Chapter 25B. Applicability of the Attorney-Client and Work-Product Privileges to Import and Export Compliance Reviews

Steven W. Baker

Steven W. Baker is the principal of the Law Offices of Steven W. Baker. He has specialized in the practice of Customs and International Trade Law in the San Francisco Bay Area for over thirty-five years. He is a past Chair of the Customs Law Committee, Section of International Law, American Bar Association, and is active in many bar and trade associations, including the American Association of Exporters and Importers.

25B:1. Trade compliance concerns

Companies involved in international trade are finding that the ability to conduct such trade on an economically efficient basis requires the development of policies, procedures, and internal controls to ensure compliance with governmental requirements. Export controls, administered by the Commerce Department's Bureau of Industry and Security (BIS) (formerly the Bureau of Export Administration (BXA)) and enforced in part by U.S. Customs and Border Protection (CBP) (formerly the U.S. Customs Service) have existed for some time. While the end of the Cold War and changes in international relationships have substantially reduced both product and country restrictions on trade, programs to ensure against improper export of products and technology, as well as concerns over terrorism, have made the export control system increasingly more complex and detailed. Export compliance systems are common in companies with significant export trade and may be contracted for by many smaller exporters.

Commercial compliance for import transactions has been a major activity for Customs since the Customs Modernization Act of 1993. Compliance Measurement, Focused Assessment, and Importer Self-Assessment programs are an important part of Customs' overall risk management process for commercial issues. Accepted standards and best practices have been developed, with clear expectations by CBP regarding expected levels of written policies and procedures and the supporting internal control process, to ensure their implementation.

Cargo and supply chain security issues, for many years focused on smuggling of drugs and illegal aliens, have expanded since September 11, 2001, to a wide range of cargo and transportation security initiatives. Some (Advanced Cargo Declaration, the Container Security Initiative (CSI)) impact primarily shippers and carriers, with more indirect effects on importers. Others, including the Customs-Trade Partnership against Terrorism (C-TPAT) and the Importer Security Filing (ISF) directly involve not only importers, but also all of their supply chain partners.

A common thread for all of these programs is the desire to ensure awareness and responsibility at high levels of corporate governance; development of policies, procedures, and internal controls, together with adequate training and informational processes, to ensure

compliance with all of the imposed requirements; and the development of review procedures to confirm compliance. Corporate compliance reviews are conducted on a regular and often routine basis for a wide range of concerns, including labor, finance, tax, and many other areas.

Compliance reviews in the import and export area are conceptually similar, and can be conducted in many different ways. Some companies have their own in-house corporate compliance groups; some utilize the Customs Compliance Department of a related company; some are conducted in house by legal, finance, or other departments; and some are contracted from outside service providers, including accountants, consultants, and law firms. Most companies engaging in compliance reviews, whether internal or outsourced, generally believe (or at least hope) that the review will confirm that their systems are operating properly, and that the company is meeting its compliance obligations.

To the extent that the investigation is fully and properly conducted, and the desired results (a finding of no compliance problems) are obtained, concerns over the confidentiality of the investigation and report, beyond those of business confidentiality, do not exist. Most compliance reviews, however, identify some type of problem, whether in the established policies, procedures, and controls, or in their implementation. Many problems may be relatively minor, but significant ones, with potentially large financial or other effects on the company, are also regularly discovered.

The use of an outside service provider to conduct a compliance review can provide several benefits. One of the most important is to have the company's activities viewed by an independent party without the kind of direct interest that employees of the organization would have. A fresh view from the outside will often find issues or problems that have been unintentionally overlooked by those close to them. It will also often involve personnel with special knowledge or expertise in the area and may include the application of recognized best practices from multiple sources.

The use of an outside law firm to conduct or supervise the compliance review has the added benefit of making the information supplied and conclusions reached during the review potentially subject to attorney-client and/or work-product privileges. This allows the company, through its attorney, some control over the use and disclosure of information discovered and the opportunity to take corrective actions, make prior disclosures, or undertake other remedial activities without the potential for uncontrolled disclosures that could result in government-initiated enforcement activities.

25B:2. The attorney-client and work-product privileges

The attorney-client privilege provides a direct protection to confidential communications between a client and an attorney in situations where a client is seeking legal advice or assistance. Communications covered by the privilege cannot be disclosed by the attorney in any form without the consent of the client, and the client cannot be compelled to disclose those communications through legal process.

The privilege is intended to encourage full and frank communications between attorneys and their clients, protecting not only the supply of professional advice to those who can act on it but also the supply of information to the lawyer to enable him to give sound and informed advice.

Communication which permits the provision of sound legal advice or advocacy serves public ends, because such advice or advocacy depends upon the lawyer being fully informed by the client. The Supreme Court has also indicated that the public interest in administration of justice requires that clients have access to the attorney's knowledge and advice without the consequences or the apprehension of disclosure.

The privilege applies to confidential communications--those intended to be kept between the attorney and the client, with reasonable precautions taken to ensure that confidentiality. The communications must be made with regard to a legal issue or problem. Both information provided to the attorney and opinions, advice, and other responses by the attorney based on that information are covered. The privilege includes discussions between attorneys and between an attorney and agents of a client, even when the client is not present.

The fact that the privileges may extend to agents of the client as well as agents and employees of the attorney allows for the use of sophisticated consultants, whether security specialists, accountants, licensed Customs brokers, or others. By having the outside attorney employ these services, the privileges can extend to these consultants as well. This permits the effective and efficient use of particular experts while preserving potential client confidences.

Because in-house counsel privileges may not be quite as extensive as those for outside counsel, use of corporate law departments to conduct/oversee such compliance investigations may not secure the same levels of confidentiality. Non-attorney consultants, of course, cannot provide the benefits of these privileges unless engaged through an attorney.

The attorney-client privilege has long been incorporated in the common law, although the concept itself dates back to Roman and Canon law. Most jurisdictions in the United States have adopted statutes reflecting the scope of the privilege, but a few states rely on the common-law expression alone. For federal issues, the appropriate state laws, or the precepts of common law, will apply.

A sometimes complementary privilege exists under the work-product doctrine. This is an independent source of immunity from discovery and protects material prepared by the attorney, whether or not disclosed to the client, and it protects material prepared by agents for the attorney. The privilege protects material prepared for or in contemplation of litigation; this includes administrative and other federal investigations. It covers material prepared by agents for the attorney and covers these materials whether or not they have been disclosed to the client.
The work-product privilege does not necessarily protect underlying factual information (which may be protected by the attorney-client privilege), but does extend to all the attorney's opinions, judgments, thought processes, impressions, or strategies.

In combination, the attorney-client and the work-product privileges work to allow full and frank communication between a client and its attorney and to protect the work performed by the attorney in connection with specific legal problems. The privilege belongs to the client and can be waived in full or in part by the client whenever the release of otherwise privileged information may be seen to benefit the client.

When the protection of the privileges is desired, the parties involved must take care that they are properly used. The privileges can be waived either intentionally or inadvertently. In some situations, government agencies will ask companies to provide copies of any reviews or investigations concerning a particular matter. For example, a company applying for membership in the C-TPAT may be asked to provide copies of any reviews of its security systems. Assuming the review was done as part of the company's preparation for application to the program, and found satisfactory results, this type of waiver of the privilege may well be considered beneficial. Waiver may also be useful in other situations to demonstrate the actions and commitment of the company.

Inadvertent disclosure of otherwise privileged material can destroy the privilege in its entirety. A popular example of this involves the discussions Martha Stewart held with her daughter regarding privileged information. Because the daughter was not a proper party to privileged discussion between Martha Stewart and her attorney, the privilege against discovery was lost. In trade compliance settings, this generally requires that access to the information involved in the review and discussion of the attorney's findings and opinions be limited to persons properly involved in the evaluation and decision-making based on those materials.

The availability of these privileges can be particularly effective when a company conducts in-house import and export compliance reviews. When these reviews are conducted by counsel, any discovered violations are potentially privileged and can allow the company to discuss and devise responses to the problem in that privileged arena. Even in an in-house review where no problem areas are found, the confidentiality involved in attorney communication can significantly increase the level of employee trust in the review process, in that employees are more likely to provide information to an attorney because the information is being supplied in a privileged context. The willingness of corporate officers and management to contribute to and discuss the results of the compliance review within a potentially privileged arena can similarly add to the openness and thoroughness of the review.

Online resources discussing the privileges are available on many sites, including the American Corporate Counsel Association (http://www.acca.com) and the Association of Independent General Counsel (http://www.aigclaw.org).