the Holder Memorandum about the advantages of seeking waiver, and that the Department of Justice did not consider waiver of the corporation's attorney-client privilege and work product protection an "absolute requirement." He further stated that the willingness of a corporation to waive the Privilege "when necessary to provide timely and complete information" is one factor to consider in evaluating a corporation's cooperation.

In November 2004, the Sentencing Commission added the language to the Commentary to Section 8C2.5 of the Guidelines that is addressed in these comments. That language encourages prosecutors to request that corporations that are criminal targets or defendants waive the Privilege in the hope of a lesser sentence. The amendment, which is close to the language of the Holder and Thompson memoranda, contains the following language:

> "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

Last October, Acting Deputy Attorney General Robert D. McCallum, Jr. issued a memorandum that directed each federal office to establish "a written waiver review process." While one might argue that this is a useful first step, the memorandum allowed each office to make its own guidelines and did not provide for any central review of the waiver request process, and we know of individual offices that still have no meaningful process in place.

In January 2006, the SEC issued a "Statement Concerning Financial Penalties", listing factors it will consider in deciding whether and how to impose financial penalties on a corporation. The two principal considerations set forth by the SEC are the presence or absence of a direct benefit to the corporation from the violation and the degree to which a financial penalty will recompense or further harm the injured shareholders. In addition, the SEC identifies several other factors including the extent of cooperation with the SEC and other law enforcement. Thus, to avoid civil SEC charges, and substantial monetary penalties, a corporation is encouraged to cooperate by, among other things, waiving the Privilege.

The Task Force believes that the Commentary to Section 8C2.5 of the Guidelines, and the foregoing pronouncements by the Department of Justice and the SEC, have brought about a sea change in how attorneys advise their clients when they are faced with possible prosecution and have resulted in a substantial increase in the frequency with which corporate clients have been waiving the Privilege. While one could argue that the increased corporate fraud culture over the past ten years has brought this about, that neither justifies it nor merits its continuation. The attorney-client privilege and work product doctrine are predicated upon jurisprudence which recognizes the critical importance of the confidentiality of communications between client and counsel. An important first step in reversing this sea change would be to amend the Guidelines as proposed herein.

Analysis and Comments

The Attorney-Client Privilege in our Society

The attorney-client privilege is "the oldest of the privileges for confidential communications."[4] For centuries, in English and American law, the attorney-client privilege has been firmly grounded in the recognition that a client's opportunity to consult with counsel, in confidence, serves the public interest.[5] In the words of Dean John Wigmore, "the privilege appears as unquestioned."

The attorney-client privilege is expressly recognized in both the Federal Rules of Civil Procedure and the Federal Rules of Evidence.[6] Except in limited circumstances, absent a knowing and voluntary waiver by the client, no third party, or government authority, can learn the contents of attorney-client communications made for the purpose of obtaining legal advice. The confidentiality of such communications has been protected because of the long-standing consensus that we all are best served when lawyers are able to provide their clients with legal advice based on a full understanding of the relevant facts.

Although the courts have recognized that protecting communications between lawyer and client may hinder the search for truth, the courts have consistently held that this "impairment is outweighed by the social and moral values of confidential consultations. The attorney-client privilege provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow."[7] The attorney-client privilege benefits society because it helps create the trust that must exist between client and attorney in order to encourage open and full discussion with counsel. The attorney-client privilege makes it possible for an attorney to obtain the information necessary to prepare an informed defense and to provide clients with the advice they need to comply with the law.

Our laws have become so complex, particularly in the financial, health and securities fields, that it is virtually impossible for a corporation to comply with the law without the advice of counsel that is based on a full communication of the underlying facts by the client. If the client believes that, down the road, it may be required to waive the privilege and make those communications available to others, there is the real risk that, over time, the corporation's officers and employees will be less willing to seek out legal advice, or they may fail to disclose all the relevant facts for fear that their statements may at a later day be made available to the SEC or prosecutors. In addition, a lawyer may modify his or her advice over concern that it may be subject to second guessing later by others in litigation or overzealous government prosecutors seeking to criminally charge attorneys for purported wrongdoing. The United States Supreme Court stated in Upjohn Co. v. United States, 449 U.S. 383 (1981), that failure to respect the privilege of these communications "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."

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[4] J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW at 542 (McNaughton rev. 1961).
[5] See, e.g., WIGMORE, supra note 12, §2291, at 545-49.
[6] See Fed. R. Civ. P. 26(b) (1) and Fed R. Evid. 502.
[7] American Law Institute, RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 68. c, at 520 (2000).

This chilling effect upon communications between attorney and client is harmful to society overall, and we believe it a deleterious and unintended effect of the 2004 amendment. It cannot be the goal of the Department of Justice, the SEC, or this Commission to discourage compliance with the law, or the communications by which corporate clients seek out the legal advice they need in order to comply. In order to reach the goal of having clients fully and truthfully communicate with counsel, so that they may be guided in their dealings and compliance with the law, there needs to be a reliable assurance to clients and attorneys of the confidentiality of the communications. Unfortunately, this is no longer the case, in large measure because of the Holder and Thompson memoranda, the SEC Seaboard Report, and the Commission's 2004 Amendment.

The Prevalence of Waiver

When a corporation learns of wrongdoing, it frequently engages counsel to ferret out the facts of what occurred, analyze the applicable law, and advise the corporation. As part of this process, which may or may not be known to government authorities at the time, counsel will usually conduct an investigation, which involves interviewing company employees and reviewing and analyzing documents, and then render advice to the client about what to do to stop or correct any wrongful conduct. Counsel will also advise on whether any laws have been violated, whether the violations are civil or criminal, whether criminal prosecution or civil litigation is likely, and whether the corporation needs to or should disclose the findings and conclusions.

At some point, civil and criminal investigators get involved, and in this current environment, the corporation needs to consider whether to waive the Privilege and disclose attorney-client communications made at the time of the conduct that is under investigation, communications by agents of the corporation with counsel during the investigation, and the notes, memoranda and correspondence written by the attorneys in connection with the investigation. In the experience of the members of our Task Force, this was unheard of a generation ago, and was rarely considered or explored even ten years ago.[8]

The inclusion of the language concerning waiver in the 2004 amendments to the Guidelines has put the waiver issue into "play". While stated in the negative (that waiver of the Privilege should not be a prerequisite to a reduction in culpability score) and providing an exception, the exception unfortunately has become the rule. It is not so much that the Department of Justice, the SEC and other regulators now regularly request a waiver, although a recent survey suggests that the practice is prevalent.[9] They need not even do so, as the practice of expecting a waiver to occur has

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[8] A further consideration is whether privileged materials may be provided to the government, but not to others such as plaintiffs in class action litigation. There is a body of law that is followed in a majority of the federal circuits which states that if a client waives the privilege or work product protection as to one set of parties, such as a prosecutor or regulatory body, the privilege is waived for at least those same communications and materials for all purposes and all others. *See, e.g., In re Columbia/HCA Healthcare Corporation Billing Practices Litigation,* 293 F.3d 289 (6th Cir. 2002); *In Re Syncor Erisa Litigation,* No. CV03-2446-RGKRCX, 2005 WL 1661875 (C.D. Cal. July 6, 2005); *In re Natural Gas Commodity Litigation,* No. 03 Civ. 6186VMAJP, 2005 WL 1457666 (S.D.N.Y. June 21, 2005). Accordingly, advising a client to waive the Privilege so it can cooperate with the Department of Justice and obtain a benefit in sentencing is a challenging task.

[9] A March 2006 Survey Report by a coalition of organizations, aided by the ABA, had the following findings. About 75% of outside counsel have had to consider the issue of waiver for a client during the last five years, and

become so prevalent, and the benefits of doing so have become so tempting, that corporate counsel are now encouraged to convince their clients to forsake the protections of the Privilege so as to obtain the benefit of being seen as cooperative. The amendment itself, by being included as part of the Guidelines, thus codifies a trend that has accelerated in the last several years. The inevitable effect has been that corporations that do not hasten to waive the Privilege are quickly viewed as hiding something of value behind the Privilege; thus, in practice, there has been an *in terrorem* effect on counsel and their clients who want to cooperate with authorities – they must waive or be deemed uncooperative and engaged in a conspiracy of silence.

The Task Force recognizes that the Department of Justice and SEC pronouncements on cooperation list numerous factors, only one of which is waiver of the Privilege. Moreover, there are times when it may be appropriate for the government, in the interests of justice and in the search for the truth, to request that the Privilege be waived. Target corporations may also sometimes hide behind the Privilege, either improperly or by an over expansive interpretation of its parameters. However, there is no empirical study known to us which proves that law enforcement today is any more effective than, say 20 or 40 years ago—when waiver of the Privilege was rarely done or considered.

High profile cases such as Enron, Adelphia and WorldCom have produced a more diligent and aggressive enforcement program for criminal and civil authorities alike. Now, more than at any other time, there is a coordination of activities by prosecutors and regulators, and parallel investigations and proceedings. This development is expected. The Task Force recognizes the value and need for such programs.

However, the parallel investigations present difficult choices for clients and counsel. Each agency and authority has its own view and guidelines on whether cooperation is expected by a client, how to gauge that cooperation, and whether waiver of the Privilege is a factor considered for cooperation and resolution of the matter. For example, the SEC will consider waiver as a factor of cooperation, but agree in writing that disclosure of privileged communications and work product is only selective and will not be deemed a general waiver as to others. The CFTC has on occasion demanded waiver of privileged communications immediately at the commencement of an investigation, and has refused to give any written comfort that the waiver would be deemed limited. The Guidelines Commentary, however, trumps any nuances of these civil regulators when there are parallel investigations. This is an unfortunate result, and we believe an unintended consequence of the 2004 amendment. An attorney may counsel a client not to waive the Privilege for a civil regulator. However, with the Holder and Thompson memoranda, and the language of the 2004 amendment, with the possibility of criminal charges and sentencing, there is an overriding, almost compulsive, urge to waive. This should not be so, and is exactly the opposite of what the language of the Commentary suggests.

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approximately 50% of in-house counsel have had to do so. Over 50% of both groups confirmed that they believed there has been a marked increase in waiver requests by prosecutors. 55% of outside counsel who have represented clients under investigation said that prosecutors had requested waiver, directly or indirectly, as part of cooperation. *The Decline of the Attorney-client Privilege in the Corporate Context* available at http://www.acca.com/Surveys/attyclient2.pdf

Conclusion

The attorney-client privilege has served the true administration of justice for centuries by protecting confidentiality and promoting the candor that results in accurate fact-finding and effective legal advice. The 2004 amendment language, together with the Holder and Thompson Memoranda and their regulatory progeny, threaten to seriously compromise this ancient privilege to the detriment of the legal system and the society it serves. The exception in the amendment has become the norm.

For this and the reasons cited herein, we urge the Commission to eliminate the 2004 amendment language that encourages a corporation to waive the attorney-client privilege and work product protections to obtain a reduction in sentence under the Guidelines. There should instead be an express statement that waiver of the attorney-client and work product protections is not to be considered in evaluating the level of cooperation of the defendant and its culpability score.

Respectfully submitted,

New York State Bar Association
Task Force on the Attorney-Client Privilege [10]

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[10] While an Assistant U.S. Attorney from the U.S. Attorney's Office for the Eastern District of New York is on the Task Force, she did not participate in drafting the position set forth in this letter, and the letter does not represent her views, the views of her Office or the views of the Department of Justice.

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March 28, 2006

U.S. Sentencing Commission
Attn: Public Affairs
One Columbus Circle NE
Washington, DC 20002-8002

Re: Proposed Amendments on Privilege Waiver Language in the Federal Sentencing Guidelines

Dear Sir/Madam:

The Association of the Bar of the City of New York[1] (the "Association"), respectfully submits this letter, prepared by its Committee on Criminal Law ("the Committee"), in response to the Commission's January 27, 2006 Notice of Proposed Amendments, 71 F.R. 4782-4804, which seeks public comment on whether the privilege waiver language in the commentary at Section 8C2.5 should be deleted or amended. *See* U.S. Sentencing Commission, *Guidelines Manual*, § 8C2.5(g), comment 12 (Nov. 2004). This letter explores a few of the principal concerns that arise in connection with waivers of the attorney-client privilege and work product protection during corporate investigations, and provides the Committee's recommendations to help ensure that these

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[1] The Committee is one of the oldest and largest local bar Committees in the United States, with a current membership of over 22,000 lawyers. The Committee serves not only as a professional Committee, but also as a leader and advocate through the work of over 170 committees. Among other activities, the Committee's committees prepare comments for legislative bodies, regulatory agencies, and rule making committees on pending and existing laws, regulations, and rules that have broad legal, regulatory, practical, or policy implications. Further information regarding the Committee can be found at its web site, http://www.abcny.org.

fundamental legal protections, which are essential to fair and effective corporate compliance regimes, will be respected and maintained.

1. The current language is having unintended consequences.

By 2004, when the Commission amended the Commentary to Section 8C2.5 of the Sentencing Guidelines for Organizations, requests for a waiver of the attorney-client privilege, once a rare event, had become a frequently used practice of prosecutors. The 2004 amendment effectively codified the practice, establishing it as a benchmark for regulators and prosecutors to determine whether an organization had engaged in the "timely and thorough cooperation" needed to obtain leniency. In the wake of this amendment, the Holder and Thompson Memoranda, and the Seaboard Report,[2] there has been a dramatic increase in government demands for access to privileged attorney-client communication and attorney work product. According to a survey recently conducted by the National Committee of Criminal Defense Lawyers, nearly three-quarters of the 1,400-plus inside and outside counsel who responded agreed that a "culture of waiver" has evolved in which government agencies expect a company under investigation to waive the attorney-client privilege or work product protection. Moreover, nearly three-quarters of outside counsel said that the expectation of privilege waiver was communicated rather than implied.[3]

The Committee's members counsel their clients within this "culture of waiver" every day. Our members are active in the Southern and Eastern Districts of New York, and their practices routinely involve discussions of presumptive waivers with federal prosecutors, the SEC, and, as the practice has grown increasingly commonplace, with state authorities as well. Indeed, many of the Committee's members find that, in the current climate, waivers of the attorney-client privilege and work product protection are almost always implied, and frequently directly discussed, in their conversations with federal prosecutors as well as state and federal agencies; often, such waivers are

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2 *Report of Investigation Pursuant to Section 2(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (October 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

3 This survey is available online at http://www.acca.com/Surveys/attyclient2.pdf.

demanded at the outset of investigations, before other alternatives for gathering information have even been considered.

Although the language in the Commentary of Section 8C2.5 does not explicitly require companies to surrender the attorney-client privilege and work product protection in order to receive a reduction in culpability score for cooperation under the Guidelines, and is in fact meant to limit compelled waiver, when a company's lawyers have gathered information about a potential violation and prosecutors and regulators do not have the same information, these prosecutors and regulators routinely assert that waiver would lead to "timely and thorough disclosure." This language has thus helped to reinforce the expectation of waiver among regulators, prosecutors, and defense lawyers.

Significantly, there is no obvious mechanism for challenging the government's routine assertion that waiver is "necessary." The government often demands waiver of a corporation's attorney-client privilege and work product protection as a precondition for the grant of cooperation that might prevent indictment or reduce punishment. In actual practice, these policies provide prosecutors and regulators with tremendous incentives and ability to push for ever greater disclosures. In contrast, companies under investigation have essentially no ability to resist the government's demands.

The Justice Department's McCallum Memorandum, issued on October 21, 2005, does not address the problem of a corporation's inability to mount a meaningful challenge to waiver. It is concerned principally with process and merely calls for each U.S. Attorney's Office to "establish a written waiver review process"; the McCallum Memorandum does not question the substance of Justice Department policy or even seek national uniformity of decision-making in this area.

In short, it appears that a company's decision to broadly waive work product protection and the attorney-client privilege – and all too frequently, *only* the decision to broadly waive – will be the test of whether the government deems a company to be cooperative. Because the charge of non-cooperation will typically have profoundly serious adverse effects on a company's public image and bottom line, companies are routinely forced to waive these protections whenever the government seeks it.

In addition, in virtually every jurisdiction – including the jurisdictions where the majority of the Committee's members commonly practice – the waiver of the attorney-

client privilege and work product protection for one party constitutes a waiver as to all parties. The Association is concerned that compelled waiver increases the cost of cooperation with the government. Once they are disclosed to the government, work product and privileged materials will inevitably be turned over to private plaintiffs, who can capitalize on the disclosure of sensitive information turned over to the government during a criminal investigation to strengthen their civil cases. The risk of expensive and time-consuming future litigation is a harsh penalty, particularly for organizations that have chosen to cooperate with the government on its terms.

Even if, in a given case, a waiver will speed the government's access to relevant information, it is not at all clear that the benefit in a given case outweighs these substantial systemic harms caused by a culture of routine waiver.

2. The Commentary has had serious adverse effects on the administration of justice.

The public policy justification for encouraging corporate waivers appears to be that waiver will lead to quicker and increased access to information for the government and that the justice system as a whole will benefit as a result. We suspect that the opposite is true. Compelled waivers do not enhance compliance with the law. Rather, corporate officers and employees who are reluctant to involve lawyers in business activities translates into a greater risk that those officers and employees will break the law. Routine government demands for waiver of attorney-client privilege and work product protection cause lawyers to lose the trust and confidence of the employees of the companies they represent. In turn, this erosion of trust and confidence undercuts lawyers' abilities to counsel compliance with the law effectively.

Compelled waivers also hobble internal corporate investigations and prevent companies from detecting and correcting illegal activity. When employees suspect that anything said to a company lawyer can and will be used against them, both by their employer and, potentially, by a prosecutor, they may refuse to say anything at all.

3. The Commentary should be amended to stress that waiver is not a required element of cooperation.

The Association notes that, in addition to the unintended consequences noted above, waivers of attorney-client privilege and work product protection may simply not be appropriate in all cases of corporate wrongdoing. We therefore recommend that the Commission adopt affirmative language that emphasizes, without exception, that waivers of attorney-client privilege and work product protection should not be used to determine whether a sentence reduction under the Guidelines is warranted. Moreover, we urge the Commission to adopt language that ensures that cooperation requires the disclosure only of "all pertinent *non-privileged* information known to the organization," and that such waivers are to be requested, if at all, on a case-by-case basis, rather than demanded uniformly in order for a corporation to receive credit for cooperation with the government during an investigation.

Finally, the Association is concerned that this issue has broader implications for the integrity of the attorney-client relationship generally, beyond the context of business organizations. A robust attorney-client relationship is fundamental to our adversarial system of justice. Without it, and its accompanying frank disclosures to informed counsel, the system cannot function effectively. Individuals and organizations would have less ability to protect their rights. This is especially true in the context of criminal law. The current language of the Commentary suggests that a waiver of the attorney-client privilege is a necessary condition of cooperation. The logical corollary of that position is that a refusal to grant such a waiver amounts to a failure to cooperate, which the government may effectively view as obstruction. This result would be a troubling and unwelcome burden on the attorney-client relationship. Our system of justice should encourage counsel to gather facts and give advice in confidence, not treat these essential functions as obstacles to be overcome.

Thank you for the opportunity to share the Association's views on this matter of critical importance.

Respectfully submitted,

Bettina B. Plevan

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March 28, 2006

VIA FACSIMILE, EMAIL AND UPS NEXT DAY AIR

Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Comments to 1/27/06
Amendments to Sentencing Guidelines

Dear Mr. Courlander:

Enclosed please find the comments of the New York Council of Defense Lawyers Regarding Certain of the Proposed Amendments to the Sentencing Guidelines.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Brian E. Maas/mcw

Brian E. Maas

BEM:mcw
Enclosure

NEW YORK COUNCIL OF DEFENSE LAWYERS
COMMENTS REGARDING JANUARY 25, 2006
PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of approximately 200 attorneys whose principal area of practice is the defense of criminal cases in the federal courts. Many of our members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Out membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines and their application both as prosecutors and defense lawyers. In the comments that follow, we address two issues that are of particular interest to our members, which are raised by the amendments published in the Federal Register, 71 Fed. Reg. 4782-01 (Jan. 27, 2006).

8. PROPOSED REVISIONS TO § 3C1.1 (OBSTRUCTION)

The NYCDL continues to view enhancements such as those included in §3C1.1 ("Obstructing or Impeding the Administration of Justice") as improper because they allow conduct that could have been prosecuted as an independent crime to be used to enhance sentences where proven only by a mere preponderance of the evidence. Even putting that issue aside, however, we believe it is extremely important that the expansion of § 3C1.1 contemplated by this proposed revision not sweep in conduct that cannot fairly be construed as obstruction of justice with respect to the underlying offense; our comments and suggestions revolve around that concern.

The Revision to the Guideline. The heart of the Commission's proposal with respect to § 3C1.1 is to add as subsection (2)(A) language requiring the enhancement to apply to conduct by the defendant that occurred "prior to the investigation of the instant offense of conviction, and

was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction." As drafted, this language sweeps in broad categories of conduct that are part of the underlying offense and not, in any traditional or practical sense, obstruction of justice. For example, the commonplace situation in which a criminal wears gloves during the commission of a crime, so as not to leave behind fingerprints, or uses a disguise or a false name would come within amended Guideline § 3C1.1(2)(A) as drafted because that conduct is both "prior to the investigation" of the offense and certainly "intended to prevent or hinder the investigation," and yet surely that is not obstruction of justice in the sense of § 3C1.1 (or, for that matter, obstruction statutes). Similarly, if an employee has been generating phony documentation to conceal that he has been embezzling money from his employer, that is plainly pre-investigative conduct designed to hinder any subsequent investigation, but again, that should not constitute obstruction of justice within § 3C1.1. In both instances, the conduct at issue is part and parcel of the underlying offense and should be considered, if at all, under other sections of the Guidelines.

Thus, the NYCDL suggests that subsection (2)(A) of § 3C1.1 be amended to read as follows, with our proposed language noted in italics:

> prior to the investigation of the instant offense of conviction *(and not as an aspect of the commission of that offense)*, and was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction, *which investigation, prosecution, or sentencing was believed to be ongoing or reasonably imminent.*

We believe that these changes will allow the amended § 3C1.1 to cover pre-investigative conduct that is truly conduct specifically intended to obstruct justice – as such conduct has traditionally been defined and understood – without also encompassing conduct that is logically connected to the commission of the underlying offense and therefore not a proper basis for a § 3C1.1 enhancement.

The Revisions to the Application Notes. We support the proposed changes to the Application Notes, subject to our comment above and the two comments below.

Civil Perjury. The proposal is to amend item (b) in Application Note 4 – which presently reads "committing, suborning or attempting to suborn perjury" – by adding the words ", including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction." If the supposed civil perjury meets the 2(A) obstruction standard as we have articulated it above (i.e., with the language changes we proposed), then we support this change to the Application Note. Without the amended 2(A) language, however, this Note would suggest that the revised § 3C1.1 could be applied to civil perjury where the defendant was not specifically focused upon the possibility of a criminal investigation or prosecution, but rather simply lied at an unrelated deposition or other proceeding rather than confess a crime. We believe such an expansion of § 3C1.1 would do violence to the natural and proper construction of the term "obstruction of justice," particularly in light of the fact that civil perjury not amounting to obstruction of justice nonetheless can and, and indeed should, be addressed as a substantive offense where the evidence warrants that approach.

False Statements to Obtain Court-Appointed Counsel. The NYCDL opposes proposed Application Note 4(l), which would add as an example of conduct warranting a §3C1.1 enhancement "making false statements on a financial affidavit in order to obtain court-appointed counsel." Such conduct can never be obstruction of justice under § 3C1.1 because making a false statement on a financial affidavit "in order to obtain court-appointed counsel" is, by definition, not conduct undertaken in order to "prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction." Such conduct by a defendant can and probably should be prosecuted, if the false statement can be proven beyond a reasonable doubt, but this proposed revision to the Application Note would directly contradict the plain language

(and intent) of § 3C1.1. Indeed, we note that a stronger argument could be made that lying to a probation or pretrial services officer about drug use while on pre-trial release is obstruction of justice, and yet that conduct is expressly excluded from § 3C1.1 by Application Note 5(e).

Proposed Additional Application Notes. For the reasons noted above, we suggest that the following be added as section (f) of Application Note 5, which provides examples of conduct that typically does not warrant application of § 3C1.1: "generating false or misleading documentation in the course of the commission of the offense of conviction."

We also urge that the following sentence be added at the very end of Application Note 5: "Enhancements under 2(A) for conduct pre-dating the investigation, prosecution and sentencing of the instant offense should be limited to those instances in which the defendant's conduct was unambiguously directed at obstructing such future investigation or proceeding, which was believed to be ongoing or reasonably imminent."

12. CHAPTER EIGHT – PRIVILEGE WAIVER

The United States Sentencing Commission has requested comment with respect to the following sentence in the commentary to the Organizational Sentencing Guidelines that relates to the culpability score for defendant organizations:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility] ***unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.***

U.S.S.G. § 8C2.5(g) (emphasis added). At the time this language was adopted by the Commission, "the Commission stated that it expect[ed] such waivers [would] be required on a limited basis...."[1]

[1] U.S.S.G. Supplement to Appendix C (Amendment 673) (2004).

As a preliminary matter, the NYCDL joins the positions taken by the Coalition to Preserve the Attorney-Client Privilege[2] and commends to you its survey research, which confirms what our members have experienced in their daily practice. When charging and sentencing decisions are made, Assistant United States Attorneys regularly put corporations in the position of having to waive the attorney-client privilege during the course of a criminal investigation in order to be considered to have cooperated fully with the government. Further, we agree with the recommendations of the American Bar Association that waiver of the attorney-client privilege and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government."[3] At a minimum, we recommend that the commentary be amended to delete the exception for when "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

In our experience, the exception, which falls completely within the unreviewable discretion of the prosecutor, has become the rule. We live in what has become a "culture of waiver."[4] In every investigation, prosecutors and criminal investigators believe it is necessary to have access to the privileged communications and work product of a corporation's lawyers. By

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[2] The Coalition is comprised of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, the Business Civil Liberties, Inc., the Business Roundtable, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the United States Chamber of Commerce. *See Oversight Hearing on White Collar Crime Enforcement (Part 1): Attorney Client Privilege and Corporate Waivers*, before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on Judiciary, 109th Cong., 2d Sess. (Mar. 7, 2006).

[3] American Bar Association, Stmt. Of Donald C. Klawiter, *Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines Regarding Waiver of Attorney-Client Privilege and Work Product Doctrine*, Nov. 15, 2005 at 3.

[4] *See Oversight Hearing on White Collar Crime Enforcement (Part 1): Attorney Client Privilege and Corporate Waivers*, before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on Judiciary, 109th Cong., 2d Sess. (Mar. 7, 2006) (noting that almost 75% of both inside and outside counsel expressed agreement that a "culture of waiver" has evolved).

the same token, our clients have unfortunately come to believe that if an indictment is to be avoided, the government will unquestionably have to have access not only to the privileged communications, but also to the innermost thoughts and analyses of the corporation's lawyers. Requiring such a waiver runs counter to the fundamental rights protected by our criminal justice system and undercuts the trust and confidence that define the relationship between lawyer and client and are necessary to its functioning. The exception is also troubling for two very concrete reasons. First, a prosecutor's determination that a particular investigation takes priority over these long-established protections is not subject to non-partisan review. Second, as discussed further below, a client's decision to waive a privilege typically has serious consequences in any future civil litigation and may even spark a civil lawsuit so that plaintiffs can have access to formerly privileged communications.

Furthermore, our experience suggests that the drive of prosecutors and regulators to obtain privileged communications, including work product, is not abating but increasing. It now appears that not only are law enforcement officials regularly determining that such waivers are necessary, they also are requiring a corporation's lawyers to provide information gathered during the course of an internal investigation on a "real time" basis – which is to say that a corporation's counsel is asked to turn over information as soon as it is acquired before counsel can evaluate whether it is relevant, appropriate or significant to the investigation, let alone whether the information is complete or trustworthy. This rush to share information with the government deprives a corporation of the opportunity to utilize fully its counsel to determine what really happened, how it can be documented, and who has critical information necessary to tell the whole story.

In the NYCDL, we know first-hand that there can be serious unintended consequences when waivers of the attorney-client privilege are required and implemented. In 2004, senior

executives of Computer Associates were indicted for obstructing justice and conspiring to obstruct justice, in violation of 18 U.S.C. §§ 1512(c)(2) and 1512(k), by failing to disclose, falsely denying and concealing from lawyers representing the corporation in parallel investigations by the United States Attorney's Office for the Eastern District of New York and the Securities and Exchange Commission irregularities in the corporation's accounting practices.[5] When a corporation engages legal counsel in connection with an investigation, it should be entitled to the full benefit of that counsel, which requires giving counsel the opportunity to conduct an investigation on behalf its client. A company's lawyers should not become *de facto* prosecutors and government investigators.

Our deep concerns about the theory on which these obstruction charges were brought have only been heightened by the continuing demands for waiver and a recent indictment in United States District Court for the Southern District of Texas, where it appears that the same theory is currently being employed to prosecute an employee of El Paso Corporation because of statements he made and failed to make to the corporation's outside lawyers during an interview they conducted regarding his natural gas trading practices.[6]

This "culture of waiver" also has unintended consequences in private civil litigation. The New York courts have experienced an onslaught of private class actions under the federal securities laws, many of which are routinely filed within days of any public disclosure of the existence of a government investigation. With the regular – if not routine – demand by prosecutors that corporations waive the attorney-client privilege and work product doctrine, plaintiffs in such cases appear ever more eager to file such lawsuits, secure in the belief that they

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[5] *United States v. Sanjay Kumar and Stephen Richards*, Case No. 04-CR-846 (E.D.N.Y. Sept. 22, 2004), Counts 6 and 7.

[6] *United States v. Greg Singleton*, Case No. 4:06CR080 (S.D. Tex., Mar. 8, 2006), Count 10.

can piggy-back on the waiver required by the government in requesting discovery, and they try to choose jurisdictions that do not accept "selective waiver." Thus, ironically, by indiscriminately requiring waiver, the government is fueling lawsuits and class actions.

Even when the government's investigation results in no charges, the corporation must expend enormous time and resources on defending itself in the private class action context. Thus, in many cases, the privilege waivers that prosecutors frequently require ultimately result in no real justice for the corporation.

In sum, we believe that the exception is unnecessary and has led to unintended consequences in its implementation. Our clients want to avoid indictment, and they recognize that usually means that the best course of action is to work with the government to help uncover wrongdoing. It is not necessary for the Sentencing Commission to express a preference for having a corporation waive its attorney-client privilege or work product protections in order to receive recognition from the government for its efforts to find, investigate, and ultimately prevent corporate crime.

THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

March 22, 2006

Michael Courlander, Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
Washington D.C. 20002-8002

Subject: Request for Public Comment on Proposed Amendments to the Sentencing Guidelines for the United States Courts (71 FR 4782-4804)

Dear Mr. Courlander:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct ("COPRAC")[1] appreciates this opportunity to submit its views on the commentary (the "Commentary") to Section 8C2.5 of the United States Sentencing Commission's ("Commission") 2004 amendments to Chapter Eight, the "Organizational Sentencing Guidelines."[2]

COPRAC's charge is to assist the more than 150,000 active members of the California State Bar in their desire to appreciate and adhere to ethical and professional standards of conduct. In so doing, we recognize that one of our primary constituencies is the public, and that our actions are governed by the objective of serving the public interest. These comments are submitted with those objectives in mind.

As explained below, COPRAC urges the Commission to delete the Commentary and instead adopt an alternate commentary providing that "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility]."

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[1] This position is only that of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. This position has not been adopted by the State Bar's Board of Governors or overall membership and should not be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

[2] The Commentary provides: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

[152]

COPRAC begins by noting the purposes behind the attorney-client privilege and work product protection. Over a century ago, the United States Supreme Court declared that the assistance of lawyers "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981), quoting *Hunt v. Blackburn*, 128 U.S. 464 (1888). The existence of the privilege facilitates an important process. Privilege begets client trust, which in turn induces clients to make full and frank disclosures to their lawyers. Those disclosures enable effective legal representation, which entails the lawyer's assistance in helping the client comply with law. Any regulations or administrative policies that inhibit that process will impinge on the "broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. These concerns are more pressing than ever. We live in an evermore complicated regulatory environment where organizations turn to lawyers for assistance in compliance with law—compliance that inures to the benefit of the clients and the public as well.

The work product protection has different purposes but, like the attorney-client privilege, serves to "promote justice." As Justice Murphy noted in *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947):

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Because the work product protection dealt with representation before or during litigation, the protection historically served the legitimate adversarial needs of litigants. Consistent with that historical framework, an organization accused by the federal government of wrongdoing has a compelling need to draw upon the services of a lawyer who can prepare a legitimate defense without fearing that the government will coerce a waiver of the work product protection. But the work product protection does more than that. Today, a great deal of compliance activity is driven by the threat or presence of litigation that is then resolved through settlement, consent decrees, stipulated injunctions, and similar mechanisms. The vast majority of litigated cases now settle out of court—and that is particularly true for large organizational clients facing litigation initiated by the federal government. Thus, the work product protection now not only serves the legitimate adversarial needs of litigants but also facilitates the compliance function as well.

Unless the Commission deletes the Commentary and expressly provides that waiver of the attorney-client privilege or work product protections will never be a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and

Acceptance of Responsibility], the Commission will be doing serious long-term damage to the public benefits derived from the confidential nature of the attorney-client relationship.

First, although the Commentary suggests that waivers will not be a prerequisite to a reduction in culpability score except when necessary to provide timely and thorough disclosure, the exception is likely to swallow the rule. At sentencing, a federal prosecutor who did not receive the organization's privileged communications and work product is likely to argue in virtually all instances that waivers were necessary to effect a more timely and thorough disclosure from the organization. And, since the organization will at that time have been found culpable, there is a substantial likelihood that its earlier failure to provide a waiver will outweigh all other aspects of its self-reporting, cooperation and acceptance of responsibility. Thus, retaining this aspect of the 2004 amendment to the sentencing guidelines will contribute significantly to a new climate in which organizations expect that communications with their counsel will not be protected.[3]

But, in fact, waivers will virtually never be necessary to a timely and thorough investigation by a federal agency or prosecutor. Federal agencies and prosecutors will still have the full subpoena powers provided by federal law. Organizations will still have strong incentives to provide information to investigating agencies, and those agencies will have ample tools to test the veracity of that factual information. Further, federal prosecutors will still be able to assert the crime fraud exception to the attorney-client privilege and, if a prima facie showing is made, will gain access to otherwise privileged materials. However, there is a material difference between having a judge determine the privilege has been waived due to commission of a crime or fraud, and creating a climate where no organization can take comfort that any of its consultations with its counsel are confidential because a federal agency or prosecutor has essentially been empowered to demand a waiver without any finding that the attorney's services have been used in the commission of a crime or fraud.

Second, as waivers become more commonplace, compliance with law will suffer. The judicial opinions cited above, which draw on centuries of practical wisdom, make that point. But it also follows from common sense. In the modern regulatory environment, and especially after enactment of the Sarbanes-Oxley Act in 2002, organizations rely heavily on in-house and outside lawyers to gather facts, analyze compliance issues, conduct investigations and recommend courses of conduct that comply with law. Lawyers cannot represent organizations effectively if they are routinely seen by their clients as actively working as an arm of the federal government. For lawyers to fulfill their role, everyone at the organization from the board members down to the line employees must trust that the lawyers are working to represent the organization consistent with the long-recognized duty of undivided loyalty, and not as agents of the government.

The negative effects of having sentencing guidelines that result in routine waivers will only increase over time, as more and more organizations will come to doubt their lawyers' loyalties and as

[3] See the March 6, 2006 Association of Corporate Counsel Survey indicating that [in light of the Thompson Memorandum as well as the 2004 Amendments to the Organizational Sentencing Guidelines] the vast majority of corporations and their counsel are now operating in a climate in which they expect a request for waiver to be a part of any regulatory or prosecutorial investigation initiated by an arm of the federal government.

organizational agents will come to fear that the organization's lawyers are future federal informants. Those doubts and fears will necessarily reduce the amount and quality of information shared with the organization's lawyers as well as the amount and quality of legal advice provided by counsel. This slow erosion of the lawyers' role as agents of legal compliance would then take many years to reverse. In the meantime, the organization, its employees, its investors, and the public itself will be deprived of the benefits of the organization's compliance with law in accordance with the advice of counsel.

For these reasons, COPRAC urges that the Commentary be deleted and that the Commission take affirmative steps to prevent further erosion of the attorney-client privilege and work product protection by finding that waiver is not a prerequisite to a reduction in culpability score.

Thank you for your consideration of our opinion in this matter.

Very truly yours,

Steven A. Lewis, Chair
Committee on Professional
Responsibility and Conduct

cc: Hon. Dianne Feinstein, United States Senate
Hon. Elton Gallegly, United States House of Representatives
Hon. Daniel E. Lungren, United States House of Representatives
Hon. Darrell E. Issa, United States House of Representatives
Hon. Howard L. Berman, United States House of Representatives
Hon. Zoe Lofgren, United States House of Representatives
Hon. Maxine Waters, United States House of Representatives
Hon. Adam B. Schiff, United States House of Representatives
Hon. Linda T. Sánchez, United States House of Representatives
Members of COPRAC
Randall Difuntorum, State Bar of California Office of Professional Competence
Mark A. Taxy, COPRAC Staff Counsel

THE BAR ASSOCIATION OF
SAN FRANCISCO

March 22, 2006

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affair – Sentencing Guidelines Comment

Re: Comments on Proposed Amendments to the Sentencing Guidelines
Chapter Eight – Privilege Waiver
Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the Bar Association of San Francisco, representing 8,500 attorneys in the State of California, we write in response to the Commission's request for comments on the above-referenced Proposed Amendments, Chapter Eight, Privilege Waiver. In particular, we write in regard to the 2004 Amendment to the commentary regarding Section 8C2.5(g). This new commentary authorizes the government to require entities to waive the attorney-client and related work product protections in order to show 'thorough' cooperation with the government.

We have several concerns, all flowing from our strongly-held belief in the fundamental character of the lawyer's duty of confidentiality to the client. In California, this duty of confidentiality has been expressed for more than 130 years in near-absolute terms through California Business and Professions Code Section 6068(e), which states: "It is the duty of an attorney … [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." There has only been one express exception to this statutory duty: a very recent amendment, effective July 1, 2004, to allow disclosure to prevent a criminal act reasonably likely to result in death or substantial bodily harm.

California has been extremely zealous in guarding and protecting client confidences and secrets. We believe that such protection is necessary for the client to obtain sound legal advice. Such advice can only come after the client has fully disclosed the facts of the case without fear that these facts might later be disclosed to adverse parties. Without such protection, we believe a client would be far more guarded in discussions with counsel. This would have a direct negative effect on the quality of the legal advice.

Good legal advice assists clients in increased compliance with the law. Full knowledge of the client's facts and issues enables counsel to guide the client through complex issues and thus stay within the confines of the law. Limited knowledge hampers counsel and may lead to inappropriate advice, with resulting damage to the client and harm to the society. Fear of eventual disclosure through erosion of the attorney-client privilege and related work product rules is likely to hamper candid discussions with counsel, limit effective internal investigations, and curtail effective internal audits and compliance initiatives.

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One of the purposes of work product protection is to prevent the parties from borrowing the work, insights, and wits of their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Work product protection is a right of the attorney, not of the client. The attorney has an independent right to assert the protection of his or her own work product. *In re Grand Jury Proceeding (FMC Corp.)*, 604 F.2d 798, 801-02 (3d Cir. 1979). *In re Sealed Case*, 676 F.2d 793, 812, fn. 75 (D.C. Cir. 1982).

The sentence added in 2004 to the Commentary at Section 8C2.5(g) is capable of misapplication, particularly in light of policies adopted by the Department of Justice. As set forth in the Holder Memorandum, attorney-client privilege and work product protections are not protected. Instead, they are deemed to be ". . . necessary in order to provide timely and thorough discussion of all pertinent information known to the organization." Waivers of privilege have become the standard for measuring the adequacy of cooperation in charging decisions and sentencing arguments. This means that prosecutors force the accused to have the accused's attorneys, accountants, and investigators prepare cases for them instead of using prosecutors' own diligence in preparing cases. As stated in the Holder Memorandum, "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements." The hidden agenda behind this statement is the implied addition of the phrase ". . . and so we do not have to conduct such investigations ourselves."

The requirements that cooperation be both "timely" and "thorough" are also abused. The requirement of "timeliness" means that disclosure must begin ". . . essentially at the same time as the organization is officially notified of a criminal investigation." Sentencing Guidelines § 2.5(g), Comment 12. This can be self-defeating. For example, it takes time to conduct an investigation. If a criminal investigation has begun before the organization's own internal investigation has been completed, the information disclosed when the organization is notified of a criminal investigation may be incomplete or inaccurate and therefore misleading. "Thoroughness" requires "the disclosure of all pertinent information known by the organization." *Ibid.* However, an organization can disclose the substance of its knowledge without having to disclose attorney-client communications and without having to divulge the work product of its counsel. For example, an organization can disclose that John Jones falsified a bookkeeping entry that materially affected a financial statement without also having to disclose that the organization's attorney communicated that information to its board of directors.

We suggest that the sentencing guidelines should honor attorney-client confidentiality and the work product doctrine. The philosophy that ought to be reflected in the sentencing guidelines appears in the United States Attorneys' Manual at Title 9, § 9-13.200:

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect *bona fide* attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.

After all, when the Department of Justice represents federal employees, its own standards explicitly recognize the value of attorney-client confidentiality:

> Attorneys employed by any component of the Department of Justice . . . undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. . . . Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3).

The sentencing guidelines should honor that attitude when addressing issues of privilege for the accused. It should be unethical for a prosecutorial agency to demand that an accused waive attorney-client confidentiality or work product protection on threat of increased culpability scores. Whether the accused is an individual or a corporation, he, she, or it should be entitled as a matter of right to protection of the confidentiality of attorney-client

responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3).

The sentencing guidelines should honor that attitude when addressing issues of privilege for the accused. It should be unethical for a prosecutorial agency to demand that an accused waive attorney-client confidentiality or work-product protection on threat of increased culpability scores. Whether the accused is an individual or a corporation, he, she, or it should be entitled as a matter of right to protection of the confidentiality of attorney-client communications.

The sentencing guidelines should affirmatively state that:

1. Waiver of the confidentiality of attorney-client communications is not a prerequisite to a reduction in culpability score, without exception.

2. If the cooperation of the accused is timely and thorough, the refusal of the accused to waive privileges or to disclose otherwise privileged information is irrelevant.

3. Disclosure ". . . of all pertinent information . . ." should be modified to say "of all non-privileged, pertinent information. . . ."

4. If counsel for the accused asserts protection of the work product doctrine, that assertion will not affect the culpability score of the accused.

We believe that these amendments are consistent with those proposed by the American Bar Association in the submission to the Commission dated November 15, 2005. Such amendments would accomplish three important goals in the protection of client confidentiality:

- Make clear that cooperation only requires the disclosure of non-privileged information and

- Eliminate the concept that waiver of attorney-client privilege and related work product protections is a factor in the determination of the client's 'thorough' cooperation with the government.

We appreciate this opportunity to present our views to the Commission.

Yours very truly,

Joan Mei Haratani

Joan Haratani
President, The Bar Association of San Francisco
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(9930.08:23)

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March 28, 2006

VIA E-MAIL TO pubaffairs@ussc.gov
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Proposed Amendments to the United States Sentencing Guideline § 8C2.5 contained in 71 Fed. Reg. 4782-4804

Dear Sir or Madam:

Kindly accept this letter to state the position of the Middlesex County Bar Association regarding whether the Commission should reconsider a portion of its 2004 amendments to Chapter Eight, the Organizational Sentencing Guidelines, namely, the portion of commentary at §8C2.5(g) regarding waiver of attorney-client privilege and of work product protection.

The Middlesex County Bar Association strongly supports the November 15, 2005 Statement of Donald C. Klawiter , Chair Of The ABA Antitrust Law Section, on behalf of the American Bar Association, appearing before The United States Sentencing Commission, on this issue. A copy of Mr. Klawiter's statement is attached for reference.

We thank the Commission for considering the views of our organization. Thank you.

Yours truly,

Stephen E. Klausner

STEPHEN E. KLAUSNER
President

Enclosure

SEK/jpc

cc: Darren M. Gelber, Esq., MCBA Trustee

AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

STATEMENT OF

DONALD C. KLAWITER

CHAIR OF THE ABA ANTITRUST LAW SECTION

on behalf of

THE AMERICAN BAR ASSOCIATION

appearing before the

UNITED STATES SENTENCING COMMISSION

concerning

PROPOSED AMENDMENT OF COMMENTARY IN SECTION 8C2.5 OF THE FEDERAL SENTENCING GUIDELINES REGARDING WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

NOVEMBER 15, 2005

[160]

Mr. Chairman and Members of the Commission:

My name is Donald C. Klawiter. I have been asked by Michael S. Greco, President of the American Bar Association (ABA), to present the ABA's views concerning recent changes to the Federal Sentencing Guidelines that we believe weaken both the attorney-client privilege and the work product doctrine. In particular, I have been asked to express the ABA's support for the Commission's decision to make it a policy priority this year to review, and possibly amend, the Commentary in Chapter Eight (Organizations) of the Guidelines regarding waiver of the attorney-client privilege and work product protections.[1] The ABA has suggested several specific changes to the Commentary that are set out at the end of my statement.

It is my privilege to serve as the Chair of the Antitrust Law Section of the American Bar Association, a section consisting of approximately 10,000 antitrust lawyers, professors and other professionals throughout the country. In that capacity, I have been authorized to express the position of the American Bar Association, and its more than 400,000 members, on the important issue of privilege waiver. We welcome the opportunity to work with you and your staff to improve the law and serve the interests of the public.

On August 15, 2005, the ABA filed a formal comment letter[2] with the Commission in response to its Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.[3] In that comment letter, the ABA urged the Commission to retain its tentative policy priority number (5), described in the Notice as a "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." The ABA also urged the Commission, at the end of its review, to amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections

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[1] *See* the United States Sentencing Commission's Notice of Final Priorities for the 2005-2006 amendment cycle, policy priority number (6), 70 Fed. Reg. 51398 (August 30, 2005).
[2] The ABA's August 15 comment letter to the Commission is available at: http://www.abanet.org/buslaw/attorneyclient/materials/049/049.pdf.
[3] 70 Fed. Reg. 37145 (June 28, 2005).

should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government. The ABA is very pleased that the Commission has decided to retain the privilege waiver issue on its final list of priorities for the upcoming amendment cycle, and we continue to urge the Commission to adopt our suggested amendment.

The ABA has long supported the use of the Sentencing Guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan*. At the conclusion of that process, the ABA adopted a new policy recommending that Congress take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

Although the ABA opposes broad changes to the Federal Sentencing Guidelines at the present time, we have serious concerns regarding several specific amendments to the Sentencing Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding

several of these recent amendments[4], our greatest concern involves a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Sentencing Guidelines (the "privilege waiver amendment"). Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines, the ABA—working with a large and diverse group of business and legal organizations from across the political spectrum—has evaluated the substantive and practical impact that ever-increasing demands for privilege waiver have had on the business and legal communities. For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys[5] of in-house and outside counsel to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. In addition, the American Bar Association's Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects[6]. As a result, the ABA has concluded that the

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[4] In August 2004, the ABA House of Delegates adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and the related background reports, are available at http://www.abanet.org/poladv/acprivilege.htm.

[5] Executive summaries of these surveys are available online at www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf and www.acca.com/Surveys/attyclient.pdf, respectively.

[6] Materials relating to the work of the ABA Task Force on Attorney-Client Privilege are available on its website at www.abanet.org/buslaw/attorneyclient/.

new privilege waiver amendment, though undoubtedly well intentioned, will bring about a number of profoundly negative consequences.

First, the ABA believes that as a result of the privilege waiver amendment, companies and other organizations will be required to waive their attorney-client and work product protections on a routine basis. The Commentary to Section 8C2.5 states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." But the exception is likely to swallow the rule. Prosecutors will make routine requests for waivers, and organizations will be forced routinely to grant them, because, among other things, there is no obvious mechanism for challenging the government's assertion that waiver is "necessary."

The Justice Department has followed a general policy of requiring companies to waive privileges in many cases as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum." Anecdotal evidence abounds where companies have been asked to turn over internal investigation reports and waive both attorney-client privilege and work product protection in cooperating with the government, even though "on the record" examples, by the very nature of the process, are hard to come by. Companies are reluctant to speak publicly about their experiences for good reason. They deal with the agencies that regulate them on a routine basis, and it is generally in a company's best interest to stay on good terms with those agencies. Companies also guard their public image and are reticent to reveal unnecessarily the existence or details of governmental investigations into their conduct. Where companies *can* come forward with their experiences, the routine nature of the government's practice is clear. For example, we recently learned that some fifty general counsel met with Paul McNulty of the Justice Department regarding

abuses of the privilege. The former General Counsel of a now defunct steel company was one of them, and his story follows.

When Bethlehem Steel was still in existence, a disgruntled former employee told authorities that the company was burying toxic waste at one of its sites in Texas. Fifty federal agents arrived at the company with a search warrant and backhoes and started digging up the yard. No buried drums were ever found, but, in the course of the search, the investigators found evidence of garden variety environmental violations that, in most circumstances, likely would have been pursued as civil violations. Perhaps understandably, the Justice Department did not want to drop the matter altogether, and decided to pursue a criminal investigation.

At their very first meeting with the General Counsel, the Justice Department demanded the privileged internal report prepared by outside counsel and sought cooperation from the company in pursuing charges against individual employees. No middle ground alternative was entertained. Firmly believing that no knowing or intentional violation had occurred, the General Counsel declined the request, and the company prepared its defenses. In the end, the Justice Department did not charge a single individual; the company negotiated a plea and paid a fine.

The Bethlehem Steel example demonstrates that the Justice Department prosecutors—operating under an increasingly expansive interpretation of the Holder and Thompson Memoranda—will seek internal investigation reports and privilege waivers even in cases that arguably never should have been prosecuted. Now that the privilege waiver amendment to the Sentencing Guidelines has become effective, there may be no limit on the Justice Department's ability to put pressure on companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Commission and Congressional ratification of the Department's policy of routinely requiring privilege waivers. From a practical standpoint,

companies will have no choice but to waive these privileges whenever the government demands it, because the government's threat to label them as "uncooperative" in combating corporate crime would profoundly threaten their public image, stock price, and credit worthiness.

Second, the ABA believes that the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards and other key personnel of the entity and must be provided with all relevant information necessary to properly represent the entity. By encouraging routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting—or being completely candid—with their lawyers. This, in turn, seriously impedes the lawyers' ability to counsel compliance with the law effectively.

Third, while the privilege waiver amendment was intended in good faith to aid government prosecution of corporate criminals, the ABA believes that its actual effect is to make detection of corporate misconduct more difficult, by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective and efficient tools for detecting and flushing out improper conduct. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal investigations depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early or even stop improper conduct before it takes

place. Therefore, rather than promoting good compliance practices, the privilege waiver amendment undermines this laudable goal.

Fourth, the ABA believes that the privilege waiver amendment unfairly harms employees. The amendment places the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and run the risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity, or they can decline to cooperate and risk their employment. In the ABA's view, it is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many other organizations have expressed similar concerns regarding the privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005—and again on August 15, 2005—when an informal coalition of numerous prominent business, legal and public policy organizations[7] submitted joint comment letters urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal and public policy communities.

The ABA shares these concerns and believes that the privilege waiver amendment is

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[7] The signatories to the March 3, 2005 letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation. The ABA also expressed similar concerns to the Commission in its separate letter dated May 17, 2005. The coalition's August 15, 2005 comment letter was signed by the same groups that signed the March 3 letter, as well as the Financial Services Roundtable, National Association of Criminal Defense Lawyers, National Defense Industrial Association and Retail Industry Leaders Association. The coalition's August 15, 2005 comment letter is available online at: http://www.abanet.org/buslaw/attorneyclient/materials/047/047.pdf.

counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship. Because of the serious and immediate nature of this harm, we urge the Commission during its 2005-2006 amendment cycle to modify the applicable language in the Commentary to clarify that the waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known to the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below. If the ABA's recommendations were adopted, the relevant portion of the Commentary would read as follows[8]:

> "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.*~~"

[8] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

We appreciate the opportunity to appear before the Commission and present our views on the important issue of privilege waiver, and we look forward to working with you and your staff on this matter throughout the current amendment cycle.

March 27, 2006

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United States Sentencing Commission
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Washington, D.C. 20002-8002

RE: Review and Possible Amendment of
Application Note 12 to Guidelines Section 8C2.5(g)

Dear Chairman Hinojosa and Members of the Commission:

As Chairs of the Federal Criminal Procedure and Attorney-Client Relations Committees of the American College of Trial Lawyers (the "College"), we write on behalf of the College, and with the approval of its Executive Committee, to provide its views on the waiver language contained in the present version of Application Note 12 to Section 8C2.5.[1] We appreciate the Commission's willingness to receive public comment on this important issue.

As currently formulated, the Application Note reads in pertinent part:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

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1 The American College of Trial Lawyers, founded in 1950, is an association of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. There are currently more than 5,500 Fellows who practice throughout the United States and Canada; fellowship is limited to a maximum of 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases, and those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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The College recommends that the Commission amend the Application Note to make clear that waiver of the attorney-client privilege and the work product doctrine (collectively, the "Privilege") should not be taken into account in determining an organization's Culpability Score under §8C2.5. Rather, whether an organization has "fully cooperated in the investigation" for purposes of subsection (g)(1) or (g)(2) should be determined by whether the organization has made timely disclosure of all pertinent *non-privileged* information known to it. The final sentence of the Application Note, as currently written, unfortunately creates an exception that swallows the rule, and also requires sentencing judges to make unnecessarily difficult hindsight determinations about whether a particular defendant organization that has provided all pertinent non-privileged information to the government should also have waived the Privilege.

This recommendation flows directly from the College's long-standing concern that developments in the conduct of federal criminal investigations pose substantial threats to the integrity of the Privilege. In 2002, the College published a report titled "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations" (the "2002 Report"), a copy of which is attached to this letter at tab A. The 2002 Report addresses threats to the Privilege beyond the sentencing issue presented here. However, the College believes that the Sentencing Commission has an important role to play in safeguarding the Privilege. As an independent agency in the judicial branch, beholden neither to the institutional interests of the Department of Justice nor to the self-interest of corporations potentially subject to investigation, the Commission is uniquely well-situated to take a stand that will promote the effective administration of justice in the long term by protecting Privilege, thereby protecting the important values it serves.

The 2002 Report sets forth at length the many benefits produced by the Privilege — we will not list all of these benefits separately here, but it is worth emphasizing that, especially for corporate clients trying to navigate today's complex legal and regulatory environment, these benefits are tangible and practical, not simply a matter of high-toned rhetoric. Moreover, by encouraging effective compliance and risk management programs, the Privilege benefits not only the corporate clients but society and the legal system as a whole.

However, as set forth at length in the 2002 Report, routine prosecutorial demands for a privilege waiver in order to show "cooperation" with an investigation create a number of systematic

problems that far outweigh whatever public benefit might be gained by the incremental information made available to the prosecution in a particular case. Pressure on a company to waive the Privilege in order to secure lenient treatment from prosecutors can and does easily build to the point where the decision to waive is effectively coerced. Just as importantly, this pressure leads to a "culture of waiver," which systematically undercuts effective representation of companies by both inside and outside counsel even before a request to waive is made, because a privilege known to be of uncertain durability is in effect no privilege at all. Without a reasonable expectation that the Privilege can be and will be maintained in practice, the free flow of information from client to attorney and of advice from attorney to client, which the privilege aims to promote, will simply not take place with the same degree of effectiveness. In particular:

- Awareness by management that any knowledge gained by their lawyers is at risk of disclosure to the government will tend to dissuade management from investigating potential problems in the first place, undercutting early detection of compliance risks.

- Indeed, companies may become reluctant to conduct thorough and comprehensive investigations even when alerted to potential wrongdoing, for fear that with inevitable pressure to waive the Privilege their interests will be compromised in subsequent civil litigation.

- Individual employees and officers may view the company's lawyers as adversaries and de facto agents of the government, and for that reason be less willing to provide information.

- Employees and counsel alike will be loathe to commit important matters to writing but instead will tend to communicate orally, as well as by euphemisms and "nods and winks," in order to avoid creating a paper trail that will be turned over to the government.

Corporate counsel and members of the practicing bar have already observed these phenomena, and have observed the situation growing worse rather than better over the last several years, as documented in the recently-published results of a survey conducted by a broad coalition of groups concerned with this issue, which were presented to the Commission in connection with the testimony of Susan Hackett at the March 15, 2006 public hearing and are available at http://www.acca.com/Surveys/attyclient2.pdf. In the aggregate, the

"culture of waiver" risks crippling the ability of counsel and management to work together to prevent wrongful behavior by corporate employees and/or mitigate its consequences.

For these reasons, treating a waiver of the privilege as potentially relevant evidence of cooperation for purposes of determining an organizational defendant's Culpability Score is highly undesirable. While the current wording attempts to suggest that waiver will be relevant only in exceptional cases, we respectfully submit that that is not how it will inevitably work in practice. Under §8C2.5(g), whether the defendant "fully cooperated with the investigation" is an all-or-nothing determination. Cooperation that is deemed after the fact to have been less than "full" will have no positive impact whatsoever on the defendant's Culpability Score. A company setting out at the beginning of an investigation to cooperate fully will find it almost impossible under the current wording to gain sufficient comfort that a decision to maintain, rather than waive, the Privilege will not be held against it for sentencing purposes. It will always be possible in hindsight for the court (perhaps pressed by the prosecutor) to decide that waiver was "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" because it would have presumably led to the disclosure of additional information. Indeed, the present wording suggests that waiver will be "necessary" in the ordinary case, unless 100% of the information the organization has learned in a privileged capacity is not "pertinent." Thus, declining to waive the Privilege at the outset of the investigation will raise a very real risk that no credit will be received for otherwise full cooperation, including timely and thorough disclosure of all non-privileged pertinent information known to the organization.

This is not just a problem with the wording of the Application Note as it now reads. In this area, any approach that says, in effect, that waiver is not necessary except under the extremely broad and undefined terms of the current formulation will ensure that the exception swallows the rule. There will always be enough uncertainty at the time the decision to maintain the Privilege or to waive it must be made that the failure to waive will seem unacceptably risky. This also may mean in some instances that the decision to cooperate may appear unacceptably risky. That is, if the company decides that it is not willing to waive but cannot be comfortable that it will derive any benefit from cooperation absent a waiver, it will not have a sufficient incentive to make timely and thorough disclosure to the investigators of the non-privileged information it may know, and may instead wish to take its chances on

the prosecution being unable to make a case without the company's cooperation.

Moreover, deciding in hindsight whether an organization that has provided timely and thorough cooperation in all respects except for a privilege waiver should be deemed to have "fully cooperated" is not a task most sentencing judges will find palatable. It requires speculation as to how much greater a benefit to the investigation might have been provided by a waiver. Indeed, since the issue will only come up when the company has maintained the Privilege, the court will be unable to determine precisely what additional benefit a waiver might have provided unless the company were to waive the Privilege in connection with the sentencing proceeding.

Finally, treating waiver as relevant to full cooperation for sentencing purposes also sends a negative message about the legitimacy of the Privilege and the interests it protects. It is appropriate to treat an organization that cooperates with an investigation more leniently than one that does not cooperate, because cooperation can fairly be said to mitigate culpability. But there is nothing culpable about maintaining the confidentiality of privileged information, and neither the Commission nor individual judges making sentencing determinations should be seen to suggest that there is. For purposes of determining "Culpability Score," an organization that maintains its right to safeguard the Privilege should not be deemed more culpable than one that is willing to succumb to pressure to waive that right.

The most practical way to avoid these problems is to amend the Application Note to make clear that waiver of the Privilege is not required nor even relevant to the determination of whether an organization has "fully cooperated" under §8C2.5(g), and that timely and thorough disclosure of all non-privileged pertinent information is what is required. The College believes that the proposed alternative language submitted to the Commission by the American Bar Association at the Commission's November 15, 2005 meeting would satisfactorily accomplish these goals.

We note that the Commission has requested comments only on the relevance of privilege waiver to determining Culpability Score under §8C2.5(g). A question might arise as to whether, under unusual circumstances outside the "heartland" of the Guidelines, a Privilege waiver might be relevant to an organizational defendant's eligibility for a downward departure from the range of sanctions determined pursuant to

the Guidelines (including the determination of Culpability Score). That, however, is a separate question not presently before the Commission, and we accordingly do not address that issue.

Again, we appreciate the Commission's willingness to consider public comment on this issue, and we hope the College's submission will assist the Commission in its important work of promoting justice under the law.

Respectfully submitted,

Elizabeth K. Ainslie (by WGM)

Elizabeth K. Ainslie
Chair,
Federal Criminal Procedure Committee

William McGuinness

William G. McGuinness
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cc: Michael A. Cooper, Esq. (w/o encl.)
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American College of Trial Lawyers

THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

Approved by the Board of Regents
March, 2002

American College of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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This report is the joint product of the following committees of the American College of Trial Lawyers:

COMMITTEE ON FEDERAL RULES OF EVIDENCE

COMMITTEE ON ATTORNEY-CLIENT RELATIONSHIPS

COMMITTEE ON FEDERAL CRIMINAL PROCEDURE

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THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

SUMMARY

The American College of Trial Lawyers (the "College") expresses its concern in this Report that the attorney-client privilege and work product doctrine are being eroded in federal criminal investigations and prosecutions in a way inimical to the fair administration of justice. We believe that the attorney-client privilege and the work product doctrine are essential to the adversary process and the criminal justice system, and request that the federal government review and modify its policies to ensure that these historic privileges are preserved.

I. INTRODUCTION

Federal prosecutors increasingly rely on counsel for the defense to build the government's case by insisting that the individual or corporate defendant waive the attorney-client privilege and turn over both client-lawyer communications and the work product of the lawyer. This provides prosecutors at the outset of an investigation with information defense counsel has obtained from their client, as well as with defense counsel's factual and legal analysis. In previous years, federal prosecutors were more likely to rely primarily on their own investigation of the facts and seek a waiver of the attorney-client privilege only rarely and then in very limited circumstances.

Today, federal prosecutors are able to obtain waivers of the attorney-client privilege and work product protections both by threatening to prosecute and by seeking more serious charges or sanctions if such cooperation is not provided. After the government has selected the crimes to be charged and obtained a conviction, courts must impose the sentence for that level crime prescribed by the Federal Sentencing Guidelines. As a result, prosecutors are able to exert a great measure of control over both the charging and sentencing process, thus requiring that defense counsel take into account the often harsh effect of the Sentencing Guidelines before responding to a federal prosecutor's request for a waiver of the attorney-client privilege or work product protections.

In seeking a waiver of the attorney-client or work product privilege, the government's demands change the very nature of the criminal justice system as well as the adversary process. These demands, which erode the attorney-client privilege and the work product doctrine, commonly include not only waiver of these protections, but also disclosure of corporate internal investigations by counsel, discouragement of payment by the corporation for counsel for individual employees whom the government prosecutor believes are culpable, and requests that information regarding the nature of the government's investigation not be relayed to other suspects through joint defense agreements. This government approach has been likened to the sound of "a requiem marking the death of privilege in corporate criminal investigations."[1]

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[1] David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000).

Inherent in this approach is that the prosecutor's initial view of the case must be accepted as fact and not be opposed by counsel for the individual or the corporation; to do so is to act at the client's peril. And this approach has recently become more widespread, if not universal, by embodiment in the United States Department of Justice ("Justice Department") standards for the federal prosecution of corporations.[2] Initially circulated as an internal memorandum by then-Deputy Attorney General Eric Holder in June of 1999, these standards are applied to individuals as well as corporations.[3]

The Holder Memo Standards encourage federal prosecutors to seek waivers of the attorney-client and work product privilege. They state that, when weighing whether the corporation has sufficiently cooperated in the investigation phase so as to not be charged with a crime, the prosecutor may consider whether the corporation has identified culprits, turned over its internal investigation and waived the attorney-client and work product protections. The Holder Memo Standards provide:

> 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 the attorney-client and work product privileges.[4]

The Holder Memo Standards do emphasize that such a waiver is not an absolute requirement, but merely one factor the government should consider in evaluating the corporation's cooperation.[5] For example, the Holder Memo Standards note that:

> This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.[6]

Yet, it is difficult to see or to make this distinction, which is, in any event, left to the sole discretion of the prosecutor.

The Holder Memo Standards also suggest that providing counsel for corporate officers, directors or employees[7] and entering into joint defense agreements may indicate a corporation's

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[2] U.S. ATTORNEYS' MANUAL, tit. 9, Criminal Resource Manual, art. 162, *Federal Prosecutions of Corporations* (2000), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm, [hereinafter "Criminal Resource Manual"]; *see also* Jonathan D. Polkes & Renee L. Jarusinsky, *Waiver of Corporate Privileges in a Government Investigation: Reaction to the New DOJ Policy*, WHITE COLLAR CRIME 2001 J-31, J-31 to J-33 (ABA 2001).

[3] *See generally* Memorandum from Eric Holder, Jr., Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys (June 16, 1999) (including attachment entitled "Federal Prosecution of Corporations"), *reprinted in* Criminal Resource Manual, arts. 161, 162, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00100.htm. The attachment to the Holder Memo will be hereinafter referred to as the "Holder Memo Standards."

[4] Criminal Resource Manual, art. 162, § VI.A.

[5] *Id.* § VI.B.

[6] *Id.* § VI.B n.2.

[7] The Holder Memo Standards do recognize in a footnote that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate." *Id.* § VI.B n.3.

lack of cooperation; *i.e.*, the company that engages in these practices is more likely to be indicted than the company that avoids them. Indeed, the Holder Memo Standards provide:

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while 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.[8]

In addition to the policies expressed in the Holder Memo Standards, the federal government has further undermined the attorney-client privilege and work product doctrine by increasingly attacking the existence of these protections in *ex parte* proceedings, asserting that the crime-fraud exception vitiates any privilege.[9] In these situations, the defendant or person under investigation has no opportunity to be heard and the government need make only a *prima facie* showing. As a result, courts often adopt the government's view of the available facts and defense counsel may be required to testify against his or her client on short notice if the court finds that the crime-fraud exception applies.

The College is concerned that these government policies undermine and erode the attorney-client privilege and work product doctrine to an alarming extent and change the balance in the adversary system from one in which opposite points of view may be pursued by opposing counsel to a system in which the federal prosecutor's view can be challenged only at great peril, thereby reducing the ability of defense counsel in a criminal investigation to provide effective assistance to his or her client.[10]

II. The Attorney-Client Privilege And The Work Product Doctrine

A. Origin and Purpose of the Attorney-Client Privilege

The Federal Rules of Evidence have adopted the attorney-client privilege as it existed at common law. Rule 501 states that "the privilege of a witness . . . shall be governed by the

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[8] *Id.* § VI.B (footnote omitted).

[9] Under this exception, a client who seeks assistance from counsel for the purpose of committing a crime or fraud is not entitled to the protections of confidentiality. Indeed, "[t]he privilege ends when the client seeks to involve the attorney in wrongdoing." David J. Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, 443-44 (1986) (tracing the history of the exception, discussing its rationale, and reviewing its expansion).

[10] In addition to the concerns expressed in this Report, the College also notes that it recently submitted comments to the Bureau of Prisons, the Attorney General and the Senate Judiciary Committee, regarding the interim rule and amendments to the Code of Federal Regulations that became effective on October 30, 2001, and that authorize the monitoring and recording of communications and meetings between inmates and counsel. *See generally* Letter from Stuart D. Shanor, President, American College of Trial Lawyers, to Rules Unit, Office of General Counsel, Bureau of Prisons, (Dec. 21, 2001) (on file with the College). These comments stated that, despite the College's support of our government's ongoing efforts to eliminate terrorism, the monitoring authorized in the amendments:

> [W]ill have a chilling effect, inhibit the free exchange between defendant and lawyer and is therefore (i) a threat to the effective assistance of counsel at a time when a defendant who is being held for trial has a constitutional right to competent and effective counsel and (ii) an unwarranted intrusion on the attorney-client privilege of both individuals awaiting trial and of unindicted detainees.

The College refers to these comments for a complete statement of the College's views on the monitoring issue.

principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[11] As recognized by Wigmore in his comprehensive and oft-cited work setting forth the history of the attorney-client privilege, this privilege is "the oldest of the privileges for confidential communications."[12]

The earliest reported cases recognizing the privilege date as far back as the early part of the reign of Elizabeth I.[13] The attorney-client privilege is likely not reported prior to this era because the testimony of witnesses and defendants was not a common source of proof at trial and, in general, testimonial compulsion had not been previously authorized.[14]

Although modern federal courts tend to apply the attorney-client privilege narrowly, the elements for establishing the privilege reflect the basic contours of the privilege since its establishment in England. In the seminal case of *United States v. United Shoe Machinery Corp.*, Judge Wyzanski first pronounced that the privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[15]

The *United Shoe* rule essentially remains the prevailing law as it relates to the attorney-client privilege when applied by federal courts.[16]

Thus, for centuries in English and American law, the attorney-client privilege has been firmly grounded in the recognition that legal consultation serves the public interest.[17] Federal

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[11] FED. R. EVID. 501; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing this rule with approval).

[12] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton Rev. 1961) [hereinafter "WIGMORE"]; *see also Upjohn*, 449 U.S. at 389; WIGMORE, *supra*, at 542 n.1 (citing, for example, *Berd v. Lovelace*, Cary 88, 21 Eng. Rep. 33 (Ch. 1577), and *Dennis v. Codrington*, Cary 143, 21 Eng. Rep. 53 (Ch. 1580)).

[13] WIGMORE, *supra* note 12, § 2290, at 542 n.1 (collecting cases from the late 1500s to the 1600s and indicating that the privilege first appeared as unquestioned in these cases); *see also* 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 87, at 343-44 (John William Strong ed., 5th ed. 1999) [hereinafter "MCCORMICK ON EVIDENCE"].

[14] WIGMORE, *supra* note 12, § 2290, at 542-43 (noting that the privilege "appears to have commended itself at the very outset as a natural exception to the then novel right of testimonial compulsion").

[15] 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see also* John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 449 (1982) (indicating that the *United Shoe* court was the first federal court to discuss the corporate attorney-client privilege at length); Zornow & Krakaur, *supra* note 1, at 149 n.9 (indicating that the *United Shoe* rule is one of the most inclusive recitations of the elements of the attorney-client privilege).

[16] *See, e.g., In re Grand Jury Subpoena*, 204 F.3d 516, 520 n.1 (4th Cir. 2000); *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 301 (3d Cir. 1999); *In re Fed. Grand Jury Proceedings 89-10(MIA)*, 938 F.2d 1578, 1581 (11th Cir. 1991); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977). The only part of *United Shoe* that has been called into question is the application of the rule to patent matters. *See, e.g., Am. Standard v. Pfizer Inc.*, 828 F.2d 734, 745-46 (Fed. Cir. 1987); *Woods v. N.J. Dep't of Educ.*, 858 F. Supp. 51, 54 (D.N.J. 1993).

[17] *See, e.g.*, WIGMORE, *supra* note 12, § 2291, at 545-49 (quoting decisions from the 1700s and 1800s that expound on the importance of the privilege).

common law in the United States has long embraced this justification,[18] in both a criminal and civil law context. Indeed, the application of the privilege to criminal as well as to civil cases has been largely unquestioned.[19] Moreover, the privilege is generally considered absolute unless waived by the client.[20] As such, today, the "attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions."[21]

B. Origin and Purpose of the Work Product Doctrine

The work product doctrine, like the attorney-client privilege, derives from common law origins. As a leading commentator has explained:

> The natural jealousy of the lawyer for the privacy of his file, and the courts' desire to protect the effectiveness of the lawyer's work as the manager of litigation, have found expression, not only as we have seen in the evidential privilege for confidential lawyer-client communications, but in rules and practices about the various forms of pretrial discovery. Thus, under the chancery practice of discovery, the adversary was not required to disclose, apart from his own testimony, the evidence which he would use, or the names of the witnesses he would call in support of his own case. The same restriction has often been embodied in, or read into, the statutory discovery systems.[22]

At common law, the privilege was much broader than its modern day analog: a document in the hands of the attorney, even if it did not come into existence as a communication to

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[18] *See, e.g., Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833) ("[S]o numerous and complex are the laws . . . , so important is it that [citizens] should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, . . . that the law has considered it the wisest policy to encourage and sanction this confidence [between client and attorney], by requiring that on such facts the mouth of the attorney shall be for ever sealed."); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice" and acknowledging that the "rationale for the privilege has long been recognized by the [Supreme] Court"); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that the privilege is necessary "in the interest and administration of justice").

[19] *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998) (rejecting any effort to apply the attorney-client privilege differently in criminal cases); *Schwimmer v. United States*, 232 F.2d 855, 863-66 (8th Cir. 1956) (assuming without discussion that the attorney-client privilege applied in a criminal case); *Gunther v. United States*, 230 F.2d 222, 223-24 (D.C. Cir. 1956) (per curiam) (same).

[20] *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d. 1414, 1429 (3d Cir. 1991) (indicating that the attorney-client privilege affords "absolute protection" and discussing waiver standards).

[21] Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1061 (1978) (stating that the privilege "is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything," and that a "legal counselor can properly advise the client what to do only if the client is free to make full disclosure").

In fact, the Justice Department itself recognizes the value and usefulness of the attorney-client privilege with respect to its representation of federal employees. In the Justice Department's codified statement of policy, it states that:

> Attorneys employed by any component of the Department of Justice . . . undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege . . . . Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3) (2000).

[22] McCormick's Handbook of the Law of Evidence 201-02 (Edward W. Cleary ed., 2d ed. 1972) (footnotes omitted); *see also In re Grand Jury Proceedings*, 473 F.2d 840, 844 (8th Cir. 1973).

the attorney, would have been exempt from production.[23] The modern work product doctrine is more narrowly tailored and traces back to the Supreme Court's decision of more than half a century ago in *Hickman v. Taylor*.[24] As articulated by the Court, the work product doctrine is distinct from and broader than the attorney-client privilege: "[W]ritten statements, private memoranda and personal recollections prepared or formed by an [attorney] in the course of his legal duties," and with an eye toward litigation, are not discoverable, as "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."[25] The work product doctrine, however, unlike the attorney-client privilege, is not absolute, and can be overcome if a party seeking discovery shows that "relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case."[26]

The Court in *Hickman* explained that the doctrine serves both a public and a private purpose. With respect to the former, the work product doctrine directly promotes the adversary system by enabling attorneys to prepare their cases without fear that their work product will be used against their clients.[27] At the same time, it also serves a private purpose by affording an attorney "a certain degree of privacy" so as to discourage "unfairness" and "sharp practices."[28] These same policies remain vital today. The rule first pronounced in *Hickman* has been codified in Federal Rule of Criminal Procedure 16(a)(2), (b)(2) and in Federal Rule of Civil Procedure 26(b)(3).

In contrast to the attorney-client privilege, which may be asserted only by the client, either the attorney or the client usually may invoke the work product doctrine.[29] Courts have recognized that "the interests of attorneys and those of their clients may not always be the same. To the extent that the interests do not conflict, attorneys should be entitled to claim [work product] privilege even if their clients have relinquished their claims."[30] The ability of the lawyer to claim the privilege has been broadly construed by the courts. For example, the Court of Appeals for the District of Columbia has held that a lawyer had the right to assert the privilege for work product materials even where the attorney was consulted in furtherance of the client's fraud, at least to the extent that the lawyer was unaware of the fraud.[31]

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[23] *See* WIGMORE, *supra* note 12, § 2318, at 620-21 & n.3 (collecting extensive list of cases from nineteenth century English courts).

[24] 329 U.S. 495 (1947). In *Hickman*, the Supreme Court dealt with two forms of work product: written statements from witnesses interviewed by defense counsel and the contents of oral interviews with witnesses, some of which had been summarized in memoranda prepared by the defense lawyers. The court reasoned that the protection for the latter category, often referred to as "opinion" product, exceeded that of the former. *Id.* at 512-13.

[25] *Id.* at 510 (Murphy, J.), 516 (Jackson, J., concurring).

[26] *Id.* at 511.

[27] *Id.* at 510-11.

[28] *Id.*

[29] *See, e.g., In re Sealed Case*, 676 F.2d 793, 809 n.56 (D.C. Cir. 1982) (indicating that work product privilege belongs to the lawyer as well as the client); *In re Grand Jury Proceeding (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973) (allowing an attorney to invoke the doctrine).

[30] *In re Sealed Case*, 676 F.2d at 809 n.56 (citing *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979)). The Supreme Court has identified several interrelated interests that the work product doctrine seeks to protect, ranging from a client's interest in obtaining sound legal advice to the interests attorneys have in protecting their own intellectual product. *Id.* (discussing *Hickman*, 329 U.S. at 511).

[31] *Id.* at 812 & n.75 (citing *FMC Corp.*, 604 F.2d at 801 n.4, 802 n.5).

C. The Joint Defense Privilege

The joint defense privilege, first recognized in *Chahoon v. Commonwealth*,[32] enables multiple parties to share information protected by the attorney-client privilege without waiving the privilege, where the parties "have common interests in defending against a pending or anticipated proceeding."[33] This privilege, however, is not an independent privilege; it is only an extension of the attorney-client privilege and acts as an exception to the general rule that the privilege is waived when privileged information is shared with a third party.[34]

Accordingly, courts have generally recognized that this privilege, also known as the "common interest rule," protects "the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[35]

D. Balancing the Unavailability of Evidence Against Need for the Privilege

The attorney-client privilege and the work product doctrine frequently operate to deny powerful evidence to the opposition, *i.e.*, the defendant's very own statement of the case against him. Our courts, however, have consistently found that "[t]he systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence."[36] Federal courts have supported the need for these protections on public policy grounds and have repeatedly recognized that the attorney-client privilege advances the administration of justice, as a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[37] As the Court of Appeals for the Ninth Circuit has stated, "[t]his valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants."[38] In similar terms, the Supreme Court has observed that the work product doctrine serves "the cause of justice" by preventing "[i]nefficiency, unfairness and sharp practices."[39]

Any perceived harm to the fact-finding process attributable to the attorney-client privilege and work product doctrine may be exaggerated because, without these protections, clients

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[32] 62 Va. (21 Gratt.) 822 (1871).

[33] John F. Savarese & Carol Miller, *Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, 1178 PLI/Corp 665, 719 (2000); *see also* Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, 653 PLI/Lit 519, 589 (2001); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 Fordham L. Rev. 871, 871-72 (1996).

[34] *See United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987).

[35] *Schwimmer*, 892 F.2d at 243; *see also United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384, at *5 (N.D.N.Y. Sept. 28, 1992) ("[D]efendants with common interests in multi-defendant actions are entitled to share information protected by the attorney-client privilege without danger that the privilege will be waived by disclosure to a third person.").

[36] *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting); *see also Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 356 (M.D. Pa. 2001).

[37] *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); *see also Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

[38] *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996).

[39] *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *see also United States v. Noble*, 422 U.S. 225, 236-38 (1975).

may well choose not to disclose sensitive information to their attorneys, and lawyers may not commit their thoughts and analysis to paper in the first instance.[40]

E. The Privilege and Corporations

It is well established that the attorney-client privilege and work product doctrine may be asserted by corporations, as well as by natural persons.[41] The attorney-client privilege protects confidential communications between the attorney and anyone within the corporate structure – directors, officers, as well as middle and lower-level employees – whose duties relate to the issues upon which the attorney is asked to provide legal assistance and who has information that the attorney would need to render adequate legal advice.[42] The Supreme Court has expressly rejected the argument that the privilege should cover only those in the corporate control group (*i.e.*, the directors and officers of the corporation), because such a view ignores the fact that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[43]

F. Special Need for the Corporate Attorney-Client and Work Product Privilege

A corporation faced with evidence or allegations of illegal behavior will generally conduct an internal investigation to determine the scope of wrongdoing and the extent of its potential liability. Typically, the corporation will retain outside counsel who will interview employees, prepare notes of interviews, review documents (privileged and otherwise), create a chronology of events, and write client memos. Counsel may also prepare a written report of such an inquiry including conclusions and recommendations, but this is not always the case. To accomplish these tasks, the investigating attorney must induce cooperation from numerous employees who, for various reasons, may not wish to cooperate. In a properly conducted investigation, the employees are informed at the outset that communications with counsel for the corporation are not privileged as to the employee; that is, the company lawyer is not the employee's lawyer, and the corporation is free to disclose such communications without the consent of the employee.[44] Nonetheless, corporate employees and officers are generally more willing to cooperate where they receive a measure of assurance that their conversations with counsel will not be divulged to government investigators or prosecutors.[45] An internal investigation would be far less useful, and its demoralizing effect on employees would be far greater, if the investigator's sole means of inducing cooperation was the threat of discipline or termination of employment, and not the protection of confidentiality.[46]

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[40] *See, e.g., Hickman*, 329 U.S. at 511 (noting that were privileged materials open to the opposition on demand, "much of what is now put down in writing would remain unwritten").

[41] *See Upjohn Co. v. United States*, 449 U.S. 383, 390-95 (1981) (allowing a corporation to invoke the privilege).

[42] *See id.* at 391-92.

[43] *Id.* at 390.

[44] Despite this caution, many employees as a practical matter consider the corporation's lawyers to be their lawyers and are otherwise hesitant for job security reasons not to answer their questions.

[45] Judson W. Starr and Joshua N. Schopf, *Cooperating with the Government's Investigation: The New Dilemma*, SE72 ALI-ABA 353, 360-61 (2000).

[46] *Id.* at 361.

In short, by facilitating internal investigations, the corporate attorney-client privilege and work product doctrine advance the administration of justice by enabling the corporation to gather the information necessary to understand the relevant issues, to receive competent legal advice, to identify culpable employees, to determine its own liability, to change existing or institute new compliance programs, and, finally, to fully cooperate with the government. It is important to note that information and documents may be provided to the government to assist it in conducting its investigation and to others without divulging such specific privileged communications.

III. Review Of The Government Encroachment On The Attorney-Client Privilege And Work Product Doctrine

A. Waiver of the Attorney-Client and Work Product Privilege

When a corporation has learned – whether through receipt of a grand jury subpoena, self-reporting by employees, or internal monitoring under a corporate compliance program – that its employees may have acted illegally and an internal investigation has begun, the corporation generally expects that communications with its lawyers and their investigators and documents produced at their request will be protected by the attorney-client privilege and/or the work product doctrine. Unfortunately, in light of the recent practices and policy statements by the Justice Department, particularly those set forth in the Holder Memo Standards, this assumption is no longer tenable.

The Justice Department's policy, as expressed in the Holder Memo Standards, is to obtain waivers of the corporate attorney-client and work product privilege where, in the government's view, these protections might keep information relevant to a criminal investigation from discovery. Indeed, there is no pretense that the values underlying these privileges are to be sacrificed for any reason other than to make the prosecution's job easier: "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."[47] The obvious alternative not widely favored by government prosecutors is to conduct a factual investigation by taking statements and obtaining documents from a corporation and its employers, yet without insisting on also obtaining privileged statements made to counsel and attorney work product. It is not inconsistent with preserving the attorney-client privilege and work product protections for a company to provide information and documents to aid the government, since the privilege goes to the specific communication with the client and not necessarily to the information and documents obtained during the course of an internal investigation.

The Holder Memo Standards, now incorporated into the United States Attorneys' Manual's Criminal Resource Manual, provide a blueprint for maximizing the government's leverage to induce waivers of the corporate attorney-client privilege and work product doctrine. For example, one source of leverage arises from the possibility that the prosecutor may enter into a non-prosecution agreement with a corporate target. The Criminal Resource Manual authorizes prosecutors to offer not to indict a corporation where its "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."[48] And in determining whether a non-prosecu-

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[47] Criminal Resource Manual, art. 162, § VI.B.

[48] *Id.* (internal quotation omitted).

tion agreement would be appropriate, prosecutors are instructed to consider the "completeness" of the corporation's disclosure, including whether the corporation granted "a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel."[49] Although the Holder Memo Standards do not consider a waiver as an "absolute requirement," they still authorize and even encourage prosecutors to "request a waiver in appropriate circumstances."[50] Fluid and ambiguous terms such as "necessary," "necessary to the public interest" and "appropriate circumstances" are left to the sole discretion of the government and generally to the individual prosecutor.

Another source of leverage that the government enjoys is its control over the sentencing decision. At the outset, the government selects the crime to be charged and the Sentencing Guidelines set forth the appropriate sentence range for such charge from which the court generally may not depart. The Sentencing Guidelines also give credit to corporations that have engaged in self-reporting, cooperation, and acceptance of responsibility for purposes of calculating the corporation's "culpability score."[51] To qualify for this credit, "cooperation must be both timely and thorough."[52] Here, "timeliness" means cooperation must begin "essentially at the same time as the organization is officially notified of a criminal investigation," while "thoroughness" requires "the disclosure of all pertinent information known by the organization."[53] Although courts ultimately decide what sentence must be imposed under the Sentencing Guidelines, the government's recommendation, based on its assessment of whether a corporation has cooperated in a "timely," "thorough," and complete manner, has tremendous influence on the ultimate sentence.[54] Similarly, the government can materially affect the sentencing decision by favorably or unfavorably calculating either the amount of pecuniary gain to the corporation or the pecuniary loss from the offense caused by the corporation.[55]

With regard to the government's raw power implicit under the Sentencing Guidelines, the government is often not willing to make a binding non-prosecution commitment without a reciprocal commitment from a defendant, oftentimes seeking in exchange a full and complete waiver of the attorney-client privilege and the work product doctrine. Yet, as commentators have queried:

> Do such demands ultimately benefit the cause of justice? Are the costs of coercing companies to waive the attorney-client privilege worth the short-term gains in the immediate case? The long-term damage inflicted on both corporate and societal interests by the government's emerging coercive waiver policy far outweighs any short-term utility.[56]

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[49] *Id.*

[50] *Id.*

[51] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2001) [hereinafter "U.S.S.G."].

[52] *Id.*, cmt. 12.

[53] *Id.*

[54] *See* Zornow & Krakaur, *supra* note 1, at 154-55.

[55] *See id.*

[56] Starr and Schopf, *supra* note 45, at 356.

If the government, however, demands a waiver of the attorney-client privilege and, more specifically, the protections for counsel's work product, the corporation is forced to make a classic Hobson's choice. It either gives in to the government's demand, thereby sending a message to its employees that they should not cooperate in future internal investigations, or rejects the government's conditions and risks indictment and conviction. The chilling effect on corporate self-scrutiny is obvious and there will be a serious adverse impact on the ability of corporations to prevent the occurrence of future violations of law, and of counsel to conduct meaningful and effective internal investigations. Furthermore, this practice serves to drive a harmful wedge between employees and the corporation.

While individual prosecutors may advance a particular case more quickly and effectively under the Holder Memo Standards, the Justice Department's waiver policy is indefensible from a systemic perspective. First, the waiver policy is ultimately counterproductive to the Justice Department's stated objective of obtaining "critical" assistance from the corporation "in identifying the culprits and locating relevant evidence."[57] As a result of this policy, outside counsel for a corporation now commences an internal investigation with the knowledge that the statements taken by the lawyer will likely be sought by and turned over to the prosecution and that the lawyer may be called as a witness. The likelihood of this occurring –and fairness to a company's employees dictates that they be so advised before their interviews – has the dual effect of chilling the inquiry from the outset and of eroding trust between management and staff.[58] Moreover, it can only complicate the task of detecting and preventing future wrongdoing.

Indeed, it has been suggested that today, in response to current Justice Department pressure on corporations to waive the protections of the work product doctrine, counsel often anticipate at the outset of an investigation that "the fruits of the investigation stand a substantial chance of being delivered to the government," and that this may, again, have a chilling effect on the investigative process.[59] As a result, counsel may simply refrain from putting inculpatory information in written form.

Second, the waiver policy also undermines our adversarial legal system. When a company decides to waive its privileges, "the role of the criminal counsel is repositioned from that of the client's confidential legal advisor and the government's adversary into a conduit of information between the client and the government."[60] Contrary to the *Hickman* Court's admonition, the prosecution then performs its duties "on wits borrowed from the adversary."[61] Moreover, counsel for the company is forced to become a witness against it and its employees, stripping both of their counsel of choice and generally impairing the client's trust in the lawyer.

Third, the government's approach, as expressed in the Holder Memo Standards, may enable federal prosecutors to circumvent employees' Fifth Amendment privilege against self-incrimination. This risk tends to be greatest when the government agrees to defer its investiga-

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57 Criminal Resource Manual, art. 162, § VI.B.

58 Zornow & Krakaur, *supra* note 1, at 157.

59 *Id.* at 156.

60 *Id* at 156-57.

61 329 U.S. at 516 (Jackson, J. concurring).

tion pending completion of the corporation's internal inquiry. Under such circumstances, the government defers with the knowledge that an employee speaking with the corporation's lawyers is less likely to retain separate counsel who, presumably, would advise the employee to invoke the Fifth Amendment privilege against self-incrimination.[62] As a result, the employee is lured into a false sense of security and speaks more freely than perhaps is wise. If, under pressure to demonstrate "complete" cooperation in pursuit of its own interest, the company subsequently decides to reveal the substance of the employee's interview, the government may gain a significant advantage in obtaining incriminating evidence from an employee without having to negotiate immunity or plea agreements.[63] Furthermore, counsel for the corporation could eventually be disqualified if called as a witness by the prosecution to impeach testimony given by one of the interviewed employees. Of course, in rare cases, calling the lawyer as a witness could also be used as a tactical tool by the prosecution to rid the corporation of the counsel of its choice.

Finally, the timing of a corporation's decision to affect a waiver of the protections may also exacerbate the waiver's detrimental impact on the case. A premature waiver may result in the corporation being "deprived of legal advice based on counsel's full development of the facts and an assessment of the strengths and weaknesses of the government's case."[64] Again, because disclosure of an internal investigation to the government by a corporation waives the protections of the attorney-client and work product privilege, the corporation may be subjected to additional litigation regarding what information must be turned over to the government.[65]

In most complicated government criminal investigations, there are parallel proceedings upon which the government's conduct also has an impact. These include civil cases against the company and individuals as well as various civil enforcement proceedings brought by federal or state agencies. If the company has waived the attorney-client privilege in the criminal investigation, it is likely to be found to have waived the privilege in these proceedings as well.

Although the current United States Attorneys' Manual recognizes the value of the attorney-client privilege and seeks to provide some protection and balance before the government may invade it, these provisions seem now to be either outdated or increasingly ignored. For example, the United States Attorneys' Manual states:

> Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect *bona fide* attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.[66]

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[62] Zornow & Krakaur, *supra* note 1, at 157.

[63] *See* Criminal Resource Manual, art. 162, § VI.B.

[64] Zornow & Krakaur, *supra* note 1, at 157.

[65] *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d. 1414, 1418 (3d Cir. 1991) (indicating that disclosure of internal investigation report to the SEC and the Justice Department constituted waiver of both protections).

[66] U.S. ATTORNEYS' MANUAL, tit. 9, § 9-13.200, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.200.

Another section of the United States Attorneys' Manual provides:

> In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General in charge of the Criminal Division applies the following principles:
>
> - The information shall not be protected by a valid claim of privilege.
> - All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
> - In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution.
>
> . . . .
>
> - The need for the information must outweigh the potential adverse effects upon the attorney-client relationship.[67]

These expressions of support for the value of the attorney-client privilege and the work product doctrine, however, are belied by the current Justice Department practices and guidelines and appear to be in conflict with the Holder Memo Standards.

B. Joint Defense Agreements

In addition to government pressure to waive the protections of the attorney-client and the work product privilege, lawyers representing clients in corporate criminal matters today encounter federal prosecutors who view joint defense agreements with suspicion and sometimes even as improper or illegal, although such agreements have long been recognized in the law as appropriate and necessary to the function of providing adequate legal advice.

The sharing of information by co-defendants under the joint defense privilege can greatly assist counsel in their efforts to represent their clients while offering substantial benefits to the agreement's participants.[68] Indeed, lawyers increasingly seek to enter into formal joint defense agreements with another party's counsel which set forth the applicability and scope of the privilege prior to the sharing of any otherwise privileged information.[69]

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[67] *Id.* § 9-13.410C, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.410.

[68] Bartel, *supra* note 33, at 879.

[69] Under certain circumstances, disqualification issues may arise when a joint defense agreement exists. Indeed, seeking disqualification is one method by which the government may seek to attack a joint defense agreement. Several commentators discuss this matter in greater detail. *See, e.g.*, Chepiga, *supra* note 33, at 593 (indicating that although the government has moved in several criminal cases to disqualify an attorney who represented one party to a joint defense agreement after another party became a witness for the prosecution, courts have routinely rejected these motions) (citing *United States v. Anderson*, 790 F. Supp. 231 (W.D. Wash. 1992), and *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 U.S. Dist. LEXIS 21445, at *17-18 (N.D.N.Y. 1992)); Arnold Rochvarg, *Joint Defense Agreements and Disqualification of Co-Defendant's Counsel*, 22 Am. J. Trial Advoc. 311 (1998) (reviewing and analyzing cases dealing with joint defense agreements and disqualification); A. Howard Matz, *Lawyers on the Attack: Prosecutors' and Defense Lawyers' Efforts to Curb the Other Side's Perceived Misconduct*, 161 PLI/Crim 177, 181-90 (1991) (discussing attempts to disqualify counsel, potential conflicts of interest and measures to avoid disqualification).

An attorney seeking to invoke the joint defense privilege on behalf of a client must be aware that the definition and scope of the privilege, as well as factors relevant to its existence, differ markedly among the Circuits. For instance, while a defendant in the Ninth Circuit need only point to a "common interest" between himself and a co-defendant in order to assert the privilege,[70] that same defendant in the Third Circuit must demonstrate that the communications he seeks to protect arose from an "on-going and joint effort to set up a common defense strategy."[71] These differences between the Circuits can have a profound impact on whether or not a client can successfully invoke the privilege.

The Courts of Appeals for the First, Second, Third and Tenth Circuits have set rigid standards for invoking the joint defense privilege. The law in these Circuits requires evidence of common defense strategy between parties before allowing the privilege to be invoked.[72] Indeed, the Court of Appeals for the Second Circuit has held that "only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected."[73]

The Court of Appeals for the Fourth Circuit also espouses a more limited scope for the joint defense privilege. Although the court has stated in one case that, "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims,"[74] the facts of that case actually suggest a narrower holding. Specifically, the parties were engaged in a joint effort to prosecute a claim and had documented their cooperation in a written agreement.[75]

Arguably, the Circuit most vigorous in protecting otherwise privileged communications divulged to third parties is the Ninth Circuit.[76] The Court has stated that the common interest exception was "not limited . . . to situations where codefendants share a common defense or have interests that are not adverse."[77] The Ninth Circuit has also indicated that the criterion for invoking a joint defense privilege is not whether the meeting was called to prepare trial strategy, stating:

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[70] *See, e.g., Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

[71] *Matter of Bevill, Bresler & Schulman Asset Mgt Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985)).

[72] *Id.* (citing *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381 (S.D.N.Y 1975)). Moreover, the communications must be made in confidence to further the joint defense effort. *Id.* The party must also present concrete evidence of an actual agreement between the parties to adopt a joint defense strategy. *Id. See also Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1043 (10th Cir. 1998) (stating that failure to "produce any evidence, express or implied, of a joint defense agreement" precluded application of the joint defense privilege to documents); *United States v. Bay St. Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28-29 (1st Cir. 1989) (adopting the *Bevill* test and finding that while the parties at issue had "many interests in common," a particular document was not covered by the joint defense privilege because there was no evidence that it related to the joint defense).

[73] *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999) (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). The Court of Appeals for the Seventh Circuit is also moving toward the Second Circuit's restrictive interpretation of the joint defense privilege and currently requires that the parties be engaged in an actual joint defense strategy. *See United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979); *see also United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985) (applying *McPartlin*, but finding no joint defense privilege because the communications at issue were not made in confidence).

[74] *In re Grand Jury Subpoenas, 89-3 and 89-4*, 902 F.2d 244, 249 (4th Cir. 1990).

[75] *Id.* at 246; *see also Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 124-25 (4th Cir. 1994) (indicating that a defendant's belief that he shared a common interest with another party would not suffice to invoke the common interest privilege).

[76] *See United States v. Montgomery*, 990 F.2d 1264, 1993 WL 74314 (9th Cir. Mar. 15, 1993) (unpublished); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); *see also United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (holding that the defendant need not show that the party with whom he allegedly shared a "common interest" faced any immediate liability; a shared interest in "sorting out . . . affairs" was sufficient), *vacated in part on other grounds*, 842 F.2d 1135 (9th Cir. 1988).

[77] *Montgomery*, 1993 WL 74314, at *4.

> [W]here two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.[78]

Another Ninth Circuit case highlights the expansiveness of this prior holding, noting that while the "paradigm case [of joint defense privilege] is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys," the privilege is not limited to such a case.[79] Indeed, "[e]ven where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications."[80]

With regard to the existence of a joint defense privilege as to documents and not just oral communications, the Court of Appeals for the Tenth Circuit has held that for a privilege to apply to documents, the party invoking the privilege must establish that "(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort."[81]

In sum, although courts tend to impose different requirements before validating a joint defense agreement, courts nonetheless recognize the importance of, and generally uphold, such agreements. The agreements, however, still make prosecutors "uneasy."[82] Indeed, commentators suggest that prosecutors disfavor the use of joint defense agreements because they fear that the cooperation and confidentiality amongst defendants inherent in a joint defense agreement will shield pertinent evidence and hinder the government's ability to get convictions because it will be more difficult for prosecutors to isolate individuals.[83] Moreover, prosecutors worry that joint defense agreements "may include unlawful efforts to impede justice, provide a group of co-defendants with the opportunity to influence improperly the memories of witnesses, or otherwise permit a concerted attempt to obstruct grand jury investigations."[84] Prosecutors also express concern that the joint defense privilege enables the continuation of criminal conspiracies.[85]

During the past two decades, as the Justice Department prosecuted corporations with increasing frequency, it began to discourage the use of joint defense agreements. In 1991, the

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78 *Hunydee*, 355 F.2d at 184.

79 *Zolin*, 809 F.2d at 1417.

80 *Id.*

81 *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1042-43 (10th Cir. 1998); *see also* Chepiga, *supra* note 33, at 586. In fact, one court has held that the privilege was not waived where an attorney shared his work product with another attorney representing a different client with a common interest, but not involved in the same litigation. Chepiga, *supra*, at 586-87 (citing *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). Of course, transferring documents to another party's attorney under a joint defense agreement does not work to extend the privilege if the protection did not apply before the transfer. *Id.* at 588 (citing *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 624 (E.D. Tex. 1993)).

82 Savarese & Miller, *supra* note 33, at 720.

83 Chepiga, *supra* note 33, at 591; Bartel, *supra* note 33, at 879.

84 Bartel, *supra* note 33, at 879 (citation omitted).

85 *Id.*

Justice Department outwardly expressed its suspicion of such agreements in an article published in "The DOJ Alert," which reported, "a select group of DOJ's senior white-collar prosecutors has launched a systematic survey of the nation's U.S. attorneys to gauge their views on joint defense agreements."[86] The then chief of the Criminal Division's Fraud Section also noted in the article that "[p]rosecutors are uneasy . . . because they see in [joint defense agreements], even unintentionally, an opportunity to get together and shape testimony."[87] Yet, despite this uneasiness, prosecutors were still cautioned in the article against having a "knee-jerk reaction" against joint defense agreements and were directed to focus instead on the investigation, unless there was a "specific reason to believe the agreement [was] being used for improper purposes."[88]

The Justice Department's view of joint defense agreements is consistent with the notion of cooperation found in the Organizational Sentencing chapter of the federal Sentencing Guidelines ("Corporate Sentencing Guidelines").[89] The Corporate Sentencing Guidelines, which became effective in November 1991, aid federal prosecutors in determining whether a target for prosecution should receive a more lenient sentence based on the quality of the cooperation with the government. Under the Corporate Sentencing Guidelines, corporations receive a more lenient sentence if they disclose the violation prior to an "imminent threat" of disclosure or if they "fully cooperate" with the government investigation.[90] The Corporate Sentencing Guidelines require that the cooperation be "timely" and "thorough."[91] "Thorough" cooperation requires the corporation to provide pertinent information "sufficient for law enforcement personnel to identify the nature and the extent of the offense and the individual(s) responsible for the criminal conduct."[92] In applying the Corporate Sentencing Guidelines, prosecutors have interpreted "cooperate" broadly and pressed corporations to disclose privileged information in order to receive credit for cooperating.[93] Therefore, the Justice Department's uneasiness with joint defense agreements reflects the fact that these agreements are perceived as inherently uncooperative since they seek to benefit the parties, while hindering the free flow of information to the government if one party seeks to cooperate under the Corporate Sentencing Guidelines. (In fact, that perception is exaggerated since the agreements hinder the flow only of privileged information which, but for the agreement, the recipient would not have.)

It is unclear whether the Holder Memo Standards, when first issued, were meant merely to clarify the Justice Department's view of joint defense agreements or whether they were meant as a warning to attorneys that pressure on corporations to waive privilege to receive

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86 *White-Collar Prosecutors Probe Joint Defense Agreements*, 1 THE DOJ ALERT 3, July 1991 [hereinafter "DOJ ALERT"].

87 *Id.* (internal quotation omitted) (alteration in original); *see also* Savarese & Miller, *supra* note 33, at 720.

88 DOJ ALERT, *supra* note 86, at 3.

89 U.S.S.G. ch. 8.

90 *Id.* § 8C2.5(g)(1), (2).

91 *Id.* § 8C2.5(g), cmt. 12.

92 *Id.*

93 *See, e.g.*, Zornow & Krakaur, *supra* note 1, at 148. One former United States Attorney described this cooperation as an "enforced partnership" between prosecutors and corporations, declaring it the best route to compliance with the law. *Id.* (citing Otto G. Obermaier, *Drafting Companies to Fight Crime*, N.Y. TIMES, May 24, 1992, at 11). Legal commentators have documented how this "enforced partnership" conflicts with *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), in which the Supreme Court held that the best route to corporate compliance with the law is "full and frank communication between attorneys and their clients." *See, e.g.*, Zornow & Krakaur, *supra*, at 148-49.

credit for cooperating will increase, thereby indicating that joint defense agreements that undermine this cooperation would not be viewed favorably.[94] A former Assistant Attorney General, however, has denied that the Justice Department requires corporations to waive privilege in order to receive the benefits of cooperation.[95] "There certainly is no department policy requiring companies to waive the attorney-client privilege to receive credit for cooperating with the government . . . [and] I, for one would be opposed to [such a] policy."[96] But, this same former Justice Department official also noted that it "should not be surprising" that prosecutors will continue "to give greater consideration to a corporation which cooperates extensively and provides substantial assistance" to the government, and stated:

> I should fully disclose that when I was doing white collar criminal defense work, I certainly participated in joint defense agreements and recognized their value. On the other hand, their value has to be balanced because there is the potential for mischief and the potential for utilizing the agreements to allow targets to circle the wagons and make it difficult for prosecutors successfully to complete an investigation or prosecution. That is, of course, why these agreements are viewed by some investigators and prosecutors as potential vehicles to obstruct a successful investigation and prosecution.[97]

While the Holder Memo Standards and this former Justice Department official's comments outwardly seem to suggest some Justice Department suspicion of joint defense agreements, the United States Attorney's Office for the Southern District of New York has been more explicit in its disapproval of the use of joint defense agreements for at least a decade. In cases where individual employees have entered into joint defense agreements with a target corporation:

> [T]he office of the United States Attorney for the Southern District of New York routinely coerces corporate waivers of the privilege by informing corporate managers that their failure to waive the privilege will be evaluated in determining whether the corporation has been sufficiently cooperative to avoid indictment and/or a severe guidelines sentence.[98]

Indeed, the United States Attorney for the Southern District of New York "has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain credit for their cooperation."[99] Accordingly, both corporations and individual employees need to take this hostility towards joint defense agreements into account prior to formalizing such agreements.

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[94] *See generally* Polkes & Jarusinsky, *supra* note 2.

[95] Irvin B. Nathan, *Assistant Attorney General James Robinson Speaks to White Collar Criminal Issues*, 6 No. 12 BUS. CRIMES BULL. 3 (Jan. 2000).

[96] *Id.*

[97] *Id.*

[98] Robert Morvillo, *The Decline of the Attorney Client Privilege*, N.Y.L.J., Dec. 2, 1997, at 3.

[99] Judson W. Starr & Brian L. Flack, *The Government's Insistence on a Waiver of Privilege*, WHITE COLLAR CRIME 2001 J-1, at J-4 (ABA 2001); *see also* Polkes & Jarusinsky, *supra* note 2, at J-31 (noting that beginning in the early 1990s, the United States Attorney's Office for the Southern District of New York began transgressing former standards for corporate cooperation).

In addition, the Government view, as expressed in the guidelines and elsewhere, sees all joint defense agreements as similar, while in fact they vary widely--from full disclosure of client communications to providing corporate documents to merely explaining the corporate structure and process.

It has been suggested, however, that, despite the apparent lack of clarity as to the government's position regarding joint defense agreements, the Justice Department's stance may actually be relaxing. The American Bar Association ("ABA") a few years ago held a session addressing attacks on the joint defense privilege,[100] and a lawyer who spoke at the session commented that several years ago the Justice Department saw joint defense agreements mainly as a "mechanism simply to obstruct justice," but that "[t]hrough education, the [Justice] Department has come to see that these agreements are simply a way for defense counsel to legitimately preserve privileges while sharing information."[101] It was further noted that the federal prosecutor who has a negative "knee-jerk" reaction against joint defense agreements has become "the exception rather than the rule."[102] If this is in fact the case, this positive development needs to be further supported by Justice Department policies and guidelines.

C. Advancement of Attorneys' Fees

Defense counsel and their clients increasingly find government resistance to corporate efforts to advancing attorneys' fees to individual employees once a government investigation has been commenced. Although individuals under investigation or charged by the government are entitled to obtain qualified, independent counsel without interference from the government, federal prosecutors frequently object to a corporation providing counsel for its employees and penalizes the company for not cooperating with the government investigation. This federal government policy, however, undermines a well-established and necessary practice and imposes itself where law enforcement has no real interest.

In recognition that "[t]he sort of litigation in which corporate executives are involved . . . is likely to be protracted, complex, and expensive,"[103] the vast majority of states have enacted statutes that expressly authorize corporations to adopt provisions within the company's bylaws, articles of incorporation, or employment contracts that automatically provide for the advancement of legal fees of officers and directors.[104] Given today's litigious environment, many corporations have adopted such provisions.[105] Since these bylaws, articles, and employment agreements are enforceable contracts, corporations that refuse to advance the fees to

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[100] The session was entitled "Assault on the Privilege: Protecting and Defending the Attorney-Client Privilege, Work Product, and Joint Defense Agreements in Criminal Investigation." *Interview with Jan Handzlik, Kirkland & Ellis and Vincent J. Marella, Bird, Marella, Boxer & Wolpert, Los Angeles, California*, 13 Corp. Crime Rep. 12 (1999).

[101] *Id.* at 15.

[102] *Id.*

[103] Joseph Warren Bishop, Jr., Law of Corporate Officers and Directors - Indemnification and Insurance § 6.27, at 45 (Gail A. O'Gradney ed., 2000).

[104] *See, e.g.*, Del. Code Ann. tit. 8, § 145(f) (2000); Model Bus. Corp. Act Annotated § 8.58(a) (3d. ed. Supp. 1998/99) [hereinafter "MBCA"]. Some state statutes directly require a corporation to advance fees. *See, e.g.*, Minn. Stat. Ann. § 300.083(3) (West 2000); N.D. Cent. Code § 10-19.1-91(4) (1999).

[105] *See* 1 Rodman Ward, Jr. *et al.*, Folk on the Delaware General Corporation Law § 145.7, at 237 (4th ed. Supp. 2000-1) ("Mandatory advancement provisions frequently appear in corporate charters, by-laws, and indemnification agreements.").

directors and officers in accordance with the agreements face declaratory judgments and damages verdicts.[106]

For example, Delaware's code extends the scope of this authority allowing for the adoption of mandatory advancement provisions to include employees, as well as directors and officers.[107] Although some corporations have bound themselves to advance fees to employees pursuant to a bylaw or merger agreement,[108] the far more common practice is for corporations to adopt provisions that provide the corporation with *discretion* to advance fees to employees:

> Under bylaws, articles of incorporation, or other contractual provisions, a corporation may provide for advancement of expenses, including attorneys' fees. The corporation may agree to make such advancements mandatory . . . . The provisions in bylaws and articles of incorporation dealing with indemnification all cover directors and officers, and a substantial minority apply also to "employees" and "agents," even if the statute does not . . . . But . . . , most of those that cover employees provide that the corporation "may" indemnify employees . . . .[109]

A discretionary fee advancement provision allows the corporation's board of directors to assess the circumstances underlying an employee's need for separate counsel (and a concomitant need for fees to be paid in advance) and render a decision that is subject to a reasonableness requirement.[110] Typically, the corporations that adopt such discretionary provisions will require the employee to provide a written affirmation of good faith or an undertaking to repay the fees if he or she is later found to be ineligible for indemnification.[111]

Significantly, Delaware's corporate code and the codes of many other states expressly permit this discretionary advancement of fees to employees.[112] The Model Business Corporation Act, which endeavors to leave unregulated the issue of advancement of expenses to employees, similarly acknowledges that its provisions are "not in any way intended to cast doubt on the power of the corporation to indemnify or advance expenses to . . . employees and agents . . . ."[113]

In addition to the state corporation codes, legal ethics rules also permit a corporation to pay an employee's attorney's fees, provided that the attorney maintains professional independence and loyalty to the employee. For example, Model Rule 1.8(f) of the ABA Model Rules of Professional Conduct ("Model Rules") requires a lawyer who accepts compensation from a third party to take steps to ensure no conflict of interest exists:

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[106] *See generally Ridder v. CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1994) (holding that officer is entitled to injunction requiring corporation to advance fees prior to final disposition of the claim); *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992) (awarding damages and prejudgment interest to director after corporation refused to advance fees as mandated in employment agreement).

[107] *See* DEL. CODE ANN. tit. 8, § 145(f).

[108] *See Ridder*, 47 F.3d at 86-87 (indicating bylaw required advancement of expenses to all employees).

[109] BISHOP, *supra* note 103, §§ 7.07.50 to 7.08, at 18-19 (footnote omitted).

[110] *See Citadel Holding*, 603 A.2d 823-24.

[111] *See, e.g.*, BISHOP, *supra* note 103, App. 7A, at 5-8 (reprinting resolution that confers the discretion to advance fees to an employee and agent if an undertaking is provided on his or her behalf).

[112] *See, e.g.*, DEL. CODE ANN. tit. 8, § 145(f).

[113] MBCA § 8.58(e) & cmt.

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.[114]

The ABA's Standards for Criminal Justice contain a comparable direction:

In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

(i) the accused consents after disclosure;

(ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and

(iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.[115]

Accordingly, the exercise of discretion by a corporation to advance fees on behalf of an employee is permitted by law and ethical codes. Corporations that exercise this discretion are guided by a legitimate concern for employee morale as well as the view that it is unfair to require employees whose corporate conduct is under investigation to pay for their own defense before any adjudication of guilt, much less before any determination of their individual guilt or responsibility could even be made. Moreover, the principles underlying the advancement of expenses to directors and officers – *i.e.*, that those who serve the corporation should not be forced to bear the expense of their own defense, as that would discourage competent people from serving in such capacity – apply equally to a corporation's decision to advance fees to employees.[116] Therefore, the exercise of discretion to advance fees typically reflects sound corporate governance goals, rather than an effort to not cooperate with a government investigation.

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[114] MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (1999). Rule 1.8(f) is very similar to its predecessor, Disciplinary Rule 5-107 of the Model Code of Professional Responsibility, which is still in force in some states.

[115] A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.5(e) (1993). If the lawyer could not exercise independence, such as in a "crime family" case, the court may order disqualification. *See, e.g., United States v. Locascio*, 6 F.3d 924, 932-33 (2d Cir. 1993).

[116] *See* MBCA § 8.58 & cmt (recognizing that the authority also exists for corporations to indemnify or advance fees to employees).

The legitimacy of the policy goals espoused by these state statutes and ethical standards is confirmed by the Justice Department's own internal regulations, which permit the Justice Department itself to pay for a prosecutor's outside counsel if the prosecutor is a subject of a federal criminal investigation.[117] Unfortunately, the guidance recently issued to federal prosecutors in the Holder Memo Standards could, and does, generate interference with the principle that non-government employees facing government investigation or prosecution are entitled to qualified, competent representation. Today, it is common for defense counsel to be confronted by a federal prosecutor who believes that a corporation is not fully cooperating with the government in a federal criminal investigation solely because the corporation is paying the legal fees for an officer, director or employee.

Although the Holder Memo Standards quite logically instruct prosecutors that the cooperation of the corporation may be a relevant factor in determining whether to charge the company, this guidance includes flawed commentary that authorizes a prosecutor to view as non-cooperative the advancement of legal fees for employees that have been deemed "culpable" by the prosecutor. Specifically, the Holder Memo Standards state that:

> [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.[118]

A footnote, fortunately, does add that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate."[119] But where this state requirement is lacking, the Holder Memo Standards undermine an otherwise legal, ethical and useful practice.

The Justice Department policy expressed in the Holder Memo Standards may unfairly prejudice corporations and their employees and, thus, compromise the administration of justice. Although corporations are often obligated under state law and their by-laws to advance fees to officers and directors, they may have statutory authority not to pay attorneys' fees for officers and directors if the corporation determines that an officer or director acted with criminal intent or acted to harm the company.[120] In addition, corporations typically retain discretion to advance fees for lower-ranking employees. Since a decision to advance fees most often must be made long before there is a sufficient factual basis to allow a corporation to assess "culpability" of the employee, the Holder Memo Standards may cause premature judgments by a corporation about an employee's criminal intent and conduct and will have a chilling effect on a corporation's exercise of discretion to advance fees.

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[117] *See* 28 C.F.R. §§ 50.15(a)(7), 50.16.

[118] Criminal Resource Manual, art. 162, § VI.B (footnote omitted) (emphasis added). Section VI.B. contains numerous other relevant provisions as well.

[119] *Id.* at n.3.

[120] *See, e.g.*, Del. Code Ann. tit. 8, § 145(a) (2000).

In addition, the Holder Memo Standards are subject to abuse by prosecutors who could gain a strategic advantage by interfering with the ability of corporate employees to retain competent counsel if they are unable to do so absent financial support from the company.

The purported application of the Holder Memo Standards to the advancement of fees only to "culpable" employees creates a paradigm that is both incompatible with the legal standards governing advancement and impractical in its application to white-collar criminal investigations. Culpability may play a role in a corporation's decision whether to ultimately indemnify an employee, as the corporation may choose not to indemnify an employee who acted in bad faith or with reason to believe that his or her conduct was unlawful.[121] Whether an employee is guilty of the offense for which he or she is under investigation, however, frequently cannot be determined by a corporation at the investigation or pre-trial stage. Indeed, the ultimate decision to not indemnify an employee is often made long after the need to do so has arisen and fees have already been advanced.

Under Delaware law, for example, a corporation's decision to advance fees is an issue resolved independently of the employee's ultimate entitlement to indemnification, and is instead resolved by answering questions that do not touch upon culpability.[122] In general, courts applying Delaware law will first determine whether the employee is entitled to the advancement of fees by virtue of a bylaw, resolution, or contractual provision.[123] If not, the decision to advance fees is left to the discretion of the corporation and the sole requirement that must be fulfilled is for the employee to file an undertaking to repay the advanced fees if such an undertaking is required by the relevant bylaw, resolution, or contract.[124]

In contrast, the Holder Memo Standards would require a corporation to determine an employee's "culpability" well before such a determination is ripe. As noted by one state legislature, "during the early stages of a proceeding (when advances are often needed) the facts underlying the claim cannot be fully evaluated and the board of directors therefore cannot accurately ascertain the ultimate propriety of indemnification."[125] This is particularly the case in corporate criminal investigations, where the proscribed behavior "is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."[126] As summarized by one commentator, "[t]he jurisprudence of white collar crime, in particular, is littered with examples of courts and legislatures struggling to clarify what is or is not a crime."[127]

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[121] *Id.* § 145(a)-(b).

[122] *See Ridder v. CityFed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1994) ("Under Delaware law, appellants' right to receive the costs of defense in advance does not depend upon the merits of the claims asserted against them and is separate and distinct from any right of indemnification they may later be able to establish.").

[123] *See, e.g., id.*

[124] *See* DEL. CODE ANN. tit. 8, § 145(e).

[125] S.C. CODE ANN. § 33-8-530 cmt. (Law. Co-op. 2000).

[126] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978); *see also* Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 293 (1991) (concluding that many white-collar criminal statutes and regulations create a "gray area between legal and illegal conduct").

[127] Bucy, *supra* note 126, at 293.

In light of this uncertain legal backdrop and the large volume of documents that typically must be reviewed in corporate investigations, a company will often be unable to realistically assess the culpability of its employees until the conclusion of the legal proceedings. In the case where an employee has made a serious mistake in judgment, the company may not have sufficient information to conclude that the employee had the necessary criminal intent. In most United States corporations, a basic tenet of human resources management is that an employee should be given the benefit of the doubt when determining something as serious as whether he or she acted with criminal intent. As a result, companies often properly refrain from premature determinations regarding an employee's criminal culpability. The Holder Memo Standards, however, unwisely pressures a company to rush to judgment.

In addition, the guidance set forth in the Holder Memo Standards is subject to abuse. Every lawyer – including a prosecutor – has an obligation not to interfere with an individual's legal representation, particularly in a criminal matter.[128] As Model Rule 8.4 states: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."[129] Although the paramount duty of a prosecutor is to seek justice,[130] the Holder Memo Standards unfortunately create a framework that allows a prosecutor to use his or her leverage to interfere with an employee's ability to obtain a well-qualified lawyer, which in fact undermines the interests of justice.

Given that most business-related investigations concern complex regulatory issues, an experienced attorney is frequently necessary to competently safeguard an employee's interests. Many employees, however, lack sufficient funds to retain such an attorney. An employee who is denied the advancement of fees is unlikely to be able to obtain competent counsel. This reasoning applies with equal – if not greater – force to low-ranking employees. Prosecutors may gain a strategic advantage by chilling a company's exercise of discretion to advance fees for employees and impeding an employee's ability to retain a capable and experienced attorney. Such strategic interference with an individual's ability to obtain representation is inconsistent with the ethical standards governing attorney conduct and ultimately impedes the fair administration of justice.[131]

D. Crime-Fraud Exception

Today, defense lawyers are confronted by government efforts to overcome the attorney-client privilege by assertion of the crime-fraud exception. A defense counsel's first notice of such a claim is often in an *ex parte* order of a court requiring the lawyer to provide testimony regarding communications with a client.

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[128] Under the McDade Amendment adopted in 1998, federal prosecutors are subject to state ethics rules and local federal court rules governing attorneys in each state where such attorney engages in that attorney's duties. *See* 28 U.S.C. § 530B(a).

[129] Model Rules of Prof'l Conduct R. 8.4(d) (1999).

[130] "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

[131] The Holder Memo Standards' guidance regarding advancement of attorney's fees is also incompatible and inconsistent with the apparent approval of this practice as expressed in state statutes permitting corporations to exercise discretion to advance fees, despite the exemption in the Justice Department guidelines when such advances are required by law.

Although the crime-fraud exception to the attorney-client privilege is as universally recognized as the privilege itself, it is justified only on the grounds that the traditional rationale for the privilege – attorneys may give sound legal advice only if clients can fully and frankly communicate with them – does not apply when the intent of the communications is to further criminal activity.[132] The crime-fraud exception to the privilege dates back to the 1743 English case of *Annesley v. Earl of Anglesea*.[133] A later English case, *Regina v. Cox*, was the first to give widespread effect to the exception, applying it to both civil and criminal wrongs in 1884.[134] *Regina* established the principle that the client's intent in consulting an attorney controls whether the communication is privileged, holding, "[i]n order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent."[135]

In the 1891 case of *Alexander v. United States*, the United States Supreme Court endorsed the *Regina* rule, but added the limitation that the exception should only apply to wrongs for which the party is *currently* being tried.[136] This restriction, however, has since become a dead letter.[137] The Court further refined the crime-fraud exception in *Clark v. United States* by limiting its application to cases in which the party opposing the privilege had presented "*prima facie* evidence that it has some foundation in fact."[138] Another early limitation to the exception was the "independent evidence" requirement, whereby the government was required to establish its *prima facie* case through evidence acquired independently of the communications at issue.[139] Yet, since prosecutors invoked it relatively infrequently, the crime-fraud exception remained an undeveloped doctrine throughout much of this century.

More recently, federal prosecutors have taken advantage of the increased criminalization of white-collar and regulatory offenses to invade the attorney-client privilege by asserting the crime-fraud exception.[140] Such government efforts have a low procedural threshold, allowing prosecutors to compel testimony about attorney-client communications based only on an *ex parte* showing that the exception applies. In most cases, the decision to proceed and the *ex parte* showing to the court are both made by the individual prosecutor handling the investigation without any additional review or approval within the Justice Department.

Most courts recognize that in order for the exception to apply, prosecutors must demonstrate two elements: (1) the client was involved in planning criminal conduct at the time of the

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[132] *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Coleman v. Am. Broad. Co., Inc.*, 106 F.R.D. 201, 206 (D.D.C. 1985).

[133] 17 How. St. Tr. 1225 (1743), *quoted in* WIGMORE, *supra* note 12, § 2291; *see also* MCCORMICK ON EVIDENCE, *supra* note 13, § 87, at 344 n.3 (citing *Annesley*); Fried, *supra* note 9, at 446-50 (discussing the history and significance of *Annesley*).

[134] 14 Q.B.D. 153 (Cr. Cas. Res. 1884); *see also* Christopher Paul Galanek, Note, *The Impact of the* Zolin *Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1123 (1990) (discussing *Regina*).

[135] 14 Q.B.D. at 168; *see also* Galanek, *supra* note 134, at 1123 n.45 (quoting *Regina*).

[136] 138 U.S. 353, 360 (1891); *see also* Fried, *supra* note 9, at 460.

[137] Fried, *supra* note 9, at 460.

[138] 289 U.S. 1, 15 (1933) (internal quotation omitted); *see also* Fried, *supra* note 9, at 462-63.

[139] *See, e.g., United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir. 1972); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir. 1939); *see also* Fried, *supra* note 9, at 463-65. This limitation has since been abrogated by *United States v. Zolin*, 491 U.S. 554 (1989), discussed *infra*.

[140] Fried, *supra* note 9, at 470.

consultation; and (2) the attorney's assistance was obtained in furtherance of this activity.[141] It is the client's subjective intent, and not the attorney's knowledge of the planned criminal activity, that controls.[142] In most federal Circuits, the exception applies even if the client never completed the planned crime or fraud.[143]

The minimal *prima facie ex parte* showing required of prosecutors underlies the current concern regarding the government's efforts to use the crime-fraud exception. The Supreme Court has addressed this issue only once, in *United States v. Zolin*, a case in which the IRS sought to compel the defendant in a criminal tax investigation to produce various documents and audiotapes that the defendant claimed were protected by the attorney-client privilege.[144] The IRS submitted statements from agents working on the case, as well as partial transcripts of the tape recordings obtained from a confidential source, to demonstrate that the crime-fraud exception applied. The district court refused to conduct an *in camera* review of the privileged material, but ordered that the defendant produce five of the requested documents based on the prosecutor's evidence. The Court of Appeals for the Ninth Circuit affirmed.[145]

The Supreme Court vacated and remanded, holding that a court can review privileged material *in camera* to determine whether the exception applies. To obtain an *in camera* review, the party opposing the privilege "must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability."[146] Disposing of the traditional "independent evidence" requirement, the Court held that any relevant evidence that was lawfully obtained and not privileged could be used to make this threshold showing.[147] Furthermore, the decision whether to grant the *in camera* review is within the district court's discretion.[148]

The *Zolin* Court declined to define the quantum of proof ultimately necessary to invoke the crime-fraud exception following the *in camera* review.[149] Most federal courts, however, continue to apply the *Clark prima facie* standard when deciding whether the exception applies. Although various Circuits have different formulations of what constitutes a *prima facie* case, none of the standards are very stringent.[150]

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[141] *See, e.g., United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997); *United States v. Collis*, 128 F.3d 313, 321 (6th Cir. 1997); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996).

[142] *See, e.g., In re Grand Jury Proceeding*, 87 F.3d at 381-82; *United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

[143] *See, e.g., Collis*, 128 F.3d at 321; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1039 (2d Cir. 1984). *But see In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) ("[T]he client must have carried out the crime or fraud . . . . [T]he exception does not apply even though, at one time, the client had bad intentions.").

[144] 491 U.S. 554, 557 (1989).

[145] *Id.* at 558-61.

[146] *Id.* at 574-75.

[147] *Id.* at 575.

[148] *Id.* at 572.

[149] *Id.* at 563.

[150] *See, e.g., Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96 (3d Cir. 1992) (indicating that all that may be required is "evidence which, if believed by the fact finder, supports plaintiff's theory of fraud"); *In re Grand Jury Proceedings*, 857 F.2d 710, 712 (10th Cir. 1988) (holding that a partial transcript of grand jury proceedings and affidavits established *prima facie* case that documents were not privileged, because the evidence showed that the allegation of attorney participation in a crime or fraud has some foundation in fact); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (endorsing Black's Law Dictionary definition of *prima facie* case – evidence that "will suffice until contradicted and overcome by other evidence" – and finding that mere allegations in plaintiff's pleadings did not meet this standard).

In applying *Zolin*, Circuits have generally required that prosecutors either make an *ex parte* showing to meet the threshold for an *in camera* review or establish a *prima facie* case. According to the Ninth Circuit, *Zolin* does not require that a court consider "other available evidence" outside of what the prosecutor presents to it in determining whether the exception applies.[151] In an *in camera* review of privileged statements, a defendant asserting the privilege also has no right to notice or opportunity to be heard. Instead, the "*prima facie* foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury."[152] For example, in one case, the government subpoenaed defense counsel for a hospital that was the target of a grand jury investigation and, in arguing that the crime-fraud exception applied to counsel's testimony, prosecutors submitted an *in camera, ex parte* "good faith" statement of evidence about the alleged criminal activity. The district court ruled that the government had established a *prima facie* case and refused to allow the hospital's counsel to view the government's evidence or to present rebuttal evidence. The Tenth Circuit affirmed, holding that instead of affording an opportunity to be heard, the court need only protect the privileged communication by defining the "scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited."[153]

Courts' willingness to rely on a *prima facie, ex parte* showing to establish the applicability of the crime-fraud exception likely stems from dual concerns. First, that a determination of this foundational issue will become a "preliminary minitrial" and waste judicial resources.[154] Second, in the context of grand jury proceedings, that the government's interest in protecting the secrecy of the proceedings outweighs a defendant's due process rights.[155] Although the increasing use of the crime-fraud exception stems in large part from the courts' willingness to find it applies, the detrimental effect of this development is greatly exacerbated by the efforts of federal prosecutors to invoke the exception, often in *ex parte* proceedings.

The United States Attorneys' Manual contains no specific guidelines regarding the invocation of the crime-fraud exception by federal prosecutors. Despite the warnings against invading the attorney-client relationship, federal prosecutors have increasingly invoked the crime-fraud exception to compel testimony about privileged communications. One review of reported case law in the mid-1980's alone indicated an "extraordinary increase" in attempts to compel attorney testimony throughout the previous twenty years.[156] Invocations of the excep-

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[151] *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994). In *Zolin*, the government sought documents relating to the defendant corporations' allegedly illegal exports and presented affidavits from former employees to demonstrate that the exception applied. The district court found the government's evidence sufficient to obtain an *in camera* review of the documents and declined to consider countervailing evidence from the corporation. 491 U.S. at 573-74.

[152] *In re Grand Jury Subpoenas*, 144 F.3d 653, 662 (10th Cir. 1998).

[153] *Id.* at 661. *But see Haines*, 975 F.2d at 97 ("The importance of the privilege . . . as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege."). The Third Circuit, however, eventually distinguished *Haines* and held that relying solely on an *ex parte* affidavit to determine the application of the crime-fraud exception does not violate due process. *In re Grand Jury Subpoena*, 223 F.3d 213, 218 (3d Cir. 2000) ("This case differs from *Haines* not only because *Haines* was a civil case and this is a criminal one but, even more important, because *Haines* involved adversarial proceedings whereas grand jury proceedings are investigative, and the rules of the game are different.").

[154] *See, e.g., In re Grand Jury Proceedings*, 857 F.2d at 712 (expressing such concern); *see also* H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1259 (1999) (discussing courts' concerns).

[155] *See, e.g., In re Grand Jury Subpoena*, 884 F.2d 124, 126 (4th Cir. 1989) (holding that *in camera* review of the government's evidence did not violate defendant's due process rights); *see also* Brown, *supra* note 154, at 1259 (discussing these secrecy concerns).

[156] Fried, *supra* note 9, at 445 (citing a review of the case digests).

tion "proliferate" in the context of federal grand juries.[157] Federal prosecutors' use of subpoenas for lawyers have been described as a "growing trend . . . [that] has troubled both practitioners and legal scholars."[158] This trend can be at least partially explained by the increase in criminalization of regulatory offenses and in federal prosecutions for white collar and organized crime.[159]

Although federal prosecutors are increasingly using the crime-fraud exception to overcome the attorney-client privilege, the evidence presented by prosecutors to make a *prima facie* case is often not disclosed in court opinions, thus making an analysis of the full extent of the problem difficult. Nonetheless, the current Justice Department practices that jeopardize the privilege and undermine the policies behind it include: (1) using unsubstantiated statements to establish the application of the exception; (2) utilizing communications outside the bounds of the exception; and (3) not following the proper procedures for the introduction of privileged evidence.

As various legal scholars have commented, there are significant consequences arising from the Justice Department's increased reliance on the crime-fraud exception, particularly because of the potential for prosecutorial abuse inherent in the law pertaining to the exception itself. The most common criticisms are the abandonment of the "independent evidence" requirement, the lack of restrictions on the legitimacy and accuracy of evidence, and the *ex parte* nature of the proceeding. The current rules allow prosecutors to obtain an *in camera* review based on unsubstantiated information that they may have collected through an unlawful intrusion into the privilege, without giving defendants an opportunity to challenge the reliability or validity of that evidence.[160] Safeguards are necessary even during an *in camera* review because "each time a court entertains a motion to defeat the privilege with any information, qualitatively acceptable or not, the court risks disclosing privileged information that should not be disclosed to any party."[161] In addressing the *ex parte* nature of the *in camera* review, this process has also come under attack by commentators who criticize its inherent weaknesses:

> The absence of notice of the basis of the crime-fraud claim further aggravates the inability of the privilege holder to meaningfully respond and to preserve the privilege. The court is also deprived of the robust factual development and legal argument necessary for an informed judicial decision.[162]

Oftentimes, the evidence that prosecutors use either to obtain an *in camera* review or to establish a *prima facie* case contains no indicia of reliability or derives from third parties with

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[157] Ann M. St. Peter-Griffith, *Abusing the Privilege: The Crime-Fraud Exception to Rule 501 of the Federal Rules of Evidence*, 48 U. MIAMI L. REV. 259, 279 (1993).

[158] Ross G. Greenberg, *et al.*, *Eighth Survey of White Collar Crime Procedural Issues: Attorney-Client Privilege*, 30 AM. CRIM. L. REV. 1011, 1021 (1993).

[159] Fried, *supra* note 9, at 445.

[160] *See* Brown, *supra* note 154, at 1252; St. Peter-Griffith, *supra* note 158, at 269-71; Galanek, *supra* note 134, at 1139-40 (each noting these concerns).

[161] St. Peter-Griffith, *supra* note 157, at 271.

[162] Brown, *supra* note 154, at 1259-60 (footnotes omitted); *see also* Michael M. Mustokoff, *et al.*, *The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following* United States v. Anderson, 9 ANNALS HEALTH L. 107, 114-17 (2000) (reflecting the current criticism of these practices).

an interest in the matter. For example, in one case, the government relied on affidavits from two former employees of the defendant corporation to meet the threshold for an *in camera* review of documents it claimed were in furtherance of export control violations.[163] Both employees' affidavits contained hearsay evidence about specific words and acts of the company's executives:

> According to one former employee, the Corporation's president shipped GPS units to the [United Arab Emirates] in July 1989 and, a short time later, received a telex from Iran thanking him for the units . . . . He further stated that both an Iranian trainee and the Corporation's vice-president indicated that the GPS units in Iran came from a [United Arab Emirates] front company deliberately set up for that purpose.[164]

In another case, the prosecutor used testimony from a government agent that likely included hearsay to make its *prima facie* case.[165] In both of these cases, the courts accepted the evidence and revoked the privilege. Furthermore, although the exception is supposed to apply to communications that take place before an intended crime or fraud is committed, federal prosecutors frequently attempt to apply it to communications after the crime has occurred.[166] Indeed, the district courts in two cases compelled production of documents dated after the completion of the alleged crime. Fortunately, the appellate courts reversed and limited the lower courts' orders to evidence of communications *before* the crime occurred.[167] These efforts to use such evidence, however, is alarming.

Federal prosecutors have also attempted to circumvent the two-step procedure outlined in *Zolin*. For example, in one case, the prosecutor sought application of the exception, and the trial court initially applied it to a letter to the defendant from his attorney. Because the prosecutor did not establish a basis for an *in camera* review, the Court of Appeals for the Ninth Circuit found this to be error.[168] In another Ninth Circuit case, a federal prosecutor relied on disclosures of attorney-client communications from a former employee of the defendant and from an agent's affidavit regarding these communications, but without first requesting an *in camera* review or making a *prima facie* showing.[169]

Federal prosecutors have also argued that attorney-client communications can be evidence of a particular "crime" and are therefore not privileged, even if the facts of the case do not make out the elements of the alleged crime.[170] Another "extraordinary ploy" used by prosecutors is to turn a past offense into a continuing one so that the communications fall

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[163] *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994).

[164] *Id.*

[165] *In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989).

[166] *See, e.g., In re Grand Jury Subpoena*, 31 F.3d at 831; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1041 (2d Cir. 1984).

[167] *See, e.g., In re Grand Jury Subpoena*, 31 F.3d at 831; *In re Grand Jury Subpoena*, 731 F.2d at 1041-42.

[168] *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992). The Ninth Circuit admitted the letter on other grounds, however, and, as a result, did not reverse the lower court decision. *Id.* at 750.

[169] *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996). Although the evidence was admitted, the lower court expressly stated that it had disregarded the privileged statements in ruling that the crime-fraud exception applied to them. *Id.* at 1503-04.

[170] *See In re Grand Jury Subpoena*, 731 F.2d at 1039-40 (stating that the court was "skeptical" that defendant corporation's sale of its stock could be considered an obstruction of justice or part of a conspiracy to defraud the United States, as the prosecutor had argued).

within the exception.[171] For example, in a Fifth Circuit case, following the defendant's indictment for extortion, defense counsel wrote a letter to the alleged victim enclosing the money allegedly extorted.[172] The prosecutor then subpoenaed the attorney to testify about conversations that occurred prior to the return of the money, which, according to the prosecutor, acted as an obstruction of justice.[173]

Last, while evidence about attorney-client communications can take a variety of forms, prosecutors most often invoke the crime-fraud exception in order to force attorneys to testify against their clients.[174] As a result, "opposing counsel could use the subpoena to eliminate troublesome, qualified defense counsel" by compelling an attorney to testify about the client's communications and thereby forcing the subpoenaed attorney to withdraw as counsel.[175] It is particularly troubling when the government's use of this exception results in the lawyer being compelled to testify against his or her client.

Because of the extraordinary impact this result necessarily has on the attorney-client privilege and relationship, the government should establish a level of review within the Justice Department that would be required before the prosecutor could make such an *ex parte* application to the Court.

IV. Recommendations And Conclusion

The current Justice Department policies and practices regarding the attorney-client privilege and the work product doctrine have significant negative consequences. By eroding the attorney-client privilege and work product doctrine, they undermine defense counsel's ability to effectively represent his or her client. The values enshrined in these protections are deep-rooted and broadly embraced by the entire legal community. As the Supreme Court has stated:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law . . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.[176]

Rather than undermining and eroding the attorney-client privilege and work product doctrine by viewing them as obstacles to the legitimate prosecution of crimes, the Justice Department should recognize that these protections provide the foundation for a lawyer to offer an informed opinion and sound legal advice to a client based upon full knowledge of the issue at hand, and play a vital role in the American system of justice. Federal prosecutors should not exact a waiver of these important protections. The Justice Department should modify and clarify its guidelines regarding the attorney-client privilege and the work product doctrine in order to ensure the fullest protection possible for these fundamental principles of American

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[171] Fried, *supra* note 9, at 474.

[172] *United States v. Dyer*, 722 F.2d 174, 176 (5th Cir. 1983); *see also* Fried, *supra* note 9, at 474-75.

[173] *Dyer*, 722 F.2d at 176; *see also* Fried, *supra* note 9, at 474-75.

[174] *See, e.g.*, Mustokoff, *supra* note 162, at 110 (discussing a case in which this occurred).

[175] Greenberg, *supra* note 158, at 1022.

[176] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

law, while still allowing vigorous enforcement of the criminal statutes. The two are not incompatible.

Cooperation with the government in its investigation may be full and complete without the coerced waiver of these protections. The proliferation of a policy of prosecutorial coercion is, in the long run, a disservice to the public interest and to the fair administration of justice. The waiver of the attorney-client and work product privilege should only be made voluntarily and not as a result of government coercion. And the government has a long standing policy in conflict with seeking such waivers. The U.S. Attorney's Manual requires that all reasonable attempts be made to obtain the information from other sources and only when these efforts have been unsuccessful, may a prosecutor serve a subpoena on an attorney for testimony or documents, and then only after approval of the Assistant Attorney General in charge of the Criminal Division.[177] There is no reason to abandon this policy.

The government has also weakened these protections by attacking joint defense agreements. Joint defense agreements provide the opportunity for defense attorneys to preserve the attorney-client privilege and work product protections while sharing information crucial to the preparation of an adequate defense. The Justice Department policy regarding joint defense agreements, however, appears to be in flux, leaving ample discretion to individual prosecutors to develop their own policies and strategies.

Some prosecutors recognize the importance of a joint defense agreement in order for a corporation's counsel to be able to obtain adequate information to advise the corporate client and provide accurate information to the government as well as its importance for an individual employee. Other prosecutors, however, find the existence of a joint defense agreement a basis for charging the corporation with interfering with a government investigation. This is an issue the Justice Department should clarify with a statement of policy supporting a presumption that joint defense agreements are valid unless there is substantial reason to believe one is being used in an illegal manner. Prior to such a determination, the fact that a joint defense agreement exists should not be used by the government as evidence of non-cooperation or obstruction on the part of a corporation.

With regard to the advancement of fees, it should be recognized in the Justice Department guidelines that this practice is permitted under state corporation law and ethical codes and is necessary to enable employees to be adequately represented in a criminal investigation of corporate conduct. The current Justice Department guidelines discourage the legitimate advancement of fees and permit prosecutors to abuse their authority and impose law enforcement where it has no real interest in order to gain a strategic advantage and thereby deprive the employee of a funded defense.

Finally, while developing case law has made it easy for prosecutors to invoke the crime-fraud exception, and perhaps this is a matter of concern best addressed to the courts, it is important that Justice Department attorneys not seek to use every opportunity available to them to invade the attorney-client privilege and work product doctrine for the purpose of building a case when other avenues are available. The government should make *ex parte* claims that these protections have been breached by the crime-fraud exception only after facts are estab-

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[177] *See* discussion *supra* at 22.

lished that fully support that a challenge to the attorney-client privilege is warranted. Such a challenge should not be merely an advocate's tool. Prosecutors must be mindful of the societal importance of the attorney-client privilege and the work product doctrine and the dangers that result from their erosion by excessive invocation of the crime-fraud exception. The Justice Department should establish more specific guidelines on compelling disclosure of attorney-client communications or work product that stress strict compliance with the few safeguards and limits that do exist in the law, particularly in regard to the *ex parte* showing that prosecutors must make to invoke the crime-fraud exception.

Since courts will not customarily provide the party asserting the privilege the opportunity to challenge the evidence establishing a *prima facie* case, the Justice Department guidelines should assure that the government's evidence originates from reliable, credible sources without a personal interest in the matter. Any *ex parte* application should first be approved by the Attorney General or appropriately designated person following a review of the facts. And prosecutors should not attempt to compel disclosure of communications that do not relate directly to a planned crime.

A. Specific Recommendations

In order to alleviate the concerns expressed in this report that the attorney-client privilege and the work product doctrine have been and continue to be eroded in federal criminal investigations, the College makes the following specific recommendations:

- The policies and guidelines of the Justice Department should reflect the critical importance of the attorney-client privilege and work product doctrine and incorporate alternatives to circumventing them. The following proposed guideline should be incorporated into the Holder Memo Standards:

> The attorney-client privilege and work product doctrine are essential to the American justice system and should not be diluted for the sake of expediting a prosecution. Prosecutors should exhaust other alternatives to obtain information before requesting that a corporation cooperate by waiving privilege.

- The current guidelines provide in part, as follows:

> "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 the attorney-client and work product privileges."

> This should be changed to read:

> In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify those within the corporation whom it is aware or becomes aware have engaged in culpable wrong doing, including senior executives, to make witnesses available and otherwise cooperate.

- The Justice Department, in assessing whether a corporation is cooperative, should consider its refusal to disclose the results of internal investigations by counsel or otherwise

waive the attorney-client and work product privilege only when evidence is unavailable from any other sources.

- With regard to joint defense agreements or payment of employees' legal fees, the guidelines should state:

> A corporation's promise of support to employees and agents, either through advancing of legal fees or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, should be considered by the prosecutor in weighing the value of a corporation's cooperation only if such support continues in an inappropriate manner after a determination of culpability or misconduct on the part of an employee.

- The government should not attempt to breach the attorney-client privilege and work product protections by an *ex parte* application to the court claiming a crime-fraud exception to the privileges without clearly establishing a solid factual basis that this exception applies. The proposed guideline should state:

> In every case in which a claim of crime-fraud is to be made to a court for the purpose of voiding the attorney-client or work product privilege, the application should be approved by the Attorney General or an appropriately designated person within the Justice Department following a review of the factual basis for such an application.

B. Conclusion

Any impediment to obtaining relevant information that is presented by the attorney-client privilege and work product doctrine is counterbalanced by the benefits these protections afford the criminal justice system and society in general. While a prosecutor's job may be rendered more difficult by a corporation's or its attorney's invocation of a privilege, this is not a valid reason to compromise the longstanding and important legal principles that underlie the privilege. Despite the challenges that the attorney-client privilege and work product doctrine may present to prosecutors, the overall benefits make these protections indispensable and deserving of preservation.

The attorney-client privilege and work product doctrine play a central role in corporate governance. In order to fully comply with the law, corporate employees must be able to seek the advice of corporate and outside counsel. It is necessary for the communication between counsel and corporate employees to be privileged to ensure an open and honest exchange of information. Any policy that equates the assertion of the attorney-client privilege and work product protections with non-cooperation or obstruction ignores the harmful consequences to proper corporate governance. It is in society's interest to ensure that corporations have the means to comply with often complicated and intricate regulations and laws. Corporate officers and employees need to be assured that what they reveal to corporate or outside counsel will not be used against them at a later date.

Whether invoked by a corporation or an individual, the attorney-client privilege and the work product doctrine are essential to the due administration of the American criminal justice system. Justice Department guidelines and prosecutorial standards should be revised to reflect adequately the central importance of these protections. ◆

CUA

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March 28, 2006

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Washington, D.C. 20002-0082

Re: Comments on the Waiver Language of Application Note 12 of the Commentary to Section 8C2.5(g) of the *Organizational Guidelines*

Dear Judge Hinojosa and Members of the Commission:

We thank the Commission for taking time to review the November 2004 amendment to the Commentary to Section 8C2.5(g) of the *Organizational Guidelines* and for inviting public comment on this language. All members of the legal profession, including law faculties and students, have a great deal at stake with respect to measures pertaining to the attorney-client privilege. We recognize that the government has legitimate reasons to request information to ensure that corporations and other organizations comply with the law, and we understand that prosecutors must leverage resources to address the widespread improprieties that have occurred in recent years. However, exerting virtually irresistible pressure on entities to relinquish attorney-client and work product protections is unfair to both organizations and their human constituents. Because the waiver language of Application Note 12 invites this practice,[1] we urge the

[1] This is particularly evident when the waiver language of Application Note 12 of the Commentary to § 8C2.5(g) is read in conjunction with relevant Department of Justice (DOJ) policies. *See* Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components, United States Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00161.htm. *See* U.S. Department of Justice, *Federal Prosecution of Business Organizations*, in Criminal Resource Manual No. 162 (2003) (incorporating Thompson Memorandum), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm. *See also* Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All Component Heads and United States Attorneys, on Bringing Criminal Charges Against Corporations (June 16, 1999) (predecessor of Thompson Memorandum), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html, and Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components, United States Attorneys, on Waiver of Corporate Attorney-Client Privilege and Work Product Protection, (Oct. 21, 2005) (instructing United States Attorneys Offices to develop written waiver reviews processes), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

Commission to amend this portion of the Commentary.[2] In its place we propose a specific provision stating that waiver of attorney-client and work product protections should not be a factor in determining an entity's "cooperation," except in those rare instances in which the government demonstrates that the entity has inappropriately invoked these safeguards to shield specific, otherwise unprivileged, factual material.

In addition to the compelling arguments offered by the American Bar Association and others who previously have commented on the adverse impact of the November 2004 amendment of Application Note 12, we request the Commission to consider three specific points in support of our proposal: (1) As currently written, the waiver language invites unfair prosecutorial tactics inconsistent with the special responsibilities of government lawyers to seek justice under law; (2) it threatens to compromise constitutional rights of corporate constituents, particularly individuals who participate in corporate internal investigations; and (3) it undermines the legitimacy of our adversarial system.

I. THE CURRENT WAIVER LANGUAGE INVITES UNFAIR CONDUCT AT ODDS WITH THE SPECIAL RESPONSIBILITY OF GOVERNMENT COUNSEL TO SEEK JUSTICE

By empowering prosecutors to label an entity "uncooperative" for refusing to waive attorney-client and work product protections, the waiver language of Application Note 12 allows government lawyers to require corporations and other entities to do what the government itself would not do – relinquish safeguards critical to our adversarial system. At a very early point in their legal education students discover that zeal in representing clients is both a professional virtue and an ethical obligation. They learn that diligence is critical to good lawyering and that a careful lawyer searches out all potentially significant information. While, as noted below, government attorneys have a special obligation to work for justice, it is unrealistic to expect the dedicated, conscientious lawyers who represent the United States to refrain from seeking all material available to them within the bounds of ethics and the law. As currently written, the waiver language of Application Note 12 provides prosecutors with a means of pressuring corporations and other entities to jettison attorney-client and work product protections, thereby affording the government essentially unfettered access to the confidential communications of "cooperating" entities. Consequently, this language unfairly and unnecessarily encourages prosecutorial conduct that undermines attorney-client and work product protections. As recent incidents have shown, overly aggressive prosecutorial tactics can have disastrous consequences. *See, e.g., Editorial,*

[2] In expressing this view, we join with the American Bar Association, the Coalition to Preserve the Attorney-Client Privilege, former senior DOJ officials, and others who have requested the Commission to delete or revise Application Note 12 on various prior occasions.

Another Blown Case?, The Washington Post at A14 (Mar. 20, 2006) (discussing troubled prosecutions of alleged terrorists). At a minimum, in the corporate context coerced waivers are likely to chill the full and frank attorney-client communications essential to achieving justice in an adversarial system.

Government attorneys, no less than lawyers in private practice, rely on the protections of the attorney-client privilege and the work product doctrine in representing their client and its constituents. Permitting prosecutors unilaterally to coerce entities to abandon these important protections unfairly tilts the balance against organizational defendants and forces corporate constituents into the proverbial space between a rock and a hard place. If an entity's constituents avoid requesting legal advice, the corporation may violate the law or fail to correct an existing problem. If they do seek out the organization's lawyers, at some point everything they say in connection with a problem may end up in the hands of prosecutors. Forcing defendant entities and their constituents into these binds is inconsistent with the obligation of government attorneys first and foremost to seek justice.

While all members of the bar have a duty to uphold justice, this responsibility is especially important for those who represent the federal government. In *Berger v. United States*, 295 U.S. 78 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960), the United States Supreme Court recognized the special obligation of government attorneys to ensure that justice is done, particularly in criminal proceedings. In the Court's words:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88.

The Supreme Court clearly affirmed the vitality of corporate attorney-client privilege and work product protections in *Upjohn Co. v. United States,* 449 U.S. 383 (1981). Any measure that entitles law enforcement personnel to impose a high cost on the exercise of these protections threatens to strike the very kind of foul blow the Court condemned in *Berger.* We urge the Commission to amend the waiver language of Application Note 12 because we believe that it invites this kind of prosecutorial overreaching.

II. EMPOWERING PROSECUTORS TO PRESSURE ENTITIES TO WAIVE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS THREATENS TO COMPROMISE IMPORTANT INDIVIDUAL RIGHTS

In a pivotal scene in Arthur Miller's classic play *The Crucible*, the judge presiding over the Salem witchcraft trials declares: "The pure in heart need no lawyers." Arthur Miller, *The Crucible* at 93 (New York: Penguin Books 1973). Even so, when protagonist John Proctor rises to present evidence on behalf of his wife and others accused of witchcraft, Reverend Hale begs the court, "In God's name, sir, stop here; send him home and let him come again with a lawyer." *Id.* at 99. The judge, however, refuses to suspend the proceedings to allow Proctor to obtain counsel. Ultimately, the accused and Proctor himself are found guilty of working for the devil and sentenced to death. Nearly three hundred years after the Salem witchcraft trials, few Americans would be so foolish as to believe that even the purest among us have no need for lawyers. As a society, we hold the right to counsel in such high regard that we have incorporated it into our Constitution, and we require law enforcement authorities to inform individuals taken into custody of this safeguard. The right, however, has little meaning if clients cannot count on the confidentiality of their communications with counsel.

Coerced waivers of the corporate attorney-client privilege have far-reaching impacts for individuals. In an internal corporate investigation, for example, an employee has no right to counsel, and refusal to answer questions posed by investigators may result in termination. Consequently, employees face intense pressure to talk with internal investigators, even though they may inadvertently lose the protection of the Fifth Amendment when they do so. *See* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Col. Bus. L. Rev. 859, 907-09; David M. Zornow and Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 157-58 (2000). *See generally* Joseph F. Coyne and Charles F. Barker, *Employees' Rights and Duties During an Internal Investigation*, in Internal Corporate Investigations at 169, 173 (Brad D. Brian, et al. eds., 2d ed. 2002).

For many years, although ethical investigators ordinarily informed interviewees that they represented the entity and that the entity could choose to disclose any information provided by the employee, corporate waivers of attorney-client and work product protections were rare. *See* Zornow and Krakaur, *supra,* at 153. In the current environment, however, disclosure is much more likely. By making waiver of attorney-client and work product protections a *quid pro quo* for recognition of corporate "cooperation," prosecutors can pressure entities to surrender these safeguards, thereby accomplishing indirectly what they could not do directly. When an organization discloses the fruits of an internal investigation to the government, prosecutors benefit from both the loyalty employees have to their employers and the threat that employees who refuse to participate in an investigation will lose their jobs. *See* Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?,*

23 Ind. L. Rev. 1, 11-13 (1990); Duggin, *supra* at 907-12. As many of those who oppose the practice have recognized, in conditioning recognition of corporate cooperation on attorney-client privilege and work product waivers, the government effectively "deputizes" corporate counsel to exploit the loyalty and fear of employees and then turn over the fruits of this labor to law enforcement personnel. N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, 19 Wash. Lawyer No. 7, 32, 36 (Mar. 2005); Zornow and Krakaur, *supra*, at 156-57.

The metamorphosis of corporate counsel into government agents is particularly dangerous for those employees who are least legally sophisticated and therefore unlikely to realize that responding to questions from corporate attorneys conducting an internal investigation may waive constitutional protections. *See, e.g.,* Tate, *supra,* at 5, 68; Duggin, *supra*, at 910. Ironically, even employees who regularly deal with corporate attorneys may be at risk because longstanding personal relationships may blind them to the ethical obligation of corporate counsel to represent the interests of the entity over all others. *See, e.g., id.* at 910-11 (even savvy managers may respond on the basis of personal connections rather than consideration of attorney obligations); Geoffrey Hazard and William Hodes, *The Law of Lawyering* § 17.13, at 17-53 (2003) (corporate officials "may incorrectly assume that the entity lawyer is also 'their' lawyer"). The Commentary to the *Organizational Sentencing Guidelines* should not invite prosecutors to take unfair advantage of such circumstances.

III. ROUTINE PRESSURE ON ENTITIES TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE UNDERMINES THE LEGITIMACY OF OUR ADVERSARIAL SYSTEM

Our adversarial system rests on the notion that truth can be distilled and justice meted out in the structured battle that takes place in the courtroom – or in the preliminary encounters that so often lead parties to resolve their differences prior to trial. Lawyers keep faith with their clients by holding the matters they share in confidence. While ethical rules forbid lawyers to assist clients in ongoing illegal activity, as a society we have come to rely on the understanding that a client can disclose almost anything to his or her lawyer knowing that such a confidence will remain inviolate. Under Model Rule 1.13 and its analogues, a lawyer who represents an organization owes allegiance to the entity rather than to any of its constituents. However, while a lawyer's ultimate duty is to the entity itself, the core relationships exist with living, breathing human beings. Constituents must have at least some level of trust that communications with corporate counsel are likely to remain confidential, or they will neither seek legal advice on behalf of the entity nor share confidences pertaining to its business.

When a corporate agent acts against the interests of an entity, corporate counsel have a duty to report the transgression – to the entity's highest authority if necessary – and to advise the entity to correct any corporate legal violations resulting from the agent's misconduct. On occasion, corporate decision makers may determine that they should or must disclose the matter to

government authorities and, in so doing, reveal otherwise privileged information. It is unjust, however, to refashion our legal system – formally or informally – to give prosecutors an unconstrained right to coerce such disclosures. Unfortunately, this is one of the unintended consequences of the waiver language of Application Note 12. This language, like any government measure that weakens the safeguards that keep the power of the state in balance, undermines the basic legitimacy of our adversarial system.

As law teachers, one of our most important tasks is to help our students understand that justice is not simply an abstract concept, but the concrete goal of our adversarial system. Achieving justice in an adversarial framework requires lawyers to represent their clients zealously within the bounds of law and professional ethics. The ability to hold client confidences inviolate in the absence of deliberate attempts to implicate counsel in illegal conduct is critical to the accomplishment of this objective. As the Supreme Court noted in *Upjohn,* "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some certainty whether particular discussions will be protected." 449 U.S. at 393. Similarly, where work product protections are uncertain, "'much of what is now put down in writing [will] remain unwritten. . . [and] "'[i]nefficiency, unfairness and sharp practices [will] inevitably develop in the giving of legal advice and in the preparation of cases for trial.'" *Id.* at 398 (quoting *Hickman v. Taylor,* 329 U.S. 495, 511 (1947)). Ultimately, "'[t]he effect on the legal profession [will] be demoralizing. And the interests of the clients and the cause of justice [will] be poorly served.'" *Id.* (quoting 329 U.S. at 511). By empowering prosecutors to deprive corporate decision makers of a real choice whether or not to relinquish attorney-client and work product protections, the waiver language of Application Note 12 inappropriately and unwisely tilts the scales in favor of securing convictions rather than attaining justice.

IV. PROPOSED REVISION OF APPLICATION NOTE 12

In its current form, the waiver language of Application Note 12 sweeps far too broadly. Accordingly, we urge the Commission to amend it. We respectfully propose the following revision:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless ~~such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization~~ *the government demonstrates with particularity that a defendant has inappropriately attempted to shield specific factual material under a claim of privilege or work product protection and that reasonable efforts to obtain knowledge through alternative means have proved unavailing.*

The working premise of the adversary system is that each side builds its own case. As Justice Jackson wrote in his famous concurrence in *Hickman v. Taylor*, members of a learned profession should not be permitted to perform their functions "on wits borrowed from the adversary." 329 U.S. at 516. The above language safeguards the attorney-client privilege and, unlike the current formulation, strikes a balance between giving prosecutors unconstrained discretion to decide when a waiver is "necessary" and affording entity lawyers *carte blanche* to invoke protections.

In sum, our adversarial system of justice cannot operate fairly without safeguards designed to keep the playing field level. Providing prosecutors with leverage to coerce organizations to surrender attorney-client and work product protections under the guise of facilitating "cooperation" upsets the critical balance. When these protections lose their vitality, justice is unlikely to be done. We therefore respectfully request the Commission to amend the waiver language of Application Note 12 to the Commentary to Section 8C2.5(g) of the Organizational Sentencing Guidelines.

Respectfully submitted,

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Members of other law faculties joining in these comments:

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cc: Pamela O. Barron, Deputy General Counsel, U.S. Sentencing Commission
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March 28, 2006

SENT BY EMAIL

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, N.E.
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Washington, DC 20002-8002

Re: Written Public Comment
Chapter Eight - Privilege Waiver

Dear Commission:

Waiver of the attorney-client privilege and work product protections in hopes of reducing a culpability score encourages defendant organizations to completely destroy the relationship between the attorney and client, a relationship that exists solely for the benefit of the client. Commentary language that states "... unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" allows privileges that should be stringently guarded for the proper administration of justice in our legal system to be at risk of waiver.

Additionally, such language effectively operates to encourage the defendant organization to produce privileged documents that may or may not demonstrate criminal actions without requiring a showing that the organization actually engaged in or planned to engage in criminal or fraudulent behavior. The attorney-client privilege belonging to the organization and the work product protections belonging to both the organization and the attorney are effectively wiped out, leaving both to defend their confidential relationship. Thus, the completion of an internal investigation as a component of appropriate remedial action, instead of showing the organization's responsible behavior, incriminates the organization and the attorney.

In our last Priorities Comment submitted on August 14, 2005, we recommended the following revisions to the Commentary since it pits employees against management, law enforcement against corporations and in-house/outside counsel against the officers of the organization they represent:

Amendment to the end of Commentary 12 as follows:

> *"Waiver of attorney-client privilege and of work product protections SHALL NOT be a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) when the organization conducted an internal investigation as a component of appropriate remedial action."*

We continue to recommend this language because it truly reflects the goals and incentives for organizations to maintain an effective compliance program. It also effectively safeguards the attorney and client relationship for the benefit of the organization in the event of prosecution and/or in anticipation of litigation.

Thank you very much for the opportunity to have provided the above Public Comment.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

March 28, 2006

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Attention: Public Affairs

Re: Comments of the Corporate Environmental Enforcement Council
Chapter Eight Privilege Waiver
United States Sentencing Commission Notice of Proposed Amendments and Request for Public Comment

Dear Docket Clerk:

On behalf of the Corporate Environmental Enforcement Council ("CEEC"), an organization of 29 major corporations that focuses exclusively on civil and criminal environmental enforcement issues, we appreciate the opportunity to submit these comments to the United States Sentencing Commission ("the Commission") regarding the Commission's proposed amendments to the United States Sentencing Guidelines ("the Guidelines") and request for public comment (71 Fed.Reg. 4782 (Jan. 27, 2006)), and specifically topic B.12, the Chapter Eight Privilege Waiver.

CEEC has worked extensively on all aspects of environmental enforcement, and has previously submitted comments to the Commission and to the Advisory Group on Organizational Guidelines and met with members and staff to address issues of concern, including specifically issues relating to Chapter Eight, the Organizational Sentencing Guidelines. CEEC has also worked on environmental enforcement issues closely with the United States Environmental Protection Agency, the United States Department of Justice, and state environmental agencies and enforcement officials.

CEEC's members have been at the forefront of the development and implementation of innovative environmental management systems and self-assessment by the regulated community over the past decade. CEEC's members have long recognized the substantial benefits that are realized when effective voluntary compliance programs are put in place – benefits including improved environmental performance, reduced risk to human health and the environment, and higher compliance levels.

To that end, while CEEC has supported the inclusion of provisions in the Organizational Guidelines recognizing the importance of such a voluntary program to prevent and detect criminal conduct, we have consistently expressed our concern with respect to provisions that could weaken or undermine the incentives for and effectiveness of such voluntary compliance programs. CEEC is concerned that the sentence that was added to the commentary at §8C2.5(g)

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with respect to the waiver of attorney-client privilege and work product protections is such a provision, and we urge the Commission to delete this sentence from the commentary and replace it with a statement that waiver of this privilege and protection is not to be considered in assessing the degree to which a company cooperates in a government investigation.

As set forth in the Federal Register Notice announcing the proposed amendments to the Guidelines and requesting comment on specific issues, the Commission has been asked to reconsider the commentary at §8C2.5(g) that was added as part of the Commission's 2004 amendments to Chapter Eight. The sentence at issue involves the potential decrease in the culpability score if a defendant organization has "self-reported, cooperated with the authorities, and accepted responsibility," and specifically the issue of whether waiver of attorney-client privilege and of work product protections is a prerequisite to such a decrease.

The commentary as amended provides that such waiver is not a prerequisite "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." USSG, §8C2.5(g), comment. (n.12) (Nov. 2005). The issue of whether this language is having or could have "unintended but deleterious effects" has been raised in numerous requests to modify or remove this language that have been submitted to the Commission since the effective date of the amendments, and in testimony offered to the Commission at its public meeting in November, 2005. 71 Fed. Reg. 4803-04. As a result, the Commission is seeking comment on whether the commentary language is having unintended consequences and whether it should be deleted or amended to address these consequences.

As an initial matter, it is our experience that organizations look to Chapter 8, and specifically Section 8B2, for guidance as to what the government believes constitutes an effective compliance program. It is critical to recognize that most companies do not look for this guidance in the context of evaluating potential decreases in the culpability score in an ongoing governmental investigation or prosecution; rather, as companies set up internal compliance programs, including programs involving compliance with environmental laws and regulations, they look to a broad array of sources for information, and Chapter 8 of the Guidelines serves as one of the more important resources. It is also worth noting the stated goal of the Chapter 8B2 guideline: "the requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable." USSG, §8B2.1, comment. (backg'd).

Internal environmental compliance programs are much more sophisticated and developed than they were in 1991, when Chapter 8 was added to the Guidelines. These compliance programs rely in large part on the free flow of information between corporate officials, including corporate counsel, compliance managers, environmental health and safety professionals, and employees whose day to day jobs involve, in some part, compliance with environmental laws. They also include various types of "reporting up" provisions, both formal/written and informal/oral.

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It is the experience of CEEC member companies that many of the individuals in the environmental compliance chain are cognizant of the fact that they will, at some point, be reporting directly to legal counsel, whether within the corporation or outside counsel. It has also been a widely held belief that these types of communications fall within the well-established attorney-client relationship, and are protected in the same manner as an individual's communications with his or her lawyer. This is critical, as the free flow of information is the lynchpin of these internal compliance programs.

Conversely, the free flow of communications can be adversely affected if the person communicating the information believes, correctly or incorrectly, that the information will not be protected. While the Commission included language in the Reason for Amendment (Supplement to Appendix C (Amendment 673)) regarding its expectation that the government would require such waivers "on a limited basis," the adverse impact on the free flow of information is felt whether or not that expectation is correct.[1]

From the perspective of a company employee that is reporting on an environmental compliance issue to legal counsel, he or she must assume that the government may require that the company waive the attorney-client privilege and/or work product protection that applies to that communication in the context of a governmental investigation. Further, it is our experience that the employee would also likely believe that a company from whom such a waiver is requested would presumably agree to waive the protections, in its own self-interest. This is especially true as the issue of waiver arises in the context of evaluating whether the company is "cooperating" with an government investigation – refusing a request/demand to waive would almost ensure a negative finding on cooperation.

As a result, while the Commission may expect that the government will not require a waiver as a matter of course, in fact that is exactly what an employee (such as an environmental compliance manager) would expect. In that situation, those who report up the environmental compliance chain may rightly view legal counsel conducting an investigation as simply as a potential conduit for enforcement sensitive material to be channeled to the government. The effect is that such persons may be discouraged from making full disclosure to legal counsel. As a result, the environmental management systems and self-assessment/compliance programs suffer, as the success of those systems depends on full and frank assessment and reporting of environmental compliance issues.

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[1] Although we do not address the issue in these comments, we cite with approval two statements presented to the Commission at its November 15, 2005 Public Meeting: the Statement of Tina S. Van Dam, National Association of Manufacturers, on behalf of The American Chemistry Council, The Association of Corporate Counsel, and The National Association of Manufacturers, and the Statement of Donald C. Klawiter on behalf of the American Bar Association, with respect to surveys conducted by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers that indicate that in practice the government's practice of seeking or demanding a waiver is not, in fact, limited, and citing to a specific example where Justice Department prosecutors have demanded privileged materials in the context of an environmental investigation. *http://www.ussc.gov/corp/11_15_05/VanDam-ACC-NAM.pdf; http://www.ussc.gov/corp/11_15_05/Klawiter-ABA.pdf.*

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CEEC submits that this result is unacceptable at all levels. If this language in the Guidelines causes environmental self-assessment/compliance systems to break down due to an unwillingness on the part of employees to engage in full and frank assessment and disclosure, this section of the Guidelines is not only not achieving its intended result (promoting existence of a program that prevents and detects criminal conduct), it is in fact defeating it. Likewise, from a company's perspective the goal of promoting environmental compliance and promptly identifying and correcting noncompliance is defeated if the person responsible for detecting and reporting such noncompliance is disincentivized from doing so for fear that the company could be forced to waive the attorney-client privilege and disclose the information to the government.

CEEC does not believe that the Commission intended this result when it adopted the subject commentary. Despite the lack of intent, we believe that these unintended consequences are occurring, and that the Commission must affirmatively act to address the situation. In order to reverse course, CEEC urges the Commission to delete the commentary at issue and replace it with a statement that waiver of attorney-client privilege and/or work product protection is not to be considered by the government when evaluating whether a company in question is "cooperating" with a government investigation for purposes of Section 8C2.5(g) of the Guidelines.

CEEC appreciates the opportunity to submit these comments to the Commission, and looks forward to continuing to work with the Commission on issues relating to the Guidelines. Please do not hesitate to call me if you have any questions with respect to these comments or would like any additional information.

Sincerely yours,

Kenneth R. Meade

Kenneth R. Meade
Counsel, Corporate Environmental Enforcement Council

cc: Steve Hellem, Exec. Dir.
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[227]

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VIA FEDEX EXPRESS

March 27, 2006

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: **Comments on Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege and Work Product Protections**

Dear Sir or Madam:

On January 27, 2006, the United States Sentencing Commission proposed guideline amendments that included a request for public comment on whether the following language from the commentary to Section 8C2.5(g) of the Federal Sentencing Guidelines for Organizations (the "Guidelines") should be deleted or amended:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

On behalf of FedEx Corporation and together with the American Bar Association, the Association of Corporate Counsel, the Business Roundtable, the U.S. Chamber of Commerce and many others, I respectfully urge the Commission not only to delete the above sentence — the so-called "privilege waiver language" — from the Guidelines, but to insert new language stating affirmatively that waiver of attorney-client privilege and work product protections should not be a factor in determining cooperation.

Section 8C2.5(g) of the Guidelines significantly reduces the culpability score of a corporate defendant that provides timely and thorough cooperation with a governmental investigation. The privilege waiver language, which was added in November 2004, singles out the attorney-client privilege and work product protections and suggests that, in certain circumstances, these protections must be waived in order to demonstrate cooperation sufficient to receive a culpability score reduction.

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We believe that the privilege waiver language is having the unintended yet deleterious effect of making waiver of the attorney-client privilege and work product protections virtually mandatory for corporate defendants. In particular, we believe that the language authorizes and encourages prosecutors to require companies to waive these protections in the early stages of governmental investigations in order to show "thorough" cooperation and thereby qualify for a more lenient sentence. We believe that from a practical standpoint companies increasingly have no choice but to waive these protections whenever prosecutors demand it, as the government's threat to label them as "uncooperative" can have a profound effect on their public image, stock price and creditworthiness.

Substantial new evidence suggests that coerced waiver of these protections is becoming almost routine. According to a recent survey of over 1,400 in-house and outside corporate counsel conducted by the Association of Corporate Counsel and others (results available at *http://www.acca.com/Surveys/attyclient2.pdf*), almost 75% of respondents believe 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 and work product protections. In addition, a majority of survey respondents believe there has been a marked increase in such waiver requests as a condition of cooperation in recent years. Finally, the survey confirmed that the prosecutors who are increasingly requiring such waivers are frequently citing the privilege waiver language in the Guidelines as a reason.

We are deeply concerned that routine coerced waiver of these essential protections will seriously weaken the confidential attorney-client relationship between companies and their lawyers, thereby undermining corporate compliance and harming the investing public and society as a whole. FedEx's attorneys play a key role in helping the company and its directors, officers and employees comply with the law and act in the best interests of the company and our stockholders. To fulfill this role, we must enjoy the trust and confidence of these individuals and must be provided with all relevant information necessary to properly represent the company. If these individuals know that their conversations with us may not be protected, they may simply choose not to seek our legal guidance. This, in turn, would seriously impede our ability to ensure FedEx's compliance with the law and ultimately harm the company and our stockholders.

In sum, FedEx joins the organizations previously identified in strongly supporting preservation of the attorney-client privilege and work product protections and opposing any governmental policies or practices that have the effect of eroding these vital protections. Accordingly, we urge the Commission to amend the privilege waiver language in the Guidelines to clarify that waiver of these fundamental rights should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

We sincerely appreciate your considering FedEx's comments and concerns. If you would like more information regarding our position on this issue, please feel free to contact me at your convenience.

Sincerely yours,

FedEx Corporation

Christine P. Richards

cc: Frederick W. Smith
Robert T. Molinet

Students for a Responsible Life
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From the Office of the Founder and Executive Director
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January 29, 2006

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Chairman Hinojosa:

Students for a Responsible Life has for some time been disaffected by the Justice Department's tactics of backing potential white-collar, executive criminal defendants into a corner such that they would have to chose between their constitutional rights, or a "package" guilty plea crafted by, in our opinion, over zealous prosecutors.

We unequivocally support the rescindment of any prior U.S. Sentencing Commission Justice Department rule allowing leniency to companies and executives ***who waive special legal privileges*** in plea deals proffered by prosecutorial staff (we understand this is now in the Federal Register seeking Public comment). We believe this practice has led (predictably in our opinion) to results harmful to America's economic and business interests, and harmful to corporate entities, their employees, and their stockholders, without any demonstrable societal benefit.

No responsible person can be "for" white collar crime. But America's strength and power come from its incredibly successful economic machine. We believe that the proper way to ferret out business criminal activity is by reverting to the tried and true methods that have served us well over the years, viz., the SEC, the various banking, insurance and stock boards of exchanges, the FBI, and to some degree, law enforcement. One need only look back on the tragedy of the senseless loss of Arthur Andersen & Company to realize how much damage has already been done.

Sincerely,

(Ms.) Ariel Huberts, Executive Director

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NORTHWESTERN SCHOOL of LAW
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Public Affairs
U.S. Sentencing Commission
One Columbus Circle NE
Washington, D.C., 20002-8002
VIA FedEx

Dear Sentencing Commission:

I note that the U.S. Sentencing Commission has proposed and circulated for public comment a new policy statement that says, "In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. sec. 3771 and in any other provision of federal law pertaining to the treatment of crime victims." While I appreciate the (somewhat belated) recognition of victims' rights in the federal sentencing guidelines, I am gravely concerned that the Commission has undertaken a meaningless gesture. Of course, federal judges will follow federal law in sentencing. Instructing judges to follow the law is not, in our view, particularly helpful. To be frank, it gives the appearance that the Commission is intent on doing as little as possible for crime victims.

What would be more helpful is for the Sentencing Commission, as the expert sentencing agency in the federal system, to provide guidance to judges on how to afford victims' rights in the sentencing process. In particular, 18 U.S.C. 3771(a) guarantees crime victims the right "to be heard" and "to be treated with fairness and with respect for the victim's dignity and privacy" throughout the federal criminal justice process, including the sentencing phrase of the process. I believe that the Commission could helpfully instruct judges on how to provide that congressionally-mandated rights to be "heard" and to "fairness" to victims in that process. Of particular concern to us is that crime victims have access to relevant parts of the pre-sentence report. As Judge Cassell cogently explained in his testimony before the Commission on the subject, access to the pre-sentence report is critically important to crime victims. He recently expanded his arguments in "Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims Rights Act," 2005 BYU L. Rev. 835, 892-903. I will not repeat is arguments other than to say we concur.

In brief, I don't understand how the Commission, which must fully appreciate the importance of the PSR to the sentencing process, could possibly take the position that denying victims access to the report is treating them with "fairness." Nor do I see how the Commission could possibly take the position that refusing a victim a chance to comment on guideline issues is treating them with "fairness." Accordingly, I specifically request that you either expand your policy statement to explain how victims should be treated fairly or expand the discussion of your "application notes" to section 6A1.5 to explain that federal law requires that victims be treated fairly and that victims should therefore be given access to relevant parts of the pre-sentence

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report and should be given a chance to speak to disputed guideline issues (when they have something relevant to say on the subject). I also specifically request the crime victims be integrated into other aspects of the sentencing process, in ways that the Commission believes are appropriate.

These steps would be in keeping with the trend in state courts to allow victims access to pre-sentence report information. The following is but a sample of state laws giving victims access to presentence reports. Alaska Rev. Stat. Sec. 12.55.023(a)(1)-(4)("If a victim requests, the prosecuting attorney shall provide the victim before the sentencing hearing, with a copy of the following portions of the presentence report: (1) the summary of the offense prepared by the Department of Corrections; (2) the defendant's version of the offense; (3) all statements and summaries of statements of the victim; and (4) the sentence recommendation of the Department of Corrections"; Ariz. Const. art. II, ' 2.1(A)(7): "To preserve and protect victims' rights to justice and due process, a victim of crime has a right ...7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant." Ariz. Rev. Stat. ' 13-4425: "If the presentence report is available to the defendant, the court shall permit the victim to inspect the presentence report, except those parts excised by the court or made confidential by law. If the court excises any portion of the presentence report, it shall inform the parties and the victim of its decision and shall state on the record its reasons for the excision. On request of the victim, the prosecutor's office shall provide to the victim a copy of the presentence report"; Idaho Const. art. 1, ' 22(9): "A crime victim, as defined by statute, has the following rights . . .(9) To read presentence reports relating to the crime." Idaho Code ' 19-5306(1)(h): "Each victim of a criminal or juvenile offense shall be . . .allowed to read, prior to the sentencing hearing, the presentence report relating to the crime. The victim shall maintain the confidentiality of the presentence report, and shall not disclose its contents to any person except statements made by the victim to the prosecuting attorney or the court . . ."; Fla. Stat. Ann. ' 960.001(1)(g)(2) "Upon request, the state attorney shall permit the victim, the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or the victim's next of kin in the case of a homicide to review a copy of the presentence investigation report prior to the sentencing hearing if one was completed. Any confidential information that pertains to medical history, mental health, or substance abuse and any information that pertains to any other victim shall be redacted from the copy of the report. Any person who reviews the report pursuant to this paragraph must maintain the confidentiality of the report and shall not disclose its contents to any person except statements made to the state attorney or the court"; Ind. Code ' 35-40-5-6 "the victim has the right to read presentence reports; relating to the crime committed against the victim; except those parts of the reports containing the following;(1) The source of confidential information.; (2) Information about another victim. Other information determined confidential or privileged by the judge in a proceeding. The information given to the victim; must afford the victim; a fair opportunity to respond to the material included in the presentence report."

Accordingly, I specifically request that you either expand your policy statement to explain how victims should be treated fairly or expand the discussion of your "application notes" to section 6A1.5 to explain that federal law requires that victims be treated fairly and that victims should therefore be given access to relevant parts of the pre-sentence report and should be given

a chance to speak to disputed guideline issues (when they have something relevant to say on the subject). I also specifically request the crime victims be integrated into other aspects of the sentencing process, in ways that the Commission believes are appropriate.

In closing, the Commission now has a chance to use its expertise to craft appropriate procedures to treat crime victims fairly. If the Commission is unwilling to do anything more on crime victims rights than instruct judges to follow the law, I will ask Congress to take the lead on this issue.

Sincerely,

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Defending Liberty
Pursuing Justice

March 28, 2006

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2006 Proposed Amendments to the Sentencing Guidelines: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write to amplify our March 15 testimony on policy for sentence reduction in cases presenting "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).[1] In our testimony we noted that the Commission's proposed guidelines amendments on this subject did not contain "the criteria to be applied and a list of specific examples," as contemplated by 28 U.S.C. § 994(t). Following our testimony, Judge Castillo invited us to submit specific language for the Commission's consideration, and we are pleased to do so.[2]

As noted in our March 15 testimony, the ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to

[1] In addition to this comment letter, the ABA is submitting a second, separate statement on the issue of "Chapter Eight – Privilege Waiver" in response to the Commission's request for comments pursuant to the Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006, published at 71 Fed. Reg. 4782-4804 (January 27, 2006).

[2] The ABA has taken no position on the sentence reduction authority applicable to "three strikes" cases in subsection (ii) of § 3582(c)(1)(A). While our proposed policy statement includes a provision referring to subsection (ii) cases, this provision is copied verbatim from the Commission's proposed policy statement. We assume that any expansion of the authority in subsection (ii) to non-three-strikes cases, as suggested by the Commission in its request for comment, would necessarily have to rely on some statutory ground other than subsection (ii) itself.

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"develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate." In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering." It also urged the Department of Justice to make greater use of the federal sentence reduction authority in Section 3582(c)(1)(A)(i), and asked this Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances."

Section 3582(c)(1)(A)(i), enacted as part of the original 1984 Sentencing Reform Act, contains a potentially open-ended safety valve authority whereby a court may at any time, upon motion of the Bureau of Prisons ("BOP"), reduce a prisoner's sentence to accomplish his or her immediate release from confinement. The only apparent limitation on the court's authority under this provision, once its jurisdiction has been established by a BOP motion, is that it must find that "extraordinary and compelling reasons" justify such a reduction. As part of its policy-making responsibility under the 1984 Act, the Commission is directed to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A), if in its judgment this would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). In promulgating any such policy, the Commission is directed by § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The only normative limitation imposed on the Commission by § 994(t) is that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

The Commission's proposal to implement the directive in § 994(t) consists of a new policy statement at USSG § 1B1.13. The proposed policy reiterates the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), including the limitation in § 994(t) on consideration of rehabilitation as grounds for sentence reduction. However, it does not include "the criteria to be applied and a list of specific examples" that are required by § 994(t). Instead, the Commission appears to propose that courts considering sentence reduction motions should defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)." We find this approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for sentence reduction under § 3582(c)(1)(A)(i) and because it contemplates

that any policy for implementation of § 3582(c)(1)(A)(i) would emerge only in a case-by-case process controlled by the Bureau of Prisons, and not in a general rule-making by the Commission.

We believe the text of § 994(t) requires the Commission to develop general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than to defer to case-by-case decision-making by the BOP. We also believe that a sentencing court must make an independent determination as to whether sentence reduction is warranted in a particular case.

To assist the Commission in carrying out the mandate of § 994(t), and in response to Judge Castillo's invitation, we have drafted language for a policy statement that describes specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and gives specific examples of situations where these criteria might apply. Our proposed policy statement would also make several other changes in the language of the Commission's proposal, as discussed in our March 15 testimony: it would make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

We propose three criteria for determining when "extraordinary and compelling reasons" justify release: 1) where the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing; 2) where information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or 3) where the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

We then propose, as part of an application note, eight specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, in past administrative practice under this statute, and in the history of and practice under its old law predecessor, 19 U.S.C. § 4205(g). These reasons are: 1) where the defendant is suffering from a terminal illness; 2) where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility; 3) where the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process; 4) where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence; 5) where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive; 6) where the defendant received a significantly higher

sentence than similarly situated codefendants because of factors beyond the control of the sentencing court; 7) where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or 8) where the defendant's rehabilitation while in prison has been extraordinary. We propose further that neither changes in the law nor rehabilitation should, by themselves, be sufficient to justify sentence reduction.

We appreciate the opportunity to provide these comments, and hope that they will be helpful.

Respectfully submitted,

Robert D. Evans

Robert D. Evans

American Bar Association

Proposed Policy Statement

§ 1B1.13 Reduction in Term of Imprisonment Upon Motion of Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –

(1) either –

(A) extraordinary and compelling reasons warrant such a reduction; or

(B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;

(2) the Director of the Bureau of Prisons has determined that the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and

(3) the reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

(b) "Extraordinary and compelling reasons" may be found where

(1) the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement; or

(2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement, or

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and, the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

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Commentary

Application Note:

Application of subdivisions (a)(1)(A) and (b):

1) The term "extraordinary and compelling reasons" includes, for example, that –

(a) the defendant is suffering from a terminal illness;

(b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;

(c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;

(d) the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence;

(e) the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive;

(f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;

(g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or

(h) the defendant's rehabilitation while in prison has been extraordinary.

2) "Extraordinary and compelling reasons" may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.

3) "Extraordinary and compelling reasons" may warrant sentence reduction