

Enforcement Update:  
What to Expect if You're A  
Witness, Subject, Or Target In An  
Investigation



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# Overview

- I. DOJ Enforcement Priorities
- II. Recent Prosecutions
- III. Triggering Events
- IV. The Law Of Privilege
- V. Protecting The Privilege In Internal Investigations
- VI. Voluntary Disclosure
- VII. Data Preservation Obligations

# I. DOJ Enforcement Priorities



- Corporate Corruption
  - Securities
  - Environmental Crime
  - Health Care Fraud
- Immigration
- Firearms
- Transnational Crimes
  - Financial Institutions
  - Money Movement
  - Export Control / Trade Sanctions
- Intellectual Property Crime
  - International Property Crimes Enforcement Network (IPCEN)
  - To combat piracy and counterfeiting crimes
  - Established October 2007

## II. Recent Prosecutions

- US v. Trujillo & Wayne (D. Utah 2007)
  - F-4 and F-14 military cable assemblies, wiring harnesses to Canada (going to Iran, the only nation still flying F-14s)
- US v. Kovacs (DDC 2006)
  - hot press industrial furnace to China (12 months)
- US v. Lee & Ge (NDCa 2007)
  - Attempt to obtain funds for new company from China's General Armaments Division
- US v. Wiseman (DDC 2006)
  - militarized vehicles (18 months)
- US v. Maghloubi (CDCa 2007)
  - conspiracy to export 100,000 Uzi machine guns to Iran
- US v. Meng (NDCa 2007)
  - military source code to China's Navy Research Center
- US v. Tek (EDNY 2006)
  - obtaining parts used in C-130 planes, and diverting to Malaysia (52 months)
- US v. Chiu (CDCa 2007)
  - conspiracy to export technical data about the Navy's current and future warship technology
- US v. Horoushi (D. Conn. 2007)
  - false statement on export declaration re: helmets to Suriname
- US v. ITT Corp (WDVa 2007)
  - \$28 million fine for night vision technology to China

# Recent Consent Orders

- Boeing, \$15mm, export compliance program
- ITT, \$100 mm, on site audits, \$50 mm for US Army R&D

[http://pmdtc.state.gov/consent\\_agreements.htm](http://pmdtc.state.gov/consent_agreements.htm)

## III. Triggering Events

- Call / Visit from any government agency:  
    “We’re from the government; we’re here to help!”
- Grand Jury subpoena / civil / criminal investigative demands (CIDs)
- Search Warrant
- Whistleblower
- M&A / Due diligence
- Anonymous tipster / SOX hotline calls
- Press inquiry / coverage concerning wrongdoing
- Government Audit
- Employee allegations
- Management Recognition of Employee Wrongdoing
- Counsel’s “inner voice”

# Grand Jury Subpoenas

- Grand jury is open and investigating
- Fed. R. Crim. P. 6(e)
- Secrecy
- Who is the recipient?
- Status in the investigation?
- Money is not real to the government

# Search Warrant

- Agents at the door
- Computers, files, export licenses, related materials
- Serious business impact
- Employee interviews
- Get out of the way & call counsel
- Money is not real to the government

# IV. The Law Of Privilege

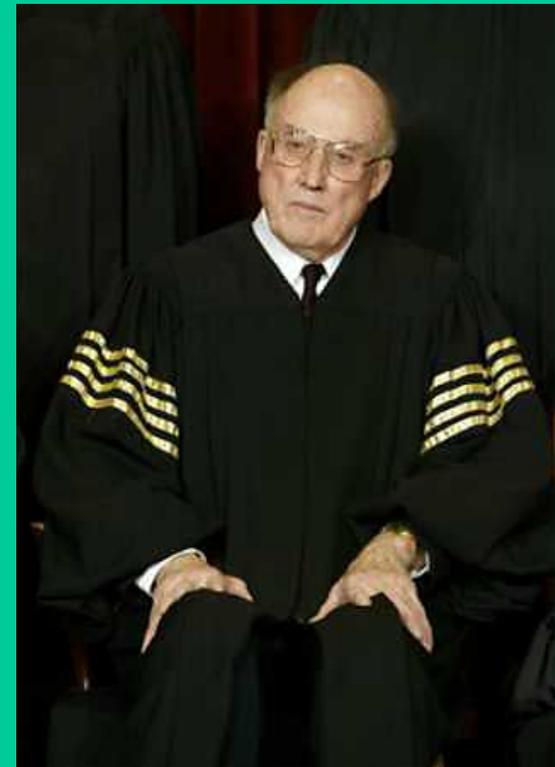
## What is Protected?



- Communications
- Seeking legal advice
- In confidence
- From a lawyer
- By a client
- Are permanently protected
- From disclosure
- Unless waived

# Corporate Privilege

- Promote “full and frank” discussions between attorney and client
- Applies to corporate entities
  - *Upjohn Co. v. United States*, 449 U.S. 383, 392-93 (1981)
  - “uncertain privilege . . . is little better than no privilege at all”



## The Work-Product Doctrine

- *Hickman v. Taylor*, 329 U.S. 495 (1947)
- “discovery [not] intended” to force a “learned profession” to work “without wits or on wits borrowed from the adversary.” *Id.* at 516.
- Fed. R. Civ. P. 26(b)(3)

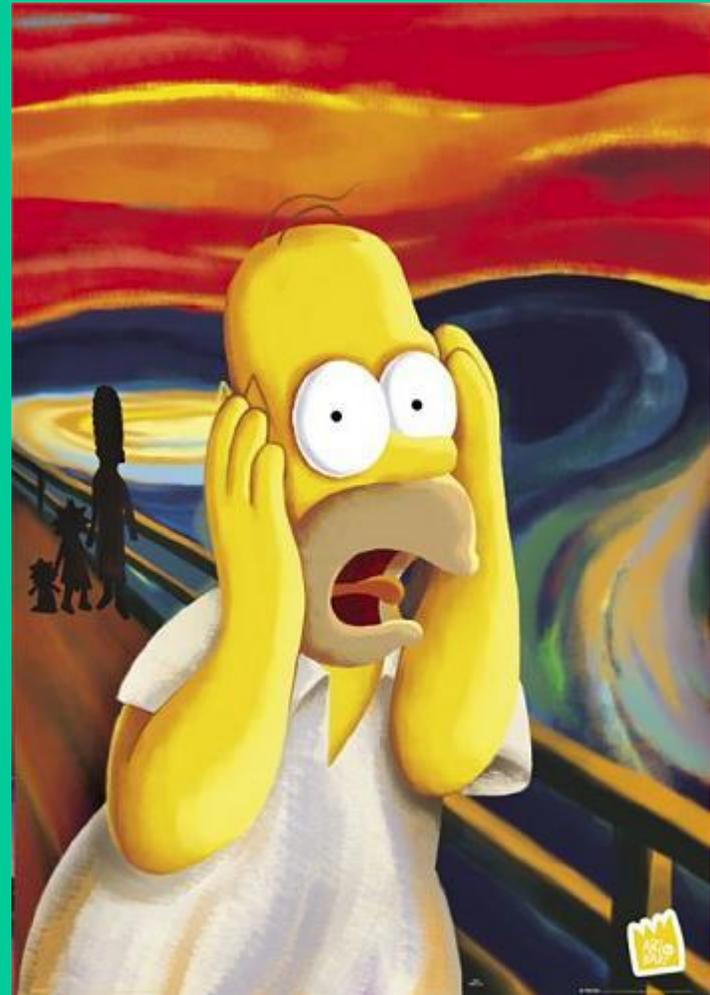
# What's Protected By Work Product?



- Broad range of materials prepared by or at the direction of an attorney for or in anticipation for litigation
- Interview notes of third-party witness
- Legal analysis/strategy

# Corporate Sentencing Guidelines

- Advisory
- Self-policing
- Self-reporting
- Waiving privilege and work-product
  - Formerly considered as part of determining cooperation
    - U.S.S.G. 8C2.5 cmt. 12
  - Guidelines no longer consider waiver



# DOJ Attempted End-run around Upjohn ?

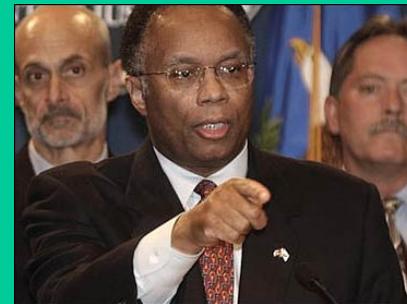
## Holder Memo: June 1999

- “willingness to cooperate . . . including, if necessary, the waiver of the corporate attorney-client and work-product privileges”
- Waiver “with respect to its internal investigation and . . . communications between specific officers, directors, and employees and counsel”



## Thompson Memo: Jan. 2003

- “main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation”
- Waiver



## McNulty Memo: Dec. 2006

- “To ensure appropriate prosecutorial discretion”
- routinized approval process
- Cat I and II materials

## McNulty Memo, Dec. 2006

- Tiered approach for all waiver requests
  - Waiver not usually part of cooperation assessment
- Facts uncovered in internal investigation, contemporaneous legal advice if advice-of-counsel defense offered, or legal advice communications within crime-fraud exception
  - AUSA must get written approval from USA, who must consult with DAG

# McNulty Memo, Dec. 2006

## (cont'd)

- A/C communications, legal advice, or non-fact attorney work product
  - USA must get written approval from DAG by demonstrating need for information and that waiver sought is narrowly tailored
  - Refusal to provide cannot be used in charging decision
- No authorization needed for voluntary offer of privileged documents without request

# News Flash – Aug. 28, 2008

- DOJ withdraws McNulty Memo
- New Corporate Charging Guidelines
  - <http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html>
  - <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>
- 5<sup>th</sup> Policy in 10 Years



# Principles Of Fed. Prosecution Of Business Organizations

- Identifies the concerns
  - waiver as “precondition” for cooperation credit
  - no credit for corps. paying legal fees
    - KPMG
- Identifies Key Mandates
  - aggressive prosecution
  - respect criminal defts rights
  - “fair outcomes for the American people”

## Principles Of Fed. Prosecution Of Business Organizations (cont'd)

- corporate coop. credit NOT dependent on:
  - waiver
  - payment of legal fees
  - JDAs
  - discipline of employees
- AUSAs cannot ask for privileged materials

<http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html>

<http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>

# Proposed Amendment To Fed. R. Evid. 502

- Limits scope of Waiver
- Inadvertent disclosure
- Selective Waiver
- JDAs
- Supported by DOJ

<http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>

[http://www.uscourts.gov/rules/Hill\\_Letter\\_re\\_EV\\_502.pdf#page=16](http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf#page=16)



## KPMG Case

- US v. Stein, 435 F.Supp.2d 330 (SDNY 2006), aff'd, 07-3042 (2d Cir. 2008)
- 13 employees, fraudulent tax shelters
- govt's "overwhelming influence"
- KPMG's "conduct . . . amounted to state action"
- govt "unjustifiably interfered with depts' relationship with counsel"
- paying fees is "not cooperation"
- fees paid if no 5<sup>th</sup> Amendment & cooperation

# V. Protecting Privilege & Privacy In Investigations

- Presume disclosure -- it may happen sooner or later
- Cooperation/voluntary waiver by you or subsequent decision-maker
- Civil discovery
- Mistake
- Press
- Whistleblower
- M&A / Due diligence



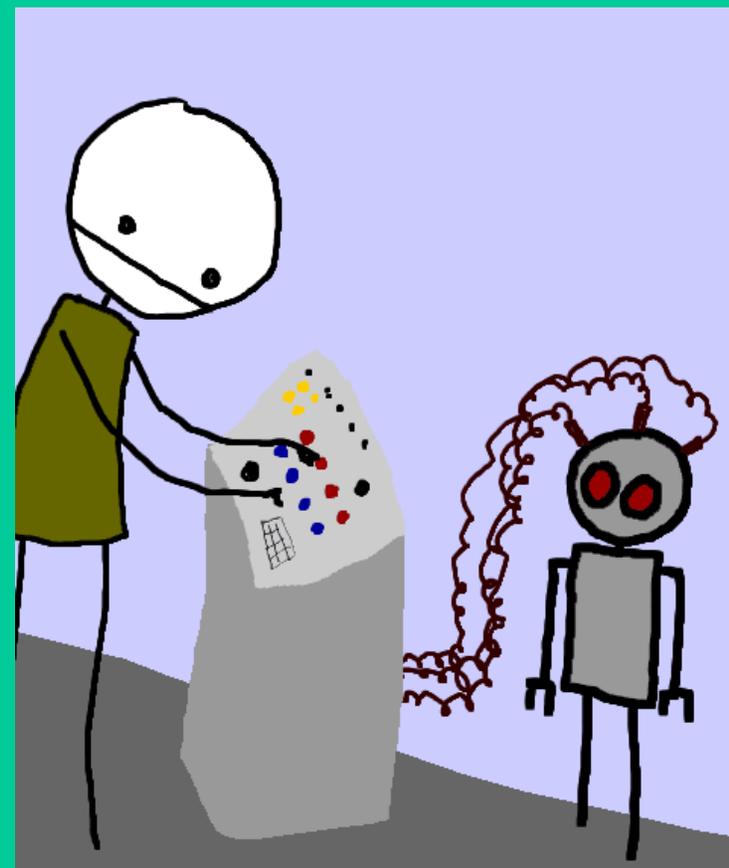
# Protecting Privilege & Privacy (cont'd)



- Conduct internal investigation accordingly
- Smokey The Bear rule
  - Meticulous interviews
  - Meticulous notes
  - Final report for client?
  - “Take your trash with you”

# Employee Interviews:

- Reliance on you as personal counsel?
- Invoke right to counsel?
- Take five?
- Self-incriminate during your interview?
- Invocation of privilege to block disclosure?
- Civil liability if charged?
- Malpractice?
- Ethical violation?



# Avoiding The Train Wreck (cont'd)

- “Civil Miranda” warnings
  - Represent the company
  - Do not represent the employee
  - Privilege applies & belongs to company
  - Company decides if/when to waive
  - Company wishes employee to keep interview confidential
  - Right to counsel
- Bring a “friend” to keep notes



# Investigation Is Done, Privilege Is Protected: Now What?



- Legal requirements?
- What did you find?
- Status of the government?
- Client goals?
- Hunker down?
- Voluntary disclosure?

# VI. Voluntary Disclosure & Waiver

- Be prepared for the decision
- Don't wait 'til you get the call
- Proper steps taken long ago?
  - Involve counsel early
  - Use outside counsel
  - Employee interview protocol
  - Smokey The Bear rule
  - Minimize written product
- Strategy call
  - Advantages vs. disadvantages

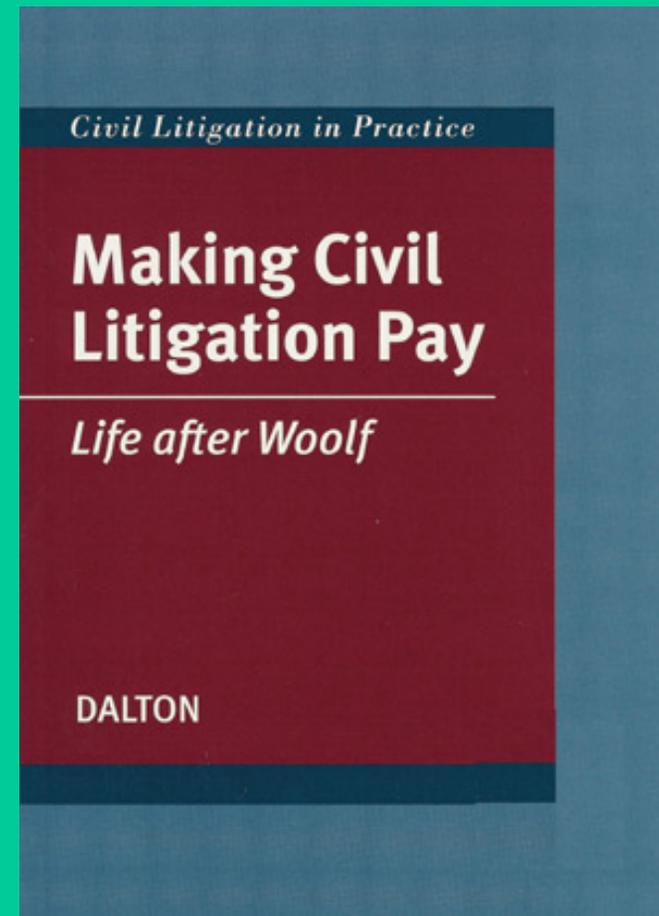


# Advantages

- Avert indictment
- Leniency
  - U.S.S.G. § 8C2.5 cmt. 12: “culpability score”
- Right thing to do?
- Investor confidence
- Catharsis



# Disadvantages



# The State Department Regulations (ITAR)

- **§ 127.12 Voluntary Disclosures**
- (a) General policy. The Department strongly encourages the disclosure of information to the Office of Defense Trade Controls by persons, firms or any organization that believe they may have violated any export control provision of the Arms Export Control Act, or any regulations, order, license, or other authorization issued under the Arms Export Control Act.

# The State Department Regulations (ITAR) (cont'd)

## **Why do a Voluntary Disclosure?**

- Failure to report such violation(s) may result in circumstances detrimental to U.S. national security and foreign policy interests.
- Voluntary self-disclosure may be considered a mitigating factor in determining the administrative penalties, if any, that should be imposed by the Department.

# Prophylactic Measures During Waiver:

- Is waiver essential?
- Will waiver get you closer to your goal?
- Confidentiality agreement?
- Acknowledgement by government?
- Limit disclosure:
  - Non-privileged materials?
  - Limited privileged materials?
- Non-adversarial relationship with gov't?
  - *In re M&L Bus. Mach. Co., Inc.*, 161 B.R. 689 (D. Colo. 1993) (Kane, J.)
- Reserve right to assert privilege later?



# L'il Help From An Old Friend?: Selective Waiver



- *In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1201 (10<sup>th</sup> Cir. 2006)
  - No selective waiver
  - No adoption of “government investigations” privilege
  - “Culture of waiver”
- Rejected in Fed. R. Evid. 502

## VII. Data Preservation



The Arthur Andersen partner was on his cell phone when he said,

"Ship the Enron documents to the feds,"

but his Secretary heard,

"Rip the Enron documents to shreds."

It turns out that it was all just a case of bad cellular.



# Document Preservation Obligations

- First step in the investigation
- Warn client and employees!
  - Letter?
  - Standardized email?
  - Verbal?
  - Which employees?
- Forensic Mirrors



# What Rules Apply?

- Federal statutes
  - E.g., *Sarbanes-Oxley Act of 2002*
  - 18 U.S.C. 1501-1520
- Case law
- Corporate policy



# Sarbanes-Oxley Document Req'ts

- Criminal penalties: 10 - 20 years
- Covers: CEO to the “button pusher”
- Covers: public and private companies



# THANK YOU

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