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WHITE-COLLAR CRIME

Expert Analysis

Personal Attorney-Client Privilege In Internal Investigations

"We here explore the treacherous path which corporate counsel must tread under the attorney-client privilege when conducting an internal investigation to advise a publicly traded company on its financial disclosure obligations."[1]

So begins a recent opinion of the U.S. Court of Appeals for the Ninth Circuit, addressing a corporate executive's claim of privilege over information shared with outside counsel during the course of an internal investigation. In May 2009, the authors addressed the provision of "Adnarim" warnings in corporate internal investigations and a federal district court's order suppressing government evidence in a stock options backdating cases against Broadcom Corporation's Chief Financial Officer, William Ruehle, based on the insufficiency of such warnings.[2] In October, a three-judge panel of the Ninth Circuit reversed the decision, adding food for thought for outside counsel conducting internal investigations.

Background

In the spring of 2006, in response to media reports that it had backdated stock options granted to employees, Broadcom took the proactive step of engaging outside counsel to conduct an internal review of the company's stock option granting practices. William Ruehle, as the company's CFO, was intimately involved in that process. On May 18, 2006, the company hired the firm of Irell & Manella LLP, a firm with which it had a long-standing relationship, to conduct the investigation.

Company representatives, including Mr. Ruehle, met with lawyers from Irell to discuss the scope of the investigation, defined in the Ninth Circuit's opinion as the Equity Review, and agreed that the results would be reported to Broadcom's Audit Committee. At an initial meeting including the Audit Committee, Mr. Ruehle and other Broadcom executives and lawyers from Irell, it was "made clear that the intent was to turn over the information obtained through the Equity Review to the [company's outside] auditors, to fully cooperate with government regulators, and, if necessary, to self-report any problems with Broadcom's financial statements."[3]

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Soon after, two civil lawsuits were filed against Broadcom and Broadcom officers and directors, including Mr. Ruehle, alleging wrongdoing in relation to Broadcom's stock option granting practices. Mr. Ruehle was informed of these lawsuits by the company's General Counsel in an e-mail on May 30, 2006. The e-mail stated that any questions or concerns should be directed to either Broadcom's General Counsel or certain Irell attorneys. Subsequently, Mr. Ruehle received e-mails from Irell attorneys updating him on the status of the Equity Review and asking to interview him about his role in the stock option granting practices of Broadcom.

> The court relied on an eight-part test to determine the privileged nature of communications during an internal investigation.

Said interview occurred on June 1, 2006, when Mr. Ruehle met with two attorneys from Irell. The Ninth Circuit noted that at no point during the interview did the topic of Mr. Ruehle's personal liability in the civil lawsuits arise. Further, the court stated that Mr. Ruehle never indicated to the lawyers that he was seeking legal advice in his individual capacity. There is some disagreement as to whether the Irell attorneys provided *Upjohn* warnings to Mr. Ruehle before the interview commenced. Regardless, the Ninth Circuit accepted as fact the district court's finding that such warnings were not given.[4]

In late June 2006, Mr. Ruehle secured independent counsel to represent him in the civil lawsuits. Nevertheless, he remained heavily involved in the Equity Review and had access to Irell's periodic reports to the Audit Committee. In August 2006, Irell fully disclosed the results of its internal investigation to Broadcom's outside auditor, Ernst & Young, at a series of meetings, some of which Mr. Ruehle attended. Included in the information provided to Ernst & Young was that received by Irell during its June 1, 2006, interview of Mr. Ruehle.

The SEC and U.S. Attorney's office commenced formal investigations into Broadcom's stock options practices in 2007. With Broadcom's authorization, Irell attorneys were interviewed by the government regarding the results of the law firm's internal investigation. Specifically discussed was Irell's interview with Mr. Ruehle in June 2006.

On June 4, 2008, Mr. Ruehle and Henry Nicholas III, Broadcom's founder and former president, were indicted on charges of conspiracy and fraud. Mr. Ruehle claimed that any statements he made to Irell lawyers during the June 1, 2006 meeting were privileged communications and could not be used against him, because at the time they were made he believed the Irell lawyers represented him in an individual capacity in the civil securities lawsuits. Finding this belief to be reasonable, the district court found that Mr. Ruehle intended his statements to the Irell attorneys to be confidential and that all evidence reflecting those communications should be suppressed.[5]

Ninth Circuit Opinion

The government filed an interlocutory appeal to review the suppression order and the issue of whether Mr. Ruehle's statements to the Irell attorneys were privileged. In doing so, the Ninth Circuit accepted the district court's factual finding that Irell had attorney-client relationships with both Broadcom and Mr. Ruehle individually at the time of the June 1, 2006 meeting. That fact alone did not end the inquiry, however. "After all, '[a] party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged nature of the communication.'"[6]

As framed by the court, the issue was whether Mr. Ruehle's communications to Irell regarding Broadcom's stock option granting practices are protected by a personal attorney-client privilege belonging to Mr. Ruehle. The court relied on an eight-part test to determine the privileged nature of the communications. Such information is covered:

(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity

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as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.[7]

Turning to the district court's decision, the circuit court noted that court's error in applying a "reasonable belief" standard, as articulated under California state law, to the determination of whether Mr. Ruehle's communications were privileged. Rather, the court stated that federal common law, as set forth in the eight-part test, governed this case and should have been applied.

Under federal law, the party asserting the privilege has the burden of establishing the privileged nature of the communications and identifying with particularity which of his communications are within his claim of privilege. The court opined that Mr. Ruehle had made no such effort, but asserted only an overly broad claim of privilege, which weighed in favor of disclosure in this case.

Applying the eight-part test to Mr. Ruehle's situation, the court found that Mr. Ruehle failed to satisfy the fourth element and that the statements made to the Irell attorneys were not made "in confidence," but for the purpose of disclosure to outside auditors. "We reject the district court's contrary finding that an expectation of confidentiality was established because, upon review of the record, we are left with the 'definite and firm conviction that a mistake has been committed' and thus we determine that this factual finding was clearly erroneous."[8]

The facts supporting the Ninth Circuit's conclusion included Mr. Ruehle's senior and sophisticated position with the company that required him to be familiar with disclosure requirements and the need to truthfully report corporate information. In addition, the record showed that Mr. Ruehle was intimately involved in all aspects of the Equity Review and participated in meetings in which it was discussed that Broadcom intended to reveal the information collected to Ernst & Young and cooperate fully with the SEC.

Further, the court noted that Mr. Ruehle had ample opportunity to raise any concerns he may have harbored regarding the disclosure of information he shared with Irell. Not only did Mr. Ruehle attend internal meetings in which Irell was directed to disclose their findings to the company's outside auditor, he also was present at meetings where those disclosures actually occurred. "Even after engaging independent counsel to apprise him of his legal rights, Ruehle never claimed that he thought his statements to Irell during the Equity Review, later shared with the auditors, were confidential—until the specter of criminal liability arose in 2008."[9]

Mr. Ruehle countered that he did not learn the details of the disclosure to the auditor or the government until 2008 and that he would not have provided certain information as part of the Equity Review had he known it could be used to support a government investigation. The court found this argument off the mark, noting that the salient point from a privilege perspective is that Mr. Ruehle freely admitted his understanding that the information he provided would be provided to third parties, namely the outside auditors. Accordingly, Mr. Ruehle's "subjective shock and surprise about the subsequent usage of the information he knew would be disclosed to third-party auditors…is frankly of no consequence here."

The court also rejected Mr. Ruehle's attempts to parse through the communications with Irell to assert an expectation of confidentiality with respect to certain statements. Even supposing Mr. Ruehle believed some of the information was confidential, in asserting the attorney-client privilege he was obligated to distinguish those statements that were covered. Because he made no effort in that regard before the district court, he was not permitted to do so on appeal. Accordingly, the circuit court concluded that Mr. Ruehle's statements to Irell were not made in confidence as required under the eight-part federal common law test.

Finally, the court rejected Mr. Ruehle's assertion that Irell's breach of its professional duties, as recounted by the district court's order referring the firm to the state bar, warranted suppression of the statements at issue in the criminal prosecution. Noting the novelty of Mr. Ruehle's argument, the court stated that a violation of a rule of professional conduct cannot provide a basis for a federal court to suppress otherwise admissible evidence. "To be clear, in some cases, material protected by the attorney-client privilege may come to light as a result of counsel's breach of a duty of confidentiality. But it is the protected nature of the information that is material, not the ethical violation by counsel."[10]

Outside counsel conducting internal investigations can best protect the interests of both the corporate client and individuals who may be witnesses by fully informing corporate employees of counsel's role and the context in which any communications with employees are occurring.

A Different Standard?

In setting forth the eight-part test for determining whether information is covered by the attorney client privilege, the Ninth Circuit declined to decide the propriety of adopting a specialized test to be applied in cases of joint representation of a corporation and its individualized officers. Such test was suggested by the U.S. Court of Appeals for the Third Circuit in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*[11]

In *Bevill*, a bankruptcy trustee sought discovery of the contents of meetings between corporate debtor's officers and corporate counsel. The individual officers objected, arguing that the information was protected by the attorney-client privilege. The Third Circuit noted that a corporate officer must satisfy a specialized five-part test in order to assert a personal claim of attorney-client privilege as to communications made in their role as corporate officer.

> First, they must show that they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.[12]

Finding that the statements at issue were made in the context of the individuals' role as corporate officers, the court rejected their assertion of personal privilege.

The U.S. Court of Appeals for the Second Circuit has recognized this five-part test, noting that "[c]ourts have been willing to allow corporate employees to assert a personal privilege with respect to conversations with corporate counsel, despite the fact that the privilege generally belongs to the corporation."[13] Finding that the employee did not seek or receive legal advice from corporate counsel on personal matters, the Second Circuit rejected the employee's claim of personal privilege.[14]

In *Ruehle*, the Ninth Circuit declined to adopt the "specialized test of *Bevill*," finding that the case could be resolved using the usual eight-part test. "Accordingly, we leave for another day, consideration of the extraordinary requirements of the *Bevill* five-prong test for establishing attorney-client privilege in a situation where both the executive and the corporation assert that they are dually represented."[15]

Conclusion

What remains clear after the Ninth Circuit's reversal in *Ruehle* is that outside counsel conducting internal investigations can best protect the interests of both the corporate client and individuals who may be witnesses by fully informing corporate employees of counsel's role and the context in which any communications with employees are occurring. In this regard, counsel would be well-advised to consult published reports, such as "Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations."[16]

1. *United States v. Ruehle*, 2009 WL 3152971 (9th Cir. Sept. 30, 2009).
2. Elkan Abramowitz and Barry A. Bohrer, "'Adnarim' Warnings in Corporate Internal Investigations," New York Law Journal (May 5, 2009).
3. 2009 WL 3152971 at 1.
4. Id. at 2 n. 3.
5. *United States v. Nicholas*, 606 F. Supp.2d 1109 (C.D. Cal. 2009).
6. 2009 WL 3152971 at 4 (emphasis in original) (citing *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997)).
7. Id. at 5.
8. Id. at 6.
9. Id. at 8.
10. Id. at 10.
11. 805 F.2d 120 (3d Cir. 1986).
12. Id. at 123 (citing *In re Grand Jury Investigation*, No. 83-30557, 575 F.Supp. 777 (N.D.Ga. 1983)).
13. *United States v. International Brotherhood of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997).
14. See also, *United States v. Stein*, 463 F.Supp.2d 459 (S.D.N.Y. 2006 (recognizing unsettled nature of area of law related to employee's right to assert personal privilege).
15. 2009 WL 3152971 at 5 n. 7.
16. American College of Trial Lawyers, February 2008.