- Attorney-client privilege under attack since Enron
- Foley partner outlines waiver saga from Seaboard to McNulty
- The Specter bill offers hope of relief from prosecutorial pressure to waive
- Companies can satisfy information demands without waiving rights
- Employees need briefings on what constitutes privileged information

By Janine Armin

A new era of privilege

Corporate Secretary magazine has partnered with Foley & Lardner to produce a series of webcasts that will continue throughout the year, covering timely issues in corporate governance, compliance and risk management. Early June marked the first installment, which centered on 'The new era of ethics and privilege: solving the DoJ, SEC and Sarbanes-Oxley puzzle.' Elizabeth Gray, partner at Foley & Lardner and former assistant director of the SEC's division of enforcement opined on attorney-client privilege in the wake of the McNulty memorandum and the SEC's position on the effect of cooperation on waiver demands. *Corporate Secretary* executive editor Brendan Sheehan moderated, and corporate secretaries and general counsel from around the country listened in and asked questions.

Last December deputy attorney general Paul McNulty issued a memo, revising DoJ guidelines for prosecuting corporate fraud. Gray said the memo was a retrenchment in response to criticism that the DoJ and the SEC had gone too far in their tactics for pursuing corporations after Enron. Investigations grew too big for government, she explained. Authorities wanted to encourage companies to self-report and gave them points for doing so, creating a culture of waiver.

Privilege 101

In providing an overview of the world of privilege over the last six years, Gray started off the discussion with the SEC's Seaboard Report published in 2001, which outlined the SEC's favorable view of cooperation in waiving privilege. The Thompson memo, issued in 2003 by then deputy attorney general Larry Thompson, evolved out of the Seaboard Report, re-emphasizing waiver as indicative of cooperation.

The McNulty memo offers further revisions on the theme; the DoJ modified its views on company cooperation, stating that prosecutors must get approval before demanding waivers and that waivers may only be sought where deemed legitimate. It also outlined how companies can be given preferential treatment by adopting good corporate compliance procedures, self-reporting, waiver of attorney-client privilege and remedial measures like appropriate firings.

Along with more cooperation in corporate prosecutions by the DoJ, the McNulty memo differentiates between purely factual information and attorney-client communications. In the case of factual information, access may be granted by a US attorney, while client communications are only accessible if a deputy attorney general grants permission. Despite this clear increase in restriction in terms of prosecutorial demands for waivers, most respondents to a webcast poll thought 'federal prosecutors should be prevented from seeking waiver of privilege.' Gray doubts this judgment would pass, and said selective waiver will more likely become customary.

Gray then went into what qualified as a legitimate need, how much information benefits the government and the importance of timely delivery. Often, she revealed, waiver is given without formal agreement and a voluntary waiver 'may be pressured by the government.' Though the SEC doesn't mandate waiving privilege, she said, companies often feel that they must.

The Specter bill (Senate bill 186) offers hope that this pressure tactic could be significantly diminished.

Currently under deliberation by committees, the bill seeks to 'cut back on prosecutorial power to request waivers.' It would bar prosecutors from requesting waivers or conditioning lenient treatment on disclosure of privileged information, Gray said.

Don't rush to waive

In the latter half of the webcast, Gray offered a range of solutions available to companies faced with privilege waivers. The aim: 'Cooperation while still representing your client.' And the government understands that, she said. 'Don't make a commitment to waive' early on, she advised, because at the beginning of an investigation you don't know what you're going to find. It's wise to let the government know about what's going on with outside counsel, but there's no need to waive privilege entirely. There are ways to 'share everything you can without waiving,' she said.

'There are ways to share everything you can without waiving the privilege'

Elizabeth Gray

Entering into an investigation, it's important to identify internal control deficiencies and to remember that simple conversations with the government can often satisfy information requests without waiving privilege. Written correspondence with the government is common, but is discoverable and therefore riskier.

When creating memos, Gray advises staying away from inferences and putting down solid information. If you do decide to waive privilege, make sure your people 'are producing work product that's as it should be.' And if an investigation does take place, the most important thing is that documents be properly retained, and to coordinate the process with the IT staff.

It's also a good idea to keep in mind who is protected under privilege. 'The privilege belongs to the company' and it should be 'evaluated like any other asset,' she said, adding that it is necessary to 'preserve your role as general counsel and not to give business advice.' But even with in-house counsel, she cautions that you want to protect privilege wherever possible.

As for witness interviews, it's important to consider whether a company should provide separate counsel to individuals, she said. Though joint defense agreements encourage efficient communication, negative effects could occur if the employee is involved in wrongdoing.

Get outside help

Once an investigation is underway, Gray said companies should ask themselves: 'Is this something I can handle alone or is this something that my internal department can handle?' Respondents to a webcast poll on protocol in the event of possible accounting issues, indicated they would conduct a brief internal investigation before doing anything else. Some also said that they would follow it with a more complete outside counsel investigation. If the initial investigation found that allegations have merit, most responded they would retain outside counsel and others added they would also 'alert the SEC to the issue.'

Gray thinks outside counsel's experience with the SEC can only help companies, by extending responsibility should a case blow up. If the 'government has contacted you or it is likely that you will self-disclose issues to the government,' she said, 'outside counsel can enhance independence and 'limit the use of in-house resources.'

Companies should also consider how they communicate with auditors since once audit is involved, it can be harder to retain privilege, cautioned Gray. Another threat to privilege is misinterpretation of privilege on the part of employees. To prevent such pitfalls, it is important to send out an *Upjohn* notice so employees understand that you represent the corporation, not the employees. If this is not done, privilege could be threatened, giving 'employees control of privilege,' she said.

The SEC maintains that it values cooperation, and if this new bill goes beyond the deliberation stage, it may be harder for prosecutors to get access to material information. Preservation of privilege is key, even with respect to in-house counsel. But timely responsiveness to the SEC, coupled with well-documented internal investigations can go a long way to preventing requests that privilege be waived.

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