REPORT

I. Background of the Task Force

The American Bar Association established its Task Force on the Attorney-Client Privilege in September 2004, to evaluate issues and recommend policy related to the attorney-client privilege and work-product doctrine. The Task Force has been examining current developments regarding the privilege and work-product doctrine, the circumstances in which governmental agencies and others are asserting the need for privileged and work product protected information, and the extent to which preserving the privilege and work product protections or disclosing privileged information or attorneys' litigation work product in such circumstances impacts the public interest. By examining and reporting on these and related issues, the Task Force hopes to inform the public and the legal profession of the importance of the privilege and work-product doctrine, to relate each of these principles to the competing demands for access to protected information, and to assist the ABA in developing policies that strike the right balance given these competing demands. This Report is designed to review the progress of the Task Force, to project further activities, and to support three recommended resolutions for bedrock principles that should be ABA policy in this area.

While much work remains to be done, the Task Force believes that it has sufficient facts and insights on certain key principles to recommend action by the ABA. The three resolutions recommended for adoption by this Report are consistent with earlier ABA policy relating to the attorney-client privilege and work-product doctrine, including the ABA's August 2004 resolution opposing the Federal Sentencing Guidelines expectation that corporations waive privileges as an element of assisting government investigations. To a substantial extent, the recommended resolutions are implicit in the earlier one, as well as in the ABA's consistent commitment, in its rules of professional conduct and other positions, to the principle of attorney-client confidentiality. Although the work of the Task Force will continue with the objective of developing more specific policy, the Task Force believes it is important for the ABA to affirm bedrock principles that will be the foundation for its further work. Strong support for the preservation of the attorney-client privilege and work-product doctrine, opposition to policies, practices and procedures of governmental agencies that have the effect of eroding the attorney-client privilege and work-product doctrine, and favoring government endorsement of policies, practices and procedures that recognize the value of those protections are the objectives of these resolutions. Some of the more specific measures that have been suggested and are being considered by the Task Force and others, both inside and outside the ABA, are described in Sections VII and VIII of this Report. When more fully developed and considered, further policy and specific measures will be brought to the ABA House of Delegates for action.

The Task Force began its work by identifying a variety of contemporary contexts in which attorney-client confidentiality has come under serious pressure, in light of changes in the law and changes in institutional practices by government agencies and others. The Task Force recognized that initially it would focus on the areas that seem to be producing the greatest tensions on the privilege and work-product doctrine. In light of its charge and its determination regarding the most pressing issues, the Task Force gave notice to the professional community that it would begin by focusing its attention on two substantial practices: (1) requests by

prosecutors and government regulators for the production of material protected by the attorney-client privilege and work-product doctrine, and (2) requests by auditors of public companies for the production of material protected by the attorney-client privilege and work-product doctrine. This report reviews the progress to date, and provides recommendations expressing the ABA's strong support for the preservation of the attorney-client privilege and work-product doctrine, its opposition to policies, practices and procedures of governmental agencies that have the effect of eroding the attorney-client privilege and work-product doctrine, and its endorsement of policies, practices and procedures that recognize the value of those protections.

The Task Force has reviewed scholarly articles and applicable law, conducted meetings, held two public hearings, and received oral and written testimony from interested persons. These meetings and hearings have produced varied views and considerable information, some of which is noted in this Report and all of which is posted on the Task Force's website, which is located at http://www.abanet.org/buslaw/attorneyclient.[1] The Task Force expects to continue its work to develop specific measures in furtherance of the recommendations to the ABA House of Delegates accompanying this Report, to flesh out recommendations on privilege and work product issues related to auditors, and to identify and address other issues not discussed herein. Discussions are underway with representatives of various regulators, which will help guide the Task Force in determining potential solutions to the issues. It has been very gratifying to see lawyers from corporations, the private sector and government all working together in a constructive manner on these critical issues for our justice system.

II. Overview of the Attorney-Client Privilege and Work-Product Doctrine

Lawyers have always been understood to play a critical role in preserving legal rights, compliance with the law, and ultimately, the rule of law. As the law becomes increasingly complex, the need for lawyers has become increasingly essential. Further, the confidentiality of the attorney-client relationship has historically been considered an essential aspect of legal representation, and one that is necessary to ensure the ability of lawyers to carry out their assigned role in the legal system. The confidential relationship is recognized and preserved not only in the common law regulating the lawyer-client relationship and in the rules of professional

[1] The following is a list of the individuals and groups providing written or oral testimony to the Task Force on February 11, 2005: The American College of Trial Lawyers; David M. Brodsky, Corporate Counsel Consortium; Kenneth W. Gideon, ABA Section of Taxation; Steven K. Hazen, State Bar of California, Business Law Section, Corporations Committee; James W. Conrad, Jr., American Chemistry Council; Paul Rosenzweig, The Heritage Foundation; John Gamino, TXU Corporation; Ursula Weingold, University of St. Thomas School of Law (Minnesota); Brad Brian, ABA Section of Litigation; United States Chamber of Commerce; The Law Society of Upper Canada; Steven R. Schell, Black Helterling LLP; Paul Rice, American University Washington College of Law; ABA Section of State and Local Government Law; Randolph Braccialarghe, NSU Law Center; and State Bar of California, Standing Committee on Professional Responsibility & Conduct. The following is a list of the individuals and groups providing written or oral testimony to the Task Force on April 21, 2005: Stephen A. Saltzburg, The George Washington School of Law; Susan Hackett, Association of Corporate Counsel; John Beccia III, The Financial Services Roundtable; Jonathan Bach, New York Council of Defense Lawyers; Elizabeth J. Cabraser, Lieff, Cabraser, Heimann & Bernstein; Gerald B. Lefcourt, National Association of Criminal Defense Lawyers; Martin S. Kaufman, Atlantic Legal Foundation; W. Wayne Withers, Emerson; State Bar of California, Business Law Section, Corporations Committee; Federation of Defense & Corporate Counsel; and Section of International Law, Ad Hoc Task Force on Money Laundering and Professional Responsibilities.

conduct, but in the attorney-client privilege and, with respect to the lawyer's role in litigation, the work-product doctrine.

The Attorney-Client Privilege. The attorney-client privilege is a rule of evidence that protects the confidentiality of communications between an attorney and client. Its underlying purpose is to encourage persons to seek legal advice freely and to communicate candidly during consultations with their attorneys without fear that the information will be revealed to others. This enables clients to receive the most competent legal advice from fully informed counsel so that the client can fulfill his or her responsibilities under the law and benefit from the law's protection. Given the ever-growing and increasingly complex body of public law, the client's better understanding of his or her legal obligations enhances the law's efficacy.[2]

Recognizing that the attorney-client privilege is an exception – albeit a very important exception – to the general principle that witnesses must provide relevant testimony in court proceedings, courts over the decades have sought to develop the parameters of the privilege toward several ends. Importantly, the privilege has been designed to apply only in the general class of cases where its purposes are strongly served. In general, attorney-client communications will only be privileged if the communication was between a lawyer and a client (or prospective client), was for the purpose of enabling the client to secure legal services or assistance (and not for the purpose of committing a crime), and was made in confidence (i.e., outside the presence of third parties). Thus, the mere fact that an individual communicates with an attorney does not make the communication privileged. Personal communications, business advice, and advice to aid in the commission of illegal activity that is carried out are not protected.[3] The client claiming the benefit of the privilege has the burden of proving its applicability,[4] and the privilege is lost if the client does not claim the privilege or waives it.[5]

The attorney-client privilege is subject to limited exceptions, [6] but importantly, it is *not* subject to an exception simply because a private litigant, government agency, or other third party claims an important need to know what the client discussed with an attorney. Such an exception has been rejected primarily because of the paramount importance of assuring clients in advance whether their communications will be privileged. If the protection were not assured, the client would be unable to rely on confidentiality when seeking legal advice, and hence might be hesitant to disclose adverse as well as favorable facts to the lawyer. Further, it is crucial to remember that the privilege does not shut off access to facts within a party's possession. A party can be asked, "what did you observe?" or "what did you do?" The only type of question that the privilege forecloses, is, "What was your conversation with your lawyer?"

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[2] PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 1:1-1.3 at 6-14 (2nd ed. 1999).

[3] See Clark v. U.S., 289 U.S. 1, 15 (1933); U.S. v. Bob, 106 F.2d 37, 40 (C.C.A. 2d Cir. 1939); Haines v. Liggett Group Inc., 975 F.2d 81, 84, 36 Fed. R. Evid. Serv. (LCP) 782 (3rd Cir. 1992), as amended, (Sept. 17, 1992).

[4] See Federal Trade Commission v. Lukens Steel Company, 444 F.Supp. 803, 806 (D.D.C. 1977).

[5] See United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[6] These exceptions, include, the crime-fraud exception, the joint-clients common interest exception and the shareholder derivative action exception. For a discussion of these and other exceptions to the privilege, please see EDNA EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, 391-465 (4th ed. 2001).

So that lawyers and clients will know in advance what communications will and will not be protected, and can conform their conduct accordingly, courts have endeavored to draw the lines with some clarity. Of course, it is impossible to achieve absolute certainty. At the margins, the application of the privilege is not always clear, and indeed, treatises can and have been written on the privilege, its exceptions, its intricacies, and its areas of ambiguity.[7] Further uncertainty results from the fact that the relevant case decisions (and, in some states, statutes) differ from jurisdiction to jurisdiction. With respect to federal proceedings, Congress has not codified the attorney-client privilege but has authorized ongoing common law development of this and other privileges.[8] Pursuant to its authority under the Federal Rules of Evidence, the Supreme Court of the United States has consistently recognized and upheld the privilege.[9] But the Supreme Court has resolved only a limited number of questions concerning the boundaries of the privilege, and on the remaining questions, different districts and circuits – and even different judges within a given federal district – may take different approaches.

Critics of the privilege argue that because the privilege prevents the disclosure of a client's communications, it hinders the public's ability to discover the truth. This argument fails to account for the countervailing benefits associated with the privilege. As one writer has stated, "[T]he definition of the privilege [expresses] a value choice between protection of privacy and discovery of truth and the choice of either involves the acceptance of an evil—betrayal of confidence or suppression of truth."[10] The judiciary has recognized this choice and has consistently decided in favor of upholding and protecting the privilege.

The Work-Product Doctrine. The work-product doctrine is a protection afforded to the "work product" of attorneys that precludes adversaries from discovering "work product" developed in anticipation of litigation. The protection accorded "work product" is premised on the same belief underlying the attorney-client privilege—that an attorney cannot provide full and adequate legal representation unless certain client-attorney material is unavailable to adversaries. While these two doctrines rest on the same principles, the focus of each is different. The privilege strives to encourage clients to communicate openly with their attorneys; the work-product doctrine aims to allow the attorney to engage in careful and thorough preparation for litigation. Whereas the privilege protects attorney-client communications when related to the provision of legal advice in all circumstances, the work-product doctrine is applicable only to the actual work product of an attorney developed in preparation for litigation.[11] Additionally, the protection of the work-product doctrine may be claimed by both attorney and client, whereas the privilege belongs only to the client.[12]

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[7] See, e.g., EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES (2002).
[8] FED. R. EVID. 501.
[9] See Hunt v. Blackburn 128 U.S. 464, 470 (1888); Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981); Swidler & Berlin v. United States, 524 U.S. 399, 403 (1997).
[10] Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061, 1085 (1978).
[11] EPSTEIN at 477.
[12] Id. at 490.

The United States Supreme Court set forth the standard for evaluating the work-product doctrine in Hickman v. Taylor.[13] There the Court found that an attorney's mental processes "fall outside the arena of discovery and [revealing such information to an adversary] contravenes the public policy underlying the orderly prosecution and defense of legal claims."[14] In summary, Hickman set forth the following propositions used in the evaluation of the work-product doctrine: (1) material collected by an attorney during his or her preparation for litigation is protected in discovery, unless an adversary can demonstrate a sufficient need for the material, and (2) an attorney's mental processes, i.e., theories, analyses, beliefs, etc., are at the foundation of our legal system and will accordingly be protected from discovery to an almost absolute extent.[15] These propositions have also been, to a degree, codified by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.[16]

While the privilege and the work-product doctrine will often overlap in their protection, they are by no means coextensive. The work-product doctrine offers a broader protection than the privilege in that it can encompass not only communications, but also an attorney's thoughts, impressions, beliefs and materials. Despite being broader than the privilege in that respect, the work-product doctrine is only applicable to "work product" prepared in anticipation of litigation.

The Attorney-Client Privilege and Work-Product Doctrine in the Context of the Corporate Client. The attorney-client privilege, unlike privileges such as the Fifth Amendment privilege against self-incrimination, extends to corporations and other business entities.[17] The corporate entity is, of course, an artificial being that exists only in the eyes of the law and can act only through its employees and agents. This anomaly creates a unique situation when evaluating how the privilege should apply in the context of communications to an attorney representing a corporate client.[18]

Some persons have argued that the privilege should not apply in the corporate context, but the United States Supreme Court has recognized the important role the privilege plays for corporations. The absence of the privilege would "not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problems but also threaten to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[19]

Generally, in the context of an individual client it is relatively easy to determine whether the privilege should apply because the client is a natural person and, more often than not, is the communicator, the privilege holder and the decision-maker. When the client is a corporation, however, it becomes more difficult to determine whether the privilege should attach to communications made by representatives of the corporation because the communicator, the privilege holder and the decision-maker necessarily never can be the same person or entity. The

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[13] Hickman v. Taylor, 329 U.S. 495 (1947).
[14] Id. at 510.
[15] EPSTEIN at 481.
[16] Id.
[17] EPSTEIN at 99.
[18] JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 1.16, at 1-14 to 1-16
[19] Upjohn, 449 U.S. at 392.

corporation is the privilege holder, but because the corporation is merely a legal fiction, it is incapable of communicating or making decisions except through the conduct of its employees and agents. This differentiation between individual and corporate clients creates a natural tension between the justification for the privilege, i.e., encouraging people to seek legal advice and communicate candidly with their attorney, and the application of that justification to a corporation.[20] It thus becomes more difficult to determine to which communications made on behalf of a corporation to an attorney the privilege should attach.[21] Courts have developed different tests to determine when the privilege should attach to communications from a corporation's representatives or agents to an attorney on behalf of the corporation. [22]

Upjohn Co. v. United States[23] is the seminal case regarding the attorney-client privilege in the corporate context. In Upjohn, accountants discovered that a subsidiary of the Upjohn Co. made payments to or for the benefit of foreign government officials for the purpose of obtaining business. In response, the company's counsel conducted an internal investigation to examine the alleged improper payments. As part of the investigation a letter containing a questionnaire prepared by counsel for Upjohn Co. was circulated to many of Upjohn Co.'s managers inquiring about the alleged improper payments. Additionally, Upjohn's in-house and outside counsel interviewed some of the same employees that received the questionnaire.[24] Following counsel's analysis of the facts and advice, the company voluntarily reported certain questionable payments to the SEC and the IRS, which it furnished with a list of all employees interviewed by Upjohn Co. and who had responded to the questionnaire. In response, the IRS launched an investigation and issued a summons for all questionnaires and notes of interviews conducted with Upjohn's employees and officers.[25]

The Supreme Court rejected the government's argument that the attorney-client privilege applied exclusively to corporate counsel's communications with the corporation's "control group," i.e., officers and employees responsible for directing the company's actions based on counsel's legal advice.[26] The Court determined that the control group test failed to take into account the need for attorneys to obtain information needed to give sound and informed legal advice, discouraged employees from communicating important information to a corporation's attorney, impaired the provision of competent legal advice to a corporation's employees who put into effect such corporation's policies, increased the difficulty of formulating legal advice for specific problems, and impaired the ability of counsel to help ensure a corporation's voluntary compliance with the law.[27] In so determining, the Court reasoned that "[t]he narrow scope given the attorney-client privilege by the [Sixth Circuit] not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's

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[20] Id.
[21] EPSTEIN at 100.
[22] For a discussion of these tests, please see GERGACZ §§ 3.67 to 3.102, at 3-130 to 3-186.
[23] Upjohn, 449 U.S. at 383.
[24] Id. at 386-87.
[25] Id. at 387-88
[26] Id. at 396-97.
[27] EPSTEIN at 102.

compliance with the law."[28] Further, the Court stated that if "the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[29] Despite the Court's decision in Upjohn, some state courts continue to apply the control group test, along with other tests, when determining who constitutes a privileged individual in the corporate client context.

Like the privilege, the work-product doctrine also applies to corporations. An issue of particular concern to corporations is whether internal investigations conducted by companies and the resulting materials are protected by the work-product doctrine. There is some case law that specifically addresses whether a company's internal investigation can be said to be "in anticipation of litigation." The cases draw a distinction between investigations into illegal activity and investigations into other matters. Most of the cases conclude that internal investigations of possible corporate illegal activity are performed with enough anticipation of litigation to qualify for work product protection.[30] In cases addressing investigations into other activities, the courts focus on whether the investigation was performed in the ordinary course of business or for litigation purposes.[31] Thus, the critical step is to distinguish investigations done as part of litigation preparation from investigations done for simple fact-finding or for a business motive.

III. Importance of the Attorney-Client Privilege to the American Justice System

The attorney-client privilege is a right held by the client, such that only the client and not the lawyer has the ultimate authority to waive the privilege. The protection afforded to the client by the privilege rests on the presumption that clients consult lawyers for the purpose of abiding by, rather than breaking, the law.[32] The privilege is an important and necessary part of our judicial system for many reasons. Among other things, the privilege has an important role in (i) fostering the attorney-client relationship, (ii) encouraging client candor, (iii) enhancing voluntary legal compliance, (v) increasing the efficiency of the justice system and (vi) enhancement of constitutional rights.

The Privilege Fosters the Attorney-Client Relationship. The legal system has developed into a complex and intricate maze not always easy to navigate. These complexities make it unlikely that clients are able to conduct their legal affairs without fully informed representation

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[28] Upjohn, 449 U.S. at 392.
[29] Id. at 393.
[30] See In re International Sys., 693 F.2d 1235 (5th Cir. 1982); In re Grand Jury Investigation (Sun Co.), 599 F.2d at 1232 (3rd Cir. 1979).
[31] Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1978) ("Law Firm's investigation was not made and its report was not prepared because of any prospect of litigation involving [the company] . . . . Board of Directors . . . wanted to frame policies and procedures that in the future would protect it against repetitions of prior misdeeds"); Miller v. Federal Express Corp., 186 F.R.D. 376 (W.D. Tenn. 1999) (concluding that an investigation was done for both employee relations and possible litigation purposes and was thus for ordinary business purposes and not in anticipation of litigation).
[32] EPSTEIN at 2-3.

by an attorney; whether in litigation or in regard to counseling about legal consequences of their actions, competent legal representation is a requirement. The privilege helps to ensure that the representation will be competent and fully informed. The attorney-client relationship must encourage trust because full disclosure will not be fostered if the attorney is viewed as a potential threat to the client's interests.[33] It is in this context that the promise of confidentiality offered by the privilege becomes a vital part of our legal system.

The Privilege Encourages Client Candor. Another purpose of the privilege is to promote client candor by encouraging "full and frank communication between attorneys and their clients."[34] The privilege allows an attorney to avoid what would otherwise be a professional dilemma of cautioning a client against disclosure and rendering perhaps uninformed legal advice or of learning all the details of a situation and increasing the peril to the client that could result if such details could be disclosed.[35]

An attorney may give reasonably informed professional advice only when information is given in confidence to the attorney by the client. If a client fears that information revealed to his attorney will be made known to others, then the client will withhold information and the attorney will be left with less than all of the information needed to provide competent legal advice.[36] The existence of the privilege encourages clients to be completely truthful with their lawyers. Legal advice is of dubious value if it is not based on a full and free disclosure of all pertinent facts, without fear of disclosure to third parties.[37]

Additionally, if individuals' communications with attorneys could be revealed to unfriendly third parties, those individuals would be less likely to seek an attorney's advice. In a society as structurally and legally complex as ours, sound legal advice is essential, and such advice is often unattainable without unfettered disclosure of all relevant information by a client to his attorney. To induce clients to seek out and consult with lawyers, the privilege is a necessity.[38]

This same principle applies in the corporate context, albeit differently because of the corporate structure. Individuals communicating on behalf of a corporation are not afforded a personal privilege in their communications with corporate counsel because the privilege belongs to the client, i.e., the corporation. Because the exercise or waiver of the privilege is controlled by the corporation and not the individual communicator, the individual communicator has no incentive to be forthcoming with corporate counsel. Nonetheless, corporate employees communicating with a corporation's attorney usually do so at the behest of management, and but for the privilege, the revelation of communications to a corporation's attorney by its employees could be compelled, a scenario any member of corporate management would like to avoid. Thus, there exists a strong incentive to extend the privilege to corporations because without it, corporate management might discourage corporate employees from communicating with

[33] GERGACZ §1.08, at 1-9 to 1-10.
[34] Upjohn, 449 U.S. at 389.
[35] See U.S. v Gonzalez, 1997 WL 155403 (D.N.M. 1997).
[36] EPSTEIN at 3.
[37] Id. at 4.
[38] United Shoe Mach. Corp., 89 F. Supp. at 358.

corporate counsel. The policy of candor in the corporate context is not tied to an individual's decision to communicate, but to the manner in which corporations utilize their attorneys.[39]

The Privilege Fosters Voluntary Legal Compliance. The freedom to consult an attorney helps encourage clients to use attorneys to promote compliance with the law. Such voluntary compliance facilitates the effective administration of the justice system. The privilege aids in the voluntary compliance with law because it enhances the ability of attorneys to counsel clients about their obligations and duties under the law and to urge compliance. An attorney can only provide informed advice about compliance when all communications between attorney and client are protected from compelled disclosure.[40]

For the privilege to be effective in promoting legal compliance, it does not and cannot attach only to communications from the client to the attorney but must attach also to communications from attorney to client. The privilege is for the purpose of encouraging "full and frank communications between attorneys and clients."[41] A lawyer's legal advice to a client often incorporates the content of the confidential information received by the lawyer from the client and which prompted the client to seek legal counsel in the first place.[42]

Promoting legal compliance is one of the most significant incentives offered by the attorney-client privilege to corporate organizations. Corporations are faced by a myriad of complex legal requirements. Sometimes the actions that corporate management considers pursuing may unbeknownst to it violate the law. Extending the privilege to corporations fosters an open dialogue between a corporation's management and corporate counsel, which can help ensure that the corporation complies with laws that might otherwise have been broken.[43]

The privilege provides this incentive more efficiently, effectively and predictably than the threat of punishment or sanctions. Given the complexity and breadth of legal requirements facing corporations, legal compliance should be encouraged as much as possible. If corporate management can consult attorneys about legal issues facing the corporation without fear of such communications being made known, the likelihood the corporation will "self-regulate" and voluntarily comply with the law is increased.[44]

Why should society be so concerned about the performance and quality of the work that attorneys perform? As society becomes more and more complex and as the laws that monitor societal behaviors and relationships become more detailed, competent legal advice grows in importance. If persons fail to seek such advice, compliance will less likely be achieved. "The social good derived from the proper performance of the functions of lawyers acting for their

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[39] GERGACZ §1.20, at 1-20.
[40] EPSTEIN at 6.
[41] Upjohn, 449 U.S. at 389 (emphasis added).
[42] Epstein at 8.
[43] GERGACZ §1.21, at 1-20 to 1-21.
[44] Id.

clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."[45]

The privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[46] Full and frank communication is not an end in itself, but a means to achieve the main purpose of the privilege, "promoting broader public interest in the observance of law and administration of justice."[47]

Further, the ABA Model Rules of Professional Conduct (the "Model Rules") state, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to a client's situation."[48] Accordingly, the privilege plays an important role by allowing the lawyer to obtain information that enables the attorney to function in the role of "counselor," a role that is of ultimate benefit to society. For example, it is to society's benefit for lawyers to raise with corporate decision makers social implications of corporate policy.

Although the privilege can result in the suppression of relevant evidence, i.e. admissions of a client, the long-term social benefits of the privilege outweigh the immediate cost of "lost" evidence. This rationale justifies the protection of communications between attorneys and clients regardless of the status of the client—individual or entity, or the position of the attorney vis-à-vis the client—retained, appointed, or regular employee.[49]

The Privilege Promotes Efficiency in the Legal System. Legal advice is most effective when it is fully informed. Such sound legal advice rests on the attorney's ability to consider all relevant information. If a client withholds information, such a thorough consideration is unlikely to occur. As a result, unjust settlements may be reached, cases may proceed with little if any chance of prevailing, and clients may incur unnecessary legal expenses.[50]

Efficiency is also obtained in addressing and resolving issues before they reach litigation. Preventive measures such as reviewing business practices, transactions, and records provide clients with an efficient and effective way to ensure legal compliance. Such pre-litigation

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[45] United Shoe Mach. Corp., 89 F. Supp. at 358.
[46] Hunt, 128 U.S. at 470.
[47] Westinghouse v. Republic of the Phillipines, 951 F.2d 1414, 1423 (3d. Cir. 1991) (quoting Upjohn, 449 U.S. at 389).
[48] MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003). Additionally, the commentary to Rule 2.1 provides, "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."
[49] RICE § 2:3, at 18.
[50] GERGACZ §1.11, at 1-11.

determinations, as compared with potential litigation costs, are economically beneficial for both clients and the legal system.[51]

While it may be true that in limited instances attorneys abuse the privilege as a tactic to delay and hinder the discovery of otherwise discoverable material, such instances do not justify encroaching upon the protections afforded by the privilege. Rules are already in place to address concerns regarding abuse of the privilege. For example, Rule 3.4(a) of the Model Rules provides, "A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."[52] Additionally, federal and state rules of evidence provide for the application of sanctions to those attorneys who commit discovery abuses.[53]

The Privilege Enhances the Constitutional Right to Effective Assistance of Counsel. The Sixth Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence."[54] This has been interpreted to mean "effective" assistance of counsel by the Court.[55] Although the privilege is recognized as playing a vital role in ensuring the effective assistance of counsel, the Sixth Amendment guarantee of effective assistance of counsel has not been recognized as a constitutional source for the privilege.[56] Nonetheless, when the privilege has been denied in the case of a criminal defendant, the courts have recognized that such a denial may operate to prevent the effective assistance of counsel.[57]

IV. Waiver

Traditionally, a client may forfeit or "waive" the protection of the privilege by voluntarily disclosing information protected by the privilege to a third party or by putting such communications in issue in litigation. Voluntary disclosures to one third party waive the privilege with respect to others on the theory that, if the client is so indifferent to maintaining confidentiality that the client voluntarily discloses privileged information, there is no longer a

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[51] Id.
[52] MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2003).
[53] See, e.g., FED. R. CIV. P. 37 and O.C.G.A. § 9-11-37 (2005).
[54] U.S. CONST. amend. VI.
[55] McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970).
[56] RICE § 10:1, at 6.
[57] RICE § 10:6, at 28-29. Of course, a denial of the privilege does not necessarily render the attorney incapable of providing effective assistance. In Weatherford v. Bursey, an undercover agent posed as a codefendant and attended defense strategy sessions with the defendant. Later, the agent testified at the defendant's trial. Weatherford v. Bursey, 429 U.S. 545, 547-50 (1977). The Court held such intrusion into the privilege did not result in a violation of the criminal defendant's Sixth Amendment right to effective assistance of counsel because the intrusion did not impede defense counsel's ability to provide effective representation. Id. at 556-57. Notably, the court relied heavily upon the District Court's finding at trial that no privileged communications were ever revealed to the prosecution. Id. at 556. Despite the Court's holding in Weatherford, an intrusion into the privilege can result in a violation of a criminal defendant's Sixth Amendment right to effective assistance of counsel. See generally, Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983).

strong justification for the law to protect the privilege in derogation of the countervailing interest in allowing other parties access to relevant information.[58]

Importantly, however, the law has come to recognize that not all disclosures outside the attorney-client relationship waive the privilege, and that there are circumstances where there is a compelling public interest in allowing clients to make or authorize their lawyers to make such disclosures while still preserving the privilege. Most obviously, it has been recognized that disclosures to agents of the lawyer and to expert consultants retained to assist the lawyer are necessary to enable the lawyer to provide competent advice, advocacy, and other assistance. Similarly, in situations where separately represented clients are aligned in interest, and especially where they are co-parties in litigation, the public interest in ensuring effective representation and in promoting fair outcomes has led courts to recognize a "common interest" or "joint representation" exception to the ordinary concept of waiver.[59]

In some contexts, the tension between the idea that voluntary disclosure waives the privilege and the countervailing idea that certain disclosures are justified on public policy grounds leads to difficult questions about the extent, if any, to which a disclosure of privileged information to a particular party should result in a waiver vis-à-vis otherwise privileged information that was not disclosed. Nonetheless, the privilege can be lost if not scrupulously guarded. Waiver of the privilege may be effected, either expressly or impliedly, by the words or conduct of the client or the client's attorney acting as the agent of the client. When the client is a corporation, the privilege may generally only be waived by members of the management group of such corporation or the corporation's attorney.[60]

In the corporate context, the law governing waiver of the attorney-client privilege and work-product doctrine is unresolved or differs from court to court in several respects. Of particular relevance to the Task Force's current proposals, there are different answers to the question of whether and to what extent these protections will be preserved when a corporation discloses privileged or work-product protected material to a regulator or prosecutor. That is, it is not at all clear that the disclosed material and other related material may be kept from opposing parties in litigation or from others who seek to discover the information in the course of litigation. The Supreme Court has yet to weigh in on these questions, and even if it did, it could conclusively resolve the question only for proceedings governed by federal law, not for state-court proceedings.

There is general agreement that if a company discloses attorney-client privileged material to a regulator or prosecutor, the company thereby waives the attorney-client privilege as far as the particular information is concerned. The cases disagree whether the effect is also to impliedly waive that privilege with respect to all other attorney-client communications on the same subject matter. The Eighth Circuit found that such disclosure did not effectuate a broader waiver in an early decision, Diversified Industries, Inc. v. Meredith.[61] But more recently, the Sixth Circuit rejected the idea of "selective waiver." In In re Columbia/HCA Healthcare

[58] GERGACZ, §§ 5.01-5.08, at 5-2 to 5-10.
[59] EPSTEIN at 185-219.
[60] RICE § 9:3, at 10-11.
[61] Diversified Indus., Inc., 572 F.2d at 604, n.1.

Corporation Billing Practices Litigation, the court concluded that even when the corporation provides privileged information to a regulator pursuant to a confidentiality agreement, the corporation waives the attorney-client privilege as to all communications on the subject matter. Further, it questioned as a matter of policy "whether the Government should assist in obfuscating the 'truth-finding process' by entering into such confidentiality agreements at all. The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain."[62] On the other hand, one might argue that this ruling will discourage corporations from cooperating with regulators in the future and that it will thwart the policy underlying the privilege by discouraging future corporate clients from making candid disclosures to counsel in the future.

There is equal uncertainty about the legal implications of sharing with a regulator or prosecutor material protected by the work-product doctrine. Several courts have said that when a company discloses its attorneys' work product to a government agency pursuant to a confidentiality agreement, the protections of the work-product doctrine are preserved.[63] The SEC has supported this approach.[64] But the Sixth Circuit in In re Columbia/HCA Healthcare Corporation Billing Practices Litigation took the opposite view, as did a California district court.[65]

V. Recent Government Policies, Practices and Procedures Regarding the Corporate Attorney-Client Privilege and Work-Product Doctrine

In recent years, particularly on the federal level, criminal law enforcement authorities and regulatory authorities have adopted policies and employed practices and procedures that suggest that if corporations disclose documents and information that are protected by the corporate attorney-client privilege and work-product doctrine, they will receive credit for cooperation. Surveys and testimony received by the Task Force assert that government agencies' requests for such information leave corporations with no practical choice but to comply, since the agencies can employ their discretionary exercise of prosecutorial or enforcement authority under criminal law or civil regulation to impose a substantial cost on corporations that assert rather than waive the privilege.[66] In federal criminal cases, prosecutors' authority has been reinforced by a recent amendment to the Commentary for Section 8C2.5 of the Federal Sentencing Guidelines against which the ABA is already on record. Building on the ABA's prior work, the Task Force

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[62] In re Columbia/HCA Healthcare Corporation Billing Practices Litig., 293 F.3d 289, 303 (6th Cir. 2002).

[63] See, e.g., In re Steinhardt Partners, 9 F.3d 230, 236 (2d Cir. 1993); In re Leslie Fay Companies, Inc. Securities Litig., 161 F.R.D. 274, 284 (S.D.N.Y. 1995).

[64] See United States v. Bergonzi, 9th Cir. Cas No. 03-10024, Brief of the Securities and Exchange Commission, 2003 WL 22716310 (April 29, 2003), at *3-4; McKesson HBOC, Inc. v. The Superior Court of San Francisco, Brief of the Securities and Exchange Commission, www.sec.gov/litigation/briefs/mckesson07103.htm (February 8, 2005).

[65] United States v. Bergonzi, 216 F.R.D. 487 (N.D. Ca. 2003).

[66] See, e.g., Statement of James W. Conrad, Jr., Assistant General Counsel, American Chemistry Council ("Finally, in the experience of our members and their outside counsel, companies faced with waiver requests virtually always accede to them. In seeking to resolve the threat to the short-term best interest of the business and its shareholders, particularly the risk of a criminal prosecution of the company, senior corporate management do not dare lose an opportunity for favorable treatment (or, conversely, trigger the wrath of prosecutors). Indeed, it is difficult in today's climate for management of publicly-held companies to do otherwise, since both DOJ and the SEC do not see any legal impediment to obtaining waiver.").

solicited additional information about these government practices. We heard that these practices are becoming increasingly widespread and are engendering substantial concern within the professional and corporate community that the protections of the attorney-client privilege and work-product doctrine are being eroded. Discussions are being initiated with the relevant enforcement agencies regarding these perceptions and concerns.

A. Federal Prosecutorial Policies

At common law, corporations were not subject to criminal liability because they were deemed incapable of forming criminal intent, but over time, with the development of broad principles of vicarious corporate criminal liability, corporations have come to face the risk of criminal prosecution based on wrongdoing committed by corporate officers and employees, even when the corporation is essentially the victim. Prosecutors have traditionally recognized that criminal charges ought to be pursued rarely against corporations, but prosecutors nevertheless employ the threat of criminal prosecution to secure corporations' assistance in their criminal investigations and prosecutions of individuals. At one time, this assistance primarily included providing relevant documents and information other than privileged communications and attorneys' litigation work product. Demands for this level of corporate assistance do not, in particular, present concerns from the perspective of the public interest in an effective corporate client-lawyer relationship.

What has become a source of considerable concern from this perspective, however, is the perceived prosecutorial expectation that in order to persuade the prosecution that the corporation has not engaged in conduct deserving of prosecution, or as an aspect of cooperation with the criminal investigation, corporations will provide material that *is* subject to the protection of the attorney-client privilege or work-product doctrine. The Task Force heard from a variety of sources that, whether made overtly or implicitly, these requests, backed by an express or implied threat of harsh treatment for refusing, have become increasingly common.[67]

These practices have been energized by the call from the President of the United States after the collapse of Enron for more vigorous prosecutions of corporations. As part of the response, on January 20, 2003, then Deputy Attorney General Larry Thompson issued a memorandum (the "Thompson Memorandum") to the DOJ addressing the "Principles of Federal Prosecution of Business Organizations."[68] The Thompson Memorandum identified nine factors

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[67] See, e.g., The Executive Summary of the Survey of the Association of Corporate Counsel regarding the Attorney-Client Privilege, (available at http://www.acca.com/Surveys/attyclient.pdf); January 31, 2005 submission of the American College of Trial Lawyers ("These demands, which erode the attorney-client privilege and the work-product doctrine, commonly include not only waiver of these protections, but also disclosure of corporate internal investigations by counsel . . ..") (quoting 2002 publication); Submission of Prof. Stephen A. Salzburg and Jan L. Handzlik, on behalf of the ABA Criminal Justice Section, "The Attorney-Client Relationship in an Age of Terrorism and Greed" ("As reflected in legislation, U.S. Department of Justice policy memoranda and litigation releases from the Securities and Exchange Commission, in order to gain an advantage in the charging process or to mitigate punishment, cooperation by targets of investigations with prosecutors and regulators is essential. The emphasis on 'complete' cooperation puts pressure on clients to waive attorney-client privilege and on their lawyers to give up the protections of the work-product doctrine.").

[68] Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (available at

(footnote continued on next page)

that federal prosecutors should utilize in making their charging decisions regarding corporations or other business entities, including the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.[69] The ABA Section of Criminal Justice takes the position that the 2003 policy "contemplate[s] that companies identify and hand over damaging documents, disclose results of internal investigations, furnish memoranda of interviews with company officers and employees, and agree to waive attorney-client and work product protections in the course of their cooperation."[70] The stated rationale for the policy is to "permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition [such requests] are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation."[71] However, the DOJ has not issued internal guidelines interpreting the purpose of this policy, when it is to be applied and what safeguards should be in place to prevent abuse at the local level. The Task Force has initiated discussions to explore these questions and to seek an outcome that properly balances all policy considerations including those underlying the privilege and work-product doctrine.

As a practical matter, corporations rarely can resist prosecutorial requests for disclosure, because of the harsh consequences of having to defend against criminal charges, and because, in cases where criminal charges are brought and sustained, corporations depend on the leniency in sentencing that results from providing assistance satisfactory to the prosecution. The difficulty of resisting prosecutorial requests for production of confidential material was reinforced by recent changes to the Federal Sentencing Guidelines.[72] Under the November 1, 2004, amendments to the Commentary for Chapter 8, Section 8C2.5 of the Guidelines, to qualify for a reduction in its sentence for providing assistance to the government investigation, a corporation would be required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[73] In response to this amendment, and even before it went into effect, the ABA voiced its opposition through the adoption of a resolution that the Commentary should be revised "to state

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http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). The Thompson Memorandum expanded and revised previous policies of the DOJ that were established in a memorandum drafted by former Deputy Attorney General Eric Holder. Memorandum from Deputy Attorney General Eric Holder to Head of Department Components and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), reprinted in Justice Department Guidance on Prosecutions of Corporations, in 66 CRIM. L. REP. (BNA) 189 (1999) (available at http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html).

[69] Thompson Memorandum at 2-3 (emphasis added).

[70] Submission of Prof. Stephen A. Salzburg and Jan L. Handzlik, on behalf of the ABA Criminal Justice Section, "The Attorney-Client Relationship in an Age of Terrorism and Greed" at 8-9.

[71] Thompson Memorandum at 5.

[72] Although the United States Supreme Court's decision in U.S. v. Booker, No. 04-104 and U.S. v. Fanfan, No. 04-105, held that the Federal Sentencing Guidelines will henceforth be only advisory and not mandatory for sentencing judges, courts will still be required to consider the Guidelines, including the Commentary to Section 8C2.5 involving privilege waiver.

[73] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004) (emphasis added) (available at http://www.ussc.gov/2004guid/8c2_5.htm).

affirmatively that waiver of the attorney-client privilege and work product protection should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government."[74] Following the adoption of this resolution, the ABA and an informal coalition of numerous business, legal and public policy organizations have sought to persuade the Sentencing Commission and Congress to reverse the 2004 amendment.[75]

Although the Thompson Memorandum notes that privilege waivers would not be considered as an absolute requirement,[76] as noted above the DOJ has not developed detailed safeguards to regulate when and how prosecutors may legitimately seek attorney-client privileged information and attorneys' litigation work product, comparable to those internal guidelines developed to regulate other sensitive investigative demands, such as demands for testimony from attorneys concerning their clients, from journalists, and from family members of targets.[77] The Task Force will be discussing other concepts such as requiring that approval be obtained from a high-ranking Department official in situations when corporations offer to relinquish the legal protections afforded to lawyer-client confidentiality. It appears that the DOJ has not collected information about the frequency with which prosecutors obtain privileged material from corporations as an element of corporate cooperation, the circumstances in which the material is obtained, or the precise nature of the material produced. The interest of the DOJ in pursuing these questions with the Task Force is a healthy dynamic that can assist in determining the facts and exploring solutions with respect to this issue.

B. Practices of Federal Regulators

Federal regulators, and particularly the SEC, have begun to adopt policies and practices mirroring those of the Department of Justice, which while discussing "cooperation credit,"

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[74] Resolution Adopted by the House of Delegates of the American Bar Association, August 2004.

[75] Other members of the informal coalition include the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, Frontiers of Freedom, the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Washington Legal Foundation. The ABA and other members of the informal coalitions have met with numerous members and staff of the House and Senate Judiciary Committees and with representatives of the Sentencing Commission in a coordinated effort to reverse the change to the Commentary of Section 8C2.5. On February 9, 2005, the ABA and the informal coalition submitted separate letters to the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security urging Congress to reverse the Commentary amendment. In addition, the informal coalition and the ABA submitted separate letters to the Sentencing Commission on March 3, 2005, and May 17, 2005, respectively, urging the Commission to reconsider and reverse the amendment. Certain members of this informal coalition have also provided testimony to the Task Force regarding their views on this issue and the various lobbying efforts of the informal coalition.

[76] Specifically, the Thompson Memorandum states in its commentary that, "[DOJ] does not…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." Thompson Memorandum at 5.

[77] The only guidance provided to AUSA's by the Thompson Memorandum is that "Prosecutors may…request a waiver in appropriate circumstances" and "[W]aiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation." Id. at 5 and 10-11, n.3.

mention disclosures of protected confidential information.[78] On October 23, 2001, pursuant to Section 21(a) of the Securities Exchange Act of 1934, the SEC issued a report outlining some of the criteria that it considers when assessing the extent to which a company's self-policing and cooperation efforts will influence its decision to bring an enforcement action against a company for federal securities law violations (the "Seaboard Report").[79] The Seaboard Report described actions taken by Seaboard Corporation upon its discovery that it might have violated federal securities laws, and listed a series of questions that the SEC considered useful in determining whether it should proceed with an enforcement action. Among the questions were whether the company had "cooperate[d] completely with appropriate regulatory and law enforcement bodies;" whether the company had conducted "a thorough review of the nature, extent, origins and consequences of the conduct and related behavior;" whether the company "promptly [made] available to [SEC] staff the result of its review and provide[d] sufficient documentation reflecting its response to the situation;" whether "the company identif[ied] possible violative conduct with sufficient precision to facilitate prompt enforcement actions against those who violated the law;" whether "the company produce[d] a thorough and probing written report detailing the findings of its review;" and whether "the company voluntarily disclose[d] information [SEC] staff did not directly request and otherwise might not have uncovered." Within the professional community, there is concern that the SEC regards the production of attorney-client privileged information and attorneys' litigation work product developed in the course of the company's internal investigation as an element of the disclosure identified in the Seaboard Report as necessary to allow the SEC to more readily gain access to statements of possible witnesses, subjects, and targets and better evaluate a corporation's level of cooperation. This concern that the SEC now regards waiver of the attorney-client privilege and work-product protection as a necessary element of cooperation is bolstered by public remarks made by SEC officials.[80]

The Task Force also received anecdotal information from attorneys, corporations and their representative organizations that the SEC and other federal regulatory agencies have been regarding disclosures of protected information as an aspect of corporate cooperation necessary to avoid harsh exercise of enforcement authority.[81] Like the DOJ, the SEC and other regulatory agencies have so far not adopted internal guidelines or

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[78] See January 31, 2005 submission of the American College of Trial Lawyers (identifying "similar cooperation and disclosure programs" adopted by other federal agencies as including "the Department of Justice Antitrust Division Corporate Leniency Policy, the EPA Voluntary Disclosure Program and the HHS Provider Self-Disclosure Protocol").

[79] 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, Exch. Act Rel. No. 44969 (Oct. 23, 2001).

[80] Stephen M. Cutler, Director of the Division of Enforcement at the SEC, Remarks at UCLA School of Law, "The Themes of Sarbanes-Oxley as reflected in the Commission's Enforcement Program," (September 20, 2004) (transcript available at http://www.sec.gov/news/speech/spch092004smc.htm).

[81] January 31, 2005 submission of the American College of Trial Lawyers ("In the three years since Seaboard, anecdotal reports have indicated – unsurprisingly – that an increasing number of defendants have waived the privilege in an attempt to earn credit or cooperation."); February 11, 2005 Letter of Steven R. Schell, Esq. (Identifying practice of EPA and Department of Justice of offering to settle environmental claims against corporations in exchange for disclosure of investigative reports containing corporate executives' earlier communications with counsel in response to EPA notice).

procedural safeguards regarding privilege and work product waivers. There also is no government data about the frequency with which this practice is employed.

VI. How Requiring Disclosure of Confidential Information Undermines the Public Interest

A corporation that feels compelled to comply with a government agency's requests for privileged material and attorneys' litigation work product may receive the benefit of lenient treatment by the particular agency, but it may also pay a considerable price. The chilling effect on clients' comfort level in fully disclosing to attorneys is a significant concern. Moreover, as noted, these disclosures can have the legal effect of waiving the attorney-client privilege or work-product doctrine. Therefore, the disclosed material, and quite possibly additional protected material on the same subject matter, then becomes accessible to private parties, as well as to other public agencies, for their use in litigation against the corporation.[82] The corporation will, in effect, be punished for having previously retained counsel for the salutary end of assisting with a legal problem, and for having directed officers and employees to confide in counsel so that the corporation could benefit from effective advice and assistance.

The chilling effect or waiver to third parties is not a consequence necessarily sought or desired by criminal or regulatory authorities, which are seeking to serve legitimate criminal and civil enforcement objectives. As a general rule, government agencies do not and may not use their power for the purpose of assisting private litigants; further, government agencies have acknowledged that the attorney-client privilege and work-product doctrine serve important societal interests.[83] Nonetheless, under evidentiary law governing the waiver of privileges,[84] complying with government agencies' demands or requests means that corporate clients relinquish legal protection otherwise accorded to attorney-client communications and attorneys' litigation work product. The applicable case law protects the holder of the applicable protection only against legal compulsion – *e.g.*, the threat of a criminal or civil contempt sanction for refusing to produce privileged material. While in today's enforcement environment, a waiver may not be voluntary in a

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[82] See, e.g., Corporations Committee, Business Law Section, The State Bar of California, "'At Every Peril' New Pressures on the Attorney-Client Relationship," Nov. 13, 2003 ("When allegations of possible misconduct arise, corporations can be subject to multiple types of lawsuits and related actions. At the federal level, alleged misconduct with securities law implications can be subject to administrative or civil enforcement action by the SEC as well as criminal prosecution by the office of the U.S. Attorney. The same alleged misconduct might also be subject to administrative or civil enforcement action a well as criminal prosecution by one or more states. In some cases, the alleged misconduct can result in disciplinary action by a self-regulatory organization. Finally, the alleged misconduct may engender one or more civil lawsuits brought by shareholders. Given the very real potential of multi-track enforcement, corporations face a serious dilemma when asked at a very early stage by just one regulator to waive client confidentiality protections.")
[83] See, e.g., SEC statement and amicus brief, cited in January 31, 2005 submission of the American College of Trial Lawyers at 11. Certainly, government agencies recognize the importance of – and have zealously litigated to preserve – these protections when these agencies themselves retain counsel. See generally, Marion J. Radson & Elizabeth A. Waratuke, "The Attorney-Client and Work Product Privileges of Government Entities," 30 Stetson L. Rev. 799 (2001), submitted by the City, County, and Local Government Law Section of the Florida Bar.
[84] Supra, note 58.

real-world sense, the courts have not caught up to that fact and rule that the resulting disclosures are sufficiently voluntary for purposes of evidentiary law to effect a waiver. The case law was developed well before government agencies adopted the current practice of using cooperation credits to obtain "voluntary" disclosures, and the law does not take into account that the legal authority wielded by government agencies makes their requests coercive as a practical matter.

As corporations become increasingly cognizant of government agencies' policies and practices, the risk is that corporations will respond with greater reluctance to employ counsel or to confide fully in counsel, thereby undermining the public objectives served by the privilege. As the Supreme Court recognized in Upjohn, the attorney-client privilege enables corporate attorneys to obtain the information necessary to "formulate sound advice when their client is faced with a specific legal problem"[85] and thereby "ensure their client's compliance with the law,"[86] but that for counsel to serve this role, it is essential that the "attorney and client . . . be able to predict with some degree of certainty whether particular discussions will be protected."[87] While the policies may not have that intent, the facts suggest that contemporary government practices deprive corporations of the certainty toward which the case law is aimed.

The Task Force heard consistently the concern that from the perspective of a corporation faced with a legal problem, the willingness to retain counsel and confide candidly and truthfully in counsel will be reduced because of the risk that government agencies, subject to scant internal standards, safeguards and guidelines, may later demand and obtain access to confidential communications with counsel, thereby in turn making those communications accessible to private litigants. Some submit that the perception that corporate lawyers have been, in effect, "deputized" by government agencies to develop evidence for those agencies' use will not only discourage disclosures but will undermine the trust and confidence in counsel that have historically been recognized as fundamental to an effective attorney-client relationship.[88] A California state bar association committee summarized what many have suggested to the Task Force as follows: "Over time, clients will . . . become reluctant to consult proactively and fully with legal counsel about issues. Knowing that the enforcement authorities will be privy to all information developed in any self-investigatory process will also serve a disincentive for clients to self-investigate and remediate…. Pressure on corporations to waive client confidentiality protections thus creates additional risks of harm to investors and innocent targets of investigation and, even to the public itself."[89]

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[85] Upjohn, 449 U.S. at 392.
[86] Id.
[87] Id. at 393.
[88] See Statement of Atlantic Legal Foundation ("The demand for corporate privilege waivers . . . 'effectively deputizes the company's in-house and outside counsel as agents for prosecutors and regulators, and this makes many employees understandably reluctant to talk to an internal investigator...employees quite naturally have started viewing the company's investigators with the same level of suspicion and apprehension that they hold toward government agents investigating a crime.'") (quoting former United States Solicitor General Theodore Olson).
[89] Corporations Committee, Business Law Section, The State Bar of California, "'At Every Peril' New Pressures on the Attorney-Client Relationship," Nov. 13, 2003 at p. 4.

The Task Force has been told that corporations and their lawyers may already have begun to alter their practices in response to government agencies' erosion of the expectations of confidentiality that the law otherwise affords. As Former United States Solicitor General Theodore Olson concluded in an address on this subject in March 2005, government agencies' practice of compelling corporations to waive the privilege has a "deleterious effect on corporate compliance programs, the ability of companies to self-regulate, and most ironically, their ability effectively to cooperate with the government."[90]

Many individuals and groups submitted testimony that by securing privileged information from a corporation, a government agency may serve the interests of a particular criminal or regulatory investigation, but it sacrifices the long-term, public interests that the Supreme Court and others have long associated with the privilege. The Section of Criminal Justice observed: "Waivers may be in the public interest in many instances, but that is not necessarily true in all cases. Balancing the public interest against the historic purpose of permitting clients to obtain the best possible legal advice by confiding and trusting fully and completely in their lawyers requires both a careful assessment of the strength of the public interest in specific circumstances and the dangers of eroding client confidence in the attorney-client relationship."[91] Among those who have commented to the Task Force concerning the current policies and practices of government agencies, there is broad concern that the appropriate balance is not being struck, and that the public interest, as protected by the attorney-client privilege and work-product doctrine, are under erosion as a consequence.[92]

In summary, there is widespread concern among corporations and the lawyers that serve them that government voluntary waiver programs do not have adequate safeguards in their present form and that the privilege along with the work-product doctrine are being jeopardized. While this may well be due to unintended consequences, the situation must be remedied. The Task Force intends to continue dialogue with the relevant agencies and believes clear articulations by the ABA of policy in this area would be constructive.

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[90] Address of Theodore Olson at March 9-10 conference on "The Attorney-Client Privilege: Erosion, Ethics, Problems and Solutions," quoted in Statement of Atlantic Legal Foundation.

[91] Submission of Prof. Stephen A. Salzburg and Jan L. Handzlik, on behalf of the ABA Criminal Justice Section, "The Attorney-Client Relationship in an Age of Terrorism and Greed" at 12.

[92] See, e.g., January 31, 2005 statement of the American College of Trial Lawyers ("each of these practices interferes with the attorney-client relationship and encroaches upon historical protections that have aided – not impeded – the fair administration of justice."); Testimony of Paul Rosenzweig, Senior Legal Reserach Fellow, Center for Legal and Judicial Studies, The Heritage Foundation ("[I]n the near term, [the new policies] will advance prosecutorial interests by giving governmental authorities easier access to corporate information developed through internal investigations. But the natural consequence of routine use of this investigative tool will necessarily be that corporations will decrease their use of internal investigations, or, if they do conduct such investigations, the cautions that the investigating attorneys are obliged to give will create a disincentive for full disclosure. . . . And of course, from the broader societal perspective, that is the wrong answer. We want corporations to be self-regulating to the extent possible. We want to encourage and foster introspection and self-correction. . . [T]he new policies are deeply troubling . . . [in part] because they reflect a short-term utilitarian calculus in disregard for historical antecedents that go back as much as 500 years.").

VII. Future Interaction with Government Agencies

The resolutions recommended by the Task Force build on the ABA's August 2004 resolution opposing the Federal Sentencing Guidelines expectation that corporations waive privileges as an element of assisting government investigations. To a substantial extent, these resolutions are implicit in the earlier one, as well as in the ABA's consistent commitment, in its rules of professional conduct and other positions, to the principle of attorney-client confidentiality.[93] Although the work of the Task Force will continue with the objective of developing more specific policy, the Task Force believes it is important for the ABA to respond to the recent developments described above by expressing its strong support for the preservation of the attorney-client privilege and work-product doctrine, its opposition to policies, practices and procedures of governmental agencies that have the effect of eroding the attorney-client privilege and work-product doctrine, and its endorsement of policies, practices and procedures that recognize the value of those protections.

Consistent with the recommended resolutions the Task Force is continuing dialogue with government agencies to assure that policies, practices and procedures are in effect to protect against any eroding of the attorney-client privilege and work-product doctrine, thereby avoid undermining the public interests served by those protections. The Task Force has been asked by government agencies to gather data to document the perceived problems that are discussed above. We are in the process of doing that and are encouraging the government agencies to do the same. As discussed, we are also studying potential guidelines, safeguards and procedures that would assure proper protections for the holders of the privilege and work product when waivers of the attorney-client privilege and work-product doctrine are involved.

In evaluating potential guidelines, safeguards and procedures as described above, the Task Force is mindful that there are factual complexities that must be considered, such as situations when the privilege is improperly asserted by a corporation and the real question is not one of waiver, but applicability of the privilege. Further, there may be situations when corporations with no pressure on them desire to voluntarily waive the privilege or work product protection. The Task Force has been advised that the ABA Section of Litigation is presently undertaking to develop proposed guidelines to assure

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[93] The recommendations of the Task Force, although limited to the attorney-client privilege and work-product doctrine, are consistent with the client confidentiality provisions of the ABA Model Rules of Professional Conduct, including the amendments to Rules 1.6 and 1.13 adopted by the ABA House of Delegates in August 2003. The attorney-client privilege and the lawyer's professional duty of confidentiality under the Rules are related concepts and share some of the same underlying purposes, but they function differently. The privilege is an evidentiary rule covering attorney-client communications whose disclosure by either client or lawyer may not be compelled by law, whereas the Rules of Professional Conduct protections cover the far broader array of information related to the representation that, absent a legal disclosure duty or client consent, lawyers must except in limited circumstances keep confidential. The client confidentiality provisions of the Rules of Professional Conduct reflect a judgment that, absent a compelling public interest, confidentiality is of paramount importance to ensure an effective lawyer-client relationship. The Task Force's recommendations are consistent with this judgment.

adequate protections when various factual scenarios are presented and the Task Force awaits the result of this effort.

It is important to note that the resolutions accompanying this Report do not address the legal consequences of a corporation's disclosure of documents or information covered by the attorney-client privilege or work-product doctrine to a government agency. The question of whether, and to what extent, such disclosures result in a waiver, thereby making previously protected material available to other parties in litigation, has been litigated in cases before state and lower federal courts. At the request of the SEC, the 108th Congress considered, but ultimately failed to pass legislation (H.R. 2179) limiting any waiver of privilege for information submitted to the SEC pursuant to a written agreement.[94] The Task Force has received varying viewpoints regarding the desirability of such legislation, and will continue to study the question. Meanwhile, the Task Force's work has advanced sufficiently to propose the three resolutions accompanying this Report.

VIII. Future Issue-PCAOB and Auditors

While the Task Force has heard from many individuals and entities regarding pressures that auditors are currently exerting on the privilege,[95] the Task Force has not yet gathered enough information to be able to formulate recommendations regarding action to the House of Delegates. Accordingly, this report does not focus on privilege issues related to auditors and their regulating body, the Public Company Accounting Oversight Board (the "PCAOB"). Nonetheless, this section of the report does offer a brief overview of privilege issues related to auditors and case law interpreting disclosures to auditors of material protected by the privilege and work-product doctrine.

Audits play an important role in the orderly functioning of our nation's social and economic systems because they ensure that the financial statements of companies "fairly present" such companies' financial conditions. Because auditors must have access to enough information to conduct audits properly and because corporations have a need to protect certain information from disclosure so that the interests protected by the privilege and the work-product doctrine are not undermined, a natural tension is created between the privilege and work-product doctrine, on the one hand, and audits, on the other hand.

An example of a reconciliation of this tension is found in the AICPA's adoption of its Statement on Auditing Standards No. 12 in January of 1976 and the corresponding adoption by the ABA of its Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information on December 8, 1975. SAS No. 12 is part of the PCAOB's interim audit standards.

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[94] H.R. 2179, 108th Cong., 2d Sess., § 4.

[95] See, e.g., Testimony of David Brodsky on behalf of the Corporate Counsel Consortium ("The problems we face today surface when auditors request access to records reflecting counsel's efforts and advice across a broad range of issues, not just internal investigations, and seek to impose on companies obligations to provide auditors with access to privileged information."); Testimony of Kenneth W. Gideon, Chair, ABA Section of Taxation ("By requesting copies of the opinions and assessments themselves rather than seeking assurance that advice on appropriate disclosures has been given, the new practice by auditors raises the risks that the attorney-client and other privileges may be waived to the substantial detriment of public companies and their shareholders.").

These two documents are often collectively referred to as the "Treaty." The purpose of the Treaty is to provide guidance to both attorneys and auditors as to the information auditors need to obtain from a company's counsel as part of the audit and that attorneys can appropriately provide. The Treaty balances the competing interests of the privilege and the work-product doctrine against the auditors' need for information, in part by recognizing the auditors' ability to rely on the attorneys' fulfilling their professional responsibility. This critical underpinning of the Treaty is even more justified today with the SEC's adoption of its Part 205 rules of professional conduct, as provided in Section 307 of the Sarbanes-Oxley Act, and the enhancement of state professional ethics rules.

The AICPA interpretations of SAS No. 12 (AU Section 337.09) also recognize the importance of the attorney-client privilege by limiting the need to examine documents in the company's possession that are subject to the privilege.[96] Recently, however, with increasing frequency, auditors have requested from companies privileged communications or attorneys' litigation work product. The Task Force has been made aware of several types of material that auditors are requesting that companies provide for audits. Examples of the requested material include (1) tax opinions prepared for companies by outside counsel that underlie tax positions and tax accruals;[97] (2) assessments prepared by both in-house and outside counsel that relate to litigation accruals and set forth counsel's reasoning underlying such accruals; (3) reports and papers produced as a result of internal investigations regardless of whether such investigations are ongoing or are likely to have an impact upon an audit; and (4) materials related to compliance with legal and regulatory requirements, e.g., requests to see board and committee members' annual self-assessments.

Requests for such materials may be at variance with the AICPA interpretations by putting in jeopardy the privilege and work-product doctrine. Sparked by the corporate scandals of 2001-2002, legislation, regulations of the SEC and standards and rules of the PCAOB have impacted how generally accepted auditing standards ("GAAS") are applied and have increased scrutiny on auditors' procedures to verify company positions and representations. The PCAOB's and the SEC's roles overseeing auditors' compliance with GAAS in the detection of fraud and public companies' compliance with securities laws have been strengthened. The auditors' role in performing procedures regarding the fair presentation of a company's financial statements has been spotlighted. It is the companies, however, that are charged with developing proper internal controls and cooperating with their auditors in the first instance. And yet, their reward may be vast exposure to civil litigation.

What is the result of disclosures of protected material to public auditors? The decisions raise uncertainties. Disclosing attorney-client privileged documents to outside auditors has been held to waive the privilege, at least as far as those documents are concerned. For example, in a decision dealing with Pfizer's disclosure of privileged information relevant to litigation reserves, the court stated: "Pfizer cannot assert attorney-client privilege for any documents that were provided to its independent auditor. Disclosure of documents to an outside auditor destroys the

[96] See AU Section 337.29 (confirming that language in the company's request letter or the lawyer's response disclaiming waiver of the privilege or work-product doctrine is permissible).
[97] See AU Section 9326.22 (amended April 9, 2003) (regarding support for tax matters).

confidentiality seal required of communications protected by the attorney-client privilege, notwithstanding that the federal securities laws require an independent audit."[98] Whether the waiver is "selective" or has the effect of waiving the privilege as to all communications with counsel on the same subject matter is less clear.

Whether a corporation may share attorneys' litigation work product with public auditors without relinquishing the protection of the work-product doctrine is also uncertain. On one hand, in Medinol, Ltd. v. Boston Scientific Corp., the court found that the protection had been waived when a company shared the results of an internal investigation with outside auditors who were reviewing the company's litigation exposures. The court reasoned that work-product protection is not waived when protected material is disclosed "to a party sharing common litigation interests," but found that the independent auditors did not share common litigation interests with the company.[99] The court concluded, "[T]he auditor's interests are not necessarily aligned with the interests of the company. And, as has become crystal clear in the face of the many accounting scandals that have arisen as of late, in order for auditors to properly do their job, they *must* not share common interests with the company they audit."[100]

More recently, another judge in the United States District Court for the Southern District of New York reached the opposite conclusion in Merrill Lynch & Co. v. Allegheny Energy, Inc.[101] In that case, Merrill Lynch's auditors received attorneys' litigation work product arising out of an internal investigation of a trader's theft, in order to enable the auditors to determine whether the theft impacted on Merrill Lynch's financial statements and whether any conditions reflected adversely on the company's ability to report financial information. Later, the plaintiff in a civil lawsuit relating to the theft sought discovery of the material provided to the auditors. But the court held that the company had not waived work product protection. Characterizing the waiver standard differently from the court in the Pfizer case, the court here said that work product protection is not waived by disclosure to third parties with a common interest, but only by disclosure to adversaries or to conduits to potential adversaries. It acknowledged that "an independent auditor could be conceived of as an adversary because of its important public function to independently ensure the accuracy of a company's financial reports."[102] But it concluded that "any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work-product doctrine. . . . A business and its auditor can and should be aligned insofar as they both seek to prevent, detect and root out corporate fraud."[103] Further, the court justified this result on policy grounds, including that, otherwise, corporations would be discouraged "from conducting a critical self-

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[98] In re Pfizer Inc. Securities Litig., 1993 U.S. Dist. LEXIS 18215 *22 (S.D.N.Y. 1993).
[99] Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 115 (S.D.N.Y. 2002).
[100] Id. at 116.
[101] Merrill Lynch & Co. v. Allegheny Energy, Inc., 2004 U.S. Dist. LEXIS 21543 (S.D.N.Y. Oct. 22, 2004); see also Laguna Beach County Water Dist. V. Superior Court (Woodhouse), 04 C.D.O.S. 11096 (Cal. Ct. App. December 15, 2004) (finding that in certain circumstances work-product given to an auditor will remain protected from disclosure to third parties).
[102] Merrill Lynch & Co. 2004 U.S. Dist. LEXIS at *19.
[103] Id. at *21-22.

analysis and sharing the fruits of such an inquiry with the appropriate actors,"[104] and, in particular, that it is "important to encourage complete disclosure between a company and its auditor."[105]

The Task Force is currently considering different approaches to address the issue of the disclosure to auditors of materials protected by the privilege and work-product doctrine. One suggestion the Task Force has heard is to encourage the adoption of legislation that would permit corporations to provide privilege and work product protected materials to auditors when necessary in connection with an audit without waiving the protections of the attorney-client privilege and work-product doctrine as to third parties.[106] The Task Force will continue to gather information and hear the opinions of individuals and organizations with a goal of developing policy that strikes the correct balance between the auditors' need for information and corporations' need to protect attorney-client communications and attorneys' litigation work product.

Additionally, there are other significant privilege and work product areas of concern that have been brought to the Task Force's attention. The Task Force is in the process of gathering more facts and insights to determine if its scope of focus should be expanded to cover these areas.

IX. Conclusion

For the foregoing reasons, the Task Force respectfully urges that the House of Delegates adopt the proposed resolutions accompanying this Report.

Respectfully submitted,

The Task Force on the Attorney-Client Privilege

R. William Ide III, Chair

May 18, 2005

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[104] Id. at *25.
[105] Id. at *26.
[106] See, e.g., Testimony of David Brodsky on behalf of the Corporate Counsel Consortium ("The Consortium proposes that the SEC and PCAOB, joined by the corporate counsel community and the principal auditors of the vast majority of U.S. public companies, propose and support federal legislation…that would permit companies to provide privileged attorney-client communications and work product to their auditors in connection with audits, reviews, attestations and compliance with Section 10A of the 1934 Securities and Exchange Act without waiving any privileges as to others.").