

**Criminal Law and Individual Rights Section  
Summary**

**Statement Concerning the Department of Justice's Policies With Respect to Corporate  
Attorney-Client Privilege and the Right to Counsel as Reflected in the McNulty  
Memorandum by the Criminal Law and Individual Rights Section**

The Criminal Law and Individual Rights Section of the District of Columbia Bar joins the many other agencies and organizations that have expressed strong concern about language in the United States Department of Justice's 2006 McNulty Memorandum and 2003 Thompson Memorandum – and other related federal governmental policies and practices – that have seriously eroded the attorney-client privilege, the work product doctrine, and the right to counsel. The Department of Justice seeks the laudable goal of vigorous and effective enforcement of the law, but when it pressures a company to waive its privileges or to refrain from paying the attorneys' fees of its employees, that threatens fundamental rights under the American criminal justice system and reduces the likelihood that corporations will engage in effective compliance programs. The Criminal Law and Individual Rights Section supports legislation (such as S.186 in the Senate and H.R. 3013 in the House) that would force DOJ to abandon its policies that threaten these fundamental rights.

**Statement Concerning the Department of Justice's Policies With Respect to Corporate Attorney-Client Privilege and the Right to Counsel as Reflected in the McNulty Memorandum by the Criminal Law and Individual Rights Section**

*Note: The views expressed in these comments are those of the Criminal Law and Individual Rights Section of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.*

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The attorney-client privilege and the constitutional right of the accused to prepare an adequate legal defense are two of the cornerstones of the American criminal justice system. The attorney-client privilege is founded on the centuries-old principle that people and organizations will be encouraged to seek guidance from a lawyer about how to comply with the law if they know the confidentiality of their consultation is protected from disclosure. In addition, when an employee of a company—or any individual, for that matter—is accused of wrongdoing, the U.S. Constitution guarantees them certain fundamental rights, including a presumption of innocence,

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<sup>1</sup> The elected members of the Steering Committee of the Criminal Law and Individual Rights Section of the District of Columbia Bar are Ashley Bailey, David Deitch, Todd Edelman, Sarah Gill, Marlon Griffith, Jonathan Jeffress, Mary Kennedy, Amit Mehta, and Seth Rosenthal.

a Sixth Amendment right to effective legal counsel, and a Fifth Amendment right against self-incrimination.

Federal prosecutors investigating allegations of corporate wrongdoing wield enormous power, and they need that power to fulfill their responsibility to protect us. Unfortunately, in their pursuit of this laudable goal, the U.S. Justice Department and other agencies are seriously eroding the attorney-client privilege and the right to counsel by pressuring companies to waive the privilege, not pay their employees' legal fees, or fire them for asserting their Fifth Amendment rights during investigations in return for cooperation credit.

The view that DOJ has gone too far with these policies is not only held by companies and defense lawyers who believe that our government has put the attorney-client privilege and the right to counsel at risk. Nine of the highest ranking former officials in the U.S. Department of Justice recently went on record supporting that view in a letter to the members of the House and Senate Judiciary Committees. In explaining why they support H.R. 3013 and S. 186 to reverse these heavy-handed agency policies, they said Congress needs to restore the proper balance between the tools government uses to fight corporate crime and the rights of individual and corporate citizens. The former Justice Department officials—attorneys general, deputy attorneys general and solicitors general—represent decades of collective experience leading the department. They, more than anyone else, know what tools prosecutors really need to enforce the law effectively without trampling the rights of the accused.


The Criminal Law and Individual Rights Section agrees with these former officials that policies intended to fight crime by coercing businesses to waive their attorney-client privilege and the related protections accorded to the work product of their lawyers have had the unintended consequence of actually undermining corporate efforts to comply with the law. This

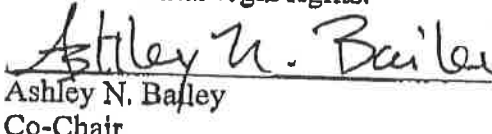
is because government pressure to waive those rights discourages businesses from seeking the legal advice they need to ensure compliance with the law. Likewise, corporations are far less likely to conduct their own thorough internal investigations, even when their suspicions of possible wrongdoing are aroused, if they know the results of those investigations may wind up in the hands of the government.

These policies also force employers to abandon their workers when the government comes knocking. Before granting a company full cooperation credit during an investigation, federal prosecutors now often force the company to take unfair actions against their employees, such as refusing to provide them with legal assistance, not sharing information that the employees need to defend themselves, or firing them if they decline to talk to prosecutors and waive their rights. As one federal judge recently ruled, these policies violate not just the employees' Sixth and Fifth Amendment rights, but also basic notions of fundamental fairness. In the long run, these policies hurt legal compliance efforts as well.

When businesses and their employees do not have access to lawyers to give them guidance, when they fear looking into problems so they can rectify them, and when employees are afraid to trust their employers, wrongdoing persists and businesses fail. And when businesses fail, the entire community suffers.

The Criminal Law and Individual Rights Section joins prominent former officials and many in the legal and business communities in urging members of Congress to vote for legislation such as S. 186 in the Senate and HR 3013 in the House that will restore the proper balance between effective law enforcement and fundamental legal rights.

  
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