



AMERICAN BAR ASSOCIATION

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STATEMENT OF
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CHAIR OF THE ABA ANTITRUST LAW SECTION
on behalf of
THE AMERICAN BAR ASSOCIATION
appearing before the
UNITED STATES SENTENCING COMMISSION
concerning
PROPOSED AMENDMENT OF COMMENTARY IN SECTION 8C2.5 OF THE
FEDERAL SENTENCING GUIDELINES
REGARDING WAIVER OF ATTORNEY-CLIENT PRIVILEGE
AND WORK PRODUCT DOCTRINE
NOVEMBER 15, 2005

Mr. Chairman and Members of the Commission:

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

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

On August 15, 2005, the ABA filed a formal comment letter² with the Commission in response to its Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.³ In that comment letter, the ABA urged the Commission to retain its tentative policy priority number (5), described in the Notice as a "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." The ABA also urged the Commission, at the end of its review, to amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections

¹See the United States Sentencing Commission's Notice of Final Priorities for the 2005-2006 amendment cycle, policy priority number (6), 70 Fed. Reg. 51398 (August 30, 2005).

²The ABA's August 15 comment letter to the Commission is available at: <http://www.abanet.org/buslaw/attorneyclient/materials/049/049.pdf>.

³70 Fed. Reg. 37145 (June 28, 2005).

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

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

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

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

several of these recent amendments⁴, our greatest concern involves a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show “thorough” cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Sentencing Guidelines (the “privilege waiver amendment”). Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines, the ABA—working with a large and diverse group of business and legal organizations from across the political spectrum—has evaluated the substantive and practical impact that ever-increasing demands for privilege waiver have had on the business and legal communities. For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys⁵ of in-house and outside counsel to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. In addition, the American Bar Association’s Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects⁶. As a result, the ABA has concluded that the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In recent months, many other organizations have expressed similar concerns regarding the privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005—and again on August 15, 2005—when an informal coalition of numerous prominent business, legal and public policy organizations⁷ submitted joint comment letters urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal and public policy communities.

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

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

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

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of “all pertinent non-privileged information known to the organization”, (2) delete the existing Commentary language “unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization”, and (3) make the other minor wording changes in the Commentary outlined below. If the ABA’s recommendations were adopted, the relevant portion of the Commentary would read as follows⁸:

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

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

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