The Decline Of the Attorney-Client Privilege in the Corporate Context[1]
Survey Results Presentation/Testimony

Before the United States Sentencing Commission
March 15, 2006

Presented by Susan Hackett of the Association of Corporate Counsel

On Behalf of
The Coalition to Preserve the Attorney-Client Privilege

Honorable Commissioners, thank you for the opportunity to present the results of our newest survey on attorney-client privilege erosion in the corporate context.

My name is Susan Hackett, and I am the Senior Vice President and General Counsel of the Association of Corporate Counsel. I am here today as the representative of The Coalition to Preserve the Attorney-Client Privilege, which is composed of the following organizations: the American Civil Liberties Union[2], the American Chemistry Council, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, the U.S. Chamber of Commerce, and the Washington Legal Foundation. The American Bar Association has also expressed similar views to the U.S. Sentencing Commission regarding the importance of preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights.[3]

---

[1] The underlying survey results document was submitted to the Commission in support of this testimony and is available online at http://www.acca.com/Surveys/attyclient2.pdf.

[2] The American Civil Liberties Union (ACLU) is a part of our coalition, but was not able to secure an approval to co-sign our underlying survey results document for its submission to the Commission by their March 1, 2006 deadline. The ACLU did sign on to our coalition's March 7, 2006, Congressional testimony on this subject, which featured and attached these survey results. In the event that you are interested, the Coalition's Congressional hearing submission is online at http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf.

[3] The ABA is prevented by internal policies from formally joining coalitions, but has worked in close cooperation with this Coalition in the preparation and distribution of the surveys referenced in this document.

Our coalition believes that the attorney-client privilege and work product doctrine as applied in the corporate context are vital protections that serve society's interests and protect clients' rights to consult counsel. The attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations and will be penalized for reporting problems they identify in the organization. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner.

In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and must be protected.

This coalition's members have previously testified before the Commission on the Guidelines' Chapter 8 Commentary[4] in Application Note 12 to Section 8C2.5, bestowing authority for lawyers in the Department of Justice to unilaterally determine *in their discretion* whether privilege waiver requests are appropriate or necessary in the corporate context. It is not our purpose today to repeat what's already been said; we believe the Commission already understands our positions well.

Instead, my purpose in appearing before you today is to: first, commend you for your decision to consider retracting the privilege waiver language that concerns us in Chapter 8's Commentary; second, provide you with an overview of the survey results document you requested, which has been provided to you in support of our contentions; and third, reiterate our request that the Commission remove the clause "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" from the Guidelines' commentary, and consider new language stating that privilege waivers are not appropriate for the Department of Justice to demand or consider.

The 2005 Privilege Survey

I begin with a short summary of the results of the 2005 survey on privilege erosion in the corporate context[5], which provided the first meaningful empirical data on privilege erosion

[4] Amendments made to the US Sentencing Guidelines, which became effective in November of 2004, state that in order to qualify for a reduction in sentence for providing assistance to a government investigation, a corporation is required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." [U.S. Sentencing Guidelines Manual § 8C2.5 (2004) available at http://www.ussc.gov/2004guid/8c2_5.htm.]

[5] An Executive Summary of the March 2005 survey may be accessed via the following links: for the in-house version: http://www.acca.com/Surveys/attyclient.pdf, and for the outside counsel version: http://www.acca.com/Surveys/attyclient_nacdl.pdf. Based on feedback from those who read the previous survey

issues. That survey confirmed our contention that companies faced with a potential investigation, prosecution, or enforcement action:

1. are increasing in number to the point that waiver requests or expectations are considered "routine,"
2. have no meaningful ability to resist waiver expectations or demands, however they are presented,
3. will face severe consequences if they do insist on exercising their privilege rights, and
4. suffered a significant and discernable "chill" in the lawyer-client relationship, negatively impacting the lawyer's ability to work with clients develop, implement, monitor and report on compliance initiatives that are core to the company's legal health.

Upon presentation of these survey results in hearings before this Commission in November of 2005, several Commissioners and the Department of Justice representative in particular requested that we collect further information on the nature and frequency of corporate privilege waiver requests by the government. The Coalition responded with a new survey instrument and we are pleased to offer you the survey's results here today. Please note that the results are reported in detail in the survey document referenced previously and submitted to the Commission on March 1st.

The 2006 Coalition Privilege Survey[6]

---

results, the 2006 survey results reside in one document that combines the results of both the in-house and outside counsel surveys.

[6] In January 2006, the Association of Corporate Counsel directly contacted approximately 4,700 of its approximately 19,000 members, including only those members whose titles included either "general counsel" or "chief legal officer," so as to avoid duplicate responses from the same company which could have led to double-counting the same incidents. Also in January, the National Association of Criminal Defense Lawyers emailed the web link for a companion outside counsel version of the survey to its 13,000 members; and then posted the web link for the survey on its listserv for white-collar practitioners, which has approximately 1,200 subscribers. Both the in-house and outside counsel email solicitations requested recipients to complete a web-based survey on attorney client privilege protections and erosion. The web link to the survey was also made available to the Coalition's leaders, and the ABA Task Force on Attorney-Client Privilege, which in turn publicized it to the many groups participating in the Task Force's endeavors, including approximately 5,000 members of the Business Law and Criminal Justice Sections. The survey was "open" for approximately 2 weeks. Five hundred sixty-six of the 676 responses to the in-house version of the survey were received from the Association of Corporate Counsel emailing to its general counsel members; the remaining corporate counsel responses are from contacts initiated by the other groups. Five hundred thirty-eight outside counsel responded to this survey, the vast majority coming from the National Association of Criminal Defense Lawyers' white-collar practitioners' membership. In total, our surveys generated approximately 1200 responses.

Both surveys included 23 questions primarily seeking specific responses to multiple choice or yes/no questions, with 4 open-ended questions at the end seeking text responses that would provide personal detail on situational experiences.

The survey results are presented in numbers and percentages that are approximated by rounding to the nearest whole integer. Some direct quotations drawn from the open-ended text responses are also included, but not all responses to those questions are included out a concern for confidentiality in some cases and to avoid unnecessary repetition in

Demographic Information about Respondents

In-house counsel: Almost 90% of the in-house counsel survey respondents were General Counsel. Approximately 40% indicated that the government (federal or state) had initiated some form of investigation into allegations of wrongdoing at their company during the past 5 years. Fifty-one percent of the respondents indicated their companies were privately-held/owned; 35% said their companies were publicly traded but not in the Fortune 500; and 9% of respondents worked for non-profits. Quasi-governmental entities and Fortune-ranked companies each represented 1% of the survey respondents. Respondents were asked to identify the primary industry that best describes their client company's main line of business and were given 22 response options. The top three industries selected were: Finance and Insurance (18%), Manufacturing (13%), and Information Technology (11%). Almost 90% of respondents worked in law departments of less than 20 lawyers: 33% were solo practitioners, 46% had offices of 2-7 lawyers, and 10% had offices of 8-19 lawyers. Of the remaining respondents, approximately 4% had law departments of over 100 lawyers, and less than 1% had law departments of over 500 lawyers.

These demographics are significant in that they show that even among a general population of company counsel, almost half have experienced some kind of privilege erosion. The vast majority of these respondents who experienced privilege erosions do not work for mega-corporations with extremely high visibility and the potential for "blockbuster" failures; they work for a wide variety of differently sized businesses, representing the full spectrum of industries.

Outside counsel**:** Seventy-one percent of those who answered the survey for outside counsel were partners in law firms, and 40% practiced criminal litigation as their primary area of concentration (26% indicated civil litigation and 20% indicated transactional work as their primary practice areas). Sixty-three percent represented companies that had been subject to a criminal or enforcement investigation in the last five years. Further demographics show that 22 % of outside counsel respondents represented privately-held or -owned companies with revenues of less than $200 million annually; 20% represented individual officers or employees of organizations; only 12% represented publicly traded companies with more than $1 billion in annual revenue; and only 11% represented publicly-traded companies with between $500 million and $1 billion in annual revenue. About the outside counsel themselves, we know that 35% of respondents work for firms of between 2 and 20 lawyers; the rest of the respondents were fairly evenly distributed among the following categories: solo (19%); 21-100 lawyers (17%); 101-500 lawyers (15%); more than 500 lawyers (14%).

As with the results of the survey of in-house counsel, outside counsel answers indicate that among a general population of outside counsel with a wide array of experience, both in terms of the types of law that they practice and the types of clients that they represent, 51% indicate that

---

most cases. We believe the survey's response rate should be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession. We can note that statisticians have designated the Association of Corporate Counsel's membership as statistically representative of the entire in-house legal profession.

they experienced a demand, suggestion, inquiry, or other expectation of waiver by the government. A commanding 73% agree that a culture of waiver has evolved with respect to the corporate attorney-client privilege. The sizable plurality of lawyers who answered this survey represented either smaller, privately held companies or individuals—thus belying the conclusion that waiver requests, demands, and expectations are a rare problem only experienced by large, publicly-traded companies who are at the center of "headline" scandals and somehow deserving of whatever treatment the government dishes out.

What the Respondents Said

We encourage the Commission particularly to listen the voices of corporate counsel and defense attorneys as captured in the survey results document on several pages containing direct quotes at the end of the document. These responses are but a portion of those penned in response to the open-ended questions at the end of the survey, which asked respondents the following:

> 24) Please describe a typical situation, or situations, in which your corporation/client waived attorney-client privilege and/or work product protections in order to avoid criminal prosecution or more severe civil penalties; please consider including information on which party suggested or demanded waiver, whether the company waived, what material was sought or produced pursuant to the waiver, and what kind of charges were being investigated.
>
> 25) If the Federal Sentencing Guidelines for organizations were mentioned during negotiations with a prosecutor or enforcement official, please describe how they were cited, and whether the commentary language in the Guidelines regarding privilege waiver was specifically referred to.
>
> 26) If your corporation or client has waived privilege at the neutral suggestion of a prosecutor or enforcement official, or without any suggestion or demand from a government official, please describe the situation, including why the corporation decided to waive privilege and as to what material.
>
> 27) Please provide any additional commentary on privilege erosion, protection or waiver issues that you think is germane.

I do not need to read these responses into the record for you to hear the outrage about government practices *vis a vis* the privilege in the voices of respondents; it jumps off the pages. Respondents wrote time and again of prosecutorial abuses (their words), coercion (their words), and inappropriate hijacking of court-governed doctrines that their clients were subjected to when privilege waiver discussions arose. The comments detail stories about prosecutors demanding waiver of companies that are not even the target of the government's investigation. They tell of prosecutors whose opening requests at their first meetings with counsel – before any discussion of the facts or knowledge of what the investigation into allegations might entail or uncover –

were to demand privilege waivers as a condition of cooperation and as a requirement for any further conversation to continue. Respondents wrote about how their clients were painted into a privilege waiver corner where they were told that of course they had choices: to waive or face criminal charges against the corporation, with entity-threatening consequences (the suggestion being that if the company did waive, it wouldn't be charged at all). And underlying all of these stories are concerns that these lawyers have regarding the damage done to their relationship with clients as a result of this culture of waiver: they're concerned that employees are no longer confident about including attorneys in business discussions or seeking legal advice when thorny problems arise. These are real voices. These are hundreds of lawyers who've personally witnessed waiver demands made by the government. You cannot read these pages and conclude that waiver problems are non-existent or rare; indeed, you must conclude, as do our respondents, that a government culture of waiver now exists and that it infects large numbers of government investigations and prosecutions.

What did respondents say in specific?

Does a Government Culture of Waiver Exist? Almost 75% of both inside and outside counsel expressed agreement (almost 40% agreeing strongly) with a statement that "a 'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections**."** Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.

The 'Government's Expectation'[7] of Waiver Confirmed: Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver as a condition to engaging in bargaining or to be eligible to receive more favorable or lenient treatment.

Waiver is a Condition of Cooperation: Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.

Further, and to refute the point often made that corporations aren't asked to waive, but they "volunteer" to waive on their own: **Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel.** Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be

[7] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

true.[8] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."

The Sentencing Guidelines are Listed by Respondents as Among the Top Three Reasons Given For Waiver Demands. This Commission specifically asked us to find out if it was reasonable to assume that the Sentencing Guidelines' language was responsible for privilege waiver issues, or if our concerns should be addressed to others who engage in privilege waiver discussions on a direct basis. The facts are in: outside counsel indicated that the DOJ's internal policies (the Thompson/Holder/McCallum Memoranda) is cited most frequently when a reason for waiver is provided by a prosecutor or enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind the need for "a quick and efficient resolution of the matter," and DOJ policies (Thompson/Holder/McCallum), respectively. Given that a number of other choices were presented, it's more than fair to conclude that respondents have been hearing about the Guidelines from prosecutors quite regularly when waiver discussions arise.

And it's Likewise Clear that the Majority of Waiver Requests are Coming from US Attorneys. For both in-house and outside counsel, the U.S. Attorneys' Offices were identified as the government agency that most often indicated an expectation of waiver. The survey asked respondents to identify which agencies indicated an expectation of waiver and were given a choice of seven enumerated agencies/categories of agencies, as well as the opportunity to state that the question did not apply or to write-in a response. (About one-third of the in-house respondents and one-fourth of outside counsel respondents indicated that this question was not applicable.) The top agencies/categories identified as most often expecting waiver (in descending order) were: (for in-house counsel) U.S. Attorneys' Offices, the SEC, the Department of Justice – "Main" (e.g., antitrust or criminal fraud), other federal agencies (e.g., DOL, EPA, HHS, FEC, etc.), and State Attorneys General Offices; for outside counsel, the order was exactly the same except that the number 2 and 3 slots for the SEC and DOJ – Main were reversed.

In the interest of time, I will not further summarize findings in my oral statement which are already discussed in greater detail in the written statement we've submitted, but please note that the written statement included additional information about the types of attorney-client communications or work product documents that are sought in waiver demands, and further details of the timing and "atmospherics" of waiver demands made of corporations. We also added a few questions with interesting answers on the experiences of corporations regarding government demands beyond waiver requests, but related to corporate employees: including requests for the company not to advance legal expenses (even in the presence of state laws and corporate bylaw provisions which mandate indemnification), company experiences with prosecutors who wish to control decisions related to joint defense agreements with targeted employees, requests that the company refuse to share requested documents with targeted employees, and demands that a company discharge an employee who would not consent to a government interview.

---

[8] Sixty percent of in-house counsel who'd had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

Taken together, these survey results present an unparalleled look into the prosecutorial process that most of us hope we'll never personally experience, but which we now know is relatively commonplace for companies that have received notice that an allegation of wrongdoing has been made against them.

Movement Toward a Solution to these Problems …

As you know, our Coalition has petitioned this Commission to reconsider the privilege waiver language of the Commentary at USSG Section 8C2.5, Application Note 12. We believe that our submission of evidence from our surveys in 2005 and now in 2006 documents that 1.) waiver demands are being made routinely and inappropriately, 2.) that waiver demands are being justified under the authority given through this provision of the Sentencing Guidelines, and that 3.) clients experiencing waiver demands are becoming less likely to consult their lawyers or include them in daily decision-making as a result of 1.) and 2.), to the detriment of corporate compliance programs. Accordingly, we request that at a minimum, the offensive clause in the Guidelines' Commentary be removed, and that the Commission consider inserting language in its stead that prohibits the DOJ from any consideration of privilege waivers – positive or negative – in the charging or negotiation discussions and decisions.

Specifically, we'd suggest that in Section 8C2.5, Application Note 12 would read as follows:

"12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~a prerequisite to~~ a reduction in culpability score under subdivisions (1) and (2) of subsection (g) is warranted ~~unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization~~."

We are hopeful that in light of the empirical information we've provided, and the fact that Associate Attorney General Robert McCallum of the Department of Justice testified before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (which held hearings on March 7, 2006 at the Coalition's request on the privilege erosion issue) that the DOJ

did not have any problems with removing the offensive language from the Guidelines, that you will favorably consider our request and propose amendment of the Sentencing Guidelines accordingly in your 2006 Amendment cycle. We believe that if we are able to remove the sources of waiver authority that the Department relies upon, it will be possible to begin to argue more effectively for a change to prosecutor's policies and practices, and find a solution that will help to restore the attorney-client privilege to its rightful position: as every client's right.

Thank you for your time and attention to this important matter, and your kind consideration of my comments. I'm happy to answer any questions I can for you.