

Ten Steps

Continued from page 15

management is not responsive. Remember that the scrutiny of in-house counsel actions and decisions, as well as the increasing likelihood of becoming a target for prosecution in the event of a failure, is far greater today than it was five or ten years ago.

Privilege and confidentiality concerns differ. Confidentiality is the lawyer's obligation to the client, and exceptions to this rule are outlined in the corporate context in ABA Model Rules 1.6 and 1.13 and each state's counterpart ethics rules; privilege is an evidentiary right that resides with the client, and courts assess its applicability (or exceptions to its applicability) based on common law and even the equities of the case. Don't confuse your obligations (wherein a failure can lead to your professional liability) and your client's rights (which you are the caretaker of) when navigating this issue.

6. Learn how to give the so-called "Corporate *Miranda*" (aka *Upjohn* warnings), and talk with executive management about how they wish to plan to treat employees who are accused or suspected of wrongdoing. Corporate counsel is not the lawyer for any individual employee interviewed about a company

failure or problem, but the employee is owed that reminder, and perhaps more: if the actions were not inappropriate or a determination of wrongdoing has not been made, the employee remains a part of the client group you represent. Even if you are obligated to remind non-cooperative employees that uncooperative behavior could lead to discipline or termination, employees have rights that you must respect (such as their Fifth Amendment Rights or employment or contractual rights that could include such things as attorney's fees and so on).

7. Consider the best involvement of non-lawyer or lawyer (not practicing law) employees who work in company compliance, internal audit, risk management and reporting functions. Non-lawyers who are asked to assist in-house counsel can be seen as agents of lawyers for purposes of protecting privilege, but they can also perform tasks that are undertaken without agency; namely, those tasks consistent with their corporate offices and that could become public should their work be requested in the future. If they are not working under your agency, you may be able to produce their findings without waiving privilege and satisfy your opponent's request for facts; if they are working under your agency, it may be possible to

claim privilege to insulate their work from discovery.

8. Avoid executing affidavits that contradict accusations against the company; otherwise, corporate counsel may become a fact witness and any hope of asserting privilege may disappear. Counsel may also find that such actions as signing the company's Sarbox 404 reports can be seen as a verification of company assertions and can lead to a finding of waiver.

9. When faced with a demand for privileged material, try to negotiate some kind of protection from future third-party discovery; also try to limit waiver to certain categories of information to avoid entire subject matter waivers. The jurisdictions are split on whether to recognize so-called limited waiver agreements (the majority have held that such agreements are not enforceable). These efforts may not suc-

ceed, but it is the only chance of insurance against future third-party claims that counsel may have if forced to waive to the government.

10. Think pro-actively about how to protect the client's rights to confidential counsel, and do not simply acquiesce when a client's privilege rights are contested. Given recent attention to this issue and the momentum of the reforms ACC has been pushing, it is no longer considered suicidal for a company to protest waiver demands; it is increasingly considered acceptable to push back.

By following these steps, in-house counsel can help protect one of their client's fundamental rights. Learn more about ACC's and the bars' efforts and find additional resource material on corporate counsel privilege issues at www.acca.com/php/cms/index.php?id=84.

Helping In-House Counsel To Tackle Civil Justice Reform Issues

Joseph M. Aronds

NEW JERSEY CORPORATE COUNSEL ASSOCIATION

The New Jersey Corporate Counsel Association (NJCCA) has a rich heritage of providing CLE and networking events to help in-house counsel tackle important issues, such as litigation defense, that impact their companies' bottom line. Our members' employment varies from small corporations operating only in New Jersey to large multinational corporations with interests in civil justice reform around the globe.

Reflecting this broad spectrum of corporate interests, NJCCA provides a variety of ways for our members to exchange their perspectives. Last year, we partnered with the New Jersey Defense Association (NJDA), an organization composed of New Jersey defense attorneys and insurance professionals who devote a substantial portion of their time to the defense of damage suits and claims. We co-hosted a half-day event that featured presentations by outside counsel with a range of experience in litigation defense, as well as in-house corporate counsel who offered the "insiders'" perspectives.

NJCCA's joint initiatives with organizations such as the NJDA serve the important function of bringing together outside counsel and their corporate clients in non-traditional settings so as

to encourage communication between the two groups. As a former law firm associate and current in-house attorney, I have seen things from both sides of the fence. Bringing outside and in-house attorneys together is a win-win situation for all concerned.

Another significant component of NJCCA's services to its members is of an educational nature with resources targeted specially to the needs of in-house counsel that are enhanced by the wealth of material available through our parent organization, the Association of Corporate Counsel. For example, at www.acca.com, you will find web casts that are online 24x7x365 for easy access by our members. Topics related to civil justice reform in web casts recorded last month include:

- Mass Tort Reform, presented by ACC's Environmental Health & Safety Law Committee and ACC's Litigation Committee and sponsored by Goodwin Procter LLP; and

- E-discovery Synergy Between Small Law Departments and Outside Counsel, presented by ACC's Small Law Department Committee and sponsored by Lexis Nexis.

Further information about NJCCA can be found at www.acca.com. I hope that you'll contact me at joseph.aronds@hartzmountain.com if you'd like to suggest ways that NJCCA can help you in your day-to-day practice. NJCCA's other board members and I welcome your opinions.



Joseph M. Aronds

Law School Notes

New York Law School Launches Patent Peer Review Project

The Institute for Information Law & Policy at New York Law School has announced that companies holding more than 6 percent of the total number of this year's patents will submit their patent applications for "open peer review" under a pilot project at the United States Patent and Trademark Office (USPTO).

GE, HP, IBM, Microsoft and Red Hat, the Lead Sponsors of the "Community Patent Review" initiative, will allow some of their patent applications to be reviewed by the public and consent to have public commentary submitted directly to the USPTO for official consideration. The pilot will launch in early 2007 and focus on published but not-yet-granted patent applications relating to computer software.

The Community Patent Review pilot is a project of the New York Law School Institute for Information Law & Policy

in collaboration with the USPTO that aims to improve the quality of issued patents by giving the patent examiner access to better information by means of an open network for community peer review of patent applications.

Selected by the USPTO as one of its strategic initiatives, Community Patent Review will deploy an online system to allow the scientific community to submit "prior art" – information relevant to assessing if an invention is patentable – with commentary to the patent examiner. The project is developing a deliberation methodology and technology to allow community rating, ranking and processing of prior art and feedback from patent examiners.

The Institute for Information Law and Policy at New York Law School will be responsible for overall administration of the pilot project in partnership with the USPTO.

Partners Notes

Wolters Kluwer Provides Access To Government Forms Electronically

Wolters Kluwer Law & Business is offering a comprehensive, one-stop online resource for more than 500 forms required for government contracts. WK Forms for Government Contracting provides instant online access to a collection of forms that can be completed and printed all from one common interface.

A subscription to WK Forms for Government Contracting includes forms from a number of sources including: Federal Acquisition Regulation; Department of Defense FAR Supplement; Cost Accounting Standards Board; Office of Management and Budget, and Court of Federal Claims.

The forms are listed in numerical order, and also can be sorted by topic, such as pre-award, performance, modification, dispute, post award and closeout. The annual subscription service is updated automatically with any new or revised forms and instructions to keep

users current.

WK Forms for Government Contracting uses advanced functionality to provide immediate and easy access to more than 500 forms required for government contracting. Users simply download the WK Forms software to the desktop-and from there can locate, view, fill out and print any form.

WK Forms is intuitive, and offers numerous time-saving features that offer ease and flexibility when completing forms.

Subscribers to the CCH Government Contracts Reports will have the new WK Forms for Government Contracting included in their subscription. The WK Forms product is also available as a stand-alone subscription purchase.

An online demonstration of WK Forms for Government Contracting can be accessed at business.cch.com. For more information, call (800) 224-7377.

Joseph M. Aronds is Assistant Vice President, Hartz Mountain Industries, and a member of the Board of Directors of The New Jersey Corporate Counsel Association.