

Trap for Unwary:

Update on the State of Attorney-Client Privilege at the European Commission

Willard K. Tom

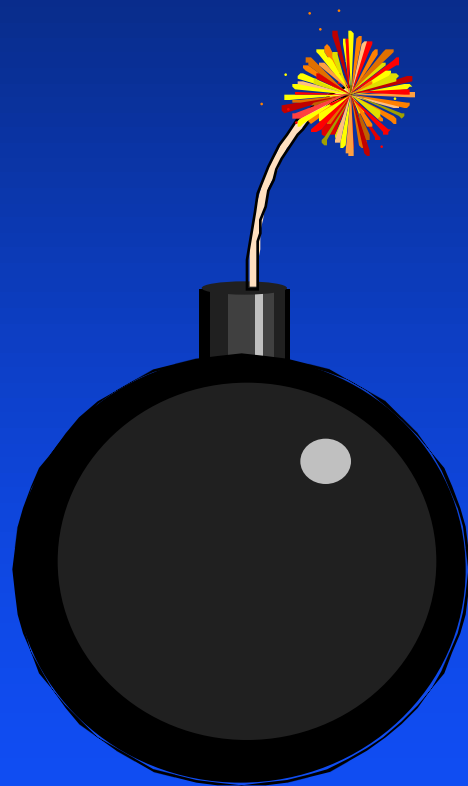
Morgan, Lewis & Bockius, LLP

GCCA Annual Conference

June 25, 2002

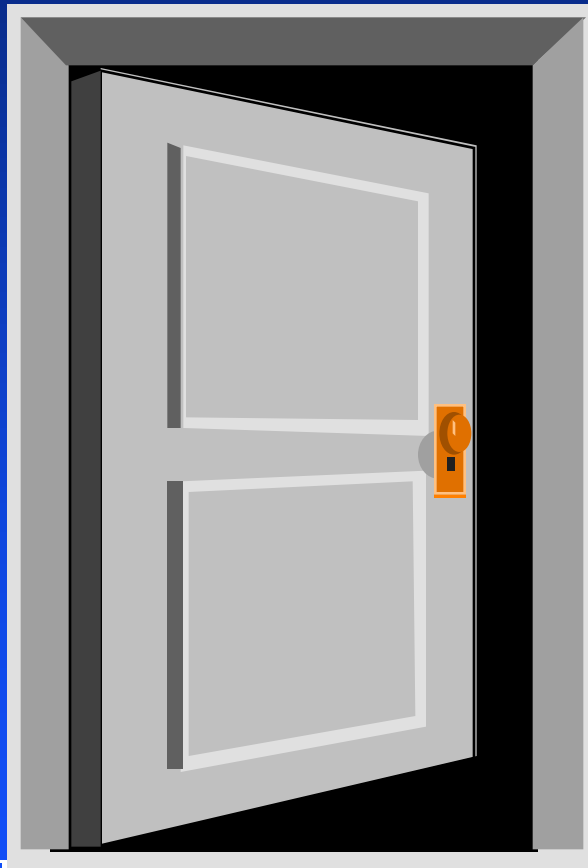
A Quick Review of the Problem

Australian Mining & Smelting (1982)



- n Member State professional ass'n
- n code of conduct
- n disciplinary sanctions
- n independent

What Does This Mean?



- n Communications between client and in-house counsel – UNPRIVILEGED
- n Communications between client and non-European counsel – UNPRIVILEGED

3 Factors Have Come Together



The Association's Advocacy Efforts

Modernization Proposal in the European Parliament

- n Committee on Economic and Monetary Affairs amendment of modernization proposal
- n After Commissioner Monti intervention, Parliament rejected the amendment.
- n But Commissioner Monti made a significant concession.

Comm'r Monti's Concession

n Background: The *John Deere* case

- u Lawyer had advised that conduct posed legal risks
- u Client proceeded despite the risks
- u Commission the advice to justify a higher fine

Comm'r Monti's Concession

n “[I]f Amendment No 10 is rejected, . . . I can give an assurance to propose [that] . . . the Commission will not regard as an aggravating circumstance . . . the existence of texts demonstrating that the company's in-house lawyers have alerted the directors to the unlawfulness of conduct”

Efforts to Enlist US Agencies

n US View:

- u Avoiding violations is a lot better than catching them
- u In-house counsel are the first line of defense against anticompetitive behavior
- u Good legal advice makes it easier to catch cartel behavior

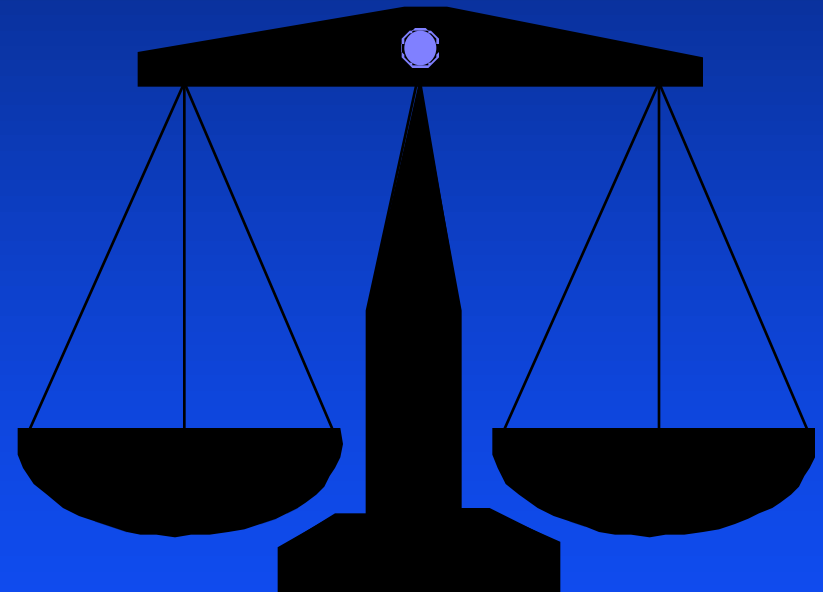
Prospects

- n This will take a long time.
- n But shouldn't give up.
 - u Progress with member states.
 - u New personnel from time to time.
 - u It's the right policy.

Coping with the Facts of Life

The Balancing Act

- n Avoid creating harmful evidence
- n But still have to do your job effectively



Some Things You Don't Want to Do By Not Writing Anything

- n Let your clients violate the law because they don't understand it
- n Fail to gather necessary facts
- n Multiply cost and inefficiency

Different Situations Call for Different Approaches

- n The Multi-Jurisdictional Cartel Case
- n Compliance Programs
- n Counseling on Distribution, Licensing, and Joint Ventures
- n Mergers and Acquisitions

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