

Corporate Privilege Waivers in Plea Negotiations

The number of recent corporate scandals, the enormous amounts of money involved, the widespread impact on stockholders and employees, and the high visibility of the prosecutions have generated pressure for more effective, aggressive, and severe treatment of corporate crime. One focal point has been corporate attorney-client privilege. Today, federal prosecutors expect corporations to assist the government in uncovering wrongdoing within the corporation by cooperating in a number of ways.

In particular, the U.S. Department of Justice (DOJ) has adopted a policy of favoring corporate cooperation that may include waiver of corporate attorney-client privilege and work product protection as a condition of the government agreeing not to prosecute the corporation, electing to pursue civil penalties rather than criminal prosecution, or giving favorable treatment at sentencing if criminal prosecution is pursued.

A recent study by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers found that nearly 75 percent of the responding lawyers agreed that the government has developed a “culture of waiver” in which it routinely expects that corporations under investigation will broadly waive privilege.

The private bar and some academic commentators have criticized the practice of demanding privilege waivers. This column examines some of its ethical implications both for prosecutors and corporate counsel.

Corporate attorney-client privilege

Corporations, like all clients, are protected by several closely related rules: attorney-client privilege, the work product doctrine, and, under modern lawyer ethics codes, client confidentiality. In deter-

mining the scope of the corporate attorney-client privilege, some jurisdictions use the “control group” test, under which only communications between the corporation’s lawyer and senior managers, who control the corporation’s response to the lawyer’s advice, are privileged. Other jurisdictions use a much broader test under which communications between the corporation’s lawyer and any corporate employee are privileged as long as the subject matter of the communication is within the scope of the employee’s duties and made so that the corporation may obtain legal advice.

Debate about corporate waivers often focuses on noncontrol group communications made to corporation lawyers conducting an investigation at the control group’s behest to determine the scope of potential wrongdoing. But the DOJ guidelines on securing waivers of the corporation’s privilege clearly encompass the waiver of control group communications, though typically exclude communications containing legal opinions or advice by the corporation lawyers conducting the investigation.

Waivers may generate collateral damage from the corporation’s point of view. An increasing number of corporations find that government investigations trigger third-party civil suits. Generally, voluntary disclosure to the government of work product or information protected by attorney-client privilege serves as a waiver of privilege to others. Thus, corporations find it more difficult to defend shareholder suits and derivative actions once privilege is waived. Additionally, waivers and resulting disclosures may generate adverse publicity and have a negative effect on employee morale.

Competence

Competent representation of their clients by both prosecutors and defense counsel requires thorough research of the law and thorough investigation of the facts. In pursuing corporate waivers, federal prosecutors seek to increase the quantity and quality of information they have about corporate wrongdoing in order to better represent the United States. The better the information, the better prosecutors are able to target blameworthy corporations and employees, shield innocent corporations and employees from prosecution, and assess appropriate punishments. From a competence per-

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spective, one might argue that prosecutors are not only ethically permitted but ethically *required* to pursue waivers in cases in which the information available to prosecutors without waiver leaves them uncertain about issues of guilt and punishment.

There are weaknesses in this argument. The prosecution is likely to have alternative means for obtaining information known by a corporation's lawyers. The privilege protects only communications, not underlying information. Prosecutors may be able to obtain the underlying information through interviews with corporate employees, and through use of search warrants and grand jury subpoenas to obtain witness testimony and documents. Prosecutors can also enter into cooperation agreements with corporate employees as a way to obtain information as well as gaining the corporation's cooperation without demanding waiver.

These counterarguments are weakened if the corporation and/or its employees engage in document destruction of the sort undertaken by Enron's auditors, or if corporate employees refuse to talk to investigating agents or testify before a grand jury. In particular, if the corporation seeks to ensure that only its lawyers have a complete picture of the company's wrongdoing as a means of preventing disclosure, it is difficult for the corporation to then complain about having to waive privilege in order to fully disclose wrongdoing and claim credit for cooperation.

Lawyers representing corporations make a similar competence claim against waivers. The classic modern defense of attorney-client privilege, as well as the closely related ethical duty of confidentiality, is that privilege and confidentiality increase the quantity and quality of information to which lawyers have access, which in turn increases the quality of the representation lawyers provide clients. Corporate waivers, it is argued, reduce the quantity and quality of the information to which the corporation's lawyer has access because waivers create a disincentive for employees to reveal, and for lawyers representing corporations to seek out, information about potential wrongdoing. Ironically, waivers of corporate privilege become worthless to the prosecution if the prospect of waiver hinders the corporation's lawyer from receiving the very information the prosecution seeks through the waiver.

But again there are weaknesses in this argument. As with the prosecution, corporations have means other than its lawyers questioning employees to gather information that will be used to represent the company. Lawyers advising the corpora-

tion have access to documents, such as checks, accounting records, and memoranda as well as email, that may discuss questionable conduct. Non-lawyers working within the corporation or as outside auditors can conduct investigations that produce information that its lawyers can use to advise the corporation, making use of the threat of terminating employment based on lack of cooperation as an incentive for full disclosure.

Both prosecutor and corporate counsel, then, can make similar competence arguments in favor of and against waivers of corporate attorney-client privilege in terms of access to information that will help each lawyer better represent his or her client.

Conflict of interest

Conflict of interest is another potential ethical issue implicated by corporate waivers of attorney-client privilege. A lawyer representing a corporation is obligated to serve the interests of the corporation, not the interests of its employees. But senior managers typically control which lawyers the corporation retains to do its work. This fact may create a tension between what is best for the corporation, which may be firing and turning over for prosecution senior managers who have engaged in criminal wrongdoing, and the interests of senior managers in keeping their jobs and avoiding prosecution. This tension, in turn, creates a possible conflict for corporate counsel between serving the interests of the corporation and currying favor with managers who control the lawyer's future employment. Conflict of interest may also arise if the lawyer played any role in the wrongdoing.

One arguable advantage of allowing the prosecution to demand waiver in certain cases is to help reveal any decisions affected by such conflict of interest and create an incentive for corporate lawyers to resist placing their own interests and those of senior managers over the interests of the corporation.

Brother's keeper

Do lawyers have an ethical obligation to preserve, or at least to refrain from undermining, an opposing lawyer's relationship with and representation of the opposing lawyer's client? The anticontact rule appears to reflect such an obligation. And, as we discussed in a previous column, *Brother's Keeper: Must You Protect Opponent's Confidentiality?* (18 (No. 3) CRIM. JUST. 43 (Fall 2003)), suggestions of such an obligation may be found in recent ethics opinions establishing a

lawyer's duty to return, without having read them, documents containing confidential information mistakenly sent to the lawyer by opposing counsel.

Just as the lawyer in the wayward document situation is compelled to act as his or her brother's keeper and refrain from undermining confidentiality between an opposing lawyer and client, the prosecutor could be viewed as having a similar obligation to refrain from undermining an opposing client's rights of confidentiality and privilege. One might argue that seeking waiver is more egregious than reading a misdirected letter or email since the scope of information revealed through waiver is likely to be greater than through a wayward document. In addition, the prosecutor acts purposefully to obtain confidential and privileged information when seeking waiver, while a lawyer who receives a misdirected document does not.

On the other hand, the prosecution might argue that, unlike inadvertent disclosure of confidential information by a lawyer, the decision to waive privilege is consciously made by the corporate client with advice of counsel in order to gain

something of value for the corporation, either freedom from prosecution or reduced liability or sanction. It might also point out that the threat of privilege waiver may help keep in check lawyer conflict of interest and thereby reinforce the corporate lawyer's loyalty to the client.

A compromise

One compromise solution to the corporate waiver issue is to allow the prosecution to demand waivers, but ensure that such waivers are used sparingly. Sparing use of waiver reduces the chances that waiver will seriously hinder corporate counsel in representing their clients. It also preserves the value of waivers for the prosecution. Despite the mounting critique of and opposition to prosecution policies requiring waivers, there is no indication that this or any other compromise is in sight.

Editor's Note: For more on this topic, see *Corporate Deferred Prosecution Agreements* on page 36.