



## FOCUS: LEGISLATION

# The Attorney-Client Privilege Protection Act of 2008

The Attorney-Client Privilege Protection Act of 2008 (S. 3217/H.R. 3013), if passed by Congress and signed into law by the President, will afford better protection to the American people from overzealous federal civil and criminal investigations and prosecutions by further safeguarding attorney-client privileged communications and attorney work product. The bill's sponsor, Senator Arlen Specter (R-PA), explained that the Attorney-Client Privilege Protection Act addresses the Department of Justice's corporate prosecution guidelines, which have "erode[d] the attorney-client relationship by allowing prosecutors to request privileged information backed by the hammer of prosecution if the request is denied."<sup>1</sup>

### Significant Provisions of the Attorney-Client Privilege Protection Act

This bill is a comprehensive reform measure designed to counteract a number of harmful federal agency policies, including those adopted by the Securities and Exchange Commission, the Environmental Protection Agency, and the Department of Housing and Urban Development, that encroach on the attorney-client privilege, the attorney work product doctrine, and the constitutional rights of employees.

Two of the most controversial policies are set out in the Department of Justice's 2003 "Thompson Memorandum" and 2006 "McNulty Memorandum." These policies pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit, and therefore leniency, during federal investigations. Some of the Department of Justice's policies even contain provisions which deny employees their Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination. This is done when the government persuades companies to refuse to pay their employees' legal fees during investigations, to fire employees for not waiving their rights, or to take other punitive

actions against employees before guilt has been established.<sup>2</sup>

Firing back, the Attorney-Client Privilege Protection Act, as currently drafted, prohibits the United States government from demanding or requesting the disclosure of any communication protected by the attorney-client privilege or attorney work product doctrine. Specifically, the legislation forbids any United States agent or attorney, in any federal investigation or criminal or civil enforcement matter from: (1) demanding or requesting that an organization, or a current or former employee or agent of such organization, waive the protections of the attorney-client privilege or attorney work product doctrine;

(2) offering to reward or rewarding an organization, or current or former employee or agent, for waiving such protections; or (3) threatening adverse treatment or penalizing an organization, or current or former employee or agent, for declining to waive those protections.<sup>3</sup>

Moreover, the bill prohibits the government from basing any charge or adverse treatment on whether an organization pays attorneys' fees for its employees or signs a joint defense agreement. In particular, a United States agent or attorney may not use as a charging decision condition or a cooperation-determining factor: (1) any valid assertion of the protection of the attorney-client privilege or attorney work product doctrine; (2) the provision of counsel to, or contribution to the legal defense fees or expenses of, a current or former employee or agent of an organization; (3) entry into, or existence of, a valid joint-defense, information-sharing, or common-interest agreement between an organization and a current or former employee or agent, or among its current or former employees; (4) the sharing of relevant information in anticipation of or in response to an investigation or enforcement matter between an organization and a current or former employee or agent, or among its current or former employees, unless such sharing is itself an offense; or (5) the failure to terminate

the employment or affiliation of or otherwise sanction any employee or agent of the organization because of the employee's or agent's decision to exercise personal constitutional rights or other legal protections in response to a government request.<sup>4</sup>

### Procedural History

The bill, as originally introduced in Congress in 2006, and titled, "Attorney-Client Privilege Protection Act of 2006," was cleared from the books when it failed to pass into law within the two-year session of Congress. However, on January 4, 2007, the Attorney-Client Privilege Protection Act of 2007 (S. 186/H.R. 3013) was introduced. Eleven months later, on November 13, 2007, the Attorney-Client Privilege Protection Act of 2007 passed unanimously in the House of Representatives. The following day, the bill was received in the Senate.

Seven months later, on June 26, 2008, a modified, companion bill of the Attorney-Client Privilege Protection Act of 2007 was introduced in the Senate: the Attorney-Client Privilege Protection Act of 2008. This 2008 version of the bill remains in the Senate, where it has had thirteen bipartisan cosponsors, one of which was former Senator Joe Biden (D-DE).

### Policy Issues Prompting Passage of the Bill

On June 26, 2008, when Senator Specter introduced the Attorney-Client Privilege Protection Act of 2008 to the Senate, he argued that the right to counsel has been engrained in American jurisprudence since the adoption of the Bill of Rights in the 18th century, and that it is "too important to be passed over for prosecutorial convenience."<sup>5</sup> Senator Specter explained that the Sixth Amendment is a fundamental right afforded to individuals charged with a crime and that it guarantees proper representation by counsel throughout prosecution. However, the right to counsel is largely ineffective unless confidential communications from a client to his lawyer are protected by law.

Indeed, the bill affirms the holding of



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the United States Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which ruled that the attorney-client privilege applies to internal corporate legal dialogue and that lower-level employees can invoke the privilege. The *Upjohn* Court highlighted the importance of the attorney-client privilege in encouraging full and frank communication between attorneys and their clients, which is essential for effective legal representation, and also emphasized those broader public interests the privilege serves in fostering the observance of law and the administration of justice.

On the Senate floor, Senator Specter further expressed that, in addition to the importance of the right to counsel, it is fundamental that the government has the burden of investigating and proving its own case. Privilege waiver, however, tends to transfer this burden to the organization under investigation. Indeed, Senator Specter stated that, based upon his own experience as a former prosecutor, he knows prosecutors to have enormous power and tools at their disposal, and do not need the coercive tool of the privilege waiver.<sup>6</sup>

## 2008 Modifications of the Bill

The 2008 version of the Attorney-Client Privilege Protection Act includes subtle improvements, such as defining “organization” to make clear that continuing criminal enterprises and terrorist organizations will not benefit from the bill’s protections.<sup>7</sup> Further, the modified version of the bill demonstrates that the prohibition on informal privilege waiver demands is far from unprecedented, as it provides that “Congress recognized that law enforcement can effectively investigate without attorney-client privileged information when it banned demands by the Attorney General for privileged materials in the Racketeer Influenced and Corrupt Organizations Act.”<sup>8</sup> Finally, as a United States District Court in Washington noted, the legislature does not intend to broaden the privilege to the extent of protecting illegal activity. Section 2[a][10] of the bill provides, “the attorney-client privilege, work product doctrine, and payment of counsel fees cannot and shall not be used as devices to conceal wrongdoing or to cloak advice on evading the law.”<sup>9</sup>

## Support for the Bill

The Attorney-Client Privilege Protection Act has received broad support from a variety of organizations, including the American Bar Association and the ACLU.<sup>10</sup> William H. Neukom, former President of the American Bar Association, expressed the ABA’s strong support for the proposed act in a persuasive letter to Representative Robert Scott (D-VA), the sponsor of the bill in the House. Mr. Neukom explained:

The Department [of Justice’s] new policy continues to seriously weaken the confidential attorney-client relationship between companies and their lawyers, which, in turn, impedes the lawyers’ ability to conduct thorough internal investigations and effectively counsel compliance with the law. This harms companies, employees and the investing public as well. ... The new Department policy and other similar federal policies also continue to deny cooperation credit to companies that assist employees with their legal defenses or decline to fire them for exercising their Fifth Amendment rights. By forcing companies to punish employees long before any guilt has been shown, these federal policies weaken the constitutional presumption of innocence and undermine principles of sound corporate governance.

[The bill] would reverse these harmful policies by prohibiting federal agencies from pressuring companies or other organizations to waive their privileges or take certain unfair punitive actions against their employees as conditions for receiving cooperation credit during investigations. At the same time, however, the bill specifically preserves the ability of prosecutors and other federal officials to obtain the important, non-privileged factual material they need to punish wrongdoers and enforce the law. In our view, [the bill] would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product and employee legal protections.<sup>11</sup>

Michael Macleod-Ball, Chief Legislative and Policy Counsel for the ACLU Washington Legislative Office, also urged passage of the Attorney-Client Privilege Protection Act:

The ambiguity that shrouded [the right to counsel] over the past decade has had a chilling effect on the relationship between attorney and client. When individuals cannot speak frankly with counsel, there is an increased risk that well-meaning people will unwittingly break the law. ... Moreover, the [bill] makes it more likely that companies will live up to promises made to employees to provide legal defense and the ability to pay for it.<sup>12</sup>

## Related Legislation: Federal Rule of Evidence 502

On September 8, 2008, further demonstrating Congress’ concerns regarding the Department of Justice’s investigation and prosecution policies, Congress passed a related measure – Federal Rule of Evidence 502 – which provides a nationwide federal standard for waiver of the attorney-client privilege and work product protection.<sup>13</sup> Under Rule 502[a], when

a disclosure waives either protection, the waiver extends to undisclosed material only if the waiver is intentional, the undisclosed material concerns the same subject matter, and “they ought in fairness to be considered together.”<sup>14</sup> Thus, Rule 502 allows litigants to exchange materials without necessarily waiving the attorney-client privilege or attorney work product protection.

Despite strong support from Senator Specter, Representative Scott, and many others, it remains to be seen whether the Attorney-Client Privilege Protection Act of 2008 will be signed into law, as was Federal Rule of Evidence 502, and, if it is, whether it will fulfill its intended purpose of thwarting the continuing erosion of the attorney-client privilege, the work product doctrine, and the constitutional rights of employees. As an editorial in the Buffalo News pointedly remarked, “[t]his Attorney-Client Privilege Protection Act should not be necessary. But it should pass. Because if the government ever did cut down all the laws to get to the real corporate devils, there would be nothing to stop prosecutors from going after the rest of us.”<sup>15</sup>

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1. Statements on Introduced Bill and Joint Resolutions—Senate at S6294 [June 26, 2008].
2. <http://www.govtrack.us/congress/record.xpd?id=110-h20071113-27&bill=h110-3013> [accessed Nov. 30, 2008].
3. <http://www.govtrack.us/congress/bill.xpd?bill=s110-3217&tab=summary> [accessed Nov. 30, 2008].
4. *Id.*
5. Statements on Introduced Bill and Joint Resolutions – Senate at S6294-S6295 [June 26, 2008].
6. *Id.*
7. S. 3217: Attorney-Client Privilege Protection Act of 2008 § 3[a][3].
8. *Id.* § 2[a][6].
9. *Id.* § 2[a][10]. See *United States v. Ferrell*, 2007 U.S. Dist. Lexis 55939, \*11-12 [W.D. Wash. Aug. 1, 2007].
10. Kathryn Grant Madigan, former President of the New York State Bar Association, called upon NYSBA members to push for passage of the Attorney-Client Privilege Protection Act. Carol DeMare, *Safe Child Enrollment Day Goes Swimmily*, The Times Union [Dec. 5, 2007].
11. <http://www.govtrack.us/congress/record.xpd?id=110-h20071113-27&bill=h110-3013> [accessed Nov. 30, 2008].
12. <http://www.aclu.org/crimjustice/indigent/36583prs20080828.html> [accessed Nov. 30, 2008].
13. <http://www.uscourts.gov/rules/index2.html> [accessed Nov. 30, 2008]. Federal Rule of Evidence 502 was passed by the Senate on February 27, 2008, passed by the House on September 8, 2008, and signed into law by the President on September 19, 2008. [http://www.abanet.org/litigation/committees/trial\\_evidence/news.html](http://www.abanet.org/litigation/committees/trial_evidence/news.html) [accessed Nov. 30, 2008].
14. Elizabeth Stull, *U.S. Dept. of Justice’s Filip Memo Not Far Enough to Protect Privilege*, The Daily Record Of Rochester [Sept. 12, 2008].
15. Editorial [author unknown], *Prosecutors Overstep Bounds*, The Buffalo News [Sept. 14, 2007].