

Corporations Pressured to Waive Attorney-Client Privilege

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Author's note: This is the first of a two-part series on the ethics of federal prosecutors in prosecuting white-collar crimes. Part two examines the controversy surrounding waiving the attorney-client privilege. The next article covers the issue of corporations paying the legal fees of employees targeted in federal investigations.

The attorney-client privilege allows anyone, including corporations, suspected of criminal conduct to get confidential legal advice. The privilege protects reports, memorandum or other work product prepared by a suspect's attorney. Government investigators can access information protected by the attorney-client privilege only if the suspect waives the privilege.

Beginning in 2003 the Department of Justice (DOJ) began pressuring corporations to waive the attorney-client privilege during federal investigations. Deputy Attorney General Larry Thompson wrote a memo advising Federal prosecutors to consider a corporation's willingness to waive the attorney-client privilege in deciding whether to indict a corporation. Refusal to waive the privilege was considered a failure to cooperate with the government's investigation and a sign of corporate guilt. Eager to avoid indictment and prosecution, many corporations waived their constitutionally protected attorney-client privilege. The DOJ's policy discouraged some company executives from seeking legal advice from corporate counsel because they feared DOJ prosecutors would be told the contents of any conversations.

The American Bar Association questioned the constitutionality of the DOJ's policy. Regardless of constitutionality, it was unethical to coerce corporations to waive the attorney-client privilege. A waiver did not even guarantee a corporation would not be indicted. Legal scholars, white-collar crime defense attorneys, the American Bar Association, the Association of Corporate Counsel and some members of Congress demanded DOJ stop the waiver practice.

To avoid possible Congressional action, the DOJ's Deputy Attorney General, Paul McNulty, in December 2006 issued a new guidance memo to prosecutors. Under the new policy, before a federal prosecutor requests a company to waive the attorney-client privilege, the prosecutor must get permission from a proper authority. If the prosecution is seeking factual information, such as witness statements and key documents, permission to seek a waiver can be gotten from a local U.S. attorney. If the confidential information consists of legal advice given the corporation; reports, notes, memorandums, or other attorney work products from investigations conducted by corporate attorneys; permission to seek a waiver can only be given by the deputy attorney general.

The policy changes do not satisfy DOJ's critics. Fredrick J. Krebs, President of the Association of Corporate Counsel, calls the new policy "a day late and a dollar short." He contends the policy remains coercive and the government continues to manipulate a corporate client's right to confidential counsel.

Senate Judiciary Committee members Patrick J. Leahy (D) of Vermont and Pennsylvania's Arlen Specter (R) are especially critical of the DOJ's 2003 policy and the 2006 revisions. Senator Leahy accuses the DOJ of creating a disturbing culture of waiver of the attorney-client privilege in the criminal justice system. Senator Specter recently told DOJ officials that a corporation should not get credit for waiving a constitutional right or a demerit for asserting one. Senator Specter believes that, regardless of the 2006 changes, federal prosecutors are bludgeoning companies into revealing confidential information. Recently, Senator Specter introduced the "Attorney-Client Privilege Act of 2006." If passed, the act will make it illegal for any government attorney or agent to demand that a corporation disclose any information protected under the attorney-client privilege.