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Issues & Overview

Attorney-Client Privilege Under Assault

Dating to the sixteenth century, the attorney-client privilege is one of the oldest privileges for confidential communications recognized by our law. It applies not only to individuals, but to business entities, including publicly traded corporations.

Described as "sacred" by some courts, the privilege has some exceptions, which historically have been limited in number and scope. The care by which the privilege has been guarded these many centuries is rooted in the recognition that it promotes an unfettered dialogue between a lawyer and his client deemed vital to the system of justice.

Until now. Today the attorney-client privilege is under assault like never before, thanks largely to prosecutors aided by securities laws such as the Sarbanes-Oxley Act of 2002 and related rules promulgated or proposed by the Securities and Exchange Commission.

In enforcing Sarbanes-Oxley, the SEC has promulgated rules that require attorneys to report what they perceive to be "material violations" of securities laws or breaches of fiduciary duties by their client companies. As many corporate lawyers now know, the report must go first to the company's chief legal officer or chief executive officer. Those officials, in turn, must report back to the attorney on the steps taken in response to the report itself.

Unless the attorney "reasonably believes" that the response is appropriate, he must submit his report "up the ladder" to the company's board of directors or a designated board committee. What happens if the attorney is dissatisfied with the board's response? Under the rules' mandatory language, the attorney's reporting obligation generally ends there. However, the rules also provide that the attorney may reveal to the SEC, without the company's consent, confidential information gathered in the course of the attorney's work if such disclosure will, in the attorney's mind, protect investors.

All of this sounds very noble on paper. In reality, the rules risk placing an attorney in the untenable position of serving not as his client's advocate or fiduciary, but as its policeman. Far worse, the rules are subject to varying interpretations. What is a "material" violation? Is one attorney's "reasonable belief" the same as all other attorneys? Although the rules attempt to define those terms, the definitions are somewhat circular. At the end of the day, we are left with no universally-accepted standard by which to judge either the attorney's conduct or that of his corporate client.

As initially proposed by the SEC, the rules went even further. They would have *required* an attorney to reveal certain confidential information to the government when withdrawing as the company's lawyer. The so-called "noisy withdrawal" requirement, although not adopted as proposed, might yet emerge as a new obligation.

To get a broader picture of the assault, we must consider the Justice Department guidelines that describe how federal prosecutors are to behave when seeking criminal charges against business entities. The guidelines state that in assessing a company's level of cooperation, which could result in reduced charges against the entity or no charges at all, prosecutors may consider whether the company has waived the attorney-client privilege as a prelude to disclosure of confidential information. Even the unsophisticated corporate officer gets the message: Waive the privilege – or else.

We would not tolerate such practices outside the corporate context. If, for example, the hand of government routinely forced individual suspects to waive the attorney-client privilege, civil libertarians would cry "foul!" And rightly so.

Why, then, is the corporate setting any different? In theory, it is because corporate fraud and other misdeeds can result in multiple victims, including shareholders, investors, and pensioners. Thus, the logic goes, erosion of the centuries-old attorney-client privilege is a small price to pay for uncovering the truth and preserving the greater public good.

There are, however, some problems with that line of reasoning. First, if finding the truth rather than treating an accused fairly were the system's highest objective, then there would be no such thing as suppression of evidence, which, of course, happens everyday in our criminal courts. Second, it is by no means certain that turning attorneys into whistle-blowers or forcing privilege waivers will have the intended effect of protecting the investing public.

These rules actually might have the opposite effect. Revealing confidential communications between a lawyer and client will, over time, undoubtedly chill such communications in the first instance. That can mean that corporate decision-makers will be denied the candid advice of their counsel, or will hesitate in asking for such advice, precisely when they need it the most. From society's standpoint, the relevant inquiry is whether we would rather have a business executive, when confronting allegations of corporate wrongdoing and charting a response, be guided by professional legal advice or not.

Perhaps it will not come to that choice, but it might. Hopefully, Congress and the SEC will monitor these rules with an eye toward modifying them should it become apparent that they are having unintended consequences.

R. Max Crane
Co-Chair, Corporate Governance and Compliance Practice Group
Sills Cummis Epstein & Gross P.C.

Peter G. Verniero
Chair, Corporate Internal Investigations and Business Crimes Practice Group
Sills Cummis Epstein & Gross P.C.