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Advisory on July 2007 SJC Ruling Regarding Confidential Communications Between Public Entities and their Attorneys

Confidential communications between public entities (such as agencies, cities, and towns) and their attorneys undertaken for the purpose of seeking or furnishing legal advice are privileged. In July 2007, the Supreme Judicial Court, recognizing that governmental officials must be able to obtain quality legal advice essential to the faithful discharge of their duties, that public entities should not be unfairly disadvantaged vis-à-vis private parties with whom they transact business, and that the public has a strong interest in the fair and effective administration of justice, unequivocally held that the attorney-client privilege applies to public entities. *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444 (2007). The Court also held that the legal advice provided to public entities by their attorneys is privileged, even where the advice is contained in a document or record and the public entity is subject to the public records law (M.G.L. c. 66, § 10, and M.G.L. c. 4, § 7, cl. 26). In essence, the Court held that public entities are protected by the attorney-client privilege, even if the protected communications are contained in a public record.

The attorney-client privilege protects confidential communications.[1] To be privileged, (1) the communication must have been made in connection with the provision of legal advice to the public client; (2) the communication must have been made in confidence; and (3) the privilege must not have been waived. *Matter of Reorganization of Elec. Mut. Liability Ins. Co., Ltd. (Bermuda),* 425 Mass. 419, 421 (1997). As to the first element, only communications between the public entity and its attorney made with a view towards obtaining or providing legal advice are protected. The privilege does not extend beyond confidential communications. So, for example, suppose town counsel writes a letter to the zoning board in which she says: "In my opinion, the board should allow reconstruction of a single-family residence on the property at issue. However, the board should advise the property owner that he needs a special permit if he intends the reconstructed residence to exceed the footprint and square footage of the original residence." The opinion contained in the letter is a protected attorney-client communication because town counsel is providing specific legal advice in a letter directed to the client board. Suppose, however, that the town counsel then sends an invoice for her legal services to the zoning board stating, "Fee for professional services: $1,000." That invoice would not be a protected attorney-client communication because the invoice does not reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of the law. *See, e.g., Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999); *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129

[1] The scope of the attorney-client privilege cannot be completely summarized in a short advisory like this one. A comprehensive resource is The Attorney-Client Privilege and the Work-Product Doctrine, Fifth Edition, authored by Edna Epstein and published by the ABA, Section of Litigation.

(9th Cir. 1992); *Maxima Corp. v. 6933 Arlington Development Limited Partnership*, 641 A.2d 977, 984 (Md. 994); *Beavers v. Hobbs*, 176 F.R.D. 562, 564-65 (S.D. Iowa 1997); *Burton v. R.J. Reynolds Tobacco*, 170 F.R.D. 481, 484 (D.Kan.1997).[2]

There is a distinction between attorney-client communications and attorney work product. A letter from town counsel to the public entity described above ("In my opinion, the board should allow reconstruction of a single-family residence on the property at issue . . .") is an attorney-client communication; a memorandum to the file that was prepared by the town counsel in connection with litigation or anticipated litigation, assembling information about special permits, for example, or outlining conclusions, opinions, and legal theories, is work product. With attorney-client privilege, the principal focus is on encouraging the client and the attorney to communicate with each other freely. With attorney work product, the focus is on encouraging careful and thorough preparation by the attorney in connection with litigation.

In *Suffolk Construction*, the Court distinguished between the privilege given to an "attorney-client communication" and the protection afforded attorney "work product." The attorney-client communication is practically inviolable; on the other hand, the broad attorney work product privilege has been abrogated by the public records law in favor of the time-limited "deliberative process privilege." *Suffolk Construction*, 449 Mass. at 454, citing *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798 (1999). Attorney work product is generally protected from disclosure during litigation, but, unless it may be withheld from disclosure under one of the public records law exemptions, is subject to disclosure under the public records law once the litigation is resolved. Therefore, public entities and their attorneys should carefully consider how legal opinions are made and communicated. For example, although not dispositive, a public entity or attorney should clearly label a letter or an e-mail between the attorney and public entity concerning the public entity's search for legal advice or the attorney's giving of legal advice, "confidential attorney-client communication" if that is what is intended.

As to the second and third elements - - confidentiality and absence of waiver -- the protection of the attorney-client privilege may be lost if the parties do not maintain the confidentiality of the communication. The privilege may be lost, for example, in the following circumstances: (1) the communication is made to or in the presence of a third party who is not a necessary agent of the attorney or client or, even if an agent, a party whose presence is not necessary to the rendering or understanding of the advice; (2) the communication was intended to be made privately but in the circumstances in which it was made, the client reasonably understood that it could be overheard; or (3) the communication was made privately, but the client understood that the information communicated would be conveyed to others, for example, where town counsel told the town manager that in her opinion, the zoning board should issue a special permit and that would be the position she would be taking at the annual town meeting. Therefore, public entities and their attorneys should consider carefully who is present when the communication is made, whom the communication is between (who the "client" is), where the communication is made, and whether the communication is

[2] To be privileged, the attorney-client communication must be intended to be confidential. In the above example, if one of the zoning board members writes a letter to the resident asking for more information and cc's the town counsel, the letter does not become an attorney-client communication. The reverse is also true: if the town counsel writes to the resident seeing additional information and cc's the zoning board, the letter does not become an attorney-client communication.

intended to be shared. An indiscreet communication, the presence of a third party not necessary to the rendering of the legal advice, or an indiscriminate "cc" may result in the privilege being lost.

When faced with a public records request, public entities should carefully differentiate between documents that must be disclosed and documents that contain privileged attorney-client communications that may be withheld. The public entity should then respond to the public records request, indicating that documents containing attorney-client communications were withheld. If the public entity's withholding of certain documents is challenged, the public entity may be required to prepare an itemized and indexed document log in which it sets out detailed justifications for its claim of privilege.

The Court has expressed its confidence that public entities and their counsel will be able to make appropriate distinctions. We add our own note of caution that public entities should guard against indiscreet use or over-use of the attorney-client privilege. Public entities should begin with the presumption that all documents are subject to disclosure, and be circumspect about their characterization of a document or part of a document as privileged. Misuse or overuse of the privilege will defeat the purpose of the public records law and could lead to litigation that might, in the end, erode the scope of the attorney client privilege in the government context.

For questions or additional information regarding this Advisory, please contact the General Counsel's Office, Office of the Attorney General, One Ashburton Place, Boston, MA 02108, (617) 727-2200.

The following information has been added for clarification purposes.

The Attorney General's Office suggests that this 2007 Advisory should be read in conjunction with DaRosa v. New Bedford, 471 Mass. 446, 459-460 (2015), which concerned attorney work product. In DaRosa, the Supreme Judicial Court held that, "Opinion work product sought in anticipation of or during the pendency of litigation is related to 'policy positions being developed by the agency' and therefore is protected from disclosure by exemption (d). Therefore, a litigant should not succeed in obtaining opinion work product that would be protected from discovery by rule 26 (b) (3) by seeking the opinion work product through a public records request. Fact work product is not protected from disclosure under exemption (d), even if related to policy positions being developed by the agency, if it is a 'reasonably completed factual stud[y] or report[] on which the development of such policy positions has been or may be based.' G. L. c. 4, § 7, Twenty-sixth (d). Where fact work product is not contained within a 'factual study or report,' or where it is contained in a 'factual study or report' that is not 'reasonably completed,' then it, too, is protected from disclosure, at least until the study or report is reasonably completed. Moreover, where a factual study or report is reasonably completed but is interwoven with opinions or with analysis leading to opinions, a purely factual section of the report might fall outside exemption (d) but a discussion or analysis section interwoven with facts would be protected from disclosure."
(This Advisory was originally published in 2007 under an earlier administration.)