia
Maria del Carmen Ballivian
C.R.& F. Rojas, Abogados

Brazil
Roberto Pasqualin.
Demarest e Almeida

British Virgin Islands
Kerry Anderson
O'Neal Webster O'Neal Myers Fletcher & Gordon

Bulgaria
Vladimir Penkov
Lega InterConsult Penkov, Markov and

Alberta, Canada
Cory Exner
Blake, Cassels & Graydon LLP

British Columbia, Canada
Ludmila B. Herbst
Farris, Vaughan, Wills & Murphy

Manitoba, Canada
J. David Brett
Thompson Dorfman Sweatman

New Brunswick, Canada
Norman Bosse
Clark Drummie

Newfoundland & Nova Scotia, Canada
John D. Bonn
McInnes Cooper

Ontario, Canada
Paul Schabas
Blake, Cassels & Graydon LLP

Prince Edward Island, Canada
Daniel Rideout
Patterson Palmer

Québec, Canada
Réjean Lizotte
Desjardins Ducharme Stein Monast

Saskatchewan, Canada
Leonard D. Andrychuk
MacPherson Leslie & Tyerman

Cayman Islands
Sara Collins-Francis
Walkers

Channel Island Guernsey
Julia White
Carey Langlois

Channel Island Jersey
Conrad Coutanche

Chile
Dr. Christian Eyzaguirre
Claro & Cia., Abogados

Colombia
Frederico Guzman Duque
Brigard & Urrutia

Costa Rica
Rodrigo Oreamuno B.
Facio & Canas

Cyprus
Dr. K. Chrysostomides
Dr. K. Chrysostomides & Co.

Czech Republic
Martin Kriz
Prochazka Randl Kubr

Denmark
Jorgen Kjergaard Madsen.
Kromann Reumert

Dominican Republic
Annie Lund
Pellerano & Herrera

Ecuador
Jose M. Perez A.
Perez Bustamante & Ponce Abogados

Egypt
Rafiaa Ragheb
Shalakany Law Office

Malack El Masry
Shalakany Law Office

Estonia
Peeter Lepik
Lepik & Luhaaar

Viive Ginter
Lepik & Luhaaar

Finland
Bernt Juthström
Roschier Holmberg Attorneys Ltd.

France
Philippe Xavier-Bender
Gide Loyrette Nouel

Germany
Dr. Christian Pelz
Noerr Stiefenhofer Lutz

Gibraltar
Rose Goncalves

Greece
Dimitris Zepos
Zepos & Yannopoulos

Ilias Koimtzoglou
Zepos & Yannopoulos

Guatemala
Eduardo Mayora
Mayora & Mayora

Honduras
Bradford K. O'Neill
Bufete Gutierrez Falla

Hong Kong
C. J. Bonsall
Johnson Stokes & Master

Hungary
Dr. Karl Hempel
Cerha, Hempel & Spiegelfeld

Iceland
Erlendur Gislason
Logos

Indonesia
Ernst G. Tehuteru
Ali Budiardjo, Nugroho, Reksodiputro

Ireland
Melissa Jennings
Arthur Cox

Isle of Man
Simon Harding
Cains Advocates Limited

Israel
Alex Hertman
S. Horowitz & Co. House

Italy
Vittorio Tadei, Esq.
Chiomenti Studio Legale

Francesco Rampone
Chiomenti Studio Legale

Ida Palombella
Chiomenti Studio Legale
Studio Legale
Via Bertoloni, 44/46
00197 Rome, Italy
Tel: (3906) 80-97-01
Fax: (3906) 80-97-06
ip@chiomenti.net

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