Rosenfeld On Ethics

Attorney-Client Privilege: Waiver By Disclosure To The Government

By Arnold R. Rosenfeld

This is another in a series of columns dealing with attorney-client privilege, work-product protection and lawyer-client confidentiality.

Substantial controversy regarding the waiver of privilege or work product by disclosure to the government has arisen because agencies of the federal government (such as the Department of Justice, its local office, the U.S. Attorney's Office, the Securities and Exchange Commission and the Internal Revenue Service) have adopted policies for dealing with corporate wrongdoing that either encourages or pressures — depending upon one's viewpoint — corporations that allegedly are violating the law or federal regulation, to disclose attorney-client privilege and work-product information in order to either avoid or mitigate criminal charges and reach civil settlements.

This article will examine some of the legal concerns that disclosure has wrought.

'Upjohn'

When a corporation either suspects or learns that there has been wrongdoing by corporate officers or employees that might violate the law or federal regulation, or that it may be under scrutiny by the DOJ, USAO, SEC or IRS, often one of its first reactions is to engage a law firm to undertake an internal investigation to obtain the facts and to seek legal advice as to what steps might be taken to minimize corporate and/or individual criminal or civil liability.

The benefit of an internal investigation is that it is protected by attorney-client privilege and work product if done properly. In fact, the Upjohn case,1 in which the U.S. Supreme Court sets out the parameters of corporate attorney-client privilege and work product, was exactly that type of situation.

Upjohn (a pharmaceutical company) had learned that someone in the company may have bribed foreign officials in order to obtain a contract. It hired a law firm first to investigate factual circumstances, and to offer it legal advice regarding whether it was in its best interests to report some or all the information it learned, via the internal investigation, to the SEC and IRS.

When the IRS sought access to the lawyers' notes from the internal investigation, Upjohn claimed attorney-client privilege and work product protection. The U.S. Supreme Court held that Upjohn's internal investigation, including the lawyers' notes from interviews with all its employees, was protected by attorney-client privilege and the notes from interviews with the non-employees and the lawyers' preparation for litigation, by work-product protection.
When governmental investigators express interest in possible corporate wrongdoing, given the potential ramifications of criminal or civil liability, it often is perceived by corporations and their legal advisors that cooperation with the governmental investigators is in the corporate best interest, especially considering DOJ, SEC and IRS policies encouraging early disclosure of wrongdoing.

For example, in 2003, then-Deputy Attorney General Larry D. Thompson issued a memorandum (the "Thompson Memorandum") that included nine factors to be considered by the DOJ in determining whether to criminally charge a corporation.

Among those factors are "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."

In fact, the Thompson Memorandum goes on to state that prosecutors should weigh the completeness of corporate disclosure "both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel." This is not a new concept, having been in effect, although less explicitly, since at least 1980.

In 1991, in the case of *Westinghouse Electric v. Republic of the Philippines*, Westinghouse, an employee of which allegedly bribed an official of the Philippines in order to obtain a multi-million-dollar contract, disclosed the results of its internal investigation to both the SEC and DOJ under confidentiality agreements, in order to mitigate whatever penalties might be assessed against it by the government.

When the Republic of the Philippines sued Westinghouse civilly and sought discovery of its internal investigation, Westinghouse claimed attorney-client privilege and work-product protection. The 3rd Circuit held that the disclosure to the SEC and DOJ, even though pursuant to a confidentiality agreement, constituted a waiver.

'MIT'

More recently, in virtually every circuit, other permutations of disclosure to the government also have been held to be waivers.

In a somewhat controversial decision, *U.S. v. Massachusetts Institute of Technology*, the 1st Circuit held that where MIT had previously disclosed privileged documents under a confidentiality agreement to the Defense Contract Audit Agency, which had refused to provide the documents to the IRS, nevertheless the IRS was entitled to the documents because MIT's previous disclosure constituted a waiver.

The court noted that while MIT may have intended to maintain confidentiality of the documents, even while turning them over to the audit agency, the test is whether protecting MIT's communication to the audit agency will prevent it or anyone else from obtaining sound legal advice.

The court held MIT had not met its burden to demonstrate that there would be harm to the attorney-client relationship. The court also rejected MIT's argument that its disclosure to the Defense Contract Audit Agency was not voluntary because if it failed to turn over the documents as part of an audit, it risked losing its defense contracts.

The court noted that MIT chose to do defense contract work. Since the documents were not prepared in anticipation of litigation, there was no work-product protection.

In another case, this one a criminal prosecution, *U.S. v. Bergonzi and Gilbertson*, the McKesson Corp., which had recently purchased another company and discovered wrongdoing in that company, agreed to disclose information from an internal investigation which it then commissioned, and disclosed certain
privileged information from that investigation pursuant to a confidentiality agreement, to both the SEC and the USAO.

The USAO then inadvertently disclosed some of the information to the defendants, who were being criminally prosecuted for crimes related to the wrongdoing. The defendants sought all of the privileged documents and communications turned over to the government. McKesson intervened, claiming attorney-client privilege. The court held that while McKesson did not intend to waive the privilege by turning the investigation and backup documents over to the government, the communications between McKesson and its lawyers was made with the intent to relay the information to the government.

Thus, the internal investigation was not privileged because its purpose was to provide information to the government, and to obtain leniency for the corporation, rather than to obtain legal advice for the corporation.

In addition, the agreements with the government allowed the government to reveal the attorney-client privileged information in order to discharge its duties and responsibilities.

Therefore, McKesson could not claim attorney-client privilege for these interviews. Furthermore, in this case, even with a confidentiality agreement, the USAO was obligated, pursuant to Brady v. Maryland, to turn over any exculpatory evidence to the defendants.

In another recent case, In re Lupron Marketing and Sales Practices Litigation, defendant TAP Pharmaceuticals, which had come under intense government scrutiny in the late 1990s for its marketing practices with Lupron, cooperated with the government and reached a settlement to both criminal and civil charges, paying fines and restitution totaling $875 million in 2001.

As part of the settlement, TAP agreed to produce material to the government that previously had been withheld under claims of attorney-client privilege and work product. The USAO agreed to treat the material as if protected by Grand Jury Rule 6(e), which allows disclosure only when ordered by a court, by government attorneys in connection with their performance of their law enforcement duties, or pursuant to the Patriot Act.

When civil class action claimants sought the documents, the court held that selective waiver or limited waiver did not apply except to a small "magic circle" of others who are necessary to facilitate consultation between the lawyer and client, such as an interpreter or some other agent of the lawyer. (See, Rosenfeld on Ethics, "Protecting Privilege And Work Product, Disclosure To Agents Of The Attorney Or Client," Massachusetts Lawyers Weekly, Jan. 17, 2005.)

Therefore, the court ordered TAP to produce the documents to the class action plaintiffs and denied a motion to certify the case for appeal.

'Diversified'

While selective waiver has not been adopted generally, it has been recognized in the 8th Circuit. In Diversified Industries v. Meredith, the court held that a corporation may selectively waive the privilege to an agency such as the SEC without impliedly effecting a broader waiver.

Diversified hired a law firm to conduct an internal investigation. When the SEC subpoenaed the information, Diversified responded to the subpoena. The justification for selective waiver, adopted in Diversified, was to encourage corporate clients to seek sound legal advice from their lawyers, which is exactly the rationale for attorney-client privilege as described in Upjohn.
Here, the court rationalized that where cooperation did not result in a complete waiver, that goal was more likely to be met. As I mentioned earlier, no other circuit has adopted this view.

There are many lawyer groups, such as the American College of Trial Lawyers, that have strongly criticized the federal policies described above and their interpretation by the courts as eroding the attorney-client privilege and work-product protection.10

The American College cites the chilling effect of encouraging or requiring waiver on internal investigations, which have a positive purpose for corporate compliance with the law.

Lawyers representing corporate clients must keep in mind several factors when advising their corporate clients in these types of situations.

First, any decision to turn over to the government attorney-client privileged and work-product protected information, even with a confidentiality agreement, is almost certain to be considered a waiver by the courts.

Second, the waiver risks inherent in any kind of disclosure of attorney-client privilege and work-product protected information must be balanced with what is in the best interests of the corporation insofar as civil and/or criminal penalties are concerned.

Third, the implications of the decision of the U.S. Supreme Court in U.S. v. Booker,11 holding that the sentencing guidelines are not mandatory, probably doesn't change the fact that the DOJ, the USAO and the SEC are maintaining their policies that waiver of the privilege remains an important factor in their decisions as to whether to prosecute.

Thus, understanding these implications of waiver of attorney-client privilege and work-product protection is essential to providing sound legal advice to corporate clients.

Endnotes


3 951 F.2d 1414 (1991)

4 129 F.3d 681 (1997)

5 216 F.R.D. 487 (2003), appeal held moot where appellant conceded on issue of defendants entitlement to documents, in U.S. v. Bergonzi et al., 2005 WL 736265 (9th Cir.(Cal.))

6 373 U.S. 83 (1963)


8 Id., at 13.

9 572 F.2d 596 (8th Cir. 1978)

11 135 S.Ct. 738 (2005)

Arnold R. Rosenfeld is of counsel in the Boston office of Kirkpatrick & Lockhart Nicholson, Graham. He formerly served as chief bar counsel of the Board of Bar Overseers of the Supreme Judicial Court. He currently is a visiting professor of law at Boston University School of Law where he teaches professional responsibility and a seminar in attorney-client privilege.

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