
INVESTOR'S BUSINESS DAILY

THURSDAY, FEBRUARY 3, 2005

ISSUES & INSIGHTS

Combating Fraud, But At What Price?

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Representing clients zealously and safeguarding the confidentiality of their communications are among a lawyer's highest obligations. Today those obligations are being tested like never before, not by state ethics agencies, which traditionally have policed the bar, but by the federal government.

This phenomenon is yet another ripple being felt by the Sarbanes-Oxley Act, the federal law intended to ensure corporate accountability, and related regulations promulgated by the Securities and Exchange Commission.

SEC enforcement director Stephen Cutler made news recently by announcing that his agency has increased scrutiny of lawyers as it relates to corporate fraud.

In-house counsel responsible for SEC filings and outside counsel hired by business clients to conduct internal investigations of alleged corporate wrongdoing increasingly find themselves on the wrong end of enforcement actions or under threat of such actions.

Moreover, thanks to Justice Department guidelines that encourage (some would say coerce) business entities to waive the attorney-client privilege to receive favorable treatment by prosecutors, what was once considered a near-sa-

cred privilege might be headed for extinction, at least in the corporate setting. In addition, SEC rules now expressly permit an attorney to reveal client confidences to that agency without the client's consent if, in the attorney's view, such disclosures will protect investors.

Is any of this a good thing for anybody? The answer, it seems, is maybe yes or maybe no.

No honest professional condones fraud, no matter who the perpetrator might be. For years, state ethics regulators have dished out severe punishment for lawyers who lie to courts. An attorney who lies to the SEC should be treated no better. Nor should he be treated harsher.

The concern about the new scrutiny being placed on lawyers is that the rules of the game seem to be changing almost daily. What was once considered aggressive advocacy or adroit representation by a lawyer might now be viewed as unethical or even criminal conduct.

Moreover, there is a risk that the role of the lawyer as adviser and the role of the business executive as the ultimate decision-maker will become blurred. Where does zealous lawyering end and improper decision-making begin?

It may take several actions by the SEC to flesh out the answer to that fundamental

question. In the interim, some lawyers may become so engrossed with the thought of defending their own conduct that they will sit on their swords rather than do battle on behalf of their clients as traditional ethics rules otherwise might require.

The modern erosion of the attorney-client privilege within the corporate context implicates similar concerns. For centuries the privilege has protected communications as a way of ensuring an unfettered dialogue between a lawyer and his client deemed essential to the pursuit of justice.

We often think of the privilege in terms of individual defendants, but it is no less important in the corporate realm, which is why the privilege historically has applied to both individual and business clients.

With the privilege in decline, those unfettered communications might be a thing of the past. It is only a matter of time before some lawyers begin holding back their candid advice or, worse, before business executives stop asking for such advice in the first instance. We might be at that juncture already.

From a policy perspective, we have to decide whether society's rules should encourage business leaders to turn to counsel for unencumbered guidance when confronting allegations of corporate wrongdoing, even at the expense of mak-

ing it more difficult for the government to prove its case.

Posed differently, aren't we better off inviting executives to seek legal assistance when addressing or attempting to remedy such wrongdoing?

If the answer to that question is yes, then Congress and the SEC have a lot of thinking to do. The states, too, might want to question this emerging federalization of the rules of attorney conduct.

For now, we trust that lawyers will continue to find ways to effectively represent their clients while keeping themselves out of hot water. We also take solace in assurances given by the SEC that it will proceed fairly in pursuing new actions against lawyers.

We should not forget, however, that our system of justice has never been one to allow prosecutors to decide unilaterally what is and isn't fair.

Ultimately, if the federal government overreaches in its quest to police the marketplace, then the courts will have to intervene to put the government in its proper place. And that, indeed, would be a good thing for almost everybody.

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