

## Focus

## Environmental Law

# Voluntary Disclosure and Privilege Waiver

BY WALTER D. JAMES

The Environmental Protection Agency's (EPA) policy regarding voluntary disclosure has been around since 1986. The Department of Justice (DOJ) also has had an evolving prosecutorial guideline for determining when and how cooperation under a voluntary disclosure should be handled. One would think that after all of this time, there would be a clear set of standards to follow when you represent a party that wants to voluntarily disclose an environmental non-compliance to the EPA and how that would interface with a voluntary waiver of privilege to the DOJ for cooperation credit. Unfortunately, that is not the case.

The EPA self-disclosure policy has changed a bit over the years and can be viewed at [www.epa.gov/compliance/incentives/auditing/auditdisclose.html](http://www.epa.gov/compliance/incentives/auditing/auditdisclose.html). Similarly, the DOJ's policy has evolved over the years as well, from a requirement of waiver to a policy that no waiver will be required. You can see the latest version at [www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf).

The McNulty Memorandum makes it clear that the waiver of the attorney-client privilege and the work-product exemption is not necessarily a prerequisite for cooperation credit. Currently, prosecutors can only request waiver of the attorney-client privilege and the work-product exemption when there is a demonstrated legitimate need for the information to fulfill the law enforce-

ment obligation. The McNulty Memorandum sets out the laundry list of what needs to be demonstrated before waiver can be requested. In short, it is the least intrusive means to conduct a complete and thorough investigation.

Some are of the opinion that the current DOJ policy provides an incentive for a prosecutor to pursue an implicit "don't ask, don't tell" policy. If the prosecutor does not explicitly seek a privilege waiver, the prosecutor will not have to seek written permission from superiors. A more discreet way to proceed is for the prosecutor to simply inquire whether the client intends to provide the results of a protected internal investigation as part of cooperation. As a practical matter, this is the way it often occurs.

How do you decide whether or not to waive privilege and what does one do in the trenches? Why waive privilege and work product? Is it simply a way to save time and effort on the part of the government?

First, review the rules concerning privilege and exemptions. The attorney-client communication privilege protects communications for the purpose of obtaining legal advice. It does not apply to facts. The attorney work-product exemption protects documents prepared in anticipation of litigation. Make sure that everyone involved, including experts, knows and understands the privileges and exemptions and the difference in the waiver of each.

Second, assume that all documents and communications will be disclosed.

Every step of an internal investigation should be documented, especially every method utilized to ensure the confidentiality of the investigation, including how draft investigatory documents are treated. Because of the assumption of disclosure, the waiver issue should be a key discussion point up front. You can then structure the investigation with waiver in mind. The downsides are that the waiver is complete. The waiver of privilege may be determined to be a complete waiver so that disclosure of some facts may destroy protections as to all facts—a so-called subject-matter waiver. This may also lead to a waiver of analytical work product.

Third, separate fact-gathering from analysis. Waiver of the first will not be

a waiver of the second.

Fourth, try to disclose the information in steps pursuant to a confidentiality agreement. You can make an oral presentation to the government, and you can steer the government toward information or inquiries that are the most relevant.

Keep in mind that a company can cooperate without waiving important privileges, by making witnesses available and voluntarily producing documents. In other words, cooperation is not inconsistent with a company's decision not to waive privileges. **HN**

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