

Michael S. Greco
President

AMERICAN BAR ASSOCIATION

321 N. Clark Street
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100

June 20, 2006

Dear ABA Section or Committee Chair:

On behalf of the American Bar Association and our Task Force on Attorney-Client Privilege, I write to enlist your help and support in preserving the attorney-client privilege and work product doctrine and protecting them from governmental policies and practices that now seriously threaten to erode these fundamental rights. In particular, our Task Force needs your assistance in identifying and helping us to address the various legal practice areas—and the government agencies and policies—that have become part of this growing and harmful trend of privilege waiver.

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, practices and procedures 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 ABA's Response to the Privilege Waiver Problem

The ABA is working to protect the attorney-client privilege and work product doctrine in a number of ways. In 2004, we created the ABA Task Force on Attorney-Client Privilege to study and address the policies and practices of various federal agencies that have eroded attorney-client and work product protections. 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 last August—supporting the privilege and opposing government policies that erode the privilege. The August 2005 ABA policy and many other useful resources on this topic are available on our Task Force website at <http://www.abanet.org/buslaw/attorneyclient/>.

The ABA and our Task Force also have been working with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to modify both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client and work

product protections should not be a factor in determining cooperation. After considering the [comments and testimony](#) provided by the ABA, the coalition, state and local bars, and others—as well as the results of a [new survey](#) of over 1,200 corporate counsel that provides compelling evidence of the privilege waiver problem—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.

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.

As the new corporate counsel survey referenced above revealed, the integrity of the attorney-client privilege and work product doctrine is under attack not just from the Justice Department and the Sentencing Commission, but from other federal and state government agencies as well. In fact, the survey found numerous areas of administrative law in which agencies routinely seek waiver of attorney-client-privilege or work product protection in order to avoid administrative sanctions. In addition, our Task Force has also learned of a number of other federal agencies that have adopted formal privilege waiver policies including, for example, the Securities and Exchange Commission and the Commodity Futures Trading Commission.

Your Help is Urgently Needed

The purpose of this letter is to alert your Section or Committee to the growing problem of government-coerced privilege waiver and solicit your entity's support and assistance on this critical issue. Specifically, we urge your Section or Committee to help us to preserve the attorney-client privilege and work product protections that are so vital to our legal system by taking the following steps:

- ***Raise the Privilege Waiver Issue at Your Next Council or Committee Meeting.*** The erosion of the attorney-client privilege and work product doctrine directly affects *all* lawyers in the ABA as well as *every* ABA Section and Committee. Therefore, please add the subject of privilege waiver to the agenda of your next council or committee meeting and either invite a representative of our Task Force to attend the meeting or inform the Task Force after the meeting about any useful information on this issue that is discussed.
- ***Establish Your Own Privilege Waiver Entity or Point Person.*** 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 or task forces to educate themselves on the issue and to assure that the privilege is protected. We urge your ABA entity to establish its own committee, subcommittee, task force, or point-person (as appropriate) and then coordinate its efforts with those of the ABA Task Force on this vital issue.

June 20, 2006

Page 3

- ***Poll Your Entity's Membership to Determine All Instances in which a Federal or State Regulatory Agency is Seeking Waivers.*** The only way to determine the extent to which other federal and state agencies are forcing waivers of the attorney-client privilege or work product doctrine is to poll or otherwise ask those who practice in these specialized areas. The Task Force is eager to work with your Section or Committee to develop methods to obtain this information from your members.
- ***Work with the Task Force to Implement ABA Policy on Preserving the Attorney-Client Privilege and Work Product Doctrine.*** The Task Force has appointed a Subcommittee on Privilege Policy Implementation to reach out to and work with all of the ABA's Sections and Committees on the privilege waiver issue. You will hear shortly from the Chair of that Subcommittee, Jack Boese (john.boese@friedfrank.com, 202-639-7220), who also serves as the ABA Public Contract Law Section's liaison to the Task Force.

Thank you for your consideration and assistance on this vital issue. If you have any questions or need additional information, please contact Bill Ide, the Chair of the ABA Task Force on Attorney-Client Privilege, 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 has served our country long and well, and it is a cornerstone of our free society. Please actively join our efforts and help to protect it.

Sincerely,



Michael S. Greco

cc: Karen J. Mathis, President-Elect, American Bar Association
R. William Ide, III, Chair, ABA Task Force on Attorney-Client Privilege
John T. Boese, Chair, ABA Task Force Subcommittee on Privilege Policy Implementation
All ABA Section and Committee Chairs-Elect