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August 22, 2001

J. Howard Beales, III
Director
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Director Beales:

Thank you, again, for our meeting on July 26, 2001. We appreciate the time and attention you have given to our concern at the application of Title V of the Gramm-Leach-Bliley Act of 1999 to attorneys engaged in the practice of law.

During our meeting and in other communications, your staff had posed several questions regarding the state level regulation of the legal profession by the judicial branch. Attached please to find a memorandum drafted by American Bar Association staff expert in the area of ethics law responding to those questions.

Thank you for your kind attention to this issue. We look forward to working with you and you staff to achieve an acceptable solution.

Sincerely,

Robert D Evans

Robert D Evans

Attachment

Defending Liberty
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MEMORANDUM

To: Robert D. Evans, Associate Executive Director
From: George Kuhlman, Ethics Counsel, and Ellyn Rosen, Associate Regulation Counsel, Center for Professional Responsibility
Date: August 21, 2001
Re: Federal Trade Commission Inquiries

With assistance from Associate Ethics Counsel Eileen Libby and Lawyer's Manual on Professional Conduct Editor Elizabeth Cohen, we submit this memorandum in response to questions that Legislative Counsel Ellen McBarnette referred to us from representatives of the Federal Trade Commission in late July. Please feel free to contact either of us if you believe we can be of additional assistance.

OVERVIEW

The subject under consideration is the application of provisions of the Graham-Leach-Bliley Act (15 U.S.C. Sec. 6801 et seq., 1999) ("the Act") to lawyers and law firms. The Act requires a financial institution to provide notices of its privacy policies and practices at least annually to its customers during the continuation of a customer relationship. The notices must be clear and conspicuous and accurately reflect the privacy policies and practices then in effect. F.T.C. Privacy of Consumer Financial Information, 16 C.F.R. Part 313, § 313.5 (May 24, 2000). Section 313.6, which implements Section 503 of the Act, identifies the items of information that must be included, such as initial and annual notices, a description of policies and practices with respect to, among other things, disclosing nonpublic personal information to affiliates and nonaffiliated third parties. Pursuant to Section 505(a)(7) of the Act, the Federal Trade Commission ("FTC") has authority over ''financial institutions'' and ''other persons'' to enforce these and all other provisions of the Act. The FTC has taken the position that these provisions apply to lawyers and law firms providing certain services.

We were advised that representatives of the FTC presented ABA Legislative Affairs Counsel with inquiries in three areas: 1) client understanding of confidentiality policies applicable in legal representation; 2) the authority and enforcement mechanisms for lawyer discipline; and 3)

the effect that enforcement of the Act might have, in the context of legal services, on the attorney-client privilege and the attorney work-product doctrines. We understand that these inquiries have been presented, at least in part, to facilitate a response by the FTC to a recent letter sent by former ABA President Martha Barnett urging that the provisions of the Act not be applied to lawyers or law firms.

I. Client Recognition of Confidentiality Policy in Legal Representations

The objective of the Act is to assure that individuals understand, and to a limited extent agree to, the circumstances in which certain types of information they expect to be confidential may be disclosed.

In the legal profession, the principle of client-lawyer confidentiality is given effect in related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. These doctrines are codified in the body of the laws of evidence, in whatever manner each state has chosen to adopt them, rather than in the body of professional responsibility law. As such, your office will recognize that they fall outside the expertise of the staff of the Center. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law, and is codified in each state's rules of professional conduct for lawyers. The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized by the client or required by those rules of professional conduct or other law.

The rules of professional conduct for lawyers that have been adopted in various forms throughout the United States, in virtually all instances by each state's highest court and substantively patterned on the ABA Model Rules of Professional Conduct, (whether in the ABA "Model Rules" format or in the predecessor format known as the "Model Code of Professional Responsitility"), provide a strict and comprehensive approach to the protection of clients' information (both that revealed by clients and any other information obtained by a lawyer in his or her representation of clients). In doing so, they provide protections to clients that in fact exceed the protections that are guaranteed to consumers of other services under the provision of the Act. They flatly prohibit disclosure of *any* information relating to a representation without prior discussion with and consent from the affected clients, except in a limited, and essentially legally mandated, number of situations. These professional conduct rules, adopted by the judicial branch of government, carry the force of law. *See, e.g., Post v. Bregman*, 707 A. 2d 806 (Md. 1998); *In re Vrdolyak*, 560 N.E. 2d 840 (Ill. 1990); and *Louisiana State Bar Ass'n v. Harrington*, 585 So. 2d 514 (La. 1990).

Although most lawyers are likely to refer to their confidentiality obligations in initial communcations with prospective or regular clients, no professional conduct rule imposes an affirmative duty on lawyers to explain the confidentiality policies. Nonetheless, the principle of client-lawyer confidentiality, including the attorney-client privilege and the work-product doctrine, although not necessarily understood in a technical sense by most non-lawyers, is a

universally familiar concept and a hallmark of the trust fundamental to the lawyer-client relationship, just as it is, for example, within the doctor-patient and priest-penitent relationships.

Under the professional conduct rules, the disclosure of confidential information by lawyers is generally *impossible* without consultation with the client and informed consent. Absent circumstances in which disclosure of information is compelled by other law, or in which the client has a dispute with the lawyer, a client must be informed of, and must agree to, the disclosure of confidential information by his or her lawyer. Failure to obtain such client approval subjects a lawyer to disciplinary liability and possible punishment, by means of an established and effective process described more fully, *infra*.

II. Nature and Operation of the Lawyer Disciplinary Process

Just as each jurisdiction has its own rules of professional conduct that apply to lawyers, each jurisdiction has an established system for the efficient and effective enforcement of those rules.

Regulation of lawyers in the United States falls under the judicial branch of government of each state, and a jurisdiction's authority regarding a lawyer's license to practice law is not preempted by the U. S. Constitution. *See, generally* 7 Am. Jur. 2d *Attorneys at Law, Sec. 2, fn. at p. 55-56.* In each state and the District of Columbia, the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law. See *e.g., In re Shannon*, 876 P. 2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is universally accepted and dates back to the thirteenth century); *Hunt v. Maricopa County Employees Merit Sys. Comm'n*, 619 P. 2d 1036 (Ariz. 1980) (listing cases from numerous states recognizing the authority of the state supreme courts to regulate the practice of law); *In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998) (noting that in every state the court has the power to admit and discipline lawyers); *People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E. 2d 941, cert. denied, 302 U.S. 728, reh. denied, 302 U.S. 777; *In re Intergration of Nebraska State Bar Association*, 275 N.W. 265 (Neb. S.Ct. 1937).

Although a state legislature may, under its police power, act to protect the interests of the public, with respect to the practice of law it does so in aid of the courts—its actions do not supersede or detract from the courts' powers to regulate the bar. *See, e.g., People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E. 2d 941, cert. den. 302 U.S. 728, reh. den. 302 U.S. 777; *In re Intergration of Nebraska State Bar Association*, 275 N.W. 265 (Neb. S. Ct. 1937); *Washington State Bar Ass'n v. State*, 890 P. 2d 1047 (Wash. 1995).

The entity responsible for investigating, prosecuting and adjudicating allegations of misconduct (violations of the rules/codes of professional conduct) at the behest of the court varies in each state. In some states the court has delegated that job to the state bar association. For example, in California, the State Bar is considered an arm of the court for this purpose. *In re Attorney Discipline System*, 19 Cal. 4th 582 (Cal. 1998). In other states, the supreme court has created an agency of the court separate from the state bar association.

For example, the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois was created by the Supreme Court of Illinois in 1973 and is empowered to investigate, prosecute and adjudicate allegations of misconduct by lawyers. ILCS S.Ct. Rules 751-71 (West 1993).

Each state's disciplinary mechanism operates under a sophisticated set of substantive and procedural rules adopted by the court. The systems are staffed by professionals with expertise in the rules of professional conduct, including disciplinary counsel, investigators, auditors and paralegals. There exists a large body of regulatory case law in each jurisdiction. Disciplinary sanctions administered to lawyers who are found to have violated professional conduct rules include admonition, reprimand, censure, suspension, disbarment, probation, and restitution. Courts also may order a disciplined lawyer to comply with specific conditions such as submission to drug and alcohol testing, and monitoring of client trust accounts. They also may require a disciplined lawyer to reimburse the involved disciplinary agency for the costs of the investigation and prosecution. In some states, the court has granted the authority to the adjudicators of its disciplinary agency/board to impose some lower-level sanctions. In rare instances the court has granted the board the authority to impose higher-level sanctions. Ultimately though, final appeals of disciplinary matters are heard by the court. Most importantly, as noted above, the court always retains the ultimate authority in the area of lawyer discipline.

Lawyer disciplinary proceedings are unique in nature. Some courts have described them as quasi-criminal. *See, e.g. In re Rufalo*, 390 U. S. 544 (1968); *Mississippi State Bar v. Young*, 509 So. 2d 210 (Miss. 1987). Basically, lawyer disciplinary proceedings are not entirely civil or criminal in nature, but are, rather, *sui generis* proceedings that result from the inherent regulatory authority of the courts. *See Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *In re Disciplinary Board of the Hawaii Supreme Court*, 984 P. 2d 688 (Hawaii 1999).

Lawyers in disciplinary proceedings are entitled to some of the due process protections that apply to defendants in criminal proceedings. For example, lawyers are entitled to notice of the charges against them, the right to confront witnesses against them, the right to present evidence, and the right to assert their Fifth Amendment protections against self-incrimination. *See, e.g., In re Rufalo*, 390 U.S. 544 (1968); *Spevack v. Klein*, 385 U.S. 516 (1967); and *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). On the other hand, courts uniformly have concluded that the Double Jeopardy Clause is not applicable in disciplinary proceedings. *In re Chastain*, 532 S.E. 2d 264 (S.C. 2000). In most states, the rules of evidence apply in disciplinary proceedings and the state's rules of civil procedure govern pre-trial practice. The ABA Model Rules for Lawyer Disciplinary Enforcement recommend the application of the rules of evidence and civil procedure in disciplinary proceedings.

We note in this context that a compelling parallel may be seen in the Commission's enforcement authority, under Section 505 of the Act, with respect to "persons providing insurance", being committed to state insurance authorities. The existence of an active and effective disciplinary authority in each state suggests the reasonableness of a similar

derogation of authority, in this case to state judiciaries to enforce policies regarding confidentiality.

III. Dangers Presented by Enforcement of the Act Relating to the Attorney-client Privilege and Work-product Doctrines

The FTC's third inquiry concerns the effect of the exercise of the agency's enforcement powers regarding lawyers' privacy policies upon the attorney-client privilege and the work-product doctrine.

The attorney-client privilege protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice. *See American Standard Inc., v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987). "The work product privilege protects the attorney's thought processes and legal recommendations." *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (D.C. Cir. 1985). While the attorney-client privilege is intended to promote communication between lawyers and clients by protecting client confidences, the work-product privilege is a broader protection, "designed to balance the needs of the adversary system: promoting of an attorney's preparation in representing a client versus society's general interest in revealing all true and material facts to the resolution of a dispute." *In re Martin Marietta Corp.*, 856 F.2d 619, 624 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989).

Waiver usually is an "all-or-nothing" proposition. "Once the attorney-client privilege has been waived, the privilege is generally lost for all purposes and in all forums. The client, therefore, may no longer use the privilege to prevent access to the communications in question by either the party who successfully challenged the privilege claim or by anyone else in the present or future litigation. Having had the opportunity to assert and address the privilege claim in a judicial proceeding, the privilege holder is thereafter barred, under the doctrine of *res judicata* and collateral estoppel, from relitigating the resolved claim." *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1416-17 (Fed. Cir. 1997).

In a case involving a lawyer's voluntary disclosure to a government agency, *In Re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453 (D.C.N.Y. 1973), plaintiffs moved to compel a lawyer to answer certain questions about his client's purported violations of securities law. Previously, the lawyer was asked to appear before the Securities and Exchange Commission ("SEC") to answer questions concerning his client's conduct. The lawyer voluntarily appeared and gave testimony. In the latter proceeding, the defendant resisted the motion to compel a transcript of the lawyer's testimony, claiming that the attorney-client privilege was not waived by its lawyer's participation in the SEC investigation. The court disagreed, stating that it is established law that the voluntary disclosure or consent to the disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege. *Id.* at 463-64.

Although the attorney-client privilege ordinarily does not protect the identity of a client, *see Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir.), *reh'g*

denied, 977 F.2d 1533 (9th Cir. 1992), courts have recognized an exception to this rule when disclosure would implicate the client in criminal wrongdoing, or when disclosure, in conjunction with information already provided, would be tantamount to revealing an "indubitably confidential communication." In *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960), an Internal Revenue Service summons to a lawyer sought disclosure of the identity of a client on whose behalf the lawyer had made an anonymous tax payment. The court found the privilege applicable, because to reveal the identity of a person who had sought legal assistance for such a purpose would also reveal that the person had effectively acknowledged his guilt of a tax offense. *See id.* at 633.

Thus, although lawyer or law firm compliance with any FTC enforcement inquiry that required only revelation of clients' identities ordinarily would not involve disclosures that effectively would waive the attorney-privilege, *Baird* provides support for serious concern that there may be occasions on which compliance would have such effect.

CONCLUSION

In light of the greater degree of protection that is afforded client confidential information in the context of the client-lawyer relationship and the existence of effective mechanisms that exist throughout the United States for enforcing lawyers' professional conduct, lawyers and law firms should be deemed to be in compliance with the objectives and procedures mandated in the Act. Such a determination will also prevent any potential loss of the attorney-client privilege and nullification of the work-product doctrine, both of which could result from the FTC's enforcing compliance with the provisions of the Graham-Leach-Bliley Act.