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by Reid H. Weingarten and Brian M. Heberlig

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Representing the General Counsel

by Reid H. Weingarten and Brian M. Heberlig

There may once have been a time when "going in-house" to become a general counsel meant leaving the rigors of a law firm partnership or a high-level government position to enjoy a diversity of legal issues and the relative comfort of fewer hours, better quality of life, and perhaps even stock options. Those days are over.

A general counsel at a Fortune 500 company today must be an expert on every legal issue he or she faces, whether it be accounting, securities, antitrust, environmental, or other. Any wrong decision can lead to grave peril. Now, more than any time in recent history, general counsel are being targeted for prosecution around the country. If the general counsel makes a mistake or fails to disclose an issue that harms the company's shareholders and gives rise to a criminal investigation, the general counsel can expect to be targeted for prosecution along with the other principals in the company.

This article addresses some of the legal issues the defense lawyer representing the general counsel in a criminal case must be prepared to face. We currently represent several current and former general counsel of public companies in criminal cases, including recently acquitted Mark A. Belnick of Tyco International, and speak as interested observers and participants in the process.

Impact of Attorney-Client Privilege

A major issue in every criminal case involving a general counsel is how the attorney-client privilege will impact the case. There are basically two possibilities. In most cases, the corporation will have waived its attorney-client privilege early in the criminal investigation, and the general counsel must prepare his defense with the knowledge that every confidential decision or statement he made during the course of employment will be in the hands of the prosecutor. In fewer instances, the opposite scenario may occur: The general counsel may want to disclose privileged information to establish a defense yet face resistance from a corporation that has invoked the attorney-client privilege and refuses to authorize the disclosure of any confidential communications. In either case, the corporate attorney-client privilege will have a significant impact on the representation of the general counsel.

In the corporate setting, the attorney-client privilege applies to confidential communications between in-house counsel and corporate employees, whether senior officers or lower level employees, as long as the communications concern matters within the scope of the employees' corporate duties and in-house counsel is acting as an attorney for purposes of providing legal advice to the corporation. *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981). Thus, when corporate officers or employees speak in confidence with the general counsel about a legal problem affecting the corporation, those conversations should be protected by the attorney-client privilege.

The purpose of the attorney-client privilege in both the individual and corporate setting is to "encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389. In theory, a general counsel presented with a delicate problem by a senior manager of the company should be able to fully evaluate the situation and provide confidential legal advice to the company's senior officers regarding the available options—all under the protective umbrella of the attorney-client privilege. The general counsel might decide that the problem is serious enough to warrant immediate disclosure to the government, and recommend that the corporation fully cooperate in the investigation that would inevitably follow the disclosure. On the other hand, the general counsel could conclude that the problem does not amount to any criminal or regulatory violation and deem it in the corporation's best interest to discipline the responsible employees and institute internal corporate reforms without disclosing any information to government

Reid H. Weingarten and Brian M. Heberlig are with Steptoe & Johnson LLP in Washington, D.C.

authorities. General counsel should be free to provide such confidential, and perhaps controversial, legal advice without fear that such advice will later be disclosed by the corporation and turned against them.

In practice, however, general counsel today cannot reasonably expect that any conversation, memorandum, or other communication made during the course of their employment will remain confidential in any investigation involving the corporation. At the first sign of trouble, the public corporation typically will waive its attorney-client privilege to protect itself, and the general counsel will have to deal with the fact that his or her confidential legal advice is in the hands of government agents and prosecutors.

The attorney-client privilege belongs to the corporation and can be waived by the corporation's management, typically its officers or directors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). The U.S. Supreme Court has ruled that a former corporate employee or in-house attorney has no power to invoke the corporation's attorney-client privilege if new management has decided to waive. *See id.* at 349 ("Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties."). In any corporate criminal investigation, one of the prosecutor's first demands will be for the corporation to waive its attorney-client privilege and work-product doctrine—concerning both historical communications generated during the events under investigation and any internal investigation the corporation conducted after it discovered a problem. Far from being the exception, these demands for privilege waivers have become the rule.

The Department of Justice's (DOJ) official policy toward privilege waivers states that a prosecutor evaluating whether to criminally charge a corporation should consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation," which in turn may be gauged by the corporation's "willingness . . . to waive the attorney-client and work product privileges." Memorandum from Deputy Attorney General Eric Holder to U.S. Attorneys, re: Federal Prosecution of Corporations 6 (June 16, 1999). The official policy states that a privilege waiver is not an "absolute requirement" for a corporation to be deemed cooperative:

> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure 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. . . . *The Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privilege as only one factor in evaluating the corporation's cooperation.*

Id. at 7 (emphasis added; footnote omitted); *see also* Memorandum from Deputy Attorney General Larry Thompson to U.S. Attorneys, re: Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (confirming same waiver policy).

Nonetheless, prosecutors routinely demand and expect waivers in criminal investigations involving corporations. In our experience, despite any lip service by the DOJ to the contrary, a corporation will be deemed cooperative only if it waives the corporate attorney-client privilege. Given the devastating consequences a criminal indictment can have on a corporation, few corporations are willing to risk indictment to preserve the privilege. In several major corporate investigations over the past two years, the corporation agreed voluntarily to waive privileges and to cooperate in the investigation, as in investigations involving Enron, WorldCom, and Rite Aid. One notable exception is the investigation involving Tyco, yet even in that case, Tyco disclosed privileged documents and information to cooperate in a criminal investigation subject only to an agreement that the prosecutors would not contend that the disclosures constituted a waiver.

This erosion of the corporate attorney-client privilege has had serious negative consequences for general counsel. It is very difficult for a general counsel to advocate against disclosure of a possible criminal or regulatory violation or to recommend that a corporation deal with a problem internally, because of the risk that such advice can be taken out of context by the government. A general counsel's recommendation for internal corrective measures can easily be viewed by an aggressive prosecutor as a conspiratorial statement designed to cover up criminal wrongdoing. This risk has led to more and more preemptive disclosures by corporations, even when it is far from clear that such disclosures are in the best interest of the corporation. Moreover, the prevalence of corporate privilege waivers has placed general counsel in the difficult position of having to tackle complex legal issues with the knowledge that their every move might later be scrutinized by the government.

What does this mean for the defense attorney representing the general counsel in a criminal investigation or prosecution? If the general counsel is a target or subject of a criminal investigation or has already been indicted, in all likelihood the general counsel is no longer employed by the corporation. Given that the power to waive the attorney-client privilege belongs to the corporation, neither the general counsel nor the defense attorney can prevent the corporation from waiving its privilege. Even if the corporation has not waived, a defense attorney must proceed under the assumption that the corporation will waive its privilege. Therefore, a defense attorney must prepare the general counsel's defense with the expectation that every conversation, memorandum, and action taken in the course of the general counsel's employment will be in the government's possession. It is simply a fact of life in these cases.

A second, albeit less frequent, possibility is that the general counsel may have to fight the corporation for the ability to use privileged documents and information in support of the defense. In far fewer cases today than in the past, the company may actually decline to waive its attorney-client

privilege in a criminal investigation. In such a case, general counsel could find themselves in the difficult position of needing to disclose privileged information, over the objection of their corporate client, to fend off a criminal charge or establish a defense at trial. For instance, assume that the U.S. Attorney's Office has indicted a corporation, its former chief financial officer (CFO), and its former general counsel for securities fraud based upon the failure to disclose certain information in corporate securities filings. The corporation declined to waive its attorney-client privilege in the investigation (which contributed to its indictment) and intends to fight the charges. The general counsel, on the other hand, wishes to defend the charges by demonstrating that the codefendant CFO and other corporate employees provided incomplete or inaccurate information that contributed to the failure to disclose. The general counsel also wishes to present evidence regarding the numerous legal and corporate governance reforms he or she instituted while general counsel, to demonstrate good faith and lack of criminal intent and rebut evidence from the government that the criminal charges are part of a broader pattern of misconduct. Without a waiver of the attorney-client privilege by the corporation, the defense attorney must evaluate and likely obtain a judicial determination of what the general counsel may legitimately disclose under the ethical rules and the privilege.

The general counsel's testimony alone may not have significant evidentiary value.

Although their parameters are far from clear, the rules governing the ethical conduct of lawyers permit attorneys to disclose client confidences to defend against a criminal charge or an accusation of wrongful conduct. Under the ABA Model Code of Professional Responsibility, a lawyer may reveal "confidences or secrets necessary . . . to defend himself . . . against an accusation of wrongful conduct." DR 4-101(C)(4). Similarly, under the ABA Model Rules of Professional Conduct, a lawyer may

> reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer . . . to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Model Rule 1.6(b)(3).

Courts facing these issues have similarly adopted a "self-defense" exception to the attorney-client privilege. "The self-defense doctrine permits an attorney to disclose attorney-client communications in order to defend himself against accusations of wrongful conduct." *SEC v. Forma*, 117 F.R.D. 516, 524 (S.D.N.Y. 1987). The self-defense exception can be invoked by an attorney before the filing of formal charges, such as where an attorney is accused of wrongdoing in a grand jury or SEC investigation. *In re Friend*, 411 F. Supp. 776 (S.D.N.Y. 1975) (grand jury); *SEC v. Forma*, 117 F.R.D. at 524 (SEC). Under the self-defense exception, courts have allowed disclosure of any privileged communications that "as a practical matter, seem likely to provide significant assistance to [the attorney's] defense." *First Federal Savings & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 565 (S.D.N.Y. 1986); *see also In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation*, 120 F.R.D. 687, 692 (C.D. Cal. 1988) (authorizing disclosure of privileged communications that counsel deemed "reasonably necessary to defend against" securities fraud charges alleged against client and attorney).

Under the ethical rules and the self-defense exception to the attorney-client privilege, general counsel should be permitted to disclose privileged information necessary to defend themselves. At a minimum this means the general counsel could testify at trial regarding otherwise privileged information in an effort to gain an acquittal. In practical terms, however, the general counsel's ability to disclose privileged communications on the witness stand at trial may prove to be of relatively little value. First, it forces the general counsel to take the stand when there may be compelling reasons not to testify. As in any criminal case, the defense attorney may decide for a variety of reasons that the risks of the general counsel's testifying outweigh the possible benefits. However, if the general counsel must testify to introduce privileged communications necessary for the defense, the general counsel is effectively stripped of his or her Fifth Amendment right to decline to testify. Second, the general counsel's testimony alone may not have significant evidentiary value. Without documents or other information to corroborate such testimony, the jury could be left to consider only the testimony of an individual charged with serious felonies. The jury could easily view such testimony with skepticism or disbelief.

It is critical therefore for the defense attorney to use the self-defense exception to gain access to any privileged documents or other information that would support the general counsel's defense. In many cases, a general counsel facing criminal charges is no longer employed by the corporation and may have left on bad terms. The corporation may even have abruptly terminated the general counsel and forced him or her to leave the corporate offices immediately. In such cases, the general counsel has no access to the files and documents created during the course of his or her employment. Moreover, new management certainly will have no interest in assisting the former general counsel's defense efforts. To gain access to the privileged documents necessary to defend the general counsel, a defense attorney should subpoena the records directly from the corporation and move to compel if the corporation declines production on privilege grounds. The cases involving the self-defense exception to the privilege

typically arise in the context of an attorney seeking to disclose or testify regarding information already in his possession. Courts applying the self-defense exception to the privilege recognize that there are many "good reason[s]" to do so, including that (1) an attorney accused of misconduct has a "compelling interest in being able to defend himself," (2) "that interest may well outweigh the interest of the client in maintaining the confidentiality of his communications," and (3) disclosure in these circumstances "will serve the truth-finding function of the litigation process." *First Federal Savings & Loan Ass'n*, 110 F.R.D. at 565. These policy reasons relied upon to authorize an attorney's disclosure of privileged information in self-defense apply with equal force to efforts to obtain from the client privileged documentation that is needed for the same purpose.

If the self-defense exception allows an attorney to disclose information in his possession to defend himself against criminal charges, why should the attorney be prohibited from obtaining documentary evidence to corroborate that information? Certainly, the general counsel's need to defend against serious criminal charges (that carry the possibility of incarceration and loss of law license) should outweigh the corporation's interest in maintaining the attorney-client privilege over historical events. Moreover, if the self-defense exception permits the general counsel to testify about such otherwise privileged matters, the disclosure of documentary evidence to corroborate that testimony would necessarily serve the truth-finding function of the litigation process. A defense attorney representing the general counsel should use every means possible to obtain necessary defense evidence, including using the self-defense exception to pierce the corporation's attorney-client privilege.

General Counsel as a Client

In most white-collar criminal representations, the client has virtually no experience with the legal system. Although the client may be a successful corporate executive, politician, or government official, he or she typically has little knowledge of the mechanics of litigation, let alone criminal litigation. As a result, most clients place their trust in the defense attorney to make the strategic decisions in the case and to prepare the client's defense with relative autonomy.

The general counsel, on the other hand, likely has significant experience with the legal system. Most general counsel are very accomplished attorneys in their own right. Many have been litigators and some have even been involved in the criminal justice system as prosecutors or defense attorneys. Even those general counsel without significant litigation experience prior to going in-house likely have overseen litigation involving the corporation and managed outside counsel conducting that litigation. In all but the rarest of cases, however, the general counsel will have nowhere near the experience of the defense attorney in defending complex white-collar criminal cases. One of the keys to representing the general counsel in a criminal case is using the general counsel's legal knowledge and skills to advantage while remaining firmly in control of the representation.

The general counsel can and should become an integral member of the defense team. As someone who lived through the events at issue in the criminal case, the general counsel can provide critical assistance in identifying relevant sources of documents, key witnesses, and important issues. In the post-indictment phase of the case, the general counsel can effectively serve as another senior partner on the case. To take advantage of the general counsel's knowledge, defense counsel should have the general counsel review documents, grand jury transcripts, and other discovery to help prepare the defense. Not only will this effort help shape the defense, but it also will keep the client focused on the task at hand. Often in these cases, defendants under indictment and awaiting trials that are frequently months away have too much time to think about the possible consequences of a conviction. Putting the general counsel to work on the defense will avoid this possibility as it advances trial preparation.

Although there is much to gain from having an experienced general counsel as a client, there can be a downside that the defense attorney should strive to avoid. Many general counsel are accustomed to being in positions of power and controlling any litigation in which they are involved. There may be a natural tendency on the part of general counsel in their own case to similarly control every decision, no matter how inconsequential. It is important for the defense attorney to avoid this dynamic and manage the defense of the general counsel as he or she would for any client. Obviously, the major decisions in the case—what motions to file, the scope and direction of the defense, whether the client will testify—will be made by the attorney and client in close consultation. The day-to-day skirmishing that goes on in every criminal case, however, should be left to the defense attorney. At the end of the day, the general counsel, like every client, must focus on what will take place at trial rather than on the daily minutiae of the criminal litigation that experienced defense counsel is better qualified to handle. Achieving the proper balance can greatly benefit the preparation of the general counsel's defense.

A Higher Standard?

An issue the defense attorney must be prepared to face when representing the general counsel at trial is the possibility that the jury will seek to hold the general counsel to a higher standard because of his or her status as the attorney for the corporation. This issue is particularly likely to arise in securities fraud cases where the false statements or omissions are contained in the company's securities filings with the SEC—documents that are typically prepared at the direction of the corporate legal department. The jury, perhaps at the urging of the prosecutors, may believe that the general counsel has greater knowledge or understanding of the legal requirements of the securities laws, and therefore be inclined to find the general counsel guilty based on a lower showing than that used for other defendants in the case. It is critical to counter this natural tendency by obtaining a strong jury instruction from the court making clear that an attorney should be treated no differently than any other defendant.

Courts have recognized that attorneys are held to the same

standard of conduct as other defendants in criminal cases. For instance, in *United States v. Koenig*, 388 F. Supp. 670, 712 (S.D.N.Y. 1974), the government contended that an attorney defendant should be held to a "special duty" of knowledge in a securities fraud case regarding what facts or omissions in securities filings may be false and misleading. The court rejected the government's position, holding, "With respect to the Government's claim of special status for an attorney, his duty is no different from that of the non-lawyer." *Id*. Similarly, in *United States v. Maniego*, 710 F.2d 24, 28 (2d Cir. 1983), a case in which attorneys and their clients were charged with submitting false documentation regarding sham marriages to the INS, the court held that the district court judge "adequately instructed the jury that an attorney is not held to a higher standard of conduct, or legal obligation, to verify independently the truth of information given by a client." *See also United States v. Jones*, 10 F.3d 901, 909 (1st Cir. 1993) (recognizing the propriety of "a special jury instruction that attorneys are held to the same standard of conduct as others").

Based on this authority, the defense attorney should seek a jury instruction making clear that the general counsel should not be treated any differently simply because he is an attorney. The following instruction could accomplish this goal: "The defendant is an attorney. In considering the charges against the defendant, you should not hold him to a higher standard of conduct simply because he is an attorney. An attorney is not held to a higher standard than others with respect to his knowledge or understanding of [insert the legal and factual matters at issue in the case], his right to rely on information that others provide to him, or the lawfulness of his actions."

Although it may be inevitable that jurors believe on some level that general counsel have a better understanding of the law than other defendants, this or a similar instruction can go a long way toward countering that tendency and ensuring that general counsel receive fair and equal consideration from the jury.

Legitimate Witness Preparation vs. Obstruction of Justice

Many of the corporate accounting and securities fraud cases being brought by prosecutors today are extremely complicated, difficult for a lay juror (and even defense counsel) to understand, and not particularly "sexy." These cases frequently involve accounting principles and securities regulations for which there may be numerous interpretations and little guiding precedent. The conduct at issue in many of these cases is not inherently criminal, and there are a number of gray issues that can make it difficult for the government to obtain a conviction. As a result, there is nothing that prosecutors like more than to be able to spice up these complex cases by tacking on an obstruction of justice charge that is easy for the jury to understand and serves to cast the defendants in a far more negative light than the underlying fraud charges.

The risk of an aggressive prosecutor bringing an obstruction of justice charge is particularly acute if the general counsel was involved in preparing corporate employees for interviews by government regulators, or even for grand jury testimony. In the early stages of a corporate investigation, the general counsel may well be involved in interviewing corporate employees to identify the nature of the corporate problem. In the case of low-level employees who are not perceived to have exposure in the case and who do not have individual counsel, the general counsel may even help prepare these employees for interviews or depositions by government regulators or for grand jury testimony. The general counsel may also be involved in debriefing the employees after their testimony to monitor the scope of the investigation. During those early sessions, the general counsel may have aggressively coached witnesses to portray events in the light most favorable to the corporation or even to himself. Months later, when the issues in the criminal investigation have crystallized and corporate employees are seeking to cut plea deals to avoid prosecution, what the general counsel performed as "aggressive witness preparation" may be characterized by employees seeking leniency from the prosecutor as "efforts to obstruct justice."

If a general counsel is charged with obstruction of justice in these circumstances, it is critical for the defense attorney to seek at a minimum a jury instruction clarifying the difference between obstruction of justice and legitimate witness preparation. Although there may be a "fine line between coaching someone to lie and coaching someone to present a story in the 'best' light," the latter is not obstruction of justice. *United States v. Poppers*, 635 F. Supp. 1034, 1037 (N.D. Ill. 1986). Defense counsel should seek an instruction along the lines of the following: "It is not unlawful for a defendant to meet with a witness prior to or after that witness's appearance before a grand jury or other investigative body. Nor is it unlawful for a defendant to discuss with a witness what the witness has said or will say when testifying before the grand jury or other investigating body. The defendant may even encourage a witness to provide testimony in the best light for the corporation or the defendant, as long as the defendant does not attempt to persuade the witness to testify falsely or otherwise corruptly endeavor to influence the grand jury proceeding."

Such an instruction can be highlighted by the defense attorney in closing argument to attempt to convince the jury that what the government deems obstruction was nothing more than legitimate efforts by the general counsel to zealously represent the corporate client.

For better or worse, the days of the general counsel being perceived as an outsider for whom criminal prosecution is off the radar screen are long gone. With greater numbers of general counsel facing indictments, defense attorneys must prepare themselves to defend the very individuals from whom they used to seek business when a corporate scandal broke. The key to successfully representing the general counsel is reaping the benefits of having a star lawyer as a client while keeping the playing field from being tilted against the general counsel in the courtroom—always keeping an eye on the impact of the corporate attorney-client privilege on the case. ◻