Opening Statement

Corporate Responsibility: The Lawyer's Role

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When I left the U.S. Attorney's Office 25 years ago, I thought I was done as an investigator. Wrong! Within just a few years, like other lawyers around the country, I was back in the business—this time not as a prosecutor but as an outside lawyer hired by companies to investigate allegations of internal misconduct.

Since then, I've handled more than a hundred internal investigations. Because, like other lawyers, I've handled these investigations as counsel for the company or its board of directors, my confidential communications with my client and my work product were protected by the attorney-client privilege and the attorney work-product doctrine. Interacting with government lawyers in many, if not most, of those investigations, I've seen firsthand the tensions that can arise between the government and a company asserting privilege in connection with its internal investigation.

Almost a quarter-century ago, in the midst of an internal investigation, one of the company's senior executives was subpoenaed to testify before a congressional committee. I was one of a dozen outside lawyers meeting with the executive to talk about the congressional hearing. Someone set out the plan: The lawyers would conduct an internal investigation and prepare briefing books for the executive; he would review them and take them with him to help answer questions. With less trepidation than would have been prudent, I raised the issue that has bedeviled the profession ever since: The briefing books would be privileged and the congressional committee, which had shown no respect for the attorney-client privilege, would demand them. Would we be willing to assert, and then litigate, the privilege?

"Are you recommending," the executive asked me with some heat, "that I testify under oath before Congress without any notes?"

"Yes," I replied, finally feeling the appropriate trepidation.

A hush fell over the room. The executive paced from one end to the other. He stopped, turned to face me, and shouted, "**** you!"

I thought my career was over. Then he burst out laughing. When he testified before Congress, he did so without a single briefing book.

I tell this story only to emphasize that tensions between the government and companies over the attorney-client privilege in internal investigations have been around for quite some time. The choices those tensions create can be hard, with reason on all sides.

These tensions have only increased over the past 20 years, as the government has increasingly come to view internal investigations as an important management tool for uncovering misconduct, weeding out wrongdoers, and promoting remedial action. In the wake of scandals in the mid-1980s in the defense, savings and loan, and investment banking industries, many companies turned to lawyers for critical assistance in cleaning up legal and ethical compliance problems. The role of lawyers in corporate management increased; more lawyers were added to corporate boards of directors; legal budgets grew—all in an effort to promote compliance.

As part of this broader sea change, companies retained lawyers to conduct internal investigations that previously had not been conducted at all or had been conducted by in-house security or human resources personnel.

The advantages of increasing lawyers' roles in internal investigations were plain. Experienced lawyers combined the fact-finding skills of investigators with the legal expertise needed to spot possible illegalities and assess potential liability. Having lawyers in charge eliminated the need for separating the learning of facts from the analysis of legal implications. Understanding the law helps an investigator know what facts to look for and how seemingly inconsequential facts

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may turn out to be important. In an often fast-moving investigation, counsel involved in it were in the best position to advise the company on critical issues—like what should be done to fix past and perhaps current compliance problems, to deal appropriately with interested government agencies, and to assure legal compliance in the future.

The Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), greatly facilitated the lawyer's role in these investigations, by applying the attorney-client privilege to protect the lawyers' interviews of company employees. This encouraged employees and officers alike to speak candidly with the lawyers about both the underlying facts and the ongoing legal obligations.

By the early 1990s, the enhanced role of lawyers was generally praised, both at the corporate level and within regulatory agencies. Lawyers set up compliance programs in many companies to satisfy the requirements of the Federal Sentencing Guidelines and to help ensure that companies were more proactive in self-policing. In the past, many companies had conducted internal investigations only in response to lawsuits or law enforcement subpoenas; now, companies initiated their own investigations to fix problems before facing outside accusations. At many companies, lawyers (both inside and out) helped forge cooperative relationships with the Securities and Exchange Commission (SEC), the Justice Department (DOJ), and other regulatory agencies.

Many companies cooperating with government agencies were confronted with the question whether they would waive privilege to turn over their lawyers' witness interviews and other work product from their own internal investigations. Anecdotal evidence suggests that most companies refused to waive privilege and instead tried to demonstrate their cooperation by producing documents, making witnesses available for interviews, and discussing with the government the factual and legal issues presented by the case.

One notable exception took place during the government's investigation of Salomon Brothers' Treasury bond desk in the early 1990s. In that case, the investment genius Warren Buffett became the interim chairman of Salomon, took charge of the company's responses to the government's investigation, and decided to waive privilege and produce to the DOJ and the SEC virtually the entire file of the company's outside lawyers, who initially had been retained to conduct the company's internal investigation. Salomon avoided criminal indictment and successfully settled all the government's civil charges.

Overall, the record of corporate compliance was better in the 1990s than in the late 1980s. Some observers attributed this success to the heightened roles lawyers had assumed within many American corporations.

Then the country was rocked by corporate scandals at Enron, MCI/WorldCom, Tyco, and other previously unscathed companies. As thousands of investors lost their savings, many observers asked, with good reason, "Where were the lawyers? Why didn't they stop this?"

There are no easy, or one-size-fits-all, answers to these questions. In some cases, lawyers were as much victims as were innocent shareholders and employees. In other cases, lawyers gave correct legal advice but, feeling restricted by their own obligations to maintain confidentiality, stood by quietly as company executives disregarded it. In a few cases, unfortunately, lawyers themselves participated in the scandals—out of greed, misplaced loyalty, or, sometimes, simple stupidity.

The immediate consequences of these recent scandals have been far-reaching. Major companies have filed for bankruptcy; corporate executives have been carted off to jail; and thousands of investors have filed multibillion-dollar lawsuits against those executives and their financial advisors.

Lawyers have not been immune. Law firms have been embroiled in massive civil litigation; and individual lawyers have been criminally charged and even convicted.

And yet, for good reason, we continue to turn to the legal profession to prevent these abuses. In 2002, Congress passed the Sarbanes-Oxley Act, dramatically expanding the duties of corporate officers and directors, requiring a host of new reports and disclosures, and imposing new responsibilities on lawyers. Together with rules enacted by the SEC, Sarbanes-Oxley requires lawyers to report evidence of certain violations to the company's most senior legal officer and, if an appropriate response is not forthcoming, to report the evidence to the audit committee or the full board of directors. In effect, the Act empowers lawyers by making clear they may not take no for an answer.

In January 2001, even before Sarbanes-Oxley, the DOJ had issued a set of guidelines designed to measure a corporation's cooperation in a government investigation and, in the process, to determine whether a corporation should be criminally prosecuted for the misdeeds of its employees. In one now controversial passage, the so-called Thompson memo (named after its author, then Deputy Attorney General Larry Thompson), provided:

> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protection, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel.

This provision, albeit stated as a narrow exception, generated considerable alarm and uncertainty. According to many corporate attorneys, many federal prosecutors began routinely insisting that companies broadly waive privilege and disclose the results of their internal investigations, including their lawyers' interview memoranda, in order to avoid criminal prosecution.

This practice could have a number of chilling consequences, undermining the role of counsel in critical compliance issues. Many fear that employees either will not be candid in internal investigations or will refuse altogether to be interviewed. Worse yet, some companies could decide not even to launch their own investigations of alleged misconduct, or to keep counsel out of the loop on critical issues. Such consequences could turn the clock back a quarter-century, undoing many of the advances in corporate compliance facilitated by lawyers' internal investigations.

The Thompson memo and most prosecutors I have had the privilege to work with recognize the vital role lawyers have assumed in corporate compliance and in the internal investigations that are so crucial to such compliance. Lawyers must be in a position to discover misconduct so that they can then advise the company to take

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appropriate remedial action, directed to both the past and the future. Wrongdoers should be fired, accounting problems should be corrected, and any monies wrongfully obtained should be repaid. Indeed, Sarbanes-Oxley seeks to make counsel legally responsible if certain of these remedial steps are not taken, in order to assure that the lawyer will use counsel's advisory mandate to influence corporate behavior. Lawyers cannot perform this role if company employees do not give them the unvarnished facts.

How would erosion of the privilege affect reporting the problem to the government? In many cases, proper corporate compliance requires disclosing to the DOJ, the SEC, or other appropriate agency the facts uncovered in the internal investigation. If a company employee or office has broken the law, the company is just as interested as the government in seeing that employee held accountable. In the long term, company and government interest in deterrence are the same.

That doesn't mean, however, that the company must be forced to waive its privileges as a litmus test of its willingness to cooperate with the government. Indeed, the practice is counterproductive, reducing the likelihood that counsel will ever learn of the critical evidence that needs to be disclosed to the government. Not only do such coerced waivers run the risk of chilling the candor so important to internal investigations, they also unfairly increase companies' exposure in shareholder derivative lawsuits and other civil litigation where the companies are otherwise as entitled as any other litigant to assert privilege.

The ever-increasing responsibility of lawyers is a good thing in our society, and good lawyers will rise to the responsibility. The company lawyer's basic obligation is to ensure that the company does the right thing based on the facts—often including disclosure *of those facts*. Insisting that a lawyer disclose not only the facts but also privileged communications with the client is self-defeating.

Companies can and should be permitted to demonstrate cooperation with government investigations by doing the many things that do not involve privilege waivers—by identifying and explaining the significance of key facts; identifying responsible employees and officers; identifying witnesses with knowledge of the facts; producing those witnesses for interviews; identifying, producing, and explaining the key documents; and describing (much like a proper response to a civil interrogatory) how the evidence bears upon the factual or legal issues under investigation. None of these steps requires, or should be viewed by the government or the courts as constituting, a waiver of the company's privileges.

On occasion—especially where a company obtained contemporaneous legal advice in connection with the transaction at issue—a company may choose voluntarily to waive the privilege, and that decision may be relevant to assessing the company's good faith. But coercing a company to waive privilege is ultimately unnecessary and fraught with potential problems that work to defeat the value of increasing the role of lawyers in corporate legal compliance. Companies and the government should work together to police misconduct and to punish wrongdoers, while at the same time preserving the attorney-client privilege that performs such a vital function in an effective legal compliance program.

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