

By Martin F. Murphy

Peering Behind the Curtain:

Government Requests for Privilege Waivers in Criminal Investigations



Martin F. Murphy, a partner at Bingham McCutchen LLP, is a criminal and civil trial lawyer and a member of the *Boston Bar Journal's* Board of Editors.

In courtrooms, lawyers generally get to *ask* the questions—it's the witnesses who have to answer them. But in a number of recent, high-profile criminal cases, including the prosecutions of CSFB investment banker Frank Quattrone, Tyco CFO Mark Schwartz, and, here in Massachusetts, a dozen present and former officers and employees of TAP Pharmaceuticals, Inc., lawyers for companies ended up on the witness stand, answering questions from prosecutors. What's more, the questions called for them to reveal, in public, information protected by the attorney-client and work product privileges.

The notion of lawyers taking the witness stand and revealing privileged information in public trials may seem startling, but it comes as a natural consequence of a Department of Justice policy that encourages corporations facing criminal investigations to consider trading the protection of the company's attorney-client and work product privileges for the possibility of lenient treatment.

JUSTICE DEPARTMENT POLICY ON PRIVILEGE WAIVERS

The Justice Department's policy favoring corporate privilege waivers grows out of its guidelines on prosecuting corporations for federal crimes. Initially issued in 1999, and refined in 2003, that policy, known colloquially as the "The Thompson Memorandum" (after its author, former Associate Attorney General Larry Thompson), sets out criteria for deciding whether to indict a company for alleged wrongdoing by its officers or employees. Cooperation with investigators is an important factor in deciding whether to charge the company with a crime. As the memorandum states:

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure [of wrongdoing] including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.¹

The prospect of prosecutors seeking privilege waivers sounded an alarm for many lawyers. The American Corporate Counsel Association wrote a sharply worded letter to the Justice Department, predicting the Department's policy would have "dire long term consequences"—corporate clients, the Association argued, would "simply stop talking with their lawyers . . ." ² The American College of Trial Lawyers issued a scathing report, arguing that, as a result of the Department's policy, "the attorney-client privilege and work product doctrine are being eroded in federal criminal investigations and prosecutions in a way inimical to the fair administration of justice." ³ The Department, for its part, has argued that corporate counsel's complaints about the demise of the attorney-client privilege were greatly exaggerated because the Department would only rarely seek waivers of core attorney-client communications. The Department has also vigorously defended its position on the merits. As Deputy Attorney General James Comey,

the Department's second ranking official has said:

In my view, for a corporation to get credit for cooperation, it must help the Government catch the crooks. Sometimes a corporation can provide cooperation without waiving any privileges. Sometimes, in order to fully cooperate and disclose all the facts, a corporation will have to make some waiver because it has gathered the facts through privileged interviews and the protected work product of counsel.⁴

The United States Sentencing Commission, which publishes guidelines that federal judges use when sentencing corporations, has effectively endorsed the Justice Department's policy. In amendments scheduled to go into effect in November, the Commission provided commentary indicating that privilege waivers are a "prerequisite" for companies seeking credit for cooperation where "such waiver is necessary in order to provide timely and thorough disclosure of all

information known to the organization."⁵

Five years after the Department first published its policy on privilege waivers, the policy debate about requiring waivers continues, but the Justice Department, now reinforced by the Sentencing Commission, has stood firm, insisting that, at least on some occasions, effective prosecution of corporate crime requires waivers. Nonetheless, practical questions, with important legal implications, remain: How often and under what circumstances will the Department seek waivers? Can companies successfully resist requests for waivers, or narrow their scope? How does the Department's policy affect the way lawyers representing companies approach the defense of criminal investigations? And, perhaps most importantly, do privilege waivers bring benefits worth the price?

POLICY AND PRACTICE

Most information about government privilege waivers is anecdotal. But in 2002, the United States Sentencing Commission conducted a survey of

United States Attorney's offices seeking to quantify waiver requests.⁶ The survey supported the Department's position that privilege waiver demands were not an everyday occurrence. According to the survey, a "request for waiver of attorney-client privilege or the work product protection doctrine is the exception rather than the rule." *Id.* The report noted, however, that the United States Attorney's Office for the District of Massachusetts was one of the offices most likely to request waivers.

The court docket in the District of Massachusetts tells more of the story. Most, but not all, of the recent plea agreements entered by corporations in the District of Massachusetts required the company to waive attorney-client or work product privileges. The scope of the waivers differed case-to-case. In the TAP Pharmaceuticals case, for example, the company's plea agreement required it to plead guilty to conspiracy and to cooperate in the government's investigation of TAP employees by, among other things, waiving the privilege for relevant advice

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its officers and employees received from company and outside counsel during a fifteen-year period. The waiver did not extend, however, to the work of its counsel defending the criminal investigation that led to the charges.⁷ In the prosecution of Bouchard Transportation Company, the owner of the ship responsible for the 2003 Buzzard's Bay oil spill, the company agreed to "waive the attorney-client privilege and work product with respect to the information disclosed to or obtained by Defendant's counsel through employee or non-employee witness interviews concerning any aspect of the ... spill." The company preserved the right to redact from its production "portions of the materials containing mental impressions and opinions of their counsel."⁸ And in the plea agreement recently entered by Warner-Lambert Company LLC, concerning off-label promotion of the drug Neurontin, the company agreed to cooperate, but the plea agreement itself recited that "Warner Lambert is not required to waive any privilege or claim of work product protections."⁹

WHAT DOES THE GOVERNMENT WANT?

Thus, in each of the cases, the companies were able to resist the production of at least some aspects of the work product generated in the defense of the criminal investigation that led to the indictment. The difference between the results in TAP and Bouchard (in TAP, no work product materials were turned over; in Bouchard, only attorney mental impressions and opinions were excluded from the waiver) highlights one challenging element in the Department's waiver policy. A major goal of the Department's policy favoring privilege waivers is "to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements." In a footnote, the Department recites that:

This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corpora-

tion concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.¹⁰

The difference between what the government says it generally wants—the facts—and what it says it will request only in unusual circumstances—communications and work product related to advice concerning the government's criminal investigation—is a difficult distinction to draw in practice. The first step most lawyers take when a corporate client becomes the focus of a criminal investigation is to gather documents, interview witnesses, and assess facts. The lawyer is typically not conducting a fact-finding mission in the abstract, but learning facts to evaluate and assemble potential defenses. The factual investigation is at the heart of the lawyer's "work product related to advice concerning the government's criminal investigation." In light of the Department's waiver policy, counsel defending a company in a criminal investigation must do so knowing there is a significant prospect the government may ultimately seek privilege or work product waivers from the company. The prosecutor becomes, in effect, a silent presence in the room when the lawyer conducts interviews, and the prospect of a waiver reinforces the need for corporate counsel (and counsel for individual corporate employees) to understand that the interests of corporate officers, even high ranking ones, may well be different from those of the company. In light of the Department's policy, counsel for companies must be sure to inform company employees they interview that the privilege that protects those interviews is the *company's* privilege, see *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which the company may choose (or be pressured by the government) to waive. When a company faces a criminal investigation, the Massachusetts Rules of Professional Conduct essentially require

as much. See SJC Rule 3:07, Rule 1.13(d), comment [7].

The Department's waiver policy should also lead lawyers handling grand jury subpoenas or other government document requests to proceed as if their communications to clients about the investigation may someday lead them to the witness stand. Indeed, it was an exchange of emails and telephone conversations with an in-house lawyer that led to the recent conviction of prominent Credit Suisse First Boston investment banker Frank Quattrone in a trial that saw CSFB's former general counsel testify about once-privileged emails and conversations he had with Quattrone after the company waived the privilege at the government's request.¹¹

ADVICE OF COUNSEL AS SWORD AND SHIELD

The government appears particularly focused on obtaining privilege waivers where it has information that, at the time of the conduct it is investigating, company officials consulted with counsel. The government's first interest may be defensive. Where a company argues that the government should not bring charges because its officers or employees sought a lawyer's advice, the government is likely to request full access to all attorney-client materials before making a charging decision. Indeed, the United States Attorney for the District of Massachusetts responded to the survey of privilege waiver practice undertaken by the Sentencing Commission Advisory Group by reporting that the office's reason for demanding waivers was "to determine whether individuals who had asserted advice of counsel defenses were validly claiming the defenses so that appropriate charging decisions could be made on those individuals."¹² But prosecutors may also make affirmative use of privileged material by obtaining waivers, then looking to the statements of corporate employees in privileged material to supply a critical element, like intent, that may be otherwise missing from the government's case.

Counsel determining whether to make a disclosure in these circumstances must engage in real world, practical reckoning: While the assertion of an advice of counsel defense at trial will require the company to waive the attorney-client privilege eventually, *In re: Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation)*, 348 F.3d 16, 25 (1st Cir. 2003), early disclosure may give the prosecutor an opportunity, before the charging decision is made, to test the advice of counsel defense by challenging whether the company has satisfied all of its requirements or by turning the lawyers themselves into targets. Moreover, as the TAP case teaches, production of privileged information to the government is likely to be viewed as a general waiver to others, including plaintiffs in follow-on civil litigation, even if the government explicitly agrees to treat the privileged material disclosed by the company as secret grand jury material. *In re: Lupron Marketing and Sales Practice Litigation*, 313 F. Supp. 2d 8, 9 (D. Mass. 2004).

GETTING VALUE FOR WAIVERS: THE ANDERSEN CASE

In the TAP, Bouchard Corporation, and other District of Massachusetts privilege waiver cases, the company and the government reached a written plea agreement *before* the company turned over privileged material to the government. Risks are higher when companies try to trade a privilege waiver for the government's agreement not to prosecute the company at all, and where the government refuses to make a commitment without seeing all the privileged material. That series of events occurred in the best known of all federal prosecutions involving a company's waiver of privilege—the Arthur Andersen case.

In an effort to avoid prosecution in the Enron investigation, the accounting firm Andersen waived its attorney-client privilege and produced memoranda and email from in-house counsel to its Houston auditors.¹³ Andersen's effort to seek lenient treatment failed: the government indicted the company for obstruc-

tion of justice, and later said publicly that the company had failed to cooperate with investigators. In a bitter irony to Andersen, however, the jury verdict, recently upheld on appeal, *United States v. Arthur Andersen, LLP* 374 F.3d 281 (5th Cir. 2004), turned not on the document shredding that received so much notoriety but, instead, on the jury's view that a single email from an Andersen in-house lawyer to a Houston partner suggesting that the partner revise a memorandum amounted to an obstruction of justice. If the company had not agreed to waive the privilege, it is unlikely that this email would have appeared anywhere but on a privilege log. In a twist of fate, the company's waiver of the attorney-client privilege, made in an effort to seek lenient treatment, acted as the engine for the company's conviction and ultimate demise.

CONCLUSION

Like other courts, the First Circuit has offered stirring language in support of the attorney-client privilege. As the Court has held: "[b]y safeguarding communications between client and lawyer, the privilege encourages full and free discussion, better enabling the client to conform his conduct to the dictates of the law and to present claims and defenses if litigation ensues." *In re: Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation)*, 348 F.3d 16, 22 (1st Cir. 2003). But for companies facing criminal investigation in today's environment, high-minded sentiments are likely to give way to hard-nosed calculations about the costs and benefits of asserting the rights the attorney-client and work product privileges were meant to protect. ■

Endnotes

¹Available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

²Available at <http://www.acca.com/public/accapolicy/holder.htm>.

³ Available at <http://www.actl.com/PDFs/Erosion.pdf>.

⁴ See, e.g. "Interview with United States Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporations under Criminal

Investigation to Waive the Attorney Client Privilege and Work Product Protection," *United States Attorneys' Bulletin*, November 2003.

⁵ 2004 Amendments to the Sentencing Guidelines, available at <http://www.ussc.gov/2004guid.2004cong.pdf>. The continuing vitality of the Sentencing Guidelines is open to some question following the Supreme Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). The Supreme Court has granted certiorari in two cases likely to resolve this question. See *United States v. Booker*, Docket No. 04-104 and *United States v. Fanfan*, Docket No. 04-105.

⁶ See Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, available at <http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm>.

⁷*United States v. TAP Pharmaceutical Products, Inc.*, 1:04-cr-10354-WGY, docket entry 6. Pursuant to the Bar Journal's disclosure policy, the author notes that he was counsel for an individual in the TAP investigation, and was also involved in aspects of the cases mentioned in notes 10, 12, and 13.

⁸ *United States v. Bouchard Transportation Company, Inc.*, 1:04-cr-10087-MBB, docket entry 7.

⁹ *United States v. Warner-Lambert Company LLC*, 1:04-cr-10150-RGS, docket entry 2.

¹⁰See Thompson Memorandum, n. 1, at n. 3.

¹¹ See "Paperless Trail: How a String of E-Mail Came to Haunt CSFB and Star Banker," *Wall Street Journal*, February 28, 2003; "Executives on Trial: Quattrone Trial: New Template?" *Wall Street Journal*, September 30, 2003.

¹² See Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, at 104.

¹³See "Auditor's Ruling: Andersen Win Lifts U.S. Enron Case," *Wall Street Journal*, June 17, 2002; see also materials available at <http://www.chron.com/content/chronicle/special/02/andersen/index.html>.