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Feature Story

Stemming the 'assault' on privileges

Confidentiality agreements, disclosing facts may be the answer


GURNEY


HEYISON


BEDINGFIELD

By Brent J. Gurney, Michael R. Heyison and Marvin B. Bedingfield

It pays to cooperate.

As in-house counsel are well aware, government agencies investigating a company look closely at its "willingness to cooperate" and its "timely and voluntary disclosure of wrongdoing" when deciding whether to bring charges, and what sanctions to apply.

This policy is set forth in the so-called Thompson Memo, written by then-U.S. Deputy Attorney General Larry D. Thompson. Dated Jan. 20, 2003, the memo is formally entitled Principles of Federal Prosecution of Business Organizations.

It is no surprise, therefore, that many companies accede to demands to turn over relevant material - even material protected by the attorney-client privilege or the work-product doctrine. Such cooperation, however, may come with a price.

Once privileged documents have been handed over to the government, any claim of privilege for these documents may be lost in subsequent civil litigation. When a party produces privileged documents to an adversary, the producing party waives the privilege and can't get it back.

Some courts have tried to balance this doctrine of waiver with the need to encourage cooperation with government investigations. In 1978, the 8th Circuit allowed Diversified Industries, Inc. to make a selective disclosure of documents to the Securities and Exchange Commission, preserving the company's privilege against future adversaries (*Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977)).

Since then, however, courts in other jurisdictions have been less willing to permit so-called "selective waiver." Many courts have rejected the idea of selective waiver altogether, while others have allowed corporations to maintain privilege over disclosed documents only in certain circumstances, or to certain degrees.

Continuing this trend among courts to require disclosure, the 10th Circuit on June 19 rejected an attempt by Qwest Communications International, Inc. to protect against disclosing

documents to private litigants that Qwest had produced previously to the Department of Justice and the SEC as part of an investigation. (*In re: Qwest Communications International, Inc. v. New England Health Care Employees Pension Fund*, Docket No. 06-1070).

Confidentiality agreements

Confidentiality agreements may provide some protection against waiver depending on the jurisdiction. In fact, in a number of recent cases in which the disclosing party successfully maintained the privilege, the party had such an agreement.

Many courts, however, either refuse to recognize the agreements outright, or find waiver when investigating agencies retain the right to disclose produced material to third parties, as happened in the Qwest case.

The dilemma derives in part from the fact that the government wants corporations to do more than simply respond to subpoenas. As then-Deputy Attorney General James B. Comey explained in his May 2004 remarks to the American Bar Association, if a corporation wants to get credit for cooperation, "it must help the Government catch the crooks" (*See* Remarks of James B. Comey to the American Bar Association 14th Annual Institute on Health Care Fraud 2004, U.S. Attorney's Bulletin, Sept. 2005, at 4 [Comey Remarks]).

But how does a company help "catch the crooks" while protecting its attorney-client communications and attorney work product and not appearing obstructionist? Companies find themselves caught between the threat of being viewed as uncooperative and the danger of wide exposure in subsequent litigation as a result of waiver.

Waiver is not an absolute requirement of cooperation - but it's hard to avoid. The Thompson Memo lists nine principles to be considered by prosecutors when deciding whether to file charges - including both "cooperation" and, "if necessary," waiver (Thompson Memo at 3).

However, the memo emphasizes that "waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue," as opposed to "communications and work product related to advice concerning the government's criminal investigation" (Thompson Memo at 7, n. 3).

Comey, in his ABA remarks, similarly distinguished between privileged communications between a client and a lawyer (waiver of which "will rarely be necessary") and facts gathered by lawyers during internal investigations (Comey Remarks at 5).

If a company can bring the facts and the relevant witnesses before the government without the need to reference privileged materials, they should, according to Comey, get full credit for cooperation (*Id.* at 4-5).

Unfortunately, it can be difficult to bring the relevant facts to the government without waiving some aspect of the attorney-client privilege or work product doctrine. And there have been complaints of some prosecutors requesting complete waiver from the outset, thereby taking compromise options off the table, although Comey denied this was a widespread practice (See interview with U.S. Attorney James B. Comey regarding the Department of Justice's policy on requesting corporations under criminal investigation to waive the attorney-client privilege and work product protection, U.S. Attorneys' Bulletin, Nov. 2003, at 2 [Comey Interview].

Encouraging developments

Some critics have characterized the DOJ's policy as amounting to an "assault" on privilege. (*See* Brad D. Brian, et al., "Assault On the Attorney-Client Privilege: What Every Lawyer Needs to Know", 2005 American Bar Association Annual Meeting, Section of Litigation, August 4-7, 2005).

In an amici brief submitted to the 10th Circuit in the *Qwest* case, the Association of Corporate Counsel and the U.S. Chamber of Commerce described a "culture of waiver" among federal prosecutors. As the amici complained, "the demand for privilege waivers by the government as a prerequisite to fair treatment by prosecutors is now routine."

Some governmental agencies are responding to the criticism.

On Oct. 21, 2005, then-Acting Deputy Attorney General Robert D. McCallum issued a memorandum directing the establishment of waiver review processes in every district (*See* memorandum from Robert D. McCallum Jr. to heads of department components, United States Attorneys, waiver of corporate attorney-client and work product protection [McCallum Memo]).

This directive apparently reflects sensitivity to criticism of the Department's waiver policies.

Other government agencies have similarly indicated that they will try to work around the problem. For example, the Department of Health and Human Services promises in its Provider Self-Disclosure Protocol to negotiate "ways to gain access to the underlying information [in privileged documents] without the need to waive protections" (See Department of Health and Human Services, Office of Inspector General, publication of the OIG's Provider Self-Disclosure Protocol, Federal Register v. 63, no. 210, Friday, Oct. 30, 1998, at 58403).

And there are other encouraging developments. On April 5, after receiving extensive written comments on the privilege waiver issue, the United States Sentencing Commission voted unanimously to reverse a 2004 amendment to the Sentencing Guidelines that conditioned credit for cooperation on privilege and work product waivers where necessary to make "thorough" disclosures to the government.

Also, on April 25, the Advisory Committee on the Federal Rules of Evidence proposed an amended rule providing that, in a state or federal proceeding, the disclosure to federal authorities of records covered by the attorney-client privilege or work product protection would not operate as a waiver.

In the meantime, however, much depends on how an investigation is conducted and recorded and how the results are communicated to the government. Insofar as a company can separate facts from mental impressions, the company may be able to disclose critical facts without compromising the attorney-client privilege or its lawyers' opinion work product.

A carefully written confidentiality agreement may provide some help in certain jurisdictions.

In the end, however, a company conducting an investigation must remain cognizant of the risk that privileged material may not remain privileged for long. Foresight and discretion can go a long way towards tailoring the body of material that will eventually appear in court.

Michael Heyison is a partner in WilmerHale's Boston office, general counsel to the firm, and a member of the intellectual property litigation and complex commercial litigation practice groups. He can be reached at (617) 526-6910 or michael.heyison@wilmerhale.com.

Brent J. Gurney, a former assistant U.S. Attorney, is a partner in WilmerHale's Washington, D. C. office and represents clients in complex civil litigation, internal investigations, and white collar criminal matters. He can be reached at (202) 663-6525 or brent.gurney@wilmerhale.com.

Brad Bedingfield is an associate in WilmerHale's litigation department in Boston. He can be reached at (617) 526-6604 or brad.bedingfield@wilmerhale.com.

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