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Ex Ante over Ex Post

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Valuing the Waiver: The Real Beauty of Ex Ante Over Ex Post

Robert C. Hockett[†]

Professor Robert Hockett's Response to Professor Geoffrey Miller

First, thanks to Geoff Miller and indeed all of my co-panelists for their stimulating remarks, and to Professor Dent, Dean Simson, and the students of Case for your kind invitation to take part in this year's Leet Symposium. It's a great pleasure and, indeed, a great honor to be here with so many distinguished practitioners, scholars and other participants.

In view of my limited time this morning, I'm going to confine myself to saying just a bit about one particular feature that I find particularly attractive about not only Professor Miller's very interesting proposal, but also about many cognate proposals – indeed *all* proposals of a particular kind of which Professor Miller's is one elegant instance – namely, what I shall call “voluntary, ex ante waiver” proposals. And in view of this feature I am going to recommend, in conclusion, that we consider experimenting with a *variety* of proposals of this kind.

First to situate my remarks: What I find most attractive about voluntary, ex ante waiver proposals is best understood by reference to several particularly interesting features of the current public debate over corporate attorney-client privilege and the work-product doctrine. The features that I have in mind are directly traceable, I believe, to a cluster of acute uncertainties – conceptual, epistemic and just plain empirical uncertainties – that afflict all of the current discussion. And the great beauty of ex ante waiver proposals, I think, is precisely that they offer us means of neutralizing, dissolving or sidestepping those very uncertainties.

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Begin first by noting that the current debate over attorney-client privilege and the work-product doctrine in the corporate context is fraught with a truly surprising degree of overstatement and, indeed, downright irony. Consider, for instance, these two topical examples:

Presently the executive branch – in particular the Department of Justice (not the SEC, of course, Professor Goldshmid and Mr. Humes!) – oftentimes speaks in terms reminiscent of those commonly employed by advocates of the inquisitorial, rather than the adversarial, system of justice when discussing the privilege. You'll hear advocates of pre-trial privilege-waiver referring to the importance of “getting at the truth,” and of how the privilege gets in the way of that desideratum. Or you'll hear the old saw that, if one really has nothing to hide, then one shouldn't be concerned about retaining the privilege in any event.

The irony here, of course, is that this is the same branch of government that has been notorious for its resistance to public scrutiny of its own internal operations – on precisely the grounds commonly proffered in *defense* of the privilege. Hence, for example, when members of the press and public interest groups sought to learn who the members of the Vice President's “energy task force” were a few years back, the answer given was that disclosure of this information might chill the frank, internal deliberation necessary to the proper functioning of the tasks force. (That of course sounds a good bit like what advocates of the privilege in the corporate context say, as will be borne out further in my second example, just below.) And so the same branch of government that impugns privilege as a refuge of scoundrels appeals, in rebuffing the press and the public, to the importance of confidentiality and the privilege that protects it. Irony number one.

Now consider this one: Some members of the corporate bar – and here I am thinking, in particular, of the hearings held by the ABA task force on attorney-client privilege and the work-

product doctrine in the last several years – have spoken as though compliance with the law and the assurance of such compliance were *always* best viewed as purely *internal* matters. The firms “really want to abide by the law,” we’re assured, and will be better positioned to do so if employees and all others internal to firm are able to speak frankly and with full candor (like the members of the Vice President’s “energy task force”!), without fear of excessive scrutiny or reprisal or prosecution, to inside counsel. “So,” these folk are in effect saying, “we really think that the *public* interest in corporate right-doing is best served by the – *privately* employed – privilege.

That’s of course *somewhat* ironic in itself. But much more ironic is the fact that some members of the bar in some of these ABA task force proceedings I’ve mentioned are now invoking the specter of an all-powerful, inquisitorial government systematically stripping firms and their officers of cherished and time-honored corporate rights in the wake of Enron and other high-profile scandals. They sound almost like Lord Coke, or the Boston Tea Party patriots. If you’ve not read these proceedings, I can heartily recommend some of them for a good chortle: You can actually read members of the corporate bar talking in terms that we’ve come to associate with the public advocacy of Amy Goodman, Noam Chomsky or the ACLU. So that’s irony number two.

Now a crowning irony in the pair of positions I’ve just sketched, of course, is, first, that surely the past five years have afforded us at least *some* reason to be skeptical about the adequacy of internal, private policing by firms alone to ensuring that upper level employees are not engaged in what amounts to public (i.e., criminal) wrongdoing. And second, it also seems a bit fanciful, to put the point mildly, to suggest that the executive branch – particularly the current personnel occupying it – are out to “stick it to the corporate man,” so to speak, or are “out to get”

businesses, or are plotting some systematic stripping, from American businesses across the board, of all cherished prerogatives and traditional rights. The current administration might have appreciated the contributions made by Ralph Nader to the 2000 elections, but they're probably not about to name him to an SEC commissionership.

So again, a bit of irony, and a bit of overstatement in what has become the customary rhetoric surrounding recent corporate scandals and their legal fallout. But now the question becomes, how do we *account* for this? Is this just a case of the usual gassing that accompanies vigorous public discussion in the wake of scandal or controversy, or is there something perhaps that's a bit more unique to the present context?

It seems to me that there a *number* of possible ways to account for the ironies I've mentioned, some of them admittedly familiar across contexts, but others indeed a bit more unique to the present context. It is in connection with the latter that I find ex ante waiver proposals so very intriguing.

Now, as for the more prosaic explanations for the ironies I've cited, first of all, admittedly part of the story must lie in the nature of contemporary public discourse itself, considered more generally. That is a discourse that tends familiarly to focus on extreme situations, sensational stories and dramatic archetypes, whose significance can be telegraphed quickly in sound-byte form. So of course we get simplified slogans and hyperbole and nightmare scenarios painted before us – not just in the present, corporate scandal context, but in any context involving public controversy.

Second and again admittedly, if you're an advocate of a position I suppose that you're naturally going to tend to emphasize the horror stories, or the most dramatic exemplars, of what

those who share your position find frightful. You'll naturally tend to do that in any advocative context, not just the present, corporate scandal context. So this too is hardly surprising.

And yet, nevertheless, there seems to me to be *one* feature *unique* to the present context – the context of corporate wrongdoing and the role of corporate counsel – that I suspect plays a more important role in accounting for the particular ironies and overstatements that I've briefly cited. This unique causal factor has to do with something peculiar to the nature of corporate conduct and misconduct itself, along with its aftermath. It also has to do with the nature of the attorney's canonically “dual role” as a “zealous advocate” for the client on the one hand, and as an “officer of the court” or of the justice system on the other. In short, I think what we've got here is a particularly acute *information* problem, a largely empirical information problem, in the context of corporate wrongdoing and the investigation of corporate wrongdoing. This problem, I believe, uniquely *lends itself* to overstatement in advocacy of one side or the other when we talk about the propriety or otherwise of waiving attorney-client privilege or the work-product doctrine.

Let me illustrate by first very quickly rehearsing – though here in a public-interest-weighted way – the classic arguments in favor of attorney-client privilege and the work-product doctrine on the one hand, those against them on the other. As I do so, please note how the commonly taken positions in respect of these issues connect to acute *information* problems. For it is this feature of them, I believe, that ultimately lends ex ante privilege-waiver proposals their valid claim to our attention.

First, on the side of privilege, what is the public interest commonly invoked? The idea, is it not, is that you facilitate ex ante compliance with the law within the firm by enabling corporate employees to speak fully and frankly, in full candor, with in-house counsel. An oft-unstated

premise here is that the law is fraught with ambiguity. It often is difficult, in consequence, to *know* whether one is complying. And so in-house counsel require frank disclosure by personnel of their deeds, both actual and contemplated. And that disclosure is in turn facilitated by the privilege.

Next, what is the public interest commonly thought to underwrite *waiver* or full availability of all pertinent information to prosecutors and plaintiffs? Well, it's that waiver of privilege facilitates ex-post-rectification of wrongs, isn't it? Because, as the argument goes, you cannot do justice without getting at the truth. (And indeed, as this argument sometimes adds, if justice then is done ex post in this way we are also going to provide the right set of incentives ex ante to future potential wrongdoers.)

Now, imagine two cases where you have *no* ambiguity, *no* uncertainty as to what is actually occurring or has actually occurred at all. The first such case is that in which all personnel within the firm are "certainly innocent," so to speak; there is *clearly* no wrongdoing afoot; we know this with full confidence. In this case (should it ever actually be encountered), it is very easy to argue that the privilege and its rationale are simply unimplicated. For here there is, by hypothesis, simply nothing to hide or to seek advice about. As a potential defendant in this case, you've got no worries. You've literally nothing to hide, so you've no need of the privilege. "The privilege is only there to hide wrongdoing or, in the best case, to hide something embarrassing the wrongness or rightness of which is vague and uncertain," one might say, "and since we've no uncertainty in this case there is accordingly no need of the privilege." That's one extreme argument, on behalf of waiver-advocates, to which the hypothetical situation involving certainty of innocence lends itself.

Here's another extreme argument that the same condition offers to advocates not of waiver, but of the *privilege*: "If we've *truly* got certain innocence and nothing that arguably constitutes wrongdoing here, then there is nothing for the *public* to gain from private *waiver* of the privilege. You're not going to learn anything that's going to enable you better to enforce the law *ex post*. All you are going to learn is that we are innocent. So, you've really no need of our waiving the privilege."

In the case of true certainty of innocence, then, there is not a very strong argument for the *privilege* or for *waiver* of the privilege. Good arguments for one or the other gain traction only in the face of uncertainty of innocence, owing either to uncertainty about what actually is occurring or has occurred, or to uncertainty about what the law actually requires. The value, then, of either the privilege or its waiver looks as though it might be contingent precisely upon uncertainty of innocence. In the absence of such uncertainty – i.e., where innocence is certain – it is altogether easy to level absolutist, simplistic cookie-cutter style arguments against privilege and waiver alike. And so advocates of the two positions, not surprisingly, typically fall back on scenarios involving certainty and then *level* such mutually canceling absolutist arguments, in turn giving rise to ironies of the kind that I cited at the beginning.

Matters are somewhat similar in the case of certain guilt rather than certain innocence, though now in a more one-sided way: Here it is very easy to argue both, on behalf of the private defendant, that the privilege is crucial (though of course not *legitimately* so, from the point of view of the public interest), and, on behalf of the private plaintiff or the general public, that *waiver* of the privilege is crucial. The defendant of course wants the privilege in this case for obvious reasons. The plaintiff or prosecutor, for her part, then says by way of rejoinder, "the only reason you desire the privilege is simply to conceal the evidence of your guilt. By

hypothesis, the wrongdoing is or was indeed wrong and is being or has already been done; hence you, the hypothetically guilty party, cannot plausibly claim that you require the privilege in order to facilitate frank internal discussion with a view to *complying* with the law.” So here, in the case of certain guilt, we again have a knock-down argument, an absolutist argument, though this time in favor of waiver alone rather than of privilege. It is accordingly not altogether surprising that advocates of *waiver* would often fall back upon assumed (though unstated) scenarios of *this* sort.

But now here, of course, is where our *problem* lies: We seldom, if ever, actually *have* this clear innocence or clear guilt – at least not at the time of the investigation, right? And typically not even then. So it really won't do to argue on the basis of cases of “clear” innocence or “clear” guilt for the privilege or for waiver of the privilege. What you've actually got in these cases is, typically, a great deal of *uncertainty* concerning what has actually happened. And/or you've got fuzziness, so to speak, concerning what the *law* actually required or requires. So there's uncertainty about “the facts,” and/or unclarity about “the law” and its implications.

As to the latter – the “*legal* fuzz,” so to speak – you commonly hear advocates for firms saying that there's been a great welter of regulatory growth, particularly post-Enron, and that in consequence it's very difficult for counsel and for other personnel within firms to know whether particular completed or contemplated actions are or are likely to be compliant with the law or not. And it is plausible in the case of this form of legal uncertainty to claim that you really do require that kind of privilege-assisted frankness of internal discussion in order to determine whether you ought to be acting differently in order to comply with the law.

As to the matter of *factual* uncertainty, we often hear that there's great unclarity as to what actually has *happened* in the wake of some complex scandal such as that said to have

occurred at Enron or WorldCom. Partly that owes to the complexity of the transactions themselves; and partly it owes, relatedly, to the clever tracks-covering that malfeasant parties are likely to have engaged in. There's a lot of paper to go through, so to speak, and possibly lots has been shredded. So “the facts” can be as unclear as the law in these cases.

But uncertainties concerning law and fact or event, as common as these are likely to be in complex corporate scandal cases, are not the only ones that plague us. There are at least three *additional* sources of relevant uncertainty that likewise account, I suspect, for much of the hyperbole and ultimate irony in the contemporary debate over corporate attorney-client privilege, work product and waiver:

First, as I mentioned in passing earlier, you've got uncertainties rooted in the role-ambiguity inherent in the role of any counsel operating within our adversarial system of justice. Any counsel, *including* any corporate counsel, faces uncertainties as between the requirements of zealous advocacy for the client on the one hand, and of serving as a responsible officer of the court and the justice system on the other.

Second, you've got potential uncertainties stemming from a species of *conceptual* ambiguity, in some cases, as between “information” – which according to doctrine of course isn't privileged anyway – on the one hand, and mere “advice” or lawyerly “opinion” – which is that to which the privilege and work product doctrine actually attach – on the other. Sometimes, as we all know, it's not very easy to draw a bright demarcation between these.

Finally third, you've also got potential ambiguity, in the case of *ex post waiver* of the privilege, as between bona fide *voluntariness* of the waiver on the one hand, and *coercion* of one or another kind or degree on the other. That is so in particular because, in the cases we're talking about – namely, waiver that is undertaken in order to be deemed cooperative in the already

commenced investigation of a crime alleged already to have been committed – one is seeking the benefit of lighter *sentencing*. That’s an inherently coercive context. And so unsurprisingly corporate counsel often have remarked that even when waiver might be “voluntary” in some metaphysical sense in these cases, it often doesn't seem to *feel* that way in any motivational sense.

Now, in all of these cases, where you've got all of these systematic ambiguities and uncertainties, it would seem pretty clear that there might indeed be some room to benefit – for the *firm* to benefit and for the public policy interest in corporate compliance with the law to be advanced – by the privilege. The claim that the privilege is salutary is at least plausible in these cases; it cannot be dismissed out of hand by absolutist argumentation predicated on hypothetical certainties that in fact are not present. One can make a colorable claim, for example, to the effect that if you *do* encourage free and candid discussion within the firm, *before* possible wrongdoing takes place, then you really *might* to some degree or another enhance the likelihood *ex ante* that the firm is going to comply with the law more effectively.

Symmetrically, in these cases where there's pervasive ambiguity and uncertainty of the sorts I have indicated, it is *also* entirely plausible – though again, not certainly correct in each case – to suggest that *waiver* of the privilege, and full revelation of all pertinent information to the prosecutors or the plaintiffs, *might indeed* afford something to the public interest. One can make a colorable claim, for example, that you more fully enable those who are prosecuting legitimate claims to find evidence of bad faith or good faith this way. There is more opportunity for more red flags to be raised, so that those who are investigating are able less expensively to ascertain where to look. And the consequently successful investigations and prosecutions *ex post* play their *own* role, of course, in encouraging *ex ante* compliance.

But now, do you see the problem here? You've got colorable claims on *both* sides – the privilege and the waiver sides – in *precisely* the situations that we're typically in fact *faced* with and thus actually *interested* in – those where there *is* ambiguity and/or uncertainty. But how do you draw the appropriate *balance* in these cases? How to you separately weigh, then commensurate, then *comparatively* weigh – i.e., “balance” – the comparative costs and benefits in these cases – the *real*, rather than the caricatured cases that we find in the public debates? What common metric do we have for determining “how much gain” actually is likely to be realized by strict honoring of the privilege, on the one hand, or by liberal waiver of the privilege (or through full disclosure of even colorably privileged information to prosecutors or plaintiffs) once an investigation is underway on the other?

Our want of an answer to the question I've just posed accounts, I suspect, in very large measure for the caricature and irony of the debate over privilege and waiver that I've described. Our multiple sources of ambiguity and uncertainty, all culminating in the grandest informational lacuna of them all – the lack of a scalar metric along which comparatively to value the vectors of benefits and burdens posed by the privilege and its waiver *ex post* – leaves us trapped with this ongoing dilemma and consequently interminable cycle of absolutist argumentation, platitude, irresoluble controversy and ongoing rhetorical irony.

Now it is precisely here, I think, that *ex ante* waiver proposals prove so intriguing. To begin with, what we're talking about here is indeed *ex ante* waiver, which of course means that it straightforwardly *isn't* coerced – at least not in the particularized, hence poignantly acute, manner that so troubles corporate counsel in the current debate. You don't have any danger here that the waiver is being made under a sword wielded by the court or a prosecutor or a government agency in circumstances where penalties already are imminent for a particular

person or group of persons. So there is little if any ambiguity about voluntariness in this ex ante case.

But now rather more generally and I think more importantly here, the ex ante waiver promises to eliminate that “grandest informational lacuna of them all” which I cited a moment ago – the valuational uncertainty stemming from the multiple sources of value in *both* the privilege *and* its waiver. For insofar as there is measuring to be done, along a common metric, as to what the comparative values of waiver privilege are, what better or more salient aggregator of that sort of valuational information is there than our deep, liquid, and by and large informationally efficient securities market itself? For, in the final analysis, isn’t that “value” which *ultimately* concerns us here, when we speak of the corporate governance regime and its optimal policing, the value of *firms* to their *owners*? Isn’t the most immediately, if not indeed exclusively *relevant* “public” here the *investing* public, the *shareholding* public? And aren’t the *securities* markets precisely those fora in which this sort of valuation takes place? And wouldn’t the decision to waive privilege ex ante, or retain it, simply be just *one more source* of such value, best determined, from firm to firm, by an informationally efficient market for firms’ *shares*?

At least provisionally speaking, I am very much tempted to think that the answer to all of these questions is “yes.” And so our answer to ex ante waiver proposals *also* should be, at least provisionally, “yes.” Indeed we ought seriously to consider the prospect of developing a *full menu* of possible waivers and partial waivers of the same general kind as that suggested by Professor Miller just before me. We ought to consider it seriously precisely because it offers means, at long last, of cutting through precisely all of that ambiguity, uncertainty, and consequent caricature-mongering, argument-cycling and irony of which I took brief account in

opening my discussion. Certainty of a sort – of the valuational sort that ultimately concerns us – at last.

If for no other reasons than these, I think one should treat voluntary waiver proposals as worthy of serious consideration, experimentation and econometric tracking no matter *which* side she currently occupies in the ongoing contemporary debate as to whether the privilege and work product doctrines should be strictly honored on the one hand, or waivable on the other. For it looks as though we might – and for now I should emphasize, “*might*” – well be able quite plausibly both to keep the cake and eat it now by saying: It should be strictly honored ex post, if and only if it has not been voluntarily waived ex ante.