



# AMERICAN BAR ASSOCIATION

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**STATEMENT OF**  
**KAREN J. MATHIS**  
**PRESIDENT OF THE AMERICAN BAR ASSOCIATION**

**before the**  
**SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY**  
**of the**  
**COMMITTEE ON JUDICIARY**  
**of the**  
**UNITED STATES HOUSE OF REPRESENTATIVES**

**concerning**  
**“THE MCNULTY MEMORANDUM’S EFFECT ON THE RIGHT TO COUNSEL IN**  
**CORPORATE INVESTIGATIONS”**

**MARCH 8, 2007**

Mr. Chairman, Ranking Member Forbes, and Members of the Subcommittee:

My name is Karen J. Mathis. I am the President of the American Bar Association (ABA) and a practicing attorney with the firm of McElroy, Deutsch, Mulvaney & Carpenter, LLP in Denver, Colorado. Thank you for the opportunity to testify before you today on behalf of the ABA and its more than 410,000 members on the critical issues surrounding “the McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations.”

The ABA strongly supports preserving the attorney-client privilege and the work product doctrine. We are concerned about language in the Department of Justice’s 2006 McNulty Memorandum and 2003 Thompson Memorandum—and other related federal governmental policies and practices—that have seriously eroded these fundamental rights.<sup>1</sup> We also are concerned about the separate provisions in the McNulty and Thompson Memoranda that erode employees’ constitutional and other legal rights, including the right to effective legal counsel and the right against self-incrimination. Because of the serious and inherent problems with these and other federal agency policies, we urge members of the Subcommittee to introduce or support legislation that would reverse all such 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

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<sup>1</sup> 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>.

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 and the Work Product Doctrine**

A number of federal governmental agencies—including the Department of Justice, the U.S. Sentencing Commission, and others—have adopted policies in recent years that weaken the attorney-client privilege and work product doctrine in the corporate context by encouraging federal prosecutors and other law enforcement officials to pressure companies and other organizations to waive these legal protections as a condition for receiving credit for cooperation during investigations.

The Department of Justice’s privilege waiver policy was set forth in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson entitled “Principles of Federal Prosecution of Business Organizations.”<sup>2</sup> The so-called “Thompson Memorandum” instructed federal 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 the Thompson Memorandum is the organization’s

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<sup>2</sup>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, available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf).

willingness to waive attorney-client 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 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. The Thompson Memorandum expanded upon a similar directive that a previous Deputy Attorney General, Eric Holder, sent to federal prosecutors in 1999.<sup>3</sup>

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. It relied on the prosecutor's discretion to determine whether waiver was necessary in the particular case.

While the Department's privilege waiver policy originally was established by the 1999 Holder Memorandum and expanded by the 2003 Thompson Memorandum, the issue of coerced waiver was further exacerbated in November 2004 when the U.S. Sentencing Commission added

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<sup>3</sup> *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.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>. The so-called "Holder Memorandum" stated in pertinent part as follows:

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, to disclose the complete results of its internal investigation, and to waive attorney-client and work product privileges.

language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that, like the Department's policy, authorized and encouraged prosecutors to seek privilege waiver as a condition for cooperation.<sup>4</sup>

On December 12, 2006, Deputy Attorney General Paul McNulty issued revisions to the Thompson Memorandum that modified, but did not reverse, the Department's privilege waiver policy. Instead of eliminating the improper practice of requiring or encouraging companies and other organizations to waive their attorney-client privilege and work product protections in return for cooperation credit, the new "McNulty Memorandum" merely requires high level Department approval before formal waiver requests can be made. The memorandum also continues to allow prosecutors to grant cooperation credit for "voluntary," unsolicited waivers. The McNulty Memorandum provides in pertinent part as follows:

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

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<sup>4</sup>The 2004 amendment to the Sentencing Guidelines added the following language to the Commentary:

Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

While this language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." As a result, the exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required. For a detailed discussion of this issue, please see the ABA's March 28, 2006 written comments to the U.S. Sentencing Commission, available at [http://www.abanet.org/poladv/letters/attyclient/060328letter\\_abauscc.pdf](http://www.abanet.org/poladv/letters/attyclient/060328letter_abauscc.pdf).

authorization if the corporation voluntarily offers privileged documents without a request by the government.<sup>5</sup>

In addition to the Justice Department and the Sentencing Commission, a number of other federal agencies have adopted similar privilege waiver policies as well, including the Securities and Exchange Commission (SEC)<sup>6</sup>, the Commodity Futures Trading Commission (CFTC)<sup>7</sup>, and the Department of Housing and Urban Development (HUD)<sup>8</sup>.

### **Unintended Consequences of Prosecutor Demands for Privilege Waiver**

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 and similar policies adopted by other federal agencies—will continue to cause a number of profoundly negative, if unintended, consequences.

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<sup>5</sup> 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](http://www.abanet.org/poladv/priorities/privilegewaiver/2006dec12_privwaiv_dojmcnulty.pdf). 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.

<sup>6</sup> 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.

<sup>7</sup> The CFTC's privilege waiver 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>.

<sup>8</sup> 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/acprivilege.html>.

First, the ABA believes that the new McNulty Memorandum and the other similar federal policies will continue to lead to the routine compelled waiver of attorney-client privilege and work product protections. During the four years it was in effect, the Thompson Memorandum and other similar federal policies led many prosecutors and other law enforcement officials to pressure companies and other entities to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations. From a practical standpoint, companies have no choice but to waive when requested to do so, as the government’s threat to label them as “uncooperative” will have a profound effect not just on charging and sentencing decisions, but on each company’s public image, stock price, and credit worthiness. This growing “culture of waiver”—and the prominent role that the Department’s policy has played in contributing to this trend—was confirmed by a recent survey of over 1,200 corporate counsel conducted by the Association of Corporate Counsel, National Association of Criminal Defense Lawyers, and the ABA.<sup>9</sup>

Instead of eliminating the improper practice of prosecutors demanding waiver, the McNulty Memorandum continues to allow such demands so long as prosecutors receive high level Departmental approval. These demands are unjustified, as prosecutors only need the relevant facts to enforce the law, not the opinions and mental observations of corporate counsel.

In addition, while the McNulty Memorandum imposes modest procedural limits on *formal* government requests for waiver, it continues to encourage companies to “voluntarily” waive their privileges without formally being asked in order to receive cooperation credit and less harsh treatment. Because companies will continue to feel extreme pressure to waive in virtually every case, the “culture of waiver” created by the Thompson Memorandum will continue under the

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<sup>9</sup> According to the survey, 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 government officials give a reason for requesting privilege waiver, the policies adopted by the Justice Department, the Sentencing Commission, the SEC, and other agencies were among the reasons most frequently cited. The detailed survey results are available at <http://www.acca.com/Surveys/attyclient2.pdf>.

McNulty Memorandum. As a result, the applicability of the privilege will remain 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 ABA believes that the McNulty Memorandum, like the previous Thompson Memorandum and the other similar federal policies, will continue 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 employees, and must be provided with all relevant information necessary to properly represent the entity. By allowing prosecutors to continue to force companies to waive these fundamental protections in many cases—and more importantly, by continuing to provide cooperation credit to companies that “voluntarily” waive without formally being requested to do so—the new policy, like the Thompson Memorandum, will discourage company personnel from consulting with the company lawyers. This, in turn, will impede 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 will 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 privilege waiver policy and 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 ABA's and the Coalition's Response to the Privilege Waiver Problem**

The ABA is working to protect the attorney-client privilege and the work product doctrine in a number of ways. In 2004, the ABA Task Force on Attorney-Client Privilege was created to study and address the policies and practices of various federal agencies that have eroded attorney-client privilege and work product protections. The Chair of our Task Force, Bill Ide, is a prominent corporate attorney, a former president of the ABA, and the former senior vice president, general counsel, and secretary of the Monsanto Corporation. 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—supporting the attorney-client privilege and work product doctrine and opposing government policies that erode these protections.<sup>10</sup> The ABA's policy and other useful resources on this topic are available on our Task Force website at <http://www.abanet.org/buslaw/attorneyclient/>.

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

The ABA and our Task Force also are working in close cooperation with a broad and diverse coalition of influential legal and business groups—ranging from the U.S. Chamber of Commerce and the Association of Corporate Counsel to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers—in an effort to modify the Department of Justice’s waiver policy and the similar policies adopted by other federal agencies to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining cooperation.<sup>11</sup> Towards that end, the ABA sent letters to the Justice Department, the Sentencing Commission, and other federal agencies urging them to modify their policies.<sup>12</sup>

In its May 2, 2006 letter to Attorney General Alberto Gonzales, which is attached to this written statement as Appendix A, the ABA expressed its concerns over the Department’s privilege waiver policy and urged it to adopt specific revisions to the Thompson Memorandum that were prepared by the ABA Task Force and the coalition.

These suggested revisions to the Department of Justice’s policy would help remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information they need to effectively enforce the law. To accomplish this, our proposal would amend the Department’s policy by prohibiting prosecutors from seeking privilege waiver during investigations, specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective

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<sup>11</sup> The 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.

<sup>12</sup> 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>.

cooperation. This new language would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege and work product protections.

### **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 three former Attorneys General from both parties—submitted letters to the Sentencing Commission and the Justice Department on August 15, 2005 and September 5, 2006, respectively.<sup>13</sup> 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

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<sup>13</sup> 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](http://www.abanet.org/poladv/documents/acpriv_formerdojofficialstletter8-15-05.pdf) and [http://www.abanet.org/poladv/priorities/privilegewaiver/2006sep05\\_privwaiv\\_frmrdojltr.pdf](http://www.abanet.org/poladv/priorities/privilegewaiver/2006sep05_privwaiv_frmrdojltr.pdf), respectively.

Crime, Terrorism, and Homeland Security held a hearing on the privilege waiver issue.<sup>14</sup> The Justice Department and several representatives of the coalition appeared and testified, while the ABA submitted a written statement for the record.<sup>15</sup> 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. Subsequently, during a Senate Judiciary Committee hearing on September 12, 2006, at which the ABA and various coalition representatives testified, both Chairman Arlen Specter (R-PA) and Ranking Member Patrick Leahy (D-VT) expressed serious concerns regarding the Department's waiver policy and urged Deputy Attorney General McNulty and the Department to adopt major changes to the policy.

#### **Recent Justice Department and Other 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 on April 5, 2006, to remove the privilege waiver language from the Sentencing Guidelines, and that change became effective on November 1, 2006. Similarly, the CFTC eliminated the privilege waiver language from its cooperation standards on March 1, 2007 and issued a new Enforcement Advisory that specifically recognizes the importance of preserving the privilege.<sup>16</sup> When it became apparent that the Justice Department would not agree to adopt similar changes to its own policy, however, legislation was introduced in the Senate last December that would bar the Department and

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<sup>14</sup> An unofficial transcript of the March 7, 2006 hearing before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security is available online at [http://www.abanet.org/poladv/documents/attyp\\_transcript5706.pdf](http://www.abanet.org/poladv/documents/attyp_transcript5706.pdf).

<sup>15</sup> 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>.

<sup>16</sup> The CFTC's new cooperation standards of March 1, 2007 are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

all other federal agencies from engaging in this conduct.<sup>17</sup> The ABA and the coalition promptly endorsed the legislation. When the McNulty Memorandum was finally issued on December 12, 2006 and it became clear that the new policy fell far short of what is needed to prevent further erosion of these fundamental legal rights, the Senate legislation was reintroduced on January 4, 2007 as S. 186.

Because the McNulty Memorandum fails to solve the problem of government coerced waiver, the ABA urges members of the Subcommittee to introduce or support legislation, like S. 186, that would: (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations, (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.

#### **Justice Department and Other Federal Policies Erode Employees' Constitutional and Other Legal Rights and Suggested Reforms**

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, in addition to its privilege waiver provisions, the McNulty and Thompson Memoranda also contain 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. The Thompson Memorandum encouraged prosecutors to deny

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<sup>17</sup> The "Attorney-Client Privilege Protection Act of 2006," was introduced by Sen. Arlen Specter (R-PA) on December 7, 2006 as S. 30.

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.<sup>18</sup>

Although the McNulty Memorandum bars prosecutors from requiring companies to not pay their employees’ attorney fees in most cases, it continues to allow this practice in some situations.<sup>19</sup> In addition, the new memorandum continues to allow prosecutors to force companies to take the other three types of punitive action against employees outlined in the Thompson Memorandum in return for cooperation credit.<sup>20</sup> The ABA strongly opposes the Department’s policy, even as modified by the McNulty Memorandum, for a number of reasons.<sup>21</sup>

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<sup>18</sup> 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 does 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 may feel compelled either to defer to the government investigators’ initial judgment or to err on the side of caution.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> 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

First, the Department of Justice’s policy is 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 McNulty and Thompson Memoranda, 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. The Department’s policy stands the presumption of innocence principle on its head. In addition, the policy overturns 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 provisions of the McNulty and Thompson Memoranda 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

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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/>.

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.<sup>22</sup> The McNulty and Thompson Memoranda seek to undermine the ability of employees and other personnel to defend themselves, by seeking to prevent companies from sharing 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.<sup>23</sup> The language in the Department's 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—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 with whom the company has a common interest in defending against the

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<sup>22</sup> 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.”).

<sup>23</sup> 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.”).

investigation 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 and their Sixth Amendment right to counsel.<sup>24</sup> 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.<sup>25</sup> Because the McNulty Memorandum continues to permit these same practices in some instances, it remains constitutionally suspect as well.

For all of these reasons, the ABA urges the members of the Subcommittee to introduce or support legislation like S. 186 that would bar the Department and other federal agencies from demanding, requesting, or encouraging that companies take any of these four types of punitive action against employees or other corporate agents as a condition for receiving cooperation credit.

The ABA believes that legislation containing these reforms, and the other proposed reforms discussed earlier in our testimony, would strike the proper balance between effective law

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<sup>24</sup> *United States v. Stein*, No. S1 05 Crim. 0888 (LAK) (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 15, *supra*. The background report is available online at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights\\_report\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf).

<sup>25</sup> See *United States v. Stein*, July 25, 2006, Memorandum Opinion and Order at 36-37.

enforcement and the preservation of essential attorney-client, work product, and employee legal protections.

We appreciate the opportunity to appear before the Subcommittee and present our views on these subjects, which are of such vital importance to our system of justice, and I look forward to your questions.



Michael S. Greco

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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.

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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

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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, flowing style.

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**

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**TO:** Heads of Department Components  
United States Attorneys

**FROM:**

**DATE:**

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

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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."<sup>1</sup>

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<sup>1</sup> 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.<sup>2</sup>

“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.

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*(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.

<sup>2</sup> 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  
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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)