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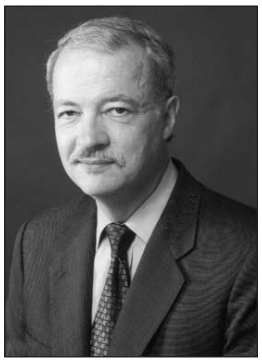
Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair



To the members of the Corporate Counsel Section:

Over 80 persons attended our four-hour *Ethics for Corporate Counsel* Spring Meeting intended primarily to benefit our Section's upstate members and other attorneys in the upstate area, held on June 10th in Rochester, New York, and hosted by Kodak. With the active support of the State Bar's CLE Department, Jay Monitz, the Program Chair and Moderator, assembled a distinguished and very well-received panel comprising of Gerard M. Larusso, Chief Counsel, Fourth Department, Attorney Grievance Committees; Daniel W. Sklar, Nixon Peabody, LLP; Gary P. Van Graafeiland, General Counsel and Senior Vice President, Eastman Kodak Company; and Professor Steven Wechsler, Syracuse University College of Law. They presented a lively and informative program specifically addressing the ethical concerns of in-house counsel, based on the same course materials that were used for our successful program in New York City in the fall of 2001, and once again the program was very well-received by the attendees.

Our Section's Annual Meeting is scheduled for Wednesday, January 22, 2003, during the New York State Bar Annual Meeting at the Marriott Marquis Hotel in New York City. This year's program is being planned together with the Business Law Section to focus on the post-Enron corporate governance reforms already in place and in process, and the implications for counsel in advising management with respect to these matters. While much of the specifics remain to be spelled out, it is sure to be a timely and worthwhile program, and I hope that as many Section members as can will attend.

So that it will not come as a shock, I want to alert our Section members that the Executive Committee has approved an increase in our Section's annual dues from $20 to $25, effective in 2003. I believe this is the first time since our Section's founding over 20 years ago that dues have increased, and I trust that this modest but necessary increment will not deter you from renewing your membership and thereby taking advantage of the publications and programs that our Section offers for your benefit.

Finally, I would like to call your attention to our Section's portion of the NYSBA Web site at www.nysba.org (select "Sections/Committees" from the home page, then "Corporate Counsel Section"). The site has been revamped as part of the State Bar's overall rebuild of its Web site last May, and is still a work in progress. We want it to serve your needs and welcome your comments as to how we can have it do so more effectively. Please e-mail any comments you have to me at tom.reed@btna.com.

Thomas A. Reed

Inside

Following the Bouncing Ball

By J. Michael Parish

In the light of the Andersen prosecution victory by the government, people within the business organizations served by such entities and by professionals in their own organizations are now feeling a renewed need to examine and better understand certain key issues relating to corporate conduct and relationships between business people and the professionals who serve them. These issues include the nature and scope of attorney/client privilege, personal rights of privacy and, especially, how liability can arise for obstruction of justice, fraud or conspiracy, as well as shareholder action concerns and questions of where their loyalty lies and how they can satisfy the obligations underlying that loyalty while also protecting themselves.

In this topsy-turvy time, there is no coherent pattern governing what the nature of our obligations to each other will be in the post-Enron, post-Global Crossing world. There is, however, certain to be a substantial expansion of corporate liability, or at least exposure. Whatever laws are written, and however courts interpret them, it is unlikely that technical defenses will be as adequate as they have recently been in the face of a society-wide revulsion toward recent attempts to divorce enrichment from accountability and responsibility.

Looking at the complexities of organizations producing products or services, "professional" or other, for profit in the context of the fragility of human memory and understanding of others' motivations and behavior, perhaps a general principle can nevertheless be derived. One version of it is that what you will need to be able to show in the future to protect your client is that your company acted in good faith, or at least not have someone else be able to show that it did not, and that there was no unjust enrichment based on the lack of good faith. Good faith is the implied covenant underlying the Uniform Commercial Code, a fact not always remembered, but critical to its ultimate utility and benefit. Unjust enrichment is, of course, a conclusory term but harkens back to fundamental principles of fairness as opposed to fraud. The focus of Congress in this area has been on the idea of a scheme or device intended to defraud or mislead, which is certainly a broad standard and likely to be interpreted broadly.

There is no one perfect policy or process, or even any structure that recommends itself over some other, and simpler is usually better. We have tried to reduce the key elements to five, itemized below. Those with resources in the current environment are presumably devoting them to reviews of corporate document retention policies and clearance procedures. The concomitant element to that process, it might be argued, should be a review of the standards governing communications among employees of the same company, whether or not they are members of the bar.

The tilt of the case law is that privilege exists between employee and fellow employee who is a lawyer only in connection with preparation for trial after a case has been commenced or threatened.[1] Outside counsel has no absolute privilege, of course, but one recommended approach involves the use of a "Bouncer."

"In this topsy-turvy time, there is no coherent pattern governing what the nature of our obligations to each other will be in the post-Enron, post-Global Crossing world. There is, however, certain to be a substantial expansion of corporate liability, or at least exposure."

The "Bouncer" is a lawyer in private practice who fields calls from people on the legal side, or the business side, who are not comfortable asking one of their coworkers, including superiors, about a perceived problem, because they either don't trust their motives or don't believe they will get an honest answer, or for some other reason of conscience or practicality. The idea is to "bounce" the concerns off someone who has no vested position in the outcome of the question. These situations occur frequently. An employee also may be concerned that through such a conversation the terms of a proper personal or corporate privilege might become waived or compromised. These calls are confidential and shared only with the general counsel or his designee on a confidential and non-name basis, as deemed appropriate, although also subject, necessarily, to whatever other overriding considerations might cause a judge to require disclosure. Whatever further role the Bouncer might play is up to the individual and the lawyer's professional responsibility.

What is critical for this measure to work is embodied in the term—in a nightclub, whether you stay or go, you know the Bouncer is impartial, and dedicated only to public order and people having a good time and enjoying themselves. This is a comic exaggeration, of

course, but those people do exist in private practice who can command that kind of respect and trust, even if they have also managed to keep their faces off the front pages of whatever media one might want to read.

The practice is worthwhile in part as a safety valve for issues that can create increased liability, for whatever is at issue directly, for a claim against the corporation for some version of a cover-up, or for failure on the part of some level of management to address a potentially critical problem. Issues of budgeting and other procedures for these services tend to be relatively easy to resolve through fixed fee or other arrangements. In a certain sense, this is the way the practice of law first evolved, through a confidence in relationships. Many places still have that. Many others, however, especially in our highly mobile society, regard "legal business" as a commodity, and not a relationship, even though to state the proposition is to demonstrate that legal services ought not to be seen, or provided, as something that is sold by the pound with one's thumb on the scale.

This approach is just one of many potential solutions to the range of problems in an area which is under serious pressure among business practitioners currently, and is offered as nothing more. One final point—in addition to whatever benefit may accrue from greater availability of privilege through the involvement of outside counsel, the ability of an employee to make such a call will necessarily increase the courage of that employee to address his or her concerns directly and move toward resolution of the issue, rather than holding back and allowing a potential problem to go unaddressed. To have a resource is not necessarily to use it—the existence of that resource will also change behavior and permit issues to be vented rather than fester. Ben Jonson said it best: Great mischiefs feed/till they be fat, like beeves, and then they bleed and bleed.

Five-Point Plan

1. **The Only Draft That's Not Discoverable Is One That Doesn't Exist**. Drafts of documents may contain harmful evidence. Creating "versions" of documents during the drafting process leaves a permanent record of the drafts subject to later discovery. Revising a single version leaves no trail.

2 **If You Type an E-Mail It's Discoverable**. E-mails exist even when you think they don't. One executive instructed a subordinate to delete his e-mails for a certain period from the hard drive, only to find, when they fell out during the course of an internal investigation, that there was a backup offsite hard drive they were unaware of. There was probably a backup behind that one as well.

3. **Don't Rely on an Attorney-Client Privilege With In-House Counsel Unless the Communication Is Directly Connected With Litigation or Trial Preparation**. The communication between Arthur Andersen's in-house attorney and its accountants should be everyone's clear reminder on that issue.

4. **Internal Notes or Memos Can Become a Harmful Record of You and Your Co-Workers' Thoughts and Statements**. Few of us will have the self-discipline to write down only observations that support the position of propriety on the part of the author, but it is a good standard to keep in mind. Further, your memos relate to and cast light not only on your behavior, but on that of other workers, and vice versa.

5. **Internal Investigations Are Here to Stay, and Likely to Be More and More Common as a Tool, Either to Discover Malfeasance or Create a Record of Due Diligence and Proper Business Conduct.** If you are employed by any sort of substantial enterprise, public companies and financial institutions in particular, you may not be wrong in assuming that you will be involved, as a subject, witness or otherwise, in more than one internal investigation in the course of your career. Fortune favors the prepared mind, as Branch Rickey said.

Endnote

1. See esp. *SR Int'l Bus. Co. Ltd. v. World Trade Center Properties*, No. 01 Civ. 9291, 2002 U.S. Dist. LEXIS 10919 (S.D.N.Y. June 19, 2002, & July 3, 2002), along with A. Stevens, *An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*, 23 Hamline L. Rev. 289 (1999) and G. Geisel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 498 Mercer L. Rev. 1169 (1997).

Mr. Parish is a partner in the New York office of Wolf, Block, Schorr & Solis-Cohen LLP, 250 Park Avenue, New York, New York 10177. He can be reached at (212) 883-2229. His e-mail address is mparish@wolfblock.com. Lawrence Ginsburg, Kenneth Roberts and Robert Stein of Wolf, Block also contributed substantially to this article.

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NYSBA Corporate Counsel Section's Report Is Honored

The Corporate Counsel Section of the New York State Bar Association issued a 54-page "Report on Cost-Effective Management of Corporate Litigation" in 1995. The Section included in the Report, and recommended consideration of, a model for corporate litigation management that can be tailored for specific cases.

The Section's Report was broadly published and otherwise disseminated throughout the United States. For example, the Report has been the subject of dozens of articles and was also reprinted in full in various publications, including the *American Journal of Trial Advocacy*, *Trial Diplomacy Journal*, the *Corporate Counsel's Guide* (1st and 2nd editions), the *Corporate Counsel's Guide to Litigation Management*, *Commercial Litigation in New York State Courts*, and the *Albany Law Review* (the *Albany Law Review* added 193 footnotes to the Report which provide citations to numerous articles and other sources of information about litigation management). Other publications reprinted and commented on the model for corporate litigation management contained in the Section's Report. Finally, the Report was the focus of numerous programs and was included in the course materials for many of those programs.

The *American Journal of Trial Advocacy* has recently published a "Special 25th Anniversary Commemorative Trial Techniques Edition." In the "Editor's Note" at the beginning of that Edition, the Editor-in-Chief states: "From the many outstanding trial techniques and articles the *Journal* has published over the years, the Honorary Board of Editors has selected eleven works that they believe best communicate insightful and practical information on a range of trial-related topics." The *American Journal of Trial Advocacy*'s 25th Anniversary Edition contains the NYSBA Corporate Counsel Section's Report beginning on page 85.

Correction

In the Spring/Summer issue of *Inside* in the profile of Michael J. Pollack, the wrong telephone number was given. Mr. Pollack's correct telephone number is (212) 275-4078.

2003 New York State Bar Association

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Corporate Counsel Section Meeting

(Joint Meeting with the Business Law Section)

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Executive Committee Member Profile: Thomas A. Reed

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J.D., University of Pennsylvania Law School, 1968

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Legal Experience

Tom began his legal career in 1968 as an Associate with the New York City law firm of Paul, Weiss, Rifkind, Wharton & Garrison, practicing in the area of wills and estates. After three years with Paul, Weiss and a short stint with another New York firm, in 1971 he joined the Law Department of Western Electric Company, then the manufacturing and supply arm of AT&T, as a staff attorney. He stayed with Western Electric until the effective date of AT&T's divestiture of the regional Bell operating companies as a result of the 1982 settlement of the U.S. government antitrust case against AT&T, which Tom helped defend. He then transferred to NYNEX Corporation (now Verizon) as a staff attorney dealing with federal regulatory matters in 1984. Western Electric was one of the founding companies of the Corporate Counsel Section, and Tom joined it in 1983.

Tom remained with NYNEX, transitioning from regulatory matters to advising the purchasing organization on contracts for the purchase of goods and services, until he accepted an early retirement offer in 1994. Since then he has worked in a variety of legal positions in the New York City area, most recently (since 1998) as a contract attorney acting as Corporate Counsel for BT North America Inc., a wholly owned subsidiary of BT Group plc, where he assists the General Counsel with a variety of corporate legal matters, primarily customer and supplier agreements for various BT business units doing business in North America.

Personal Information

Tom and his wife, Gail, a psychoanalyst in private practice whom he met while they were both French language majors, respectively, at Haverford and Bryn Mawr Colleges in Pennsylvania, are both lifelong New York City residents. They have two adult children who currently live and work in New York City: a daughter, Danielle, who is married to a French national in the process of obtaining his Green Card for permanent residence in the U.S. (they have a five-month old daughter, Julie, who charms everyone), and a son, Bill, soon to be married to a French-Canadian who will be moving to New York from Quebec. Everyone in the family speaks fluent French.

Request For Articles

Inside welcomes the submission of articles of timely interest to members, in addition to comments and suggestions for future issues. Please send to:

Peter A. Irwin, Esq.
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4 Irving Place
New York, NY 10003

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

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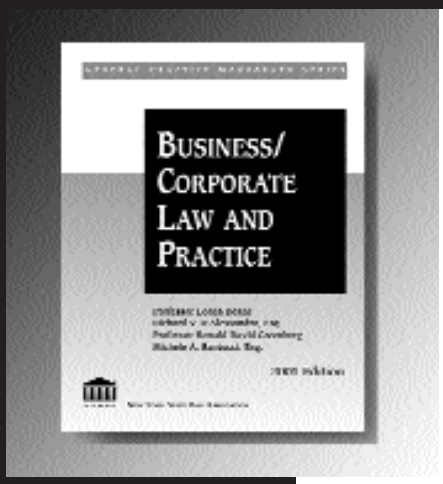

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