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Dear Colleague:

Our efforts to protect the attorney-client privilege, the attorney work product doctrine, and employees' Sixth and Fifth Amendment rights have seen results in great part because of the tremendous support lent by state and local bar associations across the country. In our previous letters to you in [January](#) and [May](#) of 2006—and again during our ABA Day in Washington grassroots lobbying program in April 2007—we asked you and other bar leaders throughout the country to join us in our effort to protect these fundamental rights from the Justice Department and other federal policies that are eroding them. On behalf of the American Bar Association and our Task Force on Attorney-Client Privilege, I would like to update you on several recent developments and urge you to help us enact comprehensive legislation, H.R. 3013 and S. 186, which would reverse all of these harmful governmental policies.

The Justice Department's original privilege waiver and employee rights policies, set forth in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," instructed federal prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit—and hence leniency—during government investigations. One of the key factors cited in these and other similar federal agency policies is the organization's willingness to waive attorney-client privilege and work product protections and provide this confidential information to government investigators. Another key factor is the company's willingness to not pay its employees' legal fees during investigations, to fire the employees for exercising their Fifth Amendment rights, or to take other punitive actions against them long before any guilt has been established.

In response to the concerns that the ABA and others raised regarding the harmful effects of these policies, the Sentencing Commission voted unanimously in April 2006 to remove the privilege waiver provisions from the Federal Sentencing Guidelines, and that change became effective last November. In addition, the Commodity Futures Trading Commission voted to reverse its privilege waiver policy in March 2007. Unfortunately, however, the Justice Department, the Securities and Exchange Commission, and other federal agencies have refused to reverse or fundamentally change their harmful privilege waiver and employee rights policies. While the Department reluctantly issued new cooperation guidelines on December 12, 2006, as part of the "McNulty Memorandum," the new policy falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee legal protections.<sup>1</sup>

### **Recent Developments on the Privilege Waiver and Employee Rights Issues**

The ABA and our Task Force on Attorney-Client Privilege have been working in close cooperation with various state and local bars and 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

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<sup>1</sup> For a detailed analysis of the McNulty Memorandum and S. 186, please see the American Bar Association's March 8, 2007 statement to the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, available online at [http://www.abanet.org/poladv/letters/attyclient/2007mar08\\_privwaivh\\_t.pdf](http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf).

achieve a comprehensive, legislative solution to the harmful governmental policies described above. In recent months, a number of important developments have taken place, including the following:

- ***Legislation Introduced in the Senate.*** In response to the widespread public outcry over the Justice Department's policies, the Senate Judiciary Committee held a hearing on September 12, 2006. After hearing [testimony from the ABA](#), the coalition, and the Justice Department, the Committee's then-Chairman and Ranking Member, Senators Arlen Specter (R-PA) and Patrick Leahy (D-VT), both expressed deep skepticism over the Department's policies and urged it to reverse them or face possible legislative action. When it refused, Sen. Specter introduced [S. 186](#), which would reverse not only the Department's policies, but the similar policies adopted by other federal agencies as well. On June 4, the ABA sent a [letter](#) to current Chairman Leahy endorsing S. 186, but no hearings or other action has been scheduled on the measure to date.
- ***Companion Bill Advances in the House.*** On March 8, 2007, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the Justice Department's McNulty Memorandum. After considering the [testimony of the ABA](#), the coalition, and the Department, virtually all Subcommittee members expressed opposition to the Department's policies. Subsequently, the Subcommittee's Chairman, Rep. Bobby Scott (D-VA), its Ranking Member, Rep. Randy Forbes (R-VA), and other House Judiciary Committee leaders introduced a House companion bill on July 12. H.R. 3013, which is identical to S. 186, was approved by the House Judiciary Committee on August 1, and Committee leaders hope to bring it to the floor for a final House vote in the fall.
- ***New Letter from Former Senior Justice Department Officials to Congress Endorsing H.R. 3013 and S. 186.*** On July 30, 2007, prior to the House Judiciary Committee markup of H.R. 3013, a prominent group of nine former senior Justice Department officials—including former Attorneys General, Deputy Attorneys General, and Solicitors General from both parties—submitted a [new letter](#) to all members of the House and Senate Judiciary Committees endorsing H.R. 3013 and S. 186. This remarkable letter, coming from the very people who ran the Department of Justice a few short years ago, demonstrates just how widespread the concerns over the Department's privilege waiver policy have become. Several House Judiciary Committee leaders commented favorably on the letter during the recent markup of H.R. 3013.

### **Your Help is Urgently Needed**

The ABA needs your support and assistance on these critical issues. Specifically, we urge you and your bar association to help us to preserve the attorney-client privilege, work product, and employee constitutional protections that are so vital to our legal system by taking the following steps:

- ***Establish Your Own Task Force.*** In addition to the ABA, many state and local bars—including the New York, Michigan, California, Florida, Arkansas, Connecticut and Boston bars—have created task forces to educate themselves on these issues and help determine how best to respond to the governmental policies in question. We urge you to establish your own task force and then coordinate its efforts with those of the ABA Task Force. More information regarding the ongoing efforts by state and local bars to protect attorney-client privilege, work product, and employee rights—**and all model bar materials cited below**—are available on our Task Force's website at: <http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/home.shtml>.

- ***Adopt Your Own Policies Endorsing H.R. 3013 and S. 186.*** The ABA House of Delegates has adopted several [resolutions](#) prepared by our Task Force that support the attorney-client privilege, the work product doctrine, and employee legal rights, oppose federal agency policies that erode these protections, and call for effective remedies. Similar policies also have been adopted by numerous state and local bars, including those in the Florida, Illinois, Maryland, Missouri, Utah, Vermont, Boston, Chicago, King County (WA), and New York City. We urge you to adopt your own policies on these issues, and to assist you in this effort, our Task Force has prepared a [Model Bar Resolution](#) for your consideration.
- ***Educate Your Leadership and Members.*** The erosion of the attorney-client privilege, the work product doctrine, and individuals' Sixth and Fifth Amendment rights is a serious threat to our nation's adversarial system of justice. It directly affects *all* lawyers in *every* legal specialty, including those in the business, criminal justice, litigation, and environmental fields, to name just a few. Therefore, please alert your bars' leaders and members to the growing problem of government-coerced waiver of these legal protections and the implications that it will have for the entire legal system. As part of that education effort, feel free to utilize and modify our [Model Bar PowerPoint](#).
- ***Contact Your Representatives and Senators.*** Congress is now considering corrective legislation, H.R. 3013 and S. 186, designed to reverse the harmful policies adopted by the Justice Department and other federal agencies, and we need your help to pass these bills. Our Task Force has prepared a [Model Bar Letter to the House](#) and [Model Bar Letter to the Senate](#) and we urge you to send similar letters to your Members of Congress as soon as possible.
- ***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, the work product doctrine, and employee legal rights during investigations—and build upon the momentum created by the House Judiciary Committee's recent approval of H.R. 3013, the ABA Task Force has prepared a [Model Bar Op-Ed Piece](#) on these issues for use by state and local bars. We urge your bar to send a similar op-ed piece to your local media outlets as soon as possible.

Thank you again for your assistance on these vital issues. If you have any questions or need additional information, please contact our Task Force Chair, Bill Ide, at (404) 527-4650, [bide@mckennalong.com](mailto:bide@mckennalong.com) or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098, [frisbyr@staff.abanet.org](mailto:frisbyr@staff.abanet.org). In addition, if your bar creates its own task force, adopts a resolution, sends letters to Congress, or submits an op-ed on this topic, please let us know so that we can coordinate our lobbying efforts with those of your bar.

The attorney-client privilege, the work product doctrine, and individuals' Fifth and Sixth Amendment rights have been cornerstones of our free society for more than 200 years. Please help us protect them.

Sincerely,



Karen J. Mathis