



D I S T R I C T O F C O L U M B I A B A R
Criminal Law and Individual Rights Section

**Criminal Law and Individual Rights Section
Statement Opposing the U.S. Department of Justice's Waiver Policy for the
Attorney-Client Privilege and Work Product Doctrine
Summary**

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The Criminal Law and Individual Rights Section Steering Committee proposes to issue the following statement concerning the January 20, 2003 Memorandum of then-Deputy Attorney General Larry D. Thompson entitled "Principles of Federal Prosecution of Business Organizations". The members of the Steering Committee* have voted regarding the issuance of this statement and the decision to adopt the statement was unanimous. The views expressed herein represent only 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.

The Thompson Memorandum can be found on the Department of Justice website at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

Inherent in the recognition of the attorney-client privilege and work product doctrine is the understanding that the societal benefits of these protections outweigh any resulting impediment to our investigative and judicial processes. The Thompson Memorandum endangers these important privileges by encouraging prosecutors to seek waivers of the attorney-client privilege and work product doctrine during the course of criminal investigations.

The Thompson directive places entities in the untenable position of deciding whether to maintain important privileges or risk losing the more favorable treatment commonly afforded organizations that engage in good-faith self-examination, cooperation with authorities, and conformance to the law. That the relinquishment of privileges and protections is only one among many factors to be considered by prosecutors does not sufficiently mitigate the Section's concerns. The mere fact that prosecutors consider waivers when assessing a corporation's cooperation necessarily means that assertion of the attorney-client privilege or work product doctrine carries with it serious risks and thus is discouraged.

In deciding to issue this public statement of its concerns, the Criminal Law and Individual Rights Section seriously weighed the possible advancements in the detection and punishment of wrongdoing against the vital role played by the attorney-client privilege and work product doctrine in both the protection of fundamental rights and the facilitation of internal examination. In the Section's judgment, the risks inherent in the Thompson directive far outweigh its potential benefits, and thus its instructions concerning waiver of the attorney-client privilege and work product doctrine should be rescinded.

*The members of the Steering Committee of the Criminal Law and Individual Rights Section of the District of Columbia Bar are Ashley Bailey, Todd Edelman, Marlon Griffith, Sarah Gill, Jonathan Jeffress, Mary Kennedy, Kelli McTaggart, Amit Mehta, and Seth Rosenthal. The views of Amit Mehta and Marlon Griffith do not represent the views of their employer, the D.C. Public Defender Service.



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Policy for the Attorney-Client Privilege and Work Product
Doctrine**

The Criminal Law and Individual Rights Section of the District of Columbia Bar joins the many other associations that have voiced opposition to the January 20, 2003 memorandum promulgated by then-Deputy Attorney General Larry D. Thompson and titled "Principles of Federal Prosecution of Business Organizations" ("The Thompson Memorandum"). The Steering Committee* of the Individual Rights Section has approved and adopted this statement on behalf of the Section. The views expressed herein represent only 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.

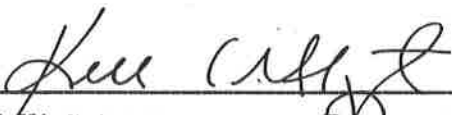
Inherent in the recognition of the attorney-client privilege and work product doctrine is the understanding that the societal benefits of these protections outweigh any resulting impediment to our investigative and judicial processes. The Thompson Memorandum, which is attached, and for which complete text can be found on the U.S. Department of Justice website, at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm, endangers these important privileges by encouraging prosecutors to seek waivers of the attorney-client privilege and work product doctrine during the course of criminal investigations. The Department's policy states in pertinent part:

In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and *to waive attorney-client and work product protections.*" (emphasis added).

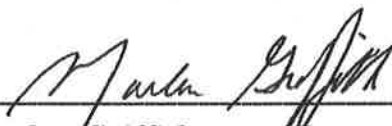
This directive places entities in the untenable position of deciding whether to maintain important privileges or risk losing the more favorable treatment commonly afforded organizations that engage in good-faith self-examination, cooperation with authorities, and conformance to the law. That the relinquishment of privileges and protections is only one among many factors to be considered by prosecutors does not sufficiently mitigate the Section's concerns. The mere fact that prosecutors consider waivers when assessing a corporation's cooperation necessarily means that assertion of the attorney-client privilege or work product doctrine carries with it serious risks and thus is discouraged.

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Kelli C. McTaggart Date 11/9/06
CLIR Steering Committee Co-Chair



Marlon Griffith Date 11/9/06
CLIR Steering Committee Co-Chair