When a Criminal Defendant's Sixth Amendment Right to Present a Defense Trumps the Attorney–Client Privilege

BY JOHN F. MCCAFFREY

A great deal of attention has focused on the memorandum issued last fall from Deputy Attorney General Sally Quillian Yates announcing a Department of Justice policy to increasingly target individuals involved in corporate crimes. Whether the "Yates Memo" will significantly change Department of Justice charging practices remains to be seen. Nevertheless, it has certainly sent a message to the public and those who occupy the "C-suite."

In an era marked by increasingly aggressive legal theories of criminal prosecution, especially in thorny regulated industries, an organization's executives often look to and rely upon the advice of lawyers, both within and outside the organization, before embarking on a course of conduct. The decisions made by these executives could expose them to allegations of individual criminal liability. The advice-of-counsel may be a defense demonstrating that there was no wrongful intent underlying an executive's actions. However, courts have not taken a consistent approach to whether and to what extent an individual asserting an advice-of-counsel defense may introduce privileged communications against the wishes of the holder of the privilege — the organization.

> An executive's Sixth Amendment right to put on an advice-of-counsel defense to allegations of criminal conduct may trump an organization's assertion of the attorney-client privilege to prevent the disclosure of privileged communications.

The Defendant's Need to Disclose Privileged Communications

If an executive is charged with committing a crime in the course of his employment with an organization, the communications he may have had with the organization's legal counsel concerning the charged conduct become relevant. The advice-of-counsel defense allows a defendant to demonstrate there was no wrongful intent underlying the alleged wrongful conduct. The advice-of-counsel defense under such circumstances is not so much an affirmative defense as it is a means of negating an element of the charged conduct. The defendant will seek to demonstrate that he lacked the specific state of mind required to commit the offense or, conversely, acted in good faith. More importantly, the communications the executive had with counsel for the organization may be the very evidence necessary to secure an acquittal.

The elements of the advice-of-counsel defense are generally outlined as follows: "(1) full disclosure of all pertinent facts and (2) good faith reliance on the advice of counsel." *United States v. Geiger,* 303 Fed. Appx. 327, 330 (6th Cir. 2008) (citing *United States v. Lindo,* 18 F.3d 353, 356 (6th Cir. 1994)). Less clear is the issue of whether the individual invoking the defense must have initially sought the advice in good faith. *See e.g., United States v. DeFries*, 129 F.3d 1293, 1308 n.7 (D.C. Cir. 1997)("[s]o long as the defendant relies on his counsel's advice in good faith, it is irrelevant whether or not he initially sought the advice in good faith."). As criminal practitioners know, raising the advice-of-counsel defense is not without risk. The individual asserting the defense generally waives the attorney-client privilege protecting communications between the client and counsel. For executives, the issue of waiver is made difficult because the lawyers they are communicating with and relying

upon usually represent the organization, not the executives individually.

Courts have not taken a consistent approach to the extent an individual asserting an advice-of-counsel defense may introduce privileged communications against the wishes of the organization holding the privilege. In *United States v. W.R. Grace,* 439 F.Supp.2d 1125 (D. Mont. 2006), the district court framed the issue thusly: "whether and under what circumstances the attorney-client privilege must give way to a criminal defendant's Sixth Amendment right to present a defense * * *."

The Sixth Amendment Meets the Attorney-Client Privilege

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

"Though not expressly stated in the text of the Sixth Amendment, a defendant's right to present evidence in his defense is protected by the federal Constitution." *W.R. Grace,* 439 F.Supp.2d at 1137 (citing *Rock v. Arkansas,* 483 U.S. 44, 51 (1987)). "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Id*. (quoting *Crane v. Kentucky,* 476 U.S. 683, 690 (1986)).

W.R. Grace thoughtfully analyzed the competing interests that exist where the holder of the attorney–client privilege will not waive it, yet refusal to do so would prevent a criminal defendant from putting on a defense. A clash between the sacrosanct protection of the attorney-client privilege versus a criminal defendant's constitutional right to present a complete defense. *W.R. Grace* involved an organization and its current and former employees charged with conspiracy to violate the federal Clean Air Act, to defraud the United States, and other federal crimes. Some of the individual defendants, including the organization's former general counsel, desired to introduce at trial confidential legal advice provided to the organization. The individual defendants claimed they relied on this advice and that the advice would show their absence of criminal intent. However, the organization asserted the attorney-client privilege and was unwilling to waive privilege as to this evidence.

Because no Ninth Circuit or U.S. Supreme Court case directly addressed whether, and under what circumstances, the right to present

a defense can trump the attorney-client privilege, *W.R. Grace* started with a review of cases arising in the Sixth Amendment context in order to determine whether analogous principles existed. *Id*. at 1138-1139. This review concluded that U.S. Supreme Court cases "use the mechanism of a balancing test in which the evidence or testimony sought to be introduced by the defendant is weighed against the policy behind the rule requiring that the evidence be excluded." *Id*. at 1139-1140. This concept of a balancing test provided the framework for the *W.R. Grace* decision, where the district court concluded "[t]he nature and content of the privileged evidence must be weighed against the purposes served by the attorney-client privilege to determine whether any of the documents are of such value as to require Grace's rights under the attorney-client privilege to yield to the individual Defendants' Sixth Amendment right to present evidence." *Id*. at 1142.

Since *W.R. Grace* was decided, other district courts have relied on it in deciding the specific circumstances under which the attorney-client privilege must yield to a criminal defendant's need to present evidence. *See, United States v. Benzer,* Case No. 2:13-cr-00018, 2014 WL 6884042 (D. Nev. Dec. 8, 2014)(a balancing test should be used to determine if exculpatory privileged evidence should be admitted despite the protections afforded to attorney-client communications); *United States v. Renzi,* Case No. CR 08-212, 2010 WL 582100, at *11 (D. Ariz. Feb. 18, 2010)(accepted *W.R. Grace's* holding that "admissibility depends on weighing the competing interests, with the exculpatory value of the lost evidence to the accused weighing most heavily on the scale of a fair trial."); *United States v. Mix,* Case No. 12-171, 2012 WL 2420016 (E.D. La. June 26, 2012) (relied on *W.R. Grace* which it described as a "meticulous and detailed opinion" to explain that the competing interests would need to be balanced to determine if the evidence should be admitted); *United States v. Weisberg,* Case No. 08-CR-347, 2011 WL 1327689 (E.D.N.Y. April 5, 2011)(held that in order to determine whether a particular item is privileged and, nevertheless, so important that disclosure is constitutionally required, each item must be reviewed *in camera*).

Accordingly, an executive's Sixth Amendment right to put on an advice-of-counsel defense to allegations of criminal conduct may trump an organization's assertion of the attorney-client privilege to prevent the disclosure of privileged communications.

Sixth Circuit Case Law

In 2005, before *W.R. Grace* was decided the Sixth Circuit in *Ross v. City of Memphis,* 423 F.3d 596 (6th Cir. 2005) held that a party's assertion of the advice-of-counsel defense as part of his defense strategy to a civil cause of action did not require an organization to relinquish its attorney-client privilege. *Ross* relied on the U.S. Supreme Court's holding in *Swidler & Berlin v. United States,* 524 U.S. 399 (1998) which rejected an exception to the attorney-client privilege where the holder of the privilege was deceased and the information would have "substantial importance to a particular criminal case." *Ross,* 423 F.3d at 603 (quoting *Swidler & Berlin*, 524 U.S. at 408). *Ross* specifically rejected a balancing test between the importance of the communications to the party's defense and the entities interest in the privilege. *Id*.

However, *Swidler & Berlin* did state "that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege[,]" and explained it "need not reach this issue, since such exceptional circumstances clearly are not presented here." *Swidler & Berlin*, 524 U.S. at 408 n. 3. Accordingly, *Ross* should have no precedential value in determining if a claim of attorney-client privilege should be abrogated in a criminal case where Sixth Amendment rights are clearly implicated.

Conclusion

The need for an organization's executives and its in-house counsel to seek legal advice before and during government investigations is apparent in the over criminalization of corporate conduct. Whether the advice-of-counsel defense may be appropriately raised by an executive accused of wrongdoing can only be determined on a case-by-case basis. Importantly, detailed and thorough recordkeeping, along with appropriate business practices can ensure that executives and in-house counsel can avail themselves of the defense if needed.

John F. McCaffrey is a former FBI Special Agent and Prosecutor. He is a partner with Tucker Ellis LLP where his practice focuses on white collar criminal defense and business litigation. He is a Fellow of the American College of Trial Lawyers. He has been a CMBA member since 1994. He can be reached at john.mccaffrey@tuckerellis.com.