

Quarterly State Compliance Review

By Sandra Feldman

This edition of the Quarterly State Compliance Review looks at some legislation of interest to corporate lawyers that went into effect from Aug. 1 through Oct. 1, including amendments to Delaware's corporation and LLC laws. It also looks at two recent decisions of interest from the Delaware Chancery Court.

IN THE STATE LEGISLATURES

This was another busy quarter for those who track changes to state business entity statutes, as a large number of amendments went into effect. Below are a few highlights from around the country.

Delaware Amends Its General Corporation Law, LLC Act and LP Act

House Bill 19, effective Aug. 1, enacted amendments to Delaware's General Corporation Law. A new Section 112 was added permitting a corporation to adopt a bylaw requiring it, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials individuals nominated by a stockholder for election as a director. A new Section 113 was added permitting a corporation to adopt a bylaw requiring it to reimburse a stockholder's proxy solicitation expenses, subject to such procedures or conditions as may be provided in the bylaws.

continued on page 11

The Definition of 'Management-Level' Employee Under Title VII

Third Circuit Clarifies

By Donald D. Gamburg and Julie E. Reid

The United States Court of Appeals for the Third Circuit recently decided a sexual harassment case that has consequences for nearly every employer, regardless of industry. This decision serves as an important reminder for all employers regarding the reporting and proper handling of discrimination and harassment complaints.

On June 8, 2009, the Third Circuit decided *Huston v. The Procter & Gamble Paper Products Corp.*, 568 F.3d 100 (3d Cir. 2009), a case involving allegations under Title VII of the Civil Rights Act of 1964, as amended, in which the plaintiff, Priscilla Huston, sought to impute liability for co-worker sexual harassment to her employer, Procter & Gamble ("P&G"). Under Title VII, an employer can be held directly liable for maintaining a sexually hostile work environment if a management-level employee has actual or constructive knowledge that such an environment exists in the workforce and does not take prompt remedial measures. In finding for P&G, the Third Circuit clarified the definition of a "management-level" employee, for the purpose of imputing liability to employers under Title VII, in a manner favorable to employers. The lessons from this case in identifying who is a management-level employee and who is tasked with receiving complaints of harassment should be heeded by all employers.

RELEVANT CHRONOLOGY

Priscilla Huston began working at P&G in the early 1990s. She worked as a technician, and her team was responsible for monitoring large paper manufacturing machines. In May and June 2004, Huston became aware of incidents of male co-workers exposing themselves on the job in front of other male employees (involving all non-supervisory employees). Specifically, on May 13 and May 22, 2004, Huston heard about, but did not observe, alleged incidents of this nature. Huston alleged that someone informed supervising technicians, Pete Romanchick and Jack Traver, of the May 13 incident the following day, May 14, 2004. Huston did

continued on page 2

In This Issue

'Management-Level' Employees and Title VII	1
Quarterly State Compliance Review . . .	1
International v. U.S. Discovery Obligations	3
A New Legal Model	5
Text Messaging	7
United States v. Stringer	9

Title VII

continued from page 1

not report those incidents to anyone at the time.

Then, on June 7 and June 8, 2004, Huston allegedly witnessed a male co-worker exposing himself. On June 30, 2004, Huston lodged a formal, internal complaint regarding the alleged incidents to a senior-level manager and a Human Resources Manager, and she also alleged that males viewed pornography at work. P&G launched an investigation that day and took prompt remedial measures, sanctioning everyone on Huston's team (including Huston) for engaging in vulgar language and behavior in the workplace. Due to Huston's prior discipline at P&G, she could have been terminated for her participation in vulgar discussions in the workplace. However, P&G chose to continue her employment. Huston did not allege that any inappropriate behavior occurred after P&G took remedial action and issued sanctions.

In the Fall of 2004, due to some concerns about proper data recording, P&G held a meeting reminding technicians to be diligent and thorough when recording data. Supervising technicians were required to sign a statement declaring they would report any data fabrication they observed, and technicians understood they risked termination for any such fabrication. Soon thereafter, in October 2004, one of the supervising technicians, Romanchick, caught Huston fabricating data, and he reported the incident to senior management. Confronted by Romanchick, Huston admitted to falsifying data. Based on this admission of wrongdoing, P&G terminated

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Huston's employment on Oct. 21, 2004.

In November 2005, Huston filed a complaint in United States District Court for the Middle District of Pennsylvania, asserting claims for sex discrimination, sex harassment, and retaliation, alleging that P&G maintained a sexually hostile work environment in violation of Title VII and the Pennsylvania Human Relations Act ("PHRA"). In May 2007, the district court granted summary judgment on all grounds in favor of P&G, and Huston appealed.

THE HUSTON DECISION

As the Third Circuit in *Huston* reiterated, there are two general scenarios in which an employer can be directly liable for non-supervisory co-worker sexual harassment. The first is when the employer fails to provide a reasonable avenue for complaint (which Huston did not allege). This could occur when an employer fails to publish or utilize a reporting procedure for concerns about discrimination or harassment in the workplace. The second scenario, which Houston relied upon in asserting her claims, is when the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action. One way this scenario arises is when management level employees have actual or constructive knowledge of the harassment and fail to take action or ignore the complaint. Another way this scenario arises is when harassment is so pervasive and open that an employer is deemed to have known, or should have known, of the alleged events.

An employee's knowledge of co-worker sexual harassment may typically be imputed to the employer in two circumstances where: 1) the employee is sufficiently senior in the employer's hierarchy (such as a vice president), or otherwise in a position of administrative responsibility over employees under him or her (*i.e.*, a departmental or plant manager), so that such knowledge is important to the employee's general management duties; or 2) the employee is specifically employed to deal with sexual harassment (*i.e.*, a member of the employer's human

continued on page 8

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Circulation e-mail: customercare@incisivemedia.com
Reprints e-mail: reprintscustomerservice@incisivemedia.com

The Corporate Counselor P0000-233
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:
Incisive Media
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljonline.com



International Restrictions on Releasing Personal Information

What Steps Your Company Needs to Consider

By M. James Daley and Laura Clark Fey

In June, data privacy experts from around the globe converged in Barcelona, Spain for The Sedona Conference's® International Programme on Cross-Border eDiscovery and Data Privacy. Participants, ranging from academics to data commissioners to judges to in-house and outside counsel from countries throughout North America, South America, Europe, Asia and Australia, gathered to dialogue on the legal, technology and cultural challenges posed by cross-border discovery conflicts. A wide variety of ideas were shared, but participants recognized that this international dilemma is not going to be solved overnight.

The challenge can be summarized as follows: With the globalization of business and the resultant flow of data across country borders, data sought in litigation, particularly litigation involving multinational corporations, increasingly includes personal information relating to employees, customers and/or clients that is located in foreign countries. A significant amount of that data is in the form of e-mails, which are recognized as personal data in most of the world other than the United States. The dilemma confronted by

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corporate counsel involved in such litigation is whether to disclose personal information located in foreign countries with laws severely restrict the processing and transfer of personal data and risk being punished there with civil and/or criminal penalties; or to filter out the personal data and risk being sanctioned in the U.S. for incomplete responses to e-discovery requests.

U.S. courts have generally rejected the interests of countries with strict data privacy laws in shielding data located in their countries from discovery in U.S. proceedings. The Sedona Conference® Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Current of International Data Privacy and e-Discovery (2008) ("The Sedona Conference® Cross-Border Discovery Framework") at 17. For example, in *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), the Ninth Circuit upheld the lower court's sanction against a Chinese corporation for failure to comply with discovery orders despite the corporation's argument that disclosure of information would have subjected it to criminal prosecution in China under Chinese State Secrecy Laws. Sanctions for failure to comply with a U.S. discovery order can be significant — including large monetary sanctions, witness preclusion and even dismissal.

Similarly, countries hosting personal data that is the subject of litigation in the United States have rejected the interests of the United States in obtaining such personal data as part of its broad discovery process. In January 2008, the French Supreme Court upheld the criminal conviction of a French lawyer for violating a French statute criminalizing discovery within France by private parties for purposes of foreign litigation despite the fact that his actions were taken to comply with a request from a federal court in the United States. *In re Advocat "Christopher X,"* No. 07-83228 (Cour de Cassation Dec. 12, 2007) (English translation). The attorney was fined 10,000 Euros, or about \$15,000 in U.S. dollars. In *Lynondell-Citgo Refining, LP v. Petroleos*

de Venezuela, S.A., 2005 WL 1026461 (S.D.N.Y. 2005), the defendant corporation accepted an adverse inference instruction rather than turning over board minutes and related documents in violation of a Venezuelan blocking statute, which could have resulted in stiff criminal sanctions. Cross-border discovery is already a significant source of international legal conflicts. These conflicts are only expected to grow as electronically-stored information proliferates and the global marketplace expands. So, what can in-house counsel do to proactively address the risks inherent in cross-border discovery?

TEN PRACTICAL STEPS

Corporations interested in mitigating their risks should consider the following actions:

One. Get the Right People and Policies in Place at the Company

To the extent not already in place, corporations should create a Chief Information Governance Officer position and develop a standing task force to proactively address data challenges. The CIGO and task force should: 1) Institute training programs to ensure that employees in the Legal, IT, Records Management, Corporate Compliance, and Human Resources departments are aware of the risks and complexities inherent in processing or transferring personal information; 2) Develop policies, procedures and processes, including safeguards against the unauthorized retransmission, onward transfer or modification of personal data that is processed and/or transferred, to address the challenges of complex, and varying data privacy and protection laws around the world; and 3) Institute compliance monitoring to confirm that employees are aware of and following those policies, procedures and processes.

Two. Use Knowledge of Relevant Laws and Risks

Corporations should take the data privacy regulations and blocking statutes (or lack thereof) of foreign jurisdictions into account in determining where their electronic information will be stored. In addition, they should ensure that people involved in e-discovery at the company know

continued on page 4

Personal Information

continued from page 3

how their electronic information is created, stored and retrieved. Further, corporations should not retain personal information for any longer than required for legal and business reasons. Shorter retention periods will assist in reducing the amount of personal data in existence at the time any litigation hold is issued.

Three. Balance the Competing Risks

When involved in cases involving cross-border discovery, early in the case, corporations should analyze the risks of failing to produce in violation of a U.S. discovery order with the risks of transferring data out of a foreign country in violation of data privacy regulations and blocking statutes. All decisions concerning discovery of personal data should take this risk analysis into consideration.

Four. Engage in Discussions With Data Protection Officers in Foreign Countries

Data protection officers in the host country should be involved early in the case to provide guidance and to assist the parties in seeking protective orders to comply with EU and the host country's data protection regulations. In addition, early on, corporations should educate their opponents and the U.S. court on the relevant data privacy laws, including the additional time anticipated to work through the process in the foreign country.

Five. Consider Using the Hague Convention

Corporations should consider first resorting to the Hague Convention, through which a court in one nation requests assistance in obtaining relevant information from an authority in another nation. Some U.S. courts have held that parties must first utilize Hague Convention procedures. But it should be noted that the process for getting relief from the Hague Convention typically is very lengthy. In addition, a number of countries will not honor discovery requests through the Hague Convention from common law countries like the U.S., and some U.S. courts have refused to apply the Hague Convention.

Six. Craft Bulletproof Consents And Clear Notices of Usage

If workable, corporations seeking to process and/or transfer personal data should provide data holders with advance notice of the possibility that their personal data may be processed for litigation; and should have data subjects sign specific, unambiguous informed consents prior to the transfer of any personal data. In addition, data subjects should be provided with timely notice of the identity of any recipients of their data, the purposes for the processing, categories of data involved and a reminder of their rights, even where their data is being collected from a third party.

Seven. Hire Counsel and Vendors With Data Privacy Expertise

In cases involving cross-border discovery, the corporation should ensure that its counsel, as well as third parties hired to assist with document collection, review and production, have the expertise and experience necessary to best address the data privacy issues in the case. Corporations should hire vendors that are Safe Harbor-certified. Safe Harbor Certification creates the presumption of adequate data protection standards by signatory corporations. In addition, because specific data privacy laws can vary in significant ways from country to country (even between EU countries), the corporation hire should local counsel with data privacy expertise and good relationships with local data privacy protection officers. Corporations also may want to consider hiring an expert in the host country to independently analyze the relevance of any personal data subject to transfer.

Eight. Take Reasonable Steps to Protect Personal Data

Corporations should take precautions to "preserve the security of the data to protect it from accidental or unlawful destruction, loss and unauthorized disclosure or access." This requirement applies to any and all parties that may handle the personal data — from law firms and vendors to experts and court personnel. Corporations should require any third parties hired to assist with the col-

lection, review and production of data to take steps to protect the integrity and security of personal data. Third parties handling personal data should collect and process personal data only for the specific reasons for which it was collected; maintain strict confidentiality; communicate only with specified individuals concerning the data; and comply with retention restrictions. Personal data should be retained only for as long as the action is pending.

Nine. Seek to Reduce the Scope Of Personal Data

Disclosure of personal data should be limited to that which is objectively relevant in the case. Try to limit the personal data required to be produced through agreement with opposing counsel or through court order. Protective orders can be utilized to limit the discovery of personal information and/or to protect the privacy of personal information that is processed or transferred.

To the extent possible, redact personal information before it is transferred to the United States. If personal information cannot be redacted, then seek permission to anonymise (or pseudonymise) such information. Collect, process, and filter personal data while it is still in the host country. If possible, review information in the host country as well. Reducing the volume of personal data transferred and produced obviously reduces the risk. In addition, use a uniform confidentiality designation, such as "Confidential EU Data" to mark the personal data that is produced.

Ten. Participate in the Dialogue

Finally, interested corporations should participate in the dialogue with data protection authorities to develop workable global best practices. The Sedona Conference® has taken a strong leadership role in trying to develop a better international framework for resolving cross-border e-discovery issues. The Sedona Conference® International Working Group on Electronic Information Management, Discovery and Disclosure (WG6) has hosted conferences to address international data

continued on page 12

Lawyers, Technology And Money

A New Legal Model

By Richard Susskind

Many lawyers do not like the title of my latest book, “The End of Lawyers?” And yet I am at pains to point out that my message is a mixed and not a negative one. I claim that the future for lawyers could be prosperous or disastrous. Admittedly, I do predict that lawyers who are unwilling to change will struggle to survive, but I also say that lawyers who embrace emerging technologies and novel ways of sourcing legal work will trade successfully for many years.

Many of my conclusions follow research among Corporate Counsel. Invariably, they tell me that they are currently under three pressures: to reduce the size of their in-house legal teams; to spend less on external law firms; and to find ways of coping with more and riskier legal and compliance work than they have had in the past. Both internally and externally, clients are requiring more for less. From 2004-2007, I found this to be a running, background theme in my research and discussions with in-house lawyers. In 2008-2009, in the slipstream of the economic downturn, it has become not so much a theme as an overriding imperative.

DISCONCERTING IMPLICATIONS

For law firms, these pressures on clients and the imperative that follows have disconcerting implications. Increasingly, for example, firms are being called upon to reduce their fees, to undertake work on a fixed fee rather than an hourly billing basis, to be far more transparent in their dealings with clients, and they are coming to be selected, more than occasionally, on the advice of hard-nosed, in-house procurement specialists in client organizations rather than by old friends and colleagues. The legal market, in

Richard Susskind, an independent adviser to international law firms, is a UK author.

other words, has become a buyers’ market and is set to be so, I argue, for the foreseeable future.

At the same time, new competitors are emerging, such as outsourcers and entrepreneurial publishers, while liberalization of the legal market (in England and elsewhere) will bring external capital and a new wave of professional managers and investors who have no nostalgic commitment to traditional business models for law firms, including hourly billing and gearing obtained through the deployment of armies of hard-working young lawyers. And liberalization in a few jurisdictions will create a ripple across all jurisdictions, as new ways of delivering legal services are developed and capture the market’s attention.

DISRUPTIVE LEGAL TECHNOLOGIES

To cap it all, a number of disruptive legal technologies are emerging (such as document assembly and closed legal communities) which will directly challenge and sometimes even replace the traditional work of lawyers in firms. For many law firms, therefore, it looks like the party may soon be over.

I anticipate that the market is likely to respond in two ways to the changes just noted. First, new methods, systems, and processes will emerge to reduce the cost of undertaking routine legal work. This will extend well beyond the back office of legal businesses into the very heart of legal work. I expect there to be a strong pull by the market away from the delivery of legal advice on a basis that I call ‘bespoke’ (a term used in the UK and meaning highly customized). To achieve the efficiencies needed, I say that legal services will evolve from bespoke services at one end of a spectrum along an evolutionary path, passing through the following stages: standardization, systematization, packaging, and commoditization. Many new ways of sourcing will emerge and these will often be combined in the conduct of individual pieces of legal work. I call this multi-sourcing. These changes will affect not just high volume, low value work

but also — and vitally — the routine elements of high-value work.

The second response by the market will be for clients, in various ways, to share the costs of legal services. Again, this will affect the entire market. In-house lawyers, I suggest, will frequently work together, often as part of online closed communities, and find ways of recycling legal work amongst themselves. In areas where their duplication of effort and expense is considerable, such as regulatory compliance, they will collaborate intensively and so spread the legal expense amongst their number. At the other end of the spectrum, citizens will have ready access to online legal guidance and to growing bodies of legal materials that are available on an open source basis. More, they will be able to share legal experiences with one another.

PREDICTIONS FOR LAWYERS

With clients cutting costs and finding alternative ways of sourcing work or sharing costs and collaborating regularly with another, what does this mean for lawyers? On the strength of the arguments and findings of my book, *The End of Lawyers?*, I predict that there will be five types of lawyers in the future.

The first will be the “expert trusted adviser.” This is the provider of bespoke legal service. The arguments of my book suggest that market pressures will generally discourage lawyers from handling matters in a bespoke manner wherever this is possible. Instead, standardized or computerized service will be preferred. However, on some occasions bespoke work will be unavoidable. For the foreseeable future, intelligent creative lawyers will be needed in certain circumstances — to fashion new solutions for clients who have novel, complex, or high value challenges (the expert element) and to communicate guidance in a highly personalized way (the trusted component) where this is wanted. The end of the expert trusted adviser is not therefore in sight. The danger facing many lawyers, however, is to assume that their clients’

continued on page 6

A New Legal Model

continued from page 5

work always requires this expert or trusted treatment. Lawyers who handcraft while their competitors introduce new efficiencies (computerizing or outsourcing, for example) will not be practicing in ten years' time, because bespoke service is a luxury that clients will not generally be able to afford.

My second category of lawyer for the future is the "enhanced practitioner." This is the individual whose legal skills and knowledge are required not to deliver a bespoke service but, enhanced by modern techniques, to support the delivery of standardized, systematized and (when in-house) packaged legal service. The crucial point here, though, is that the market will only tolerate this lawyer's involvement where legal experience is genuinely needed. Otherwise, other less costly sources of support will be favored, such as paralegals, legal executives and legal process outsourcing service providers. Today, clients frequently pay lawyers to do work that intelligent and trained non-lawyers could undertake. This will stop in years to come and the need for lawyers who perform routine work will diminish accordingly.

In contrast, there will be a much greater need for my third category of lawyer — the "legal knowledge engineer." If I am right and legal service will increasingly be standardized and (in various ways) computerized, then people with great talent are going to be needed, in droves, to organize the large quantities of complex legal content and processes that will need to be analyzed, distilled, and then embodied in standard working practices and computer systems. This new line of work will need highly skilled lawyers. The development of standard documents or procedures and the organization and representation of legal knowledge in computer systems is, fundamentally, a job of legal research and analysis; and often this knowledge engineering will be more intellectually demanding than conventional work (working out a

system that can solve many problems is generally more taxing than finding an answer to one problem). It is entirely misconceived to think, as many lawyers do, that work on standards and systems can be delegated to junior research or support lawyers. If a legal business is going to trade on the strength of outstanding standards and systems, then it will need outstanding lawyers involved in their design and development. These legal knowledge engineers will also be needed to undertake another central task — the basic analysis and decomposition of legal work that I claim will be required if legal work is to be multi-sourced effectively and responsibly. Legal knowledge engineering, in the 21st century will not be a fringe show at the edge of the legal market. It will be a central occupation for tomorrow's lawyers.

Fourth will be the "legal risk manager." This category of lawyer is sorely needed and is long overdue. Senior in-house lawyers around the world insist that they are in the business of legal risk management — clients prefer to avoid legal problems than resolve them. And yet, my research suggests that hardly a lawyer or law firm on the planet has chosen to develop methods, tools, techniques or systems to help their clients review, identify, quantify, and control the legal risks that they face. I expect this to change. Urgent demand from the market will lead lawyers (where possible, perhaps bolstered and emboldened by external funding) to offering a wide range of proactive legal services whose focus will be on anticipating and pre-empting legal problems. This will be quite different from legal work that concentrates on addressing specific deals or disputes. In some ways more like a form of strategy consulting, this legal work will be wider ranging and more generic, helping clients prepare more responsibly for the future. Again, this is not a peripheral job for the legal fraternity. This could fundamentally change the way in which the law is practiced and administered.

My final category of future lawyer is the "legal hybrid." My premise

here is that successful lawyers of the future, wherever they sit on my evolutionary path, will be increasingly multi-disciplinary. Many already claim that they are deeply steeped in neighboring disciplines, as project managers, strategy and management consultants, market experts, deal-brokers, and more. In truth, though, most of these forays into other fields are not strategically conceived, formally planned, or supported by rigorous training. They are rather *ad hoc* and piecemeal initiatives. In contrast, legal hybrids of the future will be superbly schooled and genuinely expert in these related disciplines and will be able to extend the range of the services they provide in a way that adds value to their clients.

CONCLUSION

Taking these five categories together, it is clear that there will be work for lawyers to do in the future. What is much less obvious is whether today's lawyers will be equipped to take on the jobs I envisage. While the expert trusted adviser and the enhanced practitioner look much like contemporary lawyers, I predict that their number will be greatly reduced. The range of work of the expert trusted adviser will be reduced by standardization and computerization, while the enhanced practitioner's domain will be diminished by the emergence of alternative, lower cost individuals who can work responsibly with standards and systems. In some areas of law, lawyers will be less dominant, while in others (where there are, for example, online legal services or there is legal open-sourcing); they will no longer have a role. If the demand for conventional lawyers is reduced, I wonder how easily those whose jobs are threatened will be able to re-skill and become legal knowledge engineers, legal risk managers, or legal hybrids. The transition may not be easy.

continued on page 12

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Text Messaging

The Next Advertising Frontier Requires Counsel to Proceed With Caution

By David Kiernan
and Caroline Mitchell

As text messaging grows in popularity, it is an increasingly more attractive way for companies to reach target audiences. Recent industry statistics show that more than 270 million Americans — over 85% of the population — subscribe to cellular phone services. An estimated 57% of all mobile subscribers ages 13 and older use text messaging regularly. In fact, according to a Nielson study, “[t]ext messaging has become so popular ... that U.S. mobile subscribers now send and receive more text messages in a month than they make phone calls,” including the “typical U.S. mobile subscriber between the ages of 35 and 44.” But text message advertising has legal pitfalls that companies should avoid, as a recent decision in the Ninth Circuit Court of Appeals, *Satterfield v. Simon & Schuster*, highlights.

‘TEXT SPAMMING’

In recent years, consumers, cellular telephone providers, and state attorneys general have sued companies and their marketing firms under the Telephone Consumer Protection Act (“TCPA”) and state consumer protection laws to curb “text spamming.” In 2007, for example, cellular providers aggressively sued telemarketers under the TCPA and state fraud and privacy laws for unsolicited text messages. In addition to marketing firms, plaintiffs are also suing the companies who hire marketing firms for promotional campaigns. These suits can result in substantial settlements of millions of dollars relating to a single promotional campaign.

THE SATTERFIELD CASE

Satterfield paved the way for more of these lawsuits by ruling, in a case

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of first impression in the federal appeals courts, that text messages are “calls” under the TCPA. (An Arizona appellate court has also held that an unsolicited text message is a “call” under the Act’s definition.)

Laci Satterfield, the plaintiff in the case, had registered as a Nextones Member in order to receive a free ringtone on her son’s cell phone. She checked a box that stated “Yes! I would like to receive promotions from Nextones affiliates and brands ...” and clicked the “Submit” button. According to the Nextones Web site, “By clicking Submit, you accept that you have read and agreed to the Terms and Conditions,” which stated that Nextones and its affiliates may use a user’s mobile phone number in connection with any text message offering or other campaign.

Six months later, plaintiff’s son received the following text message on behalf of Simon & Schuster promoting a new book by Stephen King: “The next call you take may be your last ... Join the Stephen King VIP Mobile Club at www.cellthebook.com RplySTOP2OptOut. Pwdby-Nexton.” Simon & Schuster did not send the actual text message, but outsourced the promotional campaign to defendant ipsh!, a mobile marketing firm, and instructed ipsh! to send the texts to adults ages 18 to 50 who had opted to receive advertising on their mobile phones. Ipsh! in turn obtained a list of 100,000 cell phone numbers, including plaintiff’s, from Nextones’ agent, Mobile Interactive Agency (MIA).

Plaintiff filed a class action on behalf of those similarly situated against Simon & Schuster, Inc. and ipsh! under the TCPA. Nextones and MIA were not named defendants.

The TCPA prohibits entities from using an “automatic telephone dialing system” — equipment that has “the capacity to store or produce telephone numbers to be called, using a random or sequential number generator” — to make a “call” to a “telephone number assigned to a cellular telephone service” made without “the prior express consent of the called party.”

A successful plaintiff can recover \$500 or the actual money lost for

each violation, whichever is more. Additionally, if a defendant acted willfully or knowingly, the damages can be trebled. The statute does not provide for attorneys’ fees, but if a claim under the TCPA were paired with a UCL claim, it is possible a successful plaintiff would try to look to the private attorney general statute for fees. Moreover, violators who willfully or repeatedly violate the TCPA are subject to fines by the FCC of up to \$16,000 per violation.

The TCPA does not afford federal question jurisdiction, so to sue in federal court, a plaintiff has to satisfy another basis for federal jurisdiction, such as diversity or supplemental jurisdiction.

The District Court’s Ruling

In *Satterfield*, the district court granted summary judgment for the defendants, finding that the equipment they used was not an “automatic telephone dialing system” and that the plaintiff had consented to receiving the promotional message.

On the consent issue, the court reasoned that the plaintiff had agreed to receive promotions from Nextones brands and that “Pwdby-Nexton” had branded the text message as coming from Nextones and thus identified the message with a Nextones brand. The court did not decide whether text messages are “calls” under the TCPA.

The Ninth Circuit Reversal

The Ninth Circuit reversed, finding that: 1) text messages are calls under the TCPA; 2) Simon & Schuster was not an “affiliate” of Nextones and the message did not relate to a Nextones brand, so Satterfield had not consented to the message; and 3) questions of fact remained about the nature of the equipment used and whether it was an “automatic telephone dialing system.”

On the first point, the Ninth Circuit recognized that the TCPA does not define “call,” but noted that the Federal Communications Commission (“FCC”) interpreted “call” to include text messages. Applying Chevron deference, the court found the FCC’s interpretation reasonable in light of the statutory text, the dictionary

continued on page 8

Text Messaging

continued from page 7

definition of “call,” and the legislative history and intent of the TCPA.

Just as significant, on the second point, the court ruled as a matter of law that “no express consent was given in this case.” This is a remarkable part of the decision in that the court ruled that there was no express consent as a matter of law, rather than simply finding that there was a fact issue to be determined at trial. According to the court, plaintiff “solely consented to receiving promotional material from Nextones or their affiliates and brands.” The court, as a matter of law, construed the term “affiliate” narrowly as having “its own, independent legal significance,” requiring a corporate relationship “to another corporation by shareholdings or other means of control.” Because the record confirmed that Nextones neither owned nor controlled Simon & Schuster and was not a subsidiary of Simon & Schuster, they were not affiliates.

Similarly, the court construed “brands” narrowly. According to the court, under the district court’s “logic, any company sending a text message could simply include ‘PwdbbyNexton’ and it would be considered a ‘brand’ of Nextones.” Because the contract was silent on the meaning of “brand,” the

court relied on the dictionary definition “a class of goods identified as being the product of a single firm or manufacturer.” Applying this definition, the court found that the promotional message was not for a “Nextones brand” because the message was a product of Simon & Schuster, not Nextones; Nextones’s only role was supplying the numbers to its agent MIA; and there was no agreement between Nextones and Simon & Schuster. The court concluded that plaintiff’s “consent to receive promotional material by Nextones and its affiliates and brands cannot be read as consenting to the receipt of Simon & Schuster’s promotional material.” It is not clear whether a simple written agreement between Simon & Schuster and Nextones would have sufficed to address the court’s concern.

On the third point, the Ninth Circuit found that the key issue was whether the equipment at issue had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator (even if that capacity had not been used) and remanded the issue for further factual development.

CONCLUSION

In the wake of *Satterfield*, a company planning to target consumers through text messaging should consult knowledgeable counsel familiar with the TCPA and state consumer

protection laws that may be implicated. Counsel should also be familiar with other relevant FCC rules and regulations. For example, FCC rules also prohibit sending unsolicited text messages to a wireless phone that is listed on the national Do-Not-Call registry unless an exception applies. In addition to consulting competent counsel, the company must understand how its marketing department or, if it outsources such work, the marketing agency, complied the list of subscribers — *i.e.*, was it compiled using an automatic telephone dialing system, whether subscribers are on a Do-Not-Call list, and whether the recipients have expressly consented to receiving the promotional message at issue.

On the issue of consent, as *Satterfield* makes plain, courts may construe narrowly what the subscriber has consented to receive. Thus, the company should demand copies of the purported written consent and determine whether it covers the promotional message at issue. If the company outsources its promotional campaign, it should include provisions in the service agreement to require compliance with TCPA and other relevant laws and a broad indemnity provision that shifts the risk of liability to the service provider.



Title VII

continued from page 2

resources department). Huston argued that Romanchick and Traver were “management-level” employees who had actual knowledge of a sexually hostile work environment in May 2004 when they first allegedly learned of the vulgar activity by an employee report on or about May 14, 2004. Thus, Huston claimed that remedial action should have been taken immediately, in May 2004, prior to her filing an internal complaint on June 30, 2004.

In this case, the Third Circuit closely examined the roles that Romanchick and Traver, the supervisory technicians, held in the workplace to determine whether or not they were management-level employees for purposes of imputing liability to

their employer. In holding that Romanchick and Traver were not management-level employees, the Third Circuit clarified the definition of such an employee. According to the court, management-level employees must be sufficiently senior in the employer’s hierarchy and in a position of administrative responsibility over the employees under them. In addition, management-level employees most likely will have authority to act on behalf of the employer to stop the harassment by either disciplining or terminating the harasser.

The Third Circuit further held that serving in a supervisory role in the workforce overseeing work assignments of others (as opposed to regulating the workplace environment) is not, by itself, sufficient to qualify someone as a management-level employee. Romanchick and Traver

held supervisory positions, but the scope of their authority was limited to ensuring that P&G’s machines were running smoothly. They oversaw the production line work, had no authority to affect employment status of their teammates, and had not been charged with corporate authority to police or stop harassment. Although Romanchick had a hand in Huston’s dismissal, as he reported Huston for fabricating data, that was within the scope of his employment as a technician and was not a management level duty; protecting against sexual harassment was not integral to his duties.

Furthermore, neither Romanchick nor Traver had any capacity to fire or discipline the harassers, nor was it within their power to improve the working environment. In short, P&G

continued on page 10

The Ninth Circuit Decision in *United States v. Stringer*

SEC and DOJ Parallel Proceedings In Light of the Decision

By Ralph Ferrara and Leigh Chapman

The federal securities laws authorize the Securities and Exchange Commission (SEC) to provide the Department of Justice (DOJ) with evidence of violations of the securities laws (See 15 U.S.C.S. §§ 77t(b), 788(d) (2009)). Because the SEC often shares — although as we shall see not always openly — information with the DOJ and the agencies frequently institute parallel enforcement actions, counsel must be vigilant to avoid the potential pitfalls such parallel proceedings may have for their clients.

UNITED STATES V STRINGER

A recent Ninth Circuit case, *United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008), is illustrative of these potential pitfalls.

Stringer arose out of an SEC investigation of, among others, Kenneth Stringer. Unbeknownst to Mr. Stringer, after the SEC commenced its investigation the DOJ told the Commission that he was a target of its criminal investigation and requested access to the SEC's investigative files. The United States Attorney's Office played an active role in the SEC investigation. It met regularly with SEC attorneys. The USAO provided the SEC with guidance on gathering sufficient evidence to secure a criminal conviction in a false statement case, including how to conduct interviews so as to gather necessary testimony. The USAO and the SEC also worked to conceal the criminal investigation from Stringer and other related par-

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ties, even going so far as to instruct court clerks to refrain from mentioning the criminal investigation in front of them.

Stringer was subpoenaed to testify in front of the SEC and was given SEC Form 1622, which says that any information given to the SEC may be used in any federal criminal proceeding. When he was deposed by the SEC, Stringer's attorney asked if the SEC was working in conjunction with the USAO. The SEC attorney said that it was the policy of the Commission not to respond to such questions and deflecting further questioning by directing Stringer's attorney to the general language of Form 1662.

Stringer moved to suppress the indictment as a violation of his Fourth and Fifth Amendment rights. Stringer said that by hiding behind the SEC, the DOJ had derailed his ability to adequately defend himself and to assert his constitutional rights. More specifically, Stringer argued that his ignorance of the criminal investigation placed him at an impermissible disadvantage because it, among other things:

- Prevented him from seeking to stay the civil proceedings;
- Deprived him of his Fifth Amendment right against self-incrimination;
- Deprived him of the opportunity to seek immunity from the prosecution; and
- Gave the prosecutor's office discovery that it would not have been entitled to under the Federal Rules of Criminal Procedure.

The District Court agreed. It rejected the prosecution's claim that the SEC and DOJ were conducting permissible parallel proceedings as sanctioned by the U.S. Supreme Court in *U.S. v. Kordel*, 397 U.S. 1 (1970). Rather than conducting its own investigation, the District Court concluded that the USAO had elected to rely upon the work of the SEC because it "was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that rules of criminal

discovery would be invoked." *U.S. v. Stringer*, 408 F. Supp.2d at 1087-88.

The District Court further held that the SEC affirmatively misrepresented the existence of the criminal investigation. In light of the extent of the involvement of the USAO in the SEC investigation, the District Court said the SEC's response to Stringer's counsel's direct question was both evasive and misleading.

THE NINTH CIRCUIT REVERSES

The Ninth Circuit reversed the District Court's decision. Form 1662 informed Mr. Stringer that his testimony might be shared with the USAO and advised him that he could refuse to testify pursuant to his Fifth Amendment right against self-incrimination. Mr. Stringer's failure to invoke his Fifth Amendment right, the Ninth Circuit held, constituted a waiver.

The court also rejected Mr. Stringer's claim that the DOJ used the SEC investigation as a pretext to obtain evidence for its criminal prosecution. On this issue, the court found it highly significant that the SEC began its investigation before the DOJ.

More broadly, the Ninth Circuit admonished that the government is entitled to pursue parallel criminal and civil proceedings without running afoul of constitution due process unless it acts in bad faith. And in stark contrast to the District Court, the Ninth Circuit found no evidence that the government acted in bad faith in its parallel proceedings against Mr. Stringer. In the final analysis, the court found that there "was no deceit; rather, at most there was a government decision not to conduct the criminal investigation openly, a decision we hold the government is free to make." *U.S. v. Stringer*, 521 F.3d at 1191.

LESSONS FROM STRINGER

In light of *Stringer*, counsel should presume that any testimony or documentary evidence given to the Commission is also being reviewed by the USAO and will be used in the event their client is indicted. This has important implications for how attorneys advise their clients.

To take perhaps the most salient example, invoking the Fifth Amendment privilege in a civil investigation

continued on page 10

U.S. v. Stringer

continued from page 9

when the defendant believes there is a criminal proceeding requires careful thinking. “In these situations, the defendant faces a double edge sword: he has the choice of being prejudiced in the civil litigation by invoking his Fifth Amendment, right or being prejudiced in the criminal investigation if he chooses to waive that right.” Jody M. Arogeti, How Much Cooperation Between Government Agencies Is Too much? Reconciling *United States v. Scrushy*, The Corporate Fraud Task Force, and the Nature of Parallel Proceedings, 23 GA. ST. U.L. REV. 427, 444 (2006). Additionally, if the client invokes his Fifth Amendment right to answer some questions but not others, he is subject to a waiver of his Fifth Amendment rights.

Stringer also demonstrates how important it is to ask questions during an investigation. During the SEC investigation, Stringer’s attorney asked a series of questions involving cooperation between the SEC and the DOJ during the deposition. The attorney also asked whether or not the

SEC was cooperating with any other agencies, and the SEC Staff attorney referenced the SEC 1662 form. The questions asked by Stringer’s attorney established a record that the court analyzed to determine whether the SEC was misleading the attorney.

An attorney representing a defendant in an SEC investigation should ask certain questions to establish a record for the best interest of the client. In investigations, the SEC is not required to disclose the extent of their cooperation with the DOJ. Because of these practices of nondisclosure, it is important, however, for the attorney who is representing the accused to establish a record in the deposition by asking specific questions relating to the investigation. For example, the attorney representing the defendant can ask the SEC staff whether or not the staff has initiated discussions with the FBI, the DOJ or any other enforcement agency.

Even though the Ninth Circuit decided that the SEC answered the questions in a permissible fashion, it is nevertheless important to ask questions regardless of the expected outcome because the SEC is forbid-

den from affirmatively misleading a defendant regarding the extent of involvement of another agency. See *U.S. v. Stringer*, 521 F.3d at 1198 (“a government official must not affirmatively mislead the subject of a parallel civil and criminal investigation into believing that the investigation is exclusively civil in nature”) (internal quotations omitted). After the deposition, counsel should request a copy of the transcript to correct and supplement the testimony as necessary to protect the client.

CONCLUSION

Like SEC Form 1662, *Stringer* can be said to have put us all on notice. When representing clients in SEC actions, attorneys must be mindful of the potential impact their strategy might have upon a future DOJ action arising out of the same transaction. Strategic decisions regarding everything from responding to discovery to the assertion of the Fifth Amendment privilege must be made with *Stringer’s* warning in mind — anything you say to the SEC can and may well be used by the DOJ against you.



Title VII

continued from page 8

“did not employ them to discover or act upon knowledge or rumors of sexual harassment.”

The court concluded that P&G took prompt remedial action after becoming aware of the issues at hand. P&G had notice of Huston’s allegations on June 30, 2004, the date she lodged a complaint with two P&G managers. There was no genuine issue of material fact as to whether P&G responded promptly and adequately once it was on notice. Additionally, the Third Circuit affirmed the district court’s grant of summary judgment to P&G on Huston’s retaliation claim. As such, the court upheld the District Court’s grant of summary judgment on all grounds in favor of P&G.

IMPLICATIONS

The Third Circuit’s opinion serves as a reminder of the general proposition that when a management-level employee has actual or construc-

tive knowledge about the existence of a sexually hostile work environment, the employer will be deemed on notice. Employers should be aware of *Huston’s* clarification of who will be considered a management-level employee and determine which employees meet the criteria to potentially impute liability to the company. This is necessarily a case-by-case determination depending on the nature of the position at hand. For instance, in relying upon the factors set forth in *Huston*, the Third Circuit recently found that an assistant manager-trainee was not a management-level employee. *Neely v. McDonald’s Corp.*, No. 07-2186, 2009 U.S. App. LEXIS 17747 (3d Cir. Aug. 10, 2009) (unpublished). Those individuals who are management-level employees should be reminded about and trained regarding their role in reporting concerns of discrimination and harassment in the workplace. The *Huston* decision reaffirms that reporting allegations to an employee who is specifically

employed to deal with reports of sexual harassment (*i.e.*, a human resources manager or compliance officer specifically designated as the point person for receiving harassment complaints) will also put the employer on notice. If an employee handbook designates a point person to handle sexual harassment claims, *Huston* does not require that person to be a “management-level employee.”

CONCLUSION

Employers should examine their reporting procedures and training programs to prevent harassment — sexual and other forms of harassment — in light of this decision. Employers should ensure that employees are clear on who to notify in the event they perceive a sexually hostile work environment, and appropriate personnel, equipped to handle such reported allegations, must be involved.



Compliance Review

continued from page 1

Section 145 was amended to provide that a right to indemnification or advancement of expenses arising under a charter or bylaw provision shall not be eliminated or impaired by an amendment to the provision occurring after the act or omission to which indemnification or advancement is related, unless explicitly authorized by the provision.

Section 213 was amended to permit the board of directors to fix separate record dates to determine the stockholders entitled to notice of a meeting and to vote at a meeting. In addition, Section 225 was amended to authorize the Chancery Court to remove directors who were convicted of a felony in connection with their duties to the corporation, or who had been judged to have breached the duty of loyalty.

Delaware's LLC Act and LP Act were amended by Senate Bill 82 and House Bill 142 respectively, effective Aug. 1. The bills, among other things: 1) clarified the Chancery Court's broad subject matter jurisdiction over actions to interpret, apply or enforce the Acts' provisions; 2) permitted a change of registered office or registered agent to be effected in a certificate of merger; 3) provided that an LLC or partnership agreement may be amended or adopted by an agreement of merger or consolidation, notwithstanding any provision of the LLC or partnership agreement specifically dealing with the amendment to or adoption of a new agreement; and 4) clarified that the doctrine of independent legal significance applies to LLCs and LPs.

In addition, House Bill 267, effective Aug. 1, increased most of the fees imposed by the Secretary of State on corporations and LLCs for filing documents and ordering certified copies and good-standing certificates.

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AMENDMENTS TO BUSINESS

ENTITY LAWS OF OTHER STATES

In Arizona, House Bill 2199, effective Sept. 30, required the publication of a copy of a domestic corporation's articles of dissolution and a foreign corporation's application for withdrawal within 60 days after the Corporation Commission approved the filing, and eliminated the 90-day time limit that a corporation had to file a permissive affidavit evidencing publication of documents.

In Connecticut, Senate Bill 963, effective Oct. 1, authorized a public corporation to adopt a bylaw that allows its directors to be elected by a plurality vote, but where a director who does not receive more votes for than against election may only serve for 90 days. Connecticut House Bill 6640, effective Oct. 1, increased the penalty that the Secretary of the State can impose on foreign corporations and other business entities that conduct business in the state without having qualified to do so.

In Florida, Senate Bill 2330, effective Oct. 1, permitted a corporation having shares on a national securities exchange to adopt a bylaw requiring directors to be elected by a greater than a plurality vote, and provided that a director's resignation may be effective upon a date determined upon the subsequent happening of an event. In Illinois, House Bill 2335, effective Aug. 25, required certain professional LLCs to obtain a certificate of registration from the Department of Financial and Professional Regulation.

In Maryland, House Bill 378/Senate Bill 626, effective Oct. 1, repealed the requirement that bylaws be kept at a corporation's principal office, allowed a corporation to eliminate a fractional interest in shares by rounding up to a full share, and required a corporation to comply with a stockholder's request to inspect certain documents within seven days after the request is made.

In Missouri, Senate Bill 217, effective Aug. 28, authorized shareholders and proxyholders to participate in a meeting and vote by means of

remote communication, and Senate Bill 294, also effective Aug. 28, provided that a nonprofit corporate name reservation may not exceed a period of 180 days.

In Nebraska, Legislative Bill 528, effective Aug. 30, authorized electronic transmission to be used by a corporation to provide notice to a shareholder and by a shareholder to appoint a proxy. In Nevada, Senate Bill 350, effective Oct. 1, authorized the formation of restricted LLCs and LPs — which are LLCs and LPs that may restrict distributions in order to obtain greater valuation discounts for transfers of interests. The bill also increased the fine imposed on foreign corporations and other business entities that transact business in the state without qualifying to do so.

In New York, Assembly Bill 8863, effective Oct. 1, required corporations that have done business in New York City and incurred liability for certain City taxes to obtain the consent of the New York City Commissioner of Finance before dissolving with the Secretary of State. In North Dakota, House Bill 1298, effective Aug. 1, enacted the North Dakota Nonprofit LLC Act and repealed a provision allowing the Secretary of State to extend the annual report filing deadline of a corporation or LLC.

In Texas, Senate Bill 1442, effective Sept. 1, authorized the formation of series LLCs, set forth provisions for the continuance of an entity after conversion, prohibited the issuance of bearer ownership certificates, and required a certificate of reinstatement to be accompanied by a tax clearance letter from the comptroller.

IN THE STATE COURTS

Delaware Chancery Court Holds That Parent Had Standing to Sue CEO of Parent and Subsidiary

In *Case Financial, Inc. v. Alden, C.A. No. 1184*, decided Aug. 21, 2009, a corporation brought a suit in the Delaware Chancery Court against an individual who had been the CEO of the corporation and its wholly owned subsidiary. The

continued on page 12

Compliance Review

continued from page 11

corporation alleged, among other claims, that the CEO breached his fiduciary duties to the corporation. The CEO claimed the corporation lacked standing to pursue the fiduciary duty claim directly because some of the wrongful conduct allegedly occurred at the subsidiary.

The corporation urged the Chancery Court to pierce its veil, find that the parent and subsidiary were the same and that it therefore had standing. However, the court found no basis for piercing the veil. The court noted that there was no evidence that the subsidiary was inadequately capitalized or insolvent or that the parent siphoned its funds or operated the subsidiary as a façade. In addition, there was evidence that the subsidiary followed some corporate formalities.

However, although the court would not pierce the corporation's veil, the court did rule that the corporation had standing to assert a direct claim for breach of fiduciary duty. The court noted that the CEO, as a director and officer, owed the corporation a duty not to intentionally or knowingly par-

ticipate in conduct that would injure the corporation. The corporation can pursue a direct claim for breach of that duty regardless of whether the entirety of the damage was sustained directly by the corporation or derivatively through its subsidiary.

DE Chancery Court Holds That Laches Does Not Create a Time Bar to an Indemnification Claim

In *O'Brien v. IAC/Interactive Corp. f/k/a USA Networks, Inc.*, C.A. No. 3892, decided Aug. 14, 2009, the plaintiff, a former CEO of a corporation, filed suit in a Florida trial court seeking indemnification of his costs in defending himself against a breach of fiduciary duty claim. The trial court ruled that the plaintiff was not entitled to indemnification. Fourteen months later an appellate court reversed. The corporation then filed for bankruptcy. The plaintiff then brought an action in the Delaware Chancery Court seeking indemnification and advancement of attorney's fees against the defendant — a former parent of the corporation that had assumed its indemnification obligations. The defendant moved for summary judgment on the grounds that the statute of limitations had run and the suit was time barred.

The Chancery Court noted that statutes of limitations that are exceeded always operate to bar actions at law. However, they are not controlling in equity. Actions in equity are only time barred by the doctrine of laches. Furthermore, laches may not bar an action that would be untimely under the statute of limitations if the plaintiff's delay in filing a claim did not prejudice the defendant and was not unreasonable based on the unusual conditions of the action. The court then found that such unusual conditions existed here. As the court noted, for 14 months, from the time the Florida trial court rejected his request for indemnification until the appellate court reversed, the plaintiff was in a "veritable holding pattern" and could not be faulted for not pressing his claim against the defendant. In addition, the defendant could not claim any prejudice considering it controlled the corporation's litigation strategy against the plaintiff and likely knew about the corporation's impending bankruptcy. Thus, the court found the plaintiff's claims timely.

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A New Legal Model

continued from page 6

In broad terms, and to answer the question posed in the title of my book, I do not therefore anticipate (in the next 20 or 30 years at least) that there

will be no lawyers. I expect instead that there will be significantly fewer lawyers providing traditional consultative advisory service; and I predict the emergence of new legal professionals with quite different roles in society. We will witness the end of many law-

yers as we know and recognize them today and the birth of a new streamlined and technology based generation of practicing lawyers who are fit for purpose in the 21st century.

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Personal Information

continued from page 4

privacy and cross-border discovery challenges, and has published The Sedona Conference® Cross-Border Discovery Framework.

Other organizations, including the Defense Research Institute ("DRI"); the International Association of Privacy Professionals ("IAPP"); and the International Chamber of Commerce ("ICC"),

also are actively involved in seeking a solution. Tremendous opportunities exist now for corporations to take an active role in shaping a solution to the challenges inherent in cross-border discovery.

In-house counsel interested in learning more about how to best protect their corporation from cross-border discovery sanctions should review the EU Data Protection Working Document 1/2009 and The Sedona Conference® Cross-Border Discovery Framework, which pro-

vided the inspiration for some of the ideas listed above.

CONCLUSION

The complexity of cross-border discovery conflicts will increase as the global marketplace continues to expand and electronically stored information continues to proliferate. No solution currently exists to eliminate the risks. But if corporations take proactive steps, including the ones listed above, they can significantly reduce their risks.

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