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ETHICAL ISSUES FOR TRANSACTIONAL LAWYERS

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I. INTRODUCTION

Recent developments have significantly affected the traditional privileged relationship between transactional counsel and their clients. These developments have created new challenges for counsel charged with the ethical duty and professional responsibility of safeguarding client confidences and preserving the attorney-client privilege. First, of general application is the growing trend of government regulators, outside auditors and the courts to chip away at privilege protections that were previously considered sacrosanct. Second, as American companies conduct an increasing volume of business overseas, transactional counsel must understand the implications of that business for the attorney-client relationship. Of paramount concern for counsel from an ethical and professional responsibility perspective, is whether the client's expectation of confidentiality remains intact whether the representation in entirely in the United States or involves international contact. This article addresses general privilege principles in the American legal system, common issues faced by counsel in preserving client privilege, the treatment by American courts of attorney-client communications occurring elsewhere, and the privilege issues in international arbitration or foreign courts.

II. PROTECTING CLIENTS AGAINST THE LOSS OF PRIVILEGE PROTECTION

A. ABA Efforts to Thwart Privilege Extinction

Most clients assume when they confer with counsel that the substance of those communications are subject to the attorney-client privilege and must be kept confidential. In today's legal environment, that is not a safe assumption, particularly for corporate clients. The stable foundation that attorney-client privilege and the work product doctrine historically provided for counsel client relationships has been challenged by judicial review, prosecutorial vigor, and auditor persistence. Each of these forces threatens the continued viability of a fundamental aspect of our legal system, and jeopardizes the counsel's ability to uncover information vital to providing sound legal advice. When counsel represents clients in transactions where involving participants outside the United States, these challenges compound. Just as preservationists rally to protect endangered species from extinction, the business and legal communities have rallied to protect the attorney-client privilege and work product doctrine against these

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encroachments, which threaten the foundation of the lawyer-client relationship. Recognizing the urgency of this problem, the American Bar Association ("ABA") has been confronting it squarely and lobbying actively for preservation of the privilege. On August 9, 2005, the ABA House of Delegates adopted a Resolution affirming the profession's commitment to preserving the attorney-client privilege and work product doctrine and condemning government policies that seek waiver of client confidentiality in exchange for favorable treatment ("Resolution"). The Resolution was based upon the recommendations contained in the Report of the ABA Task Force on the Attorney-Client Privilege ("Task Force"), issued May 18, 2005 ("Report"). The ABA created the Task Force in September 2004 to assess the status of privilege and work-product issues, study the forces that challenge the viability of attorney-client confidentiality, and propose policies to reconcile the competing interests between clients' need to preserve confidentiality and others' need for the information. Interested readers can find the Resolution and Report at http://www.abanet.org/poladv/report111.pdf.

In August 2006, the Task Force issued a further report addressing the government's position on corporate cooperation with investigations in exchange for leniency. Of greatest concern to the Task Force has been the government's position that a corporate client may not be cooperating fully if it does one of several things. These include: (1) provides counsel to an employee or pays the employees legal expenses; (2) enters a joint defense and/or information sharing agreement with employees or collaborates with them in defense of the matters under investigation; (3) shares information with employees; and (4) fails to sanction or fire an employee who invokes the Fifth Amendment privilege against self-incrimination in response to the government. At least one court has condemned the government's interfering with a company's provision of legal counsel to its employees. See *United States v. Stein*, No. S1 05 Crim. 0888 (LAK) (June 26, 2006). At the August 2006 Annual ABA Meeting, the House of Delegates unanimously approved two resolutions which ins essence: (1) supported preservation of attorney-client privilege and work product doctrine in connection with audits of company financial statements (302A); and (2) opposing government practices that erode constitutional and other legal rights of corporate clients and their employees, officers and directors (302B). Readers can find the August 2006 Task Force Report that accompanied Resolution 302B at http://www.abanet.org/media/docs/302Brevised.pdf.

The Task Force remains particularly alarmed by prosecutors' demands that corporations waive the privilege in the name of "full cooperation" with government investigations. That trend, coupled with outside auditors' insistence that companies turn over privileged information as part of the audit process, is insidious. As these forces encroach upon the expectation of confidentiality, institutional clients and their employees face an untenable choice. Corporations can remain tight-lipped and face harsher penalties or they can disclose selectively subjecting themselves to unfettered access by private litigants. Fear of prosecutorial duress and forced auditor access will inevitably have a muzzling effect on lawyer-client dialogue.

Prosecutorial vigor and auditor vigilance may undermine the very result the so-called "truth seekers" pursue. Rather than leading to the truth, the evisceration of privilege, and

the interference with corporate/employee cooperation will stifle frankness with counsel that is critical to competent advice and consequential legal compliance. Recognizing the gravity of these tactics and the harsh impact on effective legal representation, the ABA took further action. On August 15, 2005, the ABA submitted a comment letter to the United States Sentencing Commission urging the Commission to retract the November 2004 revisions to the Federal Sentencing Guidelines that encouraged the government to coerce entities to forego privilege and work product protection as a demonstration of their cooperation with investigations. The comment letter can be found at http://www.abanet.org/poladv/commentlettertoussc.pdf. With corporate attorney-client confidentiality under siege, it is critical for transactional counsel to appreciate the principles underlying privilege in order to advise corporate clients effectively well before a problem arises.

B. Attorney-Client Privilege in the Corporate Context

Attorney-client privilege is an evidentiary rule that protects the client from compelled disclosure of confidential communications with legal counsel, where such communications occur to obtain legal advice. Similarly, the work product doctrine protects from compelled disclosure materials prepared by counsel in anticipation of litigation or for trial. Issues about the applicability of attorney-client privilege and work-product generally arise in litigation when an adversary seeks disclosure of confidential information. The party seeking to safeguard its secrets bears the burden of establishing that the privilege exempts information from involuntary disclosure. These issues arise as well in connection with government investigations of alleged corporate misconduct. Prosecutors are using the specter of severe penalties as leverage to induce corporations to waive the privilege in exchange for leniency. Specifically, under United States Department of Justice policies and federal Sentencing Guidelines, the government takes into account, as indicia of an organization's cooperation, its willingness to forego privilege protection and to produce confidential and work product materials. A corporation's willingness to waive attorney-client privilege can affect whether it faces indictment at all and, if so, the opportunities for plea agreements and substantial penalty reduction. (For background, *see* www.abanet.org/buslaw/attorney-client/materials/012/012.pdf.)

The United States Supreme Court has recognized that privilege protection applies to corporations and that the parameters of privilege in that context must be clear. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Court reasoned that otherwise attorneys would be hamstrung in their efforts to obtain information from corporate employees essential to providing competent advice. Rejecting the Sixth Circuit Court of Appeals' confinement of corporate privilege to communications with a "control group" responsible to directing a company's conduct based upon legal advice, the Supreme Court acknowledged the need to apply the shield to a broader group. The *Upjohn* Court noted the integral relationship between privilege and law abidance. A "narrow scope . . . not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's conduct conforms to law." 449 U.S. at 392.

Since *Upjohn*, courts have gradually whittled away at corporate-counsel confidentiality. Judges have scrutinized the corporate invocation of privilege and have identified exceptions. For example, if counsel engages in a broad discussion with clients, courts may carve out the business aspects from the scope of privilege protection and compel their disclosure. More troubling is the possibility that, when legal and business discussions intertwine, courts will treat the entire discussion as beyond the bounds of privilege. (*See*, Task Force Report at p. 3 and citations therein.) Recently, other forces have outpaced judicial paring of privilege, which are the focus of the Task Force's efforts.

Corporate actions often stimulate both government and private action; clients may be defending on two fronts – civil and criminal. Revelation of confidential information to authorities in exchange for lesser penalties may subject the corporation to serious consequences on the private side. It is well-settled that voluntary disclosure to the government waives as to the information disclosed. *See* Report at p. 12. Courts have taken inconsistent positions, however, on the extent of the waiver. The Sixth Circuit, in particular, takes a stringent view, rejecting the concept of "selective waiver." Even when disclosure is made pursuant to a confidentiality agreement, the Sixth Circuit has treated provision of privileged information or work product as a waiver as to all communications relating to the same subject matter. *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). Other courts have viewed the situation more favorably for corporate confessors. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (holding that disclosure of privileged information to government was limited waiver applicable only to material disclosed, but not as to all attorney-client communications as to the same subject); *In re Steinhardt Partners*, 9 F.3d 230 (2nd Cir. 1993) (holding that corporate disclosure of attorney work product to government pursuant to confidentiality agreement did not constitute a waiver). In making these assessments, courts weigh the benefit of sustaining confidentiality against the desirability of exposing the truth.

Independent auditors are also demanding that corporations share confidential information to assure that corporations fairly present their financial information. Again, courts diverge in their analysis of the impact when privileged documents or work product are shared in the audit process. Some courts treat those disclosures as voluntary waivers. *See, e.g., In re Pfizer Inc. Securities Litigation*, 1993 U.S. Dist. LEXIS 18215*22 (S.D.N.Y. 1993) (waiver as to otherwise privileged documents provided to public auditors); *Medinol, Ltd. V. Boston Scientific Corp.*, 214 F.R.D. 113, 115 (S.D.N.Y. 2002) (waiver as to attorney work product shared with outside auditors because the "auditor's interests were not necessarily aligned with the interests of the company"). In contrast, others conclude that sharing work product does not expose corporations to wholesale waiver, recognizing that auditors are not adversarial with businesses "insofar as they both seek to prevent, detect and root out corporate fraud," *Merrill Lynch & Co. v. Allegheny Energy, Inc*., 2004 U.S. Dist. LEXIS 21543 (S.D.N.Y. Oct. 22, 2004).

Particularly when applied to internal corporate communications, courts contour privilege to balance competing objectives. Privilege advocates urge that candor with counsel facilitates effective legal representation, which promotes adherence to the law. Lawyers cannot reasonably expect corporate representatives to be open if they fear their conversations will be shared with others outside the organization, particularly with prosecutors. Without unfettered dialogue, counsel cannot elicit sufficient information to ferret out potential wrongdoing and to guide clients towards law abidance. Plainly, the more truthful information counsel acquires, the better equipped the lawyer is to advise wisely. "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." *Upjohn*, 449 U.S. at 389.

The principle objection to preserving privilege is society's interest in preventing wrongdoers from hiding relevant information. As corporate scandals dominate the media, public interest in punishing fraud takes precedence. While the legal community fights to preserve the privilege, law enforcement argues that the threat of compelled disclosure of corporate wrongdoing will increase legal compliance. With the crime-fraud exception to privilege already established under *United States v. Zolin*, 491 U.S. 554 (1989), privilege does not embrace communications with counsel in furtherance of future wrongdoing. Thus, the objection to privilege affects communications for furthering good behavior, rather than bad, or correcting prior misconduct. Absent an expectation of privilege, corporate representatives will be reluctant to confide to solicit sound advice towards these good ends. In these uncertain times, counsel faces greater challenges advising clients, and there are no easy answers.

However, there are some concrete steps a transactional counsel can do when the deal is negotiated and documented that can make a difference later. Care should be taken to circumscribe who has access to privileged information. Key employees should be reminded that the privilege is the entity's not the individual's. Anything share with counsel can be shared with the company client. Counsel should implement protocols to assure that everyone involved on your side cleans drafts for metadata before circulation so that the other side does not have access to your comments, concerns, revisions, thought processes, etc.

III. REPRESENTING CLIENTS ACROSS BORDERS

There are many issues to consider when handling a transaction for a client overseas or involving parties abroad. One area that transactional counsel may overlook is the extent to which attorney-client privilege and work product doctrine apply to communications during the negotiation and drafting of the deal documents and the extent to which this may create issues if a dispute arises later. To a great degree, these issues will at first depend on the forum in which the dispute is heard. However, most forums will look to the law of the site where the counsel gives legal advice to ascertain whether the client had a reasonable expectation that privilege or a similar doctrine would protect confidential communications with counsel for obtaining legal advice.

A. Privilege Asserted by United States Counsel in Litigation here

There are at least three privilege situations that can arise in the United States when litigation or a government investigation commences relating to a cross-boarders transaction. These include seeking to protect foreign in-house counsel communications with (1) business people in the Unites States; (2) business people in foreign countries; (3) their outside foreign counsel.

These three scenarios involve an analysis as to whether the client is domestic or foreign and whether the communication it is related to litigation in the US or some other country. We find guidance from cases involving litigation over foreign patents. Those cases stand for the general proposition that "any communications touching base with the United States will be governed by the federal discovery rules while any communications relating to matters solely involving [a foreign country] will be governed by the applicable foreign statute." *Golden Trade et al. v. Lee Apprel Company et al.*, 143 F.R.D. 514, 520 (S.D. N.Y. 1992) (finding that the laws of Norway, Germany and Israel should govern the confidentiality of communications between a non-party Italian company and patent agents in Norway, Germany and Israel, noting that "these countries have the predominant interest in whether those communications should remain confidential").

The Court in *Golden Trade* as a matter of comity looked to the law of those jurisdictions to determine whether the privilege applied. The predominant interest is the place where the attorney and client entered the privileged relationship or the place in which the relationship was entered at the time the communication was sent. *Id.* at 521-22. *See also Astra Aktiebolag et al. v Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D. N.Y. 2002) ("Where, as here, alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, this court defers to the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.").

The same principles of comity were followed in *Eisai Ltd. v. Dr. Reddy's Laboratories, Inc. et al.*, 406 F. Supp. 2d 341 (S.D. N.Y. 2005). There, the court looked to Japanese law to determine whether the US court should recognize a privilege in documents reflecting legal advice provided by Japanese legal professional known as *benrishi.* Applying Japanese law as a matter of comity, which accorded the privilege to *benrishi*-client communications, the court found the documents to be protected by the attorney-client privilege.

If the foreign jurisdiction recognizes that an in-house counsel's communications with his or her client for legal purposes are protected, then American courts will also respect that privilege. Therefore, with respect to the three scenarios listed above, if privilege is recognized by a foreign court, in all likelihood the American court will, in the interests of comity, apply the privilege in litigation pending in the US. The key remains whether the party seeking legal advice abroad had a reasonable expectation of such protection in the place where the party sought the advice.

B. Privilege in International Arbitration or Another Country's Forum

Most foreign jurisdictions recognize some form of protection for communication between attorney and client as a necessary prerequisite to fostering candor with counsel essential to the provision of effective legal advice. However, the scope of the privilege and the circumstances that may give rise to a waiver many vary from one country to another. In addition, further complications can arise in an international arbitration where the participants and arbitrators are in different places with different traditions. In the United Kingdom, for example, which is a common law country, the "legal advice doctrine" protects as privileged confidential communications between solicitors and clients seeking legal advice. As in the Untied States, the client controls the privilege and is the one who must consent to disclosure of protected communications. Three Rivers DC v. Bank or England (No. 6) [2004] UKHL 48, ¶ 34 (Scott LJ) ("legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.") The privilege applies to communications with in house lawyers as long as the lawyer is providing legal counsel, not merely business advice. This also extends to advice given by foreign lawyers to clients in the United Kingdom. Not all foreign jurisdictions take such a broad view to embrace foreign counsel. The United Kingdom also has a "litigation privilege doctrine" akin to our work product doctrine. It applies provided there is a reasonable likelihood of litigation.

In a civil law system there is also recognition of a legal professional secrets doctrine in attorney-client communications in connection with the provision of legal advice. In civil law systems, this is a duty imposed on the attorney entrusted with the confidences. In these systems, generally there is less respect for privilege in communications between in house counsel and their company clients.

Finally, in legal systems that show less respect for individual rights, there is usually less regard for privilege especially if the invocation of privilege interferes with perceived government interests.

Transactional counsel should consider these issues upfront. It is prudent to affiliate with foreign counsel and obtain an opinion as to privilege principles in that jurisdiction. Make sure the counsel and clients stateside and abroad understand the applicable privilege doctrines. Evaluate the competing privilege doctrines and consider these issues in drafting dispute resolution, choice of law and venue provisions. Specify what privilege principles will control if a dispute arises between the parties under the agreement.

V. SUGGESTIONS

What can a company and its counsel do in the course of a transactional representation to protect confidential communications from involuntary compelled disclosure later?

Some practice pointers:

- Promote a corporate environment that demands legal compliance from the top down so that the client is less likely to face government investigations or private suits for alleged wrongdoing.

- Clarify to clients up-front that privilege does not apply to all communications with counsel, but only to confidential communications made to obtain legal advice.

- Distinguish between communications addressing legal matters and business matters, and use a clear legend to identify privileged information. If practical, maintain separate files for business matters.

- Limit access to confidential counsel communications to those who need to know.

- Alert clients to the long-term implications of disclosing confidential information to government authorities in exchange for short-term leniency. These include a potential waiver for civil matters and damage to the relationship between the client entity and its employees.

- Make sure employees understand that the company is the client and controls the privilege and the waiver rights.

- Engage local counsel at the outset for advice on the forum's privilege rules.

- Include provisions in the transaction documents specifying dispute resolution procedures, forum for dispute resolution, and governing law on substantive, procedural and privilege protection/waiver issues.

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