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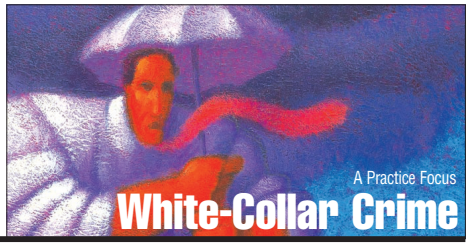
Stay Firm on the Privilege

Despite calls for selective waivers, traditional principles still have merit.



BY PHILIP T. INGLIMA
AND TOM A. HANUSIK

Clear skies at last! To a defense bar longing for reprieve from the onslaught of aggressive enforcement tactics in the post-Enron years, the December 2006 announcement of the Justice Department policy shift in the McNulty memo seemed ample cause for celebration.

Justice appeared to retreat from demands for such corporate concessions as waivers of attorney-client privilege and work-product protections. Many hoped that we could enjoy a return to normalcy in white-collar investigations and prosecutions.

Not so fast.

Although the enforcement climate has cooled a bit from its recent frantic pace, the last few years have changed some fundamentals in the white-collar realm, perhaps permanently. There's little reason to expect prosecutors to refrain from the enforcement considerations reflected in the Thompson memo, many of which are still fair game under the McNulty memo. So long as that remains true, the defense bar must continue to grapple with identifying the most effective response.

Some advocate new standards for construing essential rights and interests, like permitting selective waiver of legal privileges or providing for limited, strategic allowance of indemnification or advancement of defense costs for covered employees. Before we sign up for such significant changes, though, let's pause and consider less "new" and more "old" in our response. We might find that even in a changed enforcement environment, traditional principles serve both public and private interests best.

A New Reality

Consider the havoc wrought to our federal justice system by the collapse of Enron and WorldCom and the passage of the Sarbanes-Oxley Act—all within a 12-month time frame. Accounting fraud issues on a level of complexity rarely seen were presented in tandem with evidentiary records measured in terabytes and truckloads. Stricter corporate compliance standards and clearer front-office accountability presented opportunities for closer monitoring of corporate activities at the same time that regulators tackled the glut of ripe cases.

These developments occurred in an environment that already featured a steady regulatory trend toward increased reliance on self-reporting by corporate boards and management, often on the basis of findings from internal or special-committee investigations by outside counsel. These investigations offered the ultimate efficiency to under-scaled regulatory bodies—the government reaped all the benefits of internal investigations while holding companies accountable for any imperfections in the process. The only remaining obstacle was that tired old concept of legal privilege.

For years, prosecutors had encouraged corporate actors to demonstrate their fidelity to lawfulness by how they responded to enforcement investigations. Some companies chose to make disclosures of varying extents, often at the peril of waiving privilege, to achieve purity in the eyes of the government.

It should have been little surprise, then, when the Justice Department ratcheted up its charging policies with the Thompson memo in January 2003. The occasional peek under the tent morphed into an expectation of transparency when it mattered most, and privilege became an expendable luxury in the calculus of defense necessities.

The McNulty memo changed this dynamic only slightly, forcing companies to elect between receiving "credit" for waiving privileges or hoping for neutrality if they opted not to waive. No matter how you phrase it, offering a significant benefit only if a company chooses one course means that choosing the other course comes at a cost.

Hitting the Limit

Whether one thinks of white-collar enforcement in recent years as a swamping of corporate and individual

rights, or a dramatic forced baptism of the American business community, the signals are strong that the ebbing of those waters has commenced. How far they will retreat is a different matter.

Although Judge Lewis Kaplan took a well-reasoned stand against governmental coercion that reaches individual defendants' rights in *United States v. Stein* (S.D.N.Y. 2006), the U.S. Court of Appeals for the 2nd Circuit has not yet opined on that holding or Judge Kaplan's decision in July that such incursions on due process and the right to counsel are properly redressed by dismissal of charges. Both decisions found that KPMG became an adjunct of the state because of explicit instructions by prosecutors and because the Justice Department's policies in the Thompson memo provided few alternatives for KPMG. Meanwhile, even after the McNulty memo, corporations continue to decide in many investigations to refuse or curtail the extension of legal fees to officers, directors, and employees for fear of the government's reaction.

Though numerous corporations have affirmatively decided to waive or withhold assertion of the attorney-client privilege or the work-product doctrine, or both, in pursuit of deferred prosecution agreements or nonprosecution decisions, some of them have resisted the prevailing expectation of waiver.

More important, Congress has taken up consideration of an outright ban on the type of prosecutorial consideration encouraged by the Thompson memo's now-rescinded provisions about privileges. Last year, the U.S. Judicial Conference's Advisory Committee on the Federal Rules of Evidence proposed ratification of the seldom-approved concept of selective waiver of legal privileges, but it retreated from that proposal this spring, after the McNulty memo. All of these developments call upon us to consider what we fear more—the illness, or the cure.

Seeking the Antidote

Our profession's reverence for legal privileges is not some quaint artifact of a bygone time. It is a reflection of the central importance our nation's legal tradition places upon the role of counsel and the necessity of confidentiality in such a relationship. The privilege is sacrosanct because it promotes the complete candor necessary for sound legal advice in an adversarial process. The end result is a more efficient justice system.

Corporate persons are entitled to this same confidentiality. To obtain legal guidance on prospective or historical practices, companies must be able to communicate candidly with their counsel. Without this assurance of confidentiality, employees will suppress from counsel's view the very facts and proposed actions that most require scrutiny.

The privilege is as fragile as it is important, and both corporate and real persons must treat their privileges with care. As the D.C. Circuit held in *In re Sealed Case* some 18 years ago, preservation of the attorney-client privilege requires its holders to "treat the confidentiality of [privileged] communications like jewels—if not crown jewels." In other words, such confidentiality must be maintained with a view toward its complete preservation and once relinquished, it cannot be restored. It matters little whether it is waived in favor of a commercial adversary or the government. Disclosure of privileged matters is inconsistent with the basic confidentiality that legal privileges protect.

When concepts of selective assertion of privileges are embraced, the privileges lose their integrity and move one step closer to abrogation. If corporations and individuals can make selective disclosures to the government without being exposed to third-party discovery of their legal secrets, why shouldn't the government always be entitled to that access? A "law enforcement exception" might emerge that would render all assertions of the privilege meaningless in the investigative setting.

This era of robust investigations conducted by counsel engaged by the corporation or one of its governing bodies is not likely to fade any time soon. But our practices should more closely track traditional features of white-collar investigations. Waiver of privileges simply must have an associated cost and consequence if maintaining them is to have any residual benefit.

Some companies and individuals will decide to relinquish those protections because their exigent circumstances deem it a sound compromise. But others will determine that steps short of waiver can manifest "cooperation."

Preserving the Sixth

Waivers for corporate actors require a threshold determination of who may make that decision for the company. The role that management or the board has played in the matter under investigation may directly bear on that assessment. Even without a taint on either body, there may be a divergence between management and the board when counsel's advice was sought and relied upon for a matter with both personal and professional implications.

Likewise, with the heightened possibility that witness statements to private investigative counsel might become fodder for criminal discovery, *Upjohn* warnings to the witnesses about who controls the privilege and where privileged information ultimately might flow should be explicit and documented. The statements will be that much more reliable when viewed later (possibly by a government authority), and witnesses will be sobered to the reality that the legal confidentiality of their statements can and sometimes will be waived.

Of course, such gathered statements gain an even greater measure of reliability when the witnesses are assisted by their own counsel at the earliest possible stage of investigation. Corporate decisions to make such assistance available to employees and agents should not be construed as anything but respect for the individual's Fifth and Sixth Amendment rights. If the price of continued employment is communication with the investigators, the guidance of counsel in weighing that delicate balance is an incidental cost for the company that seeks to develop the full facts and record. Indeed, an argument can be made that employees entitled to indemnification or fee advancement by a company's bylaws

should be informed of their right to paid counsel before any statement is solicited so as to insure that the implications of waiver by a third party, such as the company, are fully understood. In many settings, the Sixth Amendment right must precede the Fifth to give it meaning.

If this sounds a bit nostalgic, it is—and it isn't. Traditional concepts and practices concerning privilege and access to counsel can apply equally well in the current enforcement setting, so long as we respect and sustain the principles underlying those traditions.

Confidences should be maintained until their holders—and no one else—decide they should be compromised. Investigations should be conducted with full disclosure to the individuals entwined in them about who controls information now—and who may be privy to it later. And lawyers should be permitted to advise their clients without presumptions that a single, uniform response to the government defines good faith and cooperation.

Philip T. Inglima and Tom A. Hanusik are co-chairs of the white-collar and securities litigation group at Crowell & Moring. They work in the D.C. office and can be contacted at pinglima@crowell.com and thanusik@crowell.com.