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Reducing Criminal Liability with Chinese Imports

By Hon. John R. Steer and Mark H. Allenbaugh

China has quickly evolved into our second largest trading partner, and our pervasive reliance on China-made products has brought an increasing vulnerability to defective goods — from poisoned pet food and lead-painted toys, to tainted heparin and melamine-laced milk-based products. Coupled with the near-depression in our economy, the China import safety crisis creates a perfect storm for driving importers and retailers out of business when faced with monumental product liabilities, both criminal and civil. Corporate counsel, therefore, must learn how to minimize or even eliminate their clients' increased criminal and civil exposure.

Background

According to the Consumer Product Safety Commission (CPSC), 61% of its 473 recalls in fiscal year 2007 were products made in China. In 2007, the President created a cabinet-level Interagency Working Group on Import Safety tasked with developing strategies to address this mounting problem. It released an Action Plan in November 2007.

Problems with the Action Plan

Although the Action Plan purports to speak to "Prevention with

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Attorney-Client Privilege in Congressional Investigations

By Steven R. Ross and Raphael A. Prober

For a litigator accustomed to practicing in court, representing a client in a Congressional investigation presents unique challenges, as the rules, procedures, processes, and customs differ vastly. One area of stark difference is the status and treatment of attorney-client privilege. Over the years, much has been said about whether the privilege does or does not apply in a Congressional investigation. The practical reality lies somewhere in between. While Congressional committees generally adopt the view that the privilege is not applicable as a matter of right, most view it as within their discretion to sustain an assertion under certain circumstances. Counsel must nimbly navigate the pitfalls to ensure that the privilege is properly asserted, that it is not waived or compromised in any fashion, and that the client is not prejudiced in actual or potential parallel proceedings.

Claims of Privilege

In practice, Congressional committees do, to varying degrees, regularly respect validly asserted claims of privilege by not insisting on production of information that would improperly intrude on the confidential nature of the attorney-client relationship. This is because most members of Congress and their staffs, many of whom are lawyers themselves, recognize that many of the basic societal values underlying common-law attorney-client privilege apply as forcefully in the Congressional setting. The attorney-client privilege promotes the public interest in the observance of law by encouraging full and frank communications between attorneys and their clients. Though some assert that the privilege should never apply because a Congressional investigation is not an adversarial proceeding, this view is far too narrow. For example, a lawyer might counsel a witness appearing before Congress on the witness's Fifth Amendment rights, and counsel's advice should be informed by full and frank communication with the client. Any discussions or communications between attorney and client related to the

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Congressional investigation itself should be, and are, viewed as falling into a different category of privilege — one on unquestionably firm ground — than the assertions of the privilege discussed below. It is simply not Congressional practice to request information or documents related to counsel's representation of the client in the Congressional investigation itself.

SUBPOENAS

Congress has the ability to issue subpoenas for testimony and/or documents, and such authority has been held to be inherent in Congress's legislative powers. Any refusal to produce documents and/or testimony, even on the grounds of the attorney-client privilege, can be met with stiff penalties, as Congress has the authority to bring criminal contempt charges in such cases. An individual withholding subpoenaed documents ultimately needs to risk criminal contempt charges in order to obtain a judicial ruling on a particular assertion of privilege. In practice, however, both sides usually stop short of the brink. While witnesses may disclose potentially privileged communications to avoid charges of contempt, Congress also has a compelling interest in not litigating because a test case could result in a conclusive determination that the privilege exists as a matter of right rather than being subject to Congressional discretion. In addition, committee staff, particularly those busy preparing for a hearing or the release of a report, are motivated to avoid a lengthy and time-consuming legal dispute. Given all of these factors, it is often in both the committees' and the witness's interests to reach a reasonable accord on issues of privilege, and more frequently than not this is accomplished. The discussion below details how this accord can be reached in practice.

WHAT COUNSEL MUST DO

As committee staff can handle claims of privilege in any number of ways, it is advisable for counsel to notify the committee as early in the process as possible of relevant documents or other communications where counsel anticipates asserting the privilege. Early notification will give counsel time to learn the committee's procedures with regard to privilege and comply with them from the outset of the document collection and information gathering process. It also gives more time to persuade committee staff of the validity of the claim.

In making privilege determinations, committees have tended to balance their need for the information and ability to get it through other sources against any harm to the client due to disclosure. As early in the process as possible, counsel should convey to committee staff the genuine risks associated with disclosure, such as waiver in actual or potential parallel proceedings (including investigations by state or federal prosecutors or administrative agencies and any civil litigation).

THE PRIVILEGE DETERMINATION PROCESS

While the privilege determination process does differ from committee to committee, it often involves one of three approaches, or a hybrid of them: 1) reliance by committee staff on counsel's assertion of privilege; 2) requiring submission of a privilege log; and 3) a preliminary review of the documents by staff for privilege only modeled on an *in camera* review by a judge. Irrespective of the approach a given committee opts to take, counsel always must be prepared to explain and defend the assertion of privilege. As

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How Much Knowledge Makes a Crime?

By Anthony M. Alexis and Tyler E. Gellasch

The unprecedented crisis in capital markets will put pressure on the new administration and Congress not only to stabilize the economy, but also to punish perceived wrongdoers. We can expect increased criminal and civil enforcement by the executive branch and, in the longer term, new criminal statutes to deter future wrongdoing. But when Congress passes a new statute in a prosecution-friendly atmosphere, it should be wary of the potential for overly aggressive prosecutors to misuse it.

A perfect example is the Aggravated Identity Theft Statute (AIT), 18 U.S.C. § 1028A(a)(1). The government's aggressive use of the AIT to combat illegal immigration has reached beyond the statutes's admirable goals in a way that dilutes the mens rea of the crime and has led to inconsistent law.

The Supreme Court Ruling

On Oct. 20, 2008, the Supreme Court agreed to weigh in on the issue. *See Flores-Figueroa v. United States*, No. 08-108. This is the third time in only five years that the Court is addressing the knowledge element of a federal criminal crime. Last term, the Court ruled that "knowingly" in a child pornography statutes applied to every element of a multi-provision statute. *Williams v. United States*, – U.S. –, 182 S. Ct. 1830, 1839 (2008). In 2005, it held that "knowingly" in the obstruction of justice statute (18 U.S.C. § 1512(b)(2)(A) and (B)) modifies more than just the immediate verbs. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). Now, the question before the Court is whether an individual can violate the AIT even if he does not know that the identification he's misusing in fact belongs to another person.

The government is now urging the Court to break with its prior two decisions and hold the word "knowingly" in the AIT modifies only the verbs (acts) that immediately follow it in the text. The Court's resolution of this issue may provide a persuasive — if not binding — interpretation of this and other statutes that arguably share its same basic structure — that a wrongdoer "knowingly" engaged in an act or a series of acts which violated the law. A limited application of the word "knowingly" might provide the government with a substantial upper hand in criminal law enforcement for years to come.

AIT As a Weapon Against Illegal Immigrants

Illegal immigrants often need a means of identification (*e.g.*, a Social Security or Alien Registration number) in order to obtain employment in the United States. Because of their status in this country, many resort to phony names and numbers. Those who do risk prosecution for myriad federal crimes. *See, e.g.*, 18 U.S.C. § 1546(b)(1) (fraud or misuse of an identification document).

The AIT supplements the preexisting legal framework with a mandatory two-year prison sentence to anyone who, during or in relation to committing any one of a few specified felonies, "knowingly transfers, possesses, or uses … a means of identification *of another person*." 18 U.S.C. § 1028A(a)(1) (emphasis added).

Federal prosecutors — and three circuit courts — interpret the statute so that the word "knowingly" does not apply to "of another person." Accordingly, they are charging illegal immigrants with aggravated identity theft even if the defendants did not know that they were using numbers assigned to other people. Thus, using a false number has become a two-year gamble: In randomly selecting a phony Alien Registration number, a lucky illegal immigrant will pick one that has not been assigned, but an unlucky illegal immigrant will stumble into an AIT violation by picking someone else's number.

Despite this seemingly arbitrary distinction, the Department of Justice is now using the threat of AIT's prison term to secure plea agreements for other offenses. As one defense lawyer described, the AIT is wielded as the "hammer over everyone's head." Jerry Markon: Justices May Take Immigration Cases, *Wash. Post*, Oct. 19, 2008 at A2.

Split in the Circuits

The six circuits that have spoken are evenly divided. The Fourth, Eighth, and Eleventh Circuits do not require that a defendant know that the means of identification that he misused belonged to someone else. These Circuits appear to rely upon grammar. *See, e.g., United States v. Hurtado*, 508 F.3d 603, 607 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213, 215 (4th Cir. 2006). According to them, "good usage" dictates that the adverb "knowingly" in § 1028A(a)(1) modify only the immediately following verbs "transfers, possesses, or uses," and does not apply to the trailing predicate "of another person."

In the Eighth Circuit case now before the Supreme Court, defendant Flores-Figueroa, a Mexican citizen, purchased and used false documents in order to obtain employment in the United States. Although he clearly knew the documents were false, the government did not prove that he knew that the identification numbers belonged to someone else. The Eighth Circuit held that he did not need to know.

Although the Supreme Court has ruled in similarly worded statutes that the modifier "knowingly" extends throughout the subsequent predicates, *see, e.g., Arthur Andersen LLP and United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Fourth, Eighth, and Eleventh

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Circuits appear to distinguish those rulings on the grounds that the Supreme Court, in each case, willingly bent grammatical rules to prevent the unintended criminalization of innocent behavior — something the three Circuits did not believe was an issue with the aggravated identity statute.

For example, in *X-Citement Video, Inc.*, the Court interpreted 18 U.S.C. § 2252(a), which proscribes knowingly transporting, shipping, receiving, distributing, and reproducing child pornography, in a way that extended the knowledge requirement beyond transporting to that fact that the materials shipped were child pornography. Otherwise, the Court said, the statute would allow prosecution of individuals who had no idea that they were even dealing with illicit material, a result it found "absurd."

As the Fourth, Eighth, and Eleventh Circuits see it, aggravated identity theft is different. There is no need to divert from the normal interpretive rules because following them would not unwittingly criminalize otherwise innocent conduct. To the contrary, a defendant in an aggravated identity theft case must have committed a predicate felony and thus already has a guilty mind.

The D.C., First, and Ninth Circuits, by contrast, require that a defendant actually know that he used someone else's ID. These Circuits have concluded that the aggravated identity theft statute is ambiguous, essentially because "it is not at all clear how far down the sentence the word 'knowingly' is intended to travel." *Villanueva-Sotelo*, 515 F.3d 1234, 1241 (D.C. Cir. 2008); *United States v. Miranda-Lopez*, 532 F.3d 1034, 1038-39 (9th Cir. 2008); *see also, U.S. v. Godin*, 534 F.3d 51, 58 (1st Cir. 2008).

The D.C. Circuit, relying upon traditional interpretive tools such as legislative history and comparisons to analogous statutes, concluded that "knowingly" applies to the phrase "of another person." It also found that the rule of lenity — which dictates that ambiguities about the scope of a criminal statute should be resolved in favor of the defendant — independently mandated that the word "knowingly" apply to the phrase "of another person."

The First and Ninth Circuits, which were not as persuaded by the results of their interpretive efforts, found the statute ambiguous as to whether the word "knowingly" should reach the end of the sentence. Given that ambiguity, they used the rule of lenity to resolve the ambiguity in favor of the defendants.

Hung up on Grammar

In our view, the circuit courts have focused too narrowly on the grammar of the statute without regard to the common-sense intent. As the First Circuit aptly noted in *Godin*, the courts' job is to apply "a criminal statute and not an English textbook."

Focusing solely on the AIT's grammar ignores Congress's clear intent to deter a "theft," typically defined as "the felonious taking and removing of another's personal property with the intent of depriving the true owner of it." BLACK'S LAW DICTIONARY 1516 (8th ed. 2004). By declining to apply the word "knowingly" to the phrase "of another person," the courts are stripping away an essential element of a theft (that the offender intend to deprive the true owner of something). Put simply, if an individual does not know that what he has taken belongs to someone else, he cannot have intended to deprive the true owner of it.

Potential Fallout

The Supreme Court's interpretation of whether "knowingly" modifies the phrase "of another person" will undoubtedly influence the efficacy of the Department of Justice's recent crackdown on illegal immigration through the AIT.

But this interpretation may also bleed over into other prosecutions. Numerous statutes — for crimes ranging from witness tampering, to fraud and false statements, to drug sales, to child pornography — use some version of the general statutory structure used by the AIT. If the knowledge requirement is applied throughout those statutes, then establishing sufficient mens rea may be a difficult burden on the government. But, if "knowingly" applies only to the acts that immediately follow, then the mens rea requirement for many of these statutes may be unduly diluted. Further, the mens rea requirements of other, differently structured, statutes may also be impacted by the Court's ruling. *See, e.g.*, the health care Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b).

Before embarking on legislation to redress the recent crises, Congress and the new administration should heed the guidance likely to come from the Supreme Court's interpretation in Flores-Figueroa. Practitioners should also take heed, because if the Court follows the narrow interpretation adopted by the Fourth, Eighth, and Eleventh Circuits, and the Court's opinion is read broadly, the mens rea requirement may be diminished throughout federal criminal law.

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in court, the burden is on the person asserting the privilege.

Generally speaking, the committee should make as minimally invasive an inquiry as is necessary to satisfy itself that a privilege exists; wherever possible, it should accept at face value a proper assertion of privilege. Often, when staff adopts a minimally invasive approach without requiring a privilege log or an *in camera* review, it stems from a long-standing working relationship with counsel based on mutual respect and honesty.

Frequently, however, committee staff will require that counsel produce a privilege log but not the underlying privileged documents. While committee staff will not always

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Verification," the main focus is on the creation of "mandatory and voluntary third-party certification programs for foreign producers that are based on product risk" and to "verify compliance with U.S. safety standards." But there are few such third-party entities competent to perform the certifications. In fact, during a public conference call on the day the Action Plan was released, the Working Group could not identify a single such entity.

The Action Plan also discusses the development "of good importer practices" and the use of "strong penalties against bad actors." Yet the prospect for prevention is not promising. As the Plan itself recognizes, "the importing community does not have available Good Importer Practices focused on ensuring product safety throughout the supply chain."

A New Statute

The Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314 (Aug. 14, 2008), was enacted largely in response to the import safety crisis. It substantially increased funding for the CPSC and provided for more personnel to monitor compliance. Like the Action Plan, it too calls for third-party certification of imported products.

The Act also increased maximum civil fines for safety violations from $1.25 million to $20 million, and increased some criminal penalties from misdemeanors to five-year felonies, with criminal forfeiture of assets tied to the offense conduct.

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Compliance and Ethics for China-based Manufacturers

With thousands of miles and significant language and legal barriers between China-based factories and U.S. companies, legislative sticks and ad hoc monitoring and audits won't stem the tide of defective imported products or reduce clients' liability, which very often will be determined under strict liability standards. To minimize or eliminate criminal exposure in the new import safety environment, U.S. companies must move away from a system based on detection to a prevention-based system of compliance and ethics.

Compliance and ethics programs were born out of the U.S. government's recognition many years ago that intra-organizational systems designed to detect, resolve, and — especially — prevent violations of laws and regulations could reasonably be tailored to the size and nature of the organization without increasing costs — in fact, often decreasing them.

Championed by the U.S. Sentencing Commission and endorsed by the Department of Justice and other executive branch agencies, compliance and ethics programs have been adopted by every Fortune 500 company in the U.S. and thousands of others. They have been credited with reducing both criminal and civil liability in all types of organizations.

An Effective Program

Here are the elements of an effective compliance and ethics program as defined by the U.S. Sentencing Commission, which we have annotated with specific suggestions regarding China-based manufacturers:

1. The organization shall establish standards and procedures to prevent and detect criminal conduct. Standards and procedures must be bilingual — Chinese and English in China, Spanish and English here. U.S. importers should have bilingual vendor contracts requiring their China-based vendors to prove that they have ethics and compliance programs in place.

2. The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to its implementation and effectiveness … Periodic reports on the effectiveness of the compliance and ethics program shall be disseminated to high-level personnel. Your clients should meet with the principals of their factories, at their factories, at least annually. Larger clients should consider opening in China a representative office staffed by local citizens acting as liaisons and in-house quality control inspectors. These employees can help build a level of trust (guanxi) to ensure that the expected level of quality, performance and compliance is met by the vendor. Your clients should also develop "vendor scorecards" to quantify the effectiveness of the compliance program and make it better understood and maintained by the vendor's employees. Scorecards can be enormous carrots for China-based manufacturers if meeting or exceeding certain scores results in faster payment or larger orders.

3. The organization shall use reasonable efforts to vet those with substantial authority within the organization. Here, it is important to understand how your client's vendors hire their key employees and factory workers. What are the backgrounds of key employees? What is the rate of attrition among factory workers? Does the factory comply with relevant Chinese employment laws and regulations? Every January and February, the Chinese New Year brings the largest mass movement of humanity as workers return inland to their homes. Roughly 1/3 do not return. Pent-up demand brings a higher rate of defects as new employees are hired and trained by March — a season particularly susceptible to unethical and non-compliant activities.

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4. The organization shall take reasonable steps to communicate periodically its standards and procedures, and other aspects of the compliance and ethics program, by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities. China-based vendors should be required to supply bilingual manuals to their U.S. importers for review and modification pursuant to relevant changes in U.S. laws and regulations (and corporate counsel must stay abreast of these changes). Examples of training should be periodically forwarded to the importer and, if possible, principals from the importer should witness training in person during annual factory visits.

5. The organization shall take reasonable steps — a) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; b) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and c) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. Since texting is ubiquitous in China, vendors should encourage factory workers to send anonymous texts or e-mails with their complaints or observations, and U.S. importers should have reasonable access to this documentary trail. This requirement can be negotiated in the vendor contract.

6. The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through appropriate incentives to adhere to the strictures of the program, and disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct. Disciplinary records should be made available to U.S. importers as part of any vendor contract negotiations, at least with respect to egregious violations that pertain to the importer's products.

7. After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program. The U.S. Embassy in Beijing and the many U.S. consulates in major Chinese cities have access to somewhat crude company financial profiles that may contain information about criminal conduct regarding a particular factory. These should be ordered at least semi-annually for major factories. The vendors' compliance manual should be revised periodically with an eye to preventing recurrences of past violations.

CONCLUSION

With the number of U.S. importers having grown from 732,000 in 2003 to 862,000 in 2007 (an increase of nearly 18%), prevention can only be achieved through heavy reliance on the import industry. Specifically, prevention can occur only through the relationship between the importers and their foreign factories.

Since compliance and ethics programs are proven systems to prevent violations of laws and regulations, the key is to make them optimally effective in foreign factories, with prevention a critical focus. U.S. importers must export our best compliance and ethics practices to Chinese manufacturers through on-site training and regular follow-up evaluations. The best entities for doing such are not government organizations but your clients themselves.

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specify the types of information to be included in the log, Federal Rule of Civil Procedure 26(b)(5) provides a good model. Counsel will not necessarily receive follow-up questions from committee staff regarding the log. This can be because the log is clear on its face, and committee staff have accepted the representations of counsel. Other times, however, lack of feedback simply may suggest that there wasn't time to engage in substantive discussions of privilege in advance of the hearing, not necessarily that the privilege claim has been accepted. It is important to remember that staff work under tremendous time constraints, often preparing for a hearing or finalizing a report when the log is produced (typically with the last set of documents).

Committee staff also may require an *in camera* review of documents — a bit of a misnomer, because the documents are not reviewed by an independent third party, but by committee staff. (In certain circumstances, the review might be conducted by Members or Congressional counsel not directly involved in investigation.) The *in camera* review may include all documents withheld as privileged, as identified in a privilege log, or just a subset of these documents. Alternatively, committee staff may simply request that counsel provide the committee with all documents (or a sample of representative documents) that counsel intends to withhold as privileged. Though there is no requirement that counsel be present during the review, committee staff typically are amenable to discussing specific documents and privilege designations with counsel, and the

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BUSINESS CRIMES HOTLINE

ILLINOIS

Two Men Sentenced for Role In Aegis Tax Fraud Conspiracy

Timothy Shawn Dunn and Robert W. Hopper were sentenced to 210 and 200 months in prison respectively, for their roles in a tax fraud conspiracy that resulted in a $600 million tax loss to the United States. According to the DOJ, the tax fraud employed a network of promoters, sub-promoters, managers, attorneys, and accountants. Both men were convicted in an 11-week trial, and the investigation, dubbed "Operation Trust Me," has resulted in more than 30 convictions nationwide and charges against 30 others. Dunn and Hopper were also ordered to repay hundreds of thousands of dollars in personal, unpaid federal taxes.

UTAH

Utah Gold and Silver Refinery Fined $3 Million

Johnson Matthey Inc. (JMI), which operates a precious metals refining facility in Salt Lake City, was sentenced to pay a $3 million criminal fine for a felony violation of the Clean Water Act. Of that amount, $750,000 will fund various environmental projects in Utah that are administered by the National Fish and Wildlife Foundation. The company and its employees violated the Clean Water Act by making false statements to government officials regarding JMI's discharge of selenium, a pollutant that is a byproduct of the refining process. An audit also revealed that employees had screened sample discharges before submitting them to an outside laboratory for analysis, which violated the company's discharge permit.

VIRGINIA

PurchasePro, Inc. Founder And Former CEO Sentenced For Securities Fraud

Charles E. "Junior" Johnson, the founder and former CEO of PurchasePro, Inc., was sentenced to nine years in prison for securities fraud, witness tampering, and obstruction of justice. The sentence was substantially less than the 16 to 17 1/2 years that prosecutors sought because the judge used an older version of the Sentencing Guidelines that called for a more lenient sentence. In addition to the fraud charges, Johnson was convicted of obstruction of justice for an unsuccessful attempt during his first trial to submit fabricated e-mails into evidence at trial. Johnson's lawyers caught him and resigned from the case, which resulted in a mistrial. Johnson's conviction concludes a seven-year investigation into the PurchasePro fraud.

WASHINGTON, D.C.

Siemens Agrees to Pay $800 Million

Siemens AG, and three of its subsidiaries, have agreed to pay $800 million to the DOJ and the SEC for violations of the FCPA. Of that amount, $450 million will be paid to the DOJ as a criminal fine and $350 million will go to the SEC to disgorge Siemens' profits. Both penalties are unprecedented and are in addition to another $800 million paid by Siemens to German authorities, which brings the total paid by Siemens to $1.6 billion. In addition to paying the fine, Siemens has agreed to retain an independent compliance monitor for a four-year period, during which a monitor will oversee the continued implementation and maintenance of Siemens' compliance program. The monitor will also make periodic reports to the company and the DOJ.

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client is best served by counsel's active participation in the process.

In Camera Review

With an *in camera* review, committee staff are serving as both judge and jury. They should, and do, take this responsibility seriously. Given this dynamic, it is even more critical that counsel be entirely forthright and professional in any assertion of privilege. If counsel loses credibility because of overly aggressive or careless privilege designations, the negative impact on the working relationship with committee staff can complicate the investigation going forward. On the other hand, if counsel uses this process to establish his care and integrity, staff are more likely to accept the assertion of privilege.

In extraordinary cases, a committee might flatly deny attorney-client privilege without any opportunity for give-and-take with the staff. Counsel then faces the stark choice of simply producing the requested documents or information or litigating the privilege in a contempt proceeding.

An assertion of privilege may be respected by one committee but not another with respect to the same witness. Different witnesses may face inconsistent treatment of an asserted privilege in the same investigation in front of the same committee. And even when the privilege is accepted, various committees may use different processes and procedures to reach this conclusion. Congress, and its committees and staff, as well as counsel and the witnesses they represent, would all benefit from a regularization of the process. This can be accomplished, in part, by the further development of a specialized bar in the area of Congressional investigations — one that understands the constitutional basis and history of Congressional investigations and on which committees can rely to advance legitimate claims of privilege.

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IN THE COURTS

SECOND CIRCUIT AFFIRMS SUBSTANTIAL DOWNWARD *BOOKER* VARIANCE

The Second Circuit Court of Appeals affirmed the lenient sentence given to Richard Adelson, the former Chief Operating Officer and President of Impath, for securities fraud. *See United States v. Adelson*, Nos. 06-2738, 06-3179, 2008 WL 5155341 (2d Cir. Dec. 9, 2008) (summary order). U.S. District Judge Jed Rakoff had sentenced Adelson in 2006 to 42 months' imprisonment, rather than imposing the life sentence recommended by the Sentencing Guidelines.

The government's principal claim on appeal was that the district court discarded the Guidelines in favor of the sentencing judge's personal view of the seriousness of Adelson's offense. In an unpublished opinion, the Second Circuit rejected that contention and explained that the post-*Booker* case law required the Court of Appeals to defer to the judgment of the sentencing judge. The Second Circuit concluded that Judge Rakoff properly calculated Adleson's advisory guideline range and that he considered the relevant sentencing factors in Section 3553(a) of Title 18.

FIFTH CIRCUIT HOLDS THAT ACTUAL LOSS SHOULD BE USED TO CALCULATE SENTENCE FOR MORTGAGE FRAUD SCHEME

The Fifth Circuit Court of Appeals held in *United States v. Goss*, --- F.3d ----, No. 07-60699, 2008 WL 4951592 (7th Cir. Nov. 21, 2008) that the market value of homes that served as collateral in a mortgage fraud scheme should have been deducted from any losses committed as a result of the fraud. Defendant-appellant Toby Goss, a mortgage lender, was convicted of conspiring to commit mail and wire fraud by preparing and submitting false documents to induce lenders to make over $2 millions in loans to 35 borrowers who may not have qualified for the loans otherwise. Under the Sentencing Guidelines, Goss's punishment would be determined, to a large degree, by the amount of loss to the victims of the offense, which in this case, would be the value of the mortgages. The government argued that Goss's intended loss exceeded the actual loss, which meant using the full value of the loans with no discount for the value of the homes which served as collateral.

Goss objected to the government's position and argued that the collateral should be deducted from the value of the loans.

The court vacated Goss's 57-month sentence and remanded for resentencing. The decision required the Court of Appeals to reconcile the practice likely preferred by the Sentencing Guidelines, which suggest that a deduction was proper, with circuit precedent that suggested that the collateral should not be credited against the value of the mortgages.

D.C. CIRCUIT UPHOLDS RESTITUTION REQUIREMENT IN FRAUD CASE

In *United States v. Anderson*, 545 F.3d 1072 (D.C. Cir. 2008), the D.C. Circuit Court of Appeals held that a drafting error in a plea agreement did not preclude a restitution award when the parties clearly intended that restitution be awarded. Walter Anderson pled guilty to two counts of evading federal income taxes and one count of first degree fraud in the District of Columbia. The district court sentenced Anderson to 108-months' imprisonment and ordered him to pay the District of Columbia more than $22 million in restitution, but denied the government's request for restitution to the United States.

On appeal, Anderson argued that his sentence violated the Ex Post Facto Clause of the U.S. Constitution because the 2001 edition of the Guidelines was used to calculate his sentence, rather than the 2000 version. The 2000 edition of the guidelines would have given Anderson a more lenient advisory guideline range. The Court of Appeals quickly dismissed Anderson's argument because the plea agreement stipulated that the district court would use the 2001 edition of the Guidelines, and the sentencing judge stated that the 71-month sentence calculated under the 2000 edition was not sufficient punishment.

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