Chapter Five

Attorney-Client and Work Product Privileges

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ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

"What is astonishing is that the attorney-client privilege, one of the foundational rights on which rests Anglo-American legal culture . . . should now be under siege. The two federal agencies that have been most vigorous in seeking waiver of the attorney-client privilege have been the Department of Justice and — unfortunately, I must say — the Securities and Exchange Commission."

Paul S. Atkins
SEC Commissioner
January 18, 2008

Background. The attorney-client privilege, the oldest evidentiary privilege with historical common law roots in England from the 1500s, is designed to protect the disclosure of confidential communications between attorney and client. The privilege was originally limited to confidential communications between an attorney and individuals, but has now been expanded to include communications between corporations and their attorneys. *See United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915).

Extending this privilege to corporations was particularly important inasmuch as the Supreme Court had ruled just a few years before *Louisville* that corporations have no Fifth Amendment right against self-incrimination. *Hale v. Henkel*, 201 U.S. 43, 86 (1906). Without this constitutional protection, the attorney-client privilege is the only protection that corporations can invoke to protect certain forms of confidential communication within the corporate structure. Unfortunately, as SEC Commissioner Paul S. Atkins has noted, this privilege is now under siege by federal prosecutors and government agencies.

The attorney-client privilege serves a valuable societal function. As the Supreme Court recognized, its purpose is to foster "full and frank communication between attorneys and their clients and thereby promote the broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice . . . depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In *Upjohn*, the Supreme Court broadened the scope of the privilege from communications with the so-called "control group" or higher management, to encompass communications between low-level employees and corporate counsel under the so-called "subject matter" test. Under this test, communications from lower level employees would be protected if the subject matter was necessary for counsel to give legal advice to the

corporate entity and its officers. Thus, the privilege enables corporate counsel to better facilitate the corporation's compliance with the current myriad of laws and regulations. Conversely, the erosion of the privilege makes corporate counsel's job more difficult.

In addition, the privilege belongs to the client and can only be waived by the client, not the attorney. In the corporate setting, the corporation is the client, not the individual employee. This relationship may compel counsel to give an "*Upjohn* warning" to employees that their statements can be revealed to the government if the company were to waive the privilege. The privilege can also be expressly waived if the client voluntarily chooses to do so, even if, as will be discussed, the waiver was effectively compelled. Finally, the attorney-client privilege does not protect communications between an attorney and client for the purpose of committing a crime or fraud (the "crime-fraud exception").

The work product doctrine is a related privilege that protects the disclosure of work product by the client's lawyer to his adversary regarding litigation that is pending or reasonably anticipated. The attorney-client privilege is thus designed to foster communication between attorney and client, while the work product privilege is designed to encourage attorneys to engage in careful preparation for litigation and to protect the attorney's work product from disclosure. The work product privilege was also recognized by the Supreme Court to be available to corporations. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). However, unlike the attorney-client privilege which is absolute, work product materials can be obtained by parties in limited circumstances as specified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

As the following discussion of events demonstrates, DOJ and other government agencies, particularly the SEC and the U.S. Sentencing Commission, have developed policies and practices over recent years that have seriously eroded these fundamental privileges in both the criminal and civil enforcement contexts. In the process, prosecutors have stifled intra-corporate communications, thus generating considerable management problems and making compliance with the law and conducting internal investigations more difficult.

Erosion of the Privilege by the Department of Justice and SEC. The federal erosion of the corporate attorney-client and work product privileges by DOJ commenced in 1999 with the issuance of the first of four memoranda issued by Deputy Attorneys General in the Justice Department. As discussed in Chapter Three, Deputy Attorney General Eric Holder issued a Memorandum, *Federal Prosecution of Corporations*, in June 1999 listing eight factors for prosecutors to consider in exercising their discretion as to whether or not to prosecute a corporation. One factor that prosecutors could and did consider was whether the corporation was willing to cooperate with the government's criminal investigation. This willingness to cooperate "includ[ed], if necessary, the waiver of corporate attorney-client and work product protection," and whether it was protecting allegedly culpable employees "through the advancing of attorneys fees." Obtaining waivers provided a shortcut for prosecutors to develop their cases.

Regulatory agencies also began to gauge a corporation's level of cooperation in making enforcement decisions by whether or not the organization waived its attorney-client and work product privileges. For example, on October 23, 2001, the SEC issued its so-called

"Seaboard Report" listing 13 criteria that the SEC would use in making enforcement decisions. One of the criteria encourages corporations to waive their privileges to gain cooperation credit along with self-policing, self-reporting, and remediation. The SEC later supplemented its Seaboard Report by issuing a Statement Concerning Financial Penalties in January 2006. That policy also provided that the extent of cooperation in an investigation will be a factor in determining the level of a civil monetary penalty. While the SEC's penalty policy does not expressly call for waiver of privilege, the not-so-subtle message to the corporate community is clear: you will be punished more severely for not waiving your privileges. Other agencies, such as the Commodity Futures Trading Commission (CFTC), EPA, Department of Health and Human Services (HHS), IRS, Federal Communications Commission (FCC), Department of Labor (DOL), and Federal Energy Regulatory Commission (FERC) have followed suit with similar waiver policies or practices. *See, e.g.*, Judson W. Starr & Yvette W. Smallwood, *Environmental Crimes in Perspective*, THE ENVIRONMENTAL COUNSELOR (Jan. 15, 2003) (privilege waivers required in some EPA cases to show cooperation).

Moreover, the 2002 passage SOX further jeopardized the confidentiality of communications between corporate counsel and management. Section 307 requires counsel to report material violations of the securities law "up the ladder" in the company, and permits attorneys to "blow the whistle" to the SEC if necessary to prevent the corporation from violating the securities laws. In addition, SEC proposed so-called "noisy withdrawals" regulations that would require or permit counsel to withdraw from representation of the company if the violations continued. This proposed rule received strong opposition from the bar and it is uncertain what the SEC will do in this area. Nevertheless, SOX has further complicated the application of state ethical rules relating to the attorney-client privilege and the crime-fraud exception.

As noted in Chapter Three, in the wake of the Enron and WorldCom scandals and the establishment of the Corporate Fraud Task Force, Deputy Attorney General Larry Thompson issued *Principles of Federal Prosecution of Business Organizations* on January 20, 2003. The Thompson Memo revised and fortified the 1999 Holder Memo by requiring "authentic cooperation" from corporations in determining whether to file criminal charges against them, and requiring that the factors be considered "in every matter involving business crimes." The mandatory nature of the Thompson Memo further emboldened prosecutors to demand and expect corporations to waive their privileges and to refrain from paying the attorneys' fees of targeted employees. Compliance with these demands would demonstrate that they were fully cooperative, and hence, deserved lenient treatment. Even if a corporation waived its privilege and acceded to the prosecutor's demands, there was no assurance that cooperation would actually preclude criminal prosecution. Further, proposed deferred prosecution agreements, in lieu of indictments (discussed in Chapter Six), often required the corporation to waive its privileges as part of the deal.

According to 2005 and 2006 surveys conducted by the Association of Corporate Counsel (ACC) and the National Association of Criminal Defense Lawyers (NACDL), approximately 75 percent of responding lawyers agreed that there is a widespread "culture of waiver." Companies had been routinely requested or expected by prosecutors to waive their attorney-client and work product privileges in order to demonstrate adequate

cooperation with the government's investigation. Even the author of the Holder Memo, now in private practice, lamented, "Today, it's maddening. . . You'll go into a prosecutor's office . . . and fifteen minutes into our first meeting they say, `Are you going to waive?'" Peter Lattman, *The Holder Memo and Its Progeny*, WSJ.com., http://blogs.wsj.com/law/2006/12/13/the-holder-memo/(Dec. 13, 2006).

The "culture of waiver" was further exacerbated by the U.S. Sentencing Commission's 2004 provision to its corporate compliance guidelines, as discussed in Chapter Seven. Like the Thompson Memo, the Sentencing Guidelines provision measured "cooperation" by the waiver of privileges in determining the level of punishment a corporation should receive if found guilty of an offense. To qualify for a reduced sentence under the U.S. Sentencing Guidelines Manual § 8C2.5 (Application Note 12), a corporation's cooperation must be "timely and thorough," including "disclosure of all pertinent information known by the organization," such as information otherwise protected by the attorney-client and work product privileges. While this policy was only invoked after a company was convicted, it nonetheless clearly bolstered the "culture of waiver" spawned by the Thompson Memo.

Adverse Consequences from Waiver. The adverse consequences of forcing corporations to waive their privileges and terminate payment of attorneys fees to employees were predictable and palpable:

- Compliance programs and corporate governance depend upon free and open communications between employees, management, and both in-house and outside corporate counsel. Waiving attorney-client privilege has a "chilling effect" on communications between employees and corporate counsel and is therefore counter-productive. It reduces the effectiveness of corporate compliance programs, including those mandated by law, such as the reporting requirements of SOX.

- Corporate counsel are effectively deputized as agents for prosecutors and regulatory agencies, thereby undermining their professional obligations to their client, as well as their perceived role by company employees.

- The forced waiver of the attorney-client privilege is a Hobson's choice for employees when corporate counsel request that they cooperate in an internal investigation. If they refuse, they can be disciplined or fired by their employer; if they cooperate, they effectively surrender their Fifth Amendment rights by risking the disclosure of their communications by the company to the government. They are then vulnerable to ruinous prosecution, particularly when the company is forced to stop paying attorneys' fees for their defense. Employees lose a shared sense of duty and loyalty to the corporation and foster a defensive "every man for himself" workplace mentality that harms productivity.

- There is an increased reluctance among qualified candidates to assume board positions at public companies, thereby reducing available talent to oversee company operations and compliance to the detriment of shareholders.

- Plaintiffs' attorneys are able to use the disclosed information as a "roadmap" for third-party follow-on civil lawsuits.

- Due to conflicting judicial authority as to the validity of limited waivers, businesses are reluctant to cooperate voluntarily with government investigations.

As the Supreme Court noted, "if the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. The mere uncertainty as to whether a corporation will be forced to waive its attorney-client and work-product privileges greatly diminishes their value.

A Crescendo of Criticism. Throughout 2005 and 2006, a growing chorus of criticism came from a broad spectrum within the legal and policy-making community. The Coalition to Preserve the Attorney-Client Privilege, consisting of members of the corporate community, the defense bar, business and trade groups, and organizations, including the ACC, NACDL, the U.S. Chamber of Commerce, the Washington Legal Foundation, Business Civil Liberties, Inc. and the ACLU, began a concerted effort to reverse DOJ's waiver policy and practice. Joining this effort was the ABA and its Task Force on the Attorney-Client Privilege, which strongly campaigned in support of preserving the privilege. On August 9, 2005, the ABA House of Delegates *unanimously* adopted Resolution 111 opposing "the routine practice by government officials of seeking to obtain waiver of the attorney-client privilege or work product doctrine."

In the interim, Acting Deputy Attorney General Robert McCallum issued a memorandum on October 21, 2005, instructing all U.S. Attorneys and Department Heads to adopt a written waiver review process for their district or component. Robert McCallum, Acting Deputy Attorney General, *Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21 2005). This tepid response to the criticism only made matters worse. With this directive, U.S. Attorneys were now free to develop policies that varied from district to district or component to component, thereby reducing certainty and predictability of the waiver process. The McCallum Memo only further delayed the much needed substantive revision to the Thompson Memo's waiver policy.

Bipartisan support also began to grow in Congress to examine and halt DOJ's withering assault on the attorney-client and work product privileges. On March 7, 2006, former Attorney General Dick Thornburgh testified before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security — apparently the first ever congressional hearing on the subject of the attorney-client privilege — strongly opposing waiver requests by prosecutors and agency attorneys. In response to the escalating criticism of the "culture of waiver," former top DOJ officials from both parties, led by the former Attorney General, submitted statements to the Justice Department, the Sentencing Commission, and Congress, in which they vigorously opposed the dangerous erosion of these essential privileges.

In the meantime, the Sentencing Commission on April 5, 2006 unanimously reversed its 2004 policy, similar to the Thompson Memo, that waiver could be considered in considering the sufficiency of cooperation with prosecutors, after receiving strong objections to the policy from the legal

and business community. While this is a welcomed revision, the Sentencing Commission policy is not triggered until after there is a conviction; hence, DOJ's waiver policy during the pre-charging stage is more relevant to businesses under investigation.

Even the courts began to weigh-in against prosecutors for forcing companies to curtail paying defense attorneys fees to targeted employees. As discussed in greater detail in Chapter Six, in August 2005, DOJ and KPMG, a major accounting firm, entered into a deferred prosecution agreement (DPA), which included a waiver provision. While there was no express term in the DPA that the company could not pay the attorneys' fees of targeted partners, the prosecutor grilled the company *before* signing the agreement about whether it intended to advance defense fees as its policy and practice had previously allowed. KPMG quickly got the message: in order to be spared criminal prosecution and the same fate of Arthur Andersen, it had better stop supporting its employees.

In his landmark follow-up opinion, Judge Kaplan dismissed the indictments against 13 KPMG employees, ruling that DOJ's heavy-handed pressure on KPMG to deny the advancement for fees violated the employees' Sixth Amendment right to counsel and Fifth Amendment right to due process and a fair trial. *United States v. Stein (Stein II),* 495 F. Supp. 2d 390 (S.D.N.Y. 2007). DOJ has appealed Judge Kaplan's decision to the U.S. Court of Appeals for the Second Circuit, which will likely hear the case in mid-2008.

The McNulty Memorandum. Reacting to the widespread criticism from Congress, the courts, and the legal community, then-Deputy Attorney General Paul McNulty issued a memorandum on December 12, 2006 replacing the Thompson Memo. The McNulty Memo was intended to allay concerns about compelled waivers and forcing companies not to pay their employees' attorneys fees. Henceforth, line prosecutors were required to obtain prior written approval from their respective local U.S. Attorney, in consultation with the Assistant Attorney General at Main Justice, before requesting disclosure of purely factual information (so-called Category I information). Prior written approval from the Deputy Attorney General was required to request and obtain the disclosure of attorney-client materials (so-called Category II information). However, not only is the line between Category I and II information vague, but also companies are still encouraged to "voluntarily" waive the privilege in order to be viewed favorably when the charging decision is being made. In addition, the McNulty Memo states that "prosecutors generally should not take into account whether a corporation is advancing attorney's fees to employees under investigation or indictment."

In particular, McNulty's public statement that companies will be rewarded for waiving the privilege undercuts the Memo's assertion that companies will not be punished for *not* waiving the privilege. While the McNulty Memo was considered by some to be a small step in the right direction, it was insufficient to dispel the notion that prosecutors could and would continue to force waivers without having to expressly request them. The message remained the same: waive the privilege or else face ruinous criminal prosecution. Employees would continue to view corporate counsel as *de facto* government agents, thereby chilling communications the attorney-client privilege was designed to protect. As one practitioner concluded, "the McNulty Memorandum fails miserably and, in many respects, exacerbates the deterioration of the corporate attorney-client privilege and the interest in compliance that the privilege seeks to further." Michael N. Levy,

Selective Waiver, McNulty, and the Stealth Attack on Privilege (McKee Nelson LLP 2007). Moreover, the McNulty Memo had no effect on the myriad of agencies that continued to coerce privilege waivers. Furthermore, DOJ continued to discourage joint defense agreements between the corporation and targeted employees, including the sharing of corporate documents for the employees' defense.

Crime-Fraud Exception and Selective Waiver. In addition to the assault on the attorney-client privilege by DOJ and regulatory agencies, there have been several judicial developments concerning the applicability of the privilege that have also contributed to its erosion. One issue is the scope of the crime-fraud exception to the privilege, and the second issue involves limited or selective waiver.

The crime-fraud exception to the attorney-client privilege provides that communications between the client and the attorney which involve the planning or commission of a crime or fraud are not protected by the privilege. For obvious reasons, the benefit of confidential communications is outweighed by the cost to society of perpetrating crimes or frauds. Yet, judicial rulings have unreasonably broadened this exception, and thus, limited the applicability of the privilege. In his Monograph on the subject, former Attorney General Thornburgh traces the judicial expansion of the crime-fraud exception. *Attorney-Client Privilege and "Crime-Fraud" Exception: The Erosion of Business and Privacy,* WLF MONOGRAPH (Sept. 1999). For example, in *Duttle v. Bandler & Kass*, 127 F.R.D. 46 (S.D.N.Y. 1989), the court held that even when the corporation innocently acted as intermediary for others who were engaging in fraud, the crime-fraud exception would apply, and thus the attorney-client privilege was lost. Moreover, since minor regulatory offenses can be prosecuted by aggressive prosecutors as a "crime," communications between attorney and client on legal advice regarding simple or minor regulatory matters may void the privilege with unduly expansive interpretation of the "crime-fraud exception."

Courts have also weighed in on the issue of limited or selective waivers. In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), the court created the concept of selective waiver. In this case, the court properly held that a corporate document turned over to the SEC in a nonpublic investigation did not waive the attorney-client privilege with respect to third parties, such as plaintiffs' attorneys seeking evidence for class action lawsuits. "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." However, most courts have ruled the other way. For example, in *In re: Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996), the court ruled that the attorney-client and work product privileges were waived for documents in a corporate internal report given to the SEC, even if there was no intent to waive the information with respect to third parties. The most recent circuit joining the chorus against selective waiver was the Tenth Circuit in *In re: Qwest Communications Int'l Inc. Securities Litigation*, 450 F.3d 1179 (10th Cir. 2006). In *Qwest*, the court held that internal corporate documents given to DOJ and SEC were not protected, even though the company did not intend to waive the privilege with respect to third parties based upon the agreement by both DOJ and SEC to keep the documents confidential with respect to third parties.

Congressional and Agency Responses. Senator Arlen Specter, with bipartisan support, proposed the Attorney-Client Privilege

Protection Act (S. 30) on December 7, 2006, just before the release of the McNulty Memo. The bill would expressly bar government attorneys, prosecutors and agency attorneys alike, from seeking waiver of the attorney-client privilege. Senator Specter reintroduced the legislation in the new congressional session in January 2007 (S. 186). Similar legislation was introduced in the House by Rep. Robert Scott (H.R. 3013) on July 12, 2007.

Throughout 2007, there was a groundswell of bipartisan support for the legislation. For example, on July 30, 2007, former DOJ officials from both Republican and Democrat Administrations, including Dick Thornburgh, Edwin Meese III, Stuart M. Gerson, Carol E. Dinkins, Jamie Gorelick, Walter E. Dellinger, III, Theodore B. Olson, Kenneth W. Starr, and Seth P. Waxman, signed a letter supporting the legislation. Former Delaware Chief Justice E. Norman Veasey, now a senior partner at Weil, Gothshal & Manges, issued a report and testified in favor of the legislation before the Senate Judiciary Committee on September 19, 2007. Judge Veasey's testimony recounted examples of abusive, if not contemptuous practices of federal prosecutors both pre- and post-McNulty Memo to coerce privilege waivers. In one case, defense counsel recounted that his objection to a waiver request by a prosecutor who failed to follow the McNulty Memo's procedures was met with a profane scolding, "I don't give a flying ---- about the [McNulty] policy." On November 13, 2007, the House approved the Attorney-Client Privilege Protection Act and sent it to the Senate, which has not yet acted on Senator Specter's bill.

Selective Waiver. In May 2006, the Advisory Committee on Evidence Rules of the U.S. Judicial Conference proposed amendments to Federal Rule of Evidence 502. The proposed rule would limit waiver as the result of inadvertent disclosure but expand an intentional waiver of privileged documents to other non-disclosed documents with the same subject matter in limited circumstances. Originally, the committee considered a provision to codify selective waiver, *i.e.*, releasing privileged information to government agencies would not waive the privilege as to third parties. While selective waiver at first blush appears to be reasonable, many voices in the corporate community, such as the Association of Corporate Counsel, were wary of this provision supported by DOJ. Selective waiver would simply give the government an added weapon to force the corporation to waive its privileges by assuring it that the information would not be released to third parties. In response to such criticism, the committee did not recommend a selective waiver provision to Congress.

On December 11, 2007, Senators Patrick Leahy and Arlen Specter introduced S. 2450, which would add a new Rule 502 regarding waiver of attorney-client and work product privileges. Notably, the legislation does not contain a selective waiver provision; however, it does permit a federal court to order that any waiver be limited to the litigation at hand, and not waived with respect to other or future litigation. On the other hand, the legislation would extend an intentional waiver of documents to a federal agency to certain undisclosed documents as well. The waiver would cover documents that concern the same subject matter of those already disclosed, but only if they "ought in fairness . . . be considered together" with the disclosed documents. More importantly, the legislation would protect the inadvertent disclosure of privileged documents so long as the holder of the privilege promptly takes steps to prevent and rectify the error.

Conclusion. The tide is turning against coercive DOJ and agency waiver policies, due to the efforts of outspoken defenders of the

privileges, including judges like U.S. District Court Judge Kaplan. However, more needs to be done. While the CFTC eliminated the waiver of privileges when assessing cooperation in March 2007, the SEC has yet to change its policy as SEC Commissioner Paul Atkins has publicly acknowledged. Other enforcement agencies, such as the EPA, also continue to seek privilege waivers. The passage of the Attorney-Client Privilege Protection Act by the Senate to match the House's legislation will go a long way to stop the erosion of the privileges.

RECOMMENDATIONS

1. Privilege waivers are not necessary for prosecutors and agencies to enforce the law. Accordingly, DOJ should modify the McNulty Memo and regulatory agencies should similarly revise their own waiver policies (such as the SEC's *Seaboard Report*), to make clear that (1) requests for waiver of attorney-client and work product information will never be made, and (2) that the refusal of a corporation to voluntarily waive its privilege would not be used against the corporation in determining whether to pursue criminal or civil action.

2. Corporate counsel should educate their client and company employees about the nature and limited scope of the attorney-client and work product privileges, and oppose government attempts to have the corporation waive the privileges.

3. At a minimum, DOJ prosecutors should regard a corporation's voluntary disclosure of purely factual information, as opposed to opinion work product and other communications, as a sufficient demonstration of corporate cooperation and not deem such limited disclosures as constituting a waiver of attorney-client or work product privileges.

4. If a corporation decides to waive its privileges, it should expressly condition or limit their availability to third parties, such as plaintiffs' attorneys in follow-on civil litigation. Courts should enforce those conditions and provide clarity concerning the validity of selective waiver agreements.

5. The Attorney-Client Privilege Protection Act, if enacted into law, will stem the erosion of the privilege if DOJ and regulatory agencies, such as the SEC, refuse to voluntarily curb their current policies that encourage waivers.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003).

Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

Susan Hackett, *Corporate Confidentiality Is Only for the "Privileged" Few*, 9 WALL ST. LAWYER No. 2 (July 2005).

John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U.L. REV. 579 (2005).

Oren M. Henry, *Privilege? What Privilege? Culture of Waiver in the Corporate World*, 20 GEO. J. LEGAL ETHICS 679 (2007).

Michael N. Levy, *Selective Waiver, McNulty, and the Stealth Attack on Privilege* (McKee Nelson LLP 2007).

William R. McLucas, et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. OF CRIM. LAW & CRIMINOLOGY 621 (2006).

Earl J. Silbert & Demme Doefekias Joannou, *The Impact of Corporate Privilege Waivers on the Adversarial System,* 43 AM. CRIM. L. REV. 1225 (2006).

Judson W. Starr & Yvette W. Smallwood, *Environmental Crimes in Perspective*, THE ENVTL. COUNSELOR (Jan. 15, 2003).

George J. Terwilliger III & Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations,* 7 ENGAGE: THE J. OF THE FEDERALIST SOC'Y PRACTICE GROUPS 25 (2006).

Brian Walsh, *What We Have Here Is Failure to Cooperate: The Thompson Memorandum and Federal Prosecution of White-Collar Crime*, HERITAGE FOUNDATION LEGAL MEMORANDUM, No. 19 (Nov. 6, 2006).

Websites:

American Bar Association: *http://www.abanet.org/buslaw/attorneyclient/*

Association of Corporate Counsel*: http://www.acc.com/public/article/attyclient/acc-ac-biblio.pdf*

TIMELINE: ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

1906:	*Hale v. Henkel*, 201 U.S. 43 (1906) (corporations have no Fifth Amendment right against self-incrimination).
1947:	*Hickman v. Taylor*, 329 U.S. 495 (1947) (work-product doctrine extends to corporations).
1977:	*Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir.) (Eighth Circuit recognizes a limited or selective waiver of privileged documents; most circuits rule otherwise).
1981:	*Upjohn v. United States*, 449 U.S. 383 (1981) (Supreme Court expands corporate attorney-client privilege from executives in the "control group" to include communications from lower-level employees).
1989:	*Duttle v. Bandler & Kass*, 127 F.R.D. 46 (S.D.N.Y. 1989) (attorney-client privilege lost under the "crime-fraud" exception even when the corporation innocently acted as intermediary for others engaging in fraud).
1996:	*In re: Kidder Peabody*, 168 F.R.D. 459 (S.D.N.Y. 1996) (privileged documents are waived for communications and information from a corporate internal report given to the SEC, even if no intent to waive for third parties).
June 16, 1999:	Holder Memorandum issued listing waiver of attorney-client and work product privileges as one indicator of cooperation that prosecutors could consider in making their charging decision.
Oct. 23, 2001:	SEC issues "Seaboard Report" which pressures corporations to waive privileges to obtain leniency.
Jan. 20, 2003:	Thompson Memorandum issued reinforcing waiver of privileges as an indicator of "authentic" cooperation; spawns "culture of waiver."
Nov. 1, 2004:	Sentencing Commission adopts waiver of privilege as criteria for assessing corporation's cooperation.
Mar. 2005:	Coalition of business and public interest groups urge Sentencing Commission to eliminate waiver as a criteria for cooperation.

Apr. 2005:	American Corporation Counsel (ACC) and National Association of Criminal Defense Lawyers (NACDL) publish surveys showing widespread practice of waiver demands.
Aug. 11, 2005:	ABA adopts Resolution 111 opposing government requests for waiver.
Oct. 8, 2005:	Acting Deputy AG Robert McCallum instructs all U.S. Attorneys and Department Heads to adopt individual written waiver review policies; lacks nationwide uniformity and predictability.
Nov. 15, 2005:	Former Attorney General Dick Thornburgh testifies before U.S. Sentencing Commission to delete waiver provision from Guidelines.
Mar. 7, 2006:	ACC and NACDL releases second survey showing that 75 percent of counsel responding confirm government request for waivers are routine.
Mar. 7, 2006:	Thornburgh testifies before House Judiciary Subcommittee opposing DOJ's waiver policies and practices.
Apr. 5, 2006:	Sentencing Commission unanimously approves removal of privilege waiver language from guideline commentary. Revised policy becomes effective November 1, 2006.
2006:	*In re: Qwest Communications Int'l Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006) (Tenth Circuit surveys law on selective waiver and joins most other circuits rejecting selective waiver first established in 1977 by the Eighth Circuit).
May 2006:	Advisory Committee on Evidence Rules of the U.S. Judicial Conference proposes amendments to Federal Rule of Evidence 502 to protect inadvertent waiver and limited subject matter waiver. Selective waiver protection not proposed due to objection by business community.
June 2006:	*United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (court rebukes DOJ for pressuring KPMG to cut off defense fees to its employees under investigation).
Sept. 5, 2006:	Former top DOJ officials urge Attorney General Gonzales to revise Thompson Memo on waiver provision.
Sept. 12, 2006:	Senator Specter holds Senate Judiciary Committee hearings on waiver issue.

Dec. 7, 2006:	Senator Specter introduces Attorney-Client Privilege Protection Act of 2006 barring all DOJ and agency attorneys from requesting waivers.
Dec. 12, 2006:	McNulty Memorandum issued in response to widespread criticism; provides DOJ review process for requests for waiver to limit abuse and bars consideration of payment of fees to employees in charging decision. However, these changes do not curtail abusive waiver practices.
Jan. 4, 2007:	Senator Specter reintroduces Attorney-Client Privilege Protection Act of 2007 as S. 186.
Mar. 1, 2007:	Commodity Futures Trading Commission (CFTC) issues enforcement advisory reversing its waiver policy.
July 2007:	*United States v. Stein (Stein II)*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (court dismissed indictments against KPMG employees due to DOJ's pressure on company to cut off payment of attorneys fees).
July 30, 2007:	Bipartisan group of former top DOJ officials urge passage of both S. 186 and H.R. 3013 to bar waiver requests.
Sept. 13, 2007:	Former Delaware Chief Justice Norman Veasey issues scathing report documenting abusive practices pre- and post-McNulty Memo by prosecutors to force waiver.
Sept. 18, 2007:	Senate Judiciary Committee holds hearings on S.186.
Nov. 13, 2007:	U.S. House of Representatives approves H.R. 3013.
Dec. 11, 2007:	Senators Patrick Leahy and Arlen Specter introduce S. 2450, which would add a new Rule 502 to Fed. Rules of Evidence on waiver of attorney-client and work product that would protect inadvertent waiver and limit subject matter waiver. However, selective waiver protection is excluded from bill due to opposition from business community.