IS THE ATTORNEY-CLIENT PRIVILEGE UNDER ATTACK?

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In light of the recent issues under the Trump administration, in addition to evolving legal developments, the question is being asked—is the attorney-client privilege under attack? This article will examine the measures that have been seemingly taken to degrade the attorney-client privilege in order to reach corporate wrongdoing, including their implications for in-house counsel, corporate clients and individuals.

WATERING DOWN THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE TO ATTACK CORPORATE WRONGDOERS

The U.S. Supreme Court has long upheld the importance of attorney-client privilege, because the privilege "encourage[s] full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Both "the giving of professional advice to those who can act on it" and "the giving of information to the lawyer to enable him to give sound and informed advice" are protected. *Id.* at 390. The privilege applies both to individual and to corporate clients. Nonetheless, claims of privilege in the modern corporate context have faced challenges. For example, because counsel, especially in-house counsel, have become widely involved in business operations, "render[ing] decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues," not all communications are presumptively privileged. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (organizations "*usually* cannot claim that the primary purpose" of emails directly addressed to both attorneys and non-attorneys is for legal advice or assistance); *see Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645 (D.N.M. 2007) (the mere fact that an attorney is involved in a communication does not make that communication privileged).

The modern work-product doctrine traces back to the U.S. Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), in which the Court sought to foreclose unwarranted inquiries into attorneys' files and mental impressions in the guise of liberal discovery. In *Hickman*, the Supreme Court held that an attorney must "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" and be free to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 510-11.

Though the two principles of attorney-client privilege and work product doctrine are related, there are distinct differences between them. Generally, in contrast to the attorney-client privilege, which may be asserted only by the client, either the attorney or the client may invoke the work-product doctrine.

Moreover, the attorney-client privilege protects confidential communications (including documents) between attorneys and their clients; in order to enjoy the privilege, the exchange of information can only take place between the client and her attorney (and staff). In contrast, the work product doctrine extends to the work product of the attorney and her agents (such as investigators and insurers) acting at her instruction, along with documents commemorating communications with third-party witnesses; of course such documents must be prepared in anticipation of litigation to be afforded protection.

Similarly, the attorney-client privilege, though narrow, is an unqualified privilege, which will be upheld if an attorney-client relationship exists and the proper steps are taken to maintain confidentiality. The work product doctrine protects only the actual product of the attorney, such as documents, without protecting the subject matter of the

documents, and can itself be pierced by a showing of "substantial need" and "undue hardship" so long as the attorneys' and their representatives' "mental impressions' and "legal theories" are not compelled.

It is against this backdrop that government actors have begun to test the limits of these protections.

THE "YATES MEMO"

In 2015, while still deputy attorney general, Sally Yates issued a memorandum to all Justice Department attorneys titled "Individual Accountability for Corporate Wrongdoing." This memo instructs all government attorneys to go beyond simply investigating corporations for criminal wrongdoing, and encouraged them to investigate individual corporate employees as well. Given the methodology laid out in this memorandum, and the stated objective of assessing criminal penalties against individuals, the effect of this memorandum has been to complicate the preservation of the attorney-client privilege.

Further, though this memorandum was presumably created in response to public outcry about the failure to prosecute individual decision makers, who bore responsibility for the banking and financial sectors crises, the memorandum is applicable to the corporate world at large and can in practice lead to the disclosure of confidential and protected information.

The Yates memorandum lays out "six key steps" for ferreting out corporate wrongdoing. The first is the most relevant to this discussion–to be eligible for any cooperation credit, corporations must provide all relevant facts about the individuals involved in the alleged corporate misconduct.

Although the DOJ has traditionally emphasized the importance of identifying culpable individuals, prior to the memorandum, companies were often allowed to disclose improper corporate practices without identifying the specific individuals involved and still avoid indictment. This practice is now specifically disallowed, pitting the corporation against the individuals who comprise it.

Further, the treatment of privileged information is now uncertain. Under the DOJ Principles of Federal Prosecution of Business Organizations, corporations need not disclose, and prosecutors may not request, attorney work product as a condition of receiving cooperation credit. However, it is becoming apparent that attorney interviews of witnesses and potentially culpable employees - the primary mechanism used by a corporation to gather information about misconduct - will not necessarily remain protected work product. Recently, a federal magistrate ordered production to third parties of witness interview memoranda from an internal investigation in related civil litigation, finding that attorneys had waived attorney work product protection when they orally disclosed the substance of the memoranda to the government, reasoning that the disclosure amounted to an "oral download, and went beyond offering only detail-free conclusions or general impressions." *SEC v. Herrera*, Case No. 17-CV-20301 (S.D. Fl. Dec. 5, 2017). Since this common practice of sharing information with the government following an internal investigation is virtually mandated by the DOJ in order to gain cooperation credit, it places corporations in a nearly impossible position if they hope to cooperate with the government and still maintain legal protection over internal investigation materials (which can then be used in subsequent civil litigation by DOJ or third parties).

Even more, in November 2017, the DOJ released its Corporate Enforcement Policy related to the Foreign Corrupt Practices Act (FCPA), the objective of which is to incentivize companies to cooperate with DOJ by offering presumptions of declination for voluntary self-disclosures of violations. But to receive credit under the new guidelines, companies must give "full cooperation" to DOJ, including proactive disclosure of "all relevant facts gathered during the company's independent investigation" and "attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of facts."

Thus, in light of these competing interests, corporations and their counsel must be particularly mindful of the level of detail being provided to the government to prevent waiver, while attempting to maximize the cooperation credit available.

THE COHEN DOCUMENTS

There are limited exceptions to the attorney-client privilege. Thus, it is well-settled that the attorney-client privilege does not protect communications between an attorney and a client in furtherance of illegal conduct or which is predicated upon covering up a crime, regardless of whether the parties intended the communications to remain "confidential." Relying on this exception, on April 9, 2018, the U.S. Attorney's Office for the Southern District of New York executed a series of search warrants to seize materials from the office, home, and hotel room of President Donald Trump's personal attorney Michael Cohen, after receiving a referral from Special Counsel Robert Mueller.

To obtain the search warrant, prosecutors convinced a federal judge that there was probable cause that investigators would find evidence of criminal activity, and reason to believe that the attorney might destroy the evidence, thus justifying a warrant rather than a subpoena. The affidavits supporting the warrant application would have made a prima facie case that the attorney-client communications were not privileged because Cohen was involved in committing or planning some type of fraud. Once the documents were seized, instead of employing the traditional and separate "taint team" to review the documents for privileged material before turning it over to investigators, a "Special Master" was appointed to determine which documents could be turned over to federal prosecutors.

Thus, though President Trump famously tweeted after the raid that the "Attorney Client privilege is now a thing of the past," and that the privilege was "dead," there is probably less to fear for the average corporate actor and attorneys from this particular set of sensational facts than there is from the uncertainty surrounding the incremental erosion of the attorney-client privilege and work-product doctrine by the DOJ's current stated policy of punishing individuals for corporate malfeasance. In any event, these recent examples show just how far the boundaries of these privileges are being pushed, and are a reminder to corporations, corporate representatives, and their attorneys to remain vigilant about safeguarding these protections.

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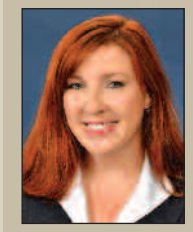

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