

Corporate Counsel Organization Highlights

Letter From The President Of The Washington Metropolitan Area Corporate Counsel Association

To The Readers Of *The Metropolitan Corporate Counsel*:

There appears to be a crack in the "culture of waiver" of the attorney-client privilege and work-product protections.

On April 5, the U.S. Sentencing Commission voted unanimously to eliminate language from the commentary to its federal sentencing guidelines that require corporations to waive the attorney-client privilege and work-product protections in certain circumstances to earn sentencing credit for cooperation with a government investigation. In my opinion, this is a welcome development.

Over the past several years, a series of policy and regulatory changes encouraged government attorneys and prosecutors to press companies to waive privilege or work-product protections during a governmental audit or investigation. Companies that waive privilege are deemed "cooperative," and therefore are eligible for more lenient treatment in settlement discussions or at sentencing. In some cases, the negative publicity about a company's level of cooperation may have a more detrimental effect on shareholder value than the issue the government began investigating in the first place. Refusing to waive privilege also can result in longer and more expensive legal battles.

While the crime/fraud exception to the attorney-client privilege is not new, over the past several years, well known policy changes included the U.S. Department of Justice Holder Memorandum (1999) (www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html), its successor memorandum, the U.S. Department of Justice Thompson Memorandum (2003) (www.usdoj.gov/dag/cftf/corporate_guidelines.htm), and the November 1, 2004 amendments to the U.S. Sentencing Commission's federal sentencing guidelines (Chapter 8-Section 8C2.5 Commentary) (www.ussc.gov/2004guid/8c2_5.htm) (now on target for elimination as identified above). Less well publicized policy changes include other federal agency announcements such as proposed U.S. Department of Labor regulations which encourage government contractors to waive privilege in the context of OFCCP compensation audits (a contractor that "opts not to waive" privileged self-audits "will not be entitled to the coordination outlined in Section IIB of this Directive") (www.dol.gov/esa/regs/fedreg/notices/2004025402.htm). Anecdotal evidence suggests that some state and federal prosecutors expect that waiving privilege is a necessary step in the process of convincing the government that a company is complying with applicable law. Major accounting firms have embraced this "culture" when they seek privileged information for audits.

While some argue that the waiver is necessary for getting to the "truth" and for improving compliance, there are compelling public policy arguments to the contrary. In-house counsel play a key role in assisting companies' efforts to comply with the law. In *Upjohn Co. v. United States*, the U.S. Supreme Court identified that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." 101 S.Ct. 677, 449 U.S. 383, 393 (1981). If company employees are "unable to predict with some degree of certainty whether particular discussions will be protected," they may simply choose not to seek guidance. Without a culture of trust and candor between employees and in-house counsel, "campfires" may become "forest fires." In other words, matters concerning compliance with complex laws and regulations simply may not be addressed at an early stage before they evolve into significant problems. Internal investigations conforming with the Sarbanes-Oxley Act of 2002 or employment laws to detect and remedy inappropriate conduct actually may be impeded, which certainly is an unintended consequence of the governmental policies.

Also, there can be significant ripple effects. Private plaintiffs in civil litigation against the company are likely to seek the same information released to governmental authorities.

In some parts of the country, this paradigm shift appears to be expanding. Nathan Koppel, in his recent *Wall Street Journal* article, detailed that prosecutors in several states have begun a strategy that also "puts companies at risk of being branded as uncooperative" if they do not stop paying legal fees of indicted (but not convicted) employees. Nathan Koppel, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, Wall St. J., Mar. 28, 2006 at B-1. Mr. Koppel suggests that employees who are unable to pay for a vigorous defense may be hampered from proving their innocence by lack of funding. *Id.*

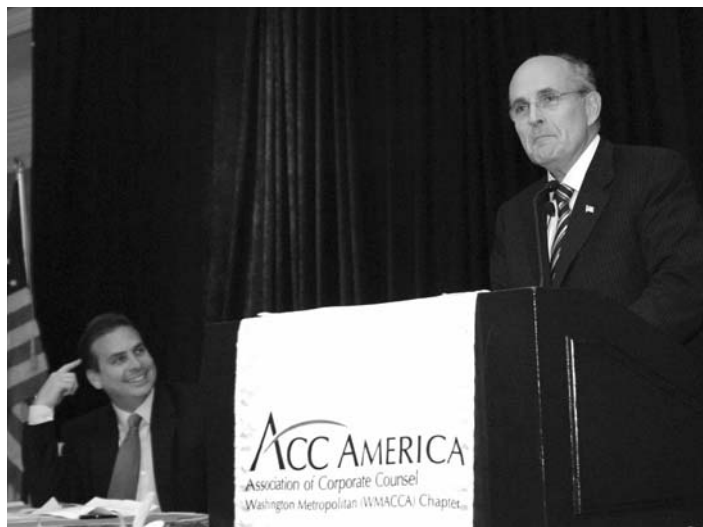
In response, major legal and business associations in the United States, including the Association of Corporate Counsel, have formed the Coalition to Preserve the Attorney-Client Privilege.

Fortunately, some governmental decision makers have begun to reassess whether these changes really are advisable. The Sentencing Commission's amendment will go into effect on November 1 unless Congress passes legislation rescinding or modifying it. In addition, the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on this issue on March 7.

In my opinion, the Sentencing Commission got it right on April 5. It is time for other key decision makers to engage in a big picture review of privilege to determine what the right balance is between the rights of clients to avail themselves of advice of counsel while maintaining the protections of the attorney-client privilege and the role of prosecutors to get at the "truth."

The views expressed in this letter are made in my personal capacity and not necessarily those of the membership of WMACCA or my employer [Sallie Mae, Inc.]. For information about WMACCA's Advocacy Committee, please contact WMACCA's Executive Director, Ilene Reid, at WMACCA@verizon.net.

Sincerely,
Eric D. Reicin



The Hon. Rudolph Giuliani Addresses Compliance

Former Mayor Rudolph W. Giuliani (right) shares his views on high-profile compliance actions at a recent meeting of the Washington Metropolitan Area Corporate Counsel Association (WMACCA) as Eric D. Reicin, Vice President and Associate General Counsel of Sallie Mae and WMACCA President, looks on. Mr. Giuliani noted that corporations must be proactive in adopting appropriate business and ethics policies and procedures, diligent in policing their own behavior, and swift and effective in addressing any problems. He was charming, witty, and non-committal about a possible run in 2008. (Photo courtesy of Philip Nobile/www.conferencephoto.com)

MCCA Set To Honor Employers Of Choice

The Minority Corporate Counsel Association (MCCA) this month will honor three corporate legal executives at its Mid-Atlantic Region Diversity Dinner.

The event will take place on Tuesday, June 13 from 5:30 to 9 p.m. at the J.W. Marriott, 1331 Pennsylvania Avenue, NW, Washington, DC.

Being honored as Employers of Choice at this year's dinner are Randall J. Boe, executive vice president and general counsel, America Online, Inc.; Doug Coblenz, executive vice president

of business and legal affairs, Discovery Communications Inc., and Doug Gaston, senior vice president and general counsel, Comcast Cable.

The keynote speaker at the dinner will be Jim Larranaga, head basketball coach, George Mason University.

For information on ticket prices, see the Bulletin Board on *The Metropolitan Corporate Counsel* website at www.metrocorp-counsel.com.

For dinner reservations, call Tiffany Payne at (202) 739-5906 or email tiffanypayne@mcca.com.

Program To Examine Developments In Money Laundering Rules

The DC Bar Association this month is offering a CLE seminar titled USA Patriot Act: Recent Developments on Money Laundering for Banks and Broker Dealers.

The program is scheduled for Monday, June 26 from 6 to 9:15 p.m. at the DC Bar Conference Center, 1250 H Street, NW, Washington, DC.

Faculty will review developments in the money laundering arena with a focus on the impact of the implementation of the USA Patriot Act regulations on banks, broker dealers, and other financial institutions. In addition, faculty will review existing money laundering laws and regulations, consider new requirements, and provide practical tips on compliance.

Issues to be considered include the new customer identification procedures, expanded SAR regime, due diligence for correspondence accounts and private banking accounts, foreign and shell bank requirements, required anti-money

laundering programs, and recent enforcement cases.

The moderator will be James E. Day, director and chief counsel, NASD Department of Enforcement. Speakers will include: Peter G. Djinis, Law Office of Peter G. Djinis; Emily Gordy, senior vice president and director of regional enforcement, NASD Department of Enforcement; William Langford Jr., associate director, Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, U.S. Department of the Treasury; Alan E. Sorcher, vice president and associate general counsel, Securities Industry Association, and Daniel P. Stipano, deputy chief counsel, Office of the Comptroller of the Currency.

For details on registration fees and CLE credits, see the Bulletin Board on *The Metropolitan Corporate Counsel* website at www.metrocorp-counsel.com.

For reservations, call (202) 626-3488 or visit www.dccbar.org.