ABA Opposes Federal Agency Policies that Erode or Fail to Adequately Protect these Fundamental Legal Rights

In response to growing concerns raised by the ABA, state and local bars, other legal and business groups, and congressional leaders, the Department of Justice revised its previous corporate charging guidelines in 2008, 2015, and 2017 to better protect the attorney-client privilege and work product. These revised guidelines ("Principles of Federal Prosecution Of Business Organizations," 9-28.000 of the U.S. Attorneys’ Manual) state that while prosecutors may require companies to disclose all relevant facts during investigations (including all facts regarding individual wrongdoers) in return for cooperation credit, they can no longer pressure companies to waive the privilege or work product protections. The U.S. Sentencing Commission, Commodity Futures Trading Commission, Securities and Exchange Commission, General Services Administration/FAR Councils, Treasury Department’s Office of Foreign Assets Control, and other agencies also adopted similar changes to their privilege waiver policies (though the SEC policy still permits its staff to request waiver if approved by certain senior agency officials).

While these agencies have modified their waiver policies to better protect the privilege and work product, many others—including the Consumer Financial Protection Bureau, Federal Reserve Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Department of Housing and Urban Development, and others—still have policies in place that seek to compel entities to disclose privileged information. Certain other agencies, such as the Department of Homeland Security and the National Security Agency, have adopted policies that only partially protect the privilege.

Federal agencies should adopt policies and procedures that recognize and fully protect the privilege and work product, and avoid measures that would erode or undermine these fundamental legal rights, because:

- The attorney-client privilege is a bedrock legal principle of our free society that is important in both the civil and criminal contexts. The privilege enables both individual and organizational clients to communicate with their lawyers in confidence, which is essential to preserving all clients’ fundamental rights to effective counsel. The privilege also encourages clients to seek out and obtain guidance to conform their conduct to the law, facilitates self-investigation into past conduct to identify shortcomings and remedy problems, and enables lawyers to fulfill their ethical duties to their clients, all of which benefit society at large.

- The work product doctrine, which protects materials prepared by or for an attorney in connection with litigation that is pending or reasonably anticipated, underpins our adversarial justice system and must be preserved. The work product doctrine allows attorneys to prepare for litigation or trial without fear that their work product, legal theories, and mental impressions will be revealed to adversaries, to the detriment of their clients. The protection accorded to work product is premised on the same basic policy rationale as that underlying the attorney-client privilege—that an attorney cannot provide full and adequate legal representation unless certain confidential client-related information is shielded from adversaries.

- Federal agency policies that compel parties to disclose privileged or work product protected information violate longstanding common law principles and undermine both the confidential lawyer-client relationship and the fundamental right to counsel. The U.S. Supreme Court has long held that the privilege and work product apply to both individuals and companies. See Upjohn vs. United States, 449 U.S. 383 (1981). The Supreme Court has also noted that effective legal representation requires that the privilege be clear and consistently applied, as “an uncertain privilege...is little better than no privilege at all.” Upjohn at 393. Therefore, federal agency policies that force parties to disclose privileged or confidential information—either routinely or in select cases—violate these fundamental legal protections established by the courts, undermine the confidential lawyer-client relationship and the right to counsel, and hinder the administration of justice.

October 2019

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