Legal Backgrounder

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SHAKESPEARE AND DOJ'S NEW GUIDELINES ON CORPORATE COOPERATION

by

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William Shakespeare famously suggested getting rid of all the lawyers ("The first thing we do, let's kill all the lawyers." *Henry VI, Part II*). Some may think that the Department of Justice seems to have adopted a similar approach in the newest version of its guidance on organizational cooperation– or at least getting rid of the company lawyers and their privileges. The new revisions by Deputy Attorney General Mark Filip, incorporated as a new chapter in the U.S. Attorney's Manuel ("revisions" or "chapter"), represents a good effort to respond to Department critics on the culture of waiver. Its five key points were honed to respond to Department critics. Barring prosecutors, for example, from requesting core attorney-client privilege material is a good start. Unfortunately, the overall approach falls well short of the mark.

Authored under pressure from Congress, which is considering passage of the Attorney Client Privilege Protection Act of 2008, the Filip revisions are supposed to strike the appropriate balance between the needs of law enforcement and the rights of business organizations and their employees. Thus the revisions focus on the following key points:

- Cooperation will be measured by the production of the facts which is what prosecutors need to make a charging decision, not privilege waivers;
- Prosecutors cannot request a waiver of what is called "core" attorney-client materials;
- Prosecutors are instructed not to consider whether a corporation has advanced attorneys' fees to its employees, officers, or directors when evaluating cooperation;

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- Prosecutors cannot consider whether the company and its employees entered into a joint defense agreement when evaluating cooperation; and

- No longer can prosecutors consider whether a corporation disciplined or terminated employees for purposes of evaluating cooperation.

While these points clearly respond to Department critics, others undermine their impact. While discussing corporate internal investigations, Mr. Filip notes that although many times they are conducted by attorneys, in others they are done by non-attorneys. The latter do not present any privilege issues when the facts discovered are given to the government. And, what yields cooperation credit is producing all the facts. While prosecutors cannot consider indemnification agreements, they can inquire about them – which is all that federal enforcement officials did in their investigation of accounting firm KPMG, which caused the company to limit or terminate certain employees. *See U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). While joint defense agreements cannot be considered in evaluating cooperation, the government does have a concern about sensitive information being disclosed concerning its investigation. And, while the retention or termination of employees cannot be considered in evaluating cooperation, that fact can be used in evaluating remediation.

Under the Filip revisions, organizations seeking cooperation credit must still make sure that all material from their internal investigation is produced either by waiving privilege or avoiding privilege by not having lawyers conduct the inquiry. At the same time the organization will still face questions about the advancement of fees, concerns regarding cooperation agreements, and other inquiries about the retention of employees. So what has changed?

The new chapter appears to substitute a culture of avoidance for the current culture of waiver the Department created with substantial assistance from the Securities and Exchange Commission. Previously, the Department stated in its memoranda on organizational charging principles that "waiver" might be necessary to furnish all the facts to the government. In practice, of course, "might" became routine.

The Filip revisions refine the question, suggesting that waiver is not the issue. Rather, it is the production of the facts and the way the company gathers them. Whether lawyers or non-lawyers are used in the collection process, DOJ wants the facts and it will only award cooperation credit for the production of those facts, not for waiver.

This approach focuses on what has always been the central issue: the facts gathered by investigators during the internal investigation and the witness interviews. The facts available to the company typically come from an internal investigation conducted by an independent law firm retained by the audit committee of the board of directors. The work of the investigators is protected from disclosure by the attorney-client privilege and the work product doctrine. Frequently, for example, investigating counsel will compile chronologies of events based on an analysis of the documents, keep a running tabulation on the inquiry in attorney-prepared notes, and summarize discussions with various witnesses in interview memoranda which contain the thoughts and impressions of counsel.

Throughout the inquiry, counsel will keep the committee abreast of the investigation in a series of oral reports culminating with a final report containing counsel's analysis and conclusions. These counsel-prepared materials are protected from disclosure by the work product privilege, what the McNulty memo (a precursor to the Fillip revisions issued by then-Deputy Attorney General Paul McNulty) called

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Category I. Discussions between the investigators and the committee may be attorney-client communications or what the McNulty memo called Category II (core attorney client).

The key area of concern in all the discussion about waiver has always been the Category I material and particularly the witness interviews, not "core" attorney-client privileged conversations which, as McNulty acknowledged, should be rarely sought by the government. The reason is clear: frequently employees may choose to cooperate with their employer, but not with the government. When an employee declines to cooperate with the government, the Constitution prohibits prosecutors from compelling the person to testify. If however, the government can compel the company to furnish the interview notes it can obtain through the back door what it is otherwise precluded from obtaining through the front door. Stated differently, the government can undercut the constitutional rights of the employee with the assistance of an organization seeking to curry favor and build up cooperation credit. This is precisely what happened in the *Stein* case, and which led Judge Lewis Kaplan to rule that the Thompson memo (another precursor to the Filip revisions) was, in part, unconstitutional. Judge Kaplan's ruling, and his dismissal of the indictments against the former KPMG employees, was upheld by the U.S. Court of Appeals for the Second Circuit on August 28, ironically the same day Deputy Attorney General Filip formally issued his revisions.

While the new chapter alters the Department's approach to obtaining otherwise privileged material, the results are the same: compulsion on the business organization. According to the revisions, the way to avoid the issue of waiver and thus be in a position to furnish all the facts is to avoid using lawyers: have someone other than counsel conduct the inquiry. By not using lawyers, there is no privilege and thus no waiver issue, according to the Department – the choice is up to the company.

No doubt this new approach avoids the waiver issue. It also ignores the consequences to the company, and perhaps its employees, of not using lawyers. Throughout the Filip revisions, the Department compares the cooperation of an individual to that of an organization. To be sure, there are similarities, but there are also key differences. An individual can assess his or her potential responsibility in discussions with counsel. Those conversations are clearly privileged and under the revisions prosecutors would be barred from seeking a waiver as to those consultations.

The question of assessing corporate responsibility is more complex. As the Filip revisions note, determining what happened and who is responsible is frequently a difficult and complex task for a business organization. The purpose of the internal investigation is to help the organization make this assessment. Unlike an individual, an investigation is frequently the only effective way for the organization to make this determination. While carrying out that task in public view – that is, absent the protection of privilege – may avoid the necessity for a waiver, it can also undercut the self-evaluative purpose of the inquiry. It may also damage the organization and its employees and ultimately make it difficult for the company to determine all the facts and give the government the assurances of future compliance with the law that are critical to cooperation and the ultimate goals of law enforcement.

By ignoring the impact of conducting a self-evaluative inquiry in public, the revisions miss the mark. The firestorm of criticism over the "culture of waiver" is not just about abstract, theoretical rights. Corporations conduct internal investigations in a privileged setting to facilitate thoughtful self-evaluation and ensure future compliance with the law. If those inquiries are conducted in the glare of a public spotlight as Mr. Filip suggests, witnesses may chose not to cooperate, depriving the company of critical facts. At the same time, the organization may be reluctant to fully explore all the facts for fear of aiding private lawsuits or injuring the reputation of employees who might at first blush appear culpable in view

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of a web of circumstances – an impression which might later prove inaccurate. Indeed, the point of privilege, whether the attorney-client or work product, is to ensure that all facts and theories are examined to aid in remediation of the current situation and ensure future compliance with the law. Avoiding privilege by eliminating the lawyers conducting the inquiry will no more aid these goals than waiving privilege. Rather the culture of waiver will simply be replaced with the culture of avoidance. This directly undercuts the stated goals of law enforcement as well as the efforts of business organizations to be good citizens.

The other key points in the new chapter suffer from the same flaw. At first glance, the passages which proscribe prosecutors from considering the payment of legal fees, entering into joint defense or cooperation agreements, and personnel actions all seem to fully answer the critics. Each statement however has the same limitation: the point cannot be considered in assessing "cooperation." Each point can be considered in other ways. Thus, while the payment of attorneys' fees cannot be considered in evaluating cooperation, prosecutors can inquire about indemnification agreements and payments. In *Stein*, prosecutors testified that the only thing they did was ask about the advancement of legal fees, not direct their curtailment. That question, sanctioned by the Filip revisions, is as *Stein* demonstrates, frequently more than enough to cause a business organization to limit or terminate such payments. This is precisely the action KPMG took in *Stein* in a desperate attempt to compile enough cooperation credits to avoid being charged.

Similarly, while prosecutors may not consider joint defense agreements in evaluating cooperation, the memo argues that the government may have concerns about the organization sharing confidential information regarding the investigation with its employees. It was these types of concerns which the Thompson memo cited as indicia that the business organization's claims of cooperation were less than genuine. Given the prospect of this result, many companies facing a government charging decision will clearly act to avoid this potential difficulty – they will simply not enter into these agreements, thus depriving their employees and perhaps the company of often critical information.

Finally, the limitation on the provision that corporate action regarding its employees cannot be considered is equally ineffective. While personnel actions may not be considered in evaluating cooperation they can be fully assessed in determining whether the organization has remedied the situation and taken sufficient steps to ensure compliance with the law in the future. Thus, like the other proscriptions in the memo, it sounds good at first, but the promise seems empty in the end. In sum, the Filip revisions substitute the "culture of waiver" with the "culture of avoidance." Neither serves the goals of law enforcement or business organizations seeking to be good corporate citizens.

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