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The Risks and Benefits of the Rule 26 Amendments Regarding Expert Reports

By Leah Knowlton and Hart Knight

The amendments to Rule 26 of the Federal Rules of Civil Procedure, effective December 1, 2010, are almost certainly creating cost savings in the use of experts in litigation. In the near term, most attorneys are likely to continue to exercise great caution in communications with testifying expert witnesses, but such caution may wane over time. However, attorneys should be mindful of the possible risks of extensive involvement in drafting expert reports and otherwise guiding the formulation of testimony. Any cost savings in the efficiencies realized under the new Rule 26 amendments could evaporate with the exclusion of expert testimony in a *Daubert* challenge or for other causes. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *see also* Fed. R. Evid. 702.

Rule 26 was amended, in part, to enlarge the scope of work-product protection for communications between attorneys and experts and to shield draft expert reports from discovery. These changes should encourage communications between attorneys and experts, saving time and money in developing expert testimony and discouraging time-consuming fishing expeditions for the expert's communications with trial counsel. Practically, this could nix the real-world necessity of hiring two experts—one to testify and another to strategize behind the scenes—making it possible for a single expert to guide the attorney and client through the case.

(Continued on page 11)

The New CPSC Searchable Database: A Headache for In-House Counsel

By Kenneth Ross

On March 11, 2011, the U.S. Consumer Product Safety Commission (CPSC) made its new searchable database of product safety incidents available online. Many manufacturers and trade associations think this new database will be a big problem for manufacturers and product sellers. Manufacturers will have to deal with such information in litigation, but to the extent the postings are true, the database will be another source of post-sale information that a diligent manufacturer should consider in evaluating post-sale risk and in deciding whether any reports to the government need to be made or corrective actions need to be undertaken.

Although the database provides some new opportunities for the transmission of inaccurate information, this possibility has existed for years with many other sources of information. I don't believe that this new database will make things much worse for manufacturers, and, in fact, it might provide some additional useful information that can help predict future risk of injury or damage.

It is interesting to note that the National Highway Transportation Safety Administration (NHTSA) has had a similar database for many years. In 2010, NHTSA received around 66,000 reports. NHTSA doesn't report significant problems with the postings, and manufacturers have been able to cope adequately with this database.

(Continued on page 15)

Highlights

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Message from the Chairs

Happy spring! As most of the country suffered an usually rough winter with many feet of snow and inches of rain, we are very happy to see spring. We are also pleased to report that our annual Corporate Counsel CLE Seminar, held in Naples, Florida, in February, received rave reviews. We were delighted to see so many new faces in attendance. Highlights of the seminar included the General Counsel Forum, A View from the Bench, Corporate Governance, Insurance Traps for In-House Counsel, the E-discovery Quiz Show, Attorney-Client Privilege "Landmines" for In-House Counsel, and the Litigation Management Roundtable. We were thrilled to honor Goldman Sachs during our Pro Bono Awards luncheon for their wonderful pro bono work.

In addition to the fabulous programming, there were plenty of networking opportunities at the seminar. Relationship building is an important aspect of this conference that should not be overlooked. It is what sets this conference apart from the others. We heard from some of our in-house colleagues that there needs to be trust between in-house and outside counsel. One cannot develop trust until one has connected and established a rapport that eventually develops into a solid relationship. Many attendees come back year after year due in part to the special relationships they have built with other conference attendees over the years.

Our cosponsoring committees—the Minority Trial Lawyer, Woman Advocate, and Business Torts Litigation Committees—each held Dutch Treat dinners for their members as well as anyone else who wanted to attend. The Woman Advocate Committee also held an amazing wine-and-cheese networking event at the resort's spa. And, of course, we held our annual golf tournament as well. These are just a sampling of the relationship-building opportunities provided by the conference. Our 2012 CLE seminar will be held February 16–19, 2012, in Carlsbad, California. Our meeting chairs are already hard at work planning the 2012 seminar. Please mark your calendars as this is an event not to be missed!

In April, at the Section Annual Conference in Miami, Florida, our committee had a strong showing. We held two dynamic and interactive programs: "Let's Talk" Litigation Management Roundtable and "In Their Own Words" General Counsel Forum. We also held a practice area and networking discussion luncheon and manned a booth at the Committee Expo and Reception.

This year, the ABA Annual Meeting will be held in Toronto in August. Our committee will host a panel on the morning of Saturday, August 6, entitled, "General Counsel with International Issues—What's on Their Minds?" We will also host a practice area meeting on Thursday, August 4, from 5:30 to 6:30 p.m. We will use that time as an opportunity to discuss committee business and to network. We hope you can join us.

As with anything, there is always room for improvement.

(Continued on page 13)

Attorney-Client Privilege Landmines: An Update

By Bruce Rubin

Two outlier cases highlighted in the "Attorney-Client Privilege 'Landmines' for In-House Counsel" program at the 2011 Corporate Counsel CLE Seminar serve as reminders to in-house counsel of best practices to maximize the protection of privileged communications within the corporation.

But, first, some helpful news. One of those cases, *Nationwide Mutual Insurance Co. v. Fleming*, 992 A.2d 65 (Pa. 2010), no longer states Pennsylvania law. The Pennsylvania Supreme Court had ruled that the privilege applies only to communications from the client to the attorney. The communications in question were internal emails to and from in-house counsel.

In a long-anticipated decision, *Gillard v. AIG Ins. Co.*, 2011 WL 650552 (Pa. Feb. 23, 2011), the Pennsylvania Supreme Court put that state back in the fold. The court held that the privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications. Reading between the lines, the dilemma that in-house counsel would face if they did not enjoy that protection may have been the reason for the decision. Several amici focused on the plight of inside counsel, generally hired to protect the company proactively by giving advice without waiting for a formal, discrete request. The court relied on this to point out that the privilege would be unworkable unless the privilege operated to protect communications initiated by either the lawyer or the client.

Nevertheless, the lessons learned from the *Nationwide* scare can help in-house counsel in structuring communications.

In-house counsel should consider, for example, whom they speak with inside the company, depending on whether the attorney-client privilege or the work-product doctrine would apply. Communications are protected under the attorney-client privilege even if the party seeking discovery can show a "good cause need for the information"; on the other hand, information protected by the work-product doctrine can still be discovered upon a showing of good cause. The business clients within a corporation, in particular, inside counsel's primary business contacts, should understand this distinction as a way to make sense of other practices that inside counsel should consider.

Thus, business clients should be trained to ask expressly for legal advice in written communications with inside counsel—to state that "legal advice is requested on the following." These persons should also be reminded that just "copying the lawyers" is not enough to protect communications.

Inside counsel should use tools readily available to limit distribution of their communications, which could otherwise result in a waiver. Emails can be sent in ways that prohibit forwarding by labeling them "Confidential: Request for Legal Advice and Response—Do Not Distribute."

When inside counsel responds to a request for legal advice, the ability to protect privilege will be strengthened if the response restates the business factual information forming the basis for the request: "You have asked for legal advice after informing counsel of the following facts."

Finally, even though many in-house counsel also have additional job functions and titles (such as vice president or manager), those titles should not be included in communications that are intended to be priviliged. Business advice is not protected even when provided by a lawyer.

In *Akzo Nobel Chemicals Ltd. v. Commission*, No. C-550/07P (Sept. 14, 2010), the European Court of Justice issued an opinion that excludes communications between corporate employees and their in-house counsel from the protection of the European Union's version of the attorney-client privilege. The decision is based on the rationale in Europe that an attorney's highest duty is to the judicial system rather than to the client, and that inside counsel's independence necessary to promote that primary duty is compromised by the loyalty owed to the company as an employee.

It seems unlikely that this rationale will ever be adopted in the United States, but that does not immunize inside counsel from the risks of disclosure as a result of the *Akzo Nobel* decision. The European Court of Justice did not opine on the geographic limitations of its decision or, more specifically, on whether it applied only to corporations operating wholly within the European Union.

As a result, U.S. corporations that operate in the European Union or frequently work with the European Union could be affected. Regardless of the geographic origin of the communication, it will cease to be privileged if it becomes relevant to a European Union investigation or litigation in a European Union court; there may be no expectation of confidentiality (a central tenet of the American attorney-client privilege) if the communication originates from inside counsel. And, under principles of comity, U.S. courts that are asked to decide questions involving European Union law may, out of deference to the sovereignty of the country in which the claim arose, apply the European Union's construction of the privilege in resolving the claim.

What to do? One solution is to associate independent outside counsel in European Union countries where the business operates. It may make more sense in the long run to shed the legal department of attorneys in those countries and instead establish them as independent lawyers (albeit independent lawyers who primarily serve the business in question). Second, corporate counsel should increase vigilance to ensure the privileged nature of their documents and communications with corporate constituents much in the way described above regarding *Nationwide*. Third, inside counsel should use the phone. It may be necessary to significantly curtail email or other written communications seeking legal advice with inside counsel where *Akzo Nobel* may control.

Bruce Rubin is with Miller Nash LLP in Portland, Oregon.

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Charting a Clear Course in Corporate Internal Investigations

By Craig D. Margolis and Lindsey R. Vaala

Corporate employees interviewed in connection with an internal investigation frequently discuss sensitive information relating to their conduct. While these communications between employees and corporate counsel are confidential and privileged, the privilege belongs only to the company, which may elect to waive it and disclose the contents of the employee's communications to the government or other third party. There are often good reasons for a company to waive privilege and disclose to the government information obtained through the internal investigation, including attorney notes and memoranda from confidential employee interviews. The problem is that, while disclosure may aid the company, it is often not in the best interests of the employees who may be the focus of the internal investigation.

This situation poses significant ethical risks to corporate counsel (both in-house and outside) and their client—the corporation. For example, if the employee can demonstrate an objectively reasonable basis for asserting the existence of an attorney-client relationship with corporate counsel, that counsel could face the prospect of disqualification from the representation, further ethical sanction, and resultant prejudice to the corporate client.

To avoid such unwanted outcomes, counsel must be aware of evolving law in this area and ensure that they take proper protective measures that will mitigate these risks. Below we outline recommendations for navigating potential ethical pitfalls inherent in conducting internal investigations for corporate clients, particularly in dealing with company employees.

Clearly Identify the Corporate Client

The first step in an internal investigation engagement should be to identify the corporate client, which seems obvious, but often is more complicated than it appears at first blush. A corporation can act only through its authorized constituents—such as officers, directors, and employees—but corporate counsel typically *does not* represent any of those individuals. Rule 1.13 of the ABA Model Rules of Professional Conduct states that a lawyer retained by an organization "represents the organization acting through its duly authorized constituents." ABA Model Rule 1.13(a). The rule further requires that, in dealing with a director, an officer, an employee, or other constituent of the corporation, the lawyer explain the identity of the client when the lawyer knows or reasonably should know that the corporation's interests are adverse to those of the individuals. ABA Model Rule 1.13(f).

Indeed, the officers or directors who confer with corporate counsel regarding the company's legal strategy likely will not themselves be represented by the company's lawyer, absent specific arrangements for dual representation. The identity of the client is especially important to keep in mind during an internal investigation where the company's legal interests may diverge from the interests of its employees and officers.

Counsel should set an appropriate tone at the outset of the engagement to govern communications and meetings with corporate constituents and make it clear that counsel represents only the company for the purposes of the investigation. In contrast to counsel's relationship with the company, which usually results from an express agreement, an attorney-client relationship between corporate counsel and an individual employee is more likely to be informal and implied. *See* ABA White Collar Crime Comm., *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* 17 (2009), http://meetings.abanet.org/webupload/commupload/CR301000/newsletterpubs/ABAUpjohnTaskForceReport.pdf. There is no standard formula for determining whether an attorney-client relationship has been created, thereby entitling the employee to the benefits of attorney-client privilege protection over his or her communications with corporate counsel. Some courts look to whether the employee's assertion that a relationship exists stems from a reasonable belief. *See, e.g.*, *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir. 2005); *In re Grand Jury Subpoena*, 68 F.3d 480, 1995 WL 608481 *2 (9th Cir. 1995). Other courts inquire whether the employee requested personal advice or representation from corporate counsel. *See United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 216 n.6 (2d Cir. 1997) (rejecting reasonable belief standard); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123–25 (3d Cir. 1986).

If such a relationship develops (even inadvertently), the employee may be entitled to an attorney-client privilege over his or her communications with counsel, which would impede the company's otherwise unfettered ability to disclose those statements to the government in the future. A situation in which the corporate client's interests conflict with those of an individual client present grave ethical concerns for corporate counsel, especially if the two parties later must compete for control of the attorney-client privilege. See the case study on page 6 for an example of how the failure to delineate clear reporting lines during an internal investigation can result in ethical dilemmas.

Give an *Upjohn* Warning

A corporation's attorney-client privilege extends to corporate counsel's communications with virtually any level of employee so long as the communication concerns matters within the employee's corporate duties and the employee is sufficiently aware that the purpose of the communication is for the corporation to

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obtain legal advice. *Upjohn v. United States*, 449 U.S. 383, 391, 394 (1981). That privilege belongs solely to the corporation. If an attorney-client relationship develops between counsel and the employee, however, a competing attorney-client privilege may arise, which poses significant complications:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> Model Rules of Prof'l Conduct R. 1.7 (2008).

To be entitled to a personal privilege, an employee must establish both that an attorney-client relationship existed and that the communication made to corporate counsel was for the purpose of seeking legal advice. *See, e.g.*, *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (discussing requirements for asserting attorney-client privilege) (citing *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997)).

In the context of an internal investigation interview, an employee may be under the impression that the lawyer conducting the interview is also his or her personal legal representative. If the corporation later waives attorney-client privilege over the interview and discloses the employee's statements to a third party, such as the government, the employee may try to prevent the waiver by asserting an individual claim of privilege. The consequences of such a situation can be disastrous for the company and for corporate counsel.

In *United States v. Nicholas*, for example, the district court's finding that corporate counsel had violated their ethical obligations to the CFO was based on the determination that, in addition to the company, corporate counsel represented the CFO individually. *Nicholas*, 606 F. Supp. 2d 1109, 1115 (C.D. Cal. 2009).

To minimize the risk of misunderstanding and decrease the chances that the employee will be able to demonstrate a basis for asserting that corporate counsel acted as his or her personal representative, corporate counsel should issue an *Upjohn* or "corporate *Miranda*" warning before the interview begins. During the course of the investigation, counsel may have numerous interactions with various employees, thus increasing the risk that the employee may develop a reasonable (even if erroneous) belief that corporate counsel also has the employee's best interests in mind or owes him or her a degree of loyalty in connection with the investigation. *See* ABA White Collar Crime Comm., *supra*, at 13. Administering a clear *Upjohn* warning reduces this risk.

An *Upjohn* warning conveys four critical pieces of information: Counsel represents the company and not the employee; the communications between the employee and corporate counsel are protected by the attorney-client privilege; the privilege belongs to the corporation only; and the corporation may choose to waive the privilege without notice to or permission from the employee. By issuing a clear *Upjohn* warning, counsel put the employee on notice that they are not the

Case Study: *United States v. Nicholas*

Failure to delineate clear reporting lines during an internal investigation recently resulted in ethical ramifications for company counsel in California. While conducting an internal investigation into potential stock option backdating issues, corporate counsel were engaged by and officially reported to the audit committee of the company's board of directors but regularly consulted with individual company officers regarding the company's legal strategy. *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1112–16 (C.D. Cal. 2009), *rev'd*, *United States v. Ruehle*, 583 F.3d 600, 602–03 (9th Cir. 2009). One of those officers was the company's chief financial officer (CFO), who received regular updates from corporate counsel about the status of the investigation and attended litigation planning meetings with company counsel and the audit committee, in which the investigation was discussed. *Ruehle*, 583 F.3d at 603–04. To further complicate the situation, company counsel represented the CFO individually in derivative suits related to the backdating investigation and previously had undertaken dual representation of the CFO and the company in an unrelated matter. *Id.* at 603 n.2.

During the internal investigation, corporate counsel interviewed the CFO about his role in the company's stock option practices and eventually turned his statements over to the government, which initiated a criminal prosecution. *Id.* at 604–05. Following litigation to determine whether the government could use the CFO's internal investigation statements against him in the prosecution, the district court found that an independent attorney-client relationship existed between corporate counsel and the CFO, thereby entitling him to attorney-client privilege protection over the communications. *Nicholas*, 606 F. Supp. 2d at 1115–20. The district court suppressed the statements and referred corporate counsel to the state bar for disciplinary action on the grounds that disclosing the CFO's privileged statements without his express consent violated counsel's ethical obligations. *Id.* at 1120–21.

The Ninth Circuit reversed the district court's suppression order, finding that no individual privilege attached to the CFO's statements, because he knew at the time he made them that the company planned to turn over all internal investigation results to external auditors and, thus, he had no reasonable expectation of confidentiality. *Ruehle*, 583 F.3d at 612–13. The appellate court did not, however, disturb the lower court's finding that corporate counsel had breached obligations owed to the CFO. *Id.*

Among other problems, the failure clearly to identify the client certainly contributed to corporate counsel's subsequent ethical woes.

employee's legal representatives, thereby reducing the likelihood that the employee will be able to assert a successful claim of privilege over the interview statements.

Put the *Upjohn* Warning in Writing

There is no current consensus regarding whether an *Upjohn* warning should be committed to a written form that can be given to the employee to sign after corporate counsel has issued the warning orally or whether the oral warning alone is sufficient. The advantages to committing the warning to writing include the ability to produce a written waiver in the event that the employee tries to claim a personal privilege to block the company's disclosure of the interview to the government or other third party. On the other hand, presenting the employee with a formal written document outlining the warning may have a chilling effect on the employee's willingness to be forthcoming with corporate counsel. Counsel should use their own discretion to determine whether to proceed with a written form.

Another alternative—scripted oral warnings—may ensure that each employee interviewed receives the same information. Such uniformity may prove helpful if a conflict later arises as a result of the investigation and the corporation is required to demonstrate that a reasonable employee in the same interview would not have believed that corporate counsel was his or her individual legal representative. Indeed, if the same warning is given to multiple employees and only one asserts a personal attorney-client privilege, this is powerful evidence that the individual's belief that he or she was personally represented was unreasonable. While a written waiver may best serve this purpose, the scripted version is somewhat less formal but serves the same purpose.

Regardless of whether the warning is in writing, any pertinent details regarding the issuance of the warning should be memorialized in counsel's interview notes. Indeed, in concluding that an attorney-client relationship had developed between corporate counsel and the CFO in *Nicholas*, the district court noted that corporate counsel failed to memorialize whether an *Upjohn* warning had been administered and specifically noted counsel's inability to point to any reference to the warning in the interview notes. *Nicholas*, 606 F. Supp. 2d at 1116–17. As a general matter, it is good practice to memorialize the contents of each employee interview as soon as possible after the interview concludes and in a manner that is consistent with the work product doctrine, attorney-client privilege protection, and ultimate purpose of the investigation. Where circumstances and budget permit, counsel also should consider having an additional witness to the interview, particularly in sensitive situations, to eliminate any doubt that the warning was given. The issuance of an *Upjohn* warning is only one of several important details that should be recorded.

Determining how to inform an employee of his or her rights without offering advice on how to exercise those rights is a delicate decision for corporate counsel.

Finally, counsel also should consider re-administering the warning as necessary throughout the interview and during the course of a lengthy investigation, especially if multiple interviews occur with the same employee, if an employee discloses misconduct during an interview, or if there is a change in the individual employee's status.

Don't Give an Employee Legal Advice

After receiving an *Upjohn* warning, an employee may understandably be concerned about proceeding with the interview without consulting his or her own lawyer. The employee may ask corporate counsel whether he or she should obtain separate legal representation—an inquiry that puts corporate counsel in a tricky spot. *See* Gabriel A. Fuentes, *Current Issues in Internal Investigations*, Internal Investigations 2010: How to Protect Your Clients or Company, Practicing Law Institute, Corporate Law and Practice Course Handbook Series, June 8, 2010, 1819 PLI/Copr 173, 184 (explaining that it may be permissible to tell a witness to seek counsel, but corporate counsel should refrain from offering opinions as to whether or not the employee needs counsel because such advice may constitute a limited form of representation).

Indeed, advising a corporate employee about whether to obtain counsel may be considered legal advice, the rendering of which may be sufficient to create a reasonable belief in the employee that corporate counsel is acting as the employee's attorney. As discussed above, such a reasonable belief may give rise to an attorney-client relationship and create a conflict of interest for corporate counsel. Moreover, if the employee subsequently decides not to seek separate representation, the decision may be motivated by the fact that he or she believes that corporate counsel has suggested that it would be unnecessary and that corporate counsel had his or her individual legal interests in mind.

Determining how to inform an employee of his or her rights without offering advice on how to exercise those rights is a delicate decision for corporate counsel. Accordingly, counsel should be prepared for any contingencies that may arise during the course of an investigation interview, including having a ready response to an inquiry about whether separate representation is necessary.

Counsel should also be aware of the ethical obligations and pitfalls associated with advising an unrepresented person. For example, Model Rule of Professional Conduct 4.3 prohibits the giving of legal advice to an unrepresented person—other than the advice to secure counsel—if the interests of the person are likely to diverge from those of the lawyer's client. Rule 4.3 further mandates that a "lawyer shall not state or imply that the lawyer is disinterested" when dealing with an unrepresented party.

Often, the best response to this question is simply to inform the individual that, as the company's lawyer, corporate

counsel cannot advise him or her whether or not to retain a lawyer. One commentator has proposed the following response: "I am not your lawyer and cannot answer that question. Whether you want to have a lawyer present for the interview is totally up to you. We should resolve that question before the interview takes place. What would you like to do?" Fuentes, *supra*, at 184–85. Before giving such an answer, however, corporate counsel should ascertain whether the corporation will permit the employee to have a personal attorney present for the interview. Counsel also should be prepared to accommodate a request for adjournment by the employee to seek counsel while keeping in mind that an employee who obtains separate counsel may be less likely to speak freely with corporate counsel in connection with the internal investigation.

> If the government's involvement with an investigation is particularly extensive, corporate counsel may find themselves serving as an intermediary between prosecutors and the company.

Determine if Employees Will Review Relevant Documents

Before commencing investigation interviews, counsel should determine whether the circumstances allow for employees to review relevant documents in advance of their interviews. Given the time constraints under which internal investigations are often conducted, it may not always be possible to afford an employee an opportunity to review documents in advance, particularly if the company is trying to uncover wrongdoing ahead of an imminent government inquiry. In addition, litigation strategy may foreclose document review by employees. For example, in some cases, corporate counsel may prefer to hear how the employee answers questions without advance preparation or may wish to save certain documents for confronting the witness during the interview.

Counsel should be aware, however, that misstatements made by an employee during an internal investigation interview—whether due to a foggy memory or in an intentional attempt to avoid responsibility—may subject the employee to prosecution for obstruction of justice. Indeed, in one recent case, the government indicted two corporate executives for obstruction of justice based on the theory that by lying to corporate counsel during an internal investigation, they had misled federal prosecutors, because the results of the company's investigation were turned over to the government in an attempt by the corporation to cooperate. *See* Indictment at 53–59, *United States v. Kumar*, No. 1:04-c-r-00846 (E.D.N.Y. Sept. 20, 2004).

Defendants Sanjay Kumar and Stephen Richards were the former chief executive officer and head of sales for Computer Associates, a publicly traded corporation. Both defendants were interviewed during the course of an internal investigation of the company's accounting practices. As part of a joint investigation, the Securities and Exchange Commission and the United States Attorney's Office requested witness statements from corporate employees and also instructed the company to conduct its own investigation into the accounting issues and give the government access to the employees. After interviews with company counsel in which both defendants falsely denied having any knowledge of fraudulent accounting practices, the government obtained indictments charging obstruction of justice. Both defendants eventually pleaded guilty to obstruction. *United States v. Kumar*, 2010 WL 3169270 *1–4 (2d Cir. Aug. 12, 2010) (denying defendants' appeal and rejecting arguments that conviction for obstruction was impermissible under the circumstances).

Before pleading guilty to obstruction, the executives tried unsuccessfully to have the charges dismissed on the grounds that the government's theory of prosecution was inappropriate because the investigation was seemingly conducted by corporate counsel rather than by the government. Although the prosecution theory is an aggressive one, it is no longer unprecedented.

Failing to permit a witness to refresh his or her recollection by reviewing documents prior to or during an interview may result in failures of memory being misconstrued as intentional falsehood. In addition, if a government investigation is proceeding simultaneously or is imminent, counsel should consider advising the employee of his or her rights and responsibilities in the event that he or she is contacted by the government and asked to submit to an interview. One potential recommendation is for counsel to circulate a memorandum in advance to affected employees notifying them of the nature of the investigation, the possibility of witness interviews, the requirement that employees cooperate with the investigation, and the ability of the company to recommend—and perhaps pay for—separate counsel for individual employees if applicable. This could be coupled with a directive to preserve documents related to the matter.

Determine the Corporation's Position on Legal Fees

Corporate counsel should determine whether the company will pay legal fees for individual counsel in the event that an employee or officer decides to retain counsel or the company believes it is prudent for an individual to retain counsel. Many companies, either by corporate policy or pursuant to state law, allow for the advancement of legal fees to employees who retain counsel in connection with a government investigation. *See, e.g.*, Del. Code Ann. tit. 8, § 145(c) ("To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding . . . or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.").

Corporate counsel should determine at the outset of the representation, if possible, whether and under

what circumstances the company will advance legal fees to employees. The decision whether to advance legal fees requires consideration of several factors. Employees who retain independent counsel during an internal investigation may be less likely to speak freely with corporate counsel, thus potentially precluding the company from obtaining valuable information regarding its own liability. Note, however, that many corporations have company codes specifically requiring employees to cooperate fully with internal investigations.

In addition, the Department of Justice (DOJ) has issued a series of conflicting policy pronouncements regarding the impact of a company's advancement of legal fees to employees on the corporation's ability to earn a cooperation credit. Indeed, until recently, DOJ guidelines specifically instructed federal prosecutors to take into account whether the corporation had advanced legal fees to employees when analyzing the company's cooperation credit eligibility. A 1999 memorandum by then Deputy Attorney General Eric Holder outlined for federal prosecutors factors to consider when deciding whether to bring criminal charges against a corporation. The factors, which included consideration of whether the corporation had advanced legal fees to its employees, were made binding by a 2003 memorandum written by Holder's successor, Larry Thompson. The Thompson Memorandum was widely understood to strongly discourage corporations' payment of legal fees to employees under investigation. *See, e.g.*, *United States v. Stein*, 495 F. Supp. 2d 390, 397 (S.D.N.Y. 2007) ("There can be no serious doubt that the Bar . . . read the Thompson Memorandum as discouraging payment of legal fees for company employees under investigation by holding out the prospect that doing so would increase the risk of indictment.").

Under the current guidelines, which have been incorporated into the United States Attorneys' Manual, consideration of a corporation's advancement of legal fees is authorized only in "special situations," and prosecutors are required to request approval before taking fee advancement into account. Memorandum from Mark Filip, Deputy Attorney Gen., Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), *available at* www.justice.gov/dag/readingroom/dag-memo-08282008.pdf. *See also United States Attorneys' Manual*, ch. 9-28.000, at 9-28.730, *available at* www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. As these new guidelines remain virtually untested, it is not clear how rigorously the "special situations" standard will be applied.

A company may also draw distinctions among different employees, for example, by advancing fees only to senior employees or excluding employees who are believed to have engaged in misconduct. Company counsel should carefully review corporate policies and bylaws to determine whether fee advancement is mandatory or discretionary and whether it is permissible for the company to make distinctions in fee advancement decisions. Where possible, counsel should include language in letters of undertaking, making clear that the company has full discretion in determining whether, and under what circumstances, it will pay legal fees.

A letter of undertaking outlines the conditions under which a corporation may advance legal fees to individual officers and employees and explains that if the individual later is found guilty of wrongdoing, the corporation can seek recoupment of the funds. *See* Kenneth M. Breen & Thomas R. Fallati, *Issues in Advancement of Legal Expenses*, Champion Magazine, Jan.–Feb. 2007, at 1, *available at* www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/32fffc27554e63848525729e005153e6?OpenDocument&Highlight=0,forensic,forensics,evidence. Pursuant to the laws of some states, advancement of legal expenses to current employees "must be conditioned upon the recipient's undertaking to repay all funds 'if it shall ultimately be determined that such person is not entitled to be indemnified.'" *Id.* at 2 (citing Delaware state law as an example). Typically, to be eligible for indemnity, the employee at least must have acted in good faith. *Id.* (noting that Delaware law permits indemnification only "if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful" (citing Del. Code Ann. tit. 8, § 145(a) (2006))).

Corporate Counsel Could Be "Deputized"

An increasing number of internal investigations are initiated at the direction of the government. Although corporate counsel officially may conduct the investigation, government attorneys very well may be behind the steering wheel. If the government's involvement with the investigation is particularly extensive, corporate counsel may find themselves serving as an intermediary between prosecutors and the company. Under such circumstances, corporate counsel arguably become de facto state actors, a condition that may jeopardize the constitutional rights of the individual employees being interviewed. For example, the government may induce (with the offer of cooperation credit) a company to coerce employees into cooperating with the "internal" investigation by threatening job loss or other economic penalty. Such a situation can trigger Fifth Amendment due process and voluntariness concerns as the government, albeit indirectly, influences the employee's decision to forgo his or her individual legal interest in favor of candid cooperation. As discussed above, similar circumstances recently played out in *United States v. Kumar*, No. 1:04-c-r-00846 (E.D.N.Y. Sept. 20, 2004), in which two corporate officers targeted through an internal investigation conducted by their employer were prosecuted for obstruction.

Corporate counsel should be cognizant of the individual rights implicated by an investigation as well as the extent of the government's involvement in the company's decision-making processes regarding the investigation. By simply marching along to the government's drum, corporate counsel may end up unwittingly helping the government to achieve ends that it would be prohibited from obtaining on its own. If corporate counsel are relegated to serving as the liaison between the

(Continued on page 19)

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(Continued from page 1)

Background of Rule 26

Prior to the Rule 26 amendments, attorneys would often take drastic steps to prevent the disclosure of litigation strategy through a testifying expert witness. Both the previous version of Rule 26(a)(2)(B)(ii) and the new version require that a testifying expert provide a written report disclosing his or her opinions and the basis for such opinions to opposing counsel. Fed. R. Civ. P. 26(a)(2)(B)(ii) (2009); Fed. R. Civ. P. 26(a)(2)(B)(ii) (effective Dec. 1, 2010). The previous rule, however, required the expert to disclose "the data *or other information considered* by the witness in forming [opinions]." Fed. R. Civ. P. 26(a)(2)(B)(ii) (2009). While there has been some disagreement among jurisdictions as to the scope of discovery arising from this rule, most courts found that the old Rule 26(a)(2)(B) required disclosure of privileged material considered by an expert witness, regardless of whether the expert ultimately relied on that information. *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006); *In re McRae*, 295 B.R. 676, 679 (Bankr. N.D. Fla. 2003); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001). For cases noting the split of authority, see *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of New York, Inc.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *Manufacturing Administration & Management Systems, Inc. v. ICT Group, Inc.*, 212 F.R.D. 110, 114 (E.D.N.Y. 2002); *American Fidelity Assurance Co. v. Boyer*, 225 F.R.D. 520, 521 (D.S.C. 2004); *Oneida, Ltd. v. United States*, 43 Fed. Cl. 611, 618 (Fed. Cl. 1999); *Smith v. Transducer Technology, Inc.*, 197 F.R.D. 260, 262 (D.V.I. 2000).

The advisory committee notes for old Rule 26(a)(2)(B) stated that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied on by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Fed. R. Civ. P 26 advisory committee's note (1993 amend.). Accordingly, many courts drew a line in the sand and held that any draft expert reports and all communications between an attorney and an expert were subject to disclosure. *See Karn v. Ingersoll-Rand*, 168 F.R.D. 633, 637–41 (N.D. Ind. 1996); *Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005); *Gall v. Jamison*, 44 P.3d 233, 238–39 (Colo. 2002). The gamesmanship began.

There were several ways around disclosure of sensitive strategy, the most common of which was to hire two experts—a testifying expert and a non-testifying, "consulting" expert. The consulting expert was the man behind the curtain, charged with analyzing the data, supporting the attorney with strategy, and basically doing most of the technical groundwork to prepare for litigation. *See Estate of Manship v. United States*, 240 F.R.D. 229, 239 (M.D. La. 2006) (discussing the relationship between testifying experts and non-testifying experts retained in the same case). There was and is no requirement under the Federal Rules of Civil Procedure that the opinions of such an expert or communications with counsel be disclosed. In fact, under most circumstances, an adverse party may not discover "facts known or opinions held" by an expert who has been retained in anticipation of litigation. Fed. R. Civ. P. 26(b)(4)(D) (2011), *formerly* Fed. R. Civ. P. 26(b)(4)(B); *see also Quinn Const., Inc. v. Skanska USA Bldg., Inc.*, 263 F.R.D. 190, 193 (E.D. Pa. 2009). The rule is intended to allow litigants to consult experts to evaluate a claim "without fear that every consultation with an expert may yield grist for the adversary's mill." *Rubel v. Eli Lilly and Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995).

> Careful attention must be paid to the subtle differences between discovery of the facts and data and the assumptions.

Communications with a testifying expert, on the other hand, would be intentionally limited in scope and substance to avoid disclosure down the road. The attorney would often insist on only oral communications in which the expert took no notes, and the expert might be instructed to draft only one report and to make any changes to the report in the original computer document. *See Armor Screen Corp. v. Storm Catcher, Inc.*, 709 F. Supp. 2d 1309, 1317 (S.D. Fla. 2010) (noting that experts provided oral opinions before being designated as a testifying expert and purposefully limited their written record so as to avoid discovery of the work product).

This dual expert reality, however, had several negative effects on the discovery process and certainly on clients. First, the absence of necessary, strategic communication between the expert and the attorney could render the testifying expert less effective and thus not as helpful to a trier of fact. Fed. R. Civ. P 26 advisory committee's note (2010 amend.); *see also generally* Robert Anderson, *Full Disclosure No More: New Amendments to Rule 26 Extend Work Product Protection to Retained Expert Witnesses*, Trial Advoc. Q., Winter 2011, 21–22 (noting the quality of expert opinions was jeopardized by the lack of communication) (citing *Report of Civil Rules Advisory Committee* app. C-3 (May 8, 2009)).

Second, attorneys wasted a great deal of time—and clients' money—in depositions and discovery, fruitlessly digging for discoverable information that might provide insight into their adversaries' strategies or how experts developed their opinions. Anderson, *supra*. The majority of the time, however, testifying experts and their counsel prepared the case in such a way that no smoking guns would be discovered.

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Third, and perhaps most important, in large cases, the parties were essentially forced to spend twice as much money for two experts, one of which would be shielded by the rules of discovery. Fed. R. Civ. P. 26 advisory committee's note (2010 amend.) (noting that "costs have risen" as a result of litigants employing two sets of experts). Behind attorney fees, often the largest expense is the expert fees.

From bench, bar, and academy, a consensus grew that Rule 26, in large part, did not serve to further efficient discovery. Hence, the 2010 amendments.

The Changes

The 2010 amendments to Rule 26 provide, among other things, that communications between attorneys and testifying experts are considered work product and thus are not discoverable. Fed. R. Civ. P. 26(b)(4)(C); see also the exceptions to the general rule. In addition, draft reports of testifying experts are protected. Fed. R. Civ. P. 26(b)(4)(B). The amendments change two significant sections of Rule 26, affecting both communications and draft reports. As noted by the Advisory Committee:

> Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel.

Fed. R. Civ. P. 26 advisory committee's note (2010 amend.). These changes in two separate sections of Rule 26 have a profound impact on two different types of work product—communications and draft reports.

Communications Between Attorney and Expert

Rule 26(b)(4)(C) specifically protects, under the guise of work product, communications between a party's attorney and a testifying expert. The drafters added the rule to provide work-product protection for such communications regardless of the manner in which the communication is transmitted, whether orally, in writing, or electronically through email or other similar technology. Fed. R. Civ. P. 26 advisory committee's note (2010 amend.). The new rule is designed to "protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." *Id.*

The amendments include, however, three important exceptions to this protection. Communications between counsel and testifying experts are not protected to the extent that the communications (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. Fed. R. Civ. P. 26(b)(4)(C).

Careful attention must be paid to the subtle differences between discovery of the facts and data, on one hand, and the assumptions, on the other. The new rule provides that all facts and data that the expert *considers* are discoverable, regardless of whether the expert *relies* on such facts and data. On the other hand, an expert need only identify and disclose the assumptions on which he or she *relied* in forming his or her opinion. *Id.* Thus, hypothetical discussions regarding assumptions, for example, are outside the scope of discoverability. Fed. R. Civ. P. 26 advisory committee's note (2010 amend.).

One final limitation in the new rule is that the work-product protection extends only to communications between attorneys and experts required to give a full report under Rule 26(a)(2)(B). *Id.* Thus, the protection does not extend to communications between attorneys and unretained experts who will be testifying at trial. *Id.* An unretained testifying expert might be, for example, a physician or an environmental management supervisor of a company—one who is employed by the party but does not regularly provide expert testimony.

Draft Reports

The 2010 amendments go beyond protecting communications. Rules 26(a)(2) and (b)(4) not only limit the scope of information an expert must disclose at the beginning of litigation but also protect draft expert reports and disclosures as work product.

> Litigants must recognize the risk that the new protections offered by the 2010 amendments may be challenged under the terms of the amendments themselves.

Prior to the new amendments, courts routinely deemed draft expert reports discoverable because they fell under Rule 26(a)(2)'s scope of "other information" that an expert considered in forming his or her opinion. *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010). The new rules do not require testifying experts to disclose "data and other information" considered in forming their opinions. Rather, an expert retained to testify in a case must disclose only "facts or data" considered. Fed. R. Civ. P. 26(a)(2)(ii). This removes from discovery the subjective "other information," which included communications between attorneys and experts and the underlying strategy that experts might have considered.

The Advisory Committee provides that "[t]he refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." Fed. R. Civ. P. 26 advisory committee's note (2010 amend.). At the same time, however, the committee observed that "the intention is that 'facts or data' be interpreted broadly to require disclosure

of any material considered by the expert, from whatever source, that contains factual ingredients." *Id.* Accordingly, the disclosure obligation extends beyond the facts and data on which the expert *relied* to reach his or her opinion. Such disclosure requires that the testifying expert also disclose any facts or data on which he or she did not rely but still *considered*. *Id.*

Rule 26(b)(4)(B) now expressly provides that draft reports and disclosures are considered work product and thus are not discoverable. This protection extends to both testifying experts that have been specially retained to provide expert testimony and to unretained testifying experts, such as treating physicians. Fed. R. Civ. P. 26 advisory committee's note (2010 amend.). Furthermore, the protection extends to draft reports, regardless of the form in which they are maintained. *Id.*

The Risk/Benefit Analysis

The 2010 amendments are designed to provide clear benefits for parties in litigation. First, parties and their attorneys will save time and money because there should no longer be a need to retain both a consulting expert and a testifying expert in most situations. Second, the discovery process should now be streamlined because opposing counsel have less of an incentive to "squeeze" an expert for information that might otherwise have been discoverable prior to the 2010 amendments. Finally, the amendments allow for more focused expert opinions because attorneys and their testifying experts have substantially more freedom to communicate.

The benefits of the amended rule must, of course, be balanced against the new risks they create. Such risks likely will include challenges under the Federal Rules of Evidence. Under Federal Rule of Evidence 702, for example, a witness must be qualified as an expert and offer an opinion that is both reliable and relevant. Under the same rule, if a testifying expert's testimony or report reflects substantial or obvious coaching, the reliability of the expert's opinions can be challenged. Similarly, when a lawyer influences the formulation of expert opinion, the opinion may no longer reflect "the product of reliable principles and methods," nor the reliable application of scientific principles and methods to the facts. Fed. R. Evid. 702(2)–(3). An opposing party may also challenge the testimony as being developed expressly for litigation if the expert failed to "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Finally, care should be taken to ensure that the expert does not become a mere "mouthpiece" for the lawyer or party, simply repeating facts or theories developed in the adversarial process. *See* Fed. R. Evid. 703.

Litigants must also recognize the risk that the new protections offered by the 2010 amendments may be challenged under the terms of the amendments themselves. In particular, Rule 26(b)(4)(B) now protects draft reports as work product, but Rule 26(a)(2)(b)(ii) requires disclosure of "facts or data considered" by the expert. Often, a draft report contains facts or data that do not make it into the final report. Moreover, such facts and data are routinely intertwined with expert theories and the attorney's thoughts, strategy, and mental impressions. Inasmuch as draft reports are likely to contain "facts or data considered" by the expert that have not been previously disclosed under Rule 26(a)(2)(b)(ii) at the time the reports are generated, there may still be challenges whenever a draft report is withheld. Such challenges could result in a need to produce a redacted draft report that discloses "facts or data considered" but protects attorney mental impressions.

Conclusion

Overall, the 2010 amendments offer the potential for cost savings and streamlined discovery for litigants who require expert testimony. However, these benefits could be offset by the increased costs of defending an expert's opinions from a *Daubert* challenge and from challenges to the scope of protection offered to draft reports under the new amendments. As always, attorneys should seek to ensure the scientific integrity and reliability of expert witness testimony.

Leah Knowlton is a member of Miller & Martin PLLC in their Atlanta office. Hart Knight is an associate with Miller & Martin PLLC in their Nashville office.

Message from the Chairs

(Continued from page 2)

Our committee is always looking for new programming ideas, topics for articles, and cosponsorship opportunities. Thanks to the diligent work of our web editors, our website is constantly changing with updated news and development items as well as articles. We are also looking for distant CLE ideas. Typically, these programs can be one-hour teleconferences that bring panelists and participants together by telephone. Webinars can be done over the web from the convenience of your office. Maybe you are an in-house litigator who would like to be featured in the "In-House Litigator Spotlight" or maybe you know of a client who would like to be interviewed. All ideas are welcome.

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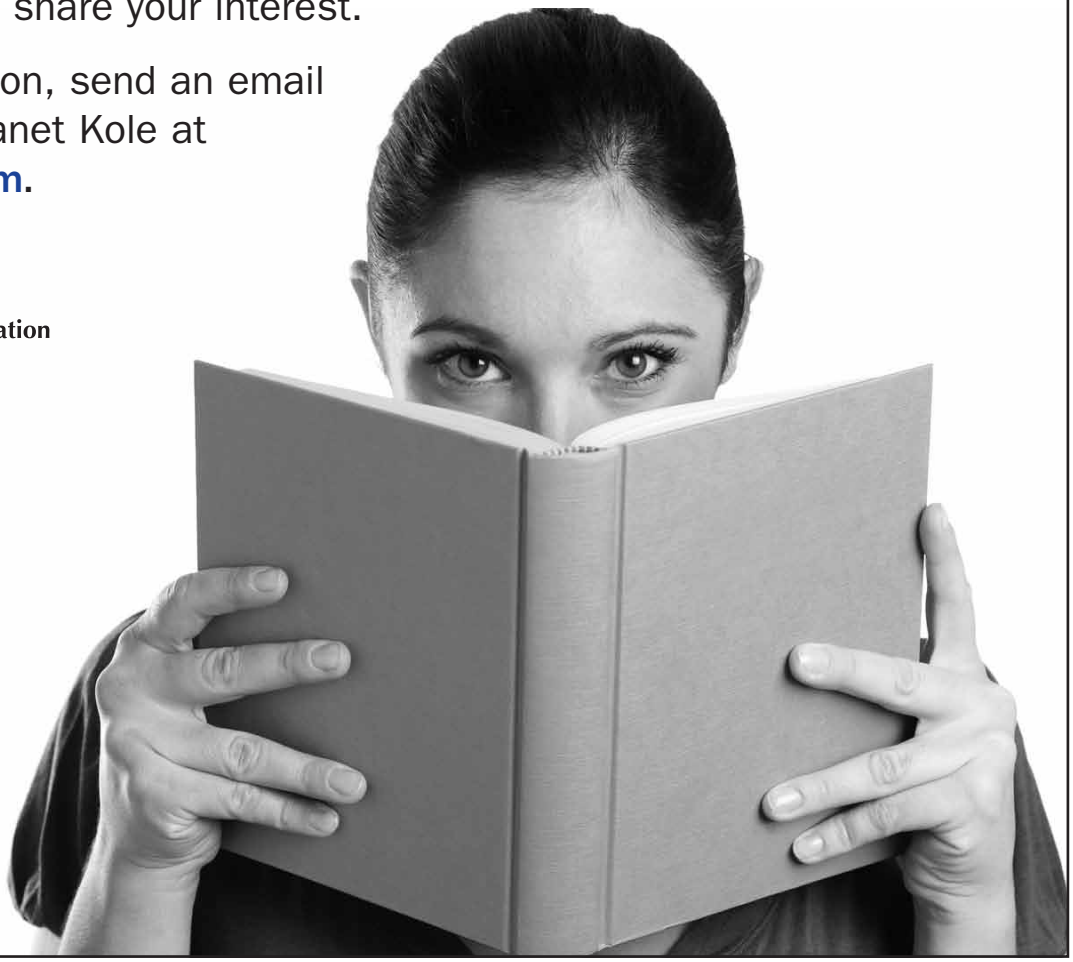

The New CPSC Searchable Database: A Headache for In-House Counsel

(Continued from page 1)

In 2008, Congress passed the Consumer Product Safety Improvement Act, which required, in part, that the CPSC establish a database of incident reports submitted by consumers that can be searched by the public. The main intent of the database is to provide consumers more information concerning the safety of the products they own or are thinking about buying. Very simply, the consumer or some other knowledgeable party can fill out an online form with basic incident information. This form is then sent to the manufacturer or other party that registers to receive the information.

The party receiving the posting has 10 days to object or respond. The main reasons for objecting are that the posting contains confidential business information or is materially inaccurate. It is unlikely, however, that consumers will have confidential business information; so, this objection will be rarely applicable. And, in many situations, it will be difficult to object on the basis of material inaccuracy because the manufacturer either will not know who the submitter is unless the consumer consents to having his or her name given out or the manufacturer won't have any basis for objecting unless the manufacturer talks to the submitter and examines the product. Sometimes a short description of an incident or a product failure is enough to allow a manufacturer to state that it is impossible for this type of failure to occur. But will that be enough to make a successful objection without actually examining the product or talking to the consumer? Time will tell.

Manufacturers need to anticipate all of the types of people who may use the database and all of the questions that may be generated by the entries.

Consumers may or may not benefit from the new CPSC database. It is questionable whether raw data on supposed incidents involving products will be useful to consumers. In the beginning, there will be no analysis on the database to help determine whether the product is unreasonably unsafe or defective or whether the consumer was just unlucky or careless. The data, however, might convince the consumer not to buy a product because it is the type of product that can be involved in accidents if not used carefully, such as ladders.

The database will also be used in the future by CPSC staff to analyze incidents and determine whether there are patterns that they believe need to be addressed by the manufacturer. To that extent, the new database isn't helpful to manufacturers; however, manufacturers who have implemented a serious post-sale analytical program should have already analyzed these patterns and considered or taken any appropriate corrective actions.

Of course, the database can be used by plaintiffs' attorneys and experts to identify accident modes and patterns that will provide useful information as they develop a case against a manufacturer.

Last, reporters will benefit from this database. They can take the raw data, and, even if they can't talk to a specific unidentified consumer, they can report on trends and patterns and on the numbers and types of accidents involving certain products. Reporters will be able to search the database and then pose some embarrassing questions to the manufacturer and retailer, who may or may not be prepared to respond at that time.

Manufacturers want to find out about problems before people are hurt, which is why they have customer service personnel who answer telephone calls, letters, emails, and website postings from consumers about safety issues. Why can't this database, if it is properly run and if bogus submissions are excluded, be treated as another opportunity to identify future risk?

Manufacturers need to anticipate all of the types of people who may use the database and all of the questions that may be generated by the entries. They need to be prepared to respond in a way that makes them seem diligent in tracking safety issues and dealing with them if necessary.

Information supplied by the consumer or others on the CPSC searchable database probably won't be any more inaccurate, incomplete, or worthless than what is currently out there. In fact, the information may prove to be more accurate, given that the consumer must certify that the information he or she submits is accurate. Whether the data is or isn't accurate, it will have the same potential problems as other information, and the manufacturer will have to decide how to follow up.

In addition to these problems, there is the problem of the use of these postings in litigation.

Use of Database Postings in Litigation

Consumer postings will, in part, provide an early alert system to manufacturers about potential safety problems with their products. And, even if consumer postings are not entered into evidence, a plaintiff's expert may be able to use the postings to argue that the manufacturer was on notice of a problem and didn't properly investigate and take corrective action.

If there is an attempt to enter the postings into evidence as proof of prior similar accidents, motions in limine can be used to try to keep out that information, especially if the incident isn't confirmed and the person responsible for the posting hasn't allowed the CPSC to disclose his or her identity to the manufacturer.

It is unclear how successful these motions will be. However, information about similar incidents will probably be admissible in some form, as long as the information comes from postings about the same or similar product as the one involved in litigation and the manufacturer has been give the names of the

consumers who made the postings and has had the product returned to it and analyzed.

And, regardless of these postings, detailed incident reports from consumers and in-depth investigations of incidents by the CPSC are readily available from the CPSC by request under the Freedom of Information Act. While it takes a bit longer to obtain these documents, there are very few bases on which manufacturers can object to the CPSC giving out this information.

Post-Sale Duties

So, the bigger question is, how should a manufacturer affirmatively use the postings to help establish an adequate post-sale fact-gathering program? The foundation for adequately dealing with post-sale issues is the establishment of an information network that will allow a company to determine how its product is performing in the domestic and world marketplace. This information is necessary for the manufacturer to ultimately make decisions about what, if any, post-sale actions might be necessary, including reports to various government authorities.

The potential liability of a manufacturer or product seller for common law negligence after the sale of its product is well known. In addition, current U.S. regulatory and common law requirements apply to information that was obtained or should reasonably have been obtained that identifies an unsafe condition. Therefore, anything less than a "reasonable" effort at obtaining and analyzing post-sale information may be considered negligent by a U.S. jury or government agency in determining whether the manufacturer should have known about the problem before the accident occurred. As a result, deciding what is reasonable under the circumstances is important to determine and document.

In addition, the potential liability for violations of regulatory law is growing as more governments implement consumer product safety legislation. Canada's new consumer product safety law will go into effect on June 20, 2011. Australia's law went into effect on January 1, 2011, and South Africa's went into effect in April 2011. While the European Union has had a reporting requirement for years, each country in the European Union is still in the process of implementing the law. Most, if not all of these laws contain a duty to report to the government if threshold safety events occur. This enhanced focus makes it even more important that a manufacturer gather and analyze safety information received from anywhere in the world.

Current Information-Gathering Systems

Today, a manufacturer can receive safety information from a number of readily available sources other than the new CPSC searchable database. The growth of the Internet and social networking has made it even easier for manufacturers to receive safety-related information from those who want to communicate with them about it.

For many years, well-known consumer publications and websites and consumer reporters have regularly evaluated the quality and safety of products. For years, consumers have been able to comment on the safety of products and communicate this information to these publications and websites as well as directly to manufacturers, the government, and other consumers over the Internet and by email, fax, and phone. Today there are more than 200 million blogs, and 34 percent of all

Obtaining Safety Information

Even without the CPSC's new searchable database, there are many ways in which manufacturers can obtain safety information on their products. Companies need to evaluate where this information comes from and how to capture it. The following sources are a base minimum to consider:

- Notices of lawsuits or claims and reports of accidents or near misses from anywhere in the world will provide information on the types of products that are failing, the mode of failure, and possible misuse of the product.
- Customer complaints and warranty returns from anywhere in the world are fertile sources of information. A pattern of complaints and returns may indicate that a product is failing in a particular mode on a regular basis.
- Notices from the chain of distribution (e.g., distributors, dealers, retailers) and the chain of production (e.g., raw material suppliers, component part suppliers) might put a manufacturer on notice of a potential or actual safety risk or problem.
- Pertinent safety information can also come from competitors or trade associations.
- Accidents, lawsuits, verdicts, settlements, or recalls involving a similar product produced by a competitor are certainly relevant to consider.
- Websites established by plaintiffs' attorneys and safety expert witnesses pinpoint alleged safety issues involving a variety of products.
- Information available from the CPSC, in some instances upon request, includes incident reports, investigatory reports, industry white papers, accident reports and accident estimates under the National Electronic Injury Surveillance System (NEISS), rule-making, recall notices, and other descriptions of corrective actions. In addition, recall notices and other guidances and rules from foreign governmental product safety agencies can be useful.
- Publications and websites established by consumer groups that report on safety issues also are sources of information. For example, see www.clickcheckand protect.org for a new website established with the help of Consumer Reports.
- Investigative reporters have ramped up their reporting as more and more companies have problems and need to recall their products. Daily news stories in the press around the world report on safety incidents. Of course, all of these articles are available to the public and the government.

bloggers post opinions about products or brands.

It is very important for the manufacturer and others in the chain of production and distribution to establish procedures to review all information that might relate to the safety of their products and to their company and to funnel that information to trained personnel to evaluate so that a decision can be made about any appropriate actions. This will also help the company respond to inquiries concerning safety made by the government, the press, or consumers. Being aware of all information—good and bad, true and untrue, complete and incomplete—can be helpful as long as the important information can be sorted out and adequately evaluated.

One big problem with much of this information is that it is unverified and unverifiable. It can be inaccurate, incomplete, a complete lie, overstated, or even understated. For example, many consumers who contact a company overstate a problem to try to get a new, free product and possibly be compensated for some alleged injury or damage. Some dealers and retailers, who usually take the side of their customer, the consumer, also tend to overstate the problem or understate the consumer's fault so as to get some compensation or some damage covered under warranty. It can be very difficult and time-consuming to get to the truth involving these various sources of information.

Many manufacturers regularly monitor websites devoted to such opinions. In fact, there are companies that are being hired to find information on the Internet and try to determine its truthfulness and remove or counteract negative information that presumably is untrue or misleading or contains confidential information. Companies such as Reputation Defender can help with such activities. And companies have been known to buy up website names (usually containing the word "sucks") that are used by people to complain about a company's products or services. Any manufacturer who engages in some of these reputation management activities must be careful not to ignore or suppress valid, accurate information concerning a safety issue related to the company's products.

Conclusion

The CPSC's searchable database will, of course, create more information that can be both harmful and helpful for manufacturers, but it will also provide additional safety information to consumers, the public, and the government. It remains to be seen whether consumers will actually take the time to post such information or consult the CPSC database to determine the safety of products they own or are contemplating buying.

As a consumer, I would much more likely communicate directly to the manufacturer about a safety issue that concerned me and demand a response—something that the CPSC database will not normally allow consumers to do. In addition, I would more likely consult with an entity like Consumer Reports to check on both the safety and quality of a product I was about to buy.

Time will tell what effect the new CPSC database will have on consumer sales, product liability issues, and regulatory issues. In the meantime, manufacturers should register a corporate contact for the database and be prepared to evaluate consumer submissions quickly. Some of them may be bogus or plants, but others may provide valuable information that will allow the manufacturer to take prompt corrective action to minimize the chance of future incidents. Failing to do this could result in more accidents and injuries and encourage a plaintiff to argue that the manufacturer ignored a clear notice of future risk and that this constitutes a basis for an award of punitive damages.

Kenneth Ross is a former partner and now of counsel to Bowman and Brooke LLP in Minneapolis, Minnesota.

Practice Tip for Young In-House Lawyers

Most in-house law departments, regardless of size or industry, struggle to become an integral part of the business that they service and to be seen as partners and not as "cost centers." Changing a business person's view of an in-house lawyer takes time, but it can be done. First, know the business. Understanding the day-to-day operations and long-term business strategies of your company will help tailor your legal advice to meet the specific needs and goals of your clients. Second, resist the tendency to just say no. Unless you are being asked to evaluate conduct that may be illegal or unethical, partner with your client to think of outside-the-box solutions to the legal issues presented to you. Third, be responsive. The business day—and hence your day—is 24/7, and even short delays can jeopardize business opportunities or put the business at risk. Finally, keep up with legal developments that affect your business and industry. Attend conferences and CLEs, and ask outside counsel to send alerts that may be relevant to your business. Proactive advice is invaluable.

—Alejandra Montenegro Almonte, corporate counsel, Gate Gourmet, Inc., Reston, Virgina

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David B. Cade on Transitioning from Outside to In-House Counsel

David B. Cade is a senior counsel at Boeing Defense, Space & Security, where he supports Boeing's Missiles and Unmanned Airborne Systems business unit, a division of Boeing Military Aircraft. Cade joined Boeing in September 2008 from General Motors Corporation (GM), where he spent 10 years overseeing GM's product litigation activities in 16 states and acted as the group's corporate law attorney, responsible for structuring joint ventures and GM's manufacturing and assembly plant expansion construction efforts. He began his legal career with a large law firm in Detroit, where his practice focused on bankruptcy and troubled supplier workouts.

The editors of *In-House Litigator* recently sat down with him to talk about his in-house practice.

Q: Why did you make the transition to practicing in-house?

A: I wanted to be a part of developing and guiding strategy from the beginning. Being in-house, you see the problems earlier and in real time. This means that the big picture is often addressed in-house before outside counsel is even involved. I learned this during my time at an outside firm and knew I wanted to be involved from the very beginning, when big decisions can make or break a case or transaction early on.

I also enjoy giving business advice and being a direct part of the success of the business. Being in-house requires that I focus on and think about how a particular issue fits within the larger business needs of Boeing. I prefer this type of big-picture thinking over doing a set of individual and linear tasks, like researching and writing a brief to exclude evidence.

Q: What are the challenges of being in-house?

A: You go from being the profit center at a law firm to being a cost center at a company. So, the challenge is to find a way to add value in the first place and then get your clients to see it. Your legal successes have to be explained in terms of how they impact the business's bottom line. The business people don't care that you won with a brilliant argument on a motion to dismiss; they care that you saved the company money by avoiding discovery.

Also, even though I enjoy giving business advice and think it is critical to be involved in the business side, I have to make it clear that I wear two separate hats. When I weigh in on the business side, I make sure to be clear that I am not giving a legal opinion. That's because legal answers may be different than business answers, and I want to ensure my clients understand that.

Finally, budgeting is another difficultly. Legal departments really cannot control and plan the same way as other business units because the risks often are harder to see. Legal departments, for example, can't always predict when a huge class action litigation will be filed or a government investigation will be initiated.

Q: What skills did you acquire in a law firm that helped you become a successful in-house lawyer?

A: I developed a number of practical skills, including [learning how] to be quick on your feet and efficient in your work. My view is that you have no frame of reference on how to be a client until you've serviced a client. For example, my time in a law firm showed me both efficient and inefficient staffing models, and reviewing bills showed me how to distinguish between the two. Now that I am in-house, I know what to expect from outside counsel in terms of efficient staffing, and how to recognize if I am getting it or not by looking at their bills. Moreover, it helps you frame whether outside counsel is required.

Q: How is your approach as an in-house lawyer different than your approach in private practice?

A: In-house, you have to balance the business and legal needs of the client more so than outside counsel. Let me give you an example. My approach to a case as a litigator was to ask myself whether the case was winnable or not. But my approach as an in-house counsel is to consider the broader business questions in addition to the narrow question of whether or not a particular case is winnable. For example, do I want to set a legal precedent here that might help our business down the road? Or do I want to send a message to future potential litigants that we are going to fight on a particular issue? Sometimes it makes more sense to spend some money early—even if a case is not "winnable" in the objective sense—to have credibility later.

Q: Have you become more specialized?

A: Yes, to a degree. But you have to remain willing to transition and jump between different things, [and] to have no fear and say, "I'm game to learn this." I started with transactional work, moved to product litigation for a number of years, and now am back to transactional work, but in the government contract context. As long as you have a positive attitude and rely upon your prior experiences, I don't see why it is not possible to move around.

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Q: Do you have a particular management style?

A: I think two things characterize my management style. First, I am not a control freak. I hold people accountable and believe in deadlines, but I don't micromanage. You have to get quality people and trust them to do their jobs.

> Clients like it when you know the law, but they like it even more when you understand how the law impacts the business side of your company's operations.

Second, it is critical to invest in people long term. You have to think [of the] big picture and give people an opportunity to grow. Someone may not be strong in a particular area, but have them do it anyways, even if someone else is stronger. The person who has never done it might blossom and grow, or they might fall on their face, but you have to give them the opportunity. Investing time and money in mentoring (both formal and informal) and training also is important on this front.

Q: What do you advise your internal clients about litigation prevention?

A: The goal is to head off problems before they happen. To do that, you have to know what the potential problems are. And the best way to know what the potential problems are is to have your clients feel comfortable coming to you and talking through ideas before they have done something. The bottom line: You want to be seen as their priest or their rabbi—the one person they want sitting at their side to contribute information and help them out.

Internal legal training for clients also is important. For example, mock exercises that paint a picture for them of what a deposition will be like and how the documents they create may be used against them can be helpful. You want to identify and outline ramifications from certain behavior.

Q: What are your thoughts on diversity in the workplace and for outside counsel?

A: I want diversity but not just for diversity's sake. Whether at Boeing or as outside counsel, it is a tremendous advantage to have individuals bringing different backgrounds and new perspectives to bear on the issues we face, and everyone building and learning from those perspectives.

Q: What advice would you give aspiring or newly minted in-house counsel?

A: Clients like it when you know the law, but they like it even more when you understand how the law impacts the business side of your company's operations. The challenge then is to learn the business side of things. To do that, you have to depend on the business people to involve you and bring you up to speed. So, do whatever it takes to get invited to meetings, and make sure you attend them when you get invited. Be prepared for those meetings. Know some basics about the business unit's operations, financials, and strategic goals so that you can ask good questions.

Don't be the lawyer who always says no. Lawyers get avoided out of fear they will say no. Have a positive and helpful attitude that allows you to say "No, but maybe you can do it this way instead." The goal should be to earn the trust of your business people, be seen as a part of the team, and have your clients rely on you for dispassionate advice.

And don't forget to be proactive and self-aware. Read org charts to find out who is who and who the decision makers are. Engage in informal networking, and ask questions about what is happening. Especially early on, meetings may occur in which the organizers may not even think of inviting you unless you are on their radar. You can't get on their radar unless you reach out and show you are a team player.

Finally, know the proclivities of the people you are dealing with. Some may prefer brevity, and others may want more information. Give them what they want. ■

David B. Cade is a senior counsel at Boeing Defense, Space & Security.

Charting a Clear Course

(Continued from page 9)

corporation and government, they may find themselves acting less as an advocate for the corporate client and more as a prosecutor of its employees.

Conclusion

The ethical issues presented by internal investigations are complex, even to the most experienced corporate counsel. To avoid the disastrous consequences of conflicting interests arising during the investigation, counsel must remain wary of and attentive to the possibility of an attorney-client relationship developing with corporate employees.

By providing a thorough and straightforward *Upjohn* warning at the beginning of an interview or other interaction with an employee—and documenting those warnings in writing—corporate counsel can protect themselves and the interests of their corporate clients. In addition, corporate counsel should refrain from giving employees legal advice, no matter how innocuous the circumstances may seem. Establishing clear parameters at the start of the representation will help to prevent ambiguous reporting lines and representative relationships from developing during the course of the investigation. As the law in this area continues to develop, it behooves counsel who conduct internal investigations to stay current with recent developments and best practices to avoid potential pitfalls. ■

Craig D. Margolis and Lindsey R. Vaala are with Vinson & Elkins, LLP, in Washington, D.C.

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