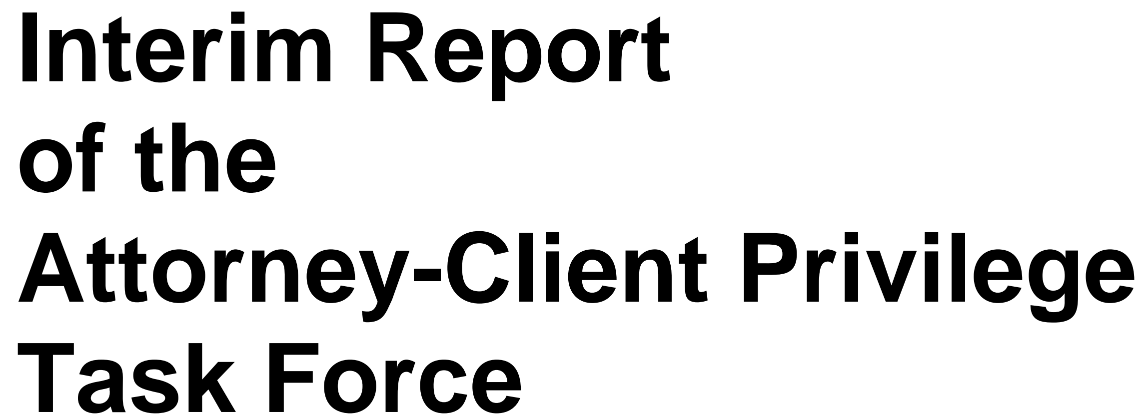

Interim Report of the Attorney-Client Privilege Task Force

To:
Henry M. Coxe, III
President
The Florida Bar

June 1, 2007

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II. Preface

In October, 2006, Florida Bar President Henry M. Coxe, III created and the Board of Governors of The Florida Bar approved the appointment of a task force in response to the adoption of policies by a number of governmental agencies that weaken the attorney-client privilege and the work product doctrine. The appointment of the task force acknowledged the urging of the National Conference of Chief Justices to create state bar committees devoted to the preservation of the attorney-client privilege and work-product doctrine, as well as the urging of the ABA for state and local bar associations to address erosion of the attorney-client privilege.[1]

The task force was asked to examine the purpose behind the attorney-client privilege and its exceptions, the circumstances under which and the extent to which the privilege is being threatened by government waiver policies, and the competing interests being asserted to override the privilege. The task force was directed to identify issues currently impacting the privilege and to report and to recommend resolutions to those issues, if warranted.

The task force is comprised of twenty-two members, from various parts of the state and from various professional backgrounds. The task force includes law professors, criminal defense lawyers, three former U.S. Attorneys, six former Assistant U.S. Attorneys, corporate counsel, private practitioners, and others. The committee held its organizational meeting by conference call on December 20, 2006. Thereafter, meetings of the entire

task force were held on January 18, 2007 (Miami), April 20, 2007 (Tampa), and May 15, 2007 (by conference call).

In furtherance of its work, the committee formed four subcommittees: the Waiver Subcommittee (consideration of the Thompson/McNulty Memoranda and any potential legislation including the Senate Bill 186 introduced by U.S. Senator Arlen Specter - the “Attorney-Client Privilege Protection Act of 2007”); the Evidence Subcommittee (consideration of evidence and procedure rules including Rule of Evidence 502); the Related Issues Subcommittee (consideration of joint defense agreements, employee rights issues such as indemnification by corporations or other employers of attorney’s fees and the privilege with respect to audits and financial statements); and the Ethics Subcommittee (consideration of Proposed Rule 3.4(g) of the Model Rules of Professional Conduct and proposed changes to Rule 4-3.8 of the Florida Rules of Professional Conduct). The subcommittees met on numerous occasions by conference call to discuss and consider their assigned issues and, ultimately, made recommendations to the full task force.

In addition to the work of the individual members of the task force and its subcommittees, the task force considered the comprehensive work of the ABA Task Force on Attorney-Client Privilege and the work of the Arkansas Task Force on Attorney-Client Privilege and other state bar associations during its review and extensively relied on that work in preparing this report.

This report outlines the work of the task force to date.

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1 *See*, Resolution of National Conference of Chief Justices at Attachment 1.

III. Executive Summary

The Attorney-Client Privilege Task Force's approved mission statement is as follows:

> The Attorney-Client Privilege Task Force has been created in response to the adoption of policies by a number of governmental agencies that weaken the attorney-client privilege and the work product doctrine and to acknowledge the urging of the National Conference of Chief Justices to create state bar committees devoted to the preservation of the attorney-client privilege and the work-product doctrine.
>
> The mission of the task force is to examine the purpose behind the attorney-client privilege and its exceptions, the circumstances under which and the extent to which the privilege is being threatened by government waiver policies, and the competing interests being asserted to override the privilege. The task force is to report on the current status of the attorney-client privilege, identify those issues that are currently impacting the privilege, and recommend resolutions to those issues if warranted.

The task force spent many hours from November, 2006 to May, 2007 considering these issues. After careful review and debate, the task force agreed on specific recommendations to be made to the Board of Governors of The Florida Bar. These recommendations and resolutions are set forth in more detail in the report. In summary, the task force recommends that the Board of Governors:

1. Adopt the following resolutions:

a. That The Florida Bar supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney; opposes policies, practices and procedures of governmental bodies that would erode the privilege; and opposes the routine practice by governmental officials of seeking to obtain waivers of the privilege or work product doctrine by the granting or denial of a benefit. (Resolution 1)

b. That The Florida Bar opposes government policies or practices that erode the constitutional and other legal rights of employees by requiring, encouraging or permitting prosecutors or other enforcement authorities to consider the following factors in determining whether an organization has been cooperative: (1) that the organization provided counsel or paid the legal fees of the employee; (2) that the organization chose to retain or declined to sanction an employee who refused a government request for an interview, testimony or other information; (3) that the organization entered into a joint defense or common interest agreement with an employee; (4) that the organization shared its records with an employee. (Resolution 2)

c. That the attorney-client privilege and work product doctrine should be preserved with respect to audits of company financial statements. (Resolution 3)

2. Approve the following recommendations:

a. That The Florida Bar take a legislative position in support of the legislation introduced by U.S. Senator Arlen Specter (S.186) or similar comprehensive legislation.

b. That The Florida Bar make no proposal at this time to amend section 90.502 to include a selective waiver provision.

c. That the concepts on inadvertent waiver contained in ABA Recommendation 120D be adopted and referred to the Florida Bar Civil Procedure Rules Committee and the Florida Bar Code and Rules of Evidence Committee for drafting of appropriate rules consistent with the concepts.

d. That The Florida Bar not pursue amendments to Rule 4-3.8(e) of the Rules of Professional Conduct to restrict a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client.

e. That the Rules of Professional Conduct (including ABA Model Rule 3.4(g) and Florida's rules) not be amended to address the issue of attorney-client privilege.

f. That the issue of whether state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert be referred to the Florida Bar Civil Procedure Rules Committee and the

Florida Bar Code and Rules of Evidence Committee for review and consideration.

g. That The Florida Bar take no action at this time on the issue of the proposed "firewall amendment" to S.186 or similar comprehensive legislation.

IV. Purpose of the Attorney-Client Privilege

The protection of communications between a client and lawyer has been a bedrock principle of our system of justice. It is based on the principle that clients and society are served when the client is able to obtain "fully informed legal advice."[2] The attorney-client privilege is a rule of evidence that protects the confidentiality of attorney-client communications made for the purpose of securing legal advice. It is enforced to encourage an atmosphere of openness between the attorney and client. Attorneys play a crucial role in our justice system and have a duty to zealously represent their clients and advise them with respect to the law and their rights. The relationship between an attorney and client functions best when clients feel free to disclose relevant information fully and candidly, without fear that third parties can compel them or their lawyers to disclose the privileged communications. Attorneys have a closely related obligation to retain client information in confidence, as set forth in professional ethics rules. Of course, there are exceptions to the privilege, such as situations where the attorney's advice or services are sought for the purpose of assisting or enabling a fraud or a crime, but those exceptions do not include situations where a government attorney finds it desirable for the privilege to be waived so that an investigation will be facilitated or expedited.

The privilege applies to corporations and other entities, both public and private. *See Upjohn v. United States*, 449 U.S. 383, 397 (1981). Corporate attorneys are needed to "formulate sound advice when their client is faced

2 *United States v. Fisher*, 425 U.S. 391, 403 (1976).

with a specific legal problem" and to "ensure their client's compliance with the law." *Id.* at 392. The application of the privilege in the corporate context serves to encourage corporations to seek legal advice and protect the rights of entities to mount defenses to criminal or civil claims and allegations. Corporate compliance programs function most effectively when corporate counsel, officers, directors and employees are able to communicate openly and frankly with the certainty that those communications will be protected by the attorney-client privilege. The privilege against self-incrimination, however, is not available to corporations. *Braswell v. United States*, 487 U.S. 99, 105 (1988).

A corollary to the attorney-client privilege is the attorney work product doctrine, which protects the work product of lawyers generated in order to prepare for litigation. Work product is generally divided into two categories: (1) factual information, which may be obtained by an adversary only upon a showing of substantial need and inability to secure the substantial equivalent of the factual information by alternate means without undue hardship; and (2) opinion work product, which consists of the attorneys' mental impressions, conclusions, opinions or legal theories, *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), and is protected against discovery by an adversary. The work product doctrine is based on "the public policy underlying the orderly prosecution and defense of legal claims," *id.* at 510, and is meant to promote efficiency and fairness in the rendering of legal advice and preparation for trial.[3]

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3 For additional information on the attorney-client privilege and work product doctrine see the ABA Report on Recommendation 111 at Attachment 2.

V. Information Gathering Process

During the course of its work, the task force solicited and received written comments from interested parties. The work of the task force was covered in The Florida Bar *News* and comments from members regarding the issue at hand were requested.[4] Updates to the work and the recommendations of the task force were posted on the task force's web page on The Florida Bar's web site and comments were solicited.

On March 15, 2007, The Florida Bar *News* published a request for comment asking for specific input related to the experiences of Florida Bar members with regard to waiver of the attorney-client privilege and work product doctrine. Specifically, the task force asked for comment on these questions:

> 1. Has a prosecutor or government investigator (federal, state, or local) ever requested your business or organizational client to waive the attorney-client privilege in connection with an investigation?
>
> 2. If so, subject to your professional responsibilities, describe the circumstances, including, what has happened if your client refused to waive the privileges.
>
> 3. To your personal knowledge, how frequently have businesses and organizations agreed to waive

4 *See, News* articles at Attachment 3.

> the privileges when requested by the government in an investigation? Please describe the circumstances.

Additionally, the request for comment was posted on The Florida Bar's home page and on the task force's web page on the bar's web site. Letters requesting comment were sent to all standing committees of the bar, all sections of the bar, rules committees, and many voluntary bar associations and other interested entities. To date, twenty-two responses have been received, some of which identified various instances where government prosecutors or agencies in Florida demanded a waiver of the attorney-client privilege from clients or their counsel during a government investigation.

The task force reviewed voluminous materials including much of the work available on this issue from the American Bar Association and posted on its web site, reports and positions from other state bars and local bars, case law on the attorney-client privilege, proposed rules and legislation, scholarly articles, newspaper articles, legal memoranda and other written materials.

At its January 2007 meeting, the task force heard a presentation from Ms. Susan Hackett, Senior Vice President and General Counsel of the Association of Corporate Counsel on the changing role of in-house counsel and the erosion of the privilege, as well as a presentation by task force members on the perspective of law enforcement. The task force received regular status reports from Neal Sonnett, Esq., task force liaison from the ABA's task force. The task force also heard presentations by R. Larson Frisby, Senior Legislative Counsel for the ABA, and James Conrad, liaison to the ABA's Task Force on Attorney Client Privilege from the American

Chemistry Council, on the proposed legislation related to this issue and on the proposed “firewall amendment” to S.186.

VI. The Issue of Coerced Waiver

In recent years, a number of federal governmental agencies have adopted policies that have eroded confidence in the protection of the attorney-client privilege, the work product doctrine, and employee legal rights, primarily in the corporate context. In recent surveys, almost 48% of outside counsel and more than 30% of in-house counsel, responded that they had personally experienced an erosion of their clients' privilege rights post-*Enron*.[5] Although all of these government policies raise concerns, the most problematic have been Justice Department policies announced by various US Deputy Attorneys General —set forth in the 1999 "Holder Memorandum", the 2003 "Thompson Memorandum", and the 2006 "McNulty Memorandum"—and the Securities and Exchange Commission's policy—set forth in the 2001 "Seaboard Report"—that encourage prosecutors and other law enforcement officials to pressure companies and other organizations to waive their privileges as a condition for receiving credit for cooperation during investigations.

The problem of coerced waiver that began with the Holder and Thompson Memoranda was further exacerbated when the U.S. Sentencing Commission adopted certain amendments to the Federal Sentencing Guidelines that took effect on November 1, 2004. These amendments applied to that section of the Guidelines relating to "organizations" -- a broad term that

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5 *See* Executive Summary, *National Association of Criminal Defense Lawyers Survey: The Attorney-Client Privilege Is Under Attack* (April 2005); Executive Summary, *Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?* (April 2005).

includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Most alarming was a change in the Commentary for Section 8C2.5 that authorized and encouraged the government to require entities to waive their attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Guidelines. Prior to the change, the Commentary was silent on the issue and contained no suggestions that such a waiver would ever be required.

The ABA took a number of steps to counter the trend of government-coerced waiver. In 2004, the ABA created a Task Force on Attorney-Client Privilege to study and address the relevant government policies and practices that have eroded attorney-client privilege, work product, and employee protections. The ABA Task Force has held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force crafted new ABA policies -- unanimously adopted by the ABA House of Delegates in August 2005 and August 2006—supporting the privilege and employee rights, and opposing governmental policies that erode these protections. The ABA also worked with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to reverse these government policies. Towards that end, the ABA sent letters to the Justice Department, the Sentencing Commission, and other agencies urging them to modify their policies. In addition, the ABA and the coalition encouraged Congress to address the problem as well.

The ABA has reached out to state and local bar associations and other organizations throughout the country on this issue. On January 31, 2006 and again on May 2, 2006, the ABA sent letters to hundreds of state and local bar leaders across the country urging them to help preserve these fundamental legal rights by, among other things, establishing their own task forces, contacting the Justice Department and their local U.S. Attorneys, and expressing their concerns through their local media.

In addition to the ABA, a prominent group of former senior Justice Department officials—including three former Attorneys General from both parties—submitted letters to the Sentencing Commission and the Justice Department on August 15, 2005 and September 5, 2006, respectively, urging them to reverse their privilege waiver policies.

Many Congressional leaders also raised concerns over the Justice Department's privilege waiver and employee related policies. During a House Judiciary subcommittee hearing on March 7, 2006, almost all subcommittee members from both parties expressed serious concerns regarding the Department's waiver policy and urged then-Associate Attorney General Robert McCallum and the Department to modify the policy. Subsequently, during a Senate Judiciary Committee hearing on September 12, 2006, at which ABA President Karen Mathis testified, both then-Chairman Arlen Specter (R-PA) and then-Ranking Member Patrick Leahy (D-VT) expressed serious concerns regarding the privilege waiver and employee related provisions of the Department's Thompson Memorandum and urged Deputy Attorney General Paul McNulty and the Department to change these policies.

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, congressional leaders, and others, the Sentencing Commission voted unanimously on April 5, 2006 to remove the privilege waiver language from the Sentencing Guidelines, and that change became effective last November. When it became apparent that the Justice Department would not agree to adopt similar changes to its own policy, Sen. Specter introduced legislation on December 7, 2006, S. 30, which would bar the Department and all other federal agencies from engaging in this conduct. The ABA endorsed Sen. Specter's bill that same day.

In response to the concerns raised by the ABA and the coalition and the introduction of S. 30, Deputy Attorney General Paul McNulty issued revisions to the Thompson Memorandum on December 12, 2006.[6] Rather than prohibiting prosecutors from requesting that companies waive their privileges in return for cooperation credit, the McNulty Memorandum requires high level Department approval before waiver requests can be made. The new policy also generally prohibits prosecutors from considering whether a company is advancing attorneys' fees to its employees under investigation and indictment—except in "extremely 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.

After reviewing the McNulty Memorandum, the ABA issued a statement opposing the new policy and urging Congress to promptly consider and pass

Sen. Specter's legislation. Sen. Specter subsequently reintroduced his legislation on January 4, 2007 as S. 186, and the measure currently is pending in the Senate Judiciary Committee.

On February 5, 2007, the ABA sent a letter to the Chairman of the SEC expressing the association's concerns over the Commission's privilege waiver and employee related policies as contained in the 2001 "Seaboard Report" and urging it to modify these policies. The ABA also provided the Chairman with specific proposed revisions to the SEC's policies that were crafted by the ABA Task Force on Attorney-Client Privilege, and issued a press release explaining its recommendations.

On February 15, 2007, the ABA submitted two separate comment letters to the Judicial Conference's Rules Committee recommending changes to proposed Federal Rule of Evidence 502 regarding waiver of attorney-client privilege and work product protections. The first letter, signed by Bill Ide, Chair of the ABA Task Force on Attorney-Client Privilege, addressed the issue of implied waiver and urged the Committee to add new language to FRE 502 that would allow companies to provide factual summaries of their internal investigations to the government without waiving the privilege as to underlying documents. The second letter, signed by ABA Litigation Section Chair Kim Askew, recommended changes to proposed FRE 502(b) regarding inadvertent disclosure of privileged materials.

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6 *See,* "McNulty Memorandum" at Attachment 4.

VII. Status of Attorney-Client Privilege Waiver In Florida

The task force is still collecting information on whether the coerced waiver of the attorney-client privilege and the work product doctrine is a problem in Florida. Instances of pressure to waive the privilege were reported to the task force during its work. At its initial meetings, task force Chair Marcos Daniel Jimenez reported that he had taken an informal survey of the U.S. Attorneys in Florida and was told that the issue of pressuring corporations to waive the attorney-client privilege or work product doctrine has not been a commonplace occurrence in their offices. At the same meeting, members were asked to raise their hands if their clients had been asked to waive the attorney-client privilege. Five out of 18 members responded "yes." Subsequently, other instances of waiver requests were reported to the task force. While coerced waiver may present a bigger problem in other states, the issue of coerced waiver has surfaced in Florida and should be addressed here.

Thus, the task force believes that a proactive approach is warranted, and that The Florida Bar should lend its support to the efforts of the ABA, the National Conference of Chief Justices, and other entities and bar associations that have taken a stand against this practice. State and local bars that are addressing the waiver issue include New York, California, Connecticut, Massachusetts, Michigan, Arkansas, Illinois, and Maryland.

VIII. Recommendations

Resolution 1

> RESOLVED, that The Florida Bar 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 so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and
>
> FURTHER RESOLVED, that The Florida Bar opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.
>
> FURTHER RESOLVED, that The Florida Bar opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.

This resolution, which tracks ABA Resolution 111 (August 2005), is the centerpiece of the task force's recommendations.[7] It acknowledges and affirms the importance of the attorney-client privilege and the work product doctrine and opposes routine policies or practices that would erode those protections. If adopted by the Board of Governors, Resolution 1 would become this bar's basic statement of principle on this very important issue.

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7 *See,* ABA Recommendation 111 and Report at Attachment 2.

The resolution recognizes the importance of the attorney-client privilege in the American justice system, but goes further. It expressly opposes routine practices by government officials of seeking a waiver through the granting or denial of a benefit or advantage.

As discussed above, in recent years, and particularly after the collapse of Enron Corporation and the ensuing emphasis on prosecution of corporate fraud, federal prosecutors increasingly requested that corporations reveal protected information, supported by formal Department of Justice policy adopted by other federal regulatory agencies, notably the SEC. Federal prosecutors no longer relied on the tools of immunity grants and grand jury subpoenas for the development of an investigation. Instead, they often insisted, at the outset of an investigation, that corporations divulge privileged communications as a condition of the corporation's cooperation with the government. This posed a serious threat to the attorney-client privilege, which benefits clients and society by fostering a confidential atmosphere where clients can safely seek fully informed legal advice without fear of disclosure to third parties or the government. This also posed a serious threat to employee rights and the relationship between senior management and lower-level employees in an organization, since communications between lower-level employees and corporate counsel were likely to be the focus of prosecutorial interest.

The ABA task force found, and surveys have confirmed, a perception among corporate lawyers that government prosecutors and agencies expected corporations to waive the attorney-client privilege and the work product doctrine as a condition of cooperation in an investigation. As a

practical matter, the ABA task force concluded, “corporations rarely can resist prosecutorial requests for disclosure because of the harsh consequences of having to defend against criminal charges. . . ."[8] Moreover, government demands for waiver negatively impacted corporate internal investigations. Since corporate counsel, officers and employees knew that a substantial chance existed that factual information gathered and advice received would be turned over to the government, a chilling effect descended on corporate internal investigations given the natural reluctance of corporate officers and employees to speak freely with corporate counsel who might become conduits of information gathered by government.

More recently, the Department of Justice issued the "McNulty Memorandum" that modified, but did not reverse, the department's privilege waiver policy. While a prosecutor must now consult with or obtain additional approvals at the Department of Justice level prior to making a demand for privileged information, the ABA has taken the position that the new department policy falls short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee legal protections.[9]

The Florida Bar's task force agrees with the ABA and other groups that these policies erode the attorney-client privilege and the work product doctrine. The task force recommends to the Board of Governors that it stand firmly in support of the attorney-client privilege and work product protection and against erosion of those protections by adopting Resolution 1.

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8 *Id*., at p. 15.
9 ABA Fact Sheet, Protecting the Attorney-Client Privilege, May 2007.

Resolution 2

RESOLVED, that The Florida Bar opposes government policies, practices and procedures that have the effect of eroding the constitutional and other legal rights of current or former employees, officers, directors or agents ("Employees") by requiring, encouraging or permitting prosecutors or other enforcement authorities to take into consideration any of the following factors in making a determination of whether an organization has been cooperative in the context of a government investigation:

(1) that the organization provided counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an Employee;

(2) that the organization entered into or continues to operate under a joint defense, information sharing and common interest agreement with an Employee or other represented party with whom the organization believes it has a common interest in defending against the investigation;

(3) that the organization shared its records or other historical information relating to the matter under investigation with an Employee; or

(4) that the organization chose to retain or otherwise declined to sanction an Employee who exercised his or her Fifth Amendment right against self incrimination in response to a government request for an interview, testimony, or other information.

The preservation of the attorney-client privilege and the work product doctrine is not only critical to promoting effective corporate governance and compliance with the law but also it is equally important for the protection of employees' constitutional and other legal rights when a company is under investigation. In that spirit, the task force proposes Resolution 2, which opposes government policies or practices that erode the rights of current or former employees or agents. This resolution mirrors ABA Resolution 302B. [10]

10 *See*, ABA Recommendation 302B and Report at Attachment 5.

While the new Department of Justice policy under the McNulty Memorandum, discussed above, bars prosecutors from requiring companies to forgo paying their employees' legal fees in many cases in return for cooperation credit, it continues to pressure companies to take other punitive actions against employees in return for such credit, before any guilt is established.[11]

Prior to the McNulty Memorandum, among the considerations set out in the Thompson Memorandum for weighing the extent and value of a corporation's cooperation were the following: "a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys' fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement." These considerations adversely affected the right and ability of the corporation to assure that employees were adequately protected in the attorney-client relationship.

The attorneys' fees issue is particularly troubling. The costs associated with defending a government investigation involving complex corporate and financial transactions can often run into the hundreds of thousands of dollars. Therefore, if the government succeeds in pressuring a company not to pay for the employee's legal defense, the employee typically may be unable to afford

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11 The McNulty Memorandum states that "a corporation's promise of support to culpable employees and agents, *e.g.* through retaining the employees without sanction for their misconduct or though providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." See McNulty Memorandum, p. 11.

effective legal representation.

National attention to this issue increased recently in connection with a government investigation of the KPMG accounting firm with respect to tax shelter practices. Under pressure from federal prosecutors, KPMG decided that it would refuse to pay or reimburse the legal fees of its partners and employees unless they cooperated with prosecutors and decided to cut off payment of fees if the partners were charged with a crime. KPMG imposed this condition to convince the government it was cooperating fully with the investigation and to avoid indictment through a deferred prosecution agreement with the government.

The government, as part of the investigation, obtained indictments charging nineteen defendants, seventeen of them formerly KPMG partners or employees, with conspiracy and tax evasion. After the defendants moved to dismiss, U.S. District Judge Lewis A. Kaplan of the Southern District of New York ordered limited discovery and held a hearing on whether the Thompson Memorandum, insofar as it deals with advancement of defense costs as a factor relevant to whether a prospective corporate defendant will be prosecuted, along with the government's actions during the investigation, improperly interfered with the defendant employees' rights to a fair trial and to the effective assistance of counsel.

In two extensive opinions, Judge Kaplan held that the government's implementation of the Thompson Memorandum in deciding whether to indict KPMG violated the employees' rights under the Fifth and Sixth Amendments. *See*, *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006) (*Stein I*) and

United States v. Stein, 440 F.Supp.2d 315 (S.D.N.Y. 2006) (*Stein II*). Judge Kaplan found that KMPG would have paid the defendant's legal expenses had the government not "held the proverbial gun to its head." *Stein I* at 336. He concluded that the government, through its actions and the Thompson Memorandum's reference to "the advancing of attorneys fees" as a factor to assess cooperation, violated the defendant's rights under the Fifth Amendment to fundamental fairness by interfering with their ability to defend themselves.

As to the Sixth Amendment, Judge Kaplan held that the Thompson Memorandum interfered with the defendants' right to counsel of their choice because it "discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves," and "undermines the proper functioning of the adversary process that the Constitution adopted as the mode of determining guilt or innocence in criminal cases." *Stein I*, 435 F. Supp. 2d at 368. The court concluded: "Justice is not done when the government uses the threat of indictment – a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees – to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law." *Id.* at 382.

Although Judge Kaplan declined to dismiss the indictments, he opened a civil docket in which the defendants could sue KPMG for provision of their legal fees. He also noted that if any statements they made to the government as a result of KPMG's insistence that they submit to government interviews as

a condition of continued employment or payment of any legal fees were improperly coerced, those statements could potentially be suppressed in the criminal proceeding.

Some defendants filed motions to suppress, arguing that their statements to the government were coerced by KPMG's conditioning the payment of their legal fees and, in some cases, their continued employment, upon their cooperation with the government and agreement not to assert their Fifth Amendment rights. In his second opinion, issued on July 25, 2006, Judge Kaplan granted the motion in part and held that statements of two employees had been coerced in violation of the Fifth Amendment right against self-incrimination. He concluded that the government was responsible for the "substantial pressure" that KPMG "exerted on its employees to waive their constitutional rights." *Stein II* at 319. The government "threatened KPMG with the corporate equivalent of capital punishment," and "KPMG took the only course open to it," - specifically, compliance with the Thompson Memorandum. *Id*. The Court noted that the Thompson Memorandum "made it clear that a company's failure to ensure that its employees disclose whatever they knew, regardless of their individual rights and concerns, might weigh in favor of indicting the company." *Id.* at 335.

Judge Kaplan's conclusion in *Stein II* captures the dangers of government policies in favor of coerced waiver of the attorney-client privilege and their unacceptable impact on corporate employees:

> Many companies faced with allegations of wrongdoing are under intense pressure to avoid indictment, as an

indictment – especially of a financial services firm – threatens to destroy the business regardless of whether the firm ultimately is convicted or acquitted. That is precisely what happened to Arthur Andersen & Co. one of the world's largest accounting firms, which collapsed almost immediately after it was indicted – and the Supreme Court's eventual reversal of its conviction did not undo the damage. So any entity facing such catastrophic conse- quences must do whatever it can to avoid indictment.

The DOJ and other federal agencies have capitalized on this, in part by altering the manner in which suspected corporate crime has been investigated, prosecuted, and, when proven, punished. The Thompson Memorandum is a part of this change. In cases involving vulnerable companies, the pressure exerted by it and by the prosecutors who apply it inevitably sets in motion precisely what occurred here – the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights.

In this case, the pressure that was exerted on the Moving Defendants was a product of intentional government action. The government brandished a big stick – it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the USAO employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves. In two instances, that pressure resulted in statements that otherwise would not have been made. In seven, the evidence does not warrant that conclusion. The coerced statements and their fruits must be suppressed.

It is no answer for the government to say that these aspects of the Thompson Memorandum are needed to fight corporate crime. Those responsible should be prosecuted and, if convicted, punished. But the end does

not justify the means.

_Id._ at 337-38.

Although the McNulty Memorandum is certainly an improvement upon the Thompson Memorandum in that it bars prosecutors from requiring that companies not pay their employee's attorneys fees in many cases in return for cooperation credit, it carves out an exception: "prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment…(but) in extremely rare cases, the advancement of attorney's fees may be taken into account when the totality of circumstances show that it was intended to impede a criminal investigation*." See, McNulty Memorandum* at p. 11 and n. 3.

In addition to the attorneys' fees problem, other employee issues include joint defense, information sharing and common interest agreements; sharing of information with parties outside the context of common interest and information sharing agreements; and termination or sanctioning of officers and employers for asserting constitutional rights. In light of the policies and practices of prosecutors and civil enforcement agencies that may erode the ability of organizations to conduct thorough internal investigations and may erode the ability of corporate employees to receive effective representation and assert their Constitutional rights without fear of punishment, this task force recommends the approval of Resolution 2.

Resolution 3

RESOLVED, That The Florida Bar supports the preservation of the attorney-client privilege and work product doctrine in connection with audits of company financial statements.

FURTHER RESOLVED, That The Florida Bar urges the Securities and Exchange Commission, the Public Company Accounting Oversight Board, the American Institute of Certified Public Accountants, the legal and accounting professions, and other relevant organizations to adopt standards, policies, practices and procedures and take other appropriate steps to ensure that attorney-client privilege and work product protections are preserved throughout the audit process.

Resolution 1 focuses on the preservation of the attorney-client privilege and work product doctrine in the context of law enforcement and prosecution, with special emphasis on the practice of requiring companies to waive these protections during investigations. It does not directly address the status of these protections in the audit area. This resolution does so and tracks Resolution 302A adopted by the American Bar Association in August 2006.[12]

The collapse of Enron Corp. in late 2001 and the disclosure of other corporate and financial irregularities in early 2002 led to enactment of the Sarbanes-Oxley Act. Shortly thereafter, the federal government obtained indictments against the accounting firm Arthur Andersen in connection with the Enron matter. The Sarbanes-Oxley Act, among other things, established the Public Company Accounting Oversight Board and charged it with authority

12 *See,* ABA Recommendation 302A and Report at Attachment 6.

to inspect the performance of auditors and issue reports on those inspections.

These developments have had a direct impact on the relationship between corporations and their auditors and, in turn, on the attorney-client relationship and the protection of the work product doctrine. The effects identified by the ABA Task Force include: (1) auditor requests for a much broader range of documents in the possession of the audited company, often with limited relevance to the audit itself; (2) auditor requests for documents covered by the protections notwithstanding other possible sources of the relevant information or other potential ways of satisfying audit needs; (3) expansive treatment of documents in the files of an audited company as being audit documentation/work papers even though it is not clear that they actually document the audit process; and (4) efforts to review protected materials not necessary for the audit of the financial statements in order to provide the internal controls certification required under Section 404 of the Sarbanes-Oxley Act. According to the ABA Task Force, auditors have unjustifiably pointed to the requirements of the Public Company Accounting Oversight Board and the Securities and Exchange Commission as supporting these actions.

These regulatory entities could substantially alleviate those issues by making clear what information auditors need, and more importantly do not need, for the proper conduct of the audit. This clarification would reaffirm the importance of the fundamental policy of preserving the attorney-client privilege and work product doctrine as a priority and outline carefully the information that can properly be sought and still be consistent with preservation of these protections.

The task force recommends the Board of Governors approve Resolution 3 supporting the preservation of the attorney-client privilege and work product doctrine with respect to audits of company financial statements. Further, the task force endorses the ABA's Report on Resolution 302A.

The Specter Legislation

On January 4, 2007, Sen. Arlen Specter (R-PA) introduced S. 186, the Attorney-Client Privilege Protection Act of 2007.[13] As stated in the bill, the purpose of the act is to “place on each [federal] agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such organization.” The “Specter Legislation” prohibits any agent or lawyer of the U.S. government from demanding any company or other organization to disclose information protected by the attorney-client privilege or work product doctrine. It also prohibits an agent or lawyer of the U.S. government from conditioning a charging decision or a determination of cooperation on the following: (1) any valid assertion of the attorney-client privilege; (2) the provision of counsel or legal fees to an employee of the organization; (3) entering into a joint defense, information-sharing or common interest agreement with an employee; (4) sharing information relevant to the investigation with an employee; or (5) failing to terminate or sanction an employee because of a decision by the employee to exercise legal protections.

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13 *See*, S.186 at Attachment 7.

The bill does not prohibit an agent or attorney of the U.S. government from requesting or seeking any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine. Further, organizations are not prohibited from making a voluntary and unsolicited offer to share the internal investigations of the organization. The ABA is encouraging the passage of the Specter Legislation, or other similar corrective legislation, as soon as possible.

The task force believes that the only effective and nationally uniform way to accomplish the goals of Resolution 1 (ABA's Resolution 111) on the preservation of the attorney-client privilege and the work-product doctrine is for Congress to pass legislation, such as the Specter Legislation, to prohibit the demand of the waiver. Although the McNulty Memorandum represents a good faith attempt to cut back on the practice of federal prosecutors to seek waivers of the attorney-client and work-product protections, it nevertheless leaves in place and institutionalizes the authority to permit such waivers. The possibility that a waiver may be sought, even if not routinely practiced, creates the practical real-world risk that a waiver may be sought in any given investigation, thereby preventing the attorney and the corporate client from engaging in a full and candid confidential relationship truly free of the risks of disclosure. A corporate client cannot have a full and candid discussion with its lawyer, if the possibility exists, however remote, that the client may one day be compelled to deputize its lawyer to reveal the "confidential" discussions.

Congress should pass legislation only in those necessary circumstances

where self-regulation or state laws are truly inadequate. Our federal system works best when Congress enacts as few statutes as possible, leaving the regulation of the conduct of its citizens first to self-regulation and next to the local and state governments. When the conduct to be regulated is the conduct of the federal government, then Congress has the responsibility to ensure that the federal government acts in a manner that promotes compliance with the Constitution, federal laws and the public policy objectives of those laws, including, if necessary, passing legislation that promotes such compliance.

If the Board of Governors adopts Resolution 1, the question it must then address is: what should The Florida Bar do to ensure that the principles and goals of Resolution 1 become a reality, not just aspirational goals on a paper resolution – well-meaning - but of no practical effect? Resolution 1 is laudable, but it, by itself, lacks any enforcement mechanism.

Because the practice of seeking waivers extends through many federal agencies and departments throughout the country, and is not just limited to the Department of Justice, federal legislation, such as the Specter Legislation, is the only truly effective way to ensure the attainment of the principles and goals of Resolution 1. The federal government must be prohibited, without exception, from demanding or requesting the disclosure of any communication protected by the attorney-client privilege and the work-product doctrine.

Without comprehensive legislation, the goals of Resolution 1 will be undermined even in the limited circumstances contemplated by the McNulty Memorandum, as the federal government will still be empowered with the authority to seek a waiver, thus leaving intact the practical real-world risk that

the waiver will be sought in any given case. In fact, the McNulty Memorandum, however well intended, institutionalizes and legitimizes the practice of seeking a waiver as a valid law enforcement tool. There can be no doubt that the driving force behind the McNulty Memorandum was to preserve the practice of seeking a waiver from the onslaught of the Specter Legislation. By seeming to act in a restrained and modest manner, the McNulty Memorandum sought to preserve the waiver from its extinction as a legitimate law enforcement tool. The adverse practical consequences of the waiver, nonetheless, remain just as real, even if the waiver appears to have been placed in remission.

Under the reality of the McNulty Memorandum, a lawyer advising a corporate client in an internal investigation may forgo exploring certain leads or conducting certain interviews because of the real risk that it could discover information which one day may be demanded by the federal government. Likewise, the lawyer conducting an internal investigation will take steps to safeguard against creating any document that contains a confidential communication with the corporate client, whether such document contains advice, factual recitations, or summaries of witness statements. The risk that such a document could be demanded or requested by the federal government, even in the limited circumstances described in the McNulty Memorandum, creates a real and unnecessary risk of its potential disclosure. The only sure way to avoid disclosing such a document is to avoid creating it in the first place.

In today's complex business and legal environment involving multi-national commerce, outside counsel brought in to perform an internal

investigation for a corporation, in order to be effective, thorough and careful, must have the freedom to conduct a full investigation without any fear of what may be uncovered. Counsel must also have the freedom to communicate their findings and recommendations completely, without inhibition and in writing, where they can be reviewed by not only the general counsel and the chief executive officer but, if necessary, by members of the audit committee of the board of directors and other board members. Clients must also have the comfort of knowing that their communications with their counsel will remain confidential and not be subject to a waiver demand by the government. This practice promotes compliance with the law as it ensures a full and candid discussion between the client and the lawyer for the purpose of seeking and obtaining legal advice. This practice is consistent with the principles and goals of Resolution 1 (*i.e*, promoting compliance with the law through effective and confidential counseling, ensuring effective advocacy for the client, ensuring access to justice, and promoting the proper and efficient functioning of the American adversary system of justice). The McNulty Memorandum, however, undermines these "best practices" by infringing on a client's ability to discuss their legal matters fully and candidly with their counsel. This serious infringement on the attorney-client relationship does not promote compliance with the law through effective counseling, the first goal of Resolution 1.

It is debatable the extent to which the loss of the waiver, as one law enforcement tool among others, will seriously impact the government's ability to investigate and prosecute cases, particularly those committed by large corporate violators. To some extent, one's view on this issue depends on which side of a courtroom one sits. Nonetheless, the task force accepts that some cases may be impacted if the government cannot demand a waiver of

confidential attorney-client and work-product communications and documents; however, corporations will retain the right to waive the privilege voluntarily without a request by the government, and the government still has powerful investigative tools at its disposal. Professional law enforcement has been very effective historically in investigating and prosecuting complex corporate crimes using traditional and sophisticated law enforcement tools and methods that did not include the practice of demanding the waiver of confidential information and documents protected by the attorney-client privilege and the work-product doctrine. In the task force's opinion, the loss of the waiver tool will not have a serious impact on effective law enforcement.

Ultimately, the decision to prohibit the waiver will come down to a public policy choice, balancing the costs and benefits. Reasonable people will differ with well-founded and strongly held opinions on this issue, and it will up to our elected public officials to make this choice. The policy choice should tip in favor of attaining the goals and principles enumerated in Resolution 1: promoting compliance with the law through effective and confidential counseling, ensuring effective advocacy for the client, ensuring access to justice, and promoting the proper and efficient functioning of the American adversary system of justice. The only effective and nationally uniform way to truly accomplish the goals of Resolution 1 is for Congress to pass legislation, such as the Specter Legislation, to prohibit the demand of the waiver.

The task force recommends that the Board of Governors adopt a legislative position in support of S. 186 or similar comprehensive legislation designed to protect the attorney-client privilege, the work product doctrine, and/or employee legal rights from governmental policies that have the effect

of eroding these fundamental legal principles.

Selective Waiver

Proposed Amendment to the Federal Rule of Evidence, Rule 502
Attorney-client Privilege and Work Product; Limitations on Waiver
* * * * * *

(c) Selective Waiver. - In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection -- when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority -- does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local governmental agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule, limits or expands the authority of a governmental agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.

In January 2006, the Chairman of the House Judiciary Committee requested that the Judicial Conference of the United States address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. In response, the conference's Advisory Committee on Evidence Rules considered the issues and proposed Rule of Evidence 502 which included a provision on selective waiver.[14] The concept of selective waiver would allow disclosure of protected information to governmental enforcement agencies in the course of an investigation without it constituting a general waiver of the attorney-client privilege or work product protection as to non-governmental persons or entities. Although the advisory committee did not take a position on the merits of the issue, the selective

14 *See,* Memorandum from Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure (May 15, 2006) at Attachment 8.

waiver provision was included in Proposed Rule 502 for the purpose of seeking public comment.

According to the *Report of the Advisory Committee on Evidence Rules*, "[c]ourts are in conflict over whether disclosure of privileged or protected information to a governmental agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected information to a governmental agency constitutes a waiver for all purposes and to all parties. *See, e.g. In re Qwest Communications Intern. Inc., 450 F.3d 1179 (10th Cir. 2006); In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). A few courts have held that the disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F. 2d 596 (8th Cir. 1977.) Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the governmental agency. *See,* e.g., *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). The rule rectifies this conflict. *See Committee Note*, Subdivision (c), p. 12.

The Advisory Committee on Evidence Rules received comment on Proposed 502, including the selective waiver provision. Ultimately, the Committee voted to excise the selective waiver provision from the proposal rule. *See, Final Version, Rule 502*, April 13, 2007.

There are strong sentiments on both sides of the selective waiver issue. Some argue that the selective waiver issue would provide some protection for those parties that have had counsel conduct internal investigations and chosen to disclose the protected results of those investigations by: (1) recognizing that government disclosures are inherently non-voluntary; (2) preserving the attorney-client privilege and work product doctrine against subsequent disclosures to third parties; and (3) offering a middle ground between those who would advocate total waiver in all circumstances and those who would advocate excluding waivers of privilege from the government's measure of an organization's cooperation. Others argue that selective waiver would only solidify the government's expectation of waiver as a condition of cooperation and will have the unintended effect of inhibiting fact-finding in the corporate setting.

This task force considered the issue of selective waiver in light of the proposed provision in 502. At issue was whether the task force should recommend to the Board of Governors that it support changes to either rules or statutes in order to incorporate the selective provision concept. In light of the complicated and potentially divisive nature of the selective waiver concept, the task force recommends that the Board of Governors make no proposal to amend 90.502 of the Evidence Code to include a selective waiver provision at this time.

Inadvertent Waiver

Discovery has always posed the risk of the inadvertent production of privileged communications and material protected by the work product

doctrine. With the advent of electronic discovery, the complexity of cases, and the significant volumes of documents involved, the problem has become more acute. Furthermore, the problem is exacerbated by the absence of consistent rules and procedures to deal with inadvertent production of protected material.

Faced with the recurring issue of inadvertent disclosures, courts have developed three general approaches to the problem. *See generally, Abamar Housing and Development Inc. v. Lisa Kaly Lady Decor, Inc.* 698 So.2d 276 (Fla. 3d DCA 1997) (discussing case law). First, some hold that an inadvertent disclosure does not waive a claim of privilege, reasoning that a truly inadvertent disclosure does not demonstrate the intent required for a true waiver by the client. At least one state has adopted this "no waiver" approach by rule. *See,* Tex. R. Civ. P. 193.3(d) (production of material without intending to waive a claim of privilege does not waive the claim if the party amends its discovery responses to assert the privilege within ten days of discovering that the production was made).

Second, a few courts take the opposite view, holding that even an inadvertent disclosure waives any protection for the materials disclosed. The finding of waiver is an automatic and necessary result of the materials having been disclosed to an opposing party. *See*, *Georgetown Manor, Inc. v. Ethan Allen, Inc.* 753 F. Supp. 936 (S.D. Fla. 1991).

Third, most courts consider all relevant circumstances in determining whether an inadvertent disclosure should result in a waiver. These courts generally employ a multi-factor analysis that considers: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2)

the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosures; and (5) whether the interests of justice would be served by relieving the party of its error. *See, Abamar Housing and Development Inc. v. Lisa Daly Lady Decor, Inc.* 698 So, 2d 276 (Fla. 3d DCA 1997); *General Motors Corporation v. Robert McGee,* 837 So. 2d 1010 (Fla. 4th DCA 2003); *Richar Jenney v. Airdata Winman Inc.* 846 So, 2d 664 (Fla. 2nd DCA 2003).

The Federal Rules of Civil Procedure establish a procedure for the court to resolve claims of privilege after documents have been produced. Under Fed. R. Civ. P. 26(b)(5)(B), a party who receives notice that the producing party is asserting a claim of privilege must "promptly return, sequester or destroy the specified information and any copies and may not use or disclose the information until the claim is resolved." A receiving party may then "promptly present the information to the court under seal for a determination of the claim." If the receiving party disclosed the information before being notified, "it must take reasonable steps to retrieve it" and the producing party "must preserve the information until the claim is resolved." The rule, however, does not address whether the privilege or work product protection that is asserted after production has been waived by the inadvertent disclosure.

The ABA has adopted a recommendation that consistent rules be established throughout the federal, state and territorial courts to address this issue. Specifically, the ABA in its Report to Recommendation 120D suggests that relevant Federal Rules of Evidence and/or Federal Rules of Civil Procedure, and state rules be adopted or amended "to provide that a disclosing party may reassert its privileges by promptly notifying the other

parties of the inadvertence of the disclosure and the privileges asserted. On the receipt of this notice, the receiving parties must then promptly safeguard and make no further use of the inadvertently disclosed materials, but with the option of being able to then challenge the applicability of the privilege, the inadvertence of the disclosure, the timeliness of the notice or the waiver of the privilege based on specified relevant factors."[15] Proposed amendments to the Federal Rules of Evidence are currently being considered that would state that an inadvertent disclosure does not constitute a waiver.[16]

The task force believes that the disclosure should not ordinarily be deemed to waive the privilege unless the waiver was knowing and voluntary. The attorney-client privilege and the work-product doctrine are too important to the legal system to permit an inadvertent act from overriding them. There should be a presumption against waiver, and the multi-factor approach described below should be used in deciding whether there has been a waiver. Consistent rules and procedures should be established to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine.

In that vein, the task force recommends that the concepts contained in ABA Recommendation 120D on inadvertent waiver be adopted by the Board of Governors and that the Board refer the issue to the Florida Bar Civil Procedure Rules Committee and the Florida Bar Code and Rules of Evidence

15 ABA Recommendation 120D and Report, Attachment 9, at p. 3.

16 (b) Inadvertent disclosure. - If the disclosure is made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if : (1) the disclosure is inadvertent; (2) the holder of the privilege or work-product protection took reasonable steps to prevent disclosure; and (3) the holder

Committee for the drafting of appropriate rules in line with the concepts. The concepts approved by the task force are:

> (1) A producing party should be required to raise the protected status of inadvertently disclosed materials within a specified period of days of actually discovering the inadvertent disclosure by giving notice to the other parties and amending its discovery responses to identify the materials. The period should commence when the party actually discovers the disclosure has been made, not from when the material was produced.
>
> (2) A party receiving notice that any inadvertently disclosed materials have been produced to it should be required to promptly return, sequester or destroy the specified materials and any copies and may not use or disclose the materials until the issue is resolved.
>
> (3) Specific grounds for testing the inadvertent disclosure should be set forth and should include the following general provisions:
>
> (a) The receiving party should be allowed to challenge the disclosing party's claim that the material is protected.
>
> (b) The receiving party should be allowed to challenge the timeliness of the producing party's notice recalling the material claimed to be protected.
>
> (c) The receiving party should be allowed to assert that the circumstances surrounding the production or disclosure warrant a finding that the disclosing party has waived any claim of that the material is protected.
>
> (4) There should be a presumption against waiver. In deciding whether the presumption has been overcome, the court should apply the multi-factor analysis followed by the majority of federal courts and many state courts that assesses (a) the reasonableness of the precautions taken to prevent inadvertent disclosure; (b) the scope of discovery; (c) the extent of the

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took reasonable and prompt steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

disclosure; and (d) whether the interests of justice would be served by relieving the party of its error.

Proposed Rule 4-3.8(e)

PROPOSED RULE 4-3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

*   *   *

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege; and

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution.

The relevant portion of the proposed Comment provides:
"Subdivision (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client relationship.

Proposed rule 4-3.8(e) is a referral from the Board of Governors. The proposed rule resulted from the work of The Florida Bar's Special Committee to Review the American Bar Association Model Rules 2002. The special committee was created to study changes in the ABA's Model Rules of Professional Conduct and compare them with the existing Rules Regulating The Florida Bar. After completing its study, the special committee made recommendations to the Board of Governors as to whether the changes made to the model rules should be adopted by Florida. The ABA made only minor changes to Model Rule 3.8, Special Responsibilities of Prosecutors, but there

were already significant differences between it and Florida's counterpart 4-3.8. The special committee recommended that Florida's rule be changed to encompass some, but not all, of the concepts addressed in the model rule. The proposed change to the rule would prohibit a prosecutor from issuing a subpoena to a lawyer in a proceeding to testify about a client unless the information is not privileged and is necessary.

The Supreme Court of Florida declined to adopt the changes to Rule 4-3.8(e) after state and federal prosecutors expressed concerns, but directed the bar to study the issue further. In the letter of referral from the Court, the following statements are made:

> The proposal appeared to create an exclusive self-exemption for the legal profession from the duty shared by most citizens, which is to serve as a witness when necessary…. Also, the search for justice requires the investigation of criminal allegations; thus, why should attorneys be almost automatically exempt from this aspect of the criminal justice system. If an attorney is called to provide information that she believes is privileged, there is established law to deal with the situation….Further, the proposal's exemption for the legal profession may be inconsistent with case law. *See*, *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991); *Stern v. U.S. District Court*, 214 F.3d 4 (1st Cir. 2000).[17]

After study, the Criminal Law Section Executive Council voted 11-9 (2 abstentions) that the bar not recommend adoption of the proposed amendments. The Criminal Law Section report and recommendation were

17 *See,* Attachment 10.

referred for review to The Florida Bar Board of Governors Disciplinary Procedure Committee. The Disciplinary Procedure Committee voted to refer the issue to this task force for review and a recommendation to the Board of Governors.

The task force recommends that the Board of Governors not pursue amendments to Rule 4-3.8. First, a review of the record from the 2002 special committee reflects that the special committee originally approved adding Rule 4-3.8 as part of a general policy of favoring consistency with the ABA Model Rules unless there was a clear Florida policy reason to the contrary. Thus, the special committee's recommendation cannot be construed as a strong endorsement of the proposed rule's content. Two members of that special committee who now serve on the task force have confirmed this conclusion.

Second, a survey of how other states have addressed this issue demonstrates that there is no national consensus supporting adoption of Rule 4-3.8. Approximately half of the states have no rule on the subject, and about half have either the ABA model or some variation of the ABA model rule on the subpoena issue.

Finally, regarding the inquiry from the Supreme Court of Florida, the task force is unable to identify any strong justification to pursue the rule. There appears to be limited support for it among the Criminal Law Section or other segments of the bar. Furthermore, the task force is confident that other ethics rules, such as 4-3.4 and 4-8.4(d), could appropriately address prosecutorial abuse of the subpoena power.

ABA Model Rule 3.4(g)

One of the proposals considered by the ABA's Attorney-Client Privilege Task Force with respect to the attorney-client privilege waiver issue is an amendment to ABA Model Rule 3.4(g).[18] The amendment would prohibit government lawyers from requesting waivers of the attorney-client privilege and work product protection as a condition for assessing a party's cooperation with the government in a criminal, civil, or regulatory enforcement investigation. The ABA task force circulated the proposal and solicited comment on the proposed rule and received three responses - from the ABA Ethics Committee, the Association of Professional Responsibility Lawyers, and the ABA Antitrust Law Section - all of which were philosophically opposed to the rule. Although expressing support for the task force's work and the current ABA policies on attorney-client privilege, the opponents of the proposed rule have offered that the issue of potential prosecutor abuse would be more effectively and appropriately addressed by legislation than an ethics rule. In light of the comment in opposition, the ABA has tabled the proposal.

It is the position of this task force that a change to the rules of professional conduct is not the preferred way to address the attorney-client privilege waiver issue. A concern of the task force is that rules of professional conduct typically are not written to address conduct that is so narrow in context. The proposed rule could be used as a way to prevent legitimate prosecutorial activity. For example, a corporate defendant might conclude that a privilege waiver is advantageous, but the prosecutor might be hesitant

18 *See,* Attachment 11.

to agree to the waiver for fear of violating a rule. It is problematic in that the proposed rule only addresses attorneys representing the government, and if the behavior is deemed to be inherently unethical, the rule should be written to cover all situations, not only those involving the government. In general, rules written to address a very specific issue often have unintended consequences.

The task force recommends to the Board of Governors that no changes be made to the ethics rules to address the issue of coerced waiver. The issue is better addressed by providing support to the federal bill and proposing changes to substantive laws and other rules.

Draft Expert Reports and Communications Between An Attorney and a Testifying Expert

One of the issues related to the waiver of the attorney-client privilege and work product doctrine has to do with expert witness discovery. According to the ABA's report on this issue, the law in the federal courts and the state courts is "uncertain and varied. Many federal courts require the production of all draft reports, the expert's handwritten notes and all attorney-expert communications. A few judges issue early case management orders to require the preservation of all expert drafts and other work product materials to counter the practice of experts who avoid generating draft reports or discard them in the ordinary course."[19] Other courts hold that the draft reports and communications are work product and not discoverable. Some judges have individual local rules with different requirements. The practice among the states varies as well.[20]

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19 *See*, ABA Recommendation 120A and Report , Attachment 12, at p. 2.
20 *Id*.

It is the ABA's contention that counsel and experts should be subjected to consistent rules and court expectations around the country. As a result, the ABA adopted policy on this issue in the form of Recommendation 120A. The policy recommends that "federal and state rules be adopted or amended, consistent with American Bar Association policy, to protect from discovery draft expert reports and attorney-expert communications that are an integral part of the collaborative process in preparing an expert's report. Although this might bar opposing counsel from inquiring into an expert's preliminary thought processes, we believe that the adverse consequences of allowing inquiry into these issues significantly outweigh their benefits." [21]

The Arkansas Bar Task Force on Attorney-Client Privilege also recommended a resolution that tracked ABA Recommendation 120A. In explaining its reasoning, the task force report states that "the collaborative process between attorneys and experts should be protected and governed by consistent rules. An attorney's mental impressions, theories, and strategies constitute archetypal work product that has been long protected from discovery. Its disclosure should not be required when it has been conveyed to a testifying expert unless his or her testimony relies on the information. *See Note, Discoverability of Opinion Work Product Materials Provided to Testifying Experts,* 32 Ind. L. Rev. 481, 503 (1999) (testifying experts "are part of a party's litigation team," and communication between counsel and expert "are often essential to the understanding and proper functioning of both, and are therefore crucial to the prosecution or defense of the case".)"[22]

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21 *Id.*
22 Report of the Arkansas Task Force on Attorney-Client Privilege, Nov. 22, 2006, at p.12.

The ABA, in its report, lists seven reasons why federal and state rules should be amended or adopted to protect draft expert reports and attorney-expert communications in preparing a draft expert's report. First, the policy underlying the work-product doctrine is that counsel should be free to explore different theories and options in preparing his or her case. In other words, public policy favors encouraging a collaborative effort between expert and attorney and a disclosure rule hinders that effort. Second, the current version of the rule hampers an expert's ability to arrive at a carefully considered opinion by testing different hypotheses, permutations and calculations. Third, there is no evidence, empirical or otherwise, that disclosure of preliminary analyses and attorney-expert communications improves the quality of justice. Fourth, because of uncertainty attached to the discoverability of drafts and the expert's mental processes - and the now-universal ability to track editorial changes in a word processing program - lawyers and experts typically avoid "creating tracks" or producing discoverable tracks and attorney-expert communications that the opposing side can use in attaching the report. Fifth, a disclosure requirement imposes unnecessary costs on the litigation process and advantages the well-heeled litigant who can afford two experts. Sixth, experienced counsel are simply stipulating around the current version of the rules by agreeing to exempt their case from the requirements to produce draft reports and attorney-expert communications. Lastly, some states have either not adopted the federal rule or are now adopting rules that depart from it and keep preliminary drafts and attorney-expert communications from being discoverable.

In its consideration of these matters, this task force reviewed the reports and recommendations from the ABA and from Arkansas and the applicable rules, but determined that this group is not in the position to adequately and fully address this topic. The task force determined that issues related to the protection from disclosure of draft expert reports and attorney communications with experts, and the need for any rule changes in this regard, should be considered by the Florida Bar Civil Rules Committee and the Florida Bar Code and Rules of Evidence Committee. Accordingly, the task force recommends that the issue of whether state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert be referred to the Florida Bar Civil Procedure Rules Committee and the Florida Bar Code and Rules of Evidence Committee for review and consideration.

The “Firewall Proposal”

The “Firewall Proposal” allows companies to make a “covered disclosure” that would constitute a waiver as to that document to the extent required under applicable law, but would not constitute waiver as to any other communications or documents that remain undisclosed.[27] In other words, organizations could, under the firewall proposal, provide summaries of their internal investigations to federal government investigators without waiving the privilege as to underlying or related documents. The proposal was developed by the ABA Task Force on Attorney-Client Privilege after it recognized the uncertainty regarding whether a purely factual report to an enforcement

27 The "Firewall Provision" is described in a February 15, 2007 letter from R. William Ide, Chair of the ABA Task

authority of the results of an investigation could constitute a general waiver as to the underlying documents and communications relating to the same subject matter. The "Firewall Proposal" has been considered as a possible addition to the Specter Legislation or similar comprehensive legislation on the attorney-client privilege.

The "Firewall Proposal" has appeal in that it might serve to limit voluntary disclosures only to intended communications and documents without creating a waiver to unintended communications and documents. However, the unintended consequence of the "Firewall Proposal" is that it may serve as an incentive for the government to obtain (through a "suggestion") delivery of privileged information in a "covered disclosure" and use that as a test for assessing "cooperation." Section 3014 (d) of the Specter Legislation provides sufficient protection for the voluntary disclosure of protected information without creating unintended adverse consequences.

Although the "Firewall Proposal" seems well-intended, in that it appears to give explicit statutory protection to undisclosed communications and documents from an unintended waiver arising from a covered disclosure, the consequences of this well-intended provision may undermine the protections of the Specter Legislation. The proposal provides the opportunity to legalize a "suggestion" by the government for the delivery of information in a "covered disclosure" and use compliance with that "suggestion" as a test for assessing "cooperation." No improper motive is cast to a government agent or prosecutor who would use such a "suggestion," as it appears the "Firewall

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Force on Attorney-Client Privilege to the Honorable Peter G. McCabe, at Attachment 13.

Proposal" would make it a legitimate law enforcement tool available to all prosecutors and agents.

The ABA is still considering the issue of the "Firewall Proposal" as there is continuing discussion and some disagreement among coalition members with regard to the desirability of a firewall provision. Although the task force's Waiver Subcommittee unanimously voted to make a recommendation against the "Firewall Proposal," at this time the task force requests no action by the Board of Governors on the "Firewall Proposal" so that the ABA and the coalition members can have an opportunity to come to a consensus on this issue.

IX. Conclusion

The attorney-client privilege, as well as the work product doctrine, serve a crucial function in our system of justice and provide confidentiality that fosters compliance with the law and protection of client interests. The work of the task force is meant to preserve and strengthen both. The task force requests that the Board of Governors accept this Interim Report and adopt the proposed resolutions and recommendations.

Respectfully submitted,

Marcos Daniel Jimenez
Chair
Attorney Client Privilege Task Force