

**STATEMENT OF
THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS (APRL) TO
THE ABA TASK FORCE ON
ATTORNEY-CLIENT PRIVILEGE REGARDING PROPOSED MRPC 3.4(g)**

The Association of Professional Responsibility Lawyers (APRL) is an independent national organization of lawyers concentrating in the fields of professional responsibility and legal ethics, including: law professors; bar association counsel; counsel for respondents in disciplinary hearings; ethics expert witnesses; legal malpractice litigators; counsel to disciplinary committees; and in-house law firm ethics counsel.

Consistent with its Bylaws, from time to time the organization adopts and publicly issues positions on issues relating to the legal profession including the promulgation of, or revisions to, provisions of the ABA's Model Rules of Professional Conduct (MRPC).

By a Memorandum dated November 2, 2006, the ABA Task Force on Attorney-Client Privilege (the "Task Force") asked various ABA entities and organizations, such as APRL, which have been monitoring the Task Force's activities through liaison representatives, to consider and comment on a proposal by a Task Force subcommittee. The proposal, contained in a "Discussion Draft," is for the adoption of a new provision of the MRPC -- Rule 3.4(g) -- which would prohibit government lawyers from requesting waivers of the attorney-client privilege and work product protection as a condition for assessing a party's cooperation with the government in a criminal or civil or regulatory enforcement investigation.

The Task Force has requested comments from its liaison organizations and other interested parties by December 31, 2006. Specifically, the Task Force has asked for

opinions on: (a) "whether [the proposed] rule is desirable"; and (b) "if so, how it might be made more effective." Nov. 2, 2006 Memo. at 8.

In its Memo, the Task Force indicated that "a substantial number of [its] members and liaisons (including former leaders of the ABA Ethics Committee) and lawyers throughout the county believe that" the type of prohibition in the proposed Rule "is badly needed." *Id.* at 8. "They support the view that it [is] unethical and detrimental to the public to use the government's extraordinary power to coerce a waiver of the attorney-client privilege or attorney work product doctrine through direct or indirect threats of more severe penalties." *Id.*

APRL commends the Task Force for its efforts. We also support its goals, including Recommendation 111, sponsored by the Task Force and others, and adopted by the ABA House of Delegates in August, 2005. In particular, APRL's members share the Task Force's concern about the practice of prosecutors pressuring entities under investigation to waive their attorney-client privilege and work product protection as a condition of receiving favorable treatment in charging decisions or on sentencing.

However, APRL does not support the adoption of proposed Rule 3.4(g) at this time.

The MRPC, in contrast to a legislative enactment or a governmental regulation or directive, should not be employed to express the displeasure of the organized bar with a particular governmental practice, even if that practice should, as a matter of law or public policy, be restricted or eliminated. It is well established that a prosecutor has broad discretion to pressure a criminal subject or target by presenting "the unpleasant alternatives of foregoing trial or facing [enhanced] charges...." *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Similarly, a prosecutor may induce the waiver of a criminal defendant's

constitutional rights, including the right to a jury trial, by promising to recommend a lenient sentence or to reduce charges." *Id.* at 363. Accordingly, it would be inappropriate to label as "unethical," and thereby subject to professional discipline, a prosecutor who makes "promises" or even induces "fear" in seeking the waiver of legal protections that, while constituting vital *evidentiary* safeguards, are not *constitutionally* required.

Finally, we note our support for the "Attorney-Client Privilege Protection Act of 2006" recently introduced by Senator Arlen Specter that addresses the concerns raised by the Task Force. Indeed, the proposal is largely the result of the Task Force's commendable advocacy efforts in defense of the attorney-client privilege. We believe the legislative remedy is the more appropriate vehicle to regulate the prosecutorial practices at issue.