



THE MISSOURI BAR

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STATEMENT OF POSITION OF THE MISSOURI BAR RELATING TO S. 186, ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT OF 2007

The Missouri Bar supports S. 186, introduced by Senator Arlen Specter, to appropriate protection to attorney-client privileged communications and attorney work product. Introduction of S. 186 has been prompted by concern about the Justice Department's privilege waiver policy, which The Missouri Bar opposes.

Formally established by the Department's 1999 "Holder Memorandum" and 2003 "Thompson Memorandum," the incidence of coerced waiver has increased dramatically during the past several years. The problem was exacerbated in November, 2004 when the U. S. Sentencing Commission added language to Section 8C2.5 of the Federal Sentencing Guidelines authorizing and encouraging the government to seek waiver as a condition for cooperation. Although the Sentencing Commission subsequently removed the privilege waiver language from the Sentencing Guidelines, the Justice Department has not agreed to adopt similar changes to its own policy. A "McNulty Memorandum" issued in December of 2006 merely requires high level Department approval before waiver requests can be made. The new policy generally prohibits prosecutors from considering whether a company is advancing attorneys' fees to its employees under investigation and indictment except in very rare cases when the totality of the circumstances show that it was intended to impede a criminal investigation, but it continues to allow prosecutors to pressure companies to fire employees or not enter into joint defense agreements or share information with them as conditions for receiving cooperation credit. Many lawyers complain that their clients have been and are being coerced into waiving the privilege and that a "culture of waiver" now prevails.

The attorney-client privilege and work product doctrine have long been an essential part of our justice system in America. If clients cannot freely and openly communicate with their lawyers at each juncture in complete confidence, the opportunity to present a full and complete defense is compromised. The erosion of this privilege could result in a defense attorney potentially testifying against his client. Lawyers may well be obligated to advise clients at their first meeting of the potential waiver of the attorney-client privilege and the potential that a lawyer may be obligated to testify regarding matters disclosed to their attorney. Such a possibility is repugnant to the American system of justice which has always revered and protected the right of individuals to freely and openly discuss with their lawyer their conduct without fear of that information being used against them. This privilege also permits clients to seek out and obtain guidance in how to conform conduct to the law. It facilitates self-investigation into past conduct, identifies shortcomings and remedies problems to the benefit of everyone.

S. 186 would reverse the harmful privilege waiver and employee-related provisions contained in the Justice Department's Thompson and McNulty memoranda and all other similar federal agency policies, such as the Securities and Exchange Commission's policy set forth in the 2001 "Seaboard Report." The Missouri Bar urges Congress to approve this legislation.

*Adopted by the Executive Committee of The Missouri Bar
acting on behalf of the Board of Governors, May 31, 2007*