

Memorandum

TO: House of Delegates, Arkansas Bar Association

FROM: John Watkins, Chair, Task Force on the Attorney-Client Privilege

RE: Task Force Report – Recent Developments

DATE: December 27, 2006

This memorandum briefly addresses developments since the Task Force's report, which was completed in late November and considered by the Board of Governors on December 2.

It was suggested at the Board's meeting that copies of proposed Resolution 1, if adopted by the House, be sent to the Arkansas congressional delegation. The Task Force had recommended that copies be provided to the U.S. Attorneys for the Eastern and Western Districts of Arkansas. This suggestion is a good one, as the battleground is shifting to the legislative front.

On December 7, Senator Arlen Specter, chair of the Senate Judiciary Committee Chairman, introduced the Attorney-Client Privilege Protection Act of 2006.¹ Although Senator Specter filed the measure on the eve of adjournment of the 109th Congress, he said that he will reintroduce it when the new Congress convenes in January. The bill would override provisions of the Thompson Memorandum by prohibiting federal prosecutors from seeking corporate waivers of attorney-client privilege and work product protection in return for leniency in prosecutions, preventing prosecutors from considering such waivers in making charging decisions, and protecting employee rights in corporate investigations.

In another development, Deputy U.S. Attorney General Paul McNulty issued a memorandum on December 12 that revises the guidelines set out in the Thompson Memorandum. Under the McNulty Memorandum,² federal prosecutors no longer have blanket authority to routinely ask that a company waive the attorney-client privilege and work product doctrine or risk being indicted. Instead, prosecutors must obtain written approval for waivers from the deputy attorney general, and any waiver sought should be "the least intrusive waiver necessary to conduct a complete and thorough investigation."

Even if approval is granted, a waiver is not absolutely required to avoid prosecution, although a company can be given credit for cooperating due to a waiver. Another change prohibits prosecutors from considering, when weighing indictment of a company, whether it is paying the legal fees of an employee caught up in the inquiry.

¹<http://www.abanet.org/media/docs/acppa06.pdf>.

²<http://www.abanet.org/media/docs/mcnultymemorandum.pdf>.

Bar leaders have agreed that the McNulty Memorandum does not go far enough. President Karen J. Mathis of the American Bar Association called the revised guidelines “a modest improvement” over previous policy but said they “fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.” Similarly, Stephen J. Bronis, co-chair of the White Collar Crime Division of the ABA Criminal Justice Section, described the memorandum as a “baby step” toward reform.

William Ide, a former ABA president who chairs the ABA Task Force on Attorney-Client Privilege, said that legislation remains necessary unless the Justice Department recognizes that prosecutors “are not entitled to waiver, period, under any circumstances.” Stephanie Martz, director of the White Collar Crime Project at the National Association of Criminal Defense Lawyers, said that her group will seek the passage of legislation barring all disclosure of confidential communications and any prosecutorial credit to companies that did disclose.

Senator Patrick Leahy, the incoming chair of the Senate Judiciary Committee, said in a written statement that he welcomes the new prosecutorial standards and is “pleased that the Justice Department has heeded bipartisan criticism . . . and moved away from its most excessive practices in corporate fraud investigations.” At the same time, he “remain[s] concerned that, depending on how the new policies are implemented, prosecutors may still be able to inappropriately consider a corporation’s waiver of this important privilege.”