



## **ABA Section of Business Law Fall Meeting**

**November 21-- 22, 2008**

**The Ritz-Carlton**

**Washington, DC**

### **Attorney-Client Privilege and SEC Examinations**

**Presented by: The Committee on Federal Regulation of  
Securities**

**Chair - Jay G. Baris**

**[www.ababusinesslaw.org](http://www.ababusinesslaw.org)**

**THE ATTORNEY-CLIENT PRIVILEGE AND SEC EXAMINATIONS:  
TO WAIVE OR NOT TO WAIVE?**

**AMERICAN BAR ASSOCIATION  
COMMITTEE ON FEDERAL REGULATION OF SECURITIES  
CLE PROGRAM**

**JAY G. BARIS\***

**KRAMER LEVIN NAFTALIS & FRANKEL LLP  
NOVEMBER 21, 2008**

**What is the Attorney-Client Privilege?**

The attorney-client privilege is a legal rule of evidence that protects the confidentiality of communications between an attorney and a client. The purpose of the privilege is “to encourage full and frank communication between attorneys and their clients” without fear that the lawyers will disclose confidences.<sup>1</sup>

The privilege encourages clients to “put everything on the table” so that the lawyers, being fully informed of all the facts, can fulfill their responsibilities under the law to their clients and help their clients enjoy the full benefits of the law.<sup>2</sup>

Moreover, the privilege exists “to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”<sup>3</sup>

The privilege is a bedrock of the adversarial system. It allows lawyers to prepare for litigation “without fear that their work product and mental impressions will be revealed to adversaries.”<sup>4</sup>

**What is the Work Product Doctrine?**

The work product doctrine provides an independent source of immunity. The work product doctrine precludes adversaries from discovering the “work product” of lawyers or non-lawyers (whether or not disclosed to the client) developed in anticipation of litigation. Unlike the attorney-client privilege, the work product doctrine provides only a “qualified” protection – it can be overcome by a showing that the adversary needs the information and cannot obtain it in another way.

---

\* The author gratefully acknowledges the review and suggestions of his colleagues at Kramer Levin Naftalis & Frankel LLP: Arthur H. Aufses, Partner; Alexandra K. Alberstadt, Special Counsel; Mark Parise, Associate; and Gariel Nahoum, Associate (not yet admitted to the bar).

## **What is at Stake?**

Lawyers are increasingly concerned that prosecutors and regulators are effectively weakening the attorney-client privilege and the work product doctrine. In particular, there is a growing perception that prosecutors and regulators, in their investigations, encourage clients to waive the privilege in exchange for “cooperation credit.” In effect, clients (both companies and individuals) risk being labeled “uncooperative” if they do not waive the privilege, thus facing potentially harsher penalties.

This issue frequently arises in the context of regulatory examinations and investigations of investment companies and their service providers by the Office of Compliance Inspections and Examinations (“OCIE”). During a regulatory examination, the staff may effectively ask for a “subject matter” waiver, which could lead to compelled disclosures or privileged information in later stages.

## **The Seaboard Report**

The Securities and Exchange Commission summarized its policy concerning waivers of the attorney-client privilege in its Seaboard Report, published in 2001.<sup>5</sup> It described the criteria that the Commission

“will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation *and cooperation* – from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.”<sup>6</sup> (emphasis added)

The Seaboard Report’s 13 factors provide a useful understanding of the Commission’s mindset when it decides whether, and to what extent, it will take enforcement action. The Report recognizes that no one-size-fits-all formula exists; rather, the Commission holds wide discretion to protect investors. The Commission emphasized that it would evaluate each case on its facts and circumstances.

Perhaps the most contentious factor is paragraph 11, and its footnote. Paragraph 11 states that the Commission will consider whether a company made available sufficient documentation in its response to the problem, clearly identified the improper conduct; wrote a report detailing its findings; and self-reported violations.

The last sentence of paragraph 11 asks “Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?”

In a footnote to that sentence, the Commission states:

In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege,

the work product protection and other privileges, protections and exemptions with respect to the Commission.<sup>7</sup>

The Commission said that while it recognizes the importance of these privileges, protections and exemptions, it viewed a waiver “as a means (where necessary) to provide relevant and sometimes critical information to the Commission’s staff.”

The staff’s request for a waiver creates a dilemma:

- waive the privilege, and open the door for public dissemination of confidential attorney-client communications, which could prove costly in related lawsuits, or
- risk the Commission slapping on the “uncooperative” label, and face immediate, severe enforcement action that could create an adverse impact.

### **ABA Task Force on the Attorney-Client Privilege**

The American Bar Association established the Task Force on the Attorney-Client Privilege in September 2004 to evaluate issues and recommend policy related to the privilege and the related work-product doctrine.

The Task Force’s report, issued May 18, 2005, summarized what it viewed as an erosion of the attorney-client privilege.<sup>8</sup>

This report expressed concern that the Seaboard Report had resulted in routine requests by the Securities and Exchange Commission for companies to waive the attorney-client privilege and other protections so that the SEC could better evaluate a company’s level of cooperation.

The report describes how companies feel compelled to comply with a government agency’s request for waivers of the privilege and the work product doctrine in exchange for lenient treatment. For this benefit, the Task Force said, companies pay a “considerable price.” Moreover, the “chilling effect on clients’ comfort level in fully disclosing to attorneys is a significant concern, as privileged information becomes accessible to private parties and other public agencies.”

The Task Force concluded that it opposes policies, practices and procedures of governmental bodies that effectively erode the attorney-client privilege and work product doctrine, and favors policies, practices and procedures that recognize the value of those protections. The Task Force also said it opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine by granting or denying any benefit or advantage.<sup>9</sup>

## The McNulty Memorandum

In a speech on December 12, 2006, U.S. Deputy Attorney General Paul J. McNulty announced that the Department of Justice (“DOJ”) was revising its corporate charging guidelines for federal prosecutors making charging decisions for suspected wrongdoing.<sup>10</sup>

The new guidance, widely known as the “McNulty Memorandum,” revises the previous guidance issued in January 2003 by then-Deputy Attorney General Larry D. Thompson, titled “Principles of Federal Prosecution of Business Organizations.”<sup>11</sup>

The Thompson Memorandum had generated a firestorm of criticism because it allowed prosecutors, when evaluating a company’s cooperation, to consider whether the company (a) waived its attorney-client privilege and work product protection; and (b) declined to advance attorneys’ fees for its employees under investigation. Critics claimed that this policy discouraged open communications between attorneys and their clients, and that preserving the privilege in private litigation would be difficult, if not impossible.

The McNulty Memorandum pulled back from some of the controversial aspects of the Thompson Memorandum. It established formal procedures for federal prosecutors seeking waivers of a company’s attorney-client privilege and work product privilege.

Under the new guidelines, prosecutors may request waivers of attorney-client or work product protections only when they have a legitimate need for privileged information to fulfill their law enforcement obligations. Prosecutors cannot establish a need simply because it is desirable or convenient. Rather, the new test requires a “careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government’s investigation.”

The McNulty Memorandum says that determining whether prosecutors have a legitimate need depends upon these four factors:

- the likelihood and degree to which the privileged information will benefit the government’s investigation;
- whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require a waiver;
- the completeness of voluntary disclosure already provided; and
- the collateral consequences to a corporation of a waiver.

The Guidelines established a step-by-step approach for seeking privileged information, and prosecutors must ask for the “least intrusive” waiver.

Category I information includes facts relating to the underlying misconduct, such as chronologies, witness statements, and other factual summaries. Prosecutors seeking waivers of the attorney-client privilege or work product protection for Category I

information need to obtain written authorization from the U.S. Attorney, who must consult with the Assistant Attorney General for the Criminal Division.

Category II information includes privileged attorney-client communications or non-factual attorney work product, such as legal advice given to the company before, during, and after the underlying misconduct occurred. Prosecutors can seek Category II information only if they can establish that Category I information was insufficient. Prosecutors follow a similar procedure but are cautioned to seek Category II information only in “rare instances.”

In evaluating a company’s cooperation, prosecutors may consider a company’s refusal to provide Category I information, but *may not* consider a company’s refusal to provide Category II information.

In addition, the McNulty memorandum had stated that, to evaluate a company’s cooperation, federal prosecutors may not consider whether a company had advanced attorneys’ fees to employees under investigation or indictment.

The ABA has criticized the McNulty Memorandum. In testimony before Congress, ABA President Karen J. Mathis said that the McNulty Memorandum continues to encourage companies to “voluntarily” waive their privileges without formally being asked in order to receive cooperation credit and more lenient treatment. This policy, she said, perpetuates the “culture of waiver” created by the Thompson Memorandum because companies “continue to feel extreme pressure to waive in virtually every case . . . .”<sup>12</sup>

Not surprisingly, the DOJ has defended the charging factors in the McNulty Memorandum as “prudent, necessary and time-tested.” Eliminating the DOJ’s ability to request a waiver and thus make the right charging decisions by severely restricting what it can consider in determining whether a corporation is cooperating “not only hamstring federal prosecutors, it will ultimately discourage corporate self-policing.”<sup>13</sup>

## **The Filip Memorandum**

Despite the DOJ’s initial defense of the McNulty Memorandum, Attorney General Michael Mukasey announced that the DOJ would revise some of the McNulty policies. A July 9, 2008, letter by Deputy Attorney General Mark Filip said that the DOJ would prohibit prosecutors from even pressuring companies to voluntarily waive privileges, and prohibit them from considering whether a company participated in a joint-defense arrangement with employees.<sup>14</sup> Attempting to block support for the Attorney-Client Privilege Protection Act of 2008 (described later), Filip argued that the guideline changes were preferable to legislation.<sup>15</sup>

The Filip letter was memorialized at the end of August 2008 when the DOJ published a memorandum by Filip entitled “Principles of Federal Prosecution of Business Organizations” (the “Filip Memorandum”). The Filip Memorandum provides, in relevant part, that disclosure of facts, and not a corporation’s waiver of attorney-client privilege or

work product protection, is the only proper inquiry when determining whether a corporation receives cooperation credit.<sup>16</sup>

The Filip Memorandum alters its predecessor by expressly forbidding federal prosecutors from asking for the disclosure of non-factual attorney-client privileged information (Category II information under the McNulty Memorandum) even in special circumstances. The only two exceptions to this “don’t ask” policy are well established in law and are for communications made in furtherance of crime or fraud.<sup>17</sup> The Memorandum also reinforces the McNulty principle that federal prosecutors may not look to a corporations’ advancement of attorneys’ fees to employees when apportioning cooperation credit.<sup>18</sup>

Under the memorandum Prosecutors are also prohibited from:

- deeming a corporation ineligible for cooperation credit for participation in a joint defense agreement alone; and
- considering, for purposes of assigning cooperation credit, whether a corporation has sanctioned or retained culpable employees.<sup>19</sup>

The Filip Memorandum further differentiates itself from its predecessors by expressly recognizing the importance of a corporation’s ability to seek “frank and comprehensive legal advice...in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments.”<sup>20</sup> The new DOJ guidelines provide that it is precisely these concerns that have deterred the DOJ from recognizing waiver of the attorney-client privilege as a prerequisite for being labeled “cooperative.”<sup>21</sup>

The policies contained in the Filip Memorandum, which were effective on August 28, 2008, will become part of the United States Attorneys Manual and will be binding upon all federal prosecutors within the DOJ. Whether the guidelines will effectively remove the pressure placed on corporations to waive the attorney-client privilege in order to achieve “cooperator” status remains to be seen.

### **SEC Releases Enforcement Manual Including Policy on Waiver of Attorney-Client Privilege**

In a change of policy, the SEC publicly released its Enforcement Manual for the first time. Section 4 of the manual directs the staff, in bold, italicized letters, that it “should not ask a party to waive the attorney-client or work product privileges and is directed not to do so.”<sup>22</sup> Evaluations of a corporation for cooperation credit by the SEC staff should be based on timely disclosure of relevant facts, the manual provides. Specifically, the manual states “The Enforcement Division’s central concern is whether the party has disclosed all relevant facts within the party’s knowledge that are responsive to the staff’s information requests, and not whether a party has elected to assert or waive a privilege.”<sup>23</sup> This is the same standard articulated in the Filip Memorandum.

Proponents of legislation, rather than guidelines and internal policies, to prohibit all federal agencies from seeking privilege waivers as evidence of cooperation in corporate investigations are skeptical that the Enforcement Manual will deter waiver requests by government. Stephanie Martz, director of the white-collar crime project of the National Association of Criminal Defense Lawyers said “It will be interesting to see how this works if you do have [relevant] facts and its work product, and the government wants them.”<sup>24</sup>

### **ABA Proposal to Revise the Seaboard Report**

Concerned that the SEC’s policies on waivers of the attorney-client privilege “led to a number of profoundly negative consequences,” the American Bar Association asked Chairman Christopher Cox in a letter dated February 5, 2007 to revise the conditions described in the Seaboard Report.<sup>25</sup>

The ABA said it believed that the Seaboard Report has led to routine compelled waivers of the attorney-client privilege and work product protections – and a growing “culture of waiver.” From a practical standpoint, the ABA argued, companies “have no choice but to waive when encouraged or requested to do so” or risk being labeled as “uncooperative.”

The ABA would amend the Seaboard Report’s criteria for measuring a company’s cooperation by prohibiting the Commission from requiring a company to take any action that “would result in a waiver of the attorney-client privilege or work product doctrine.”

In response to the ABA’s suggested revisions, former SEC Commissioner Paul S. Atkins remarked that he agrees with the ABA and that “the Commission should not view a company’s waiver of privilege as a factor that will afford cooperation credit.”<sup>26</sup> He further stated the Commission would carefully consider the suggestion, but to date the Seaboard Report has not been revised.

### **Exceptions to Waiver**

Disclosure of protected information to someone other than a client or lawyer generally waives the attorney-client or work product privileges. Courts, however, will sometimes recognize an exception for parties similarly aligned with a “common interest” in a case or consultation (sometimes referred to as the “joint-enterprise” exception to waiver).<sup>27</sup>

A recent decision out of the federal court in the Southern District of New York involved a subpoena issued to Kramer Levin from lead plaintiffs in a civil securities fraud class action.<sup>28</sup> The plaintiffs sought work product materials developed by Kramer Levin (not a party to the litigation) over the course of its internal investigation as special counsel on behalf of the Audit Committee of Cardinal Health, Inc.

Kramer Levin, in connection with its representation of the Audit Committee, previously had produced to the SEC and the U.S. Attorney's Office the subpoenaed materials.<sup>29</sup> The plaintiffs argued that the disclosures to the government constituted a waiver of the protection provided by the work-product doctrine.

The Court rejected the plaintiffs argument based upon the "common interest" (among the Audit Committee, the SEC, and the U.S. Attorney's Office) to have Cardinal Health, Inc. maintain proper financial and accounting practices. Although the corporation remained potentially adverse to the government, the Court found that the Audit Committee and the government were not adversaries, and thus the cooperation between them did not trigger the waiver doctrine. The court quashed the subpoena.

The full impact of this decision is unclear. The case may be significant because it effectively removed a major disincentive for some parties to disclose work product to the government.

### **Selective Waiver - Federal Rule of Evidence 502**

The Advisory Committee on Evidence Rules in April 2006 proposed new Federal Rule 502.<sup>30</sup> The rule was signed into law by the President on September 19, 2008.<sup>31</sup> The rule was designed to address concerns that:

- Litigants expend significant amounts of time and effort to preserve the attorney-client privilege, even when many of the documents produced are of no concern to the producing party;
- If a privileged document is produced inadvertently, there is a risk that a court will find that a waiver extends to other documents as well; and
- Courts generally reject the concept of "selective waiver" (that is, the concept that companies disclosing privileged information to federal agencies can maintain the privilege in private litigation).

Rule 502 addressed these issues by introducing the following principles:

- A subject matter waiver of privilege should only be found when the privileged or work product material has already been disclosed, and a further disclosure "ought in fairness" be required to protect against a misrepresentation that might arise from the previous disclosure.<sup>32</sup>
- An inadvertent disclosure of privileged information should not constitute a waiver if the holder of the privilege or work product took reasonable precautions to prevent the disclosures and reasonably prompt measures, once the holder knew of the disclosure, to rectify the error.<sup>33</sup>
- Parties to litigation should be able to protect against the consequences of selective waiver by seeking a confidentiality order from the court, and any such confidentiality order must bind non-parties in any federal or state court.<sup>34</sup>

- Parties should be able to contract around common-law waiver rules by entering into confidentiality agreements, but in the absence of a court order, these agreements cannot bind non-parties.<sup>35</sup>

### **Attorney-Client Privilege Protection Acts of 2007 and 2008**

Senator Arlen Specter (R-PA) introduced a bill on January 4, 2007 that would amend the federal criminal code to bar any federal civil or criminal investigation or enforcement action from demanding, requesting, or conditioning treatment on the disclosure by a company or its employees of information protected by the attorney-client privilege or any attorney work product.<sup>36</sup>

Among other things, the bill would prohibit federal agencies from considering whether to charge or provide cooperation credit resulting from:

- any valid assertion of the attorney-client privilege or attorney work product doctrine;
- providing counsel to, or paying defense costs of, an employee;
- entry into a joint-defense, information-sharing, or common-interest agreement with an employee of the organization, if the organization determines it has a common interest in defending against an investigation or enforcement action;
- sharing relevant information with an employee; or
- failing to terminate or sanction employees who exercise their constitutional rights or other legal protections in response to a government request.

The last action taken on the 2007 bill was on September 18, 2007 when hearings were held by the Commission on the Judiciary. An identical bill sponsored by Representative Robert Scott (D-VA) was passed by the House, but the Senate took no further action in 2007. In June 2008 a similar bill was introduced by Senator Arlen Specter and it has been referred to the Senate Judiciary Committee.<sup>37</sup>

### **Commodity Futures Trading Commission**

The Commodity Futures Trading Commission's Division of Enforcement issued on March 1, 2007 amendments to its 2004 Enforcement Advisory on Cooperation to clarify the factors meant to encourage strong cooperation among parties in enforcement discussions without eroding the protections of the attorney-client or work product privileges.<sup>38</sup>

The Advisory summarized the factors that the Enforcement Division would consider in measuring cooperation. Nonetheless, the Advisory recognized that:

- The attorney-client privilege and the work product doctrine are “fundamental to the American legal system and the administration of justice.”

- The rights are “no less important for an organizational entity than for an individual.”
- The protections can promote a client’s communications with counsel and thereby serve to promote the client’s compliance with the law.
- The Advisory is not intended to erode or heighten the rights.

### **State Justices Weigh In**

The Conference of Chief Justices (consisting of the highest judicial officers of the fifty states, the District of Columbia, the Commonwealths of Puerto Rico and Northern Mariana Islands, and the territories of the U.S.) in August 2006 adopted a resolution supporting the establishment of state committees on the preservation of the attorney-client privilege and work-product doctrine, calling those protections “vital” to the legal system.<sup>39</sup>

### **Challenges Facing Investment Managers and Investment Companies**

Investment management is a highly regulated area. Fund directors, their investment advisers, and their counsel make decisions that frequently are questioned after the fact. How those decisions are made, and how they are documented, present challenges to the attorney-client privilege and the work product doctrine.

The issues are particularly acute in the context of regulatory examinations and enforcement proceedings. To the extent that a fund or adviser waives the privilege (voluntarily or under perceived duress), private litigants may gain access to otherwise confidential communications.

Here, we examine the nature of these relationships and explore how to avoid waiving the attorney-client privilege and the work product doctrine.

**The Players.** The structure and regulation of investment companies, their independent directors, and investment advisers, often create challenges for counsel representing each of these players. Each typically has some form of legal representation.

*The fund’s board of directors.* Some directors are “interested persons” of the fund, while a majority of the directors must be independent (that is, not “interested persons” of the fund). Interested directors, frequently officers of the fund’s investment adviser, owe a duty of loyalty to the fund and to their employer.

*The service providers.* Various entities provide services to the funds, including, the investment adviser, administrator, distributor, fund accountant, transfer agent, custodian, and independent auditors. Representatives of some, or all, of these service providers typically attend some, or all, of funds’ board of director meetings.

*Who is the client?* Lawyers play various roles in the world of investment companies and investment advisers.

Consider the various alternative structures for legal representation. One law firm may represent:

- the investment adviser
- the fund
- the independent directors
- both the investment adviser and the fund, but not the independent directors
- both the fund and the independent directors, but not the investment adviser

When lawyers play dual roles, conflicts may arise between their joint clients, further complicating the issue of what information is protected by the attorney-client privilege or the work product doctrine. The ability to assert the attorney-client privilege may turn on the issue of who, exactly, is the client.

*Meetings in executive session.* While the Investment Company Act of 1940 does not require independent directors to retain their own counsel, if they do, the counsel must qualify as “independent legal counsel” and directors must meet with their independent counsel, alone, at least quarterly.<sup>40</sup> Independent directors frequently invite their interested director colleagues to participate in some meetings held with their “independent legal counsel” in executive session, when sensitive matters are discussed. The presence of interested directors, while desirable, may affect the ability of the independent directors to assert the privilege at a later time.

*Independent auditors.* Before certifying the audit of a fund’s financial statements, independent auditors typically require copies of minutes of all board meetings, including meetings held in executive session. Similarly, delivering copies of minutes of board meetings in executive session may affect the ability of the independent directors to assert the privilege at a later time.

*Chief compliance officer.* Every registered investment adviser must designate a chief compliance officer (“CCO”) and establish a compliance program reasonably designed to prevent violations of federal securities laws.<sup>41</sup>

Similarly, every registered investment company must designate a CCO and establish a similar compliance program, including policies and procedures that provide for the oversight of the fund’s investment adviser.<sup>42</sup> The fund’s CCO, however, reports to the fund’s independent directors, who must approve the CCO’s compensation and meet with the CCO each quarter to discuss compliance issues. Potential conflicts arise because the CCO may be (and typically is) an employee of the fund’s investment adviser or another fund service provider.

**Compliance Reports and Examinations.** Examinations by federal regulators of investment adviser and investment company compliance programs raise unique issues involving the attorney-client privilege and the work product doctrine.

*Where do you draw the line?* Investment companies and investment advisers may seek legal advice in fulfilling their responsibilities to review their compliance programs. What information or communications are privileged? Will the regulators encourage advisers and funds to waive the privilege in exchange for cooperation credit or avoidance of an enforcement action?

- *Protected: advice on how to comply.* As a practical matter, federal regulators tend to respect the privilege if a lawyer provides legal advice on how an adviser or fund can satisfy its compliance obligations. Example: A lawyer advises independent directors on steps they can take to fulfill their fiduciary and regulatory obligations.
- *Not protected: advice relied upon to assess compliance.* Federal regulators generally consider advice given in connection with an assessment of a compliance examination to be not privileged. Example: A fund's board of directors relies on the results of a lawyer's mock examination to demonstrate compliance with Rule 38a-1. That is, regulators do not consider privileged any information provided by lawyers that directors use to conclude that they complied with the rule's requirements.

The distinction: The latter advice forms an integral part of the review, while the former concerns how they should comply.

In light of the SEC's apparent acceptance of the principles contained in the Filip Memorandum, it would appear that the SEC's policy would prohibit encouraging waiver in exchange for cooperation credit.

**Practical Suggestions.** Here are some practical suggestions to manage the dilemma – how to balance the need to maintain the attorney-client privilege and work product doctrine with the requirements of running a highly regulated business.

*Who is the client?* Keep in mind at all times who the client is. Structure meetings and communications (including discoverable e-mail) in a manner designed to maximize protection. For example:

- Consider permitting only independent directors to attend meetings at which sensitive, privileged information is to be discussed.
- Be careful before you hit "reply to all" in sensitive e-mail communications.

*Minutes of meetings.* Start with the idea that minutes of meetings are likely to lose their privileged status. For example:

- If a lawyer notifies an adviser of a material compliance violation involving a fund, the adviser will have an obligation to disclose that violation to the fund's directors. The minutes of the meeting likely will reflect discussion of that violation.

- When appropriate, limit minutes of meetings held in executive session to topical descriptions. Records of privileged advice may not be privileged if read by third parties (*e.g.*, independent auditors).

*Keep communications confidential.* The four basic elements required to establish the existence of the attorney-client privilege are:

- A communication;
- Made between privileged persons;
- In confidence;
- For the purpose of seeking, obtaining, or providing legal assistance to the client.<sup>43</sup>

To satisfy these elements, clients should make reasonable attempts to keep communications confidential. For example, in the context of investment companies:

- Consider asking counsel to the independent directors to retain independent experts to conduct investigations requested by the directors, and request that the reports be delivered to such counsel.
- In conducting annual self-assessments, consider asking independent counsel to collect and collate results from questionnaires.
- Enter into confidentiality and/or “common interest” agreements.
- Recognize that what you had thought were privileged communications may not be – *e.g.*, communications between the company and an independent committee of the board.

## Conclusion

The decision by an investment adviser or investment company to waive the attorney-client privilege or the work product doctrine should not be taken lightly. In a perfect world, clients should make the decision free from pressure – real or imagined – that a regulator will withhold “cooperation credit” if they fail to waive the privilege. Unfortunately, we do not live in a perfect world.

Therefore advisers and funds should take steps to protect the privilege by limiting access to information to people who are covered by the privilege. Furthermore, they should understand that many communications they believe are privileged may in fact not be privileged.

## ENDNOTES

---

<sup>1</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>2</sup> The attorney-client privilege is not absolute, and is subject to limited exceptions, *i.e.*, the crime-fraud exception; the attorney self-defense exception. For a discussion of the limits on the testimonial privilege,

---

see EDNA EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 391-465 (4th ed. 2001).

<sup>3</sup> *Upjohn Co.*, 449 U.S. at 391.

<sup>4</sup> Letter from Karen J. Mathis, President, Am. Bar Ass'n, to The Honorable Christopher Cox, Chairman, Sec. & Exch. Comm'n (June 5, 2007) (discussing the Proposal for Revising the Commission's Policy Regarding Requesting Waiver of Attorney-Client Privilege, Work Product and Employee Legal Protection), available at [http://www.abanet.org/poladv/letters/attyclient/2007feb05\\_privwaivsec\\_1.pdf](http://www.abanet.org/poladv/letters/attyclient/2007feb05_privwaivsec_1.pdf).

<sup>5</sup> The Seaboard Report is actually a misnomer, because it does not contain the term "Seaboard." The Seaboard Report is officially known as the 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 Decisions, Exchange Act Release No. 44,969, 2001 SEC LEXIS 2210 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at n.3.

<sup>8</sup> *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW 1029 (2005), available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>.

<sup>9</sup> *Recommendations of the ABA Task Force on Attorney-Client Privilege* (2005), available at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf).

<sup>10</sup> See Memorandum from Paul J. McNulty, Deputy Attorney Gen., to U.S. Attorneys, Regarding Principles of Federal Prosecutions of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf).

<sup>11</sup> See Memorandum from Larry D. Thompson, Deputy Attorney Gen., to U.S. Attorneys, Regarding Principles of Federal Prosecutions of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

<sup>12</sup> See *The McNulty Memorandum's Effects on the Right to Counsel in Corporate Investigations: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Karen J. Mathis, President, American Bar Association), available at [http://www.abanet.org/poladv/letters/attyclient/2007mar08\\_privwaivh\\_t.pdf](http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf).

<sup>13</sup> See *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Barry M. Sabin, Deputy Assistant Attorney General), available at [http://www.usdoj.gov/criminal/pr/testimony/2007/03/2007\\_5048\\_03-08-07bmsabin-statement.pdf](http://www.usdoj.gov/criminal/pr/testimony/2007/03/2007_5048_03-08-07bmsabin-statement.pdf).

<sup>14</sup> Letter from Mark Filip, Deputy Attorney Gen., to The Honorable Patrick Leahy, Chair, Senate Judiciary Comm., and The Honorable Arlen Specter, Ranking Member, Senate Judiciary Comm. (July 9, 2008), available at <http://online.wsj.com/public/resources/documents/mcnulty070908.pdf>.

<sup>15</sup> Debra Cassens Weiss, *Mukasey: Attorney-Client Privilege to be Protected in Corporate Probes*, A.B.A. J. (July 10, 2008), available at [http://abajournal.com/news/mukasey\\_attorney\\_client\\_privilege\\_to\\_be\\_protected\\_in\\_corporate\\_probes/](http://abajournal.com/news/mukasey_attorney_client_privilege_to_be_protected_in_corporate_probes/).

<sup>16</sup> U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.720 (Aug. 28, 2008) [hereinafter U.S. ATTORNEYS' MANUAL].

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at § 9-28.730. Additionally, in August 2008 the 2nd Circuit affirmed the judgment of the U.S. District Court for the Southern District of New York in *United States v. Stein*. The Second Circuit found that the government's policies of considering the advancement of legal fees to employees in determining "cooperation" had deprived defendants, KPMG employees whose legal fees were capped and not advanced to them by KPMG, their Sixth Amendment right to counsel. *United States v. Stein*, 541 F.3d 130 (2nd Cir. 2008).

<sup>19</sup> U.S. ATTORNEYS' MANUAL, *supra* note 16, at § 9-28.700, 9-28.730.

<sup>20</sup> *Id.* at § 9-28.710.

<sup>21</sup> *Id.*

<sup>22</sup> SECURITIES AND EXCHANGE COMMISSION, DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL (2008), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> Marcia Coyle, *The SEC Directs Staff Not to Ask Parties to Waive Attorney-Client or Work-Product Privileges*, NAT'L L. J., Oct. 14, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425238304>.

<sup>25</sup> Letter from Karen J. Mathis, President, Am. Bar Ass'n, to The Honorable Christopher Cox, Chairman, Sec. & Exch. Comm'n (Feb. 5, 2007), available at [http://www.abanet.org/poladv/letters/attyclient/2007feb05\\_privwvaysec\\_1.pdf](http://www.abanet.org/poladv/letters/attyclient/2007feb05_privwvaysec_1.pdf).

<sup>26</sup> Paul S. Atkins, Former Comm'r, Sec. & Exch. Comm'n, Remarks before the SEC Speaks in 2007 (Feb. 9, 2007), available at <http://www.sec.gov/news/speech/2007/spch020907psa.htm>.

<sup>27</sup> For example, courts have recognized under the "common interest" doctrine an exception to waiver in the context of the insurer-insured relationship (even though a possibility of adversity remains). See *e.g.*, *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322 (1991); *Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985); *but see, U.S. v. MIT*, 129 F.3d 681 (1st. Cir. 1997), and *Linde Thomson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508 (D.C. Cir. 1993).

<sup>28</sup> *In re Cardinal Health, Inc. Securities Litigation*, No. C2 04 575 ALM, 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007).

<sup>29</sup> The firm made disclosures and productions to the SEC pursuant to a written confidentiality agreement, while no comparable written agreement governed the exchanges with the U.S. Attorney's Office. See also, *McKesson HBOC, Inc. v. Superior Court of San Francisco County*, in which the court rejected the SEC's approach to waiver laid out in an amicus brief which provided in part, "production of work-product materials to the Commission, under a confidentiality agreement, when the Commission is engaged in a statutorily authorized investigation, should not result in waiver of work-product protection, because upholding such confidentiality agreements against private parties serves the public interest. It does so by enhancing the Commission's ability to conduct effective and expeditious investigations without harming private parties." Brief of the United States Securities and Exchange Commission as Amicus Curiae in Support of McKesson HBOC, Inc., 115 Cal. App. 4th (2003), available at <http://www.sec.gov/litigation/briefs/mckesson071703.htm#3>. Plaintiffs in this case sought to compel production of an investigation report and interview memoranda from an internal investigation prepared by a law firm for McKesson's audit committee. McKesson expressed a willingness to provide the government with the results of the investigation but only if confidentiality agreements were signed because McKesson believed this would preserve their attorney-client privilege and work product protection. The court

---

however granted Plaintiff's request to order McKesson to produce the documents stating that the law firm could adequately represent its client without sharing the information with the government. The court rejected the "common interest" approach to the work product doctrine, stating that government did not have a substantive interest in confidentiality even though McKesson and the government entered into a confidentiality agreement. *McKesson HBOC, Inc. v. Superior Court of San Francisco County*, 115 Cal. App. 4th 1229 (2004).

<sup>30</sup> See Judicial Conference of the U.S., Report of the Advisory Committee on Evidence Rules, at Fed. R. Evid. 502 (Proposed 2006) [hereinafter May 15, 2006, Report of the Evidence Advisory Committee], available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>.

<sup>31</sup> FED. R. EVID. 502 (2008). Unlike other amendments to the federal rules of practice, procedure, and evidence that take effect automatically (unless Congress acts affirmatively to modify, defer, or reject it) "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b) (2000).

<sup>32</sup> FED. R. EVID. 502(a),(b). This rule rejects the results in *In re Sealed Case*, 877 F. 2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver (that is, a waiver of all communications related to the same subject matter). See May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 30, at 7.

<sup>33</sup> FED. R. EVID. 502(b).

<sup>34</sup> FED. R. EVID. 502(d).

<sup>35</sup> FED. R. EVID. 502(e).

<sup>36</sup> Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Congress (1st Sess. 2007), available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.186>.

<sup>37</sup> Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Congress (2nd Sess. 2008), available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3217>.

<sup>38</sup> COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS (Mar. 1, 2007), available at <http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf>.

<sup>39</sup> Adopted as proposed by the Conference of Chief Justices Resolution 9 (In Support of the Establishment of State Committees on Attorney-Client Privilege), adopted Aug. 2, 2006, available at <http://ccj.ncsc.dni.us/resol9StateCommitteesOnAttorneyClientPrivilege.html>.

<sup>40</sup> Rule 0-1a(6) under the Investment Company Act of 1940 provides that a person is an *independent legal counsel* with respect to the independent ("disinterested") directors if: (a) a majority of the disinterested directors reasonably determine in the exercise of their judgment (and record the basis for that determination in the minutes of their meeting) that any representation by the person of the company's investment adviser, principal underwriter, administrator ("management organizations"), or any of their control persons, since the beginning of the fund's last two completed fiscal years, is or was sufficiently limited that it is unlikely to adversely affect the professional judgment of the person in providing legal representation to the disinterested directors; and (b) The disinterested directors have obtained an undertaking from such person to provide them with information necessary to make their determination and to update promptly that information when the person begins to represent, or materially increases his representation of, a management organization or control person. 17 C.F.R. § 270.0-1(a)(6) (2008).

<sup>41</sup> Rule 206(4)-7 under the Investment Advisers Act of 1940, 17 C.F.R. § 275.206(4)-7 (2008).

---

<sup>42</sup> Rule 38a-1 under the Investment Company Act of 1940, 17 C.F.R. § 270.38a-1 (2008).

<sup>43</sup> RESTATEMENT OF THE LAW GOVERNING LAWYERS § 118 (Tentative Draft No. 1, 1988); *see* EPSTEIN, *supra* note 2, at 46. *See also*, *Pritchard v. Erie County*, No. 06-2459-op (Jan. 3, 2007) (the U.S. Court of Appeals, Second Circuit, reversed a district court’s decision that found certain e-mails at issue were not privileged because they went “beyond rendering ‘legal analysis.’” The Second Circuit found that a county attorney was doing her job as a “complete lawyer” when she went beyond the mere rendering of legal advice, and that the client did not lose the protection of the attorney-client privilege because she did so.).