



# **In-House Counsel Ethics and Privilege:**

How Protecting Yourself Can Help Protect Your  
Company from Liability

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## What Are the Press and Profession Saying About In-House Counsel Liability

- “Major corporate fraud cannot happen over an extended period of time without the complicity of accountants, lawyers and other professionals  
**Larry Thompson, Deputy Attorney General, June 2003**
- “Paradise Tarnished: Today’s Sources of Liability for Corporate Counsel”  
**Association of Corporate Counsel, March 2005**
- “Gatekeeper GCs Increasingly Becoming Targets for Liability”  
**National Law Journal, September 2006**
- “General Counsel Under Attack”  
**ABA, Section of Litigation, Committee on Corporate Counsel, October 2007**
- Record Number of General Counsel Charged in 2007  
**Law.com, October 2007**
- In-house Counsel and Backdating: What Will They Criminalize Next?  
**Associate of Corporate Counsel, February 2008**
- “... lawyers are what today we call crucial gatekeepers responsible for safeguarding shareholder’s interests ...”
- .. It’s because the roles of gatekeeper and watchdog come with a great deal of responsibility that, when professionals - lawyers or accountants - fail to live up to their responsibility, the government will bring enforcement actions ...”  
**Christopher Cox, SEC Chairman**

## Presentation Overview

- Personal liability risks facing in-house counsel
  - History and sources of liability
  - Some current statistics
  - The emerging liability landscape
  - Getting into and staying out of trouble
- Dealing with liability risks in everyday situations
  - In-house counsel as parties/deponents
  - Threats to the attorney client privilege
  - Protecting your communications
  - Reviewing employee e-mails
  - Defamation claims
  - Internal investigations/private investigators
  - Preserving/gathering documents for litigation or regulatory review
  - Dealing with auditors
  - Successfully handling a crisis
- 2008 and beyond
- Some steps to help minimize your personal liability, and protect the corporation
- Presentation Materials/Questions

# **Personal Liability Risks Facing In-House Counsel**

## A Historical Perspective

- “BE” and “PE”
- Before Enron
  - Focus was on violations of established state law or state rules of professional conduct.
  - Key enforcers were the ABA, state bar associations and state courts.
  - In-house counsel viewed as a trusted advisor with obligations to his or her client, the Company.
- After Enron
  - Increased and direct federal involvement in regulation of the legal profession.
    - “With Enron and Worldcom and all the other corporate misconduct we have seen, it is again clear that corporate lawyers should not be left to regulate themselves.”  
**Senator John Edwards**
    - “The state bars as a whole have failed ... even if they do have a general rule that applies, it often goes unenforced.”  
**Senator Mike Enzi**
    - “Sarbanes-Oxley reflects some skepticism about the degree to which the legal profession can police itself.”  
**SEC Chairman Harvey Pitt**
  - Sarbanes-Oxley § 307.
  - In-house counsel continue as a trusted adviser, but add the roles of a “cop on the beat,” and “gatekeeper,” in partnership with the SEC and other government agencies, and with equal obligations to the public and the Company.

## Sources of Personal Liability Risks Facing In-House Counsel

- Governmental liability
- Liability to shareholders
- Liability to employer/client
- Liability to other parties
- “In-house counsel are warned of their exposures with respect to regulatory compliance, legal opinions, § 307 of the Sarbanes-Oxley Act, outside third party lawsuits, confidentiality/privilege, intellectual property, conflicts of interest, stock options backdating, multijurisdictional practice, whistleblower and employee issues, and advice given to boards, among others.”

**New York Law Journal, July 23, 2007**

- In every transaction you handle, every governance problem you tackle, and every shareholder communication you write, keep in mind that America’s investors are depending on you”

**SEC Chairman Christopher Cole, March 2006**

## Some Governmental Liability Data

- There have been a number of high profile cases involving in-house counsel liability in the “after Enron” years.
- The “front page” cases, however, appear to be in the minority, and may not be representative of the most typical claims brought against in-house counsel.
- The volume of claims brought against in-house counsel is low in comparison to other senior corporate executives.
- Claims against in-house counsel continue to increase at a slow, but steady pace.
- Options backdating cases skew the statistics.

**Issue:** Securities Fraud

**Investigation**

**Pending:**

7

**Infractions:** 20

**Convictions or**

**Settlements:**

11

**Charged:** 20

- Disgorgement, interest, civil penalties, criminal fines
- \$25,000 to over \$3,900,000
- Prison terms up to two years
- Supervised release
- Probation
- Community service
- Permanent violation injunctions
- Officer and director ban
- SEC practice suspension
- Termination/early retirement

**Issue:** Stock Options Backdating

**Investigation**

**Pending:**

7

**Infractions:** 25

**Convictions or**

**Settlements:**

3

**Charged:** 10

- Disgorgement, interest, civil penalties, forfeiture
- \$381,000 to over \$3,000,000
- Prison terms up to one year
- Permanent violations injunction
- SEC practice suspension
- Officer/director ban
- Termination/early retirement

**Issue:** Insider Trading

**Investigation**

**Pending:**

1

**Infractions:** 4

**Convictions or**

**Settlements:**

3

**Charged:** 4

- Disgorgement, interest, and civil penalties
- \$290,000 to almost \$3,000,000
- Prison terms of up to five years
- Permanent violations injunction
- Officer/director ban

**Issue:** Internal Policy Violations

**Investigation**

**Pending:**

1

**Infractions:** 4

**Convictions or**

**Settlements:**

0

**Charged:** 0

- Termination
- Early resignation

**Issue:** Obstruction of Justice or Document Destruction

**Investigation Pending:**

1

**Infractions:** 3

**Convictions or Settlements:**

1

**Charged:** 1

- Fines
- Up to \$50,000
- Prison terms of up to three years
- Permanent violations injunction
- SEC practice suspension
- Terminated from job

**Issue:** Reporting Violations

**Investigation  
Pending:**

0

**Infractions:** 3

**Convictions or  
Settlements:**

3

**Charged:** 3

- Civil penalties
- Up to \$40,000
- Permanent violations injunction

<b>Issue:</b> False Statements to Government Entity	<b>Investigation Pending:</b>	2
<b>Infractions:</b> 4	<b>Convictions or Settlements:</b>	1
<b>Charged:</b> 2		

- Civil fines
- Up to \$20,000
- Prison terms up to ten years
- Officer/director ban
- Permanent violations injunction
- Resignation

<b>Issue:</b> Fraudulent Transfers		<b>Investigation Pending:</b>	0
<b>Infractions:</b>	2	<b>Convictions or Settlements:</b>	2
<b>Charged:</b>	2		

- Civil penalties
- Up to \$50,000
- Prison terms up to five years
- Permanent violations injunction

**Issue:** False Statements to Auditors

**Investigation**

**Pending:**

0

**Infractions:** 1

**Convictions or  
Settlements:**

1

**Charged:** 1

- SEC practice suspension
- Permanent violations injunction

**Issue:** Wire or Mail Fraud

**Investigation**

**Pending:**

0

**Infractions:** 4

**Convictions or**

**Settlements:**

4

**Charged:** 4

- Fines and restitution
- Up to \$200,000
- Sentencing pending for 3 individuals
- 96 hours of community service
- Permanent officer/director ban
- SEC practice suspension

**Issue:** Failure to Disclose Info to  
Investors or the Public

**Investigation  
Pending:**

0

**Infractions:** 4

**Convictions or  
Settlements:**

4

**Charged:** 4

- Disgorgement, interest, penalties
- \$100,000 to \$165,000
- Officer/director ban
- Permanent violations injunction
- SEC practice suspension

**Issue:** Fraudulent Marketing and  
False Product Claims

**Investigation  
Pending:**

0

**Infractions:** 2

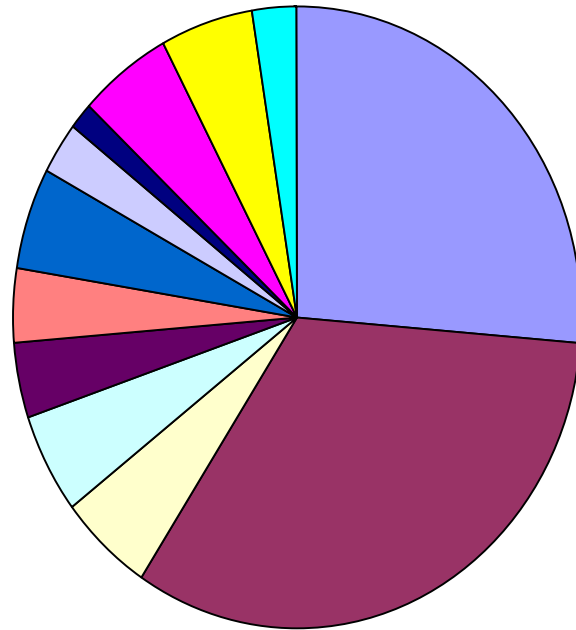
**Convictions or  
Settlements:**

1

**Charged:** 2

- Fines and penalties
- Up to \$8 million
- Probation
- Community service

# Infractions:



- Securities Fraud
- Stock Options Backdating
- Insider Trading
- Internal Policy Violations
- Obstruction of Justice or Document Destruction
- Reporting Violations
- False Statements to Government Entity
- Fraudulent Transfers
- False Statements to Auditors
- Wire or Mail Fraud
- Failure to Disclose Info to Investors or the Public

Source: American Bar Association, Section of Litigation, Committee on Corporate Counsel, Oct. 2007;  
updated with information from the SEC and DOJ

### Some Governmental Liability Data – The Past Five Years

In-house counsel that settled with the government or pleaded guilty	24
In-house counsel found guilty	10
In-house counsel acquitted or charges dismissed	5
In-house counsel charged with cases pending	12

## Some Governmental Liability Data - The Past Five Years

### Found Guilty

- **Robert Graham**; Assistant GC, *General Re Corp*; Securities fraud
- **Michael J. Petrzak**; GC and CFO, *Hexagon Consolidated Cos. of America*; Securities fraud
- **Peter Atkinson**; EVP, GC, *Hollinger Inc.*; Mail and tax fraud
- **Mark Kipnis**; Chief corporate counsel, *Hollinger Inc.*; Mail fraud
- **Bruce Hill**; GC, *Inso Corp.*; Perjury (jury deadlock on securities and wire fraud)
- **Chris Gunderson**; GC, *Universal Express Inc.*; Securities fraud
- **Anne Hovis**; GC, *Phlo Corp.*; Aiding/abetting SEC violations
- **Mitchell Drucker**; Associate GC, *NBTY Inc.*; Insider trading
- **Kevin Heron**; GC, *Amkor Technology*; Insider trading
- **Charles Spadoni**; GC, *Triumph Capital Group*; Racketeering, theft/bribery

## Some Governmental Liability Data - The Past Five Years

### Settled or Pleaded Guilty

- **Scott Lodin**; GC, *Andrx Corp.*; SEC violations
- **Thomas Bucknum**; GC, *Biogen Idec Inc.*; Insider trading
- **Jane Kober**; GC, *Biopure Corp.*; Securities fraud
- **Jon Bloodworth**; GC, *Busybox.com*; IPO fraud
- **Steven Woghin**; GC, *Computer Associates International*; Conspiracy/securities fraud, obstruction of justice
- **William Sorin**; GC, *Comverse Technology, Inc.*; Conspiracy/securities, mail, wire fraud
- **John Isselmann Jr.**; GC, *Electro Scientific Industries, Inc.*; SEC violations
- **Craig Scott**; CFO and GC, *FFP Marketing Company Inc.*; Securities fraud
- **Jonathan Orlick**; GC, *Gemstar-TV Guide International*; Securities fraud
- **David Drummond**; GC, *Google, Inc.*; SEC violations
- **Kevin Hunsaker**; Senior Counsel/Chief Ethics Officer, *Hewlett-Packard Co.*; Fraudulent wire communications
- **James Moen**; GC, *Katun Corp.*; Wire fraud/computer-related fraud
- **Myron Olesnycky**; GC, *Monster Worldwide*; Options backdating
- **Randi Collotta**; Associate, Global Compliance Division, *Morgan Stanley*; Conspiracy/securities fraud (insider trading)
- **Steven Hunt**; President/GC, *Southmark Advisory Inc.*; SEC violations
- **Leonard Goldner**; EVP/GC, *Symbol Technologies, Inc.*; Conspiring to obstruct the IRS, securities fraud
- **Kenneth Selterman**; GC, *Take-Two Interactive Software Inc.*; Options backdating
- **Howard Udell**; CLO, *The Purdue Frederick Company, Inc.*; Misbranding a drug
- **Stanley Silverstein**; GC, *The Wornaco Group, Inc.*; SEC violations
- **David Klarman**; GC, *U.S. Wireless Corp.*; Mail fraud, money laundering, SEC violations
- **Andrew Marks**; Chief Patent Counsel, *Vertex Pharmaceuticals, Inc.*; Insider trading
- **Fred Stone**; GC, *Millennium Management*; Fraudulent market timing
- **Herbert Getz**; GC, *Waste Management Inc.*; Securities fraud

## Some Governmental Liability Data - The Past Five Years

### Acquitted or Charges Dismissed

- **Scott Monson**; GC, *JB Oxford Holdings, Inc.*; Late trading
- **Scott Wiegand**; GC, *PurchasePro.com*; Conspiracy, Securities fraud
- **Mark Belnick**; Chief Corporate Counsel, *Tyco International*; Fraud
- **Jay Lapine**; GC, *HBO & Co.*; Acquitted on one charge of securities fraud, mistrial declared on six other counts.
- **Daniel Adkins**; GC, *Xpress Pharmacy Direct*; Various charges related to running an illegal Internet pharmacy

## Some Governmental Liability Data - The Past Five Years

### **Indicted or Charged; Cases Pending**

- **Nancy Heinen**; GC, *Apple Inc.*; Options backdating
- **Jilaine Bauer**; GC, *Heartland Advisers Inc.*; Insider trading
- **Lisa C. Berry**; GC, *Juniper Networks Inc.*; Options backdating
- **Kent Roberts**; GC, *McAfee Inc.*; Options backdating
- **Susan Skaer**; GC, *Mercury Interactive*; Options backdating
- **Eric Deller**; GC, *Peregrine Systems Inc.*; Aiding/abetting fraud
- **Richard T. Nelson**; GC, *Peregrine Systems Inc.*; Securities fraud
- **W. Roderick Johnson Sr.**; GC, *Rocky Mountain Energy Corp.*; Securities fraud
- **Christi Sulzbach**; GC, *Tenet Healthcare Corp.*; Securities fraud
- **Eric Jaeger**; EVP-Corporate Affairs; GC, *Cabletron Systems Inc.*; Securities fraud
- **Jordan Mintz**; GC, *Enron Corp.'s Global Finance Group*; Securities fraud
- **Rex Rogers**; Associate GC, *Enron Corp.*; Securities fraud
- **David Dull**; GC, *Broadcom Corp.*; Options backdating

## The Emerging Liability Landscape for In-House Counsel

- The efficacy of criminal prosecution of corporations is being questioned by federal district judges, legislators, former prosecutors and others.

The landmarks --

New York Central v. United States 212 U.S. 481 (1909)

Holder Memorandum (1999)

Thompson Memorandum (2003)

McNulty Memorandum (2006)

“We have reached a point in our history where corporate criminal liability is an appropriate subject for reconsideration”

USDJ Lewis Kaplan

“Corporations do not commit crimes; people do.”

USDJ John Martin

“When a company has implemented a rigorous compliance program prior to the misconduct of a rogue employee, the goals of the criminal law have been satisfied.”

Former Enron Task Force Leader Andrew Weissman

## The Emerging Liability Landscape for In-House Counsel

- Post Enron/Arthur Andersen focus has shifted toward deferred prosecution of companies.
- Biopure Corp.
  - SEC alleged misleading statements about U.S. Food & Drug Administration's review of pharmaceutical company's products
  - Company settled, without admitting or denying SEC's charges, agreeing to an injunction against future violations of securities laws and retention of independent consultant to overhaul the company's disclosure policies
  - GC Jane Kober paid a \$40,000 civil penalty

## The Emerging Liability Landscape for In-House Counsel

- But the government and press still want a scapegoat
- There is expanded focus on enhanced scrutiny of individual actions and intent, including corporate counsel.
- Milberg
  - Formerly known as Milberg Weiss Bershad Hynes & Lerach
  - Lerach is in prison; Weiss is headed there under previously announced guilty pleas
  - Firm has agreed to pay \$75 million over five years; prosecutors will soon ask for dismissal of indictment
  - “The settlement with Milberg reflects the seriousness of what was probably the largest-running scheme ever conducted by a law firm.”

Thomas O'Brian, U.S. Attorney

## The Emerging Liability Landscape for In-House Counsel

- Companies are more willing to lay blame at feet of in-house counsel.

## The Emerging Liability Landscape for In-House Counsel

- To increase size of potential settlements and to pit corporate insiders against one another, plaintiffs are more willing to sue in-house counsel.

## The Emerging Liability Landscape for In-House Counsel

- The efficacy of criminal prosecution of corporations is being questioned by Federal district judges, legislators, former prosecutors and others.
- Post Enron/Arthur Andersen focus has shifted toward deferred prosecution of companies.
- There is expanded focus on enhanced scrutiny of individual actions and intent, including corporate counsel.
- Companies more willing to lay blame at feet of in-house counsel.
- To increase size of potential settlements and to pit corporate insiders against one another, plaintiffs more willing to sue in-house counsel.

## Getting Into and Staying Out of Trouble

- United States v. Mark Kipnis [Conrad Black/Hollinger]
  - Kipnis, General Counsel, prepared contractual documents
  - Documents memorialized illusory non-corporate agreement between senior managers and subsidiary
  - Disclosures to Audit Committee not accurate
  - Kipnis obtained no direct financial benefit, in contrast to senior managers
  - Kipnis (and CEO, CFO) convicted of mail fraud, etc.

## Getting Into and Staying Out of Trouble

- United States v. Robert Graham [Gen Re/AIG]
  - Graham, mid-level in-house attorney, prepared contractual documents
  - Documents memorialized illusory transaction between his employer (Gen Re) and AIG
  - Gen Re's documents helped AIG make materially false financial disclosures
  - Graham (and CEO, CFO) convicted of aiding and abetting AIG's securities fraud, etc.

## Getting Into and Staying Out of Trouble

- United States v. Christi Sulzbach [Tenet Healthcare]
  - Sulzbach, General Counsel, received outside counsel's investigative report that certain physician contracts masked unlawful referral payments
  - Investigative report was privileged and not disclosed to the government
  - Sulzbach, as Tenet's corporate integrity program director, signed sworn declarations that the Company was in compliance with law
  - Government filed False Claims Act against Sulzbach, seeking millions of dollars in damages
  - By filing false compliance declarations that hid the illegal physician relationships, Sulzbach caused the government to pay millions of dollars in claims that it should not have, and that Sulzbach should have to pay that money back, plus treble damages and other relief.

## Getting Into and Staying Out of Trouble

- Securities and Exchange Commission v. Steven Woghin [Computer Associates]
  - Woghin, General Counsel, participated in widespread practice that resulted in improper revenue recognition (the “35 day month”)
  - Woghin knew, or was reckless in not knowing, “that attorneys in his department worked long hours in the days after each quarter end to approve backdated contracts that CA improperly recorded in prior quarters”
  - Woghin “met with various employees and instructed them regarding the manner in which should answer questions when they were interviewed by outside counsel”
  - Woghin (and CEO, CFO and others) sentenced to two years in prison and three years of supervised release

## Getting Into and Staying Out of Trouble

- **Kevin Heron, General Counsel, Amkar Technology, Inc.**

“How is anyone to know if you sell 1,000 shares? I mean, think about it, the market trades over a billion shares a day, who gives a rat’s ass if you sell 1,000?”

- **John Isselmann, Jr., General Counsel, Electro Scientific Industries, Inc.**

“ . . . failed to provide important information to ESI’s Audit Committee and Board of Directors regarding a significant accounting transaction . . . Isselmann’s failure to fulfill his gatekeeper role was a cause of the Company reporting materially false financial results . . . ”

## Getting Into and Staying Out of Trouble

- **Scott Monson, General Counsel, JB Oxford Holdings and National Clearing Corporation**

In drafting an agreement, “used to memorialize the late trading relationship with institutional customers . . . Monson failed to undertake any substantive analysis, such as considering the legality or propriety of late trading, and failed to review the SEC’s rules and regulations or even consult NCC’s compliance director . . .”

## Getting Into and Staying Out of Trouble

- The rhetoric of in-house lawyers as “gatekeepers” is becoming reality
- Perspectives on what is “accepted conduct” by in-house counsel change
- Wearing more than one hat carries risks for in-house counsel
- There is an element of “bystander liability” for in-house lawyers near the scene of a business disaster
- Inside lawyers who relied on and followed outside counsel’s advice are seldom targets
- Putting money in your pocket is not necessary to prompt an enforcement action or criminal charge
- The top lawyer is nearly always the target, with trickle down liability to any counsel with direct involvement
- Disclosures, and particularly omissions in disclosure, are often the trigger
- E-mail, E-mail, E-mail
- There is no “pass” for solo in-house counsel, or for the failure to supervise
- A thoroughly ethical culture matters as much, or even more today, than ever

# **Effectively and Ethically Dealing with Everyday Liability Issues**

## General Counsel As Parties And Deponents

- Did you participate in discoverable communications?
- Did you review employee e-mails?
- Did you make statements to third parties that could give rise to disparagement, defamation or other claims?

## Why Your Communications May Not Be Protected By Privilege

- Courts show lingering ambivalence toward in-house attorney-client privilege.
- Legal advice may be mixed with business advice.
- Advice communicated to a non-client:
  - Disclosure of Investigative Report to Target Directors
    - *Ryan v. Gifford* (Del. Ch. 2008) (privilege for investigative report waived by counsel's oral report to target directors and their personal counsel)

## Why Your Communications May Not Be Protected By Privilege

- Auditors
- Former Officer
  - *People v. Greenberg* (App. Div. NY 2008) (former officer has a right of review in New York, but not Delaware)
- Advisors
- Non-control group members
- Disclosure to business affiliates

## Why Your Communications May Not Be Protected By Privilege

- Waivers:
  - Putting advice at issue: state of mind, good faith, assertions of lack of knowledge.
  - Selective waiver.
  - Inadvertent production.
  - Sale of business assets.
  - Government disclosures.
  - Refreshing recollection.
- Fiduciary/Fraud Exception – No Scierter Required.

## How To Protect Your Communications

- Legal Protections:
  - Joint interest agreements.
  - Inadvertent production provisions in protective orders.
  - Affirmative privileged material provisions in acquisition agreements.
  - Engage consultants to assist you or outside counsel.
- Practical Protections:
  - Is it better to talk about it?
  - Retention policies/litigation hold.
  - Confirm an engagement to provide legal advice.

## How To Protect Your Communications

- Caption and state purpose of your communication.
- Think about your distribution.
- Involve outside counsel.
- Educate your executive team.
- Ensure you are not inadvertently facilitating a breach of duty.

## Review Of Employee E-mails

- *Scott v. Beth Israel Med. Ctr. Inc.* (Sup. Ct. NY 2007)
- Review of Internal E-mails:
  - Who does it? Who should do it?
  - Any threshold showing required?
  - Notice given to employees after review is conducted?
- Inside or Outside Investigators?
  - Specialized expertise – in investigative technique/subject matter.
  - Credibility of investigation with regulators/prosecutors.
  - Maximizing applicability of privilege.

## Review Of Employee E-mails

- Firm policy – what are the expectations of privacy?
- Enforcement of policy – relevant to expectations.
- Use of g-mail versus firm e-mail/server.
- Review of employees' communications with his or her private counsel – is personal use of e-mail permitted by policy?

## Defamation

- Privileged versus non-privileged communications related to litigation.
  - “This employee who sued us was engaged in outside activities not authorized by the firm...”
  - Attorney to client: “Here is the complaint. The defendant is a dishonest person.”
- Lawsuits are protected conduct:
  - Exceptions: sham litigation; abuse of process; malicious prosecution; slander of title.

## The In-house Counsel Dilemma

In-house counsel must be supportive of the business and part of the “team.”

V.

In-house counsel must be independent, objective professionals.

\* \* \*

Responsiveness v. Reflection

## Emerging Issues In The World Of Electronic Discovery

- Some Qualcomm/Broadcom Lessons
- Litigation Holds/Preserving Evidence: Electronically Stored Information
- ESI -- Quirk of the Day

## Some Qualcomm/Broadcom Lessons

- The lessons go beyond the admonition: “Don’t lie and don’t cheat”
- “Discovery of electronically stored information stands on equal footing with discovery of paper documents.” FRCP 34(a) Advisory Committee Notes
- Elevate the importance of electronic document preservation and discovery
- You need knowledgeable internal and external resources
- Highly functioning collaboration between inside resources and outside counsel is essential

## Litigation Holds on Electronically-stored Information

- The legal obligation to preserve potentially relevant information – when the duty arises
- The minimum requirements to consider
- How to know if you're not there yet

## Litigation Holds on Electronically-Stored Information (Continued)

- Key computers: To image or not to image?
- Knowing and defeating the “spoliation game”

## ESI - Quirk of the Day

- The weird world of pdf documents
- What happened to GE and others
- Keeping up with the metadata

## Ethical Notes on Internal Investigations

- Use of private investigators
- Watching the privilege

## Use of Private Investigators

- The H-P case wake-up call
- Keep the key ethical rules in mind
- Some potential pitfalls presented by use of private investigators
  - *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693
  - *Allen v. Int'l Truck & Engine*, 2006 U.S. Dist. LEXIS 63270
  - *In re Ositis*, 40 P. 3d 500

## Protecting the Privilege

- Is the internal investigation privileged?
- Waiver: When the audit or other special committee is the client
- Ryan v. Gifford, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007) and Ryan v. Gifford, 2008 WL 43699 (Del. Ch. Jan. 2, 2008).

**Preparing a Government Investigation Response Plan:  
a View From the Inside**

## Initial Notification of Investigation or Request for Interview

- Retain criminal counsel who can do the following: (1) de-brief employee(s) interviewed; (2) arrange for initial meeting with government and determine the nature and status of the investigation and the status of employee (target, subject, witness); (3) ascertain the scope of investigation (i.e., document requests and witness interviews); (4) notify impacted employees of probable government agent contact; (5) help investigate and assess response; and (6) begin internal discussion regarding cooperation.
- Note: consider whether to retain independent criminal counsel rather than regular outside counsel and to whom counsel should report.
- Corporate counsel: risk of claim of obstruction of justice or witness tampering – should be handled by outside counsel.

## Interview/Investigation Planning

- Educate employees/executives about rights and obligations.
- Identify reporting chain and investigation team (e.g., GC, Board, outside counsel, outside financial investigators, electronic evidence experts, security experts, etc.)
- Ensure preservation of electronic information and suspend records destruction under routine document retention policies schedule.
- Never conduct interviews alone.
- Consider the need for a written report.
- Understand Sentencing Guidelines and requirement to investigate.
- Consider voluntary reporting to Government, either before or after an internal investigation. Regular updates useful.
- Select and prepare PR representative as single point of contact with media. Outside counsel to review all statements.

## Document Preservation and Collection

- Litigation/records holds.
- Educate employees about consequences of destruction.
- Consider use of outside management of discovery process.
- Corporate Counsel: risk of claim of obstruction of justice or witness tampering with regards to inadequate document retention.

## Determine Disclosure Requirements

- Determine obligation to disclose fact of investigation publicly.
- Consider whether to institute trading blackout by insiders if the investigation is not disclosed publicly.
- Determine SOX reporting requirements and remediation.
- Consider when to notify the Board of Directors if SOX does not remediate.
- Consider notifying auditors and timing of notification, if appropriate.
- Consider notifying insurance brokers to determine potential coverage.

## Ethical Issues

- Employees to be reminded that corporate counsel represent the company and not the individual employee
- Reminder that attorney-client privilege may not apply and that an interview may be disclosed to the government
- Right to retain counsel
- Determine indemnification obligations and need to provide separate counsel for implicated officers, directors, employees

## Remediation

- Determine remediation, if necessary: (1) change in employment status; (2) changes in training or procedures?
- Determine adequacy of compliance program.
- Confirm no retaliation against whistleblowers.

**2008 and Beyond**

**Minimizing Your Liability–  
A Twenty Step Program**

## What to Expect in 2008 and Beyond

- 2007's backdating is giving way to 2008's subprime meltdown
- Continued pressure on in-house counsel to self-report, monitor financial condition, and compromise the attorney client privilege
- Increased governmental focus on antitrust, anti-bribery, and FCPA enforcement, particularly in China and Europe
- Vigorous review and enforcement of data preservation and handling protocols
- Renewed efforts to attach liability to secondary actors, particularly in light of global ramifications of credit crisis
- Hedge funds
- Executive compensation
- 10b5-1 Trading Plans

## **Twenty Steps In-House Counsel Might Consider for Minimizing Personal Liability and Protecting Their Company**

1. Consider documenting the advice you provide, but be careful about that documentation.
2. Know the law. Don't break it. Be right.
3. Question, review, reflect, involve, analyze.
4. Actively investigate, seek to remedy, and if required, report any potential corporate improprieties.
5. Remember you represent the company: make that clear when dealing with employees and outside parties.
6. Avoid pretexting and other questionable investigative techniques.
7. Understand there may be different obligations for dealing with witnesses and documents in criminal and civil actions.
8. Try to de-link your compensation to the compensation of the company's top officers, or your business unit's performance.
9. Do not rely solely upon indemnity provisions to protect you. Examine whether Errors and Omissions Insurance or some other insurance vehicle offers you better protection.
10. Know the license requirements of the states in which you work and provide legal advice, as well as the license status of all attorneys you supervise.

## Twenty Steps In-House Counsel Might Consider for Minimizing Personal Liability and Protecting Their Company

11. Always have one eye focused on protecting the corporation's attorney-client privilege, but remember that the right to such protection may not survive.
12. Avoid taking steps that make it more likely you will become a fact witness regarding events. Be a lawyer.
13. Know what role you are playing in every meeting and discussion. Maintain that clarity for everyone.
14. Watch your back, because it may be in the company's interest to toss you under the bus.
15. Look at the substance and merits of the transaction in question. Just because it's industry practice, or everyone is doing it, does not make it right.
16. Use outside counsel or expertise to fill gaps in your knowledge. Always question the advice you get.
17. Learn how to say "no" and "stop." Do not just do management's bidding.
18. Look for problems. If you don't, they'll find you.
19. Prepare in advance for your next crisis. It's coming.
20. And always ask yourself these questions — how would this decision look if it made headlines? Am I doing the right thing?

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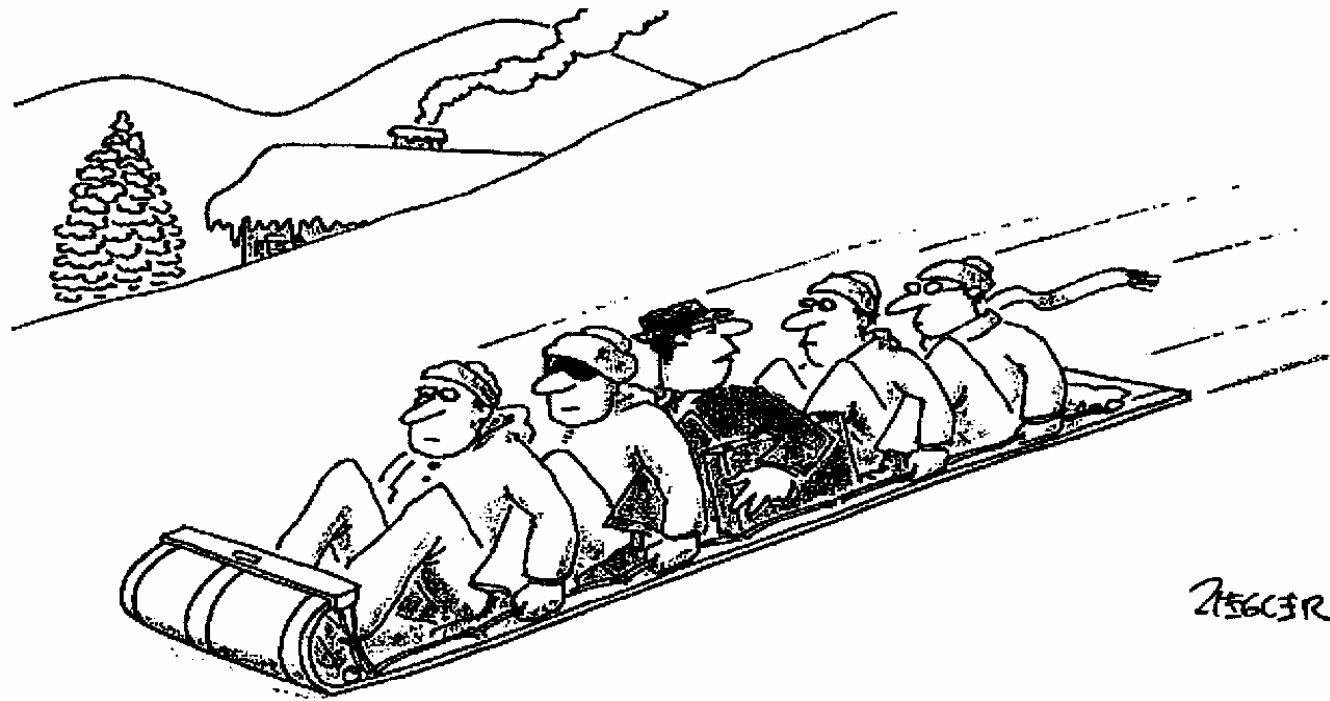
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**And in Conclusion**



*“Look, I’m not saying it’s going to be today. But someday– someday– you guys will be happy that you’ve taken along a lawyer.”*

**Remember to Always Ride with Your Lawyer**

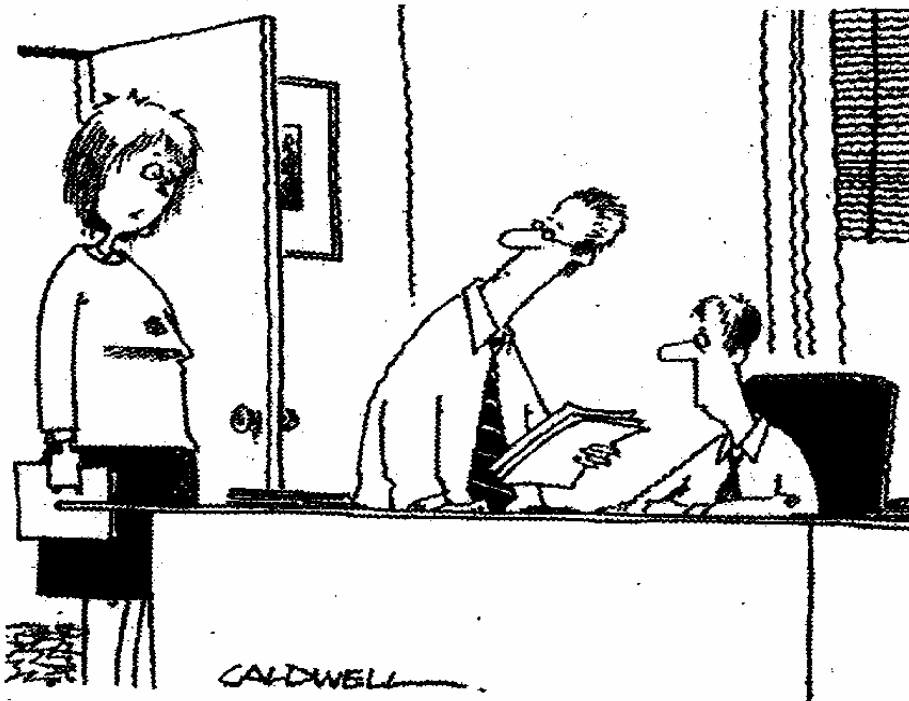


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**Do the Right Thing**

# Pepper . . . and Salt

THE WALL STREET JOURNAL



**“We waited too long to run it by legal.  
Now we need to run it by a judge.”**

**And to Love Your In-house Counsel**

# Questions