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Legal News

Attorneys--Corporate Counsel Uncertainty Over Attorney-Client Privilege Eroding Client Communication, Speakers Say

The American Bar Association needs to give guidance and draw lines around what the attorney-client privilege actually protects before employee communications with corporate attorneys are stifled altogether, interested parties said at an April 21 meeting of an ABA task force studying the privilege.

Speaking in New York at the second public hearing of the ABA Task Force on Attorney-Client Privilege, several lawyers also urged the Department of Justice and other federal agencies to take action to preserve the privilege that protects attorney-client communications. In particular, these speakers said, the "option" of waiver of the privilege has eroded into an "expectation" of waiver on the part of regulators, government agencies, and external auditors in exchange for leniency or evidence of cooperation.

While one participant recommended legislation supporting a limited waiver of the privilege, others said that this would only exacerbate the problem by enabling automatic access to at least some privileged communications. Instead, many panelists said that an agency such as the DOJ should set up a system of oversight and approval when privilege is sought, to limit waiver to exceptional circumstances.

"This is one of the most important issues facing us right now," ABA President Robert J. Grey Jr., of Richmond, Va., told the group. Grey, who announced the creation of the task force in October 2004, said that he is interested in what the task force's end product will be and is looking forward to its report, now that it has conducted two public hearings on the issue. The first hearing was held Feb. 11 in Salt Lake City. See 73 U.S.L.W. 2494. 

The task force asked for comments and said it expects to produce a final report with recommendations for consideration by the ABA's House of Delegates, which will meet in August in Chicago.

Weak Privilege Chilling Compliance Programs

Speakers at the hearing said that one of the negative impacts of a weakened privilege has been its "chilling" effect on employee communications with a company's attorney, which in turn hinders corporate compliance programs. This is happening, they said, because employees who are unsure of whether and with whom their communications will be shared are deciding not to talk with the corporate attorneys at all.

Panelists pointed out, for example, that individual employees are less likely to engage in meaningful, candid communications that could prevent compliance problems if they know that the communications will become part of the government's case and could be used against them down the road.

This is the worst consequence of a weakened privilege, said Stephen A. Saltzburg, a professor at the George Washington University School of Law, because having an employee who does not talk at all "is not in anyone's best interests."

In a similar vein, Susan Hackett, counsel for the Association of Corporate Counsel, Washington, D.C., said: "Employees have a pretty bad choice: cooperate fully and potentially implicate themselves as well as create a roadmap for prosecution, or risk getting fired."

Hackett told the task force that ACC members and others have said that prosecutors, regulators, civil litigation opponents, and courts increasingly "seem to be inappropriately mixing up the longstanding recognition and respect for a client's right to confidential counsel with the current focus on corporate transparency and a related belief that anything kept secret is somehow a red flag to inappropriate activity."

In fact, in a recent survey conducted by ACC, more than 30 percent of in-house counsel respondents said that their clients had personally experienced an erosion of the attorney-client privilege and work product protections post-Enron Corp. See 73 U.S.L.W. 2612. ☺

"There is a crisis in the current state of the attorney-client privilege," Gerald B. Lefcourt, a criminal defense attorney and past-president of the National Association of Criminal Defense Lawyers, said in a letter to the task force. "Corporations have no choice but to waive privilege when it is demanded, requested, or even suggested, because the stakes of corporate prosecution are too high," he said, adding that a weakened privilege is having a "terrible impact" on individual employees caught up in corporate investigations, and has "severely compromised honest attempts at candor and compliance."

Jan L. Handzlik, a member of the task force and an attorney with Howrey Simon Arnold & White, Los Angeles, similarly said: "The government is investing a lot of responsibility for corporate counsel to carry out the compliance programs, but is then undercutting their abilities with an attorney-client privilege waiver."

Waivers Have Become 'Matter of Course.'

The main problem is that waiver of the attorney-client privilege has become "the norm, rather than an option," Jonathan Bach, representing the New York Council of Defense Lawyers, said, echoing other speakers' comments.

These speakers said that it is now virtually "a matter of course" that companies waive the attorney-client privilege. The problem is that regulators are assuming these intrusions are par for the course, and waiver of the privilege has become accepted--and expected--by both companies and their regulators, prosecutors, and others.


The speakers and task force members addressed four particular situations in which companies have been providing privileged material:

- ◆ in some circumstances, to appear cooperative to prosecutors under the U.S. Sentencing Guidelines;
- ◆ as a condition of leniency with DOJ for targets of criminal investigations or prosecution;
- ◆ for favorable resolution of civil investigations and enforcement proceedings with the Securities and Exchange Commission and other federal regulatory agencies; and
- ◆ in such areas as litigation over reserves, tax provisions, and internal investigations with a company's external auditors.

partner with Palmer & Dodge, Boston, pointed out that courts have drawn the distinction between having access to known facts as opposed to legal advice, which deserves the most protection.

"The real balance," said Steve Cannon, also a member of the task force and an attorney with Constantine & Cannon, Washington, D.C., is between the public's interest and the client's interest in obtaining the best possible legal advice.

Overall, speakers recommended that the task force work with DOJ and federal regulatory agencies to accomplish the following:

- provide greater oversight of requests for and approval of waivers of the privilege either by DOJ or by an ombudsman;
- require prosecutors to take greater account of corporate compliance programs;
- forbid prosecutors or regulators from seeking limited waivers--which allow client to disclose privileged information to prosecutors or regulators without waiving the privilege as to third parties for collateral litigation--because they give federal agencies "carte blanche" to request waiver;
- require prosecutors to report all instances in which privileged material is obtained;
- establish a process under which either an ombudsman or DOJ would determine whether a waiver of the privilege is necessary; and
- create educational resources for law students and bar members so that they know the scope of the privilege. 

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