

ABA Task Force on the Attorney-Client Privilege

Good Afternoon. My name is Jonathan Bach, and I am a partner at the law firm Kronish Lieb Weiner & Hellman LLP. I am also a member of the New York Council of Defense Lawyers (“NYCDL”) and am appearing before you on the Council’s behalf. We at the Council are pleased to respond to this task force’s request for comments about matters related to the attorney-client privilege, especially in the white-collar criminal investigation context.

The New York Council of Defense Lawyers is a not-for-profit professional association of approximately 200 lawyers – many of whom are former federal prosecutors. The Council’s principal area of practice is criminal defense in the federal courts of New York. Its mission is to support and advance the criminal defense function by enhancing the quality of defense representation, taking positions on important defense issues, fostering understanding and consensus in areas of mutual concern to defense lawyers and prosecutors, and promoting collegiality among lawyers on both sides and the bench. In making this submission, the NYCDL offers the perspective of practitioners who regularly handle some of the most complex and significant federal criminal cases. Our *amicus* brief was recently cited by the Supreme Court in *Booker*.

Thus, because of our extensive practice in sophisticated white collar criminal investigations and prosecutions, we believe we are uniquely qualified to provide input to the Task Force.

Although we do not question that law enforcement is entitled to investigate alleged wrong-doing, certain tactics currently used by law enforcement too often encroach in

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areas that have traditionally been sacrosanct because of the attorney-client privilege. These practices turn attorneys into quasi-prosecutors, creating adversarial relationships with their own clients, and requiring them to give previously confidential information to the government and private nonparties who will use it to their advantage and to the disadvantage of the attorney's client.

“The attorney-client privilege is one of the oldest recognized privileges for confidential communications,” *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998); *see also United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989), one that “for centuries has been a part of the common law, in one form or another,” In Re: Grand Jury Investigation, 2005 WL 407644 (2d Cir.)

Today, the generally acknowledged purpose of the privilege is “to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” *Swider*, 524 U.S. at 403 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66L. Ed. 2d 584 (1981)); *see also In re John Doe, Inc.*, 13 F.3d 633, 635-36 (2d Cir. 1994) (“The purpose of the attorney-client privilege is to promote open communication between attorneys and their clients so that fully informed legal advice may be given.”); Restatement (Third) of the Law Governing Lawyers § 68 cmt. c (2000) (“The rationale for the [attorney-client] privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services. . . . “Recognition of the privilege reflects a judgment that [impairment of the search for truth in some instances] is outweighed by the social and moral values of confidential

consultations. . . . The law accepts the risks of factual error and injustice in individual cases in deference to the values that the privilege vindicates.”).

As recently observed by the Federal Circuit Court of Appeals, “[t]he idea that a robust attorney-client privilege will in fact “promote broader public interests” does not mean that application of the privilege will render justice in every single case. Nevertheless, courts have by reason and experience concluded that a consistent application of the privilege over time is necessary to promote the rule of law by encouraging consultation with lawyers, and ensuring that lawyers, once consulted, are able to render to their clients fully informed legal advice.” In re: Grand Jury Investigation.

In the government’s effort to investigate and prosecute criminal wrong-doing, protect the financial markets, curb corporate misconduct, and secure more accurate financial reporting, we should recognize the worthwhile role of independent counsel who guide and assist a corporate client to comply with the law, correct past errors and mistakes and comply with the complexities of financial reporting. However, some of the practices engaged in by both prosecutors and the SEC can at times become obstacles in the path of attorneys doing their jobs, and disturb long-standing privileges which inure to the benefit of the client as well as the system of criminal justice as a whole. They also can be readily avoided while still honoring the spirit and letter of Sarbanes-Oxley as well as the Sentencing Guidelines.

So, for example, it is routine practice in the Southern and Eastern Districts of New York for the prosecution to “require” cooperating entities to waive the fruits of their own

internal investigative work product, and turn that product over to it.¹ If a corporation refuses to do so, the government views the entities' actions as not reflective of a good corporate citizen, and increases the likelihood of prosecution of the entity.

Knowing of the government's practice, experienced counsel serves in effect as a government agent or as a second prosecutor, but without the need to adhere to the requirements of the fourth, fifth or sixth amendments, because the corporation is a private party. Private attorneys retained by a corporation can seize an employee's documents without probable cause, and they can interview employees almost with impunity. When they want to interview an individual, they give what amounts to corporate Miranda warnings for employees, but with an added edge: If the individual will not submit to an interview, then the individual might very well lose his or her job as well as the payment of attorneys' fees. Moreover, this interview is subject only to the corporation's attorney-client privilege, not the individual's privilege, and it can be waived if the corporation deems it in its interests. The corporation's lawyers are therefore put in the position of conducting sensitive interviews, about confidential matters, without being able to assure the person being interviewed of any privilege protecting the information being provided. The private attorney representing the corporation too often encounters an ethical conundrum, encouraging an employee to talk while knowing that the employee's statements may well lead to incrimination or other adverse consequences. The attorney's obligation to his or her corporate client, and the concomitant obligation to cooperate and

¹ The SEC also requires this in certain investigations. Moreover, Sarbanes-Oxley imposes disclosure obligations in the financial reporting arena.

share information with the government, is at odds with the traditional imperative of the private bar to maintain confidences and safeguard against any unnecessary incrimination.

And it can get even more complicated. When cases against individuals go to trial, the lawyers conducting the internal investigation for a corporation that has waived privilege find themselves as potential witnesses at the trial, needing to testify about what individuals have said at interviews. Our members have been put in this position on several occasions recently. Cross examination has pitted one defense lawyer, cross examining behind the lectern, against another on the stand.

This is a difficult, and too often, an ethically challenging role for private counsel to play, and one that should not be encouraged as the norm whenever a public corporation is being investigated. The lawyer conducting an internal corporate investigation is, of course, required to represent the corporation zealously, which means extracting all pertinent information, however incriminating that may be for individual employees. However, when interviewing any such employee, the lawyer must also not mislead in anyway. That much is clear. But there is no rule, for example, as to whether the corporation's attorney is required to advise the individual that it may be in his or her best interest to seek the advice of counsel before engaging in any interview. What is the proper way to proceed? How is the corporation's desire to provide information to the government to be balanced against an individual's desire to avoid incrimination? Because there are no clear guidelines – and even the legal doctrine is changing (in the *Computer Associates* case, for example, the prosecution took the unprecedented step of having individuals interviewed by private attorneys plead guilty to charges for

obstruction of justice) – the private defense bar must find its way through very difficult situations while often forced to compromise one ethical norm or another. In this difficult terrain, there are not enough clear rules or ethical guidelines to help an attorney balance conflicting ethical demands.

It can be equally disturbing when one is the lawyer representing the individual whom the corporation wants to interview as part of its internal investigation. No longer can one rest assured that a client's words will not be used against him or her, because now, anything the client says in an internal investigation is likely going to be turned over to the government as part of the corporation's cooperation with the government. Both the lawyer for the individual as well as the corporation become potential witnesses at trial. If the client declines the company's request to be interviewed, he or she can be fired. With mortgages to pay and families to support, the pressure to submit to the interview becomes paramount, and a lawyer's entreaties to the client to refuse to be interviewed because of the potential self-incrimination consequences may be outweighed by considerations that did not, in the past, come into play. Thus, the traditional attorney-client relationship is compromised from the outset, with the lawyer providing advice not about the client's constitutional rights, but about how to best protect one's fiscal health.

The public's interest is directly affected by these practices. The government decides what is in the corporation's best interest -- full disclosure to it. The requirement of full disclosure can cause real harm to the corporation, ironically at times because of what the corporation does not learn. If an individual exercises his or her right not to be interviewed because of the possible communication of the content of the interview to law

enforcement, the corporation is deprived of learning what the individual has to say. This in turn deprives the corporation of the ability to improve its practices and ensure that, if there are problems revealed by the individual, they are remedied. So, for instance, if an individual knows of an accounting problem, an inventory shortfall, of an employee unknown to the Corporation who is currently engaging in undetected wrong-doing, or a defect in design, the threat that the interview might be disclosed to the government will many times prevent the individual from revealing what he or she knows, which prevents the company from learning of it and correcting it. This is not in the best interests of the public or the shareholders.

In our view, regulators and prosecutors should not be in a position to request or require the production of privileged information as the cost of not being prosecuted. The NYCDL believes that there should be a norm of non-disclosure. And, if there is some disclosure, it should be reserved for exceptional circumstances, where it is clearly warranted and no other approach is available.

We appreciate the opportunity the Task Force has provided to us to provide this input, and would be glad to answer any questions the Task Force may have.