Ethical Issues for In-House Counsel: Attorney-Client Privilege, Confidentiality, Work Product Doctrine and Conflicts of Interest

Steven Allison, Mandana Massoumi and Kate Santon
Dorsey & Whitney LLP
Ethical Issues for In-House Counsel: Attorney-Client Privilege, Confidentiality, Work Product Doctrine and Conflicts of Interest ............................................................................................................. 1

The Attorney-Client Privilege .................................................................................................................................................. 2
   The General Rule ................................................................................................................................................................. 2
   Who is the Client? ............................................................................................................................................................... 2
   What Communications are Privileged? ................................................................................................................................. 3
   When Does the Attorney-Client Privilege Attach? .................................................................................................................. 3
   Who Can Assert or Waive Attorney-Client Privilege? .......................................................................................................... 4
   Exceptions to the Application of Attorney-Client Privilege ................................................................................................. 4
   When is the Attorney-Client Privilege Destroyed? .................................................................................................................. 5
   How to Maximize the Protection of the Attorney-Client Privilege? ......................................................................................... 5

The Ethical Duty of Confidentiality ......................................................................................................................................... 6

The Work Product Doctrine ...................................................................................................................................................... 7
   The General Rule ................................................................................................................................................................. 7
   When Has a Party “Anticipated Litigation?” .......................................................................................................................... 7
   Testifying v. Non-Testifying Expert ........................................................................................................................................ 8

Inadvertent Disclosure and the New Federal Rule of Evidence 502 .................................................................................. 9

The Duty to Preserve Evidence and Spoliation .................................................................................................................... 10

Conflicts of Interest ................................................................................................................................................................. 12
   General Observations ............................................................................................................................................................ 12
   Special Considerations for In-House Counsel ...................................................................................................................... 12

Conclusion .................................................................................................................................................................................. 14
Ethical Issues for In-House Counsel: Attorney-Client Privilege, Confidentiality, Work Product Doctrine and Conflicts of Interest

By
Steven Allison, Mandana Massoumi and Kate Santon

Dorsey & Whitney LLP
38 Technology Drive, Suite 100
Irvine, CA 92618

In-house attorneys face ethics questions that are significantly different from outside counsel or criminal defense attorneys. For example, application of the attorney-client privilege in the corporate context can be complicated, leading to confusion as to who the client of the corporate counsel is and when communications are or are not privileged. The goal of this article is to summarize the law governing the application of the attorney-client privilege, the work product doctrine and the ethical duty of confidentiality in the corporate setting and to discuss ethical issues associated with transactions that implicate conflicts of interest. The article will also provide some practical advice as to what steps an in-house attorney can take to maximize the protection of confidential communications under the attorney-client privilege and the work product doctrine and will also provide suggestions on how to avoid conflicts of interest.
The Attorney-Client Privilege

The General Rule

The attorney-client privilege protects confidential communications between an attorney and a client in the course of seeking or rendering legal advice. Underlying the attorney-client privilege is the policy that the adversarial system functions best as long as clients are truthful with their lawyers. In California, the attorney-client privilege is governed by and codified in California Evidence Code Section 950 et seq.

The general rule in the California Evidence Code provides that the client of an attorney or other holder of the attorney-client privilege has “a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.” Cal. Evid. Code § 954. The attorney-client privilege attaches to (1) communications (2) made in confidence (3) by the client (4) where legal advice of any kind is sought (5) from a professional legal advisor in his or her capacity as such (6) unless the protection is waived. Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1492 (9th Cir. 1989). For privilege to apply, the communication must be made between persons described in the Rule for the purpose of giving or receiving legal advice.

Attorney-client privilege can arise in any setting in which an attorney is consulted in his or her professional capacity. It is well established that the privilege applies to corporations as well as to individuals, and to both in-house and outside counsel. Upjohn Co. v. United States, 449 U.S. 383 (1981).

Who is the Client?

Where an attorney-client relationship exists, the attorney-client privilege belongs to the client. A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with the intention of obtaining professional legal services from the lawyer.

When the client is a corporation, the client is considered to be the legal corporate entity and not its individual directors, officers, or employees. Cal. Rules Prof. Conduct (“C.R.P.C.”) 3-600. The fact that the attorney-client privilege belongs to the corporation rather than individual employees can present ethical problems when an employee's interests appear to be in conflict with those of the corporation. A lawyer should explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing. In such circumstances, the attorney needs to advise the organization’s directors, officers, employees, members, shareholders or other constituents that discussions with counsel may not be privileged, that the corporation retains the right to waive privilege, and that the employee may wish to obtain individual counsel. C.R.P.C. 3-600.
What Communications are Privileged?

Only confidential communications are protected by the attorney-client privilege. A “confidential communication between lawyer and client” means “information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” Cal. Evid. Code § 952.

Because a corporation can only act through the individuals running it, the question often arises as to which corporate employees are within the protected circle of confidentiality. Before 1981, the prevailing view was that communications to a lawyer on behalf of a corporation were privileged only if they were made by corporate employees who fell within the “control group.” The “control group” was defined as those employees who control or who have a substantial role in the decision-making process or the corporate officers responsible for taking action on the basis of the attorney’s legal advice. *Upjohn*, 449 U.S. at 390.

The Supreme Court rejected the control group test in *Upjohn Co. v. United States*, the landmark case discussing the application of the attorney-client privilege in the corporate context. 449 U.S. at 383. In that case, the IRS was unable to obtain completed questionnaires that had been sent by counsel to Upjohn employees who might have had knowledge of improper payments to foreign officials. The government filed suit against Upjohn, claiming that the attorney-client privilege did not apply to the questionnaires because most of the interviews were not with “control group” employees. The Supreme Court held that so long as the purpose of the questionnaires was to facilitate legal advice, and so long as confidentiality and restricted access to the questionnaires were maintained, the documents were protected. *Id.*

Although *Upjohn* is not a recent case, it continues to be relied upon as authority that provides a guide to identify corporate employees who are within the protected circle of confidentiality. As a result of this case, corporate counsel may obtain information from even low-level employees for the purpose of giving advice to the corporation, and that information may be protected by the attorney-client privilege and the work product doctrine.

When Does the Attorney-Client Privilege Attach?

It is commonly accepted that the attorney-client privilege attaches only when the attorney acts in his or her capacity as such. The privilege does not attach when the attorney is engaged in non-legal work such as rendering business or technical advice. *See, e.g., Aetna Casualty & Surety Co. v. Sup. Ct.*, 153 Cal. App. 3d 467, 475 (1984). This presents special problems to in-house attorneys who often have mixed business and legal responsibilities.

Generally, the attorney-client privilege does not attach to an attorney’s communications when the client’s dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice. *Costco Wholesale Corp. v. Sup. Ct.*, 47 Cal. 4th 725, 735 (2009). But the fact that business considerations are weighed in the rendering of legal
advice does not impair the attorney-client privilege unless the attorney is merely providing business advice, such as merely acting as a negotiator or as a trustee for the client. *Aetna Casualty & Surety Co.*, 153 Cal. App. 3d at 471. If legal advice is only incidental to a discussion of business policy, the communication may not be protected. For communications at such meetings to be privileged, they must be related to the acquisition or rendition of professional legal services. *Id.* Likewise, simply copying an in-house attorney on a memorandum or an email message may not be sufficient to establish the application of attorney-client privilege if the sender is not actively seeking legal advice from the attorney.

**Who Can Assert or Waive Attorney-Client Privilege?**

The power to assert or waive the corporate attorney-client privilege generally rests with the corporation’s current management and is normally exercised by its officers and directors. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985).

When control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well. New managers may waive the attorney-client privilege with respect to communications made by former officers and directors. *Id.* at 349. Displaced managers may not assert the attorney-client privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties. *Id.*

**Exceptions to the Application of Attorney-Client Privilege**

Not all communications between an attorney and a client made in the course of seeking or rendering legal advice are privileged. The California Evidence Code provides several exceptions to the attorney-client privilege. The exceptions include communications relevant to any of the following: claims through the same deceased client; breach of duty by lawyer or client; documents attested by a lawyer; communications in furtherance of a crime or fraud; and representation of joint clients. Of particular relevance to in-house attorneys are the last two exceptions.

Specifically, there is no attorney-client privilege in California if (1) the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud or (2) if the lawyer reasonably believes that disclosure of any confidential communication relating to the representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual. Cal. Evid. Code §§ 956, 956.5.

Moreover, the attorney-client privilege does not apply to situations in which communications are made to an attorney by joint clients regarding a matter of common interest (e.g. a contract) where that matter of common interest later becomes the subject of an action between the joint clients. Cal. Evid. Code § 962. However, disclosures made in confidence to third persons do not waive the attorney-client privilege if “reasonably necessary for accomplishment of the purposes for which the lawyer was consulted.” Cal. Evid. Code § 912(d). A corporate counsel should keep this exception in mind before undertaking legal representation of individual
corporate employees. If the employees’ interests later become adverse to those of the corporation, the corporation may not be able to assert the privilege.

**When is the Attorney-Client Privilege Destroyed?**

The attorney-client privilege can be destroyed if any of the critical elements listed in the general federal common law rule or in the California Evidence Code are missing in a given communication. For example, if third parties are present in a meeting, no privilege will attach because the essential element of confidentiality was destroyed. Further, a client can waive the privilege by disclosing confidential communications to outsiders or third parties. This includes situations where email messages containing confidential communications are forwarded to anyone outside the company. Lastly, the privilege is intended to protect communications—not facts. Thus, a client cannot endeavor to hide otherwise discoverable facts by relaying them to his or her attorney.

**How to Maximize the Protection of the Attorney-Client Privilege?**

Attorneys must exercise great care in order to avoid an unintentional waiver of the attorney-client privilege. In order to preserve the privilege, in-house attorneys should implement the following precautions:

- Educate all officers, directors and employees about (1) what the attorney-client privilege is and (2) how to maintain it;
- Instruct all employees to cooperate with counsel and communicate in the strictest confidence;
- Communicate to the recipients of the advice that the advice is legal, not business-related;
- Use outside counsel if possible when conducting internal investigations, as outside counsel’s actions are more likely to be found privileged and be seen as objective in the eyes of third parties;
- Limit dissemination of corporate communications only to those corporate employees who have the need for such communication or advice;
- Keep all documents confidential and mark them “privileged”; and
- Use technology with care to avoid inadvertent disclosure of protected information.

In the end, there is simply too much uncertainty associated with the application of the attorney-client privilege in the corporate context to be able to rely on it entirely for the protection of confidential information. Therefore, in-house attorneys should prepare written communications, to the greatest extent possible, with the view that they may ultimately be disclosed.
The Ethical Duty of Confidentiality

The duty to preserve confidential information of a client is central to the attorney-client relationship. Rule 3-100 of the California Rules of Professional Conduct ("C.R.P.C.") requires the lawyer to preserve in confidence all information relating to representation of a client. C.R.P.C. 3-100 works in conjunction with Cal. Bus. & Prof. Code § 6068. Section 6068 of the California Business and Professions Code requires the lawyer to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

A lawyer may only reveal such information when the lawyer reasonably believes that the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual. Before revealing such information, however, the lawyer must make a good faith effort to persuade the client not to commit the act and must inform the client of the intended disclosure of the confidential information. C.R.P.C. 3-100. The California Rules of Professional Conduct are much more limited in their exceptions to the duty of confidentiality than jurisdictions governed by the Model Rules of Professional Conduct. Jurisdictions adhering to the Model Rules of Professional Conduct allow for a number of exceptions to the duty of confidentiality, including the following: a lawyer may only reveal confidential information to the extent that the lawyer reasonably believes it necessary (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime; (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud; (4) to secure legal advice regarding compliance by the lawyer, another lawyer associated with the lawyer’s firm or the law firm with the Model Rules of Professional Conduct or other law; (5)(i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct or (ii) to establish or collect a fee; or (6) when permitted or required under the Model Rules of Professional Conduct or to comply with other law or court order. California severely curtails many of these exceptions.

The duty of confidentiality encompasses all information relating to the representation. Thus, the duty can include information learned from the client as well as information obtained from others.

C.R.P.C. 3-600 provides more guidance to in-house attorneys with respect to the issue of confidentiality in the organizational setting. Specifically, under this Rule, a lawyer may report legal violations “up” the organizational ladder and, in some serious instances, to the highest authorities within the organization. If the highest authority insists upon taking action that is a violation of the law and likely to result in substantial injury to the organization, the attorney must resign, but still cannot disclose the confidential information. C.R.P.C. 3-600.
The Work Product Doctrine

The work product doctrine—and its relationship to the law of privilege—should be considered whenever a written discovery request has been propounded on the corporate entity. Even though materials may not be subject to the attorney-client privilege, they may nevertheless be protected as the attorney’s work product under Rule 26(b)(3) of the Federal Rules of Civil Procedure or under Section 2018.010 of the California Code of Civil Procedure.

The General Rule

The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3) and California Code of Civil Procedure Section 2018.010, provides for protection of materials “prepared in anticipation of litigation or for trial by or for another party or by its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) . . . .” Fed. R. Civ. P. 23(b)(3). Such materials are discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Id.; Cal. Code Civ. Proc. § 2018.010. Mental impressions, conclusions, opinion, legal research or legal theories of the case are not discoverable under any circumstances. Cal. Code Civ. Proc. § 2018.030 (“[A] writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.”).

The rationale behind the work product doctrine is that, in an adversary system, it is essential that attorneys be allowed to work with a certain degree of privacy, free from the unwarranted intrusion of opposing counsel. The need for such protection supports the adoption of the work product doctrine both to promote the ends of justice and to protect client interests. See Hickman v. Taylor, 329 U.S. 495 (1947); Cal. Code Civ. Proc. § 2018.020 (“It is the policy of the state to do both of the following: (a) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; (b) prevent attorneys from taking undue advantage of their adversary’s industry and efforts.”).

When Has a Party “Anticipated Litigation?”

In California, work product protection is not limited to writings created by a lawyer in anticipation of a lawsuit; it applies as well to writings prepared by an attorney while acting in a nonlitigation capacity. State Comp. Ins. Fund v. Sup. Ct., 91 Cal. App. 4th 1080, 1091 (2001); Laguna Beach County Water Dist. v. Sup. Ct., 124 Cal. App. 4th 1453, 1461 (2004). Federal Rule of Civil Procedure 26(b)(3), however, requires the materials to be prepared in “anticipation of litigation” in order to be subject to the work product doctrine.

There is no clear answer to the question of when the preparation of a document is sufficiently related to possible litigation so as to trigger the protection of the work product doctrine. Some courts have held that as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation, the work product doctrine applies. U.S. v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981), cert. denied 454 U.S. 826 (1981). On the other
hand, material prepared where litigation is a remote possibility or prepared in the ordinary course of business is not work product. *E.g., Spell v. McDaniel*, 591 F. Supp. 1090, 1120 (E.D.N.C. 1984). Finally, a non-party to litigation may not assert work product doctrine. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) (holding that the White House may not assert work product where its counsel was communicating with Hillary Clinton and only Mrs. Clinton was anticipating litigation).

**Testifying v. Non-Testifying Expert**

Issues involving the scope of work product most frequently arise over expert discovery. Federal Rule of Civil Procedure 26(b)(4) provides for separate treatment of testifying and non-testifying experts. Essentially, if the expert will testify at trial, the expert is subject to discovery. The opposing party may obtain by interrogatories a summary of the expert’s expected testimony. Fed. R. Civ. P. 26(b)(4). If the expert will not testify at trial, however, then the opposing party is permitted to depose the expert only upon a showing of exceptional circumstances under which it is impracticable to obtain facts or opinions on the same subject by other means. Fed. R. Civ. P. 26(b)(4)(B).

Non-testifying experts are therefore afforded much greater protection than experts who are expected to testify at trial. Because these experts will not testify at trial, the policy concern of adequate preparation for cross-examination and rebuttal is not applicable. *See generally The Ordinary Witness Doctrine: Discovery of the Pre-Retention Knowledge of a Non-witness Expert under Federal Rule 26(b)(4)(B)*, 38 ARK. L. REV. 763, 793 (1985).

California’s treatment of this issue is similar. While testifying experts are subject to disclosure and discovery, non-testifying experts, also known as consultants, are not. The identities and opinions of experts retained by counsel solely as a consultant—to help evaluate the case or to prepare for trial, and not as a trial witness—are entitled to qualified work product protection. *Williamson v. Sup. Ct.*, 21 Cal. 3d 829 (1978).
Inadvertent Disclosure and the New Federal Rule of Evidence 502

On September 19, 2008, President Bush signed into law a bill adding new Evidence Rule 502 to the Federal Rules of Evidence. The new Rule 502 standardizes federal law on the effects of inadvertent disclosure of communications or information protected by the attorney-client privilege or the work product doctrine.

Prior to the adoption of the Rule, courts were in conflict over whether an inadvertent disclosure of a communication or information protected by the attorney-client privilege or work product doctrine constituted a waiver. Under the new Rule, if privileged material is disclosed “inadvertently” in a federal proceeding, the disclosure does not operate as a waiver of privilege in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error. Fed. R. Evid. 502(b).

Moreover, under the prior law, disclosure of one protected communication risked the loss of protection of privilege or work product as to all documents containing the same subject matter. The new rule provides that a voluntary disclosure of protected information in a federal proceeding or to a federal government agency exercising regulatory, investigative or enforcement authority results in a waiver only of the communication or information actually disclosed. The waiver extends to an undisclosed communication or information only in those unusual situations where the waiver is intentional, and fairness requires a further disclosure of related, protected information in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. Fed. R. Evid. 502(a).

The new Rule 502 provides for more certainty as to how the disclosures made in a federal proceeding or to a government entity in the course of an investigation will be treated in subsequent litigation. However, in order to trigger the protections of the Rule, the in-house attorney must not forget to take reasonable steps to protect the confidential information in the first place, and if incidents of inadvertent disclosure happen, act promptly in response to them.

In California, the privilege belongs to the client and not the attorney. Therefore, absent evidence of the client’s intent to waive the privilege, the attorney’s inadvertent disclosure of confidential communications during discovery does not constitute a waiver. State Comp. Ins. Fund v. WPS. Inc., 70 Cal. App. 4th 644, 652-54 (1999) (privileged documents accidentally included in large stack of documents delivered in response to inspection demand).
The Duty to Preserve Evidence and Spoliation

Among the most vexing issues facing corporate counsel in the electronic era is the duty to preserve evidence. Such duty exists when a party learns of the commencement of litigation or when litigation is foreseeable with a degree of certainty. Failure to meet evidence preservation obligations may lead to liability for spoliation.

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation. *Kearney v. Foley & Lardner, LLP*, 566 F.3d 826 (9th Cir. 2009); *Hernandez v. Garcetti*, 68 Cal. App. 4th 675, 680 (1998). Courts have recognized a party’s duty to preserve evidence when it knows or reasonably should know the evidence is relevant and when prejudice to an opposing party is foreseeable if the evidence is destroyed. *Lewis v. Ryan*, 261 F.R.D. 513, 518 (S.D. Cal. 2009). The concept of spoliation originates from the legal principle of “omnia prae sumuntur contra spoliatorium” which means “all things are presumed against the wrong-doer.” Under this doctrine, destruction of evidence by a litigant gives rise to an inference that the evidence would have been unfavorable to his cause. The courts apply this doctrine by imposing penalties upon the litigants who destroy evidence. The penalties can range from monetary sanctions, outright dismissal of the action, an adverse jury instruction and an order prohibiting the offending attorney from introducing other evidence or raising certain arguments at trial. The doctrine of spoliation is intended to protect two important objectives: truth and fairness. In practice, however, it has become a strategic sword, not a shield, and is now the weapon of choice for many plaintiff lawyers. Therefore, it is critical that in-house attorneys have a firm grasp of the practical application of the spoliation doctrine in litigation.

The modern doctrine of spoliation requires the establishment of three basic elements before sanctions are imposed by the trial judge against an offending litigant: (1) the party with control over the evidence had a duty to preserve it at the time of destruction; (2) the evidence was destroyed with a “culpable state of mind”; and (3) the evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could infer that it would support that claim or defense. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12 (2d Cir. 2001)). In some jurisdictions, a “culpable state of mind” for purposes of spoliation inference includes ordinary negligence. *Id.*

In California, the Supreme Court has held that there is no longer a separate tort cause of action for intentional spoliation committed by a party to the underlying lawsuit, at least when the spoliation is or should have been discovered before the conclusion of that lawsuit. *Cedars-Sinai Medical Center v. Sup. Ct.*, 18 Cal. 4th 1, 4 (1998). Although such “first party” spoliation claims are now barred, the court’s holding did not encompass “third party” spoliation claims, where a nonparty allegedly destroys or fails to preserve evidence that is relevant to the lawsuit. *Hernandez v. Garcetti*, 68 Cal. App. 4th 675, 680 (1998).

The doctrine of spoliation has been applied in cases involving a variety of electronic evidence such as email and word processing data. See *Proctor & Gamble Co. v. Haugen*, 179 F.R.D. 622 (D. Utah 1998); *Gates Rubber Co. v. Bando Chemical Industries*, 167 F.R.D. 90 (D. Colo. 1996). See California’s Electronic Discovery Act for more information about discovery of...
electronic evidence in California. California’s Electronic Discovery Act can be found in full in AB 5, signed into law in June 2009, and is codified in the California Code of Civil Procedure Sections 1985.8, 2016.020, and 2031.010 et seq. Corporate counsel should give careful attention to the corporation’s electronic document retention policy in order to avoid the harsh consequences of the spoliation doctrine.

For example, many corporations utilize document retention programs that periodically delete electronic documents. Ordinarily, a corporation has a right to do so with respect to documents that it is not required by law to preserve. However, if a corporation is anticipating litigation or is subject to investigation, continuing destruction of potentially relevant documents under routine policies may subject the corporation and its counsel to liability for spoliation. Specifically, under Rule 37(e) of the Federal Rules of Civil Procedure, there is a “safe harbor” for litigants who fail to preserve electronic information due to normal business operations. The Rule excuses from sanctions the loss or destruction of “electronically stored information lost as a result of routine, good faith operation of an electronic information system.” Fed. R. Civ. P. 37(f). However, the safe harbor provision does not apply where a party fails to suspend the routine operation to prevent loss of information when that information is subject to a preservation obligation. Therefore, in order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business. *Toussie v. County of Suffolk*, No. CV 01-6716(JS)(ARL), 2007 WL 4565160 at *7 (E.D.N.Y. Dec. 21, 2007) (quoting *Doe v. Norwalk Comm. College*, 248 F.R.D. 372 (D. Conn. 2007)). In this regard, corporate attorneys must determine appropriate trigger points for “anticipation of litigation” and develop litigation hold procedures to be implemented upon such triggers in order to ensure the preservation of relevant documents.

If a spoliation claim is brought against a company in a federal court, choice of law questions might arise. Generally, when federal courts hear diversity claims that are controlled by state law, the Erie doctrine requires that state law be applied to substantive matters and federal law be applied to procedural matters. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Because spoliation involves evidentiary matters, and evidentiary matters are considered procedural, federal law generally governs spoliation questions. *See Fakhro v. Mayo Clinic Rochester*, 2004 WL 909740 at *2 (D. Minn. March 31, 2004).
Conflicts of Interest

General Observations

The phrase “conflict of interest” is generally used in connection with public officials or fiduciaries and their relationship to matters of private interest or gain to them. See Black’s Law Dictionary with Pronunciations (West Publ’g Co., 1990).

In the legal profession, the term refers to an attorney’s representation of an individual or entity whose interests are, or could potentially become, adverse or incompatible or where the attorney’s representation could be substantially affected. C.R.P.C. 3-310.

The term “conflict of interest” is also used to describe various “prohibited transactions” identified in the California Rules of Professional Conduct in which an attorney may not engage. C.R.P.C. 3-300. For example, the rules preclude an attorney who represents a client from entering into a business transaction with the client and from knowingly acquiring certain financial interests adverse to the client. C.R.P.C. 3-300. Other provisions of the California Rules of Professional Conduct prohibit an attorney (1) from using information procured to the client’s disadvantage, (2) from preparing instruments that give the attorney or the attorney’s family a substantial gift, (3) from negotiating a deal granting the attorney literary or media rights to a portrayal or account based upon the attorney’s representation of the client—but the client can waive this right—, (4) from accepting compensation from others who are not the client, (5) from making aggregate settlements, (6) from prospectively limiting the client’s ability to assert a malpractice claim, (7) from acquiring a proprietary interest in an action, and (8) from having sexual relations with the client or the client’s representative.

Special Considerations for In-House Counsel

In some ways, conflict of interest issues might seem less of a problem for in-house attorneys because they only have one client, the corporation. However, California Rule of Professional Conduct 3-600 recognizes that a lawyer for an organization may, in certain circumstances, also represent its constituents. For example, a corporate officer, director or major shareholder might seek out the corporate counsel’s advice on a personal employment matter or other issues. California Rule of Professional Conduct 3-600 only permits representation of corporate constituents where their interests either do not conflict with the corporation or where both have given their consent to a waivable conflict.

Although not prohibited by the law, undertaking joint representation of the corporation and its constituents is problematic because it puts the company at risk of giving up the attorney-client privilege should litigation subsequently occur. Therefore, in-house counsel should avoid joint representation and encourage corporate employees to retain outside counsel for legal representation in personal matters.

Joint representation issues may also arise in situations where an in-house attorney is asked to represent a subsidiary company. While the attorney may jointly represent the parent company and the subsidiary company on matters of mutual interest, outside counsel should be retained.
for the subsidiary company if the interests of the two companies diverge. Moreover, if joint representation is undertaken, it is wise to document the nature and scope of such representation so as to limit any future loss of privilege over key corporate documents.
Conclusion

There are important differences in the nature of the work performed by in-house counsel and outside attorneys. Specifically, unlike outside lawyers, in-house attorneys have only one client, the corporation. Moreover, as an employee of the organization, in-house attorneys have thorough knowledge of the corporation’s affairs and are often expected to give not only legal but business advice as well. Finally, interpersonal relationships between in-house counsel and corporate employees often play a role in legal representation of a corporate client. Despite these differences, ethics rules offer little guidance to address special problems encountered by corporate attorneys. As a result, the application of ethics rules in the corporate context is full of uncertainty, leading to unique ethical dilemmas. By taking the preventative measures discussed in this article, corporate counsel may be able to reduce the likelihood of occurrence of the most common problems—the default loss of the protection offered by the attorney-client privilege and work production protection and the various conflict of interest situations. This material, however, provides only general information and cannot be relied upon as a substitute for legal advice. Corporate counsel should seek the expertise of outside attorneys if problems related to ethical issues arise.
About the Authors

Steven Allison

Mr. Allison is a partner in the Southern California office and head of the California Trial department. His litigation practice includes complex business, class action, insurance coverage, health care, intellectual property and real estate matters. Mr. Allison has represented clients in trials, arbitrations and appeals. In addition, he counsels clients prior to the filing of litigation to avoid disputes and on insurance coverage matters.

Mandana Massoumi

Ms. Massoumi is a partner in Dorsey's Labor and Employment department and her practice is focused exclusively in this area of law. She represents employers at trial and arbitration on complex employment litigation, wage and hour class actions, and multi-plaintiff and single plaintiff cases involving various employment claims, including discrimination and harassment, wrongful discharge, unfair competition, and misappropriation of trade secrets. Ms. Massoumi regularly advises a wide range of corporations—public and private, large and small—on labor and employment-related issues, including wage and hour matters under state law and the FLSA, unfair competition, reasonable accommodation under the Americans with Disabilities Act (“ADA”), the Family Medical Leave Act (“FMLA”) and the Fair Employment and Housing Act (“FEHA”), protecting proprietary information, non-solicitation issues, and other related personnel matters. Ms. Massoumi also designs and conducts wage and hour audits, investigations and training on every aspect of the employment relationship. She has given numerous presentations on a wide array of employment and management trainings and seminars.

Kate Santon

Ms. Santon is an associate in the Trial department and her practice focuses on the representation of corporations, financial institutions, investment entities and individuals before federal and state courts. She specializes in complex commercial litigation, with an emphasis in contract and business disputes, business torts, antitrust law, securities litigation and enforcement, unfair competition law, and enforcement of judgments. She also has experience in alternative dispute resolution, with special emphasis in international commercial arbitration. Ms. Santon is a member of the antitrust and competition law practice group and the securities litigation and enforcement practice group.