



Protecting the Attorney-Client Privilege, the Work Product Doctrine and Employee Legal Rights

Comprehensive Reform Still Critically Needed

In response to growing concerns raised by Congressional leaders, former Justice Department officials and many in the legal and business communities, the Department of Justice replaced the 2006 “McNulty Memorandum” in August 2008 with new corporate charging guidelines that direct federal prosecutors, with certain exceptions, not to coerce companies and other organizations to waive their attorney-client privilege or work product protections, or to pressure their individual employees to waive their own legal and constitutional rights during investigations, in return for cooperation credit. The Securities and Exchange Commission later issued a new Enforcement Manual in October 2008 that provides additional guidance on its privilege waiver policy outlined in the 2001 “Seaboard Report.” Though helpful, the SEC’s new language also contains several exceptions and does not provide adequate protection for the privilege and employee legal rights.

In November 2007, the House overwhelmingly approved comprehensive legislation known as the “Attorney-Client Privilege Protection Act” (H.R. 3013). Many of the bill’s reforms were later adopted by the Justice Department in its new corporate charging guidelines. But unlike the limited scope of the new DOJ policy, the reforms in the House bill—sponsored by Representatives John Conyers (D-MI), Bobby Scott (D-VA), and Lamar Smith (R-TX)—would apply to *all* federal agencies. A Senate companion bill, S. 3217, sponsored by Senators Arlen Specter (R-PA), (Vice President) Joseph Biden (D-DE) and 12 other Senators from both parties, was also introduced in the 110th Congress but failed to receive a vote. On February 13, 2009, Senator Specter reintroduced similar legislation, S. 445, in the new 111th Congress.

While the new Justice Department policy is a welcome and important improvement over its previous policy outlined in the McNulty Memorandum, a comprehensive solution to the ever-widening problem of government-coerced waiver is still critically needed. **Therefore, the ABA and its coalition allies strongly support the adoption of a Presidential executive order applying a strengthened version of the DOJ reforms to all federal agencies or the enactment of comprehensive federal legislation like the Attorney-Client Privilege Protection Act (ACPPA) for the following reasons:**

- **The new DOJ policy, standing alone, does not provide a comprehensive solution to the problem of government-coerced waiver.** Under the Justice Department’s new policy, companies will be required to provide all relevant facts to government investigators in order to receive full cooperation credit, but they generally cannot be asked or required to waive their attorney-client privilege or work product protections. In addition, the policy specifically bars federal prosecutors from pressuring companies, as a condition for receiving cooperation credit, not to pay their employees’ attorneys fees or to take other unfair actions to undermine their employees’ rights and ability to mount a legal defense. Although these reforms are promising and constitute a significant improvement over DOJ’s previous policy, the new policy still requires companies to waive “ordinary work product” (i.e., work product not involving attorney mental impressions) in some cases, is limited to just the Department’s prosecutors, and does not alter the harmful waiver policies that have been adopted by numerous other federal agencies.
- **The new SEC Enforcement Manual also contains numerous exceptions and does not fully protect the attorney-client privilege, work product and employee legal rights during investigations.** Although Section 4.3 of the SEC Manual states that agency staff should not directly ask companies to waive the attorney-client privilege or work product, it permits the staff to demand waiver if approved by a supervisor. The SEC Manual also will continue to pressure companies to “voluntarily” waive the privilege—and to take punitive actions against employees who decline to waive their legal rights—in return for full cooperation credit. Thus, the new Manual cannot be viewed as a substantial departure from past SEC policies and practices that have led to widespread government-coerced waiver.

- **Government-coerced waiver has become a multi-agency problem that requires a multi-agency solution.** In addition to the SEC, many other federal agencies have adopted policies that erode the attorney-client privilege, the work product doctrine and employee legal rights. For example, the EPA’s “Audit Policy,” like the Justice Department’s previous McNulty Memorandum, authorizes agency officials to pressure companies to waive their attorney-client privilege and work product protections during investigations. In addition, HUD, the Treasury Department’s Office of Foreign Assets Control (OFAC), and other agencies have adopted policies that threaten to erode not only the attorney-client privilege and the work product doctrine, but also employees’ Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination. As more and more federal agencies adopt similar waiver policies, broad administrative or legislative reform is still needed to protect these fundamental rights and reverse the “culture of waiver.”
- **A Presidential executive order applying a strengthened version of the Justice Department’s recent reforms to all federal agencies—or new comprehensive legislation like the ACPPA—would protect fundamental attorney-client privilege, work product, and employee constitutional rights during investigations.** By applying a stronger version of the DOJ reforms to the SEC, HUD, the EPA, and all other federal agencies that prohibits all demands for waiver, a Presidential executive order would prevent the agencies from pressuring companies to waive their attorney-client privilege and work product protections in order to receive full cooperation credit during investigations. Such an order also would help protect employees’ Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination by preventing federal prosecutors from pressuring companies not to pay employees’ legal fees during investigations, to fire employees for not waiving their rights, or to take other punitive measures against the employees before their guilt has been established under law. Enactment of comprehensive legislation like the ACPPA would offer similar benefits to a Presidential executive order, with the added advantage of making these critical reforms permanent and enforceable in a court of law.
- **A Presidential executive order or comprehensive legislation would both strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product and employee legal protections.** Adoption of the executive order—or passage of legislation like the ACPPA—would prevent all agencies from forcing companies and employees to waive their fundamental legal rights while preserving the ability of prosecutors and other agency officials to obtain the important, non-privileged factual materials they need to punish wrongdoers and enforce the law.
- **The proposed Presidential executive order and comprehensive legislation also enjoy widespread bipartisan support.** The ABA is working in close cooperation with a broad and diverse coalition of business and legal groups in an effort to advance these critical reforms. The entity, known as the “Coalition to Preserve the Attorney-Client Privilege,” consists of the following organizations: American Chemistry Council; American Civil Liberties Union; Association of Corporate Counsel; Business Civil Liberties, Inc.; Business Roundtable; The Financial Services Roundtable; Frontiers of Freedom; Lawyers for Civil Justice; National Association of Criminal Defense Lawyers; National Association of Manufacturers; Retail Industry Leaders Association and U.S. Chamber of Commerce.

Copies of the Justice Department’s August 2008 policy, other relevant federal agency policies, the comprehensive legislation introduced in the 111th and 110th Congresses and other key background information are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.