

## **Attorney-Client Privilege**

Recent actions by the federal government have imperiled a cornerstone of America's justice system - the attorney-client privilege.

As members of the House Judiciary Committee, we share a deep, abiding and bipartisan respect for the attorney-client privilege and work product doctrine and the fundamental purposes these protections serve in our system of justice.

We have become gravely concerned that these protections are being undermined by recent policy changes by the Department of Justice, the Securities and Exchange Commission and other federal agencies that encourage federal prosecutors to pressure organizations to waive these protections as a condition of being deemed “cooperative.” These changes in policy are dangerous and misguided and we are pleased the Senate Judiciary Committee will be holding oversight hearings September 12<sup>th</sup> into the consequences of this dangerous trend.

As former law enforcement officials, we are also concerned that this dramatic policy shift will undermine internal corporate legal compliance programs. It is important to keep in mind that lawyers play a key role in helping companies understand the complex legal environment in which they operate. In order to fulfill this important role, lawyers must have the trust and confidence of companies' leaders and employees so that they receive all of the relevant information necessary to advise their clients on how best to comply with the law.

By authorizing the government to demand a waiver of the companies' attorney-client privilege and work product protections, these policies create a strong disincentive for attorney-client consultation. These policies also impede internal investigations within companies aimed at detecting and remedying misconduct. The public interest is ill served by such policies.

Prosecutors already have enormous power to obtain information in a criminal investigation, as they should. But it is simply unnecessary to give them extraordinary new authority to circumvent a time honored privilege. The attorney-client privilege is the oldest evidentiary privilege in this country, predating even the Constitution and the Bill of Rights. It has been embraced time and again by the courts because, as in the words of the Supreme Court, it

encourages “full and frank communication between attorneys and their clients and thereby promote[s] broader public interest in the observance of law and administration of justice.”

The government’s expectation that organizations will routinely waive privileges also jeopardizes the rights of individuals within those organizations who may be fired and left to fend for themselves if they do not “cooperate” with a company’s attorney who has already agreed to provide their privileged information to prosecutors. This is a serious inroad on Fifth Amendment rights.

We recently held a subcommittee hearing in the House of Representatives on these developments. Our Subcommittee on Crime, Terrorism and Homeland Security is often deeply divided along party lines. But on the issue of protecting the attorney-client privilege and all of its societal benefits, every member present expressed serious concern about the government’s current practices. Perhaps most telling of all, ten former Attorneys General, Deputy Attorneys General and Solicitors General, from both Republican and Democratic administrations, just this week called for action to reverse this dangerous trend.

In addition, the American Bar Association which represents all types of lawyers, including both prosecutors and defense attorneys, unanimously adopted a resolution that “strongly supports the preservation of the attorney-client privilege” and “opposes policies, practices and procedures of government bodies that have the effect of eroding the attorney-client privilege.” Furthermore, the United States Sentencing Commission unanimously concluded that waiver of the attorney-client privilege should not be a factor in sentencing determinations.

For decades, prosecutors have been able to do their jobs by a variety of means, including subpoenas and interviews, without violating the confidential attorney-client relationship. There is no evidence that that they could not continue to do so effectively now without demanding waiver of the privilege. In fact, former Attorney General Dick Thornburgh testified before us that, in his nine years at the Department of Justice, he could not remember a single case where the government felt it was necessary to obtain attorney-client privilege-protected material in order to prosecute a case successfully.

The Administration does not consider itself to be uncooperative when it legitimately asserts executive privilege to protect confidential communications with its attorneys. We agree with this position.

Similarly, the Department of Justice, the Securities and Exchange Commission and other federal agencies should not consider any company or other entity to be “non-cooperative” for protecting its right to consult confidentially with its attorneys.

Federal agencies should adopt policies that reverse the government’s assault on the attorney-client privilege. And if they refuse to do so, Congress should act.

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