

# SPECIAL SECTION

Compliance/Insurance/Risk Management

## HIGHLIGHTS

### Law Firms

Corporate Compliance: Big Solutions For Big Issues Page 28  
Paul Smith, Eversheds LLP

Enterprise Risk Management – The New Frontier Page 29  
Interview: Lori Nugent, Cozen O'Connor LLP

Corporate Governance: Best Practices Become Mainstream Page 30  
Interview: Alyce C. Halchak, Gibbons, Del Deo, Dolan, Griffinger & Vecchione

The Positive Use Of Independent Investigations To Lower Risk And Create A More Effective Business Model Page 32  
R. William Ide, III and Thomas Wardell, McKenna Long & Aldridge LLP

Whistleblowing Under Sarbanes-Oxley: The Mist Begins To Clear Page 35  
Interview: Connie N. Bertram, Winston & Strawn LLP

Suit Limitation Issues In Insurance Coverage Litigation Are Not Always Simple Page 40  
Charles Allen Yuen, Pitney Hardin LLP

D&O Coverage – What You Should Know In This Compliance-Oriented And Litigation-Intensive Environment Page 41

Interview: John P. Kincaid and Donald F. Campbell, Winstead Sechrest & Minick P.C.

Risk Management For Prospective Outside Directors Page 42

Robert McL. Boote, Justin P. Klein and John C. Grugan, Ballard Spahr Andrews & Ingersoll, LLP

### Legal Service Providers

SEC Responds To Concerns Over Implementation Of Sarbanes-Oxley Section 404 Page 26

Neil Goldenberg, Eisner LLP

The Pharmaceutical Supply Chain: A Key To Corporate Profits And Public Protection Page 33

Jerry Wald, Ernst & Young

Achieving Compliance Objectives Page 34

Interview: Alice Lawrence, Jordan Lawrence, and Therese Paul, Fifth Third Bank

Better Internal Controls For Compliance: Registered E-Mail = Legal Proof Page 36

Interview: Zafar Khan, RPost®

Partnering Adds Value To Compliance Training Page 37

Interview: John M. Spinnato, sanofi-aventis USA LLC, and Steven A. Lauer, Integrity Interactive Corporation

How The New Federal Rules Will Likely Change eDiscovery Practice Page 38

John Patzakis, Guidance Software, Inc.

Alternative Dispute Resolution And Its Use In Commercial Insurance Disputes Page 43  
Robert Matlin, American Arbitration Association

A New Product: A “Security And Privacy Policy” Page 44

Interview: Nick Economidis, American International Group, Inc.

### Corporate Counsel

Experts Identify The Characteristics Of Well Run Compliance Programs Page 45  
Interview: Glen Chan, Citigroup Inc., and Doug Lankler, Pfizer Inc.

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## Erosion Of The Attorney-Client Privilege And Work Product Doctrine: The ABA And Other Groups Seek Reversal Of Government Waiver Policies

By R. William Ide, III

The American Bar Association has joined forces with a broad and diverse coalition of legal and business groups and others in an effort to protect the attorney-client privilege and work product doctrine and roll back various federal governmental policies and practices that have seriously eroded these fundamental rights. Despite some recent success, the ABA and the coalition are gearing up for a sustained campaign to restore and protect federal recognition of the privilege and the doctrine.

### The Importance Of The Attorney-Client Privilege

The attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

### Federal Government Policies That Erode The Attorney-Client Privilege

Unfortunately, a number of federal governmental agencies – including the Department of Justice, the U.S. Sentencing Commission, and others – have adopted policies in recent years that weaken the attorney-client privilege and the work product doctrine in the corporate context by encouraging federal prosecutors to routinely pressure companies and other organizations to waive these legal protections as a condition of receiving credit for cooperation during investigations. While the Department’s policy was formally established by the so-called 1999 “Holder Memorandum” and 2003 “Thompson Memorandum,” the incidence of coerced



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waiver has increased dramatically during the past several years. The problem of government-coerced waiver was exacerbated in November 2004 when the Commission added language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that, like the Justice Department’s policy, authorizes and encourages prosecutors to seek privilege waiver as a condition for cooperation.<sup>2</sup>

In an attempt to address the growing concerns being expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt “a written waiver review process for your district or component,” and local U.S. Attorneys are now in the process of implementing this directive.<sup>3</sup> Though well-intentioned, the McCallum Memorandum does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. As a result, it is likely to result in numerous different waiver policies throughout

the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from government-coerced waiver.

### Unintended Consequences Of Federal Government Waiver Policies

Substantial new evidence has demonstrated that these policies adopted by the Justice Department and the Sentencing Commission have resulted in the routine compelled waiver of attorney-client privilege and work product protections. According to a new survey of over 1,200 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006,<sup>4</sup> almost 75% of corporate counsel respondents believe that a “culture of waiver” has evolved in which governmental agencies believe that it is reasonable and appropriate for

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