

WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE:

A BALANCED APPROACH

by The Honorable Dick Thornburgh
Kirkpatrick & Lockhart Nicholson Graham LLP

Foreword by The Honorable John Engler
President and CEO, National Association of Manufacturers

Introduction by Laura Stein
Senior Vice President - General Counsel
and Corporate Secretary
The Clorox Company

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WASHINGTON LEGAL FOUNDATION
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As the Supreme Court said so wisely 25 years ago in its seminal decision in *Upjohn v. U.S.*, “If the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all.” Even though recent discussion, debate, and rhetoric over the attorney-client privilege might indicate otherwise, it really is as simple as the Court put it. If a lawyer or a client can’t count on confidentiality, then full and open communication between them is less likely to occur.

That outcome is not good for business, it’s not good for government’s ability to enforce the laws, and it’s certainly not in the public’s best interest. Unfortunately, as Dick Thornburgh so well documents in this Washington Legal Foundation Monograph, the corporate enforcement environment today is highly unpredictable and uncertain with regards to the attorney-client privilege.

Inspired by the Federal Sentencing Guidelines and the post-Enron imperative to stamp out corporate fraud, federal prosecutors and officials at agencies such as the Securities and Exchange Commission (SEC) have routinely demanded that white collar investigation targets disclose attorney-client protected information. Companies who fail to do so, lawyers and their clients are told, will be considered “uncooperative” and be charged, fined or sentenced accordingly.

As Dick Thornburgh points out, being labeled uncooperative can have a devastating impact on a company’s reputation, permanently tainting it in the marketplace even if the government’s charges are later found baseless. Also, a policy of seeking privilege waiver severely chills companies’ desire and ability to conduct comprehensive

corporate internal investigations to find small problems before they become large ones, or root out the rogue employees who put the company's future in jeopardy. A prosecutor's eagerness to obtain waiver also is directly at odds with federal sentencing policies and ethical business practices that encourage voluntary corporate compliance programs, a key portion of which involves communications between lawyers and company employees. Employees are less likely to be as forthcoming if they know the attorney-client privileged communication will be turned over to the government and others.

In addition, any information that is given over to the government could end up in the hands of third parties eager to use it against the investigative target. Attempts can be made to negotiate confidentiality agreements, but creative plaintiffs' lawyers will likely obtain those documents. As Dick Thornburgh writes, "Few things are as effective in a plaintiff's hands as a lawyer's memo that, shorn of context, suggests that a client may be out of compliance with the law."

Because the attorney-client privilege is so vital to the operations of any business, the National Association of Manufacturers has joined a broad-based coalition that includes the National Association of Criminal Defense Lawyers (NACDL), the American Civil Liberties Union (ACLU), the Washington Legal Foundation, and the U.S. Chamber of Commerce to educate the U.S. Sentencing Commission, Congress, and others about the risks and consequences of waiver policies. The American Bar Association, and numerous state bar groups, vigorously supported the efforts.

Two of the coalition's members, the Association of Corporate Counsel and NACDL, polled their members to determine the extent of the problem. The results were rather revealing, and reinforce what General Thornburgh writes here. Approximately one-third of in-house respondents said that they had personally experienced an erosion of their corporation's privilege, and nearly 40 percent of outside counsel agreed. Almost 95 percent of both inside and outside attorneys agreed that the lack of a privilege would chill the flow or candor of information from clients. Of those lawyers surveyed, 94 percent believed that the existence of the privilege enhances the likelihood that

company employees will come forward to discuss sensitive issues regarding corporate legal compliance.

Our coalition has been successful in raising awareness of the issue and in obtaining some changes. The U.S. Sentencing Commission voted April 5, 2006, to eliminate language from the Federal Sentencing Guidelines and its accompanying commentary that essentially endorsed waiver of the attorney-client privilege and attorney work product protections in government investigations for companies to be given credit for cooperation with governmental authorities. These changes will become permanent on November 1, 2006, unless Congress acts affirmatively to prohibit the changes. Also, the Justice Department's policies and prosecutorial actions came under significant bipartisan attack in a House Judiciary subcommittee hearing on March 7, which featured testimony by General Thornburgh.

But even with the proposed changes to the Sentencing Guidelines and congressional pressure, the Justice Department, the SEC, state attorneys general, and other law enforcers have given no indication that they will limit their waiver demands. We must continue working to make it clear that routinely requesting information gathered with the expectation that it would remain private does not lead to greater legal compliance. Companies or their executives who break the law and defraud their shareholders should be brought to justice. However, that can be achieved without policies that undermine good faith efforts to comply with the Byzantine web of federal and state laws and rules regulating business conduct. The ultimate irony, as Dick Thornburgh so aptly notes, is that "the corporations with the strongest compliance programs may have the most to lose by providing information to the government." That just doesn't make sense.

This thoughtful, timely, and concise monograph will provide much needed education on these critical issues for the many policymakers and thought leaders in government, business, the judiciary and the media. Dick Thornburgh has spent his entire career championing respect for the rule of law and fair, predictable legal standards for the regulation of personal and business conduct. We are fortunate that he and the Washington Legal Foundation are communicating this message

on the time-honored attorney-client privilege that is so basic to our system of justice.

INTRODUCTION

By
Laura Stein
Senior Vice President - General Counsel
and Corporate Secretary
The Clorox Company

One of the most important challenges we face is the continued viability of the attorney-client privilege for companies. A lawyer's regular interaction with a corporate client is fundamental to the company's ability to comply with the thousands of laws and rules that regulate corporate conduct. If business executives perceive that the privilege may not protect communications with their company's lawyers, they will be discouraged from conferring openly with them and less effective corporate legal compliance will result. At the same time, confidential legal counsel arising from those interactions is, in the context of criminal investigations, of great interest to government prosecutors. In this time of focus on corporate accountability and transparency, there can be great pressure brought by government prosecutors on a company to waive the privilege and disclose the company's communications with its lawyer. Prosecutorial pursuit of corporate attorney-client communications raises a host of legal and policy questions.

It is critical for all participants in the debate over the attorney-client privilege to be fully informed of the value of the privilege, and to understand the impact on corporate compliance that requests for its waiver can have. This Washington Legal Foundation Monograph, authored by former United States Attorney General Dick Thornburgh, is a strong contribution to understanding these critical issues and helps interested parties understand how to practically navigate them. General Thornburgh's years of public service, including serving as the nation's top lawyer, combined with his current work as a private attorney, give

him unparalleled experience and insight on corporate compliance and investigation matters.

The underlying thesis of General Thornburgh's paper is universally accepted: "forthright advice serves clients best." This principle underlies the venerable attorney-client privilege. In his introduction, General Thornburgh expresses a concern, which I share, that government enforcement policies and practices are eroding the privilege at a time when lawyers must be more involved than ever in executive decision-making and preventive compliance initiatives in order to be able to monitor, enforce and improve corporate compliance.

General Thornburgh begins the Monograph with a brief section on the history of protections for attorney-client communications in the corporate context. The current debate is not over the parameters of the privilege, but "when the government should get access to material that is clearly privileged." General Thornburgh reviews potential considerations and benefits of the privilege, including the ability of companies to conduct internal investigations with the confidence that the raw communications and legal impressions of counsel will remain private and the positive effect on corporate compliance when business executives do not fear disclosure from talking with their company's lawyers.

The Monograph's second section focuses on government policies that are eroding the privilege in the corporate context and how such policies impact the charging decisions of prosecutors and the settlement decisions of companies. The privilege waiver issue today usually arises before the parties ever get to court when the government considers whether a company has "cooperated" with an investigation of alleged wrongdoing. Not only the federal government, but also state officials and regulatory agencies, now seek to tie privilege waiver to a determination of cooperation. If a company is not perceived as having "cooperated," it may be unable to survive and continue to engage in its business. The General's analysis of these matters includes a discussion of the government's justifications for seeking a waiver of the attorney-client privilege, an analysis of investigations where a waiver has been sought, and the effects of the waiver for a company and its employees.

Although companies and the government share the goal of legal compliance, requests for privilege waivers undermine such things as internal investigations and employee interviews geared toward discovering and correcting wrongdoing. Most information the government receives from a waiver is readily available to private plaintiffs' lawyers for their use in class action litigation. A compelling reason for a company to avoid disclosure of privileged communications is not because a company does not want to cooperate with the government, but rather because the company may not be able to survive subsequent derivative suits by shareholders or class action plaintiffs.

General Thornburgh concludes with several wise suggestions on how government can better balance the competing interests of protecting attorney-client communications and law enforcement, and how companies might ensure cooperation with the government short of offering a waiver of the privilege. The privilege belongs to the corporate client, who should be able to choose how and when to assert it within the rules of the court.

A recent survey by the Association of Corporate Counsel confirms the importance of the privilege to corporate compliance and the risks posed by current uncertainties surrounding it. It is critically important to have highly respected voices speaking out on issues like this which affect the free enterprise system and enforcement of our laws. I commend General Thornburgh for offering his voice and informed counsel in this debate, and the Washington Legal Foundation for carrying his message forward so effectively.

ABOUT THE AUTHOR

The Honorable Dick Thornburgh has served as Governor of Pennsylvania, Attorney General of the United States, and Under-Secretary-General of the United Nations during a public career which has spanned over 30 years.

He was elected Governor of Pennsylvania in 1978, and re-elected for a second term in 1982. He served as Attorney General of the United States from 1988-1991. He began his career as a member of the legal department at ALCOA in Pittsburgh and is currently counsel to the national law firm of Kirkpatrick & Lockhart Nicholson Graham LLP in its Washington, D.C. office.

Mr. Thornburgh is the Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

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About half the practice of a decent lawyer consists in telling would-be clients they are damn fools and should stop.

* * * *

A lawyer is a counselor, an advisor. He isn't a hired man to do the bidding of his clients, but he must exert the independence of his mind and understanding upon the conduct of his client's business.

The blunt description of a "decent lawyer" advising "damn fools" to stop is attributed to Elihu Root, a prominent New York lawyer of nearly a century ago, while the more urbane and nuanced statement on the role of the attorney as advisor is linked to Justice Felix Frankfurter.¹ Yet the touchstone of Root's counsel to "damn fools" and Frankfurter's exercise of independent thought on the "conduct of his client's business" is the same: forthright advice serves clients best. The lawyer's exercise of this critical professional responsibility benefits more than the individual client. When forthright counsel is given by many lawyers to many

¹See Martin Mayer, *THE LAWYERS* (New York: Harper & Row 1967), at 6.

clients, it promotes a law-abiding society through voluntary action. Fortright advice that benefits clients and society does not arise in a vacuum. It is provided in the context of the attorney-client relationship, a relationship of trust and confidence. And it depends on the historic confidence of lawyers and clients as preserved in the attorney-client privilege.

The parameters of the attorney-client privilege have been relatively certain for many years, and have perhaps been taken for granted. That historic situation is now changing. The previously solid confidence in the confidentiality of attorney-client communications has been shaken, for members of the Bar are profoundly concerned that there has been an erosion of the privilege. This erosion results in part from relatively recent court decisions that broaden exceptions to the privilege, or narrow its scope.² More recently, however, and, to lawyers, more alarmingly, the erosion has been linked to a trend in law enforcement for the government to demand a waiver of a corporation's privilege as a precondition for granting the benefits of "cooperation" that might prevent indictment, or diminish punishment. The profession is ready to join issue with the government: the hottest topic of the 2005 Annual Meeting of the American Bar Association ("ABA") was the perceived assault on the attorney-client privilege by the government. Indeed, at the conclusion of that meeting, the ABA House of Delegates unanimously passed a resolution that "strongly supports the preservation of the attorney-client privilege" and "opposes policies, practices and procedures of government bodies that have the effect of eroding the attorney-client privilege. . . ."³

²See Dick Thornburgh, *Attorney-Client Privilege and "Crime-Fraud" Exception: The Erosion of Business and Privacy*, Washington Legal Foundation MONOGRAPH (Sept. 1999).

³This resolution was initially drafted by an ABA Task Force on the Attorney-Client Privilege, which had held public hearings on the issues raised by recent government practices. A report detailing the Task Force's work is available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>. ABA members also heard extensive discussion of the issues at these well-attended presentations. See Conference Report, ABA Annual Meeting, Vol. 21, No. 16 (Aug. 10, 2005).

This ABA resolution was bound to be controversial. Many private attorneys (and clients) will view the resolution as a necessary defensive measure, believing that any limitation on the attorney-client privilege is a threat to the legal profession's role as counselor to businesses and individuals. In contrast, government attorneys may view the resolution as the result of the proverbial "tempest in a teapot." They contend that requests for privilege waivers pose no significant concerns, for in the government's view, such requests are relatively rare, the government seldom seeks an attorney's core "mental impressions," and the client always has a choice as to whether to waive or not.⁴ From the general public's vantage point, the lawyers' alarms may seem an effort by attorneys to preserve their competitive edge by maintaining the legal profession's exclusive right to have "secret" discussions with clients. And still others in the public may take a darker view, seeing the privilege as a device to conceal wrongdoing, or to cloak advice on evading the law.

In my view, there is cause for concern. The attorney-client privilege is a vital pillar of a law-abiding society, and the erosion of the privilege is a matter of considerable import for business clients, for the general public and for the government. My concern is rooted in one of a private lawyer's most important public functions in American society – fostering voluntary compliance with law. Counseling voluntary compliance has a long and distinguished tradition; it is reflected in Elihu Root telling "damn fools" they should stop, and in Felix Frankfurter's thinking independently in order to give the best available advice to shape the conduct of his client's business. Yet the ability to render such advice requires a client confident enough to make full and candid disclosure to a lawyer, and a lawyer confident that his advice will not travel beyond the foolish, but now well-advised, client. When they spoke, Root and Frankfurter could base this confidence on more than three hundred years of Anglo-American law concerning the "inviolability" of the attorney-

⁴See Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST LAW REV. 587 (2004); James B. Comey, *Interview with United States Attorney Regarding Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney-Client Privilege and Work Product Protection*, 51 U.S. Attorneys' Bulletin 6 (Nov. 2003).

client privilege. Would those eminent lawyers speak as freely today? Again, in my view, uncertainty would now temper their confidence, as the privilege that the legal profession and its clients have long relied on erodes.

The concern of lawyer, client and public with the erosion of the privilege is amplified by two additional factors. One is the increasingly complex legal and regulatory environment that requires businesses to depend ever more heavily on candid legal advice. The other is the relatively recent regulatory emphasis on the role of lawyers as “gatekeepers.” Expanding regulation is not a new phenomenon: for years it has been a cliché to observe that businesses face more complex regulation from all levels of government: federal, state and local. But the cliché continues to be well grounded in fact, for, as most business executives would testify, lawyers are increasingly involved, and more deeply involved, in many core business activities, ranging from stock offerings to product design and marketing.

The attorney’s role as a “gatekeeper,” on the other hand, is a relatively recent development. The term describes the independent professional whose advice or services are an essential component of a business transaction. A classic example is the securities attorney whose services are necessary in order for an offering of securities to proceed.⁵ If the lawyer performs his due diligence responsibility and is not satisfied that all is in order, the deal cannot close. The public is thereby protected by the lawyer fulfilling his ethical responsibility to his client. Plainly, the role of a “gatekeeper” requires a lawyer to be fully informed, and this, in turn, requires the clients to be confident enough to speak with complete candor.

⁵See, e.g., Stephen M. Cutler, Director, SEC Enforcement Division, Remarks at UCLA School of Law, *The Themes of Sarbanes-Oxley as Reflected in the Commission’s Enforcement Program* (Sept. 20, 2004) (transcript available at <http://www.sec.gov/news/speech/spch092004smc.htm>). See John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003), available at <http://www.columbialawreview.org/pdf/Coffee.pdf>.

The purpose of this MONOGRAPH is not to argue that the “inviolability” of the privilege means there must never be a waiver. In individual cases, a waiver may be appropriate. I do, however, want to sound a note of caution for all the participants in the legal process: Making the waiver of the privilege a criterion for avoiding or lessening charges, or in reducing penalties if charges are brought, will increase pressure on clients to waive the privilege. Waivers will become the rule rather than the exception, and the prospect of an uncertain privilege will undermine the ability of lawyers to provide candid advice. The business community, which operates in an increasingly regulated environment, should be just as concerned about this erosion as we in the legal profession. Indeed, the government should be concerned as well, for the corrosive effect of routine demands for waiver as a condition may deprive society as a whole of the benefits of increased voluntary compliance and improved corporate governance. These are benefits that cannot be achieved solely through the prosecutor’s office.

* * *

In this Monograph, I attempt to find a path to preserving the benefits of the privilege, while recognizing legitimate needs of law enforcement. It reviews the history of the privilege, discusses the waiver requirements and their ramifications, and provides some recommendations that should serve to protect the benefits of the attorney-client privilege.⁶

⁶I do not mean to slight the importance of, or the protection due, attorney work product. While not a “privilege” in the strict sense, the work product doctrine plays an important role in facilitating effective counseling and advocacy. The pressures to waive the attorney-client privilege are also being brought to bear on work product protection, and the reasons to reduce or eliminate those pressures discussed in this article apply with equal force to its preservation.

I.

A BRIEF HISTORY OF THE PRIVILEGE IN THE CORPORATE CONTEXT

The attorney-client privilege is the oldest of the “evidentiary privileges,” originating in the common law of England in the 1500s.⁷ The original purpose of the privilege was to protect the attorney by not requiring him to reveal his client’s secrets.⁸ Yet the privilege soon shifted to protecting the client and the client’s interests, for the courts recognized early on that when confidentiality between an attorney and client is protected, communications are more open, and sound legal advice is more easily obtained.⁹ Since the privilege exists to protect the client’s interests, only the client can decide whether to waive its protections.

⁷See *Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580) (A counselor not to be examined of any matter, wherein he hath been of counsel).

⁸See generally Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978). More particularly, the privilege also expanded in scope through the rulings of Lord Brougham in two cases decided in 1833. See *Bolton v. Corporation of Liverpool*, 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch. 1833); *Greenough v. Gaskell*, 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch. 1833). In these cases, the communications between an attorney and client, regardless of when the communications occurred with respect to a lawsuit, were protected by the attorney-client privilege.

⁹American cases on the attorney-client privilege began in the 1820s. Hazard, at 1087. While early cases in both England and America differed in the extent to which the privilege would protect communications between the attorney and client, the privilege was established as a historical, honored tradition. Wigmore describes the privilege:

The history of this privilege goes back to the reign of Elizabeth, where the privilege already appears as unquestioned. . . . The policy of the privilege has been plainly grounded, since the latter part of the 1700s. . . . In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; and hence the law must prohibit such disclosure except on the client’s consent.

Id. at 1069-1070 (citing 8 J. WIGMORE, EVIDENCE § 2290, 2291 (3d ed. 1940)).

Although the privilege shields (conceals, cynics might say) evidence from disclosure that might otherwise be admissible in court, the courts have found that the loss of evidence occasioned by the privilege is outweighed by other factors. In particular, open communication between lawyer and client benefits both the immediate client, who receives better advice, and society as a whole, which obtains the benefits of voluntary legal compliance. These ideas have been embraced time and time again by the courts. In defining the privilege in the corporate context, the United States Supreme Court reaffirmed that the purpose of the privilege is to encourage:

full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that such legal advice or advocacy depends upon the lawyers being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Thus, as recognized by the courts, the attorney-client privilege is a core element in a law-abiding society and a well-ordered commercial world.

The history of the “corporate” attorney-client privilege is briefer, and more complex, than the general history of the privilege itself. Courts have recognized the availability of the attorney-client privilege to corporations for nearly a century.¹⁰ In earlier cases, however, the courts often tended to treat the privilege as a “personal” or individual privilege, and did not distinguish between individual and corporate “clients.”¹¹ This approach created some confusion among the courts, as corporations are legal entities that cannot communicate on their own, and the question of who speaks for the corporation produced difficult issues concerning

¹⁰See *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915); see also *Radiant Burners, Inc. v. Am. Gas Ass’n*, 320 F.2d 314, 319 (7th Cir. 1963).

¹¹See *Radiant Burners, Inc. v. Am. Gas Ass’n*, 320 F.2d 314, 322 (7th Cir. 1963) (“Our conclusion is that the privilege is that of a ‘client’ without regard to the non-corporate or corporate character of the client, designed to facilitate the workings of justice.”).

which communications the privilege protected.

One solution was to limit the privilege to a corporate “control group,” consisting of the directors and those senior officers who ran the company. The control group theory limited the scope of privilege to communications made by persons in the corporation who were “in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.”¹² Unfortunately, a consequence of the “control group” formulation was to restrict the attorney’s usefulness by limiting the information the attorney could acquire under the protection of the privilege, and restricting the attorney’s ability to communicate that advice to corporate employees in the context of the privilege.

In 1981 the United States Supreme Court decided *Upjohn Co. v. United States*, rejecting the “control group” theory, and establishing the current scope of the attorney-client privilege in the corporate context where it may protect corporate counsel’s communications with any corporate employee.¹³ The Supreme Court observed that the “control group” theory failed to acknowledge the privilege’s essential purpose of protecting *any* communication with an attorney for purposes of enabling that attorney to give appropriate legal advice.¹⁴ In the Court’s view, the historic logic of the privilege protects communications with relatively low-level employees to the same extent as communications with the CEO, if these communications are needed to give legal advice to the corporate entity.

A. Benefits of the Attorney-Client Privilege

Upjohn’s redefinition of the corporate privilege enhanced a lawyer’s ability to provide legal services to a corporate client. A lawyer could

¹²*City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (D. Pa. 1962).

¹³*Upjohn Co. v. United States*, 449 U.S. at 383, 402 (1981).

¹⁴*Upjohn*, 449 U.S. at 394.

now get all the facts firsthand by speaking directly with those corporate employees who had the knowledge necessary for the lawyer to provide full and complete advice. In turn, the lawyer's advice could now be communicated to those in the corporation who have a "need to know" in order to implement the advice and assure compliance with law. The *Upjohn* definition of privilege also expanded the lawyer's role in corporate compliance by facilitating internal investigations into possible wrongdoing, as *Upjohn* gave corporations reasonable confidence in the protection of the privilege over the fact-gathering process.

This second element is of increasing importance. In recent times, the internal investigation has been encouraged by the government as an appropriate response to suspected wrongdoing by corporate employees. In some cases, internal investigations are effectively required: two important federal "authorities" require that a corporation undertake an investigation when it is apprised that there has been, or is currently, a possible violation of law. One authority is the Federal Sentencing Guidelines, which until recently held out the prospect for leniency when a corporation has identified, investigated and disclosed possible violations of law.¹⁵ The second authority is Section 307 of the Sarbanes-Oxley Act of 2002,¹⁶ and the Securities and Exchange Commission's ("SEC") regulations thereunder.¹⁷ The Sarbanes-Oxley Act and the SEC's regulations require a public company, through its chief legal officer or a committee of the board, to undertake an investigation whenever counsel brings to their attention possible violations of federal or state laws relating to securities or corporate governance. Even when

¹⁵See United States Sentencing Commission, *Guidelines Manual*, § 8C2.5(f) & (2), comment 10 (Nov. 2004)(g), comments (n.10-12) (Nov. 2005). On April 5, 2006, the staff of the Sentencing Commission voted to remove the 2004 privilege waiver amendment contained in § 8C2.5, comment (n.12) of the Sentencing Guidelines. See News Release, U.S. Sentencing Commission, *U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids* (Apr. 11, 2006), available at <http://www.ussc.gov/PRESS/rel0406.htm>. Unless Congress takes affirmative action to modify or disapprove of that amendment, it should become effective on November 1, 2006.

¹⁶15 U.S.C. § 7245 (2005).

¹⁷17 C.F.R. § 205 (2005).

not required by a statute or regulation, the internal investigation is often sound and responsible corporate practice, and is of increasing importance in corporate compliance programs generally.¹⁸

In part because of the availability of the attorney-client privilege and the attorney work product doctrine, most internal investigations are conducted by attorneys. While appropriate cautions must be given to advise employees that the corporation is the holder of the privilege, the *Upjohn* definition allows an attorney to have confidential conversations with corporate employees. In fact, to have an effective internal investigation, the protections for interviews with employees “are indispensable tools in counsel’s war chest.”¹⁹

In addition to protecting the fact-gathering process, the privilege allows an attorney to prepare memoranda, and ultimately report findings and advice, without concern that the information will be obtained by adversaries. Based on this report, the corporate client can then make the appropriate judgments on remediation and, if appropriate, report violations to the authorities. All this is to the public good, as it furthers the “broader public interests in the observance of law and the administration of justice”²⁰ by encouraging corporations to investigate and correct wrongdoing in an expedient and useful manner.

¹⁸See generally Thomas P. Vartanian, Lawrence R. Bard and Travis P. Nelson, *Internal Investigations in the Post Sarbanes-Oxley Era*, ABA Banking Law Committee Newsletter (Nov. 2005), available at www.abanet.org/buslaw/committees/CL130000pub/newsletter/200511/vartanian.pdf; John J. Fons, *The Case for Compliance: Now it's a Necessity, Not an Option*, 13 BUS. LAW TODAY, 27, 31 (2003), available at <http://www.abanet.org/buslaw/blt/2003-09-10/fons.html>.

¹⁹See Judson W. Starr and Brian L. Flack, *Self-Reporting: Dangers Ahead*, SG014 ALI-ABA 47, 53 (Nov. 8-9, 2001). The *Upjohn* formulation of the privilege carries the seeds of a significant issue in internal investigations. Under the attorney-client privilege, an attorney cannot disclose a privileged communication to an outsider without client consent. Employees may feel protected in their discussions with attorneys and therefore shielded from any outside liability for their comments or confessions. Employees therefore must be warned that the privilege belongs to the corporation, and that the communication to counsel can be revealed to others outside the government if the privilege is waived by that employer.

²⁰*Upjohn*, 449 U.S. at 389.

B. The Costs of the Privilege

There is no doubt that the attorney-client privilege comes with certain costs. The principal cost is that it can shield important evidence from coming to light and being used to prosecute crimes. Little would be more relevant to an issue than the facts a party discloses to its attorney about that very issue. These disclosures are placed beyond reach by the attorney-client privilege. In addition to loss of evidence, there is continuing concern that the privilege may be used to cloak advice used to facilitate illegal conduct – to evade the law rather than foster compliance with it. The law as it exists today, and has existed for many years, addresses these potential costs.

As a threshold matter, the privilege itself is narrowly defined. According to Revised Uniform Rule of Evidence 502 (1986 amendment), “a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendering of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer’s representative...” 1 MCCORMICK, EVIDENCE § 87 (5th ed. 1999). Moreover, the proponent of the privilege must establish each of its elements, and one widely cited formulation of the privilege identifies the following elements:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made
 - (a) is a member of the bar of a court, or his subordinate, and
 - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed

- (a) by his client,
 - (b) without the presence of strangers,
 - (c) for the purpose of securing primarily either
 - (i) an opinion on law, or
 - (ii) legal services, or
 - (iii) assistance in some legal proceeding, and not
 - (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been
- (a) claimed, and
 - (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (Wyzanski, J.).

When rigorously applied, these elements from the classic *United Shoe* formulation by Judge Wyzanski circumscribe the privilege and prevent its abuse. Several restrictive elements bear some elaboration. First, the person to whom the communication is made must be a member of the Bar, or his subordinate. Lawyers may and do use agents, investigators, and legal assistants in rendering legal advice, and where their services are needed for effective legal representation, the communications should be protected. Yet courts have been unwilling to allow this “agent” theory to expand the sphere of protection beyond these clear agents of the attorney. Second, the purpose of the communication must be to secure a legal opinion. This restriction excludes communications related to business advice or public relations, even if that is a significant part of a client’s defense strategy.²¹ Third, the

²¹See, e.g., *Cavallaro v. United States*, 284 F.3d 236 (1st Cir. 2002) (documents related to tax planning advice given to clients of law firm by accounting firm were not privileged, as accounting firm was not assisting law firm with the rendering of legal advice); *Calvin Klein Trademark Trust*, 198 F.R.D. 53 (S.D.N.Y. 2000) (documents from public relations firm hired by attorney on behalf of client were not privileged).

formulation makes it clear that advice or assistance used for the purpose of committing a crime or tort is not protected. This so-called “crime/fraud” exception is an important limitation, but one that is susceptible of use (and sometimes abuse) as a sword to pierce legitimately shielded communications.²²

The current debate does not involve defining what is and what is not privileged. These boundaries have been fixed for some time so that lawyers and clients have been able to operate with a good measure of certainty. The debate focuses on when the government should get access to material that is clearly privileged. Communications to and from counsel to a corporation often contain significant information about major decisions taken by management, and those communications are often of keen interest to government investigators. It is here that the current pressure against the privilege is being applied.

II.

WAIVER AND EROSION OF THE ATTORNEY-CLIENT PRIVILEGE

The current pressures on the attorney-client privilege emanate chiefly from the Department of Justice (“DOJ”) and the SEC. Both agencies have issued public guidelines that strongly encourage corporations to waive the privilege by holding out to them the prospect of favorable treatment. In addition, recent amendments to the Federal Sentencing Guidelines have stated that the waiver of the privilege may be a significant factor in determining whether the corporation has

²²See Dick Thornburgh, *Attorney-Client Privilege and “Crime-Fraud” Exception: The Erosion of Business and Privacy*, Washington Legal Foundation MONOGRAPH (Sept. 1999); see also Jeffrey J. Greenbaum, *Report Regarding Changes to Discovery Rules Regarding Electronic Discovery* (2005) (detailing proposed changes to discovery rules regarding privilege and work product claims approved by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States), available at: www.abanet.org/litigation/documents/greenbaum_report.pdf.

engaged in the timely and thorough “cooperation” necessary for obtaining leniency.²³ Following the federal lead, state law enforcement officials are beginning to demand broad privilege waivers, as are self-regulatory organizations and the auditing profession.²⁴ While the United States Sentencing Commission agreed to review this aspect of the Federal Sentencing Guidelines, and has recently voted to repeal that amendment,²⁵ other authorities are pursuing aggressive policies seeking waivers.

A. Policies Encouraging a “Voluntary” Waiver

The possibility of avoiding criminal charges through “cooperation” has been the principal inducement offered by the government in seeking a waiver of the attorney-client privilege. The DOJ’s guidelines promoting waiver first appeared in a 1999 memo from then-Deputy Attorney General Eric Holder (the “Holder Memorandum”). The Holder Memorandum was initially circulated as an internal departmental memorandum and encouraged a corporation’s waiver of the attorney-

²³United States Sentencing Commission, *Guidelines Manual*, § 8C2.5(g), comment 12 (Nov. 2005). As previously noted, on April 5, 2006, the Commission voted to remove that 2004 amendment, with an effective date of November 1, 2006 absent modification or disapproval by Congress.

²⁴For example, in late 2005 the New York Stock Exchange issued a memorandum detailing the degree of “required” or “extraordinary” cooperation Members and Member Firms could and should engage in with the Exchange. See NYSE Information Memorandum No. 05-65, *Cooperation*, dated September 14, 2005. Exchange Members engaging in “extraordinary” cooperation, including waiver of the attorney-client privilege, are able to reduce prospective fines and penalties levied by the Exchange. See, e.g., News Release, New York Stock Exchange, *NYSE Regulation Announces Settlements with 20 Firms for Systemic Operational Failures and Supervisory Violations* (Jan. 31, 2006) (noting that Goldman, Sachs & Co. had been credited with “extraordinary” cooperation by self-reporting violations, and indicating it received the lowest of three possible fine amounts), available at <http://www.nyse.com/Frameset.html?displayPage=/press/1138361407523.html>.

²⁵See News Release, U.S. Sentencing Commission, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids (Apr. 11, 2006), available at <http://www.uscc.gov/PRESS/rel0406.htm>.

client privilege if the corporation wanted to be seen as cooperative.²⁶ These policies were restated in a 2003 memo from Deputy Attorney General Larry Thompson (the “Thompson Memorandum”).²⁷ The SEC,²⁸ in a public investigation report now known as the “*Seaboard*” Report,²⁸ outlined a similar policy by identifying privilege waiver as evidence of cooperation. I will spend some time discussing these statements of government policy, as they are important to understand the current concerns over waiver.

1. The Thompson Memorandum

The Thompson Memorandum expresses the current DOJ policy on charging corporations for violations of the federal criminal law. The waiver of the attorney-client (and work product) privileges is an important element in determining whether a corporation may get favorable treatment as a “cooperator.”

In determining whether to charge a corporation, that

²⁶See *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003).

²⁷The Thompson Memorandum is the current statement of DOJ policy. See Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003); available at www.usdoj.gov/dag/cftf/business_organizations.pdf. The DOJ recently reaffirmed that the Thompson Memorandum remains the Department’s official policy. See Memorandum from Acting Deputy Attorney Robert D. McCallum, Jr. to Heads of Department Components and United States Attorneys, *Re: Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21, 2005) (the “McCallum Memorandum”); available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

²⁸See *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001); available at <http://www.sec.gov/litigation/investreport/34-44969.htm>. The *Seaboard* Report does not mention the public company by name. Nonetheless, that company, Seaboard Corporation, has lent its name to this important statement of SEC policy.

corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to *waive the attorney-client and work product privileges*. Thompson Memorandum, VI.A. (emphasis added).

The tone of the Thompson Memorandum seems temperate. In describing the circumstances where a waiver may be sought, it states that the "waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue." *Id.* at VI.B. n.2.

Furthermore, the request of a waiver concerning communications and work product related to the government's investigation should not occur in normal circumstances. *Id.* While this language may be an attempt to provide balance, it is often difficult in practice to make the distinctions outlined in the Thompson Memorandum and, as is typically the case, actual practice paints a different picture than the text in the Memorandum.²⁹ Despite its temperate tone, and the use in the Thompson Memorandum of "may" rather than "shall," prosecutors routinely demand prompt disclosure of wrongdoing *and* waiver of the privilege at the beginning of an investigation. If a corporation does not waive the privilege at the outset when it is sought, then the prosecutor

²⁹Additionally, the Thompson Memorandum states that the prosecutor is to consider whether the corporation appears to be protecting its culpable employees. *See id.* at VI.B. If a corporation honors a prior promise and retains counsel for an employee, then a prosecutor can consider this factor when determining the amount of the corporation's cooperation with the government. This also seems to encourage corporations to disclose any information so it does not appear they are protecting a culpable employee.

might view that as untimely and uncooperative.³⁰ In short, while this language does not explicitly *require* corporations to waive the privilege, it certainly provides an incentive to do so, and to do so quickly.³¹

This raises two concerns I have in connection with the Thompson Memorandum. The first concern is the absence of specific safeguards, as the DOJ has not issued any clarification or guidelines to explain the prosecutor's consideration of a corporation's waiver in determining the authenticity of its cooperation. The DOJ has recently issued a new statement purportedly addressing this lack of standards.³² But it indicates that each of 94 separate United States Attorneys Offices is to develop its own standards. There are two problems with this approach. First, there are no safeguards to ensure this policy is not abused at the local level. Second, there is the danger of inconsistent application, which acts to decrease the amount of certainty in this area. While it would be beneficial for a high-ranking official to approve the request for waiver of this privilege, this type of safeguard is not used, or even recommended. *See Report*, American Bar Association, Task Force on Attorney-Client Privilege, at 16.³³

In addition to the absence of safeguards, I have a concern that waiver requests are not isolated instances, and each waiver has a "ripple effect" of creating more demands for greater disclosures, both in individual cases, and as a matter of practice. In other words, once a corporation discloses a certain amount of information, then the bar is raised for the next situation, and each subsequent corporation will need to provide more information to be deemed as cooperating with the prosecution. The

³⁰See Robert A. Del Giorno, *Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, CHAMPION, Aug. 2003.

³¹Unfortunately, even when a waiver is given by a corporate client, there is no assurance that the corporation will be given leniency, as prosecutors retain wide discretion in determining the charges to bring against a corporation and waiver of the privilege is but one of a number of factors.

³²See McCallum Memorandum; available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

³³Available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>.

Thompson Memorandum offers no hints on how to limit this crescendo of disclosure.

2. The Federal Sentencing Guidelines

The approach established by the Thompson Memorandum, that “cooperator” status effectively requires a waiver, has been adopted in other settings. One example appeared in the culpability calculations under the Federal Sentencing Guidelines. Language added to commentary of the Guidelines in 2004 identified the waiver of attorney-client privilege (and work product protection) as a factor that could weigh favorably in fixing punishment for convicted corporations.³⁴ The United States Sentencing Commission, the body that promulgates the Guidelines, has recently voted to delete the reference to waivers in its discussion of factors reflecting cooperation. While this is a welcome step, standing alone, it does not substantially alleviate the pressure on the privilege in the criminal justice system.

The Guidelines encouraged waivers by holding out the prospect of favorable treatment. Section 8C2.5 of the Guidelines currently governs the effects cooperation may have on potential culpability. If a corporation “fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct,” it receives two points off its culpability score. *See* USSG § 8C2.5(g)(2). If, in addition, the corporation has voluntarily reported the offense to the government, it will be effectively awarded five (5) points – enough to negate the initial culpability value entirely, setting aside other factors. USSG § 8C2.5(g)(1).

The Application Notes in the Commentary to this section further illuminate the meaning of “cooperation”:

[t]o qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely

³⁴*See* United States Sentencing Commission, *Guidelines Manual*, § 8C2.5(g), (Nov. 2005); *see also* United States Sentencing Commission, 2004 Amendments to the Sentencing Guidelines, at 83 (available at <http://www.ussc.gov/2004guid/2004cong.pdf>).

and thorough. To be timely, 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 information known by the organization.

USSG § 8C2.5(g), note 12 (emphasis added). Moreover, a “prime test of whether the organization has disclosed all pertinent 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.” *Id.*

Does “all” include privileged communications? In 2004, the Sentencing Commission adopted an amendment to the Commentary that appeared to answer “yes.” The Commentary, like the Thompson Memorandum, seemed to adopt a measured approach to waiver, stating that “[w]aiver of the attorney-client privilege and of work product protections is not a prerequisite” to receiving the status of a cooperator. But it effectively undermined this point by adding “unless such waiver is necessary in order to provide timely and thorough disclosure of *all* pertinent information known to the organization.” Like the language in the Thompson Memorandum, which gives a prosecutor discretion to consider the importance of a waiver, the “unless such waiver is necessary” qualification creates such uncertainty that it makes a wide-ranging waiver the only possible course of action for an organization seeking cooperator status. For a would-be cooperator, a “voluntary” waiver effectively becomes a required step.

In light of the strong negative public reaction to the implications of the Commentary’s language on waiver,³⁵ the Sentencing Commission

³⁵Throughout 2005, numerous parties contacted the Sentencing Commission with requests to review and amend the 2004 waiver commentary to Section 8C2.5, including both a coalition involving the American Civil Liberties Union and the American Bar Association. See Coalition Letter to U.S. Sentencing Commission Regarding Recent Privilege Waiver Amendment (Mar. 3, 2005), available at <http://www.aclu.org/crimjustice/sentencing/10231leg20050303.html>; see also Letter from Robert D. Evans, Director, American Bar Association, to the Honorable Judge Hinojosa, Chairman, United States Sentencing Commission (Dec. 2, 2005), available at http://www.abanet.org/poladv/acpriv_aba12-2.pdf. Similarly, in August 15, 2005, I and

identified it as a topic for “review and possible amendment” and solicited further public comment on whether the language would have “unintended consequences” that may adversely affect application of the Guidelines and the administration of justice.³⁶ Numerous comments were submitted raising concerns from a number of perspectives. Recently, the Sentencing Commission voted unanimously to overturn the amendment regarding privilege waivers,³⁷ with an effective date of November 1, 2006, unless modified or disapproved of by Congress.

While heartening, the removal of the express reference to the consideration of waiver in sentencing proceedings, by itself, may do little to relieve the pressure to waive the privilege. First, the deletion of the language expressly identifying waiver as an indication of cooperation does not mean that waiver is no longer to be considered. The Guidelines are, after all, just that: non-exclusive considerations for judges.³⁸ A corporation pressing for leniency may still face pressure to reveal “all” information. Moreover, sentencing decisions represent the end of the criminal justice process. A corporation enhances its prospects for avoiding or at least minimizing criminal sanctions by being a “cooperator” up front, in the investigative process that informs the critical prosecutorial decisions: who to charge with what offenses. The Thompson Memorandum, with its express consideration of waiver, and not the Sentencing Guidelines, controls this analysis. Until there is a change in the policy followed in the investigative phases, the pressures will continue largely unabated.

other former Attorneys General, as well as other former Justice Department officials, submitted a joint letter to the Honorable Judge Ricardo H. Hinojosa, Chairman of the United States Sentencing Commission, detailing our concerns with the privilege waiver amendment. A copy of that letter is available at <http://www.abanet.org/poladv/dojlettertoussc.pdf>.

³⁶See 71 Fed. Reg. 4803-04 (Jan. 27, 2006).

³⁷See News Release, U.S. Sentencing Commission, *U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids* (Apr. 11, 2006), available at <http://www.ussc.gov/PRESS/rel0406.htm>.

³⁸See *United States v. Booker*, 543 U.S. 220, 246 (2005).

3. The SEC

The SEC also plays a leading role in investigating public companies, and has created a similar incentive for corporations to waive the attorney-client privilege when they are under investigation.³⁹ The agency's policy has been set out in the context of settlements or reports at the conclusion of actual investigations. As a result, the SEC's pronouncements concerning the waiver of the attorney-client privilege offer a more concrete statement of the potential benefits. The first statement, the *Seaboard* Report, was issued using the SEC's authority to issue "reports" rather than bringing charges at the end of an investigation.⁴⁰ In the *Seaboard* Report, the SEC listed thirteen criteria it considers when determining penalties. Cooperation is a critical factor, and a significant aspect of cooperation is the willingness to waive the attorney-client privilege not only directly, but through providing the results of an internal investigation, voluntarily disclosing information not requested by the SEC, and encouraging employees to cooperate.⁴¹

In a recent official statement of policy on financial penalties, the SEC has reaffirmed the importance of cooperation in determining whether civil money penalties will be imposed on a corporation.⁴² Again, an early decision is essential, as the SEC has imposed harsh sanctions for companies or individual employees that have not fully cooperated, even though the company may later cooperate after initial

³⁹See Russell G. Ryan, *Cooperation in SEC Enforcement: The Carrot Becomes the Stick*, 9 LEGAL BACKGROUNDER 33 (2004); see also *Seaboard Report* (Oct. 23, 2001).

⁴⁰See *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

⁴¹*Id.*

⁴²See News Release, Securities and Exchange Commission, *Statement of the Securities Exchange Commission Concerning Financial Penalties*, Jan. 4, 2006, available at www.sec.gov/news/press/2006-4.htm.

“uncooperative” behavior.⁴³ The SEC staff asserts that it does not ask for waiver. The decision, in the staff’s view, is entirely up to the corporation.⁴⁴ But like the DOJ, the SEC has created a regime where corporations have little choice but to “cooperate” and surrender privileged communications.

B. Consequences to the Corporation of an Agreement to Waive the Privilege

The requirement that a corporation waive attorney-client privilege to be deemed “cooperative” creates significant issues at several levels. First, it may hinder a corporation’s efforts to address wrongdoing internally. Setting aside the government’s interest in enforcing the law, corporations have a need to manage themselves effectively. This means treating problems as management issues as well as legal matters. Internal investigations are important vehicles for accomplishing this objective, but in light of these recent cases, a corporation and its employees are going to resist providing any potentially prejudicial information during any type of investigation.

Current ethical rules require that lawyers for a corporation advise employees that the lawyers represent the entity, not the employee, and alert the employees to the possibility that the corporate employer may decide to waive the privilege.⁴⁵ Often the waiver question is effectively

⁴³See, e.g., News Release, Securities and Exchange Commission, *Dynegy Corporation*, No. 2002-140 (Sept. 24, 2002) (“Just as the Commission is prepared to reward companies that cooperate fully and completely with agency investigations, the Commission will also penalize those who do not. If companies wish to receive the maximum benefit from their cooperation, the cooperation must be complete and meaningful from the outset.”), available at <http://www.sec.gov/news/press/2002-140.htm>.

⁴⁴See *SEC Enforcement: Thomsen Says Division ‘Tough But Fair’ In Pursuing Wrongdoers*, BNA’s Securities Regulation & Law Report, 38 SRLR 419, *2 (Mar. 13, 2006); see also *Seaboard Report*, *supra*, at n. 3.

⁴⁵See, e.g., D.C. Bar Ethics Opinion 269, *Obligation of Lawyer for Corporation to Clarify Role in Internal Investigation* (Jan. 15, 1997), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion269.cfm; see also

decided at the beginning of the investigation, due to the inherent penalties a corporation accrues through delayed cooperation. Where the likelihood or inevitability of the waiver is known, the attorney conducting an internal investigation may become a de facto government agent. Indeed, the government seems to hold this view, in that it has brought prosecutions based on false statements to private lawyers who submitted those statements to the government as part of a program of cooperation.⁴⁶ Under these circumstances, an employee may be reluctant to be as forthcoming as he or she otherwise might be, and valuable information and insights may be lost.

On a larger scale, the decision to waive the privilege may have a chilling effect that damages current operations. Corporate counsel and executive personnel whose past communications become the subject of government scrutiny are likely to communicate less, not more. Managers will be less likely to seek advice on difficult issues or, if they do, the degree of documentation and internal (and external) legal review may render decision making slow and inflexible.

Furthermore, despite the implicit promise that cooperation and a waiver will produce tangible benefits, the consequences for corporations may be disastrous. For example, Arthur Andersen, LLP, a large accounting firm, was prosecuted by the government after agreeing to waive the attorney-client privilege. Although the United States Supreme Court eventually overturned the firm's conviction because of faulty jury

Comment 8 to Rule 1.13 of the D.C. Rules of Professional Conduct (“...Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.”), available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/Rule_one/rule01_13.cfm.

⁴⁶See Tom Perrotta, *Computer Associates Defendants Challenge Obstruction Charge News*, N.Y. LAW J., Dec. 29, 2005 (noting that federal prosecutors in the Eastern District of New York accused the defendants of lying both to the government and to their own company's outside counsel, which was conducting an internal investigation of the company).

instructions, this legal result was of scant consolation to the company. The damage was done, and the firm destroyed, ironically as a result of Andersen's effort to be "cooperative" with the government and receive leniency.

The correlation between Andersen's demise and the release of information is recognized by other corporations. As previously noted, KPMG, LLP, another large accounting firm, recently entered into a long-negotiated agreement with the government to avoid criminal charges concerning its marketing of abusive tax shelters.⁴⁷ KPMG certainly understood that an indictment could have grave consequences, and this indictment must be avoided. Indeed, counsel for the firm acknowledged that an indictment could have effectively destroyed KPMG.⁴⁸

C. Justification for Seeking a Corporation's Waiver of the Attorney-Client Privilege

The government's purpose in "encouraging" waivers is plain. As the Thompson Memorandum points out, a waiver eases government access to witnesses and reveals critical internal communications that enable the government to obtain a complete picture of the conduct under investigation. It also makes the prosecutors' jobs easier, as they often find evidence marshaled for them in detailed legal memoranda. But are these benefits worth the costs? In other words, how does the government justify its position in terms of the benefits it provides to law enforcement? The most comprehensive expression is a spirited defense of the government's policies offered by Mary Beth Buchanan, the U.S. Attorney for the Western District of Pennsylvania and former Director of the Executive Office for U.S. Attorneys.⁴⁹ In an article in the *Wake*

⁴⁷See Albert B. Crenshaw and Carrie Johnson, *Regretful KPMG Asks for a Break*, W. POST (June 17, 2005); June 17, 2005; Jonathan D. Glater, *The Squeezing of Lawyer-Client Privilege*, NY TIMES (Sept. 7, 2005).

⁴⁸*Id.*

⁴⁹See Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587 (2004).

Forest Law Review, Buchanan explains why cooperation by corporations is necessary, and then addresses each criticism that has been leveled against the DOJ's efforts to obtain waivers of privilege.

Buchanan's first point is to downplay the issue. She quotes the Thompson Memorandum as cautioning against routinely requiring a waiver as to all privileged information:

waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue.

Thus, in her view, the information provided in the normal circumstances of a requested waiver does not consist of privileged communications, but mostly of the underlying facts not including an attorney's mental impressions. *Id.* at 596.

Second, Buchanan rejects the notion that government frequently seeks waivers, citing an internal survey conducted by the Ad Hoc Advisory Group and distributed to the Criminal Chiefs and Civil Chiefs Working Groups of the Attorney General's Advisory Committee of U.S. Attorneys, the U.S. Attorneys on the White Collar Crime Subcommittee and the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee. This survey showed that requests for waivers were the exception and not the rule, with the survey stating that waivers were only requested in eighteen circumstances. *Id.* at 598.

Third, Buchanan challenges those who claim that the request for waivers creates friction between employers and employees. From the government's perspective, she contends that employees with a realistic perspective of the situation are not surprised by the process. *Id.* at 599. In other words, employees should understand there is zero tolerance for

crime in the workplace, and employers need to report the information to the proper authorities to maintain the proper organizational culture. *Id.*⁵⁰

Fourth, she addresses the concern that the government will interfere with a corporation's legal decisions by requiring waiver and disclosure before the options can be analyzed. In her view, this may not be as much of a problem as it seems. In particular, Buchanan emphasizes that there might already be requirements for disclosing the information immediately, and the information requested is limited in scope.⁵¹

Finally, Buchanan addresses one of the principal critiques of the government's request for a waiver, namely that disclosure will increase exposure to third-party civil litigation claims, for once the information is released, third parties have the necessary data to bring action against the company. *Id.* at 605. Buchanan's response to this legitimate concern is that the government normally seeks only work product and the corporation normally is already required to provide this information to its shareholders or investors. *Id.* at 606.

In short, Buchanan concludes that the effects of the government policies are small and easily outweighed by the benefits to law enforcement.

⁵⁰In Ms. Buchanan's view, an employee's Fifth Amendment right against self-incrimination is not jeopardized through the request for waivers. The employee who makes disclosures in an internal investigation is not offered any protection under the Fifth Amendment. *Id.* at 601. While the employee may decide not to disclose information, this act can result in adverse action by the corporation since an employee has the duty to cooperate with the corporation under his or her contract. *Id.* at 602. Of course, this overlooks the fact that incriminating information is likely to be directly provided to the government.

⁵¹Similarly, opponents view this disclosure as allowing the government to use all of the information the corporation obtained through its hard and long endeavors for its own purposes. *Id.* at 604. Again, to address this concern, the argument is presented that waivers can be limited and the disclosures normally include only the work product and not the privileged conversations. *Id.*

D. Government's Use of the Waiver Requirement

There may be some room to debate the regularity with which the government is seeking waivers of the privilege. However, a review of the events within the last year indicates that waivers are frequent, often very public, and are seemingly not limited to communications directly related to the government's asserted goal of identifying the wrongdoing and wrongdoers. For example, the government has required broad waivers of privilege by corporations in the following recent situations:

- *KPMG*: The accounting firm KPMG entered into an agreement with the government regarding the sale of illegal tax shelters by certain of its partners, in which KPMG promised not to try to use "any claim of privilege" to withhold information from prosecutors.⁵²
- *AEP Energy Services, Inc.*: A subsidiary of American Electric Power Company, AEP Energy Services, agreed to a Deferred Prosecution Agreement in which it promised it would not assert claims of attorney-client privilege regarding any documents, information, or testimony requested by the DOJ related to factual internal investigations or contemporaneous advice.⁵³
- *Computer Associates International, Inc.*: Accused of filing materially false and misleading reports with the SEC and with obstruction of justice, Computer Associates agreed to a Deferred Prosecution Agreement revealing in part that it had already shared with the SEC, FBI, and the United States' Attorney's Office the results of its own internal investigation as well as privileged documents, and that it agreed to not assert with relation to the above entities any claims of

⁵²See Jonathan D. Glater, *The Squeezing of Lawyer-Client Privilege*, N.Y. TIMES (Sept. 7, 2005).

⁵³Available at <http://www.usdoj.gov/dag/cftf/chargingdocs/aepesagreement.pdf>.

privilege regarding documents, records, information, or testimony requested by those entities.⁵⁴

- *Micrus Corporation*: After assertions by the government that it had violated the Foreign Corrupt Practices Act, Micrus Corporation agreed to a Deferred Prosecution Agreement in which it agreed not to assert privilege claims for any materials such as memoranda of witness interviews, documents relating to the underlying transactions, and documents reflecting contemporaneous legal advice given to Micrus regarding those transactions.⁵⁵

While these are examples, it seems that few of the Deferred Prosecution Agreements negotiated by the DOJ fail to contain language requiring the waiver of privilege. It seems we are seeing more requests for more documents.

E. The Broader Effects of Waiver

There is more to it than the impact on specific cases. The government's waiver analysis essentially relies on a decision by a corporation that the near-term benefits of disclosure are greater than the long-term benefits of confidentiality.⁵⁶ I am not so confident in the government's judgment that forcing this choice is a good policy. The attorney-client privilege has historic roots dating to the 1500s and the rationale has been accepted and reaffirmed after centuries of experience. It should not be undermined or limited without serious consideration as to the consequences.

⁵⁴Available at <http://www.usdoj.gov/dag/cftf/chargingdocs/compassocagreement.pdf>.

⁵⁵Available at <http://www.usdoj.gov/dag/cftf/chargingdocs/micrusagreement.pdf>.

⁵⁶See Testimony of Paul Rosenzweig before the American Bar Association Task Force on the Attorney-Client Privilege, *Federal Prosecution Policy and the Attorney-Client Privilege* (Feb. 11, 2005); available at <http://new.heritage.org/Research/LegalIssues/tst021105a.cfm>.

In addition to the “client”-specific issues created by the decision to waive the privilege, there are broader concerns as the waiver becomes commonplace, either by specific government request or as a result of the implied threat of being branded less than fully cooperative under prevailing policy. Unless it is truly limited, the current waiver policy may have the long-term effect of impeding internal investigations, *and* thereby the ability of the government to get information of real value. Must a corporation fire all employees who are deemed “uncooperative” in that they are reluctant to provide information that will be turned over to the government? Future investigators may find that the well of candor upon which prior internal investigations were based has run dry. Thus, the result of the current policy may be that the corporation has less information of use to provide to prosecutors.

How will the government view a corporation that does not meet its expectations as a result of the lack of disclosure by its own employees? Will it still receive benefits for its efforts if it is unable to produce information to assist the government’s own investigation? A corollary to the loss of benefits to the government is likely to be a lessening of the corporation’s ability to remedy potential problems through internal efforts.⁵⁷ In order to prevent confidential information from existing in documents or written form (and therefore be subject to waiver), corporations may be discouraged from even investigating potential wrongdoing, or inquiring into possible breaches. The corporations with the strongest compliance programs may have the most to lose by providing information to the government. Instead of creating an environment that encourages corrective steps within a corporation, current efforts to seek privilege waivers may create disincentives to aggressive investigations.⁵⁸

These questions will only become more relevant as companies continue to waive the privilege in the hopes of lenient treatment, with each waiver serving to both raise the bar for subsequent companies and to put other corporate employees on notice that anything disclosed to an

⁵⁷*Conference Report*, American Bar Association, Vol. 21, No. 4 (Feb. 23, 2005).

⁵⁸*Id.*

internal investigation may well be akin to disclosure to a prosecutor directly.

The consequences of a waiver go beyond the relations with employees and the government. Agreeing to a waiver can increase exposure for a company when privileged material falls into the hands of the plaintiffs' bar. When the information is the product of an internal investigation by the corporation, that information literally provides a "road map" for the third party in its claim against the corporation. *Id.*⁵⁹ Plaintiffs' lawyers, working on contingency, seek the path of minimum effort. What easier way to frame a complaint than to tap the company's own internal investigation. Moreover, unlike the government, which has a significant internal review process that acts as a check on overzealous line prosecutors and a curb on their overly speculative cases, the plaintiffs' bar is motivated purely by the prospect that it can extract an economic reward from a given figure. Few things are as effective in a plaintiff's hands as a lawyer's memo that, shorn of context, suggests that a client may be out of compliance with the law.

Unfortunately, there is no way to guarantee that a waiver to provide information to the government will not be extended to require disclosure to all. The government and corporations often agree on what they think the scope of the waiver is, and commonly place language in deferred prosecution agreements that waivers do not extend to third parties.⁶⁰ Nevertheless, most courts have not protected such selective waivers. A few courts permit "selective disclosure" to the government. These courts

⁵⁹A corporation faces other adverse consequences if it does not provide the requested confidential information. *Conference Report*, American Bar Association, Vol. 21, No. 4 (Feb. 23, 2005). Auditors are increasingly asking for privileged information, despite a standing "treaty" governing this issue. Unless demands for information are satisfied to an auditor, the auditor has the ability to issue a qualified opinion.

⁶⁰Such decisions can have implications for the corporation as an entity distinct from its current or former employees who allegedly performed the actions charged. For example, the KPMG Deferred Prosecution Agreement can be read such that the waiver does not extend to former corporate employees who are defendants in the resulting prosecutions. See KPMG – Deferred Prosecution Agreement, ¶ 8 (Aug. 26, 2005); available at [http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%](http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%20)

see the benefits of internal investigations and recognize that “[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”⁶¹ Most courts adhere to the rule that a waiver may not be selective.⁶²

Overall, it is the lack of certainty as to when a privilege may be regarded as inviolate that causes the greatest concern. Certainty with regard to the privilege is important. As the Supreme Court has stated, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all.”⁶³

III.

PRACTICAL STEPS AND RECOMMENDATIONS

Several possible solutions have been offered by professional associations and legal thinkers, including, as previously noted, alterations to the Federal Sentencing Guidelines, and greater judicial respect for limited waivers, perhaps derived from a federal rule or statute.⁶⁴ These solutions are sound.

⁶¹*Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 607 (8th Cir. 1978).

⁶²See *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). See *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

⁶³*Upjohn*, 449 U.S. at 393.

⁶⁴See *Speakers Mull Possible Fixes to Stem Perceived Erosion of Corporate Privilege*, ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 21, No. 24, at 608 (Nov. 30, 2005).

However, it seems to me that another necessary approach is to focus on the individual case to determine whether a waiver request is even necessary. Can the information be provided to the government without a waiver? Is there a legitimate expectation of uncovering relevant documents or information that could not be obtained by means of normal discovery mechanisms, or is the waiver request merely a fishing expedition or effort to “not miss anything”? In many cases, facts can be shared without a waiver of the underlying privileges. For example, if past advice was in fact used to further a crime or fraud, those documents and communications also may be produced without a waiver, since they are not privileged in the first instance.

A consistent process of internal DOJ review is appropriate to achieve uniformity and fairness. Such centralized review is already used where prosecutors pursue certain measures, such as issuing a subpoena to an attorney or a reporter or using undercover operations. If the incidents where a waiver is sought are as limited as United States Attorney Mary Beth Buchanan says, then a consistent and uniform internal review procedure will not be an undue burden.⁶⁵

On the other side, a corporation can take some precautions to protect itself in response to the request for a waiver of the attorney-client privilege. First, a corporation should attempt to comply with the government and cooperate without the waiver of the privilege. A corporation can also convey its concerns to the federal agency in an

⁶⁵The recent McCallum Memorandum directs the U.S. Attorneys to develop a “written waiver review process” but expressly permits the process to vary from district to district or DOJ component to component. *See id.* By contrast, the SEC appears to have concentrated the review process for waiver requests. The Director of the SEC’s Division of Enforcement, also arguing that the DOJ is more aggressive in its approach than the SEC, indicated that the Division vests the power to seek waiver of the privilege at the assistant-director level or higher. *See Thomsen Defends SEC’s Policy on Waiver of Attorney-Client Privilege*, *Federal News*, Vol. 37, No. 46, at 1914 (Nov. 21, 2005). However, other commentators have suggested that although the SEC may generally be less focused on obtaining privilege waivers than the DOJ, often the SEC and the DOJ are working together so the SEC does not need to obtain a waiver on its own. *See Speakers Mull Possible Fixes to Stem Perceived Erosion of Corporate Privilege*, *ABA/BNA Lawyers’ Manual on Professional Conduct*, Vol. 21, No. 24, at 608 (Nov. 30, 2005).

effort to negotiate a result that does not include a waiver. A third alternative is to appeal, where applicable, an improper or unnecessary request for a waiver to the prosecutor's supervisor, the U.S. Attorney, or the Deputy Attorney General. Finally, if waiver must occur, a written confidentiality agreement should be pursued to limit the scope of the waiver. While there is no evidence or data about the government's receptiveness to these proactive steps, it is valuable for a corporation to attempt to protect itself in any possible way.

CONCLUSION

There is no doubt that our venerable attorney-client privilege needs some attention. If not resulting in erosion in fact, federal policies and their adoption by states and self-regulatory agencies have caused an undermining by uncertainty.

The courts created the privilege and can do much to shore it up. Courts may provide clarity and consistency concerning the validity of selected waiver agreements, as well as reinforce the proper bounds of the privilege itself. Yet the primary burden lies with the federal government. The government should acknowledge that the benefits of effective counsel can only be provided through an effective attorney-client privilege, and that the benefits to society in general outweigh the outcome in a particular case. At a minimum, additional guidance is necessary from the government to address the importance of the privilege and protect it in the context of waiver requests.

Respect for the attorney-client privilege and its larger benefits to our society must be an integral part of the approaches taken by both the government and by the courts if the privilege is to fulfill its essential function.

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