TRIAL PRACTICE SERIES

Testimonial Privileges

Third Edition

Volume 2

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When a party voluntarily discloses documents or communications to a government agency,[1] the documents and communications may lose the protection of the privilege and be subject to discovery by other parties, including private litigants.[2] Corporations have argued that these voluntary disclosures to government agencies amount to a selective waiver of the privilege solely for the benefit of the public agency's review, and should not be considered as a waiver for purposes of private civil litigation. Only a small minority of courts have adopted this concept of selective waiver.[3]

The clear trend, and the majority rule under federal law,

[Section 1:77]

[1]There is increasing pressure on companies to disclose internal investigatory materials to government agencies in order to avoid prosecution, or at least to obtain leniency in the event of criminal conviction. For example, amendments to the Federal Sentencing Guidelines that became effective on November 1, 2004 reduce an organization's "culpability score" if, among other factors, the organization "fully cooperated in the investigation" of its wrongdoing. See United States Sent. Guidelines § 8C2.5(g)(1). Application Note 12 to Section 8C2.5. The Guidelines provide the following guidance regarding when "cooperation" may require waiver of the attorney-client privilege:

> waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

[2]See D. Greenwald and M. Thomas, Selective Waiver of Privileges, For The Defense, December 2002.

[3]See, e.g., Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 1977-2 Trade Cas. (CCH) P 61591, 1978-1 Trade Cas. (CCH) P 61879, 23 Fed. R. Serv. 2d 1473, 24 Fed. R. Serv. 2d 1201 (8th Cir. 1977) (rejected by, Republic of Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 17 Fed. R. Serv. 3d 1476 (D.N.J. 1990)) and (disapproved of by, U.S. v. Massachusetts Institute of Technology, 957 F. Supp. 301, 97-1 U.S. Tax Cas. (CCH) P 50269, 37 Fed. R. Serv. 3d 711, 79 A.F.T.R.2d 97-595 (D. Mass. 1997)) and (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)). See also In re M & L Business Mach. Co., Inc., 161 B.R. 689 (D. Colo. 1993) (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)) (more likely to find waiver when the holder selectively discloses to the government, then later tries to reassert the privilege against the government or a grand jury rather than against a private litigant).

is that waiver as to even one government agency constitutes waiver as to all, including other government agencies and private litigation adversaries. The seminal case on selective waiver is *Diversified Industries, Inc. v. Meredith*.[4] In *Diversified*, a corporation responded to allegations that it had paid bribes to obtain business by forming an independent audit committee and retaining outside counsel to prepare an internal report on the issue. The internal report was subsequently produced to the SEC. The Eighth Circuit held that this disclosure constituted only a "limited waiver" which did not preclude the corporation from withholding the report from private litigants on the grounds of attorney-client privilege.[5] The Eighth Circuit explained: "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[6]

Most courts have rejected or at least applied a narrow

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[4]Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 1977-2 Trade Cas. (CCH) P 61591, 1978-1 Trade Cas. (CCH) P 61879, 23 Fed. R. Serv. 2d 1473, 24 Fed. R. Serv. 2d 1201 (8th Cir. 1977) (rejected by, Republic of Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 17 Fed. R. Serv. 3d 1476 (D.N.J. 1990)) and (disapproved of by, U.S. v. Massachusetts Institute of Technology, 957 F. Supp. 301, 97-1 U.S. Tax Cas. (CCH) P 50269, 37 Fed. R. Serv. 3d 711, 79 A.F.T.R.2d 97-595 (D. Mass. 1997)) and (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)).

[5]Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 611, 1977-2 Trade Cas. (CCH) P 61591, 1978-1 Trade Cas. (CCH) P 61879, 23 Fed. R. Serv. 2d 1473, 24 Fed. R. Serv. 2d 1201 (8th Cir. 1977) (rejected by, Republic of Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 17 Fed. R. Serv. 3d 1476 (D.N.J. 1990)) and (disapproved of by, U.S. v. Massachusetts Institute of Technology, 957 F. Supp. 301, 97-1 U.S. Tax Cas. (CCH) P 50269, 37 Fed. R. Serv. 3d 711, 79 A.F.T.R.2d 97-595 (D. Mass. 1997)) and (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)).

[6]Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 611, 1977-2 Trade Cas. (CCH) P 61591, 1978-1 Trade Cas. (CCH) P 61879, 23 Fed. R. Serv. 2d 1473, 24 Fed. R. Serv. 2d 1201 (8th Cir. 1977) (rejected by, Republic of Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 17 Fed. R. Serv. 3d 1476 (D.N.J. 1990)) and (disapproved of by, U.S. v. Massachusetts Institute of Technology, 957 F. Supp. 301, 97-1 U.S. Tax Cas. (CCH) P 50269, 37 Fed. R. Serv. 3d 711, 79 A.F.T.R.2d 97-595 (D. Mass. 1997)) and (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)). See also U.S. v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (applying the reasoning of Diversified); U.S. v. Buco, 1991 WL 82459 (D. Mass. 1991) (disclosure to Office of Thrift Supervision did not waive privilege for internal investiga-

construction of the selective waiver doctrine, and have held that selective disclosure of a document to the government constitutes complete waiver of the privilege. As the D.C. Circuit observed in one of the early selective waiver cases, the privilege was not designed to allow a client "to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others."[7]

Since the D.C. Circuit first rejected selective waiver, the First, Second, Third, Fourth and Sixth Circuits have rejected the selective waiver doctrine to varying degrees. In *Westinghouse Elec. Corp. v. Republic of Philippines*,[8] the Third Circuit held that disclosure to the government waived privileges, even when the disclosing party had entered into a confidentiality agreement with the government agency receiving the privileged materials. In that case, the SEC and the DOJ had investigated allegations that Westinghouse had obtained a contract to build a nuclear power plant in the Philippines by bribing foreign officials. After entering into a

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tion of banking violations); Schnell v. Schnall, 550 F. Supp. 650, 652–53, Fed. Sec. L. Rep. (CCH) P 98871, 12 Fed. R. Evid. Serv. 97, 35 Fed. R. Serv. 2d 885 (S.D. N.Y. 1982) (rejected by, Manufacturers and Traders Trust Co. v. Servotronics, Inc., 132 A.D.2d 392, 522 N.Y.S.2d 999 (4th Dep't 1987)) and (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)) (public policy of encouraging disclosure to SEC compels finding of selective waiver).

[7]Permian Corp. v. U.S., 665 F.2d 1214, 1219, 1220, Fed. Sec. L. Rep. (CCH) P 98280, 8 Fed. R. Evid. Serv. 1424, 32 Fed. R. Serv. 2d 429 (D.C. Cir. 1981). Occidental Petroleum produced a large number of documents to Mead under a stipulation that inadvertent production would not waive the attorney-client privilege. Occidental allowed the SEC access to these documents for an on-going SEC investigation under an agreement that prohibited certain further disclosures by the SEC. The Department of Energy then sought the disclosed documents from the SEC. The District of Columbia Circuit found that the disclosure of the documents to the SEC resulted in waiver. Permian Corp. v. U.S., 665 F.2d 1214, 1222, Fed. Sec. L. Rep. (CCH) P 98280, 8 Fed. R. Evid. Serv. 1424, 32 Fed. R. Serv. 2d 429 (D.C. Cir. 1981). The court refused to find that the public policy to encourage cooperation with the SEC overrode the requirements of the privilege. Permian Corp. v. U.S., 665 F.2d 1214, 1220–1222, Fed. Sec. L. Rep. (CCH) P 98280, 8 Fed. R. Evid. Serv. 1424, 32 Fed. R. Serv. 2d 429 (D.C. Cir. 1981). It concluded that any privilege had been waived, stating "the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality." Permian Corp. v. U.S., 665 F.2d 1214, 1222, Fed. Sec. L. Rep. (CCH) P 98280, 8 Fed. R. Evid. Serv. 1424, 32 Fed. R. Serv. 2d 429 (D.C. Cir. 1981).

[8]Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 35 Fed. R. Evid. Serv. 1070, 22 Fed. R. Serv. 3d 377 (3d Cir. 1991).

confidentiality agreement with the DOJ, and in reliance on SEC regulations stating that materials furnished during an investigation were non-public and confidential, Westinghouse provided internal investigation reports to the agencies. Almost a decade after the confidentiality agreement, the Philippines brought suit against Westinghouse and sought the reports Westinghouse had disclosed to the government. The Third Circuit held that, by disclosing the reports to the government years earlier, Westinghouse had waived its privilege as to *all* litigation adversaries, despite the terms of the confidentiality agreement and SEC regulations. The court reasoned that the protection of the attorney-client privilege was not required to encourage corporations to make such disclosures to a government agency since the corporation would most likely share any exculpating documents with the government willingly, privileged or not, in order to obtain lenient treatment.

In *U.S. v. Massachusetts Institute of Technology*,[9] the First Circuit refused to adopt the selective waiver doctrine. The court held that MIT fully waived the privilege with respect to documents it disclosed to a government audit agency (the DCAA) pursuant to the terms of a contract that it had with the government. Neither the government's interest in obtaining privileged information, nor MIT's interest in supporting its relationship with the government, justified preserving the attorney-client privilege. The court noted: "But the general principle that disclosure normally negates the privilege is worth maintaining. To maintain it here makes the law more predictable and certainly eases its administration."[10] Acknowledging the difficulty created by government demands, the court stated: " . . . MIT chose to place itself in this position by becoming a government contractor."[11]

Although the rule allowing selective waiver per se, as an-

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[9]U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 97-2 U.S. Tax Cas. (CCH) P 50955, 48 Fed. R. Evid. Serv. 66, 39 Fed. R. Serv. 3d 4, 80 A.F.T.R.2d 97-7981 (1st Cir. 1997).

[10]U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 685, 97-2 U.S. Tax Cas. (CCH) P 50955, 48 Fed. R. Evid. Serv. 66, 39 Fed. R. Serv. 3d 4, 80 A.F.T.R.2d 97-7981 (1st Cir. 1997).

[11]U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 686, 97-2 U.S. Tax Cas. (CCH) P 50955, 48 Fed. R. Evid. Serv. 66, 39 Fed. R. Serv. 3d 4, 80 A.F.T.R.2d 97-7981 (1st Cir. 1997). See also In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 294–310, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002), cert. dismissed, 539 U.S. 977, 124 S. Ct. 27, 156 L. Ed. 2d 690 (2003) (noting inconsistent application of selective waiver and following Westinghouse in rejecting selective waiver in favor of a "bright line" rule that disclosure waives the privilege); In re Steinhardt Partners,

L.P., 9 F.3d 230, 236, Fed. Sec. L. Rep. (CCH) P 97818, 27 Fed. R. Serv. 3d 726 (2d Cir. 1993) (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)) (court refused to acknowledge selective waiver in the case before it, but expressly declined to adopt a per se rule against selective waiver, leaving the door open where the parties enter into a confidentiality order); In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (waiver where party conducted an internal investigation into alleged fraudulent accounting procedures and disclosed the results to the government to avoid indictment; resulting waiver extended to non-disclosed materials, and even to undisclosed details underlying the published data, however, there was only a partial waiver for opinion work-product); In re Subpoenas Duces Tecum, 738 F.2d 1367, 1370, Fed. Sec. L. Rep. (CCH) P 91566, 16 Fed. R. Evid. Serv. 165, 39 Fed. R. Serv. 2d 611 (D.C. Cir. 1984) (relying on *Permian*, the court found that a party waived the privilege by disclosing information to the SEC, despite the fact that the party's transmittal letter stated that the documents were confidential and their submission to the SEC was not a waiver of any privilege); In re Sealed Case, 676 F.2d 793, 824, Fed. Sec. L. Rep. (CCH) P 98647, 82-1 U.S. Tax Cas. (CCH) P 9335, 10 Fed. R. Evid. Serv. 490, 33 Fed. R. Serv. 2d 1778, 50 A.F.T.R.2d 82-5637 (D.C. Cir. 1982) (company waived privilege by voluntarily submitting report of investigative counsel to the SEC; waiver included any documentation necessary to evaluate the report); In re Tyco Intern., Inc. Multidistrict Litigation (MDL 1335), 2004 DNH 53, 2004 WL 556715 (D.N.H. 2004) (disclosure of otherwise privileged material to the SEC and the New York District Attorney waived the privilege as to third-party private litigants, despite party's cover letters that stated it did not intend to waive its privileges, and an affidavit from an assistant district attorney who conceded he had agreed that disclosures would not constitute waiver); In re Lupron Marketing and Sales Practices Litigation, 2004 WL 764454 (D. Mass. 2004), subsequent determination, 2004 WL 1058108 (D. Mass. 2004) (disclosure of otherwise privileged material to DOJ waived privileges as to third party litigants, notwithstanding government's agreement to treat the materials with the confidentiality accorded to documents produced to a grand jury under Fed. R. Crim. P. 6(e)); U.S. v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003) (disclosure of investigative materials to SEC and US Attorney's Office waived privilege, despite agencies' agreement to keep the materials confidential; attorney-client privilege did not apply because the investigation was never intended to be confidential in light of company's advance agreement to disclose materials to the agencies); Information Resources, Inc. v. Dun & Bradstreet Corp., 999 F. Supp. 591, 593 (S.D. N.Y. 1998) (voluntary disclosure of privileged information to government agency in order to "incite it to attack the informant's adversary" waives privilege); Maryville Academy v. Loeb Rhoades & Co., Inc., 559 F. Supp. 7, 9, 12 Fed. R. Evid. Serv. 1324, 36 Fed. R. Serv. 2d 81 (N.D. Ill. 1982) (court rejected concept of selective waiver and found party's disclosure to the government constituted full waiver of the privilege). But see McDonnell Douglas Corp. v. U.S. E.E.O.C., 922 F. Supp. 235, 70 Fair Empl. Prac. Cas. (BNA) 980 (E.D. Mo. 1996) (disclosure of attorney-client privileged information to EEOC did not waive the privilege with respect to third parties; EEOC and producing party had agreed that production of privileged information to EEOC would not constitute waiver); S.E.C. v. Amster & Co., 126 F.R.D. 28, 30, Fed. Sec. L. Rep. (CCH) P 94480, 14 Fed.

nounced by the Eighth Circuit, is largely out of favor, there remains some debate over whether disclosure to the government waives privileges when the disclosing party has entered into a confidentiality agreement with the government. In *Westinghouse*, the Third Circuit held that disclosure to the government waived privileges, even when the disclosing party had entered into a confidentiality agreement with the government agency receiving the privileged materials.[12] The Second Circuit took a softer position in *Steinhardt Partners*. The court stated:

> [W]e decline to adopt a per se rule that voluntary disclosures to the government waive work-product protection . . . Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government . . . have entered into an explicit agreement that the [government agency] will maintain the confidentiality of the disclosed materials.[13]

In *U.S. v. Massachusetts Institute of Technology*,[14] the parties had not entered into a confidentiality agreement, but the court disposed of the selective waiver doctrine with such a broad stroke, it seems that the existence of a confidentiality agreement would have made little difference.

The Sixth Circuit struck the most decisive blow yet to the selective waiver doctrine with its holding in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*,[15] In that case, Columbia/HCA refused to disclose its internal audit

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R. Serv. 3d 138 (S.D. N.Y. 1989) (recognizing selective waiver if the party holding the privilege and the government have entered into a binding agreement protecting the privilege); Saito v. McKesson HBOC, Inc., 2002 WL 31657622 (Del. Ch. 2002) (applying selective waiver doctrine based in part on Delaware's strong preference not to find waiver of privilege).

[12]Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1426, 35 Fed. R. Evid. Serv. 1070, 22 Fed. R. Serv. 3d 377 (3d Cir. 1991).

[13]In re Steinhardt Partners, L.P., 9 F.3d 230, 236, Fed. Sec. L. Rep. (CCH) P 97818, 27 Fed. R. Serv. 3d 726 (2d Cir. 1993) (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)). See Maruzen Co., Ltd. v. HSBC USA, Inc., 2002 WL 1628782 (S.D. N.Y. 2002) (following In re Steinhardt and finding no waiver of attorney-client privilege where parties entered into a confidentiality agreement before internal investigation materials were disclosed to U.S. Attorney's office).

[14]U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 97-2 U.S. Tax Cas. (CCH) P 50955, 48 Fed. R. Evid. Serv. 66, 39 Fed. R. Serv. 3d 4, 80 A.F.T.R.2d 97-7981 (1st Cir. 1997).

[15]In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002), cert. dismissed, 539 U.S. 977, 124 S. Ct. 27, 156 L. Ed. 2d 690 (2003).

materials to the Department of Justice, and ultimately did so only after entering into a confidentiality agreement with the government that stated: "[t]he disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim under the work-product doctrine."[16] Despite the agreement, the court rejected "the concept of selective waiver, in any of its various forms," and affirmed an order compelling the release of the audits to private litigants.[17] Some courts, however, have left the door open to the selective waiver doctrine where the parties entered into a confidentiality agreement with the government.[18]

X. EXTENSIONS OF THE PRIVILEGE BASED ON COMMON INTEREST

§ 1:78 In general

Ordinarily the presence of third parties at a professional legal consultation, or the later disclosure to third persons of communications made as part of a legal relationship, will destroy the confidentiality that is essential to a valid assertion of the attorney-client privilege. Courts have, however, recognized several extensions of the attorney-client privilege which allow clients and lawyers with common interests to

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[16]In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 292, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002), cert. dismissed, 539 U.S. 977, 124 S. Ct. 27, 156 L. Ed. 2d 690 (2003) (emphasis added).

[17]In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 302, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002), cert. dismissed, 539 U.S. 977, 124 S. Ct. 27, 156 L. Ed. 2d 690 (2003). See also U.S. v. Bergonzi, 214 F.R.D. 563 (N.D. Cal. 2003), opinion amended and superseded, 216 F.R.D. 487 (N.D. Cal. 2003) (rejecting selective waiver doctrine despite confidentiality agreement with the government). But see Saito v. McKesson HBOC, Inc., 2002 WL 31657622 (Del. Ch. 2002) (citing Delaware's general reluctance to find waiver of privileges, the court upheld a form of selective waiver, compelling production of documents disclosed to the government prior to execution of a confidentiality agreement, and protecting documents disclosed after the confidentiality order was in place).

[18]See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 308, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002), cert. dismissed, 539 U.S. 977, 124 S. Ct. 27, 156 L. Ed. 2d 690 (2003) (J. Boggs dissenting) ("the circuit courts of appeal are deeply split on whether a disclosure of privileged information to the government, in the course of an investigation and with a confidentiality agreement, waives the privilege as to all other parties.").

privilege; hence a client's records delivered by the client's accountant to a second accountant retained by the taxpayer's attorney would not be protected.[9] Where a joint defense is undertaken by parties and their lawyers, the protection can in proper cases extend to communications which pass from one party to the accountant hired on behalf of both parties.[10] A party, however, cannot resurrect the privilege by adding another party, and that party's accountant to the mix. This is true even if they share a common interest. The common interest rule presumes a valid underlying privilege. One cannot create a privilege, where previously there was none, simply by introducing a third party (with or without a common interest) into the circle within which documents are shared.[11]

§ 3:5 Risk of waiver of attorney-client privilege and work product protection through disclosure to auditors

In response to recent corporate accounting scandals, the long-standing role of the independent auditor as a "public watchdog" with responsibilities to creditors, stockholders, and the investing public, has taken on heightened significance.[1] In order to comply with SEC regulations and generally accepted accounting standards, auditors request a wide variety of information in the course of their annual audits. Among other things, auditors may request informa-

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and Co. Partnership, 89-1 U.S. Tax Cas. (CCH) P 9163, 63 A.F.T.R.2d 89-650, 1989 WL 47285 (W.D. Pa. 1989), at *2 (attorney-client privilege does not prevent subpoena of amended tax returns, even if the accountant prepares the returns at the taxpayer's attorney's request; preparation of a tax return usually does not require legal advice).

[9]U.S. v. Clark, 847 F.2d 1467, 1470, 88-1 U.S. Tax Cas. (CCH) P 9369, 25 Fed. R. Evid. Serv. 1391, 61 A.F.T.R.2d 88-1313 (10th Cir. 1988).

[10]U.S. v. Schwimmer, 892 F.2d 237, 244, 29 Fed. R. Evid. Serv. 434 (2d Cir. 1989).

[11]Cavallaro v. U.S., 284 F.3d 236, 2002-1 U.S. Tax Cas. (CCH) P 50330, 52 Fed. R. Serv. 3d 761, 89 A.F.T.R.2d 2002-1699 (1st Cir. 2002)

[Section 3:5]

[1]See In re Raytheon Securities Litigation, 218 F.R.D. 354, 360 (D. Mass. 2003), citing U.S. v. Arthur Young & Co., 465 U.S. 805, 817, 818, 104 S. Ct. 1495, 79 L. Ed. 2d 826, Fed. Sec. L. Rep. (CCH) P 99721, 84-1 U.S. Tax Cas. (CCH) P 9305, 15 Fed. R. Evid. Serv. 15, 53 A.F.T.R.2d 84-866 (1984); Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 116 (S.D. N.Y. 2002) ("And, as has become crystal clear in the face of the many accounting scandals that have arisen as of late, in order for auditors to properly do their job, they must not share common interests with the company they audit. '[G]ood auditing requires adversarial tension between the auditor and the client.'") (citation omitted).

tion from counsel regarding loss contingencies[2] ("audit letters") and may request access to board minutes, case reserves, and other sensitive information, much of which may be protected by the attorney-client privilege and/or the work product doctrine.

Because generally accepted accounting standards[3] require financial statements to accrue or disclose loss contingencies, auditors require their clients to provide them with information regarding pending or threatened litigation and actual or possible claims and assessments. Auditors typically request that clients ask counsel to provide them with information regarding litigation, claims, and assessments involving the client. In some cases, auditors may be unwilling and/or unable to issue unqualified audit opinions unless they review these types of information.[4]

Clients and their attorneys are faced with a serious dilemma in attempting to respond to auditors' requests for information. On the one hand, failure to disclose material loss contingencies may expose clients and their attorneys to liability for misrepresentation.[5] On the other hand, disclosures may waive both the attorney-client privilege and work-product protection over materials disclosed, while at the same time giving notice to those possessing potential claims against the corporation; in effect, advertising for lawsuits that might otherwise not be filed.[6]

The American Bar Association (ABA) and the American Institute of Certified Public Accountants (AICPA) have attempted through separate statements of policy to reach an

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[2]Loss contingency is defined as "an existing condition, situation or set of circumstances involving uncertainty as to possible . . . loss . . . to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur." American Institute of Certified Public Accounts, Statement of Financial Accounting Standards No. 5, Accounting for Contingencies (Mar 1975), reprinted at 31 Bus. Law 1727 (1976).

[3]American Institute of Certified Public Accounts, Statement of Financial Accounting Standards No 5, Accounting for Contingencies (Mar 1975), reprinted at 31 Bus. Law 1727 (1976). See also American Bar Association, Auditor's Letter Handbook (1990).

[4]American Institute of Certified Public Accounts, Statement of Financial Accounting Standards No 5, Accounting for Contingencies (Mar 1975), reprinted at 31 Bus. Law 1727 (1976). See also American Bar Association, Auditor's Letter Handbook, 24–25 (1990); Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 115, 116 (S.D. N.Y. 2002) (discussing auditors and their independent role in providing opinion letters).

[5]See ch. 1.

[6]Michael F. Sharp, Abraham M. Stanger, Audit Inquiry Response In The Arena of Discovery: Protected By the Work Product Doctrine, 56 Bus. Law 183 (2000).

accommodation regarding the responsibilities of auditors, clients, and attorneys in making such disclosures. The statements attempt to reconcile the public interest in full financial disclosure with the public interest in preserving the confidentiality of attorney-client communications.

The AICPA Statement provides that auditors should:

> b. Obtain from management a description and evaluation of litigation, claims and assessments that existed at the date of the balance sheet being reported on . . .
>
> c. Obtain assurances from management . . . that they have disclosed all unasserted claims that the lawyer has advised them are probable of assertion and must be disclosed in accordance with Statement of Financial Accounting Standards No. 5.[7]

The AICPA Statement also provides that the auditor should require the client to send a letter asking counsel to corroborate or supplement this information as to matters to which counsel devoted "substantive attention" on behalf of the company.[8]

With respect to pending or overtly threatened litigation, the AICPA statement advises that clients should request counsel to provide the auditor with a description of the nature of the matter, the progress of the case to date, the action the client plans to take, an evaluation of the likelihood of an unfavorable outcome, and an estimate, if one can be made, of the amount or range of potential loss.

Financial Accounting Standard No. 5 provides that disclosure of a loss contingency "shall be made when there is at least a reasonable possibility that a loss or an additional loss may have been incurred."[9] It continues by stating that:

> The disclosure shall indicate the nature of the contingency and shall give an estimate of the possible loss or state that such an estimate cannot be made. Disclosure is not required of a loss contingency involving an unasserted claim or assessment when there has been no manifestation by a potential claimant of an awareness of a possible claim or assessment unless it is considered probable that a claim will be asserted

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[7]American Institute of Certified Public Accountants, Statement of Auditing Standards No 12, ¶ 5 (Jan 1976). For a description of the requirements of Financing Accounting Standard No. 5, see text below.

[8]American Institute of Certified Public Accountants, Statement of Auditing Standards No 12 ¶¶ 8 & 9 (Jan 1976).

[9]American Institute of Certified Public Accountants, Statement of Financial Accounting Standards No 5, Accounting for Contingencies ¶ 10 (Mar 1975), reprinted at 31 Bus. Law 1727, 1728 (1976) (emphasis added).

> and there is a reasonable possibility that the outcome will be unfavorable.[10]

The ABA Statement of Policy[11] takes a narrower approach to disclosure. First, the Statement carefully limits the types of information that may properly be provided by the lawyer to the auditor:

> When properly requested by the client, it is appropriate for the lawyer to furnish to the auditor information concerning the following matters if the lawyer has been engaged by the client to represent or advise the client professionally with respect thereto and he has devoted substantive attention to them in the form of legal representation or consultation:
>
> (a) overtly threatened or pending litigation, whether or not specified by the client; (b) a contractually assumed obligation which the client has specifically identified and upon which the client has specifically requested, in the inquiry letter or a supplement thereto, comment to the auditor; (c) an unasserted possible claim or assessment which the client has specifically identified and upon which the client has specifically requested, in the inquiry letter or a supplement thereto, comment to the auditor.[12]

With regard to category (c) above, encompassing cases in which there has been no manifestation by a potential claimant of a present intention to assert a claim, the ABA Statement provides that the client should request the lawyer to furnish information to the auditor only if: (1) the claim is material; (2) the "prospects of non-assertion seem slight"; and (3) "the prospects of the claimant not succeeding are judged to be extremely doubtful."[13]

In all cases, the ABA Statement notes, auditors should assume that lawyers will advise their clients on the applicable requirements of Financial Accounting Standard No. 5 and

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[10]American Institute of Certified Public Accountants, Statement of Financial Accounting Standards No 5, Accounting for Contingencies ¶ 10 (Mar 1975), reprinted at 31 Bus. Law 1727, 1728 (1976) (emphasis added).

[11]American Bar Association, Statement 31 Bus Law 1709 of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (1975), reprinted at 31 Bus. Law 1709 (1976). See also American Bar Association, Auditor's Letter Handbook, 8–9 (1990).

[12]American Bar Association, Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information ¶ 5 (1975), reprinted at 31 Bus. Law 1709 (1976) (emphasis in original). See also American Bar Association, Auditor's Letter Handbook, 8–9 (1990).

[13]American Bar Association, Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information ¶ 5 (1975), reprinted at 31 Bus. Law 1709 (1976) (emphasis added). See also American Bar Association, Auditor's Letter Handbook, 8–9 (1990).

the need for disclosure in each instance.[14] The Commentary on the ABA Statement cautions, however, that:

> If a client discloses to a third party a part of any privileged communication he has made to his attorney, there may have been a waiver as to the whole communication; further, it has been suggested that giving accountants access to privileged statements made to attorneys may waive any privilege as to those statements. Any disclosure of privileged communications relating to a particular subject matter may have the effect of waiving the privilege on other communications with respect to the same subject matter.
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> . . .
>
> . . . It might be argued that any evaluation of a claim, to the extent based upon a confidential communication with the client, waives any privilege with respect to the claim. Another danger inherent in a lawyer's placing a value on a claim, or estimating the likely result, is that such a statement might be treated as an admission or might be otherwise prejudicial to the client.[15]

It is well-settled under federal common law that the attorney-client privilege generally does not protect communications with auditors or accountants.[16] The exception to this rule is where the auditor or accountant is acting as the agent of counsel to assist counsel in formulating specific

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[14]American Bar Association, Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information ¶ 6 (1975), reprinted at 31 Bus. Law 1709 (1976). See also American Bar Association, Auditor's Letter Handbook, 10 (1990).

[15]American Bar Association, Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information commentary to ¶ 1 (1975), reprinted at 31 Bus. Law 1709 (1976) (emphasis in original). See also American Bar Association, Auditor's Letter Handbook, 12–13 (1990).

[16]See, e.g., In re John Doe Corp., 675 F.2d 482, 488, Fed. Sec. L. Rep. (CCH) P 98648, 10 Fed. R. Evid. Serv. 1390 (2d Cir. 1982) ("We have previously held that statements to accountants unrelated to the seeking of legal advice are not privileged.") (citations omitted); U.S. v. El Paso Co., 682 F.2d 530, 540, 82-2 U.S. Tax Cas. (CCH) P 9534, 11 Fed. R. Evid. Serv. 502, 34 Fed. R. Serv. 2d 918, 50 A.F.T.R.2d 82-5530 (5th Cir. 1982) ("Our Circuit does not recognize an accountant-client communications privilege and, as the Supreme Court has acknowledged, neither does any other federal court.") (citations omitted); In re Honeywell Intern., Inc. Securities Litigation, 2003 WL 22722961 (S.D. N.Y. 2003), at *3 (attorney-client privilege does not extend to communications between a company and its accountants or auditors); First Federal Sav. Bank of Hegewisch v. U.S., 55 Fed. Cl. 263, 269 (2003) (documents transmitted to an agent for the preparation of an audited financial statement are not privileged); U.S. v. South Chicago Bank, 1998 WL 774001 (N.D. Ill. 1998), at *3 ("auditors are not generally part of the circle of persons, including secretaries and interpreters, for example, with whom confidential information may be shared without destroying the privilege.") (citations omitted).

legal advice for the client.[17] Independent auditors conducting annual audits are not acting as agents of counsel for the purpose of providing legal advice, and communications between the corporation or its counsel and the auditor generally are not protected by the attorney-client privilege.[18] Disclosure to an auditor of information that is otherwise privileged under the attorney-client privilege generally will waive the privilege,[19] including the privilege over unredacted

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[17]See, e.g., Ferko v. National Ass'n for Stock Car Auto Racing, Inc., 218 F.R.D. 125, 140 (E.D. Tex. 2003). In Ferko, general counsel of International Speedway Corp. hired an independent appraisal firm to investigate and appraise the economic value of certain agreements pursuant to recently revised accounting standards relating to intangible assets, because counsel believed that the company had taken an aggressive stance that could trigger litigation with the SEC. 218 F.R.D. at 129. Although the court noted the general rule that "a client's disclosure of documents directly to an auditor, accountant or tax analyst destroys confidentiality with respect to those documents" (218 F.R.D. at 134), the court held that communications with the accountant were privileged in this case because counsel had hired the accountant to help translate complicated financial information to enable him to formulate legal advice for the company. 218 F.R.D. at 139; see also § 3:4 (accountants as privileged agents).

[18]See U.S. v. El Paso Co., 682 F.2d 530, 539, 82-2 U.S. Tax Cas. (CCH) P 9534, 11 Fed. R. Evid. Serv. 502, 34 Fed. R. Serv. 2d 918, 50 A.F.T.R.2d 82-5530 (5th Cir. 1982); First Federal Sav. Bank of Hegewisch v. U.S., 55 Fed. Cl. 263, 268 (2003); In re Pfizer Inc. Securities Litigation, 1993 WL 561125 (S.D. N.Y. 1993), at *7.

[19]U.S. v. El Paso Co., 682 F.2d 530, 540, 82-2 U.S. Tax Cas. (CCH) P 9534, 11 Fed. R. Evid. Serv. 502, 34 Fed. R. Serv. 2d 918, 50 A.F.T.R.2d 82-5530 (5th Cir. 1982) (disclosure of tax pool analysis to auditors "destroys confidentiality" and waives the attorney-client privilege); In re John Doe Corp., 675 F.2d 482, 488, 489, Fed. Sec. L. Rep. (CCH) P 98648, 10 Fed. R. Evid. Serv. 1390 (2d Cir. 1982) (conversation between corporate general counsel and accountant during course of annual audit regarding questionable payments to a lawyer that had been the subject of an internal investigation "either waives the privilege or, what is much the same thing in the circumstances of this case, evidences a corporate decision to use the materials for purposes other than seeking legal advice"); Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162, Fed. Sec. L. Rep. (CCH) P 97004, 36 Fed. R. Evid. Serv. 761 (9th Cir. 1992) (Pennzoil conceded that district court was correct in finding waiver with respect to documents disclosed to outside auditor; appellate court limited scope of waiver to the communications actually disclosed rather than extending it to all communications concerning the same subject matter); In re Honeywell Intern., Inc. Securities Litigation, 2003 WL 22722961 (S.D. N.Y. 2003), at *3 (disclosure to outside auditor waived attorney-client privilege); U.S. ex rel. Robinson v. Northrop Grumman Corp., 2002 WL 31478259 (N.D. Ill. 2002), subsequent determination, 2003 WL 21439871 (N.D. Ill. 2003) (privilege with respect to documents prepared by auditors during course of first, privileged review, waived to extent used by same auditors for second, non-privileged review); see also U.S. ex rel. Robinson v. Northrop Grumman Corp., 2003 WL 21439871 (N.D. Ill. 2003), at *3 (following further review, Northrop Grum-

board minutes that have been disclosed as part of a regular audit.[20]

The courts are less uniform when confronting the work product protection. The issue of waiver of the work-product doctrine arises with respect to two types of documents: documents prepared by the corporation or counsel for the auditor, such as audit letters that assess litigation or potential litigation, and documents prepared in anticipation of litigation that were not prepared for the auditor, but which are disclosed to the auditor during the course of an audit. The court in *In re Raytheon Securities Litigation*[21] recently analyzed whether audit letters prepared by counsel in response to an auditor's inquiry are protected by the work product doctrine. In *Raytheon*, plaintiff moved to compel the company to produce audit opinion letters and other documents prepared by its attorneys that had been submitted to the company's independent audit or for use in an audit.[22] The opinion provides a detailed discussion of the split among the courts on the question whether opinion letters provided to auditors are protected by the work product doctrine. The outcome often turns on the standard that a court applies for the phrase "prepared in anticipation of litigation or for trial" in Rule 26(b)(3) of the Federal Rules of Civil Procedure. In jurisdictions where the phrase is interpreted to encompass documents that have been prepared *"because of"* litigation, the courts generally find that audit opinion letters are protected because the letters were prepared "because of"

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man failed to sustain its burden of demonstrating that interview notes were not used for the second, non-privileged review).

[20]See First Federal Sav. Bank of Hegewisch v. U.S., 55 Fed. Cl. 263 (2003) (disclosure of unredacted board minutes to auditor during annual audit waived the attorney-client privilege that otherwise protected counsel's advice reflected in the minutes); U.S. v. South Chicago Bank, 1998 WL 774001 (N.D. Ill. 1998), at *3 ("By voluntarily disclosing the minutes from the meetings of the boards of directors and special fraud committees to the year-end auditors in full and to their insurance company in part, the banks have relinquished the right to assert the privilege now against the government."); Eglin Federal Credit Union v. Cantor, Fitzgerald Securities Corp., 91 F.R.D. 414, 7 Fed. R. Evid. Serv. 1604, 31 Fed. R. Serv. 2d 709, 31 Fed. R. Serv. 2d 713 (N.D. Ga. 1981) (disclosure of board minutes for the purposes of annual audit waives any applicable attorney-client privilege).

[21]In re Raytheon Securities Litigation, 218 F.R.D. 354 (D. Mass. 2003).

[22]In re Raytheon Securities Litigation, 218 F.R.D. 354, 356 (D. Mass. 2003).

litigation.[23]

Courts in jurisdictions that apply the "primary motivation" test to the "anticipation of litigation" requirement generally find that audit letters are not protected by the work product doctrine.[24]

To the extent that a company discloses to its auditor documents that were prepared in the anticipation of litigation and not for the auditor, a few courts have held that the work product protection may be waived. The work product protec-

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[23]In re Raytheon Securities Litigation, 218 F.R.D. 354, 358 (D. Mass. 2003). See U.S. v. Adlman, 134 F.3d 1194, 1200, 98-1 U.S. Tax Cas. (CCH) P 50230, 39 Fed. R. Serv. 3d 1189, 81 A.F.T.R.2d 98-820 (2d Cir. 1998) (court adopts "because of" approach and concludes, in dicta, that work product doctrine would protect a memorandum prepared by a company's attorneys at an independent auditor's request "estimating the likelihood of success in litigation and an accompanying analysis of the company's legal strategies and options to assist it in estimating what should be reserved for litigation losses"); In re Honeywell Intern., Inc. Securities Litigation, 2003 WL 22722961 (S.D. N.Y. 2003), at *6 (company's assertion of work product protection for its audit letters and litigation reports prepared by its internal and outside counsel, as well as the auditor's documents memorializing the company's opinion work product, was proper); Southern Scrap Material Co. v. Fleming, 2003 WL 21474516 (E.D. La. 2003), at *9 (work product doctrine applies to audit letters sent to auditor by company's outside counsel that summarize on-going litigation and reflect counsel's mental impressions, opinions and litigation strategy); In re Pfizer Inc. Securities Litigation, 1993 WL 561125 (S.D. N.Y. 1993), at *6 (disclosure of individual case reserves to company's auditor did not waive the work product protection); Tronitech, Inc. v. NCR Corp., 108 F.R.D. 655, 656, 1986-1 Trade Cas. (CCH) P 67161, 3 Fed. R. Serv. 3d 1265 (S.D. Ind. 1985) (an audit letter "is prepared because of the litigation, and it is comprised of the sum total of the attorney's conclusions and legal theories concerning that litigation").

[24]In re Raytheon Securities Litigation, 218 F.R.D. 354, 358 (D. Mass. 2003). See U.S. v. Gulf Oil Corp., 760 F.2d 292, 297, 17 Fed. R. Evid. Serv. 896, 1 Fed. R. Serv. 3d 528 (Emer. Ct. App. 1985) (documents created in response to auditor's inquiry were not created for the primary purpose of assisting the company in litigation but rather to assist the auditor to prepare financial reports that would satisfy the requirements of the federal securities laws); U.S. v. El Paso Co., 682 F.2d 530, 543, 54482-2 U.S. Tax Cas. (CCH) P 9534, 11 Fed. R. Evid. Serv. 502, 34 Fed. R. Serv. 2d 918, 50 A.F.T.R.2d 82-5530 (5th Cir. 1982) (documents "written ultimately to comply with SEC regulations" were prepared "with an eye on its business needs, nor on its legal ones" and do not "contemplate litigation in the sense required to bring it within the work product doctrine"); Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co., 117 F.R.D. 292, 298 (D.D.C. 1987) (declining to extend work product protection to audit letters prepared by an attorney where Magistrate Judge's in camera examination of the letter reveals that they were not prepared to assist company in present or reasonably anticipated litigation but rather to assist accounting firm "in the performance of regular accounting work done by such accounting firms").

tion may be waived through disclosure.[25] Disclosures to non-adversary third parties generally does not waive the protection unless it substantially increases the opportunity for potential adversaries to obtain the information.[26] Some courts have held that disclosure to auditors does not substantially increase this opportunity.[27] Other courts have focused on the independence of the auditor and the auditor's responsibilities to creditors and the investing public.[28] The court in *Raytheon* quoted the United States Supreme Court's characterization of an independent auditor in *United States v. Arthur Young & Co.*:

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.[29]

The court in the *Raytheon* decision did not decide whether the company's disclosure of work product to its auditors waived that protection, and instructed the company to produce the documents at issue to the court *in camera* so that the court could determine, among other things, "the scope of litigation information an independent auditor or audited company can reasonably be expected to disclose in public financial reports."[30] In an unpublished Order, the court in *Raytheon* subsequently held that the company had waived the work product protection by disclosing the documents to

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[25]In re Raytheon Securities Litigation, 218 F.R.D. 354, 359 (D. Mass. 2003).

[26]In re Raytheon Securities Litigation, 218 F.R.D. 354, 360 (D. Mass. 2003). See also ch. 2.

[27]In re Pfizer Inc. Securities Litigation, 1993 WL 561125 (S.D. N.Y. 1993), at *6 (auditor shared common interests with company, therefore auditor is "not reasonably viewed as a conduit to a potential adversary").

[28]In re Raytheon Securities Litigation, 218 F.R.D. 354 (D. Mass. 2003).

[29]U.S. v. Arthur Young & Co., 465 U.S. 805, 817–818, 104 S. Ct. 1495, 79 L. Ed. 2d 826, Fed. Sec. L. Rep. (CCH) P 99721, 84-1 U.S. Tax Cas. (CCH) P 9305, 15 Fed. R. Evid. Serv. 15, 53 A.F.T.R.2d 84-866 (1984).

[30]*In re Raytheon Securities Litigation, 218 F.R.D. 354, 361 (D. Mass. 2003)*.

its auditors.[31] There is some limited additional authority supporting waiver based on disclosure of work product to a company's auditors.[32] Courts that focus on the independence of auditors may draw further support from the recently enacted Sarbanes-Oxley Act, which enhances the independence requirements for auditors.[33]

II. STATE LAW

§ 3:6 Generally

Eighteen states have enacted statutes which provide for an accountant-client privilege: Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, New Mexico,

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[31]In re Raytheon Sec. Litig., No. Civ. A. 99-12142-PBS, unpublished Order, at pp. 1, 2 (D. Mass. February 3, 2004). The Order states in part: "PwC has indicated that it relied on these materials in performing its audit procedures and that it 'intends to introduce evidence of such work as necessary to rebut plaintiff's assertions that PwC failed to conduct a GAAS audit.' It is permitted to do so 'in the case of legal process or the auditor's defense of the audit'. See ABA Statement of Policy Regarding Lawyers' Response to Auditors' Requests for Information, ¶ 7 and Commentary . . . Therefore, Raytheon understood that PwC retained the right to disseminate the information for the limited purpose of defending the audit, and it has waived any work product protection (even for opinion work product) at least to the extent the standard was applicable." The court ordered that any opinion work product be sealed and subject to a protective order so that trial adversaries in other litigation would not have access to counsel's opinions. In re Raytheon Sec. Litig., No. Civ. A. 99-12142-PBS, unpublished Order, at p. 2 (D. Mass. February 3, 2004).

[32]See Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 116, 117 (S.D. N.Y. 2002) (Auditor's interests not aligned with company's; while disclosure of special litigation committee minutes to auditor may not substantially increase the risk that such work product would reach potential adversaries, disclosure to auditor did not serve the privacy interests that the work product doctrine was intended to protect); In re Diasonics Securities Litigation, Fed. Sec. L. Rep. (CCH) P 92817, 1986 WL 53402 (N.D. Cal. 1986) (documents disclosed to public auditor not entitled to work product protection and, when entitled to such protection, the protection was waived). But see Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., 2004 WL 2389822 (S.D. N.Y. 2004) at *5 to 8 (holding that the relationship of the auditor should be evaluated on a case by case basis and finding no waiver where company supplied internal investigation reports to its auditor.

[33]See generally Matthew A. Melone, United States Accounting Standards — Rules or Principles? The Devil is Not in the Details, 58 U. Miami L. Rev. 1161, 1210–1213 (2004) (discussing Sarbanes-Oxley rules increasing independence of auditors); Larry Cata Backer, The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors To Detect and Report Corporate Wrongdoing Beyond The Federal Securities Laws, 77 St. John's L. Rev. 919 (2003); Jared Kopel, The SEC's New Auditor Independence Rules, 17 No. 3 Insights 2, March, 2003.

I. INTRODUCTION

§ 4:1 The privilege defined

Research References

West's Key Number Digest, Witnesses ⚿297

The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person... shall be compelled in any criminal case to be a witness against himself. . . ."[1] Once defined by the Supreme Court as "the essential mainstay of our adversary system,"[2] the privilege against self-incrimination guarantees each individual the right to remain silent without penalty,[3] and, more specifically, the right not to be compelled to produce testimonial or communicative evidence that may be incriminating. A witness protected by the privilege may rightfully refuse to answer questions or testify unless he or she is protected against the use of the compelled testimony, and evidence derived from compelled testimony, in any subsequent criminal prosecution against him or her. If the witness is nonetheless compelled to answer without such protection, the answers are inadmissible against him or her in a subsequent criminal trial.[4]

[Section 4:1]

[1]The Fourteenth Amendment makes the Fifth Amendment privilege binding on the states as well as the federal government. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). A state may grant its citizens greater, but not less, protection against self-incrimination than that of the Fifth Amendment. See U. S. ex rel. Laino v. Warden of Wallkill Prison, 246 F. Supp. 72, 77, 78 (S.D. N.Y. 1965), judgment aff'd, 355 F.2d 208 (2d Cir. 1966).

[2]Miranda v. Arizona, 384 U.S. 436, 460, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966); see also Murphy v. Waterfront Com'n of New York Harbor, 378 U.S. 52, 55, 84 S. Ct. 1594, 12 L. Ed. 2d 678, 56 L.R.R.M. (BNA) 2544, 49 Lab. Cas. (CCH) P 51102 (1964) (the Fifth Amendment privilege "reflects many of our fundamental values and most noble aspirations . . .").

[3]Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

[4]Garner v. U. S., 424 U.S. 648, 653, 96 S. Ct. 1178, 47 L. Ed. 2d 370, 76-1 U.S. Tax Cas. (CCH) P 9301, 76-1 U.S. Tax Cas. (CCH) P 16218, 37 A.F.T.R.2d 76-1042-A (1976).

In light of the historical origins of the privilege,[5] courts have applied the privilege broadly. The Supreme Court has held that the privilege should "be accorded liberal construction in favor of the right it was intended to secure."[6] The privilege may be invoked in many types of proceedings: civil, criminal, quasi-criminal, administrative, legislative, judicial, investigatory, and adjudicatory. The privilege also bars disclosures that the witness "reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[7]

The privilege is not unlimited, however. It may be invoked only to protect against "real dangers, not remote and speculative possibilities,"[8] and only to avoid being forced to personally produce incriminating evidence, not to prevent the production of incriminating evidence from other sources. Ultimately, the judge, focusing on what a "truthful answer might disclose,"[9] must determine the legitimacy of the witness' claim of privilege.

When a witness invokes the Fifth Amendment privilege against self-incrimination, the judge must determine whether that privilege is applicable to the case at hand. As a general rule, where there can be no further incrimination, there is no basis for the assertion of the privilege. If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no fur-

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[5]For good discussions of the historical development of the privilege, see Ullmann v. U.S., 350 U.S. 422, 445-49, 76 S. Ct. 497, 100 L. Ed. 511, 53 A.L.R.2d 1008 (1956), and sources cited in De Luna v. U.S., 308 F.2d 140, 144 n3, 1 A.L.R.3d 969 (5th Cir. 1962) (rejected by, U.S. v. Pirro, 76 F. Supp. 2d 478 (S.D. N.Y. 1999)); see also 8 Wigmore § 2250, at 267–92 (McNaughton rev ed 1961); L. Levy, Origins of the Fifth Amendment (1968).

[6]Hoffman v. U. S., 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951); see also Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[7]Kastigar v. U.S., 406 U.S. 441, 445, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Izen v. Catalina, 256 F.3d 324 (5th Cir. 2001).

[8]Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972); see also Marchetti v. U.S., 390 U.S. 39, 53, 88 S. Ct. 697, 19 L. Ed. 2d 889, 68-1 U.S. Tax Cas. (CCH) P 15800, 21 A.F.T.R.2d 539 (1968) (danger must be "real and appreciable" not merely "frifling or imaginary"); U.S. v. Bowling, 239 F.3d 973, 976 (8th Cir. 2001).

[9]Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972).

ther incrimination to be feared.[10]

The duty of a trial court when confronted with an invocation of a party's Fifth Amendment privilege in a civil case is to "strive to accommodate a party's Fifth Amendment interests" while at the same time being careful to "ensure that the opposing party is not unduly disadvantaged." The burden on the party asserting the privilege "should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side."[11]

In the wake of the Supreme Court's decision in *Brogan v. U.S.*,[12] which rejected the "exculpatory no" doctrine and held that simple denials of culpability to investigators can be prosecuted as a false statement, one further caveat must be added. To assert the privilege, a witness may either invoke the privilege or (if wrongly required by a judicial officer) testify truthfully and seek later to have the wrongfully compelled testimony suppressed as violative of the privilege. However, false statements under oath—even if obtained under a grant of immunity—can be the basis of a subsequent perjury prosecution.[13]

As in other areas of constitutional law, the precise scope of the Fifth Amendment privilege is not constant, although it is possible to identify recurring themes. This chapter is intended to describe the contours of the privilege articulated by the federal courts; counsel are advised to consult state precedents where necessary. The chapter is also intended to distinguish those aspects of the privilege that are relatively well established from those that are relatively unsettled.

The case law in this area is both voluminous and complex. Thus, the chapter focuses primarily on the key elements of the privilege. After discussing the concept of incrimination, the chapter turns to the following questions: First, who may (and who may not) claim the privilege? Second, in which proceedings may the privilege be claimed? Third, what evidence falls within the privilege? Fourth, what constitutes compulsion? Fifth, what are the mechanics of claiming and protecting the privilege? Finally, how and to what extent may the privilege be waived or abrogated?

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[10]In re Vitamins Antitrust Litigation, 120 F. Supp. 2d 58, 2000-2 Trade Cas. (CCH) P 73092 (D.D.C. 2000).

[11]In re Vitamins Antitrust Litigation, 120 F. Supp. 2d 58, 2000-2 Trade Cas. (CCH) P 73092 (D.D.C. 2000).

[12]Brogan v. U.S., 522 U.S. 398, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998).

[13]U. S. v. Apfelbaum, 445 U.S. 115, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980).

