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# FEDERAL PRIVILEGE WAIVER DEMANDS IMPACT CORPORATE COMPLIANCE

By

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The collapse of Enron and recent corporate scandals naturally have triggered widespread calls for enhanced corporate accountability and transparency, and for more vigorous prosecution of corporate wrongdoing. One unfortunate by-product of this effort has been the erosion of a bedrock principle of our system of justice — the attorney-client privilege. Waiver of attorney-client privilege has now become a disturbingly commonplace requirement for a corporation's "full cooperation" with federal authorities. The American Bar Association and others have called for a critical reevaluation of this practice, a practice which may ultimately undermine the very goal that vigorous post-Enron enforcement is intended to foster — responsible corporate conduct.

A recent Department of Justice directive to all U.S. Attorneys and to the heads of Department components addressing this practice adds uncertainty by allowing prosecutors discretion in demanding such waivers.<sup>1</sup> Indeed, the McCallum Memo instructs each individual office to establish its own written waiver review process, and expressly provides that "such waiver review processes may vary from district to district (or component to component), so that each United States Attorney or component head retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations." *Id.*

In other words, prosecutors have maximum freedom to demand waivers, while corporate America can have little confidence that its communications with counsel will remain confidential whenever it seeks to cooperate with authorities. However, as the U.S. Supreme Court recognized in a seminal case addressing attorney-client privilege in the corporate context, if "the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular

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<sup>1</sup>See Memorandum from Acting Deputy Attorney General Robert McCallum to Heads of Department Components and U.S. Attorneys, *Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21, 2005), [the "McCallum Memo"], at <http://www.corporatecrimereporter.com/documents/AttorneyClientWaiverMemo.pdf>.

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discussions will be protected. An uncertain privilege . . . is little better than no privilege at all.” *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981). Privilege unpredictably protected is, so to speak, privilege denied.

The practice of demanding a waiver of the attorney-client privilege as an element of a corporation’s full cooperation with authorities is based on a twin set of policies that have come under increasing criticism. The first is a Department of Justice memorandum that identifies the nine factors that prosecutors should use when making charging decisions regarding business entities, including “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.”<sup>2</sup> The second is a recent amendment to Commentary for the federal Sentencing Guidelines, which provides that in order to qualify for a sentence reduction for assisting with the government’s investigation, a corporation is required to waive confidentiality protections if “such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” U.S. Sentencing Guidelines Manual § 8C2.5 (2004) (the “privilege waiver amendment”), at [http://www.ussc.gov/2004guid/8c2\\_5.htm](http://www.ussc.gov/2004guid/8c2_5.htm).

Thus, whether at the front end of the process or the back — at the charging stage or sentencing — the waiver of attorney-client privilege is viewed as indicative of a corporation’s willingness to cooperate with federal authorities. Although the Thompson Memo states that the Department does not consider a waiver an “absolute requirement,” and the federal Sentencing Guidelines state that a waiver is not a “prerequisite” unless it is “necessary,” there is mounting evidence that, in practice, privilege waiver demands are becoming increasingly frequent, and that compliance with those demands is viewed by corporations and their counsel as anything but voluntary.

According to a recent report from the ABA Task Force on the Attorney-Client Privilege, “[s]urveys and testimony received by the Task Force assert that government agencies’ requests for such information leave corporations with no practical choice but to comply, since the agencies can employ their discretionary exercise of prosecutorial or enforcement authority under criminal law or civil regulation to impose a substantial cost on corporations that assert rather than waive the privilege.”<sup>3</sup> Furthermore, the Task Force “heard from a variety of sources that, whether made overtly or implicitly, these requests, backed by an express or implied threat of harsh treatment for refusing, have become increasingly common.” *Id.* at 14.

Indeed, while some champions of the privilege waiver policy have suggested that “those who argue that waivers are required frequently do so on the basis of anecdotes without any supporting data,”<sup>4</sup> there is in fact mounting data to support the ABA Task Force’s conclusions. In recent surveys, almost 48% of outside counsel and more than 30% of in-house counsel responded that they had personally experienced an erosion of their corporate clients’ privilege rights post-Enron.<sup>5</sup> In fact, some 40% of outside counsel reported that federal authorities tried to dissuade them from asserting their corporate clients’ privilege or work product protections within the past year alone. *Id.*

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<sup>2</sup>Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) [the “Thompson Memo”], at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). This policy actually originated in an earlier memorandum during the previous administration. See Memorandum from Deputy Attorney General Eric H. Holder, Jr. to Heads of Department Components and U.S. Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999) [the “Holder Memo”].

<sup>3</sup>ABA Task Force on the Attorney-Client Privilege, *Report to the ABA House of Delegates* (May 18, 2005), p. 13, at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>.

<sup>4</sup>Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587-611 (2004).

<sup>5</sup>See Executive Summary, *National Association of Criminal Defense Lawyers Survey: The Attorney-Client Privilege Is Under Attack* (Apr. 2005), at [http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC\\_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf); Executive Summary, *Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?* (Apr. 2005), at <http://www.acca.com/advocacy/attyclient.php>.

Moreover, the mounting data also indicates that this erosion, and the attendant uncertainty that accompanies the absence of clear policy guidelines for demanding privilege waivers, may have several detrimental consequences. First, it may undermine sound corporate governance, because attorney-client privilege encourages consultation, facilitates legal compliance, and promotes more informed decision-making, all of which are in the public interest. In fact, 95% of respondents indicated that absent the privilege, there would be a “chill” in the flow or candor of information provided by clients to their counsel. *Id.* Without effective legal counsel, corporate leaders — and their decisions — will be far less informed.

Second, if the attorney-client privilege continues to be eroded, it may undermine proactive corporate self-regulation, and vigorous internal investigation of potential wrongdoing. According to the survey results, over 90% of respondents believed that the privilege enhances the likelihood that company employees will come forward to discuss or agree to be interviewed about sensitive or difficult issues regarding the company’s compliance with the law. *Id.* Moreover, nearly 95% indicated that the existence of the privilege improves a lawyer’s ability to monitor, enforce, and/or improve a company’s compliance initiatives. *Id.* As the Supreme Court noted in *Upjohn*, the absence of the privilege would “not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problems but also threaten to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.” 449 U.S. at 392.

Third, and perhaps most ironically, the lack of a more clearly defined and limited government privilege waiver policy may undermine the willingness of corporations to cooperate with prosecutors. Without any protections as to scope or disclosure, waiving attorney-client privilege to government authorities also means that corporations run the risk of providing fodder to a plaintiffs’ bar actively seeking its next target.

As government authorities more frequently require corporations to hire counsel to conduct their own internal investigations of potential misconduct — and then demand that corporations waive privilege and turn over the fruits of such investigations as a term of their cooperation — the issue of third party disclosure becomes particularly acute. Even when a corporation cooperates with authorities pursuant to a confidentiality agreement, there is no guarantee that a court will uphold such a so-called “limited” or “selective” waiver if civil litigants subsequently seek the privileged material. *See, e.g., In re Columbia/HCA Healthcare*, 293 F.3d 289 (6<sup>th</sup> Cir. 2002) (rejecting the notion of selective waiver and requiring defendant to turn over privileged material to private plaintiffs that it had provided to the Department of Justice under confidentiality agreement). Indeed, the federal courts have taken a variety of positions as to whether such a limited waiver is ever enforceable in the context of a corporation’s cooperation with authorities. *Id.* at 294-304 (reviewing the array of positions federal courts have taken regarding selective waiver). Even more unsettling, different jurisdictions have provided different answers when third parties have demanded access to the same internal review that one corporation conducted under a confidentiality agreement.<sup>6</sup>

Lastly, another troubling aspect of increased outsourcing of investigative work by government authorities and the subsequent pressure to waive privilege is the impact on a corporation’s individual employees. As the ABA has recognized, employees “can cooperate and run the risk that statements made to the company’s lawyers will be turned over to the government by the entity or they can decline to cooperate and risk their employment. In our view, it is fundamentally unfair to force employees to choose between keeping their jobs and losing their legal rights.”<sup>7</sup> For these reasons, the existing, virtually unfettered policy of demanding privilege waivers as a requirement of corporate cooperation could very well undermine the

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<sup>6</sup>See Pamela MacLean, *SEC Use of Private Counsel is ‘Pandemic,’* NAT’L LAW J (Dec. 19, 2005), p. 1 (discussing divergent holdings concerning an internal review conducted by McKesson Corporation as the “poster child” case for waiver disputes).

<sup>7</sup>Letter to the U.S. Sentencing Commission from the American Bar Association, *Re Comments on Notice of Proposed Priorities -- Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege* (Aug. 15, 2005), at <http://www.abanet.org/buslaw/attorneyclient/materials/049/049.pdf>.

overall goal of more responsible corporate conduct in the post-Enron era. And, for these reasons, the ABA House of Delegates recently adopted the recommendation of its Task Force on Attorney-Client Privilege by stating its opposition to “policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine” and to “the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.”<sup>8</sup>

The ABA is not alone in its criticism of the policies that have resulted in the burgeoning demand for privilege waivers as a badge of full cooperation. A broad coalition of organizations — ranging from the American Civil Liberties Union to the U.S. Chamber of Commerce (and including the Washington Legal Foundation) – have submitted comments to the U.S. Sentencing Commission (which is reconsidering the privilege waiver amendment during the 2005-2006 amendment cycle) opposing the practice of considering privilege waivers in assessing a corporation’s cooperation under the federal Sentencing Guidelines.<sup>9</sup>

Finally, a number of former high-ranking Justice Department officials spanning the past four administrations have joined the chorus opposing the policy of demanding privilege waivers as an element of cooperation.<sup>10</sup> The former officials noted their concern that “[n]ow that the privilege waiver amendment has been incorporated into the official Commentary to the Sentencing Guidelines, the Justice Department, as well as other enforcement agencies, are contending that this amendment provides Congressional ratification of the Department’s policy of routinely asking that privilege be waived. In practice, companies are finding that they have no choice but to waive these privileges whenever the government demands it.” *Id.* In sum, they conclude that this practice “undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship.” *Id.*

The continued erosion of the attorney-client privilege will, without improved oversight, uniform policy guidance, and stricter limits, ultimately undermine, rather than promote, more responsible corporate conduct in the post-Enron world. The ABA proposes excluding the waiver of attorney-client privilege as a factor in assessing cooperation at sentencing. Another helpful measure would be to pass legislation that recognizes the validity of limited waiver of the privilege for the purpose of cooperating with government authorities. In any event, the practice of demanding waiver of attorney-client privilege as a matter of course must be reigned in so that corporate employees have some degree of certainty in the confidentiality of their communications with corporate counsel. On the other hand, if corporate counsel are to become the practical equivalent of federal investigators, employees must receive appropriate warnings regarding the potential use of any information they provide.

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<sup>8</sup>ABA Task Force Recommendation 111 (Aug. 9, 2005), at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf).

<sup>9</sup>See Letter to the U.S. Sentencing Commission from the American Chemistry Council, et al, *Re Comments on Notice of Proposed Priorities -- Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege* (Aug. 15, 2005), at <http://www.abanet.org/buslaw/attorneyclient/materials/047/047.pdf>.

<sup>10</sup>See Letter to the Honorable Ricardo H. Hinojosa, Chairman of the U.S. Sentencing Commission, from Griffin Bell, et al, *Re Organizational Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities* (Aug. 15, 2005), at <http://www.abanet.org/buslaw/attorneyclient/materials/046/046.pdf>.