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Inside

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

Message from the Chair

Welcome to the Winter 2006 edition of *Inside*, the Corporate Counsel Section's periodical. I am pleased to report on the many activities of the Corporate Counsel Section this past Fall, in addition to our upcoming programs and activities.

This Fall saw another successful Ethics For Corporate Counsel CLE program presented at the NYC Bar Association. Our seventh annual program brought together experts on ethical issues along with more than 80 attendees to discuss hypothetical fact patterns presenting typical situations facing all of us in the profession. Congratulations to the CLE committee, chaired by Section Chair-Elect Steve Nachimson, for another successful program benefiting our members.

This Fall also saw our Section co-sponsoring two CLE programs of interest to our members—Best Practices for New York Not-for-Profit Corporations, presented in four locations around the State, and the Antitrust Law Update, presented in Rochester with the Antitrust Law Section. Finally, our Section assisted with the presentation of the Best Practices for Corporate Pro Bono Programs, presented in New York City.

Our Diversity Internship Committee, chaired by former Section Chair Barbara Levi, is busy planning for next year's internship program, placing law students from diverse backgrounds in corporate law departments. We hope to have three to four students placed this coming Summer.

The Section's Executive Committee completed its strategic plan for the next two years, focusing on ways to increase Section membership and to enhance the services offered to our members. Among the priority activities are expanding the membership of our CLE/Meetings, *Inside*, Diversity Internship, Governance and Pro Bono Committees.

Recently, our Section created a Committee for Law Firm General Counsel to address issues unique to our colleagues who serve in this type of position. We are pleased that Kenneth Standard, former NYSBA President and currently General Counsel to Epstein Becker & Green, PC in New York City, has agreed to serve as Chair of this innovative committee.

Our Section looks forward to the Second Corporate Counsel Institute in October 2007, featuring two days of presentations on cutting edge legal issues facing in-

Inside

house counsel. Further information will be forthcoming as details are finalized.

Our Section continues to monitor developments in the NYSBA House of Delegates as we move toward adoption and implementation of Model Rules to replace New York's Code of Professional Responsibility. Of special interest to in-house counsel are the rules related to multi-jurisdictional practice, and we are pleased that former Section Chairs Conal Murray and Thomas Reed represent us in the House and keep us apprised of debate and developments.

Finally, please be sure to attend the Section's Annual Meeting on Wednesday, January 24, 2007 at 8:00 a.m. at the NYSBA annual conference. After the meeting, please stay for our Section's program, "The Lawyer as Employer and Employee," featuring experts in employment law discussing legal issues for managers, especially those in law firms and corporate law departments who manage employees who are also lawyers. The panel will discuss issues relating to hiring, evaluation and supervision, including attorney-client privilege and conflict-of-interest issues, with a particular emphasis on ethical issues in the lawyer as employer and employee context.

With this Annual Meeting in mind, several articles in this issue of *Inside* focus on labor and employment law issues, to complement our Section program. Congratulations to Bonni Davis, *Inside* editor and former Section Chair, for another excellent issue.

I hope to see you on January 24 at our Annual Meeting. Please see our Section's home page at the NYSBA website at www.nysba.org/corporate for additional information on the Section and our activities. Of course, please feel free to e-mail me at steven.mosenson@nyu.edu for additional information or questions about our Section as well.

Steven H. Mosenson

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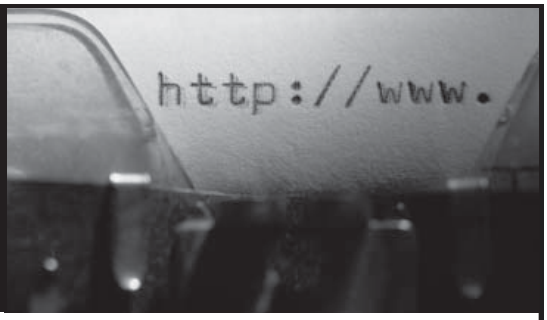

Back issues of *Inside* (Corporate Counsel Newsletter) (2000-present) are available on the New York State Bar Association Web site

Back issues are available in pdf format at no charge to Section members. You must be logged in as a member to access back issues. Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

Inside Index

For your convenience there is also a searchable index in pdf format. To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.

How to Respond to a Breach of an Employer's Computer Systems—Legal Obligations, Practical Guidance and Preventive Strategies

By Diane Windholz and Richard Greenberg

Instances of identity theft, stolen laptops, unauthorized entries into electronic databases and similar attacks on personal data have significantly increased both in regard to their frequency and the number of persons affected. According to Javelin Strategy & Research, which compiles data for the Federal Trade Commission, identity theft will affect approximately 10 million Americans this year and cost those affected $56.6 billion. For example, in April 2006, a laptop containing personal information of 196,000 current and former Hewlett-Packard employees was stolen from a California restaurant parking lot. One month later, an electronic data file containing addresses, Social Security numbers and dates of birth of over 25 million veterans was stolen from the home of a Veterans Affairs employee. And in September 2006, two laptops containing 25,000 Social Security numbers and other personal information of University of Texas students were stolen from a faculty member's home.

To combat the epidemic, nearly all states have enacted legislation of one form or another intended to protect individuals from identity theft. Such legislation includes codifying the crime of identity theft, increasing civil and criminal penalties, requiring specific protections for certain types of information such as Social Security numbers, and requiring entities doing business in a particular state to provide notice when there has been a breach of personal information maintained by the entity.

With the eighth highest percentage of identity theft in the country, New York State has enacted significant protective legislation in the past two years, including the August 2005 Information Security Breach and Notification Act ("the Act"). Other enacted measures include "Consumer Communication Records Privacy Act," the "Disposal of Personal Records Law," the "Security Freeze Law," the "Anti-Phishing Act" and legislation restricting disclosure and use of Social Security numbers. This article summarizes the Act and provides legal and practical guidance as to compliance as well as proactive preventive measures all New York employers should consider implementing.

The Act, which has been effective since December 9, 2005, requires employers to notify affected employees of any breach of an employer's computer systems containing "private or personal information." "Private or personal information" includes Social Security numbers, driver's licenses or other identification numbers, and financial account numbers. The Act requires employers to provide expedient notification in one of the following manners:

- Written notice to the affected individual(s);
- Electronic notice to the affected individual(s), provided that the notice recipient has expressly consented to receiving notice in electronic form and a log of each notification is kept by the business;
- Telephone notification to the affected individual(s), provided that a log of each notification is kept by the business; or
- Substitute notice—if a business demonstrates to the state attorney general that the cost of providing notice would exceed $250,000 or that the affected class of subject persons to be notified exceeds 500,000, or the business does not have sufficient contact information, substitute notice shall consist of *all* of the following:
  - E-mail notification when the business has an e-mail address for the subject persons;
  - Conspicuous posting of the notice on the business' web page, if the business maintains one; or
  - Notification to major statewide media.

When notification is necessary, the Act also requires written notification to three (3) New York State offices: (i) the N.Y.S. Attorney General (AG); (ii) the N.Y.S. Office of Cyber Security and Critical Infrastructure Coordination (CSCIC); and (iii) the Consumer Protection Board (CPB). See http://www.cscic.state.ny.us/security/securitybreach/index.htm. In the event of a failure to comply with the Act, the Attorney General of New York may commence a legal action for non-compliance. Failure to provide prompt notice can result in injunctive relief, liability for actual losses suffered by an employee who did not receive notice, and if a court finds an employer knowingly or recklessly failed to provide notice, a civil penalty of up to $150,000.

In addition to providing the above described notice when mandated, employers should also consider taking the practical measures below in the event of a breach. Employers also should consider many of these measures even if there has not yet been an ultimate determination as to whether a breach occurred.

- Purchase fraud prevention and detection programs on behalf of employees;
- Sponsor seminars or information sessions to educate employees about identity theft recovery;
- Provide employees with contact information for credit reporting agencies;
- Provide employees with suggested actions to take to protect their credit; and
- Rebuild employer-employee trust by taking steps to prevent future breaches and assuring affected employees that such measures are in place.

A sample notification letter appears on p. 5 in this issue (Appendix 1) that both satisfies the Act's requirements and fosters the rebuilding of trust with affected employees.

Of course, the best way to manage a system breach is to avoid it altogether. Below are some preventive strategies:

1. Perform an internal audit designed to (i) identify information maintained in the organization that is subject to breach notification laws; (ii) map the flow of that information throughout the organization; and (iii) assess the risks of unauthorized access and disclosure. This internal audit should include locating information that is maintained by third parties on behalf of the organization.
2. Determine whether it is possible to collect, reformat and/or maintain the information in a way that would cause it not to be "personal information" as defined in the Act.
3. Consider encrypting all personal information maintained by the company.
4. If personal information must be maintained and encryption is not possible in all cases, adopt policies and procedures to strengthen the privacy and security of that information. Measures required under the HIPAA privacy and security regulations are a good model for this purpose.
5. Develop protocols to be followed when the organization learns of a breach of personal information—identify who is in charge of determining whether there has been a breach, whether notification is required, how notice will be provided, who will prepare the notice, what the notice will contain, etc.
6. For companies in multiple jurisdictions, instead of trying to deal with each state's requirements individually, consider formulating one common policy based on all of the applicable states that will satisfy all of the requirements in the respective states.
7. Train employees accordingly.
8. Develop a record retention policy so that records are maintained no longer than is necessary; destroy information no longer needed.
9. Obtain written assurances from third parties that receive or maintain personal information on your behalf that they are aware of and prepared to comply with these and similar laws.
10. Monitor legal developments, including pending federal legislation which may affect the state laws discussed in this article.

Diane Windholz is a partner in Jackson Lewis' New York City office. Since joining the firm in 1988, she has been engaged exclusively in employment litigation, representing employers before federal and state courts and administrative agencies in matters involving, among other causes of action, discrimination, wrongful discharge, and tortious injury, such as defamation, invasion of privacy, infliction of emotional distress, and interference with advantageous relations. Ms. Windholz regularly conducts training sessions on a variety of topics including sexual harassment, hiring and firing, avoiding employment litigation, employee discipline, employee evaluations, discrimination and how to conduct internal investigations.

Richard Greenberg, a partner in Jackson Lewis' New York City office, is admitted to the bar of the State of New York and the Federal District Court for the Southern District of New York. He advises both unionized and union-free clients on a full range of labor and employee relations matters, including maintenance of personnel policies and personnel infrastructures, federal and state employment laws, as well as new legal developments impacting labor and employment policies and practices.

Appendix 1

Date

Dear Employee:

We have recently discovered a situation that warrants your attention. It appears that certain employee data maintained on our systems, including but not limited to [INSERT PRIVATE OR PERSONAL INFORMATION], may have been accessed by an unauthorized individual. Steps to ensure that our systems have all practical measures in place to prevent such a potential issue from arising at any time in the future are currently being refined. We are committed to ensuring that all employee data and other information is secure and will continue to ensure that the systems are regularly audited and that those with access to the systems are properly screened.

While there is nothing to indicate that anyone who may have improperly accessed the system has utilized any data for any purpose, we are notifying all employees of this issue and providing suggestions as to measures you may wish to take to protect yourself (and information regarding actions we are taking to help you implement such suggested measures).

The attached document issued by the Federal Trade Commission lists certain precautions that individuals can take to protect themselves from being victims of identity theft. These measures include requesting credit reports and placing security freezes on accounts. Instructions on how to request your credit report through the appropriate agency are included in the attachment. While there is a nominal fee associated with having a credit report run, to ensure that you have the resources necessary to obtain such reports, we have set up a special account number to reimburse you for the cost of securing your credit reports. To recoup the cost, submit an expense report and charge the amount to the account number which may be obtained from Human Resources. [Documents are contained on FTC website.]

Additionally, within the next few weeks, we will hold informational sessions led by an expert in the field of identity theft. Attendance is not mandatory; however, we encourage all employees to attend to assuage concerns and gain a better understanding of what can be done to prevent identity theft. A schedule for these sessions will be provided shortly.

We hope this issue never arises again and, as noted above, we are taking the utmost precautions to reduce our potential risk exposure and avoid these types of potential issues going forward. To assist us, we ask that each and every employee be vigilant about reporting any violation of company policy or process to their manager and Human Resources.

Thank you for your cooperation and patience regarding this matter. If you have any further questions, please contact Human Resources.

Very truly yours,

Management
ABC Corporation

Pandemic Preparedness: Guidelines for Formulating a Pandemic Flu Response Plan

By Ashley Z. Hager

Media reports are full of warnings about the threats Americans face from hurricanes, terrorist activity, and now the possibility of an avian flu pandemic. Many employers think that because they have developed an emergency response plan that entails computer system backups and facility evacuation processes, they are prepared for any emergency that might occur. While these types of plans may be effective responses to incidents that threaten the physical workplace, they are not nearly sufficient to address the types of issues that will arise if an avian flu pandemic breaks out among workers. This article provides a broad outline of the steps employers should take now, before a pandemic strikes, to prepare for the widespread and severe effects that such an outbreak would have on their workforce.

What Is Avian Flu?

Since 2003, an increasing number of human cases of the avian flu have been reported throughout eastern Asia and the Middle East. Most human cases of avian flu result from direct or close contact with infected poultry or contaminated surfaces or materials. In humans, avian flu results in typical flu-like symptoms (sudden high fever, cough, sore throat, and muscle aches) as well as eye infections, diarrhea, pneumonia, severe respiratory diseases, and other life-threatening complications. The mortality rate is alarming, as more than half of the people infected with the especially virulent flu strand have died.

To date, there has been no sustained human-to-human transmission of the virus. However, health professionals are concerned that a new virus subtype capable of human-to-human transmission will evolve from the continued outbreak of the highly pathogenic virus in poultry, ultimately resulting in a flu pandemic.

Is Avian Flu Really Something to Worry About?

Many experts believe that it is not a question of "if" the avian flu virus will mutate to the point where it is transmissible from human to human, but "when" that mutation will occur. Once the virus has mutated, the effects are likely to be widespread and severe. Because avian flu viruses do not commonly infect humans, there currently is no commercially available vaccine to protect humans in the event of a sustained outbreak. Further, unlike the seasonal flu typically affecting humans, all age groups may be at risk for infection, not just "at risk" groups such as children and the elderly. Thus, an especially severe pandemic could lead to high levels of illness, death, social disruption, and economic loss.

What Steps Can Employers Take Now to Prepare for a Flu Pandemic?

1. Develop a Pandemic Flu Contingency Plan

As a first step, employers should begin formulating a pandemic flu contingency plan and establishing a response team or advisory council to develop and implement that plan. Responsibilities of the response team or council under that contingency plan may include:

- Planning for the severe impact a flu pandemic could have on the employee population;
- Reviewing the company's supply chain to determine where and how it might be vulnerable during a pandemic;
- Preparing for potential interruptions in infrastructure, such as telecommunications;
- Anticipating increased or decreased needs from customers during a pandemic and making the financial preparations required;
- Coordinating communications to employees about the flu, the current level of threat and the company's pandemic response plan;
- Coordinating with local and federal health and disaster response agencies; and
- Establishing procedures for activating and terminating the company's pandemic response plan.

This article will focus on the portions of a pandemic response plan that pertain to employees.

2. Anticipate and Plan for Increased Human Resources Shortages

Past flu outbreaks suggest that a pandemic would wash over a particular geographic area two or three times over a twelve- to eighteen-month period, with each wave of the outbreak lasting for six to eight weeks. Many experts recommend that employers should plan for up to 40% employee absenteeism during the two-week peak of an outbreak, with lower levels of absenteeism during the weeks before and after that peak. Employee absences could result from, among other things, the employee's own illness or death, the need to care for family members

who are ill, the need to care for children whose schools are closed, and a desire to volunteer in the community (e.g., with the Red Cross or National Guard). Also, some employees may simply be unwilling to come to work because they feel safer at home.

Therefore, employers should identify critical functions within each business unit or department and determine how to keep those functions operational despite the anticipated absenteeism. Ideas include cross-training employees, increasing the ability for employees to telecommute (e.g., by enlarging the capacity of remote online access systems), creating teams of employees who can be rotated in to perform the critical tasks, and altering business operations (e.g., limiting or shutting down operations in affected areas). Because managers are as likely to be affected by the pandemic as everyone else, employers should also ensure that there are back-ups for management who will be making key decisions during a pandemic.

3. Take Steps to Isolate Sick Employees

To slow the spread of the flu among employees, employers should develop a screening process for determining whether employees are fit to work. This screening process should be designed to prohibit employees who have the symptoms of the flu or who have been exposed to someone with the flu from coming onto the premises. In addition, a procedure should be developed to remove affected employees from the premises without unnecessarily exposing other workers to the virus.

Employers should also review their existing compensation, benefits, sick leave and family and medical leave policies to consider how they should be modified in order to deter sick employees from continuing to come to work. At the same time, certain other policies (such as vacation, holiday and bereavement leave policies) may have to be altered to encourage employees who have not been exposed to the flu to come to work. Some employers have decided to provide enhanced or lengthened sick time for employees during a pandemic because they want to prevent employees from coming to work while they are infectious due to financial concerns or concerns that they will lose their jobs if they are absent. Other employers have determined that the widespread absenteeism and other effects of a pandemic will have such a negative effect on the business that they will have to reduce the compensation and benefits provided to employees during a pandemic.

4. Develop an Employee Communication Plan

In an emergency, individuals often turn to their employers for reliable information and support. Consequently, employers should develop and distribute to their employees materials containing basic information about:

- The virus itself (e.g., signs and symptoms of the flu and how the flu is transmitted);
- The progress of the pandemic, both internationally and domestically;
- Steps employees can take to prepare and protect themselves and their families (such as stockpiling necessary items, obtaining Tamiflu, engaging in proper hygiene techniques, and developing contingency plans); and
- The employer's pandemic preparedness and response plan.

Governmental agencies, international agencies, and industry groups should be regularly contacted for up-to-date information regarding the pandemic.

5. Consider Legal Implications of Prevention and Response Strategies

Finally, employers should be aware that a number of federal and state laws may be implicated by the development and implementation of effective response plans and strategies. For example, as employers extend and amend existing policies and develop and implement strategies to manage extended employee absences, they may be required to bargain over the changes under the National Labor Relations Act or pay additional overtime under the Fair Labor Standards Act to non-exempt employees working an alternative work schedule. Likewise, employers will need to comply with any pandemic preparedness guidelines or regulations promulgated by the Occupational Safety and Health Administration ("OSHA"). Other laws that may be implicated include the Americans with Disabilities Act, workers' compensation laws and the Health Insurance Portability and Accountability Act ("HIPAA").

Ashley Z. Hager is a partner in the Labor and Employment Group of Troutman Sanders LLP in Atlanta, Georgia. Ashley's practice focuses on employment discrimination litigation and general employment advice regarding issues such as employee and manager policies and handbooks, employment contracts, separation agreements, severance plans, federal contractor obligations, and employee selection and testing. She also provides general human resources consulting services for a number of clients, with a recent focus on preparing for disasters such as a pandemic. She has presented a number of seminars on "Managing Your Workforce During an Influenza Pandemic," as well as other employment-related topics. Ashley received her undergraduate degree from Dartmouth College in 1990 and her law degree from the University of Virginia in 1994.

Are the Times Really A-Changin'? Recent Developments Regarding Privilege Waivers in Corporate Criminal Investigations

By David M. Zornow and Steven R. Glaser

Introduction

The last several years have borne witness to a focused government attack on white collar crime and a concomitant expansion of the government's powers in this arena. One casualty of the government's approach has been the sanctity of the attorney-client privilege. *See* David M. Zornow and Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147 (2000); David M. Zornow and Keith D. Krakaur, *Over the Brink: Further Reflections on the Death of Privilege in Corporate Criminal Investigations*, 20 No. 1 White-Collar Crime Rep. 2 (2005). A number of commentators have recently argued, in effect, that the "times-they-are-a-changin'" and that the pendulum in favor of expansive governmental leverage in the privilege area has swung in the other direction. While we believe it is premature to make such a definitive statement, this article focuses on recent developments regarding the attorney-client privilege in three areas—the Bar, the legislature and the courts—which may be indicative of a slowdown in momentum in the government's efforts to denude the privilege of its traditional protections.

The Bar's Defense of the Attorney-Client Privilege

Few areas of the government's attempt to expand its powers in the prosecutorial arena have received as much adverse attention by the Bar as the so-far successful attempts to erode the protections of the attorney-client privilege. In particular, the Bar has shown strong displeasure with the routine practice of governmental requests of companies under investigation to waive the attorney-client privilege as a sign of cooperation and good corporate citizenship, and as a step necessary to avoid indictment. This governmental practice found support primarily in two places. First, until recently, the United States Sentencing Guidelines contained commentary in the section addressing organizational sentencing that, at the very least, implied that a reduction in sentence was appropriate where the corporation has waived its privilege and, conversely, that such a reduction was inappropriate where the corporation had chosen not to do so. U.S. Sentencing Guidelines Manual § 8C2.5 cmt. n.12 (2005). Second, in the Department of Justice's so-called Thompson Memorandum, which provides guidance to prosecutors when making decisions whether or not to charge corporations, one of the factors that the prosecutor is supposed to consider is the corporation's willingness to waive its privileges. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations at pp. 5-6 (Jan. 20, 2003).

The ABA first expressed its opposition to the Guidelines Commentary in August 2004, when it passed Recommendation 303, which called on Congress to amend the Sentencing Guidelines to "state affirmatively that waiver of the attorney-client privilege and work product protection should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Resolution Adopted by the House of Delegates of the American Bar Association, August 2004, *available at* http://www.abanet.org/poladv/report303.pdf. In October 2004, ABA President Robert J Grey, Jr., announced the creation of the ABA Task Force on the Attorney-Client Privilege, intended to "educate policymakers and the general public on the importance of preserving the attorney-client privilege." Mission Statement of the ABA Presidential Task Force on the Attorney-Client Privilege, *available at* http://www.abanet.org/buslaw/attorneyclient/. Since its creation, the Task Force has issued several Recommendations and Reports regarding the attorney-client privilege, including Recommendation 111, unanimously passed in August 2005. Recommendation 111 "opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage." ABA Task Force on Attorney-Client Privilege, Recommendation 111, *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf.

With respect to the Thompson Memorandum, in early September of this year, a bipartisan group of former Justice Department officials, including two former Attorneys General, sent a letter to Attorney General Alberto Gonzales to protest the increasing use of privilege waivers in government investigations of corporate crime. The letter urged the department to change its policies and "stop the practice of federal prosecutors requiring organizations to waive attorney-client privilege and work product protections as a condition of receiving credit for cooperating during investigations." Letter from Griffin B. Bell et al. to Alberto Gonzales, Attorney General, on Proposed Revisions to Department of Justice Policy

Regarding Waiver of the Attorney-Client Privilege and Work-Product Doctrine at p. 1 (September 5, 2006).

Legislative Trends/Rulemaking Regarding the Attorney-Client Privilege

Recent amendments to the United States Sentencing Guidelines and hearings in Congress focusing on the attorney-client privilege may suggest that the Bar's coordinated effort to preserve the privilege is having some effect.

In April, the United States Sentencing Commission voted unanimously to strike the language from the Commentary discussed above that suggested that waiver of the attorney-client privilege was determinative of whether a company was cooperating with an ongoing government investigation. In so doing, the Commission observed that although it had expected that waivers would "be required on a limited basis," it subsequently received public comment and heard testimony "that the sentence at issue could be misinterpreted to encourage waivers." 71 Fed. Reg. 28063 (May 15, 2005). Congress approved this proposed amendment and it took effect on November 1, 2006. Sentencing Guidelines Manual § 8C2.5 (2006).

Similarly, Congress has taken notice of the uproar surrounding the erosion of the attorney-client privilege, particularly as codified in the Thompson Memorandum. In March, the House Judiciary Committee held hearings on the issue of attorney-client privilege and corporate waivers. During those hearings, witnesses from both sides of the table expressed their views on the state of the attorney-client privilege in the corporate context. One witness, Robert D. McCallum, Jr., the Associate Attorney General at the U.S. Department of Justice, defended the policies outlined in the Thompson Memorandum but acknowledged that "[s]ome critics have suggested that the Department is contemptuous of legal privileges." *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcom. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 6 (2006). McCallum pointed to the McCallum Memorandum, a document he authored in 2005 during his time as Acting Deputy Attorney General, as evidence that the government is seeking to ensure that privilege waivers are not routine. The McCallum Memorandum instructs U.S. Attorneys to develop written waiver review processes for their districts. According to McCallum's testimony, these review processes ensure "that no Federal prosecutor may request a waiver without supervisory review." *Id.* However, despite McCallum's defense of federal policies, the tone of the hearing largely reflected concern. Another witness, former U.S. Attorney General Dick Thornburgh, now in private practice, spoke of the "grave dangers posed to attorney-client privilege and work product doctrine by current governmental policies and practices," *id.* at 12, and thanked the committee "for beginning a much-needed process of Congressional oversight of the privilege waiver crisis." *Id.* at 14. Thomas J. Donahue, President and CEO of the U.S. Chamber of Commerce, testified on behalf of a "coalition to preserve the attorney-client privilege." *Id.* at 16. To that end, he urged the committee to "exercise [its] oversight of the Department of Justice and the SEC to ensure the protection of the attorney-client privilege." *Id.* at 18.

Even more recently, during a Senate Judiciary Committee meeting in mid-September, Senate Judiciary Chairman Arlen Specter and ranking minority leader Patrick Leahy questioned representatives of the Attorney General's office and critics of the Thompson Memo on this issue. Following the hearing, Specter spoke to the National Association of Criminal Defense Lawyers and announced plans to introduce legislation that would, among other things, prohibit federal prosecutors from taking into account whether a corporation waived privilege when considering whether or not to seek charges. Specter, a Republican, said the bill has the support of Senator Leahy and other Democrats, although he acknowledged that the timeline for passage would be "next year at the earliest."

The views expressed by Specter also appear to be gaining traction within the SEC, as well. Although the SEC's formal policies do not expressly list waiver of the attorney-client privilege as one of the factors to be considered when determining a corporation's cooperation, SEC Commissioner Paul S. Atkins, in a speech delivered in late September, articulated his belief that the Commission should clarify that waivers will never be considered in this context.

Recent Case Law Addressing the Attorney-Client Privilege

In July, amidst these public challenges to privilege waivers, the Sixth Circuit decided a case that may indicate another step in the direction of strengthening attorney-client privilege. In *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, the court was called upon to weigh the competing interests of grand jury secrecy against the protection of the attorney-client privilege and found the protection of the attorney-client privilege to be paramount. 454 F.3d 511 (6th Cir. 2006).

In re Grand Jury Subpoenas involved Larry Winget, the former owner of Venture Holdings, who was suspected of looting the company prior to its falling into bankruptcy. *Id.* at 513. After Venture fell into bankruptcy, new ownership took control of the company ("New Venture") and received a subpoena to produce documents. *Id.* at 514. New Venture complied with the request and waived the company's attorney-client privilege. *Id.* Winget, however, claimed that the records held by New Venture were protected by his personal attorney-client privilege and wanted members of his defense team to have the first op-

portunity to determine which materials should be placed on the privilege log. *Id.* The district court rejected this option and instead allowed a government "taint team" to review the documents for privilege. *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 2005 WL 2978959 (E.D. Mich. 2005).

The Sixth Circuit addressed the issue of whether the government or Winget had the right to conduct the initial privilege screen of documents responsive to a grand jury subpoena issued to a third party. *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d at 516. Because the subpoena was not addressed specifically to Winget, the government argued that a privilege review by Winget's attorneys would result in a breach of grand jury secrecy. *Id.* However, the court determined that the privilege outweighed the investigative authority and secrecy of grand jury practice. *Id.* at 518.

Significantly, the court also rejected the government's proposal—following routine practice in these situations—that a taint team consisting of an Assistant United States Attorney from the same office as the prosecuting attorneys, although not affiliated with the case, and at least one Postal Inspector would review the documents and make privilege determinations in the first instance, noting:

> It is reasonable to presume that the government's taint team might have a more restrictive view of privilege than appellants' attorneys. But under the taint team procedure, appellants' attorneys would have an opportunity to assert privilege *only* over those documents which *the taint team has identified* as being clearly or possibly privileged. As such, we do not see any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise. . . . On the other hand, under the appellants' proposal, which incidentally seems to follow a fairly conventional privilege review procedure employed by law firms in response to discovery requests, the government would still enjoy the opportunity to challenge any documents that appellants' attorneys misidentify . . . as privileged.

Id. at 523 (emphasis in original).

Instead, the Sixth Circuit's approach permitted Winget's attorneys to conduct the review, as this method made it less likely that privileged material would fall into the hands of prosecutors or the grand jury. *Id*. The Sixth Circuit's opinion is arguably significant in that it not only elevates the protection of the attorney-client privilege above grand jury secrecy, but it also rejects what has become a conventional procedure for review of potentially privileged material by the government in many contexts, including material obtained pursuant to a search warrant.

Conclusion

While it is still too early to determine whether the government's assault on the attorney-client privilege has been arrested entirely or has simply been placed in a holding pattern, recent trends suggest that, at least in this area of criminal law, there may be reason for optimism. Though this article has addressed the lopsided tug-of-war over the government's expanding investigative powers within the context of the attorney-client privilege, perhaps the next phase in this battle should be focused on making the tug-of-war not so lopsided in the first place. One fertile area of inquiry may involve a re-examination of the source of the leverage that the government exerts over corporations, namely the foundational principles underlying the concept of corporate criminal liability. If the government could not so easily indict a corporation as a matter of its discretion based on the acts of even a low-level employee, its ability to obtain privilege waivers would drastically diminish.

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Book Review

Business and Commercial Litigation in Federal Courts, Second Edition

Reviewed by John Hartje

Business and Commercial Litigation in Federal Courts, published in 1998 by the West Group and the ABA Section of Litigation, was quickly recognized to be the most comprehensive and practical single reference work on its subject. When the annual pocket parts exceeded 1,800 pages, Robert L. Haig, the treatise's Editor-in-Chief, decided it was time for the Second Edition, which adds 16 new chapters and 47 authors to the already illustrious array of seasoned judges and practitioners who contributed to the First Edition.

It just isn't feasible to capture the full scope and content of this eight-volume treatise (including a CD Rom with forms and jury instructions), comprised of nearly 100 chapters and over 9,000 pages written by scores of judges and litigators, in a single review—just listing the chapters and authors would fill the page! So I have focused on three chapters which are a compendium of employment law and on a group of new chapters that effectively comprises a primer for in-house counsel who try to avoid lawsuits and then, when litigation strikes, to minimize the drain on corporate resources while achieving effective results.

As soon as you unpack your new set, read Chapter 22 "Discovery of Electronic Information," co-authored by the Honorable Shira A. Scheindlin, whose *Zubulake* decisions have been a resounding wake-up call for businesses where the explosion of e-documents and underlying meta-data had rapidly outpaced the ability to access and organize that material. There could hardly be a better source to follow and cite on e-discovery issues than the Judge who authored the seminal *Zubulake* case.

When you've caught your breath after inhaling Judge Scheindlin's wisdom, you can dive into the six chapters described below. Then cap off your reading with Judge Harold Baer, Jr.'s "Alternative Dispute Resolution," which appeared in the First Edition as well.

Chapter 5, "Case Evaluation," describes in detail how to perform substantive and quantitative case evaluations which, updated as circumstances warrant, will inform a company's decision-making at each juncture of a case: What are our chances in a jury trial? Should we mediate? Should we settle and for how much? Along the way, the authors also address Sarbanes-Oxley implications of case evaluations, privilege issues and a lawyer's disclosure obligations under FASB 5.

Chapter 54, "Litigation Avoidance and Prevention," identifies some commonsense strategies to avoid disputes by carefully managing your business conduct (e.g., "enforce sound internal policies and procedures") and suggests ways to defuse difficult situations (consider an apology, for example).

When lawsuits are thrust upon you, Chapter 55 provides "Techniques for Expediting and Steamlining Litigation" and carefully explores the dynamics of the three sets of relationships that can be the sources of resistance to faster and easier (and thus cheaper) litigation: between client and counsel; between opposing parties (and their respective counsel); and between the parties and the court.

In Chapter 56, "Litigation Technology," David Boies helps you to formulate a comprehensive plan to collect, store, review and categorize information electronically, and then to present it to maximum effect in federal courts that are equipped with sophisticated audio and video equipment.

Inside counsel should read Chapters 57, "Litigation Management by Law Firms," and 58, "Litigation Management by Corporations," together. Chapter 58 also alerts you to reserves requirements; audit letters; the role of in-house counsel with clients; and the special considerations of legal staff as fact witnesses.

Each of the 96 chapters is organized and formatted similarly. A "Scope Note" tells you what the chapter does and doesn't cover and cross-references the treatise's chapters that address both excluded and related topics. A comprehensive and carefully documented discussion of the chapter's subject matter then follows. Relevant West Key Numbers are identified along with other source material. Checklists appended to most chapters are an invaluable tool for in-house counsel trying to keep up with their outside counterparts.

The first 60 chapters address procedural and strategic considerations which can apply to all forms of litigation. Urge your outside lawyers to read them. The final 36 chapters (including the new chapter "Director and Officer Liability") address specific substantive claims. They are as valuable to inside business counsel as they are to in-house litigators. In clear, concise language, the authors discuss the substantive law as well as strategic and procedural considerations for both prosecuting and defending claims. No longer will you be stumped when your outside antitrust counsel mentions *Illinois Brick* (not construction material) or your patent lawyer tells you there's a "Markman hearing" next week!

Of particular interest to in-house counsel are the back-to-back discussions of the full spectrum of the substantive law of the workplace and the role of the federal courts in resolving the array of disputes which arise in that arena.

Chapter 77, "Labor Law," focuses on federal preemption, injunctions, judicial review of decisions of the National Labor Relations Board, and actions for damages for violations of contracts between an employer and a union.

Chapter 78, "Employment Discrimination," provides a detailed road map which charts commonsense courses through the thicket of each of the discrimination, harassment, disabilities, and family and medical leave statutes—from both the employer's and employee's perspective. The comprehensive Checklists for each statute of essential plaintiff's allegations and employer defenses (with references to the relevant chapter sections), and the linked Checklists of sources of proof, are handy references for both the employment specialist and the corporate generalist.

Finally, Chapter 79, "ERISA," demystifies that particularly esoteric area of law. It helps you to determine when ERISA applies and it addresses claims of unpaid benefits, breach of fiduciary duty and retaliation, as well as settlement and the risks to a company's benefit plans of adverse verdicts, among other considerations (e.g., removal to federal court is almost always advisable because those courts (i) better comprehend the statute's intricacies and (ii) treat claims as equitable and therefore nonjury).

Business and Commercial Litigation in Federal Courts, *Second Edition*, is truly one-stop shopping for in-house counsel.

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