Preserving attorney client privilege in the dawn of a culture of waiver

Contributed by Christina A. Daskas, Esq

By:Â Christina A. Daskas
Ford Motor Company

The attorney-client privilege was the first evidentiary privilege recognized in Anglo-American law.1Â Â Its purpose 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."2Â Â The privilege is based upon the client's ability to communicate openly and freely and to seek legal advice from persons skilled and knowledgeable in the law.Â

Confidentiality is a necessary and essential component of the privilege.Â The privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance procedures and practices.Â However, this privilege is consistently being eroded. If this trend continues, clients will be discouraged from seeking advice from their attorneys.Â Furthermore, in corporate settings, officers, directors and employees will be less forthcoming and internal investigation will be less reliable.Â Ultimately, the search for the truth will be frustrated3.Â Â Â Â Â Â

It is no secret that companies and corporations are in jeopardy of losing the value of the attorney-client privilege because of federal prosecutorial intervention.Â Even though most attorneys are not faced with corporate criminal investigations, the Department of Justice routinely seeks privilege waivers in two common situations:Â (1) when a prosecutor demands that a company provide the product of an internal investigation, including interviews with employees who may have criminal exposure; and (2) when a prosecutor demands that a company disclose its attorney's advice.4
The attorney-client privilege must be protected, not only for individuals, but also corporations.Â The privilege enables companies to seek and obtain advice regarding corporate compliance with the law.Â It also encourages corporations to self-investigate to identify issues and remedy problems to the benefit of the business, its investors and society as a whole.Â Therefore, any waiver of the attorney-client privilege, especially if initiated by the government, derogates the culture of confidentiality which is the incentive to seek and obtain advice.Â In the end, this derogation decreases corporate legal compliance.Â

Summary:Â Erosion of the Attorney-Client Privilege for Corporate Defendants

In the aftermath of scandals at Enron and WorldCom, "corporate governance and criminal enforcement have become indistinguishable."5Â Â What were once two sides of an adversarial system has blended into one for the corporate defendant.6Â Â Â This is a direct result of the pressure placed on corporations and their employees by federal prosecutors to "cooperate" with the government.7Â Â The Department of Justice, the U.S. Sentencing Commission and other federal agencies have adopted policies that weaken the attorney-client privilege in the corporate context by encouraging federal prosecutors and other law enforcement officials to pressure companies and other organizations to waive the attorney-client privilege as a condition for receiving credit for "cooperation" during investigations.

In June of 1999, the attorney-client privilege waiver policy was established in a memorandum by Eric Holder, Deputy Attorney General, Department of Justice.8Â Â This memorandum, Waiver of the Corporate Attorney-Client and Work Product Protections (â€œHolder Memorandumâ€•), introduced the concept that prosecutors could consider a corporationâ€™s willingness to waive attorney-client privilege and work-product privileges in evaluating the corporationâ€™s cooperation.Â The prosecutor had the discretion to determine whether waiver was necessary in each particular case.

In January of 2003, this policy was further expanded in a memorandum issued by former Deputy Attorney General Larry Thompson, Re: Principles of Federal Prosecution of Business Organizations (â€œThompson Memorandumâ€•).9Â Â The Thompson Memorandum instructed prosecutors to specifically evaluate whether an organization would receive credit or leniency for its cooperation (i.e., its willingness to waive attorney-client and work product privileges).Â

In November 2004, the U.S. Sentencing Commission modified the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines to encourage prosecutors to actively seek such waivers as a prerequisite for cooperation.10Â Â Â To further validate these directives, Deputy Attorney General Robert McCallum, Jr., issued a memorandum in October 2005 asking each U.S. Attorney to develop local written policies for obtaining privilege waivers.11

Not surprisingly, many additional federal agencies followed in the direction of the Justice Department and the Sentencing Commission.Â For example, the Securities and Exchange Commission (SEC)12 , the Commodity Futures Trading Commission (CFTC)13Â and the Department of Housing and Urban Development14Â adopted like or similar privilege waiver policies.

Â Response to the Attack on the Attorney-Client Privilege

In response to the attack on the attorney-client privilege, in September of 2004, the ABA created a Task Force to focus on the attorney-client privilege.15Â Â It was established to examine any developments regarding the privilege, keep the public and legal community informed of the developments and assist the ABA in developing policies that balance the need for privilege protection and the demand for access to protected information.Â The Task Force drafted new ABA policy supporting the attorney-client privilege and opposing government policies that erode it.Â One such policy is known as "Recommendation 111", which was unanimously adopted by the ABA House of Delegates in August of 2005.16Â Â The

third paragraph of the resolution states that "that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the grant or denial of any benefit or advantage."17

In addition to the ABA and its Task Force, a group of influential legal and business groups such as the U.S. Chamber of Commerce and the Association of Corporate Counsel to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers formed a coalition ("Coalition") and are working together to modify the Department of Justice's waiver policy and other like policies adopted by governmental agencies.18Â Â Also, a prominent group of former senior Justice Department Officials and various Congressional leaders raised similar concerns over the privilege waiver provisions and encouraged the Department to amend the Thompson Memorandum.19Â Â Â Â

Â Most Recent Actions and the McNulty Memorandum

On April 5, 2006, the Sentencing Commission voted unanimously to remove the privilege waiver language from the Sentencing Guidelines, which became effective on November 1, 2006.20Â Â Similarly, the CFTC eliminated the privilege waiver language from its cooperation standards on March 1, 2007.Â They issued a new Enforcement Advisory that specifically recognizes the importance of preserving the privilege.21Â Â However, the Department of Justices failed to adopt like or similar modifications to its privilege waiver policy.Â

In response to the Department's inaction, on December 7, 2006, Senator Arlene Specter (R-PA) introduced the "Attorney-Client Privilege Protection Act of 2006" ("S.30").Â The proposed legislation's purpose was to prevent the Department of Justice and all other federal agencies from requesting attorney-client privilege waivers from companies.Â This legislation was endorsed by the ABA and the Coalition.22

In a futile attempt to pacify the growing groups of protestors, on December 12, 2006, the Department of Justice released another memo, referred to as the "McNulty Memorandum".23Â Â The McNulty Memorandum modified the privilege waiver policy set forth in the Thompson Memorandum.Â However, it left much to be desired.Â Rather than reversing the effects of the previous memorandums, the McNulty Memorandum simply added a layer of bureaucracy by requiring a higher level of approval before the waiver requests could be made.Â

In response to the McNulty Memorandum, on January 4, 2007, Senator Specter's proposed legislation (S.30) was reintroduced as S.186.Â The bill was referred to the Committee on the Judiciary for consideration.Â Once again, the ABA, the Coalition and others support S.186.24Â Â

Continued Concerns over the Thompson and McNulty Memorandums

The Department of Justice's privilege waiver policy, as set forth in the McNulty Memorandum and other like federal policies, causes a number of profoundly negative consequences.25Â Â First, the McNulty Memorandum and like policies routinely compel companies to waive the attorney-client privilege for fear of being labeled as "uncooperative".Â This compulsion to waive the privilege will severely effect charging and sentencing decisions and adversely impact the companyâ€™s public image, stock price and credit.Â

According to a recent survey of over 1200 corporate counsel conducted by the Association of Corporate Counsel, National Association of Criminal Defense Lawyers, and the ABA, almost 75% of the responding attorneys believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate to expect a company under investigation to broadly waive attorney-client privilege.26Â Â It is clear that the McNulty Memorandum fails to eliminate the improper practice of federal prosecutors demanding waiver. Instead, the McNulty Memorandum encourages such demands so long as federal prosecutors obtain high level Departmental approval.

Second, the applicability of the attorney-client privilege will remain highly uncertain for companies since the McNulty Memorandum only imposes modest, at best, procedural limits on formal government waiver requests.Â The McNulty Memorandum urges companies to voluntary waive their privileges without a formal request in order to receive cooperation credit and a more lenient treatment.Â Â

Third, the McNulty Memorandum and like policies erode the sacred confidential relationship between companies and their lawyers.Â Corporate lawyers assist companies and their officers, directors and employees act lawful and in the companies' best interests.Â In order to adequately advise companies and their employees, lawyers must have the unrestrained confidence and trust of the employees.Â Moreover, lawyers must receive any and all relevant information necessary to adequately and effectively represent the company.Â The McNulty Memorandum accomplishes just the opposite.Â

It discourages employees from seeking advice from company lawyers for fear that any conversation will be disclosed to federal prosecutors under the guise of "cooperation" and result in criminal liability.Â It causes a deterioration of individual employee constitutional rights27Â and hinders or prevents corporate lawyers from effectively advising companies regarding compliance issues.Â The negative impact of the McNulty Memorandum is widespread effecting not only companies, but also their officers, directors, employees and investors.Â

Fourth, the McNulty Memorandum and like policies discourage and/or impede internal corporate investigation by undermining companies' compliance regimes, which include internal investigations conducted by in-house or outside lawyers.Â Internal compliance programs and procedures are essential mechanisms for identifying and correcting malfeasance.Â They are only effective when individuals speak freely and confidentially with corporate lawyers.Â The McNulty Memorandum undermines these types of internal compliance programs by discouraging individual candor, which is necessary and crucial to these programs.Â

ABA States a "Need for Balance"

The ABA advocates a balance between effective law enforcement and protection of the attorney-client privilege.28Â Â In a letter dated May 2, 2006 to Attorney General Alberto Gonzales, the ABA urged the Department of Justice to adopt specific revisions to the Thompson Memorandum that were prepared by the ABA Task Force and the Coalition.Â The proposal amends the Department's policy by:Â (1) prohibiting prosecutors from seeking privilege waivers during

investigations; (2) requires specification of the non-privileged information sought by prosecutors as a sign of "cooperation"; and (3) clarifies that any voluntary waiver of privilege shall not be considered when assessing whether the company provided effective "cooperation".29Â Â The proposed language strikes "the proper balance between effective law enforcement and the preservation of the essential attorney-client privilege".

Corporate attorneys should be vigilant in their support of the ABA and its Task Force's effort to preserve the attorney-client privilege.30Â To learn more about their continued efforts, go to http://www.abanet.org/buslaw.attorney-cliengt/home.shtml.

Christina A. Daskas is an attorney at the Office of General Counsel of Ford Motor Company.Â She currently is a case handler for asbestos litigation.Â She can be reached at (313) 322-7358.Â Her email address is cdaskas@ford.com. Â

1Testimony of Kent Wicker, Before the United States Sentencing Commission, March 15, 2006.

2Upjohn Co v United States, 449 US 383, 389 (1981).

3Testimony of William M. Sullivan Jr., Before the Committee on the Judiciary, United States House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, March 7, 2005.

4Testimony of Wicker, supra note 1, 2.

5National Association of Criminal Defense Lawyers' Statement on Corporate Attorney-Client Privilege, March 2, 2006, available at http://www.nacdl.org/public.nsf/freefor/attorneyclient.

6Id.

7Id.

8Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations, June 16, 1999, available at http://www.usdoj.gov/criminal/fraud/policy/chargingcorps.html.

9Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys, Principles of Federal Prosecution of Business Organizations, January 20, 2003, available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

10For a detailed discussion regarding the 2004 amendment to the Commentary of Section 8C2.5 of the Federal Sentencing Guidelines refer to the ABA's March 28, 2006 written comments to the U.S. Sentencing Commission, available at http://www.abanet.org/poladv/letters/attyclient/060328letter_abaussc.pdf.

11Memorandum from Robert D. McCallum, Jr. to Department Components and United States Attorneys, Waiver of Corporate Attorney-Client and Work-Product Protection, October 21, 2005.

12The SEC's privilege waiver policy is set forth in its 2001 "Seaboard Report", formally known as "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions", issued October 21, 2001 as Releases 44969 and 1470, available at http://www.sec.gov/litigation/investreport/34-44969.htm.

13The CFTC's privilege waiver policy was set forth by its Division of Enforcement in an Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations, August 11, 2004.Â Â

14HUD's privilege waiver policy is set forth in a formal Notice, dated February 3, 2006, available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

15Information about the Task Force and its materials can be found on the Task Force's website at http://www.abanet.org/buslaw/attorneyclient/home.shtml.Â See also Statement of Karen J. Mathis, President of the American Bar Association, Before the United States House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on Judiciary, March 8, 2007, available at http://judiciary.house.gov/media/pdfs/Mathis013107.pdf

16Recommendation 111 and the Report are available at http://www.abanet.org/buslaw/attorneyclient.Â See also Statement of Mathis, supra note 15, at 2.

17d.

18Statement of Mathis, supra note 15, at 9.

19 Id. at 10-11.

20Id. at 11.

21The CFTC Division of Enforcement removed the waiver language on March 1, 2007.

22Statement of Mathis, supra note 15, at 11-12.

23Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Component and United States Attorneys, Principles of Federal Prosecution of Business Organization, December 12, 2006, available at http://www.abanet.org/poladv/priorities/priviilegewaiver/2006dec12_privwaiv_dojmcnulty.

24Statement of Mathis, supra note 15, at 12.

25Id. at 5-8.Â Karen Mathis does an excellent job of describing the unintended consequences of federal prosecutors' demands to companies for waiver of the attorney-client privilege, which is summarized in the following paragraphs.Â

26The survey results are available at http://www.acca.com/Surveys/attyclient2.pdf.Â Notably, responding corporate counsel stated that the most frequently cited reasons for requesting a waiver were policies adopted by the Department of Justice, the Sentencing Commission and the SEC.

27Statement of Mathis, supra note 15, 12-16 (discussion on the effect that corporate waiver policies have on employees).Â See also NACDL Statement, supra note 4, 3-4.Â Â

28Statement of Mathis, supra note 15, 9-10.

29Id. at 9.Â Â

30Id. at 10.