### Letters to the Department of Justice

In 2006, the ABA used its new policy to lobby for reforms to the Thompson Memo. In May, then-ABA President Michael Greco sent a letter to Attorney General Alberto Gonzales voicing the ABA's concern over the Thompson Memo guidelines. He urged the Department to consider modifying its "internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product privilege protections as a condition for receiving cooperation credit during investigations." Greco also criticized an October 2005 memo released by then-Acting Deputy Attorney General Robert McCallum to all United States Attorneys and Department Component Heads instructing them to adopt "a written waiver review process for your district or component." Greco warned that this memo "likely will result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver."

Greco also discussed the ABA's concern that the government waiver policies would weaken companies' internal compliance programs. According to Greco, the waiver policies "discourage entities from consulting with their lawyers…and conducting internal investigations designed to quickly detect and remedy misconduct."

Greco outlined three suggestions that the ABA Task Force on Attorney-Client Privilege and its coalition partners proposed to remedy the problems. These reforms would: "1) prevent prosecutors from seeking privilege waiver during investigations; 2) specify the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation; and 3) clarify that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation." According to Greco, these changes "would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections."

In July, Attorney General Gonzales responded, reiterating the government's "zero tolerance" policy toward corporate fraud. He emphasized that there were a number of ways in which a corporation could cooperate with the government under the Thompson Memo guidelines. He affirmed, "One such factor,

## Education Department Reviews ABA Law School Accreditation Standards

On December 4, 2006, the Department of Education held a hearing examining the ABA's standards for accrediting law schools. Currently, supreme courts and bar examiners of all 50 states use ABA accreditation approval as a factor in granting law school graduate licenses. The National Advisory Committee on Institutional Quality and Integrity, the Department's appointed panel, considered whether to re-certify the ABA as the official accrediting agency.

The hearing included a heated discussion about the ABA's recently adopted diversity standards. Recently adopted Standard 212 states that each law school "shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity." The Standard also states that "concrete action" should ensure that the faculty and staff are also diverse.

The Interpretations of Standard 212 assert that the rule is consistent with *Grutter v. Bollinger* (2003), which allowed the consideration of race and ethnicity in law school admissions. The Interpretations state that the Standard "does not specify the forms of concrete actions a law school must take" but that the "commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students, and [initiatives] that create a more favorable environment for students from underrepresented groups."

This new diversity Standards has provoked much discussion from critics on both sides of

the legal spectrum (See *ABA Watch,* August 2006 for more details). Last summer, the United States Commission on Civil Rights held hearings to discuss whether the Standards were unconstitutionally required the use of racial preferences in hiring and law school admissions. The National Association of Scholars also asked the Department of Education to not renew the ABA's accrediting power unless the rewritten rules were removed. Other critics, such as the Congressional Black Caucus, maintained that the Standards did not sufficiently support minorities.

These conflicting perspectives were debated at the December Department of Education hearing. Roger Clegg, President and General Counsel for the Center for Equal Opportunity, urged non-renewal of the accrediting authority unless there was formal assurance that the ABA would not coerce law schools into racial, ethnic, and sex discrimination and preferences of any kind. Bill James, an Education Department official, contended that while Standard 212 did not explicitly require quotas, "The language is so vague that they can be reasonably read to require just that."

Members of the ABA defended the rewritten policy, maintaining that they had been defending diversity for over two decades. Some members charged that the attacks on Standard 212 stemmed from an anti-affirmative action agenda. William Rakes, the chairman of the ABA's Section of Legal Education and Admissions to the Bar, countered that the debate had been twisted into "a policy issue relating to affirmative action, relating to diversity." Rakes went on to say that diversity standards should not play a role in whether or not the ABA was reauthorized as an accreditation authority.

The National Advisory Committee on Institutional Quality and Integrity decided to renew the ABA's accreditation powers for 18 months, rather than the usual 5 years. The body also charged the Association with improving its system for accrediting law schools, although the staff did not make any specific requirements regarding the rewritten diversity standard. The next authorization hearings will occur before the end of President Bush's second term.

but certainly not the only factor, can be whether the corporation has waived its attorney-client privilege and work product protections. In such circumstances, corporations are generally represented by sophisticated counsel and make informed and considered decisions on whether to offer such waivers, to agree to make requests for them from prosecutors, or to refuse such requests." He dismissed the idea that prosecutors create a "culture of waiver," contending that waivers were "sought only when based upon a need for timely, complete, and accurate information and only with supervisory approval after a review of the underlying facts and circumstances."

ABA President Karen Mathis later stated that the ABA was "very disappointed" by Gonzales' response.

### Senate Judiciary Committee Hearing

On September 12, 2006, new ABA President Karen Mathis testified before the Senate Judiciary Committee concerning "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations." Mathis reiterated Greco's concerns about the attorney-client privilege and other provisions in the Thompson Memo that erode "employee's constitutional and other legal rights, including the right to effective legal counsel and the right against self-incrimination."

Mathis outlined what many view as the unintended consequences of prosecutorial demands for privilege waiver. First, the ABA contends that waiver policies "resulted routinely in the compelled waiver of attorney-client privilege and work product protections…[T]hese polices have led many prosecutors to pressure companies and other entities to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations." Mathis asserted that the government's threat to label companies as "uncooperative" forces companies to waive when asked to do so. Mathis also discussed the findings of a March 2006 survey of over 1,200 corporate counsel compiled by the Association of Corporation Counsel, the National Association of Criminal Defense Lawyers, and the ABA. Almost 75% of respondents replied that a 'culture of waiver' had developed in which "governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections."

Second, Mathis maintained that these policies "seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public." These requirements serve to discourage