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# Privilege Standing Committee Update

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## D.C. Circuit Holds that Attorney-Client Privilege Does Not Protect Communications Between Corporate Counsel, Executive and Executive's Personal Attorney Due to Crime-Fraud Exception

In a recent case, a corporate executive and his personal attorney prevailed upon the court to quash a grand jury subpoena served on the corporation's corporate counsel for testimony relating to communications between corporate counsel, the executive and his personal attorney. The Department of Justice ("DOJ") had opened an investigation into allegations of election fraud by the corporation and had issued a subpoena requesting documents related to contributions made by the corporation and any of its officers, directors, or employees. *In re Grand Jury*, No. 05-3126, 2007 U.S. App. LEXIS 2889, at *2-3 (D.C. Cir. Feb. 9, 2007). The executive retained his own attorney, and the corporation and corporate counsel entered into a Joint Defense Agreement ("JDA") with the executive and his personal attorney. *Id.* at *3.

In the course of the investigation, the DOJ requested additional information about a February 2003 board meeting at which the executive had recommended that the corporation make certain political candidate contributions. *Id.* at *4. Corporate counsel asked the executive's attorney for any information that might respond to the DOJ's request, and in response, the executive's attorney faxed signed minutes from the meeting and an attached list of recommendations (the "Assignment Recommendation") that suggested, contrary to the minutes, that none of the executive's recommendations had been approved. *Id.* Corporate counsel then had multiple conversations with

the executive regarding the delayed production of the Assignment Recommendation in which the executive gave inconsistent statements about the creation of the document. *Id.* at *4-6. In a subsequent DOJ interview, the executive explained that the Assignment Recommendation had been created in December 2004 to "replicate notes" he had taken around the time of the meeting. *Id.* at *6-7. He stated that he had been aware that the Assignment Recommendation would be provided to the grand jury. *Id.* at *7. When the DOJ questioned the executive about his inconsistent accounts of the document's creation, his attorney raised the attorney-client privilege, noting that communications between the executive and corporate counsel were protected under the JDA. *Id.* The DOJ subsequently began an obstruction-of-justice investigation into the situation and served a subpoena on corporate counsel. *Id.*

In the district court and on appeal, the executive and his personal attorney sought to quash the subpoena to corporate counsel and to have returned to them documents relating to communications with corporate counsel. *Id.* at *8. On appeal, the court (Sentelle, J.) determined that the attorney-client privilege could not protect the Assignment Recommendation itself. The court reasoned that because the fax from the executive's personal attorney attaching the Assignment Recommendation was in response to corporate counsel's request for additional information to provide to the DOJ, the executive and his attorney intended that the document would be provided to the DOJ. *Id.* at *13. The court also determined that the attorney-client privilege could not shield from disclosure the executive's conversations with corporate counsel regarding the creation of the Assignment Recommendation because the crime-fraud exception applied. *Id.* at *14. The government's evidence, including an affidavit from corporate counsel, that "the Assignment Recommendation was a back-dated fraudulent document produced to mislead the government in connection with its ongoing grand jury investigation" was sufficient to make out a prima facie case that the exception applied. *Id.* at *15. The appellate court did not address the district court's determination that the JDA was not relevant and noted that, even if the JDA did give rise to an attorney-client privilege, the crime-fraud exception superceded it. *Id.* at *16. Finally, the court held that the executive's argument that the D.C. Rules of Professional Conduct relating to client confidences and secrets protected the information sought by the subpoena was not viable: no evidence had been offered that, even if the rule applied to the information, exclusion of the communications would have been appropriate. *Id.* at *17.

### Ninth Circuit: The "Work Product" Protection Established By the Federal Rules of Criminal Procedure Is Broader Than the Civil "Work Product" Doctrine

Although Fed. R. Crim. P. 16(a)(2) is often called a "work product" rule, its protection does not correspond to either the common-law or statutory "work product" doctrines. *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007). Following an investigation by the San Francisco Police into the alleged gang-related activities of defendants Fort, Diaz, and Calloway ("Defendants"), the federal government charged Defendants with multiple counts of racketeering and various predicate crimes. In its Discovery Order, the district court required the U.S. Attorney to disclose to Defendants unredacted versions of "inculpatory police reports created by the San Francisco Police Department prior to the initiation of the federal prosecution of Defendants," subject to the terms of an accompanying Protective Order. *Id.* at 1108. The court reasoned, in part, that the documents at issue

did not constitute the type of "work product" protected by Fed. R. Crim. P. 16(a)(2). *Id*. When the federal government refused to comply with the discovery order, the district court imposed sanctions; the government then appealed both the sanctions and the underlying order.

The Ninth Circuit (Graber, J.), by a 2-1 margin, overturned the Discovery Order, holding, *inter alia*, that the district court had misstated the scope of Rule 16(a)(2)'s protection. Rule 16(a)(2) states that, subject to the specific exceptions provided in section (a)(1), Rule 16 "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." Fed. R. Crim. P. 16(a)(2). The court acknowledged that several authoritative sources — including a U.S. Supreme Court opinion and the advisory committee notes on Rule 16 — referred to the materials protected under Rule 16(a)(2) as "work product." *United States v. Fort*, 472 F.3d at 1115. Nevertheless, the court determined, based upon the Rule's legislative history, policy considerations, and the language and substance of other Rules, that Rule 16(a)(2) protected from discovery investigative materials such as the police reports at issue, even when those materials did not meet the civil definition of "work product." *Id*. at 1116.

### Court of Federal Claims Allows Deposition of Opposing Party's Trial Attorney As Fact Witness

In considering a motion for a protective order and a cross-motion to compel the deposition of the opposing party's attorney, the Court of Federal Claims (Lettow, J.) held that the attorney could be deposed. *Boston Edison Co. v. U.S.* involved a contract between Boston Edison Company ("Boston Edison") and the Department of Energy ("DOE") for the disposal of spent nuclear fuel from one of Boston Edison's plants beginning by January 31, 1998. No. 99-447C, No. 03-2626C, 2007 U.S. Claims LEXIS 54, at *3-4 (Ct. Fed. Cl. Feb. 26, 2007). Boston Edison filed its complaint against DOE on July 12, 1999, and sold the plant to Entergy Nuclear Generation Company ("Entergy") on July 13, 1999. *Id.* at *4. The complaint included claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and was amended to include a claim alleging an uncompensated taking of Boston Edison's property, with damages measured by the diminution in value of the plant at the time of its sale to Entergy.

During discovery, the government sought to depose one of the attorneys on Boston Edison's trial team, Mr. Mattia, regarding his work as a non-legal consultant for Boston Edison during the sale and transfer of the plant. Boston Edison argued that *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), and its three-part test for determining whether a court should allow the taking of opposing counsel's deposition applied, involving consideration of (1) the unavailability of the information through other means, (2) the relevance and nonprivileged nature of the information sought, and (3) the crucial nature of the information to case preparation. *Boston Edison*, 2007 U.S. Claims LEXIS 54 at *9. The government asserted that *Shelton* was inapplicable because it sought to depose Mr. Mattia as a fact witness and not in his capacity as trial counsel for Boston Edison. *Id.* at *10. The court ruled in favor of the government and distinguished the facts at hand from *Shelton*: "[T]he government's proposed deposition is focused on his 'substantial non-legal' responsibilities as a consultant to Boston Edison at the time of the [plant's] sale, and the government is not seeking to discover Boston Edison's litigation strategy or to obtain Mr. Mattia's mental impressions of that

strategy." *Id.* at *21-22. The court thus determined that Boston Edison had not shown good cause, as required by Rules of the U.S. Court of Federal Claims 26(c), for the court to preclude the deposition of Mr. Mattia through issuance of a protective order. *Id.* at *23.

### House Judiciary Committee, American Bar Association, and SEC Commissioner Express Concerns Regarding Government Use of Privilege Waiver in Corporate Investigations and Prosecutions

Two months after the Department of Justice issued the "McNulty Memorandum," and one month after Senator Arlen Specter introduced the "Attorney-Client Privilege Protection Act of 2007" (S. 186), the question of whether and when the government should request that corporate defendants waive claims of privilege remains hotly debated. For more on the Memorandum and Senator Specter's proposed legislation, *see* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3570

On February 5, ABA President Karen J. Mathis sent a letter to SEC Chairman Christopher Cox proposing that the SEC revise the "Seaboard Report" (which parallels the DOJ Thompson Memorandum) to prohibit the SEC from requiring defendants to waive attorney-client privilege in order to demonstrate their cooperation. Four days later, SEC Commissioner Paul S. Atkins informed the audience at "SEC Speaks" that he shared the ABA's view "that the Commission should not view a company's waiver of privilege as a factor that will afford cooperation credit," and indicated his willingness to consider the ABA's proposed revisions to the Seaboard Report. *See* C:\Documents and Settings\04912\Local Settings\Temporary Internet Files\OLK88\2007-02-09 Atkins SEC Speech Remarks Before the SEC Speaks in 2007; Washington D_C_ Feb_ 9 2007.htm.

Finally, on March 8, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security heard testimony on "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations." Speakers included ABA President Mathis, Deputy Assistant Attorney General Barry M. Sabin, partners from Winston & Strawn and Jenner & Block, and the General Counsel of The Auto Club.

### Practice Tip

While courts often enforce oral agreements, in certain situations parties with similar interests may decide to have written joint defense agreements prior to sharing any privileged communications. Written joint defense agreements often include at least the following points:

(1) Identify the common legal problem;

(2) Note that the agreement covers only communications/documents exchanged in furtherance of addressing that common legal problem;

(3) Agree that one party cannot disclose documents/communications received from another party without that party's prior written permission;

(4) Agree that any party may still exercise the option to waive privilege in its own documents, regardless of whether it shared those documents with other joint

defense parties;

(5) Agree that one party cannot use confidential information obtained from another party in connection with the joint defense for any other purpose;

(6) Require one party to provide notice to the other parties if it intends to leave the joint defense group; and

(7) Agree that none of the parties' lawyers will be considered the lawyer for any other party in the joint defense group.