

Stephen N. Zack
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
E-mail: abapresident@abanet.org

February 8, 2011

The Honorable Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 7th Street SW, Suite 10000
Washington, DC 20410

The Honorable Michael P. Stephens
Acting Inspector General
Office of Inspector General
U.S. Department of Housing and Urban Development
451 7th Street, SW, Suite 8256
Washington, DC 20410

Re: Concerns Regarding HUD's Attorney-Client Privilege Waiver Policies and Practices

Dear Secretary Donovan and Acting Inspector General Stephens:

On behalf of the American Bar Association, which has nearly 400,000 members, I write to enlist your help and support in preserving the fundamental attorney-client privilege and work product protections of U.S. Department of Housing and Urban Development (HUD) grantees, particularly public housing agencies (PHAs). Towards that end, we urge you to rescind HUD guidance¹ that pressures PHAs to execute an upfront waiver of these important protections. Consistent with the concerns expressed by congressional leaders and the recent actions of numerous other federal agencies, we also urge you to implement a clear policy preventing HUD and HUD Office of Inspector General (OIG) employees from requesting or requiring that PHAs or other HUD grantees waive their attorney-client privilege or work product protections or penalizing those grantees who decline to waive these rights.

The attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to law. The privilege also facilitates self-investigation by HUD grantees into past conduct to identify shortcomings and remedy problems, which protects federal dollars and thus benefits HUD, grantees, and U.S. taxpayers. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product, including litigation strategies and mental impressions, will be revealed to adversaries.

¹The HUD guidance discussed in this letter originated as an addendum to Notice PIH 2003-24 entitled "Procurement of Legal Services by Public Housing Agencies," which was extended as Notice PIH 2006-09. Although both notices have expired, they were permanently incorporated into HUD guidance at Appendix 6 to HUD Handbook 1530.1 REV-5, "Litigation" dated May 2004 and Section 7.4G of HUD Handbook 7460.8 REV-2, "Procurement Handbook for Public Housing Agencies" dated March 2007.

The ABA strongly supports the preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. Unfortunately, it is our understanding that HUD and the HUD OIG continue to follow certain policies and engage in certain practices that place both of these important rights in serious jeopardy.

Current HUD guidance “urges” all PHAs to attach an Addendum to all contracts with outside counsel for professional legal services. The Addendum contains language that would restrict the ability of the PHA’s lawyers to assert the attorney-client privilege, the work product doctrine, or any other discovery privileges on behalf of their PHA clients in connection with HUD and OIG information requests, reviews, investigations and enforcement proceedings. We previously expressed our serious concerns to HUD in December 2006 regarding the Addendum, noting that it “is an indirect effort to get unwary and unsophisticated housing authorities to waive their privilege.”²

Although use of the Addendum by grantees has not been required by HUD, the HUD guidance lacks any clear statements to this effect; in fact, the guidance suggests the Addendum must be used. As a result, some PHAs may have already unwittingly waived these important protections. Rescinding all guidance to PHAs that encourages use of the Addendum—and hence waiver of attorney-client privilege and work product protections—is particularly important at this time, as it appears that some OIG and HUD staff may erroneously believe that its use is required. Therefore, we request that you issue a clear statement to PHAs and to your employees rescinding both the Addendum and those elements of the guidance that may cause PHAs or your employees to believe that use of the Addendum and waiver of privilege and work product are required.

It is also our understanding that HUD and OIG staff continue to issue direct requests for PHAs and other grantees to waive their attorney-client privilege and work product protections. Although we recognize that HUD and the OIG may seek access to a wide range of information pertaining to compliance with HUD grants and funding, this information can almost always be obtained in ways that do not require waiver of these protections. For instance, documentation of legal professional services can be made available in a manner that does not waive the attorney-client privilege. We have also become aware that HUD has recently been suspending its approval of contracts with legal counsel, including litigation contracts, when PHAs decline to waive the privilege.

In light of such actions by HUD and OIG employees, we believe a clear directive to both entities’ staff prohibiting them from requesting waivers of attorney-client privilege and work product protections is essential. This directive should also instruct the staff that PHAs and other grantees should not be penalized in any way if they decline to waive these rights.

The ABA’s requests with respect to the HUD Addendum, guidance and waiver demands are consistent with actions already taken by Congress and a number of other federal agencies.³ In

² See the ABA’s December 8, 2006 letter to then-HUD Secretary Alphonso Jackson, at footnote 2. The ABA’s letter is available at http://www.abanet.org/poladv/letters/attyclient/2006dec08_hudattyfees_1.pdf

³ Copies of the Attorney-Client Privilege Protection Act, the previous and current privilege waiver policies of DOJ, the CFTC, the Sentencing Commission, the SEC and other federal agencies, and other relevant materials are available on the ABA’s website at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>

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November 2007, the House of Representatives overwhelmingly approved the "Attorney-Client Privilege Protection Act" (H.R. 3013), which would prohibit all federal agencies from seeking waivers of the attorney-client privilege or work product protections. While the legislation has not yet been enacted into law, the House action in 2007—and the reintroduction of an identical bill in December 2009 by the current House Judiciary Committee Chairman Lamar Smith (R-TX) and Ranking Member John Conyers (D-MI) as H.R. 4326—demonstrates the strong and ongoing bipartisan support in Congress for this prohibition.

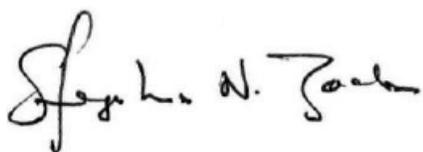
In another important related development, the Department of Justice replaced its previous privilege waiver policy in August 2008 with new corporate charging guidelines, known informally as the "Filip Memorandum," which direct prosecutors not to pressure companies and other organizations to waive their attorney-client privilege and work product protections during investigations. Instead, the revised DOJ policy states that in order to receive cooperation credit during investigations, entities need only produce the relevant factual information. In May 2009, Attorney General Holder strongly endorsed the new policy and noted that DOJ was "engaged in ongoing efforts outside the department to inform investigators and attorneys at other government agencies about the guidelines and are suggesting them as best practices...."

In addition to the Justice Department, several other key federal agencies have also reversed their privilege waiver policies in recent years. For example, the U.S. Sentencing Commission voted unanimously to remove the waiver language from Section 8C2.5 of the Federal Sentencing Guidelines in April 2006, and the Commodity Futures Trading Commission replaced its previous August 2004 waiver policy with a new Enforcement Advisory in March 2007 directing its staff to respect the privilege and work product protections during investigations. In addition, the Securities and Exchange Commission issued a new Enforcement Manual in January 2010 generally prohibiting its staff from seeking such waivers. Therefore, HUD's current policies and practices that pressure PHAs to waive their fundamental attorney-client privilege and work product protections are clearly out of step not only with the views of many congressional leaders, but also with the growing consensus among other leading federal law enforcement agencies on this issue.

For all these reasons, the ABA urges HUD to rescind all guidance to PHAs that seeks an upfront waiver of attorney-client privilege and work product protections. In addition, we urge you to instruct all HUD and OIG staff that such waivers should not be requested, directly or indirectly, nor should they be a factor in determining whether PHAs or other HUD grantees have cooperated with audits or investigations. Finally, we urge you to instruct staff that HUD should not penalize PHAs or other grantees that decline to waive their attorney-client privilege or work product protections.

Thank you considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice. If you have any questions regarding the ABA's concerns, please contact our Governmental Affairs Director, Thomas Susman, at (202) 662-1765.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen N. Zack". The signature is written in a cursive, flowing style.

Stephen N. Zack

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cc: Helen R. Kanovsky, General Counsel, U.S. Department of Housing and Urban Development
Thomas M. Susman, Governmental Affairs Director, American Bar Association