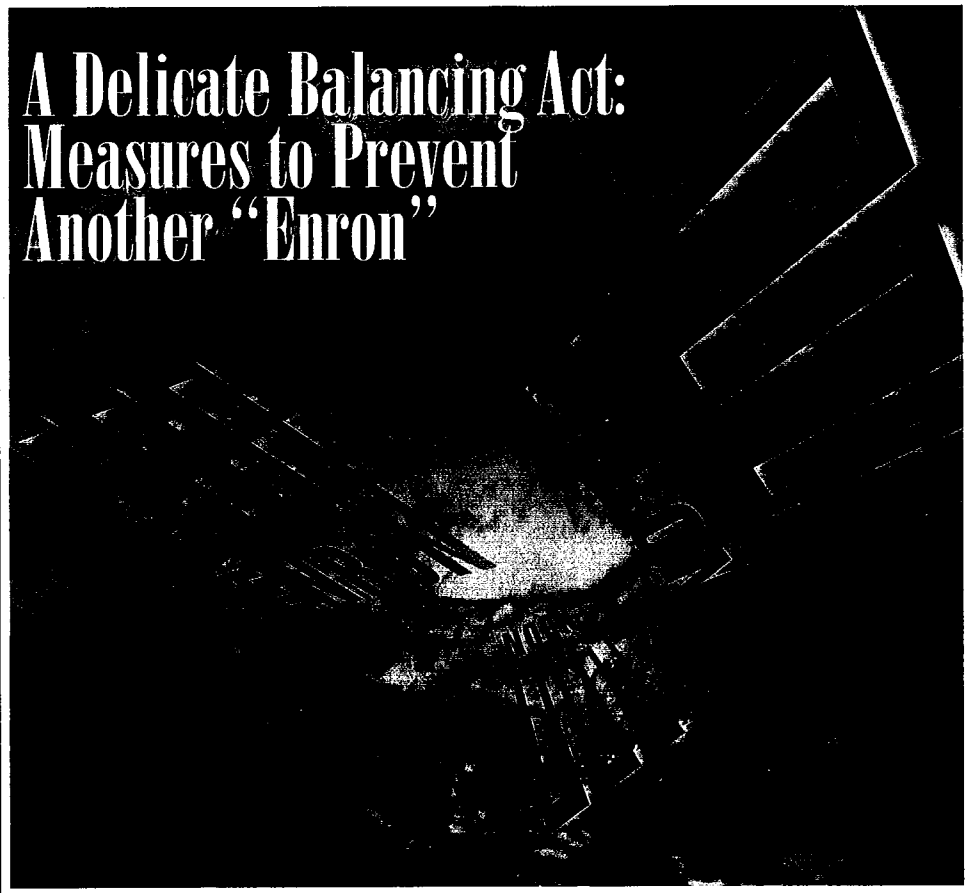
ETHICALLY SPEAKING

In this issue of *Ethically Speaking*, the authors – two Orange County Federal Prosecutors – provide a counterpoint to last month's article, *Attorney-Client Confidentiality in the Post-Enron Prosecutorial World*, by Keith Paul Bishop and Steven K. Hazen.

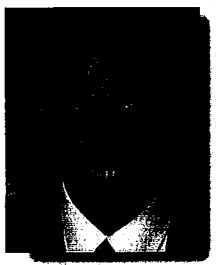
A Delicate Balancing Act: Measures to Prevent Another "Enron"



by Wayne Gross and John Hueston

Background

A cynic once famously defined a corporation as an "ingenious device for obtaining individual profit without individual responsibility." (AMBROSE BIERCE, THE DEVIL'S DICTIONARY 29 (1999).) Enron appeared to evolve into precisely this type of corporation. In October 2001, the seventh largest corporation in America announced that it had a $618 million net loss for the third quarter, resulting in a reduction of shareholder equity of more than $1 billion. (Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 225 (2004).) Recent criminal verdicts affirmed that for an extended period of time Enron inflated its reported earnings by shifting debt off the books and hiding corporate losses, ultimately causing it, in December 2001, to file for Chapter 11 bankruptcy protection. (*Id.*) The Enron scandal resulted in the loss of thousands of jobs and billions of dollars in shareholder value. (*Id.*)



Wayne Gross

John Hueston

Numerous other companies, including WorldCom, Adelphia, HealthSouth, McKesson, Tyco, and Qwest, soon became embroiled in corporate fraud investigations by federal and state regulators. (*Id.*) As one academic aptly put it: "Enron was, quite simply, the opening chapter in a series of sordid tales about corporate governance run amok." (*Id.*) To coordinate the response of the federal law enforcement and regulatory community to this challenge, President Bush, in July 2002, created a Corporate Fraud Task Force, under the leadership of the Deputy Attorney General, with the mission of restoring integrity to the marketplace. (Exec. Order No. 13, 2171, 67 Fed. Reg. 46091 (2002), *available at* http://www.usdoj.gov/dag/cftf/execorder.htm). Since the task force was created, more than 480 criminal cases have been filed against more than 990 defendants, including corporate executives, attorneys, accountants, stock brokers, and investment advisers. (PRESERVING LIFE & LIBERTY: THE RECORD OF THE U.S. DEPARTMENT OF JUSTICE 2001- 2005, 71 (2005).) To date, more than 600 of those defendants have been convicted, including top executives at Enron, Worldcom, and Adelphia. (*Id.*)

The Thompson Memo and Corporate Cooperation

In January 2003, as a result of the increasing number of corporate criminal investigations, then Deputy Attorney General Larry D. Thompson issued a memorandum concerning corporate charging decisions. (FEDERAL PROSECUTIONS OF BUSINESS ORGANIZATIONS, MEMORANDUM FROM DEPUTY ATTORNEY GENERAL, LARRY D. THOMPSON, TO THE UNITED STATES ATTORNEYS' OFFICES (January 20, 2003), *available at* www.usdoj.gov/usao/eousa/foia_reading_room /usam/title9/crm00162.htm (hereinafter "Thompson Memo").) It begins with a general principle of corporate criminal responsibility:

> Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime. (*Id.* at IA).

The Thompson Memo further explains that, in deciding whether to seek charges against a corporation, prosecutors should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative and other consequences of conviction, and the adequacy of non-criminal approaches. (*Id.* at IIA). However,

due to the nature of the corporate "person," some additional factors must be considered when conducting an investigation of a corporation. (*Id.*) One such factor is the prosecutor's evaluation of corporate cooperation and voluntary disclosure of information and wrongdoing:

> In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work product protection. (*Id.*)

That the Department of Justice would like the cooperation described in the Thompson Memo should come as no surprise to anyone. As explained by a former U.S. Attorney:

> The corporation has the ability to provide assistance to the government because it can determine the facts quickly and efficiently. Corporate defendants often have complicated organizational structures, with many employees working in various divisions, departments, and business locations. They frequently have in place sophisticated document management and computer systems where much of the information relevant to an investigation would be stored. They also have policies and procedures specific to their organizations that may bear on the issues in a given case. With respect to an organization's "knowledge" of a particular event, that knowledge may be spread over many individuals, some of whom may have since left the organization's employment. The corporation may be able to identify quickly and efficiently the appropriate individuals with knowledge of the events and the relevant documents and other evidence.

(Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 605 (2004).)

The Thompson Memo's Waiver Provision in the Context of Creative Resolutions with the Government

As noted above, one way in which a corporation may establish its cooperation with the government is by waiving attorney-client and work product protections. Indeed, the Thompson Memo provides that prosecutors "may . . . request a waiver in appropriate circumstances." (THOMPSON MEMO, at VIB). Nevertheless, the Thompson Memo makes clear that the Department of Justice does not require waiver of a corporation's attorney-client and work product protections. Rather, the Thompson Memo states that prosecutors should consider an organization's willingness to make a waiver as simply one factor of many, including the corporation's history and management's role in wrongdoing. (*Id.*)

Moreover, when the Department does request a waiver, it is normally limited in scope. The Thompson Memo makes clear that "waiver

should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation." (*Id.*) Thus, the information disclosed pursuant to a waiver is nearly always attorney work product concerning the underlying facts, rather than privileged communications. This was explained by former Deputy Attorney General James B. Comey as follows:

> Prosecutors are generally seeking the facts: what happened, who did [it], how they did it. Although the facts gathered by an attorney providing advice to a corporation may be covered by both the attorney client privilege and work product doctrine, prosecutors are not generally seeking legal advice or opinion work product; they are just seeking the facts, including factual attorney work product.

(UNITED STATES ATTORNEYS' USA BULLETIN, Vol. 51, No. 6, pg. 1).

Whenever possible, corporations can and should work with the government to obviate the need for waiver of the attorney-client privilege or to structure cooperation to minimize intrusion into the attorney-client relationship. It is important to note that the government is increasingly willing to enter into creative agreements with corporations that provide effective reforms and permit the corporation to avoid criminal prosecution. These agreements normally come in the form of non-prosecution agreements and deferred prosecution agreements. In a non-prosecution agreement, a prosecutor agrees not to criminally prosecute the corporation in exchange for fines, cooperation, monitors, and changes in corporate structure.[1] Under a deferred prosecution agreement, the company is charged with a crime but agrees to a series of reform measures which, if fulfilled by a stipulated date, trigger the dismissal of the charges.[2] When structuring such agreements with the government, private counsel, when appropriate, should seek to explain how it believes the government may effectively investigate its case without a waiver or, if absolutely necessary, with a limited one. For instance, prosecutors rarely find it necessary to request a waiver of the attorney-client privilege when private counsel endeavors to provide prompt witness interview opportunities and access to documents.

Private counsel should also explain what steps the company is prepared to take to ensure that it doesn't engage in fraudulent conduct in the future. The agreement structured by Merrill Lynch with the Enron Task Force is a case in point. Merrill Lynch and certain executives were under investigation for improperly assisting Enron to enhance fraudulently its financial statements. An innovative agreement was structured that included the appointment of a monitor to assure the Department of Justice and the court that the company was abiding by its agreement to institute and comply with the agreed-upon reforms. The agreement was negotiated to exclude a wholesale waiver of the attorney-client privilege: "This obligation of truthful disclosure includes an obligation to provide to the Department access to Merrill Lynch's facilities, documents and employees. This paragraph does not apply to any information provided to counsel after July 31, 2000, in connection with the provision of legal

advice and the legal advice itself." (Merrill Lynch Agreement at pg. 2, *available at* ww.usdoj.gov/usao.gov/opa/pr/2003/September/enronagree.pdf).

In sum, it is important for attorneys representing target corporations to keep in mind that prosecutors and regulatory agencies routinely resolve investigations involving corporations in a manner that results in minimal intrusion on the attorney-client privilege. Given the minimal nature of the intrusion, the real criticism of waiver requests appears to be that they are somehow coercive, requiring corporations to discover and turn over incriminating information that, even if non-privileged, the government should obtain on its own. (*See* Keith Paul Bishop and Steven K. Hazen, *Attorney-Client Confidentiality in the Post-Enron Prosecutorial World*, 48 Aug. ORANGE COUNTY LAWYER 46 ("[G]overnment agencies . . . attempt to conscript private attorneys as their eyes and ears").) Former Deputy Attorney General Comey, however, explained that corporations who receive waiver requests maintain the choice to cooperate or not:

> [T]he core issue . . . is whether a corporation wants to earn leniency in the charging decision . . . . If it does, then it will have to figure out a way to tell the Government what i[t] knows about the misconduct and to help us catch the wrongdoers. [¶] No corporation can be forced to cooperate. But isn't cooperation what good corporate citizenship is all about? If a corporation prefers that the Government not find out the true facts, or take a longer time to gather the same facts the corporation has gathered, then it won't provide full and timely disclosure. How that will affect the charging decision, which is based on numerous factors, will vary in every case.

(UNITED STATES ATTORNEYS' USA BULLETIN, Vol. 51, No. 6, pg. 4).

Asking a corporation to waive privilege in return for more lenient treatment is no different, fundamentally, from informing an individual criminal defendant that he or she will receive more lenient treatment with full cooperation and complete disclosure of what he or she knows about others. It is indisputable that an individual criminal defendant receiving such an offer is in no way being coerced to cooperate; he or she

always has the choice to say no and force the government to prove guilt beyond a reasonable doubt. The same analysis applies to corporations, which, like individual defendants, have the absolute right to force a prosecutor to prove the government's case without any assistance whatsoever from the corporation.

Conclusion

Since the collapse of Enron, the Department of Justice has made extraordinary strides in restoring integrity to the marketplace. In carrying out this mission, prosecutors have sought to use the tool of corporate cooperation in a manner that results in no more intrusion on the attorney-client relationship than absolutely necessary. While corporations being so investigated have the absolute right to refuse a government request to cooperate, an attorney representing such a corporation should consider creative solutions that enable the client to cooperate with the government in a manner that results in minimal or no intrusion on the attorney-client privilege.

Wayne Gross is the Chief of the Orange County Branch of the U.S. Attorney's Office and is responsible for overseeing the prosecution of all federal crimes in Orange County. John Hueston is a member of the Enron Task Force and served as one of the government's lead trial lawyers in the criminal case against Kenneth Lay and Jeff Skilling. The authors

[1] Companies that have entered into non-prosecution agreements in the last three years include American Electric Power (January 2005), Adelphia Communications (May 2005), Bank of New York (November 2005), Hilfiger (August 2005) Merrill Lynch (September 2003), Shell Oil (June 2005), and Symbol Technologies (June 2004). (*See Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORPORATE CRIME REPORTER (December 28, 2005), *available at* www.corporatecrimereporter.com/deferredreport.htm).

[2] Companies that have settled their cases with deferred prosecution agreements in recent years include America On-Line (December 2004), Bristol Myers Squibb (June 2005), Canadian Imperial Bank of Commerce (December 2003), Monsanto (January 2005) and Sears (April 2001) (*Id.*).