By John W. Allen

Protecting the Privilege—MRPC 3.4(g) is NOT the Way

Editor's note: This article was written in response to Samuel C. Damren's article, "A Proposal to Amend the Rules of Professional Conduct: Prohibiting Thompson-Styled Waiver Requests," which was published in the October 2006 issue of the Michigan Bar Journal.

Our colleague, Sam Damren, has done a service to the profession with his article, "A Proposal to Amend the Rules of Professional Conduct: Prohibiting Thompson-Styled Waiver Requests."[1] Framed by State Bar President Tom Cranmer's recitation of the development of the "culture of waiver" in recent years and his formation of the State Bar of Michigan Task Force on Attorney-Client Privilege,[2] Sam Damren added a vivid picture of the scope of the seriousness of recent assaults on the privilege, and the urgency required for our response. Sam also proposes that we amend the Michigan Rules of Professional Conduct to add Rule 3.4(g), prohibiting any government lawyer from obtaining a waiver of attorney-client privilege in exchange for favorable consideration in a governmental investigation or prosecution. Acting urgently to protect the privilege is a good idea; adding MRPC 3.4(g) is not.

"The Fault, Dear Brutus . . ."—We Caused Part of This

The "culture of waiver" and assaults on the privilege are real and deserve our urgent response. Some of it arose out of the increased criminalization of business fraud (Enron Worldcom) and the perception that, because all wrongs had not been prevented, the then-existing laws were not sufficient to meet the issues. The media and politicians made much of "Where were the lawyers?" The result was a misunderstanding of the role of the lawyer and a material overstatement of the lawyer's "public" duties as legal counsel to the client corporation/business enterprise.

Much of this misunderstanding can be traced back to the American Bar Association's own Task Force on Corporate Responsibility,[3] which (together with the then-ABA president) made imprecise statements about a lawyer for a corporation also having a duty "to further the interests of the corporation *and its shareholders.*"[4]

> In supporting a Rule requiring a lawyer to report otherwise privileged information to the U.S. Securities and Exchange Commission, the Final ABA Task Force Report noted, with some pride: "In describing these proposed rules, the SEC noted with approval the Task Force's Preliminary Report, and its Chairman at the same time indicated that further rule-making would be influenced by action taken by the ABA."[5]

When the SEC Final Rule was published in Release 33-8185, requiring lawyers to report some protected information to the SEC, the most frequently cited source was the ABA's own Task Force Report.[6]

How did this go so wrong? MRPC 1.13 clearly states:

> A lawyer employed or retained to represent an organization represents the organization as distinct from its . . . shareholders, or other constituents.

Despite the clarity of MRPC 1.13, similar misstatements continued through 2002 from prominent lawyers, such as U.S. Senator John Edwards ("Corporate lawyers sometimes forget they are working *for the shareholders . . .*"[7]). Such loose talk proliferated, likely intended to reflect the functional nature of the organization or just to sound "kinder and gentler" amidst the then-current public outcry; nevertheless, the shareholders/corporate constituents and the public quickly acquired the reasonable belief that there is, indeed, a "client" relationship with the constituent and the lawyer, and therefore a duty of the lawyer to the constituent. The error then compounded, morphing into the mistaken belief that, like the corporate auditor, the corporate lawyer should be obligated to disclose confidential communications, if helpful to achieve some popular version of "justice." Innumerable media articles reflect this same mistaken phenomenon, as well as a strong sense of frustration when the corporate lawyer or the corporate client is not willing to hand over privileged material.[8]

Later, in its December 18, 2002, letter to the SEC, the ABA and then-President A.P. Carlton attempted to undo the earlier damage done by contrary non-specific statements as to whom the organizational lawyer represents, and came much closer to MRPC 1.13. At page 9, the letter says:

> The organization, and not its various constituencies, is the client. Section 307 and the SEC's proposals to implement it focus on the obligations of lawyers to the organization as the client. The Commission, in the Release, as distinguished from some earlier statements, correctly characterizes the organization, and not its shareholders or other constituencies, as the client. *This distinction is important in identifying to whom a lawyer owes duties—namely the organization and not particular shareholders, whose interests may differ. The interests of shareholders are, of course, relevant in assessing the consequences of matters affecting the organization—for example, whether a violation is material—but not for defining a duty.* (Emphasis added.)

Unfortunately, by then, it was too late to put the toothpaste back in the tube. By February 2003, the cover of the *ABA Journal* was entitled "DISCLOSURE, INC."—not exactly a testament to our profession's commitment to lawyer-client confidentiality. We ended up with the Edwards Amendment

(Sec. 307 of Sarbanes Oxley Act), the new SEC reporting rule, and many articles about corporate lawyers representing shareholders.[9]

In the words of Mr. Shakespeare (the playwright, not the fishing rod and golf club maker from Kalamazoo), "The fault, dear Brutus, is not in our stars, but in ourselves."[10] Thus, we should be careful to be sure that the cure is not worse than the affliction.

Policy, Not Ethics

Overstatements continue. After the September 12, 2006, U.S. Senate Judiciary Committee Hearings on DoJ use of the Thompson Memorandum policies and coercive waiver demands,[11] U.S. Senator Alan Spector claimed that, had he done this when he was a prosecutor, he would have been "hauled in on an ethics violation." Not really. In fact, it seems a virtually universal conclusion that DoJ's practices are *not* violations of the present MRPC. There has been no flood of MRPC 8.3 reports; and most believe that, if MRPC is to address the issue, it must first be amended.[12]

There is also widespread concern that MRPC should not be used for adopting what are more properly public policies or "good practices," especially when targeted at only a discrete group of lawyers (e.g., prosecutors/government lawyers). Much the same debate occurred during the ABA "Ethics 2000" review and revision of MRPC, regarding proposed MRPC 4.2, which would prohibit law enforcement contacts (even by "undercover" agents) to persons known to be represented by legal counsel.

For the most part, MRPC is a strict liability, quasi-criminal disciplinary code. When used for other purposes (e.g., platform for civil liability, public policies which are as much political as legal), it tends to be corrupted. Its fair application does not lend it well to words like "reasonable" or "negligence," which invariably are satisfied by materially lower levels of scienter and too often result in after-the-fact determinations. When you add the consequent civil liability based on the same MRPC, the results to lawyers are likely draconian and quite undesirable.

If a government lawyer's request of a waiver is an unethical invasion of the privilege, then is it also unethical for the corporate lawyer to ask for a joint defense agreement, which includes waiver of privilege between the same parties? I hope not. But if not, why not?

Characterizing MRPC as "strict liability and quasi-criminal" often draws a strong reaction, especially from bar discipline officials. But this is not just a matter of semantics.

In addition, if the proposed MRPC 3.4(g) makes it a disciplinary offense every time a government lawyer "obtain[s]" privileged material in exchange for more favorable treatment, what of the corporate lawyer whose client *chooses* (without any coercion) to allow the government to "obtain" such material, to avoid or lessen the corporate prosecution, or just to help get a bad guy? The privilege still belongs to the client (not the lawyer), does it not? But if the corporate lawyer assists the business client in making such a deal, and thus assists the government in "obtain[ing]" the privileged material, is that not "knowingly assisting" the government lawyer's misconduct? If it is, then the corporate lawyer has his or her own issues with MRPC 8.4(a).

To most, the key issue in the application of the Thompson Memorandum is not that, sometimes, protected information may be "obtained" by the government, but rather that *coercion,* express or implied, is used by some government prosecutors in doing so.[13] That coercive element is difficult to reflect fairly in a strict liability, quasi-criminal disciplinary code, such that lawyers (all lawyers, not just government lawyers) know, in advance, how to conform their conduct to the requirements of the law. It also seems unfair to apply any such prohibition only to prosecutors, when a "coerced" waiver could be (and is) as easily engineered by lawyers other than those working for the government.[14]

MRPC: A Strict Liability, Quasi-Criminal Code

Characterizing MRPC as "strict liability and quasi-criminal" often draws a strong reaction, especially from bar discipline officials. But this is not just a matter of semantics.

The sui generis nature of lawyer discipline gives special emphasis to the seriousness of any violation. MRPC is not a "statement of principles" or "good practices" or "ethical considerations" (as they were called in the former Model Code of Professional Responsibility). This distinction is made more difficult by our frequently imprecise interchanging of terms like "disciplinary rules of conduct," "ethics," and "professionalism." The MRPC is a set of disciplinary rules, the violation of any of which may result in the loss of the professional license to practice. This is why many persons believe MRPC is not the place for expressions of "public policy," "better practices," "what would be nice," or what would be "better public relations" for the bench and bar.

On this, Michigan law is clear, and has been, at least for a century or so. Attorney discipline proceedings are "quasi-criminal." Our Supreme Court has said:

> Although it is not necessary to observe all of the rules of criminal law and procedure in a disbarment proceedings, nevertheless *our Court has long recognized that a disbarment proceeding is quasi-criminal in character.* As this Court stated in *Matter of Baluss* (1874), 28 Mich 507, 508: "While not strictly a criminal prosecution, it is of that nature, and the punishment, in prohibiting the party following his ordinary occupation, would be severe and highly penal." (Emphasis added.)[15]

Likewise, "liability" under most MRPC provisions is "strict" or "absolute," in that, at the "liability"/prosecution stage, it is (under most of the Rules) irrelevant whether the violation was knowing or negligent, intentional or accidental, frequent or isolated, damaging or not. Factors like scienter, intent, history, personal profit, and damage are only "mitigating" factors regarding the "severity of the sanction," but do not affect "liability" (except through some unwritten, subjective prosecutorial discretion or grace). In a bifurcated lawyer discipline system (like Michigan's and most other jurisdictions), these factors are not

considered until the "adjudicative" phase. They affect the sanction, but not the determination of culpability.

Although the Comments to the ABA Model Rules of Professional Conduct speak of the importance of "willfulness," the Comments to the Rules are not the law in Michigan.

> This court allows publication of the *comments* only as "an aid to the reader," but they are *not "authoritative statement[s]." The rules are the only authority.* (Emphasis added.)[16]

Michigan's consideration of vast amendments to MRPC, as part of the ABA "Ethics 2000" review, will not change this. See Michigan newly Proposed Preamble, Scope, Comment [21]:

> The Preamble and this note on Scope are only intended to provide general orientation and are not to be interpreted as Rules. *The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.* (Emphasis added.)[17]

The ABA MRPC Proposed Comment [19] does not help; it blurs the important distinction between the prosecutorial/liability phase and the adjudicative phase, saying:

> Moreover, the *Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of the sanction,* depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations. (Emphasis added.)

In Michigan, these factors go only to the "degree of sanction," not to the issue of "liability." ABA Proposed Comment [19] provides little solace, even outside Michigan, if all it means is that the disciplinary authority can use its unfettered and undefined discretion to look at scienter or willfulness in deciding whether to charge.

The zealous disciplinary authority, choosing to ignore those factors, will find much support in the law. In most jurisdictions, even "willfulness" under MRPC does not require intent or scienter. For example, from California:

> Petitioner contends his failure to obey our order of March 23, 1988, was not wilful, but owing to inadvertence and excusable neglect. *We have defined "wilful" under rule 955 as "'simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate the law, or to injure another, or to acquire any advantage.'"* (*Phillips v State Bar* (1989) 49 Cal 3d 944, 952, 264 Cal Rptr 346, 782 P.2d 587.) Moreover, *wilfulness under rule 955 does not require bad faith or actual knowledge of the provision which is violated.* (Emphasis added.)[18]

Proposed MRPC 3.4(g) is a prohibition. Some of the most common disciplinary examples of "strict" liability are those involving "prohibitions," such as those forbidding commingling trust funds, and conflicts of interest. At the "liability" stage of a bifurcated disciplinary proceeding, it does not matter if the conduct was intentional or mistaken, or if it caused damage or not, or if the lawyer knew of it or it was done by an employee without the lawyer's knowledge, or if it resulted in any gain to the lawyer. If there was commingling or a conflict (or under proposed MRPC 3.4 (g), if privileged material was "obtain[ed]"), regardless of the degree or amount or absence of coercion, then the culpability determination is certain—against both the government lawyer and any non-government lawyer who assisted. Those other factors (intent, damage, scienter) may go to mitigation of sanction, but do not affect the liability determination (other than through prosecutorial grace, based on no written authority or standard).

If that is not "strict" (or "absolute," if you wish) liability, then what is?

Why is this important? Again, it is not just semantics. When the sanctions are "quasi-criminal . . . severe and highly penal" and rooted in concepts of strict and absolute liability, it is both unwise and unjust to base violations on subjective concepts of whether a demand for privilege waiver is, under a variety of fact circumstances, "coerced" or not. The same is true when MRPC is riddled with concepts of "negligence" (which presumes the otherwise necessary elements of proximate causation and damage not present in MRPC) and undefined, or idiosyncratic, criteria like "informed consent" (which make it impossible to know with reasonable certainty in advance how to conform one's conduct to the requirements of the law). Many thoughtful persons believe quasi-criminal laws should not do that, because it offends elementary notions of fairness and due process.

The argument is sometimes offered that the prohibition of requesting waiver should be made part of MRPC, and then we just trust the disciplinary authorities to be "reasonable" about its enforcement. When the government (including the Attorney Grievance Commission and the Attorney Discipline Board) says, "Just trust us," most of us feel uncomfortable. It sounds strangely like what DoJ is currently telling us about its practices under the Thompson Memorandum.

Any outright prohibition of certain conduct (e.g., all requests for privilege waivers by all prosecutors) poses the same issues. It is not an answer to say the disciplinary authorities will not charge those who do it "without coercion."

Twenty years ago, this same concern was a guiding principle of the American Bar Association's Kutak Commission's proposal of the Model Rules, and its discarding of the undefined and much abused "appearance of impropriety" rubric in Canon 9 of the former Model Code of Professional Responsibility.[19] This is also a principal reason why many of the ABA "Ethics 2000" Proposals were so hotly debated, and why many were approved in the ABA House of Delegates only by narrow margins. Some persons reasonably view many of these changes as "Back to the Future," undoing much of what the Kutak Commission and ABA then set out to do.[20]

Conclusion

The privilege is under attack, and we must defend it. Abuses by some prosecutors must be addressed, and public misperceptions of the role of business lawyers must be corrected. Any incursion on the privilege of any client must be properly viewed as an assault on the confidentiality of every attorney-client relationship. The "chilling effect" on every client and every potential client cannot be denied.

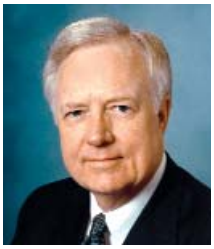
But public policy is better addressed through those who make the policy, such as DoJ and the Thompson Memorandum. The legislative and judicial branches can also weigh in with their observations and influence. The ABA Task Force on Attorney-Client Privilege has focused on that process and has been quite successful in those efforts. The process is more cumbersome, and certainly more time consuming, but, in the

end, will have a better result for all lawyers than misusing MRPC to achieve a public policy objective.

If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. MRPC is handy, since the ABA or our Supreme Court, all by themselves, can change it. We have done that before, but not always with the best results for clients and lawyers.

The MRPC need not be the vehicle with which to approach every issue of the profession. Some persons believe "public policy" (like DoJ criteria for demands for privilege waivers), "good practices" (like "should" admonitions), laudatory ethical considerations (e.g., pro bono service), and wise loss prevention (e.g., "confirmed in writing") are all worthy aspirations, recommended topics for CLE, and probably good public relations, but not the stuff of a strict liability, quasi-criminal disciplinary code. Others believe these should be in MRPC.

As J.S. Mill said, "These are great questions. And on all great questions, much remains to be said." ◆



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FOOTNOTES

1. Damren, *A proposal to amend the rules of professional conduct: Prohibiting Thompson-styled waiver requests,* 85 Mich B J 44–49 (October 2006).
2. Cranmer, *State Bar of Michigan task force on the attorney-client privilege,* 85 Mich B J 14–16 (June 2006). The Michigan Task Force on Attorney-Client Privilege is co-chaired by Diane Akers and John Allen and includes Samuel C. Damren, Steven C. Kohl, David F. DuMouchel, Steven M. Ribiat, Stephen L. Hiyama, Robert A. Maxwell, Michael W. Puerner, Martin Krohner, Eric J. Wexler, and Dawn Evans. The task force maintains a website at <http://www.michbar.org/generalinfo/attorney-client.cfm> (accessed October 23, 2006).
3. The ABA Corporate Responsibility Task Force and its reports and materials may be viewed at <http://www.abanet.org/buslaw/corporateresponsibility/> (accessed October 17, 2006).
4. Preliminary Report of the American Bar Association Task Force on Corporate Responsibility, July 16, 2002, p 12 <http://www.abanet.org/buslaw/corporateresponsibility/preliminary_report.pdf> (accessed October 18, 2006).
5. Citing Release Nos 33-8186; 34-47282; IC-25920, available at <http://www.sec.gov/rules/proposed/33-8186.htm> (accessed October 17, 2006), and speech by former SEC Chairman Harvey Pitt, January 29, 2003, available at <http://www.sec.gov/news/speech/spch012903hlp.htm> (accessed October 17, 2006).
6. <http://www.sec.gov/rules/final/33-8185.htm> (accessed October 17, 2006).
7. Cong Rec S6557, July 10, 2002, available at <http://thomas.loc.gov/cgi-bin/query/F?r107:1:./temp/~r107YWe8bm:e312291:> (accessed October 23, 2006).
8. For example, see Carrie Johnson, "Look Who's Left Standing—Legal Penalties in Frauds Are Seldom Paid by Legal Advisers," *The Washington Post,* August 31, 2006.
9. The government's reliance on privileged material increases. Recent indictments of former Hewlett-Packard Chairperson Patricia Dunn and others, for "pretexting" during an investigation of the H-P Board, were precipitated by the prosecutor's obtaining materials from the internal H-P investigation, conducted by outside legal counsel, and that these materials had not been earlier available to the prosecutor until they were subpoenaed by Congress for the recent hearings in Washington. "California Charges Dunn . . . ," *Wall Street Journal,* October 5, 2006.
10. *Julius Caesar* (I, ii, 140–141).
11. For materials on the recent Senate Hearings and the testimony by ABA President Karen Mathis, see <http://www.abavideonews.org/ABA383/index.php> (accessed October 18, 2006).
12. Similar to Sam Damren's proposal, former ABA Ethics Chair M. Peter Moser has proposed an amendment to the Model Rules of Professional Conduct, Rule 3.4(g), to prohibit any government lawyer's "seeking to obtain" privileged material in exchange for more favorable treatment, unless the waiver is "purely voluntary." So far, Mr. Moser's proposal has not gained traction with either the ABA Task Force on Attorney-Client Privilege or with the ABA Ethics Committee.
13. Though empirical data is still lacking, the recent congressional testimony hinted strongly that the coercive use of the Thompson Memorandum policies may be restricted to the actions of 10 or 12 U.S. Attorneys' offices, none of them in Michigan.
14. Sam Damren's article recites important issues under the MRPC raised in the context of the "company attorney"-conducted investigatory interviews of employees, effectively waiving the employee's consultation with independent legal counsel.
15. *In re Woll,* 387 Mich 154, 161, 194 NW2d 835 (1972). See also *In re Clink* (1898), 117 Mich 619, 76 NW 1.
16. *Grievance Administrator v Deutch,* 455 Mich 149, 164, 565 NW2d 369 (1997).
17. See Michigan Supreme Court Administrative Order No 2003-62 and materials collected at <http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm> (accessed October 18, 2006), which proposes hundreds of changes to the Michigan Rules of Professional Conduct. The Supreme Court still has these proposals under consideration.
18. *Dahlman v State Bar,* 790 P2d 1322, 1324 (Cal 1990).
19. See Restatement of the Law Third, The Law Governing Lawyers, Section 5, Comments b and c.
20. On a similar note, while some of the Model Rules (i.e., Rule 1.1) reference "neglect," the MRPC is not a proper mechanism with which to regulate lawyer competence. Attempting to regulate lawyer competence with the MRPC is like trying to teach driver education by using only speeding tickets.