NYSBA FALL 2009 | Vol. 27 | No. 2

Inside

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

Conal Eugene Murray

Conal Eugene Murray of Mt. Kisco, NY, died on May 13, 2009. He was born on October 12, 1937 to Dr. and Mrs. Francis Murray of New York City. He was a graduate of Cardinal Hayes High School '55, Harvard College '59, Harvard Business School '61, Harvard Law School '68 and NYU '73. He served as a U.S. Navy Lt. supply officer from 1961 to 1965. From 1968 to 1999, he served as Assistant General Counsel for Kraft Foods, and as President of the Westchester/Fairfield Corporate Counsel Association.

Mr. Murray was very active in the New York State Bar Association. He chaired the Association's Corporate Counsel Section in 1995 and was a member of that Section's Executive Committee from 1982 to present. He served a number of years as one of that Section's Delegates to the Association's House of Delegates, where he took an active role and organized the Section Delegates Caucus. He chaired the Association's Committee on Continuing Legal Education from June of 1998 until May of 2004, and was a member of that Committee from 1985 to present. He also served on the Association's Committee on Women in the Law.

He is survived by Betty Murray, his wife of 40 years; his son, Conal Murray; his daughter, Heather Murray; granddaughter Elisa Murray, and siblings Grace Carter, Frank Murray, Charles Murray and Kenneth Murray. Donations in his honor may be made to the American Cancer Society.

October 12, 1937 – May 13, 2009

NYSBA

An Appreciation of

Conal E. Murray

October 12, 1937 – May 13, 2009

Conal Murray was one of the founding members of the Corporate Counsel Section, having joined it at, or very soon after, its beginning in 1981, served as its Chair in 1986, and remained an active and involved member of the Executive Committee up to his untimely death in May. He was especially active in Continuing Legal Education (CLE). He chaired a very well received program on E-Discovery and E-Record Management for the Section's Annual Meeting last January, this being just the latest in a number of programs he helped to produce over his long term of service to our Section. He also served on the New York State Bar Association's CLE Committee, of which he recently concluded a term as Chair. When New York State instituted mandatory CLE some years ago, Conal was the one who explained its intricacies to us so that we could all understand them.

During Conal's recent four-year term as our Section's Delegate to the NYSBA House of Delegates, finding that the delegates of the respective NYSBA Sections had no available forum for discussing shared issues and concerns, he initiated and served as Chair of what has become the Section Delegates Caucus, which now meets immediately prior to each of the regular quarterly meetings of the House. Nor did Conal limit his Bar activities to a single association—he was also a past President of the Westchester/Fairfield Corporate Counsel Association. Conal's principal corporate legal position was with Kraft Foods from 1968-1999, where he served as Assistant General Counsel.

Having worked with Conal in one way or another since I joined the Section in the early 80s, it was impossible for me not to consider him a friend as well as a colleague. His warm, welcoming smile and willing, positive attitude about everything he did were infectious. Over the years I also came to know his wonderful wife Betty, who survives him, as do his son Conal, his daughter Heather Murray, his granddaughter Elisa Murray, and four siblings.

Conal, we all miss you. Thank you for all you have done. Know that it was appreciated and will be remembered, as we remember you with great fondness.

—Thomas A. Reed

Thomas A. Reed is a former Chair of the Corporate Counsel Section and the Section's representative to the NYSBA House of Delegates.

Message from the Chair

It's fall, and we're all settling back into the corporate rhythm after an extremely wet summer. In fact, a number of us were beginning to wonder how we'd managed to get Seattle's summer weather instead of our own.

It didn't affect our productivity, however. The Corporate Counsel Section has been busy these past few months. With the NYSBA CLE department, we co-sponsored a June program on Operating the Not-for-Profit Corporation in three locations across the state. Over 200 lawyers attended (last-minute seating had to be added in New York City) to hear panels address topics ranging from lobbying, crisis management, and taxation to fundraising in the context of a not-for-profit entity.

In August we held a reception honoring interns and host companies of the Kenneth R. Standard Diversity Internship Program, and opened this for the first time to Section members, giving them an opportunity to network with students, judges, and other members of the Bar, as well as the chance to see the concrete results of our Section's hard work.

In addition, we co-sponsored the NYSBA Membership Boat Cruise reception. Section representatives mingled with new and future Section members and other Sections while touring the sights of New York Harbor and generally showing our sea-faring, fun-loving side.

We've also been busy putting together our second Corporate Counsel Institute, which will be held November 19 and 20 at the Radisson Martinique Hotel in midtown New York City. This year's Institute is packed with today's critically relevant topics—plenary panels will discuss labor and employment law (with emphasis on reductions in force and the impact of labor law changes from President Obama's administration), corporate counseling in the electronic age—including managing PR ramifications, bankruptcy and creditors' rights, brand integrity and the law in social networking media, and intellectual property.

Last but not least, we will hear from Marshall Huebner of Davis Polk, lead counsel to the Federal Reserve Bank of New York and the Department of the Treasury, with respect to their multi-billion-dollar financing and equity stake in AIG.

The second day of the Institute pairs our annual Ethics for Corporate Counsel program with break-out sessions on developing employment issues (health care records and privacy, among others), commercial leases, law department cost savings and counsel management, and responding to EEOC, NYSDHR, and NYCCHR investigations. The Institute is one of our most popular events, so if you haven't registered, don't procrastinate—registration is not limited to Section members, and can fill up quickly.

The Section is also looking to Webinars and other technology to make our programs more accessible to members. We will be making offerings of this type available soon, and we hope that many of you will take advantage of them.

Finally, thanks to those of you who provided feedback on the changes to *Inside* and praise for its content. The Section and this publication exist to serve your practice—if there are other features or topics you'd like to see, make your voice heard.

Fawn M. Horvath

Inside

Editors: Janice Handler and Allison B. Tomlinson

SPECIAL ISSUE: CORPORATE CRIMINAL LIABILITY

The Corporation Under Scrutiny: Some Do's, Don'ts and the Ethical Grey; or Tools and Techniques to "Box Out" Corporate Criminal Liability

By Peter A. Crusco

Introduction

"Box Out!" This terse exclamatory statement is familiar to any veteran of the hardwood, that is, the basketball court. It's a basic concept in the game of basketball and simply translates to claiming the good floor space before your adversary does, so you're in the best position to grab that rebound and control the momentum of the game. The statement is also very apropos in the field of corporate criminal liability, where the game is anticipating and confronting legal issues before they metamorphose into significant challenges that may require visits to a different court, not the hardwood one. This article will address some current legal issues in the field of corporate criminal liability so that you too may hold the good floor space, control the momentum and avoid any legal "fouls" that may confront your corporate client.

> *"In the present economic climate many a company has cut to the bone its compliance department, given the fact that these departments are not profit-making units. Nevertheless, these departments have been found essential to the existence of a healthy company."*

Corporate Criminal Liability

The path leading to corporate criminal liability is even clearer today than it was a year ago, given the decision of the Second Circuit this past January in *United States v. Ionia Management S.A.*[1] The *Ionia* decision dashed any hopes held by the corporate Bar that the court would re-examine and depart from the 100-year-old-plus standard under which a corporation may be found criminally liable for an agent's conduct, that is, the judicially crafted standard holding a corporation liable under the doctrine of *respondeat superior*.[2] Instead, the court reaffirmed the age-old standard, the analog to the civil standard of *respondeat superior* and vicarious liability, which was engrafted by the federal courts and applied in criminal cases.[3] Although under attack in the *Ionia* decision, the assault was vanquished in the face of arguments utilizing the notorious consequences of the Arthur Andersen prosecution.[4] The court rejected the argument that the standard be replaced by the Model Penal Code (MPC), the law that is followed in the majority of states. Under the MPC, for criminal liability to lie there must be proof that unless directed otherwise by statute, the conduct at issue was authorized, permitted, or "recklessly tolerated" by a "high managerial agent," or a person whose responsibilities are so high that his or her acts may fairly be assumed to represent company policy.[5] Under the MPC, even if a statute is directed specifically at a corporation, an act is not deemed to be within the scope of employment if the company exercised due diligence to prevent its commission.[6] The court rejected the invitation to depart from precedent and in a summary fashion confirmed the standard and refused to require the prosecution to prove as an essential element that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees, although the court did state that a corporate compliance program may be relevant to whether an employee was acting in the scope of his or her employment. Given a compliance program's relevance to potential corporate liability, the next section discusses some issues concerning corporate compliance programs.

Corporate Compliance Programs

"You can't have a strong company without strong compliance, at every level—from strong CEO and executive support for the compliance team, to rigorous standards and processes, to broad financial and organizational resources . . .,"[7] stated Christopher Cox, the former Chairperson of the SEC, to a seminar attended by corporate compliance officers on Nov. 13, 2008. It is clear that the first defense to potential corporate jeopardy is the company's compliance or risk management department. In the present economic climate many a company has cut to the bone its compliance department, given the fact that these departments are not profit-making units. Nevertheless, these departments have been found essential to the existence of a healthy company.

> In a profit and loss driven world, there is always a risk that companies facing an uncertain economic future may choose to cut compliance expenses as a shortsighted way to save money. But experience has taught us again and again that giving short shrift to regulatory compliance subjects a company's investors, employees, management, directors and every other stakeholder to unacceptable risks.[8]

Like any organization, the message concerning responsibility and ethics must be clear from the top, and in the case of a corporation that means that it must originate from the board. Mixed messages are detrimental to the clear mission and health of any organization especially one that is profit driven. Moreover, given that profit is a motivating force in American corporate structure, executive compensation should not reward unethical management.

Although the voice of ethical decision-making must be heard from the top, for it to work, a foundation must be adequately "cured" from the ground up. The lower level employees and "rookies" must be adequately trained, supervised and ethical conduct ingrained. Further, one key indicator, that is, the manner in which the corporation determines high-level compensation, usually gives a picture of the ethical balance in the profit-driven company. It has been said that any board which makes poor decisions about a CEO's compensation package is almost certain to be making poor decisions elsewhere in its range of responsibilities.

An employee compensation package that rewards unethical conduct eventually costs the company in other ways, such as defending litigation for such misconduct. For instance, in the case of one company engaged in the mortgage business, employees were given much higher commissions when they recommended a subprime mortgage to a potential customer because the company made more money in points, interest and fees, even though that particular mortgage package was a far more costly one for the client with a good FICO score. The company was willing to assume the risk because their mortgages were repackaged and sold to other companies. Ultimately this was due to the fact that the loan officers who initially negotiated the mortgages and vetted the purchasers in these loans were not accountable to the companies who took the loss when the mortgage failed. Company goodwill and tangible assets suffered in defending litigation concerning the misconduct that came under intense scrutiny.

Any compliance program must be effective, meaning that it is fully funded, sufficiently staffed, and empowered to subject offenders to appropriate discipline. Without each of these attributes, the program is a paper tiger, receiving little respect from company employees who are driven by the profit margin. This usually means that the compliance officer must be directly answerable to the board and not reporting to others who may dilute or only choose to transmit "good" news.

Unfortunately, in many cases in which the corporation came under scrutiny of government law enforcers, the compliance officers were often "marginalized," seen as second class citizens, or speed bumps and potholes in the pursuit of new business or the use of creative corporate gimmicks. On occasion they were given responsibility but no authority, and with no resources they have limited ability to undertake internal investigations of even small scope. The tough issue is how you put all the right incentives into place so as to protect the company and continue a healthy business. Anyone who has played on a winning basketball team knows it means that egos have to play a back seat to what's in the best interest of the team. Of course, this is easier said than done. Every player must know his or her own role and endeavor to do one's best in that capacity. If the team's star is too aggressive and fouls out, the whole team suffers. A team with a good captain who communicates effectively and has good teamwork is rare and usually successful. It is a balance that in the sports world and the corporate world must be developed by the entire team. Knowledge and genetics will take a team only so far.

Internal Investigations

Once suspect misconduct has come to the attention of those in authority in a corporation, the corporation's officers usually try to get to the source and motivation for the misconduct. Corporations routinely conduct internal investigations with either inside or outside attorney-investigators.[9] Internal investigations eventually involve interviews by the attorney-investigators of corporate officers and employees. On occasion the corporation may inquire into the filing of criminal charges with a government entity. The issue of access and availability of the witness interview statements and reports to both the prosecution and the defense, and the application of the attorney-client or work product privileges[10] to those interview statements, is usually a significant issue and will most certainly be raised in the context of the official investigation and any subsequent prosecution. Furthermore, the terms of any retention letter memorializing the engagement of outside counsel may also be significant in defining the scope of the attorney-client privilege, work product privilege issues, and any possible waiver issues. Rest assured that the defense in any criminal prosecution of corporate officers or employees will demand access to the witness statements to assess the culpability of their client's conduct and anticipate the strategy and strength of the government's case. The defense will most certainly subpoena the witness statements if they were not voluntarily given to them. If the statements were given to the government, then the government is duty-bound to disclose the statements to the defense in certain circumstances.[11] The corporate attorneys may contest the subpoena or move to quash by contending the subpoenas are overly broad, or impermissibly seek disclosure of materials shielded by the attorney-client or work product privileges. Often the corporation will have cooperated or consulted with government agencies to avoid the corporation's exposure to serious criminal sanction. Thus, the defense attorney will contend that the corporation waived the privileges by its previous cooperation with the government. The initial burden is on the defense to demonstrate that the witness statements were reasonably likely to contain material that could contradict statements of key witnesses for the government.[12]

Once met, the defense must then overcome the privileges asserted by the corporation objecting to the disclosure of the witness statements. The accused's right to a fair trial is a major consideration in this potential litigation.

Accordingly, corporate counsel is well advised to closely monitor the creation and distribution of witness interview statements, keeping in mind the applicability of the attorney-client and work product privileges and the potential issues that may arise with future litigation. Additionally, any retention agreement concerning outside counsel must also be carefully analyzed with these issues in mind.

The Joint Defense Agreements

When corporations do come under scrutiny by law enforcers, the old adage of safety in numbers is reflected in the modern-day joint defense agreement. The joint defense agreement expands the attorney-client privilege to include communications between counsel for a corporation and its employees. Under the privilege, information exchanged among the attorneys remains privileged because the defendants were engaged in a common defense. Nevertheless, the courts have set rigid standards for invoking the joint defense privilege,[13] and prosecutors routinely view such agreements with suspicion because they fear that the cooperation and confidentiality among defendants inherent in a joint defense agreement will shield evidence, making it more difficult to isolate individuals and develop valuable cooperators.[14] In the past, defense counsel have referred to the "culture of waiver" that federal investigations have engendered, meaning that corporations would not be treated favorably by prosecutors if they entered into joint defense agreements with their employees. A corporation's involvement in a joint defense agreement was considered a negative factor. More recently, the Department of Justice's policy has shifted in that a corporation's participation in a joint defense agreement does not make it ineligible to receive credit for cooperation.[15]

Advancing Attorneys' Fees for Corporate Officers and Employees

Under prior DOJ policy, in assessing a corporation's cooperation, the prosecutor may weigh "whether the corporation appears to be protecting its culpable employees and agents." The policy acknowledged that "while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." One such type of corporate support referred to in the DOJ policy memo, the Thompson Memo, was "the advancing of attorneys' fees." The present DOJ policy reversed this position, noting that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." Present DOJ policy indicates that "[i]n extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation."[16]

Note that in reversing the prior policy, DOJ acknowledges that many corporations are required by state statute and/or contract to advance the fees for these corporate officials and, therefore, such payments "cannot be considered a failure to cooperate." One recent New York State case discussing a corporation's responsibility to honor an agreement to advance litigation fees and expenses is *Ficus Investments, Inc. v. Private Capital Management, LLC*.[17] The operating agreement provided for advancement of expenses and indemnification for members, managers and officers of the company when certain criteria were satisfied. Intentional misconduct and knowing violations of law were excepted from coverage under the fee agreement. The court cited Delaware law in that one of the beneficial purposes of both indemnification and advancement is to help attract capable individuals into corporate service by easing the burden of litigation-related expenses. In *Ficus*, a corporate officer was alleged to have stolen company property. The company balked when requested by the officer to provide litigation fees to him. Under the agreement, advancement of fees was contingent only upon the person's submission of a written affirmation that he or she has not engaged in prohibited conduct and an undertaking to repay any funds disbursed. The court determined that mere allegations of theft do not relieve the company from its obligations to advance expenses, and a request for advancement is not meant to become an adjudication of the merits of the case against the officer. A summary proceeding was all that was necessary for a determination of entitlement to advancement of the officer's expenses. On the other hand, an agreement to advance fees does not preclude the company with due diligence to investigate, locate and freeze property held in the name of the defalcators that can be traced to corporate theft,[18] and recoup as restitution for losses not only the purloined property but costs associated with the internal investigation.[19]

Conclusion

This article provides only a snapshot of potential issues you may face when the corporation comes under scrutiny by government law enforcers. As with many legal conundrums, you must review the issues in advance and consider appropriate steps in anticipating concerns so that you, too, may box out the specter of corporate criminal liability!

Endnotes

1. *United States v. Ionia Management S.A.*, 555 F.3d 303 (2d Cir. 2009).
2. *See, e.g., People v. Rochester Railway & Light Company*, 195 N.Y. 102 (1909).
3. *New York Central Railroad v. United States*, 212 U.S. 481 (1909).
4. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
5. *See* MPC Proposed draft § 2.07(1) (1962).
6. *See* MPC Proposed draft § 2.07(5).
7. *See* Speech of SEC Chairperson Christopher Cox on Nov. 13, 2008, *available at* http://www.sec.gov/news/speech/2008/spch111308cc.htm.
8. *See* Speech of SEC Chairperson Christopher Cox, *supra* note 7; *see, e.g.,* David Hechler, *Risky Business*, Corporate Counsel Magazine, April 01, 2009, *available at* www.law.com.
9. *See, e.g., People v. Kozlowski*, 11 N.Y.3d 223, 869 N.Y.S.2d 848 (2008).
10. CPLR 3101.
11. *See, e.g., People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961); C.P.L. § 240.45.
12. *See People v. Gissendanner*, 48 N.Y.2d 543, 550, 423 N.Y.2d 893, 897 (1979).
13. *See, e.g., United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999).
14. *See, e.g.,* American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 Duquesne Law Review 307, 327 (2003).
15. *See, e.g.,* Audrey Strauss, *Justice Reverses Opposition to Joint Defense Agreements*, N.Y.L.J., Nov. 6, 2008, p. 5.
16. *See United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, 2006 WL 2060430 (S.D.N.Y. July 25, 2006); The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations Before the U.S. Senate Committee on the Judiciary (Sept. 12, 2006) (statement of Andrew Weissmann, Esq.); *see, e.g.,* Elkan Abramowitz and Barry Bohrer, *Justice and Corporate Prosecutions: The Continuing Saga*, N.Y.L.J., Sept. 2, 2008, p. 3.
17. 61 A.D.3d 1, 872 N.Y.S.2d 93 (1st Dep't 2009).
18. *See Corporacion Nacional del Cobre de Chile v. Hirsch*, 242 A.D.3d 183, 673 N.Y.S.2d 681 (1st Dep't 1998).
19. *See, e.g.,* Daniel M. Gitner and Brian A. Jacobs, *Seeking Restitution for the Costs of Internal Investigations*, N.Y.L.J., Sept. 29, 2008, p. 4.

Peter A. Crusco is the Executive ADA in charge of the Investigations Division in the Office of the Queens County District Attorney, a former law clerk to the judges of the Appellate Division for the Fourth Department, Executive Articles Editor of the *Duquesne University Law Review* and the ninth man on the St. Luke's basketball team, a perennial contender for the Long Island Lutheran "Over the Hill" trophy. The views expressed herein are his own.

The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective

By Beth A. Wilkinson and Alex Young K. Oh

I. Introduction

Ten years ago, in June 1999, the U.S. Department of Justice (DOJ) issued the Principles of Federal Prosecution of Business Organizations (the "Principles") to articulate and standardize the factors to be considered by federal prosecutors in making charging decisions against corporations.[1] The Principles—which were amended several times over the past decade—have had a significant impact on the fate of corporations being investigated for possible criminal misconduct.

> *"Companies may be well-advised . . . to increase their focus on the development and implementation of world-class corporate compliance systems."*

To mark the ten-year anniversary of the Principles, we examined recent DOJ corporate criminal prosecutions to assess whether any broad trends could be observed about the current state of corporate criminal prosecutions.[2] While it is difficult to generalize, one observation is that corporate cooperation now appears to be presumed by DOJ, rather than be viewed as a potentially decisive factor for granting a more lenient resolution to the company under investigation. Another discernible trend may be an increasing focus by DOJ on the adequacy of corporate compliance systems, either as a factor to consider under the Principles in charging the corporation criminally, or as an on-going condition of a settlement agreement to be administered by an independent monitor. The case that best exemplifies these observations is, in our view, the recent criminal prosecution of Siemens AG, Europe's largest electronics and engineering concern, where DOJ itself acknowledged the "extraordinary" cooperation provided by the corporation, but nonetheless required the corporation to plead guilty to felony violations of the Foreign Corrupt Practices Act (FCPA) and imposed an independent monitor for four years to oversee the company's corporate compliance system as part of the plea agreement.[3] This case is discussed further in Section III.

Of course, cooperation remains an important component of any corporate response to a DOJ investigation. Companies may be well-advised, however, to increase their focus on the development and implementation of world-class corporate compliance systems. Such a system not only may prevent or detect misconduct by employees, but may better position the company for leniency under the Principles—in the form of alternative settlements such as deferred prosecution agreements (DPA) or non-prosecution agreements (NPA)—in the unfortunate event of a DOJ criminal investigation.

II. Background

A. The Evolution of the Principles

The Principles comprise a set of nine factors to guide federal prosecutors "on investigating, charging, and negotiating a plea or other agreement with respect to corporate crimes."[4] Although the Principles share many factors with the U.S. Corporate Sentencing Guidelines, the Principles differ from the Sentencing Guidelines in that they do not create a formulaic decision-making process.[5]

The original Principles that were issued in 1999 were known as the "Holder Memo" because the memo was authored by then-Deputy Attorney General Eric Holder, Jr. At the time, the Holder Memo's factor that received the most attention from corporations was cooperation, presumably because cooperation likely was a factor over which a corporation under investigation could exert greatest control. Indeed, the Holder Memo expressly instructed federal prosecutors to consider, when evaluating the corporation's cooperation, whether the corporation waived the attorney-client privilege or advanced legal fees to culpable employees.[6] This, of course, led to many companies waiving privilege in order to obtain leniency from DOJ, even though such practices received some criticism.[7]

The first-revised Principles, issued by then-Deputy Attorney General Larry D. Thompson in 2003 (known as the "Thompson Memo"), came on the heels of the Enron and WorldCom scandals and only heightened the pressure on corporations. The Thompson Memo not only permitted federal prosecutors to consider waiver of privilege as part of cooperation, but encouraged them to scrutinize "the authenticity of a corporation's cooperation,"[8] including by considering whether the corporation, while "purporting to cooperate," actually impeded the investigation.[9] Corporations, in turn, were compelled to demonstrate the "authenticity" of their cooperation by resorting to increasingly creative measures, such as conditioning legal fees for employees embroiled in the investigation on their agreement to provide testimony to prosecutors.[10]

The intense pressures on corporations to demonstrate "authentic" cooperation abated in 2006, only after judicial intervention. In *United States* v. *Stein*, the Hon. Lewis A. Kaplan held that prosecutors in the U.S. Attorney's Office for the Southern District of New York violated the Fifth and Sixth Amendment rights of KPMG employees by coercing KPMG, as part of its cooperation with the criminal investigation, to condition payment of the employees' legal fees on the employees' willingness to be interviewed by the Government.[11] Soon after the *Stein* decision, Senator Arlen Specter introduced legislation to prevent prosecutors from considering the waiver of the attorney-client privilege in their prosecution decisions.[12]

In response to these judicial and legislative rebukes, then-Deputy Attorney General Paul McNulty revised the Principles in 2006 by forbidding prosecutors from seeking information protected by the attorney-client privilege without first establishing a legitimate need for the information.[13] The most recent version of the Principles—the "Filip Memo"—issued by then-Deputy Attorney General Mark Filip in 2008—completely removed consideration of a waiver of the attorney-client privilege and the payment of employees' legal fees as factors in corporate charging decisions.[14] Under the most recent version of the Principles, then, cooperation by a corporation simply means disclosure of all relevant factual information to investigators, but does not require waiver of any privileges.[15]

B. Increasing Use of NPAs, DPAs and Independent Monitors

Separately, since 2003, DOJ has turned increasingly to alternative settlement agreements such as NPAs and DPAs to resolve corporate criminal investigations. A study published by the Government Accountability Office (GAO) in June 2009, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreement* ("Preliminary Observations"),[16] observed that DOJ recently "has made more use of [DPAs and NPAs]," in which prosecutors may "require companies to hire an independent monitor to oversee compliance."[17] Indeed, the GAO found that in 26 of the 57 DPAs and NPAs reviewed as part of its study, an independent monitor was imposed by DOJ on the corporation to monitor compliance procedures.[18]

This trend may be, in part, due to the public outcry over the rapid demise of Arthur Andersen following the DOJ's indictment and conviction of Arthur Andersen for obstruction of justice in 2002. Not only was Arthur Andersen's conviction ultimately overturned by the U.S. Supreme Court,[19] but the indictment of Arthur Andersen caused unfair harm to the thousands of innocent employees and shareholders of Arthur Andersen. Resorting to NPAs and DPAs with independent monitors allows DOJ to maintain oversight over corporations that engaged in misconduct, without putting such companies out of business.

An independent monitor's typical responsibility is "to assess and monitor a corporation's compliance with [the] terms of the agreement . . . and reduce the risk of recurrence of the corporation's misconduct."[20] DOJ sought to articulate its rationale for requiring independent monitors in a March 2008 memo issued by then-Acting Deputy Attorney General Craig Morford ("Morford Memo").[21] The Morford Memo noted that independent monitors are not employees or agents of the corporation or the government, but rather act as third-party advocates,[22] and benefit corporations by providing "expertise in the area of corporate compliance from an independent third party."[23] At the same time, according to the Morford Memo, the corporation's shareholders, its employees, and the public "benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace."[24]

For most companies, however, independent monitors can substantially increase the cost of a DOJ settlement because companies must bear the expenses incurred in retaining an independent monitor, which can be substantial.[25] Moreover, company officials interviewed as part of the recently released GAO study complained that they had "little leverage to negotiate fees, monitoring costs, or the monitor's roles and responsibilities with the monitor" because the monitor had the power to conclude that the company was not in compliance with its agreement with DOJ.[26]

There are also problems arising from the current absence of any defined DOJ criteria for selecting corporate monitors.[27] Typically, the selection process for an independent monitor is set forth in the NPA or DPA, and permits input from the federal prosecutors and the corporation without any clear guidelines.[28] In a recently publicized case, the hiring of former Attorney General John Ashcroft as an independent monitor by Zimmer, Inc., which was under investigation by a U.S. Attorney who had served under Mr. Ashcroft, came under great criticism for potential conflict of interest, especially when it was discovered that Mr. Ashcroft had received $28 million from Zimmer for an 18-month independent monitor contract.[29] The GAO has recommended that the Deputy Attorney General "adopt internal procedures to document both the process used and reasons for monitor selection decisions,"[30] and the DOJ recently agreed to adopt internal procedures to document the process for the selection of corporate monitors.[31]

III. Case Study: Siemens

As noted above, we believe that the recent criminal prosecution of Siemens for FCPA violations exemplifies the above recent trends in corporate prosecutions, i.e., cooperation alone may not be sufficient to obtain leniency, and the increasing focus on the adequacy of a company's compliance systems not only in charging decisions, but as part of a settlement.

In December 2008, Siemens AG, Europe's largest electronics and engineering company, entered into a plea agreement to resolve bribery investigations being conducted simultaneously by the DOJ and by German authorities. In the DOJ plea agreement, Siemens agreed to plead guilty in the United States to two counts of criminal violation of the books and records and the internal controls provisions of the FCPA, and to pay a record combined fine and penalty of $800 million to the U.S. authorities. Combined with an additional $856 million paid to the German authorities, Siemens paid a total fine of $1.6 billion.[32]

DOJ required Siemens to plead guilty to felonies despite acknowledging that Siemens provided "extraordinary" cooperation during DOJ's investigation, including by conducting an internal investigation "of unprecedented scope"[33] that included "virtually all aspects of [Siemens'] worldwide operations,"[34] and by sharing the results of such an investigation with the governmental authorities.[35] According to published reports, Siemens paid an estimated $275 million in legal fees for the internal investigation, which involved over 297 lawyers from Debevoise LLP, who billed over 354,000 hours.[36] In addition, Siemens reportedly paid $470 million to Deloitte & Touche to assist in the internal investigation.[37]

Such extraordinary cooperation and expenditure, however, were not enough for Siemens to resolve the criminal investigation with a more lenient resolution, such as a DPA or an NPA. The extraordinary size and frequency of the bribe payments undoubtedly weighed heavily on the scale. Interestingly, the DOJ expressly noted the gross inadequacies of Siemens's compliance systems in its charging documents. In the Criminal Information filed against Siemens, DOJ charged that Siemens's internal compliance policies and procedures were nothing more than "paper program"[38] and that, "for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens."[39] DOJ also found that Siemens's compliance systems were understaffed and small for the scale of its operations, that Siemens's senior management ignored potential corruption issues and failed to adequately investigate such issues, and that Siemens "engaged in systematic efforts to falsify its corporate books and records and circumvent existing internal controls."[40]

As a result, in addition to the guilty plea and the record fine, DOJ prosecutors required Siemens in the plea agreement to improve its compliance policies and procedures, and to hire an independent monitor for four years to ensure, among other things, that Siemens implements an effective system of corporate governance.[41] For example, the Siemens independent monitor is charged with evaluating the corporation's internal controls, record keeping, and compliance programs.[42] The monitor is obligated under the plea agreement to issue a written report making recommendations to improve the effectiveness of Siemens's compliance programs.[43] Siemens would have an opportunity to comment on any recommendations,[44] but would have to adopt the report's recommendations, unless the recommendations were "burdensome, . . . impracticable, costly or otherwise inadvisable."[45] Finally, the plea agreement requires Siemens to retain independent U.S. counsel to advise the independent monitor in the carrying out of his duties.[46] Such an undertaking undoubtedly will add a significant expense and burden on Siemens for the next four years.

IV. Conclusion

Our review of recent DOJ prosecutions demonstrates that one clear effect that the Principles have had on corporate criminal investigations over the last decade is to hammer in the point that corporations must cooperate fully in DOJ investigations. What is not clear, in light of the recent amendments to the Principles to reign in the definition of "cooperation," is whether cooperation alone is enough to make the difference between a guilty plea or an alternative settlement such as an NPA or a DPA.

DOJ's increasing focus on the adequacy of compliance systems in charging decisions provides some room for corporations to seek to distinguish themselves in the unfortunate event of a criminal investigation. Implementing and maintaining a state-of-the-art compliance system not only helps a company to prevent and detect criminal wrongdoing, but also would better position the company in negotiations with DOJ. Moreover, such a company may have a better chance of talking DOJ out of imposing a costly independent monitor than a company that does not have an adequate compliance system.

Endnotes

1. Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Attorneys (June 16, 1999) [hereinafter *Holder Memo*], *available at* http://www.usdoj.gov/ criminal/fraud/docs/reports/1999/chargingcorps.html.
2. For this article, all DOJ press releases concerning corporate criminal prosecutions for the period from May 2006 through the present, and related documents, were reviewed.
3. Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008) [hereinafter *Siemens' Press Release*], *available at* http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html.
4. *Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office) [hereinafter *Preliminary Observations*], *available at* http://www.gao.gov/new.items/d09636t.pdf.
5. *Compare* U.S. Sentencing Guidelines Manual § 8A-8C (2004), *with* Memorandum from Mark R. Filip, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, U.S.A.M. §§ 9-28.700 (Aug. 28, 2008) [hereinafter *Filip Memo*], *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.
6. *Holder Memo*, *supra* note 1, § VI.
7. *See, e.g.*, Philip Urofsky, *Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs*, U.S. Att'ys' Bull., May 2002, at 19, 21-22, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5002.pdf.

8. Memorandum from Larry D. Thompson, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.
9. *Id.* § VI.
10. *See Filip Memo*, *supra* note 5, § 9-28.710 (acknowledging that "a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection").
11. *United States* v. *Stein*, 435 F. Supp. 2d 330, 367-73 (S.D.N.Y. 2006), *aff'd on other grounds*, 541 F.3d 130 (2d Cir. 2008).
12. *See* Attorney Client Privilege Act of 2006, S. 30, 109th Cong. (2006). The bill stalled in the Senate.
13. Memorandum from Paul J. McNulty, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, § VII (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.
14. *Filip Memo*, *supra* note 5, § 9-28.710.
15. *Id.* § 9-28.700-760.
16. *Preliminary Observations*, *supra* note 4.
17. *Id.* at 1.
18. *Id.* at 19.
19. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
20. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Dep't of Justice, on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corps. to Heads of Dep't Components, § I (Mar. 7, 2008) [hereinafter *Morford Memo*], *available at* http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf.
21. *Id.*
22. *Id.* § III.A.
23. *Id.* § I.
24. *Id.*
25. *See Preliminary Observations*, *supra* note 4, at 28-29.
26. *Id.* at 29.
27. *Id.* at 6. Recently proposed legislation aims to promote uniformity in the use of NPAs and DPAs, and what such agreements should contain. Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong., § 4 (2009), *available at* http://www.opencongress.org/bill/111-h1947/text.
28. *Preliminary Observations*, *supra* note 4, at 23.
29. Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. Times, Jan. 10, 2008, *available at* http://www.nytimes.com/2008/01/10/washington/10justice.html.
30. *Preliminary Observations*, *supra* note 4, at 30.
31. *Id.*
32. *Siemens' Press Release*, *supra* note 3.
33. *Id.*
34. Department's Sentencing Memorandum at 2, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C. Dec. 12, 2008).
35. *Siemens' Press Release*, *supra* note 3.
36. Michael D. Goldhaber, *Cheap at the Price*, Am. Law., May 2009, at 86.
37. *Id.*
38. Criminal Information ¶ 39, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C. Dec. 12, 2008) [hereinafter *Siemens's Criminal Information*].
39. *Siemens's Press Release*, *supra* note 3 (quoting Acting Assistant Attorney General Matthew Friedrich).
40. *Siemens' Criminal Information*, *supra* note 38, at ¶¶ 65-88, 89.
41. Statement of Offense, Attachment 2 ¶ 1, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C. Dec. 12, 2008).
42. *Id.*
43. *Id.* Attachment 2, ¶ 5.
44. *Id.* Attachment 2, ¶ 6.
45. *Id.* Attachment 2, ¶ 5.
46. Plea Agreement ¶ 12, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C Dec. 15, 2008).

Beth A. Wilkinson and Alex Young K. Oh, both former federal prosecutors, are members of Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors gratefully acknowledge the assistance of Andrew J. Graeve in the preparation of this article.

Request for Articles

If you have written an article and would like to have it considered for publication in *Inside*, please send it to either of its editors:

Allison B. Tomlinson
Parsons Brinckerhoff
1 Penn Plaza
New York, NY 10119
allison11955@aol.com

Janice Handler
handlerj@aol.com

Articles should be submittted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/Inside

From In-House to the Jailhouse—A Career Path to Avoid

By Alfredo F. Mendez and Danielle Elias

Lawyers have never been immune from scrutiny by law enforcement. It has not been unusual to see prosecutors, particularly in the federal arena, probing the conduct of litigation and criminal defense attorneys to determine the lawyers' potential involvement in their clients' suspected criminal conduct. As a result of the well-publicized corporate scandals that began with Enron and continue to this day with the subprime mortgage industry scandals, the conduct of in-house and transactional business lawyers has come more and more under the prosecutorial microscope.

Law enforcement's response to the continued corporate scandals has been the emergence of numerous investigations and criminal prosecutions of transactional attorneys in the banking, insurance, securities, tax and health care areas. Prosecutors seem to be betting that, by going after lawyers who review and ultimately "bless" the transactions that prosecutors consider illegal, and raising the stakes by threatening lawyers with jail and loss of their license if convicted, business lawyers will be forced to be more conservative in the advice that they give to their employers and clients, and businesses will have no choice but to curb or stop completely practices that the government considers illegal or unethical.

With increasing frequency, federal prosecutors have followed through on their threats to prosecute business lawyers. According to a report that the American Bar Association issued in October 2007, at least 25 in-house attorneys have faced federal criminal prosecution since Congress passed the Sarbanes-Oxley Act in 2002. Of more than 1,200 convictions gained in the last six years by the federal Corporate Fraud Task Force created after Enron, at least 23 were of corporate attorneys. State prosecutors have not remained idle, either. In New York, the New York State Attorney General and the Manhattan District Attorney, among others, have been very aggressive in investigating corporate attorneys involved in what those offices perceive to be questionable business transactions in the banking, insurance, health care and securities industries.

In-house counsel work in a very fast-paced business environment where the stakes are raised because millions of dollars are regularly at issue and the questions presented can be very complicated. Corporate attorneys are often asked by company executives or their bosses to review and approve transactions that the attorneys suspect are potentially problematic. In this current prosecutorial climate, it would be suicidal for in-house attorneys to simply "go along with the plan" either to please the boss or for fear of losing their well-paid positions in the company. When in-house counsel is pushed to play ball, his or her solution can be to look the other way and do nothing affirmatively to stop the misconduct. That approach can be disastrous. Indeed, when an in-house attorney allows his or her judgment to be compromised, and in so doing collaborates in wrongdoing or becomes "willfully blind" to what is happening, he or she will find himself or herself in serious criminal trouble.

"Prosecutors seem to be betting that, by going after lawyers who review and ultimately 'bless' the transactions that prosecutors consider illegal . . . business lawyers will be forced to be more conservative in the advice that they give to their employers and clients, and businesses will have no choice but to curb or stop completely practices that the government considers illegal or unethical."

Recent Prosecutions of In-House and Corporate Counsel

On July 13, 2007, a Chicago federal jury convicted Conrad Black, the former Chairman of Hollinger International, Inc., of various mail and wire fraud charges. The same jury also convicted Mark Kipnis, an in-house attorney who worked for Hollinger in Chicago, on three counts of having committed mail fraud.[1]

Prosecutors accused Kipnis, Hollinger's former chief in-house corporate counsel, of facilitating a series of business transactions that wrongfully put millions of dollars in his co-defendants' pockets. Specifically, he was accused of drafting a number of noncompete agreements connected with the sale of Hollinger publications. Accounts of the trial revealed that, from 1999 to 2001, Chicago-based Hollinger, now known as Sun-Times Media Group, Inc., sold off hundreds of community newspapers to concentrate on its main publications. Prosecutors claimed that these deals were set up to extract a fee from buyers in exchange for a pledge from Hollinger that it would not compete against its former properties in the future. Prosecutors presented evidence that millions of dollars in noncompete fees went to an entity that Black and others controlled. Prosecutors argued that Hollinger's shareholders were cheated, because the fees should have gone to the company instead.

Kipnis's defense attorney argued that Kipnis was a dedicated company lawyer who was simply in over his head when he became Hollinger's corporate counsel. He argued that Kipnis followed orders from his employer and relied, as he was told that he could, on the advice of outside counsel regarding the legality of the agreements that he had drafted. The prosecutors never accused Kipnis of conceiving the fraudulent scheme but argued that, as the lawyer who drafted the noncompete agreements, Kipnis played a critical role in the scheme and it did not matter that he was implementing other people's decisions as opposed to running the show. It also did not matter that Kipnis received no money from the scheme. In essence, Kipnis was prosecuted and convicted for being an enabler of business transactions that the government claimed he knew were illegal.

Noncompete agreements like those in the Hollinger case can serve legitimate business purposes. Corporate attorneys have always said that they should not be presumed to know everything just because they prepared the transactional documents. However, when as in the Hollinger case, the attorney's role in drafting the questionable agreements is extensive, it is very hard to convince a jury that the lawyer did not know or suspect that there was a problem. The Hollinger jury's decision to criminalize an in-house attorney's failure to ask questions of his employer or client, or to rely on outside counsel to tell him or her if there was a problem, should be very frightening to every corporate attorney in America. Kipnis avoided going to jail, and was sentenced to five years probation, including six months of electronically monitored home detention. However, his career as an attorney is over.

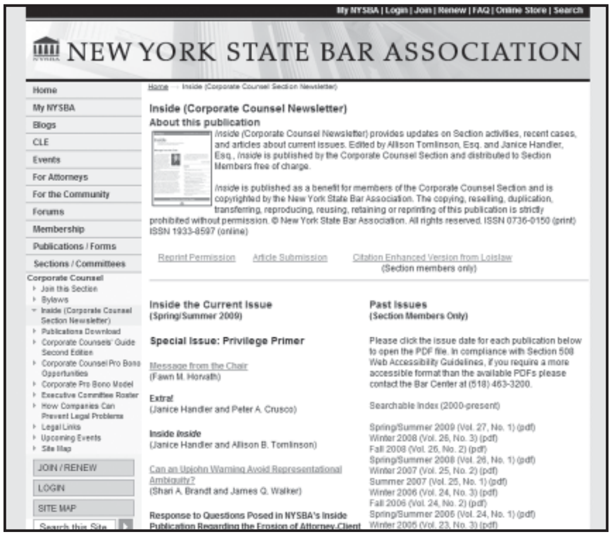
In 2008, Robert Graham, associate general counsel at General Re Corp., was indicted by a federal grand jury in Connecticut.[2] He was charged with engaging in a fraudulent scheme to help American International Group Inc. (AIG) to structure a sham reinsurance transaction. The transaction made it appear as if Gen Re was buying reinsurance from AIG, one of its frequent customers, in order to make it seem as if AIG had increased its loss reserves by $250 million in the fourth quarter of 2000 and by an additional $250 million in the first quarter of 2001. According to the prosecution, AIG needed the deal to dupe investors into believing that AIG was in better financial shape than it really was. Prosecutors claimed that Graham drafted the contracts for the transaction even though he knew that the transaction was fraudulent and then tried to hide the evidence.

According to the government, it was the AIG Chairman who initiated the deal with Gen Re. However, Graham participated in phone calls discussing the deal, drafted two contracts in which Gen Re appears to pay AIG millions for reinsurance, and knew that the contracts were phony. In addition, the government presented evidence that Graham created a paper trail to deceive auditors and make it appear as if Gen Re, and not AIG, had commenced the transaction.

Graham's defense centered on the argument that this type of deal was common in the reinsurance business and that Graham always thought that the transaction was legal. However, the prosecution produced an e-mail from Graham to Gen Re's general counsel, which the prosecution contended showed that Graham knew that the deal was a sham. Graham argued that the e-mail actually showed that he was trying to do the right thing by sharing his concerns with his immediate boss. The jury rejected Graham's arguments and believed the government. Graham was convicted of 16 felony counts. On May 7, 2009, he was sentenced to 12 months and 1 day in prison to be followed by 24 months of supervised release, and fined $100,000. He has been disbarred.

Conservative advice does not always prevent the government from coming after transactional attorneys. Two highly respected health care attorneys were prosecuted alongside certain executives of their hospital client for aiding and abetting violations of the federal anti-kickback statute.[3] The attorneys had drafted contracts providing that a hospital client would pay certain doctors an annual fee for consulting and administrative services. The government commenced an investigation of the hospital when a whistleblower employee told the FBI that the doctors were not performing the services under the contracts drafted by the lawyers. The government alleged that the doctors created these sham consulting agreements and that the hospital's lawyers assisted in preparing them. The government procured the attorneys' files from the hospital as a condition of a global settlement with the hospital. Although the files contained evidence that the lawyers had given conservative advice to the hospital, the government relied on other notes and memos in the files to argue that the lawyers knew that the contracts were a sham. The case proceeded to trial. At the close of the government's case, the court found that the government had failed to meet its burden of proof and dismissed all charges against the lawyers.[4] Despite their ultimate triumph in court, the lawyers took a tremendous hit to their professional reputations and wallets.

Inside (the Corporate Counsel Newsletter) is also available online



Go to www.nysba.org/Inside to access:

- Past Issues (2000-present) of *Inside**
- *Inside* Searchable Index (2000-present)
- Searchable articles from *Inside* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be a Corporate Counsel Section member and logged in to access. Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

Conclusion

In this current climate, government views in-house attorneys as a first line of defense against corporate misconduct and greed. Any lapse of judgment by an in-house attorney can have disastrous consequences for the attorney. Thus, corporate lawyers must be aware of all of the circumstances that have led prosecutors to charge their colleagues in the past. However, recognizing potential problem areas alone is not sufficient. Lawyers must use their common sense. In many cases, the questions that the lawyer did not ask the employer or client will determine the lawyer's fate. Trial juries will be given instructions which will permit them to find the lawyer guilty as charged if the jurors conclude that the lawyer willfully closed his or her eyes to the truth or deliberately chose not to ask the hard questions. In the end, if you have to think hard about whether you should do something that your employer or client asks you to do, you should not do it. Unless, of course, you aspire to be a jailhouse lawyer.

Endnotes

1. *U.S. v. Black*, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (May 18, 2009) (No. 08-876).
2. *U.S. v. Ronald E. Ferguson, et al.*, 3:06-CR-137(PCD); *see also U.S. v. Ferguson*, 545 F. Supp. 2d 238 (D. Conn. 2008).
3. 42 U.S.C. § 1302a-7b(b).
4. See *U.S. v. Dan Anderson et al.*, Case No. 98-20030-JWL, Superseding Indictment (D. Kansas July 15, 1998), reported in part at 85 F. Supp. 2d 1047 (D. Kansas 1999).

Alfredo F. Mendez is the partner in charge of the White Collar Criminal Practice Group at Abrams Fensterman Fensterman Eisman Greenberg Formato & Einiger, LLP. He is a former Chief of the Financial Crimes Section in the Criminal Division of the NYS Attorney General's Office, former Deputy Commissioner/Chief Counsel to the NYS Commission of Investigation and former Special Assistant U.S. Attorney in the Southern District of New York.

Danielle Elias, a third-year law student at Fordham University School of Law and a summer clerk at Abrams Fensterman Fensterman Eisman Greenberg Formato & Einiger, LLP, assisted in writing this article.

The "Nuts and Bolts" of Internal Investigations in Today's Highly Charged Regulatory Environment

By Marvin G. Pickholz, Jonathan S. Sack, Ernest E. Badway and Jason R. Pickholz

Internal investigations are difficult and expensive exercises for companies, typically undertaken in response to concerns about possible employee wrongdoing. The objective is to understand and address the matter by determining that misconduct did not occur, or, alternatively, occurred warranting an appropriate corporate response, ranging from sanctions on employees (up to and including termination), disclosure to one or more government or self-regulatory agencies and shareholders, and remedial actions to deter and detect such misconduct in the future. To achieve this result, one touchstone above all others should guide the internal investigation: the investigation must in fact and appearance be reliable and credible to the various audiences (who may include the company's senior executives and directors, the company's shareholders and debt holders, lenders and outside auditors, and regulatory, civil and criminal authorities) that will judge and rely on its conclusions.

The Structure of Internal Investigations

The decisions a company makes at the start of an investigation—decisions on basic structural issues—may very well determine whether the investigation succeeds and puts the matter to rest or fails and is merely one more challenge for the company to overcome. The key structural decisions to make at the outset consist chiefly of the following: (a) the nature and scope of the investigation; (b) who should the client be for purposes of the investigation, or, phrased differently, who should oversee the investigation and ultimately decide what the conclusions of the investigation should be; (c) who should conduct the investigation; and (d) what basic practices should be followed in regard to the collection of evidence, both in the gathering of documents and the conduct of interviews. What makes these decisions especially challenging is that, as critical as they are to a successful internal investigation, the decisions must be made quite early—before many of the important facts are known.

First, once a company decides to investigate, it must decide how to investigate the matter to satisfy those parties who will judge the quality of the investigation without causing undue disruption and expense. Much depends on the specificity and apparent merit of the complaint or issue being investigated. If the allegations under review are very specific and credible, then an investigation may readily be tailored to identify the witnesses who must be interviewed and documents to review so as to adequately investigate. More difficult is the situation of a vague or amorphous complaint, when a company may find it appropriate to conduct a preliminary inquiry, focusing on the witnesses and documents most likely to reveal any possible wrongdoing, and only then deciding whether to pursue a fuller inquiry, if justified, as well as its future scope. Just as it would often be a mistake to refuse to conduct any investigation in the case of a vague complaint, it would similarly be unwise to conduct a wide-ranging investigation before a complaint is well understood. A two-step approach has the merit of being responsive to a complaint without prematurely committing to an investigation that turns out to be unnecessary.

Next, client issues must be examined. There may be several parties who will have appropriate oversight authority for an internal investigation; in other words, any of these parties may be the appropriate "client" for purposes of the investigation, including company management, a committee of the board of directors (such as the audit committee or special committee formed for purposes of the investigation), or the board of directors as a whole. Especially in public companies, the choice of client raises corporate governance issues that may have to be addressed by the company's corporate and securities counsel. For purposes of the investigation, the central issue is whether the allegations under review encompass senior management, such as the CEO and CFO, or whether the allegations are confined to mid- or lower-level employees. In the former case, it would most often be inappropriate for one or more members of senior management to oversee the investigation since an investigation of a superior or close colleague would not be, and would not appear to be, independent; at a minimum, a committee of the board, with independence from management, would most likely be the appropriate client. In the case of alleged lower-level wrongdoing, senior management, such as the general counsel, may oversee the investigation, although it would be prudent at a minimum to report the findings, even findings that nothing improper occurred, to others in management and the board of directors.

Additionally, as to who conducts the internal investigation, attorneys are customarily involved. In matters that appear to involve mid- to lower-level employees, it may be appropriate for in-house counsel to conduct interviews and review documents. In such instances, the attorney's obligations to report wrongdoing under the rules of professional conduct and, if applicable, the Sarbanes-Oxley Act of 2002 (SOA), provide a legal framework for conducting and reporting the results of the investigation.[1] In matters touching directly or even indirectly on the conduct of senior management, especially in a public company, it would be imprudent for anyone but outside counsel to lead the investigation. In many cases, it must be highly independent outside counsel.

Government agencies and auditors now commonly expect and even insist that investigative counsel not have extensive ties to the company. As a practical matter, this means that regular outside counsel—for corporate or litigation matters—may not be a wise or acceptable choice to conduct an investigation. Such counsel may more appropriately continue to represent the company while other outside counsel, who have done little or no prior work for the company, conduct the investigation and report to the client.

Finally, limited space does not permit a discussion of all the sound practices of an effective and credible internal investigation. Two aspects of such an investigation stand out and merit brief mention. First, it is imperative to preserve and gather documents sufficiently to understand the relevant issues. A company may, of course, limit any document hold to the affected individuals and areas of the company, and phrase any internal communications about the document hold in as mild language as possible. At the same time, an inadequate hold or poorly executed document collection and review could taint the investigation from the outset as well as raise difficult questions of obstruction of justice and spoliation.[2] Second, it is imperative when conducting interviews that investigative counsel state clearly, at a minimum, that he or she represents the company (or another client, as discussed above) and not the individual employee, and that the information provided by the witness may be disclosed to the government pursuant to a waiver of attorney-client privilege and work product protection—the so called *Upjohn* warnings.[3] Although the importance of such warnings on practical and ethical grounds should be well known by now, problems still arise when law firms fail to provide employees with the necessary warnings, causing charges of unethical conduct and information tainting to be made.[4]

One final aspect of conducting internal investigations warrants mention. Investigators often believe that it is more conducive to gathering truthful information to refuse requests of employees to be represented by counsel at interviews or to advance funds for the retention of counsel for employees. In the experience of many participants in the investigative process, this is often foolish and wrongheaded. Witnesses left to their own devices often dissemble—for many reasons other than fear of disclosing criminal behavior. In such cases, companies end up investigating too much or too little or the wrong topics altogether. Conversely, companies often find that employees represented by counsel are more likely to provide a coherent narrative and clarify the matters under review without any heightened risk of false testimony. In sum, encouraging counsel for witnesses reduces the "messiness" of what is inevitably a somewhat messy process, and may very well help achieve the goal of conducting a thorough investigation that yields clear and well-founded conclusions.

Conducting the Internal Investigation—Protection of the Lawyer

The words "internal investigation" uttered by so many, so frequently, in so many different factual scenarios, with potential to destroy a corporation and those who serve it as directors, officers or employees, are often pushed to the background only to re-emerge if the internal investigation is conducted badly. Unfortunately, the lawyer suffers personally when the investigation is performed poorly. Accordingly, this section addresses an important principle for attorneys called upon to conduct investigations—lawyer protect thyself.

When confronted with a situation calling for an internal investigation, the initial decision should be to protect both the attorney-client privilege and the attorney work product privilege. An "investigation," although conducted by a lawyer, may not be privileged. Therefore, the retention agreement, and Board of Directors meeting or other minutes approving retention of counsel, should clearly state that the lawyer was engaged to render legal advice to the given client.[5]

Additionally, domestic counsel engaged by a corporation, especially one conducting an international business or representing a U.S. subsidiary of a foreign corporation, need to consider certain factors. First, who is the client and how to avoid situations described in the lawsuit by a former employee of the Stanford Group, Laura Prendergest-Holt.[6] Second, did the outside counsel make it absolutely clear whom they represented, that they may not be revealing information to the employee, within their knowledge, or even refreshing the employee's recollection before they testify to the government?[7] Third, did counsel inform the employee that the corporation has an agreement with the government to turn over its investigatory notes, and whatever counsel was told by employees, so that, in essence, lying to counsel for the corporation may be tantamount to lying to the government, leading to prosecution if the information proves false?[8] Fourth, what is the risk faced by counsel and corporate clients when regular outside counsel, who represented the company, officers and employees in their individual capacities, now attempt both to continue that representation and to conduct the internal investigation? In one recent case, the court granted a motion to suppress evidence contained in counsel's notes and provided to the prosecution, precluding their use in the criminal trial. Worse, for the law firm, the court issued a strong condemnation of its ethical standards and referred the law firm to the State Bar for disciplinary action.[9]

In conducting the internal investigation and rendering legal advice, counsel must carefully advise the client regarding retention of all documents, including those stored in electronic format and to suspend related document-retention programs. Care must be taken to explain "obstruction of justice" law to the corporation and its employees. Greater care must then be used to avoid any suggestion that counsel engaged in, or sanctioned, document destruction or alteration. Do not put yourself in the role of a "custodian" or "semi-custodian" of the client's records and do not personally vouch for the accuracy or completeness of those records. Remember "A" stands for "attorney," not "accomplice."

If the corporate entity conducts international business, is based in a foreign country with its own secrecy laws, or is a member of the European Union (EU), one must avoid violating "personal privacy" or commercial laws designed to protect entities and individuals, under pain of criminal prosecution.[10] The EU personal data privacy laws might preclude many of the activities viewed as "routine" in the United States, such as obtaining an employee's personal e-mails found on the corporation's computer system.

Lastly, a lawyer advising a foreign corporation otherwise not amenable to U.S. subpoenas should consider the wisdom of visiting the entity's foreign locations and returning to the United States with corporate documents not otherwise available to the U.S. government or private litigants. The new U.S. document location might then lead to subpoenas to the law firm to produce copies as "otherwise unavailable documents," thereby overcoming the "work product" attorney privilege. More embarrassing, the lawyer may be subpoenaed to "authenticate" or state the source of the records.

Reporting Results of Internal Investigations

Given the many issues endemic to internal investigations, it is no wonder that counsel's natural reaction is to hide when the internal investigation is complete, but critical decisions must be made as to an appropriate manner to convey the investigation's results to the client. Counsel must determine how the facts, opinions and recommendations marshaled during the investigation will be communicated outside of the lawyer's world. Essentially, counsel must answer four questions: (a) To whom should the report be made? (b) How should the results be recorded? (c) What steps should be taken to remediate the situation found? and (d) What, if any, disclosures should be made to third parties concerning the information gathered?

Initially, the first inquiry appears simple, but, as discussed above, issues relating to client retention and interaction arise. Reporting would be logical and efficient if it proceeds through the client who retained counsel, such as the audit committee or special litigation committee of the Board of Directors.[11] However, if during the course of investigation counsel begins to believe that such a subcommittee may not be able to perform the duties delegated to it by the Board of Directors, counsel may have an obligation to report his or her findings (especially if it involves a public corporation and material violations of the law) directly to the full Board of Directors.[12] Such a strategy is, of course, something counsel should not engage in lightly, but only after significant consideration.

Counsel, however, must remember that the client is the corporation, not senior management, or other important or substantial employees. The corporation is entitled to know all of the facts learned during the investigation in a clear, unvarnished manner. This approach, unfortunately, may result in the disclosure of potentially harmful information for certain persons within the corporation; however, any other report would result in chaos for the corporation.

Nonetheless, although no one suggests a lawyer has an obligation to report back to the same people, who are in these positions or were interviewed during the course of the investigation, counsel must still be cautious in providing the appropriate "Adnarim" or *Upjohn* warnings discussed above.[13] Counsel does not want these individuals to believe they have a right to be kept abreast of the investigation and results. Such lack of clarity seems to have created the problems for certain attorneys who previously defended a legal malpractice claim brought by a former executive allegedly involved in the Stanford "Ponzi" scheme discussed above.[14]

Additionally, the recordation of the investigation's results presents unique challenges for counsel. For example: Should the report be formal or informal, written or oral, and should drafts be shared with the corporation's personnel, among others? Historically, the favored approach had been to produce a written report, including a factually detailed statement, documentary evidence, and a thoughtful legal analysis of the facts and events investigated. That is, these reports, generally, would have had substantive information and conclusions, serving as a "road map" for outside entities who wished harm upon the corporation.

Thoughtful lawyers today do not, usually, provide such written and substantive reports to the entity. Instead, today's lawyers will, generally, report orally to the client, allowing a measured response, including only facts and legal conclusions based upon those facts. Such disclosures would not be discoverable in any form of civil or criminal litigation unless the corporation chose to disclose the investigation's findings.[15] Nonetheless, a best practice for counsel conducting these investigations would be to collect the documentary evidence, index it, and compile a list of the witnesses interviewed (coupled with a list of those who declined to be interviewed or asserted their Fifth Amendment rights).

Critically, a Board of Directors (or some subset) must review the investigation's results with an eye toward taking the appropriate action. Full and candid disclosures from counsel are essential, but equally important are the client's response and the implementation of remedial measures to correct the situation precipitating the investigation. All options must be considered by the client (and the lawyer must discuss these options with the client no matter how painful), including, among other things, the termination of the employees responsible for the corporation's problems, new compliance programs and training and potential remuneration to those affected by the issues uncovered during the investigation.

Finally, the Board of Directors and senior management (if not implicated in the investigation) must consider whether disclosures should be made to interested third parties. The classic disclosure is usually to certain regulatory authorities—state or federal, civil or criminal. The potential dissemination of this information carries inherent risks and benefits. Although much ink has been spilled as to the benefits of such disclosure with various civil and criminal authorities, there are significant costs if the ultimate disclosure to the regulators is deemed insufficient to obtain credit for cooperation, or if the nature of the investigated conduct is so egregious no regulator is likely to afford credit to the corporation. Similarly, disclosure to other third parties, such as to the corporation's outside auditor, may bring immediate angst to the corporation. If the conduct requires a re-statement of the company's financials, the auditor may require public disclosure, or worse, may resign as the corporation's auditor and notify the authorities. This would certainly bring quick regulatory action. Accordingly, corporations must be wary of third party disclosures, carefully weighing the benefits and costs before reporting outside the corporation.

Conclusion

In short, an internal investigation requires careful planning and supervision until it is completed. If there is a misstep at any point during the investigation, the corporation and attorney may suffer the consequences for many years to come.

Endnotes

1. *See, e.g.*, New York Rule of Professional Conduct 1.13; 17 C.F.R. Section 205.3.
2. *See, e.g.*, 18 U.S.C. §§ 1517–20.
3. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).
4. *See, e.g., United States v. Nicholas and Ruehle*, SACR 08-00139-CJC (C.D. Cal.).
5. *Upjohn* (the privileges referred to in the text extend to the lawyer's review of facts, documentation or oral statements in conjunction with the rendering of legal advice).
6. *Pendergest-Holt v. Sjoblom*, Case No. 3:09 CV 00578-L (N.D. Tex. March 27, 2009) (dismissed without prejudice or finding of any wrongdoing by the law firm).
7. *Id*.
8. *United States v. Kumar*, Case No. 1:04-CR846-ILG (E.D.N.Y. Sept. 20, 2004) (employees and firm general counsel indicted for lying to outside investigative counsel with knowledge that the information was going to be provided to the government).
9. *Nicholas*, at 18.
10. *See In re Vivendi Universal, S.A. Securities Litigation* 02 Civ. 45571 (RJH) (HBP) (January 7, 2009) (Ernst & Young LLP ordered to produce documents pursuant to a subpoena *duces tecum* served upon it in the United States for audit papers it created in connection with auditing Vivendi (US), although Ernst & Young *et Autres*, the principal auditors for Vivendi Universal, S.A., for which an audit report was to be issued by the French auditors, were based in France. Several court orders in France held that production of the documents was precluded by secrecy laws governing auditors. Production of the documents could lead to criminal prosecution under French law). *See* Article 226-13 of the French Criminal Rule.
11. American College of Trial Lawyers, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations* (February 2008), pp. 8 and 11.
12. Section 307 of the Sarbanes-Oxley Act of 2002; and Rule 205 of the SEC Rules of Conduct, 17 C.F.R. pt. 205.
13. *See* David A. Kettel and Danette R. Edwards, *United States v. Nicholas: Expanding the "Upjohn" Suppression Remedy*, Corporate Counsel Weekly (June 10, 2009), pp. 174 and 176.
14. Lisa A. Cahill, *Cases Highlight Minefield in Internal Inv*estigations, N.Y.L.J. (May 21, 2009) pp. 4 and 6.
15. In fact, both the DOJ and the SEC now seemingly prefer factual reports when the corporation chooses to make such disclosures to these government agencies. *See* www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf-2008-11-03 ("Filip Memo") and www.sec.gov/divisions/enforce/enforcementmanual.pdf, SEC Enforcement Manual, § 4.3.

Marvin G. Pickholz is a partner of Duane Morris LLP in its securities and white collar regulatory group and was a former national Assistant Director of the Securities and Exchange Commission's Division of Enforcement. He has represented clients in many high profile matters both in the United States and from other nations. He has lectured and written extensively, has been a guest commentator on many domestic and foreign news and business programs and is the author of the treatise *SECURITIES CRIMES* and the co-author of chapters in others treatises on accountants' liability and *Insider Reporting and Short Swing Trading*.

Jonathan S. Sack is a principal of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. He previously served as Chief of the Criminal Division, U.S. Attorney's Office for the Eastern District of New York, and is an adjunct professor at St. John's University School of Law, where he teaches a course on white collar crime. He is co-author of *Federal Corporate Sentencing: Compliance and Mitigation* (Revised Edition) (Law Journal Press).

Ernest E. Badway, a Fox Rothschild LLP partner, former SEC enforcement attorney and Adjunct Assistant Professor at Brooklyn Law School where he teaches a course on securities enforcement, co-chairs and practices in both the firm's White Collar and Securities Industry Groups, in New York, New York and Roseland, New Jersey.

Jason R. Pickholz is a partner of Duane Morris LLP in the Trial Practice group. His experience includes conducting internal investigations for both domestic and foreign corporations, and representing them in civil, criminal and regulatory proceedings brought by federal and state prosecutors and foreign authorities.

Critical Issues

Fresh Ideas

Best Practices

THIRD CORPORATE COUNSEL INSTITUTE

Thursday and Friday, November 19 and 20, 2009

The Radisson Martinique on Broadway, New York City

49 West 32nd Street • New York, New York 10019 • Ph: (212) 736-3800

14.0 CLE Credits, including 4.0 in ethics

Co-sponsored by the Corporate Counsel Section and the Committee on Continuing Legal Education of the New York State Bar Association.

Program Description

The Corporate Counsel Section of the New York State Bar Association announces its **Third Corporate Counsel Institute**. The Institute, designed as a comprehensive two-day program, covering a multitude of topics of particular interest to Corporate Counsel, will be combined with the Section's popular annual **Ethics for Corporate Counsel** program.

Day One will be devoted to five separate plenary sessions. The electronic age, employment law developments, bankruptcy pitfalls and intellectual property sessions are scheduled on the first day. Lunch will feature Keynote Speaker Marshall Huebner, lead counsel to the Federal Reserve Bank of New York and to the United States Department of the Treasury with respect to their $150 billion multiple financing and 79.9% equity stake in the American International Group.

Day Two will begin with **Ethics for Corporate Counsel,** a well-received and engaging program designed especially for Corporate Counsel. After lunch, various workshops will assist Corporate Counsel with such important practice areas as employee privacy, commercial leasing, responding to the government, and law department management.

A premier faculty has been assembled by the Planning Committee to present a program geared to assisting Corporate Counsel in navigating these challenging times. Each topic could be a program on its own, but by attending the **Corporate Counsel Institute**, the busy in-house attorney will gain important insights and knowledge into many of these topics to support their everyday practices.

Program Agenda

DAY ONE

Thursday, November 19, 2009

8:30–9:00 a.m.	**REGISTRATION** (outside meeting room)
9:00-9:05	**WELCOME AND INTRODUCTIONS**
9:05-10:00	**ADVISING CORPORATIONS IN THE ELECTRONIC AGE THE INTERPLAY BETWEEN LEGAL AND PUBLIC RELATIONS RAMIFICATIONS** Mercedes Colwin, Esq. Lolita Lopez Jay L. Monitz, Esq. Billy Martin, Esq.
10:00-10:20	**REFRESHMENT BREAK**
10:20-11:30	**EMPLOYMENT LAW/REDUCTION IN FORCE/OBAMA UPDATE/WAGE AND HOUR COLLECTIVE ISSUES/EMERGING ISSUES** Philip B. Rosen, Esq. Michael E. Kreitman, Esq. Vicki R. Walcott-Edim, Esq. Gary H. Glaser, Esq.
11:30-12:30	**WEB 2.0 SOCIAL NETWORKING IN CORPORATE AMERICA SEO, SOCIAL MEDIA, BRAND INTEGRITY AND LEGAL ISSUES** Natalie Sulimani, Esq. Sarah M. Feingold, Esq.

12:30-2:00 p.m.	**LUNCHEON**
	KEYNOTE LUNCHEON SPEAKER (No MCLE credit) **Speaker: Marshall S. Huebner, Esq.** Mr. Huebner is lead counsel to the Federal Reserve Bank of New York and to the United States Department of the Treasury with Respect to their $150 billion multiple financing and 79.9% equity stake in the American International Group
2:00-3:30	**BANKRUPTCY—ANTICIPATING AND NAVIGATING THE FILING** Karen B. Dine, Esq. Howard S. Shafer, Esq. Rachelle Stern, Esq. Kent C. Kolbig, Esq. Charles M. Tatelbaum, Esq. Damian S. Schaible, Esq.
3:30-3:45	**REFRESHMENT BREAK**
3:45-4:45	**INTELLECTUAL PROPERTY** Barry I. Slotnick, Esq. Chester P. Rothstein, Esq. Sarah M. Feingold, Esq.

DAY TWO

FRIDAY, NOVEMBER 20, 2009

8:30-9:00 a.m.	**REGISTRATION (outside meeting room)**
9:00-12:30 p.m.	**ETHICS FOR CORPORATE COUNSEL (**there will be a 10-minute refreshment break mid-morning) Michael S. Ross, Esq. Andral N. Bratton, Esq. Prof. Ellen Yaroshefsky James Q. Walker, Esq. Anthony E. Davis, Esq.
12:30-1:30 p.m.	**LUNCH** (on your own)
1:30-3:00	**WORKSHOPS A, B <u>or</u> C** (Select only one)
	Workshop A: CONFIDENTIALITY OF EMPLOYEE HEALTH RECORDS AND EMPLOYEE PERSONAL IDENTIFYING INFORMATION FMLA, ADA, OSHA, Executive Law, Public Health Law, Labor Law, General Business Law, Department of Transportation (DOT) Drug Testing Regulations, Confidentiality of Employee Personal Identifying Information, Genetics Information Act (GINA) Education Law, Civil Practice Law and Rules, and Employee Assistance Programs Steven M. Berlin, Esq. Linda A. Malek, Esq. Wayne A. McNulty, Esq. Francis J. Serbaroli, Esq. Marcy Wilder, Esq.
	Workshop B: COMMERCIAL LEASES Hope K. Plasha, Esq. Robert T. Tunis
	Workshop C: RESPONDING TO GOVERNMENT SUBPOENAS AND INFORMATION REQUESTS Michael L. Koenig, Esq.
3:00-3:15	**REFRESHMENT BREAK**
3:15-4:45	**WORKSHOPS D <u>or</u> E** (Select only one)
	Workshop D: RESPONDING TO INVESTIGATIONS/EEOC/NYSDHR/NYCCHR Dean L. Silverberg, Esq.
	Workshop E: WORKING WITH OUTSIDE COUNSEL/LITIGATION COST SAVINGS/ LAW DEPARTMENT MANAGEMENT Maryann W. Lawrence, Esq. David A. Kalow, Esq. Rachelle Stern, Esq.
4:45 p.m.	**Adjournment**

Program Planners and Faculty

Program Chair
Howard S. Shafer, Esq.
Shafer Glazer, LLP
New York, New York

Corporate Counsel Section Chair
Fawn Horvath, Esq.
Macy's Inc.
New York, New York

Planning Committee

Mitchell F. Borger, Esq., Macy's, Inc., New York, New York * **Sarah M. Feingold, Esq.**, Etsy Inc., Brooklyn, New York * **Wayne A. McNulty, Esq.**, New York City Health & Hospitals Corporation, New York, New York * **Steven H. Mosenson, Esq.**, United Cerebral Palsy Associations of New York State, New York, New York * **Steven G. Nachimson, Esq.**, Compass Group USA, Inc., Rye Brook, New York * **Howard S. Shafer, Esq.**, Shafer Glazer, LLP, New York, New York * **Rachelle Stern, Esq.**, Macy's Inc., New York, New York

Faculty

Steven M. Berlin, Esq., Martin Clearwater & Bell LLP, Marlboro, New Jersey * **Andral N. Bratton, Esq.**, Appellate Division, First Department, New York, New York * **Mercedes Colwin, Esq.**, Gordon & Rees, LLP, New York, New York * **Karen B. Dine, Esq.**, Pillsbury Winthrop Shaw Pittman, LLP, New York, New York * **Anthony E. Davis, Esq.**, Hinshaw & Culbertson LLP, New York, New York * **Sarah M. Feingold, Esq.**, Etsy Inc., Brooklyn, New York ***Gary H. Glaser, Esq.,** Seyfarth Shaw LLP , New York, New York * **Marshall S. Huebner, Esq.,** Davis Polk & Wardwell, New York, New York * **David A. Kalow, Esq.,** Kalow & Springut, LLP, New York, New York * **Michael L. Koenig, Esq.**, Greenberg Traurig, P.C., Albany, New York * **Kent C. Kolbig, Esq.**, Moses & Singer LLP, New York, New York * **Michael E. Kreitman, Esq.**, Macy's, Inc., New York, New York * **Maryann W. Lawrence, Esq.**, Chanel, Inc., New York, New York * **Lolita Lopez**, WPIX-TV-11, New York, New York * **Linda A. Malek, Esq.**, Moses & Singer LLP, New York, New York * **Billy Martin, Esq.**, HOWREY, LLP, Washington, DC * **Wayne A. McNulty, Esq.**, New York City Health & Hospitals Corporation, New York, New York * **Jay L. Monitz, Esq.**, Macy's, Inc., New York, New York * **Hope K. Plasha, Esq.**, Patterson Belknap Webb & Tyler LLP, New York, New York * **Michael S. Ross, Esq.**, Law Offices of Michael S. Ross, New York, New York * **Chester P. Rothstein, Esq.**, Amster, Rothstein & Ebenstein LLP, New York, New York * **Philip B. Rosen, Esq.**, Jackson Lewis, LLP, New York, New York * **Damian S. Schaible, Esq.**, Davis Polk & Wardwell, New York, New York * **Howard S. Shafer, Esq.**, Shafer Glazer, LLP, New York, New York * **Francis J. Serbaroli, Esq.**, Greenberg Traurig, P.C., New York, New York * **Dean L. Silverberg, Esq.**, Epstein Becker & Green, P.C., New York, New York * **Barry I. Slotnick, Esq.**, Loeb & Loeb, New York, New York * **Rachelle Stern, Esq.**, Macy's Inc., New York, New York * **Natalie Sulimani, Esq.**, Sulimani Law Firm, New York, New York * **Charles M. Tatelbaum, Esq.**, Adorno & Yoss, Fort Lauderdale, Florida * **Robert T. Tunis,** FirstServices Williams Commercial Real Estate, New York, New York * **Prof. Ellen Yaroshefsky**, Benjamin N. Cardozo School of Law, New York, New York * **Vicki R. Walcott-Edim, Esq.**, Jones Day, New York, New York * **James Q. Walker, Esq.**, Richards Kibbe & Orbe LLP, New York, New York * **Marcy Wilder, Esq.**, Hogan & Hartson, LLP, Washington, DC

Registration Fees

OPTION 1: Entire Two-Day Institute:
NYSBA Members*: In advance - $525 / Late registration after 11-6-09) - $550
Non-Members: In advance - $575 / Late registration (after 11-6-09) - $600
Special discount pricing for the second or subsequent registrant(s) from the same firm, regardless of when they register:
NYSBA Members: $375; **Non-members**: $400

OPTION 2: Ethics Program ONLY (Friday morning**):**
NYSBA Corporate Counsel Section Members: $175 in advance; $200/door
NYSBA Non-Corporate Counsel Section Members: $200 in advance; $225/door*
Non-NYSBA Members: $225 in advance; $250/door

** Registrants who are NYSBA members but not Corporate Counsel Section members will receive a 2009 and 2010 Corporate Counsel Section membership as part of their registration fee for this program.*

Important Note: CLE Seminar Coupons and Complimentary Passes cannot be used for this program.

Important Note: If you plan to pre-register within 10 days of the program or register at the door, please call us at **1-800-582-2452** or in Albany and surrounding area, dial **518-463-3724**, to verify that the program is not sold out or that the date or location has not been changed. Those who pre-register at least 10 days in advance of the program will automatically be notified of any such changes and will receive a full refund up to the day prior to the program, if they cannot attend and notify us of their cancellation. Please pre-register as early as possible.

Corporate Counsel Section Committee Chairpersons

CLE and Meetings
Howard S. Shafer
Shafer Glazer LLP
Your House Counsel—
New York Office
90 John Street, Suite 701
New York, NY 10038-3202
hshafer@shaferglazer.com

Corporate Governance
Janice Handler
handlerj@aol.com

INSIDE/Publications
Allison B. Tomlinson
Parsons Brinckerhoff
1 Penn Plaza
New York, NY 10119
tomlinson@pbworld.com

Janice Handler
handlerj@aol.com

Internship
Barbara M. Levi
Unilever United States, Inc.
700 Sylvan Avenue
Englewood Cliffs, NJ 07632
barbara.levi@unilever.com

Membership
Thomas A. Reed
Pitney Bowes Inc.
One Elmcroft Road
Msc 63-12
Stamford, CT 06926
thomas.reed@verizon.net

Pro Bono
Steven H. Mosenson
Cerebral Palsy Association
of New York State
330 West 34th Street
15th Floor
New York, NY 10001-2488
steven.mosenson@nyu.edu

NEW YORK STATE BAR ASSOCIATION
CORPORATE COUNSEL SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

Submission of Articles

Inside welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information. Please submit articles its either of its editors:

Janice Handler
handlerj@aol.com

Allison B. Tomlinson
Parsons Brinckerhoff
1 Penn Plaza
New York, NY 10119
allison11955@aol.com

Inside is a publication of the Corporate Counsel Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. Each article in this publication represents the author's viewpoint and not that of the Editors, Section Officers or Section. The accuracy of the sources used and the cases, statutes, rules, legislation and other references cited is the responsibility of the respective authors.

ISSN 0736-0150 (print) 1933-8597 (online)

Inside