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:
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> - 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. ◆

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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.

BETTINA B. PLEVAN
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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

Bettina B. Plevan

United States Sentencing Commission

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 15, 2006

The 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: Comment on Omnibus Proposals for 2006 Amendment Cycle

Dear Judge Hinojosa:

The Practitioners' Advisory Group ("PAG") submits the following comments to the Commission's January 25, 2006 notice, pursuant to 71 FR 4782-4804, proposing various sentencing guideline amendments for the 2006 amendment cycle. As always, PAG appreciates the opportunity to formally participate in this process.[1]

1. Proposed Amendments to Immigration Guidelines

PAG submits that the Commission's proposed amendments to the immigration guidelines are not appropriate at this time, but rather, should await any Congressional action. In the alternative, we address these proposed amendments and provide you with our comments.

a. Interim Staff Report Fails To Provide a Compelling Basis For Immigration Guideline Amendments at this Time

The Interim Staff Report recommends across-the-board increases in the severity of immigration sentences, based primarily upon its perception that immigration reform is a high Congressional priority. The Interim Report cites an increase in illegal immigration, as well as an alleged increase in violence associated with it, as underlying Congressional interest in additional immigration reform measures. This Report, however, is deficient in several important ways.

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[1] PAG wishes to thank its members Pat Mullin, Mary Price, Tim Hoover, David Debold, Barry Boss, Amy Baron-Evans, Anne Blanchard, Margy Love, Richard Crane, and Steve Jacobson, who made various contributions to this submission, as well as members Lyle Yurko and Tom Dawson, who made significant contributions to PAG's February 23, 2006 comment on the Commission's proposed emergency steroids amendments, referenced herein.

First, the Report repeatedly references H.R. 4437 which, among other things, would make illegal presence in the United States a federal crime by increasing the statutory maximum sentences from six months to one year and a day. The House measure would also increase the severity of penalties for other immigration-related offenses. At this juncture, however, this House Bill has not yet received Senate approval. The Senate Judiciary Committee only began its markup of a separate immigration bill this month, and no Senate vote will occur on any bill until March 27 at the earliest; even if a Senate bill passes, it would still need to be reconciled with H.R. 4437 in conference. The Senate bills under consideration appear to include Senator (and Judiciary Chair) Arlen Specter's proposal that sentencing enhancements be based not on an "aggravated felony," but on the length of the sentence for the prior conviction; moreover, under his bill, prior convictions would need to be charged in the indictment and proved beyond a reasonable doubt. These provisions would differ markedly from the Commission's proposals.

It makes no sense for the Commission to rely upon incomplete, unenacted legislation, passed in the House but awaiting Senate review and amendment, as a basis for ratcheting up immigration sentences. Rather, the Commission should utilize its expertise in crafting amendments to existing immigration guidelines only after Congress speaks again on this issue. The immigration issues in Congress are complex, and the potential tradeoffs palpable. The Commission should not endeavor to read the tea leaves, but instead should await a final word from Congress that might (or might not) then trigger the Commission's involvement.

The Interim Staff Report also fails to proffer meaningful evidence that violence is routinely associated with violation of immigration offenses. There is, in fact, only one reference in the Report to immigration-related violence – a segment of a television program aired January 5, 2006 on CNN. One would have expected the Interim Staff Report to contain far more compelling evidence of immigration-related violence before advancing its position that such violence is an underlying basis for increasing the severity of immigration-related sentences.

Perhaps most significant is the history of increased immigration sentences since the inception of the guidelines. Since 1987, there have been 25 separate amendments to the immigration guidelines. *See* U.S.S.G. § 2L1.1 (Amendments 35, 36, 37, 192, 335, 375, 450, 543, 561); U.S.S.G. § 2L1.2 (Amendments 38, 193, 375, 523, 562, 632, 637, 658); U.S.S.G. § 2L2.1 (Amendments 195, 450, 481, 524, 544, 563); U.S.S.G. § 2L2.2 (Amendments 39, 196, 450, 481, 524, 544, 563, 671). Many of these amendments have increased the severity of sentences meted out for immigration crimes.

For example, re-entry cases under § 2L1.2 were originally set at a base offense level 6. In year 1988, without explanation, the re-entry's base offense level was raised to level 8. In 1989, the following year, yet another amendment was imposed that distinguished between illegal re-entry and illegal re-entry after deportation for a prior felony. A specific offense characteristic was created that imposed a 4-level increase for a

defendant who had previously been deported after a felony conviction for a crime other than an immigration offense.

In 1991, the concept of aggravated felonies was introduced into the immigration guideline scheme, with a 16-level increase for defendants previously deported as aggravated felons. In 1995, yet another amendment was passed which granted further potential for increased sentences for re-entry offenses. Thus, within an 8-year span, there had been 4 separate amendments that each increased the severity of sentences for re-entry cases – often substantially. The guidelines for other immigration offenses, including smuggling and document offenses, also have reflected similar guideline increases.

PAG does not believe that the purposes of sentencing under 18 U.S.C. § 3553(a) were advanced through these increased immigration guidelines. Between years 1987 and 1993, the federal courts saw somewhere between 1,000 and 2,000 immigration cases annually. Since then, the rate of immigration cases in the federal courts has exploded. In year 2003, 15,066 immigration convictions represented 21.9% of all guideline cases. In year 2004, the percentage of immigration cases rose further to 22.5% of all federal sentences. According to the Interim Staff Report at page 2, Post-Booker 2005 data (January 12, 2005 through November 1, 2005) indicates that 23.1% of all guideline cases sentences were immigration offenses.

Though arguments can be made that increased enforcement and fast-track programs account for a substantial increase in immigration sentences, the reality is that the increased severity of the immigration guidelines has failed to result in deterrence to criminal conduct, nor has it protected the public from further crimes as contemplated by Congress in enacting 18 U.S.C. § 3553(a)'s sentencing purposes.

PAG therefore believes that the Interim Staff Report provides no compelling basis for an increase in the severity of immigration sentences as contemplated in many of the proposed amendments. The Report's reliance upon H.R. 4437 is misplaced; it also fails to provide any significant evidence of increased violence and immigration offenses. The Report further ignores the 25 amendments to the guideline amendments enacted during the past 19 years that have already had the cumulative impact of significantly increasing immigration sentences.

PAG submits that the Commission should await final Congressional action on the immigration laws before unilaterally considering additional changes to these guidelines.

b. Specifically-Proposed Immigration Guideline Amendments

Should the Commission decide nevertheless to proceed with consideration of the proposed immigration amendments, we request that the following comments be considered:

§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

A. National Security Concerns

The Commission proposes two options for a proposed amendment that would increase sentences for defendants convicted under 8 U.S.C. § 1327. Option 1 would provide a base offense level of 25 where the crime involved an alien who was inadmissible because of "security or related grounds," as defined in 8 U.S.C. § 1182(a)(3). Option 2 would provide a specific offense characteristic with an increase somewhere between 2-6 levels for smuggling, transporting, or harboring an alien who was inadmissible because of security or related grounds, was convicted under 8 U.S.C. § 1327, or some other statute.

We are concerned, among other things, by the very broad sweep of both options. First, we note that § 1182(a)(3) encompasses, among other persons, aliens whom the Attorney General "knows, or has reason to believe" seek to enter the United States to engage in some form of security-related activity. Implementation of these guidelines would grant enormous discretion to the Justice Department in determining which aliens may be subject to significantly increased penalties. For example, Option 2 could result in an 87-108 month guideline level for a defendant suspected of smuggling, transporting, or harboring a suspected security risk.

Also, Option 2's 2-6 level increase may be triggered solely upon relevant conduct and not require that the crime of conviction involve a security risk. Given that fact, PAG believes a heightened standard of proof such as a "beyond a reasonable doubt" standard should be utilized in determining whether an increased level is appropriate. It should be noted that the guidelines contemplate such a higher standard in addressing hate crimes or vulnerable victim enhancements under § 3A1.1. A similar, higher standard of proof should be applied here as well.

B. Number Of Aliens

The Commission's proposal also has two options to amend § 2L1.1(b)(2) concerning the number of aliens involved in an immigration offense. Option 1 maintains the current table under § 2L1.1, which provides a 3-level enhancement for offenses involving 6-24 aliens, a 6-level enhancement for offenses involving 25-99 aliens, and a 9-level enhancement for 100 or more aliens. Option 1's proposal, which further has an additional 3-level increase for offenses involving 200-299 aliens and an additional 6-level increase for offenses involving 300 or more aliens, has no support in the available data. As noted at page 7 of the Interim Report, only 1.4% of all year 2005 post-*Booker* cases involved 100 or more aliens. In egregious cases, a judge can always depart upward from the applicable guideline range. There is therefore no reason then to codify the unusual, additional punishments as is being proposed in this option.

Nor does the Interim Report provide justification for an additional 3-level increase at the lower end of the table as contained in Option 2. There has already been at least a 50% increase in sentencing based on the number of aliens, which was adopted in 1997. No good reason is presented to again increase these sentences. Moreover, as noted at page 8 in the Report, relevant conduct allows a court to include not only the number of aliens smuggled during the offense of conviction but also those smuggled during other smuggling operations related to a common scheme or plan. Any concerns regarding an ongoing course of conduct, then, can be met through application of the § 1B1.3 relevant conduct provisions and does not require the proposed additional 3-level increase at the lower end of the table.

C. Endangerment Of Minors

The proposed amendment also presents two options and an issue for comment relating to the smuggling of alien minors. Option 1 provides a potential 6-level increase for the smuggling of a minor unaccompanied by a parent. Option 2 provides a graduated increase based upon the age of the alien minor, with an additional 4-level increase for minors under the age of 12 and a 2-level increase where an unaccompanied minor has attained age 12 but not yet attained age 16.

We submit that the Interim Report fails to provide compelling reasons for a guideline increase for unaccompanied minors. The provisions of § 3A1.1(b) already provide a guideline increase where vulnerable victims are involved. Smuggled unaccompanied minors, where appropriate, would provide a basis for such increased sentences under § 3A1.1(b). Moreover, Judges may upwardly depart outside the applicable guideline range in egregious cases. Therefore, this amendment is unnecessary.

D. Offenses Involving Death

PAG also finds no justification for the proposed amendment's additional 2-level increase through a new specific offense characteristic under U.S.S.G. § 2L1.1(9), with cumulative enhancements where both bodily injury and death occur as well as a cross-reference to § 2L1.1(c)(1) which cover deaths other than murder. As noted at page 12 of the Interim Report, only slightly over 1% of all § 2L1.1 cases involve an increase for an offense involving death. A better course of action would be to maintain the current 8-level increase for death under § 2L1.1(6)(4) and permit judges to upwardly depart from the applicable guideline range for egregious cases. If the Commission considers adopting this proposal despite our objection, the new guideline at least should be modified to make clear that any separate sentencing enhancements for bodily injury and death can only be applied where two separate victims exist; otherwise, this would be improper double-counting.

E. Abducting Aliens, Or Holding Aliens For Ransom

A new specific offense characteristic is proposed where an alien is kidnapped, abducted, or unlawfully restrained for a period of time. In this proposed amendment, there is a 4-level increase in the base offense level with a minimum level of 23. It must be noted, however, that this course of conduct is presently criminalized under 18 U.S.C. § 1203, which imposes sanctions up to life imprisonment and, where appropriate, death for hostage-taking. The applicable guidelines for such an offense are found under § 2A4.1.

Therefore, the almost 7½% of all instances involving hostage-taking, cited in a 2005 Immigration Coding Project, are already subject to prosecution under 18 U.S.C. § 1203, with severe potential sanctions. The proposed amendment to § 2L1.1 to cover alien hostage-taking would be duplicative of existing law and is therefore unnecessary.

§ 2L2.1 (Trafficking In A Document Related To Naturalization, Citizenship, Or Legal Resident Status, Or A United States Passport; Et Cetera) and § 2L2.2 (Fraudulently Acquiring Documents Related To Naturalization, Citizenship, Or Legal Resident Status For Own Use; Et Cetera)

A. Number of Documents

The proposed amendment to § 2L2.1 provides two options to amend the specific offense characteristic involving the number of documents and passports involved in the offense. Employing the same model as set forth in the proposed amendment to § 2L1.1, these options create additional increased levels at, respectively, the higher or lower end of the table.

The Interim Report provides no basis for the proposed increase in sentences based upon the number of documents, but rather reiterates at page 15 that document guideline sentencing was first initiated in 1992 to include a specific offense, and was the subject of increased sentencing in 1997. The Interim Report fails to recite any data or other sound reason that supports the proposed increase in severity of punishment based upon the number of documents involved. This amendment should not be approved.

B. Fraudulently Obtaining Or Using U.S. Passports Or Foreign Passports

While we do not dispute the symmetry argument raised by the Commission that the 4-level increase in § 2L2.1(b)(3) (defendant knew that passport and visa was to be used to facilitate the commission of a felony offense other than an offense involving violation of immigration laws) should also encompass fraudulent use of a United States passport to facilitate an immigration crime, there is no compelling justification for the proposed two-level increase where a foreign passport is used. We further concur with the Federal and Community Defender's proposal that a downward adjustment for obviously counterfeit documents be added if this proposal is enacted over our objections, since the

bearer's ability to evade detection or cross international borders will not be significantly enhanced by use of such a document.

§ 2L1.2 (Unlawfully Entering Or Remaining In The United States)

The Commission presents five separate options modifying the current illegal re-entry guideline. Four of these options require the continued use of a 16-level enhancement under § 2L1.2(b)(1)(a), implemented in November 2001.

According to the Interim Report, 49.3% of all "unlawfully entry" or "unlawfully remaining in the U.S." cases were subjected to a 20-year statutory maximum penalty, as their removal was subsequent to a conviction for commission of an "aggravated felony". Of those cases, the majority received the 16-level increase provided under the guidelines.

The initial issue the Commission should address is whether implementing a threefold level increase (eight levels to 24 levels) is warranted in these cases. We find that the proposal set forth by the Federal and Community Defenders, which is similar to the structure of the firearms guideline, presents a more appropriate means of enhancement based upon the nature and number of prior felony convictions.

We are further concerned that the proposed use of the statutory definition of "aggravated felony" in Options 1, 2, and 3 would create the distinct possibility that persons with only a misdemeanor conviction could see their sentences drastically increase, after being deemed an aggravated felon under 8 U.S.C. § 1101(a)(43)(G). A defendant may then be subject to a potential 8-12 level enhancement. In our experience, one of the most difficult (if not impossible) tasks we have ever faced in our practice is to try to rationally explain to any person, much less an immigrant with broken English, how a misdemeanant with no felony restrictions can nevertheless be classified as not only a felon, but also an aggravated felon. In 2001, the Commission at least ameliorated some of the effects of overbroad "aggravated felony" classifications by reducing this enhancement for certain individuals who were deemed aggravated felons under the statute, while reserving the 16-level enhancement for the most serious offenses. Nothing has changed in the past five years. The facts and general principles of proportionality do not warrant drastically increasing the sentences of misdemeanants and other individuals convicted of non-violent offenses.

We further oppose Option 1's reliance upon 18 U.S.C. § 924 for the definition of "drug trafficking offense". While the Interim Report at pages 27-28 reflects the Commission's desire to tie all immigration drug trafficking offenses to the statutory definition, including those cases in which an individual pleads guilty to possession of a controlled substance where the amount involved would reflect trafficking rather than simple possession, there is a growing circuit split over application of the statutory term "drug trafficking," which already impacts upon the guideline application of this statute. In fact, the Solicitor General has urged the Supreme Court to resolve the matter in *Lopez*

v. Gonzalez, No. 05-527 (U.S. Jan. 24, 2006), which addresses this issue. We urge the Commission to defer further action on this issue pending Supreme Court consideration.

As to Option 5 (which creates a significantly higher base offense level and then provides for a possible reduction based on the nature of the prior conviction), we believe that a troubling precedent would be set if this option is adopted, as the burden would lie upon a defendant to justify a reduction by establishing facts relative to a prior conviction. This proposal, even if it could pass constitutional muster (which we doubt), would be unwise. Even beyond the fact that these defendants are likely to have limited English language skills and even more limited understanding of the American legal system that may hinder their ability to find and prove facts about prior convictions, there are the practical limits stemming from even competent and diligent defendant's counsel's inability to run NCIC criminal history checks, or to obtain copies of former prosecutors' or agents' case files – limits that federal prosecutors and their agents would not face, at least to the same degree. Prosecutors have always had this burden of proving prior convictions – and they will continue to have the burden where prior convictions are an element of the offense – including under 8 U.S.C. § 1326(b). The government already has systems in place to allow it to conduct research and meet this long-established burden; defendants' counsel (especially appointed counsel) have few or none. In sum, PAG believes it makes no sense to suddenly shift this burden only in this singular context of immigration sentencing enhancements. Rather, the government should continue to shoulder this burden of proving prior convictions justify higher sentences.

In sum, for all the reasons stated herein, we request that the Commission postpone any further action on these proposed immigration amendments until Congress has affirmatively acted on this issue, and clarified the issues the Commission should consider. Congress, if it does soon enact new immigration legislation, should not then be presented with additional (or even contrary) submissions from the Commission that would then need to be considered anew by Congress before the October 31, 2006 deadline.

2. Proposed Amendments to Firearms Guidelines

a. Introduction

PAG offers the following comments on certain of the proposed amendments to the Guidelines covering firearm offenses. For those proposals on which we do not comment, we join in the positions outlined by the Federal Public and Community Defenders in their March 9, 2006 letter to the Commission.

b. Special Offense Characteristics for Trafficking in Firearms

PAG adopts the comments on this set of proposed amendments made by the Defenders. *See* March 9, 2006 Letter from Jon Sands to the Honorable Ricardo H. Hinojosa, as well as the alternative proposed by the defenders. We share the Defenders' concern about the dissonance between the Commission's proposed language defining

trafficking and that contained in 18 U.S.C. § 921(a)(21)(A-F)&(a)(22) and readily appreciate the risk to defendants whom Congress would not consider traffickers but who would be treated as such by the Guidelines' elastic definition.

c. Stolen and Altered or Obliterated Serial Numbers

The proposed amendment to U.S.S.G. § 2K2.1(b)(4) should be rejected. Whether or not the amendment is adopted, § 2K2.1(b)(4) should be amended to require that the enhancement should apply only if the defendant had knowledge either that the firearm was stolen or that it had an altered or obliterated serial number.

The existing 2-level enhancement for possessing a firearm that is either stolen or has an obliterated serial number is already a strict liability provision, and results in double-counting. The effect is to increase punishment even though, in almost all firearms offenses, the fact that the firearm is stolen or has an obliterated serial number has nothing to do with the offense of conviction, and likely did not make the firearms possession more dangerous or conceal any other crime. That is the obvious effect of current Application Note 8, which provides that the aggravating enhancement applies even where the defendant does not know and has no reason to believe that the firearm was stolen, or that the serial number was altered or obliterated. Absent such knowledge, PAG believes that a felon who possesses a weapon that he does not know is stolen commits no more serious an offense than a felon who possesses a weapon that has not been stolen. Thus, § 2K2.1(b)(4) already works an enhancement without any clear purpose or connection to increased culpability.

With an already shaky basis for the enhancement as it presently exists, the proposed amendment would raise the number of levels for having an altered or obliterated serial number to 4, from 2. There is no plausible justification for raising the enhancement and putting it on par with the large, 4-level specific offense characteristics that actually have some value in appropriately measuring the increased seriousness of the offense, such as § 2K2.1(b)(5). And the only justification offered – that "[t]he 3-level increase reflects the difficulty in tracing firearms with altered or obliterated serial numbers" – is insufficient to support the four-level increase, for several reasons.

First, this "difficulty" in tracing altered firearms appears to be the reason for the current two-level enhancement. It does not justify any particular number of levels for an enhancement beyond a 2-level enhancement, and certainly does not justify a 4-level enhancement, the type typically reserved for particularly aggravating specific offense characteristics.

Second, this "difficulty" does not have any relationship with the federal crime of being a felon-in-possession, or federal gun possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an offender to escape detection. A person or felon standing on a street corner with a gun in his waistband is guilty of the offense of possessing a firearm with an obliterated serial

number or being a felon in possession, period.

Third, it is subject to debate whether this "difficulty" even exists. In our experience, the "tracing" of firearms recovered by law enforcement is not a normal or even usual part of federal firearms prosecutions, either by federal authorities or state and local police that make street arrests that are later adopted for federal prosecution. The most that will happen is that the firearm's serial number is entered into an agency database to discover where and when it was manufactured, sold and the like. But rarely is there ever any additional investigation to determine whether the firearm was illegally sold or transferred at a previous point. It simply does not occur. At the same, time, federal law enforcement has a series of tools at its disposal to discover the actual serial number or path the weapon traveled to reach the defendant's hand, clothes or car. These include a cooperation reduction, laboratory work to "recover" the serial number, and old-fashioned investigation techniques (such as the use of informants, witness interviews).

While the Commission should reject the proposed amendment, whatever it does it should add a knowledge requirement to the specific offense characteristic. A knowledge requirement, even under the softer "knew or had reason to believe" standard, will ensure that the purported increased harm from having a firearm with either of these characteristics is applied only where that harm actually bears on the federal offense by the possessor's knowledge of the characteristic at issue.

d. "In connection with" in Burglary and Drug Offenses

The Commission should adopt Option Three, because it is the only option that is consistent with the standard in the clear majority of circuits. This majority-endorsed standard does not permit application of the enhancement (and does not allow an 18 U.S.C. § 924(c) charge to be sustained) where the possession of the firearm is merely coincidental to another felony – even where the other felony is a drug offense. Also, Option Three is the option that accurately reflects the holdings of a clear majority of circuits that a § 2K2.1(b)(5) enhancement cannot be applied in the case of a contemporaneous burglary where firearms are stolen but not otherwise used.

As the Commission's synopsis to the Amendment recognizes, an unquestioned majority of circuits have adopted the standard for applying the enhancement from *Smith v. United States*, 508 U.S. 223 (1993), and interpret the "in connection with" language in U.S.S.G. § 2K2.1(b)(5) consistently with the "in relation to" language in 18 U.S.C. § 924(c). *See, e.g., United States v. Spurgeon*, 117 F.3d 641 (2d Cir. 1997) (per curiam); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996); *United States v. Nale*, 101 F.3d 1000, 1003-04 (4th Cir. 1996); *United States v. Thompson*, 32 F.3d 1 (1st Cir. 1994); *United States v. Routon*, 25 F.3d 815 (9th Cir. 1994); *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993). This is a rigorous standard that provides:

> So long as the government proves by a preponderance of the evidence that the firearm served some purpose with respect to the felonious conduct, section 2K2.1(b)(5)'s 'in connection with' requirement is satisfied; conversely, where the firearm's presence is merely coincidental to that conduct, the requirement is not met.

Sprugeon, 117 F.3d at 644 (quoting *Wyatt*, 102 F.3d at 247).

The majority of the circuits that have decided the issue also will decline to apply the enhancement when firearms are possessed as the result of a burglary, but are not otherwise used. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Fenton*, 309 F.3d 825, 826 (3d Cir. 2002); *United States v. Szakacs*, 212 F.3d 344 (7th Cir. 2000); *United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999); *United States v. Sanders*, 162 F.3d 396 (6th Cir. 1998); *see also United States v. Lloyd*, 361 F.3d 197, 201-204 (3d Cir. 2004).[2]

Adopting Option One or Option Two would not clarify current U.S.S.G. § 2K2.1(b)(5), but instead would effectively override almost every circuit that has ruled on the applicable standard, and the application of that standard to the burglary context. Options One and Two would overrule the correct standard and replace it with a loose, automatic standard that would apply the enhancement even if the possession of the firearm was coincidental – in all cases under Option One, and in all drug cases under Option Two. Put another way, the appropriate standard under the case law would be eviscerated by Option One and Option Two, not as a matter of resolving any circuit split, but simply by watering down the Guideline to make the enhancement a strict liability provision, regardless of whether the offense conduct justified any increased punishment. These options therefore should be rejected – especially for the stiff 4-level enhancement that this specific offense characteristic provides.

Finally, the apparent purpose of the original Guideline enhancement was to enhance a sentence where there was an increased danger or other criminal conduct that was facilitated by gun possession. As the majority of courts have recognized, there is no "other criminal conduct" when a burglary occurs and guns, not used, often unloaded and not even held in hand, are taken away. Moreover, the offense is not made more

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[2] In the Third, Fourth, Sixth and Seventh Circuits, the Guideline as presently written is not applied in the case of a burglary when firearms are taken because the firearms are not possessed in connection with another felony offense (the Fourth Circuit), or the burglary is not "another felony offense" for purposes of U.S.S.G. § 2K2.1(b)(5) (the Third, Sixth and Seventh Circuits). And in the minority of circuits that would allow the enhancement to be applied, at least one of those circuits (the Fifth) allows the enhancement based on its minority-view standard of "in connection with" that is different than almost every other circuit. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Kenney*, 283 F.3d 934 (8th Cir. 2002); *United States v. Armstead*, 114 F.3d 504 (5th Cir. 1997); *see also United States v. Hedger*, 354 F.3d 792 (8th Cir. 2004); *United States v. English*, 329 F.3d 615 (8th Cir. 2003).

dangerous when guns are possessed in this fashion. Option Three accounts for this; it allows the enhancement to be applied when there is actual additional criminal conduct beyond the burglary, and an upward departure is always available when there is no other felony offense or use of the firearm, but the sentencing judge believes an enhanced sentence is required. As the Fourth Circuit, in interpreting current § 2K2.1(b)(5), has explained, the purpose of the enhancement is to provide increased punishment where the offense was made "more dangerous by the presence of the firearm . . . ." *Blount*, 337 F.3d at 406. With that said, the *Blount* court ruled that the enhancement could not be applied in the garden variety burglary context. That common sense, majority interpretation, shared by then-Judge Alito (authored the *Lloyd* opinion), Chief Judge Wilkins (authored the *Blount* opinion) and Judge Easterbrook (joined in the *Szakacs* opinion), and grounded in the appropriate standard for applying the "in connection with" language, should not be disturbed.

In maintaining the clear majority standard, and following the lead of a majority of circuits have ruled on this precise issue, the subdivision (C) language should be amended to reflect that a burglary as discussed in Option Three is not "another felony offense." This will maintain the current circuit majority interpretation of "another felony offense" in the current Guideline.

e. Lesser Harms and Felon in Possession

Without explanation, the Commission proposes to bar departures based on lesser harms under U.S.S.G. § 5K2.11 to anyone convicted under 18 U.S.C. § 922(g), which prohibits felons from possessing firearms. PAG opposes this blanket prohibition because the scope is unprecedented, the change is unwarranted (stemming neither from a circuit split nor from any obvious need to resolve a situation that the courts are not already equipped to handle), and the offense-specific prohibition is so random and inexplicable that it suggests the action may be motivated by concerns other than those that should inform guideline amendments.

First, the scope of this prohibition is unprecedented. The Commission has from time to time defined classes of departures as prohibited or discouraged, sometimes because they were placed off-limits by the Sentencing Reform Act itself.[3] These restrictions apply to all cases where a departure might otherwise be entertained. However unwise such blanket prohibitions may be, they apply, with "majestic equality," to thieves, drug dealers and fraudsters alike.[4] PAG is aware of no situation, however, in

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[3] See e.g., U.S.S.G. §§ 5H1.4, Drug or Alcohol Dependence; 5H1.10, Race, Sex, National Origin, Creed, Religion and Socio-Economic Status; 5H1.12, Lack of Guidance as Youth and Similar Circumstances.

[4] "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France, *The Red Lily*, Chap. 7, available at: http://education.yahoo.com/reference/quotations/quote/33040 (last visited March 12, 2006).

which the Commission has forbidden a departure for one class of offenses but retained it for all others.[5] And we can discern no reason to do so here.

The Commission's restraint in this respect is consistent with its general approach to departure policy. Congress provided for departures from the guidelines where the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* §5K2.0. According to the Commission, it adopted its departure policy for two reasons:

> First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. . . . Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice.[6]

These observations obtain in felon-in-possession cases just as in other cases for which the Commission would not forbid lesser harms departures. The vigorous departure case law confirms the Commission's first observation that the guidelines cannot be expected to account for the range of human conduct and condition.[7] The scarcity of lesser harms departures also bear out the Commissions prediction. Despite what must be the rather tantalizing prospect that a court can account for lesser harms at sentencing that could not be credited at conviction, the departure is extremely rarely invoked. Between 2000 and 2003 lesser harms departures comprised fewer than 1 percent of all departures.[8] While it is impossible to determine from available data, PAG is confident from our experience that felon-in-possession cases comprise a very small subclass of these already-infrequent "Lesser Harms" departures.

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[5] Of course, Congress in the Protect Act limited the application of certain departures in certain offenses involving crimes against children, *see United States v. Van Leer*, 270 F. Supp. 2d 1318, 1321-22 & n.20 (D. Utah 2003), citing PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 667 (discussing the "Feeney Amendment" limitations on downward departures), much as it has enacted mandatory minimum sentences that limit departures for certain offenses. The Commission, however, has never declared departures off-limits for any particular offense category, and has long criticized Congress' enactment of mandatory minimums as inconsistent with a rational Guidelines system.

[6] United States Sentencing Commission, *Departures*, at 15 (April, 2003).

[7] *Id.* at 11-113, discussing treatment of cases that illustrate various grounds for departure.

[8] According to the Sentencing Commission's Sourcebooks for the identified years: in 2003 lesser harms departures accounted for only 46 or 0.8% of the 5950 other-than-government initiated departures granted; in 2002, 34 or 0.3% of the 10,995 departures, in 2001 23 or 0.2% of the 11,044 departures; and in 2000, they were 24 or 0.2% of the 10,288 departures. Lesser harms departures never exceeded 1%, even after the Commission began isolating judicial from government-sponsored departures in 2003.

The Commission's history of restraint in establishing "forbidden" departures is therefore appropriate, and borne out by this history of judicial restraint. The recently-proposed offense-specific prohibition, by contrast, is surprising and ill-considered in light of Congress' and the Commission's concern to ensure that the breadth of the human condition not be lost forever at sentencing by overly rigid guidelines. The Commission cannot and should not take the unprecedented step of declaring that, with felon-in-possession cases only, the penalties it is establishing "encompass[] the vast range of human conduct potentially relevant to a sentencing decision."

Second, there is simply no need to forbid "lesser harms" departures in felon-in-possession cases. The Commission carefully monitors developments in guideline sentencing and occasionally proposes amendments to clarify existing guidelines, respond to congressional directives, or resolve circuit conflicts. For example, the Commission seeks to resolve two circuit conflicts in the firearms section of the current set of proposals. *See* Proposed Amendment to the Sentencing Guidelines, at 27-28 (January 25, 2006). In contrast, the lesser harms departure needs no clarification, as it is relatively uncomplicated. Congress has not directed the Commission to eliminate this departure in § 922(g) cases, and there is no significant Circuit split developing in this area. In fact, the majority of the Courts of Appeals that have encountered lesser harms departures in § 922(g) cases have either ruled they are available or ruled in such a way that it can be inferred the court accepts the propriety of the departure's use in at least some 922(g) contexts.[9]

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[9] A number of courts have explicitly recognized the authority to depart for lesser harms in § 922(g) cases, while others have implied in their rulings that the departure authority was available to judges. *See, e.g., United States v. Bunnell*, 280 F.3d 46, 50 (1st Cir. 2001) (rejecting appeal based on failure to grant § 5K2.11 departure in § 922(g) case by holding that lower court did not misunderstand its authority to depart on this ground); *United States v. Clark*, 128 F.3d 122, 123 (2d Cir. 1997) (remanding case because of doubt that sentencing judge appreciated his available authority to depart for lesser harms in § 922(g) case); *United States v. Cutright*, 2000 WL 166345, at *3-4 (4th Cir., Nov. 6, 2000)(collecting cases and rejecting district court lesser harms departure in § 922(g) because not adequately supported); *United States v. Washington*, 1998 WL 13533, at *1 (4th Cir., Jun. 15, 1998)(holding that the sentencing court was aware of, but properly declined to exercise, its authority to depart based on lesser harms in § 922(g) case); *United States v. Williams*, 432 F.3d 621, 623-24 (6th Cir. 2005) (holding that departure from § 922(g) sentence for, *inter alia*, lesser harms, reasonable based on court's consideration of appropriate factors); *United States v. Peterson*, 37 Fed. Appx. 789, 792 (7th Cir. 2002) (rejecting appellant's contention that district court's failure to depart for lesser harms was because court thought it was powerless to do so in gun case); *United States v. Dubuse*, 289 F.3d 1072, 1075-76 (8th Cir. 2002) (finding that district court understood it had authority to depart for lesser harms in § 922(g) case); *United States v. Wentz*, 46 Fed. Appx. 461, 461 (9th Cir. 2002) (finding that district court was aware of authority to depart for lesser harms but nonetheless declined to do so); *United States v. Styles*, 139 Fed. Appx. 249, 253 (11th Cir. 2005) (clarifying that court had authority to depart downward under § 5K2.11 and remanding so that court could consider downward departure in § 922(g) case); *but see United States v. Riley*, 376 F.3d 1160 (D.C. Cir. 2004) (rejecting downward departure under § 5K2.11, even though defendant had no unlawful purpose because statute does not distinguish between unlawful possession and purpose).

Indeed, there are important reasons to retain the departure. The Sentencing Guidelines routinely permit departures when statutes have been violated, and allow lesser harms departures when the violation does not "threaten the harm or evil sought to be prevented by the statute." *United States v. Lewis*, 249 F.3d 793, 796 (8th Cir. 2001). "[T]he guidelines authorize reasonable departure for an act that is technically unlawful, yet not committed for an unlawful purpose." *Id.* at 797 (discussing departure in context of § 922(a)(6) false statements case). While not widespread, a number of courts have at least considered and occasionally found grounds to depart because the weapons' possession, while criminal conduct, merited a lower sentence. Other conceivable examples abound. For example, suppose a defendant who had attained a prior conviction, perhaps even on felony tax charges, at age 20 or 25, is later is found in his home at age 75, passively possessing in his closet a firearm that his grandchildren bought him for self-protection after his neighborhood became less safe. This would be a felon-in-possession, but does the Commission really want to make a "lesser harms" departure off-limits in this situation and all others? Retaining the possibility of a departure makes good sense, particularly in light of its limited current use in only the most deserving cases. The Courts of Appeals have proven adept at evaluating these few cases and should be permitted to continue its management of this area.

Finally, PAG must note that the Commission has chosen to present this proposal without any type of explanation, suggesting that it might be prompted by complaints about recent use of this infrequently-used departure. Whatever the reason behind the proposed amendment, the defense bar and the courts deserve some explanation from the Commission about why it feels the change may be necessary, and also deserve an opportunity to respond to that specific rationale. Particularly striking in this regard is that the Commission would forbid the departure even in a class of cases where the defendant has come into possession of a weapon and is acting in haste to dispose of it. For example, in *United States v. Hancock*, 95 F. Supp. 280 (E.D. Pa. 2000), the Court granted a § 5K2.11 departure when it found that the defendant had found a gun by chance and fired two times into the ground to empty the gun of ammunition and then quickly threw the gun away. The defendant possessed the gun for only a short time and then only to determine if it was loaded and to remove its harm. This seems the right result in such a case where the possession of the weapon by the former felon is only for the purpose of disarming it. Tellingly, the Government did not appeal the *Hancock* departure. We can think of no reason to deny such considerations of a departure to other defendants whom the court determines did what they could as quickly as possible to dispose of a weapon.

For these reasons, we strongly urge that the Commission not amend the guidelines to forbid the use of the Lesser Harms departure at U.S.S.G. § 5K2.11 for otherwise deserving defendants convicted of being felons in possession under 18 U.S.C. § 922(g). If the Commission continues to feel this amendment is warranted, the public should be given a meaningful opportunity to evaluate the specific reasons behind the proposed change, and consideration of this change should be deferred to the next amendment cycle.

3-5. Proposals to Make Permanent Emergency Amendments on Steroids, Intellectual Propery (FECA), & Terrorism/Obstruction of Justice

On these proposed amendments, PAG calls the Commission's attention to the comments previously submitted by PAG and others in response to the Commission's requests for input on the emergency amendments. In particular, PAG references its February 23, 2006 letter on Anabolic Steroids, and a letter on Intellectual Property/FECA submitted by PAG member and University of Richmond Law Professor James Gibson on August 2, 2005, as well as letters submitted by the Federal and Community Defenders.

6. Proposed Amendments Implementing the Transportation Act

The Commission has proposed certain amendments designed to implement Pub. L. 109-59 (the "Transportation Act"), and also issued a related request for comment.

In its proposed amendments, the Commission plans to implement Section 4210 of the Transportation Act, and its new criminal offense for a knowing failure to deliver household goods, by simply adding a cross-reference to U.S.S.G. § 2B1.1. PAG agrees that § 2B1.1 is a catch-all for this type of offense. But we are troubled at the notion that this new Class E felony, established by Congress with a two-year maximum, will be lumped in with far more serious offenses. Under this guideline, the statutory maximum might be reached so easily that the normal incentives to plead guilty in an effort to get an acceptance of responsibility adjustment would prove meaningless.

We note that U.S.S.G. § 2B1.1 was amended to establish a higher base offense level of 7 for offenses with statutory maximums of 20 years or more. The mirror-image should be established for low-end offenses. We ask that a new base offense level of 5 be established for offenses that carry a statutory maximum of less than five years.

On the issue for comment, the Commission's acknowledges that its 2004 amendment to 2Q1.2 was intended to capture the increase in harm associated with offenses involving transportation of hazardous materials. That 2-level increase means that an Offense Level 26 will ordinarily be applied in this situation, and that defendants with a Criminal History Category of VI already will be in a 120-150 month range before any Chapter 3 adjustments. Although the Transportation Act increased the statutory maximum in 49 U.S.C. § 5124 to ten years, these existing guideline numbers are already entirely consistent with a 10-year statutory maximum. Congress did not direct the Commission to revisit this guideline, and no further adjustment is necessary here.

7. Proposed Amendments Implementing the Intelligence Reform and Terrorism Prevention Act of 2004

PAG submits a few comments on these proposed amendments. First, the Commission suggests three options for implementing § 5401 of the Act. Section 5401 increases maximum penalties by up to 10 years if a defendant meets three elements: (1)

the criminal conduct is part of an ongoing commercial organization or enterprise, (2) aliens were transported in groups of 10 or more, *and* (3) aliens were transported in a manner that either endangered their life or a presented a life-threatening health risk to people in the United States. We are asked to comment on the proposed options.

As noted, the new statutory enhancement *does not* apply if *only one* of these three elements is met. This fact points squarely against the Commission's options that would add an enhancement or departure any time only one of these elements (an "ongoing commercial organization") exists. If the statute itself is strong on this, the legislative history is even stronger. The Commission should know that, in an earlier, rejected version of what became Pub. L. 108-458, the House of Representatives had suggested applying this enhancement if any one of these elements applied. *See* H. Rep. No. 108-724 (Part 5), at 69 (then-§ 3041 would have allowed 10-year enhancement if any element existed). That "disjunctive" suggestion was rejected by Conference Committee, with Congress instead passing a law applying the enhancement only in the conjunctive – i.e., only when all three of these elements exist. If the Commission were to enact a new sentencing enhancement that applied whenever an "ongoing commercial organization" is found, it would essentially codify the rejected House approach. The guidelines instead should be modified to enact the final law that Congress passed. In implementing § 5401, the Commission should adopt only proposed Option One, or the Option Three alternative requiring a conviction under 8 U.S.C. § 1324(a)(4).[10]

If the Commission follows this approach, it will also gain the benefit of no longer needing to define "ongoing commercial organization," since an enhancement would only apply if a defendant is found guilty under § 1324(a)(4) (and an "ongoing commercial organization" is found by a jury or via a guilty plea). In any event, however, PAG responds to the Issue for Comment by discouraging any new definition of "ongoing commercial organization." As the Commission notes, the Act did not define the term, and PAG has not located any legislative history that elucidates its meaning. The Commission would essentially be creating a definition from scratch, and before the courts have faced real-world examples that might put meat on these bones. In sum, even if the Commission were inclined to define an "ongoing commercial organization," it would be wise at least to wait until some facts and a real dispute (or circuit conflict) develop instead of trying to establish artificial parameters in the abstract at this time.

On the other proposed amendments, PAG notes a few additional concerns, particularly given the breadth of some of these directives. For example, in implementing § 6903 of the Act, the Commission plans to reference only U.S.S.G. § 2K2.1, since the weapons described "would seem to be covered as destructive devices under 26 U.S.C. § 5845(a)." If they are indeed covered by § 5845(a), PAG does not oppose the suggested reference to § 2K2.1, but PAG must note that § 6903 of the Act also punishes "any part

[10] Tracking the statute will also avoid potential double-counting concerns that would otherwise arise if a defendant received an enhancement for being part of an "ongoing commercial organization" and then other, seemingly-similar adjustments under § 3B1.1 (aggravating role) or § 4B1.4 (criminal livelihood) as well.

or combination of parts" used in "fabricating" a rocket or missile – items that would clearly seem to fall outside of § 5845(a). In such circumstances, the Commission at least should allow for a downward departure. Similarly, under the Commission's proposed implementation of § 6803 of the Act, we question whether providing "material support or resources" is always as culpable as the direct development of the weapons themselves. The divergent statutory maximums (20 years v. life) suggests they are not, yet the Commission suggests that all 18 U.S.C. § 832 convictions must be referenced only to U.S.S.G. § 2M6.1. PAG suggests instead that 18 U.S.C. § 832 be cross-referenced to both § 2M6.1 and § 2M6.2, or at least that a downward departure option be considered.

Finally, on the Commission's implementation of § 6702 of the Act, PAG has no objection to the proposed referral to U.S.S.G. § 2A6.1, but does not understand the proposed cross-reference to § 2M6.1. This new law involves "hoaxes" – where there is, by definition, no intent to carry out a threat. The proposed cross-reference, by contrast, would apply § 2M6.1 when there is "an intent to carry out a threat." In other words, the proposed change does not appear to be an implementation of § 6702 of the Act at all. It instead appears to be a general broadening of 2M6.1's application to cover offenses previously covered by § 2A6.1.

8. Proposed Guideline Amendments on False Domain Names

The Commission proposes to create a new U.S.S.G. § 3C1.3, in an effort to implement the directive in § 204(b) of Pub. L. 108-482. The Commission proposes an increase of 1-4 levels, with no indication of which increase might be chosen, or why.

PAG suggests that any increase should not exceed 2 levels. A higher increase would actually be inconsistent with Pub. L. 108-482, since at the high end of the guidelines (such as an Offense Level 32 with a Criminal History Category VI), a 4-level increase would increase ranges more than 7 years, despite the 7-year cap on increases in the statutory maximum established in the Act's § 204(a). PAG also notes the Commission's recently-proposed 2-level increase for steroids "masking." PAG sees some logic in treating "masking" and hiding one's identity through false domain names as similar, and accordingly believes that any increase here should not exceed 2 levels.

Finally, as the introduction to the Commission's proposed amendment notes, the statute only directs the Commission to establish this enhancements when an underlying "felony" offense is "furthered" through false domain names. Consistent with this statutory directive, the amendment should be changed to clarify that any enhancement does not apply to misdemeanors, and that the underlying offense must be "furthered" by the false domain name before this enhancement can be applied.

9. Proposed Guideline Amendments for "Miscellaneous Laws"

PAG submits two comments to the Commission's proposed "Miscellaneous" changes, the first of which relates to the new proposed Class A Misdemeanor guideline.

PAG believes that a general misdemeanor base offense level of 4, rather than 6, is appropriate. There are several reasons for this. First, the guidelines have historically been structured in ways that preserve a benefit to defendants who accept responsibility. The newly-proposed misdemeanor guideline, U.S.S.G. § 2X5.2, would start at an Offense Level of 6, and then add 2 points for a person who had committed the same offense before.[11] A Category VI offender in this situation would find no guideline benefit at all to pleading guilty in an effort to gain an acceptance of responsibility adjustment, since this would only move him to a 12-18 month range (still in Zone D). Starting at 4 (or even 5), by contrast, would preserve these traditional guideline incentives of skipping a trial. Second, PAG believes the Commission should recognize, and codify, the fundamental difference between a misdemeanor and a felony. Congress has made a formal classification decision that misdemeanors are simply not the same as felonies. The guidelines' catch-all misdemeanor guideline should reflect that difference. The Commission is proposing that this guideline will apply only to misdemeanors not already covered by another guideline, suggesting that it will be used with many unusual regulatory violations. PAG submits that it is simply illogical to start these types of documentation-type offenses at the same base offense level as Class C and D felony thefts and frauds, for example. Regulatory offenses involving controlled substances in U.S.S.G. § 2D3.2, for example, have a Base Level of 4, and PAG believes that is where this catch-all Class A Misdemeanor guideline should start as well. The new guideline would then be in line with numerous similar offenses. *See, e.g.*, U.S.S.G. § 2A2.3 (Base Offense Level 3 for some forms of Minor Assault); § 2B2.3 (Base Offense Level 4 for Criminal Trespass); § 2J1.5 (Base Offense Level of 4 for a material witness' failure to appear at a misdemeanor trial); § 2P1.2 (Base Offense Level of 4 for providing or possessing certain contraband in prison); § 2T1.7 (Base Level of 4 for Failing to Deposit Collected Taxes in Trust Account as Required After Notice); § 2T1.8 (Base Offense Level of 4 for Offenses Relating to Withholding Statements); § 2T2.2 (Base Offense Level of 4 for Regulatory Offenses); § 2T3.1 (Base Offense Level of 4 for smuggling if the tax loss does not exceed $100).

Second, PAG wishes to comment on the two options proposed for Plant Protection Act ("PPA") sentences. PAG does not believe that a new specific offense characteristic is necessary here, especially given the expected infrequency of PPA prosecutions, which the Commission concedes. At most, the Commission should adopt Option Two's establishment of an encouraged upward departure in PPA cases, especially given the wide array of divergent plants (ranging from biological control organisms down to far less significant plants) that may fall within the parameters of the PPA, and the need for judges to factor those into departure decisions. Unfair disparities would arise from lumping all such plants together into a single and uniform specific offense characteristic.

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[11] PAG does not object to the general concept of adding 2 offense levels when a defendant has committed the same misdemeanor before, but as noted, believes this adjustment fits into the general guidelines scheme only if the starting point for Class A misdemeanors is placed at a Base Offense Level of 5.

10. Proposed Guideline Amendments Relating to "Application Issues"

The Commission proposes to create a new U.S.S.G. § 3C1.3 for Offenses Committed While on Release, eliminating § 2J1.7. Although PAG does not object generally to the movement of this guideline to Chapter 3, we do object to the proposed elimination of § 2J1.7's background commentary. Among other things, the existing commentary notes that, although a court should impose a consecutive sentence, "there is no requirement as to any minimum term." That analysis, gleaned from § 3147's legislative history, has been the law and remains the law, yet the proposed amendment would eliminate it. PAG is concerned that this elimination may be improperly construed as a substantive change in the law where none (according to the Commission's explanations for its amendment in a mere "Application" change) was intended. PAG believes that § 2J1.7's background comment should be carried forward to § 3C1.3.

Carrying forward the background commentary would also properly continue the Commission's notice requirement. The Commission claims that "[t]he majority of circuit courts have found that there is no notice requirement in order for 18 U.S.C. § 3147 to apply." But this statement ignores that two very different types of "notice" issues that these circuits have discussed. As the circuits note, cases raising § 3147 and § 2J1.7 issues involve both "pre-release" and "pre-sentencing" notice. "Pre-release" notice arguments have claimed that a defendant might avoid § 3147's enhancement if a defendant did not receive notice of the possibility of additional punishment when released, either on an earlier offense or at the time bond was granted. PAG acknowledges that a majority of circuits have rejected this argument as inconsistent with the mandatory requirements of § 3147 itself. As Judge (now Justice) Alito explained:

> We read the commentary to mandate, not pre-release notice in the first case, but simply pre-sentencing notice in the second case.

United States v. Hecht, 212 F.3d 847, 849 (3d Cir. 2000). This distinction is important, however, for it explains why the subject commentary is worth keeping, even if the Commission believes (as it reasonably may) that this commentary should be clarified so that judges know that only "pre-sentencing" notice is required. To PAG's knowledge, *no circuit* has ever held that "pre-sentencing" notice is unnecessary in this context. And PAG submits that such "pre-sentencing" notice serves a highly useful function here. When a § 3147 enhancement is applied, defendants are being hit with a sentencing enhancement based on another, wholly collateral "offense." In this context, defense counsel should be given advance notice of the possibility of this enhancement, so that counsel can investigate the sometimes-complicated underlying facts of an entirely different offense, and then present whatever relevant arguments may be gleaned, so that the Court can reach a more-informed judgment on what sentence is fair and just. In short, defendants and their counsel should not be surprised at sentencing by an enhancement based upon another "offense" about which they had no earlier notice. The Commission

should keep its notice requirement, and at most clarify that it is intended to require only pre-sentence notice akin to what is required when an upward departure is sought.

11. 3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

The Commission has proposed certain changes to the text and commentary of Section 3C1.1 (Obstructing or Impeding the Administration of Justice). PAG believes the Commission should adhere to the approach, clarified in 1998 through amendment 581, that this guideline does *not* apply to pre-investigative conduct. The proposed change to expand the guideline to pre-investigative is both unnecessary and unwise. Unnecessary, because the purported circuit conflict that has prompted the proposal is not as significant as appears at first blush and could be cured by re-affirmation of the 1998 clarifying amendment. And unwise, because the amendment would create thorny applicability issues that are likely to produce more, rather than less, unwarranted sentence disparity. We also believe that the Commission's proposed new examples of "covered conduct" are in tension with the definition of obstructive conduct found in the text of the guideline itself, and these new examples would unduly complicate sentencing proceedings. To the extent the conduct mentioned in these examples occurs in individual cases, the sentencing judges and others have sufficient and more desirable options for addressing that conduct.

The synopsis of the proposed amendment to Section 3C1.1 states that it addresses a circuit conflict regarding whether pre-investigative conduct can form the basis for the 2-level enhancement. But the Commission has already addressed and resolved the stated conflict. In 1998, the Commission added a new application note to the guideline which reads, in part: "This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction . . . ." The stated purpose of this amendment was to "clarify the temporal element of the obstruction guideline (*i.e.*, that the obstructive conduct must occur during the investigation, prosecution, or sentencing, of the defendant's offense of conviction)." USSG, App. C (Amendment 581).

Although the synopsis of the proposed 2006 amendment identifies four circuits that "have concluded that pre-investigative conduct can be used to support an obstruction enhancement," not one of those cases applied the 1998 clarifying amendment to the facts before it. The case from the D.C. Circuit was decided in 1991. *See United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991). The Tenth Circuit case, decided shortly after the 1998 amendment went into effect, merely relied on a pre-1998 case to hold that the enhancement can apply where the defendant is aware of an "impending investigation"; the court made no mention of the effect of the 1998 amendment on the pre-1998 ruling. *See United States v. Mills*, 194 F.3d 1108, 115 (10th Cir. 1999). The Seventh Circuit case, also decided in 1999, noted the promulgation of the 1998 amendment but found it "need not resolve" whether it precludes an enhancement "when the obstructive conduct occurs before any investigation has begun," because the defendant in that case engaged in (and continued) the threatening conduct after the investigation had begun. *United States v. Snyder*, 189 F.3d 640, 649 (7th Cir. 1999). Finally, the First Circuit case mentioned in

the synopsis relied on a pre-1998 case, in addition to *Mills* and *Barry*, *supra*, again without discussing or even acknowledging the 1998 clarifying amendment. *See United States v. McGovern*, 329 F.3d 247, 252 (1st Cir. 2003).

The Commission made the right decision in 1998 when it added language expressly limiting the enhancement to post investigative conduct, and it should not reverse course now. Not surprisingly, most criminals try to avoid getting caught. They do so in a number of ways. Some take steps to shield their identity when they are committing or concluding their offense (*e.g.*, using false identities, disguises or convoluted transactions that make conduct difficult to trace, or destroying a paper trail that would otherwise lead back to themselves). Some endeavor to hide the fact that a crime has occurred. in the hope either that the victim will not realize there is anything to report or that the government will never know there is something to investigate (*e.g.*, structuring a fraudulent investment to make it appear that losses to investors had an innocent explanation). And so on. It is therefore very difficult to draw a predictable line between conduct that is part and parcel of the offense and conduct designed to "prevent" or "hinder" the investigation, prosecution or sentencing of the offense. On which side of the line should the sentencing judge put the structuring of a securities fraud to make it look like the drop in price was the result of market forces, or the disposal of clothing immediately after a bank robbery? By abandoning a clear and logical temporal line – the start of the official investigation – the Commission would be inviting individual judges to draw different lines. Without any logical guidance, the inevitable result is unwarranted disparity.

There undoubtedly will continue to be cases from time to time where pre-investigation conduct designed to prevent or hinder deserves an incremental level of punishment. One of types of conduct that the Commission's proposal would add to application note 4 is a good example. The Commission has proposed making explicit that the obstruction enhancement applies to defendants who make threats to a victim for the purpose of "prevent[ing] the victim from reporting the conduct constituting the offense of conviction." A threat designed to prevent an investigation is usually worthy of enhanced punishment because it results in a separate and tangible psychic harm to another person. In order to address examples like this, the Commission should encourage a higher sentence, perhaps through a departure, as is done with other guideline provisions. But it should not expand the scope of the guideline to cover pre-investigative conduct.

In addition to "victim threats," the Commission has proposed two other categories to add to its list of "Examples of Covered Conduct" in application note 4 to the guideline. Neither should be adopted. New application note 4(l) would include within the guideline "making false statements on a financial affidavit in order to obtain court-appointed counsel." The main problem with this "example" is that the conduct described does not satisfy one of the elements of the enhancement. That is, to receive the enhancement the defendant's object must be to "obstruct" or "impede" the administration of justice. As the Second Circuit has correctly noted, the defendant who lies on a financial affidavit is "not seeking to prevent justice or even delay it." *United States v. Khimchiachvili*, 372

F.3d 75, 80 (2d Cir. 2004). Rather, he is trying to avoid paying his legal fees. *Id.* When the Commission uses, as an example of obstruction, conduct that by its nature does not meet the provision's definition of obstruction, it runs the risk that judges will apply the "object to obstruct or impede" requirement in an inconsistent manner when dealing with other types of allegedly obstructive conduct.

A further problem with this proposed example is that it is likely to cause significant disruption in those cases where the example is invoked. If the government or the probation department alleges that the defendant made false statements to qualify for appointment of the lawyer who has been representing him in the criminal case, that attorney will likely be unable to continue representing the defendant due to a conflict of interest. As a result, new counsel would need to be brought in very late in the case to complete the criminal proceedings, resulting in delay and even greater public expense. This problem is readily avoided. There are a number of ways the courts can remedy lies on a financial affidavit, including separate contempt proceedings. PAG is also unaware of any showing that this type of problem has become both widespread and incapable of redress in those other ways.

The other example that would be added under the proposed amendment is similarly flawed. It would recognize, as an example of obstruction, perjury "during the course of a civil proceeding pertaining to conduct constituting the offense of conviction." The first problem, again, is that the conduct described in the proposed example is not really an "example" of what the guideline covers. Perjury in a civil proceeding, even where the subject matter of the criminal case is identical, does not by its nature obstruct or impede the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense of conviction, nor is such perjury necessarily "related to" the offense of conviction or other closely related offenses (even though the subject matter of the testimony may in fact be "related"). If the new example is meant to enhance the sentence for defendants who perjure themselves in a civil case in order to thwart the criminal investigation, the proposed amendment needs to be rewritten. It should read: "(b) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction, with the intent to obstruct or impede the criminal investigation, prosecution or sentencing." (Proposed new language underscored).

To expand the scope of Section 3C1.1 perjury, as proposed in application note 4(b), would do more than conflict with the limiting language of the guideline itself. It would unnecessarily complicate the sentencing process by requiring the judge presiding over the criminal case to assess the impact on "the administration of justice" of alleged perjury that occurred in a separate non-criminal proceeding with which the judge may have little or no familiarity. For example, the sentencing judge would need to review substantially all of the record in a state court private civil suit before he could determine whether the defendant's alleged perjury was an attempt to obstruct or impede the administration of justice in that other proceeding. Even if perjury in civil proceedings that "pertain to conduct constituting the offense of conviction" is common enough to warrant separate mention in the guidelines – a point for which we have seen no data – the

officials that preside over these other proceedings, and the prosecutors with jurisdiction over perjury offenses committed in those tribunals, are well equipped to attach consequences to such misconduct.

In sum, the proposed changes to the obstruction guideline are not needed, would generate little benefit, and impose high costs on the system. PAG urges the Commission to reject these proposals. Instead, the Commission should revise the commentary of Section 3C1.1 to reiterate that the provision applies only to post-investigation conduct. If sufficient evidence is available that judges do not properly account for those instances of pre-investigation obstructive conduct that are outside the heartland (such as threats of physical violence for reporting an offense), the Commission may wish to add language to the commentary recognizing that a departure of up to two levels is available in unusual cases. *Cf.* USSG §§ 2A2.4, comment. (n.3) (encouraging upward departure under offense guidelines for obstructing or impeding officers where substantial interference with government function results) 2B1.1, comment. (n.19) (encouraging upward departures for various reasons where fraud and theft guideline understates seriousness of the offense); 2C1.1, comment. (n.7) (encouraging upward departure where amount paid in bribery case understates seriousness of offense); 2Q1.2, comment. (nn. 4-9) (encouraging various guided departures for environmental offenses).

12. <u>Chapter Eight (Privilege Waiver)</u>

The Commission has solicited comment on whether it should modify or replace the following sentence from the commentary to U.S.S.G. § 8C2.5:

> 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.

PAG believes that this sentence should be deleted from Chapter 8 and that the Commission should state, either in the commentary or in the Reasons For Amendment, that the purpose of the change is to establish that an organization's decision whether to waive the attorney-client privilege or work product protections is not a factor for the court to consider in calculating an organization's culpability score. Such an amendment would harmonize U.S.S.G. § 8C2.5(g) with corresponding guideline provisions applicable to individuals – specifically, U.S.S.G. §§ 3E1.1 & 5K1.1 – and would thereby reduce the undue pressure currently placed on organizations to waive these paramount privileges and protections.

A number of diverse groups, including those that provided testimony and written submissions in October 2005, have already offered extensive input on the problems caused by the waiver language in the commentary to § 8C2.5. PAG concurs in the views expressed by these groups. In particular, we echo their reminder of the special status held

by the attorney-client privilege and work-product protections. The attorney-client privilege, in particular, is an irreplaceable element of the American legal system. Without a vibrant privilege, individuals are less likely to seek advice of counsel on how to comply with the law and less likely to report questionable conduct in a timely manner, if at all. Waiver of the privilege in any particular case has negative consequences well beyond that proceeding. In the corporate context, the privilege works – and can only work – if employees and officers can be reasonably certain that the promise of confidentiality will be kept, or at least that a decision by others in the corporation to waive the privilege will not be coerced. The language found in Chapter 8, however, has resulted in greater pressure on organizations to waive the attorney-client privilege and work product protections in order to satisfy government investigators. For that reason, we endorse the recommendation of the American Bar Association that the waiver language be replaced.

It is apparent from the wording of the commentary that the Commission made a good faith attempt in 2004 to strike a balance between promotion of the attorney-client privilege and work product protections on the one hand, and legitimate law enforcement objectives on the other. In practice, however, this language has the unintended consequence of placing undue pressure on organizations to waive such privilege and protections at the early stages of an administrative, civil or criminal investigation.

The problem lies in the inherent inability of organizations to know, until it is too late, whether waiver is needed to satisfy the requirements for a reduced sentence. The commentary makes waiver a prerequisite to reductions in the culpability score for self-reporting and cooperation (along with acceptance of responsibility) if "such waiver is necessary" to provide "timely" and "thorough" disclosure of "all pertinent information known to the organization." Because the commentary requires disclosure in a "timely" manner, the organization must make its decision whether to turn over the protected information early in the investigation, usually before counsel for the organization has had time to assess the facts in anything approaching a thorough manner. Especially at this early stage, the organization also is not in a position to know the scope of information already in the government's possession. Indeed, it is the rare case where a lawyer for an organization is aware of the full universe of pertinent information known to the government until the government's investigation is complete (and many times, not even then). Counsel for the organization therefore simply cannot know, until it is too late, whether the government has, from its own sources, all of the pertinent information that the organization's counsel has separately acquired through an attorney-client communication or as the product of work conducted by counsel.

A second reason organizations feel undue pressure to waive their rights is this: Even assuming the decision-makers at the organization know the government lacks certain information that the organization gathered in a privileged or otherwise protected manner, the organization cannot reliably predict *when* the government might acquire that information absent waiver. If the organization incorrectly predicts that the government will independently acquire the pertinent information sooner rather than later, it may learn after-the-fact that it still has failed the "timely" and "thorough" disclosure test. Thus, in

all but the rarest of investigations, an organization cannot rationally choose whether to waive a privilege that serves as the foundation for our legal system—the privilege that enables individuals to seek the advice and guidance of legal counsel.

The undue pressure to waive that the commentary creates is confirmed by the recent survey conducted by a coalition of organizations including the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel. Among other things, the majority of outside counsel responding to the survey reported that enforcement officials have directly or indirectly requested waiver of the attorney-client privilege in investigations involving companies that the responders represent. These counsel also report that the commentary to Section 8C2.5 is second only to the relevant DOJ memoranda on prosecution policies on the list of reasons cited by the government for the company to waive the privilege.

The attorney-client privilege retains its value in our legal system only if the client can count on the confidentiality of the communications covered by the privilege. As the Supreme Court emphasized in the seminal case on the availability of the attorney-client privilege to organizations, "an uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). As more and more corporations give in over time to undue pressure to waive the privilege, it is inevitable that employees – whatever their level – in corporations across the country will be deterred from seeking advice about how to comply with an increasingly complex matrix of rules, regulations and statutes.

It is no answer that waiver serves a valuable purpose, or even that its benefits outweigh its costs in some instances. That may be true sometimes, and in those cases the organization may very well choose on its own to waive the privilege. But such a choice should not be coerced through the threat of harsher treatment – or the unavailability of more lenient treatment – if it "insists" on playing by the venerable rules of our adversary system.

The language of the relevant guidelines for individuals is instructive on this point and, in our view, dispositive. To qualify for acceptance of responsibility credit or a substantial assistance downward departure, an individual must make difficult choices including the possible waiver of certain constitutional rights. For example, the extra one-level reduction for acceptance of responsibility in § 3E1.1(b) is conditioned upon timely waiver of the Sixth Amendment right to a jury trial and the Fifth Amendment right not to incriminate one's self. Although these required waivers have generated controversy, to our knowledge it has never been suggested that the Commission include as a factor in the availability of either of these provisions the individual's decision whether to waive the attorney-client privilege or work-product protections. No doubt this is due to a universal recognition that these protections are basic to the operation of our legal system, even in those instances where the defendant has ultimately agreed to "give up the fight." Before a defendant can get to the point where he decides to accept responsibility or cooperate or both, he must be able to discuss his conduct and his options in confidence with counsel,

safe in the belief that he will not be coerced into revealing those confidences at some later date.

The same is true for organizations. The attorney-client privilege and work-product protection are part of the basic rules that make the adversary system work. Indeed, they are the very tools that make it possible for defendants – be they individuals *or* organizations – to get to the place where they can make the fully informed decision whether to self-report, cooperate and accept responsibility. We urge the Commission to harmonize the commentary of § 8C2.5 with the guideline provisions applicable to individuals and remove the decision whether to waive from the sentencing guidelines calculus.

13. Proposed New Guideline Related to Crime Victims' Rights

On this proposal, PAG does not object generally to the new U.S.S.G. § 6A1.5's directive that courts must afford crime victims the rights described in 18 U.S.C. § 3771. PAG does, however, object to the Commission's call for new sentencing procedures that would extend beyond § 3771. In particular, we do not understand what might be encompassed in the Commission's policy statement calling on courts to adopt procedures related to "any other provision of Federal law pertaining to the treatment of crime victims." PAG can envision how a court might use this phrase to create new procedural rights for victims that Congress never intended. As the Justice for All Act of 2004's Crime Victims' Rights Amendment ("CVRA") itself showed, the establishment of new procedural rights in this area involves a very careful balancing of interests, not only for defendants, but also for prosecutors who inherently lose certain control of a case when victims' procedural rights increase. PAG respectfully suggests that the Commission should respect that procedural balancing established by Congress in the CVRA, and omit the clause quoted above so that § 6A1.5's new language is tailored specifically to the procedural rights the CVRA intended. If the Commission wishes to expand the list of procedural rights, it should do so later upon reflection of specific requests, rather than adopting a catch-all clause whose meaning and parameters are wholly unknown.

14. Proposed New Guideline for Bureau of Prisons Motions to Reduce Terms of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(1)(A)

We commend the Commission for its decision to promulgate policy guidance for courts considering motions filed by the Bureau of Prisons to reduce sentences under 18 U.S.C. § 3582(c)(1)(A)(i). As we noted in our June 14, 2005 letter to the Commission, it is essential to have some "safety valve" in a determinate sentencing scheme, so that the government may respond to any extraordinary and compelling situations that arise after sentencing that render continued imprisonment unjust or meaningless. We believe that Congress intended § 3582(c)(1)(A)(i) to serve just such a safety valve function, and the legislative history of the Sentencing Reform Act of 1984 supports this interpretation. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 121 ("safety valves" contained in § 3582(c) "keep[] the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations").

We are concerned, however, that the Commission's new policy statement at U.S.S.G. § 1B1.13 is largely a restatement of the statutory language in § 3582(c)(1)(A), and that it still does not respond to the directive in 28 U.S.C. § 994(t) that the Commission describe what should be considered extraordinary and compelling reasons, "including the criteria to be applied and a list of specific examples." In the expectation and hope that the Commission intends to include criteria and examples in its final rule, we make some recommendations below.

Before doing so, however, we note that proposed U.S.S.G. § 1B1.13(2) appears to improperly narrow the statutory circumstances in which sentence reduction may be sought. First, it extends the requirement in § 3582(c)(1)(A)(ii) that the court determine that the prisoner "is not a danger to the safety of any other person or the community, as provided in 18 U.S.C. § 3142(g)," to motions under § 3582(c)(1)(A)(i). Subsection (i) contains no such requirement. While we agree that a determination of *present* dangerousness is an appropriate consideration when deciding whether or not to reduce a prisoner's sentence, we do question whether § 3142(g), which governs pretrial release decisions, is the appropriate source of standards in this situation. For example, § 3142(g)(1) requires consideration of the nature and circumstances of the offense of conviction, "including whether the offense is a crime of violence or involves narcotic drug," and § 3142(g)(2) refers to "the weight of the evidence against the person." Neither of these sections is necessarily relevant to the question of present dangerousness, which may be many years after the original offense. It would be particularly inappropriate to infer present dangerousness from the mere fact that the underlying offense "involves narcotic drugs." Even § 3142(g)(3), which requires the court to consider of "the history and characteristics of the person," may not always be relevant to a finding of present dangerousness. It would seem preferable in this context to refer only to § 3142(g)(4), which requires consideration of "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." Applying the broader standard of dangerousness under § 3142(g)(1) through (3) may unfairly invite rejection of prisoner petitions at the administrative level on grounds that have no relevance to any danger the prisoner may currently present.

We also note what may simply be a drafting oversight – the Commission's reference to a singular "extraordinary and compelling reason" in proposed U.S.S.G. § 1B1.13(1)(A). We assume that the Commission did not mean to suggest that a court must rely upon a single reason that is both extraordinary and compelling, as opposed to a combination of such reasons. We therefore recommend that proposed § 1B.1.13(1)(A) be amended to state "reasons" in the plural, as in the statute.[12]

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[12] Alternatively, the Commission could adopt the language in the FAMM Proposal for Policy Guidance published in the Federal Sentencing Reporter in 2001:

> An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that

We now turn to the matter of criteria and examples of "extraordinary and compelling reasons" warranting sentence reduction. As a general matter, we do not believe that Congress intended this statute to apply only to medical cases, much less cases involving terminal illness. Rather, Congress intended a court to be able to respond affirmatively to a government motion for sentence reduction in a broad range of circumstances, both medical and non-medical. The language of § 3582(c)(1)(A)(i) suggests no specific limits on the government's ability to bring cases warranting sentence reduction to the court's attention, and the reference to "rehabilitation alone" in § 994(t) strongly suggests that Congress contemplated use of the statute in circumstances where rehabilitation would be a relevant reason to consider sentence reduction together with other factors.

The legislative history of the 1984 Sentencing Reform Act also indicates that § 3582(c)(1)(A)(i) was intended to be applied in circumstances other than those involving a prisoner's health. See S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 5 (statute available to deal with "the unusual case in which the defendant's circumstances are so changed, *such as* by terminal illness, that it would be inequitable to continue the confinement of the prisoner"); *id.* at 55 (changed circumstances warranting sentence reduction would include "cases of severe illness, [and] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence"). The use of terminal illness as one example ("such as") of an extraordinary and compelling reason in the first quoted passage, and the distinction drawn between "severe illness" and "other extraordinary and compelling circumstances" in the second, demonstrate that Congress clearly expected the statute to be available in circumstances other than those involving the prisoner's medical status.

While in practice the Bureau of Prisons (BOP) has thus far not invoked this statute except in cases of imminent death, its own regulations recognize that sentence reduction may be sought for both medical and non-medical reasons. *See* 28 C.F.R. § 571.61 (directing prisoner to describe plans upon release, including where he will live and how he will support himself and, "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment." *See also* 28 C.F.R. § 571.62 (a) through (c)(describing a process by which sentence reduction requests based on medical reasons are reviewed by the Medical Director, and non-medical cases are reviewed by the Assistant Director for Correctional Programs). Moreover, BOP's policy under the predecessor statute § 4205(g) was to invoke the statute "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," including "if there is an

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together make the rationale for a reduction extraordinary and compelling.

See Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rep. 188, 191 (2001).

extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." BOP Program Statement No. 5050.41 (October 5, 1983). In practice, BOP invoked § 4205(g) in cases involving a broad range of equitable circumstances. *See, e.g., United States v. Diaco*, 457 F. Supp. 371 (D.N.J. 1978)(federal prisoner's sentence reduced because of unwarranted disparity among codefendants); *United States v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(good behavior in prison). In the *Banks* case, the Director of the Bureau of Prisons noted that "Prior to the passage of the Parole Commission and Reorganization Act, applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result." 428 F. Supp. at 1089. *See also Diaco*, 457 F. Supp. at 372 (same).

It may be, as Vice Chairman Steer has suggested, that BOP's reluctance to invoke this statute more broadly and frequently stems from the absence of codified standards and policy guidance from this Commission, as well as from its conception of its own role in as that of turnkey. *See* John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences," 13 Fed. Sent. R. 154 (2001). If that is the case, it is all the more imperative for this Commission to step forward to give explicit policy guidance in this area, and to spell out the criteria and give examples so that the statute can begin to function as the "safety valve" that Congress intended it to be.

In developing specific criteria and examples, we cannot improve upon the thorough and thoughtful approach taken in the Families Against Mandatory Minimums (FAMM) Proposal for Policy Guidance, published as an Exhibit to Mary Price's article. *See* Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rep. 188, 191 (2001). Both the general criteria in FAMM's proposed § 1B1.13(b) and the more specific examples set forth in the proposed "application note," deserve the Commission's careful consideration. The criteria define "extraordinary and compelling reasons" to include a situation or condition 1) that was unknown to the court at sentencing; 2) that may have been known to the court but has changed significantly since sentencing; and 3) that the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited from considering. Examples include terminal illness, severely diminished physical capacity, deteriorating health as a result of aging, substantial assistance to the government, changes in the applicable law that have not been made retroactive, disparity among codefendants, and compelling family circumstances. Rehabilitation may be relevant and properly be taken into account in many of these situations, even though it cannot serve as the sole reason for sentence reduction. The FAMM proposal is appended to this letter.

In addition to the criteria and examples proposed by FAMM, we would suggest that the Commission consider the criteria for equitable reduction in sentence that the Department of Justice itself has identified in the United States Attorneys' Manual as grounds for recommending commutation of sentence to the President. Section 1-2.113 of the U.S.A.M. states that commutation may be recommended in cases involving

"disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g. cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action." The section goes on to say that "a combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case." Particularly in light of the original purpose of the sentence reduction authority when it was enacted in 1976 to provide a judicial alternative to clemency, it seems appropriate that the circumstances identified by the government as appropriate for clemency should also be appropriate in this situation.

Thank you in advance for considering our comments, and please let us know if we may be of further assistance to the Commission.

Sincerely,

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cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
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Commissioner Deborah J. Rhodes
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NORTHWESTERN SCHOOL of LAW
of LEWIS & CLARK
COLLEGE

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

10015 S.W. TERWILLIGER BLVD. PORTLAND, OREGON 97219-7799 PHONE: 503-768-6600 FAX: 503-768-6671

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.

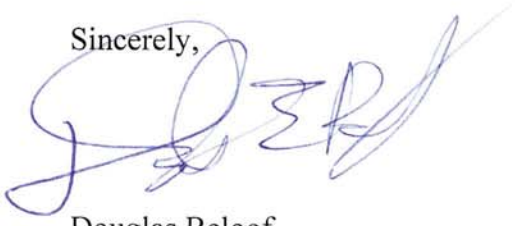
These steps would be in keeping with the trend in state courts to allow victims access to pre-sentence report information. The following is but a sample of state laws giving victims access to presentence reports. Alaska Rev. Stat. Sec. 12.55.023(a)(1)-(4)("If a victim requests, the prosecuting attorney 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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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

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.

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 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.

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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
Bar Association of San Francisco

(9930.08:23)

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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Archaeological Institute of America
Located at Boston University
656 Beacon Street
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www.archaeological.org

March 23, 2006

The Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Judge Hinojosa,

As President of the Archaeological Institute of America (AIA), I am writing to comment on the proposed amendments to Section 2B1.5 of the United States Sentencing Guidelines. The Archaeological Institute of America is the oldest and largest organization in the United States devoted to archaeology and the preservation of the human record. Founded in 1889 and chartered by an act of Congress in 1906, the AIA's 8,000 members include not only professional archaeologists and students but a majority of members from all walks of life united by a passion for archaeology and what it has to tell us about our shared human past. For over a century the AIA has cultivated the interests of and educated the American public about the past.

Of particular concern to both the professional and avocational members of the AIA is the preservation of archaeological sites, historic monuments and museum collections, which form the basis for our understanding and knowledge of the past. The AIA today leads the debate concerning the trade in illicit antiquities. It was one of the first organizations in the United States to call for adherence to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and to incorporate UNESCO principles into its Code of Ethics. The AIA has been instrumental in the enactment of United States cultural heritage legislation from the Antiquities Act of 1906 to the Convention on Cultural Property Implementation Act of 1983 and the Emergency Protection for Iraqi Cultural Antiquities Act of 2004.

The AIA submitted comments to the Sentencing Commission in support of the original Cultural Heritage Resource Crimes Sentencing Guideline when it was proposed in 2002. Today I write in support of the new proposed amendment, which would refer a new offense, created under the Veterans' Memorial Recognition and Preservation Act of 2003, 18 U.S.C. § 1369, to § 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources). The AIA supports the addition of Veterans' Memorials to the list of culturally significant places in § 2B1.5(b)(2). The proposed amendment also raises the question of whether the enhancement for damage or destruction to a Veterans' Memorial should be raised to four or six levels instead of the current two-level enhancement provided under § 2B1.5(b)(2). The AIA strongly supports an increase in the amount of enhancement to four or six levels for all the offense characteristics listed in §

2B1.5(b)(2) (offenses involving specially protected places) and § 2B1.5(b)(3) (offenses involving specially protected cultural items). This type of uniform increase in the enhancement will send an even clearer message to those who loot, deface or destroy cultural sites and monuments that the United States government is serious about protecting our cultural heritage for future generations of Americans. However, the AIA does not support an increase in the enhancement level if it applies only to Veterans' Memorials, but only if it applies to all the special offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3).

Particularly with respect to the characteristics listed in § 2B1.5(b)(2), there seems to be no policy justification for treating one type of protected location differently from other types of protected locations. For example, § 2B1.5(b)(2) currently lists museums and sites listed on the World Heritage List. There is no apparent reason to subject an offense involving any of these different locations to different levels of punishment. The AIA has a particular interest in the sentence to be given to those involved in the trafficking of cultural items stolen from museums located both in the United States and in other countries. For example, the looting of the Iraq Museum in Baghdad in April 2003 and the world's reaction to that event illustrate the deep concern of the American public as well as that of museum professionals and archaeologists for the losses suffered from these types of thefts. The AIA feels strongly that all these types of cultural losses should be treated equally under the Cultural Heritage Resource Crimes Sentencing Guideline and none should be subjected to disparate or inconsistent treatment.

Congress has demarcated all of the cultural places and types of cultural resources listed in the special offense characteristics in § 2B1.5(b)(2) and § 2B1.5(b)(3) for heightened protection through specific statutory treatment. Therefore, the Sentencing Guidelines should also treat them in a uniform and consistent manner, particularly as one of the goals of the Sentencing Guidelines is to achieve consistency in the punishments given to similar crimes. In the past, when the sentence was determined primarily by market value, defendants involved in the trafficking of looted and stolen archaeological artifacts might receive a different sentence depending on whether the artifact involved was a Classical sculpture from Italy, a ceramic vessel from Peru or a Native American artifact from the Southwest, even though the cultural harm inflicted was comparable. The AIA would not want to see this type of inconsistency reintroduced to the Cultural Heritage Resource Crimes Sentencing Guideline through the proposed amendment. As the AIA commented in its 2002 letter to the Sentencing Commission, "the places and types of objects included have all been recognized by federal law, international agencies, or international conventions as having particular value to the cultural history of humankind."

An increase in the offense level enhancements will raise again the issue of the statutorily imposed maximum sentences contained in the Archaeological Resources Protection Act (ARPA), the Native American Graves Protection and Repatriation Act and the Theft from Indian Tribal Organizations act. This issue was addressed in the Sentencing Commission's statement on Reason for Amendment and in a letter from the former Chair of the Sentencing Commission, Judge Diana Murphy, to Congress at the time the Cultural Heritage Resource Crimes Sentencing Guideline was submitted to Congress in 2002. These statutory maxima can prevent imposition of the full sentence permitted under the Sentencing Guideline and therefore help to defeat the goals of the Guideline to achieve more meaningful punishment of cultural heritage resource crimes.

Archaeological Institute of America
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The AIA has a particular interest in the sentence that can be imposed for violation of ARPA. While the primary goal of ARPA is the protection of archaeological sites located on federally owned and controlled lands, the trafficking provision of ARPA also pertains to archaeological resources that are stolen in other countries and brought to the United States. This section of ARPA has been applied, for example, to prosecutions involving manuscripts stolen from the Vatican library, ancient Etruscan ceramics looted from archaeological sites in Italy, and ancient Inca and Huari ceramics and textiles looted from Peru. The statutory maximum, however, can limit unreasonably the sentence that can be given in similar cases that may be prosecuted in the future. The AIA therefore urges you to suggest again to Congress that it take up the issue of changing the statutory maximum sentences provided in ARPA and the other affected legislation.

I thank you for this opportunity to provide comments on the proposed changes in the Sentencing Guideline for Cultural Heritage Resource Crimes. If any additional explanation or comments are requested, please feel free to contact me.

Sincerely,

Jane C. Waldbaum
President, Archaeological Institute of America
jcw@uwm.edu

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.

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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."

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
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March 24, 2006

The Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Judge Hinojosa,

I am submitting this letter on behalf of the Lawyers' Committee for Cultural Heritage Preservation commenting on the proposed amendments to Section 2B1.5 of the United States Sentencing Guidelines. The Lawyers' Committee for Cultural Heritage Preservation (http://www.culturalheritagelaw.org) is an association of lawyers who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy.

The proposed amendment would refer a new offense, created under the Veterans' Memorial Recognition and Preservation Act of 2003, 18 U.S.C. § 1369, to § 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources) of the Sentencing Guidelines. The Lawyers' Committee supports the addition of Veterans' Memorials to the list of culturally significant places. The current guideline provides as one of its specific offense characteristics that if the offense involves property damage to one of the protected places, the base offense level will be enhanced by two levels.

The proposed amendment also raises the question of whether the enhancement for damage or destruction to a Veterans' Memorial should be raised to four or six levels. The Lawyers' Committee supports this increase in the enhancement but only if the increase applies to all the special offense characteristics listed in § 2B1.5(b)(2) (offenses involving specially protected places) and § 2B1.5(b)(3) (offenses involving specially protected cultural items). Particularly with respect to the characteristics listed in § 2B1.5(b)(2), there seems to be no policy justification for treating one type of protected location differently from other types of protected locations. For example, § 2B1.5(b)(2) currently lists national monuments, national memorials and national cemeteries, as well as the national park system, National Historic Landmarks, national marine sanctuaries, museums, and sites listed on the World Heritage List. There is no apparent reason to subject an offense involving any of these different locations to different levels of punishment. By the same reasoning, offenses involving human remains (listed in § 2B1.5(b)(3)) should be subject to the same punishment as offenses involving cemeteries and memorials.

What unites all of the special offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) is that Congress has singled out all of these culturally significant places and types of cultural resources for special treatment. This is reiterated in the Reason for Amendment given by the Sentencing Commission at the time that § 2B1.5 was adopted:

> The first two of these enhancements, at subsections (b)(2) and (b)(3), relate to whether the offense involves a place or resource that Congress has designated for special protection. A two level enhancement attaches if the offense involves a resource from one of eight locations specifically designated by Congress for historic commemoration, resource preservation, or public education. ... An additional two level enhancement attaches to offense conduct that involves any of a number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law.

The Lawyers' Committee strongly believes therefore that all of the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) should be treated in a uniform and consistent manner. Only uniform treatment is justified under the Sentencing Commission's own original rationale for the enactment of these sections of the Sentencing Guideline. Establishing an unfortunate precedent for non-uniform treatment may create misunderstanding of the purpose and application of the Guideline. One of the central accomplishments of the Cultural Heritage Resource Crimes Sentencing Guideline is its capacity to achieve uniformity in sentencing because the sentencing provisions are based primarily on the cultural significance of the resource involved without regard for extraneous factors such as whether the resource was found within the United States or in another country and whether the resource has a relatively high or low commercial value.

At the same time, the Lawyers' Committee strongly supports an increase in the amount of enhancement to four or, even preferably, six levels for all the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3). This type of uniform increase in the enhancement will send an even clearer message to those who loot, deface or destroy cultural sites and monuments that the United States government is serious about protecting our cultural heritage for future generations of Americans.

Any increase in the offense level enhancements will make even more urgent a point made in the Sentencing Commission's statement on Reason for Amendment and in a letter from the former Chair of the Sentencing Commission, Judge Diana Murphy, to Congress—that the statutory maxima established under three of the relevant statutes, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and the Theft from Indian Tribal Organizations Act, prevent full implementation of the Cultural Heritage Resource Crimes Sentencing Guideline. The Sentencing Commission previously pointed out that "full implementation of this new guideline for the most serious offenders often will be limited in its application because of the extremely low statutory maxima of some of the potentially applicable statutes, such as the criminal provisions of ARPA, NAGPRA, and 18 U.S.C. § 1163 (covering theft of tribal property)." These statutes have either a one or two year statutory maximum term of imprisonment for the first offense and a statutory maximum term of five years for second and subsequent offenses. At the time the Commission submitted the Guideline to Congress it recommended that Congress raise the statutory maximum terms of imprisonment for these offenses.

In her letter to Senators Leahy and Hatch, Judge Murphy gave several examples where an individual who violates one or more of these statutes would not receive the sentence allowable under the Guidelines because of the statutory maxima. In order to achieve uniformity in sentencing and to accomplish the goal of greater enforcement of these statutes that protect our cultural heritage, Judge Murphy urged Congress to change these statutory maxima to ten years, consistent with other general property crimes and the Theft of Major Artwork statute, 18 U.S.C. § 668. The Lawyers' Committee strongly urges you to send a similar letter to Senators Specter and Leahy this year suggesting that the Judiciary Committee consider increasing the statutory maxima for ARPA, NAGPRA and the Theft from Tribal Organizations Act so that judges can give the sentences provided for under the Sentencing Guideline.

I thank you for this opportunity to provide comments on the proposed changes in the Sentencing Guideline for Cultural Heritage Resource Crimes. If any additional explanation or comments are requested, please feel free to contact me.

Sincerely,

Patty Gerstenblith
Professor
President, Lawyers' Committee for
Cultural Heritage Preservation

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March 27, 2006

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Re: The 2004 Amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines

Dear Sir or Madam:

I am pleased to enclose the report of our Association's Task Force on Attorney-Client Privilege, commenting on the 2004 amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines. This report was approved unanimously by our Association's Executive Committee earlier today, and represents the position of the New York State Bar Association. As set forth in the report, we urge that the 2004 amendment language be eliminated and replaced with an express statement that waiver of the attorney-client privilege and work-product protection is not to be considered in evaluating the level of cooperation and culpability score.

The attorney-client privilege is one of the most fundamental and sacred principles of our legal system. We believe that the 2004 amendment undermines the attorney-client privilege and thus undermines clients' confidence in the confidentiality of attorney-client communications, affects the quality and candor of communications, and adversely affects the ability of counsel to provide clients with effective representation. Given the potential of significant increases in penalties in the absence of waiver, there is tremendous pressure on corporations to waive a privilege that, for centuries, has been recognized as serving the public interest.

I commend this report to you for your review and consideration. If our Association can provide additional information or comment on this issue, please do not hesitate to contact me.

Very truly yours,

A. Vincent Buzard

A. Vincent Buzard

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Report of
Task Force on Attorney-Client Privilege

March 27, 2006

The Task Force on Attorney-Client Privilege of the New York State Bar Association, joined by the Business Law Section of the Association, welcomes the opportunity to respond to the request by the United States Sentencing Commission (the 'Commission") for comments on the 2004 amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines (the "Guidelines").[1] This amendment stated that waiver by a corporation of its attorney-client privilege and work product protections (hereinafter jointly referred to as the "Privilege") can be considered in determining whether a corporation qualifies for a reduction in its sentence under the Guidelines.[2]

Summary of Issue and Conclusion

The amended Commentary authorizes and encourages the government to require entities to waive the Privilege and, by its express appearance in the Guidelines, has contributed to the pressure on entities to waive the Privilege. As a result, in the experience of the members of the Task Force, waiver has become the rule, not the exception. Many attorneys have come to believe that it is necessary for their clients to offer to waive the Privilege in the hope of obtaining credit for cooperation, even when waiver has not been requested, and there have been many situations where corporate clients have felt compelled to waive the Privilege, before even being asked, lest they be viewed as less than fully cooperative and less than fully interested in having the truth revealed.

We believe that this has, and will have, the effect of undermining the confidence of clients in the confidentiality of their communications with their attorneys, will have a "chilling effect" upon

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[1] The Task Force on Attorney-Client Privilege was appointed by President Vincent Buzard of the New York State Bar Association to examine and make recommendations concerning the practice of state and federal prosecutors, regulators and agencies of requesting that corporations waive their attorney-client privilege and the protection of the work product rule in various circumstances, including plea agreements, deferred prosecution agreements, decisions as to whether to commence enforcement proceedings, and sentencing. The Task Force consists of fifteen members from private practice, the government, self-regulatory organizations, and law school faculty, including two former United States Attorneys for the Eastern District of New York, three former Assistant United States Attorneys for the Southern and Eastern Districts of New York, a former SEC Division of Enforcement Branch Chief, an attorney for the New York Stock Exchange, a professor of Law at Fordham Law School and well known and highly distinguished criminal and civil defense counsel.

The Business Law Section is comprised of members of the New York Bar whose practices focus in the fields of securities regulation, corporation law, finance, banking, and commercial law. The Section includes lawyers in private practice, in-house counsel of corporate legal departments, law school faculty, and self-regulatory agencies.

[2] The views set forth in these comments are those of the New York State Bar Association, the Task Force and Business Law Section and do not necessarily reflect the views of the organizations with which its members are associated.

the quality and candor of those communications, and will compromise the ability of counsel to provide effective representation of their clients.

We urge the Commission to remove the amended Commentary and, instead, to include an express statement in the Commentary that waivers of the attorney-client privilege and work product rule are not to be considered in evaluating the level of cooperation of a defendant or in determining the appropriate sentence under the Guidelines.[3] We recognize that there may be rare instances in which prosecutors may need to request that a corporation waive the Privilege as part of an investigation; removal of the Privilege waiver language from the Commentary will not deprive prosecutors of that option.

Introduction

The first formal written suggestion that a corporation seeking to avoid criminal prosecution and demonstrate cooperation waive the attorney-client privilege and work product protections arose in a June 1999 Department of Justice memorandum prepared by Deputy Attorney General Eric H. Holder, Jr. That document, entitled "Bringing Criminal Charges against Corporations", outlined the factors for a prosecutor to consider in charging a target corporation. One such factor was the target's degree of cooperation in the criminal investigation. In gauging the extent of cooperation, the prosecutor was to consider the corporation's willingness to identify the culprits, to make witnesses available, to disclose the results of its internal investigation, and to waive the attorney-client privilege and work product protection.

In discussing the reasons for seeking waiver, the Holder Memorandum noted the advantages of obtaining the results of the corporation's internal investigation and communications between specific employees and counsel. This permits the government to obtain witness statements without having to negotiate individual cooperation or immunity agreements. In addition, it enables the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.

On its heels in October 2001 was the Securities and Exchange Commission 21(a) Report entitled the "Statement on the Relationship of Cooperation to Agency Enforcement Decisions" (the so-called "Seaboard Report"). In the Seaboard Report, the SEC announced that no action was being taken against a corporation for fraudulent activities by a former controller of a subsidiary. In making this determination, the SEC stated that the corporation cooperated in the SEC's investigation and did not assert the applicable attorney-client privilege and work product protection. The Report sets forth a number of criteria that the SEC will consider in determining whether and how much to credit cooperation, including the following: "Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered?" By so stating, the SEC was, in our view, encouraging companies to consider not asserting, or waiving, privileges they otherwise might have, even when not requested by the SEC staff.

In 2003, Deputy Attorney General Larry D. Thompson issued a Memorandum to the heads of Department Components and United States Attorneys. Mr. Thompson reiterated the statements from

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[3] Two members of the Task Force, Loretta E. Lynch, Esq. and Jean T. Walsh, Esq., dissent from the recommendation that the Commentary contain an express statement that waivers of the Privilege not be considered.

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