



Mandatory Waiver of Attorney Client Privilege: Cooperation or Coercion

Written by:
Patricia Brown Holmes
pholmes@schiffhardin.com
312.258.5722

May 2006

SCHIFF HARDIN LLP

6600 Sears Tower
Chicago, IL 60606
t 312.258.5500
f 312.258.5600

1666 K Street, N.W.
Suite 300
Washington, DC 20006
t 202.778.6400
f 202.778.6460

623 Fifth Avenue
28th Floor
New York, NY 10022
t 212.753.5000
f 212.753.5044

One Atlantic Center
Suite 2300
1201 West Peachtree
Atlanta, GA 30309
t 404.806.3800
f 404.806.3801

One Westminster Place
Suite 200
Lake Forest, IL 60045
t 847.295.9200
f 847.295.7810

One Market
Spear Street Tower
Thirty-Second Floor
San Francisco, CA 94105
t 415.901.8700
f 415.901.8701

www.schiffhardin.com

Introduction

There has been significant controversy within the legal community surrounding recently enacted policies and regulations regarding the mandatory waiver of attorney-client privilege/work product doctrine in the context of corporate investigations conducted by federal agencies. Following is a brief discussion of these policies/regulations, the implication of such policies/regulations on corporate entities and an update on progress to implement changes to the way the government enforces these policies/regulations.

Discussion

I. Department of Justice Policies

The Thompson and McCallum Memorandums

In a memorandum entitled “Principles of Federal Prosecution of Business Organizations” (“the Thompson Memo”), then Deputy Attorney General Larry D. Thompson set forth several factors that prosecutors should consider in determining whether to prosecute a corporation:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. 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*; (emphasis added)
5. the existence and adequacy of the corporation's compliance program;
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, *and to cooperate with the relevant government agencies*; (emphasis added)
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable, and impact on the public arising from the prosecution;
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions.¹

Factors 4 and 6 have been the source of significant debate because “cooperate” not only refers to the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; and to disclose the complete results of its internal investigation; but it also refers to the corporation's willingness to waive what are perhaps *the* most important privileges--attorney-client and work product protection.²

Although the Thompson memo provides that “[t]he Department does not...consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation”, it has become relatively common-place for prosecutors to request such waivers in the context of corporate investigations. This fact was further manifested in a memorandum issued by Acting Deputy Attorney General Robert D. McCallum Jr. on October 21, 2005 (“McCallum Memorandum”). Noting that “some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval

¹ Memorandum from former Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys Re: Principles of Federal Prosecution of Business Organizations, Section II (January 20, 2003)

² Memorandum from former Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys Re: Principles of Federal Prosecution of Business Organizations, Section VI (January 20, 2003)

from the United States Attorney or other supervisors before seeking a waiver of the privilege or work product protection,” the memo provides that each United States Attorneys’ office should “establish a written waiver review process” for such requests.³ Accordingly, it is clear that the Justice Department is not only encouraging the waiver of this privilege in the context of corporate investigations, but is facilitating this policy.

Although the ABA was successful in its efforts with the U.S. Sentencing Commission (to be discussed below), its success will be almost meaningless if the Justice Department policies continue to prevail. As a result, the ABA is now aggressively pursuing a course of action which would eliminate the Justice Department waiver requirements. As part of its effort to stop “the assault by federal agencies on the attorney-client privilege,”⁴ the ABA Task Force On Attorney-Client Privilege has issued a memorandum containing several proposed amendments of Justice Department policies.⁵ These amendments serve to allow the Justice Department to effectively conduct its investigations and obtain all necessary information to do so, while still preserving the attorney-client privilege. The amendments strike the language in the Thompson memo regarding the waiver of attorney-client privilege and adds language regarding the importance of attorney-client privilege and the “adverse consequences that may occur when attorneys within the Department of Justice seek the waiver of these protections.”⁶ Further, the memo provides alternatives for determining whether organizations have been cooperative under the Thompson Memo requirements (e.g. “Whether the entity has identified for and provided to attorneys within the Department all relevant data and documents created during and bearing upon the events under investigation other than those

entitled to protection under the attorney-client privilege or work product privilege”, and “Whether the entity has identified for attorneys within the Department the individuals with knowledge bearing on the events under investigation.”)⁷

Moreover, the ABA Task Force has expressed that the mandatory waiver of the privilege will have a negative effect on the conduct of corporate entities because it will prevent entities from conducting internal investigations that may quickly rectify unlawful conduct for fear that their communications will be discoverable by prosecutors.⁸

II. Federal Sentencing Guidelines

Almost in support of the Thompson Memo provisions, Section 8C2.5 of The Federal Sentencing Guidelines, sets forth several factors to determine the “culpability score” of a corporate entity. These factors include: Involvement in or Tolerance of Criminal Activity; Prior History; Violation of an Order; Obstruction of Justice; Effective Compliance and Ethics Programs; and Self-Reporting, Cooperation, and Acceptance of Responsibility.⁹ In 2004, following widespread release of the Thompson Memo, the Federal Sentencing Guidelines were amended to include a note regarding the waiver of attorney-client privilege as a potential factor in reducing the corporation’s “culpability score.” Note 12 of the Commentary to §8C2.5 provides in relevant part, “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”¹⁰

Many within the legal community expressed significant concerns about the negative ramifications of this amendment because the language appears to encourage waivers of the attorney-client privilege. In fact the ABA task force, “a broad coalition of business and legal groups”, and several former Justice Department officials worked together in an effort to have this amendment overturned,

³ Memorandum from Acting Deputy Attorney General Robert D. McCallum Jr. to Heads of Department Components and United States Attorneys Re: Waiver of Corporate Attorney-Client and Work Product Protection (October 21, 2005)

⁴ Letter from Michael S. Greco, President, American Bar Association, to Chairman Specter, Chairman, Committee on the Judiciary, United States Senate (May 9, 2006)

⁵ Memorandum from the American Bar Association Task Force On Attorney-Client Privilege to Heads of Department Components and United States Attorneys Re: Guidelines for Determining “Timely and Voluntary Disclosure of Wrongdoing and Willingness to Cooperate” (February 10, 2006)

⁶ *Id.*; Report To The House of Delegates, American Bar Association Task Force on Attorney-Client Privilege (August 2006)

⁷ See *Id.*

⁸ *Id.*

⁹ United States Sentencing Commission, *Guidelines Manual*, §8C2.5 (Nov. 2005)

¹⁰ United States Sentencing Commission, *Guidelines Manual*, §8C2.5, Commentary, Note 12. (emphasis added) (Nov. 1, 2005)

and on April 5, 2006, the Federal Sentencing Commission voted unanimously to remove the privilege language from the guidelines.¹¹ Accordingly, the proposed amendment to the Sentencing Guidelines has removed the privilege language, and is expected to take effect on November 1, 2006.

III. Proposed Federal Rule of Evidence 502

Lastly, the Advisory Committee on the Federal Rules of Evidence is currently considering proposed Federal Rule of Evidence 502 which addresses waiver of attorney-client privilege and work product protection. Subdivision “c” of the proposed rule adopts the doctrine of selective waiver, which permits a person/entity that has disclosed privileged communications to the government to nevertheless continue asserting the privilege against others.¹² This proposed rule appears to be beneficial to corporate entities because it would preserve the privilege with regards to third parties even when the entity has waived the privilege with a federal office or agency. Opponents of this doctrine, however, believe that this rule will encourage prosecutors to continue to request/require waiver of the corporate attorney-client privilege because the privilege is protected against other parties.¹³ This rationale is consistent with the rationale of opponents of the 2004 Amendment to the Federal Sentencing Guidelines. The debate continues with respect to this proposed amendment.

Conclusion

The attorney-client privilege and work product doctrine are arguably the most important concepts in the United States judicial system. Recently enacted policies and regulations, however, have significantly changed their purview in the context of corporate investigations conducted by federal agencies and entities.

Because of the magnitude of these recently enacted policies and regulations, many within the legal community have taken an active role in an effort to preserve the attorney-client privilege and work product doctrine. Nonetheless, there will certainly be continued debate surrounding this heated topic, and in the wake of increasingly publicized corporate scandals, there will undoubtedly be some supporters of the mandatory waiver rule. As a result, corporations and in-house counsel should remain apprised to developments involving this fundamental issue.

¹¹ See Letter from Michael S. Greco, President, American Bar Association, to Chairman Specter, Chairman, Committee on the Judiciary, United States Senate (May 9, 2006); see also *Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary*, Amendment 13 (May 1, 2006)

¹² Gregory P. Joseph, *Privilege Waiver: Proposed Federal Rule of Evidence 502*, at 8, (May 2006), http://www.josephnyc.com/PRIVILEGE_WAIVER.shtml

¹³ *Id.* at 9-10.

About the Author

Patricia Brown Holmes is an Equity Partner in Schiff Hardin LLP. She is a former state trial judge who concentrates her practice in general commercial litigation and white collar criminal and corporate compliance matters. Schiff Hardin LLP Associate **Drahcir Smith** is credited for her contribution to this article.

About Schiff Hardin LLP

Schiff Hardin LLP was founded in 1864. In the past 142 years we have grown to nearly 400 attorneys, with offices in Chicago and Lake Forest, Illinois; Washington, D.C.; New York, New York; Atlanta, Georgia; and San Francisco, California.

This publication is for the general information of clients and friends of our firm. It does not provide legal advice for any specific matter. Readers should consult a lawyer directly for such advice. This publication, or parts of it, may be considered advertising material under professional conduct rules applicable to lawyers.