Protecting the Attorney-Client Privilege

# Depositions of In-House Counsel

By Todd Presnell

You were simply doing your job as in-house litigation counsel to your company—reviewing the claim; investigating the situation; gathering facts from the company's employees; preparing a report for your business managers. So, now in the midst of litigation, why were you just served with a subpoena *duces tecum* commanding you not only to appear for a deposition in the case, but also to bring any and all documents evidencing your fact-gathering information? Your communications with employees and management and all of your memoranda about the case are clearly protected from discovery by the attorney-client privilege or work product doctrine, right?

It was not too long ago that "the deposition of an attorney [was] a highly unusual occurrence." *Anderson v. Hale*, 198 F.R.D. 493, 495 (N.D. Ill. 2000). Now, deposition of in-house litigation counsel, whether in a products liability, employment, commercial, or any other case, is a more frequent phenomenon, representing "a troubling and real-world discovery problem." *United States v. Philip Morris, Inc.*, 209 F.R.D. 13, 17 (D.D.C. 2002). This article addresses this litigation tactic, including the reasons for the increased attempts to depose in-house counsel before and during a deposition, the legitimate reluctance of in-house lawyers to sit for a deposition, how to establish and maintain the attorney-client privilege, and the procedures for responding to a subpoena in order to protect the privilege.

## Increasingly Targeted Deponents

While there is no scientific data, the rise in reported decisions dealing with in-house lawyer depositions reveals "that the practice of taking the deposition of opposing counsel has become an increasingly popular vehicle of discovery." *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (citing cases). Many companies

■ Todd Presnell is a trial lawyer in the Nashville office of Miller & Martin PLLC. He is a frequent lecturer on the subject of the attorney-client privilege for in-house lawyers, and is the author of *A Higher Standard—Claiming the Attorney-Client Privilege is Tougher for In-House Counsel*, 14 Bus. L. Today No. 5, May/June 2005, and *Scope of the Corporate Attorney-Client Privilege*, For The Defense, Jan. 2000, at p. 26. He may be reached at tpresnell@millermartin.com.

maintain a group of lawyers dedicated to managing litigation, including overseeing initial fact gathering prior to a lawsuit actually being filed. Other litigation in-house counsel are responsible for reviewing large repositories of documents and identifying for outside counsel those documents with the most relevance. In the commercial litigation setting, in-house lawyers are often called upon to lead the investigation into a particular dispute and make a recommendation on whether to file suit against another company. Because of these in-house activities, in-house lawyers will likely have more information about the facts giving rise to the litigation and often possess the most knowledge about the persons within the company who have discoverable information. Simply put, in-house lawyers are perceived by their adversaries as the proverbial gold mine of information.

As a result of these roles of in-house litigation counsel, crafty adversaries are citing arguably legitimate reasons for seeking discovery from the in-house lawyer. Of course, other motives may also be at work. For example, adversary counsel may seek to depose the in-house litigation lawyer in order to determine whether she had a good faith basis for asserting a particular claim or defense. The right (or wrong) answers could result in the adversary seeking Rule 11 sanctions or, later, filing a malicious prosecution lawsuit. In addition, some adversaries will seek to depose in-house counsel for the sole purpose of harassing the lawyer and her company, causing delay in the litigation, or disrupting the normal progression of the case. In these less attractive situations, depositions of in-house counsel "have a tendency to lower the standards of the profession, unduly add to the costs and time spent in litigation, personally burden the attorney in question, and create a chilling effect between the attorney and client." *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 (M.D.N.C. 1987).

## Legitimate Concerns of In-House Lawyers

While the adversary's reason for seeking to depose the in-house counsel may or may not be genuine, there clearly are legitimate reasons for in-house lawyers to oppose giving depositions, many of which are rooted in their ethical obligations. First, except in certain, defined situations, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Model Rules of Prof'l Conduct R. 1.6. This ethical mandate is essentially a codification of the attorney-client privilege, which prohibits a lawyer from revealing confidential communications, the purpose of which "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege belongs to the company and, therefore, "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors," not its in-house attorney. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).

> The obligation of the in-house litigation attorney is to prevent disclosure of information protected by the attorney-client privilege or work product doctrine.

A second ethical issue that may arise is that, to the extent the in-house lawyer intends ultimately to participate as counsel at trial, he or she may not serve as an advocate if he or she is a witness. The ethical rule expressly provides that, except in limited circumstances, "[a] lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness." Model Rules of Prof'l Conduct R. 3.7. *See Qad, Inc. v. ALN Assocs.*, 132 F.R.D. 492, 493 (N.D. Ill. 1990). Thus, answering questions at a deposition may result in the in-house lawyer's disqualification as trial counsel.

A third issue is that the deposition subpoena will often seek documents that constitute the in-house attorney's work product, which must, absent waiver, be disclosed only in limited circumstances. Specifically, lawyers, including in-house lawyers, are not required to produce documents "prepared in anticipation of litigation or for trial" unless "the party seeking discovery has substantial need of the materials" and shows "that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). As explained below, for these privilege and ethics related reasons, "[c]ourts have been especially concerned about the burdens imposed on the adversary process when lawyers themselves have been the subject of discovery requests, and have resisted the idea that lawyers should routinely be subject to broad discovery." *In re: Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003).

## Compelling the Deposition of the In-House Lawyer

With these concerns in the minds of in-house lawyers and the courts, the in-house lawyer seeking to resist giving his or her deposition should first challenge any errors in the adversary's compulsion process. There are two avenues through which an attorney may compel an adversary lawyer to appear for a deposition. First, the attorney may serve a Notice of Deposition under Rule 30(b)(6) of the Federal Rules of Civil Procedure upon the in-house lawyer's client, designating therein topics that would predictably fall within the exclusive knowledge of the in-house lawyer. *See, e.g., Shelton*, 805 F.2d at 1325. The notice may also identify documents, such as lawyers' memoranda and witness interview summaries that the in-house lawyer likely prepared. *See* Fed. R. Civ. P. 30(b)(5). In this situation, the deponent must be given at least 30 days to gather and produce the documents. *See, e.g., Orleman v. Jumpking, Inc.*, 2000 WL 1114849 (D. Kan.).

The preferred method, however, is for counsel to serve on the in-house lawyer a subpoena *duces tecum* under Rule 45 of the Federal Rules of Civil Procedure. *See, e.g., Qad, Inc.*, 132 F.R.D. at 493; *Philip Morris*, 209 F.R.D. at 17. Under this rule, the party seeking the deposition must have the subpoena personally served by a non-party over the age of 18, either within the district

of the court from which it was issued or within 100 miles of the place of the deposition. Fed. R. Civ. P. 45(b)(1) & (2). In short, "[a] party wishing to depose the opposing party's counsel must follow the same procedural rules as anyone else, and serve a Rule 45 subpoena on counsel for a deposition or production of documents." *Philip Morris*, 209 F.R.D. at 17. The failure of one's adversary to follow the timing and other procedures of either Rule 30 or Rule 45 provides the in-house attorney with ammunition for defeating the deposition attempt.

### Responding to the Notice or Subpoena

When faced with a proper notice or subpoena, the obligation of the in-house litigation attorney is to prevent disclosure of information protected by the attorney-client privilege or work product doctrine. In essence, "courts have fashioned two divergent approaches to resolving disputes over attempts to depose attorneys. One approach considers a motion for a protective order in advance of the deposition to be presumptively premature and thus requires the attorney to attend the deposition and raise particular objections in response to specific questions." *Advance Sys. v. APV Baker PMC, Inc.*, 124 F.R.D. 200, 201 (E.D. Wis. 1989) (citing *Hunt International Resources Corp. v. Binstein*, 98 F.R.D. 689, 690 (N.D.Ill.1983)). "The other and better approach considers that 'the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed. R. Civ. P., protective order unless the party seeking the deposition can show both the propriety and need for the deposition.'" *Id.* (quoting *N.F.A. Corp.*, 117 F.R.D. at 85).

Before examining the relevant case law on these two approaches, it is important to review the applicable rules of civil procedure to understand their scope. Rule 26, for example, allows parties to "obtain discovery regarding any matter, not privileged." Fed. R. Civ. P. 26(b)(1). Moreover, Rule 30 permits a party to "take the testimony of *any person*, including a party, by deposition upon oral examination." Fed. R. Civ. P. 30(a)(1) (emphasis added). It is clear, therefore, that "[t]he deposition-discovery regime set out by the Federal Rules of Civil Procedure is an extremely permissive one to which courts have long accorded a broad and liberal treatment to effectuate their purpose that civil trials in federal courts need not be carried on in the dark." *Friedman*, 350 F.3d at 69. As one court noted, "the Federal Rules of Civil Procedure create no special presumptions or exceptions for lawyers, or anyone else—even a sitting President of the United States." *Philip Morris*, 209 F.R.D. at 19 (citing *Clinton v. Jones*, 520 U.S. 681 (1997)).

> The civil procedure rules provide ample justification for preventing or limiting depositions of in-house counsel.

While there may not be an attorney-specific rule, the civil procedure rules provide ample justification for preventing or limiting depositions of in-house counsel. First, Rule 45 provides that a court "*shall* quash or modify the subpoena if it... requires disclosure of privileged or other protected matter and no exception or waiver applies." Fed. R. Civ. P. 45(c)(3)(A)(iii) (emphasis added). Although employing less mandatory terms, Rule 26(c) states that a "court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including... that certain matters not be inquired into, or that the scope of disclosure or discovery be limited to certain matters." Fed. R. Civ. P. 26(c)(4). Although permissive in tone, "Rule 26(c) is broader in scope than the attorney work product rule, attorney-client privilege and other evidentiary privileges because it is designed to prevent discovery from causing annoyance, embarrassment, oppression, undue burden or expense not just to protect confidential communications." *Boughton v. Cotter Corp.*, 65 F.3d 823, 829–30 (10th Cir. 1995). Accordingly, while Rule 45 requires a court to quash a subpoena seeking privileged information, Rule 26(c) goes further and permits a court to prevent the deposition of an in-house lawyer where it appears that the purpose of the deposition is illegitimate.

### First File a Motion to Quash/ for Protective Order

While deciding strategy necessarily requires a case-by-case analysis, generally speaking the better method to prevent disclosure of privileged information by the in-house lawyer is to file a motion to quash the subpoena and/or a motion for a protective order. The seminal case supporting this approach is *Shelton v. American Motors Corp.*, 805 F.3d 1323 (8th Cir. 1986). In this products liability case, the plaintiffs served a notice to take the deposition of Rita Burns, the defendant's in-house litigation attorney who was assigned to this case. *Id.* at 1325. The defendant filed a motion for a protective order, which was denied by the court. *Id.* The plaintiffs' lawyer thereafter took her deposition and specifically asked her about the existence or nonexistence of documents pertaining to the allegedly defective product. *Id.* Ms. Burns refused to answer, citing the attorney-client privilege and work product doctrine and, as a sanction, the trial court entered a default judgment against the defendant. *Id.* at 1236.

On appeal, the court framed the issue as whether an in-house lawyer's acknowledgement of the existence of documents is protected by the work product doctrine. The broader issue, however, was under what circumstances may an in-house litigation counsel be deposed by her adversary. Although acknowledging that the rules of civil procedure "do not specifically prohibit the taking of opposing counsel's deposition," the court "view[ed] the increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be employed only in limited circumstances." *Id.* at 1327. Accordingly, while not "hold[ing] that opposing trial counsel is absolutely immune from being deposed," the court limited the circumstances wherein an in-house lawyer may be deposed to "where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case." *Id.*

Under the *Shelton* rule, "it is appropriate to require the party seeking to depose an attorney to establish a legitimate basis for requesting the deposition and demonstrate that the deposition will not otherwise prove overly disruptive or burdensome." *N.F.A. Corp.*, 117 F.R.D. at 85. Thus, upon the filing of a motion to quash or for a protective order, the burden is placed on the party seeking discovery to meet all three of the *Shelton* requirements. Other courts follow this approach. *See, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); *Boughton*, 65 F.3d at 830 (stating that "the trial court at least has *discretion* under Rule 26(c) to issue a protective order against the deposition of opposing counsel when any one or more of the *Shelton* criteria for deposition... are *not* met" (emphasis in original)).

### Appear and Assert Objections to Specific Questions

Some courts, however, do not follow the *Shelton* approach, and instead require that in-house lawyers appear for their depositions and assert privilege objections when appropriate in response to specific questions. In an admittedly *dicta* opinion, for example, the Second Circuit refused to adopt the *Shelton* requirements and stated that "the standards set forth in Rule 26 require a flexible approach to lawyer depositions whereby the judicial officer supervising the discovery takes into consideration all of the relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship." *Friedman*, 350 F.3d at 72. The burden-shifting results of *Shelton* have also been challenged based on the argument that, "[i]f the three *Shelton* criteria applied whenever the propriety of any attorney deposition was in issue, the presumption of discoverability in the Federal Rules would be turned upside down, requiring Plaintiff to prove the absence of what Defendants must show affirmatively in order to limit discovery." *Philip Morris*, 209 F.R.D. at 19.

Although recognizing the legitimate ethical and privilege issues that arise when an in-house lawyer is to be deposed, the district court in *Qad, Inc. v. ALN Assocs.*, 132 F.R.D. 492, 494 (N.D. Ill. 1990), decided that "it is a mistake to translate those entirely legitimate needs for the protection of lawyer-client privileged communications and of lawyers' privileged thought processes into a kind of global protection of lawyers as a privileged class." The court flatly rejected the *Shelton* approach, noting that its disagreement is "respectful but profound." *Id.* at 495. Instead, the court "subscribe[d] wholeheartedly to a procedure that rejects any prior restraint in favor

of permitting the deposition to go forward, with any individualized objections to be dealt with during its regular course." *Id.*

While it is preferable to file a motion to quash the subpoena or for a protective order, these cases show that not all courts will follow the *Shelton* criteria and force the party seeking discovery to prove that it is seeking nonprivileged information that is important to the case and cannot be obtained elsewhere. When that approach is taken, the in-house lawyer must be well versed in the boundaries of the attorney-client privilege and prepared to assert objections when a question calls for divulging confidential information that the company has not authorized to be disclosed.

### If You Talk the Talk, You Must Walk the Walk

Whether made in support of a motion for protective order or as justification for refusing to answer a question at a deposition, simply claiming that providing testimony will violate the attorney-client privilege will be insufficient to gain protection from the court. In other words, the in-house lawyer must be able to show, regardless of the burden shifting, that the anticipated testimony will reveal confidential communications and, thus, threatens the privilege. At a deposition, the smart deposing lawyer, however, will not merely ask the in-house counsel to repeat communications made to him or her by upper management and hope that he or she momentarily forgets the privilege and answers the question. Rather, the lawyer will attempt, through rigorous questioning, to lay a foundation for the argument that the communications are not actually privileged or, alternatively, that the privilege has been waived. For example, the lawyer will ask the in-house lawyer to name all recipients of the subject communication to see if any third parties received the information, which would constitute a waiver of the privilege. Or the lawyer will question the in-house attorney about all the measures taken to ensure that the communication remained confidential and not subject to disclosure, again hoping to later argue that a waiver has occurred. The equally smart in-house attorney, therefore, will take the necessary steps—long before receiving a deposition subpoena—to ensure that the privilege is not only established at the time of the communication, but also maintained thereafter.

The most frequently cited rendition of the attorney-client privilege was penned by Judge Wyzanski as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*United States v. United Shoe Machinery Co.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950). This privilege, of course, applies to corporations, *Upjohn*, 449 U.S. at 389–90; however, "admittedly complications arise when the client is a corporation." *Id.* at 389. One problem arises when determining which employees, supervisors, and upper management personnel actually speak for the corporation to such a degree that their communications to the in-house lawyer are deemed privileged communications.

> The in-house lawyer must be well versed in the boundaries of the attorney-client privilege.

For years, the federal courts applied the so-called "control group test" to determine which communications obtain the cloak of the privilege. Under this test, "if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of an attorney, or if he is an authorized member of a body or group which as that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply." *City of Philadelphia v. Westinghouse Electr. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962). In other words, it is only the communications from manager-level employees who have authority to make legal decisions for the company that obtain the attorney-client privilege.

This restrictive parameter remains viable today only in a handful of states. *See, e.g., Sterling Finance Management, L.P. v. UBS Painewebber, Inc.*, 782 N.E.2d 895 (Ill. App. Ct. 2002). The federal courts and most states now follow the "subject matter test" first announced in *Upjohn*. Although expressly declining to "lay down a broad rule or series of rules to govern all conceivable future questions in the [corporate attorney-client privilege] area," the *Upjohn* court recognized five fundamental elements that a corporation must prove in order to secure the attorney-client privilege: (1) the communication must be made for legal advice; (2) the employee making the communication must have done so at the direction of a superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who need to know its contents. 449 U.S. at 394–395.

Even under the more flexible subject matter test, the in-house lawyer faces problems in establishing and maintaining the attorney-client privilege. The biggest issue is whether the in-house lawyer can show that the communications sought to be protected were made to the lawyer for the purpose of the lawyer rendering legal advice to the client. *See Edwards v. Whitaker*, 868 F. Supp. 226 (M.D. Tenn. 1994) (stating that "the privilege only applies if the lawyer is providing legal advice and services, and it will not protect disclosure of non-legal communications where the attorney acts as a business or economic advisor"). While that sounds simple in theory, in today's corporate environment, in-house lawyers often render business advice just as much as

legal advice. *See Leonen v. Johns-Manville*, 135 F.R.D. 94, 98–99 (D.N.J. 1990) (stating that the rule's "application is difficult, since in the corporate community, legal advice is often intertwined with and difficult to distinguish from business advice").

As a result of the dual business and legal roles that many in-house lawyers play, courts apply a heightened standard in determining whether a communication to in-house counsel should receive protection of the privilege. In *In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984), then-Judge Ginsburg was presented with the issue of whether the attorney-client privilege protected certain communications of an in-house lawyer, identified as C, who also served as the company's vice president. The court outlined the burden of the company as follows:

> We are mindful, however, that C was a company vice- president, and had certain responsibilities outside the lawyer's sphere. The company can shelter C's advice only on a *clear showing* that C gave it in a professional legal capacity.

*Id.* at 99 (emphasis added).

Many courts, therefore, hold that "[a] corporation can protect material as privileged only on a clear showing that the lawyer acted in a professional legal capacity." *Boca Investerings Partnership v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998). The "clear showing" burden means that the proponent "must show by affidavit that *precise facts* exist to support the claim of privilege." *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986).

The in-house lawyer, therefore, must be prepared to support his or her motion for protective order and/or refusal to answer deposition questions with precise facts showing that the communication was (1) made to her by an employee at the direction of a superior; (2) for purposes of securing legal advice; (3) was within the employee's scope of duties and knowledge; and (4) was not disseminated to third parties. In order to put him/herself in the best position to win a motion for protective order to quash a deposition subpoena, the in-house lawyer should incorporate certain activities into his or her daily routine, such as making affirmative statements on memoranda (such as witness interview summaries) that the information was obtained for purposes of rendering legal advice. *See Malco Manufacturing Co. v. Elco Corp.*, 45 F.R.D. 24 (D. Minn. 1968). In addition, the in-house lawyer should place a stamp all such communications indicating that the document is "privileged and confidential." *See In re Air Crash Disaster*, 133 F.R.D. 515 (N.D. Ill. 1990). The communications should also have a limited distribution spectrum, with only those who absolutely need to know the information actually receiving a copy. In today's world of electronic communications, it is routine to copy many persons, indeed entire departments, on emails. This type of distribution, however, will likely constitute a waiver of the attorney-client privilege and result in the motion for protective order being denied. Finally, multiple steps should be taken to maintain all such written communications, including emails, in separate files that are only accessible by the legal department.

If these steps are taken on a consistent, routine basis, then the in-house lawyer will be in a better position to file and win a motion for protective order and/or to quash a deposition subpoena. Even if the lawyer ultimately has to testify, whether as a result of a voluntary, strategic decision or a court order, he or she will be in a much better position to answer the foundation-based questions that the adversary will ask in an attempt to destroy the claim of privilege. Consider the following actual exchange between a lawyer questioning a company's general counsel (the names of the parties are changed to protect the innocent):

Q. What is your formal position with the [defendant company]?

A. I'm corporate legal counsel in charge of the legal department.

Q. What are your current duties and responsibilities in your current position, sir?

A. I'm responsible for the legal affairs of the parent company and all of its subsidiaries including all forms of dispute resolution.

Note how the general counsel did not state that he was involved in business decisions; rather, he stated unequivocally that he has one title and is responsible only for legal affairs. Such testimony will allow counsel to defeat the argument that the communication was received in a business, rather than legal, capacity.

Q. [Regarding a document filed by counsel's legal assistant] Well, then why would you—I mean, did you tell your secretary to do those things because you wanted it segregated, or was there some other—was it a clerical reason?

A. Well, let me say that I made the decision that it be segregated in my capacity as attorney for the company. And I've not been instructed to waive the company's right to attorney/client privilege with me. And also it's, in my mind, regarding work product,... so you appreciate the fact that I'm not able to answer that question, and I have to invoke the company's privileges in those regards.

Q. I forgot what my question was. What did I ask?

Having been thwarted with a proper privilege objection, from the in-house attorney-deponent, no less, the questioning lawyer changed tactics and tried to lay a foundation that the privilege had been waived due to the failure to keep the information confidential. The in-house attorney, however, appropriately handled the question:

Q. Does anyone in your office or in your offices have access to your files, like paralegals, people come in, work with your files, that type of thing?

A. No, not—not people that come in. We have a small staff, and we have a small set of offices that are secure to the extent that only my secretary and my partner and I have keys. And we also have a file clerk, but she doesn't have a key. So those four people have access to the legal office.

After successfully avoiding the trap of providing testimony that would vitiate the attorney-client privilege, this general counsel went on to invoke the privilege consistently when the question called for protected communications:

Q. Do you believe that this employment agreement is enforceable?

A. I have to, again—Mr. [plaintiff's lawyer], as you, I'm sure, appreciate, I have to invoke the privilege that my company enjoys for me not to disclose my impressions or opinions about its affairs.

**Depositions**, continued on page 67

how they stored information. relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected. . . . *In short, it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.* This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.

*Zubulake V*, 229 F.R.D. at 432.

Aside from the clear obligation imposed on a corporation and its counsel, an established follow up protocol makes practical sense. No matter how urgently a letter is worded, many employees will simply not make such a request a priority item on their everyday agendas, particularly if they have not been personally involved in the underlying events. Moreover, given the many locations of electronic data and the complexity of segregating and preserving this information (including suspension of normal course data deletion protocols), there is simply no way to monitor whether employees are taking the steps needed to preserve data short of personal contact on a regular basis. In short, e-data cannot be treated like hard copy data when it comes to ensuring preservation efforts if, for no other reason, than how much more quickly huge quantities of potentially relevant electronically stored data can be altered or completely lost if appropriate measures are not established and enforced.

The litigation hold letter is now an indispensable tool in the changing landscape of modern day litigation. It is a critical element in satisfying a party's obligation to preserve evidence and demonstrate that a litigant understands these obligations and the consequences of non-compliance. As such, the hold letter will often become "Exhibit A" to any defense of the litigant's preservation efforts and proof of its good faith in taking all reasonable steps to meet these obligations. Thus, attention to these few key elements of the internal litigation hold letter can lead to huge dividends down the road.

**Depositions**, from page 55

Q. You're refusing to identify that document?

A. Yes, I am. In the—I'm invoking my company's—my client's privileges to refuse to identify the document.

Q. Could you identify that document, sir?

A. I'm going to decline to do that on the grounds of my client's right to attorney-client privilege and as to work product as well.

Q. And were there documents enclosed with that letter?

Company Lawyer: Objection. At this point, we believe the substance of the communication is protected by the privilege.

A. I, of course, am not authorized by my client to abandon its privilege thus invoked. I, therefore, decline to answer that question.

This exchange shows how the in-house attorney should be prepared to answer the foundation questions aimed at defeating the privilege, as well as how to work with the company's counsel to invoke the privilege properly. It is also advisable for the in-house attorney to retain his or her own lawyer to be present at the deposition, represent his or her personal interests, and ensure that the privilege remains intact. With testimony and counsel such as was displayed in this real-life example, the adversary counsel will have a difficult time succeeding on a motion to compel answers as he or she will be disarmed to defeat the privilege.

## Conclusion

Justice Jackson once stated that "[d]iscovery was hardly intended to enable a learned profession to perform its functions... on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, concurring). In order to avoid lending his or her wits to adversary counsel during a deposition, the in-house lawyer must consistently follow standards for receiving client communications and maintaining their confidentiality. Then, upon receipt of a subpoena *duces tecum*, he or she is better positioned to quash the subpoena in its entirety successfully, or to invoke the attorney-client privilege effectively in refusing to answer questions aimed at gaining her insights during litigation.