INSIDE: Sorting out Privilege Doctrines in Civil, Criminal, Family and Military Courts

Delaware Lawyer

A PUBLICATION OF THE DELAWARE BAR FOUNDATION
VOLUME 25 ◆ NUMBER 4
$3.00 ◆ WINTER 2007/2008

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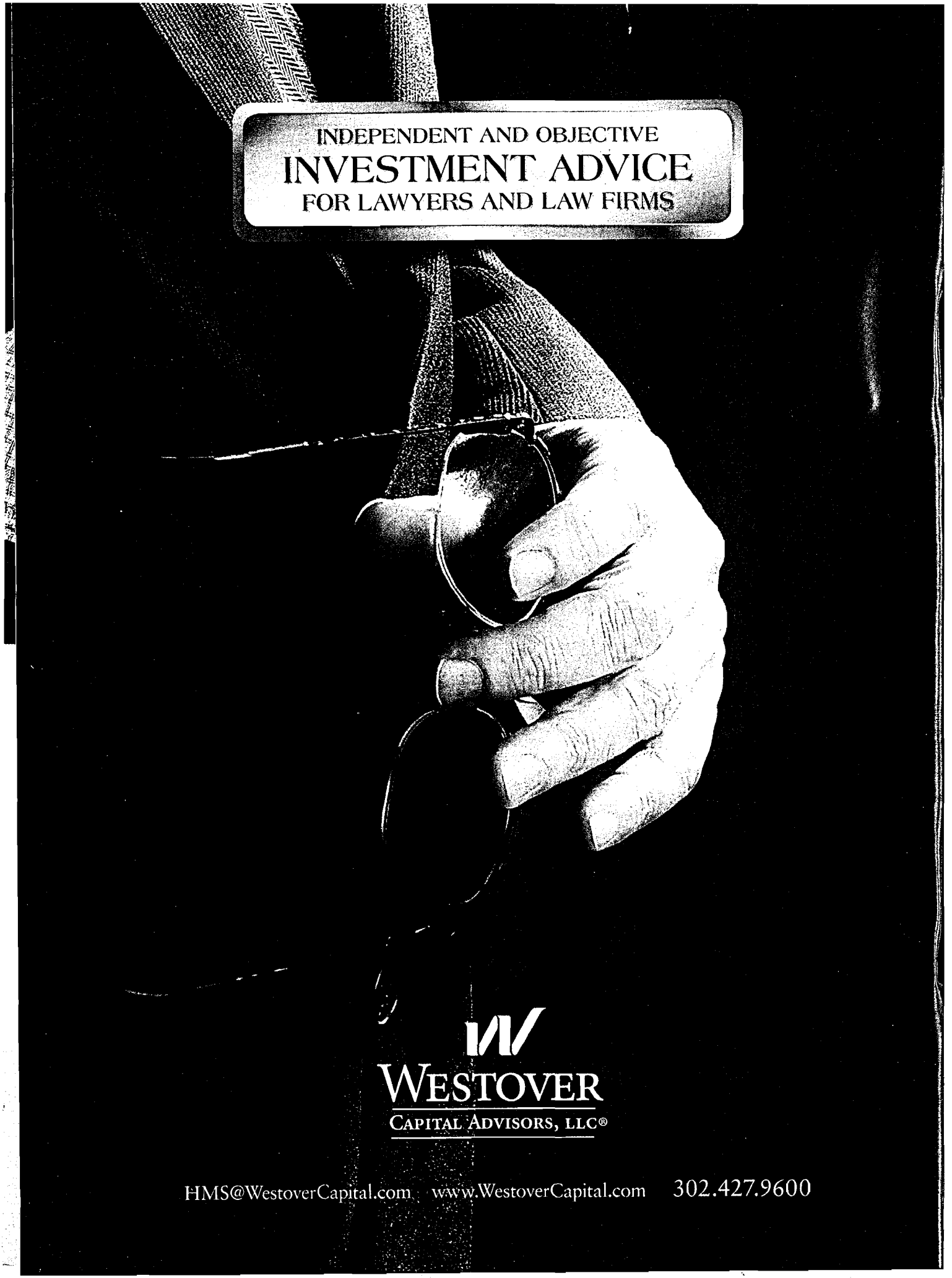
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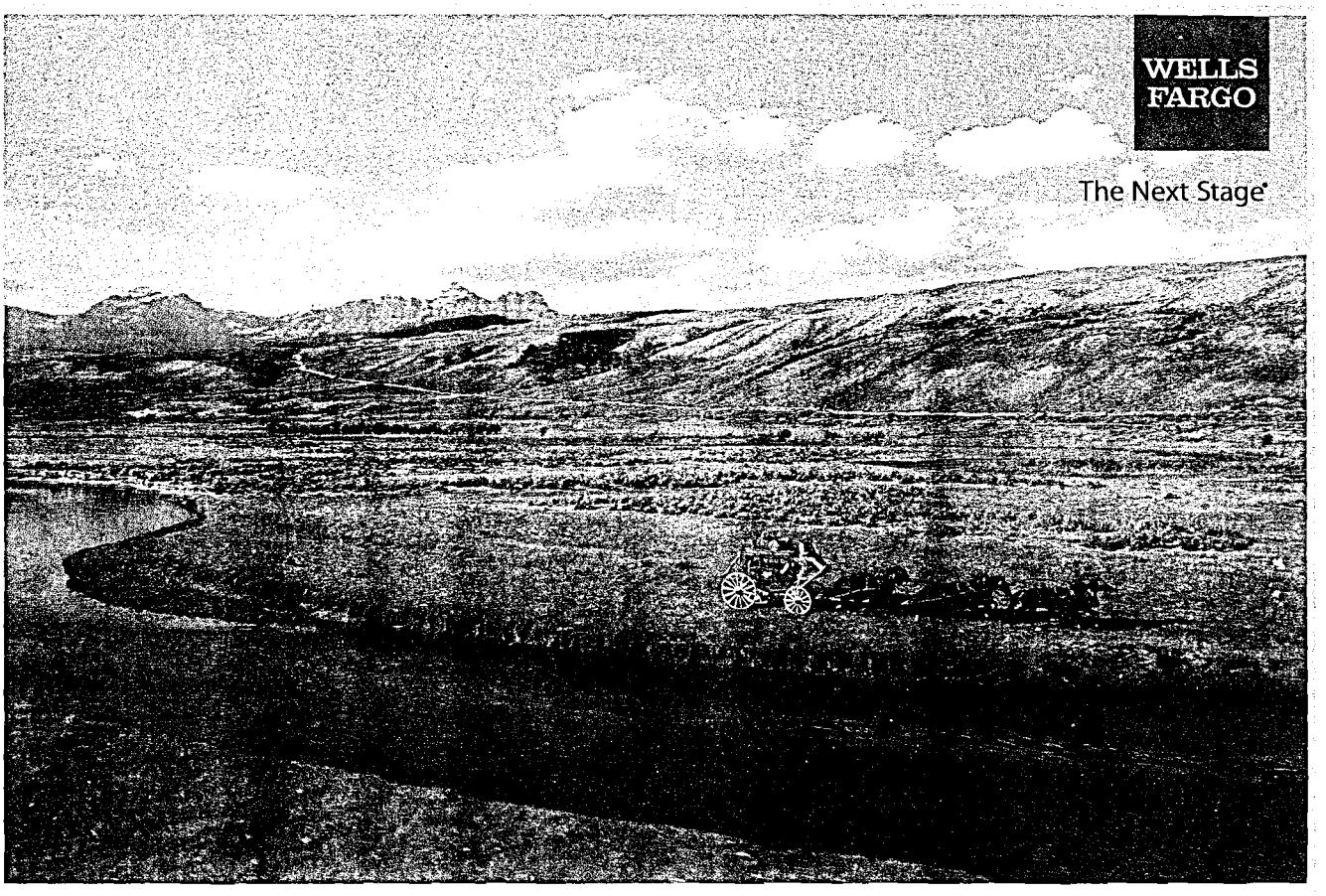

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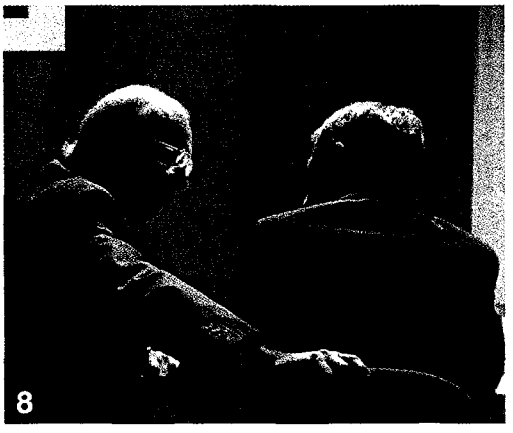
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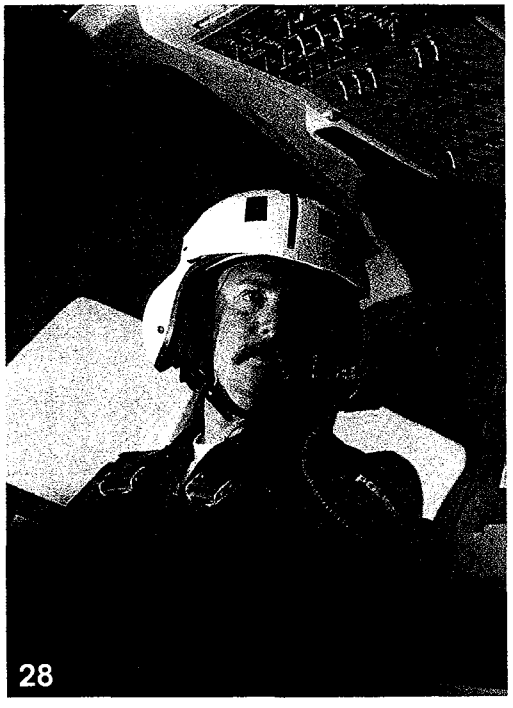
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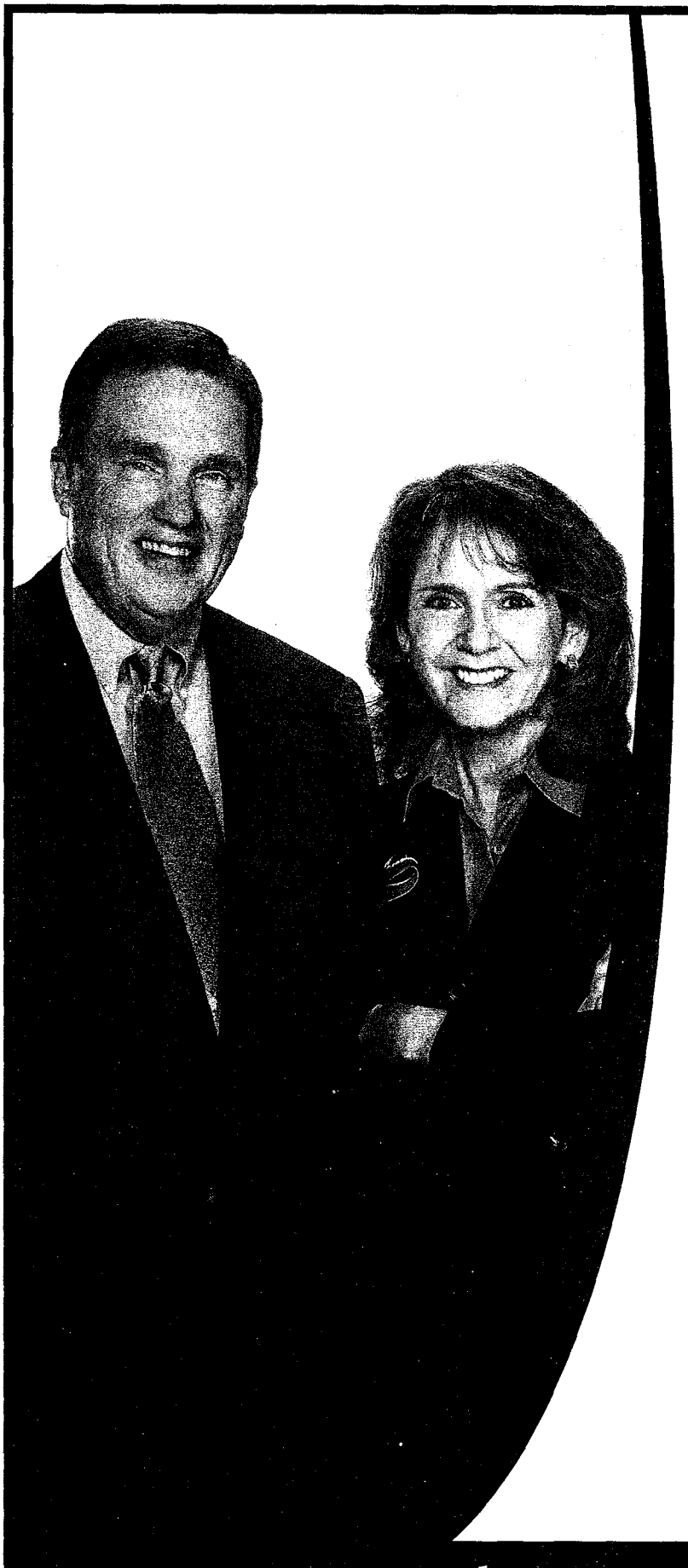

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Delaware Lawyer

A publication of the Delaware Bar Foundation
Volume 25, Number 4

DELAWARE LAWYER
is produced for the Delaware Bar Foundation by:

Media Two, Inc.
1014 W. 36th St. / Baltimore, MD 21211

Editorial Coordinator / Peter L. Kerzel

Art Director / Samantha Carol Smith

Subscription orders and address changes should be directed to:
Chris Calloway 302-656-1809

Requests for advertising information should be directed to:
Howard B. Hyatt 1-800-466-8721

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EDITOR'S NOTE

Loretta M. Young

This issue is dedicated to attorney/client privilege. Accordingly, I am including a brief synopsis of pending legislation in lieu of a true editor's note.

In mid-November, the U.S. House of Representatives overwhelmingly passed, by voice vote, H.R 3013, the "Attorney/Client Privilege Protection Act of 2007."* This legislation was introduced to lend balance to the process in prosecuting white-collar crime and to prevent the erosion of the privilege doctrine.

Presently, when federal prosecutors set their sights on a corporation, they determine whether the corporation deserves lenient treatment by applying a "factors analysis" to measure the degree of cooperation. Some of the factors require the corporation to waive the attorney/client privilege and relinquish requested materials and/or refuse to provide legal counsel or assistance with fees for employees who are targets if that employee fails to cooperate with prosecutors.

The types of documents typically requested by prosecutors are written reports of internal investigations; files and work papers that support internal investigations; counsel's interview notes, memos or transcripts of interviews with employees who were targets; compliance performance reports and audits; and notes or oral recollections of privileged communications with senior executives, board members or board committees.

Privilege is something that attorneys hold sacred. It is the lifeblood of the attorney/client relationship and essential to effective representation. The pending legislation has far-reaching implications. Preserving the attorney/client relationship is also important to the investing public and to maintaining stockholder confidence. Corporate counsel can be called upon to operate in one of two modes: preventative (preferable) and reactive. Meaningful privilege protections are necessary to ensure that corporate executives will candidly approach legal counsel for sound advice on complex legal matters before making decisions.

The American Bar Association, American Civil Liberties Union, National Association of Criminal Defense Lawyers and every recognized legal organization have spoken out in support of the attorney/client privilege legislation. While it is in everyone's best interest that the government aggressively fight corporate crime, the overwhelming majority see the Department of Justice's current policy as an outrageous prosecution tactic that allows the government to bully corporations into waivers.

Having cleared the House, this new legislation is headed for Senate consideration. Introduced by Sen. Arlen Specter (R-Pa.), S. 186 is now pending in the Senate Judiciary Committee. It is hoped that the Judiciary Committee will move the bill to the floor of the Senate, where it will be voted on before adjournment this fall.

Loretta M. Young

** This new Act will not repeal existing federal statutes giving banking regulatory agencies authority to force financial institutions to produce privileged materials during routine bank inspections nor will it affect existing law making it a crime to pay an employee's legal fees, enter a joint defense agreement or share information with an employee during an investigation.*

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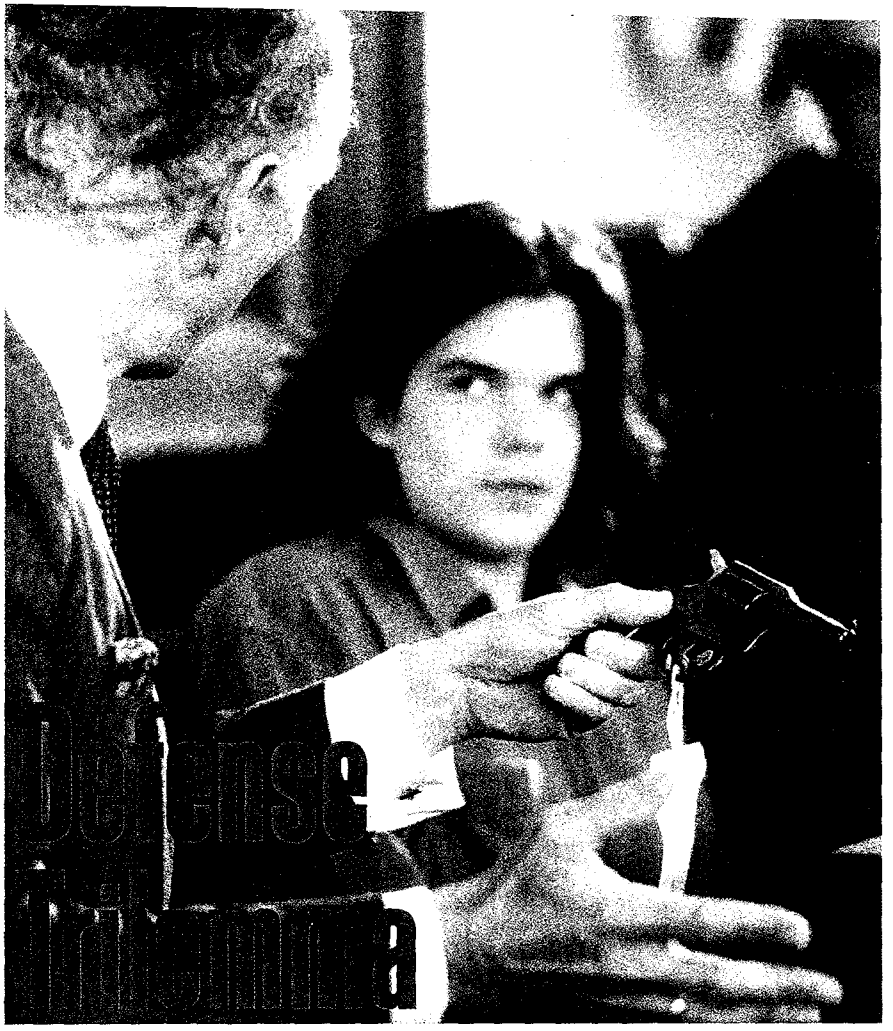
FEATURE

James E. Liguori



Criminal Defense Dilemma and Attorney/Client Privilege

The most dangerous person in the criminal justice equation is not the government, not the judge, not the jury, but the client.

In this day and age, there are a number of attorney/client privileges that increasingly are coming under attack. This article will focus on the single issue of what a criminal defense practitioner should do when she or he is faced with the client who intends to assault the attorney/client relationship and lie to the tribunal.

Let me begin by noting that I couldn't have even undertaken this task without the knowledge that my daughter Kristen (Widener University School of Law 2006) would be there to help and guide me. This then is a sort of cookbook approach to the ethical obligations of an attorney arising from the attorney/client privilege when that privilege may be compromised by the client.

I've had the good fortune in my life to meet many accomplished criminal defense attorneys. One of those lions of the criminal defense bar is Nathan Cohn of San Francisco. Nate told me a long time ago (and I've since repeated it to almost every other defense attorney I know), that the most dangerous person in the criminal justice equation is not the government, not the judge, not the jury, but the client. Nate's advice has time and again proven correct. Hence, if one keeps in mind the above advice, the obligations, priorities and pitfalls become clear and one's representation of the accused should not unravel.

According to the Preamble of the Delaware Rules of Professional Conduct, an attorney encompasses many roles.[1] The attorney is a representative of the client, an officer of the legal system and

a public citizen with a "special responsibility for the quality of justice."[2] An effective attorney should be considered a zealous advocate, advisor, evaluator and (in these days of minimum-mandatory sentences) a negotiator. While these roles tend to coincide with each other, there are times when they conflict. Case in point: when a client informs you she or he intends to commit perjury. The defense attorney then has to resolve the divergence of how to still fulfill all three roles and do what is ethically correct.

This issue can be referred to as the "perjury trilemma."[3] My friend, Monroe Freedman of Hofstra University School of Law, fully describes the complexity with the trilemma, stating the three obligations of an attorney, while trying to come up with a solution. The first obligation is the attorney's requirement to seek all relevant facts from the client.[4] The second obligation is the attorney's duty to make his clients trust him, hence allowing the client to fully divulge all the information, including possibly harmful information.[5] Finally, the third obligation is the attorney's duty as an officer of the court to be candid with the court.[6]

In order to resolve the trilemma, obviously, one obligation must be broken. If the first obligation is broken, the result will be "selective ignorance" by the attorney, or choosing not to know all the facts.[7] This, in turn, will not allow the attorney to give the client the best legal advice and direction. If the second obligation is broken, the result will again be intentional selective ignorance,[8] and it will play into the public image of a slick, untrustworthy mouthpiece. Therefore, Freedman suggests the best solution is to break the third obligation, which will result in maintaining the best attorney/client relationship[9] and cause the least assault on the privilege.

The "perjury trilemma" was at issue in *Shockley v. State*.[10] In *Shockley*, the defendant challenged his murder first conviction on a Sixth Amendment violation of right to effective counsel.[11] Shockley claimed his counsel did not directly question him during his testimony, nor did he argue zealously in his closing argument.[12] At trial, Shockley testified in his own defense, in the form of a narrative statement. The defense attorney did not question him.[13] While Shockley claimed that this was insufficient and violated his constitutional rights, our Supreme Court determined that the narrative method of testimony is an adequate method to use when dealing with the "perjury trilemma."[14]

The best method to resolving the trilemma is persuading the client not to testify falsely.

Does *Shockley* help the practitioner? It adequately addresses the problem. But what capable lawyer strives only to be adequate?

The Delaware Rules of Professional Conduct state that "a lawyer shall not knowingly ... offer evidence that the lawyer knows to be false."[15] The Rules also state that if a lawyer or the lawyer's client offers evidence that is false, then the lawyer must remedy the situation so as not to cause injury.[16] This then creates the "perjury trilemma."

Before one can determine how to proceed in the face of this predicament, it is important to address the standard of knowledge an attorney must have regarding whether or not the client will commit perjury. While some advocates claim that an attorney should have actual knowledge, Delaware courts have stated that "beyond a reasonable doubt" is the proper standard.[17] The "beyond a reasonable doubt" standard is "necessary to allow the attorney to represent the client zealously while remaining true to the judicial system."[18]

Many scholars and attorneys – including Monroe Freedman – agree that the best method to resolving the trilemma is persuading the client not to testify falsely. In fact, that is the first method to try to resolve the trilemma. However, Freedman feels that once an attorney has tried to persuade the client not to commit perjury, then the attorney has done his duty and should go on with normal questioning at trial, regardless if the client lies.[19] I believe we are obligated to try a different approach.

As I mentioned, it is the attorney's initial duty to persuade the client not to testify falsely.[20] The attorney should fully discuss with the client the attorney's duties to the court, his suspicions that the client might testify falsely, and all of the consequences of perjury.[21] More often than not, the client sees the reasoning and determines not to testify falsely, or possibly to not even testify at all.[22] However, there are times when the client, being the most desperate person in the equation, believes that anything is better than jail; therefore, if lying will help him or her stay out of jail, then he or she will lie.

If this initial persuasion does not work and the client still wants to testify falsely, then the attorney should impress upon the client that committing perjury usually adds time to their sentence.[23] In *Nix v. Whiteside*,[24] the U.S. Supreme Court stated that perjury is very much a crime that "undermines the administration of justice."[25]

If, after the above approaches do not work and the client still wants to testify falsely, the next step would be disclosure to the court. An attorney is never allowed to "passively tolerate a client's

giving false testimony" or otherwise violate the law.[26] Therefore, the attorney must tell the court of the client's intent to commit perjury.[27] And you can just imagine how that's going to be received, if the client gets convicted! That's why I tell my clients the beauty of my job is that I don't do "one day of their time in jail," so they need to properly think through the matter of their intention to lie.

The whole idea of disclosure breaks the rules of privilege between the client and the attorney, since the attorney is telling the court the client's intentions. This is a major reason why Freedman believes this is not an option.[28] Another possible option and one that I think the most prudent, would be to allow the attorney to seek withdrawal from the situation. According to the Delaware Rules of Professional Conduct, an attorney

"may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's service to perpetrate a crime or fraud; (4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[29]

This rule reinforces the idea that an attorney can seek withdrawal in the situation at hand, when a client chooses to commit perjury. Unfortunately, no matter how you couch your request to withdraw, the circumstances of the withdrawal request tend to send a signal to the court that your client is about to become Pinocchio.

In a perfect world, this withdrawal should not prejudice the client.[30] It is important to try and retain the duties of an attorney, which involve serving justice and the client's best interests. Freedman also believes that withdrawal should be done without revealing the client's intent to commit perjury.[31] Fat chance! While this would be ideal as I've just suggested, it could be difficult to follow since the major reason for withdrawal is the client's intent to commit perjury.

The withdrawal option has obvious drawbacks. First, the motion to withdraw can only be granted by the court.[32] That means the court can deny or grant the motion. If the motion is denied, then the attorney must still represent the client, sending the attorney back to square one. Second, the withdrawal motion may be viewed as shirking the attorney's duty to do justice.[33] This is because there is a possibility of a mistrial or double jeopardy issues if the withdrawal is granted while the trial is in progress.[34] While withdrawal should give the client the impression that an attorney will not put up with their intent to commit perjury, if granted, it does not necessarily solve the problem.[35] Third, as mentioned, your request to withdraw for "conflict of interest" reasons is just code words known to mean the client intends to lie.

The most popular approach to resolving the trilemma is allowing the client to testify in the narrative. (*Shockley*).[36] The Court stated that it is permissible to allow the client to testify in the narrative and for the attorney not to question the client.[37]

The actual procedure of the narrative statement is quite simple. The client takes the stand in his own defense and states in narrative format his story in his own words.[38] The defense attorney does not ask any questions touching upon this area of testimony. Therefore, the attorney is not presenting any misleading evidence nor is he actively pursuing perjurious testimony.[39] The attorney also refrains from addressing the testimony in the closing argument.[40] Again, not furthering, or being a party to, the client's intent to commit perjury.

The narrative statement also allows the attorney to "adequately" fulfill his duties. First, it satisfies the client's constitutional rights[41] because the client is still allowed to testify and is still being represented by counsel. Second, it leaves the attorney's hands "clean" of any wrongdoing.[42] The attorney has limited involvement and is not directly offering any testimony to the court. Therefore, even if the client does commit perjury, the attorney took "no part" in the perjury. (We can sleep better at night!) Third, it preserves the attorney/client relationship and privilege.[43] While it might put a strain on the relationship, the relationship is still intact.

However, the narrative statement is not a perfect solution. It does raise the issue as to whether the attorney is actually zealously representing his client. Freedman actually considers this method "passive representation" since the attorney is not actively participating.[44] With the popularity of television shows and movies about the law, lawyers and courtroom antics, the jury could find this method very suspicious and not the "normal" style of what they've come to expect. Hence, the jury will infer that the client must be guilty.[45] While this method is imperfect, and has its faults, it is generally seen as the best option. Our Supreme Court has said that it is fine to proceed in that narrative fashion.

The attorney/client relationship is a confidential and privileged relationship. The relationship invites the client to talk freely to the attorney knowing that what is said will be kept in confidence.

There is no bright-line rule to solving the perjury trilemma. There are many positives and negatives to each approach. Even though the narrative method is not without faults, it is deemed to be an adequate method for this situation.

It is a privilege to practice law in Delaware, and many have heard me say that there are pros and cons to practicing in Delaware. The pros are that you can't practice law anonymously. The cons are that you can't practice law anonymously. Why would you want the reputation that you may be one who would condone perjury or win at any cost?

Hence, at my initial meeting with potential clients, I explain how I will zealously represent them but that if I become handcuffed by their even thinking of lying to the court, that they will suffer the consequences of their own handiwork because I'll move to withdraw as counsel. I'm not going to strive to do adequate work.

Together, the client and I can win or minimize her or his exposure, so why compromise or compound a workable for mula? Now tell me what happened! ◆

FOOTNOTES

1. DE R RPC.
2. *Id.*
3. Freedman, Monroe H. *Understanding Lawyer's Ethics*, 3 ed. (2004). Dean Freedman extensively describes and tries to resolve the perjury trilemma. *See* Sec. II for further discussion of his solutions.
4. *Id.* at 160.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. 565 A.2d 1373 (Del. 1989).
11. *Id.* at 1374. Mr. Shockley actually makes several claims as to why his conviction should be overturned, but they will not be addressed here.
12. *Id.*
13. *Id.*
14. *Id.* at 1378.
15. DE R RPC Rule 3.3.
16. *Id.*
17. 565 A.2d at 1379.
18. *Id.*
19. *Supra* note 4 at 169.
20. 565 A.2d at 1378.
21. *See* Slipakoff, Brian. *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 Geo. J. Legal Ethics 935 (2001-2002). *See also supra* note 4 at 170.
22. It is important to note here that whether or not the client testifies is up to the client not the attorney. This is why there is not an option to not put the client on the stand.
23. *Supra* note 22.
24. 475 U.S. 157 (1986).
25. *Id.* at 169.
26. *Nix*, 475 U.S. at 171.
27. 565 A.2d at 1377. *See also, Nix*, 475 U.S. at 170.
28. Freedman at p. 160.
29. DE R RPC Rule 1.16.
30. Freedman at p. 164.
31. *Id.* at 165.
32. Formal opinion 2003-01, *Client perjury and the criminal defense attorney*, 46-JAN Orange County Law. 20.
33. Freedman at p. 164.
34. *Id.* This is also why it is recommended to make a motion to withdraw prior to the trial commencing.
35. *Supra* note 34. *See also* note 22.
36. 565 A.2d at 1379-1380.
37. *Id.*
38. *Supra* note 22.
39. *Id.*
40. *Id. See also* note 34.
41. *Supra* note 22.
42. *Id.*
43. *Id.*
44. Freedman at p. 166.
45. *Id.*

FEATURE

Jane E. Kirtley

Reporter's Privilege in the 21st Century

Despite the ongoing controversy concerning adoption of a federal reporter's privilege statute, the idea is neither new, nor novel.

Is there any institution the American public loves to hate more than the media? Depending on your point of view, the institutional press is either irredeemably liberal or cravenly conservative, a toothless watchdog or a godless traitor, willing to do anything to sell newspapers or raise viewership ratings. News consumers marvel at the media's fixation on the latest peccadilloes of a drunken starlet or a straying senator at the sacrifice of stories that "matter."

Anyone who has been the object of media attention "knows" that reporters are sloppy, arrogant, imprecise, agenda-driven, fixated on the negative and, of course, biased. How could they be anything else, when no minimum education requirements, no licensing system, no mandatory ethics code and no disciplinary body can be used to keep the incompetents and undesirables out? And that's just the mainstream media. What about those bloggers — the infamous geeks in pajamas, spreading rumors throughout the Internet and railing at anything and everything in cozy anonymity from their shadowy basement lairs, accountable to no one?

How in the world could anyone seriously argue that these people should be granted any kind of testimonial privilege?

Well, a lot of people have made this argument for a very long time, and have made it persuasively. Despite the ongoing controversy concerning adoption

of a federal reporter's privilege statute, still being debated in Congress as this article goes to press, the idea is neither new, nor novel. Journalists have claimed the right to protect confidential sources since the Colonial era.[1] In 1896, the state of Maryland became the first to adopt a reporter's shield law.[2] Currently, 33 states (including Delaware), plus the District of Columbia, have enacted some form of statutory protection for the press,[3] and courts in all the states, with the exception of Wyoming, have recognized at least a qualified privilege, as have the majority of federal circuits.

The precise contours of the privilege vary. A few states, such as Nevada, recognize virtually an absolute privilege, protecting reporters from any kind of compelled revelation of sources or unpublished materials.[4] Most jurisdictions, however, provide only a qualified privilege to journalists. The privilege may extend to sources, unpublished material, or both.

A qualified privilege can only be overcome if all the elements of a multi-part test are met. A typical test would require the subpoenaing party to demonstrate that the information sought 1) is highly material and relevant to the underlying claim; 2) goes to the heart of the claim; and 3) is unobtainable from any other non-media source. Some tests also require a showing that the claim is viable,[5] and some states carve out an exception if a news organization is the defendant in the underlying lawsuit.[6] Notably, several courts have ruled that the privilege belongs to the journalist, not to his source, and therefore cannot be waived by anyone other than the reporter.[7]

Accordingly, the absence of a federal reporter's privilege is the anomaly, rather than the rule. But some say 49 states (and the District of Columbia) are misguided or mistaken. Just because a policy has been in place for more than 100 years doesn't make it justifiable.

The Supreme Court of the United States must be counted among the skeptics. Given an opportunity to recognize a constitutionally based privilege in 1972, the high court declined to do so, at least on the facts presented in four consolidated cases, all involving situations where reporters had witnessed criminal activity and were ordered to testify about it before a grand jury.[8] The 5-4 decision, authored by Justice White, although acknowledging that gathering news enjoys some First Amendment protection, observed that the Constitution does not "confer[] a license on either the reporter or his news sources to violate valid criminal laws. ... Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial."[9] Reporters, in other words, are not above the law.

All the states, with the exception of Wyoming, have recognized at least a qualified privilege.

But as the dissenters observed, such a policy is not without consequences. Justice Stewart predicted that the majority's ruling would "invite[] state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of the government."[10]

And "annex" them, they have — or at least, attempted to — many times, in the 30-odd years since *Branzburg*. As the Reporters Committee for Freedom of the Press has documented since 1990, both print and broadcast news organizations are served with thousands of subpoenas seeking notes, tapes, drafts, photographs and testimony every year,[11] despite the existence of state shield laws, judge-made law, procedural and evidentiary rules,[12] as well as internal guidelines, adopted by the Department of Justice in 1970, which were intended to balance the First Amendment interest against the need for effective law enforcement by requiring prior approval from the attorney general before issuing a subpoena to the news media.[13]

Since 1972, lawyers representing the news media have fought back against the dismal pronouncement from the high court, with a surprising degree of success. In the years following *Branzburg*, most state and federal courts, relying in large part on Justice Powell's "enigmatic concurring opinion,"[14] which emphasized the limited nature of the majority ruling, declared that a constitutional or federal common law privilege did exist, at least in other contexts, such as civil or criminal trials. Reporters occasionally went to jail for refusing to cooperate, but this was rare and always controversial.[15] The Supreme Court has yet to revisit the question.

Then, in the early years of the 21st century, federal judges in the several circuits began to question the wisdom of recognizing a privilege. Notably, Seventh Circuit Judge Richard A. Posner, scorning what he characterized as an "audacious" argument that *Branzburg* created some kind of constitutional privilege, wrote that, "We do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."[16]

Posner's opinion, although construing a case that did not involve confidential sources, lit the slow fuse that would explode what some had come to regard as the "myth" of a constitutionally based reporter's privilege.[17] What came to be

known as "the Judith Miller case," arising from the decision of a then-*New York Times* reporter to defy a subpoena issued by a grand jury investigating the unauthorized disclosure of the identity of CIA operative Valerie Plame, prompted the federal courts in the District of Columbia to reexamine the scope of the privilege and to conclude that none existed, at least in these circumstances.[18] Miller spent 85 days in jail before agreeing to testify after her source released her from her promise of confidentiality.[19]

The house of cards threatened to collapse in other cases as well. Some arose in criminal proceedings, either seeking journalists' eyewitness observations of criminal activity[20] or demanding that they reveal the identity of sources who had provided unauthorized access to information sealed by court order.[21] Others involved civil lawsuits brought against the federal government by individuals who claimed that their personal information was leaked to the media in violation of the law.[22]

Although the ethical conduct of the press had been called into question in these cases, the media were not the defendants or the "targets" in any of them. In each instance, the subpoenaing entity claimed that it sought the journalists' testimony not to punish the media, but rather to uncover the true violator of the prohibition against disclosure — whether that was the Privacy Act,[23] the Intelligence Identities Protection Act[24] or a judge's sealing order — thereby effectively eliminating any possibility that the reporters could assert the Fifth Amendment as grounds for refusing to testify.

In each instance, the federal courts were implacable, ruling that the journalists had no constitutional basis for refusing to testify "just like anyone else." Blogger Josh Wolf spent 226 days in prison after he resisted a grand jury subpoena seeking raw videotape he filmed at a G-8 protest in July 2005.[25] In order to protect their confidential sources, five media organizations agreed to pay an unprecedented $750,000 to nuclear scientist Wen Ho Lee as part of the government's settlement of Lee's Privacy Act lawsuit.[26]

Faced with the prospect of jail, fines or both, the news media reluctantly concluded that the time had come to turn to Congress for a remedy. Reporter's shield bills were introduced in the House and Senate, with bipartisan sponsorship, most recently on May 2, 2007. They bear the short title "The Free Flow of Information Act," and would protect journalists from being forced to reveal confidential sources in the majority of situations and would create a qualified privilege for news gathering materials that would not disclose a confidential source.[27] Exceptions would include situations where disclosure was necessary to prevent "an act of terrorism" or other

significant harm to national security, imminent death or significant bodily injury, or to identify who had disclosed trade secrets, or personal or financial information protected by certain federal laws.

The drafters of the bills struggled to describe exactly who would be a "journalist" covered by the statute. Attempts to craft the definition in terms of institutional affiliation met with howls of protest from the blogosphere. Adopting a "functional" approach, the bills define a "covered person" as one who is "engaged in journalism," which is further defined as "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

The bills have been vigorously opposed by the Justice Department, whose representative testified at a hearing in June 2007 that they would protect unauthorized leaks and disclosure of sensitive information, as well as threaten national security. Justice has also asserted that the bill's definition of "covered persons" who could invoke the law would include "a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public."[28]

According to the *San Francisco Chronicle*, House Judiciary Committee Chairman John Conyers (D-Mich.) dismissed that assertion as "totally absurd."[29] Nevertheless, opposition to the bill in some quarters remains strong, at least in part because of lawmakers' deference to the Justice Department's concerns.

But even assuming that a federal shield law could be drafted that Justice could live with, would it be good public policy to recognize a privilege for journalists?

Professor Geoffrey R. Stone argues that testimonial privileges "promote open communication in circumstances in which society wants to encourage such communication."[30] Privileges such as attorney/client, doctor/patient and priest/penitent exist because our society recognizes that without confidentiality, these communications would be inhibited, and on balance, the cost to the legal system by losing the information is outweighed by other compelling interests.[31]

But opponents argue that equating these relationships with that of a journalist and her source is faulty. Unlike these other professionals, a reporter is not licensed, and is not subject to any kind of regulatory authority. Most news organizations and the major voluntary press associations, such as the American Society of Newspaper Editors and the

Society of Professional Journalists, have adopted ethical codes or guidelines.[32] But many of these are aspirational in nature, and even if a journalist were to violate a particular employer's code and lose his job, nothing would prevent another organization from hiring that individual the next day.

So, do journalists "deserve" to have a privilege? The better question would be: Does society deserve to have a journalist's privilege?

Stories ranging from Watergate, the Enron scandal, abuse at Abu Ghraib prison and conditions at Walter Reed Army Medical Center depended, at least in part, on confidential sources. They all reported things than some powerful entity did not want the public to know about. Common sense tells us that if journalists cannot promise their sources confidentiality, sources will be reluctant to speak with them. Without information, knowledgeable debate will suffer.

The role of the press is critical to maintaining our democratic system. Although it may be expedient to compel reporters to comply with subpoenas, "just like anybody else," as Justice Douglas noted in his dissenting opinion in *Branzburg*, "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."[33] Journalists play a unique role in fulfilling that right. For them, "good citizenship" means remaining independent. Surely there can be no more "compelling" interest than that. ◆

FOOTNOTES

1. *See, e.g.*, Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515. 533-4 (Feb. 2007)

2. Md. Code Ann., Cts. & Jud. Proc. § 9-112 (2007).

3. The other states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee and Washington.

4. Nev. Rev. Stat. Ann. § 49.275 (2006).

5. *See, e.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980).

6. *See, e.g.*, Minn. Stat. Ann. § 595.025 (2006).

7. *See, e.g.*, *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *State v. Boiardo*, 416 A.2d 793 (N.J. 1980).

8. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

9. *Id.* at 691.

10. *Id.* at 725.

11. *See* Reporters Comm. for Freedom of the Press, *Agents of Discovery*, 2003, http://www.rcfp.org/agents/index.html

12. *See, e.g.*, Fed. R. Crim. P. 17 (c); Fed. R. Civ. P. 26 (c); Fed. R. Evid. 501.

13. 28 C.F.R. §50.10 (2006).

14. So characterized in Justice Stewart's dissenting opinion in *Branzburg*, *supra* note 8, at 725.

15. *See* Reporters Comm. for Freedom of the Press, *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, http://rcfp.org/jail.html

16. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

17. *See, e.g.*, Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 Cardozo Arts & Ent. Law J.385 (2006).

18. *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

19. *See* Susan Schmidt and Jim VandeHei, *N.Y. Times Reporter Released from Jail*, Wash. Post, Sept. 30, 2005, at A01.

20. *In re:* Grand Jury Subpoena, Joshua Wolf, 201 Fed. Appx. 430 (9th Cir. 2006).

21. *See, e.g.*, *In re* Special Proceedings, 373 F.3d 37 (1st Cir. 2004) (WJAR-TV reporter Jim Taricani); *In re* Grand Jury Subpoenas, 438 F. Supp.2d 1111 (N.D.Cal. 2006) (*San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams).

22. *See, e.g.*, Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005); *Hatfill v. Gonzales*, 2007 U.S. Dist. LEXIS 58520 (D.D.C. 2007).

23. 5 U.S.C. § 552a (2006).

24. 50 U.S.C. § 421 (2006).

25. Wolf was released after he posted all of his footage on his personal Web site and signed an affidavit swearing he did not see and could not identify individuals who committed the underlying crimes being investigated. *See*, Bob Egelko and Jim Heron Zamora, *Imprisoned freelance journalist released*, Sfgate,com, April 3, 2007, at http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/03/BAGLRP0PAP4.DTL

26. *See* Paul Farhi, *U.S., Media Settle with Wen Ho Lee, News Organizations Pay to Keep Sources Secret*, Wash. Post, June 3, 2006, at A01.

27. H.R. 2102, S. 1267 (Free Flow of Information Act of 2007).

28. *Hearing Before the House Comm. on the Judiciary Concerning H.R. 2102, the Free Flow of Information Act of 2007* (June 14, 2007) (statement of Rachel L. Brand, Assistant Attorney General, Office of Legal Policy) http://www.usdoj.gov/olp/pdf/hr2102_brand_hjc_061407.pdf

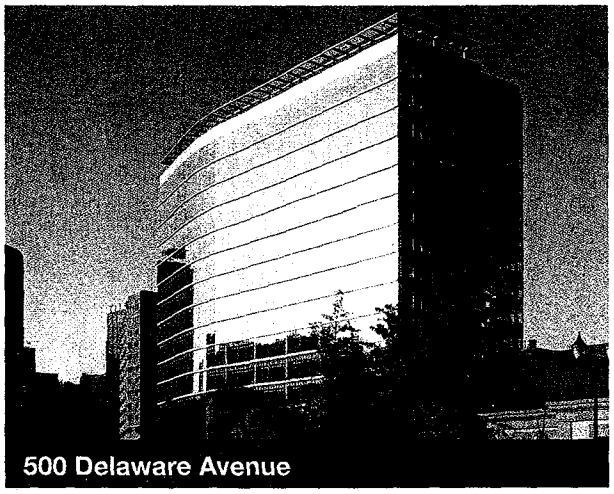
29. John Diaz, *"Code Orange" for press freedom*, S.F. Chron., July 15, 2007, at D-6.

30. Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 Hofstra L. Rev. 39 (Fall 2005).

31. *Id* at 40.

32. *See, e.g.*, Society of Professional Journalists Code of Ethics, http://www.spj.org/ethicscode.asp; American Society of Newspaper Editors Statement of Principles, http://www.asne.org/kiosk/archive/principl.htm. The ASNE website also provides links to many other media ethics codes at http://www.asne.org/index.cfm?id=387.

33. *Branzburg*, *supra* note 8, at 721.



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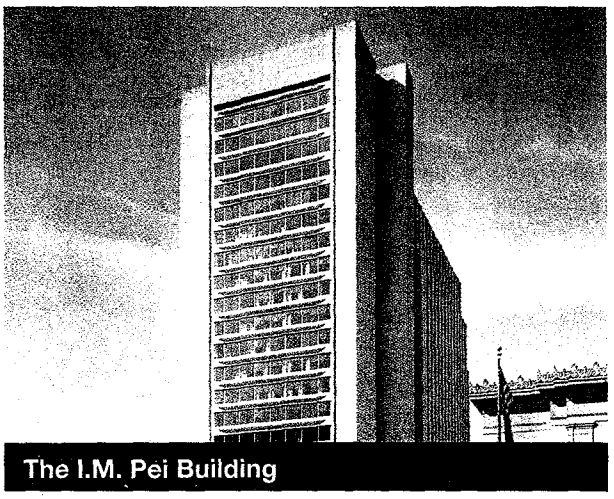

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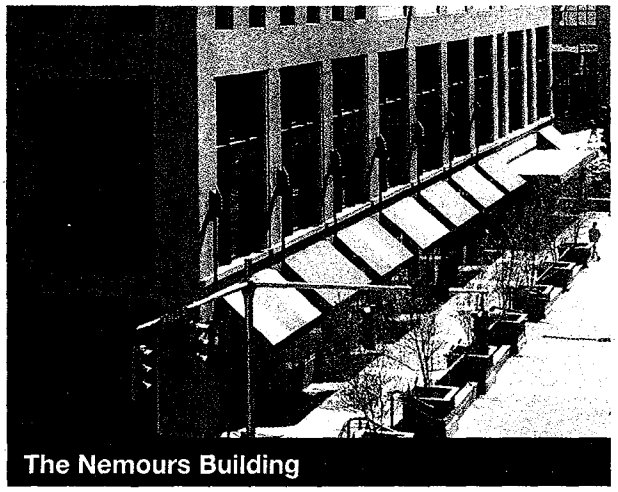

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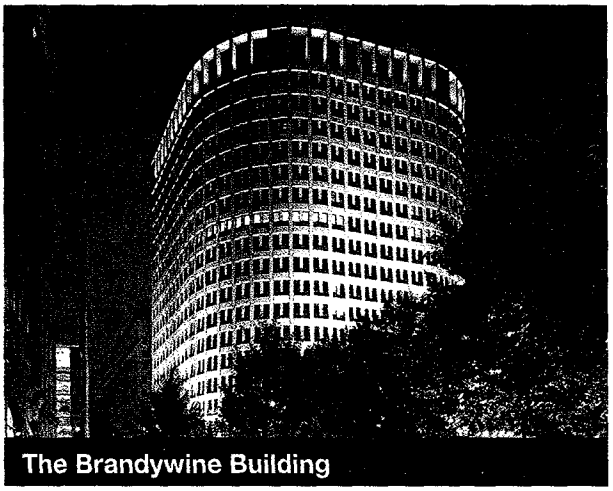

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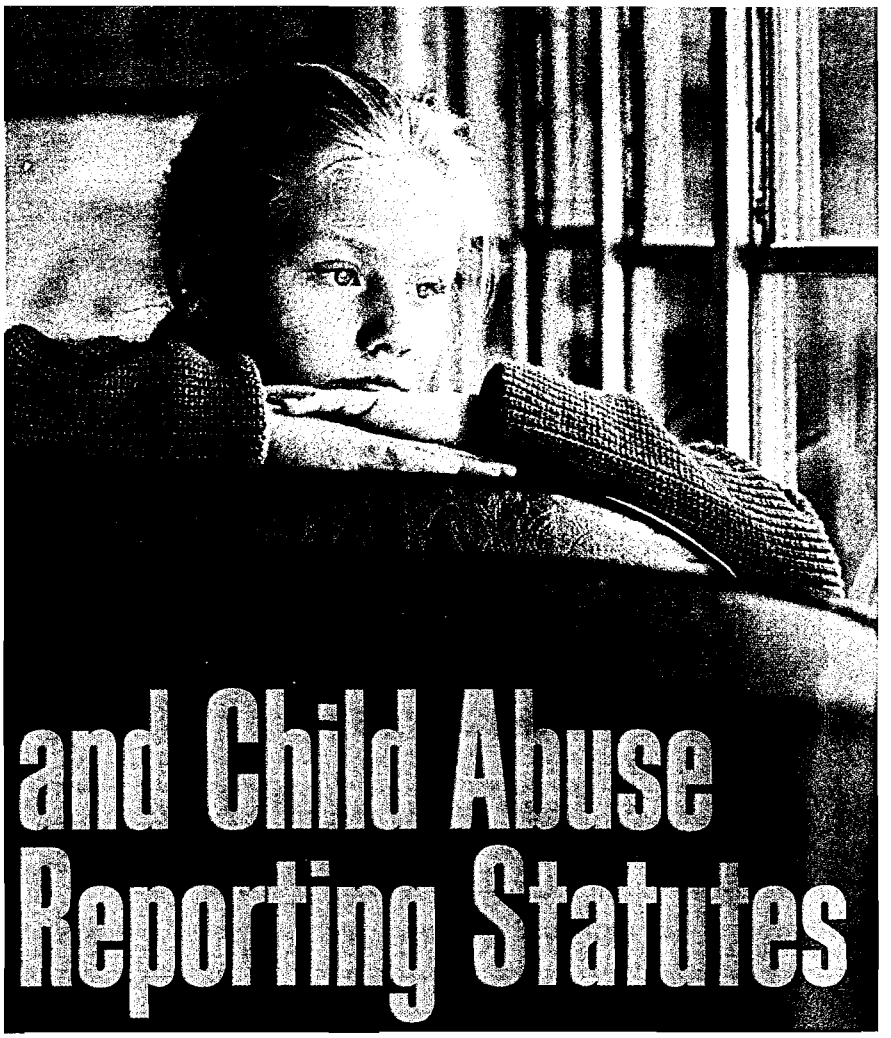

When Public Policies Collide: Privilege and Child Abuse Reporting Statutes

Crimes against children are of great concern to all of us. The victims are the most vulnerable members of our society.

Public policy is the basis of the doctrine of privilege. Assuring confidentiality in certain circumstances is good for the general welfare; we want people to freely and fully inform their doctor, therapist, clergymen and lawyer so that they can receive the best treatment, spiritual guidance and representation.

Public policy also drives us to seek special protection for certain classes of our society. Crimes against children are of great concern to all of us. The victims are the most vulnerable members of our society; the actions of the perpetrators are often shrouded in secrecy, held confidential by threats to the young victims and protected by the veil of family privacy. To enhance the measures of protection for children and to aide in the prosecution, this category of crimes has been given special treatment under state and federal law.

State courts have developed child-friendly courtrooms and special procedures intended to facilitate interviewing child victims.[1] Special exceptions have been developed for the admission of hearsay for the child victims or witnesses' out-of-court statement of abuse.[2] The U.S. Supreme Court has modified the Confrontation Clause of the 6th Amendment to some extent in child sexual abuse cases, *Maryland V. Craig*.[3] Justice O'Connor, writing for the majority in a 5-4 decision, allowed one-way, closed-circuit television testimony of the child victim of sexual abuse.

This article examines privilege and the child abuse reporting statutes in several states. It also includes a brief discussion of privilege communication between the child and their attorney.

Federal law initiatives

While family law is the domain of the

states, the federal government, through financial incentives, has had a great impact on state law in the areas of child welfare and child support. One such proposal mandated by federal law is the child abuse reporting statute. Under the Child Abuse Prevention and Treatment Act of 1974 (hereinafter referred to as CAPTA), Congress authorized federal grants to the states if they implemented federal standards on reporting child abuse and establishing central child abuse registries.[4]

The reporting statutes were being enacted through state legislatures to address the problem of child abuse. Each state developed its own unique provisions. Exactly what privileges would be retained in light of the duty to report child abuse and who were mandated reporters became significant issues. It was at this point that two very important public policies collided and the aftermath can be found in the various state reporting statutes that have been enacted throughout the nation.

Delaware's statutes

Without reference to the reporting statute under Delaware law,[5] in evaluating best interest of the child in a custody proceeding, one of the criteria considered by the court is "The mental and physical health of all individuals involved."[6] These cases clearly state that the mother's past medical and psychological records must be provided even though parents objected on the basis of privilege.[7] In 1983, the Supreme Court of Delaware upheld the Family Court's decision stating, "The records were relevant to an evaluation of whether contact with them would be harmful to the child. ... Thus, the records of mothers' psychiatric or psychological history were discoverable within the discretion of the Court."[8]

In 1963, the Children's Bureau of the U.S. Department of Health, Education and Welfare published a model statute entitled "Abused Child: Principles and Suggestive Language for Legislation on Reporting of the Physically Abused Child," which became the guideline for the states in drafting state legislation to comply with the federal mandate in CAPTA. In Delaware, the reporting statute is found at 16 Del. C., 909:

"Privileged Communication not recognized. *No legally recognized privilege, except that between attorney and client and that between priest and penitent in a sacramental confession, shall apply to situations involving known or suspected child abuse, neglect, exploitation or abandonment and shall not constitute grounds for failure to report as required by § 903 of this title or to give or accept evidence in any judicial proceeding relating to child abuse or neglect."*

Most states have abrogated the following privileges: marital, physician and therapist.

While under the statute, anyone who knows of child abuse is a mandated reporter, and people in the health care professions are specifically listed as mandated reporters. The Delaware statute, as stated in the section title, specifically abrogates certain privileges that a person would enjoy under common law.

Other states carve out privileges

Most states have abrogated the following privileges: marital, physician and therapist. Certain people who are specifically listed are deemed "mandated reporters." While the model legislation only listed those in the health care professions, many states have greatly enhanced the number of mandated reporters. For instance, Arkansas lists 29 categories of mandated reporters[9] and California lists 37 categories of mandated reporters. Under one category of the California Codes, subsection (21), there are 16 mandated reporters.[10]

While some states completely abrogate the clergy/client privilege, there is a wide diversity among the states. Under the Florida statute, while there is the general requirement for everyone who suspects child abuse to report, the statute list seven categories of mandated reporters who must also report their names to the hotline staff. This would include the medical professions, mental health professionals, practitioners who rely solely on spiritual means for healing, school teachers and school officials, social workers, law enforcement officers and judges.[11] Alabama provides, "A member of the clergy shall not be required to report information gained solely in confidential communication privilege pursuant to Rule 505 of the Alabama Rules of Evidence which communications shall be continued to be privileged as provided by law."[12]

In the Alaska statute, there are a number of mandated reporters specifically exempted from this requirement. One such exemption is: "A religious healing practitioner to report as neglect of child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of recognized church or religious denomination by accredited practitioner of the church or the denomination."[13]

Under the Arkansas code, any clergymen including a priest, minister, rabbi or Christian Science practitioner has the duty to report, except if they have acquired the suspected maltreatment by admission of the offender in the confidential relationship.[14] The only clergy privilege retained under Delaware Law is the priest/penitent in sacramental

confession. (For a very thorough and interesting history of clergy privilege under state reporting statutes see Mary Harter Mitchell's *"Must Clergy Tell? Child Abuse Reporting Requirements vs. The Clergy Privilege and Free Exercise of Religion."*[15])

Attorney/client privilege and the reporting requirement

The attorney/client privilege has always been considered the most significant. Delaware specifically preserves that privilege. There may still be exceptions. The Delaware Rules of Professional Conduct[16] allow a lawyer to reveal information relating to his client if it is to "to prevent reasonable certain death or substantial bodily harm." Therefore, it would seem that an attorney "may" report abuse by his own client if it is ongoing. There is monograph by Ruth Thurman entitled "Client Incest and the Lawyers Duty of Confidentiality." This monograph was published in 1985 by the American Bar Association. Thurman presents three different views of the lawyer's obligation of confidentiality:

Nondisclosure: The parents' lawyer should not reveal the incest and should not suggest appointment of counsel for the children, but if counsel is appointed, the children's counsel should not disclose the fact of the incest without the client's consent unless the client is incapable of making a considered judgment.

Mandatory Disclosure: The parents' lawyer should suggest appointment of counsel for the children, and both the parents' lawyer and the children's counsel should disclose the fact of the incest even without the consent of their clients.

Permissive Disclosure: The parents' lawyer should suggest appointment of counsel for the children, and may disclose the fact of the incest, but is not required to do so. The children's counsel should not disclose the fact of the incest over the objection of a client capable of making a considered judgment.[17]

There are three states that list attorneys as mandated reporters under reporting statutes: Mississippi, Nevada and Ohio. Ohio exempts lawyers from the reporting requirements of information that has come from their particular client in the lawyer/client relationship. Nevada excludes lawyers in cases where the lawyer knows of abuse from a client who may be accused of neglecting or abusing the child. Mississippi is the only state where the reporting statute requires the lawyer to report his own client and that is only when there is ongoing abuse occurring.[18]

The attorney/client privilege has always been considered the most significant. Delaware specifically preserves that privilege.

It is clear that when these two public policies collide, reporting of child abuse clearly trumps most of the common law privileges. The marital privilege, the doctor/patient privilege, the psychotherapist/patient privilege and, to a large extent, the clergy privilege has been narrowed in child abuse cases. Attorney/client privilege for the most part has been maintained, however, noting that the ethical rules allow disclosure in certain cases of ongoing and future abuse. The attorney/client privilege is to a limited extent discretionary.

The child's privilege to confidentiality

CAPTA provides that "in every case involving an abused or neglected child which results in a judicial proceeding, a *guardian ad litem*, who may be an attorney or a court appointed special advocate (or both), shall be appointed to represent the child in such proceedings. ..."[19] When it comes to privilege communications that a child might have with their attorney there is precedent that protects that privilege. In the case of *In Re Maraziti,*[20] the Appellate Court decided that a criminal defendant had no constitutional right for an *in camera* review of notes or communications between the attorney for the child and the child when the defendant was facing criminal child abuse charges.

An attorney may be appointed *guardian ad litem* or attorney for the child. Historically, under the classic definition of *guardian ad litem,* they represent the best interest of the child and therefore have no duty of confidentiality to the child. On the other hand, an attorney for the child representing the child's expressed wishes must zealously represent their client and would have a duty of confidentiality. Privilege would attach to their communication. Under our state law, the Office of Child Advocate refers to appointing volunteer as *attorneys guardian ad litem,* and while the scope of the representation is for the child's best interest, as the *guardian ad litem*, the statute states "the *attorney guardian ad litem* shall have the duty of confidentiality to the child unless disclosure is necessary to protect the child's best interest."[21] Also, the records of the office of child advocate "pertaining to the care and treatment of child are confidential."[22]

Whether the child's communication with their lawyer is privileged depends largely on the type of appointment. While the above describes the classic models, there are many "hybrid" appointments where the attorney might be confused as to whether the privilege attaches. If there is not a statute on point, the attorney needs to have the court ad-

vise what actions are to be taken in representing the child including whether communications are privileged.

This information needs to be on the record prior to the initiation of the relationship. The child, if at an age to comprehend, should be advised by his or her attorney whether the attorney is required to keep the information shared by the child confidential. For guidance in this area, the American Bar Associations has published *"Standards of Practice for Lawyers Who Represent Children in Child Abuse Cases,"* approved by the ABA House of Delegates on Feb. 5, 1996. ◆

FOOTNOTES

1. 11 Del. C. § 3511 and 13 Del.C. §724 (a)
2. 11 Del.C. § 3513 and 13 Del. C. § 724 (d)
3. 497 U.S. 836, 110 S. Ct. 3157 (1990)
4. 42 U.S.C.A § 5106a (b) (west1995)
5. 13 Del.C. § 722
6. 13 Del.C. § 722(a) (5). Shipman v. Division of Family Services, Del. Fam. Ct., 442 A.2d 101 (1981), aff'd sub nom. Betty J.B. v. Division of Social Servs., Del. Supr., 460 A.2d 528 (1983)
7. *Id.* at 530
8. *Id.* at 531
9. A.C.A § 12-12-507
10. Ann. Cal. Penal C. §1165.7
11. F.S.A. §39 201 (1) (a) & (b)
12. Ala. Code 1975 § 26-14-3 (f)
13. AS 47. 17. 020. (8) (d)
14. A.C.A. §12-12-507 (29) (A & B)
15. 71 Minnesota Law Review 723 (1987)
16. Rule 1.6 (b) (1)
17. Thurman at 11
18. Mississippi Rule of Professional Conduct 1.6(b) (1). (See Beyea, Allison." Competing Liabilities: Responding to Evidence of Child Abuse that Surfaces During the Lawyer-Client Relationship." Maine Law Review 51, 1999, 269.) Renne, Jennifer L. "Legal Ethics In Child Welfare Cases", (American Bar Association, 2004). at 25.
19. 42 U.S.C.A. § 5106(a) (b) (2) (A) (ix) (West Supp. 1999) Cf. 18 U.S.C.A. § 3509(h) (West 1997).
20. 559 A.2d 447 (N.J.1989)
21. 29 Del. C. §907A(c).
22. 29 Del. C. §9006A.

FEATURE

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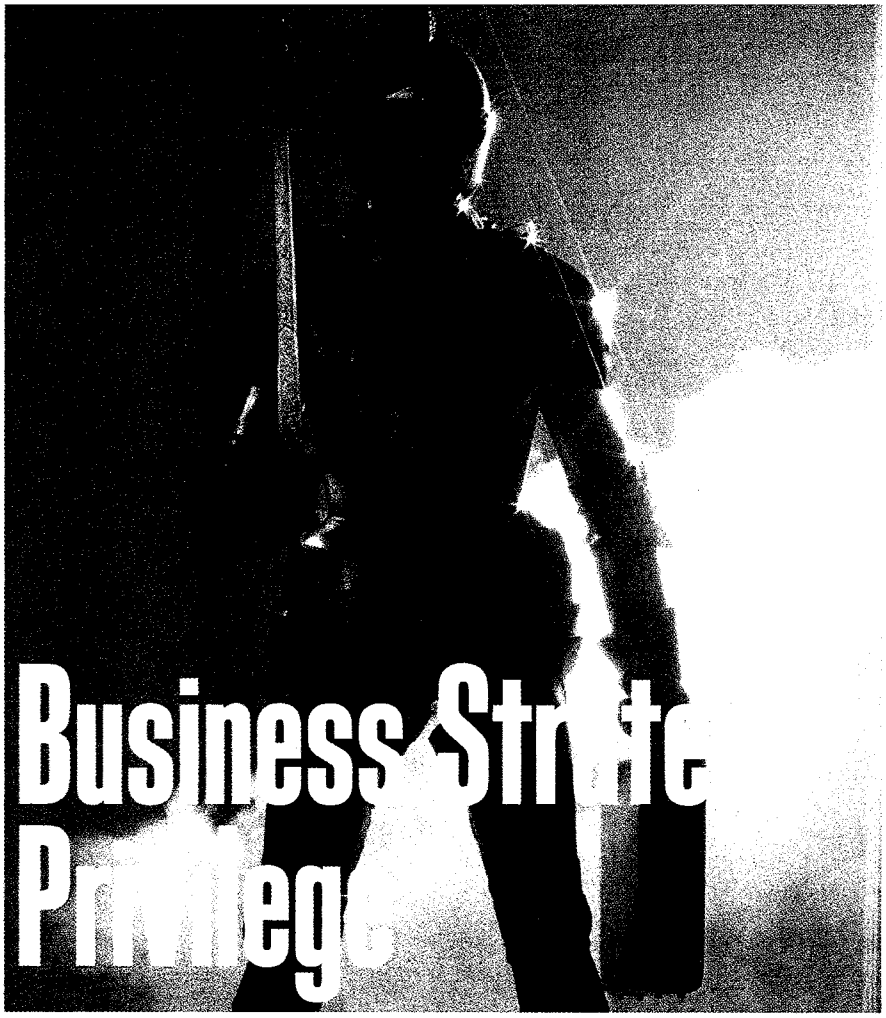
Michael A. Barlow



The "White Knight" or Business Strategy Privilege

A party with all of its cards on the table cannot usually bargain as effectively as one still holding its cards.

Almost all of the privileges recognized in our law have the goal of fostering communications between two parties by concealing them from everyone else. In the relationships between attorney and client, doctor and patient, and priest and penitent, better communications, and better outcomes, are achieved by a candor made possible only by the exclusion of others.

In this sense, the "business strategy" or "white knight" privilege is really no different. The "business strategy" privilege is immunity from discovery premised on the simple concept that a party with all of its cards on the table cannot usually bargain as effectively as one still holding its cards. It is a privilege for high-stakes poker players, to be figurative about it.

To oversimplify, when a company (say, the target) is facing negotiations with another party (say, a hostile bidder), the target may be able to achieve better outcomes for its stockholders when it can evaluate its position candidly and develop alternatives without the involvement and knowledge of the hostile bidder, notwithstanding that the hostile bidder may otherwise have a right to the target's considerations in discovery of its claims.[1] Similarly, a target may be able to achieve better outcomes when it can negotiate with a third-party preferred bidder — the "white knight" — without the knowledge or involvement of the hostile bidder, even when those third-party negotiations are relevant to a hostile bidder's claims.

Unlike other privileges, however, there is no statute or common law tradition according protection to the confidentiality of ongoing business negotiations.[2] Rather, Delaware courts have

addressed such confidentiality concerns by issuing protective orders, sometimes with "attorneys' eyes only" or "highly confidential" designations. While an expedient way of handling discovery, such protective orders are not always a perfect solution for disputes involving ongoing negotiations. They can create an artificial wall between attorneys and their clients on some of the most significant strategic decisions in both the case and the ongoing business negotiations, while putting outside counsel in the unenviable position of using information in litigation that cannot be used to inform related business decisions.[3] The question thus becomes, in the context of ongoing transactions, when might protective orders fail the parties in litigation? And what type of privilege can be invoked when that might happen?

It was not until the corporate takeover contests of the 1980s that the regular confluence of corporate deal-making and simultaneous litigation spawned the development of a body of law concerned with preserving the integrity of a party's negotiating power by denying discovery of ongoing negotiation positions under Rule 26(c).[4] The "white knight" or "business strategy" privilege was born, even if it wasn't necessarily a "privilege" in the strict sense and instead only a body of case law about how Rule 26 should be used to protect ongoing negotiations from discovery that could disrupt the free operation of the marketplace and hurt shareholder value.

As the name suggests, early cases addressing the "white knight" privilege concerned efforts by target companies to entice more favorable bidders that might present a more attractive transaction than what a hostile bidder offered. Courts have generally held that the identity of those possible "white knights" in ongoing negotiations with the target should be protected from discovery by a hostile bidder.[5] Indeed, the threat of public outing of potential "white knight" bidders, many of whom are unlikely to complete the transaction successfully, may be enough to dissuade potential "white knights" from ever taking a seat at the negotiating table. Courts also have protected the terms of those negotiations, on the theory that — in certain circumstances — a hostile bidder might adjust the terms of its offer to upstage its possible rival, or try to challenge the financing or terms being offered by its rival.

The concepts underlying the "white knight" privileges were eventually extended to other contexts in which the disclosure of confidential information might undermine ongoing business negotiations. In *Atlantic Research Corp. v. Clabir Corp.*, then-Vice Chancellor (now Justice) Jacobs extended what was then known as the "white knight" privilege to protect a bidder's ongoing plans and strategy. As the court explained in that case, "the relevance of certain of that information — namely, the ongoing and ... future plans and strategy of [the bidder] — is, in my opinion, outweighed by the prejudice that would result to [the bidder] if that information is disclosed. ... The same policy that would protect the disclosure ... of that information if it were sought from the target ... should likewise be available to protect [the bidder] from forced disclosure of that information...."[6] The court held that the application of the business strategy privilege would extend even to protect the bidder's strategy as reflected in the documents of its bankers.

The court held that the application of the business strategy privilege would extend even to protect the bidder's strategy.

Thus, Delaware courts have protected against discovery of strategic negotiations while they are ongoing and before they have been announced. When a party can use discovery to inform itself of all of the details of those negotiations before they are decided or announced, it can gain an unfair position in those negotiations. As Chancellor Chandler has explained, providing plaintiffs with "highly sensitive financial valuations of [the target] ... would disclose [the target's] reservation price and would effectively remove the possibility of arms-length bargaining between the parties."[7] The resultant harm to the target's stockholders is clear: the hostile bidder's "offers will likely not exceed the value [the target] places on its own stock," and the target's "shareholders may lose an opportunity to receive a premium that [the bidder] might have paid if it remained unaware of [the target's] internal valuations."[8]

To address these concerns without unnecessarily impeding the discovery process, Delaware courts have developed certain principles to guide the appropriate use of the "business strategy" privilege.

First, the business strategy privilege has no application to decisions that have already been made and announced, the legal consequences of which need to be tested in litigation. Courts use the business strategy privilege to protect from discovery "decisions that are tentative, subject to ongoing consideration, and which have not yet been (and perhaps may never be) made," while denying protection to "now-accomplished" de-

cisions with "legal consequences for the corporation's shareholders, who are entitled to test the validity of that decision and, for that purpose, to inquire into its underlying basis."[9] Thus, just as the facts in litigation of ongoing transactions are constantly shifting, so too does the scope of permissible discovery. Discovery on a topic barred at the beginning of a case may be relevant and discoverable thereafter.[10]

Second, Delaware courts have typically refused to define the "business strategy" privilege with clearly defined elements or signposts, instead examining the context of each transaction to balance the interests of full and fair discovery in litigation against the need to maintain "a level playing field for both bidder and target."[11]

While clearly defined elements are necessarily the typical hallmarks of a privilege because people (attorneys and their clients, for example) rely on those privileges in structuring their relationships, courts have rejected applying such rigid requirements when considering the business strategy privilege.

"[T]he 'business strategy privilege' or 'white knight privilege' is not technically a privilege in the sense that proof of certain elements creates something akin to an entitlement, but is in the nature of a qualified immunity to discovery similar to the attorney's work product doctrine...."[12]

Instead of clearly defined signposts, Delaware courts recognize that every transaction is different and have employed balancing tests that, generally speaking, weigh the significance of the information in the litigation against the capacity of its disclosure to disrupt the marketplace or unfairly favor one party to a negotiation.[13] Chancellor Allen set the most enduring statement of this balancing test forth in *Grand Metropolitan PLC v. Pillsbury Co.*:

> Thus, under [the] authority of Rule 26(c), we have, when a threat of that kind is present, engaged in an analysis that attempts to evaluate the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts as well as the stage of the litigation.[14]

Delaware courts have not limited themselves to these factors, however. Some courts also have looked to the subjective motivation of the party seeking the information. Is the requesting party's discovery sought in good faith for a litigation purpose, or is there an ulterior business motivation?[15] Courts also have looked to whether there might be an alternative public source for the type of information sought, although that analysis presumes the confidential information possessed by the company can be reasonably divorced from that which is public.[16]

Courts have also looked to whether there might be an alternative public source for the type of information sought.

Third, in applying the business strategy privilege, courts will consider whether a protective order can be trusted to accord the parties sufficient protection from disclosure and misuse.[17] Given a lawyer's professional and ethical obligations to the court and each other, and in particular the high standard to which Delaware lawyers hold themselves, this factor would rarely, if ever, counsel in favor of application of a "business strategy" privilege. But, as Chancellor Allen has stated, "we must operate ... in a world more closely aligned with a reality in which mistakes occur and in which trust is sometimes abused for advantage."[18]

Yet there is no need to anticipate mistakes or misuse of a confidentiality order to understand why a protective order, even if affording "attorneys' eyes only" protection, might sometimes fail to provide the kind of protection that would render the business strategy privilege unnecessary. Attorneys representing a party in litigation and simultaneous negotiations cannot always excise from their minds information learned in discovery. Nor can the litigation and negotiations always be divorced from each other to avoid the inadvertent passage of information from the former to the latter, as any informed client decision-making necessarily requires consideration of all alternatives. Finally, the "attorneys' eyes only" designation can raise the specter of division between a client and its attorneys, and the divided loyalty of attorneys to serve the conflicting interests of their client and obligation to the court represent a Scylla and Charybdis most would rather avoid.

Courts have thus properly focused on the nature of the information requested, rather than the integrity of the counsel before them, in evaluating whether a protective order would adequately protect the bargaining process. Judges recognize that protective orders can fail to do the job, particularly for what Chancellor Allen described as the "core region of data protected by this concept" — namely, "information disclosing or relating to a functioning board's ongoing consideration of alternatives to the present offer."[19] In this core region, which in some situations may be partic-

ularly relevant to the claims advanced in litigation, the risk that a protective order might be inadequate is simply too high to risk the harm that would be caused if one party had inside information about its adversary.

The business strategy privilege thus remains a somewhat unique body of law. It does not protect all business strategies. Nor is it even really a "privilege" in the strict sense. But the business strategy privilege nonetheless reinforces an important value of Delaware courts — that the role of the litigation process is to judge the transaction subject to suit, not to allow the discovery process to shape the transaction or un-level the playing field.

This basic principle is universal, and thus it is somewhat surprising that the business strategy privilege continues to arise almost exclusively from opinions in corporate merger and acquisition cases. Presumably, courts attempt to maintain a level-playing field in all manner of cases involving developing negotiations — breach of contract disputes in which one party is negotiating with a third party on the same subject, debtors negotiating new financing in bankruptcy and patent holders negotiating exclusive license rights while litigating infringement.[20] However, there is little recent authority suggesting that the business strategy privilege is widely used by courts outside corporate law disputes. Nonetheless, as long as courts recognize that their role is to judge transactions, and not allow the vagaries of the discovery process unfairly to shape them, there will be a role for the business strategy immunity in cases for years to come. ◆

FOOTNOTES

1. *See NiSource Capital Mkts., Inc. v. Columbia Energy Group*, C.A. No. 17341, 1999 WL 959183, at *1 (Del. Ch. Sept. 24, 1999) (noting that "granting discovery in this case, in my opinion, threatens injury to CEG and its shareholders"); *Grand Metropolitan PLC v. Pillsbury Co.*, C.A. No.

10319, 10323, 1988 WL 130637, at *2 (Del. Ch. Nov. 22, 1988) ("We have repeatedly recognized that disclosure of such efforts, while they are ongoing, may be detrimental to shareholder interests.").

2. *See Grand Metropolitan*, 1988 WL 130637, at *2 ("[T]he 'business strategy privilege' or 'white knight privilege' is not technically a privilege in the sense that proof of certain elements creates something akin to an entitlement....").

3. As then-Vice Chancellor Jacobs noted in *Plaza Securities Co. v. Office*, takeover "litigation is often but one of a host of tactics employed in a larger strategy designed to accomplish ulterior objections, either to acquire control of the target company or to prevent a takeover." C.A. No. 8737, 1986 WL 14417, at *5 (Del. Ch. Dec. 15, 1986).

4. Because the "business strategy" immunity finds its home in Rule 26(c), and not the more traditional law of privilege, the immunity can be applied in almost any court, state or federal, that recognizes a court's inherent power to control the scope of discovery in a fashion similar to that in the Federal Rules of Civil Procedure or the Delaware Court of Chancery or Superior Court Civil Rules.

5. *Grand Metropolitan*, 1988 WL 130637, at *3 (denying discovery regarding "the identity of such person and the subject of discussions that may have occurred....").

6. *Atlantic Research Corp. v. Clabir Corp.*, C.A. No. 3783, 1987 WL 758584, at *2 (Del. Ch. Feb. 10, 1987).

7. *NiSource Capital Mkts., Inc.* 1999 WL 959183, at *1. *See also Omnicare, Inc. v. NCS Healthcare, Inc.*, C.A. No. 19800 (Del. Ch. Oct. 11, 2002) (S.M. Regan) ("a target should not be allowed to exploit the compulsion of the litigation discovery process to gain a potential negotiating edge over the bidder by discovering the highest price a bidder might be willing to pay," citing *Rosenblatt v. Getty Oil*, 493 A.2d 929, 939 (Del. 1985) and *In re Pure Resources, Inc. S'holders Litig.*, C.A. No. 19876, slip op. at 66-67 (Del. Ch. Oct. 1, 2002)).

8. *NiSource Capital Mkts., Inc.* 1999 WL 959183, at *1.

9. *Plaza Sec. Co.*, 1986 WL 14417, at *3.

10. *See BNS Inc. v. Kobbers Co.*, 683 F. Supp. 454, 458 (D. Del. 1988) ("It is equally clear at some future point BNS may be immediately entitled to that which has been refused it today.").

11. *NiSource Capital Mkts., Inc.*, 1999 WL 959183, at *3.

12. *Grand Metropolitan*, 1988 WL 130637, at *2.

13. *Id.*; *Computervision Corp. v. Prime Computer, Inc.*, C.A. No. 9513, 1988 WL 909326, at *1 (Del. Ch. Jan. 26, 1988).

14. *Grand Metropolitan*, 1988 WL 130637, at *2; *see also Pfizer Inc. v. Warner-Lambert Co.*, C.A. No. 17524, 1999 WL 33236240, at *2 (Del. Ch. Dec. 8, 1999) (quoting *Grand Metropolitan*); *Vitro, Sociedad Anonima, C. Holdings Corp. v. Anchor Glass Container Corp.*, C.A. No. 11016, 1989 WL 108406, at *1 (Del. Ch. Sept. 20, 1989) (describing considerations similar to those in *Grand Metropolitan* as "illustrative, not exhaustive").

15. *NiSource Capital Mkts., Inc.*, 1999 WL 959183, at *3 (noting the extra-judicial statements of Plaintiff's chairman concerning Plaintiff's interest in using the discovery sought in negotiations); *Gioia v. Texas Air Corp.*, C.A. No. 9500, 1988 WL 18224, at *3 (Del. Ch. Mar. 3, 1988) (acknowledging "that this suit is but part of a larger dispute" between an airline and union and noting the "legitimate concern that unfair advantage may be achieved through the discovery process").

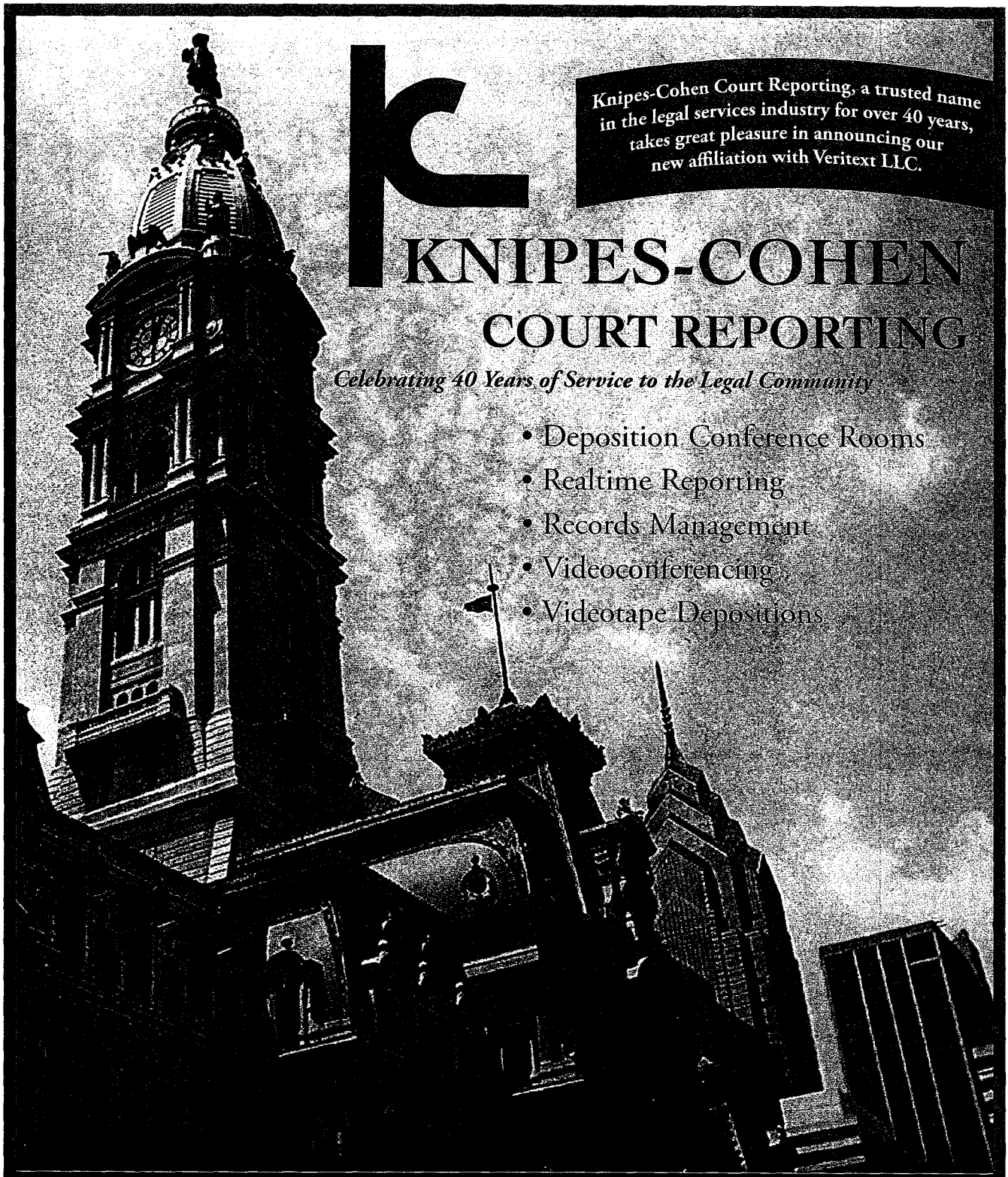
16. *NiSource Capital Mkts., Inc.*, 1999 WL 959183, at *2 ("The public existence of such material also renders discovery less necessary.").

17. *Vitro, Sociedad Anonima, C. Holdings Corp.*, 1989 WL 108406, at *2 (Del. Ch. Sept. 20, 1989) (describing considerations similar to those in *Grand Metropolitan* as "illustrative, not exhaustive").

18. *Gioia*, 1988 WL 18224, at *3.

19. *Computervision Corp.*, 1988 WL 909326, at *1 n.1 (describing the "core region" as "including information relating to possible 'white knights' or negotiations with such third parties, information relating to alternative forms of transactions such as self-tenders or recapitalizations or information relating to negotiating strategies with respect to improving the plaintiff's offer").

20. Indeed, several early cases recognized the application of the "business strategy" privilege outside corporate takeover litigation. *See, e.g.*, *Gioia*, 1988 WL 18224, at *3 (preventing the disclosure of a corporation's contingency plans for a strike in a case brought by a labor union); *In re Heizer Corp.*, C.A. No. 7949, 1987 WL 19560, at *3 (Del. Ch. Nov. 9, 1987) (applying the business strategy immunity to ongoing negotiations for the disposition of trust assets).



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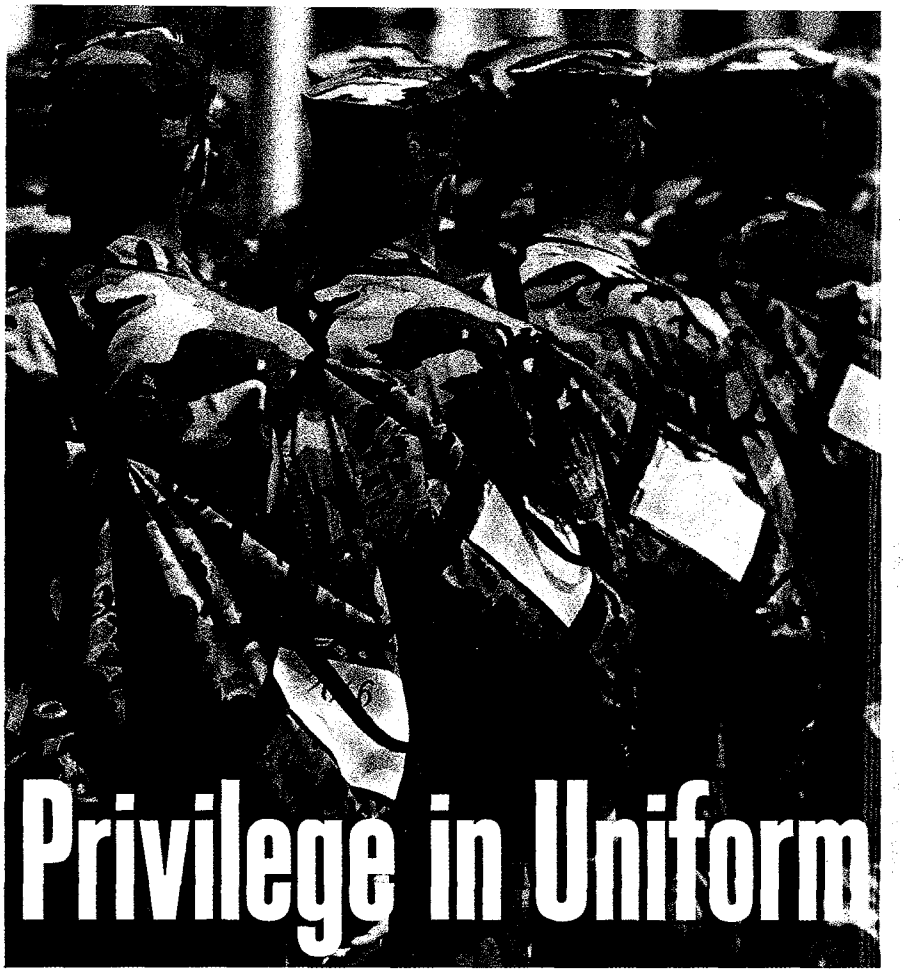

A Military Perspective: Privilege in Uniform

In the military context, there are evidentiary rules that speak to the issue of privileges.

The concept of privilege, or the maintaining of confidentiality of communications, has a long tradition in both the common law and in statutory enactments. It is designed to permit and promote free disclosure of information between those parties or entities that society has determined need that disclosure to properly perform their purpose or mission. So, over time, a number of privileges have become recognized either by the courts or legislatures: for example, clergy/penitent, doctor/patient, husband/wife and reporter/source.

Privileges have also developed for the convenience of the government, such as executive privilege, the national security exemption and the informant privilege (in criminal proceedings). Of course, the oldest common law privilege recognized was that of attorney and client.[1] This privilege, perhaps the most discussed and at times misunderstood, has developed in the common law to assure that the adversary system can function properly.

Many of these privileges have been adopted or later codified by statute, or adopted by court rule or by court decisions. Some, such as the attorney/client privilege, have developed largely through case law although they may also implicate rules of evidence, rules of professional conduct and statutory limitations.

In the military context, there are evidentiary rules that speak to the issue of privileges.

Military Rules of Evidence 504 deals with both the spousal privilege and spousal incapacity to testify. In particular, it provides that a spouse lawfully married cannot be compelled to testify against the other spouse. The incapac-

ity belongs to the spouse who has been called as a witness. Thus, if the wife is called to testify, and agrees to do so, she may appear as a witness even over the objection of the husband. If she refuses to testify, her decision would be final. Of course, for the incapacity to be invoked, the couple must still be married at the time of the proposed testimony.

As to the spousal privilege, the rule recognizes that communication between spouses intended to be confidential acquires protection from disclosure. This privilege relates only to communications and not to observed acts.[2] This privilege is available to both parties and may be asserted by either spouse. Thus, even if the husband wants to disclose the communication, the wife can object and the privilege attaches. An exception to this rule would be where one of the spouses is the accused. In this case, the communication can be disclosed if the accused so demands even over the objection of the other spouse. The privilege depends on the marriage being valid at the time of the discussion or communication and is not eliminated based upon a subsequent divorce or annulment.

Military Rule of Evidence 503 relates to the clergy/penitent privilege and recognizes its existence. A communication by any person to a clergyman, made as a formal act of religion or as a matter of conscience, becomes privileged. The person may refuse to disclose that communication and may prevent anyone else from disclosing it. Under the evidentiary rule the member of the clergy may assert the privilege as well.[3] Only the penitent has the right to waive the privilege. It should be noted that the military rule of evidence incorporates a very broad definition of clergy.

In Military Rule of Evidence 501 (d), it is made clear that the military does not recognize a doctor/patient privilege. Any communication between doctor and patient, if otherwise admissible, may be used in military court proceedings. The various services have provided that information obtained from a patient for treatment for AIDS may not be used in any adverse action such as court martial or discharge proceeding. Likewise, each service has provided a qualified privilege for information disclosed by a service member who is seeking treatment for substance abuse problems.[4]

In addition, the Military Rules of Evidence do not recognize or discuss any reporter/source privilege.

Any communication between doctor and patient, if otherwise admissible, may be used in military court proceedings.

Under Military Rules of Evidence 504, the right of the government to withhold the identity of a confidential informant is recognized. This privilege is granted only to the government and not to the informant. Further, it is limited solely to the identity of the informant and does not prevent disclosure of what information he/she disclosed. This limited privilege ceases to exist if the informant was previously disclosed, is called as a witness by government or if the military judge determines disclosure is required or necessary to the defense of the accused.[5]

Military Rule of Evidence 505 discusses the privilege of classified information. The rule provides that disclosure of classified information is prohibited if such disclosure would be detrimental to national security. This privilege may be invoked only by the head of the executive or military department having control over the subject matter of the information.[6] The material must have been classified under an executive order, a statute or a regulation. In at least one case, the fact that the privilege was invoked by an individual of less rank than a department head caused reversal of the trial verdict.[7] In that case, the privilege had been invoked by the commander of the U.S. Air Force Office of Special Investigations. The Review Court held that there was no evidence that the secretary of the Air Force had directed that the privilege be invoked and thus the department head had not invoked the privilege nor delegated authority to invoke it.

The attorney/client privilege is discussed in Military Rule of Evidence 502. In general, the rule provides that confidential communications between the client (and his/her representative) and the lawyer (and his/her representative) for the purpose of facilitating the provisions of legal services to the client are privileged. Only the client may waive this privilege. Of course, the usual exceptions to this privilege apply: where the discussion involves a future criminal act or where the client has initiated a claim of malpractice or impropriety against the lawyer.[8]

This rule presupposes an attorney/client relationship. In the military context, that relationship may be a significant issue. Under the regulations applicable to the services a lawyer may have his/her client defined as being the Army, the Air Force, etc. For example, it is expressly stated in Army Regulations[9] that:

"Except when representing an individual client pursuant to (g) below, an Army lawyer represents the Department of the Army through its authorized

officials."

Indeed, most services define the client relationship to be a personal one only as to those attorneys assigned to provide "legal assistance" to service members and their families; and to those attorneys assigned to "Trial Defense Services" (Army), "Area Defense Counsel" (Air Force), etc.[10]

At a large military base, the problems caused by this definition are easily addressed by referring soldiers seeking advice to the appropriate legal office before discussing their case. In all cases, however, this requires the judge advocate to be sensitive to this issue and to make clear that an attorney/client privilege might not apply. At small posts, on ships and in smaller components, the lines of confidentiality become far more difficult to ascertain. A few personal examples of assignments demonstrate the difficulty faced by judge advocates.

When I was deployed to Germany as a National Guard judge advocate, the command staff judge advocate assigned me to provide legal assistance to deploying soldiers and their families. Those soldiers and family members were my clients.[11] Attorney/client privilege clearly attached. I could not be compelled to disclose any of the information disclosed to me by those service members or their families seeking legal advice.

In my home billet, as the state judge advocate, my client was the Delaware National Guard and not individual soldiers. In Kabul, Afghanistan, serving as the rule of law officer, my client was the U.S. Army.[12] Again, I had to warn individual soldiers or others seeking legal advice that their communications with me would not necessarily be privileged. Because of the small size of the Judge Advocate Office at Camp Eggers, Kabul, the staff judge advocate did authorize some members of the office to provide legal assistance. Once so authorized, that judge advocate officer could discuss legal matters with the service members with a confidential privilege in force.

The types of problems this creates are many. In a theater of operations such as Afghanistan, many attorneys in positions where they represent the Army, Air Force or Navy are routinely brought into contact with military personnel. For example, an operational law officer is advising a commander of a provincial reconstruction team on issues relating to the expenditure of funds. The commander's disbursement officer chimes in with, "you mean we were supposed to get each worker's fingerprint" (for the $3.00 daily wages paid). Or the commander asks if it is permissible to continue to pay the provincial elders a stipend for helping maintain order. Or the operational law officer is asked by a soldier how to ship an antique weapon back to the states. While explaining the customs certification to the soldiers, the soldier explains how he liberated (stole) the weapon. A marine asks the rule of law officer for a customs certification that a machine gun is an antique when it is not and clearly illegal to ship home. The post command judge advocate is approached by a clerk in the office who wants to send pirated DVDs she purchased at the bazaar through the Army post office to her sister in the United States.

At small posts, on ships and in smaller components, the lines of confidentiality become far more difficult to ascertain.

In all of these situations, the information disclosed to the judge advocate officers would not be subject to an attorney/client privilege. The judge advocate must immediately inform the service members of this when she realizes that the "client" might believe that a privilege exists.

Frequently in the military, a judge advocate is "dual hatted," or given several distinct jobs to fulfill. In these circumstances the shades of grey become very opaque. In one case an Air Force officer considering accepting a job with a defense contractor sought legal advice from two attorneys assigned to legal assistance at his base. They heard his story, then explained they could not answer his specific questions as they "represented the government," but they could give him written documents explaining potential conflicts of interest. As it happened, both attorneys also had been dual hatted as ethics counselors. After the officer accepted the job, and was later charged criminally for violating the conflict of interest provisions, both lawyers were called as witnesses and, subsequently provided the evidence that convicted the officer. The Court of Appeals reversed the officer's conviction noting that the District Court's narrow reading of the "legal assistance" exception would deter those in the military from seeking advice from any legal assistance attorneys on matters of ethics.[13] Of course, this case points out that attorneys should not be assigned to both a confidential position such as legal assistance as well as one such as ethics counselor.

Likewise, in cases involving claims officers, the attorney's client is the government, not those individuals with whom the officer is dealing.[14] It should be noted that in all of these cases the courts, both civilian and military, have

made it clear that if the individual has a "reasonable basis" to believe that the military attorney is acting as the individual's attorney, and that any communication will be confidential, then a privilege may be enforced.

We can see in the area of attorney/client privilege within the military that the serious difficulty that arises is related primarily to the definition of who is in the role of attorney and who is in the role of client. Because of the exigencies of the military environment, judge advocate officers are often given more than one mission or duty. This places a heavy responsibility on those officers to clearly explain their position and role to any persons seeking their counsel. As we have seen from a few practical examples from an active conflict zone, privilege issues can arise in many different contexts. Those providing legal advice in those operational settings are often presented with difficult ethical decisions.

Conclusion

The Military Rules of Evidence codify those privileges that will be recognized by military courts and administrative boards. If privilege does not exist, it will not be recognized by the courts. In addition, the Rules of Professional Conduct, as adopted by the individual services for their lawyers, spell out the scope and applicability of the attorney/client privilege and define who the client of a military lawyer is. That being said, both military and civilian courts have acted to maintain the attorney/client privilege where it appears the service member had a good-faith reason to believe the communication would be privileged. ◆

FOOTNOTES

1. It has been suggested that this privilege predated common law and was recognized by the Roman Civil Code. *See*, for example, Geoffrey C. Hazzard Jr., *A Historical Perspective on the Attorney/Client Privilege*, 66 Cal. L. Rev. 1061, (1978).

2. MRE 504.

3. MRE 503.

4. Such information, while disclosed, may not be used for any adverse criminal or personnel action.

5. MRE 504.

6. MRE 505.

7. *U.S. v Staff Sergeant James V. Flannigan*, U.S. A.F.C. Mil. Rev., 28 M.J. 988 (1989).

8. Note the additional clause in AR27-26, Appendix B, Rules of Professional Conduct, Rule 1.6(d): An Army lawyer may reveal such information when required or authorized to do so by law.

9. AR 27-26, Appendix B, Rule 1.13 (a).

10. AR 27-26, Appendix B, Rule 1.13 (g).

11. *Id.*

12. AR 27-26, Appendix B, Rule 1.13(a).

13. *Scholten brand v United States*, 11th Cir.,930 f 2d 1554 (1991).

14. *See*, for example, *Rust v. United States*, USCAAF, 41 M.J. 472 (1995).

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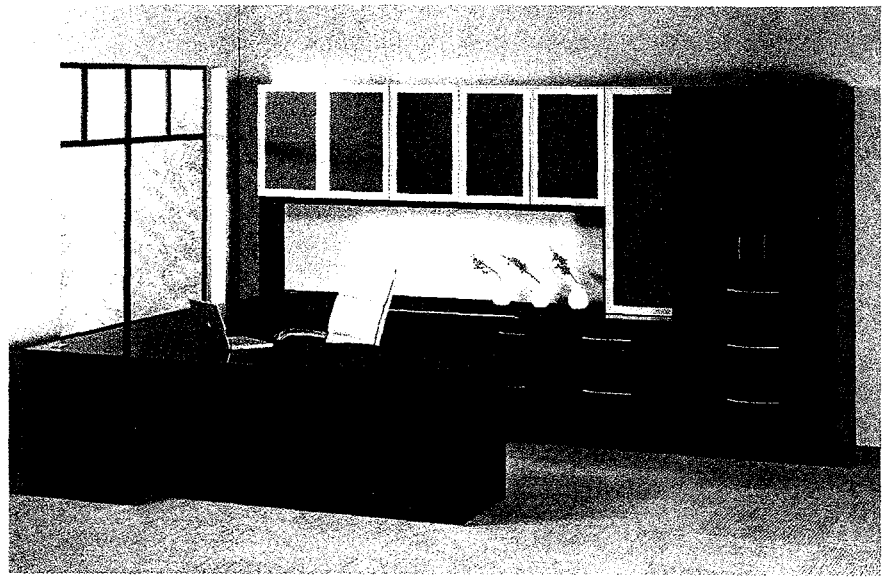

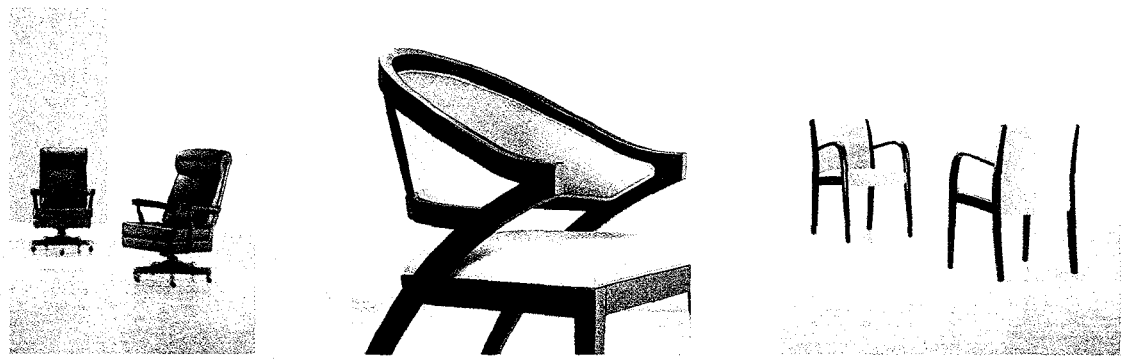

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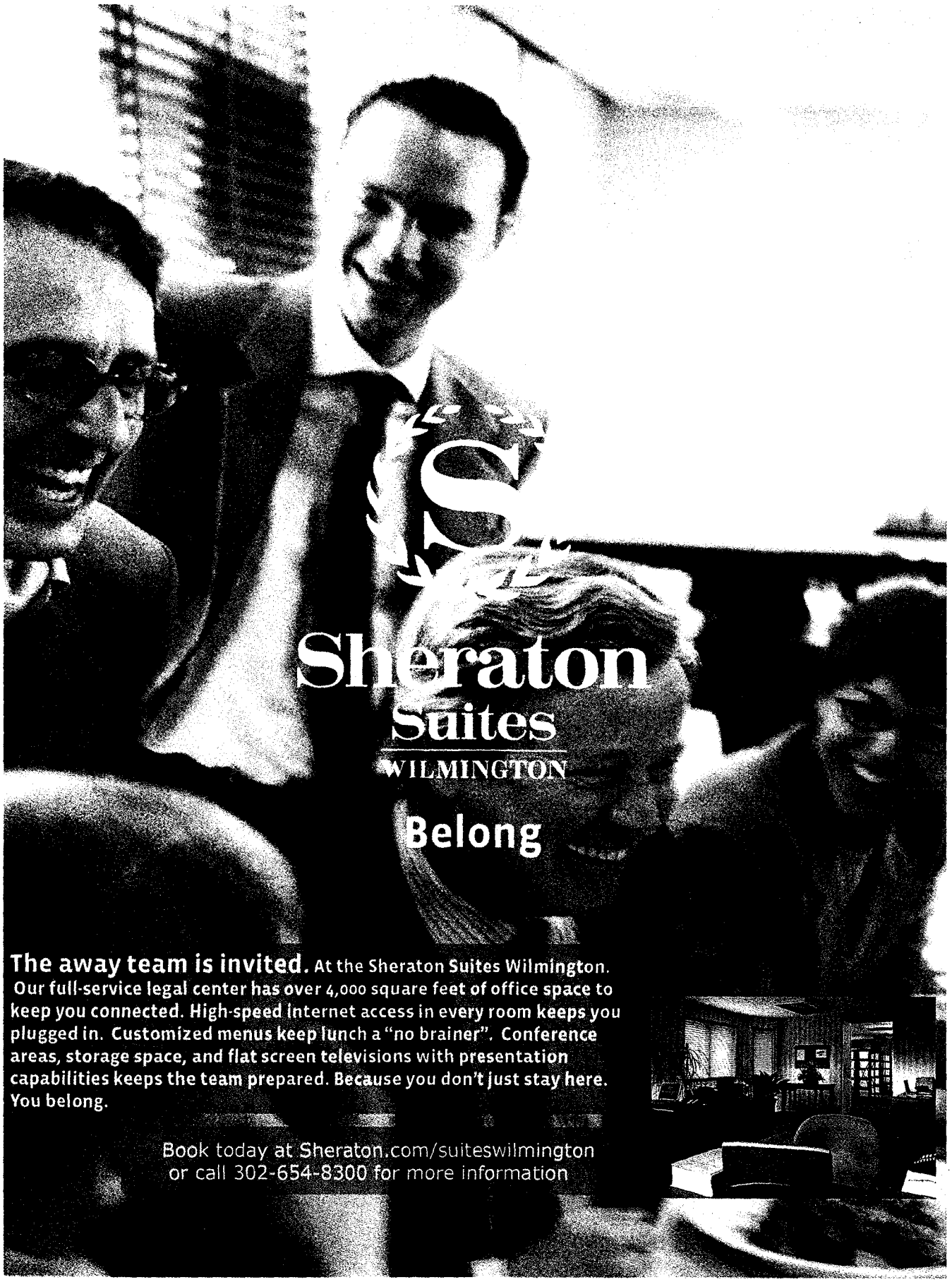

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