

Michael S. Greco
President

AMERICAN BAR ASSOCIATION

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

January 31, 2006

Dear Colleague:

On behalf of the American Bar Association, I write to enlist your help and support in preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights.

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and organizational clients to communicate with their lawyer in confidence. The privilege permits clients to seek out and obtain guidance in how to conform conduct to the law. It 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 ABA strongly supports the preservation of the attorney-client privilege and opposes those governmental policies, practices and procedures that have the effect of eroding the privilege. Unfortunately, the Department of Justice has adopted—and is now following—a dangerous policy that has led many of its prosecutors routinely to pressure companies and other organizations to waive their privileges as a condition of cooperation during investigations.

The Justice Department's privilege waiver policy was formally established by the Department's 1999 "Holder Memorandum" and 2003 "Thompson Memorandum," but the incidence of coerced waiver has increased dramatically during the past several years. The problem was exacerbated in November 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. Many lawyers complain that their clients have been and are being coerced into waiving the privilege.

In an attempt to address this growing problem, Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads last October instructing each of them to adopt "a written waiver review process for your district or component," and many local U.S. Attorneys are now in the process of implementing this directive. Unfortunately, the [McCallum Memorandum](#) will likely 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.

The ABA's Response to the Privilege Waiver Problem

The ABA is working to protect the attorney-client privilege and work product doctrine in a number of ways. In 2004, we created the ABA Task Force on Attorney-Client Privilege to study and address the policies and practices of various federal agencies that have eroded attorney-client and work product protections. The ABA Task Force has 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—unanimously adopted by our House of Delegates last August—supporting the privilege and opposing government policies that erode the privilege. The new ABA policy and other useful resources on this topic are available on our Task Force website at <http://www.abanet.org/buslaw/attorneyclient/>.

The ABA is also working with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to persuade the Sentencing Commission to remove the privilege waiver language from the Sentencing Guidelines and insert new language stating that waiver of attorney-client and work product protections should not be a factor in determining cooperation. After receiving [written comments from the ABA and the coalition](#), the Commission issued [Proposed Amendments](#) on January 27 that seek public comment on whether the privilege waiver language in the Guidelines should be deleted or amended. The ABA and the coalition will file comments with the Commission on this issue prior to the March 28, 2006 deadline.

Your Help is Urgently Needed

The purpose of this letter to you and other bar leaders throughout the country is to solicit your support and assistance on this critical issue. Specifically, we urge you and your bar association to help us to preserve the attorney-client and work product protections that are so vital to our legal system by taking the following steps:

- ***Establish Your Own Committee.*** In addition to the ABA Task Force, several state and local bars—including the New York and Arkansas bars—have established committees to educate themselves on the issue and to assure that the privilege is protected. We urge you to establish your own committee or task force and then coordinate its efforts with those of the ABA Task Force on this vital issue;
- ***Contact Your Local U.S. Attorney and the Justice Department.*** In response to the McCallum Memorandum, many local U.S. Attorneys are now in the process of adopting local privilege waiver review procedures. Please contact your U.S. Attorney—and the Justice Department—and urge them to adopt waiver review procedures that do not allow any requests, direct or indirect, for waiver of the privilege and work product;
- ***Submit Comments to the U.S. Sentencing Commission.*** Both the ABA and the coalition will file comments with the Sentencing Commission commending its decision to reconsider the 2004 privilege waiver amendment to the Sentencing Guidelines and encouraging it to add language to the Guidelines stating that privilege waiver should not be a factor in determining cooperation. We urge your association to file comments supporting and reinforcing this position prior to the March 28 deadline.

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

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The attorney-client privilege has served our country long and well, and it is a bedrock of our free society. Please actively join our efforts and help to protect it.

Sincerely,

A handwritten signature in dark ink, reading "Michael S. Greco". The signature is written in a cursive style with a large, stylized initial "M".

Michael S. Greco