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Re: **The Justice Department's October 2005 Directive to U.S. Attorneys to Establish a Written Waiver Review Process**

Dear Mr. Sullivan:

On behalf of the Boston Bar Association (BBA) and its more than 9,000 members, I write to enlist your help and support in preserving the attorney-client privilege and work product doctrine and preventing further erosion of these bedrock legal principles.

In connection with your implementation of the October 2005 directive that was sent to you and all other U.S. Attorneys by then-Acting Deputy Attorney General Robert McCallum (the "McCallum Memorandum"), we urge you to ensure that your written waiver review process and related policies will promote both effective law enforcement and respect for the attorney-client privilege and work product doctrine.

As you know, both the attorney-client privilege and the work product doctrine are fundamental legal principles that benefit not just clients and attorneys, but society as well. The privilege enables both individual and organizational clients to communicate with their lawyers in confidence and permits clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege also 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 is a critical component of 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.

Many attorneys throughout the country have reported a significant erosion of these protections in recent years. According to a recent survey of over 1,200 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 Justice Department's policy authorizing prosecutors to seek waiver in certain cases was one of the reasons most frequently cited.

In an attempt to address the growing concern being expressed about government requests for waiver, the Justice Department sent the McCallum Memorandum to all U.S. Attorneys and Department Component Heads on October 21, 2005 instructing them to establish "a written waiver

review process for your district or component." We understand that your office has implemented this directive.

We are concerned that unless the McCallum Memorandum is implemented with great care, it could result in a number of different waiver policies throughout the country that do not adequately preserve the attorney-client privilege and the work product doctrine.

As you implement your own written waiver review process and other related policies and procedures for your prosecutors in response to the McCallum Memorandum, the BBA urges you to respect the following policies:

- 1) There should be a fixed procedure whereby supervisory approval is required before a prosecutor may request a waiver of corporate attorney client privilege or work product protection.
- 2) The consideration of any request for such a waiver should include a careful examination of both the necessity/justification of the proposed waiver and of the scope of the proposed waiver.
 - a. In considering the necessity/justification of a proposed waiver, there should be careful consideration of whether requests for factual information can be satisfied without disclosing privileged or work-product materials. Likewise, the purposes for a proposed waiver should be weighed carefully. For example, some waivers may be essential to make a fair evaluation of an assertion of an advice of counsel defense. By contrast, in light of the recent amendment of the United States Sentencing Guidelines, waiver should not generally be required as part of the assessment of the completeness or quality of a corporation's assistance to law enforcement authorities.
 - b. Any waiver should be narrowly tailored, with appropriate limitations on subject matter, time period or identity of counsel. Except in addressing allegations of obstruction of justice, rarely will there be justification or need for disclosure of privileged or work-product materials prepared after the corporation has been informed of the existence of a federal investigation. Likewise, any waiver of work product protections should distinguish between fact work product and opinion work product; rarely will there be justification or need for disclosure of attorney opinion work product.

Thank you for considering our views on this vital issue. If you have any questions or need additional information, please contact Deborah Gibbs, BBA Director of Government Relations, at (617) 778-1942 or Bill Ide, the Chair of the ABA Task Force on Attorney-Client Privilege, at (404) 527-4650.

Sincerely,



Edward P. Leibensperger
President