

White-Collar CRIME

An ALM Publication

WWW.NYLJ.COM

MONDAY, JULY 9, 2012

Challenges in Asserting The Advice of Counsel Defense

BY RICHARD M. STRASSBERG,
BILL HARRINGTON
AND NATASHA DAUGHTREY

THE POST-RECESSION increase in complex white-collar investigations and prosecutions¹ may increase the chance that white-collar attorneys will encounter a vexing conflict that looms, often unexplored, in many corporate criminal investigations: What to do when an individual employee's defense to criminal charges rests upon her reliance on the legal advice she received from in-house or outside corporate counsel. As a recent U.S. Securities and Exchange Commission case makes clear, an individual employee may find herself hamstrung in her ability to defend against criminal fraud charges if her corporate employer determines that waiving its attorney client privilege on the issue would not be in its self-interest. The conflict between an individual's Sixth Amendment right to an effective defense and a company's right to the preservation of its attorney client privilege is one with astonishingly little developed case law and breathtakingly large implications for individuals, their corporate employers, and the government.

Recently, the conflict between an individual's right to assert a reliance on counsel defense and a corporation's right to refuse to waive its attorney client privilege

RICHARD M. STRASSBERG, a partner in Goodwin Procter's litigation department, chairs its white-collar crime and government investigations practice in New York, in which partner Bill Harrington also specializes. Natasha Daughtrey is a litigation associate. Mr. Strassberg was the chief of the Major Crimes Unit, and Mr. Harrington was a prosecutor, at the U.S. Attorney's Office for the Southern District of New York.

and turn over its privileged documents essential to that defense, was the subject of a motion filed in the Southern District of New York by the SEC. In *SEC v. Stoker*,² the SEC sought to compel Citigroup to produce documents relating to legal advice that one of its employees, Stoker, claimed was relevant to his defense of a securities fraud case the SEC filed against him. Citigroup identified those materials as protected by Citigroup's attorney client privilege and refused to turn them over.

In its motion, the SEC requested that, in the event the court found that the documents the SEC itself described as "relating to legal advice" provided by Citigroup's legal counsel to its employees were covered by attorney client privilege, "the Court should preclude [Stoker] from asserting as a defense that he reasonably relied on advice of counsel and further preclude [Stoker] from presenting any evidence, documentary or testimonial, referring to reliance on advice of counsel."³



BIGSTOCK

Unfortunately for this legal analysis, the SEC's underlying motion papers were filed and remain under seal, and in mid-April the parties resolved the issue in an undisclosed manner and the SEC withdrew the motion, without any decision by the court. This type of quiet, agreed-upon resolution appears typical of the manner in which this conflict is often handled, because these situations present dire consequences for all parties involved. The defendant may be prevented from fully defending herself, thereby increasing the chances that she will be convicted of a charge she did not have the intent to commit. The corporation may find itself subject to a privilege waiver that it does not want and has not caused, and that may be interpreted broadly by civil plaintiffs and the government. And the government may be thwarted in its ability to test the defendant's claims and ensure that any charges it brings against the defendant are appropriate. It is no wonder that parties strive to discover a resolution, rather than risk an adverse ruling in such situations.

Law on 'Advice of Counsel' Defense

The advice of counsel defense allows a party to show good faith and negate liability for any crime that requires fraudulent intent.⁴ To successfully assert advice of counsel, the defendant must show that she

- (1) sought the advice of counsel in good faith;
- (2) made a complete disclosure to counsel of all relevant facts she knew; and
- (3) reasonably relied on and followed counsel's opinion.⁵

Once a defendant asserts that she relied on the advice of counsel, "fairness requires examination of protected communications" because a party cannot use privilege as "both a shield and a sword."⁶ Asserting the advice of counsel defense is the quintessential example of waiver because the party asserting the defense makes the confidential communications relevant to the proceeding, and therefore invites scrutiny of the privileged communications by the opposing party. Courts decide whether a party has asserted the defense and the scope of the attorney client privilege waiver on a case-by-case basis, taking into account the extent of the disclosure, when the disclosure occurred in the proceedings, and the prejudice caused to the opposing party.⁷ The waiver analysis may be somewhat straightforward where the party protected by the privilege invokes her reliance

on counsel, but grows more complicated where the party is a corporate employee who received advice from corporate counsel.

It is axiomatic that legal advice provided to a corporation belongs to the corporation, not any individual employee who may have received that advice.⁸ As the Supreme Court noted in *Commodity Futures Trading Commission v. Weintraub*, principles of waiver are complicated when a corporate entity is involved. "As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation."⁹ Therefore, while a corporation can only act and waive

Defense counsel will often need to obtain **access to privileged documents** and **interview** the lawyers involved with the privileged communications to determine whether the advice of counsel defense **will stand up to a government challenge**.

privilege through its agents, the corporation can also prevent such agents from waiving the privilege.¹⁰ The converse is also true: Agents of the corporation cannot prevent it from waiving privilege, as a corporation sometimes does in the context of cooperating with the government and attempting to forestall criminal charges.

With this legal backdrop in mind, the problem becomes apparent: A corporation can prevent an individual from waiving privilege, but an individual cannot waive privilege without consent of the corporation. In other words, an individual accused of a crime whose defense rests on her lack of intent due to the advice she received from corporate counsel may be barred from asserting that defense without obtaining a waiver from the corporation. Worse yet, defense counsel may be unable to assess the strength or weakness of such a defense because they may be precluded from examining the relevant documents and interviewing the lawyers involved in providing the advice if the corporation refuses to make these privileged

communications available. The resulting deadlock sets two well-grounded legal principles in conflict—the oldest category of confidential communications recognized by law and the Constitutional mandate that a defendant be equipped to defend himself against criminal charges. There is scant law in the Second Circuit, or elsewhere, to guide lawyers on how to resolve this conflict.

Second Circuit's 'Grand Jury' Decision

The Second Circuit has addressed a related issue: whether a corporate officer may unilaterally waive the corporation's privilege by invoking an advice of counsel defense during grand jury testimony.¹¹ Before the grand jury, the CEO of an unnamed company, "Doe Corp.," testified that he relied on Doe Corp.'s attorney's legal advice that the transactions under investigation were legal. Even when reminded of his right to assert attorney client privilege and consult his attorney outside the grand jury room, the CEO again invoked Doe Corp.'s attorney's advice as the explanation for the transactions at issue. Thereafter, the government demanded that Doe Corp. produce the legal opinions and communications referenced in the grand jury testimony. Doe Corp. refused, maintaining that it would not, and had not, waived privilege. The district court disagreed and granted the government's motion to compel production of the privileged communications.

On appeal, the Second Circuit held that implied waiver might occur if a party attempts to use privilege as a "sword and a shield." The Second Circuit remanded the case to the district court, directing it to weigh a number of factors in determining whether the employee had caused an implied waiver of the corporate privilege: whether the government compelled the testimony that described the privileged communications; whether the witness spoke individually or for the corporation; whether the corporation explicitly asserted the attorney client privilege; and whether the disclosure prejudiced the opposing party. The Second Circuit also directed the district court to consider whether the witness' testimony and reliance on counsel served to exculpate the corporation or himself.

The Second Circuit's test appears to leave little room in its analysis for the witness' right to present a defense or for the government's ability to test that defense, with the critical questions turning mostly on the corporation's actions and intentions.¹² Other courts, however, have been more willing to

compel a corporation to disclose confidential documents, at least to a former corporate insider. For example, in *Spitzer v. Greenberg*, the New York State Attorney General charged the former CEO of AIG with violations of the Martin Act and common law fraud.¹³ In his defense, the former CEO sought to compel AIG to produce privileged documents so that he might evaluate the merits of an advice of counsel defense. When the trial court denied defendant's motion to compel AIG to produce the documents, the former CEO appealed. The appellate division held that the former CEO was within the circle of persons entitled to view the privileged materials and therefore AIG could produce them without waiving its privilege. While the court never addressed what would happen if the defendant subsequently asserted the advice of counsel defense (but the corporation refused to waive its privilege), the fact that the defendant was granted access to the privileged documents over the company's objections implies that the defendant would not be precluded from asserting such a defense.

Dealing With the Conflict at Trial

At trial, the admission of privileged materials over a corporation's objection proves an even more difficult issue. In *United States v. W.R. Grace*, a Montana district court faced the question of whether severance was required because individual defendants sought to assert an advice of counsel defense based on opinions given by corporate counsel, but the defendant corporation refused to waive its privilege regarding these opinions.¹⁴ The district court concluded that the attorney-client privilege must yield when its application "would significantly undermine fundamental elements of the defendant's defense," finding the privilege "abrogated over [the corporation's] objection."¹⁵

The district court, however, rejected the government's argument that this abrogation resulted in a privilege waiver, asserting that a level of confidentiality for the privileged communications could be maintained by preventing dissemination of the documents beyond the jury. The district court determined that there was no unfairness to the government, because the party asserting the privilege as a shield (the corporation) was different from the party asserting the defense as a sword (the individuals). The district court also concluded that a joint trial with all defendants—individuals and corporate—was permissible because

there were no privileged materials that the defendants sought to introduce that would prejudice the corporation. It appears that this analysis was based on the court's in camera evaluation of the privileged materials.

Practical Concerns

The lack of substantial case law addressing this conflict makes navigating the competing interests involved in raising an advice of counsel defense based on corporate legal advice very delicate. Defense counsel will often need to obtain access to privileged documents and interview the lawyers involved with the privileged communications to determine whether the advice of counsel defense will stand up to a government challenge. Before asserting an advice of counsel defense, it is essential for the lawyer to ensure that the defense does not boomerang and provide additional evidence against the client, as might happen if the client made incomplete or arguably misleading disclosures to corporate counsel.

The *Greenberg* case suggests certain practical steps that might be taken to allow at least some high level employees access to privileged documents without danger of waiver, in order to assess the validity of an advice of counsel defense. Given the legal uncertainties involved, it may often be in the corporation's interest to work collaboratively with the employee's counsel to allow for such a review, regardless of the employee's position at the company and especially where there is uncertainty about the wisdom of asserting an advice of counsel defense.

The matter is trickier if the individual and corporate interests diverge. This may occur when a corporation refuses to waive privilege, despite an employee's reliance on counsel defense, because the corporation is concerned about preserving the privilege in parallel civil or criminal cases, or because it is concerned that the fuller set of privileged materials could expose more senior people at the company, or the company itself, to more scrutiny by the government.

The Second Circuit's Grand Jury framework, while dealing with waiver, was decided in a different context and fails to consider the employee's Sixth Amendment rights. If literally applied to resolve the conflict between these two competing principles, the test could easily result in a defendant's inability to present powerful exculpatory materials because the corporate employer refuses to waive privilege. But corporations should not take

much comfort in this test, because a court concerned with the defendant's right to a defense might find the test inapplicable, and even if it applied the test, might find that a waiver has occurred, broadly exposing the company's communications with its lawyers not only to the individual employee, but also to the government and other third-parties. The attempt at a compromise, as in *W.R. Grace*, where the employee was allowed to assert the defense and the corporation was deemed protected from a broad waiver, is one approach, but that case has not been followed by others to date, and offers little guidance on how the limited waiver could be enforced against third parties, or how one might deal with such issues at the investigative stage.

Conclusion

As complex white-collar cases continue to be aggressively pursued by the government, the conflict that lurks between an employee's ability to assert a defense based on advice of counsel, and a company's ability to control and protect its privileged communications with legal counsel, is likely to be subject to judicial scrutiny that will provide more clarity on how this conflict can be managed.

.....●●.....

1. White Collar Crime Prosecutions for January 2012, http://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthly-jan12/fil/ (April 19, 2012) (finding a 9.4 percent increase in white collar prosecutions between 2007 and 2012).

2. 11-civ-0788(JSR) (S.D.N.Y. 2011).

3. Pl.'s Mot. to Compel 1, ECF No. 40.

4. *United States v. Beech-Nut Nutrition*, 871 F.2d 1181, 1195-96 (2d Cir. 1989).

5. *Id.*

6. *In re Grand Jury*, 219 F.3d 175, 182 (2d Cir. 2000).

7. *Id.*

8. *Id.* at 184.

9. 471 U.S. 343 (1985).

10. *United States v. Int'l Brotherhood of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997).

11. *Grand Jury*, 219 F.3d at 186.

12. For application of a similar analysis to a question of waiver in a collateral civil matter, see *Dangler v. NYC Off Track Betting*, 2000 WL 1510090, *5-6 (S.D.N.Y. 2000) (rejecting a civil party's demands for the production of privileged materials because it would be "unfair" to conclude that an employee, who claimed to rely on the corporation's attorney's advice in a government investigation, waived the corporate privilege).

13. 851 N.Y.S.2d 196 (App. Div. 2008).

14. 439 F. Supp. 2d 1125 (D. Mo. 2006).

15. *Id.* at 1138-40.