

May 2, 2006

Dear Colleague:

On January 31, 2006, I wrote to you and our fellow state and local bar leaders throughout the country to enlist your help and support in preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights. On behalf of the American Bar Association, I renew and expand upon my earlier request for your assistance and update you on several recent positive developments that have occurred since my earlier correspondence.

As I noted in [my January letter](#), the attorney-client privilege is a bedrock principle of our justice system that enables both individual and organizational clients to communicate with their lawyers in confidence. The privilege encourages clients to seek out and obtain guidance in how to conform conduct to the law, and it facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without having to 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 those governmental policies that erode these protections, including the Justice Department's privilege waiver policy—formally established by the 1999 “Holder Memorandum” and 2003 ["Thompson Memorandum"](#)—and the 2004 amendment to the Federal Sentencing Guidelines. Both of these policies have helped create a “culture of waiver” by encouraging prosecutors to require companies and other entities to waive their attorney-client and work product protections on a routine basis as a condition for receiving cooperation credit during investigations.

The Justice Department inadvertently compounded the problem last October when it issued the so-called ["McCallum Memorandum,"](#) a directive to all 93 U.S. Attorneys around the country instructing them to develop local written procedures governing when and how they will authorize their prosecutors to seek privilege waiver as a condition of cooperation credit. Unfortunately, instead of reducing government waiver demands, 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.

Recent Developments on the Privilege Waiver Issue

As I explained in my January 31 letter, the ABA and our Task Force on Attorney-Client Privilege has been working in close cooperation with a broad and diverse coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to protect the attorney-client privilege and work product doctrine and stop the erosion of these protections. The ABA's policies on privilege waiver and other useful resources on this topic are

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available on our Task Force website at <http://www.abanet.org/buslaw/attorneyclient/> and our Governmental Affairs Office website at <http://www.abanet.org/poladv/acprivilege.htm>. Since my January 31 letter, a number of important developments have taken place, including the following:

- ***Survey of Corporate Counsel.*** According to a [new survey](#) of over 1,200 corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006, almost 75% of corporate counsel 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. Respondents also said that when prosecutors give a reason for requesting privilege waiver, the Holder/Thompson/McCallum Memoranda and the 2004 amendment to the Sentencing Guidelines were among the reasons most frequently cited. This survey provides compelling new evidence in support of our contention that the Justice Department’s waiver policies, combined with the 2004 amendment to the Federal Sentencing Guidelines, have resulted in the routine compelled waiver of attorney-client privilege and work product protections.
- ***Congressional Hearings on Privilege Waiver.*** On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the privilege waiver issue. The Justice Department and several of our coalition allies appeared and [testified](#) at the hearing, while the ABA submitted a [written statement](#) for inclusion in the hearing record. 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 both the Justice Department’s internal waiver policy and the 2004 privilege waiver amendment to the Federal Sentencing Guidelines.
- ***Sentencing Commission Votes to Reverse Privilege Waiver Amendment.*** I am pleased to report that after considering the [comments and testimony](#) provided by the ABA, state and local bars, our coalition allies, former Justice Department officials, and others, as well as the results of the corporate counsel survey referenced above, the U.S. Sentencing Commission voted unanimously on April 5, 2006 to remove the privilege waiver language that it previously added to the Federal Sentencing Guidelines in 2004. Unless Congress affirmatively takes action to modify or disapprove the Commission’s action, the Commission’s decision will become effective on November 1, 2006.
- ***ABA Letter to Attorney General Gonzales.*** While the ABA is extremely gratified by the Sentencing Commission’s vote to remove the privilege waiver language from the Sentencing Guidelines, the Justice Department’s waiver policy continues to erode the privilege and still needs to be addressed. Accordingly, on May 2, 2006, I sent a [letter](#) to Attorney General Alberto Gonzales expressing the ABA’s concerns over the Department’s privilege waiver policy and urging it to adopt specific [new language](#) recommended by the ABA and the coalition. This new language would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections.

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Your Help is Urgently Needed

As I explained in my January 31 letter to you and other bar leaders throughout the country, the ABA needs your support and assistance on this critical issue. Specifically, we urge you and your bar association to help us to preserve the attorney-client and work product protections that are so vital to our legal system by taking the following steps:

- ***Establish Your Own Committee.*** In addition to the ABA Task Force, several state and local bars—including the New York, California, Arkansas, Connecticut and Boston bars—have established committees to educate themselves on the issue and to assure that the privilege is protected. We urge you to establish your own committee or task force and then coordinate its efforts with those of the ABA Task Force on this vital issue. To help facilitate this coordination, please let me know if, or when, your bar has established a committee or task force by sending me an e-mail message at abapresident@abanet.org. More information regarding the ongoing efforts by state and local bars to protect the privilege is available at: <http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/home.shtml>.
- ***Contact Your Local U.S. Attorney and the Justice Department.*** In response to the McCallum Memorandum, many local U.S. Attorneys are now in the process of adopting local privilege waiver review procedures. The ABA Task Force has prepared a [sample letter](#) from state and local bars to U.S. Attorneys urging them to adopt waiver review procedures that do not allow any requests, direct or indirect, for waiver of the privilege and work product. Please send a similar letter to your U.S. Attorney—and a separate letter to the Justice Department that makes the central points outlined in my May 2 letter to Attorney General Gonzales—as soon as possible and keep our Task Force apprised of your efforts.
- ***Send An Op-ed Piece to Your Local Media Outlets.*** In an effort to raise awareness of the growing erosion of the attorney-client privilege and work product doctrine—and build upon the recent favorable development involving the U.S. Sentencing Commission, I submitted an [op-ed piece](#) to various media outlets on April 17, 2006. The ABA Task Force also has prepared a [sample op-ed piece](#) on the issue of privilege waiver for use by state and local bars, and we urge your association to send a similar op-ed piece to your local media outlets as soon as possible.

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

The attorney-client privilege, which protects the people and not lawyers, has been a cornerstone of our free society for more than 200 years. Please help us protect it.

Sincerely,



Michael S. Greco