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Advisory on the Law of Lawyering in New Hampshire

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ABA Task Force Criticizes Government Demands for "Cooperation" by Waiver of Corporate Attorney-Client Privilege

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In a recent report, the ABA Task Force on the Attorney-Client Privilege urged the ABA House of Delegates to affirm the importance of the attorney-client privilege and work-product doctrine and to oppose various governmental practices that could erode such protections. See American Bar Association Task Force on Attorney-Client Privilege, Section of Criminal Justice, Report to the House of Delegates (May 18, 2005) (hereinafter "Report"). The Report provides a good overview of the law surrounding the attorney-client privilege and recent attempts to compel waiver of the privilege. This material may be especially useful to attorneys representing corporations in serious enforcement proceedings and government investigations. It will also be helpful to lawyers interested in participating in the ABA debate, or faced with privilege waiver issues in court or elsewhere.

This Advisory summarizes the Task Force Report, which goes to the House of Delegates for approval next month.

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Values Underlying the Corporate Privilege and Work Product Doctrine: Formed in 2004 in response to government policies and practices regarding the corporate attorney-client privilege and work-product doctrine, the Task Force was charged with "examin[ing] the purposes behind the privilege and its exceptions, the circumstances in which competing objectives are currently being asserted by governmental agencies and others to override the privilege, and the extent to which the correct balance is being struck between these competing objectives and the important policies underlying the privilege." Task Force Mission Statement.

As the Report outlines, the evidentiary attorney-client privilege protects the confidentiality of communications between an attorney and client made for the purpose of enabling the client to secure legal services or assistance, while the work-product doctrine accords protection of an

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attorney's "work product" developed in anticipation of litigation. Report, at 3, 4. Both of these protections extend to corporations and other business entities. Id. at 5, 7. The United States Supreme Court has ruled that the attorney-client privilege applies to counsel's communication with corporate employees, not just with the corporation's "control group," i.e., those responsible for directing the company's actions. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981). Although the New Hampshire Supreme Court has not addressed this issue, most practitioners believe that New Hampshire is a "control group" state, based upon the Reporter's Notes to the Rules of Evidence. See N.H. R. Evid. 502, Reporter's Notes ("The 'control group' test is preferable to the principal alternative, which is that the privilege cover any employee communication to counsel directed by the employer and referring to the performance of his duties. This approach would permit a corporation to insulate all of its normal fact gathering about a matter by using the medium of communication with counsel for it.").

The Task Force's Report underscores the importance of preserving the legal protections afforded to lawyer-client confidentiality. "In both corporate and individual representations, the preservation of the attorney-client privilege and work-product doctrine are essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal problems fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American justice system." Report, Executive Summary, at 1.

The Development of Conflicting Governmental Policies: According to the Task Force, recent federal prosecutorial policies as well as practices by federal regulators are eroding the attorney-client privilege and work-product doctrine in the corporate context. See Report, at 13. Criminal law enforcement authorities and regulatory authorities alike provide corporations "credit for cooperation" if they disclose protected information. Id. Indeed, under some circumstances, a corporation must provide protected information to persuade the prosecution that it has not engaged in wrongdoing. Id. at 14.

Specifically, the Task Force is concerned by the Department of Justice policy and practice of requiring targets of criminal investigations or prosecution to provide privileged material, in certain circumstances, as a condition of leniency. Id. In response to the President's call for more vigorous prosecutions of corporations following the Enron scandal, then Deputy Attorney General Larry Thompson (one of several attorneys and judges now being discussed as potential Supreme Court nominees) issued a memorandum to the DOJ listing nine factors for federal prosecutors to consider in charging corporations or other business entities. See Memorandum from Deputy Attorney General Larry

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Thompson to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). One such factor is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection." Id. The Task Force expressed strong concern over this factor, especially in light of the absence of DOJ internal guidelines interpreting the policy and its application, as well as the lack of safeguards to prevent abuse at the local level. Report, at 15.

According to the Task Force, corporations are further discouraged from resisting government requests for confidential information by the Sentencing Commission's decision to require a corporation to provide privileged material to the prosecution to show "thorough" cooperation. Id. at 13-14. In particular, recent amendments to the Federal Sentencing Guidelines[1] provide that, in order to qualify for a reduction in its sentence, a corporation must waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Id. at 15 (quoting U.S. Sentencing Guidelines Manual § 8C2.5 [2004]).[2]

Policies and practices of federal regulators are equally disturbing to the Task Force. Id. at 16. In particular, the Task Force received information that the SEC now regards waiver of confidentiality protections as "a necessary element of cooperation." Id. at 17. "Like the DOJ, the SEC and other regulatory agencies have so far not adopted internal guidelines or procedural safeguards regarding privilege and work product waivers." Id. at 17-18.

The Task Force believes these practices and policies, which are becoming increasingly widespread, "leave corporations with no practical choice but to comply, since the agencies can employ their discretionary exercise of prosecutorial or enforcement authority under criminal law or

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[1]Although the United States Supreme Court recently ruled that the Sixth Amendment right to a jury trial requires that current Federal Sentencing Guidelines be advisory, not mandatory, see United States v. Booker, No. 04-104 (U.S. Jan. 12, 2005), the guidelines are still expected to receive significant deference by the courts, see Standing Order on Procedure for Requesting Deviation from Sentencing Guidelines for the District of New Hampshire, dated Feb. 1, 2005 (McAuliffe, C.J.) ("in all criminal cases in this district in which either the government or the defendant seeks the imposition of a sentence that varies from the sentencing range established by proper application of the Guidelines, the party requesting the variance must set forth with specificity the factors and reasons justifying the variance").

[2]The ABA had previously voiced its opposition to the Commentary for Section 8C2.5 of the Sentencing Guidelines. See Resolution Adopted by the House of Delegates of the American Bar Association, August 2004; Letter from Robert D. Evans, Director, American Bar Association, to Ricardo H. Hinojosa, Chairman, U.S. Sentencing Commission (May 17, 2005).

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civil regulation to impose a substantial cost on corporations that assert rather than waive the privilege." Id. at 13. The Task Force warns that this "compulsory waiver" comes at a cost: discouraging client candor. See id. at 9. "Full and frank communication is not an end in itself, but a means to achieve the main purpose of the privilege, promoting broader public interest in the observance of law and administration of justice." Id. at 10 (quotation omitted).

In addition, it remains unresolved "whether and to what extent these protections will be preserved when a corporation discloses privileged or work-product protected material to a regulator or prosecutor." Id. at 12. For example, it is unclear whether the disclosed material can be kept from private parties or other governmental agencies who seek the information for use in litigation against the corporation, or whether the privilege is lost as to all other attorney-client communications on the same subject matter. Id. The risk, according to the Report, "is that corporations will respond with greater reluctance to employ counsel or to confide fully in counsel, thereby undermining the public objectives served by the privilege." Id. at 19.

Task Force Recommendations: Based upon these widespread concerns, the Task Force has recommended three resolutions for adoption by the ABA, expressing: (1) its strong support for the preservation of the attorney-client privilege and work-product doctrine; (2) its recognition that "waiver should occur only under circumstances that do not erode those protections"; and (3) its opposition to government policies that undercut these privileges and its endorsement of practices and policies that recognize the value of these protections. See Report, Recommendation.

The Report, which can be found at http://www.abanet.org/buslaw/attorneyclient, will be presented to the ABA House of Delegates for consideration as policy in August.

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