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Client Alert

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Cooperation Credit and Attorney-Client Privilege: The Implications of Coburn

Cognizant Technology's Privilege Waiver

On February 1, 2022, the District of New Jersey ordered a company to produce internal investigation materials to two former executives indicted in connection with an alleged foreign bribery scheme, finding the company waived privilege by selectively disclosing portions of those materials to the Department of Justice (DOJ) in connection with its investigation. The court's order highlights the predicament often faced by companies seeking to cooperate with the DOJ and the careful consideration that must be given before sharing potentially privileged materials.

In 2019, the DOJ declined to prosecute Cognizant Technology Solutions Corporation in connection with its investigation into potential violations of the Foreign Corrupt Practices Act (FCPA). The DOJ asserted that Cognizant, through its employees, authorized a two-million-dollar bribe and other improper payments to Indian government officials to secure a planning permit for construction of an office park. But the DOJ decided not to prosecute Cognizant based on its cooperation—its voluntary self-disclosure, thorough internal investigation, and provision of "all known relevant facts about the misconduct" to the DOJ.[1]

The following day, the DOJ announced that a grand jury indicted two former Cognizant executives—former president Gordon Coburn and former chief legal officer Steven Schwartz—in connection with the alleged bribery scheme. In connection with their defense, the defendants subpoenaed Cognizant for documents and communications relating to Cognizant's internal investigation that Schwartz oversaw in his capacity as chief legal officer. The defendants' specific requests included materials related to Cognizant's internal investigation, including witness interview summaries that Cognizant's counsel prepared, as well as Cognizant's communications with a public relations firm and accounting firm. After Cognizant withheld these materials on the basis of attorney-client privilege and work-product doctrine, defendants moved to compel production, arguing that they

contained facts and information unrelated to legal advice and that, in any event, Cognizant's "detailed oral downloads" to the government waived privilege as to its entire internal investigation.

Judge Kevin McNulty agreed that Cognizant's disclosures to third parties gave rise to a "significant" waiver.[2] The court found that disclosing internal investigation materials – in this case, "detailed accounts of 42 interviews of 19 Cognizant employees – to a potential adversary (the government) while under threat of prosecution undermined the purpose of the attorney-client privilege and the work-product doctrine and waived any protection.[3] That Cognizant's disclosures waived both attorney-client privilege and work-product protection is significant. While a waiver of attorney-client privilege typically extends to other communications on the same subject matter, a waiver of work product doctrine is more often limited to the disclosed document. The court further ruled that this disclosure waived other communications and documents concerning the same subject matter—its internal investigation—that the court deemed should in fairness be considered alongside the actual disclosures.[4] Those other materials included:

- Summaries, notes, memoranda, and other records of witness interviews, to the extent those summaries were conveyed to the government, whether orally or in writing;
- Documents and communications whose contents were conveyed within those summaries; and
- Other materials that were "reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ."

Separately, the court also ordered Cognizant to produce its communications with a public relations firm, finding that they bore too tenuous a connection to the provision of legal advice and preparation for litigation and were thus not privileged.[5] It did, however, agree that Cognizant's communications with an accounting firm were privileged, as the nature and scope of the allegations against Cognizant rendered accounting expertise vital to any law firm.[6]

Following the court's order, Cognizant produced copies of interview summaries but redacted portions not conveyed to the government, arguing that the court did not adopt defendants' expansive view of waiver—which resulted in dispute that required the court's clarification as to the scope of waiver.[7] And while the court agreed that it did not accept the "very broad" subject matter waiver espoused by defendants, it rejected Cognizant's "latest attempt to limit the reach of discovery," reiterating its finding that Cognizant waived privilege over summaries of interviews conveyed to the government along with materials that were reviewed and formed any part of the basis of any presentation.[8] It concluded by reminding Cognizant that it signed a declination agreement requiring its voluntary disclosure and cooperation, so it should not be surprised that it waived privilege—and that by doing so, it "dodged a bullet."[9]

Although this ruling might seem striking, courts in other cases have reached similar conclusions. The Southern District of Florida and Southern District of New York also have found that a company waived work product protection over notes and memoranda of witness interviews by providing oral summaries to the SEC.[10] In these decisions, the courts have reinforced the reality that if a company intentionally discloses privileged materials, it risks a finding of subject matter waiver, and the rule of completeness may mean that such a waiver will include sufficient documents and materials to ensure that the subject matter at issue is disclosed fully.

Implications for Corporate Cooperation

The *Coburn* decision illustrates the challenging strategic decisions faced by defense counsel when engaging with the Justice Department. In *Coburn*, defense counsel chose to turn over privileged information implicating the company's executives, and it was rewarded with a declination. Unsurprisingly, though, DOJ then indicted the executives, who successfully sought the full record of the internal investigation in order to defend themselves. The price for turning over privileged materials, then, was costly: subject-matter waiver over portions of the internal investigation, as well as public prosecutions of executives with all the attendant reputational impacts on the company. And the price could have been much steeper: if DOJ had chosen to proceed with charges against Cognizant despite the company's cooperation, the company would have produced privileged materials that DOJ would then have used against it.

In theory, as a matter of DOJ's written policy, which has long been that it will not request that a company waive privilege, defense counsel should not find themselves needing to risk a privilege waiver in order to cooperate with a DOJ investigation. A company can obtain full cooperation credit without waiving the attorney-client privilege or the work product protection.[11] All that's necessary, in theory, is to disclose all of the relevant facts, which by definition are unprivileged. In practice, however, there has been deliberate ambiguity in DOJ's actions during investigations with regard to the relationship between privilege waiver and cooperation credit, thus necessitating assurances from DOJ on its position.[12] It should be possible both to cooperate fully without turning over privileged information, and to advance a vigorous defense on the merits. But in DOJ's view, cooperation often entails reporting on information obtained in employee interviews which, depending on how that is accomplished, may risk a waiver. Companies that feel pressure to ensure as much credit as possible may therefore pursue cooperation in a manner that heightens the risk of waiver.

When defense counsel decide that the right strategy is to share information, they should think carefully about how much is too much to share. Among the considerations that counsel should think about:

- How to draft and finalize memoranda summarizing investigation interviews, including the level of detail in such summaries;
- Whether to opt for written or oral summaries of the investigation;
- Whether to provide direct quotes from interviews (or interview memoranda) or other investigation work product;
- How to manage the process of drafting and editing proffer outlines; and
- Whether to seek a joint defense agreement with individual defendant-employees

Defense counsel should also consider whether to seek the government's agreement to a court order under Federal Rule of Evidence 502(d). That rule was created in 2008 to provide heightened protection against both knowingly and unknowingly waiving privilege in federal proceedings. It provides that "a federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding." Although DOJ historically has been reluctant agree to such orders, *Coburn* supplies enough reason for defense counsel to ask for one, as an extra layer of protection against subject matter waiver.

Counsel should also remember that the parties to whom information about an investigation is provided matters now more than ever. While the *Kovel* doctrine may shield against a finding of privilege waiver in communications with third parties, such as an accounting firm, the involvement of the third party must be "at least highly useful…for effective representation" and "the communication must be made for the purpose of obtaining legal advice from the lawyer."[13]

Coburn's disparate treatment of Cognizant's communications with its accounting firm versus communications with its public relations firms was rooted in the court's perception of how closely the accounting firm's communications were linked to legal advice. Corporate counsel should ensure that any third parties – whether a communications firm, as in *Coburn*, or a cybersecurity firm, as seen in recent data breach cases – are retained through counsel, and preferably, external counsel, who may have an easier time proving that the retention of the third-party was for a legal, rather than a business, purpose. To the extent a third-party's expertise does not directly tie to the nature of the allegations, as was the case with the public relations firm in *Coburn*, counsel should be wary of sharing any privileged work product or information with that third-party.

Coburn illustrates that there is no single playbook when a company is dealing with a Justice Department investigation. Much depends on company counsel's assessment about whether a good defense on the merits is available, whether it's necessary to turn over privileged information in order to achieve a favorable resolution, and whether the company is prepared to see DOJ prosecute its executives.

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[1] Letter from the Department of Justice, U.S. Attorney's Office for the District of New Jersey to Counsel for Cognizant Technology Solutions Corporation (Feb. 13, 2019) https://www.justice.gov/criminal-fraud/file/1132666/download.
[2] *United States v. Coburn, et al.,* No. 2:19-cr-00120, 2022 WL 357217, at *7 (D.N.J. Feb. 1, 2022).
[3] *Id.* (citing *In re Chevron Corp.*, 633 F.3d 153, 165 (3d Cir. 2011)).
[4] *Id.* (citing *Shire LLC v. Amneal Pharms., LLC*, No. 2:11-CV-03781, 2014 WL 1509238, at *6 (D.N.J. Jan. 10, 2014)).
[5] Cognizant filed a motion for reconsideration of this decision, but the court maintained its position and denied the motion. United States v. Coburn, No. 2:19-cr-00120, 2022 WL 874458 (D.N.J. March 23, 2022).
[6] *Coburn*, 2022 WL 357217, at *6.
[7] Letter from Cognizant Technology Solutions Corporation to the Honorable Kevin McNulty, United States District Judge, District of New Jersey (Apr. 6, 2022).
[8] *United States v. Coburn*, No. 2:19-cr-00120 (Apr. 27, 2022).
[9] *Id.*
[10] *See SEC v. Herrera*, 324 F.R.D. 258 (S.D. Fla. 2017); *SEC v. Vitesse Semiconductor Corp.*, No. 10-cv-9239, 2011 WL 23899082 (S.D.N.Y. 2011).
[11] Memorandum from Deputy Attorney Gen. Mark Filip to Head of Dep't Components and U.S. Attorneys, The Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.
[12] *Id.*
[13] *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).