

Thomas W. Cranmer



State Bar of Michigan Task Force on the Attorney-Client Privilege

Recently, at the request of the Business Law Section of the State Bar of Michigan, I appointed a task force to examine the important and troubling issue of the compelled waiver of the attorney-client privilege in criminal investigations and proceedings. First, some background.

Erosion of the Attorney-Client Privilege for Business Entities

As you may (or may not) be aware, over the last several years, a business entity's ability to rely on the attorney-client privilege has been significantly eroded, and that troubling trend is continuing today. In particular, federal enforcement officials, including the Securities and Exchange Commission and the Department of Justice (DOJ), have been demanding that business entities waive their privilege to show that they are "cooperating" with government officials, and businesses may acquiesce in the hope that this cooperation will help them to avoid criminal indictment.¹ In response to an October 21, 2005 directive, United States attorneys throughout the country have been directed to draft procedures for securing such waivers.²

Nationally, the criminal defense bar has been focused on these changes in the law of attorney-client privilege. However, as former United States Attorney General Richard Thornburgh testified a relatively short time ago, "[T]he significance of these developments took some time to penetrate beyond the Beltway and the relatively small community of white collar defense lawyers."³

Waiver of the privilege by giving otherwise privileged materials to federal prosecu-

tors can have harmful or even catastrophic consequences for businesses. First, if a business cannot rely on the confidentiality of its communications with its counsel, it may fail to seek guidance on the legal implications of its past, present, or future conduct for fear that prosecutors will obtain and use the business's confidential disclosures to its counsel to indict and punish the business. Nor is a business likely to undertake searching self-examination and remediation of any discovered inadequacies in compliance procedures if the fruits of such an examination would be likely to wind up in the hands of federal enforcement officials.

Second, a business that acquiesces to a demand for waiver of the privilege may well be deemed to have waived the privilege for all purposes, especially in the Sixth Circuit.⁴ A business confronted with a demand for waiver has no reliable way to predict the extent to which future litigants can obtain the formerly privileged materials in civil discovery, using those materials to the business's detriment in the litigation.

National Efforts to Respond to this Erosion of the Attorney-Client Privilege

In 2004, the Business Law Section of the American Bar Association created a Task Force on Attorney-Client Privilege, which has been active in opposing compelled waivers of the privilege.⁵ The ABA task force has collected information and developed materials to assist lawyers in understanding and dealing with waiver demands.⁶

In addition, numerous organizations throughout the country have been forming coalitions aimed at protecting the privilege for businesses, resulting in some unlikely alliances. For instance, although the American Civil Liberties Union is not traditionally viewed as a business-oriented entity, it has joined with the Association of Corporate Counsel, the Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce, among others, to form the Coalition to Preserve the Attorney-Client Privilege, which recently submitted to the U.S. House of Representatives Judiciary

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Subcommittee on Crime, Terrorism and Homeland Security a position paper strongly condemning this erosion of the privilege.⁷

Various solutions to the problems associated with compelled waivers have been proposed. For instance, the ABA task force has proposed that the DOJ expressly reject its policies on waiver and, instead, state affirmatively that a business's refusal to waive its privilege cannot be used in determining whether to charge the business entity with a crime.

In addition, there is a proposal to adopt a new federal rule of evidence⁸ that would allow a business to waive its privilege selectively so that cooperation with federal law enforcement officials would not lead to a waiver for all purposes. Reaction to this proposal has been mixed. Some believe that enactment of the rule would entirely ameliorate concerns about a broad waiver and so support the rule. Others are concerned that the rule, if adopted, would encourage prosecutors to seek waivers in all cases, which could cause more harm than good.

State Bar of Michigan Task Force on Attorney-Client Privilege

In addition to task force co-chairs Diane Akers⁹ and John Allen,¹⁰ the other excellent lawyers I have appointed to the SBM task force include Samuel C. Damren of Dykema Gossett PLLC in Detroit; noted white-collar criminal defense practitioner David F. DuMouchel of Butzel Long in Detroit; Stephen L. Hiyama of the Office of the United States Attorney for the Eastern District of Michigan; Steven C. Kohl of Warner Norcross & Judd LLP in Southfield, who represents the Environmental Law Section; Martin P. Krohner, a private practitioner in Farmington Hills who is co-chair of the SBM Standing Committee on Criminal Jurisprudence and Practice and a member of the Criminal Law Section council; Michael W. Puerner, vice president and general counsel of Hastings Mutual Insurance Company in Hastings, who represents the SBM U.S. Courts Committee; Steven M. Ribiat of Butzel Long in Bloomfield Hills, who represents the SBM Judicial and Professional Ethics Committee; and Eric J. Wexler, general counsel for Great Lakes Health Plan, Inc., who represents the Health Care Law Section. In addition, Dawn

M. Evans, SBM Director of Professional Standards, will serve as liaison to the Bar.

The SBM task force will engage in the following activities:

Raising awareness of the issues. The SBM task force has initially concluded that many Michigan lawyers—particularly those who do not practice criminal law—are unaware of this erosion of the attorney-client privilege or might not fully appreciate the ramifications of a waiver given to avoid prosecution or minimize punishment. Therefore, the SBM task force will disseminate information to SBM members to raise their awareness of these important issues.

Gathering information. There are presently no reliable statistics regarding how frequently businesses are being confronted with demands for waiver, how frequently they are agreeing, and what has happened if they refused. The Association of Corporate Counsel very recently conducted a survey of its members, who expressed concern about the growing pervasiveness of requests for waivers.¹¹ The SBM task force will solicit input from SBM members and their business clients to determine their experience in Michigan and will also request feedback on their concerns about how waivers could affect their businesses.

Providing opportunities for education and professional development. Lawyers representing businesses in connection with criminal investigations and prosecutions are developing strategies for dealing with requests for waivers in a wide range of circumstances. In addition, business lawyers need to know how to advise their business clients on how to avoid problems with waiver long before any criminal investigation is under way. The SBM task force will identify resources and provide opportunities for Michigan lawyers to enhance their ability to protect their business clients' important rights.

Coordinating with other similar bodies. The SBM task force will coordinate its efforts with others around the country that are also focusing on waiver issues, including the ABA task force, The Coalition to Preserve the Attorney-Client Privilege, and other similar groups. In addition, the SBM task force will work with entities established in response to the January 31, 2006, request of the presi-

dent of the ABA that all state bar organizations form committees or task forces to address waiver issues.¹²

Working with United States attorneys. Regardless of whether the DOJ is persuaded to modify its current policies on waiver, the SBM task force will ensure that federal prosecutors are aware of the consequences for businesses in this jurisdiction if they accede to a demand for a waiver. Although federal officials may understand that waiver of the attorney-client privilege as to the government will lead to waiver for all purposes, they may not fully appreciate the far-reaching effects of a complete waiver and especially the ramifications of permitting otherwise privileged information to wind up in the possession of adverse third parties who will use it in litigation against the businesses. I fully anticipate that the dialog with the United States Attorney's Office for both the Eastern and Western Districts of Michigan will be open, professional, and productive. The issue of seeking waivers of the attorney-client privilege is not entirely new. Fortunately, I have never encountered in Michigan some of the draconian pressure tactics reported in other parts of the country. I am grateful that Stephen Hiyama, an experienced and well-regarded assistant United States attorney, has agreed to be a member of the task force.

Where Do We Go from Here?

In an April 6, 2006, editorial entitled "Corporate Injustice," the *Wall Street Journal* wrote:

It's certainly possible for law breakers to shield incriminating material using attorney-client privilege, but taking down that wall also has serious unintended consequences. For one thing, executives are now on notice that even asking a legal question of an attorney could later be used against them in court—say, as proof that they were aware what they were doing might not be proper. The likely result is a greater reluctance to seek legal advice in the first place.

The State Bar of Michigan task force has already begun its important work, but there is much more to do. The task force will be reporting on its activities and making recommendations to the Representative Assembly at its meeting in September. As always, I welcome your thoughts and input. Please feel free

to contact a member of the task force, your Representative Assembly person, or me with your comments and recommendations. ♦

FOOTNOTES

1. See, e.g., January 20, 2003 memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components regarding Principles of Federal Prosecution of Business Organizations (Thompson Memo); October 23, 2001 SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Actions (Seaboard Report); June 16, 1999 memorandum from Deputy Attorney General Eric Holder to All Component Heads and United States Attorneys regarding Bringing Criminal Charges Against Corporations (Holder Memo).
2. October 21, 2005 memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to Heads of Department Components regarding Waiver of Corporate Attorney-Client Privilege and Work Product Protection (McCallum Memo).
3. March 7, 2006 Testimony of Richard Thornburgh, former Attorney General of the United States, before the Subcommittee on Crime, Terrorism & Homeland Security of the House Committee on the Judiciary regarding White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers.
4. *In re Columbia/HCA Healthcare Corp Billing Practices Litig.*, 293 F3d 289 (CA 6, 2002).
5. See, e.g., March 3, 2006 letter from ABA Governmental Affairs Office Director Robert D. Evans to Hon. Howard Coble, chairman, House Judiciary Subcommittee on Crime, Terrorism and Homeland Security; ABA Task Force on Attorney-Client Privilege Recommendation 111, adopted on August 9, 2005 by the ABA; ABA Task Force Mission Statement.
6. Materials are available at <http://www.abanet.org/buslaw/attorneyclient>.
7. March 7, 2006 submission of Coalition to Preserve the Attorney-Client Privilege to U.S. House of Representatives Judiciary Subcommittee on Crime, Terrorism and Homeland Security.
8. Advisory Committee on Evidence Rules Proposed Amendment: Rule 502.
9. Ms. Akers is treasurer of the Business Law Section and a member of its council. She also chairs the section's Business Court Ad Hoc Committee and co-chairs its Commercial Litigation Committee. Ms. Akers' informational report to the Representative Assembly on Compelled Waiver of Attorney-Client Privilege in Criminal Investigations and Proceedings is the basis for this president's column. I am deeply grateful to Ms. Akers for granting me permission to adopt and share her excellent report.
10. Mr. Allen serves as liaison to the ABA Task Force on Attorney-Client Privilege from the ABA Tort Trial and Insurance Practice Section and serves on its Professional Responsibility Committee.
11. ACC Survey results are available at <http://www.acca.com/Surveys/attyclient2.pdf>.
12. See January 31, 2006 letter from ABA President Michael S. Greco to Council of State Bar Presidents.