

## Avoiding privilege and work-product waiver

Oral attorney proffers, nonprivileged documents or facilitation of DOJ interviews may sidestep waiver issue.

BY DAN K. WEBB AND J. DAVID REICH

Having work product or attorney-client communications from an internal investigation of corporate wrongdoing used against your corporate client by private litigants is always unpleasant and can also deliver a body blow to your case. Waiver is usually the culprit—resulting not from inadequate compliance with civil discovery rules or

the use of the material to refresh a witness' memory, but instead from the material's use by a special litigation committee of a board of directors in shareholder derivative litigation, or from the material's "voluntary" disclosure to a governmental agency investigating the wrongdoing.

### THE PRACTICE

Commentary and advice on developments in the law

Work product and attorney-client communications wind up getting disclosed in these circumstances for reasons that are well-known.

A special litigation committee, for understandable reasons, often prefers a detailed written report from counsel documenting the scope of the committee's investigation and the grounds for the committee's conclusions. See *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981).

Companies frequently conclude they are required to disclose protected materials in order to receive credit for cooperating with a governmental investigation—one of the key requirements for avoiding or facing only reduced charges, penalties and fines. This pressure exists in investigations by the Department of Justice even after DOJ's 2008 amendment of its corporate charging guidelines in response to criticisms of the old guidelines' emphasis on waiver. DOJ's new guidelines provide that a corporation's cooperation credit is to be based on disclosure of "relevant facts" concerning the alleged wrongs, and not on waiver of work-product or attorney-client privilege. The guidelines also prohibit prosecutors from requesting waivers of "core"

work product or attorney-client communications and advise prosecutors not to require production of interview memorandums and notes. However, the guidelines do not eliminate entirely the pressure on companies to waive because the "relevant facts" are usually the product of witness interviews and document analyses conducted by counsel and thus reflect work product and privileged communications.

The same is true for investigations by the U.S. Securities and Exchange Commission and certain state law enforcement agencies. The SEC recently adopted a policy consistent with DOJ's emphasis on disclosure of "relevant facts," with its associated risk of waiver.

How, in these circumstances, can trial



ISTOCKPHOTO/FRANCISBLACK



DAN K. WEBB



J. DAVID REICH

**DAN K. WEBB** and **J. DAVID REICH** are partners at Winston & Strawn who concentrate on civil, regulatory and white-collar cases. Webb, the firm's chairman, previously served as the U.S. attorney for the Northern District of Illinois. Reich, based in New York, previously served as an assistant U.S. attorney for the District of New Jersey.

counsel reduce the risk of waiver and the accompanying rocky day in court and yet provide the requisite information?

Unfortunately, a review of relevant case and statutory authorities will rarely enable counsel to conclude that a report of the investigation can be disclosed to the government or filed with a court on behalf of a special litigation committee without substantial risk of waiver.

In the federal courts, only the U.S. Court of Appeals for the 8th Circuit has adopted the selective-waiver doctrine, which allows a company to disclose privileged information to a governmental agency investigating the company and, at the same time, assert the privilege against others. See *Diversified Industries Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc). Of the eight circuits that have rejected the doctrine, the 2d, 4th, 10th and Federal circuits leave open the possibility that privilege may be preserved when the disclosing corporation and the government have entered into a confidentiality and nonwaiver agreement; the determination is made on a case-by-case basis. See, e.g., *In re Steinhard & Partners L.P.*, 9 F.2d 230 (2d Cir. 1993). But the 1st, 3d, 6th and D.C. circuits simply rule out reliance on confidentiality agreements as a means of preventing waiver. See, e.g., *Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991).

As with attorney-client privilege, most courts generally do not permit selective waiver of work-product protection. Even courts that recognize the potential relevance of confidentiality agreements between the disclosing company and the government are unlikely to find an absence of waiver when the agreement leaves the government with discretion to disclose the work product to third parties. See, e.g., *In re Qwest Communications Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006).

Recently enacted Federal Rule of Evidence 502 allows parties to agree upon the rules of waiver applicable in a particular litigation. Rule 502(d) further provides that this agreement is binding on third parties if it is incorporated into a court order. Rule 502 is not likely to be a panacea in government investigations, however. A rule permitting selective waiver for disclosures to the government was proposed but not adopted. Instead, Rule 502(d) is limited to disclosures made "in connection with the pending litigation." This

limitation precludes Rule 502(d)'s application to voluntary disclosures to governmental agencies. And it is unclear whether courts will sidestep the limitation by entering a Rule 502(d) order when the "pending litigation" is the service of a government subpoena and filing of a motion to quash initiated essentially for the purpose of obtaining such an order.

### LITIGATION COMMITTEE REPORTS

Similar challenges for trial counsel are raised by case authorities addressing the status of counsel's report to a special litigation committee. Under Delaware law (representative of many jurisdictions), courts adhere to the business judgment rule in evaluating a full board's decision not to pursue derivative claims. However, they apply a more searching modified business judgment rule if the board has delegated the decision to a special committee, which is often necessary when there are interested members on the board or members whose interests may diverge from those of the corporation. Under that rule, courts typically independently assess the reasonableness of the committee's decision.

Ordinarily, counsel's legal work for a special litigation committee is protected by the work-product doctrine and attorney-client privilege. But when the committee determines that it is in the company's best interests to file a motion to settle or dismiss the derivative claims, and in connection therewith to have counsel prepare a written report for the committee summarizing the internal investigation, some cases have held that the filing of the report will make it and certain related information discoverable by the derivative plaintiffs. See, e.g., *Joy v. North*, 692 F.2d 880 (2d Cir. 1982). Waiver has also been found when the committee discloses the report to other directors who are acting in their own interests instead of as fiduciaries of the corporation. *Ryan v. Gifford*, 2007 WL 4259557 (New Castle Co., Del., Ch. Nov. 30, 2007). Because of these generally unfavorable legal authorities, counsel to a company seeking to maintain privilege should pay particular attention to the form and content of any reports.

Sharing the results of counsel's fact-finding with the government does not automatically require the preparation or production of a written report. Alternative approaches that should be explored with governmental authorities include oral attorney proffers that

do not provide specifics in terms of witness attributions, production of nonprivileged documents and facilitation of interviews by the government itself of knowledgeable employees.

When a company determines that a written report to the government is required, it needs to disclose only the "relevant facts" in order to receive cooperation credit; it need not present legal conclusions or disclose witness interview notes or memorandums. When important facts can be established through nonprivileged documents without also referring to the substance of witness statements, counsel should focus on the documents. A company should also seek a confidentiality agreement with the government, recognizing that its usefulness will likely depend on the jurisdiction in which a subsequent assertion of waiver is made.

Many of these same strategies apply to reports to special litigation committees and boards of directors. A combination of more detailed oral and summary written reports is usually sufficient to establish the scope of a committee's investigation and the bases for its conclusions. Another approach is to "layer the reporting used in the investigation," with counsel providing a report to the committee with counsel's analysis and legal advice and the committee providing a report to the board containing "only a detailed account of the committee's investigative steps, its factual findings and its conclusions." Michael Mukasey and Andrew Ceresney, "Internal Investigations," N.Y.L.J., March 19, 2010.

Because of the potential consequences in civil litigation, it is critical that counsel focus on the above considerations at the commencement of any investigation in order to avoid or minimize waiver. ■