FROM THE

EDITORS

In its mission statement, the American Bar Association declares that it is the "national representative of the legal profession." And, not surprisingly, as the largest professional legal organization in the world, many policy makers, journalists, and ordinary citizens do in fact look to the ABA as a bellwether of the legal profession on matters involving law and the justice system. This is why debate about the work and the activities of the ABA—and the role that it plays in shaping our legal culture—is so very important.

ABA Watch has a very simple purpose—to provide facts and information on the Association, thereby helping readers to assess independently the value of the organization's activities and to decide for themselves what the proper role of the ABA should be in our legal culture. We believe this project is helping to foster a more robust debate about the legal profession and the ABA's role within it, and we invite you to be a part of this exchange by thinking about it and responding to the material contained in this and future issues.

This issue features an interview with Michael Wallace, who was nominated to the United States Court of Appeals for the Fifth Circuit. He discusses his experience being vetted by the ABA Standing Committee on Federal Judiciary. The ABA's Testimony is included. We also discuss the ABA's work promoting the attorney-client privilege and recent developments concerning law school accreditation. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. Please write, call or E-mail:

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ABA Partners with Diverse Coalition In Seeking Reforms to Thompson Memo

The American Bar Association has partnered with a diverse legal coalition to seek reforms to the "Thompson Memo," which outlines corporate prosecution guidelines of criminal offenses. Together with the United States Chamber of Commerce, the American Civil Liberties Union (ACLU), the Association of Corporate Counsel, former senior Department of Justice (DOJ) officials, and the National Association of Criminal Defense Lawyers, the ABA has maintained that provisions of the memo jeopardize the attorney-client privilege. This resulting scrutiny led the Thompson Memo to become the subject of several speeches and hearings in 2006. Despite a few recent revisions, announced by Deputy Attorney General Paul McNulty, the coalition critics are still urging further reforms. In particular, many of these coalition critics are endorsing reform legislation proposed by Senator Arlen Specter. *ABA Watch* examines the recent controversy and the ABA/coalition efforts to urge changes to the Thompson Memo.

Past ABA Activity Regarding A Attorney-Client Privilege

In 2004, the ABA launched a Task Force on Attorney-Client Privilege to "study and address the policies and practices of various federal agencies that have eroded attorney-client privilege and work product protections." The Task Force was organized one year after the January 2003 issuance of the Thompson Memo, which was announced by then-Deputy Attorney General Larry Thompson. The ABA Task Force was directed to consider recent federal amendments to the federal sentencing guidelines and Justice Department actions—including the Thompson Memo—affecting the privilege.

The Task Force's recommendations were unanimously adopted at the ABA's Annual Meeting in 2005. The resolution declared its support for the preservation of the attorney-client privilege and opposed "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." It further "oppose[d] 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."

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

entities from cooperating with their lawyers, impeding the ability of attorneys to comply with the law. Third, Mathis contended that these waiver polices "are likely to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures," including internal investigations. These requirements all serve to "undermine rather than enhance compliance with the law."

Mathis discussed the findings of the ABA Task Force and its collaboration with coalition partners such as the Chamber of Commerce, the Association of Corporate Counsel, and the ACLU. She highlighted the "political and philosophical diversity" of these partners as a reason to give credence to their recommendations. She also maintained that the coalition's suggestions contributed to the U.S. Sentencing Commission decision to reverse unanimously its 2004 privilege waiver amendment. The coalition continues to work together to provoke changes to the Thompson Memo.

The ABA's proposal "would amend the Department's policy by prohibiting prosecutors from seeking privilege waiver during investigations, specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and clarifying that any voluntary waiver of privilege shall be considered when assessing whether the entity provided effective cooperation. This language would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege and work product protections."

In addition to promoting the attorney-client privilege, Mathis also declared, "It is equally important to protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation." Specifically, Mathis criticized the Thompson Memo's provisions encouraging prosecutors to deny cooperation credit to companies that assist or support their "so-called 'culpable employees and agents'" who are under investigation. Mathis outlined in her testimony the reasons why the ABA opposes these provisions. First, the "policy is inconsistent with fundamental legal principles that all prospective defendants…are presumed innocent." Second, "it should be the prerogative of a company to make an independent decision as to whether an employee should be provided defense or not." Third, "these provisions…improperly weaken the entity's ability to help its employees to defend themselves in criminal actions." Fourth, U.S. District Court Judge Lewis A. Kaplan in *U.S. vs. Stein* had already declared several of the provisions questionable. In the decision, Judge Kaplan suggested that these provisions violated the employee's Fifth and Sixth Amendment rights.

Mathis concludes that the ABA's proposed changes "would strike the proper balance between effective law enforcement and the preservation of essential attorney-client, work product, and employee legal protections."

Proposed Changes

On December 12, U.S. Deputy Attorney General Paul McNulty announced in a speech before the Lawyers for Civil Justice meeting that the Department of Justice (DOJ) would be revising some provisions of the Thompson Memo. According to a DOJ press release, "Prosecutors must first establish a legitimate need for privileged information, and that they must then seek approval before they can request it. When federal prosecutors seek privileged attorney-client communications or legal advice from a company, the U.S. Attorney must obtain written approval from the Deputy Attorney General. When prosecutors seek privileged factual information from a company…prosecutors must seek the approval of their U.S. Attorney. The U.S. Attorney must then consult with the Assistant Attorney General of the Criminal Division before approving these requests."

In his speech, McNulty disagreed with the assertion that blanket waivers were routinely sought in the past, contrary to the findings of the March 2006 ABA survey. He affirmed that such attorney-client communications would only be sought in limited occasions, and prosecutors must show a "legitimate need" for such information. However, "this is not to say that if the corporation decides to give us the information, we will not consider it favorably."

With respect to whether the advancement of attorney fees would be considered in corporate prosecutions, McNulty also emphasized that this was only a "rare" consideration. However, revisions to the guidelines would "now generally prohibit prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment. So the guidance generally prohibits consideration of fees, but in those extremely rare cases, fee advancement can be considered where the totality of the circumstances shows that it was intended to impede a government investigation." McNulty asserted, "The revisions in our guidance make sense, while still preserving the Department's right to obtain needed privileged information where appropriate. And they encourage the company's compliance efforts."

Reaction to this announcement was mixed amongst

National Right to Work Legal Defense Foundation Seeks Participation in ABA Labor Conference

Between March 4-7, 2007, the ABA's Labor and Employment Law Section's Committee on Development of the Law Under the National Labor Relations Act will be hosting its Midwinter Meeting in Hawaii. Conference panels will analyze labor court cases, with members of management, unions, and the National Labor Relations Board all represented. Panels at this conference will consider *Heartland Industrial Partners*, *Dana/UAW*, and Section 302 cases, all of which are being litigated by the National Right to Work Legal Defense Foundation (NRTW).

NRTW describes itself as a non-profit organization that provides legal assistance to employees "whose human and civil rights have been violated by compulsory unionism abuses." NRTW leadership maintains that the ABA panels are not balanced. Representatives of management, unions, and the government are represented, but attorneys representing employees, particularly non-union employees, are not included on the panel, and, NRTW contends, this is an altogether different perspective in many of the areas covered by the conference.

Recent correspondence between Stefan Gleason, Vice President of the NRTW Legal Defense Foundation, and W.V. Bernie Siebert, Co-Chairman of the ABA committee, provides some background regarding the composition of NRTW lawyers at the conference. On November 22, Mr. Gleason wrote that the attorneys who worked on these cases would gladly participate in the panels, offering a third perspective that would "enhance members of the coalition opposing the Thompson Memo provisions. Stanton Anderson, Senior Counsel at the U.S. Chamber of Commerce, acknowledged that while the policy contained some improvements, it still did "not adequately protect the right to attorney-client privilege, and unwisely ignores many of the recommendations of former senior Justice Department officials, the ABA, and a massive coalition of some of the nation's most prominent business, legal, and civil rights groups." He called for DOJ to "take its cue" from proposed legislation offered by Senator Arlen Specter calling for reforms.

Karen Mathis offered an even more harshly worded response. The new guidelines "fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations. They are but a modest improvement over the Department's previous policy." In particular, she singled out two of McNulty's provisions. First, she criticized the decision to require a high level Department approval of a waiver request rather than eliminating the practice of waiver. Second, she criticized the policy's lack of protection of employee legal rights as it continued to permit prosecutors to force companies to take punitive actions against employees before guilt was established. Mathis also endorsed the Specter bill and urged the Senate to consider the legislation in January.

Recent Developments

In recent months, scrutiny of the Memo has continued, extending even to the Department of Justice officials who originally formulated the policy. At a November panel discussion co-sponsored by the Heritage Foundation and the Federalist Society, Larry Thompson defended the goal of the policy, while also questioning whether prosecutors may have become overly aggressive in persuading businesses to cooperate with prosecutors. He suggested that the instances in which prosecutors should ask companies to waive the attorney-client privilege should be "extremely limited." Thompson suggested that "appropriate revisions" should be considered.

In December, Senator Specter introduced legislation to limit the impact of the Thompson Memo. The bill would prohibit prosecutors from offering a waiver to determine the level of cooperation of companies under investigation. In January, at the start of the 110th Congress, Senator Specter reintroduced the "Attorney-Client Privilege Protection Act of 2007" (S. 186). In his floor statement reintroducing the bill, Senator Specter stated that McNulty's proposed revisions did not go far enough in deterring prosecutors from requesting privileged attorney-client communication.