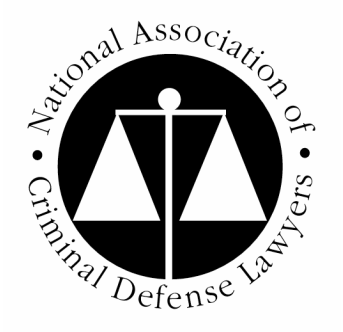

Testimony of Henry W. Asbill
On behalf of
The National Association of Criminal Defense Lawyers

UNITED STATES SENTENCING COMMISSION
NOVEMBER 15, 2005
3 P.M.
PROPOSED AMENDMENT OF COMMENTARY IN SECTION 8C2.5 OF THE FEDERAL SENTENCING GUIDELINES REGARDING WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

Good afternoon. My name is Hank Asbill, and I am a partner in the law firm of Cozen O'Connor. I have practiced criminal defense law for 31 years, and I am currently the co-chair of Cozen O'Connor's White Collar Defense and Complex Criminal Defense Practice Group. I have been asked to provide you with the views of the National Association of Criminal Defense Lawyers, a nearly 50-year-old organization of more than 13,000 criminal defense lawyers throughout the country.

I am very pleased to have the opportunity today to address the issue of whether waiver of the attorney-client privilege should be relevant to determining "cooperation" within the meaning of the Organizational Guidelines. As you know, on August 15, 2005, NACDL joined in the written comments of several other business and bar associations that all support the Commission's proposal to re-examine its new "waiver" amendment to the Guidelines. In my comments to you today, I will review some of the reasons that we think that this amendment is extremely harmful to the attorney-client relationship and should be altered or repealed. NACDL also believes, however, that it is worthwhile at this juncture also to review the reasons that we are back here today, in front of the Commission, a scant year after the amendment in question became effective.

First, many of us here today did submit testimony to the Commission during the 2004 amendment cycle; some of us—among us, the business groups who represent the biggest stakeholders in the corporate attorney-client privilege—did not. We believe that this amendment, which strikes at the heart of how highly we value the attorney-client

privilege in our adversarial system, must be afforded every opportunity for analysis and debate.

Second, as the Ad Hoc Committee and the Commissioners noted during the 2004 amendment cycle, the very decision to include the waiver of the attorney-client privilege in the Guidelines itself implicates extremely important policy issues. It is NACDL's belief that some of these issues may not have received the attention that they deserved at the time of the original amendment because the Committee and the Commissioners were also considering a large and novel package of Guidelines amendments in response to Sarbanes-Oxley. Just some of the issues that NACDL urges the Commission to consider anew are: that allowing for ***any*** waiver in meting out sentences will diminish the value of the attorney-client privilege in general; the impact that "codifying" a broad allowance for waiver in the Guidelines has on the current policy of the Department of Justice and the Securities and Exchange Commission[1]; the affect that such a policy has on business organizations' compliance programs; and the affect that such a policy has on individual corporate employees.

Third, more complete data has become available that indicates how aggressively the federal government is now pursuing the waiver of the corporate attorney-client privilege. We are aware that at the time of the 2004 amendment cycle, the Department of Justice had conducted its own study indicating that waiver requests were rarely made—and that, for instance, the office of the United States Attorney for the Southern District of New York had only requested that a corporation waive its attorney-client privilege four times in a 12-month period. Without commenting on whether this was an accurate result at the time, it is the experience of our members that this result would not reflect today's reality. This year, NACDL and the Association of Corporate Counsel conducted a survey of 800 inside and outside counsel.[2] Eighty-five percent of

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[1] *See* Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Jun. 6, 2005). This memorandum revised the earlier "Holder Memorandum," although the changes were relatively minor. Memorandum from Eric Holder to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (Jun. 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (last visited Jun. 6, 2005).

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[2] In March 2005, NACDL emailed this survey (on two separate occasions) to all of its 12,000 members, not all of whom are white-collar defense practitioners. The survey was open for approximately three weeks and 365 outside counsel responded. Results were tabulated as of April 8, 2005.

The survey had two parts: the first part included 21 questions primarily seeking responses in multiple choice or yes/no question format; the second part consisted of 10 open-ended questions seeking text responses to inquiries about investigations, audits, and generally, circumstances in which waiver is requested or demanded. Respondents were given the option of completing both parts or submitting their responses following completion of Part 1. Of the 365 responses received, approximately 13 percent of respondents chose to complete the "essay" questions in Part 2.

At the same time, the Association of Corporate Counsel—who deserve the credit for initiating this survey and authoring the template for it—offered the same survey reworded for a different audience—in-house counsel. Those results can be found at http://www.acca.com/feature.php?fid=670.

respondents who are outside counsel for corporations and corporate employees said that waiver had been suggested, pushed for, or demanded in a recent case. More than 96 percent of outside corporate counsel reported that an unpredictable and inconsistent corporate privilege would have a chilling affect on the flow and candor of information to corporate counsel. Similarly, more than 96 percent of outside counsel agreed that a weakened privilege hinders a company's ability to enforce and improve its internal compliance systems.

When NACDL's respondents were asked to provide text answers to questions about waiver, the following information surfaced: An overwhelming number of respondents—approximately 85 percent—reported that DOJ and the SEC frequently require "discussions" of waiver as part of "settlement" negotiations—in other words, in deciding whether to charge a company, accept a plea, or settle civilly. Lawyers reported: (1) that the results of internal investigations are routinely demanded; (2) that individuals are less forthcoming as a result; (3) that indemnification for legal bills and joint defense agreements are a thing of the past; and (4) that the climate is such that waiver is often offered before it is requested—at the cost of individual employees.

Only a uniform, predictable, non-discretionary federal policy that reflects the centuries-old understanding of the role of the attorney-client privilege can reverse these harmful collateral consequences. Currently, the Commentary to Section 8C2.5 of the Guidelines states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government] … *unless* such a waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" (emphasis added). NACDL agrees with the ABA's position that this exception swallows the rule. "Prosecutors will make routine requests for waivers, and organizations will be forced routinely to grant them, because, among other things, there is no obvious mechanism for challenging the government's assertion that waiver is 'necessary.'"[3] As the Supreme Court observed unequivocally in *United States v. Upjohn*, 449 U.S. 383, 393 (1981), "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

More instrumentally, as one respondent to the NACDL survey stated eloquently:

These surveys involved the largest number of respondents of any survey on attorney-client privilege, including the Department of Justice's survey. However, NACDL would welcome the opportunity to partner with any organization or government entity to obtain more scientific results. In the meantime, NACDL believes that its survey results are the most accurate to date, since data reflects requests for waiver that are formally presented and reported.

[3] Statement of the American Bar Association Concerning the Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines Regarding Waiver of Attorney-Client Privilege, November 15, 2005, at 4.

> In today's world, most non-employment issues trigger at least the consideration of outside counsel. … [In the course of an investigation], employees need some basic protection in order to feel comfortable and for the corporation to have a right to expect cooperation by the employee. Today's world [in which the attorney-client privilege is under attack] leaves these employees twisting in the wind. Ultimately, corporations and corporate America will be harmed by this uncertainty and the unnecessary risks being imposed on corporate management. The nation's best and brightest will eventually stay out of public companies if this trend isn't halted or even reversed.

NACDL recommends that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent *non-privileged* information known to the organization"; (2) delete the existing Commentary language "unless such waiver is necessary …"; and (3) make the wording changes in the Commentary that are recommended by the American Bar Association.

Below, we emphasize some of the ways in which the current "waiver climate" jeopardizes employees, in particular.

(1) The Hobson's choice an employee must make in deciding whether to talk to lawyers dangerously erodes the adversarial system. The ramifications for an employee who refuses to talk, on Fifth Amendment grounds or otherwise, to lawyers performing an internal investigation are extraordinarily severe. Increasingly, companies do not hesitate to fire individual employees who refuse to "cooperate." (This is in keeping with the blunt statement that Timothy Coleman, Counsel to the Deputy Attorney General, made during a panel at the American Bar Association's White Collar Institute in Henderson, Nevada on March 3, 2005: "Corporate employees have no right not to talk to internal investigators.") This has been the case recently at both KPMG LLP and American International Group, Inc. (AIG).[4]

In addition, un-insured officers and employees are unlikely to have their defense costs paid if there is even a hint that they are potential targets of the investigation; at the same time many companies will categorically refuse to pay defense costs of employees who are seen as non-cooperating.[5] In fact, the Thompson Memo

[4] *See* Laurie P. Cohen, "Prosecutors Tough new Tactics Turn Firms Against Employees," *Wall Street Journal*, June 4, 2004, at A1; Theo Francis and Ian McDonald, "AIG Fires Two Top Executives As Probe Intensifies," *Wall Street Journal*, March 22, 2005, at A1.

[5] According to an article in the Wall Street Journal, "KPMG … is refusing to pay the legal costs [of 32 employees who were subjects of a grand jury investigation] unless the partners and employees talk to prosecutors. KMPG believes it is expected to impose such a condition to be regarded by investigators as fully cooperating … . KPMG also is eschewing another traditional practice: joint defense agreements, in which a business under investigation shares information with employees who are also a focus. … Going still further, KPMG has agreed to tell prosecutors which documents the employees and partners are requesting to use in their own defense, say lawyers for some of them. Indeed, KPMG is taking the position that it must give copies of these documents to prosecutors at the same time as it provides them to the

explicitly *discourages* corporations from advancing defense costs to employees in connection with an investigation and related proceedings.[6] In the view and experience of NACDL's members, the result is that employees feel compelled to talk, but are understandably terrified at the prospect of full disclosure. This is, in effect, compelled self-incrimination. As one defense lawyer recently wrote, "Essentially, they [employers and government officials] are demanding a waiver of the employee's Fifth Amendment rights as a condition of continued employment. In an interesting contrast, the Supreme Court has found that the government itself cannot make such a demand on its own employees" (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)).[7]

In one recent case that may foreshadow a new frontier in criminal prosecution, employees of a company under criminal investigation were charged with fraud and causing false statements to be made *because of false material that they allegedly provided to lawyers conducting an internal investigation, and the privilege was later waived as to the entire investigation.*[8] In short, employees can be criminally sanctioned for refusing to talk to internal investigators when it is clear, in the current climate, that the fruits of such conversations will be turned over to the government, and yet they cannot assert their Fifth Amendment rights without risking termination or financial ruination. We respectfully submit that in such instances, the erosion of the attorney-client privilege has resulted in the emasculation of the adversary system for individual corporate employees.

In fact, a company's own lawyers have now become so closely identified with the government that, when company lawyers interview employees about nearly any issue—big or small—they usually give what is sadly known as a "corporate Miranda warning." The company's lawyer has to tell the employee that the lawyer represents the company, not the employee, and that any statement made by the employee could be turned over to the government. For most regular people, this is extremely confusing, and likely to result in mistaken assumptions about the confidentiality of the conversation. Just this summer, the Fourth Circuit ruled that a lengthy corporate Miranda warning that contained the words "we, the company's lawyers, *can* represent you," as opposed to "we *do* represent you,"

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individuals' defense attorneys. This gives prosecutors a blueprint to the individuals' defense strategies, many attorneys complain." *See* Cohen, *supra* note 6.

[6] Thompson Memo at 8.

[7] N. Richard Janis, "Taking the Stand: Deputizing Corporate Counsel As Agents of the Federal Government," *Washington Lawyer*, March 2005.

[8] *See* Department of Justice, Press Release, "Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges," Sept. 22, 2004 (In February 2002, Computer Associates retained a law firm to represent it in connection with the government investigations. Shortly after being retained, the company's law firm met with [CA executives] … During these meetings, the defendants and others allegedly failed to disclose, falsely denied and concealed the existence of [the allegedly fraudulent accounting practice]. The indictment alleges that [the CA executives] knew, and in fact intended, that the company's law firm would present these false justifications to the U.S. Attorney's Office, the SEC and the FBI in an attempt to [cover up the practice]."

was sufficiently clear that the employee should have known that the privilege was his employer's, and not his own. [9]

(2) Individuals cannot obtain documents that are necessary to their defense. At the same time that corporations have been faced with a do-or-die choice regarding waiving their attorney-client privilege, federal enforcement officials have stated in words and in deeds that joint-defense agreements, and the common-interest privilege, are a thing of the past. The Thompson Memo explicitly discourages cooperation between a corporation and its employees.[10] In the experience of our members, this results in a one-way flow of documents and testimony: from the employees, to the corporation, and inevitably to the government.[11] This gives the government a blueprint of an individual's strategy without allowing the individual the ability to obtain the documents he or she needs to prepare a defense.

(3) Individuals cannot communicate candidly and effectively with in-house counsel in order to prevent compliance problems. The results of the Association of Corporate Counsel's survey of in-house lawyers confirm that senior and mid-level employees rely heavily on the attorney-client privilege in communicating with in-house counsel. Effective compliance systems promote rapid identification and reporting-up of events and circumstances that may give rise to legal liability. It is difficult to persuade officers and line employees alike to be forthcoming and frank about potential problems or misfeasance. The attorney-client privilege insures that all employees are able to provide all the relevant information about a potential problem, before it happens or escalates, to the company's legal advisors. It prevents non-lawyer personnel from trying to "guess" what a lawyer would advise.[12]

In particular, the Thompson Memorandum places great emphasis on the need for voluntary cooperation by corporations wishing to avoid indictment. Rather than making the effectiveness of a corporation's compliance program a critical factor in deciding whether to charge a company with a criminal violation, the Memo elevates "voluntary disclosure" as especially important. Regarding corporate compliance, the Memo warns, "The existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees or agents."[13] By contrast, the Memo spells out a number of ways that the assertion of the privilege or work-

[9] I was involved in this case. *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005).
[10] Thompson Memo at 8.
[11] *See*, *e.g.*, Statement of Robert Morvillo, ABA White Collar Crime Institute, Henderson, Nevada, March 3, 2005 (explaining that even when he drafts joint defense agreements, they provide for document sharing from the employee to the corporation but not vice-versa).
[12] As the trial of former HealthSouth CEO Richard Scrushy and former WorldCom CEO Bernard Ebbers have shown, it is extremely difficult to determine who reported what to whom regarding alleged contemporaneous wrongdoing. *See*, *e.g.*, Dan Morse, "Fifth Finance Chief Adds To Pressure on Scrushy," *The Wall Street Journal*, March 22, 2005, at C4.
[13] Thompson Memo at 9-10.

product protection can be viewed as non-cooperation: for example, "overly broad assertions of corporate representation of employees or former employees"; "incomplete or delayed production of records"; failure to promptly disclose illegal conduct known to the corporation."[14] This emphasis on transparency *at the expense of compliance* disserves the public interest in reducing the incidence of corporate crime.

The emphasis on "transparency" also redounds to the detriment of individual employees who are less likely to make disclosures to prevent violations, and therefore are more likely to face criminal charges in the future. Regardless of whether this is a rational decision in terms of risk, the testimony before this panel unanimously confirms that this is the case. Individuals are more afraid of the *certain* risks of disclosure than of the *uncertain* risks of non-disclosure; to wit, if they do not disclose, they might not get caught. If they do disclose, they will certainly pay for their decision.

(4) Employees cannot be candid with outside counsel conducting internal investigations: NACDL members reported that they believe that 88 percent of senior-level employees rely on the privilege when they are interviewed in the course of an internal investigation—especially when potential criminal behavior is implicated; similarly, they answered that 61 percent of mid-and lower-level employees rely on the privilege. More than 95 percent agreed that the erosion of the privilege has diminished the flow and candor of information from the employees of their clients. One respondent answered bluntly: "Individuals are not willing to be forthcoming in internal investigations, even if they have nothing to hide for fear of waiver of privilege and revelation to the government." The problem has become so acute that companies are often willing to put waiver on the table before it is requested: a respondent said, "In one instance, an executive demanded that the privilege be waived and the results of a privileged analysis be disclosed to the government even without the demand because he believed that the current climate requires such 'openness' in order to be taken seriously in any discussion with the government."

Conclusion

Only an attorney-client privilege that is consistently respected can serve all of the instrumental and prudential goals that are inherent in our adversarial system of criminal justice. In addition, a privilege whose validity relies on case-by-case determinations of individual prosecutors undermines the very goals of good corporate governance that the Guidelines seek to protect. For all of the reasons set forth above, the Organizational Guidelines should be amended to reflect the fact that the privilege is not a luxury afforded by the government, but a critical protection that can only breached in the most exigent of circumstances—circumstances that are determined by well-recognized, court-made exceptions, not prosecutors alone.

[14] *Id.* at 7-8.