

ask the legal professional

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Q: Are there any circumstances under which my company should consider waiving its attorney-client privilege?

A: Confidentiality between an attorney and a client is at the heart of the relationship not only between an individual and his or her lawyer, but also between a corporation and its outside counsel. The attorney-client privilege is the oldest of the common law privileges that protect certain communications between client and attorney. In the landmark United States Supreme Court case *Upjohn Co. v. United States*, the Supreme Court stated that the purpose of this centuries-old 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 administration of justice.” Corporate attorney-client privilege encourages corporate officers, executives, and managers to ask for legal advice to assist a company in keeping its conduct compliant and in conformance with the law.

A related but separate form of client protection is the attorney work product doctrine. The doctrine, established by the Supreme Court sixty years ago in another landmark decision, *Hickman v. Taylor*, protects the pretrial preparation materials of a lawyer. According to the Supreme Court, “Proper presentation of a client’s case demands that [a lawyer] assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.” The Federal Rules of Civil Procedure provide that a party release certain protected materials in discovery only if the other party has a substantial need and cannot obtain the materials elsewhere; however, “the mental impressions, conclusions, opinions, or legal theories of an attorney” are absolutely privileged work product.

The attorney-client privilege and the attorney work product allow the client to assert its rights to protect and keep confidential certain communications between lawyer and client, as well as an attorney’s work performed in

anticipation of possible or pending litigation. Traditionally, courts have safeguarded these client privileges, but during the last few years, these client rights have come under attack from the U.S. Department of Justice and various state attorneys general conducting prosecutions or investigations of corporations. In 1999, and again in 2003, the Justice Department issued an internal memorandum that contained the Department’s privilege waiver policy. The 2003 “Thompson Memorandum,” entitled “Principles of Federal Prosecution of Business Organizations,” is one basis of this attack on corporate attorney-client privilege.

Deputy Attorney General Thompson wrote in his 2003 memorandum that when considering whether to charge a corporation, a prosecutor should consider the same factors as for an individual, plus nine additional factors. One of these additional factors is the corporation’s “willingness to cooperate . . . including, if necessary, the waiver of corporate attorney-client and work product protection.” Given the proliferation of federal and state investigations and prosecutions during the last few years, the American Bar Association, the corporate defense bar, and numerous industry trade associations have gone on record as opposing corporate-privilege waiver policies and expressing grave concerns that the privileges are being seriously eroded. Corporations that are the targets of investigations are commonly asked to waive their privileges. Perhaps of even greater concern is that business entities that are not targets are being asked to waive their privilege rights so that prosecutors can gather information regarding the true corporate targets.

If a government investigator asks your company to waive its privileges, what should you do? First, consult your legal counsel. Although in many investigations prosecutors are in essence turning a company’s lawyers into a governmental investigative tool by asking



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the company to divulge privileged information, there is still no substitute for consulting with counsel before waiving corporate privileges. One way to avoid disclosing your deliberations over whether to waive privileges may be to hire outside counsel solely for the purpose of making the waiver decision, particularly if your usual outside counsel has substantive knowledge of the activities being investigated. Second, seek compromise and try to cooperate with the government without waiving any privileges. Third, require a written waiver and confidentiality agreement. Some courts allow “selective waiver,” whereby a company may waive privileges with respect to a governmental entity, yet may not have to waive privileges with respect to other third parties, for example, shareholder groups or others that may be involved in private actions. Fourth, narrow as much as possible the scope of information to be provided. Finally, share information only orally to the extent that is possible. Don’t waive your privilege rights lightly; the consequences may be disastrous for your company.

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