



New York State Bar Association

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Report of Task Force on Attorney-Client Privilege

March 27, 2006

The Task Force on Attorney-Client Privilege of the New York State Bar Association, joined by the Business Law Section of the Association, welcomes the opportunity to respond to the request by the United States Sentencing Commission (the "Commission") for comments on the 2004 amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines (the "Guidelines").¹ This amendment stated that waiver by a corporation of its attorney-client privilege and work product protections (hereinafter jointly referred to as the "Privilege") can be considered in determining whether a corporation qualifies for a reduction in its sentence under the Guidelines.²

Summary of Issue and Conclusion

The amended Commentary authorizes and encourages the government to require entities to waive the Privilege and, by its express appearance in the Guidelines, has contributed to the pressure on entities to waive the Privilege. As a result, in the experience of the members of the Task Force, waiver has become the rule, not the exception. Many attorneys have come to believe that it is necessary for their clients to offer to waive the Privilege in the hope of obtaining credit for cooperation, even when waiver has not been requested, and there have been many situations where corporate clients have felt compelled to waive the Privilege, before even being asked, lest they be viewed as less than fully cooperative and less than fully interested in having the truth revealed.

We believe that this has, and will have, the effect of undermining the confidence of clients in the confidentiality of their communications with their attorneys, will have a "chilling effect" upon

¹ The Task Force on Attorney-Client Privilege was appointed by President Vincent Buzard of the New York State Bar Association to examine and make recommendations concerning the practice of state and federal prosecutors, regulators and agencies of requesting that corporations waive their attorney-client privilege and the protection of the work product rule in various circumstances, including plea agreements, deferred prosecution agreements, decisions as to whether to commence enforcement proceedings, and sentencing. The Task Force consists of fifteen members from private practice, the government, self-regulatory organizations, and law school faculty, including two former United States Attorneys for the Eastern District of New York, three former Assistant United States Attorneys for the Southern and Eastern Districts of New York, a former SEC Division of Enforcement Branch Chief, an attorney for the New York Stock Exchange, a professor of Law at Fordham Law School and well known and highly distinguished criminal and civil defense counsel.

The Business Law Section is comprised of members of the New York Bar whose practices focus in the fields of securities regulation, corporation law, finance, banking, and commercial law. The Section includes lawyers in private practice, in-house counsel of corporate legal departments, law school faculty, and self-regulatory agencies.

² The views set forth in these comments are those of the New York State Bar Association, the Task Force and Business Law Section and do not necessarily reflect the views of the organizations with which its members are associated.

the quality and candor of those communications, and will compromise the ability of counsel to provide effective representation of their clients.

We urge the Commission to remove the amended Commentary and, instead, to include an express statement in the Commentary that waivers of the attorney-client privilege and work product rule are not to be considered in evaluating the level of cooperation of a defendant or in determining the appropriate sentence under the Guidelines.³ We recognize that there may be rare instances in which prosecutors may need to request that a corporation waive the Privilege as part of an investigation; removal of the Privilege waiver language from the Commentary will not deprive prosecutors of that option.

Introduction

The first formal written suggestion that a corporation seeking to avoid criminal prosecution and demonstrate cooperation waive the attorney-client privilege and work product protections arose in a June 1999 Department of Justice memorandum prepared by Deputy Attorney General Eric H. Holder, Jr. That document, entitled "Bringing Criminal Charges against Corporations", outlined the factors for a prosecutor to consider in charging a target corporation. One such factor was the target's degree of cooperation in the criminal investigation. In gauging the extent of cooperation, the prosecutor was to consider the corporation's willingness to identify the culprits, to make witnesses available, to disclose the results of its internal investigation, and to waive the attorney-client privilege and work product protection.

In discussing the reasons for seeking waiver, the Holder Memorandum noted the advantages of obtaining the results of the corporation's internal investigation and communications between specific employees and counsel. This permits the government to obtain witness statements without having to negotiate individual cooperation or immunity agreements. In addition, it enables the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.

On its heels in October 2001 was the Securities and Exchange Commission 21(a) Report entitled the "Statement on the Relationship of Cooperation to Agency Enforcement Decisions" (the so-called "Seaboard Report"). In the Seaboard Report, the SEC announced that no action was being taken against a corporation for fraudulent activities by a former controller of a subsidiary. In making this determination, the SEC stated that the corporation cooperated in the SEC's investigation and did not assert the applicable attorney-client privilege and work product protection. The Report sets forth a number of criteria that the SEC will consider in determining whether and how much to credit cooperation, including the following: "Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered?" By so stating, the SEC was, in our view, encouraging companies to consider not asserting, or waiving, privileges they otherwise might have, even when not requested by the SEC staff.

In 2003, Deputy Attorney General Larry D. Thompson issued a Memorandum to the heads of Department Components and United States Attorneys. Mr. Thompson reiterated the statements from

³ Two members of the Task Force, Loretta E. Lynch, Esq. and Jean I. Walsh, Esq., dissent from the recommendation that the Commentary contain an express statement that waivers of the Privilege not be considered.

the Holder Memorandum about the advantages of seeking waiver, and that the Department of Justice did not consider waiver of the corporation's attorney-client privilege and work product protection an "absolute requirement." He further stated that the willingness of a corporation to waive the Privilege "when necessary to provide timely and complete information" is one factor to consider in evaluating a corporation's cooperation.

In November 2004, the Sentencing Commission added the language to the Commentary to Section 8C2.5 of the Guidelines that is addressed in these comments. That language encourages prosecutors to request that corporations that are criminal targets or defendants waive the Privilege in the hope of a lesser sentence. The amendment, which is close to the language of the Holder and Thompson memoranda, contains the following language:

"Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

Last October, Acting Deputy Attorney General Robert D. McCallum, Jr. issued a memorandum that directed each federal office to establish "a written waiver review process." While one might argue that this is a useful first step, the memorandum allowed each office to make its own guidelines and did not provide for any central review of the waiver request process, and we know of individual offices that still have no meaningful process in place.

In January 2006, the SEC issued a "Statement Concerning Financial Penalties", listing factors it will consider in deciding whether and how to impose financial penalties on a corporation. The two principal considerations set forth by the SEC are the presence or absence of a direct benefit to the corporation from the violation and the degree to which a financial penalty will recompense or further harm the injured shareholders. In addition, the SEC identifies several other factors including the extent of cooperation with the SEC and other law enforcement. Thus, to avoid civil SEC charges, and substantial monetary penalties, a corporation is encouraged to cooperate by, among other things, waiving the Privilege.

The Task Force believes that the Commentary to Section 8C2.5 of the Guidelines, and the foregoing pronouncements by the Department of Justice and the SEC, have brought about a sea change in how attorneys advise their clients when they are faced with possible prosecution and have resulted in a substantial increase in the frequency with which corporate clients have been waiving the Privilege. While one could argue that the increased corporate fraud culture over the past ten years has brought this about, that neither justifies it nor merits its continuation. The attorney-client privilege and work product doctrine are predicated upon jurisprudence which recognizes the critical importance of the confidentiality of communications between client and counsel. An important first step in reversing this sea change would be to amend the Guidelines as proposed herein.

Analysis and Comments

The Attorney-Client Privilege in our Society

The attorney-client privilege is “the oldest of the privileges for confidential communications.”⁴ For centuries, in English and American law, the attorney-client privilege has been firmly grounded in the recognition that a client’s opportunity to consult with counsel, in confidence, serves the public interest.⁵ In the words of Dean John Wigmore, “the privilege appears as unquestioned.”

The attorney-client privilege is expressly recognized in both the Federal Rules of Civil Procedure and the Federal Rules of Evidence.⁶ Except in limited circumstances, absent a knowing and voluntary waiver by the client, no third party, or government authority, can learn the contents of attorney-client communications made for the purpose of obtaining legal advice. The confidentiality of such communications has been protected because of the long-standing consensus that we all are best served when lawyers are able to provide their clients with legal advice based on a full understanding of the relevant facts.

Although the courts have recognized that protecting communications between lawyer and client may hinder the search for truth, the courts have consistently held that this “impairment is outweighed by the social and moral values of confidential consultations. The attorney-client privilege provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow.”⁷ The attorney-client privilege benefits society because it helps create the trust that must exist between client and attorney in order to encourage open and full discussion with counsel. The attorney-client privilege makes it possible for an attorney to obtain the information necessary to prepare an informed defense and to provide clients with the advice they need to comply with the law.

Our laws have become so complex, particularly in the financial, health and securities fields, that it is virtually impossible for a corporation to comply with the law without the advice of counsel that is based on a full communication of the underlying facts by the client. If the client believes that, down the road, it may be required to waive the privilege and make those communications available to others, there is the real risk that, over time, the corporation’s officers and employees will be less willing to seek out legal advice, or they may fail to disclose all the relevant facts for fear that their statements may at a later day be made available to the SEC or prosecutors. In addition, a lawyer may modify his or her advice over concern that it may be subject to second guessing later by others in litigation or overzealous government prosecutors seeking to criminally charge attorneys for purported wrongdoing. The United States Supreme Court stated in Upjohn Co. v. United States, 449 U.S. 383 (1981), that failure to respect the privilege of these communications “threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”

⁴ J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW at 542 (McNaughton rev. 1961).

⁵ See, e.g., WIGMORE, *supra* note 12, §2291, at 545-49.

⁶ See Fed. R. Civ. P. 26(b) (1) and Fed. R. Evid. 502.

⁷ American Law Institute, RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 68. c, at 520 (2000).

This chilling effect upon communications between attorney and client is harmful to society overall, and we believe it a deleterious and unintended effect of the 2004 amendment. It cannot be the goal of the Department of Justice, the SEC, or this Commission to discourage compliance with the law, or the communications by which corporate clients seek out the legal advice they need in order to comply. In order to reach the goal of having clients fully and truthfully communicate with counsel, so that they may be guided in their dealings and compliance with the law, there needs to be a reliable assurance to clients and attorneys of the confidentiality of the communications. Unfortunately, this is no longer the case, in large measure because of the Holder and Thompson memoranda, the SEC Seaboard Report, and the Commission's 2004 Amendment.

The Prevalence of Waiver

When a corporation learns of wrongdoing, it frequently engages counsel to ferret out the facts of what occurred, analyze the applicable law, and advise the corporation. As part of this process, which may or may not be known to government authorities at the time, counsel will usually conduct an investigation, which involves interviewing company employees and reviewing and analyzing documents, and then render advice to the client about what to do to stop or correct any wrongful conduct. Counsel will also advise on whether any laws have been violated, whether the violations are civil or criminal, whether criminal prosecution or civil litigation is likely, and whether the corporation needs to or should disclose the findings and conclusions.

At some point, civil and criminal investigators get involved, and in this current environment, the corporation needs to consider whether to waive the Privilege and disclose attorney-client communications made at the time of the conduct that is under investigation, communications by agents of the corporation with counsel during the investigation, and the notes, memoranda and correspondence written by the attorneys in connection with the investigation. In the experience of the members of our Task Force, this was unheard of a generation ago, and was rarely considered or explored even ten years ago.⁸

The inclusion of the language concerning waiver in the 2004 amendments to the Guidelines has put the waiver issue into "play". While stated in the negative (that waiver of the Privilege should not be a prerequisite to a reduction in culpability score) and providing an exception, the exception unfortunately has become the rule. It is not so much that the Department of Justice, the SEC and other regulators now regularly request a waiver, although a recent survey suggests that the practice is prevalent.⁹ They need not even do so, as the practice of expecting a waiver to occur has

⁸ A further consideration is whether privileged materials may be provided to the government, but not to others such as plaintiffs in class action litigation. There is a body of law that is followed in a majority of the federal circuits which states that if a client waives the privilege or work product protection as to one set of parties, such as a prosecutor or regulatory body, the privilege is waived for at least those same communications and materials for all purposes and all others. See, e.g., *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002); *In Re Syncor Erisa Litigation*, No. CV03-2446-RGKRCX, 2005 WL 1661875 (C.D. Cal. July 6, 2005); *In re Natural Gas Commodity Litigation*, No. 03 Civ. 6186VMAJP, 2005 WL 1457666 (S.D.N.Y. June 21, 2005). Accordingly, advising a client to waive the Privilege so it can cooperate with the Department of Justice and obtain a benefit in sentencing is a challenging task.

⁹ A March 2006 Survey Report by a coalition of organizations, aided by the ABA, had the following findings. About 75% of outside counsel have had to consider the issue of waiver for a client during the last five years, and

become so prevalent, and the benefits of doing so have become so tempting, that corporate counsel are now encouraged to convince their clients to forsake the protections of the Privilege so as to obtain the benefit of being seen as cooperative. The amendment itself, by being included as part of the Guidelines, thus codifies a trend that has accelerated in the last several years. The inevitable effect has been that corporations that do not hasten to waive the Privilege are quickly viewed as hiding something of value behind the Privilege; thus, in practice, there has been an *in terrorem* effect on counsel and their clients who want to cooperate with authorities – they must waive or be deemed uncooperative and engaged in a conspiracy of silence.

The Task Force recognizes that the Department of Justice and SEC pronouncements on cooperation list numerous factors, only one of which is waiver of the Privilege. Moreover, there are times when it may be appropriate for the government, in the interests of justice and in the search for the truth, to request that the Privilege be waived. Target corporations may also sometimes hide behind the Privilege, either improperly or by an over expansive interpretation of its parameters. However, there is no empirical study known to us which proves that law enforcement today is any more effective than, say 20 or 40 years ago—when waiver of the Privilege was rarely done or considered.

High profile cases such as Enron, Adelphia and WorldCom have produced a more diligent and aggressive enforcement program for criminal and civil authorities alike. Now, more than at any other time, there is a coordination of activities by prosecutors and regulators, and parallel investigations and proceedings. This development is expected. The Task Force recognizes the value and need for such programs.

However, the parallel investigations present difficult choices for clients and counsel. Each agency and authority has its own view and guidelines on whether cooperation is expected by a client, how to gauge that cooperation, and whether waiver of the Privilege is a factor considered for cooperation and resolution of the matter. For example, the SEC will consider waiver as a factor of cooperation, but agree in writing that disclosure of privileged communications and work product is only selective and will not be deemed a general waiver as to others. The CFTC has on occasion demanded waiver of privileged communications immediately at the commencement of an investigation, and has refused to give any written comfort that the waiver would be deemed limited. The Guidelines Commentary, however, trumps any nuances of these civil regulators when there are parallel investigations. This is an unfortunate result, and we believe an unintended consequence of the 2004 amendment. An attorney may counsel a client not to waive the Privilege for a civil regulator. However, with the Holder and Thompson memoranda, and the language of the 2004 amendment, with the possibility of criminal charges and sentencing, there is an overriding, almost compulsive, urge to waive. This should not be so, and is exactly the opposite of what the language of the Commentary suggests.

approximately 50% of in-house counsel have had to do so. Over 50% of both groups confirmed that they believed there has been a marked increase in waiver requests by prosecutors. 55% of outside counsel who have represented clients under investigation said that prosecutors had requested waiver, directly or indirectly, as part of cooperation. *The Decline of the Attorney-client Privilege in the Corporate Context* available at <http://www.acca.com/Surveys/attyclient2.pdf>.

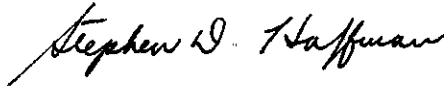
Conclusion

The attorney-client privilege has served the true administration of justice for centuries by protecting confidentiality and promoting the candor that results in accurate fact-finding and effective legal advice. The 2004 amendment language, together with the Holder and Thompson Memoranda and their regulatory progeny, threaten to seriously compromise this ancient privilege to the detriment of the legal system and the society it serves. The exception in the amendment has become the norm.

For this and the reasons cited herein, we urge the Commission to eliminate the 2004 amendment language that encourages a corporation to waive the attorney-client privilege and work product protections to obtain a reduction in sentence under the Guidelines. There should instead be an express statement that waiver of the attorney-client and work product protections is not to be considered in evaluating the level of cooperation of the defendant and its culpability score.

Respectfully submitted,

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Task Force on the Attorney-Client Privilege¹⁰



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¹⁰ While an Assistant U.S. Attorney from the U.S. Attorney's Office for the Eastern District of New York is on the Task Force, she did not participate in drafting the position set forth in this letter, and the letter does not represent her views, the views of her Office or the views of the Department of Justice.