

## **SPEAK FREELY!: THE RETURN OF THE ATTORNEY-CLIENT PRIVILEGE FOR CORPORATIONS.**

**By: Steve Wrobel**

On August 28, 2008, the Department of Justice (“DOJ”) announced significant changes to its policies regarding its treatment of the attorney-client privilege in the corporate context. This is good news (finally) to any corporation faced with the prospect of a federal investigation.

After years of attempting to eviscerate the protections afforded to advice given by counsel to their corporate clientele, the DOJ appears to finally have acknowledged the need for counsel to freely advise their corporate clients without the fear of later disclosure to the very agencies investigating them.

Prior to this recent announcement, the DOJ had embarked on a decade-long journey to measure a corporation’s “cooperation” in an investigation of itself by the willingness of that corporation to lay bare it’s own counsel’s fact-finding, work product, and even the interpretation of those efforts, with extra points awarded to those companies that dealt quickly, and harshly, with any employees that appeared to be involved in some sort of wrongdoing. Corporations were awarded “bonus” cooperation points for terminating those employees suspected of wrongdoing; actual findings of guilt were not required.

But it appears that based on this new announcement, the tide has turned. The new DOJ policy stresses five major revisions:

- Credit for cooperation will not depend on waiver of the attorney-client privilege. Corporations that timely reveal relevant *facts* will receive credit, regardless of whether the privilege has been waived. This means a company can tell the government what’s going on, but it doesn’t have to tell the government how it found out.
- Prosecutors are now forbidden from requesting non-factual attorney-client privileged communications and work product, such as...legal advice. This means a lawyer can actually advise its corporate client whether something is legal or not, without having to worry about whether it will have to tell the government five years from now whether it ever told its client whether something was legal or not.
- The DOJ will no longer consider it “uncooperative” for a company to actually advance legal fees to its officers, employees or directors that are also undergoing federal scrutiny. Previously, this was viewed by DOJ as an indication that the company was truly not cooperating with the investigation, or worse, impeding it.
- It will also not be considered “uncooperative” if the corporation has entered into a joint defense agreement with others, such as those same officers, directors and

employees. Again, DOJ previously considered these efforts by the company's lawyers to understand what was going on (by entering into these joint defense agreements) to be unwise if it wanted to be considered a good (i.e. cooperating) corporate citizen.

- Finally, prosecutors can no longer look at whether a company has disciplined or terminated employees to evaluate the company's cooperation. Now, such personnel moves can only be viewed in the light of evaluating a company's compliance program, or its own remedial measures. (This appears to be a distinction without much of a difference, but at least it's something.)

With these revisions, the attorney-client relationship between corporations and their counsel has returned to its position of a decade ago. The "new" policy overturns some very controversial measures developed during the tenure of several Deputy Attorneys General. In 1999, there came the *Holder memo*, named after then Deputy Attorney General Eric Holder, which discussed the prosecution of corporations, and which suggested that waiver of the attorney-client privilege would be viewed favorably by DOJ. In 2003 came the *Thompson memo* named after then Deputy Larry Thompson, which continued if not strengthened the idea that waiving attorney-client privilege (and denying the payment of fees to individuals within the company) was an expectation of the DOJ, in order for a corporation to be considered cooperative. More recently there was the *McNulty memo*, authored by then Deputy Attorney general Paul McNulty, which attempted to soften some of the sharp corners of those policies.

This new policy, announced at the end of August 2008 by Deputy Attorney General Mark Filip, is not however memorialized in another memo that will bear his name, but will be set forth for the first time in the United States Attorneys' Manual, to, as Deputy Attorney General Filip stressed, reflect the Department's firm commitment to safeguarding the attorney-client privilege, and preserving the Department's ability to investigate corporate wrongdoing effectively.

Regardless of whether located in a memo or the US Attorneys Manual, these revisions to DOJ policy regarding the attorney-client relationship should restore some confidence to counsel and their corporate clients in being able to effectively discuss and analyze potential problems and even wrongdoing within the company. One also hopes that going forward DOJ will focus its scrutiny more on the corporation's handling of its problems, once discovered and dealt with, rather than the discussions had between counsel and client in investigating and dealing with them.

If you are facing a situation as a corporate plaintiff or defendant or if you have any other litigation needs, please contact Steven F. Wrobel (410-547-2417, or [swrobel@rosenbergmartin.com](mailto:swrobel@rosenbergmartin.com)) or any attorney in our litigation group:

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