

**TESTIMONY OF STANTON D. ANDERSON,
SENIOR COUNSEL TO THE PRESIDENT AND CHIEF EXECUTIVE OFFICER,
U.S. CHAMBER OF COMMERCE,
TO THE U.S. SENTENCING COMMISSION**

Thank you for inviting me to speak today on behalf of the three million businesses that are members of the U.S. Chamber of Commerce. The attorney-client privilege is threatened as never before – and not because of a change in the common law or because of a new statute enacted by Congress. The threat comes from unprecedented burdens on the privilege, imposed unilaterally by prosecutors, that are chilling attorney-client interaction in companies throughout the nation.

This Commission is to be applauded for being the first disinterested governmental decision-maker to consider the issue. We regret that we did not participate actively in your proceedings regarding this issue last year, and we very much appreciate your willingness to hold this hearing to supplement the record on this extremely important topic.

No one supports the detection and punishment of corporate wrongdoing more than honest businesspeople. Bad actors tarnish the entire business community in the eyes of the public, and often inflict as much or more economic harm on other companies as they do on consumers or investors. I am not here to protect wrongdoers – they should be punished to the full extent of the law. I am here because the attacks on the attorney-client privilege hurt legitimate businesses.

I want to make two basic points today. First, no one should believe a company's decision to waive the attorney-client privilege in the current environment is voluntary. The practical effect of current policies is to force companies to waive the privilege any time that prosecutors

request it. We are dealing here with government-compelled waivers of one of our legal system's most fundamental protections.

Second, this policy of compelled waivers does not enhance compliance with the law. By making officers and employees reluctant to involve lawyers in ongoing business activities, it increases the risk that those officers and employees will inadvertently violate the law. The policy also hobbles internal corporate investigations, preventing companies from detecting and correcting illegal activity. Finally, because the courts have held that a privilege waiver in favor of the government also exposes attorney-client communications to private plaintiffs, the policy can impose huge financial burdens on innocent shareholders by forcing companies to pay exorbitant settlements in private litigation.

The starting point for this issue was the Department of Justice's 1999 "Holder Memo" which states that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness . . . to waive the attorney-client and work product privileges." Although the memo does not expressly require a waiver, its inevitable practical effect is to compel one.

Similarly, I recognize that the language that you added last year to the commentary to Section 8C2.5 does not explicitly *require* companies to surrender the privilege and in fact it was meant to limit compelled waiver. But any time that a company's attorneys have gathered information regarding a potential violation, and prosecutors do not have the very same information, prosecutors may be able to assert that a privilege waiver would lead to "timely and thorough disclosure."

In today's environment, companies will suffer tremendous harm – to their brand; to their banking, supplier, and customer relationships; to the value of shareholders' investments; and to their very ability to survive – if they are described as “not cooperating” with a government investigation. For the same reasons, ending investigations as quickly as possible is a business imperative. Declining the government's waiver requests therefore simply is not an option for the vast majority of American businesses today. The real-world effect of the DoJ policies and the language in your commentary is to force companies to waive the privilege.

I know that representatives of the Justice Department argue that they are not requesting privilege waivers on a large scale; they say that in most cases the companies volunteer a waiver. But these companies are only volunteering because they know that doing so gets cooperation points under the Department's policy, and cooperation is essential to their survival.

Waivers are not needed to give prosecutors access to attorney-client discussions where the attorney aided the client in committing a crime. The crime-fraud exception eliminates the privilege in those circumstances. By definition, therefore, the waivers are being used to obtain access to legitimate attorney-client conversations. That intrusion on the privilege imposes a very high price on honest businesses and on our entire legal system.

- First, for the truth to emerge and justice to be served, adversaries must meet on equal footing. This new system creates tremendous inequality. The government decides what companies to investigate. It decides that the company cannot keep its discussions privileged. And it decides what charges to bring. The practical business realities that I've already discussed often prevent the company from going to trial or otherwise

challenging the government's decisions. That is not a system that most Americans would recognize as anything close to fair and just.

- Second, compelled waivers actually diminish compliance with the law. The statutes and regulations governing corporate activities are complicated; business people need legal advice to comply with the law. As the Supreme Court observed in upholding the privilege in the *Upjohn* case, “the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all.” 449 U.S. at 393. Because privilege waivers are becoming commonplace, company employees no can longer “predict with some degree of certainty” that the conversations will be protected – as a result, they do not consult lawyers as frequently as they did in the past. The practical effect of this process is to defeat the key law enforcement goal of *encouraging* compliance with the law.
- Third, compelled waivers also make it more difficult for company lawyers to conduct effective internal investigations. When employees suspect that anything they say can and will be used against them, they won't say anything at all. That means neither the company nor the government will be able to find out what went wrong, punish the wrongdoers, and correct the company's compliance systems.
- Finally, the coerced waiver policy also can have a serious effect on companies' bottom lines. Plaintiffs' lawyers closely monitor the companies the government is investigating. When those companies waive their privilege, the plaintiffs' lawyers demand access to the same materials, use them against the company in tort suits, and obtain massive settlements. After all, lawyers' notes taken out of context can be extremely useful in

prejudicing a jury. Companies that waive privilege in hopes of staving off the massive blow of a criminal indictment might find themselves equally hobbled by private lawsuits.

This Commission cannot fix all of these problems. But you can have a very important impact on this debate. As I said at the beginning of my testimony, you are the first unbiased decision-maker to address the issue. Please continue to exercise that independence and decline to join with those who are placing unfair burdens on the privilege, especially in the absence of any congressional or judicial authority for that approach. We request that you strengthen the language that you added to the commentary last year by prohibiting any consideration of privilege waivers in the sentencing process. That will leave intact the crime-fraud exception and the long-standing proffer process which allow access to privileged information when necessary for law enforcement purposes, and prevent the significant harm that is now occurring as a result of today's compelled privilege waivers.

Thank you.