

**Summary of State and Local Bar Positions Regarding H.R. 3013 and S. 186 and
Federal Agency Policies that Erode the Attorney-Client Privilege, the Work Product
Doctrine and Employee Legal Rights**

(updated 4/2/08)

AL – no to all Qs below

AR - created Task Force on Attorney-Client Privilege; Task Force recommended that the AR HOD create a committee to regularly monitor developments in this area and adopt eight resolutions based in large part on related ABA Resolutions passed in 2005 and 2006; *awaiting update on final action of AR HOD.*

AZ – Board of Governors voted unanimously in October 2007 to adopt resolution similar to ABA resolutions 111 and 302B opposing federal agency policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights during investigations and endorsing S. 186 and H.R. 3013.

AZ, Maricopa Bar - no to all Qs below

CA – Corporations Committee of the Business Law Section sent letters to Senators Patrick Leahy (D-VT), Arlen Specter (R-PA), and Dianne Feinstein (D-CA) in November 2007 endorsing S. 186. Standing Committee on Professional Responsibility and Conduct sent letter to US Sentencing Commission in March 2006 opposing privilege waiver provisions in Federal Sentencing Guidelines

CT - sent letter to local US Atty. in April 2006 expressing concerns over the Thompson Memorandum provisions that erode attorney-client privilege and work product protections

DC – Criminal Law and Individual Rights Section of the District of Columbia Bar issued a statement in January 2008 endorsing H.R. 3013 and S. 186 and expressing opposition to those provisions in the Justice Department's McNulty and Thompson Memoranda that erode fundamental attorney-client privilege, work product, and employee legal rights.

FL - Board of Governors voted unanimously in June 2007 to adopt policies similar to the ABA's opposing federal agency policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights during investigations and endorsing S. 186 and H.R. 3013; sent letters to entire congressional delegation endorsing S. 186 and H.R. 3013.

FL, Volusia - no to all Qs below

HI - no to all Qs below

ID - no to all Qs below

IL - opposes Thompson and McNulty Memoranda provisions that erode attorney-client privilege, work product, and employee legal protections; endorsed S. 186 and H.R. 3013 and lobbied IL congressional delegation during ABA Day event in April 2007 and before and during markup of H.R. 3013 in July/August 2007 and hearing on S. 186 in September 2007.

IL (Chicago Bar Assn. and Chicago Bar Foundation.) – opposes Thompson and McNulty Memoranda provisions that erode attorney-client privilege, work product, and employee legal protections; endorsed S. 186 and H.R. 3013 and lobbied IL

congressional delegation during ABA Day event in April 2007 and before and during markup of H.R. 3013 in July/August 2007 and hearing on S. 186 in September 2007.

IL, Peoria - no to all Qs below

IA – *awaiting update*

KS – no to all Qs below

ME – no to all Qs below

MD - opposes Thompson and McNulty Memoranda provisions that erode attorney-client privilege, work product, and employee legal protections; endorsed S. 186 and H.R. 3013 and lobbied MD congressional delegation during ABA Day event in April 2007 and before and during hearing on S. 186 in September 2007; sent letter to Senator Benjamin Cardin (D-MD) in September 2007 urging him to support and cosponsor S. 186.

MA (Boston Bar Assn.) - opposes Thompson and McNulty Memoranda provisions that erode attorney-client privilege, work product, and employee legal protections; endorsed S. 186 and H.R. 3013 and lobbied MA congressional delegation during ABA Day event in April 2007 and before and during markup of H.R. 3013 in July/August 2007 and hearing on S. 186 in September 2007; sent letter to US Sentencing Commission in March 2006 urging removal of the privilege waiver language from the Federal Sentencing Guidelines and the addition of a statement that waiver should not be a factor in determining cooperation; sent letter to local US Atty. in June 2006 expressing support for the attorney-client privilege and recommending that the McCallum Memorandum be implemented with great care and subject to certain principles

MI – created Task Force on Attorney-Client Privilege in 2006,

<http://www.michbar.org/generalinfo/attorney-client.cfm>; State Bar of Michigan Representative Assembly adopted its Task Force's Recommendations 1 through 5 on September 27, 2007 that mirror ABA resolutions 111, 302B, and others, opposes the concept of "selective waiver," and recommends that Michigan not enact legislation regarding privilege. The proposed resolutions do not specifically endorse or oppose S. 186 or H.R. 3013 (or federal legislation in general), and the SBM will determine its position on appropriate remedies at a later time.

MN – no to all Qs below, but certain individual officers of the Minnesota State Bar Association sent letters to Congress in 2007 endorsing H.R. 3013 and S. 186 and/or lobbied for passage of the legislation during the ABA Day event in April 2007.

MS – created committee to study issues surrounding the Thompson/McNulty Memoranda and other similar federal policies and report to Board of Commissioners (BOC) in June 2007; BOC has not yet adopted a formal position on the Thompson or McNulty Memoranda or S. 186

MO – opposes Thompson and McNulty Memoranda provisions, and similar federal agency policies like the SEC's "Seaboard Report," which erode attorney-client privilege, work product, and employee legal protections; endorsed S. 186 and H.R. 3013 and lobbied MO congressional delegation for prompt passage of the legislation in 2007; sent letters to all members of MO delegation in November 2007 endorsing H.R. 3013 prior to House passage; sent letter to local US Atty. in March

2006 expressing concerns about DOJ memoranda and support for preserving the privilege

NV – no to all Qs below

NC State Bar (unified) - no to all Qs below

ND - no to all Qs below

NJ - expressed interest in studying issues surrounding the Thompson/McNulty Memoranda and other similar federal policies at ABA Business Bar Leaders Conference in April 2007; Business Law Section now is studying these issues

NJ, Federal - opposes Thompson Memorandum provisions that erode attorney-client privilege and work product protections

NM – no to all Qs below

NY – created task force; cosponsored ABA Resolution 302B on employee rights in August 2006, and NYSBA HOD adopted a similar resolution in June 2006; sent letter to US Sentencing Commission in March 2006 urging removal of the privilege waiver language from the Federal Sentencing Guidelines and the addition of a statement that waiver should not be factor in determining cooperation; adopted policy (i.e., its task force's report) in November 2007 endorsing S. 186 and H.R. 3013 and sent letters to Senators Charles Schumer (D-NY) and Hillary Clinton (D-NY) endorsing the legislation and recommending amendments that would (i) clarify the definition of "employees" protected by the bill, (ii) clarify that under the bill, the government could not reward organizations that voluntarily waive the privilege or take certain punitive actions against employees, (iii) provide a remedy for violations of the new law by allowing aggrieved persons to seek redress in court and (iv) allow the government to base cooperation credit in part on the organization's willingness to abstain from entering into joint defense agreements with employees in the future.

NY (New York City Bar Assn.) – sent letter in June 2007 to Senate Judiciary Committee in support of S. 186; bar sent letters to all NY members of House and Senate Judiciary Committee in 2007 urging prompt passage of S. 186 and H.R. 3013.

OH (Cincinnati Bar Assn.) – Board of Trustees voted on February 27, 2008 to adopt resolution similar to ABA resolutions 111 and 302B opposing federal agency policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights during investigations and endorsing S. 186 and H.R. 3013.

OH, Lake County - no to all Qs below

PA – adopted resolution in November 2007 similar to ABA resolutions 111 and 302B opposing federal agency policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights during investigations and endorsing S. 186 and H.R. 3013; also previously adopted numerous other positions in favor of preserving the attorney-client privilege in general

PA (Philadelphia Bar Assn.) – adopted resolution in November 2007 similar to ABA resolutions 111 and 302B opposing federal agency policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights during investigations and endorsing S. 186 and H.R. 3013.

SC – *awaiting further response*

SD - expressed interest in studying issues surrounding the Thompson/McNulty Memoranda and other similar federal policies at ABA Business Bar Leaders

Conference in April 2007; Business Law Committee proposed various a/c privilege Resolutions, including a resolution that tracks ABA Resolution 111, to entire state bar membership for vote at the June 22-23, 2007 annual meeting; resolution was postponed indefinitely.

TN - opposes Thompson and McNulty Memoranda provisions that erode attorney-client privilege, work product, and employee legal protections; endorsed S. 186 and H.R. 3013 and sent letters to entire TN congressional delegation in September 2007 urging them to cosponsor and support the legislation

TN, Nashville - no to all Q

UT - Utah State Bar Commission recently voted to support the ABA's position on attorney-client privilege as asserted in ABA Resolution 111 and ABA Resolution 302B and supports the enactment of S. 186 and H.R. 3013 and other efforts which protect these fundamental rights; lobbied UT members of House and Senate Judiciary Committees during ABA Day in Washington program in April 2007 and prior to House Judiciary Committee markup in July/August 2007.

VT - opposes Thompson and McNulty Memoranda provisions that erode attorney-client privilege, work product, and employee legal protections; endorsed S. 186 and lobbied VT congressional delegation during ABA Day event in April 2007; sent letter to Sen. Leahy prior to Senate Judiciary Committee hearing in September 2007 urging support for S. 186.

VA (unified) – no to all Qs below

VA (voluntary) – no to all Qs below, *awaiting further response*

WA - no to all Qs below

WA, King County - opposes Thompson and McNulty Memoranda provisions that erode attorney-client privilege, work product, and employee legal protections and other similar federal policies; sent letter to local US Atty. in November 2006 expressing concerns about DOJ memoranda and support for preserving the privilege

WV - expressed interest in issue in April 2007; Executive Director will raise the issues with the WV Bar leadership, but as a mandatory bar, it probably will not take a formal position

WI – State Bar of Wisconsin Board of Governors adopted resolution on February 29, 2008 that “strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel.” SBW governmental affairs staff also offered to send messages to Senators Kohl and Feingold endorsing S. 186.

WY – no to all Qs below