Board Members and Contacts

President
Mark Rogers
Corporate Counsel
Insight Enterprises, Inc.
480.333.3475
mnrogers@insight.com

Secretary
Gary Smith
audric@cox.net

Treasurer
James Curtin
jcurtin_phx@msn.com

Board of Directors
David Glynn
Chief Administration Officer, and General Counsel
OneNeck IT Services
480.315.3042
david.glynn@oneneck.com

Robert Itkin
Vice President and Assistant Chief Counsel
CI Commercial Finance
480.784.9540
robert.itkin@cit.com

John Kaminsky
Aspiring1@aol.com

Chapter Administrator
Karen Rogers
accarizona@yahoo.com

Recruit a Member and Win a Prize—Guaranteed!

Help increase ACC's membership by participating in the ACC's Share the Wealth Membership Drive. Each time you use the Association of Corporate Counsel network, you gain valuable skills and experience only available through ACC. More members in ACC translate into improved educational opportunities, enhanced networking, increased online resources, and advancement of the profession worldwide.

Each time you recruit a member, you will receive a Starbucks Card loaded with $5.00. Recruit two or three members and win a chance to receive a portable DVD player. Recruit four or five members and receive a chance to win a digital camera. Recruit six or more members and receive a chance to win a Mac or PC valued at $1,500 or a free ACC Annual Meeting or ACC Europe Annual Conference registration and a $750.00 travel stipend.

ACC's Share the Wealth Membership Drive ends on July 31—so don't delay, recruit today! Get more information and tips on recruiting members at *www.acc.com/sharethewealth*.

ACC America
Association of Corporate Counsel
Arizona Chapter

1025 Connecticut Avenue, NW
Suite 200
Washington, DC 20036-5425

ACC America
Association of Corporate Counsel
Arizona Chapter

Second Quarter 2007

Focus

Mark Rogers
President's Message

This has been an exciting quarter for the Arizona Chapter. Attendance at meetings has never been this high on a regular basis. I hope this means that we are improving our skills in choosing relevant topics for our monthly CLE luncheons, and in making you aware of the programs in a timely manner. We know that "continuous improvement" is the real goal, though, so please let us know (send an email to *accarizona@yahoo.com*) if there are ways for the chapter to be of more assistance to you. Also let us know, please, if you'd like to be a part of the chapter's leadership.

Now, many thanks to Snell & Wilmer for the content of this quarter's newsletter and an even greater thanks to the firm for the three-meeting series of ethics topics in March, April, and May. This series was designed specifically for the chapter (with input from the chapter), and is unmatched in terms of focus for ethics programs in the entire Southwest this year. Furthermore, the series comes to chapter members at low out of pocket cost. I mention all of this to point out the continued support from Snell & Wilmer, but also to point out the benefits of membership. If you have colleagues who are not members, please talk to them about the benefits of membership and encourage them to join us. It has become clear over the years that the growth of the chapter increases our ability to stage great programs and that great programs attract more members. Help us continue this upward spiral!

I need to also thank Westlaw for their continued support of the chapter. I have heard that having Westlaw on hand at the meetings to talk about research material related to the CLE topics has proven to be a useful way of learning how to make more and better use of our Westlaw subscriptions.

Again, thanks to Snell & Wilmer and Westlaw, and thanks to our members. I hope to see you at a program soon.

On the Minds of In-house Counsel: ACC Listservs

Every day ACC members use the committee listservs to get insight and advice from their in-house peers. Here's what ACC members are talking about:

- Recommendations for outside counsel in particular geographic areas and legal specialties;

continued on page 9

Welcome New Members

We wish to welcome the following new members who have joined the ACC Arizona Chapter since January 2007:

Anne Aikman-Scalese, Lisa Frank, Inc.
Gary Blyn, Cytec Engineered Materials, Inc.
Kelleen Brennan, Integrity Interactive Corporation
Benjamin Cotton, ASM America, Inc.
Shane Gosdis, DLC Dermacare, LLC
Barney Holtzman, First Magnus Financial Corporation
Suzanne Jones, Scottsdale Insurance Company
Robert Kessler, Schaller Anderson, Incorporated
Karen Mourad, Universal Technical Institute, Inc.
Dennis Naughton, CSK Auto, Inc.
Michael Reagan, Kahala
Diane Thompson, Apollo Group, Inc.
Gregory Winfree, Phelps Dodge Corporation

Viva la Revolution?

By Susan Hackett, Senior Vice President and General Counsel, ACC

Am I the only one who sees the pink elephant dancing in the room? I'm still waiting for the in-house counsel community to rise up and protest, but the silence is deafening. What's going on out there? Many of the top-tier law firms announced their most recent round of first-year associate pay hikes, and though the legal press reports one major firm after another following suit, there's been surprising little action in response from the in-house bar. Disgust? Sure. But no hint of the revolution that I thought was coming. In-house counsel of the world: Who's managing your legal spending—you or the firms?

Let's do the math. Be conservative and say that an average employer pays about one-third of an employee's pay on top of their salary in order to offer benefits (such as paid vacation/sick time, health, life, disability insurance, retirement or 401K-type contributions, etc.). The newly announced first year salary level of $160,000 plus $50,000 in benefits takes us to a total of $210,000. Then there's overhead, including a portion of the law firm's high-market rent, top-notch administrative support, computer, library, other office technologies, and the art-filled lobby. So let's add another $100,000 on top of the previous $210,000, and for the sake of keeping it simple, let's say that our highly recruited first year associate is now costing the firm $300,000 year. Every associate will get this hike, even the not so competitively recruited ones get it.

That doesn't even take into account the cost of the cocktail-cruising summer associate program, the firm's high-power recruitment, or the cost of attrition. For every 10 of those really expensive first years less than half will make it to partnership and profitability before they're either pushed out or run screaming from the building.

Then, there's the added bonus that the majority of big firms operate on a lockstep salary system for associates, so a raise for the first-rung associates necessitates a corresponding $15,000/year increase (at least) for every other successive class. This way, the natives won't feel bad that the least experienced workers who've labored a shorter time are making more than them. Let's say, conservatively, that the $300,000 cost of a first year associate, when combined with the very real costs of attrition and recruiting, brings us to a nice "blended" rate of about $400,000/year in costs.

Who's paying for this? Do you think that when the decision is made to up first-year salaries that the partnership votes to take less money to pay for it? Or do you think that the associates will be expected to "earn their keep?" The latter is a nicer way of saying that clients will be billed for the overworked first-year associates' time and efforts, and the associates will be expected to perform the feat of billing more than anyone thinks they're worth. Both clients and associates lose.

I'm having so much fun with the math, I think I'll keep going.

If you assume that every one of those associates will bill 2,000 hours that can actually be invoiced to a client (as opposed to a certain amount of time that will be billed, but written off as non-collectable for pro bono, incompetence, client objections, learning curve, you name it), that means that their 2,000 hours will have to be billed at an average of $200 per hour in order to reach the break even point. We all know that firms don't charge associate rates to break even. Large firms bill up to $400 per hour for these newcomers.

Perhaps a few of those new-to-the-profession associates are so smart or have amazing previous experience, making them worth every dime of $200+ per hour, and perhaps every one of their 2,000 hours billed is actually providing efficient and meaningful value to the clients they serve. But perhaps the vast number of those hired—smart, hardworking, and deserving as they are—are worth nowhere near $200 per hour.

Do you remember how much you knew or what your functional worth was the first day you entered the workforce to take your first "real" job? I remember feeling incredibly incompetent and very confused that I'd not learned any of the stuff that I needed in private practice during my summer work, or in law school. Indeed, law school may teach students how to think like a lawyer, but it does very little to produce graduates who are capable of providing valuable and efficient legal services right out of the box. And that's okay, the value of a lawyer is something that's learned and earned over time with hard experience. But clients are expected to pay for it from day one, since firms don't seem to think it's their cross to bear, and I don't see associates volunteering to do internships until their services are worth what they're charging for them either. Most attorneys in the corporate bar are willing to pay for entry level associates working under supervision; it's how it's done...but at a rate that within the last five years was reserved for only the most experienced partners? Come on.

Sanity check: You can hire an incredibly smart and experienced partner-level lawyer in the next town over from New York or DC or Chicago or LA who bills at $250 hour, and who can do the same work with a better result in half the time. That lawyer is very likely a refugee from the big firm and every bit as smart. Let's not forget about those nice folks in India or Iowa or ConsultantLand, or about your favorite vendors who will do the work for even less.

Sanity check: The members of the federal judiciary, who we hope will be composed of the best in our profession, and who must be attracted to engage in public service on the bench at the pinnacle of their careers, are paid less than these new first-years. Most of these newbies will make more in their first year than an associate justice of the US Supreme Court. Our underpaid judiciary is not the fault of large law firm associates, but it's a sign of how out of whack the law firm world's artificial pricing structure is.

Sanity check: Most new associates spend their time—as they should—learning the ropes by doing legal drudgery: endless, painstaking research; document review and shuffling through terabytes of discovery material; making necessary appearances and filings in courts; writing form contracts and pleadings; and hopefully learning their craft at the elbows of their seniors who have the experience necessary to bill $500 per hour and more for their time and counsel. Associate apprenticeship is necessary and supervision of those on the learning curve is professionally mandated by every state's legal regulations, but billing for the time of the supervising lawyer and the learning associate is part of a time-honored legal tradition that often amounts to double-billing. Those in the non-law-firm vending community who can expertly perform a variety of the services performed by first-years at a third of the price are gaining ground and expanding their business lines daily. Why not hire a legal research company or a team of ediscovery consultants to do document work, or another in-house paralegal to do the routine and repetitive contracts and pleadings work? I hear of more and more in-house counsel who: 1) won't pay for entry level associates any more—they are "outlawed" in the retention letter,
2) mandate that their firms work with vendors on some of the less exciting aspects of the case or matter that can be severed and done for a fraction of the firm's costs, and
3) give increasing amounts of work to a couple of savvy law firms who've started creating and offering those alliances with preferred out-sourcers so that they can be more efficient.

Sanity check: Many of the best and brightest students graduating from school today say that they don't want to work the hours or make the sacrifices that their senior partners did when they entered the profession. But they'll take the money, thank you. They'll still apply for the jobs in firms where they know that they're expected to put their lives on hold in perpetuity in order to earn the salary and have an eventual shot at a seven-figure income. And their partners, unable to get over their own frustrations, will continue to demand the same rituals of crazy hours that caused their pain.

Sanity check: Who says that firms that are paying these rates will recruit the best talent? Skyrocketing salaries and the need to bleed revenues from the resulting associate classes will do more to prevent these firms from hiring anything other than driven and "pedigreed" applicants, even though that may not be the only kind of talent that clients want. Perhaps what clients actually want is not the editor of the law review from one of the 25 "top 10" law schools in the country. Perhaps they want talent more broadly defined: experienced, diverse, and with life experiences beyond those normally held by the majority of "highly-pedigreed" graduates. Maybe clients want lawyers with a more developed ethical compass to work on their complex corporate-quagmire problems. Maybe clients are more interested in graduates with a pronounced passion for public service, or who communicate really well with juries, or who—dare I say it? —are actually satisfied with their jobs because they work in a more balanced work environment. There are plenty of bright lawyers who are actually a pleasure to work with because they are happy, and their lives are a bit more balanced with a mix of work and non-work activities and interests. Some of them might be in that rarified air of graduates who get the $160,000 per year (read: $400,000) offer; a great many of those people work elsewhere, though, and don't carry the baggage or the price tag of large law firm life.

Every study out there says it over and over: You don't get more—indeed, you get less—from folks who are working at surge capacity 24/7/365. Those workers are less and less productive and more and more inefficient. The business model of hourly billing in firms exacerbates the problem by encouraging work to be done in greater quantity, rather than with greater efficiency.

So who will stop the madness? Are we going to wait until firms announce in 2009 that the class of 2010 will be offered $180,000? Will that finally be enough? Or have you reached the end of your rope now?

The corporate legal community needs to stand up and exercise its not inconsiderable influence. You and your clients are being overcharged for legal work in the largest firms. Do something about it. Tell your firms that charge too much that you won't pay increased rates, and that you don't want any of those nice new associates (or their increasingly expensive senior associate colleagues) billing to your account unless the firm can quantify why it is that they'll provide more value to you as the client than a partner in a less expensive firm, or an expert legal service vendor/consultant. Ask why, if the top 20 recruits in the nation need this much, it is that firms can't just give a raise to them, rather than to every associate in the firm's pool? Explain to them that they're killing the practice of law by driving associates into the ground, and that you're not going to help them do it.

Then go out and hire from the abundant pool of talent in less expensive places, whether it be smaller firm lawyers, or lawyers working outside the confines of the really big cities. Let your expensive firms' management know that while you'll miss their high quality work, they've just got it wrong and you won't be forced to pay for their continued lack of business principal and judgment. Remind them that in spite of what they tell themselves and you everyday, there's quality legal service to be had at a fraction of the cost. After all, most of those large firm's mid-level and experienced associates will be secretly interviewing for jobs in your legal department or these alleged "second" and "third" tier firms as soon as they realize that the cycle of pain at the most prestigious firms just won't stop. We all know they'll be willing to take half the pay in order to earn the privilege of working somewhere they're valued for more than the number of hours they bill, but rather lauded for the high quality legal services they're bright enough to provide.

What can ACC do to support you on this matter? We're considering the alternatives and would like to hear your views. Let me know by emailing me at *hackett@acc.com*. After all, my bill to you is only $225 per year if you're eligible for membership!

A Brief Primer on Inadvertent Disclosure of Otherwise Privileged Documents

By Andrew F. Halaby and Teresa K. Anderson[1]

Introduction

Document review isn't always so bad. You might, after all, stumble across the "smoking gun" document that turns the case in your client's favor. But what do you do after you learn that your "smoking gun" is a communication between opposing counsel and his client, and likely was inadvertently disclosed? The issue has ethical, professional courtesy, procedural law, and substantive law dimensions.

For Arizona attorneys, the applicable ethics rule is ER 4.4(b). This rule provides that once an attorney receives a document that he or she knows or reasonably should know was inadvertently sent, the attorney "shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." The obligations imposed by this rule are more expansive than the ABA's Model Rule of Professional Conduct 4.4(b), which requires only that the recipient promptly notify the sender. As such, Arizona has – in essence – folded what otherwise might be considered obligations of professionalism into the ethics rule. As a matter of professional courtesy, and because of discovery rules like Ariz. R. Civ. P. 26(g),[2] the recipient also should inform the sender reasonably promptly of the recipient's position on the legal effect of the inadvertent production. If the recipient's position is that the production waived the attorney-client privilege, the "protective measures" sought by the sender may include a motion for protective order to compel the document's return.

Procedurally, as has been discussed extensively in the literature, Federal Rule of Civil Procedure 26(b)(5)(B) now provides that "[i]f information is produced in discovery that is the subject of a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it." The receiving party, "[a]fter being notified . . . must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved." But (somewhat like ER 4.4(b)) this rule only addresses what must be done until the merits of the privilege (or waiver) claim are resolved. It does not decide the merits themselves.

The merits – whether an inadvertently produced document must be returned, or conversely, what use of it the recipient may make – turn on the pertinent jurisdiction's substantive law. Arizona law is unsettled as to whether inadvertent disclosure waives the attorney-client privilege. As naturally follows, the scope of any waiver – such as whether it would be limited to specific document that was inadvertently produced, or instead also extends to other documents relating to the same subject matter – also is unsettled. Here, we put forth a conceptual framework, deriving from the law of other jurisdictions, for analyzing the inadvertent disclosure/waiver issue. We believe it may prove useful in understanding that issue, in guiding the arguments an Arizona litigant might make, and helping explain the precautions taken in connection with large-scale document review and production.

Other Jurisdictions Recognize Three Different Substantive Law Rules

Other jurisdictions' rules on the effect of inadvertent production can be divided into three types: (1) waiver always results, (2) waiver never results, and (3) waiver sometimes results, depending on the particular facts and circumstances. The case law appears to be trending away from the first two and toward the third.

Under the strict rule, all disclosure of privileged material (whether intentional or inadvertent) waives the privilege. Many courts that recognize this rule view the attorney-client privilege as inimical to truth-seeking, and therefore fragile. Some reason that if the client truly wished to keep the material privileged, proper precautions would have been taken. The mere fact of disclosure suggests that the client must have not deemed the document's privileged status sufficiently important to maintain it. These courts sometimes also reason that, as a practical matter, once disclosure has occurred, confidentiality typically cannot be restored. While the bright line character of the strict view is attractive, it is unforgiving, and may lead to harsh results in some situations.

Other courts take what we would regard as a lenient view: that if a disclosure truly is inadvertent, by definition it cannot result in waiver. Waiver is a knowing and intentional relinquishment of a known right. "Inadvertent" disclosure of a privileged document cannot satisfy this definition. Another rationale is that the client, not the attorney, is the holder of the privilege, so only the client can waive it. This rationale is, of course, inconsistent with traditional agency principles.

The modern trend has been away from both of these extremes to a middle ground where, depending on the unique facts and circumstances of the particular case, inadvertent disclosure may waive the attorney-client privilege. This inquiry usually begins with an examination of the reasonableness of the producing attorney's conduct and what efforts and precautions were taken to avoid disclosure. If those efforts and precautions are found lacking, waiver may well result. The court also may consider how quickly the attorney acted to remedy the error and the extent of the disclosure. The modern trend allows courts to take into consideration the realities of large-scale discovery (both its scope and means) and weigh them against the policies that support maintaining client confidence. This approach also allows weighing various "fairness concerns" in determining whether there is waiver.

While the Arizona courts have not adopted any of these rules, we speculate they would follow the modern trend and evaluate whether waiver has occurred based on all the facts and circumstances. The Arizona Supreme Court has observed that "[i]f the client himself does not treat the particular communication as privileged, that communication will not be recognized as a confidence by the court."[3] But that observation came in a case riddled with conflict issues in the joint representation context. More recently, the Arizona Court of Appeals commented that "Arizona courts take a 'fairness' approach to determine whether implied waiver of the attorney-client privilege should be found in a particular situation."[4] These comments provide only limited, anecdotal data, but they arguably stand for the proposition that what the producing party did, and what result would follow, bear upon the waiver inquiry – that is, that the facts and circumstances of the particular situation matter.

Scope of the Waiver

When disclosure is held to have resulted in waiver, the next issue is the scope of that waiver. Often, courts hold the waiver is not limited to the specific document disclosed, but instead to all the producing party's documents or communications relating to the same subject matter. The rationale is that limiting the waiver to the document disclosed would reveal only part of the story, while the other privileged documents on the same subject would divulge the rest. This concept is similar to the bar against using the attorney-client privilege as both a sword and a shield. It is unfair for a party to disclose and use privileged documents that are helpful to one's case, while withholding others that are not. On the other hand, a holding that the waiver extends to all otherwise privileged documents relating to the same subject matter compounds the harshness of a waiver finding arising from, say, a single inadvertently produced document. Accordingly, some courts in inadvertent disclosure cases have limited the scope of the waiver to the disclosed document itself. This limitation does not, however, resolve the sword and shield problem.

Conclusion

As one federal district court has observed, "The inadvertent production of a privileged document is a specter that haunts every document intensive case."[5] Modern document discovery, which now uniformly includes electronic documents, can involve massive volumes of documents. Like all good business decisions, management of document review and production involves cost-benefit analysis. In this analysis, it is also important to keep in mind that the potential cost of inadvertent disclosure may include a finding of broad waiver as to all otherwise privileged documents relating to the same subject matter.

continued on page 6

continued from page 5

The environment surrounding inadvertent production of privileged documents is fraught with uncertainty. Moreover, even if your court holds that your inadvertent production did not result in waiver, or that the scope of the waiver extends only to the inadvertently produced document, another court addressing the very same facts later might well reach a different result. As long as the possibility exists that a court may apply the strict rule or look to the particular facts and circumstances surrounding disclosure, clients and their counsel have little alternative but to undertake the comprehensive, thorough pre-production review necessary to ensure – as much as possible – that a privileged document does not accidentally slip through.

---

1. Andy Halaby is a partner and Teresa Anderson is an associate at Snell & Wilmer L.L.P., Phoenix, Arizona. Andy can be reached at 602.382.6277 or *ahalaby@swlaw.com*. Teresa can be reached at 602.382.6208 or *tanderson@swlaw.com*.
2. That rule provides, "No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter."
3. *Alexander v. Superior Court*, 141 Ariz. 157, 163, 685 P.2d 1309, 1315 (1984).
4. *Elia v. Pifer*, 194 Ariz. 74, 82, 977 P.2d 796, 804 (App. 1999).
5. *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479-80 (E.D. Va. 1991).
6. It is not surprising that in March 2007, the New York Times reported that during a private meeting with the Attorney General several then-current United States Attorney complained that the McNulty Memorandum was approved without their input.

McNulty Memo: While Maybe Not a "Significant Retreat," It is a Step in the Right Direction

By Dan W. Goldfine

Beginning in the early 1990s and continuing through 2006, the United States Department of Justice ("DOJ") through its practices and three policy memoranda, the Holder memo, the McCallum memo and the Thompson memo, effectively compelled many companies to waive the attorney-client privilege and the attorney-work product protections (collectively, "the attorney-client privilege") in order to receive credit for fully cooperating. More recently, over the last few years, the DOJ has also engaged in the practice (pursuant to some language in the Thompson memo) of denying credit to otherwise cooperating companies which agreed to advance attorneys' fees to executives and former executives accused of wrongdoing. Other governmental agencies, such as the Securities & Exchange Commission ("SEC"), have followed the DOJ's lead in these two areas. In December 2006 and in response to potential Congressional action, however, the DOJ stated in the McNulty memo that it was retreating from its current practices in these areas. A copy of the McNulty memo is found at *www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf*.

The Problems

In Utopia, waiving the attorney-client privilege and not advancing fees to executives accused of wrongdoing appears principled. In the real world, however, neither is so principled.

The Nearly Automatic Waiver of the Attorney-Client Privilege

Centuries of history tell us that the compromise inherent in the attorney-client privilege has served our jurisprudence system well. The criminal jurisprudence system is no exception. In the context of a governmental investigation, the attorney-client privilege, in tandem with selective joint defense agreements with current and former employees, allows companies to investigate fully accusations of purported wrongdoing. A full investigation is necessary so the company can defend itself and take appropriate remedial action. Appropriate remedial action includes compensating victims of the purported wrongdoing, penalizing employees who committed the purported wrongdoing, preventing the purported wrongdoing from repeating, and candidly and accurately reporting the wrongdoing to law enforcement and its shareholders. Absent a meaningful attorney-client privilege and absent the belief that the company will preserve the confidentiality of the information provided, employees and former employees may not be entirely candid about known and unknown wrongdoing or, even worse, may not cooperate with the company at all.

Historically, there was always a risk that the company would waive the attorney-client privilege, but that risk was modest. Add to the equation a properly-worded joint defense agreement, the risk that the content of a particular current or former employee's statement to company counsel would be waived is very low.

In light of (1) the Thompson memo, (2) the apparent leverage it gave DOJ line attorneys, (3) the practice of line attorneys requesting waiver without seeking supervisor permission, and (4) the new environment of "cooperation" in the context of Sarbanes-Oxley, waiver of the attorney-client privilege by companies was beginning to appear inevitable, and current and former employees – particularly those represented by counsel – were beginning to balk at cooperating with company counsel far more frequently than in the past. The end result was that the underlying purposes of the attorney-client privilege were not being served, and companies and shareholders as well as the public were harmed.

The Attempted Bar on Advancing Attorneys' Fees

It is a typical practice to advance attorneys' fees to current and former executives accused of wrongdoing, often required under companies' by-laws as interpreted by state law. The primary intended consequences of that practice are that executives are more likely to cooperate with the company, statements made to the company and the government are more likely to be accurate (or, at the least, consistent) because they are vetted by the executive's own attorney, and the company is more likely to obtain an accurate picture of what the executive is saying to the government. An unintended (perhaps) consequence of advancing fees is that fewer executives and former executives cooperate. The former consequences are benefits that companies should preserve for their shareholders, and it is questionable that the government should be interfering with these benefits.

The government has never been happy with the practice of advancing attorneys' fees. The government attorney's lifeblood (i.e., leverage) is inconsistent statements, misstatements, overstatements, and secret statements. As a result, DOJ line attorneys (as well as other government attorneys) have used the Thompson memo in an effort to block the advancement of fees. This been the case even though the DOJ now recognizes what was obvious to attorneys representing companies and at least one Federal District Court:

> Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.

Key Changes to Policy Set Forth in the McNulty Memo

The McNulty memo introduced both substantive and procedural changes from the Thompson memo and DOJ's current practices with respect to seeking waivers of the

continued on page 8

continued from page 7

attorney-client privilege and actions to penalize companies for advancing fees.

Substantive Changes

The McNulty memo makes a couple of key substantive changes. First, the Thompson memo had, in effect, made the waiver of the attorney-client privilege a criteria – employed by DOJ line attorneys – for obtaining credit for cooperation in the DOJ's decision to bring a case. As the DOJ explained, the McNulty memo purports to bar use of the waiver *negatively* in charging decisions:

> If a corporation chooses not to provide attorney-client communications after the government makes the request, prosecutors are directed not to consider that declination against the corporation in their charging decisions.

Nevertheless, if a company waives the privilege, that waiver can be viewed favorably in the charging decision.

Second, the Thompson memo had permitted DOJ line attorneys to consider in all circumstances the company's decision to advance fees in determining whether to charge the company. The new McNulty memo expressly bars such consideration except in "extremely rare cases . . . [when] the advancement of attorneys' fees . . . was intended to impede a criminal investigation."

Procedural Changes

The McNulty memo sets forth procedural requirements with respect to the waiver of attorney-client privilege that are likely to be significant. With respect to requests to disclose interview memoranda and witness statements that are subject to either the attorney-client privilege or attorney work product protection, DOJ line attorneys must obtain written authorization from the United States Attorney[6] who must consult with the Assistant Attorney General for the Criminal Division (or the Assistant Attorney General for the appropriate litigating Division (e.g., the Antitrust Division)) before requesting a company to waive these protections. In the past, the line attorney simply made the request with or without consultation with supervisors. In a real, bureaucratic and political sense, this change will reduce the requests significantly. Assuming the procedure is followed, future requests will be made in a very small percentage of cases.

With respect to requests to waive the privilege as to legal advice given, the United States Attorney or the Assistant Attorney General for the litigating Divisions (e.g., the Antitrust Division) must request in writing authority from the Deputy Attorney General, the second highest officer in the DOJ. Again, these requests will likely be rare – at least relative to the frequency of requests by line attorneys.

The procedural changes requiring supervisor sign-off will have a more significant impact over time than the substantive change barring a DOJ line attorney from considering the failure to waive the attorney-client privilege on the charging decision.

The SEC and Other Governmental Agencies

We have yet to hear from the SEC and the other governmental agencies with respect to the McNulty memo. History tells us that most, if not all, will follow the DOJ's lead. This is largely because criminal prosecution is typically the 800 pound gorilla in the room when there are joint investigations. This is also true because the DOJ has articulated weaknesses in the current practice of demanding waiver of attorney-client privilege and barring advancement of fees as a pre-requisite to receiving credit for cooperation.

continued from page 1

- Hourly rates law firms are charging for the use of paralegals;
- The legal and accounting costs for taking a company public;
- Malpractice insurance;
- Best ways to avoid duplicate inquiries to the legal department;
- Cell phone use policies; and
- Holding departing employees accountable for returning company property.

Take advantage of this great resource, go to *www.acc.com/php/cms/index.php?id=55*.

ACC: Planning for the Future

ACC strives to be the premier association for in-house counsel and we have made significant strides towards that goal. Consider last year we crossed the 20,000 membership threshold, while averaging a net gain of 1,400 members per year for the past 5 years. The Annual Meeting has doubled in size in 5 years and we expect total attendance to surpass 3,000 people in Chicago this October. ACC Online and the *ACC Docket* provide a wealth of useful and practical information that in-house counsel can use for their professional development. In addition, the committee network continues to expand and the chapter network has never been stronger or more robust.

ACC's Strategic Plan constitutes a critical component of our success. The Board of Directors as well as chapter and committee representatives first developed this plan over 3 years ago. This January, the directors and a group of chapter and committee representatives met to assess and refine the plan based on the results of our recent member needs assessment survey. As a result, two strategic initiatives were added as initiatives for ACC to focus on in the next year or two. This plan provides the guidance and focus that is critical to our recent success and our future challenges.

Here are the major goals of the strategic plan with examples:

- Be the Voice of the In-House Bar by advancing the in-house practice of law and the professional standing of in-house attorneys. (E.g., preserve the attorney-client privilege and promote MJP reform.)
- Provide value to in-house counsel at each stage of their career through targeted resources and services. (E.g., Corporate Counsel University for new in-house attorneys and CLO Think Tanks.)
- Build a global network. (E.g., a thriving chapter in Europe and 1000 members outside the US in 60 countries.)
- Improve awareness of ACC in the in-house community while developing and expanding our brand in the legal and business communities. (Recognition in the media as the source of information about the in-house practice, including such publications as *Business Week*, *Forbes*, *USA Today* and the *Wall Street Journal*.)
- Provide more training on general business and management issues. (E.g., Executive Leadership Institute, Mini MBA Program covering financial and business issues)
- To leverage technology resources and skills. (E.g., enhance our website and expand our use of technology to deliver resources to and facilitate networking among our members.)