



FEDERAL EVIDENCE REVIEW

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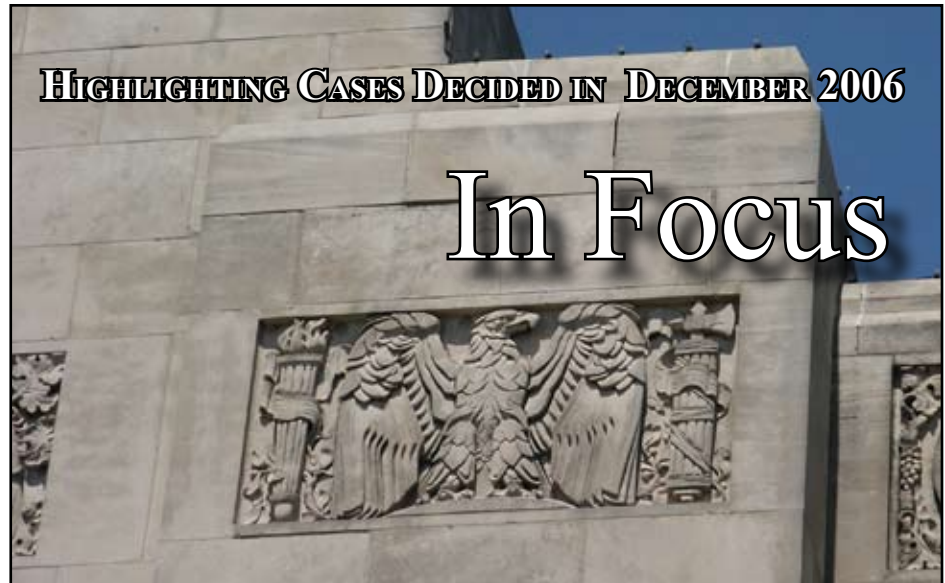
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Lead Story: Are Further Changes On The Horizon Concerning the Corporate Attorney-Client Privilege and Work Product Protection?

The new McNulty Memorandum, recent congressional action, and proposed FRE 502 suggest a ripe environment for even further standards to be promulgated.

In the past year, all three branches of the federal government have addressed the issue of the waiver of attorney-client privilege and work product protection in corporate investigations in one form or another. The first congressional hearings on this issue were held in the House in March 2006, followed by another hearing in the Senate in September 2006. The U.S. Judicial Conference issued a proposed selective waiver rule for public comment. Some key cases have also been decided. In December 2006, Deputy Attorney General Paul McNulty announced new guidelines for federal prosecutors. The same month, Pennsylvania Senator Arlen Specter also introduced legislation in the Senate the same month. The recent debate, activity, and focus on this issue suggest that an impetus for further change may be on the horizon.

One of the more significant privileges involves confidential communications between a lawyer and client. The attorney-client privilege is considered “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Supreme Court has held that the attorney-client privilege protects confidential communications between the corporation and its attorney. *See, e.g., id.* (recognizing privilege in corporate setting). As the Supreme Court has noted, the rationale for the attorney-client privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.” *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (quoted in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). A common companion protection



is the work product doctrine which safeguards “[m]aterials obtained or prepared by an adversary’s counsel with an eye toward litigation.” *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *see also* FED. R. CIV. P. 26(b)(3) (work product rule: noting “the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”).

Special issues are raised concerning legal advice given in a corporate setting and the scope of the privilege and work product protection when a government investigation is commenced involving the corporation. For example, if the corporation conducts its own internal investigation concerning potential misconduct, to what extent will this information be protected by the attorney-client privilege and work product protection? A host of other policy questions include:

- Whether a corporation is required (expressly or implicitly) to waive attorney-client communications and work product protections as a sign of cooperating with the government on an investigation?
- To what extent can or should the attorney-client privilege and work product doctrine be used to shield criminal conduct from government investigators?
- Whether and to what extent a corporation’s response to the government’s request for waiver of privilege should be considered favorably or unfavorably in terms of the corporation’s cooperation with the government?
- If a corporation voluntarily produces privileged material to the government, should a third party later be able to compel production of the privileged material in civil litigation?
- What impact will any policy changes have on the



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