

# **PROPOSED RESOLUTION (1) – PRESERVATION OF ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT**

## **Issue**

Should the State Bar of Michigan adopt the following resolution in support of the preservation of the Attorney-Client privilege and attorney work product doctrine?

RESOLVED, that the State Bar of Michigan 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 State Bar of Michigan 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 State Bar of Michigan opposes a 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.

## **Synopsis**

The proposed resolution lays a foundation for the support of the attorney-client privilege and work product doctrine; expresses general opposition to policies, practices and procedures that erode either; and establishes the State Bar in opposition to governmental officials seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage as a routine practice.

## **Background**

The resolution is the majority recommendation of the State Bar's Task Force on Attorney-Client Privilege, and mirrors Resolution 111 adopted by the American Bar Association (ABA) House of Delegates in August 2005 without dissent. The Final Report of the Task Force on Attorney-Client Privilege, including the rationale for the proposals and for the dissenting views of the minority report, is attached.

### **Opposition**

A minority report of the Task Force on Attorney-Client Privilege opposes the adoption of the second and third paragraphs of the resolution as failing to take into account legitimate interests of law enforcement, and for what is perceived as the intimation of the second paragraph that policies such as those expressed in the Department of Justice Thompson and McNulty memoranda do not respect the value of the privilege.

### **Prior Action by Representative Assembly**

None known.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

### **STATE BAR OF MICHIGAN POSITION**

**By vote of the Representative Assembly on September 27, 2007**

The above Resolution should be adopted.

(a) Yes

or

(b) No

## **PROPOSED RESOLUTION (2) – ATTORNEY CLIENT PRIVILEGE/GOVERNMENTAL INVESTIGATION AND PROSECUTION**

### **Issue**

Should the State Bar of Michigan adopt the following resolution opposing the consideration of certain factors implicating the attorney-client privilege in prosecutorial decisions concerning whether an organization has been cooperative in a governmental investigation?

RESOLVED, that the State Bar of Michigan 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.

### **Synopsis**

The proposed resolution is designed to express opposition to prosecutorial policies, practices, and procedures that require a business to deny assistance to an employee, including sharing information with the employee, paying for the employee’s legal representation, or declining to sanction an employee for exercising a 5<sup>th</sup> amendment right against self-incrimination, as a condition for being deemed “cooperative.”

### **Background**

The proposed resolution is the majority recommendation of the State Bar Task Force on Attorney-Client Privilege, and is based on ABA Resolution 302B, adopted unanimously by the ABA House of Delegates in August 2006. The Final Report of the Task Force, including the rationale for the proposal and for the dissenting view of the minority report, is attached.

### **Opposition**

A minority report of the Task Force on Attorney-Client Privilege opposes the adoption of the proposed resolution as overbroad in that it fails to take into account situations in which a corporation's payment of attorneys' fees, retention of culpable employees without sanction, or information sharing are, intended to impede a criminal investigation, or where the corporation is otherwise acting improperly to shield itself and its culpable employees from government scrutiny.

### **Prior Action by Representative Assembly**

None known

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

## **STATE BAR OF MICHIGAN POSITION**

**By vote of the Representative Assembly on September 27, 2007**

The above Resolution should be adopted.

(a) Yes

or

(b) No

## PROPOSED RESOLUTION (3) – DISCOVERY IN CLIENT REPRESENTATION AND MCR 2.302(B)

### Issue

Should the State Bar of Michigan adopt the following resolution calling for an amendment to the Michigan Court Rules restricting the circumstances under which production of information and a lawyer's testimony relating to the lawyer's representation of a client can be compelled?

RESOLVED, that the State Bar of Michigan supports amendment of the Michigan Court Rules (MCR) to restrict the compelled production of information relating to a lawyer's representation of a client, or compelling testimony by a lawyer relating to a representation of a client, except upon a showing of exigent circumstances, or upon a showing of substantial need including exhaustion of efforts to obtain such information from other sources; and mandating the requesting party's payment of the reasonable cost of production and testimony, including the value of any loss of working time; and

FURTHER RESOLVED, that the State Bar of Michigan proposes the amendment of MCR 2.302(B) by adding subsection (B)(5) as follows:

#### (5) Lawyers and Lawyers' Files:

Compelling production of information relating to a lawyer's representation of a client, or compelling testimony by a lawyer relating to a representation of a client, shall not be ordered, except upon a showing of exigent circumstances, or upon a showing of substantial need including exhaustion of efforts to obtain such information from other sources.

The requesting party shall be responsible for payment to the lawyer for the reasonable cost of production and testimony, including the value of any loss of working time.

### Synopsis

The proposed resolution supports an amendment to the Michigan Court Rules to prohibit the compelled production of information or lawyer's testimony related to the lawyer's representation of a client except upon a showing of exigent circumstances or a showing of substantial need after exhaustion of efforts to obtain the information from other sources. The amendment would make the requesting party responsible to the lawyer for the cost of production and testimony.

### **Background**

The proposed resolution is the recommendation of the State Bar's Task Force on Attorney-Client Privilege. The Final Report of the Task Force is attached. The proposed amendment would apply to all actions in Michigan state courts, and would not apply to federal prosecutors or federal court actions.

### **Opposition**

None known.

### **Prior Action by Representative Assembly**

None known.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

### **STATE BAR OF MICHIGAN POSITION**

**By vote of the Representative Assembly on September 27, 2007**

The above Resolution should be adopted.

(a) Yes

or

(b) No

## PROPOSED RESOLUTION (4) – INADVERTENT WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

### Issue

Should the State Bar of Michigan adopt the following resolution concerning inadvertent waiver of the attorney-client privilege?

RESOLVED, that the State Bar of Michigan support the concepts contained in the American Bar Association (ABA) Resolution 120D on inadvertent waiver as adopted and that the issue be referred to the State Bar of Michigan Civil Procedure and Courts Committee for the drafting of appropriate rules in line with those concepts<sup>1</sup>, and report back to the Representative Assembly. The concepts are:

(1) The attorney-client privilege is a fundamental right of all persons and entities, and, absent exigent circumstances, should not be waived by inadvertence.

(2) All lawyers have a duty to assist in the preservation of privilege as a fundamental right of all parties. Thus, all lawyers should be required to raise the protected status of inadvertently disclosed materials promptly after actually discovering the inadvertent disclosure, by giving notice to the other parties, and, where appropriate, amending its discovery responses to identify the materials. The duty of notice upon discovery should not be limited to only the producing party.

(3) A party receiving notice that any inadvertently disclosed materials have been produced should be required to promptly return, sequester or destroy the specified materials and any copies and may not use or disclose the materials to anyone, including that lawyer's client, until the issue is resolved.

(4) 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.

(d) 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 (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the scope

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<sup>1</sup> This analysis should also include consideration of the role of the expense of document review before production, especially in cases involving broad document requests, electronically stored information (EST), and other factors that materially increase the burdens on the producing party.

of discovery; (3) the extent of the disclosure; and (4) whether the interests of justice would be served by relieving the party of its error.

### **Synopsis**

The proposed resolution would adopt the language of a resolution on inadvertent waiver adopted by the ABA in August 2006, and task the State Bar's Civil Procedure and Courts Committee with drafting amendments consistent with the concepts of the resolution and to report back to the Representative Assembly.

### **Background**

The proposed resolution is the recommendation of the State Bar's Task Force on Attorney-Client Privilege. The Final Report of the Task Force is attached.

### **Opposition**

None known.

### **Prior Action by Representative Assembly**

None known

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

## **STATE BAR OF MICHIGAN POSITION**

**By vote of the Representative Assembly on September 27, 2007**

The above Resolution should be adopted.

(a) Yes

or

(b) No



## **PROPOSED RESOLUTION (5) – SELECTIVE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE**

### **Issue**

Should the State Bar of Michigan adopt the following resolution concerning “selective waiver” of the attorney-client privilege?

RESOLVED, that the State Bar of Michigan opposes the concept of "selective waiver" of the attorney-client privilege and work product doctrine; and

FURTHER RESOLVED, that the State Bar of Michigan opposes policies, practices and procedures of governmental bodies that purport to authorize and encourage "selective waiver" of the attorney-client privilege and work product doctrine; and

FURTHER RESOLVED, that the State Bar of Michigan opposes a routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the offering of a purported agreement that the disclosed protected information will not be disclosed to others; and

FURTHER RESOLVED, that the State Bar of Michigan opposes the adoption of proposed Federal Rule of Evidence (FRE) 502(c) incorporating the concept of "selective waiver."

### **Synopsis**

The proposed resolution opposes “selective waiver” of the attorney-client privilege in general, and specifically opposes a proposed amendment of FRE 502(c) incorporating the concept of selective waiver.

### **Background**

The resolution is the majority recommendation of the Task Force on Attorney-Client Privilege. The Task Force’s Final Report, including the rationale for the proposal and for the dissenting view of the minority report, is attached. As described by the minority report of the Task Force on Attorney-Client Privilege, selective waiver would allow a corporation to disclose protected materials to the government, thereby waiving its attorney-client and work product privileges as to the government, without waiving those privileges as to other persons, particularly vendors, shareholders, lenders, and auditors. The Advisory Committee on Evidence Rules, concluding that selective waiver “raised questions that were essentially political in nature,” declined to take a position on an FRE amendment, and

instead submitted its report to Congress along with statutory language to implement selective waiver.

### **Opposition**

A minority report of the Task Force on Attorney-Client Privilege opposes adoption of the resolution, noting that the concept of “selective waiver” advances the interests of law enforcement, and that its effect on the interests protected by the attorney-client and work product privileges of corporations is unclear.

### **Prior Action by Representative Assembly**

None known

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

## **STATE BAR OF MICHIGAN POSITION**

**By vote of the Representative Assembly on September 27, 2007**

The above Resolution should be adopted.

(a) Yes

or

(b) No

**STATE BAR OF MICHIGAN  
TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE**

**FINAL REPORT TO  
STATE BAR OF MICHIGAN  
REPRESENTATIVE ASSEMBLY**

**FROM**

**STATE BAR OF MICHIGAN  
TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE**

**August 17, 2007**

**Submitted by Diane L. Akers and John W. Allen, Co-Chairs  
SBM Task Force on Attorney-Client Privilege  
Submitted for September 27, 2007 Representative Assembly Meeting**

This Final Report was approved by the SBM Task Force on Attorney-Client Privilege on August 17, 2007.

**I. Formation of the Task Force on Attorney-Client Privilege**

The SBM Task Force on Attorney-Client Privilege (“Task Force”) was created on February 2, 2006 to address ongoing developments in the law of attorney-client privilege. In particular, in response to the policy of the United States Department of Justice as described in what is generally referred to as the “Thompson Memo,”<sup>1</sup> a business may feel compelled to waive its attorney-client privilege in order to be deemed to be “cooperating” with law enforcement in the hope that it will avoid criminal indictment or receive more favorable treatment than if it preserved its privilege.

The attorney-client privilege and work product protections confer enormous value on our society. The underlying rationale of the privilege is that legal compliance is enhanced when individuals and businesses are able to seek and rely upon confidential legal advice from their lawyers. Any coerced waiver of the attorney-client privilege or work product protections derogates from a culture of confidential communication, which forms the principal incentive to seek legal advice; therefore, any waiver, especially if initiated by the government, holds a large potential for decreasing legal compliance in general.

Task Force members are: Diane L. Akers, Co-Chair, Bodman LLP, Detroit, who is also Co-Liaison to the ABA Task Force on Attorney-Client Privilege and is Secretary and Council Member of the SBM Business Law Section; John W. Allen, Co-Chair, Varnum Riddering Schmidt & Howlett

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<sup>1</sup> January 20, 2003 memorandum from then-Deputy Attorney General Larry D. Thompson to Heads of Department Components regarding Principles of Federal Prosecution of Business Organizations.

LLP, Kalamazoo, who is also Co-Liaison to the ABA Special Presidential Task Force on Attorney-Client Privilege from the SBM Task Force, and Liaison from the ABA Tort Trial and Insurance Practice Section, where he serves on its Ethics and Professional Responsibility Committee, and on its Governing Council; Samuel C. Damren, Dykema Gossett, Detroit; David C. DuMouchel, Butzel Long, Detroit; Stephen L. Hiyama, Office of the United States Attorney, Detroit; Steven C. Kohl, Warner Norcross & Judd LLP, Southfield, who represents the Environmental Law Section; Martin P. Krohner, Farmington Hills, who is Co-Chair of the SBM Standing Committee on Criminal Jurisprudence and Practice and a member of the Criminal Law Section Council; Robert A Maxwell, Logicalis, Inc., Bloomfield Hills, who represents the Association of Corporate Counsel; Michael W. Puerner, Hastings Mutual Insurance Company, Hastings, who represents the SBM U.S. Courts Committee as a resource as with respect to potential rules changes or matters involving the fair and efficient administration of the federal courts; Steven M. Ribiat, Butzel Long, Bloomfield Hills, who represents the SBM Judicial and professional Ethics Committee; and Eric J. Wexler, General Counsel of Great Lakes Health Plan, Inc., Southfield, who represents the Health Care Law Section. In addition, Dawn M. Evans, SBM Director of Professional Standards, serves as Liaison to the SBM.

## **II. The Task Force's April 2006 Informational Report to the RA and Goals**

The Task Force submitted its Informational Report to the RA on March 13, 2006 for consideration at the RA's meeting on April 29, 2006. The Task Force reviewed the background of waiver issues and the status of various efforts around the country to preserve the privilege. The Task Force established six goals:

- A. Raise awareness of the issues among Michigan lawyers.
- B. Gather information regarding how frequently businesses are being confronted with expressed or implied requests or demands that they waive their attorney-client privilege.
- C. Provide opportunities for education and professional development in representing businesses and others who may need counsel in preparing for and responding to expressed or implied requests for waivers.
- D. Coordinate with other groups around the country who are also involved in similar efforts, including the ABA Task Force and other state bar organizations.
- E. Work with United States Attorneys to ensure that federal prosecutors understand fully the far-reaching effects of a business's waiver of its privilege and, in particular, the ramifications of permitting otherwise privileged information to wind up in the possession of adverse third parties who will use it in litigation against the businesses.
- F. Report to the Representative Assembly on the Task Force's activities.

### III. The Task Force's Activities

#### A. Raising awareness of the issues

The Task Force undertook a number of initiatives designed to raise awareness of the issues among members of the Bar, gather information about waiver issues in Michigan and provide opportunities for education and professional development.

On May 10, 2006, the Task Force presented a panel discussion entitled, "Compelled Waiver of Attorney-Client Privilege for Businesses: Issues and Practices for Corporate Lawyers and their Clients." Speakers included Hon. Paul D. Borman, United States District Court for the Eastern District of Michigan; David F. DuMouchel; Muzette Hill, Ford Motor Company; Paul E. Pelletier, Acting Chief of the Fraud Section of the Criminal Division of the United States Department of Justice from Washington, D.C.; and Stephanie A. Martz, Director, White Collar Crime Project of the National Association of Criminal Defense Lawyers from Washington, D.C. This program, followed by a cocktail reception, was very well-received and about 50 members of the SBM attended.

Task Force members have made presentations to a wide range of local and special interest bar associations including Michigan District Judges' Association, Hispanic Bar Association, Wayne County Probate Bar Association Board of Directors, Downriver Bar Association, Genesee County Bar Association, Isabella County Bar Association, Rochester Bar Association, Livonia Bar Association, Irish-American Lawyers Association, Wayne County Family Law Association, Detroit Metropolitan Bar Association, St. Joseph Bar Association, Oakland County Bar Association Board of Directors, Flint Trial Lawyers, Livingston County Bar Association, Michigan Defense Trial Counsel, Board of Directors of Michigan Referees' Association, Michigan ICLE, Inns of Court (Gerald Ford Chapter), Upper Peninsula Bar Associations, Kalamazoo County Bar Association, and Cooley Law School (Oakland University campus).

Task Force members have also ensured that various Sections and Committees of the SBM have been informed and their input sought. Former SBM President Cranmer formed the Task Force at the joint request of Ms. Akers, who was and is an Officer and Council Member of the Business Law Section, and that Section's former Chairman. The Business Law Section continues to be very interested in waiver issues.

The Task Force established an interactive page on the SBM's web site, at <http://www.michbar.org/generalinfo/attorney-client.cfm>. This page includes background materials, articles and materials written by Task Force members, upcoming events and information about the Task Force.

The *Michigan Bar Journal* published three articles about the Task Force and compelled waiver of attorney-client privilege. In the June 2006 issue, the President's Page was devoted to the Task Force and waiver issues.

Task Force member Samuel C. Damren wrote an article proposing a new ethical rule, Michigan Rule of Professional Conduct 3.4(g), that would prohibit governmental requests for

waivers, “A Proposal to Amend the Rules of Professional Conduct to Prohibit Thompson-Styled Waiver Requests,” published in the October 2006 *Michigan Bar Journal*. Task Force Co-Chair John W. Allen responded to Mr. Damren’s proposal and the November 2006 issue of the *Michigan Bar Journal* contained an article by Mr. Allen entitled, “Protecting the Privilege – MRPC 3.4(g) is NOT the Way.” Task Force member Stephen L. Hiyama also responded to Mr. Damren’s proposal and Mr. Hiyama’s article, “Confusing Prosecutorial Discretion With Ethics: A Misguided Proposal to Amend the Michigan Rules of Professional Conduct,” appeared in the January 2007 *Michigan Bar Journal*. Articles have also appeared in *Crain’s Detroit Business* and the *National Law Journal*.

In addition, Mr. Allen has written a paper that has been useful in Task Force presentations and which is available on the web page, “Assault on the Privilege – You Could be Next.”

In general and especially when the Task Force began its work in early 2006, SBM members who had contact with the Task Force were not aware of the erosion of attorney-client privilege or were not aware of the degree to which the erosion had progressed.

In late 2006 and into 2007, this has been changing, and there have been a number of developments that have received national attention. For example, in November 2006, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2006 (which has been re-introduced in 2007), which would prohibit federal prosecutors from seeking privilege waivers in exchange for more favorable treatment by prosecutors. In December 2006, presumably at least partly in response to Sen. Specter’s bill, Deputy Attorney General Paul J. McNulty issued a memorandum providing further guidance to United States Attorneys when implementing the principles in the Thompson Memo, and the McNulty Memo has received much scrutiny. Whether the McNulty Memo has had or will have any significant effect is widely debated. In response to the McNulty Memo and to provide the DOJ with the opportunity to demonstrate that the culture of waiver would be receding rather than expanding under the McNulty policies, Mr. Damren asked the Task Force to table his proposed amendment to the Michigan Rules of Professional Conduct. There are also a number of efforts to enact rules of evidence that would render inadmissible privileged information given to prosecutors for law enforcement purposes and statutes that would permit regulated entities to disclose privileged information to their regulators without effecting a waiver of the privilege for all purposes.

What has been frequently characterized as the largest criminal tax fraud case in history, which prosecutors brought against certain partners from KPMG has also received a great deal of publicity. In *US v Stein*,<sup>2</sup> the United States District Court for the Southern District of New York held that federal prosecutors violated the Fifth and Sixth Amendment rights of certain former KPMG employees “by causing KPMG – under threat of indictment and destruction of the firm – to depart from its uniform prior practice of paying the legal expenses of KPMG personnel in all cases in which they were named in consequence of their activities on behalf of the firm.”<sup>3</sup> On July 16, 2007, the District Court reaffirmed its ruling that the government violated the defendants’

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<sup>2</sup> *US v Stein*, 435 F Supp 2d 330 (SDNY, 2006).

<sup>3</sup> *US v Stein*, 452 F Supp 2d 230, 237 (SDNY, 2006).

constitutional rights and dismissed the charges against thirteen of the sixteen defendants.<sup>4</sup> Under the Thompson Memo, an employer increases its risk of being indicted if it supports an employee who may be involved in the investigation, even when there has been no determination that the employee was involved in any wrongdoing.

#### B. Gathering information from members of the Bar

All groups with whom Task Force members have met have expressed concern, often serious concern, about the erosion of the privilege, and they have spread the word. Task Force members have received requests for information from many individuals and organizations who heard about the Task Force and waiver issues from others who attended a Task Force presentation and wanted to learn more.

The Task Force did not hear of any specific instances in Michigan in which a federal prosecutor has stated or implied that a business should or must waive its privilege to avoid unfavorable treatment. As noted below, the United States Attorneys for both the Eastern and Western Districts of Michigan have been very open and receptive to the concerns expressed by the Task Force and have demonstrated what the Task Force considers to be responsible approaches to waiver issues.

The Task Force received some anecdotal reports about what some have termed a “culture of waiver,” *i.e.*, an environment where waiver of the privilege is simply expected by governmental regulators or law enforcement officials as a condition of receiving favorable treatment in licensing, funding, or other areas that go to the heart of an entity’s operation and existence, and that go far beyond the scope of investigation and prosecution of federal crimes. Presently, no such entity has been willing to step forward and publicly disclose details of waiver expectations by its regulators. Health care and housing are two areas where the culture of waiver may have gained a stronghold.

#### C. Providing education and professional development opportunities

In addition to raising awareness of the issues and soliciting feedback from members of the SBM, the Task Force has also identified readily available sources of a wealth of information and guidance on preserving the privilege in practice. These include the web sites maintained by the ABA, Association of Corporate Counsel and National Association of Criminal Defense Lawyers.

#### D. Coordinating with other similar groups

Task Force Co-Chairs Diane Akers and John Allen have served as Co-Liaisons to the ABA Task Force, and both have attended meetings of the ABA Task Force. In addition, Ms. Akers and Mr. Allen have ensured that the SBM Task Force is aware of the ABA Task Force’s activities and national developments in the issues. Mr. Allen has also attended ABA Annual Meetings, including the meeting at which the ABA House of Delegates (“HOD”) approved two of the recommendations on which the Task Force based two of its recommendations in this Report. At

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<sup>4</sup> US v Stein, \_\_\_ F Supp 2d \_\_\_ (SDNY, 2007).

those Annual Meetings, Mr. Allen has also met with and briefed the Michigan Delegation to the ABA HOD on these issues.

Many other state bar associations have formed their own groups to address waiver issues and have looked to the SBM Task Force for leadership. The Florida Task Force on Attorney-Client Privilege recently hosted a meeting at which Mr. Allen spoke.

#### E. Working with United States Attorneys

The United States Attorneys for the Eastern and Western Districts of Michigan have met with representatives of the Task Force and have expressed their willingness to maintain an open dialog with the Task Force and their understanding of the seriousness of the concerns about waiver issues. Assistant United States Attorney Stephen Hiyama is a member of the Task Force and has helped to establish a positive working relationship between the Task Force and the United States Attorneys' Offices.

### IV. Preparation of This Final Report

The Task Force prepared a Draft Final Report in June 2007, which was posted on the Task Force's web page and circulated to SBM members and organizations, including those with whom Task Force members have had contact. All SBM members were invited to submit comment on the Draft Report and to attend a meeting to discuss the issues, the Task Force's work and the recommendations to the RA.

#### V. Recommendations to the SBM Representative Assembly

The Task Force requests that the RA consider the following recommendations.

A. Recommendation No. 1 on Preservation of Attorney-Client Privilege. The Task Force requests that SBM **support** Recommendation No. 1, which mirrors ABA Resolution 111 and supports preserving the attorney-client privilege and attorney work product doctrine.

B. Recommendation No. 2 on Employee Rights. The Task Force requests that SBM **support** Recommendation No. 2, which mirrors ABA Resolution 302B. The Task Force believes that law enforcement officials should not require a business to deny assistance to an employee, including sharing information with the employee, paying for the employee's legal counsel and declining to sanction an employee for exercising his or her Fifth Amendment right against self-incrimination, in order to be deemed to be "cooperative" with law enforcement.

C. Recommendation No. 3 on Discovery from Lawyers, Proposed MCR 2.302(B). The Task Force requests that SBM **support** Recommendation No. 3, which is a proposed amendment to Michigan Court Rule 2.302, governing discovery generally. It would restrict the compelled production of information in or relating to a lawyer's client representation file, or compelling testimony by a lawyer relating to a representation of a client, except upon a showing of exigent circumstances, or upon a showing of substantial need including exhaustion of efforts to obtain such



information from other sources; and to provide reasonable reimbursement for reasonable cost of production and testimony, including the value of any loss of working time.

This amendment would apply to all actions in Michigan courts, and would not have any effect on federal prosecutors or federal court actions. It would codify the common law's skepticism toward efforts to take discovery from counsel, using criteria similar to those already applicable to the discovery of work product under MCR 2.302(B)(3), while permitting the discovery in appropriate circumstances and on the showing required in the proposed amendment.

D. Recommendation No. 4 on Inadvertent Waiver. The Task Force recommends that the **SBM support** the concepts contained in ABA Resolution 120D on inadvertent waiver and that the issue be referred to the SBM Civil Procedure and Federal Courts Committees for the drafting of appropriate rules in line with those concepts. The concepts are:

(1) The attorney-client privilege is a fundamental right of all persons and entities and, absent exigent circumstances, should not be waived by inadvertence.

(2) All lawyers have a duty to assist in the preservation of privilege as a protected status of inadvertently disclosed materials promptly after actually discovering the inadvertent disclosure, by giving notice to the other parties and, where appropriate, amending its discovery responses to identify the materials. The duty of notice upon discovery should not be limited to only the producing party.

(3) A party receiving notice that any inadvertently disclosed materials have been produced should be required to promptly return, sequester or destroy the specified materials and any copies and may not use or disclose the materials to anyone, including that lawyer's client, until the issue is resolved.

(4) 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 that the material is protected.

(d) 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 states courts that assesses (1) the reasonableness of the

precautions taken to prevent inadvertent disclosure; (2) the scope of discovery; (3) the extent of the disclosure; and (4) whether the interests of justice would be served by relieving the party of its error. [This analysis should also include consideration of the role of expense of document review before production, especially in cases involving broad document requests, electronically stored information, and other factors that materially increase the burdens on the producing party.]

E. Recommendation No. 5 on Selective Waiver. The Task Force recommends that the SBM **not** support any legislation or court rule to authorize or include a provision for "selective waiver," which would purport to authorize limited waiver of privileged or protected information through an agreement or court order. A proposal to add "selective waiver" to the Federal Rules of Evidence was stricken in recent hearings by the Federal Rules Advisory Committee. The Association of Corporate Counsel and the U.S. Chamber of Commerce both oppose "selective waiver."

F. Recommendation No. 6 on Michigan Legislation. The Task Force recommends that the SBM **not** support any legislation by the Michigan legislature to address issues of attorney-client privilege. Historically, the attorney-client privilege has not been the subject of Michigan legislation. In Michigan, the privilege and work product protections are judicially created, judicially administered and judicially protected. This tradition of judicial control should be continued and supported.

SBM should **support and assist** the Michigan Supreme Court in offering continuing education to judges and courts regarding current issues involving attorney-client privilege and work product protections.

G. Recommendation No. 7 on MRPC 3.4(g). The Task Force recommends that the SBM **not** support, at this time, any amendment(s) to the Michigan Rules of Professional Conduct to address issues of attorney-client privilege.

## **VI. Termination of the Task Force's Activities**

The Task Force will attend the RA meeting on September 27, 2007 to make its presentation and answer any questions posed by Representatives.

Once the RA takes action on the Recommendations, the Task Force will inform members and organizations of the SBM and others of the RA's action. At that time, the Task Force believes it will have concluded the work the Task Force undertook when it was created in 2006. However, individual members of the Task Force remain strongly committed to preserving the privilege and the work supporting the privilege will continue.

Respectfully Submitted,  
State Bar of Michigan  
Task Force on Attorney-Client Privilege

Co-Chairs:

Diane L. Akers  
Tx: 313-393-7516  
Em: [dakers@bodmanllp.com](mailto:dakers@bodmanllp.com)

John W. Allen  
Tx: 269.553.3501  
Em: [jwallen@varnumlaw.com](mailto:jwallen@varnumlaw.com)

Members:

Samuel C. Damren  
Steven C. Kohl  
David F. DuMouchel  
Steven M. Ribiat  
Stephen L. Hiyama  
Robert A. Maxwell  
Michael W. Puerner  
Martin P. Krohner  
Eric J. Wexler  
Dawn M. Evans

## VII. Minority Report Submitted By Stephen L. Hiyama

### I. Introduction

The issues addressed by the State Bar of Michigan Task Force on Attorney-Client Privilege (Task Force) are important, and the Task Force has carried out its mission with admirable diligence and professionalism. But, as explained below, the Task Force's Final Report minimizes or disregards the legitimate interests of law enforcement, and some of its recommendations fail to take those interests into account.

The name of the Task Force suggests that its mandate is broad: examining the status of the attorney-client privilege as it exists in the practice of law in Michigan. But the charge of the Task Force is actually quite narrow, as its website explains:

The Task Force has been formed to study and make recommendations to the State Bar of Michigan Representative Assembly regarding certain developing principles in the law of attorney-client privilege and compelled waivers of the privilege. In particular, federal prosecutors have been instructed to develop and implement procedures for demanding that a business waive its privilege in order to avoid criminal prosecution[.]

The principal focus of both the Task Force and the ABA Task Force on the Attorney-Client Privilege, after which the Task Force has been modeled, has been the *Thompson Memorandum*, an internal policy of the U.S. Department of Justice entitled "Principles of Federal Prosecution of Business Organizations" that was issued in January 2003 by then Deputy Attorney General Larry D. Thompson. The *Thompson Memorandum* provided that in deciding whether or not to charge a corporation with a crime, federal prosecutors should consider nine factors, one of which related to corporate cooperation, a concept that embraced, among other things, a "corporation's willingness . . . to disclose the complete results of its internal investigation[] and to waive attorney-client and work product protection."

Thus, the context in which issues concerning the waiver of attorney-client and work product privileges have arisen is the limited situation of government investigations of wrongdoing by corporations and their officers and other agents. The privileges being waived are those of *corporations*; the attorney-client privileges of *individuals* are completely unaffected. This is not to say that corporate privileges are insignificant. They are, and the Department of Justice has recently revised its internal policy to give them greater weight: in December 2006, the *Thompson Memorandum* was superseded by the *McNulty Memorandum* issued by then Deputy Attorney General Paul J. McNulty. But it is to say that the subject matter of the Task Force involves a specialized area of federal criminal practice that affects a relatively small segment of Michigan practitioners.

## II. Internal Investigations by Corporations

The kinds of corporate misconduct that might attract the attention of federal law enforcement are numerous, such as violations of federal environmental and antitrust laws, false statements or claims made to such federal agencies as the FDA and Customs and Border Protection, and corruption in the federal procurement process. In recent years, the corporate misconduct that has garnered most of the headlines has been accounting fraud and other forms of securities fraud.

The waiver issue typically arises in the following situation: A corporation's board of directors learns that some of its employees (possibly including members of senior management) may have engaged in illegal conduct. For any number of sound business reasons, the board will direct its in-house counsel to investigate the allegations or will hire outside counsel to investigate. The internal investigation will enable the board to find out what happened; determine whether any laws were violated and, if so, what the corporation's civil and criminal exposure might be; fire or otherwise discipline wrongdoers; and put in place better internal controls that will make the problem's recurrence much less likely.

When a board encounters allegations of illegal conduct by employees, however, it is not *required* to investigate. But in most situations a board will conclude that a strategy of quickly identifying the problem, dealing with it, and getting it behind the company is in the company's best interest. This approach may uncover unpleasant and embarrassing facts that hurt the company's reputation in the short term, but it will also end the illegal conduct, remove the cloud of negative rumors surrounding the company, and restore the confidence of the marketplace in the company's integrity and the judgment of its senior management.

Another consideration in a board's decision to conduct or not conduct an internal investigation is the fact that "[a] promptly instituted and properly run internal investigation may decrease the chances of a criminal prosecution or enforcement action, or reduce any criminal sentence or penalty ultimately imposed." ALI-ABA Continuing Legal Education, Securities Litigation: Planning and Strategies: Considerations in Conducting an Internal Investigation, SM086 ALI-ABA 187 (June 7, 2007). But that does not mean that federal prosecutors command or coerce companies with problems to conduct internal investigations. That is "above our paygrade," and we have no authority to issue such dictates.

However, *if* a company conducts an internal investigation, a federal prosecutor may ask the company to disclose the factual information developed in the investigation.

Attorneys who are hired by corporations to conduct internal investigations invariably find it necessary to interview corporate officers, directors, and employees. The results of such interviews can be useful to law enforcement. They can assist in the identification of transactions or practices that are non-compliant and of the individuals who participated in those transactions or practices. But such interview materials are [or maybe] protected by the corporation's attorney-client and/or work product privileges

and, thus, cannot be disclosed to government investigators without a waiver of those privileges.

Stephen L. Hiyama, *Confusing Prosecutorial Discretion with Ethics: A Misguided Proposal to Amend the Michigan Rules of Professional Conduct*, 86 Mich. B.J. 40, 40 (Feb. 2007), And if the company refuses to disclose the factual product of its internal investigation — namely, interview memoranda and documents discussed during interviews — the prosecutor may take this refusal into account, as one of a number of factors, in deciding whether to seek to charge the company with a crime. This Department of Justice policy was first set forth in June 1999, in the *Holder Memorandum*, and reaffirmed in January 2003 and December 2006 in, respectively, the *Thompson Memorandum* and the *McNulty Memorandum*.

The *Thompson Memorandum*, which was issued in the wake of such high-profile corporate financial implosions as Enron, WorldCom, and Adelphia, was criticized in some quarters as effectively eroding the attorney-client and work product privileges of corporations. The Department took some of this criticism seriously, and revised its policy on seeking corporate waivers. Now, under the *McNulty Memorandum*, a federal prosecutor must first obtain the approval of the United States Attorney, who must consult with the head of the Department's Criminal Division, before requesting a corporation to turn over "purely factual information, which may or may not be privileged, relating to the underlying misconduct." Thus, such requests can no longer be fairly characterized as routine, if they ever were.

### III. Attorney-Client Communications

In the corporate context, communications between a company's attorneys (whether in-house or outside counsel) and its officers and directors lie at the heart of the attorney-client privilege. It is rare for a federal prosecutor to request a corporation to disclose such communications. With respect to the work of the Task Force, it is a non-issue. In only two situations might corporate attorney-client communications be relevant to a criminal investigation, and in both situations, the law provides an exception to the privilege. First, as recognized in the *McNulty Memorandum*, "legal advice contemporaneous to the underlying misconduct [might be relevant] when the corporation or one of its employees is relying upon an advice-of-counsel defense." Second, "legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege," might be relevant. In addition, as is the case with the results of internal investigations, the *McNulty Memorandum* requires federal prosecutors to obtain the approval of the United States Attorney, who must consult with the head of the Department's Criminal Division, before requesting a corporation to turn over any attorney-client communications.

#### IV. Task Force Recommendation No. 1

Recommendation No. 1 is virtually identical to a resolution adopted by the ABA House of Delegates in August 2005 pursuant to the recommendation of the ABA Task Force on the Attorney- Client Privilege. Recommendation No. 1 has three paragraphs, the last two of which read:

FURTHER RESOLVED, that the State Bar of Michigan opposes policies, practices and procedures of government 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 State Bar of Michigan opposes a 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.

It is clear that the ABA resolution was a direct rebuke of the *Thompson Memorandum*, and it is reasonable to infer that Recommendation No. 1 is a rebuke of the *McNulty Memorandum*. The first paragraph quoted above implies that the Department's policies do not recognize the value of a corporation's attorney-client and work product privileges. And the second paragraph quoted above suggests that there are no circumstances in which it would be appropriate for federal prosecutors to request a corporation to waive its privileges.

The basic flaw of Recommendation No. 1 (and of the ABA resolution) is that it fails to account for the legitimate interests of law enforcement. Its terms are categorical and suggest that the interests protected by the privileges are absolute and should never be weighed against valid countervailing interests. But "[w]hen investigators and prosecutors seek to obtain the results of a corporation's internal investigation, they are only trying to get the answer to the central question of every investigation: what happened?" Stephen L. Hiyama, *Confusing Prosecutorial Discretion with Ethics: A Misguided Proposal to Amend the Michigan Rules of Professional Conduct*, 86 Mich. B.J. 40, 42 (Feb. 2007). That is manifestly a valid countervailing interest.

The Department's view that law enforcement interests may, in certain circumstances, outweigh the interests protected by the privileges does not mean that the Department does not value those privileges. Indeed, the revisions to the *Thompson Memorandum* as now embodied in the *McNulty Memorandum* represent the Department's assigning a greater value to those privileges than before. It is all a matter of weighing and reconciling conflicting interests. People, as they are entitled to, will have different opinions as to whether the *McNulty Memorandum* strikes the right balance. But Recommendation No. 1 fails to recognize to any extent the existence of legitimate law enforcement interests. It should not be adopted.

## V. Task Force Recommendation No.2

Recommendation No. 2 is virtually identical to a resolution adopted by the ABA House of Delegates in August 2006 pursuant to the recommendation of the ABA Task Force on the Attorney- Client Privilege. Recommendation No.2 reads:

RESOLVED, that the State Bar of Michigan 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.

This ABA resolution was prompted by a provision of the *Thompson Memorandum* that read:

[W]hile cases will differ depending on the circumstances, 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, may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation.



This provision of the *Thompson Memorandum*, which is separate and apart from the provisions on the waiver of corporate privileges, came to the fore in the federal criminal prosecution in the Southern District of New York of KPMG “employees” (actually, some defendants are current or former KPMG partners) in connection with tax shelters devised by KPMG. There, KPMG paid the fees of attorneys representing its current and former employees who were targets, but it discontinued payments for any employee who declined to cooperate with the government. In June 2006, the federal judge presiding over the case held that the termination of attorneys’ fees violated the defendants’ substantive due process rights and right to counsel. That ruling is now on appeal.

The *McNulty Memorandum*, issued in December 2006, has removed the phrase “through the advancing of attorneys fees” from the provision quoted above, and provides instead that “[p]rosecutors generally should not take into account whether a corporation is paying attorneys’ fees to employees or agents under investigation and indictment.”

Federal prosecutors are still allowed, under the *McNulty Memorandum*, to consider a corporation’s “retaining [culpable] employees without sanction for their misconduct or . . . providing information to the employees about the government’s investigation pursuant to a joint defense agreement . . . in weighing the extent and value of a corporation’s cooperation.” Thus, Recommendation No. 2, which directly contradicts the *McNulty Memorandum* on this point, is objectionable.

More important, Recommendation No. 2 is, like Recommendation No. 1, categorical, and thus does not account for the situation in which circumstances show that a corporation’s payment of attorneys’ fees, retention of culpable employees without sanction, or information sharing are, in the words of the *McNulty Memorandum*, “intended to impede a criminal investigation,” where “the corporation is acting improperly to shield itself and its culpable employees from government scrutiny.”

Accordingly, Recommendation No. 2 should not be adopted.

## VI. Task Force Recommendation No. 5

Recommendation No. 5 opposes the concept of selective waiver. Selective waiver would allow a corporation to disclose protected materials to the government, thereby waiving its attorney-client and work product privileges as to the government, without waiving those privileges as to other persons, particularly vendors, shareholders, lenders, and auditors who could sue the corporation under any number of causes of action and seek to recover tens or even hundreds of millions of dollars in damages.

In September 2006, then Deputy Attorney General Paul J. McNulty testified in support of selective waiver before the Senate Judiciary Committee. At the time, selective waiver was being considered by the Advisory Committee on Evidence Rules of the Judicial Conference of the United States in the form of proposed Federal Rule of Evidence 502(c). Selective waiver would eliminate the reluctance of corporations to disclose relevant evidence to the government based on

concerns about increasing their exposure to civil liability. This in turn would multiply the effectiveness and efficiency of the government's use of resources to investigate corporate wrongdoing, which are finite.

In May 2007, the Advisory Committee on Evidence Rules issued report that noted that “[t]he selective waiver provision proved to be very controversial. The public comment from the legal community (including lawyer groups such as the American Bar Association, Lawyers for Civil Justice, and the American College of Trial Lawyers) was almost uniformly negative.” “In sharp contrast, federal agencies and authorities (including the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the Department of Justice) expressed strong support for selective waiver.” The Advisory Committee

finally determined that selective waiver raised questions that were essentially political in nature. Those questions included: 1) Do corporations need selective waiver to cooperate with government investigations? 2) Is there a “culture of waiver” and, if so, how would selective waiver affect that “culture”? These are questions that are difficult if not impossible to determine in the rulemaking process.

In the end, the Advisory Committee took no position on selective waiver. It dropped the selective waiver provision from proposed FRE 502 but decided to submit to Congress a separate report on selective waiver along with suggested statutory language to implement selective waiver. (The Advisory Committee's full report may be found at <http://www.uscourts.gov/rules/Reports/EVO5-2007.pdf>.)

Selective waiver would advance the interests of law enforcement. Whether and to what extent, if any, it would impair the interests protected by the attorney-client and work product privileges of corporations remain unclear. Consequently, Recommendation No. 5 should not be adopted.