CHAPTER 1

An Overview of the Attorney-Client Privilege When the Client Is a Corporation

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I. Introduction

Then Deputy Attorney General Larry D. Thompson released the “Principles of Federal Prosecution of Business Organizations”\(^1\) (the Thompson memo) on January 23, 2003, generating a maelstrom of controversy. In the memo, Thompson instructed federal prosecutors to consider various factors when determining whether to reach a favorable plea agreement with corporations under investigation. Among those factors was a corporation’s willingness to waive the attorney-client privilege and work-product doctrine protection if deemed necessary by the Justice Department. Other federal agencies followed, announcing that they too would implement similar policies. The American Bar Association and other corporate and professional groups lamented this assault on the “sanctity” of the attorney-client privilege.

Thompson’s memo was the Justice Department’s prevailing policy until late 2006. At that time, Deputy Attorney General Paul McNulty announced a policy change in a meeting of the Lawyers for Civil Justice. McNulty’s comments were followed by the release of a highly publicized memo, “Principles of Federal Prosecution of Business Organizations,”\(^2\) that superseded and replaced the Thompson memo.\(^2\) Subsequent deputy attorneys general, including Mark Filip, issued similar memos, emphasizing that “waiving the attorney-client and work-product protections has never been a prerequisite . . . for a corporation to be viewed as cooperative.”\(^3\) Under Filip’s leadership, the department revised its policies so that a corporation may voluntarily share information protected by the attorney-client privilege or work-product doctrine, but prosecutors may not ask for such waivers.\(^4\)

Although significant, Thompson’s memo had no effect on the substantive law of privilege; at bottom, the memo articulated a federal agency’s policy regarding the circumstances under which a corporation might receive a more favorable disposition in a governmental investigation. Also, the memo was limited to attorneys representing entities being investigated for violating federal law. Far more important to the law of attorney-client privilege and work-product protection is the effect of legislation and court decisions interpreting the scope of these privileges and protections.

This chapter presents an overview of federal and state law regarding the attorney-client privilege as an evidentiary privilege and the procedures that relate to it, especially as they apply to communications by attorneys representing corporations. Frequently, attorney-client-privileged communications also are protected by the attorney work-product doctrine, which is best known as
a rule of civil procedure, and by the attorney’s ethical duty to maintain confidentiality as to information related to representation of a client.

The attorney-client privilege is generally recognized as one of the oldest evidentiary privileges in Anglo-American law. The intended purpose of the attorney-client privilege is to promote the free flow of information between attorneys and their clients by removing the fear that the details of their communications will be disclosed to outsiders. This privilege rests on the presumption that an attorney can render accurate advice only if the client fully discloses all the relevant facts. The client is encouraged, therefore, to provide complete disclosure, even as to facts that, if disclosed, could adversely affect the client’s legal position. After all, it is frequently the most harmful information that the attorney needs in order to provide the best legal advice to a client.

The attorney-client privilege can restrict or totally preclude certain communications from being discovered or admitted into evidence. For this reason, the privilege runs afoul of the general premise that every person is obligated to offer information he or she has about an issue before the courts. This general duty to disclose information is regarded as nearly sacrosanct. One important commentator on evidence, Wigmore, recognized this fact and commented as follows:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

Nor was Professor Wigmore alone in his view that a rule that exempts some information from evidence should be narrowly construed. As one court put the matter:

[The attorney-client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

Many of the situations selected for inclusion in this chapter involve the assertion of attorney-client privilege by corporate in-house or general counsel, as well as by attorneys representing corporations. As will be discussed, the privilege presents special problems in the context of corporations, especially when asserted by in-house counsel. Although every American court
recognizes that in-house counsel qualify for the privilege, many courts require in-house attorneys to clear a high bar before they can successfully assert the attorney-client privilege. While this position may not be legally warranted, it is nevertheless the attitude of courts, which are typically suspicious of the role that in-house counsel play in a corporation, especially given the many nonlegal assignments that in-house lawyers perform. Further, a court’s approach in resolving a corporation’s attorney-client privilege issues must be considered in light of the courts’ liberal interpretation of discovery rules and the narrow interpretation to which the attorney-client privilege is generally subject.

II. The Attorney-Client Privilege: First Principles

The attorney-client privilege is an evidentiary rule designed to encourage (by protecting) the free flow of information between an attorney and his or her client. The privilege is traditionally and historically a product of the common law, but it has been codified in many jurisdictions across the country. In some states, the attorney-client privilege statute merely restates the common law. Other states, including Arizona and Texas, have codified the privilege in detail, specifically setting forth not only the privilege but also many of the procedural rules regarding its use. Some states have also anticipated and addressed questions on how to interpret the privilege.

The basic definition of the attorney-client privilege is fairly simple. Rule 503(b) of the Texas Rules of Evidence provides a good working definition of the privilege: “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . . .”

The assumption underlying the privilege is that our legal system is more civilized and efficient because we recognize the attorney-client privilege. Many believe that, if courts do not broadly interpret and enforce the privilege, the legal system will suffer, as clients will have to determine whether confidential disclosures to their attorney could be revealed to a party with opposing legal interests. Undoubtedly, this risk could “chill” full disclosure, causing a client to withhold important facts from the attorney. As a result, the attorney runs the risk of rendering incomplete and, perhaps, incorrect legal advice. It is believed that our adversarial legal system can encourage full disclosure only by eliminating the fear that the communication will be disclosed by the attorney and then used against the client. The attorney-client privilege helps achieve this end.

The free flow of uncensored information between an attorney and client is as important within a corporation as it is between the corporation and outside counsel. In-house counsel owe a duty to their client—the corporation. And like outside counsel, in-house counsel can perform that duty only with full knowledge of the information available to the client. It is important to understand the