



August 4, 2008

Mr. Robert H. Herz Chairman Financial Accounting Standards Board 401 Merritt 7 P.O. Box 5116 Norwalk, CT 06856-5116



LETTER OF COMMENT NO. 29

Re: Disclosure of Certain Loss Contingencies – an amendment of FASB Statements No. 5 and 141(R) – File Reference No. 1600-100

Dear Mr. Herz:

As Chair of the Committee On Attorney Client Relationships of the American College Of Trial Lawyers, I am responding to your invitation to comment on the Exposure Draft of the Proposed Statement of Financial Accounting Standards issued on June 5, 2008 relating to "Disclosure of Certain Loss Contingencies" (the "proposed amendments"). While we appreciate the Board's desire for greater transparency, we believe that the proposed amendments would do great harm to the beneficial relationship between clients and their counsel, and consequently to the cause of justice, with little or no corresponding benefit.

The American College of Trial Lawyers, founded in 1950, is composed of eminent members of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful and rigorous investigation, to those experienced trial lawyers who represent plaintiffs or defendants in civil trials and their counterparts in criminal prosecution and defense. Lawyers must have a minimum of fifteen years' experience before being considered for Fellowship, and membership in the College cannot exceed 1% of the total lawyer population in any state or province. The College, for many years, has pursued its mandate to take positions on issues that affect litigation, the litigation practice and the obligations of trial lawyers. We have a continuing interest in protecting the attorney client privilege and the protection accorded to attorney work product (together, the "privileges"). Our Committee on Attorney Client Relationships is charged with the responsibility to monitor developments that affect those privileges, and the Committee has been authorized to present these comments on behalf of the College.

Although the proposed amendments speak in terms of disclosures by an entity, disclosures regarding litigation-related loss contingencies normally emanate from or consist of information and advice provided by the trial lawyer who represents the entity (the "client"). In most instances, the nature, extent and presentation of that information and its potential disclosure to others than the client will have a profound effect upon the trial lawyer's performance of his or her obligations to the client, to the justice system, and to the legal profession. Therefore, the proposed amendments would have a direct impact on the trial lawyer as well as on the client.

reply to:

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We have reviewed the several early, unsolicited comments submitted by various interested persons and organizations as well as the more recently submitted comments of the American Association of Corporate Counsel. While we concur with many of the concerns expressed in those various comments, we do not address those which relate solely to the internal management or administration of entity clients. Similarly, we refrain from commenting on the Board's judgment as to the breadth or scope of the information deemed necessary by auditors to conduct their examinations or the availability of information and assessments from sources other than the trial lawyer. Our comments, then, do not follow the format suggested in the Exposure Draft but are directed only to the litigation-related concerns of trial lawyers and their clients. Those concerns focus on, but are not limited to, the impact of the proposed amendments on the attorney-client privilege and the protection of attorney work product and the collateral duty of confidentiality reflected in the Rules of Professional Conduct and their counterparts.

One of the College's principal endeavors in recent years has been to stem the perceived erosion of the privileges. We have recently witnessed actions by both Houses of Congress designed to support these privileges against relatively recent attempts in some quarters to weaken them. The important public policy objectives of the attorney-client privilege were stated by Chief Justice Rehnquist in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981):

...to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon lawyers being fully informed by their clients.

Similarly, in its pronouncement on the social utility of the attorney work product protection, Mr. Justice Murphy's Opinion for the Court stated in *Hickman v. Taylor* that, without work product protection:

...much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. 495, 511 (1947). We submit that the proposed amendments, viewed as a whole, are retrogressive and are starkly in contrast with the efforts of Congress and others to strengthen the privileges.

<sup>&</sup>lt;sup>1</sup> See Attorney Client Protection Act of 2007, H.R. 3013; S. 186; Proposed Federal Rule of Evidence 502, S. 2450; Letter of July 9, 2008 from Deputy Attorney General Mark Filip to Senators Leahy and Specter.

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In particular, the proposed amendments, in paragraph 5, would require the disclosure of unasserted loss contingencies, presumably including those in which the advice of defense trial counsel has been obtained, even where there "has been no manifestation by a potential claimant of an awareness of a possible claim" if it is "probable" that a claim will be asserted and if the likelihood of a loss upon the assertion of the claim is "more than remote". In situations where defense trial counsel has been consulted, the judgments as to probability of assertion and likelihood of loss are intimately bound up with analyses, thought processes and advice of trial counsel after frank and confidential conversations with the entity client. The communication to auditors of conclusions based on such analysis and advice, especially at such an early stage, poses a severe threat to the privileges. It also poses the collateral danger of sparking litigation that would not occur otherwise. The threat of waiver of the privileges inherent in such communication, is magnified by the scope of disclosure proposed in paragraph 7. The quantitative and qualitative information that would be required by that paragraph threatens the privileges even when applied to asserted claims and to unasserted claims as to which potential claimants have manifested awareness. To require such quantitative and qualitative information regarding unasserted claims as to which there has been no manifestation of awareness by a potential claimant could, in addition, have a chilling effect on the client entity's full and frank discussions with trial counsel. Moreover, the proposed disclosures could result in an increase in litigation. We further suggest, with due respect, that the quantitative information required by paragraph 7.a. is described in somewhat deceptive terms. That paragraph carries the implication that a bare statement of the amount of a claim or assessment, unaccompanied by the client's best estimate of actual exposure, is equivalent to an admission that the client believes the amount of the claim, assessment or maximum exposure is representative of the client's actual exposure. This will inevitably require that the client and trial counsel, in all but the most unusual cases, formulate and disclose a "best estimate", no matter how premature, of the possible loss or range of loss, thereby disclosing otherwise privileged communications and thought processes.

The proposed requirement of qualitative information by itself is threatening to the privileges. Paragraph 7.b. would require, among other things, a description of the factors that are likely to affect the ultimate outcome of litigation-related contingencies, their potential effect on the outcome and a qualitative assessment of the most likely outcome of the contingency. When this proposed requirement is applied to litigation-related contingencies, whether asserted or unasserted, it will undoubtedly involve disclosure of otherwise confidential information and advice provided to the client by trial counsel. In addition, any pro forma auditors' requests to trial counsel for information that follow the language of the proposed Statement would require disclosure by trial counsel of material that is otherwise subject to the attorney client privilege and counsel's work product protection. It is highly questionable whether the client's signature to such a pro forma request rises to the level of "informed consent" required by the Rules of Professional Conduct as a condition of revealing information relating to the representation of the client. See ABA Model Rules of Professional Conduct, Rule 1.6(a), 1.0(c) and (f); see, also, American Bar Association Statement of Policy Regarding Lawyers' Responses To Auditors' Request For Information, (1) (b). If the proposed amendments were to be adopted, compliance with the Rules of Professional Conduct would require trial counsel

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to communicate to the client "adequate information and explanation about the material risks of and reasonably available alternatives to" providing privileged information or work product to the auditors. ABA Model Rules of Professional Conduct, Rule 1.0(f), Rule 1.6. This would need to be done prior to any response. Moreover, as you are undoubtedly aware, providing privileged information or attorney work product to a client's auditors can result in a waiver of the privileges not only as to the information provided but also as to undisclosed but related privileged information or work product. See, e.g., United States v. Textron, Inc., 507 F, Supp. 2d 138 (D.R.I. 2007); Medinol Ltd. v. Boston Scientific Corp., 214 F.R.D. 113 (S.D.N.Y. 2002); In re Raytheon Sec. Litig., 218 F.R.D. 354 (D. Mass. 2003); see, contra, Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 229 F.R.D. 441 (S.D.N.Y. 2004). As you are probably also aware, the status of auditors as adversaries or conduits to adversaries (disclosure to whom would waive work product protection) has been the basis for court decisions waiving privilege protections and is currently before the United States Court of Appeals For The First Circuit on appeal from a judgment of the United States District Court for the District of Rhode Island. United States v. Textron Inc. and Subsidiaries, (No. 07-2631).

Perhaps as importantly, the proposed amendments proceed from an unrealistic concept of litigation-related contingencies and of the trial lawyer's analysis. The financial statements for which the amplified disclosures would be required are presented as a stationary picture as of a certain date. Litigation, however, is a constantly moving picture, no single frame of which accurately portrays the drama quantitatively or qualitatively, until the final frame. This is especially pertinent to the pre-assertion and early stages of a litigation-related claim. Any "best estimate" analyses and advice by counsel at such stages would necessarily be subject to change as the litigation progresses through pleading, discovery, trial and appeals. Yet the early "best estimate" as part of a financial snapshot could have a drastic impact on the client.

We submit that the proposed amendments will, if adopted, unnecessarily threaten the attorney client privilege and attorney work product protection; will unduly complicate the process of trial lawyers' responses to auditors' requests for information and will disrupt the longstanding accord achieved by the ABA Statement of Policy and its approval by the AICPA Auditing Standards Executive Committee. For those reasons, we request that the Board reconsider and decline the proposed amendments.

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Sincerely,

James P. Garland

JPG:mjg

cc: Mr. Russell G. Golden, Technical Director

Mikel L. Stout, Esq. David J. Beck, Esq. John J. Dalton, Esq.

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