In recent years, the American Bar Association (ABA) and its allies have worked hard to preserve the independence of the legal profession in many different ways. Some of the ABA’s legislative and regulatory victories, as well as its ongoing efforts to protect the profession, include the following:

- **TAX REFORM LEGISLATION BENEFITING LAWYERS AND LAW FIRMS**

  The ABA won hard-fought victories on several key tax issues affecting the legal profession in the “Tax Cuts and Jobs Act of 2017,” the comprehensive tax reform legislation signed into law by President Trump in December 2017. While not all ABA recommendation were incorporated into the final legislation, the ABA and its allies persuaded Congress to:

  - Reject mandatory accrual accounting proposals that would have required many law firms to pay taxes on work in progress, accounts receivable, and other “phantom income” long before it is received from clients. The ABA worked with 34 state, local, and specialty bars, dozens of law firms, and many ABA members and leaders for over four years to protect the legal profession from these harmful provisions. If enacted, these proposals would have caused serious financial hardship to many lawyers and law firms throughout the country (See ABA Washington Letter Article);

  - Allow individual owners of pass-through entities—including law firms and other professional service businesses, up to certain income thresholds—to deduct 20% of the “qualified business income” they receive from the entity. Although the ABA did not endorse this or any other specific tax reductions contained in the bill, the ABA worked to ensure that law firms received the same tax benefits as other pass-through businesses (See ABA Letter to Congress and ABA Journal Article);

  - Retain the existing deduction for student loan interest that benefits lawyers with law school debt (See ABA Letter to Congress); and

  - Preserve the current deduction for upfront litigation expenses that allows lawyers with contingency fee cases in the 9th Circuit to deduct their lawsuit-related expenses at the time the expenses are incurred instead of at the conclusion of the lawsuit.

- **PREVENTING EXCESSIVE FEDERAL REGULATION OF THE LEGAL PROFESSION**

  The ABA and its state and local bar allies successfully blocked or modified numerous key legislative and regulatory proposals that would undermine traditional state court regulation of lawyers, interfere with the confidential lawyer-client relationship, or otherwise impose excessive federal regulations on lawyers engaged in the practice of law. For example, the ABA and its allies:
Helped defeat the Department of Labor’s (DOL’s) 2016 changes to the “Persuader Rule” that would have required many lawyers and law firms representing employers in unionization disputes to report confidential client information to the government. The 2016 rule changes also could have required affected law firms to report extensive financial information regarding all their employer clients, not just those clients to whom the lawyers were providing persuader services. In June 2016, a federal district court in Texas granted a nationwide preliminary injunction against the new rule that quoted extensively from the ABA’s 2011 comment letter to DOL and April 2016 statement to Congress, and the injunction was made permanent in November 2016. In July 2018, DOL published a final rule that formally rescinded the 2016 rule changes, based in part on comments submitted by the ABA and other stakeholders. (See ABA Washington Letter article and DOL News Release);

Persuaded the Federal Deposit Insurance Corporation (FDIC) to modify its final rule on “Recordkeeping for Timely Deposit Insurance Determination” to protect the confidentiality of law firm clients. The final FDIC rule published on December 5, 2016 includes ABA-proposed language clarifying that while law firms must continue to maintain complete and detailed records regarding their IOLTA and other client trust accounts held at large banks, confidential client information regarding those accounts need not be disclosed to the bank or the FDIC unless and until the bank actually fails (See ABA Comment Letter to FDIC and ABA Washington Letter article);

Convinced the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) to modify its final rule on “Customer Due Diligence Requirements for Financial Institutions” to protect the confidentiality of law firm clients. The final FinCEN rule issued in May 2016 includes ABA-proposed language clarifying that when law firms open escrow or client trust accounts at financial institutions on behalf of their clients, the law firms will only have to disclose their own beneficial ownership, not the identity or beneficial ownership of their clients for whom the accounts were established (See ABA Washington Letter article);

Persuaded Congress to include a strong practice of law exclusion in the “Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010” (P.L. 111-203, Title X) that effectively exempts the vast majority of practicing lawyers and their employees from the broad regulatory powers of the Consumer Financial Protection Bureau (CFPB) created by the legislation. The original bill would have granted the CFPB extensive new authority to regulate many lawyers who represent individual clients, including numerous bankruptcy lawyers, litigators, family lawyers, tax lawyers, real estate lawyers, and general practitioners. In addition, the original bill would have authorized the CFPB to regulate anyone acting as a “custodian of funds,” which could have allowed the agency to regulate hundreds of thousands of other lawyers with client trust accounts, regardless of legal specialty (See ABA Statement);

Convinced the Federal Trade Commission (FTC) to include a broad exemption for lawyers engaged in the practice of law in its final “Mortgage Assistance Relief Services” (MARS) Rule issued in November 2010. The final FTC rule exempts the vast majority of practicing lawyers who help consumer clients to renegotiate their mortgages or avoid foreclosure from all of the burdensome federal regulations in the rule, including its ban on
advance, hourly, and non-contingent fees; extensive record keeping requirements; and a prohibition on providing certain types of legal advice to clients (See ABA Statement);

- **Persuaded the Department of Housing and Urban Development (HUD) to include a broad lawyer exemption in its final rule implementing the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) issued in June 2011.** The final HUD rule states that lawyers who help clients negotiate or renegotiate their residential mortgages will not be deemed to be engaging in the business of a “loan originator” and will not be subject to the SAFE Act regulatory requirements when they provide legal services to clients and comply with applicable state court ethical rules and standards (See ABA Statement);

- **Successfully fought to exempt lawyers from the FTC’s “Red Flags” Rule** that requires “creditors” to develop costly programs identifying, detecting and responding to the warning signs of identity theft—a problem that does not exist in the lawyer-client relationship. In October 2009, the ABA obtained a federal district court order against the FTC holding that lawyers should not be covered by the Red Flags Rule. The ABA also helped persuade Congress to enact legislation in December 2010 (P.L. 111-319) that effectively exempts all practicing lawyers from the Rule (See ABA Statement);

In addition to these accomplishments, the ABA and its allies continue to oppose excessive federal agency regulations on lawyers engaged in the practice of law. For example, the ABA and its allies are:

- **Urging Congress to pass legislation (H.R. 5082, 115th Congress) that would restore traditional state court regulation and oversight of the legal profession by clarifying that the Fair Debt Collection Practices Act (FDCPA) and the CFPB’s regulatory authority under the Dodd-Frank Act do not apply to creditor lawyers engaged in litigation.** The House Financial Services Committee marked-up and approved the bill on March 21, 2018. During the markup, the bill’s sponsor, Rep. Alex Mooney (R-WV), made a statement touting the ABA's strong support for the legislation. The bill now proceeds to the full House for further consideration (See ABA FDCPA Reform webpage);

- **Vigorously opposing legislation (S. 1454, H.R. 3089, and draft House legislation, 115th Congress) that would impose burdensome and intrusive gatekeeper regulations on lawyers.** In its recent letters to the Senate Judiciary Committee and the House Financial Services Committee, the ABA expressed concerns that the legislation would subject many lawyers and law firms to the anti-money laundering and suspicious activity reporting requirements of the Bank Secrecy Act when helping clients to establish companies, thus undermining the attorney-client privilege and the confidential lawyer-client relationship. The ABA also developed and is actively promoting the “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing” and the ABA/IBA/CCBE "Lawyer's Guide to Detecting and Preventing Money Laundering" as the best means to combat money laundering while avoiding costly new federal and international regulations on lawyers (See ABA Gatekeeper Regulations on Lawyers web page);
• PROTECTING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

The ABA—working in close cooperation with a broad coalition of legal and business groups—has also helped to preserve fundamental attorney-client privilege and work product protections in many ways, including:

- **Persuading U.S. Customs and Border Protection (CBP) to improve its border search policy to better protect privileged client information on lawyer laptops and cell phones.** In response to the ABA’s May 2017 letter and a subsequent meeting between the ABA and senior Department of Homeland Security (DHS) officials, CPB issued a revised Directive on Border Search of Electronic Devices on January 4, 2018 that includes several key ABA-requested reforms. While not all ABA recommendations were adopted—and more needs to be done—the new directive significantly increases the protections for privileged and confidential client information contained on lawyer laptop computers, cell phones, and other electronic devices and is a clear improvement over the prior border search policy. (See ABA Letter to DHS and ABA Washington Letter Article);

- **Persuading Congress to enact legislation in December 2012 protecting the attorney-client privileged status of information submitted to the Consumer Financial Protection Bureau (CFPB).** The new law, P.L. 112-215 (H.R. 4014), clarifies that when banks and other supervised entities provide attorney-client privileged information to the CFPB, the privilege will not be waived as to any third parties and the CFPB can share the information with other federal agencies without affecting its privileged status (See ABA Statement);

- **Convincing the Legal Services Corporation not to proceed with its proposal limiting the scope of attorney-client privilege protections in the new Grant Assurances form that grantees must follow starting in FY 2015 to just those protections covered by the “federal attorney-client privilege.”** In its July 2, 2014 announcement explaining its decision, LSC specifically referenced the ABA’s written comments as a key factor (See ABA Comments to LSC and LSC Statement);

- **Persuading the Federal Reserve Board to modify its original proposal that would have required bank holding companies (BHCs) to report detailed information regarding their legal reserves for pending and probable litigation claims.** In response to comments submitted by the ABA and numerous leading financial industry groups in July 2012, the Fed modified its final reporting rule to permit BHCs to aggregate their disclosures of legal reserves in order to better protect the attorney-client privilege, the work product doctrine, and the right to effective legal counsel (See ABA Statement);

- **Convincing the Financial Accounting Standards Board (FASB) in July 2012 to withdraw its earlier proposed amendments to its Financial Accounting Standards that would have substantially increased the amount of privileged information that companies must report in connection with their periodic disclosures of litigation contingencies (See ABA Washington Letter article);**
Persuading the IRS to make major changes in Fall 2010 to its original proposals requiring disclosure of uncertain tax positions to avoid undermining companies’ attorney-client privilege and work product protections or the 26 U.S.C. section 7525 tax practitioner’s privilege (See IRS Announcement);

Enactment of legislation adopting new Federal Rule of Evidence 502 (P.L. 110-322) in September 2008, which protects against accidental waiver of attorney-client privilege and work product protections during federal court litigation and dealings with federal agencies, reduces the risk of subject matter waiver, and greatly reduces discovery costs for companies and all other parties in litigation (See ABA Statement);

Convincing the Justice Department to reverse its harmful privilege waiver policy (the “Holder, Thompson, and McNulty Memoranda”) in August 2008 and issue new corporate charging guidelines (the “Filip Memorandum”) instructing prosecutors not to require or ask companies or other entities to waive the privilege or work product protections or to forgo paying their employees’ legal fees during investigations in return for cooperation credit (See ABA Statement);

Persuading the Commodity Futures Trading Commission to reverse its similar privilege waiver policy in March 2007 (See, e.g., ABA Statement to Senate Judiciary Committee);

Convincing the General Services Administration, the Defense Department, and NASA to add language to their FAR rule on “Contractor Business Ethics Compliance Programs and Disclosure Requirements” in November 2008 designed to preserve the attorney-client privilege and work product protections during government audits, investigations, and corrective actions involving federal contractors (See Final FAR Rule);

Persuading the U.S. Sentencing Commission to remove language from the Federal Sentencing Guidelines commentary in April 2006 that unfairly pressured companies and other organizations to waive their attorney-client privilege and work product protections in order to receive full cooperation credit during investigations (See ABA Statement); and

Securing House passage of the proposed “Attorney-Client Privilege Protection Act” (H.R. 3013) in November 2007 that would have prohibited all federal agencies from seeking waiver of the privilege, work product or employee legal rights during corporate or organizational investigations, and generating strong bipartisan support for the similar Senate bill (S. 186/S. 3217) (See ABA Statement). Although the bills were not enacted, their momentum helped convince the Justice Department to reverse its own waiver policy, as noted above.

In addition to these achievements, the ABA and its coalition allies continue to engage various federal agencies to ensure that their policies and practices do not erode or undermine the attorney-client privilege or parties’ fundamental rights to effective counsel. For example, the ABA and its allies are:

Urging the CFPB to protect the attorney-client privilege in its proposed rules governing disclosure of confidential information. On October 24, 2016, the ABA submitted written comments to the CFPB urging it to modify its proposed rule on Disclosure of Records and
Information to clarify that the Bureau cannot share privileged information it receives from banks and other supervised or regulated entities with any other foreign, state, or other non-federal government agency, as such sharing could threaten the privileged status of the information (See ABA Washington Letter Article);

- **Vigorously opposing key language in the CFPB’s proposed (and final) rule on “Confidential Treatment of Privileged Information.”** The ABA filed comments in April 2012 directly challenging the CFPB’s claims that it has the legal authority to require all bank and non-bank supervised entities to submit privileged information during examinations and other regulatory processes (See ABA Statement Opposing CFPB Rule);

- **Urging the National Security Agency to respect and protect the attorney-client privilege.** In response to press allegations that confidential communications between a U.S. law firm and its overseas client were intercepted by a foreign intelligence agency and shared with the NSA, the ABA wrote to the NSA in February 2014 and sought its support in preserving fundamental attorney-client privilege protections for all clients and ensuring that the proper policies and procedures are in place to prevent the erosion of this important legal principle (See ABA Letter to NSA, NSA Response to ABA, and ABA Statement).

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