

White Collar Crime - USA

Concern About Waiver of Attorney-Client Privileges

Contributed by [Sideman & Bancroft LLP](#)

January 09 2006

There is growing concern in the United States with regard to the erosion of company attorney-client and attorney work product privileges. These privileges protect the confidentiality of attorney communications and work papers from court-compelled disclosure in court or otherwise to third parties. Company counsel for multinational entities conducting business in the United States with clients facing actual or possible federal government investigations should be aware of the problems that companies may encounter with respect to preserving these privileges during a federal investigation.

The attorney-client and attorney work product privileges are well established in US law. However, recent federal prosecutorial policies and amendments to the US Sentencing Guidelines have undercut them. The amendments and policies have been criticized by a growing body of opinion as treating a company's assertion of the privileges as an illicit attempt to withhold relevant information from the government, with adverse consequences for the company, rather than as a claim to a valuable right.

Chapter 8 of the US Sentencing Guidelines provides the criteria for sentencing business organizations. Recent amendments to the guidelines provide that failure timely to waive the privileges during an investigation and before a charging decision is made may result in a higher sentence. Therefore, a company that chooses not to agree to the government's request for waiver may be deemed non-cooperative and undeserving of a reduction in penalties.

The guidelines provisions were preceded in January 2003 by a memorandum by Department of Justice Deputy Attorney General Thompson designed to guide US attorneys in deciding whether to pursue charges against business organizations. The memorandum lists nine factors for federal prosecutors to consider in their charging decisions, 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."

Given the provisions and policies, a company may believe that it has no viable choice but to waive the attorney-client and work product privileges, and disclose otherwise confidential communications and attorney papers; a government denomination of a company as non-cooperative can have a severe effect on not only sentencing, but also the company's public image, stock price and creditworthiness. However, disclosure is a Faustian pact: not only is there a chilling effect on communications and attorney work product if the traditional protection of confidentiality is removed, but also in a subsequent proceeding the court may rule that the company has waived its privilege of confidentiality and third parties (including potential civil plaintiffs) can access otherwise privileged materials that the company provided to the investigating government agency.

In a recent case employees of the software company Computer Associates were indicted by the Department of Justice (and pleaded guilty to obstruction of justice) for making false statements to the government based on their conversations with company lawyers who had conducted internal

investigations for the company. The government's theory was that the employees should have known that their otherwise privileged statements would be turned over to the government. As a result of this government policy, some companies have now resorted to giving warnings to employees, telling them that the company lawyer they are speaking to represents the company, not the employee, and that any statement made by the employee could be turned over by the company to the government.

According to a recent survey by the National Association of Criminal Defence Lawyers, 87% of corporate clients had recently been asked to waive the attorney-client privilege - mostly in federal criminal investigations. Eighty-five percent of respondents reported that the Department of Justice and federal regulation agencies (eg, the Securities and Exchange Commission) frequently require discussions of waiver as part of 'settlement' negotiations - in other words, in deciding whether to charge a company, accept a plea or settle civil claims.

In response, interest groups from across the political spectrum - from the US Chamber of Commerce to the American Civil Liberties Union - are fighting back by campaigning to persuade the Department of Justice (and relevant federal agencies such as the Securities and Exchange Commission) to alter any policies that effectively force waiver of the privilege. For instance, in a letter to the US Sentencing Commission, 13 groups asked the commission to amend the commentary to Section 8C2.5 (on the waiver of the attorney-client privilege) of the US Sentencing Guidelines:

"to clarify that waiver of the attorney-client privilege and attorney work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government."

At present, the Department of Justice and the Securities and Exchange Commission have not altered their positions.

However, criticism of these policies may have at least a marginal effect in two respects. First, on October 21 2005 Department of Justice Deputy Attorney General McCallum issued a memorandum instructing the 92 US attorneys (chief federal prosecutors) around the country to establish written procedures for the supervisory review of line prosecutors' requests for waiver of the privileges. This may give an opportunity for the defence bar to influence these policies in their initial promulgation and on a periodic basis as new cases arise. Second, the US Sentencing Commission has announced that on January 20 2006 it will release for comment proposed amendments to the US Sentencing Guidelines, which are widely expected to include amendment to the waiver provision.

Therefore, due to the uncertainty and inherent risk surrounding the waiver of attorney-client and attorney work product privileges in connection with a government investigation, there is no particular approach a company can rely on to guarantee protection of the privileged material. However, company counsel must understand that a decision made regarding the waiver of these privileges can have significant case and collateral business consequences.

For further information on this topic please contact [David Bancroft](mailto:dbancroft@sideman.com) or [Julia Mezhinsky Jayne](mailto:jjayne@sideman.com) at Sideman & Bancroft LLP by telephone (+1 415 392 1960) or by fax (+1 415 392 0827) or by email (dbancroft@sideman.com or jjayne@sideman.com).