

## Outside Counsel

## Expert Analysis

# Pandora's Box And the Bank of America

At the end of the classic film noir, “Kiss Me, Deadly,” the duplicitous femme fatale Lily Carver (played by Gaby Rodgers), bursting with Pandora-like curiosity, opens the mysterious box over which numerous men have paid with their lives. The nuclear material contained in the box burns Lily alive, blows up the Malibu beach house, and (who knows) threatens life in L.A. forever. Recent events suggest that real life is now imitating art.

On Sept. 14, U.S. District Judge Jed Rakoff threw out a \$33 million settlement the Bank of America (BoA) had reached with the Securities and Exchange Commission. According to the SEC, BoA had “materially lied” to BoA shareholders by failing to disclose prior to the Dec. 5, 2008, vote on BoA’s proposed acquisition of Merrill Lynch that \$5.8 billion in bonuses were going to be paid to Merrill Lynch employees. Judge Rakoff rejected the settlement, saying that it did “not comport with the most elementary notions of justice and morality.” Upset that BoA shareholders were both victimized and now being made to bear the financial penalty for the alleged misconduct, Judge Rakoff opined that the settlement “was a contrivance designed to provide the

---

C. EVAN STEWART is the managing partner of the New York office of Zuckerman Spaeder. He is an adjunct professor of law at Fordham Law School and a visiting professor at Cornell University.

By  
**C. Evan  
Stewart**



SEC with the façade of enforcement and the management of the bank with a quick resolution of an embarrassing inquiry.”<sup>1</sup>

Setting a trial date for February 2010, Judge Rakoff also focused on the role of BoA’s lawyers. And although the bank specifically decried that it was not

---

This entire imbroglio may well signify the end of the corporate attorney-client privilege.

relying on an advice of counsel defense, the inevitable pressure to give up the attorney-client privilege became inevitable (especially in the wake of the resignation of BoA’s Ken Lewis as CEO). By mid-October, the bank caved, reaching an agreement with the SEC (a) waiving the privilege and attorney work product with respect to the Merrill Lynch merger and shareholder vote, (b) agreeing that all such information could be shared with other governmental agencies (including, New York’s Attorney General, Andrew Cuomo), and (c) agreeing that the foregoing information would not be shared with private litigants in 58

civil lawsuits seeking money damages against BoA.

Judge Rakoff subsequently approved of this agreement, although he cautioned that BoA’s “cabined” waiver would not preclude any of the private litigants from challenging the Bank on privilege and work product assertions.<sup>2</sup>

### Gambling in the Casino

Judge Rakoff’s shock at the “cynical relationship” between the SEC and BoA is somewhat reminiscent of Casablanca, where Claude Raines professed to be shocked that gambling was going on in the casino being run by Humphrey Bogart (while pocketing his winnings). Coercive settlements compelled by governmental agencies who have life and death power over public companies (irrespective of the underlying merits) have been part of the landscape for a very long time. That being said, however, Judge Rakoff’s rejection of BoA’s settlement has opened a Pandora’s Box which does have some very significant consequences.

Before we get to them, however, let’s quickly identify what is likely not a significant outcome. While some have suggested that BoA “is in serious, serious trouble now,”<sup>3</sup> in point of fact that is not so; the decision to waive the privilege will, in the short run, directly benefit BoA. Because unless the advice given by one of the country’s best corporate law firms (Wachtell, Lipton, Rosen & Katz) proves to be completely off base, the act of letting sunshine in on the communications between BoA and its

lawyers will almost certainly inoculate BoA from any notion that it committed securities fraud, deliberately misleading its stockholders vis-à-vis the Dec. 5, 2008 vote.

What is far more likely is that there will be a failure of proof by the SEC when this matter actually goes before a jury. Predicting the outcome of trials is a tricky business, but this time it should be a lot easier than usual. (Of course, to get to that point, BoA's shareholders will have to foot out-sized legal bills to vindicate the Bank's disclosure decisions.)

But that is merely the beginning. As already flagged by Judge Rakoff, for example, BoA is going to have an extraordinarily difficult time successfully asserting privilege as a shield in the 58 civil lawsuits that have been filed (to date); the law on privilege waiver is decidedly against such a heads I win/tails you lose sort of arrangement.<sup>4</sup>

Judge Rakoff's rejection of the settlement, moreover, will surely embolden other Article III judges to take a more active oversight role when governmental agencies seek judicial imprimaturs. It will also either make agencies like the SEC do a better evidentiary job vis-à-vis the cases it brings or, more likely, lead them to opt for administrative settlements without going to the judicial branch for extra umph.

Most importantly, this entire imbroglio may well signify the end of the corporate attorney-client privilege. This has been a trend that some observers (the author being one) have been commenting upon and urging push back against for some time.<sup>5</sup> Judge Lewis Kaplan's rulings in the *KPMG* litigation and the Justice Department's public pull-back from the McNulty/Thompson/etc. memoranda suggested that the trend might have been arrested.<sup>6</sup> Now, however, corporate executives have (once again) been shown that, when the government 800 lb. gorilla gets mad enough, the privilege gets quickly thrown into the campfire.

And while that is not irrational corporate behavior vis-à-vis the gorilla, the logical/rational outflow of it is either (a) a stifling of

what business people tell their lawyers, or (b) business people simply not seeking out lawyers in difficult situations. Either result is directly at odds with the U.S. Supreme Court's seminal *Upjohn* decision, in which the Court in 1981 upheld the broadest possible application for the corporate attorney-client privilege.<sup>7</sup> Because of the complexity of complying with the law (which has only accelerated in the years since 1981), the Court ruled that legal compliance required that corporate personnel's communications with lawyers be assured of confidentiality—so that lawyers would be able to get all the necessary facts in order to give corporate clients the best possible legal advice.

### Conclusion

So, the Pandora's Box, which Judge Rakoff opened in order to "protect" BoA shareholders, has resulted in (a) costly litigation with the SEC in which BoA will likely prevail, (b) costly civil litigation with private parties in which BoA will have great difficulty protecting privileged communications, (c) governmental agencies (like the SEC) likely shifting their enforcement/settlement protocols in ways that protect the agencies from public embarrassment (while not necessarily affording their public company targets more due process rights), and (d) corporate executives (and the lawyers who advise them) having no faith that the corporate attorney-client privilege has a breath of life left. As Don Corleone once asked his fellow Dons: "How did things ever get so far?"



1. Judge Rakoff's decision can be found in the New York Law Journal at p. 40 (Sept. 15, 2009).

2. See New York Law Journal 1 (Oct. 15, 2009).

3. See L. Moyer, "Big Trouble for Bank of America," *Forbes.com* (Sept. 14, 2009) (quoting St. John's University law professor Anthony Sabino).

4. The use of a "sword" and "shield" strategy has usually been a controversial one. See *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987); *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996). Regardless, the "selective waiver" approach adopted by BoA was specifically dropped as part of a recent amendment to the Federal Rules of Evidence, and every circuit court—save one, the U.S. Court of Appeals for the Eighth Circuit more than 30 years ago—has rejected selective waiver as inconsistent with the attorney-client privilege. Compare *Diversified Industries Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) with *In re Subpoena Duces*

*Tecum*, 738 F.2d 1367 (D.C. Cir. 1984); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Steinhardt Partners, LP*, 9 F.3d 230 (2d Cir. 1993); *In re Qwest Communications International Inc. Securities Litigation*, 450 F.3d 1179 (6th Cir. 2006).

5. I have been writing about this state of affairs for almost 20 years. See, e.g., "Whither the Attorney-Client Privilege?" New York Law Journal (Oct. 11, 1990); "The Corporate Attorney-Client Privilege: Is Nothing Sacred?" *The Corp. Crim. & Const. L.R. Vol. 1 No. 17* (April 5, 1991); "Corporate Counsel and Privileges: Going, Going..." New York Law Journal (July 11, 1996); "The Attorney-Client Privilege: The Best of Times, the Worst of Times," *The Prof'l Lawyer* (1999). During most of that time, however, many observers (mostly non-practicing lawyers and academics) believed that all was hunky dory. See, e.g., F. Zacharias, "The Fallacy That Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar," *The Prof'l Lawyer* (1999).

6. See C. Stewart, "The False Promise of 'Reform'," New York Law Journal (Feb. 21, 2008); C. Stewart, "'Carnacking' the Future," New York Law Journal (Feb. 15, 2007); C. Stewart, "When the Government Comes Knocking," New York Law Journal (March 19, 2005).

7. 449 U.S. 383 (1981).