Opening Statement

Alarms Still Sound to Preserve Attorney-Client Privilege

by Kim J. Askew

Chair, Section of Litigation

In sophisticated legal publications and mainstream newspapers and magazines alike, the attorney-client privilege and work product doctrine are the topics of much recent discussion. The headlines scream at us: Both the attorney-client privilege and work product doctrine, notably in the corporate context, are being "eviscerated," "attacked," "eroded," and seriously "encroached upon." The profession is being given a wake-up call.

The general public, often those with little, if any, involvement in the legal system, now ask about the attorney-client privilege and work product doctrine. They read about these sacrosanct principles in the context of corporate scandals, government enforcement actions, and highly publicized trials. They want to know what these principles are, how they are important to the legal system, and why they are being discussed on the front pages of major newspapers. Like other ABA leaders, I frequently field questions from reporters regarding the attorney-client privilege and work product immunity.

The Section of Litigation has always worked to further the development of the law and to better educate the public on these bedrock protections in our system. Despite the Section's extensive work over the years on the attorney-client privilege and work product protection, nothing compares to the recent attention we have focused on these issues. Our task forces and committees have developed recommendations on the attorney-client privilege that have become ABA policy. We have reviewed and provided critical input on recommendations from ABA task forces addressing these issues and have worked with ABA sections to meet head-on the attacks on the attorney-client privilege and work product immunity. Some suggest that the recent erosions of these protections are simply another phase in the overall development of the law. But if the work of our Section and the ABA as a whole is any indication of what is happening with these protections, there is no question in my mind that the attorney-client privilege and work product immunity are still seriously imperiled. The alarms are sounding on every front.

The Section continues to lead the way on these important issues because these principles are cornerstones of our system of jurisprudence. The attorney-client privilege has preserved the confidentiality of communications between lawyers and clients since the days of Elizabethan England. It is one of the first rules of confidentiality and privilege that lawyers learn. Most lawyers can quote passages from *J. Wigmore on Evidence* on the attorney-client privilege in their sleep. The privilege goes to the essence of our legal system and promotes equality under the law. Privileged attorney-client communication allows us to provide effective representation to our clients. And the preservation of the privilege is as important to organizations as it is to individuals.

Lawyers spend countless hours staying abreast of the rules of professional conduct, evidentiary and procedural rules, and developing case law to ensure that they are always up to date on the parameters and nuances of applying attorney-client privilege and work product immunity. When I look at the legal topics I have written on, issues involving work product and the attorney-client privilege are at the very top of the list.

The privilege encourages full and frank disclosure between lawyers and clients so that the client is afforded the most informed and complete legal advice. Lawyers must be able to research issues, develop theories, and provide legal advice to their clients. Organizations, like any individual, must be free to seek and obtain legal advice in confidence and without fear of waiver through compelled "voluntary" disclosure to the government or to subsequent third parties.

While working to preserve the oldest privilege known to the common law, the profession has always recognized that

Published in *Litigation*, Volume 33, Number 2 Winter 2007.

the privilege is not absolute. From the earliest common law to codifications in statutes and rules of professional conduct, the privilege extends only to confidential communications between lawyers and clients in which legal advice is sought or discussed. The privilege has never protected the fact of a communication between lawyer and client, only its substance. Exceptions to the attorney-client privilege such as crime-fraud are well established. As they do all evidentiary privileges, courts narrowly construe the attorney-client privilege and work product doctrine.

The Section's work on the attorney-client privilege increased significantly after the U.S. Department of Justice released the memo Principles of Federal Prosecutions of Business Organizations, now commonly known as the Thompson Memorandum, in 2003. Under the Thompson Memorandum, federal prosecutors were encouraged to consider waiver of the attorney-client privilege and work product immunity as a factor for receiving cooperation credit during investigations. The government insists that these waivers are not absolute, but we need look no further than the recent opinion in *United States v. Stein*, 435 F. Supp. 2d 330 (2006), for an example of how the Thompson Memorandum can be improperly applied in an investigation.

Testimony from business organizations during ABA hearings and before Congress suggests that the government routinely seeks such waivers in investigations. Organizations face the Hobson's choice of waiving the attorney-client privilege or taking other punitive actions against its employees or of refusing to do so and facing the possibility of criminal prosecution or other consequences. These "selective waivers" in government investigations have given rise to litigation with third parties in which organizations risk waiver of the privilege. Most federal courts have held that organizations cannot pick and choose when to waive the privilege, and have concluded that selective waiving in a government investigation is a waiver of the privilege and work product immunity for all purposes.

The erosion of these principles continued in 2004 when the U.S. Sentencing Commission adopted amendments to the Federal Sentencing Guidelines that allowed a sentencing judge to consider whether a company had cooperated with the government by waiving the privilege as a condition to receiving cooperation credit. Under amended Comment 12, a corporation might not have been eligible for a sentence reduction if it had refused to waive the privilege and the waiver was "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

After these developments, various ABA entities, including the Section of Litigation, appointed blue-ribbon task forces to study these issues. The ABA Task Force on Attorney-Client Privilege led the ABA's efforts, conducting public hearings around the country to obtain input on the privilege and work product immunity and to identify actions necessary to protect these principles. The work of those task forces resulted in the adoption of amended ABA policy in August 2005. The ABA affirmed its strong support for the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential nature of the attorney-client relationship. The ABA opposed policies, practices, and procedures of government agencies that eroded the attorney-client privilege and work product immunity, and opposed the routine practice by government officials of obtaining waivers of the attorney-client privilege in certain circumstances.

The ABA, and many other interested entities, were at the forefront in seeking revisions to the Federal Sentencing Guidelines as they related to the waiver of these protections. In April 2006, after testimony from ABA leadership and other organizations, the Sentencing Commission completely deleted the controversial language in the comments of the Sentencing Guidelines on the issue of waiver under Section 8C2.5. The commission explained that public comment and testimony during public hearings led it to conclude that the language in the comments could be misinterpreted to encourage waiver of the attorney-client privilege and work product immunity.

In August 2006, the ABA adopted a policy further designed to protect the attorney-client privilege. This policy opposed any government practices, policies, and procedures that allowed the government to consider factors such as an organization's payment of an employee's legal fees in determining whether an organization had cooperated in a government investigation.

When the U.S. Senate Judiciary Committee held hearings to evaluate the impact of the Thompson Memorandum on the attorney-client privilege and work product immunity, the ABA was again on the front line. In September 2006, the ABA presented well-developed testimony, "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations," in which it strongly supported the preservation of the attorney-client privilege and work product doctrine. Noting that language in the Thompson Memorandum and related federal policies and practices had begun to "seriously erode" the fundamental rights protected by the privilege and work product immunity, the ABA raised concerns regarding federal policy that encourages prosecutors to require organizations to waive the attorney-client privilege and work product immunity as conditions for receiving cooperation credit during investigations.

When the DOJ released its revisions to the Thompson Memorandum on December 12, 2006, the ABA again raised concerns, concluding that the revisions were only a "modest improvement" over the previous policy. Rather than eliminate waiver of the privilege, the new McNulty Memorandum simply required the approval of higher-level government officials before waivers would be approved. The ABA concluded that these revisions threatened to further impede the ability of corporations to obtain the legal advice necessary to effectively comply with the law. The McNulty Memorandum also failed to fully protect employees because federal prosecutors could still force companies to take punitive actions against their employees—in return for cooperation credit in the criminal context—before the employees' guilt was established.

The ABA is also on record in support of a pending bill that will provide much-needed protection for the attorney-client privilege and work product immunity. On December 7, 2006, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2006, designed to overturn policy of government attorneys and federal agencies in which prosecutors encourage organizations to waive these protections to avoid indictment and other sanctions. The bill prevents government attorneys from requiring organizations to do the following:

- Disclose communications protected by the attorney-client privilege and work product immunity.
- Refuse to provide legal counsel to

or contribute to the legal defense fees or expenses of an employee.
- Refuse to enter into joint defense or common-interest agreements with employees if an organization determines that it has a common interest in defending an investigation.
- Refuse to share with an employee information relevant to investigation or enforcement actions.
- Terminate or otherwise sanction employees who exercise their constitutional rights or other legal protections in connection with an investigation.

The ABA believes that this bill "strikes a proper balance between legitimate needs of prosecutors and regulators and the constitutional and fundamental rights of individuals and organizations."

The Section also has been active on the rule-making front in protecting the attorney-client privilege and work product immunity. With the recent e-discovery amendments to the Federal Rules of Civil Procedure, considerable attention has been given to how to protect attorney-client or trial preparation materials inadvertently produced by a party. Rule 26(b)(5) now provides a procedure by which parties may retrieve inadvertently disclosed privileged information or work product and prevent further disclosure until the claims of privilege or immunity are resolved by a court. As did other organizations, the Section submitted detailed comments to the Civil Rules Advisory Committee and closely monitored the development of the rules.

Although the e-discovery amendments provide an orderly procedure for resolving privilege claims, they do not address the substantive issue of waiver. Last summer, Proposed Federal Rule of Evidence 502 was published for comment. This rule addresses issues regarding inadvertent disclosure and selective waiver of the attorney-client privilege and work product. It allows selective waiver in prescribed circumstances in federal proceedings. Under the proposed rule, an inadvertent disclosure of attorney-client privilege or work product materials in federal cases does not result in a waiver in state or federal proceedings if reasonable precautions were taken to prevent disclosure.

The draft committee notes show that the Evidence Rules Committee was aware that practitioners were expending significant amounts of time and expense trying to preserve the privilege in the discovery process. The committee was also aware that federal courts were conflicted on the issue of selective waiver and that organizations might be deterred from cooperating in an investigation if producing privileged information to the government would constitute a complete waiver of the privilege or work product immunity. The Section will consider these proposals at its winter meeting and post any comments to its website, www.abanet.org/litigation.

And our work goes on. It is encouraging to see that bar associations throughout the country have worked hand in hand with the ABA in focusing on the importance of protecting the attorney-client privilege and work product immunity. Many state and local bar associations have appointed task forces and special working groups to raise awareness on these issues by conducting educational programs that will further educate lawyers and the general public about these critical principles.

The Section strongly encourages the work of our members and bar entities in legislative arenas to ensure that these protections are preserved. Many lawyers work through their state bars and state legislatures to pass laws on work product and attorney-client protections. Encourage your state legislators to consider amendments to existing laws to protect against forced waivers of the privilege. As lawyers, we can help our lawmakers understand the importance of the attorney-client privilege and work product doctrine and the delicate balance we must maintain to ensure that clients can receive proper legal advice.

A final point: You do not have to be a member of a bar task force or any group to make a difference. We must continue to individually take steps to protect the attorney-client privilege and work product immunity. In that regard, each time we provide confidential legal advice and undertake procedures to ensure confidentiality, we are working to preserve the privilege. We preserve the privilege when we spend countless hours in discovery and client counseling, seeking to prevent the disclosure of privileged information. We protect the privilege when we take reasonable positions on the applicability of privileges.

Additionally, we all can make time to help everyday citizens better understand the attorney-client privilege and work product doctrine. The next time you hear someone erroneously suggest that the attorney-client privilege allows an organization to hide wrongdoing, explain the real purpose of the privilege and why corporate governance is enhanced when legal advice can be confidentially rendered to an organization. Continue to write editorials and letters to publishers and editors that explain why the attorney-client privilege and work product immunity are so absolutely vital to our justice system and to the rule of law. The interests of the public and our system of justice are improved through our actions.

Debate on these important issues will continue, as it should. Visit the Section of Litigation website for more detailed information on ABA policies and background materials concern-ing the attorney-client privilege and work product doctrine: www.abanet.org/litigation.