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Attacking Corporate Attorney-Client Privilege and Work Product

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Our laws and process continue to become more harsh. Potential regulatory and criminal sanctions are so severe that it is in the main only the most hearty or desperate targets who dare to resist succumbing to the lure of proffered leniency by the government in exchange for cooperation. This fundamental shift in power between the government and its corporate and individual citizens -- in effect, the government acquiring ever more power to affect the outcome of any dispute between it and its citizens -- is a recipe for arrogance and arbitrariness in the administration of justice.

Attorney-Client Privilege Erosion

It is far beyond the compass of this article to explore the societal and political currents, justifiable and not, that have led us to this point in our system. But it is not too much to say that officers of the law are becoming more prone to ride roughshod over certain basic values. This article addresses the erosion of the attorney-client relationship because, increasingly in investigations involving corporations, prosecutors are demanding waiver of attorney-client privilege and work product protection for documents and internal investigative reports even from the inception of the investigation. The pressures on a corporation hoping to avoid prosecution or to obtain leniency can be overwhelming. The governmental attack on the corporate attorney-client relationship is remarkably short-sighted and threatens to undermine the important historic public purpose of the privilege. Note to readers: Arkin Kaplan is involved in representations that touch on issues raised in this article.

In recent months, both the Securities and Exchange Commission and the U.S. Sentencing Commission have opened for discussion proposals that together comprise the next step in eviscerating the attorney-client privilege for corporations. The sentencing commission has approved changes in the sentencing guidelines that formally incorporate into guidelines commentary recognizing waiver of attorney-client privilege and work-product protection as elements of timely cooperation.1 The SEC is considering a proposal requiring lawyers to make a noisy withdrawal in the event that the lawyers discover that a client is engaged in securities fraud and is unable to persuade the corporation to take corrective action, or, alternatively, requiring the attorneys to notify the company of their resignation and the company to report the resignation to the Commission.2 And the SEC, while ostensibly proffering proposals to protect privileged information provided to the SEC in the course of an investigation under the guise of institutionalizing the notion of selective waiver,3 nonetheless is insisting on retaining the ability to use the privileged information in a manner that can effect a wholesale waiver of the corporation's privilege.

As Enforcement Director Stephen Cutler recently noted, [o]f course, the Commission must always be free to disclose in an enforcement proceeding the documents produced to it (even pursuant to a confidentiality agreement) if the Commission determines that it is necessary in furtherance of the discharge of its duties and responsibilities. This would be true even if such use (as distinct from the mere production of the documents) resulted in a waiver of the privilege.4

Waiver as 'Cooperation'

The sentencing commission and the SEC merely echo the increasingly aggressive attack on corporate attorney-client privileges launched in the Department of Justice and other federal and state agencies. Although it has been common practice in the Office of the U.S. Attorney for the Southern District of New York since the early 1990s to seek complete waivers of the attorney-client privilege and the work product doctrine in investigations of crimes by corporate employees,5 the federal practice of routinely seeking waivers was memorialized by the publication of a Department of Justice memorandum entitled, Principles of Federal Prosecution of Business Organizations, by Deputy Attorney General Larry D. Thompson in January 2003,6 which expanded upon a June 1999 memorandum by then-Deputy Attorney General Eric H. Holder.7 The request for waiver is presented in the department's memo as a factor to consider in determin-

ing whether or not a corporation has cooperated with the government's investigation, which determination in turn affects, among other things, the departmen's decisions about prosecution and plea agreements and can substantially affect the penalties available against the corporation in the event of a successful prosecution.

Among the factors to be considered in assessing cooperation are the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection. Expanding on this point, Mr. Thompson stated that [o]ne factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel, thus permitting the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.8

Although the memo cautioned that privilege waivers would not be considered by the department as an absolute requirement, prosecutors and regulators have begun routinely to request them at the outset of investigations, even before other means of ascertaining the facts have been considered, and even to insist on waivers as a condition of favorable treatment.9 It takes little imagination to understand why a prosecutor or government investigator would seek the waiver. Corporate employees confide problems and seek particular advice from corporate attorneys in respect to their conduct and responsibilities for corporate business. Breaching the privilege may indeed hasten or achieve a better truth in a particular case, yet the lack of an expectation of confidentiality surely discourages a troubled or uncertain employee from seeking legal counsel.

Why Attorneys Waive

Why would a defense attorney acquiesce to such a request? To understand this, it is important to appreciate what is at stake for the defendant corporation when it comes to the determination of cooperation. Prosecutors and regulators have considerable discretion. A prosecutor may decide, if the corporation is sufficiently cooperative, not to seek an indictment at all. Cooperation is similarly a factor considered in making plea agreements and charging decisions.10 As importantly, cooperation plays a significant role in determining the culpability score under the U.S. Federal Corporate Sentencing Guidelines of a corporation faced with potential fines, and can drastically reduce the potential fines to be levied against such a corporation.11

In the face of pressure from a prosecutor to waive the privilege, and presented with the apparent benefits of doing so, a defense attorney must consider counseling their clients to waive the privilege. Looking at the interests of the client in the narrow view of the particular case, it may almost seem reasonable. But the interests of the client in a broader context necessitates a closer look at the risks to the company as an entity in forsaking the secrecy accorded its confidential communications with its legal advisors.

The Supreme Court recognized the significance of corporations being able to consult freely with legal counsel in Upjohn Co. v. United States, where it rejected a control-group test and articulated the basis for the privilege:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.... Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.12

The Court recognized in Upjohn that fulfillment of this purpose in the corporate context required extension of the privilege to communications with middle-level and even lower-level employees of the corporation because these employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. The Court well understood that the privilege should be extended because if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.13

In the U.S. Court of Appeals for the Second Circuit, as in the majority of circuits, a party who voluntarily discloses privileged information to an investigating government agency waives its privilege with respect to the information dis-

closed in subsequent litigation with the government or a private litigant.14 While some district courts have allowed selective waiver given strong confidentiality agreements, that law is far from bulletproof.15 Consequently, if the SEC, for example, finds certain disclosures useful in deciding whether or not to bring an action against a given corporation, it is a near certainty that a plaintiff's lawyer will find the same material eminently useful in deciding how to fashion claims against that corporation. Thus, by waiving the attorney-client privilege or work product protection, the corporation may be providing a script for private litigants to follow.

Further, by agreeing to waive the attorney-client privilege, particularly at the inception of the investigation, the corporation essentially becomes the agent of the government and defense counsel are in the somewhat unseemly position of representing both the corporation and the government in its investigation. This has a number of undesirable consequences, including driving a wedge between the corporation and its employees; creating hostile feelings among employees; assisting the government in doing an end-run around the Fifth Amendment; undermining the efficacy of the attorney-client privilege in the corporate context; decreasing the likelihood that employees will be cooperative in internal investigations; impairing the corporation's ability to detect violations and to prevent future violations of the law; and undermining our adversary system of justice.16

The American legal system takes as its axioms the importance of effective counsel, the need for a client to be able to confide in his or her (or, since Upjohn, its) attorney, and the advantages of zealous representation in an adversarial system. The attorney-client and work-product privileges were instituted to serve those important social ends, even at the cost of occasionally limiting the truth-seeking function in individual cases.

Every member of the defense bar will likely run into the dilemma of whether to waive attorney-client privilege or work product protection. The art of defending is to minimize harm or exposure to your client, whatever lawfully that may take. In the present environment, sad to say, waiving privilege may often be the only prudent response to government threats. While it is obvious that each case requires a careful consideration of the particular facts and circumstances, an attorney faced with a request for waiver should bear in mind, however, the broader interests of the client and the interests in furthering compliance with the law generally. At the very least, think long and hard before contributing to the creation of an uncertain privilege for corporations that the Supreme Court presciently warned against in Upjohn, not to mention what could at some point prove to be an unhappy precedent created by your client not having insisted on preserving its privilege.

1. See Sentencing Commission, Sentencing Commission Toughens Requirements For Corporate Compliance And Ethics Programs (April 13, 2001), available at http://www.ussc.gov/PRESS/rel0404.htm. See also Business, U.S. Fight Over Sentencing Guidelines, Wash. Post, Mar. 18, 2004, at E01 available at http://www.washingtonpost.com/wpdyn/articles/A2959-2004Mar17.html.

2. Remarks of SEC Chairman William H. Donaldsto the Practising Law Institute (Nov. 6, 2003), at 2, available at http://www.sec.gov/news/speech-/ spch110603whd.htm; Remarks of Giovanni P. Prezioso, General Counsel of the SEC, before the American Bar Association Section of Business Law 2004 Spring Meeting, Seattle, Washington (April 3, 2004), at 8, available at http:// www.sec.gov-/news/speech/spch040304gpp.htm. The current rule governing standards for professional conduct of attorneys practicing before the SEC (17 CFR 205), enacted pursuant to Section 307 of the Sarbanes-Oxley Act of 2002, merely permits a noisy withdrawal, as do ABA Model Rule 1.13 and the rules of a number of state bar associations.

3. The Securities Fraud Deterrence and Investor Restitution Act of 2003, H.R. 2179, 108th Cong. (2003) 4.

4. The Securities Fraud Deterrence and Investor Restitution Act, H.R. 2179: Hearings Before the Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the House Committee on Financial Services, 108th Cong. 10 n.5 (2003) (prepared testimony of SEC Director of Enforcement Stephen M. Cutler) available at http://www.-sec.gov/news/testimony/060503tssmc.htm. Unlike the Department of Justice, however, which often seems oblivious to the importance of the attorney-client privilege (see Interview with United States Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, 51 United States Attorneys' Bulletin, No. 6 (Nov. 2003)), the SEC has acknowledged that the attorney-client privilege and work-product protection serve important social interests. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 44969 (Oct. 23, 2001), at 5, n.3. The Department of Justice has said that it is neither for nor against the proposed legislation permitting selective waiver to the SEC. Business, U.S. Fight Over Sentencing Guidelines, supra, n.1.

5. Tamara Loomis, Privilege Waivers: Prosecutors Step Up Use of Bargaining Chips, The New York Law Journal, Sept 7, 2000.

6. U.S. Department of Justice Memorandum from Larry D. Thompson to United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (Thompson Memo), available at http:// www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

7. Lawrence D. Finder, Internal Investigations; Consequences of the Federal Deputation of Corporate America, 45 So. Texas L. Rev. 111, 114-15 (2003).

8. Thompson Memo, supra, n. 6, at 1, 3, 5.

9. Vanessa Blum, U.S. Mounts New Attack on Privilege, Legal Times (March 17, 2003); Lisa A. Cahill, Internal Investigations and Waiving Corporate Privilege, 224 NYLJ 5 (Sept. 21, 2000); David M. Zornow and Keith D. Krakaur, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations, 37 Am. Crim. L. Rev. 147, 148 (2000).

10. Thompson Memo, at 6. The Antitrust Division, for example, has a rarely used corporate leniency policy (available at http:// www.usdoj.gov/atr/public/guidelines/0091.htm) under which a corporation may be granted amnesty if it meets certain prerequisites, including bringing illegal activity to the attention of the Division before it has received such information from another source, and the SEC has forborne taking action against a company based on the nature of the conduct and the company's complete cooperation with the staff. E.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 44949 (Oct. 23, 2001), available at http:// www.sec.gov/litigation/investreport/34-44949.htm. The EPA and the Department's Environmental and Natural Resources Division similarly have voluntary disclosure programs under which a business entity may qualify for amnesty or reduced sanctions. Thompson Memo, at 6.

11. The pertinent Sentencing Guidelines Application Note states that to qualify for a reduction of sentence under USSG 8C2.5(g)(1) or (g)(2) cooperation must be both timely and thorough. The guideline states that to be timely, cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. USSG 8C2.5, Application Note 12. As noted supra, the Sentencing Commission has amended the Note to refer specifically to waiver of the attorney-client privilege and the work product doctrine as indicia of timely cooperation.

12. United States v. Upjohn, 449 US 383, 389 (1981).

13. Id. at 391, 393.

14. In re Steinhardt Partners, L.P., 9 F3d 230, 235-36 (2d Cir. 1993) (holding that by voluntarily producing documents to SEC, partnership waived work-product protection as against class action plaintiffs, but declining to adopt a per se rule of waiver). Only the Eighth Circuit, in Diversified Industries v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc), has held that a corporation may selectively waive the privilege to an agency such as the SEC without impliedly effecting a broader waiver. Other circuits have declined to follow Diversified Industries. See, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1220-22 (D.C. Cir. 1981) (holding that by voluntarily permitting thirty-six privileged documents to be produced to SEC, corporation impliedly waived attorney-client privilege as against Department of Energy, but upholding trial court's protection of work-product documents without discussion); In re Sealed Case, 676 F.2d 793, 817-25 (D.C. Cir. 1982) (holding that by participating in SEC voluntary disclosure program and submitting investigative reports and notebooks of witness interviews and selected documents to SEC, and assuring it access to underlying documents, corporation waived both attorney-client privilege and work-product protection except for pure opinion work product as against Department of Justice); In re Subpoena Duces Tecum, 738 F2d 1367, 1369-75 (D.C. Cir. 1984) (holding that by voluntarily producing investigative reports and binders of corporate records and attorney notes taken during the course of investigation to SEC and Department of Justice, corporation waived both attorney-client privilege and work-product protection as against private class action litigants); In re Martin Marietta Corp., 856 F2d 619, 622-27 (4th Cir. 1988) (holding that by furnishing position paper to United States Attorney describing why company should not face indictment, company waived attorney-client privilege and protection for non-opinion work product as against indicted employee), cert denied sub nom. Martin Marietta Corp. v. Pollard, 490 US 1011 (1989), and Pollard v. Martin Marietta Corp., 490 US 1011 (1989); Westinghouse Electric Corp. v. Republic of the Philippines, 951 F2d 1414, 1423-29 (3d Cir. 1991) (holding that by disclosing documents to SEC and Department of Justice, Westinghouse waived both attorney-client privilege and work-product protection against all other adversaries); Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F3d 289, 302-07 (6th Cir. 2002) (holding that by disclosing documents to the Department of Justice, despite certain stringent confidentiality provisions, corporation waived both attorney-client privi-

lege and work-product protection as against private litigants), cert. dismissed sub nom. HCA, Inc. v. Tennessee Laborers Health and Welfare Fund, ___ US ___, 124 SCt 27 (2003).

15. See Columbia/HCA Healthcare Corp. Billing Practices Litig., supra, at 302-03.

16. A number of commentators have criticized the Department of Justice's guidelines on these and other grounds. See, e.g., Judson W. Starr and Joshua N. Schopf, Cooperating With the Government's Investigation: The New Dilemma, ALI-ABA Course of Study, Criminal Enforcement of Environmental Laws (May 11, 2000); Finder, Internal Investigations: Consequences of the Federal Deputation of Corporate America, supra, n. 7; The Erosion of the Attorney-Client Privilege and the Work Product Doctrine in Federal Criminal Investigations, A report prepared by the American College of Trial Lawyers, 41 Duquesne L. Rev. 307 (2003); Lance Cole, Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney Client Privilege (And Why It Is Misguided), 48 Villanova L. Rev. 469 (2003). For suggestions on how to attempt to limit waiver, see Nancy Horton Burke, The Price of Cooperating With the Government: Possible Waiver of Attorney-Client and Work Product Privileges, 49 Baylor L. Rev. 33, 59-70 (1997).