ATTORNEY'S ROLE DURING & AFTER THE EXECUTION OF AN ENVIRONMENTAL SEARCH WARRANT

Avoiding Conflicts & Preserving Client Confidences

Environmental Law Section Fall Meeting
October 14, 2016

Veronica Reed, Law Office of Veronica Reed
Veronica.reed@kidsworklife.com

Attorneys for corporate/entity clients should consider conflicts and the proper handling of confidential information well before a criminal environmental search warrant, as this case study is intended to show:

1 CASE STUDY

1.1 COVERING A MULTITUDE OF SINS

Acme Pipe Company, a New York Corporation trading on the NYSE, is a pipe fabricator and manufacturer located in Oswego, New York. Acme has 500 employees. The President and CEO Jim Penny also oversees the day-to-day operation, which is led by the Plant Manager Roger Putts.

Acme's manufacturing process results in industrial wastewater. Although the facility is equipped with a wastewater treatment plant, it is seldom running because of its high operational costs. Instead, Acme employees routinely discharge industrial wastewater onto the ground or into the woods on an adjacent lot which also contains a trout stream. Acme business documents indicate that untreated wastewater is stored in "Tank 8". Acme also routinely brings in truckloads of fill to spread over the site contamination. Acme's annual report to shareholders includes statements that it complies with all applicable laws, regulations and permits.

In April, when local residents complained that tap water was frequently brown with visible sediment and that dead fish were a reoccurring phenomenon in the trout stream, a local newspaper began investigating. Shortly thereafter, local residents commenced civil suits for trespass and nuisance, naming Acme and Acme's officers, directors and employees individually, including Jim Penny and Roger Putts.

In May, Acme's in-house corporate counsel, Jenny Dedlock sent an email to various Acme employees notifying them of the civil actions and inviting anyone with concerns to contact her. The email did not include any other information.

Q1. Is this email protected by attorney-client privilege? Is it protected by attorney work product privilege?

1.2 THE INTERLOPERS

Acme's board of directors and management decided to bring in outside counsel for an internal review of its manufacturing practices. Acme hired Iris & Marigold LLP ("Iris"). An Audit Committee was designated and led by Mr. Penny. On March 24th, the Committee met with Iris' counsel and the scope of the Iris review was determined and agreed. The investigation was designated the "Audit".

Q2: Why is it important to establish the scope of the Iris review prior to start of the Audit? Is Iris' status as outside counsel significant?

The Audit Committee determined that Acme would self-report any problems and fully cooperate with government regulators, including the U.S. Environmental Protection Agency (EPA) and New York State Department of Environmental Conservation (DEC), and that Acme would, if necessary, report any findings to Acme's third party auditor, Ernst & Young LLP.

On June 1st, Mr. Penny received an email from Iris attorneys asking him "for an hour of his time to discuss certain aspects of the Audit". On June 2nd, Mr. Penny and the Iris attorneys met as requested in the email. Later, during his criminal trial, Mr. Penny and the Iris attorneys disputed whether or not the discussion was an interview for the purposes of the Audit investigation.

Q3: Mr. Penny testified that he had no recollection of being provided with what type of warning prior to the start of the discussion on June 2nd?

Q4: Mr. Penny believed that the June 2nd conversation with the Iris attorneys was protected by attorney-client privilege. Is he correct?

The Audit revealed several accounting irregularities, OSHA violations and possible violations of various environmental regulations with respect to Acme's handling of its wastewater.

In late June, Iris attorneys advised Mr. Penny that he should secure independent counsel with respect to a possible government investigation and the ongoing civil suit. Mr. Penny retained Allswell & Good to represent him individually.

1.3 A Turn of the Screw

In July, the EPA received an anonymous tip from an Acme employee that the wastewater treatment facility was not operating. Officials from the EPA arrived at the facility for an unannounced inspection. Mr. Penny granted permission for the inspection which subsequently revealed the non-operating treatment facility and a non-existent Tank 8.

In August, Acme restated its earnings to include $2.2 billion in previously undisclosed operating expenses. The SEC and U.S. Attorney's Office commenced formal enforcement and Grand Jury investigations of Acme and its executives, including Mr. Penny.

In August, with Acme's authorization, government investigators interviewed the Iris attorneys, including the attorneys who had the conversation with Mr. Penny in June. The investigation resulted in evidence that Acme and individual employees may have committed various crimes involving environmental pollution, worker safety violations, violations of the Clean Water Act, and misappropriation and divestitures of public funds associated with various contracts held by Acme.

A grand jury issued at 34 count indictment and a search warrant was executed at the Acme plant and offices. The warrant was examined by Jenny Dedlock and multiple paper and electronic records were seized, including 15 laptops.

1.4 Attorney and Client

Mr. Penny's criminal defense attorneys, Allswell & Good, moved to compel the production of the records obtained by search warrant on the grounds that those records contained Mr. Penny's personal emails with Allswell & Good. Allswell & Good argued that because the emails discussed Mr. Penny's representation, they were protected by attorney-client privilege and work-product privilege.

Q6: How should the court find?

In support of their motion, Allswell & Good provided a privilege log that included descriptions and comments stating "Fax Re: EPA Findings, cover sheet" and "Fax: Whistleblower article, self-explanatory" and "Summary of Enclosures, self-explanatory".

Q7: Is the Allswell & Good privilege log sufficient for a court to determine the question of privilege?

1.5 Mr. Penny's Other Records

Mr. Penny kept additional corporate and personal records in his home office in Albany, New York. Shortly after the seizure of Acme's records at the plant, Mr. Penny, asked his personal attorney, Esther Summerson, to move the records to her law office in order to avoid seizure.

Q8: If the records are moved to Attorney Summerson's office are they now protected under the attorney client privilege?

Mr. Penny testified before the Grand Jury that the records existed and that his personal accountant, Mr. Wigmore, used the records to complete Mr. Penny's personal taxes. Mr. Wigmore is not an employee of Acme and is not otherwise retained by the company in any capacity.

The attorney general served a *subpoena duces tecum* requiring production of all of the records. Pursuant to an agreement between Attorney Summerson and the attorney general, the records were brought to the attorney general's office, where they were to remain unopened pending the outcome of the Allswell & Good motion to quash on the basis of attorney-client privilege.

The Allswell & Good motion was based on Mr. Wigmore's testimony that he used Mr. Penny's records to prepare tax filings and that these records included letters and emails from Jenny Dedlock (Acme corporate counsel).

Q9: Are the records used by Mr. Wigmore protected by attorney-client privilege?

1.6 The Fate of Roger Putts

After he received Jenny Dedlock's May email, Plant Manager Roger Putts stopped by her office for an informal discussion. During that discussion, Mr. Putts made certain exculpatory comments and asked for advice.

Q10: Are Attorney Dedlock's legal opinions admissible?

Plant Manager Roger Putts was charged with various environmental, workplace safety and other crimes and was represented by a criminal defense firm selected and compensated by Acme, also a co-defendant under the same indictment.

Q11: Can Roger Putts be represented by an attorney selected and compensated by Acme?

2 CASE STUDY ANSWERS

A.1 *This email is not protected by attorney-client privilege. Attorney-client privilege is "the oldest of the privileges for confidential communications".* Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."* Upjohn *at 389. Because "the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures – necessary to obtain informed legal advice – which might not have been made without the privilege."* Fisher v. U.S.*, 425 U.S. 391, 403 (1976).*

Examples of protected corporate documents are:

- *A company's written requests for legal advice from its counsel;*
- *In house and outside counsel's legal advice;*
- *Company documents that are based on the substance of counsel's opinion or advice*
- *Reports of attorney-client communications*
- *Drafts of documents prepared by counsel.*

Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 601 (S.D.N.Y. 1991).*

In house and outside counsel's opinions and strategy memoranda are privileged, except when counsel is acting as a regulatory decision-maker instead of a legal advisor. See, Mobil Oil Corp. v. Dept. of Energy*, 102 F.R.D. 1, 9-10 (N.D.N.Y. 1983).*

The email is not protected by attorney work product unless it includes "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). The fact pattern states that the email merely informed employees about the existence of the civil suits, and without more would not be protected. See, Resolution Trust *at 601-602, quoting* Hickman v. Taylor*, 329 U.S. 495, 511 (1947).*

See also, Paul R. Rice, Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 Am. Univ. Law Rev.* 967 (1999) accessed online at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1334&context=aulr and *Paul R. Rice* Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 Duke Law J. __ (*1998), accessed online at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1026&context=dlj

See also, Dylan L. Ruffi, Attorney-Client Privilege in Corporate Administration: A New Approach*, 9 Brook.J.Corp.Fin&Com.L (2015), accessed online at: http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1032&context=bjcfcl or http://brooklynworks.brooklaw.edu/bjcfcl/vol9/iss2/7/?utm_source=brooklynworks.brooklaw.edu%2Fbjcfcl%2Fvol9%2Fiss2%2F7&utm_medium=PDF&utm_campaign=PDFCoverPages*

A2: *In-house counsel's interview notes and memos are protected if they are prepared and collected by in-house counsel, as part of an investigation to determine alleged illegal activities, so that in house counsel can provide legal advice to the company, and obtained from employees who are "sufficiently aware" of the purpose of the investigation and its confidentiality.* Upjohn *at 394-395. See also, Jason Canales and Cristina I. Calvar, "Keeping Up with* Upjohn*: Preserving Attorney-Client Privilege in Corporate Internal Investigations",* NYSBA Journal*, February 2016 at 10.*

The distinction between in house and outside counsel is not significant after In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) which held that an investigation could be conducted at the direction of either in-house or outside counsel and that the communications would be privileged if it met the "primary purpose" test established by* Upjohn*.*

A3: Prior to interviewing the officers, directors, and employees in house and outside counsel should issue an Upjohn *warning (sometimes called a "corporate* Miranda *warning"). As a best practice, this should be done in writing, reviewed with the interviewee, and acknowledged, in writing, by the interviewee. The warning makes clear that the company's attorneys do not represent the individual; that anything said by the individual to the attorney will be protected by the company's attorney-client privilege subject to waiver of the privilege in the company's sole discretion, and that the individual may wish to consult with his or her own attorney if he or she has any concerns regarding potential personal legal exposures.* Upjohn *at 393-396 (1981).*

A4: It is clear that Acme and its counsel, both in house and outside, have an attorney-client relationship. See, U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009). Here, Mr. Penny is alleging that he also has an attorney-client relationship with Acme's outside counsel. In some circumstances, the reasonable belief of the individual is enough to create an attorney-client relationship, but not a personal attorney-client privilege over the company's records, including the interview notes. See, e.g.,* In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998).*

It is worth noting that at the commencement of the Audit, the Committee stated its intention to turn over relevant information and fully cooperate with government regulators and its third party auditor, Ernst & Young LLP.

The June 16, 1999 Memo from Deputy Attorney General Eric H. Holder to All Component Heads and United States Attorneys states that a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors" in determining whether to charge the corporation with a crime. A corporation's cooperation is demonstrated by a "willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges." See, §VI available online at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

This was narrowed by the "Yates" memo issued by Deputy Attorney General Sally Quillian Yates on September 9, 2015 (available here: https://www.justice.gov/dag/file/769036/download). Corporate cooperation is now demonstrated by a corporation "completely" disclosing "all relevant facts about individual misconduct" including identifying "all individuals involved in or

responsible for the misconduct at issue" and providing "all facts relating to that misconduct." Id*. at §1. Corporations now have an affirmative requirement to "learn of such facts" and "provide the Department with complete factual information about individual wrongdoers" as a threshold requirement when seeking credit for cooperating with the government.* Id.

A6: *Generally, a defendant has no constitutional right to discovery in a criminal case.* Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). There are exceptions intended to protect a defendant's right to due process. Under Federal Rules of Criminal Procedure 16, a defendant can move for production of tangible objects belonging to him and documents and objects "material to the preparation of defense" and/or that the government intends to offer at trial. Fed. R. Crim. P. 16(a)(1)(E)(i)-(iii).*

When the government seizes company records pursuant to a search warrant, it will very likely seize items protected by attorney-client privilege. In light of this, the government agency will establish a "Filter Team" and "Filter Review" process that insures that only non-privileged materials are released to the government's trial team. The application for the search warranty should include an affidavit explaining the process by which the government will review the materials. See, e.g., In re Grand Jury Subpoena, *No. 15-35434 (9th Cir. July 13, 2016) (Fastcase Federal 9th Circuit)*.

When the federal rule applies, "attorney-client privilege is strictly construed." Ruehle *at 609. the party invoking attorney-client privilege must demonstrate that there was client and counsel communication which was intended to be and was in fact kept confidential, and for the purposes of obtaining or providing legal advice.* U.S. v. Construction Products Research, Inc., *73 F.3d 464, 473 (2d Cir. 1996) citing* Fisher *at 403,* U.S. v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995),* U.S. v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990). A party invoking work-product privilege must show that the documents were prepared principally or exclusively to assist in anticipation of or in ongoing litigation. Fed. R. Civ. P. 26(b)(3);* Bowne of New York City Inc., v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D.N.Y. 1993).*

New York's attorney-client privilege is codified in CPLR §4503. The information must be "confidential communication" made to an attorney for the purpose of obtaining legal advice or services. Matter of Priest v. Hennessy*, 51 NY 2d 62, 69 (1980). The burden of proving privilege is on the asserting party and "even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy required disclosure."* Id.*, citations omitted.*

A7: *A privilege log must be adequately detailed and should "identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure."* Construction Products Research *at 473 quoting* Bowne of New York City *at 474. The party seeking the protection of privilege should also supply affidavits or deposition testimony for other required information which will provide detail sufficient to support the application for privilege.* Id. *If the court is not provided with enough information to support the privilege claim, than the claim will be rejected.* Id.

A8: *No, documents do not acquire protection merely by being turned over to an attorney. The documents would be protected only if they were otherwise protected by privilege before passing into the attorney's possession.* Colton v. U.S.*, 306 F.2d 633 (2d Cir. 1962).*

A9: *Here, Mr. Wigmore testified that he had access to the Jenny Dedlock letters and emails after the advice had already been made and that he reviewed the documents for purposes unrelated to legal advice. The Second Circuit held in* In re Horowitz, that *"[s]ubsequent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of privilege." 482 F.2d 72, 81 (1973).*

Courts have found it dispositive when record keeping lacks special efforts to segregate and preserve privileged and protected documents from other routine documents, and have found that privilege does not exist. Id. *at 82. The New York Lawyer's Code of Professional Responsibility, Canon 4 states that a lawyer should preserve the confidences of a client, which is defined by New York Rules of Professional Conduct as information protected by attorney-client privilege and other information gained in the professional relationship that a client requests be kept confidential or disclosure of which would be embarrassing or detrimental to the client. Rule 1.6.*

A10: *Jenny Dedlock's legal opinions which she provided in the role of corporate counsel, even when the opinions are provided to individual employee defendants in their capacity as employees are privileged unless waived by the company. The company, as an entity, and its counsel have an attorney-client relationship. See,* Ruehle *at 607. However, as discussed above with regard to Mr. Penny's relationship with the Iris attorneys, Mr. Putts does not have an individual attorney-client relationship and he does not have a personal attorney-client communication privilege.*

Prosecutors may seek to oppose the privilege on the basis of the crime-fraud exception if the communication between Jenny Dedlock and Roger Putts was in furtherance of an intended or present illegality and if there was some relationship between the communications and the illegality. See, U.S. v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996). Evidence must exist that there is reasonable cause to believe that the attorney's services were utilized in the furtherance of an ongoing unlawful scheme.* U.S. v. Zolin*, 491 U.S. 554, 572 (1989). Once that threshold showing is made, a court may engage in* in camera *review of the documents to determine "whether allegedly privileged attorney-client communications fall within the crime-fraud exception."* Zolin *at 574.*

A11: *There is a potential conflict of interest if an individual is represented by a criminal defense firm selected and compensated by the individual's company when the company is also a co-defendant. See,* Prisque v. U.S.*, No. 14-1213 (D.N.J., Jan. 19. 2016) (Fastcase New Jersey District Court). The individual defendant must make a knowing and voluntary waiver of his right to conflict-free counsel.* Glasser v. U.S.*, 315 U.S. 60, 70-71 (1942). A knowing and voluntary waiver will insulate a conviction from later attack on this ground.* Flanagan v. U.S.*, 465 U.S. 259 (1984).*

3 TABLE OF AUTHORITIES

Cases

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Other Authorities

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4 About the Author

Veronica Reed is a family law attorney focused on special education, children's civil rights, family law and injured-at-school cases. The Law Office of Veronica Reed opened in March 2016. Based in downtown Schenectady the practice provides a range of legal services and representation for upstate New York parents and children before the NYS Education Department, NYS Department of Health, and in Family, State and Federal Court.

Ms Reed's 20-year corporate career with General Electric, Kawasaki, Booz Allen Hamilton, and MTA New York City Transit predominately focused on commercial contracts and claims for national and international construction and manufacturing projects. After law school, Ms Reed was a defense litigator in New York City for Fisher & Fisher and Traub, Lieberman, Straus & Shrewsberry, LLP, practicing in the areas of education, professional liability, employment discrimination and practices, premises liability, and CGL and PL insurance coverage. She represented religious and educational institutions and commercial clients in all phases of litigation in New York City and downstate counties and in Eastern and Southern U.S. District Courts.

Ms Reed holds a BA from Seattle Pacific University and a JD from New York Law School. She was admitted to practice in New York in 2005. She is admitted to practice in multiple U.S. District Courts.

Veronica's profile is available on Avvo, Linkedin and the Law Office website at www.kidsworklife.com.