



## **ACC's CLO ThinkTank Series 2005**

### **“STEMMING THE TIDE OF PRIVILEGE EROSION”**

**Hosted by Anastasia Kelly, CLO of MCI**

**September 16, 2005  
10:00 a.m. – 2:00 p.m.  
Ritz-Carlton, Pentagon City**

\* \* \* \* \*

### **Participants' Briefing Materials**

\* \* \* \* \*

## Summary / Outline of Discussion Topics

The following outline is intended to provide a short overview of some of the issues at the heart of this discussion topic. There may be other issues we've not identified, or perspectives on the identified issues that are not adequately represented in the outline: you should feel free to raise these additional thoughts, as you like. The outline is merely intended as a starting point to help you identify discussion topics and tee up your conversation.

### **Erosion of the Attorney-Client Privilege in the Corporate Context**

#### **A. Is there really a problem?**

1. Government suggests that their prosecutors aren't demanding waivers – that this issue is of the corporate bar's making and serves the white collar/corporate bar's purposes.
2. ACC surveys show that corporate counsel identify a significant increase in waiver demands – and that it is not a positive development.
3. Should the privilege enjoy the same status of protection post-Enron? Are protecting privilege and promoting transparency conflicting goals?
4. Does privilege erosion adversely affect clients and compliance? Or is it only about lawyers and the "guild?"

#### *Links to Resources*

*Wither Attorney-Client Privilege?*

<http://www.acc.com/resource/v6033>

*Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?*

<http://www.acc.com/resource/v6306>

*In-House Counsel and the Attorney Client Privilege : A Lex Mundi Multi-jurisdictional Survey*

<http://www.acc.com/resource/v6301>

#### **B. Privilege Erosion in the Corporate Context**

1. In the Prosecutorial Context

State and Federal – Holder/Thompson Memo requires waiver for cooperation.

U.S. Sentencing Guidelines – Sentencing "Credits" not available for non-cooperative companies, and cooperation is again linked to waiver.



Federal Agency enforcement actions: SEC, IRS, DOL, EPA, FTC, Banking regulators, etc.: all identify lawyers as “gatekeepers” and require waiver as evidence of cooperation.

Deferred Prosecution Agreements/Limited or Selected Waiver Options/Implied Waiver: trying to hold the line against more costly/subsequent third party suits.

*Links to Resources:*

*Thompson Memorandum, 162 Federal Prosecution of Business Organizations*

[http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00162.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm)

*Effective Cooperation By Business Organizations And The Impact Of Privilege Waivers*

<http://www.law.wfu.edu/prebuilt/Buchanan-final.pdf>

*The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program*

<http://www.sec.gov/news/speech/spch092004smc.htm>

2. In the Judicial and Civil Litigation Context

Privilege waiver cases are not making it to courts; waiver demands happen outside of the courtroom. The judiciary can't protect the evidentiary privilege.

Those cases that have been brought before judges have not supported privilege as expected in recent years: everyone “wants to get the bad guys,” and there's a renewed concern that privilege has no place in the corporate context when “stakeholders” want to know.

Courts are split on respecting limited waiver agreements with the government.

3. In the Audit Context

What the ABA/AICPA “treaty” used to regulate (regarding auditor's respect for privilege and willingness to cooperate with lawyers for the company when seeking information on issues that are otherwise privileged) has fallen to the wayside in the post-Enron, post-Andersen world.

Argument: Auditors have a public reporting obligation; information divulged to them in order to complete the audit is arguably no longer privileged since they are not an aligned party, but an independent watchdog. Caselaw is split on these issues. It's clear, however, that auditors are concerned with investigating all possible evidence of problems (often contained in the law department's files), they want more information than ever, they want unimpeded access to all relevant files and knowledge, and they will not certify the audit without complete cooperation, including waiver.

*Links to Resources*

*The New Federal Sentencing Guidelines for Organizations: Great for Prosecutors, Tough on Organizations, Deadly for the Privilege*

<http://www.acca.com/protected/article/attyclient/sentencing.pdf>

*American Bar Association Fact Sheet, Federal Government Waiver Policies Threaten the Attorney-Client Privilege*

<http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/20060421000000.pdf>

**C. The Issue of Waiver – Whose Rights are at Stake? What is the Real Cost?**

1. The entity owns the privilege, but who is the entity when waiver is on the table? Short vs. long term interests.
2. The push to serve up anyone and anything to avoid charges against the company. Does this instill trust in confidential reporting amongst employees who want to do the right thing?
3. At what price is waiver offered? Can lawyers do their jobs without privilege and the expectation that even if the company's lawyers represents the company, there's still presumed confidentiality in the relationship and alignment of interests?

**D. The Privilege and its Protections Beyond US Borders**

Privilege is treated differently outside the US. How does this affect the debate for MNCs?

In-house privilege is not recognized in many jurisdictions outside the US, particularly in many countries in Europe and Asia, and with the EU. How will this impact corporate efforts to assert privilege or waiver rights in this country?

**E. The Public Policy / General Public Stakes**

What are corporate lawyers interested and willing to do to protect privilege?

Is it a priority for their client relationships? Do clients care or even understand? Does the presence or absence of privilege affect the way they behave?

What practical guidance should general counsel consider adopting to protect privilege in their workplaces?

Should courts continue to bear responsibility for the protection of privilege (through the rules of evidence? If legislation is sought, are we prepared for the (further) federal regulation of the profession? What can be done to curb government agency waiver "creep" at institutions like the SEC?



Does the general public understand their interests in protecting the privilege in the corporate context? Can they be educated on this point? Is the public's perception of corporate legal defense rights so hostile that this is not a realistic goal?

*Links to Resources*

<http://www.acc.com/resource/v7158>

<http://www.acc.com/public/comments/attyclient/privilege.pdf>

<http://www.acc.com/resource/v6327>