PRESERVING THE ATTORNEY-CLIENT PRIVILEGE

I. PROPOSED CHANGES TO THE FEDERAL RULES OF EVIDENCE

At the request of the Chairman of the House Committee on the Judiciary, the Judicial Conference Advisory Committee on Evidence Rules (the "Advisory Committee") has drafted a proposed rule of evidence, Rule 502[1], entitled "Attorney-Client Privilege and Work Product; Waiver By Disclosure," governing issues such as inadvertent disclosure, selective waiver, subject matter waiver, and the binding effect of confidentiality orders. Because of the importance and sensitivity of the issues, the Advisory Committee has determined to conduct a hearing on April 24, 2006 (the "Hearing"), on the proposed rule to assist it in deciding whether changes are needed before the rule is sent out for public comment. The authors of this paper[2] are pleased to have been invited to submit their views to the Advisory Committee and, in the case of Mr. Brodsky, to testify at the Hearing.

The authors expect that the ABA Task Force and the NYSBA Task Force may comment on Proposed Rule 502 at a later stage of the proceedings leading to its consideration by the Judicial Conference. In the meantime, for purposes of the Hearing, the authors of this paper

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1 Insofar as this paper is concerned, the proposed amendment to Rule 502 states, in relevant part, as follows:

"Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

"(a) Waiver by disclosure in general. — A person waives an attorney-client privilege or work product protection if that person — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

"(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

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(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation."

2 The authors of this paper, all of whom are participants in the American Bar Association Task Force on the Attorney-Client Privilege ("ABA Task Force"), include David M. Brodsky, Liaison to the ABA Task Force; Steven K. Hazen, Adviser to the ABA Task Force; R. William Ide, Chair of the ABA Task Force; and Mark O. Kasanin, Liaison to the ABA Task Force; in addition, one of the authors, David M. Brodsky, is also a member of the New York State Bar Association Task Force on the Attorney-Client Privilege ("NYSBA Task Force") (names of affiliations are solely for identification purposes; none of the authors are authorized to speak on behalf of his organization on this issue).

Because the ABA and the NYSBA did not have sufficient time prior to the Hearing, the authors of this paper are expressing their views in this paper in their individual capacity only. Accordingly, the views expressed in this paper are presented on behalf of its individual authors only and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association or by the leadership of the New York State Bar Association and, accordingly, should not be construed as representing the position of either association.

The list of all Members, Liaisons and Advisers of the ABA Task Force are identified on the Task Force's website: http://www.abanet.org/buslaw/attorneyclient/home.shtml.

recommend that Rule 502(b)(3) be dropped from further consideration. Among other things, we believe the procedure contemplated in it continues an alarming trend threatening the viability of the corporate attorney-client privilege, a privilege that we believe has important societal benefits and which trend we believe should be halted, if not reversed,[3] before consideration of "selective waiver" could occur in a truly non-coercive environment.

II. THE ATTORNEY-CLIENT PRIVILEGE IS IN JEOPARDY BY CURRENT ENFORCEMENT PRIORITIES AND TACTICS

Since the mid-1990s and continuing to date, the principal law enforcement and regulatory authorities in the United States have developed policies and guidelines that are designed to induce corporations and other business entities[4] to waive, or not assert, applicable attorney-client and work-product privileges and protections.[5] There are a variety of reasons why such authorities adopted such polices and, for a fuller discussion of them, we refer to the Report of the ABA's Task Force on the Attorney-Client Privilege[6], and to the report by the Joint Drafting Committee of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* (March 2002)[7]. Regardless of the reasons proffered, the result at the Department of Justice, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and other regulatory and self-regulatory agencies, as well as many state attorneys general offices and state regulatory

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3 In this regard, the authors note that the ABA's House of Delegates unanimously adopted Recommendation 111 at its Annual Meeting in August 2005, which reads in its entirety as follows:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.

4 For convenience, each of such entities is referred to herein as a "company" as the actual organic nature of its formation and existence is not germane to the issues addressed in this paper. The term "corporate" is similarly used as an adjective with respect to such entities.

5 See United States Attorneys' Criminal Resource Manual, Art. 162, §VI.B; United States Sentencing Guidelines Manual §8C2.5(g)(2001); the SEC's Seaboard Report, http://www.sec.gov/litigation/investreport/34-44969.htm; see also the EPA Voluntary Disclosure Program, the HHS Provider Self-Disclosure Protocol, and the Department of Justice Antitrust Corporate Leniency Policy.

6 60 Bus.Law. 1029 (May 2005); also available at http://www.abanet.org/buslaw/attorneyclient/home.shtml. The "Recommendation" approved by the ABA House of Delegates and outlined in footnote 4, *supra,* and not the related "Report" cited herein, constitutes official ABA policy.

7 Available at http://www.actl.com.

agencies, has been a marked increase in the compelled, requested, suggested, or (pragmatically inevitable) "voluntary" waivers of the privilege and the work-product doctrine, in order to further enhance the likelihood that the company will avoid significant prosecution or regulatory action. The surge in such waivers has been well documented; a recent survey administered jointly by the Association of Corporate Counsel[8], an organization representing nearly 19,000 public companies, and the National Association of Criminal Defense Lawyers[9] found that

- Nearly 75% of both inside and outside counsel state that, in their experience, government agencies expect a company under investigation to waive legal privileges (1 percent of in-house counsel and 2.5% of outside counsel disagreed with the statement);
- Of the respondents who confirmed that they or their clients had been subject to investigation in the past five years, approximately 30% of in-house counsel and 51% of outside counsel said that the government expected waiver in order to engage in bargaining or be eligible for more lenient treatment; and
- Of those who had been investigated, 55% of outside counsel said the privilege waiver was requested either directly or indirectly; 27% of in-house counsel confirmed that experience.

Of the over 675 responses to the survey, almost half of the general counsels responding on behalf of public and private companies have experienced some kind of privilege erosion, caused by the government's policies. Of these companies, by far the most were not from global companies with high visibility, but rather from a wide variety of differently-sized businesses. After more than a decade of increased pressure, explicit and implicit, on companies to waive the attorney-client privilege and work-product protections, there has emerged a "culture of waiver" in which government agencies expect a company under investigation to waive legal privileges, and many companies do so, most without even being asked any longer but knowing there is no practical alternative to doing so.

The proposed Rule 502(b)(3) would have the effect of continuing this trend toward waiver and exacerbate it. Any pretense of requests for waiver being infrequent would be lost and such request would become item 1 in the playbook of regulators and enforcement agencies even at the earliest stages of the most generic investigations. We believe that such effect would be impossible to resist[10] As such, we conclude that promulgation of Rule 502(b)(3) would be an

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8 "The Decline of the Attorney-Client Privilege in the Corporate Context," Survey Results, Presented to the United States Congress and the United States Sentencing Commission, March 2006, http://www.nacdl.org/public.nsf/whitecollar/wcnews024/$FILE/A-C_PrivSurvey.pdf, and http://www.acca.com/public/attyclntprvlg/coalitionussctestimony031506.pdf ("Survey Results").

9 The ABA and several other organizations provided active participation and access to their members in the survey process.

10 In connection with another aspect of the DOJ's policies regarding corporate cooperation, U.S. District Judge Lewis Kaplan recently characterized the government's apparent efforts to pressure KPMG not to pay the legal fees of employees that were indicted, despite indemnification provisions requiring it to do so, as "shameful and may be worse than that..." See "Lawyers Argue KPMG Motions," THE WALL STREET JOURNAL p. C3, March 31, 2006. Judge Kaplan noted that, in his view, companies under investigation ought to be free to decide whether to support their employees or former employees without Justice's "thumb on the scale." See "Corporate Injustice" THE WALL

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unintended and undesirable by-product of such "culture of waiver". We respectfully conclude it should not be promulgated until such time as efforts currently underway to roll-back government encroachment on the attorney-client relationship upon which the judicial system depends are successful and corporate clients have the ability to make a decision about waiver on a completely voluntary basis. That is already starting to occur.[11]. As such, this is not about delay of a provision with which we pointedly do not take issue as it stands.[12] It is about making sure that such rule can be adopted on its own merit without becoming a tool for undermining the very protections it seeks to preserve.

III. THE PUBLIC INTEREST IN PRESERVING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION AND THE RISKS IN NOT DOING SO

We believe it is beyond serious discussion that the attorney-client privilege and work product doctrine as applied in the corporate context are "vital protections that serve society's interests and protect clients' Constitutional rights to counsel."[13] A legal system that fails to

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STREET JOURNAL p. A14, April 6, 2006, http://online.wsj.com/article/SB114429123411418521.html?mod=todays_us_opinion.

[11] On April 5, 2006, following hearings on November 15, 2005, and March 15, 2006, concerning this issue, at the latter of which the Survey Results were presented, the U.S. Sentencing Commission voted unanimously to reverse a 2004 amendment to the commentary for Section 8C2.5 of the Organizational Sentencing Guidelines that encouraged prosecutors to require companies and other organizations to waive their attorney-client privilege and work product protections as a condition for receiving credit for cooperation at sentencing. Unless Congress acts to modify or reverse the change, it will become effective on November 1, 2006. The Commission's action marks a potentially vital change in momentum of the "culture of waiver."

This change may not, however, be an isolated event. At March 7, 2006, hearing of the Subcommittee on Crime, Terrorism and Homeland Security entitled "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers", Members of Congress representing a broad political spectrum were united in their pointed skepticism during questioning of then-Acting Deputy Attorney General Robert McCallum as to the propriety of Department of Justice policies set forth in the Thompson Memorandum undermining the traditional confidentiality of the attorney-client relationship. The preliminary transcript of those hearings confirms that Mr. McCallum informed the Subcommittee that the Department of Justice would probably be willing to agree to the Sentencing Commission reverting to the position it held before the 2004 amendment, a position the Task Force was requesting. However, at the U.S. Sentencing Commission meeting on March 27, 2006, a Department representative denied that was the position of the Department of Justice. Most recently, the Wall Street Journal carried an editorial criticizing the policies of the Department that encroach on the attorney-client relationship upon which society depends for legal compliance and noting the remarks of Judge Kaplan at the impact of those policies. See footnote 10.

[12] The authors note that, in some regulated industries, there may effectively be no confidentiality of company records or communications vis-à-vis the regulatory authority. Where there is no confidentiality, there may be no privilege or work product protection. For example, 12 U.S.C. §481 is routinely invoked by examiners of the Office of the Comptroller of the Currency for unfettered access to all documents and records, regardless of their status as protected communications or work product. The authors do not take a position in this paper on whether there may be circumstances, such as those, in which some form of selective waiver may be appropriate. The authors also do not wish to imply that a company could not or should not, on a truly voluntary basis, waive the attorney-client privilege or the attorney work product doctrine.

[13] See "The Decline of the Attorney-Client Privilege in the Corporate Context," Survey Results, Presented to the United States Congress and the United States Sentencing Commission, March 2006.

assure business entities the benefits of the attorney-client privilege and work product protection denies those entities the effective assistance of counsel when potentially illegal corporate behavior is discovered within the organization. As the Supreme Court has stated, impairment of these privileges and protections would "not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threaten to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[14]

But it is precisely those confidential communications between corporate attorneys and the employees of the corporate client that are imperiled when the attorney-client privilege or work product doctrine is undermined. "Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner."[15]

And it is not only corporate employees who will curtail – and have curtailed – the extent of their confidential communications with counsel to seek legal advice on business programs and strategies. It is our experience that company legal counsel (internal and outside) are curtailing their own activities, such as taking extensive notes at business meetings, for fear that if the subject of the business meetings were ever implicated in a governmental inquiry (where the company might not even be the "target"), such counsel's notes would be turned over when the company waived the privilege and the counsel would be converted into a potential adverse witness against the company as client. Even outside counsel retained to conduct internal investigations are having to be sensitive to procedures that might result in their becoming involuntary adverse witnesses. Those pressures create a potential conflict of interest between attorney and client that the privilege otherwise helps to prevent.

The strongest criticism of the attorney-client privilege – and, indeed, of any evidentiary privilege – is that, in investigations or court proceedings, potentially valuable evidence may be suppressed and the "truth" harder to find. This debate has been raised countless times, and no doubt is the basis for concerns raised by the governmental organizations behind the shift in policy over the last decade. But in our society, the debate was long thought to have been settled. As one court has noted: "The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."[16] The Supreme Court has held that this social good extends to companies as well as to individuals.[17]

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14 *Upjohn Co. v. U.S.*, 449 U.S. 383, 392 (1981). This point was made forcefully in *Comments of the ABA's Section of Antitrust Law On The Proposed Amendments To The Sentencing Guidelines For Organizations*, at 5-7, *available at* http://www.abanet.org/antitrust/comments/2004/sentencing guidelines0704.pdf.

15 See "The Decline of the Attorney-Client Privilege in the Corporate Context," Survey Results.

16 *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950). *See Trammel v. United States*, 445 U.S. 40, 50 (1980) (the privilege "promotes a public goal transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.").

17 *Upjohn*, 449 U.S. at 389-90.

Protecting the confidentiality of work product likewise furthers vital public interests.[18] Work product protection supports a fair adversary system by "by affording an attorney 'a certain degree of privacy' so as to discourage 'unfairness' and 'sharp practices.' "[19] The work-product doctrine is simply a recognition that a lawyer's work on behalf of a client preparing a response to litigation or a potential claim – even when not subject to the attorney-client privilege – must also be protected, lest all lawyers be discouraged from conducting those preparations effectively, the clients be punished and their adversaries be unfairly rewarded. Those corporate clients (including their authorized representatives) who fear that the work product generated by their counsel in determining an appropriate response will be disclosed to their adversaries and promptly used against them will, not surprisingly, be reluctant to seek legal assistance at all much less provide information that will assist the attorney in providing such assistance.

But in modern-day, post-Enron corporate America, the historic policies in favor of protecting privilege and work-product are being crowded by the policies of promoting cooperation with governmental agencies and maximizing the effectiveness and efficiency of governmental investigations.[20] Companies formerly expected that the work product of their counsel prepared as a result of an internal investigation, and advice given as a result of such investigation, will be protected. They have come to learn that, upon the initiation of a governmental inquiry, whether formal or informal, whether the company is a target or not, such expectations of confidentiality are illusory. Internal investigations, conducted by and at the direction of legal counsel, are still a critical tool by which companies and their boards learn about violations of law, breaches of duty and other misconduct that may expose the company to liability and damages. They are an essential predicate to enabling companies to take remedial action and to formulate defenses, where appropriate. But internal investigations no longer have clear and predictable protections of confidentiality in the "culture of waiver" environment. Privileged information and work-product are routinely expected to be made available to government authorities, sometimes, at the authorities' request, on a day-to-day basis during the internal investigations. Under current governmental policies, companies do not realistically have the option to preserve the confidentiality upon which an effective attorney-client relationship is so heavily dependent and otherwise protected by the privilege and doctrine, or they run the considerable risk of being deemed "uncooperative" by the governmental authority – a characterization that can be a virtual corporate death sentence[21] or, at least, extraordinarily

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[18] "[T]he work product privilege [exists] ... to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.", *In re Raytheon Securities Litig.*, 218 F.R.D. 354, 359 (D. Mass. 2003) (quoting *United States v. Amer. Tel & Tel. Co.*, 642 F.3d 1286, 1299 (D.C. Cir. 1980)).

[19] Joint Drafting Committee of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* (March 2002), at 6, quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1946).

[20] Committee Note to Proposed Amendments to the Federal Rules of Evidence (Rule 502), at 8; see also *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) ("the public interest in easing government investigations counsels against holding the attorney-work-product privilege waived when the holder of the privilege discloses privileged information to the government...a limited disclosure pursuant to a government agency's investigatory request ought not waive the privileges as to all other parties...").

[21] As in the case of Arthur Andersen.

financially punitive. Putting it another way, if the government decides a company is not being cooperative, in essence the government can act as prosecutor, judge, jury, and executioner.

In the wake of such governmental policies, none of the court-developed tests or hurdles to establish a third party's right to such materials, such as, in the case of the attorney-client privilege, the so-called "crime fraud exception[22]," or in the case of work product, substantial need and undue hardship[23], need to be satisfied. As documented in the Survey Results, an Assistant U.S. Attorney most often conducts an inquiry, and makes the request, either implicitly or expressly, without even purporting to satisfy such tests or hurdles.

The problems that have arisen from this routine demand for waivers has led to a crisis – a true Hobson's choice – among companies desirous of maintaining the sanctity of the privilege, but more anxious to avoid being charged with corporate crime. As a result of many forced waivers, company after company has had to endure the inevitable by-product of a waiver – a demand for production by a third party civil litigant.

IV. PROPOSED RULE 502(b)(3)

When a company produces protected materials, attorney-client privileged or work product, to a governmental authority, and later seeks to protect production to a third party in litigation, courts are routinely asked to opine on the question of whether that company can still invoke the confidentiality protections of the privilege and the doctrine. In other words, can a client selectively waive as to the government and successfully maintain the privilege as to third parties?

In 1977, the Eighth Circuit found that the production of documents, including privileged documents, to the SEC pursuant to subpoena did not constitute a general waiver as to a third party litigant in a private civil suit, thus initially recognizing what came to be called the "selective waiver" doctrine.[24] However, most courts in recent years have rejected the concept of "selective waiver," holding that waiver of privileged or protected material constitutes a waiver as to all parties and for all purposes.[25] Other courts have given greater or lesser protection depending on the presence of confidentiality agreements, or non-production to other third parties.[26] In recent years, only a few courts have sanctioned the "selective waiver" doctrine.[27]

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[22] *See In re Sealed Case,* 107 F.3d 46, 50 (D.C. 1997); *In re Richard Roe, Inc.*, 68 F.3d 38, 39-40 (2d Cir. 1995); *U.S. v. Ruhbayan*, 201 F.Supp. 2d 682 (E.D. Va. 2002).

[23] Fed. R. Civ. P. 26(b)(3).

[24] *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

[25] *See, e.g., Bank of America, N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 167 (S.D.N.Y. 2002); *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Philippines*, 951 F.2d 1414 , 1458 (3rd Cir. 1992); *In re Martin Marietta Corp.*, 856 F.2d 619, 622-23 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

[26] *See, e.g., Westinghouse Electric Corp. v. Republic of Philippines,* 951 F.2d 1414 (D.C. Cir. 1991); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 291 (6th Cir. 2002); *In re Steinhardt*

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It is as a result of such court confusion and resulting lack of certainty that the "selective waiver" portion of the Rule was proposed. It would create a measure of certainty by providing that disclosure of protected material to a local, state, or federal investigating authority would not constitute a general waiver of either the attorney-client privilege or work-product protection,[28] and it would "further[] the important policy of cooperation with governmental agencies, and maximize[] the effectiveness and efficiency of governmental investigations."[29]

However, our concern, and the basis of our objection to the rule, is that adopting the rule in the "culture of waiver" environment puts a Band-Aid on the corporate injury caused by wrong-headed governmental policies. The Advisory Committee has drafted a possible solution to the collateral problems caused by such policies.[30] But while much of Proposed Rule 502 appears appropriately designed to protect the confidentiality of attorney-client communications or attorney's work product, the "selective waiver" provision, if adopted, will undermine that same confidentiality by advancing the governmental policies that have that undermining as their *raison d'etre*. If adopted, the rule would effectively eliminate the possibility that a company could ever again assert the right not to waive the privilege or the work product doctrine.

In our view, the most important question that should be addressed, by Congress and by the various governmental agencies such as the Department of Justice and the SEC that have promulgated such policies that lead to such massive privilege waivers, is whether the policies contributing to the apparent need for "selective waiver" are themselves significant intrusions on

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Partners, L.P., 9 F.3d 230 (2d Cir. 1993); *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F.Supp. 638 (S.D.N.Y. 1981.

27 *See, e.g., Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *6, 11 (Del. Ch. Ct. 2002); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, 2002 WL 1628782, at *2 (S.D.N.Y. 2002) ; *In re McKesson HBOC Securities Litig.*, 2005 U.S. Dist. LEXIS 7098 (March 2005).

28 *See* Committee Note, at 6-7 (*infra*, fn 20).

29 *Id.*

30 The authors are concerned that even a proper "selective waiver" procedure in a truly voluntary environment would be ineffective unless uniformly applied in all jurisdictions. We note that there is a reasonable diversity of opinion as to whether a federally-enacted selective waiver rule would be effective in all instances in the courts of the various United States, *compare* Broun, "Memo on the Impact of the Draft Rule 502 on Waiver of Privilege in a State Action," Capra and Broun, Memorandum to Advisory Committee on Evidence Rules, April 24-25, 2006, at 17-23, *with* Comment Letter, Corporations Committee of the Business Law Section of the State Bar of California, at 2. The problems of inconsistency on questions of waiver can be profound. If otherwise protected information becomes available to a third party in one jurisdiction, the protections of disclosure in such jurisdiction may not be effective in another jurisdiction. And once the information is out, it is practically impossible to re-protect it. *Compare* (as to the same materials produced to the SEC by McKesson HBOC), *Saito v. McKesson HBOC, Inc.*, 2002 Del. Ch. LEXIS 139 [2002 WL 31657622 at p. *11 (Del. Ch. Ct. Nov. 13, 2002) ("[P]ublic policy seems to mandate that courts continue to protect the confidentially disclosed work product in order to encourage corporations to comply with law enforcement agencies."), with *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1241 (Cal. Ct. App. 2004) ("Given the Legislature's expressed desire to control evidentiary privileges and protections, adoption of the selective waiver theory should come from that body. We agree with the trial court that under California law, McKesson waived the work product protection for the audit committee report and the interview memoranda."); *see also In re McKesson HBOC Securities Litig.*, 2005 U.S. Dist. LEXIS 7098, upholding the selective waiver doctrine on behalf of McKesson HBOC.

privilege and work-product protections and should be curtailed if not reversed. Under the auspices of the ABA Task Force, the Association of Corporate Counsel, the U.S. Chamber of Commerce, various state and local bar associations, and many other groups, strong efforts are being made to convince the appropriate authorities that such policies are misguided, destructive of important societal benefits, and should be repealed. In recent weeks, as mentioned above, after such efforts, the U.S. Sentencing Commission has voted to repeal its 2004 amendment to the Federal Sentencing Guidelines that encouraged prosecutors to require companies and other entities to waive their attorney-client privilege and work product protections as a pre-requisite for receiving credit for cooperation at sentencing.

We urge the Advisory Committee and, ultimately, the Congress, not to adopt Rule 502 with the provision set forth in (b)(3). We further urge that governmental agencies currently implementing policies of granting benefits for waiver and imposing penalties for not doing so look to the recent wise example set by the U.S. Sentencing Commission by no longer using a company's waiver of the attorney-client privilege or work product protections as a factor in determining whether a corporation has been cooperative with inquiries. In our judgment, that will be a far more effective way of reducing the incidence of waivers and the collateral problems addressed by proposed Rule 503(b)(3).

V. IMPACT ON THE JUDICIAL PROCESS

As noted above and in virtually every serious discussion of the attorney-client relationship, recognition of the attorney-client privilege represents a balance made over several centuries of competing interests to preserve the integrity of the judicial process and thereby preserve important societal and governmental values. Recognition of the attorney work product doctrine is more recent but rests on exactly the same foundation of preserving the integrity of the judicial process. Whether that balance and those protections are established in case law, statute or rules of evidence, the judicial system has *always* been the locus of authority for interpreting and enforcing them. That is the only logical place for that locus to rest as it is the judicial system itself that can and must preserve that integrity.

Unfortunately, the authority of the judicial system in that context is undermined or even defeated if decisions are taken much earlier in the process than commencement of judicial proceedings that use waiver of those rights as a bargaining tool. The authors respectfully urge the Advisory Committee to be mindful that crafting a "selective waiver" protocol when governmental regulators and law enforcement agencies are pursuing policies resulting in a "culture of waiver" will merely contribute to interference in the lawyer-client relationship on which both self-informed compliance with laws and the judicial process itself depend.

To be sure, there is much to be said for attempts to bring uniformity to such a critical issue. Indeed, the ABA itself has long advocated the significant benefits of achieving uniformity in the judicial process.[31] Were that the only issue in play on this topic, the authors might come to

[31] See, e.g., *amicus* brief submitted in the application for certiorari in *Martin Marietta Corp. v. Pollard*, 856 F. 2d 619 (4th Cir. 1988); cert. den. 490 U.S. 1011 (1989).

a different conclusion. But here, there is an overlaying issue of governmental policies and the impact they have on the requisite voluntary nature of waiver[32] and the actual freedom to assert rights of privilege and work product without which waiver cannot actually *be* voluntary. That complicates the evaluation in a way that causes us, on balance, to come down against the proposed Rule 502(b)(3).

VI. SUPPORTING MATERIALS

As noted in this paper, the ABA has been working to preserve the attorney-client privilege and attorney work product protection. It has done so in a number of ways, including by testifying before Congress and the U.S. Sentencing Commission, submitting letters and other written statements to Congress and the Commission, participating in several *fora* involving privilege waiver issues, etc. The authors believe that it will continue to do so, individually or in cooperation with a coalition of organizations similarly concerned about threats to the attorney-client relationship. While not necessarily directly on point with issues presented by proposed Rule 502, the authors submit the following additional materials and attach them to this paper for the consideration of the Advisory Committee:

- Letter dated March 3, 2006 from the ABA Governmental Affairs Office to the Honorable Howard Coble, Chairman, Subcommittee on Crime, Terrorism and Homeland Security, Committee of the Judiciary, U.S. House of Representatives.

- Letter dated March 28, 2006 from the ABA Governmental Affairs Office to the United States Sentencing Commission.

Respectfully submitted,

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April 19, 2006

[32] Proposed Rule 502(a) recognized the importance of voluntariness.

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March 28, 2006

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

Re: Comments on the Issue of "Chapter Eight – Privilege Waiver"

Dear Sir/Madam:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write in response to the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.[1] In particular, we would like to express our views regarding Final Priority (6), described in the Notice as the "review, and possible amendment" of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary in Section 8C2.5 of the Federal Sentencing Guidelines.[2] We urge the Commission to amend this language to clarify that waiver of 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.

The ABA has long supported the use of 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* (the "*Booker/Fanfan* decision"). At the conclusion of that process, the ABA adopted a new policy recommending that Congress

[1] 71 Fed. Reg. 4782-4804 (January 27, 2006)
[2] In addition to this comment letter on the issue of "Chapter Eight – Privilege Waiver," the ABA is also filing separate comments with the Commission today on the specific issue of "Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)."

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 Sentencing Guidelines at this time, we continue to have serious concerns regarding certain narrow amendments to the 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 Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

> 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.[3]

Before the adoption of this privilege waiver amendment, the Commentary was silent on the issue of privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. This was true, even though the Department of Justice—acting in accordance with the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum" [4]—was increasingly requesting that companies and other organizations waive their privileges as a condition for certifying their cooperation during investigations.

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[3] In August 2004, the ABA 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 detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm. In addition, other useful materials regarding privilege waiver are available on the website of the ABA Task Force on Attorney-Client Privilege at http://www.abanet.org/buslaw/attorneyclient/.

[4] The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the "Holder Memorandum," that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the "Thompson Memorandum." Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," although the directive—also known as the "McCallum Memorandum"—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and http://www.abanet.org/poladv/mccallummemo212005.pdf, respectively.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines in 2004, the ABA has been working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to persuade the Commission to reconsider, and perhaps modify, the waiver provision. Towards that end, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment on March 3, 2005 and the ABA sent a similar letter on May 17, 2005.

In June 2005, the Sentencing Commission issued its "Notice of Proposed Priorities and Request for Public Comment" for the amendment cycle ending May 1, 2006 in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials[5]—including three former Attorneys General—and Rep. Dan Lungren (R-CA) submitted separate comment letters to the Sentencing Commission on August 15, 2005 urging it to reverse the 2004 privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation.[6] Later that month, the Commission issued its "Notice of Final Priorities" for the amendment cycle ending May 1, 2006 in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines.

On November 15, 2005, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on the subject of privilege waiver.[7] In response to questions from several Commissioners regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests, the coalition and the ABA subsequently undertook a detailed survey of in-house and outside corporate counsel, and the results were presented to the Commission in early March 2006.[8] Several representatives of the coalition also testified before the Commission on March 15, 2006 regarding the results of the new survey.

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[5] The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

[6] The signatories to the coalition's August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the ABA, coalition and other August 15, 2005 comment letters and most other privilege waiver materials referenced in this letter are available at http://www.abanet.org/poladv/acprivilege.htm.

[7] The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

[8] The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at http://www.acca.com/Surveys/attyclient2.pdf. The new March 2006 surveys expanded upon the coalition's previous surveys of in-house and outside counsel that were completed in April 2005. Executive summaries of the April 2005 surveys are available at www.acca.com/Surveys/attyclient.pdf and www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf, respectively.

Meanwhile, the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

> (1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.[9]

Unintended Consequences of the Privilege Waiver Amendment

In response to the first two issues posed by the Commission, the ABA believes that the 2004 privilege waiver amendment to the Sentencing Guidelines has helped cause a variety of profoundly negative, if unintended, consequences.

The ABA believes that as a result of the privilege waiver amendment and related Justice Department policies and practices, companies have been forced to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and standing in the marketplace.

Substantial new evidence confirms that the privilege waiver amendment, combined with the Justice Department's waiver policies, has resulted in the routine compelled waiver of attorney-client and work product protections. According to the new survey of over 1,200 in-house and outside corporate

[9] *See* Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

counsel that was completed by the coalition and the ABA in March 2006, almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel respondents also indicated that when prosecutors give a reason for requesting privilege waiver, the Sentencing Guidelines rank second only to the Justice Department's waiver policies among the reasons most frequently cited.

The ABA is concerned that that the 2004 privilege waiver amendment to the Guidelines and the related Justice Department waiver policies—which together have resulted in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, the 2004 privilege waiver has helped to seriously weaken the confidential attorney-client relationship 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 the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law, thereby harming not only companies, but the investing public as well.

Second, while the privilege waiver amendment—like the Justice Department's waiver policies—was intended to aid government prosecution of corporate criminals, it has actually made detection of corporate misconduct more difficult by helping to undermine companies' internal compliance programs and procedures. These compliance mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Unfortunately, because the effectiveness of these internal mechanisms 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 protections will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good corporate compliance practices.

Third, the privilege waiver amendment unfairly harms employees by infringing on their individual rights. By fostering a system of routine waiver, the 2004 privilege waiver amendment and the other related governmental policies place 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 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. It is

fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many others—including the coalition of business and legal groups and the former senior Justice Department officials referenced above—have expressed similar concerns regarding the unintended consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines. The ABA shares these concerns and believes that the privilege waiver amendment is 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.

Congressional Oversight of Governmental Waiver Policies

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held an oversight hearing on the subject of government-coerced waiver policies. The hearing, titled "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," included a number of prominent witnesses, including Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.[10] With the exception of Mr. McCallum, all of the other witnesses expressed serious concerns regarding the growing trend of government-coerced privilege waiver and identified the Justice Department's waiver policies and the 2004 privilege waiver amendment as major contributing factors causing the erosion of the privilege.

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. In addition, after acknowledging that prosecutors "must be zealous and vigorous in their efforts to bring corporate actors to justice," Chairman Coble said that "there is no excuse for prosecutors to require privilege waivers as a routine matter." In addition, Chairman Coble vowed that his subcommittee would "examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege." After noting that the Sentencing Commission is now reexamining the privilege waiver issue as part of the current amendment cycle, he concluded that "while the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement..."

Later in the hearing, similar concerns regarding government-coerced waiver were also raised by Rep. Dan Lungren (R-CA), who previously served as California Attorney General. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines as explained in his August 15, 2005 letter to the Commission, and he said that he had a "huge concern" with the 2004 amendment to the extent that it "require[d] entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation." In addition, Rep. Lungren criticized the 1999 Holder Memorandum, the

[10] The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by the ABA to the Subcommittee regarding the hearing are available at http://www.abanet.org/poladv/testimony306.pdf.

2003 Thompson Memorandum, and the 2004 privilege waiver amendment as together constituting a "creeping intrusion" on the attorney-client privilege.

Rep. William Delahunt (D-MA), himself a former long-time prosecutor, expressed similar misgivings at the hearing regarding government-coerced waiver in general and both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines in particular. At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that all the Subcommittee members had previously expressed regarding governmental privilege waiver policies, and he respectfully asked Associate Attorney General McCallum to convey those concerns to the Justice Department in order to avoid having to face bipartisan legislation designed to resolve the issue.

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed to the ABA and the coalition on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.[11]

Recommended Changes to the 2004 Privilege Waiver Amendment to the Sentencing Guidelines

In order to reverse the negative consequences that have resulted from the 2004 privilege waiver amendment to the Guidelines and help prevent further erosion of the attorney-client privilege, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines to clarify that 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. To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent <u>non-privileged</u> information known by 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 our recommendations were adopted, the relevant portion of the Commentary would read as follows[12]:

> "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 <u>non-privileged</u> information known

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[11] On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a legal conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. A transcript of Sen. Specter's comments on the privilege waiver issue, as well as the full text of Rep. Sensenbrenner's prepared remarks, are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf and http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf, respectively.

[12] 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.

> 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.*~~."

Thank you for considering our comments. If you would like more information regarding the ABA's position on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

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March 3, 2006

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," Scheduled for March 7, 2006

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write to express our views concerning the subject of your Subcommittee's upcoming hearing, "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," which is scheduled for March 7, 2006. In particular, we would like to express our strong support for preserving the attorney-client privilege and work product doctrine and our concerns regarding several federal governmental policies and practices that have begun to seriously erode these fundamental rights. We ask that this letter be included in the official record of the Subcommittee's March 7, 2006 hearing.

The Importance of the Attorney-Client Privilege

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client's rights to effective counsel and confidentiality in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance in how to conform conduct to the law. In addition, both the attorney-client privilege and the work product doctrine help facilitate self-investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large.

Federal Government Policies That Erode the Attorney-Client Privilege

The American Bar Association strongly supports the preservation of the attorney-client privilege and opposes governmental policies, practices and procedures that have the effect of eroding the privilege.[1] Although a number of federal governmental agencies have adopted policies in recent years that have weakened attorney-client and work product protections, the ABA is particularly concerned about policies recently adopted by the Department of Justice—and an amendment to the Federal Sentencing Guidelines adopted by the U.S. Sentencing Commission in 2004—that have led many federal prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition of receiving credit for cooperation during investigations.

Justice Department Policies

The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder entitled "Federal Prosecution of Corporations." The so-called "Holder Memorandum" encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit. It states in pertinent part:

> 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 attorney-client and work product privileges.

Although the Holder Memorandum stated that waiver was not an absolute requirement, it nevertheless made it clear that waiver was a factor for prosecutors to consider in evaluating the corporation's cooperation. It relied on the prosecutor's discretion to determine whether waiver was necessary in the particular case.

The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson entitled "Principles of Federal Prosecution of Business Organizations." The so-called "Thompson Memorandum" stated that:

> One factor the prosecutor may weigh in assessing the adequacy of the corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protection, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees

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[1] 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. Previously, in August 2004, the ABA 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." Both ABA resolutions, and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm.

> and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects and targets without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.[2]

Although both the Holder and Thompson Memoranda state that waiver is not mandatory and should not be required in every situation, the reality is that these policies have led many if not most federal prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations. Moreover, prosecutors typically demand disclosure at the very beginning of the investigation, even before the government has sought to obtain information through techniques such as grand jury subpoenas, warrants, and in appropriate circumstances, compulsion of testimony.[3] In addition, the U.S. 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."[4]

In an attempt to address this growing problem of routine governmental demands for privilege waiver, Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," and many local U.S. Attorneys are now in the process of implementing this directive.[5] Unfortunately, the McCallum Memorandum does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. As a result, it will likely result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver.

The 2004 Privilege Waiver Amendment to the Federal Sentencing Guidelines

The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was further exacerbated when the U.S. Sentencing Commission adopted certain amendments to the Federal Sentencing Guidelines that took effect on November 1, 2004. These amendments apply to that section of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. These organizational guidelines provide the standard by which the criminal

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[2] Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

[3] Public hearing held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines, Nov. 14, 2002, at 27.

[4] Judson W. Starr and Brian L. Flack, *Government's Insistence on a Waiver of Privilege*, WHITE COLLAR CRIME 2001 J-1, at J-4 (ABA 2001).

[5] A copy of the McCallum Memorandum of October 21, 2005 is available online at http://www.abanet.org/poladv/mccallummemo212005.pdf.

penalties for corporate wrongdoing are measured, and they ostensibly are designed to create incentives for good corporate behavior while increasing penalties for corporations that lack mechanisms for discouraging and detecting employee wrongdoing.

Although the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

> 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.

While this language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Unfortunately, neither the Holder nor Thompson Memoranda provide any meaningful oversight over what waivers prosecutors may deem "necessary" under the new language in the Sentencing Guidelines. Therefore, now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and credit worthiness.

Unintended Consequences of Governmental Demands for Privilege Waiver

Substantial new evidence has demonstrated that the Justice Department's waiver policies, combined with the 2004 privilege waiver amendment to the Federal Sentencing Guidelines, have resulted in the routine compelled waiver of attorney-client privilege and work product protections. According to a new survey of over 1,400 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006,[6] almost 75% of corporate counsel respondents believe that

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[6] The detailed Survey Results are available online at http://www.acca.com/Surveys/attyclient2.pdf.

a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Thompson/Holder/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

The American Bar Association is concerned that the Justice Department's waiver policies and the 2004 amendment to the Sentencing Guidelines—resulting in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, these governmental policies seriously weaken the confidential attorney-client relationship 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 the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By requiring routine waiver of an entity's attorney-client and work product protections, these governmental policies discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This harms not only companies, but the investing public as well.

Second, while the Justice Department's waiver policies and the 2004 privilege waiver amendment were intended to aid government prosecution of corporate criminals, they are likely 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 tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, any attempt to require routine waiver of attorney-client and work product protections will seriously undermine systems that are crucial to compliance and have worked well.

Third, the Justice Department's policies and the privilege waiver amendment to the Sentencing Guidelines unfairly harm employees by infringing on their individual rights. By fostering a system of routine waiver, these policies place 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 risk that their privileged statements will be turned over to the government by the organization or they can decline to cooperate and risk their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights. For all these reasons, the ABA believes that the Justice Department's waiver policies and the 2004 privilege waiver amendment to the Guidelines are counterproductive and undermine, rather than enhance, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

The ABA is working to convey these concerns to policymakers, and reverse the recent erosion of attorney-client and work product protections, in a number of ways. In 2004, we created the ABA Task Force on Attorney-Client Privilege to study and address the governmental policies and practices that have eroded attorney-client and work product protections. The ABA Task Force has held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force also crafted new ABA policy—unanimously adopted by our House of Delegates last August—supporting the privilege and opposing government policies that erode the privilege.[7] The new ABA policy and other useful resources on this topic are available on our Task Force website at http://www.abanet.org/buslaw/attorneyclient/.

The ABA is also working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to modify both the Justice Department's waiver policies and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client and work product protections should not be a factor in determining cooperation. The remarkable political and philosophical diversity of that coalition shows just how widespread these concerns have become in the business, legal, and public policy communities.

On August 15, 2005, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials[8]—including three former Attorneys General—submitted separate comment letters to the Sentencing Commission urging it to reverse or modify the 2004 privilege waiver amendment.[9] Subsequently, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on November 15, 2005 in order to reiterate these views.[10] In addition, the ABA and various members of the coalition have met repeatedly with a number of senior Justice Department officials in order to express our joint concerns over the Department's internal privilege waiver policies.

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[7] See ABA resolution regarding privilege waiver approved in August 2005, discussed in footnote 1, *supra*.

[8] The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

[9] The signatories to the coalition's August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the coalition and ABA August 15 comment letters and all other privilege waiver materials referenced in this letter are available at http://www.abanet.org/poladv/acprivilege.htm.

[10] The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

Reforms Necessary To Remedy the Privilege Waiver Problem

In order to stop and reverse the erosion of the attorney-client privilege and work product doctrine in the corporate context—and start to undo the negative consequences that have resulted from this erosion—it will be necessary to modify both the 2004 privilege waiver amendment to the Sentencing Guidelines and the Justice Department's internal waiver policies.

After receiving extensive written comments and testimony from the ABA, the coalition, former senior Justice Department officials, and other organizations, the Sentencing Commission issued a request for public comment by March 28, 2006 on whether the privilege waiver language in the Guidelines should be deleted or amended. In addition, the Commission has scheduled a hearing on March 15, 2006 to consider proposed amendments to the Sentencing Guidelines on a number of issues—including privilege waiver. Several representatives of the coalition have been invited to testify at that March 15 hearing and explain the results of the new surveys of corporate counsel. In addition, the ABA and the coalition will file additional comments with the Commission on this issue prior to the March 28 deadline, urging the Commission to revise the Sentencing Guidelines by stating affirmatively that waiver of attorney-client and work product protections should not be a factor in determining cooperation.

Although we are encouraged by the Commission's willingness to reconsider the 2004 privilege waiver amendment during its current amendment cycle, it is not known what changes, if any, the Commission will make to the provision this year. Its final decision on this issue will not be known until it issues its final Proposed Rules in late April 2006. Therefore, we urge the Subcommittee to (1) express its concerns to the Commission regarding the privilege waiver issue as soon as possible and (2) encourage the Commission to amend the Guidelines—during the current amendment cycle—to state that waiver of attorney-client and work product protections should not be a factor in determining whether a corporation or other entity has fully cooperated with the government during an investigation.

Unlike the Sentencing Commission, the Justice Department is not yet formally taking steps to reexamine—and possibly remedy—its role in the growing problem of government-coerced privilege waiver. As a result of the 1999 Holder Memorandum and the 2003 Thompson Memorandum, most federal prosecutors now routinely demand that companies waive their privileges as a condition for receiving cooperation credit. In addition, in response to the 2005 McCallum Memorandum, many local U.S. Attorneys are now in the process of adopting local privilege waiver review procedures, which will likely result in numerous different waiver policies throughout the country.

For these reasons, the ABA urges the Subcommittee, as part of its oversight responsibilities, to hold additional hearings and encourage the Department to modify its internal policies on privilege waiver. Ideally, the Department's policies should be modified to (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations, (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the

attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

cc: All members of the Subcommittee on Crime, Terrorism and Homeland Security