

## Use of General Counsel as Informant Against Corporate Client – A Reminder of the New Era in Aggressive White Collar Investigative Techniques and of the Limitations of the Attorney-Client Privilege

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The use of more aggressive investigative techniques in white-collar corporate probes in the aftermath of the last financial crisis is no secret. Over the last decade, law enforcement has increasingly resorted to investigating financial crimes through methods more typically reserved for ferreting out organized crime, terrorism, and drug cartels. Indeed, wiretaps and confidential informants have become regular weapons in the Government's arsenal. The recent news, however, that a New Jersey District Court will now allow secret recordings made by a General Counsel of his conversations with the company's CEO stands as a sobering reminder of the new era in the war against financial crime and of the boundaries of attorney-client confidentiality in the corporate setting.

The referenced case involves the former General Counsel of PetroTiger Ltd., who turned government informant and secretly recorded a conversation with Petro Tiger's CEO during which the CEO allegedly acknowledged a scheme to bribe a foreign official in order to secure a lucrative business contract. The court rejected an argument that the conversation was privileged, citing the scope of the privilege as protecting only conversations seeking or providing legal advice. The court ruled that although the conversation took place between attorney and client, it was not a discussion in which the CEO sought, or counsel provided, legal advice. A federal grand jury indicted the CEO for violations of the Federal Corrupt Practices Act, money laundering, and fraud. The evidence against him will now include his own statements to his counsel - statements which he likely felt were confidential at the time they were made.

It is natural to think of the mainstream perception that attorneys are an impenetrable vault safeguarding a client's disclosures and secrets at any cost. For certain, those facing criminal investigation are afforded great protection against improper disclosure by their counsel. The New Jersey Supreme Court summarized this privilege in frequently quoted language that could easily lull one into a sense that the privilege is impermeable:

*If the rule of law is this nation's secular faith, then the members of the Bar are its ministers. A lawyer is the mediator between his client's desires and the sovereign's commands. His aid is sought because of the relative ignorance of those to whom the law is but a collection of dim mysteries. When confronted with the awesome power of the criminal process, a client is never more in need of professional guidance and advocacy. In this setting, an instinct for survival compels a defendant to confide in an attorney. The necessity of full and open disclosure by a defendant imbues that disclosure with an intimacy equal to that of the confessional, and approaching even that of the marital bedroom. [State v. Sugar, 84 N.J. 1 (1980)]*

This protection extends to corporations and is applied to protect communications between in-house counsel and the corporation's employees and agents when necessary to provide legal advice to the company. Upjohn Co. v. United States, 101 S.Ct. 677(1981).

The rule is simpler to state than to apply, and the reality is far less comforting, particularly in the corporate context. For example, business discussions that are not in furtherance of legal advice are generally not protected. As such, the content of the conversations rather than the parties to them often determines whether

the privilege applies. Likewise, every conversation or communication involving counsel and corporate officers or employees is not automatically privileged. To the contrary, mass emails, forwarded email chains, meetings outside of the litigation control group and a host of other scenarios can readily pierce what might otherwise have been privileged communications. Finally, the crime-fraud exception to the privilege always stands to remove attorney-client conversations from protection when the conversations take place in furtherance of unlawful activity.

The PetroTiger ruling, particularly when viewed against the backdrop of the Government's stepped up war on financial and corporate crime, serves as a crucial reminder that the privilege in the corporate context is not absolute. Companies and in-house counsel should periodically review and revise policies and protocol regarding communications with corporate counsel. In a white-collar climate where anyone could become a witness – including the company attorney turned informant – awareness of what is protected and what is not is key. Armed with laws broad enough to apply in contexts ranging from mafia enterprises to insider trading and healthcare fraud, the Government has immense power to prosecute what might once have been considered ethical lapses or regulatory violations at worst. Counsel and clients must understand the nature and scope of the privilege and proceed with great caution in protecting it in the business setting.

### **Practices**

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