The McNulty Memo – Much More Remains To Be Done
The ABA Role In Protecting The Attorney-Client Privilege

*The Editor interviews **R. William "Bill" Ide**, Chair, ABA Task Force on Attorney-Client Privilege and Partner, McKenna Long & Aldridge LLP. Mr. Ide is a former President of the ABA and the former Senior Vice President, General Counsel, and Secretary of the Monsanto Company.*

Editor: What brought about the focus of the ABA on the Thompson Memo and the need to revise it?

Ide: Confidentiality is a broader concept than the attorney-client privilege or work product doctrine. When I was general counsel at Monsanto, employees would come to me because they could have a confidential conversation, and I would provide advice on how to work out a problem. Confidentiality is needed for lawyers to provide effective assistance of counsel.

Over the last four years there has been a disruption in that process. After Enron, the enforcement and regulatory community began to pressure the corporate community to turn over information communicated to their lawyers or risk indictment. Many of the substantive law Sections of the ABA began to report concerns that their clients had with the erosion of their confidentiality. After receiving so many reports, the American Bar Association decided that this was an issue worth looking into.

Editor: What triggered the establishment of the ABA Task Force on the Attorney-Client Privilege?

Ide: The ABA House of Delegates passed a resolution that the Federal Sentencing Guidelines should be amended to remove waiver of the attorney-client privilege as a factor of cooperation. This concern was consistent with what the ABA Sections were reporting in many different areas and with what I was seeing in my practice of doing independent investigations for boards of directors.

Robert Grey, then ABA President-elect, and I determined that this issue needed to be addressed by a new Task Force that could coordinate the many different ABA Sections and other entities within the profession that had raised concerns about these threats to the attorney-client relationship.

Editor: Did the experiences of corporate counsel play a role in the creation of the Task Force?

Ide: Corporate counsel are very conscious of the fact that the Thompson Memorandum allows prosecutors to pressure corporations into waiving the attorney-client privilege. While I was general counsel at Monsanto, it was critical to my role as counselor that the CEO and all employees felt our conversations would be confidential. The general counsel community expressed concerns to our Task Force that they could not perform their compliance functions as their in-house clients were becoming uncomfortable in confiding to them.

Our Task Force held hearings to get a sense of how pervasive the problem was. The gravity of the problem was confirmed by a survey of over 1,200 corporate counsel conducted by the Association of Corporate Counsel, National Association of Criminal Defense Lawyers, and the ABA.

Editor: What is the Task Force's mission statement?

R. William Ide

Ide: Our mission statement focuses on maintaining confidentiality of communications between clients and attorneys so that lawyers can provide effective assistance as counsel.

Our scope was later expanded to consider other provisions in the Thompson Memorandum instructing prosecutors to deny cooperation credit to companies that assist or support their so-called "culpable employees and agents" by: (1) paying for their legal counsel; (2) participating in joint defense and information sharing agreements with them; (3) sharing relevant information with them; or (4) declining to fire or sanction them for exercising their Fifth Amendment rights in response to government requests for information. Pursuant to our Task Force's recommendation, the ABA has taken a position strongly opposing these provisions, as well as the privilege waiver provisions of the Thompson Memorandum.

The mission statement as approved by ABA Board of Governors is posted on the Task Force's website at www.abanet.org/buslaw/attorneyclient/home.shtml.

Editor: Given the size and diversity of the ABA, how were you able to get agreement on the principles that the Task Force would pursue with the DOJ?

Ide: We reached out to all Sections of the ABA, all state and local bars, and all professional organizations within the legal community. We invited people to attend our public hearings, to appoint liaisons, and attend our meetings. Education as to the critical role that confidentiality plays in assuring effective assistance of counsel has been our main goal. Privilege, work product, confidentiality and regulation of the profession have been the province of the judiciary for centuries. The notion that the executive branch can unilaterally pressure a client to waive the privilege (by threat of indictment) without court oversight threatens the client relationship that has been so thoughtfully developed by the courts over all these centuries. Our job has been to stay at that level of discussions and to emphasize the critical importance of protecting those principles.

In the end, we were able to convince the ABA House of Delegates to unanimously pass resolutions endorsing these key principles.

Editor: Who are the members of the Task Force?

Ide: We have a strong representation from the ABA Criminal Justice Section, the ABA Business Law Section, and the ABA Litigation Section, as well as numerous other ABA Sections and entities. Our members include Larry Thompson, general counsel of PepsiCo, who produced the Thompson Memorandum when he was in the DOJ. Larry has been very constructive as a member. Our members include sitting general counsels, criminal defense lawyers, former Attorney General Dick Thornburgh and many other talented individuals. A number of state bars have appointed liaisons who are very constructive. The ABA Business Law Section provides wonderful administrative support through Sue Daly.

In addition, the Task Force also liaisons with a number of prominent outside groups – such as the Association of Corporate Counsel, the U.S. Chamber of Commerce, the National Association of Manufacturers, the Financial Services Roundtable, American Chemistry Council, ACLU and the National Association of Criminal Defense Lawyers.

Editor: Did the Task Force work with other organizations?

Ide: Our Task Force has been well received by members of Congress, the administration and the judiciary. The ABA Governmental Affairs Office is helping to coordinate a coalition with the various legal and business group liaison members I listed previously.

Editor: Does the McNulty Memo adequately address the principles sought to be achieved by the Task Force?

Ide: Our basic concern is that lawyer-client confidentiality must be honored in our society. If a client sees a lawyer, they are entitled to feel free to discuss concerns and make disclosures of information, which will not have to be shared with third parties. That essential ingredient is threatened by the culture of waiver that the enforcement and regulatory communities have fostered post-Enron. The Thompson Memo has been viewed by federal, state and local agencies as legitimizing the right of the executive branch to demand waiver. Such demands have created a culture of waiver which has chilled the need for clients to be forthcoming.

In the eyes of its authors, the McNulty Memo reforms potential waiver demand abuses within DOJ, and it may do that to a very limited extent. It is clear that a great deal of care and effort went into that product. By preserving the right to reward for waiver of the privilege and to demand waiver, however, the Memo violates the principle that the effective assistance of counsel is maintained by preserving the privilege and confidentiality. It should be up to courts, not prosecutors, as to whether confidential materials must be produced. That is what the U.S. Supreme Court said in Upjohn, and yet the McNulty Memo violates that principle. The executive branch has hijacked the right to confidentiality upstream from the protection of the courts, and that has to be fixed.

I commend Paul McNulty for taking the time and effort to delve into this issue. His Memo puts processes in place that should enable DOJ to rein in renegade prosecutors. But, the Memo does not address the fundamental problem. If left unchanged, it will chill confidentiality and erode effective assistance of counsel for corporations today – and ultimately for individuals tomorrow.

Editor: The McNulty Memo provides one standard for obtaining a waiver with respect to facts communicated by a client to an attorney and a higher standard for seeking the mental impression that the attorney takes away or the advice given on the basis of a review of the facts. How does that square with the principles that the Task Force has advocated?

Ide: It is inappropriate to include a waiver of any information subject to the attorney-client privilege or waiver of work product as a factor to be considered as to whether a corporation will be indicted or otherwise treated during an investigation. We don't believe that any distinctions should be made with respect to types of protected confidential communications between the lawyer and the client – the lawyer should not be asked to disclose such information. Of course, it is appropriate for a prosecutor to ask a company what happened, who did it and for a list of witnesses. The company can receive from its lawyer an analysis of facts and then it can decide whether it will furnish them and be deemed cooperative or not.

Editor: If matters are satisfactorily resolved at the federal level, will the Task Force continue in existence with respect to state level issues?

Ide: Our mission will not be accomplished until both state and federal investigators respect effective assistance of counsel and do not allow coercion of a waiver. State and local bars are the best vehicles for addressing this situation at the state level. On January 31 and again on May 2, 2006, the president of the ABA sent a letter to hundreds of state and local bar leaders across the country urging them to take the following steps: Establish their own committees or task forces and then coordinate their efforts with those of the ABA Task Force; Write to their U.S. Attorneys urging them to adopt waiver review procedures that do not allow any requests, direct or indirect, for waiver of the privilege and work product (Bar groups were also encouraged to send a separate letter to the Justice Department that makes the central points outlined in the ABA's May 2 letter to Attorney General Gonzales); and Send an op-ed piece to local media outlets supporting the change in Justice Department policies and providing a model for local adaptation.

Editor: Do you feel that the Task Force can successfully accomplish its mission?

Ide: Definitely. The Task Force is committed to the proposition that, irrespective of prosecutorial zeal, the most effective way to prevent corporate crime is through effective counseling by a corporation's lawyers – and that, without confidentiality, our ability to be effective counselors will be dramatically impaired. The availability of the attorney-client privilege is essential to the success of a compliance program. Using private sector institutions like the legal profession to achieve socially desirable objectives is a critical part of how we function as a society. With such a powerful message and dedicated allies, the Task Force's efforts will undoubtedly be crowned by success. We are pleased that the Federal Sentencing Guidelines were revised to remove waiver of the privilege as a cooperation factor. We are also pleased that Senator Spector has proposed legislation that would prevent federal agencies from coercing waiver of the privilege, and we are hopeful that the legislation will receive prompt and favorable attention from the new Congress in early 2007. I urge readers of *The Metropolitan Corporate Counsel* to do what they can to support the reform effort.

Please email the interviewee at bide@mckennalong.com with questions about this interview.