

Statement of ABA President H. Thomas Wells Jr. Re: New U.S. Department of Justice Corporate Charging Guidelines

Chicago, Aug. 28, 2008—The American Bar Association applauds the decision announced today by the Department of Justice to withdraw the 2006 “McNulty Memorandum” and issue new corporate charging guidelines that expressly bar prosecutors from forcing organizations and their employees to waive fundamental protections during investigations. The ABA has vigorously fought for more than two years to reverse Justice Department policy that has severely threatened the attorney-client privilege, the work product doctrine, and employee constitutional rights in federal investigations.

While the new guidelines are a welcome improvement over the McNulty Memorandum, the rights of American employees and the businesses they work for are too important to be subject to constantly shifting administrative policies. The Department’s new guidelines are its fifth such policy in ten years and can be changed again at any time. Unlike legislation, guidelines can provide no certainty that critical attorney-client privilege, work product, and employee constitutional rights will be protected in the future. These bedrock legal rights are sacrosanct and must not be dependent on the personal leanings of each new deputy attorney general. As a result, legislation like S. 3217 and H.R. 3013, the “Attorney-Client Privilege Protection Act,” is urgently needed to permanently solve the problem of government-coerced waiver.

The new Justice Department policy also does nothing to change the similar policies adopted by the Securities and Exchange Commission, the Environmental Protection Agency and the Department of Housing and Urban Development, or the informal waiver practices of many other agencies. Such policies, like the Justice Department’s previous policy, pressure organizations to waive their privileges and violate their employees’ Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination to receive cooperation credit during investigations.

While the ABA supports and appreciates the Department’s new policy, that policy cannot, standing alone, reverse the widespread “culture of waiver” created by all these federal policies—a culture that is seriously undermining both the confidential attorney-client relationship and basic employee rights in the corporate community. Comprehensive legislation is the only way to make the Department’s reforms permanent, give them the force of law, and apply them to all federal agencies.

The House overwhelmingly approved H.R. 3013 last year. It’s time for the Senate to do its part to guarantee Americans’ core legal rights by passing the companion bill, S. 3217, as soon as possible.

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