



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

STATEMENT OF

THE AMERICAN BAR ASSOCIATION

to the

COMMITTEE ON JUDICIARY

of the

UNITED STATES SENATE

concerning its hearing on

**“EXAMINING APPROACHES TO CORPORATE FRAUD PROSECUTIONS AND THE
ATTORNEY-CLIENT PRIVILEGE UNDER THE MCNULTY MEMORANDUM”**

SEPTEMBER 18, 2007

Mr. Chairman, Ranking Member Specter, and Members of the Committee:

The American Bar Association, with more than 410,000 members nationwide, appreciates the opportunity to present this statement to the Committee regarding the critical issues surrounding today's hearing titled "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum."

The ABA strongly supports the preservation of the attorney-client privilege, the work product doctrine and employee legal rights, and we have become concerned in recent years about various federal agency policies and practices that are eroding these fundamental protections. Those governmental policies, which arose in response to Enron and other similar corporate scandals, have created a "culture of waiver" that is seriously undermining the confidential attorney-client relationship in the corporate community.

Although all of the federal agency waiver policies raise concerns, the ABA has become especially concerned about language in the Department of Justice's 2006 "McNulty Memorandum" and 2003 "Thompson Memorandum"—and other similar federal governmental policies and practices—that pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations.¹ The ABA also opposes the separate—but related—provisions in many of these federal policies that erode employees' constitutional and other legal rights by pressuring companies to forgo paying their employees' legal fees during

¹ On August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Previously, in August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Both ABA resolutions and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

investigations or to take other punitive actions against them long before any guilt has been established.

Because of the serious and inherent problems with the McNulty Memorandum and other similar federal agency policies, we urge members of the Committee to support legislation like S. 186, the “Attorney-Client Privilege Protection Act of 2007,” that would reverse these policies.

The Importance of the Attorney-Client Privilege and the Work Product Doctrine

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client’s rights to effective counsel and confidentiality in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance in how to conform conduct to the law. In addition, the privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

Justice Department and Other Federal Policies that Erode the Attorney-Client Privilege, the Work Product Doctrine and Employee Constitutional Rights in the Corporate Context

The Justice Department’s original privilege waiver and employee rights policies, set forth in the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum,”² instructed federal

² See Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at http://www.abanet.org/poladv/priorities/privilegewaiver/1999jun16_privwaiv_dojholder.pdf. See also Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), at p. 7, http://www.abanet.org/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.pdf.

prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit—and hence leniency—during government investigations. One of the key factors cited in these Justice Department policies—and in similar federal policies adopted by the Securities and Exchange Commission (SEC)³, the Commodity Futures Trading Commission (CFTC)⁴, the Department of Housing and Urban Development (HUD)⁵, the Environmental Protection Agency (EPA)⁶, and others—is the organization’s willingness to waive attorney-client privilege and work product protections and provide this confidential information to government investigators. The Thompson Memorandum stated in pertinent part that:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and

³ The SEC’s privilege waiver policy is set forth in its 2001 “Seaboard Report,” which is formally known as the “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions,” issued on October 23, 2001 as Releases 44969 and 1470. A copy of the Seaboard Report is available at <http://www.sec.gov/litigation/investreport/34-44969.htm>. In that report, the SEC set forth the criteria that it will consider in determining whether, and to what extent, companies and other organizations should be granted credit for seeking out, self-reporting, and rectifying illegal conduct and otherwise cooperating with the agency’s staff as the SEC decides whether and how to take enforcement action. Like the corresponding policies adopted by the Justice Department, the Seaboard Report encourages companies to waive their attorney-client privilege, work product, and other legal protections as a sign of full cooperation. *See* Seaboard Report at paragraph 8, criteria no. 11, and footnote 3.

⁴ The CFTC’s privilege waiver and employee rights policy was contained in an August 11, 2004 Enforcement Advisory titled “Cooperation Factors in Enforcement Division Sanction Recommendations” issued by the agency’s Division of Enforcement, but the Commission issued a revised Enforcement Advisory eliminating the waiver language on March 1, 2007. The Commission’s original 2004 policy, the ABA’s July 7, 2006 letter recommending changes in the policy, and the Commission’s new March 1, 2007 policy are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

⁵ HUD’s privilege waiver policy is contained in a February 3, 2006 formal Notice to public housing authorities urging them to include an addendum in all contracts with legal counsel that would restrict their attorneys’ ability to assert the attorney-client privilege on behalf of these clients in regard to HUD investigations and enforcement proceedings. HUD’s 2006 Notice is available at http://www.abanet.org/poladv/priorities/privilegewaiver/2006feb02_privwaiv_hud.pdf.

⁶ The EPA’s privilege waiver policy is contained in its May 11, 2000 cooperation standards titled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.” The text of the EPA’s standards is available at <http://www.abanet.org/poladv/priorities/privilegewaiver/epaprivwaiverpolicy05112000.pdf>.

cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

See Thompson Memorandum at pg. 7. Although the Thompson Memorandum, like the earlier Holder Memorandum, stated that waiver is not an absolute requirement, it nevertheless made it clear that waiver was a key factor for prosecutors to consider in evaluating an entity's cooperation.

In addition to its privilege waiver provisions, the Justice Department's policy also contained language directing prosecutors, in determining cooperation, to consider a company's willingness to take certain punitive actions against its own employees and agents during investigations. In particular, the Thompson Memorandum encouraged prosecutors to deny cooperation credit to companies and other organizations that assist or support their so-called "culpable employees and agents" who are the subject of investigations by (1) providing or paying for their legal counsel, (2) participating in joint defense and information sharing agreements with them, (3) sharing corporate records and historical information about the conduct under investigation with them, or (4) declining to fire or otherwise sanction them for exercising their Fifth Amendment rights in response to government requests for information.⁷ A number of other federal agencies, including the SEC⁸ and HUD⁹, have adopted similar policies or practices as well.

⁷ The Thompson Memorandum provided in pertinent part that:

...a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

See Thompson Memorandum, note 2 *supra*, at pgs. 7-8. The Thompson Memorandum did not provide any measure by which an organization is expected to determine whether an employee or agent is "culpable" for purposes of the government's assessment of cooperation and, in part as a consequence, an organization felt compelled either to defer to the government investigators' initial judgment or to err on the side of caution.

⁸ The SEC's Seaboard Report contains language in the last sentence of its cooperation criteria no. 11 that encourages companies to "make all reasonable efforts to secure" their employees' cooperation with Commission staff during investigations. *See* note 3, *supra*. Although this language is not as explicit as the corresponding language in the Justice

The ABA's and the Coalition's Response to the Privilege Waiver Problem

In 2004, the ABA created its Task Force on Attorney-Client Privilege to study and address the various federal agency policies and practices that have eroded attorney-client privilege and work product protections. The Task Force held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force also crafted new ABA policy in August 2005—unanimously adopted by the ABA House of Delegates—supporting the attorney-client privilege and work product doctrine and opposing government policies that erode these protections.¹⁰ Subsequently, the ABA adopted a separate resolution in August 2006 opposing those related federal agency policies that erode employees' constitutional and other legal rights.¹¹ All of these ABA policies and other useful resources on this topic are available on our Task Force website at <http://www.abanet.org/buslaw/attorneyclient/>. These and other related materials also are posted on the ABA Governmental Affairs Office website at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

Department's policies, the ABA is concerned that it could result in the erosion of employees' constitutional and other legal rights to the extent that companies are asked to not advance the employees' legal fees or to terminate employees unless they agree to waive their Fifth Amendment rights against self-incrimination.

⁹ Officials in HUD's Enforcement Center have been accused of threatening to take enforcement action against the directors of state and local government entities that administer federal awards because they covered the costs of legal assistance for their employees from program funds. While HUD does not appear to have a formal, written policy forbidding payment of these employees' legal fees, the agency's threats to take enforcement action have eroded employees' constitutional and other legal rights in much the same way as the more formal Justice Department and SEC policies. The ABA's December 8, 2006 letter to HUD expressing concerns over this practice is available online at: http://www.abanet.org/poladv/letters/attyclient/2006dec08_hudattysfees_1.pdf.

¹⁰ See ABA resolution regarding privilege waiver approved in August 2005, discussed in note 1, *supra*.

¹¹ On August 8, 2006, the ABA approved a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege and the New York State Bar Association, opposing government policies, practices and procedures that erode employees' constitutional and other legal rights by requiring, encouraging, or permitting prosecutors to consider certain factors in determining whether a company or other organization has been cooperative during an investigation. These factors include whether the organization (1) provided or funded legal representation for an employee, (2) participated in a joint defense and information sharing agreement with an employee, (3) shared its records or historical information about the conduct under investigation with an employee, or (4) declined to fire or otherwise sanction an employee who exercised his or her Fifth Amendment rights in response to government requests for information. The ABA resolution and a detailed background report are available at <http://www.abanet.org/buslaw/attorneyclient/>.

The ABA and its Task Force also have been working in close cooperation with a broad and diverse coalition of influential legal and business groups¹² and numerous state and local bars¹³ in an effort to raise awareness of these harmful government policies and craft effective remedies. Towards that end, the ABA and various representatives of the coalition testified before the Senate and House Judiciary Committees in September 2006 and March 2007, respectively, and expressed their concerns over these policies. In addition, the ABA sent letters to the Justice Department (May 2006), the U.S. Sentencing Commission (March 2006), the Commodity Futures Trading Commission (July 2006), the Department of Housing and Urban Development (December 2006), and the Securities and Exchange Commission (February 2007) urging them to reverse their relevant policies.¹⁴ The ABA's May 2, 2006 letter to Attorney General Alberto Gonzales regarding the Justice Department's waiver policies is attached to this written statement as Appendix A.

**Former Senior Justice Department Officials Speak Out
Against Privilege Waiver Policies**

In addition to the ABA and the coalition, a prominent group of former senior Justice Department officials—including former Attorneys General, Deputy Attorneys General, and Solicitors General from both political parties—submitted letters to the Sentencing Commission and

¹²The Coalition to Preserve the Attorney-Client Privilege consists of the following entities: American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation.

¹³ In recognition of the nationwide implications of the harmful governmental policies eroding the privilege and employee rights, the ABA has reached out to state and local bar associations and other organizations throughout the country on these issues. As of August 2007, a number of state bars – including those in Florida, Illinois, Maryland, Missouri, Utah and Vermont – had formally endorsed S. 186. In addition, a number of major local bars have endorsed the legislation as well, including the Boston, Chicago, and New York City bars. As more and more bars around the country become aware of the serious erosion of the privilege and employee constitutional rights caused by the federal waiver policies, many of them are expected to join the growing chorus calling for corrective legislation as well.

¹⁴ The ABA's various letters and comments to the Justice Department, the Sentencing Commission, the CFTC, HUD, and the SEC, as well as the coalition's letters and comments to the Sentencing Commission, are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

the Justice Department on August 15, 2005 and September 5, 2006, respectively.¹⁵ In their letter to Attorney General Gonzales, a copy of which is attached to this statement as Appendix B, the former officials voiced many of the same concerns previously raised by the ABA and the coalition and urged the Department to amend the Thompson Memorandum “...to state affirmatively that waiver of attorney-client privilege and work product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.”

This remarkable letter, coming from the very people who ran the Department of Justice a few short years ago, demonstrates just how widespread the concerns over the Department’s privilege waiver policy have become. The fact that these individuals previously served as the nation’s top law enforcement officials—and were able to convict wrongdoers without demanding the wholesale production of privileged materials—makes their comments even more credible.

Congressional Reaction to the Department’s Waiver Policy

In addition to the ABA, the coalition, and former Department of Justice officials, many congressional leaders also have raised concerns over the privilege waiver provisions in the Department’s Thompson Memorandum. On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the privilege waiver issue.¹⁶ The Justice Department and several representatives of the coalition appeared and testified, while the ABA submitted a written statement for the record.¹⁷ During the hearing, virtually all of the Subcommittee members from both political parties expressed strong support for preserving the attorney-client privilege and serious concerns regarding the Department’s waiver policy.

¹⁵ The former Justice Department officials’ letters to the Sentencing Commission and to Attorney General Gonzales are available at http://www.abanet.org/poladv/documents/acpriv_formerdojofficialstletter8-15-05.pdf and http://www.abanet.org/poladv/priorities/privilegewaiver/2006sep05_privwaiv_frmrdojltr.pdf, respectively.

¹⁶ An unofficial transcript of the March 7, 2006 hearing before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security is available at http://www.abanet.org/poladv/documents/attyp_transcript5706.pdf.

¹⁷ The written statements of the ABA and the witnesses appearing at the hearing are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

Subsequently, during a Senate Judiciary Committee hearing on September 12, 2006, at which the ABA and various coalition representatives testified¹⁸, the Committee's then-Chairman and Ranking Member, Senators Arlen Specter and Patrick Leahy, both expressed deep skepticism over the Department's policies and urged Deputy Attorney General McNulty and the Department to reverse them or face possible legislative action.

DOJ's McNulty Memorandum and Other Recent Federal Agency Actions

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, congressional leaders, and others, the Sentencing Commission voted unanimously in April 2006 to remove the privilege waiver provisions from the Federal Sentencing Guidelines, and that change became effective last November. In addition, the CFTC voted to reverse its privilege waiver policy in March 2007, though its harmful employee rights policies remain in place. Unfortunately, the Justice Department, the SEC, and the other federal agencies have refused to reverse or fundamentally change their harmful privilege waiver or employee rights policies.

Although the Justice Department reluctantly issued new cooperation standards on December 12, 2006 in the form of the "McNulty Memorandum,"¹⁹ the new policy falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product and employee legal protections. While the new policy requires prosecutors to obtain high-level Departmental approval before they can formally demand waiver of a company's privileges, it fails to end the practice and continues to encourage routine waiver by rewarding companies for their "unsolicited" offers to waive these protections. The McNulty Memorandum provides in pertinent part as follows:

¹⁸ The written statements of the ABA and the other witnesses appearing at the Senate Judiciary Committee hearing on September 12, 2006 are available at http://www.abanet.org/poladv/letters/attyclient/060912testimony_hrgjud.pdf.

¹⁹ See Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (December 12, 2006), at pgs. 4, 8, and 11, available at http://www.abanet.org/poladv/priorities/privilegewaiver/2006dec12_privwaiv_dojmcnulty.pdf.

In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target: ...4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, *infra*);...Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure. Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations...Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government.²⁰

In addition, while the McNulty Memorandum generally bars prosecutors from requiring companies to not pay their employees' attorney fees in most cases, it continues to allow this practice in some situations.²¹ The new memorandum also continues to allow prosecutors to force companies to take the other three types of punitive action against employees outlined in the previous Thompson Memorandum in return for cooperation credit long before any guilt is established.²²

The McNulty Memorandum and Other Federal Privilege Waiver Policies Continue to Cause Negative Consequences

The American Bar Association is concerned that the Department of Justice's new privilege waiver policy outlined in the McNulty Memorandum—like the previous Thompson Memorandum

²⁰ See McNulty Memorandum referenced in note 19, *supra*, at pgs. 4, 8, and 11. The McNulty Memorandum also outlines four factors for determining whether prosecutors have a "legitimate need" to request privileged materials and requires prosecutors to obtain various types of high level Departmental approval before demanding either factual attorney-work product ("Category I") material or attorney-client communications or non-factual attorney work product ("Category II") material. *Id.* at pgs. 8-11.

²¹ The McNulty Memorandum states that "prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment... (but) in extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation." See McNulty Memorandum at p. 11.

²² The McNulty Memorandum states that "a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." See McNulty Memorandum at p. 11. See also Thompson Memorandum, notes 2 and 7, *supra*, at pgs. 7-8.

and similar policies adopted by other federal agencies—continues to cause a number of profoundly negative consequences.

First, the McNulty Memorandum and the other similar federal policies continue to lead to the routine compelled waiver of attorney-client privilege and work product protections. Instead of eliminating the improper practice forcing companies and other entities to waive in return for cooperation credit, the McNulty Memorandum still allows prosecutors to demand waiver after receiving high level Department approval. Equally important, the new DOJ policy continues to encourage routine waiver by granting companies credit if they “voluntarily” waive without being asked. Because companies still feel extreme pressure to waive in virtually every case, the “culture of waiver” created by the Thompson Memorandum is continuing under the McNulty Memorandum.²³ As a result, the applicability of the privilege remains highly uncertain in the corporate context. This is unacceptable, because as the U.S. Supreme Court noted in the case of *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), “an uncertain privilege...is little better than no privilege at all.”

Second, the McNulty Memorandum—like the previous Thompson Memorandum and the other similar federal policies—continues to seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity’s best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the company’s officers, directors, and

²³ According to a March 2006 survey of over 1,200 corporate counsels, almost 75% of the respondents believe that a “culture of waiver” has evolved in which agencies—including the Justice Department, the SEC, and others—believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections. The survey results are available at <http://www.acc.com/Surveys/attyclient2.pdf>. After the McNulty Memorandum was issued in December 2006, prosecutor demands for waiver have continued unabated, though most are now *informal*, so as not to trigger the procedural requirements of the new memorandum. For numerous specific examples of these informal waiver demands that are occurring post-McNulty, see the September 13, 2007 Report of former Delaware Chief Justice Norman Veasey, available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

employees, and must be provided with all relevant information necessary to properly represent the entity. By pressuring companies to waive these fundamental protections in order to receive maximum cooperation credit, the McNulty Memorandum and the other similar federal policies discourage company personnel from consulting with the company lawyers. This, in turn, impedes the lawyers' ability to effectively counsel compliance with the law, resulting in harm not only to companies, but to employees and investors as well.

Third, while the McNulty Memorandum and the other similar federal policies were intended to aid government prosecution of corporate criminals, they continue to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, policies such as the McNulty Memorandum that pressure companies to waive their attorney-client and work product protections seriously undermine systems that are crucial to compliance and have worked well.

For all these reasons, the ABA believes that the Department of Justice's new privilege waiver policy contained in the McNulty Memorandum and the other similar federal agency policies are counterproductive. They undermine rather than enhance compliance with the law, as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

**The McNulty Memorandum and Other Federal Employee Policies Continue to Erode
Employees' Constitutional and Other Legal Rights**

While preserving the attorney-client privilege and the work product doctrine is critical to promoting effective corporate governance and compliance with the law, it is equally important to

protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation. Unfortunately, the McNulty Memorandum and the other similar federal policies continue to erode employees' constitutional and other legal rights by pressuring companies to take unfair punitive action against them during investigations.

While the McNulty Memorandum bars prosecutors from requiring companies to forego paying their employees' legal fees in many cases, it continues to allow this practice in some situations.²⁴ In addition, the new memorandum and the similar policies adopted by other federal agencies continue to deny credit to companies that choose to assist their employees with their legal defenses or decline to fire them for exercising their Fifth Amendment rights against self incrimination.²⁵ The ABA strongly opposes the Department's employee rights policy contained in the McNulty Memorandum, and the other similar federal policies, for a number of reasons.²⁶

First, these governmental policies are inconsistent with the fundamental legal principle that all prospective defendants—including an organization's current and former employees, officers, directors and agents—are presumed to be innocent. When implementing the directives in the

²⁴ The McNulty Memorandum states that "prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment... (but) in extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation." See McNulty Memorandum at p. 11 and footnote 3.

²⁵ The McNulty Memorandum states that "a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." See McNulty Memorandum at p. 11. See also Thompson Memorandum, notes 2 and 7, *supra*, at pgs. 7-8. See also notes 4, 8, and 9 regarding the relevant CFTC, SEC, and HUD employee rights policies, respectively.

²⁶ On August 8, 2006, the ABA approved a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege and the New York State Bar Association, opposing government policies, practices and procedures that erode employees' constitutional and other legal rights by requiring, encouraging, or permitting prosecutors to consider certain factors in determining whether a company or other organization has been cooperative during an investigation. These factors include whether the organization (1) provided or funded legal representation for an employee, (2) participated in a joint defense and information sharing agreement with an employee, (3) shared its records or historical information about the conduct under investigation with an employee, or (4) declined to fire or otherwise sanction an employee who exercised his or her Fifth Amendment rights in response to government requests for information. The ABA resolution and a detailed background report are available at <http://www.abanet.org/buslaw/attorneyclient/>.

McNulty Memorandum and the other similar federal policies, prosecutors take the position that certain employees and other agents suspected of wrongdoing are “culpable” long before their guilt has been proven or the company has had an opportunity to complete its own internal investigation. In those cases, the prosecutors often pressure the company to fire the employees in question or refuse to provide them with legal representation or otherwise assist them with their legal defense as a condition for receiving cooperation credit. These policies stand the presumption of innocence principle on its head. In addition, they overturn well-established corporate governance practices by forcing companies in certain cases to abandon the traditional practice of indemnifying their employees and agents or otherwise assisting them with their legal defense for employment-related conduct until it has been determined that the employee or agent somehow acted improperly.

Second, it should be the prerogative of a company to make an independent decision as to whether an employee should be provided defense or not, and the government should not be able to make this determination, even in the “extremely rare cases” referenced in footnote 3 of the McNulty Memorandum. The fiduciary duties of the directors in making such decisions are clear, and they—not government officials—are in the best position to decide what is in the best interest of the shareholders.

Third, these governmental policies improperly weaken the entity’s ability to help its employees to defend themselves in criminal actions. It is essential that employees, officers, directors and other agents of organizations have access to competent representation in criminal cases and in all other legal matters. In addition, competent representation in a criminal case requires that counsel investigate and uncover relevant information.²⁷ The McNulty Memorandum and the other similar federal policies undermine the ability of employees and other personnel to

²⁷ See, e.g., ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.1(a) (3d ed. 1992) (“Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.”).

defend themselves by pressuring companies not to share records and other relevant information with them and their lawyers. However, subject to limited exceptions, lawyers should not interfere with an opposing party's access to such information.²⁸ The federal agency policies undermine these rights by encouraging prosecutors to penalize companies that provide information or, in some cases, legal counsel to their employees and agents during investigations.

The costs associated with defending a government investigation involving complex corporate and financial transactions can often run into the hundreds of thousands of dollars. Therefore when government prosecutors—citing the directives in footnote 3 of the McNulty Memorandum or the other similar federal agency policies—succeed in pressuring a company not to pay for the employee's legal defense, the employee typically will be unable to afford effective legal representation. In addition, when prosecutors demand and receive a company's agreement to not assist employees with other aspects of their legal defense—such as participating in joint defense and information sharing agreements with the employees or by providing them with corporate records or other information that they need to prepare their defense—the employees' rights are undermined.

Fourth, several of these employee-related provisions of the Justice Department's policy have been declared to be constitutionally suspect by the federal judge presiding over the pending case of *U.S. v. Stein*, also known as the "KPMG case." On June 26, 2006, U.S. District Court Judge Lewis A. Kaplan issued an extensive opinion suggesting that the provisions in the Thompson Memorandum making a company's advancement of attorneys' fees to employees a factor in assessing cooperation violated the employees' Fifth Amendment right to substantive due process

²⁸ See, e.g., ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.1(d) (3d ed. 1992) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has a right to give."); *id.*, The Defense Function, Standard 4-4.3(d) ("Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give."); ABA Model Rules of Professional Conduct, Rule 3.4(g) (providing that a lawyer may not "request a person other than the client [or a relative or employee of the client] to refrain from voluntarily giving relevant information to another party.").

and their Sixth Amendment right to counsel.²⁹ In addition, Judge Kaplan subsequently determined that certain KPMG employees' statements were improperly coerced in violation of their Fifth Amendment rights against self-incrimination as a result of the pressure that the government and KPMG placed on the employees to cooperate as a condition of continued employment and payment of legal fees.³⁰ Because the McNulty Memorandum continues to permit these same practices in some instances, it remains constitutionally suspect as well.

Former Senior Justice Department Officials Endorse S. 186

On July 30, 2007, the same basic group of nine former Justice Department officials who previously sent letters to the Sentencing Commission and Attorney General Gonzales in August 2005 and September 2006, respectively,³¹ sent a new letter to Congress expressing their concerns over the McNulty Memorandum and endorsing S. 186 and H.R. 3013. The July 30 letter to all the members of the Senate and House Judiciary Committees is attached to this statement as Appendix C.³² After concluding that “the McNulty Memorandum maintains the fundamental flaws of the prior regime,” the former officials encouraged the congressional leaders to “support the prompt enactment of the Attorney-Client Privilege Protection Act of 2007 [i.e., S. 186 and H.R. 3013] or other similar legislation.” This remarkable letter reflects the growing consensus emerging in the legal and business communities—and among many top former law enforcement officials—that a legislative remedy is needed to reverse the growing “culture of waiver” caused by the McNulty Memorandum and the other similar federal policies.

²⁹ *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y., June 26, 2006). For a more detailed discussion of Judge Kaplan's rulings in the case, please see the background report accompanying the ABA's August 2006 resolution referenced in note 11, *supra*. The background report is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/empights_report_adopied.pdf.

³⁰ See *United States v. Stein*, July 25, 2006, Memorandum Opinion and Order at 36-37.

³¹ See note 15, *supra*.

³² The July 30, 2007 letter from the former DOJ leaders to Congress is also available at http://www.abanet.org/poladv/priorities/privilegewaiver/2007jul30_privwaiv_fmrdojb_1.pdf.

Conclusion

In sum, the American Bar Association believes that the Justice Department's McNulty Memorandum and the other similar federal policies are fundamentally flawed and must be reversed. Therefore, the ABA strongly supports legislation like S. 186 and H.R. 3013 that would bar the Department and other federal agencies from pressuring companies to waive their privileges or take unfair punitive actions against their employees as conditions for receiving cooperation credit. In our view, S. 186 and H.R. 3013 would strike the proper balance between effective law enforcement and the preservation of essential attorney-client, work product and employee legal protections, and we urge Congress to enact the legislation as soon as possible.

Thank you for considering the views of the American Bar Association. If you have any questions regarding the ABA's views on these issues or need more information, please feel free to contact R. Larson Frisby of the ABA Governmental Affairs Office at 202-662-1098 or at frisbyr@staff.abanet.org.



Michael S. Greco

AMERICAN BAR ASSOCIATION

321 N. Clark Street
President
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100

May 2, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposal for Revising Department of Justice Attorney-Client Privilege and Work Product Doctrine Waiver Policy

Dear Mr. Attorney General:

On behalf of the American Bar Association and its more than 400,000 members, I write to enlist your help and support in preserving the attorney-client privilege and work product doctrine and protecting them from Departmental policy and practices that seriously threaten to erode these fundamental rights. Towards that end, we urge you to consider modifying the Justice Department's internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product protections as a condition for receiving cooperation credit during investigations. Enclosed is specific proposed language that we believe would accomplish this goal without impairing the Department's ability to gather the information it needs to enforce federal laws.

As you know, 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 the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

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, the Department of Justice has adopted—and is now following—a policy that has led many of its prosecutors to routinely pressure organizations to waive the protections of the attorney-client privilege and/or work product doctrine as a condition for receiving cooperation credit during investigations. While this policy was formally established by the Department's 1999 "Holder Memorandum" and 2003 "Thompson Memorandum," the incidence of coerced waiver was exacerbated in 2004 when the U.S. Sentencing Commission added language to Section 8C2.5 of the Federal Sentencing Guidelines that authorizes and encourages the government to seek waiver as a condition for cooperation.

May 2, 2006

Page 2

In an attempt to address the growing concern being expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt “a written waiver review process for your district or component,” and it is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

According to a recent survey of over 1,200 in-house and outside corporate counsel, which is available at <http://www.acca.com/Surveys/attyclient2.pdf>, almost 75% of the respondents believe that a “culture of waiver” has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Holder/Thompson/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

The ABA is concerned that government waiver policies weaken the attorney-client privilege and work product doctrine and undermine companies’ internal compliance programs. Unfortunately, the government’s waiver policies discourage entities both from consulting with their lawyers—thereby impeding the lawyers’ ability to effectively counsel compliance with the law—and conducting internal investigations designed to quickly detect and remedy misconduct. The ABA believes that prosecutors can obtain the information they most frequently seek and need from a cooperating organization without resorting to requests for waiver of the privilege or doctrine.

The ABA and a broad and diverse coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—previously expressed these and other similar concerns to Congress and the Sentencing Commission. In addition, a prominent group of nine former senior Justice Department officials—including three former Attorneys General from both parties—submitted similar comments to the Sentencing Commission last August. These statements and other useful resources on the topic of privilege waiver are available at <http://www.abanet.org/poladv/acprivilege.htm> and on the website of the ABA Task Force on Attorney-Client Privilege at <http://www.abanet.org/buslaw/attorneyclient/>.

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, and others, as well as the results of the new survey of corporate counsel that documented the severe negative consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines, the Commission voted unanimously on April 5, 2006 to remove the privilege waiver language from the Guidelines. Unless Congress affirmatively takes action to modify or disapprove of the Commission’s proposal, it will become effective on November 1, 2006. While we are extremely gratified by the Commission’s action, the Justice Department’s waiver policy continues to be problematic and needs to be addressed.

The ABA Task Force on Attorney-Client Privilege and the coalition have prepared suggested revisions to the Holder/Thompson/McCallum Memoranda that would remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information

May 2, 2006
Page 3

that they need to effectively enforce the law. The revised memorandum enclosed herewith would accomplish these objectives by (1) preventing prosecutors from seeking privilege waiver during investigations, (2) specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and (3) clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation. We believe that this proposal, if adopted by the Department, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact Bill Ide, the Chair of the ABA Task Force on Attorney-Client Privilege, at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael S. Greco". The signature is written in a cursive style with a large initial "M".

Michael S. Greco

enclosure

**SUGGESTED REVISIONS TO DEPARTMENT OF JUSTICE POLICY CONCERNING
WAIVER OF CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT
PROTECTIONS**

**PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON
ATTORNEY-CLIENT PRIVILEGE**

FEBRUARY 10, 2006

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM:

DATE:

RE: Guidelines for Determining “Timely and Voluntary Disclosure of Wrongdoing
and Willingness to Cooperate”

This Memorandum amends and supplements the October 21, 2005 memorandum issued by Acting Deputy Attorney General Robert D. McCallum, Jr. (“*McCallum Memorandum*”) concerning Waiver of the Corporate Attorney-Client and Work Product Protections. In general, the *McCallum Memorandum* requires establishment of a review process for federal prosecutors to follow before seeking waivers of these protections. The *McCallum Memorandum* also notes the Department of Justice that “places significant emphasis on prosecution of corporate crimes.”

This Memorandum also amends and supplements the Department’s policy on charging business organizations set forth in the memorandum issued by Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (hereinafter “*Thompson Memorandum*”), reprinted in *United States Attorneys’ Manual*, tit. 9, Crim. Resource Manual, §§ 161-62. As noted in the *McCallum Memorandum*, one of the nine (9) factors that was identified for federal prosecutors to consider under the *Thompson Memorandum* (§ II.A.4.) is “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.”

In particular, this Memorandum amends the *Thompson Memorandum* by striking the following portion of § II.A.4.: “...including, if necessary, the waiver of corporate attorney-client and work product protection.” As amended, § II.A.4. directs that federal prosecutors consider “...the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”

This Memorandum also amends § VI.A. of the *Thompson Memorandum* by striking the last clause: "...and to waive attorney-client and work product protection;" and by striking the word "complete" from the third clause preceding "results of its internal investigation." As amended, that sentence of § VI.A. states: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; and to disclose the results of its internal investigation."

This Memorandum also amends § VI.B. by striking the fourth paragraph and adding language in its place that recognizes the importance of the attorney-client and work product protections and the adverse consequences that may occur when attorneys within the Department of Justice seek the waiver of these protections. As amended, the fourth paragraph of § VI.B. states:

"The Department of Justice recognizes that the attorney-client privilege and the work-product doctrine are fundamental to the American legal system and the administration of justice. These rights are no less important for an organizational entity than for an individual. The Department further recognizes that an attorney may be an effective advocate for a client, and best promote the client's compliance with the law, only when the client is confident that its communications with counsel are protected from unwanted disclosure and when the attorney can prepare for litigation knowing that materials prepared in anticipation of litigation will be protected from disclosure to the client's adversaries. *See Upjohn Co. v. United States*, 449 U.S. 383, 392-393 (1981). The Department further recognizes that seeking waiver of the attorney-client privilege or work-product doctrine in the context of an ongoing Department investigation may have adverse consequences for the organizational entity. A waiver might impede communications between the entity's counsel and its employees and unfairly prejudice the entity in private civil litigation or parallel administrative or regulatory proceedings and thereby bring unwarranted harm to its innocent public shareholders and employees. *See also* § IX (Collateral Consequences). Attorneys within the Department shall not take any action or assert any position that directly or indirectly demands, requests or encourages an organizational entity or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine. Also, in assessing an entity's cooperation, attorneys within the Department shall not draw any inference from the entity's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by an organizational entity to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation."¹

¹ Notwithstanding the general rule set forth herein, attorneys within the Department may, after obtaining in advance the approval of the Assistant Attorney General of the Criminal Division or his designee, seek materials otherwise

(footnote continued on next page)

Section VI. of the *Thompson Memorandum* is further amended and supplemented by adding new subpart C. that states:

“C. In assessing whether an organizational entity has been cooperative under § II.A.4. and § VI.B., attorneys within the Department should take into account the following factors:

“1. Whether the entity has identified for and provided to attorneys within the Department all relevant data and documents created during and bearing upon the events under investigation other than those entitled to protection under the attorney-client privilege or work product doctrine.

“2. Whether the entity has in good faith assisted attorneys within the Department in gaining an understanding of the data, documents and facts relating to, arising from and bearing upon the matter under investigation, in a manner that does not require disclosure of materials protected by the attorney-client privilege or work product doctrine.

“3. Whether the entity has identified for attorneys within the Department the individuals with knowledge bearing on the events under investigation.

“4. Whether the entity has used its best efforts to make such individuals available to attorneys within the Department for interview or other appropriate investigative steps.²

“5. Whether the entity has conducted a thorough internal investigation of the matter, as appropriate to the circumstances, reported on the investigation to the Board of Directors or appropriate committee of the Board, or to the appropriate governing body within the entity, and has made the results of the investigation available to attorneys within the Department in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine.

(footnote continued from previous page)

protected from disclosure by the attorney-client privilege or the work product doctrine if the organization asserts, or indicates that it will assert an advice of counsel defense with respect to the matters under investigation. Moreover, attorneys within the Department also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this paragraph, the attorneys within the Department shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

² Actions by an entity recognizing the rights of such individuals are not inconsistent with this factor.

“6. Whether the entity has taken appropriate steps to terminate any improper conduct of which it has knowledge; to discipline or terminate culpable employees; to remediate the effects of any improper conduct; and to ensure that the organization has safeguards in place to prevent and detect a recurrence of the events giving rise to the investigation.”

- APPENDIX B -

September 5, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposed Revisions to Department of Justice Policy Regarding
Waiver of the Attorney-Client Privilege and Work-Product Doctrine

Dear Mr. Attorney General:

We, the undersigned former senior Justice Department officials, write to enlist your support in preserving the attorney-client privilege and work-product doctrine. We believe that current Departmental policies and practices are seriously eroding these protections, and we urge you to take steps to change these policies and stop the practice of federal prosecutors requiring organizations to waive attorney-client privilege and work-product protections as a condition of receiving credit for cooperating during investigations.

As former Department officials, we appreciate and support your ongoing efforts to fight corporate crime. Unfortunately, we believe that the Department's current policy embodied in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," which encourages individual federal prosecutors to demand waiver of the attorney-client privilege and the work-product doctrine in return for cooperation credit, is undermining rather than strengthening compliance in a number of ways. In practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled "uncooperative" simply poses too great a risk of indictment to do otherwise.

The Department's carrot-and-stick approach to waiving attorney-client privilege and work-product protections gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.

The Department's policies also make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, have become one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of internal investigations depends on the ability of employees to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client privilege and work-product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the Department's consideration of waiver as an element of cooperation undermines, rather than promotes, good compliance practices.

Finally, we believe that the Department's position with regard to privilege waiver encourages excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client privilege or work-product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities routinely to waive their privileges during criminal investigations provides plaintiffs' lawyers with a great deal of sensitive – and sometimes confidential – information that can be used against the entities in class action, derivative, and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so – in order to preserve their defenses for subsequent actions that appear to involve great financial risk – instead face the government's wrath.

We are not alone in voicing these concerns. According to a survey conducted earlier this year of over 1,200 in-house and outside corporate counsel, which is available at <http://www.acca.com/Surveys/attyclient2.pdf>, almost 75 percent of the respondents agreed with the statement that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work-product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the policy contained in the Holder/Thompson memoranda was most frequently cited.

We recognize that, in an attempt to address the growing concern being expressed about government-induced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt a "written waiver review process for your district or component." It is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies being established throughout the country, many of which may impose only token restraints on the ability of prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

The Honorable Alberto Gonzales
September 5, 2006
Page 3

As you probably know, these views were expressed forcefully to Mr. McCallum on March 7 at a hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. The U.S. Sentencing Commission also validated these concerns when it voted on April 5, over the Department's objection, to rescind the "waiver as cooperation" amendment it had made only two years earlier to the commentary on its Organizational Sentencing Guidelines.

We agree with the position taken by the American Bar Association, as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country: Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship – for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.

In sum, we believe that the Thompson Memorandum is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.

Thank you for considering our views on this subject, which is of such vital importance to our adversarial system of justice.

Sincerely,

Griffin B. Bell
Attorney General
(1977-1979)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

Walter E. Dellinger III
Acting Solicitor General
(1996-1997)

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
Civil Division (1989-1993)

Jamie Gorelick
Deputy Attorney General
(1994-1997)

Theodore B. Olson
Solicitor General
(2001-2004)

Dick Thornburgh
Attorney General
(1988-1991)

George J. Terwilliger III
Deputy Attorney General
(1991-1992)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

- APPENDIX C -

July 30, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Bldg.
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
711 Hart Senate Office Bldg.
Washington, D.C. 20510

The Honorable John T. Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2426 Rayburn House Office Bldg.
Washington, D.C. 20515

The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
2409 Rayburn House Office Building
Washington, D.C. 20515

Re: S. 186 and H.R. 3013, the "Attorney-Client Privilege Protection Act of 2007"

Dear Members of Congress:

We, the undersigned former senior Justice Department officials, write to enlist your support for enacting S. 186 and H.R. 3013—both known as the "Attorney-Client Privilege Protection Act of 2007"—or other similar legislation. These bills provide a measured legislative solution to the continued erosion of the attorney-client privilege, the work-product doctrine, and employee rights caused by the policies of the Department of Justice and other federal agencies regarding evaluation of a business entity's "cooperation" with a government investigation in order to avoid indictment. We share the belief expressed by many in the legal and business communities that congressional involvement is now appropriate.

Last fall, we wrote a letter to Attorney General Alberto Gonzales expressing our appreciation for the Department's efforts to fight corporate crime but explaining that although the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum" that superseded it were well-intentioned, their actual effect has been to "undermin[e] rather than strengthen[]" corporations' efforts to comply with the law—the opposite of what the Department intended. Our letter (a copy of which is attached) explained the reasons for that conclusion.

Thereafter, the Department of Justice issued revised cooperation standards under the auspices of Deputy Attorney General Paul McNulty. We applaud the Department for

its attempt to respond to legitimate criticism. We believe, however, that the McNulty Memorandum maintains the fundamental flaws of the prior regime.

The McNulty Memorandum, for example, does not remove from consideration a company's willingness to punish employees who assert their constitutional rights, or to enter into valid joint-defense or information-sharing agreements with the employees. In addition, although it bars prosecutors from urging companies not to pay their employees' legal fees in cases where such payment is statutorily or contractually required, that bar does not apply when payment is discretionary or in those instances, identified in Footnote 3 of the Memorandum, in which prosecutors believe that "the totality of the circumstances show that it was intended to impede a criminal investigation." In either of those instances, the Memorandum continues to allow prosecutors to reward companies that refuse to pay legal fees.¹

On the issue of waiver of attorney-client privilege and work-product protections, the McNulty Memorandum also continues to raise concerns. Most important, entities still receive credit for turning over work product (as well as material that may be privileged) labeled "Category I" in the Memorandum, including witness statements, interview memoranda, internal reports, and the like, and may be considered uncooperative for not doing so. Moreover, entities still receive credit for turning over highly sensitive materials labeled "Category II," including their attorney's opinion work product, the contemporaneous advice of counsel, lawyer mental impressions, and other legal advice.² Accordingly, at an oversight hearing conducted by the U.S. House of Representatives in March 2007, witnesses from the American Bar Association, the Association of Corporate Counsel, and the defense bar agreed that the expectations of the Department of Justice, as well as the practices of counsel for businesses, have not changed under the new policy.

We encourage Congress to restore the proper balance between the tools that the government needs to fight corporate crime and the rights of individual and corporate citizens. Accordingly, we hope that you and your colleagues will support the prompt enactment of the Attorney-Client Privilege Protection Act of 2007 or other similar legislation.

¹ One federal district court has held that practices such as pressuring companies not to pay lawyers' fees and to fire employees who assert their Fifth Amendment rights are unconstitutional. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

² The McNulty Memorandum requires approval from the U.S. Attorney in consultation with the Assistant Attorney General for information covered by "Category I" and approval from the Deputy Attorney General for "Category II" material. But because the incentive system remains intact, business organizations are highly likely to conclude that it is still necessary to turn over this material in order to avoid indictment, regardless of whether a formal request is made. *Cf. United States v. Stein*, ___ F. Supp. 2d ___, 2007 WL 2050921 at *2-*5 (S.D.N.Y. Jul. 16, 2007) (dismissing indictments against 13 former employees and reaffirming the court's earlier finding that Thompson Memorandum policies on their face improperly pressure companies into taking steps to ensure that their employees cooperate with a criminal investigation).

July 30, 2007

Page 3

Sincerely,

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
Civil Division
(1989-1993)

Edwin Meese III
Attorney General
(1985-1988)

Dick Thornburgh
Attorney General
(1988-1991)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

Jamie Gorelick
Deputy Attorney General
(1994-1997)

Walter E. Dellinger III
Acting Solicitor General
(1996-1997)

Theodore B. Olson
Solicitor General
(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

Attachment

cc: All other Members of the Senate Judiciary Committee
All other Members of the House Judiciary Committee

ATTACHMENT

September 5, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposed Revisions to Department of Justice Policy Regarding
Waiver of the Attorney-Client Privilege and Work-Product Doctrine

Dear Mr. Attorney General:

We, the undersigned former senior Justice Department officials, write to enlist your support in preserving the attorney-client privilege and work-product doctrine. We believe that current Departmental policies and practices are seriously eroding these protections, and we urge you to take steps to change these policies and stop the practice of federal prosecutors requiring organizations to waive attorney-client privilege and work-product protections as a condition of receiving credit for cooperating during investigations.

As former Department officials, we appreciate and support your ongoing efforts to fight corporate crime. Unfortunately, we believe that the Department's current policy embodied in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," which encourages individual federal prosecutors to demand waiver of the attorney-client privilege and the work-product doctrine in return for cooperation credit, is undermining rather than strengthening compliance in a number of ways. In practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled "uncooperative" simply poses too great a risk of indictment to do otherwise.

The Department's carrot-and-stick approach to waiving attorney-client privilege and work-product protections gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.

The Department's policies also make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, have become one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of internal investigations depends on the ability of employees to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client privilege and work-product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the Department's consideration of waiver as an element of cooperation undermines, rather than promotes, good compliance practices.

Finally, we believe that the Department's position with regard to privilege waiver encourages excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client privilege or work-product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities routinely to waive their privileges during criminal investigations provides plaintiffs' lawyers with a great deal of sensitive – and sometimes confidential – information that can be used against the entities in class action, derivative, and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so – in order to preserve their defenses for subsequent actions that appear to involve great financial risk – instead face the government's wrath.

We are not alone in voicing these concerns. According to a survey conducted earlier this year of over 1,200 in-house and outside corporate counsel, which is available at <http://www.acca.com/Surveys/attyclient2.pdf>, almost 75 percent of the respondents agreed with the statement that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work-product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the policy contained in the Holder/Thompson memoranda was most frequently cited.

We recognize that, in an attempt to address the growing concern being expressed about government-induced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt a "written waiver review process for your district or component." It is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies being established throughout the country, many of which may impose only token restraints on the ability of prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

As you probably know, these views were expressed forcefully to Mr. McCallum on March 7 at a hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. The U.S. Sentencing Commission also validated these concerns when it voted on April 5, over the Department's objection, to rescind the "waiver as cooperation" amendment it had made only two years earlier to the commentary on its Organizational Sentencing Guidelines.

We agree with the position taken by the American Bar Association, as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country: Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship – for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.

In sum, we believe that the Thompson Memorandum is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.

Thank you for considering our views on this subject, which is of such vital importance to our adversarial system of justice.

Sincerely,

Griffin B. Bell
Attorney General
(1977-1979)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

Walter E. Dellinger III
Acting Solicitor General
(1996-1997)

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
Civil Division (1989-1993)

Jamie Gorelick
Deputy Attorney General
(1994-1997)

Theodore B. Olson
Solicitor General
(2001-2004)

Dick Thornburgh
Attorney General
(1988-1991)

George J. Terwilliger III
Deputy Attorney General
(1991-1992)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)