

**William H. Neukom**  
President

AMERICAN BAR ASSOCIATION

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November 8, 2007

Re: H.R. 3013, the “Attorney-Client Privilege Protection Act of 2007”

Dear Representative:

On behalf of the American Bar Association (“ABA”) and its more than 415,000 members, I write to express our strong support for H.R. 3013, the “Attorney-Client Privilege Protection Act of 2007.” This bipartisan bill, sponsored by Representatives Bobby Scott, John Conyers, Lamar Smith, Randy Forbes, and eight other Members of Congress from both parties, was approved unanimously by the House Judiciary Committee on August 1 and will be considered by the full House next week under suspension of the rules. We urge you to vote in favor of this important legislation.

H.R. 3013 is a comprehensive reform measure designed to roll back a number of harmful federal agency policies that are seriously eroding the attorney-client privilege, the work product doctrine and the constitutional rights of employees. Although all of these federal policies raise concerns, the most problematic is the Department of Justice’s policy—set forth in the 2003 “Thompson Memorandum” and 2006 “McNulty Memorandum”—that pressures companies and other organizations to waive their privileges as a condition for receiving cooperation credit, and hence leniency, during investigations. In addition, these federal policies contain separate provisions that violate employees’ Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination by pressuring companies to not pay their employees’ legal fees during investigations, to fire the employees for not waiving their rights, or to take other punitive actions against them long before any guilt has been established.

Despite the serious concerns raised by congressional leaders, former Justice Department officials, and the legal and business communities, the Department of Justice and other federal agencies have refused to reverse or fundamentally change their harmful privilege waiver or employee rights policies. Although the Department reluctantly issued new cooperation guidelines on December 12, 2006 as part of the McNulty Memorandum, 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.<sup>1</sup>

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<sup>1</sup> For a detailed analysis of the problems with the McNulty Memorandum and the need for corrective legislation such as H.R. 3013 and the Senate companion bill, S. 186, please see the ABA’s September 18, 2007 statement to the Senate Judiciary Committee at [http://www.abanet.org/poladv/priorities/privilegewaiver/20070918\\_mcnulty.pdf](http://www.abanet.org/poladv/priorities/privilegewaiver/20070918_mcnulty.pdf).

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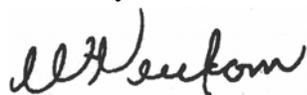
As demonstrated by the report that former Delaware Chief Justice Norman Veasey recently sent to congressional leaders, the McNulty Memorandum has not significantly reduced the incidence of government coerced waiver, and federal prosecutors continue to routinely demand waiver of the privilege during investigations despite the new policy. (The Veasey Report is available at <http://www.abanet.org/poladv/priorities/privilegewaiver/cjveaseyletter.pdf>.) As a result, the Department's new policy continues to seriously weaken the confidential attorney-client relationship between companies and their lawyers, which, in turn, impedes the lawyers' ability to conduct thorough internal investigations and effectively counsel compliance with the law. This harms companies, employees and the investing public as well.

In addition, while the McNulty Memorandum bars prosecutors from requiring companies to not pay their employees' legal fees in some cases, it continues to allow the practice in many instances. The new Department policy and other similar federal policies also continue to deny cooperation credit to companies that assist employees with their legal defenses or decline to fire them for exercising their Fifth Amendment rights. By forcing companies to punish employees long before any guilt has been shown, these federal policies weaken the constitutional presumption of innocence and undermine principles of sound corporate governance.

H.R. 3013 would reverse these harmful policies by prohibiting federal agencies from pressuring companies or other organizations to waive their privileges or take certain unfair punitive actions against their employees as conditions for receiving cooperation credit during investigations. At the same time, however, the bill specifically preserves the ability of prosecutors and other federal officials to obtain the important, non-privileged factual material they need to punish wrongdoers and enforce the law. In our view, H.R. 3013 would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product and employee legal protections, and we urge you to support the bill during next week's floor vote.

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. If you have any questions regarding the ABA's views or need more information, please ask your staff to contact Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. Neukom".

William H. Neukom