

## Between A Rock And A Hard Place

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ALM MEDIA

FOR TWO YEARS, AN ALLIANCE of bar and business groups tried to undo a 2004 sentencing-guideline change they say was eroding the attorney-client privilege.

Their efforts paid off earlier this spring, when the U.S. Sentencing Commission removed language allowing for more lenient treatment of defendant organizations that waive attorney-client and work-product privileges. The amendment will take effect on Nov. 1 unless Congress acts to the contrary.

But those behind the move are now trying to undo what they see as an even more serious threat: an internal Department of Justice policy that allows—and perhaps even encourages—prosecutors to demand a privilege waiver as a condition for reducing charges or for not bringing them at all. Companies, they say, face a difficult choice between preserving privilege and avoiding prosecution—a dilemma



**Conducting in-house investigations may be increasingly difficult if clients know that once-confidential information may later become a bargaining chip with prosecutors, said Shipman & Goodwin white-collar criminal defense lawyer Ross H. Garber.**

that undermines the confidentiality underlying the attorney-client relationship and harms the public by deterring businesses from obtaining salutary advice.

Representatives of the Association of Corporate Counsel and the U.S. Chamber of Commerce met with Justice Department lawyers on the issue. The two groups are part of a coalition that includes such unlikely allies as the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the Washington Legal Foundation, the National Association of Manufacturers and the American Chemistry Council.

Also taking a lead role is the American Bar Association, which has a task force on the issue and plans to ask Attorney General Alberto Gonzalez to revise the department's waiver position.

The troublesome policies are set forth in a Jan. 20, 2003,

memorandum by then-Deputy Attorney General Larry Thompson, entitled "Principles of Federal Prosecution of Business Organizations." One of the criteria listed for deciding how to treat a corporation is "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including if necessary, the waiver of corporate attorney-client and work product protection."

The U.S. Attorney General's Office, which opposed the April 5, 2006, sentencing change, stated afterward that it would have no impact on the Thompson memorandum and that the department "remains committed to using all of the tools at its disposal to investigate and prosecute corporate fraud." Thompson, now general counsel for Pepsico, is on the ABA task force that proposes revising his memo to delete the reference to waiving privilege.

Ross H. Garber, of Hartford-based Shipman & Goodwin, is vice chair of the National Association of Criminal Defense Lawyers' White-Collar Crime Committee, and has spoken frequently on the increasing requests for such waivers.

"I think, particularly as evidenced by the decision of the sentencing commission to abandon waiver of the attorney-client privilege as a factor in corporate sentencing, ... the tide has turned on this issue," he said. "The defense community and the business community, in particular, have realized it's simply bad public policy for the government to bludgeon companies into waiving the attorney-client privilege."


Simply eliminating the waiving of the privilege as a sentencing factor isn't the end of the problem, Garber added. "Increasingly, prosecutors are asking for privileged information, and increasingly, lawyers for companies

are providing that information, which has negative impact on the attorney-client relationship."

Garber noted that corporate counsel may face increasing difficulty conducting in-house investigations if clients know that once-confidential information may later become a bargaining chip with prosecutors.

### 'Culture Of Aggressiveness'

The Justice Department says it does not abuse privilege waiver and that, in any event, corporations, advised by

 Companies increasingly urged to waive attorney-client privilege or face the consequences

sophisticated counsel, are capable of choosing what is in their best interests.

Deputy Director of Public Affairs Brian Roehrka said the department has received no formal complaints of abuse and if it did, it "would take it seriously and investigate it thoroughly."

But a survey by the groups trying to change the waiver policies found that 75 percent of inside and outside counsel agreed that the government now expects routine waiver of privilege.

Prosecutors do not even necessarily demand waiver but sometimes merely walk into the room and "slap the Thompson memo on the table" or even just mention it, said ACC's general counsel, Susan Hackett. "It's well understood you cooperate or you die; you go the way of Arthur Andersen," she added.

Arthur Andersen was convicted of covering up fraud by its client, Enron.

Though the Supreme Court reversed in 2005, the company, once one of the largest in its field, no longer exists.

"If you're a corporation, the death knell is not the sentence, it's the indictment," said criminal defense attorney Lawrence Lustberg, of Newark's Gibbons, Del Deo, Dolan, Griffinger & Vecchione.

R. William Ide, chairman of the ABA task force, sees a "new culture of aggressiveness" in demanding waiver. In the past, "whether or not the privilege should be waived has always been an evidentiary matter in front of the courts," he said. But "it got hijacked upstream by the prosecutor function."

James Bergenn, a criminal defense lawyer and Garber's partner at Shipman & Goodwin, said Connecticut defense lawyers and clients haven't been subject to abusive waiver requests. However, he added, "you can be put in a box when you're asked to waive. It's not a comfortable position to be in. There is really no solution; just because the prosecutors here are less onerous than elsewhere, you can get out of it by saying, 'We're all reasonable.'"

Wayne State Law School Professor Peter Henning said he doubts the Department of Justice will change its position, since the efforts of the ABA and the coalition could be viewed with suspicion as geared toward protecting the corporation rather than the privilege. "The pendulum swings one way, then the other," he said. After the Enron scandal unfolded, "you had to cooperate," he said. Now, "the question is whether you can push back and get a bit more of the privilege." ■