



# American Bar Association Backgrounder

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## Federal Government Coerced Waiver of Attorney-Client Privilege and Work Product Protections

### Background

A number of federal governmental agencies—including the Department of Justice, the U.S. Sentencing Commission and others—recently have adopted policies that weaken the attorney-client privilege and the work product doctrine in the corporate context. Both the Justice Department’s policy—established by the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum”—and the Sentencing Commission’s 2004 amendments to Section 8C2.5 of the Federal Sentencing Guidelines encourage federal prosecutors to require companies and other entities to waive their attorney-client privilege and work product protections as a condition for receiving cooperation credit during investigations.

*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 individuals—as well as companies and other organizations—to seek legal advice freely and to communicate candidly during consultations with lawyers 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. Although the privilege is a fundamental bedrock of the American justice system, courts only recognize it when certain specific requirements are met. In general, attorney-client communications will only be privileged if (1) the communication was between a lawyer and a client (or prospective client); (2) the communication was for the purpose of enabling the client to secure legal services or assistance, and (3) the communication was made in confidence (i.e., outside the presence of third parties). Therefore, the mere fact that an individual or organization communicates with an attorney does not make the communication privileged. In addition, the privilege is subject to a number of important exceptions. For example, communications with a lawyer for the purpose of committing a crime or defrauding others (the so-called “crime-fraud exception”) are not protected. In addition, the privilege will not prevent the government or third parties from asking about relevant facts known by the client—it just prevents them from forcing the client to disclose its confidential communications with its lawyer.

*The Work Product Doctrine.* The work product doctrine prevents the government or a client’s adversaries from obtaining the work product prepared by the client’s lawyer. Work product generally is defined to include documents, statements, and testimony containing legal impressions and theories formed by the lawyer as to litigation that is pending or reasonably anticipated. The protection accorded “work product” is premised on the same basic policy rationale underlying the attorney-client privilege—that an attorney cannot provide full and adequate legal representation unless certain confidential client-related information 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 lawyers; the work-product doctrine permits the lawyer to engage in careful and thorough preparation for litigation. Whereas the privilege protects attorney-client communications 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 that is developed in preparation of litigation.

The United States Supreme Court has ruled repeatedly in support of both the attorney-client privilege and the work product doctrine and has stated specifically that both protections apply not just to individuals, but to corporations as well. In the case of *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court concluded that the attorney-client privilege protects confidential communications between a company and its lawyers. The Supreme Court also noted that effective legal representation requires that the attorney-client privilege be certain, as 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.” *Upjohn* at 393. In the case of *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court also defended the work product doctrine in the corporate context, noting that the doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients, and that it affords “a certain degree of privacy” to discourage “unfairness.”

## **Status**

Despite strong judicial support for preserving the vitality of the attorney-client privilege and work product doctrine, both the Justice Department and the U.S. Sentencing Commission recently adopted policies that have eroded these protections by encouraging prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations. While the Department's policy was formally established by the so-called 1999 "Holder Memorandum" and 2003 "Thompson Memorandum," the incidence of coerced waiver has increased dramatically during the past several years. The problem was exacerbated in November 2004 when the Commission added language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that authorizes and encourages prosecutors to seek privilege waiver. Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component." Many of these local policies are likely to conflict with one another, further worsening the problem of coerced waiver.

The ABA and its Task Force on Attorney-Client Privilege are working with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to modify both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client and work product protections should not be a factor in determining cooperation. Materials relating to the ABA's work on the privilege waiver issue and other useful resources on this topic are available at <http://www.abanet.org/poladv/acprivilege.htm> and on the website of the ABA Task Force on Attorney-Client Privilege at <http://www.abanet.org/buslaw/attorneyclient/>.

After receiving extensive written comments and testimony from the ABA, the coalition, numerous former senior Justice Department officials—including three former attorneys general—and other organizations, the Sentencing Commission voted unanimously on April 5, 2006, to reverse the 2004 privilege waiver amendment to the Sentencing Guidelines. The change will be included in the package of amendments that the Commission sends to Congress on May 1, 2006. Unless Congress acts to modify or reverse the change, it will become effective on November 1, 2006. Unlike the Sentencing Commission, the Justice Department has not yet taken steps to reexamine and remedy its role in the growing problem of government-coerced waiver, and as a result, many federal prosecutors continue to routinely demand that companies waive their privileges as a condition for receiving cooperation credit. In addition, in response to the 2005 McCallum Memorandum, many U.S. Attorneys are now in the process of adopting local privilege waiver review procedures, which will likely result in numerous conflicting waiver policies throughout the country.

In addition to the Justice Department and the Sentencing Commission, Congress has also begun to focus its attention on the recent trend of government coerced privilege waiver. On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the privilege waiver issue. In addition to Associate Attorney General Robert McCallum, several representatives of the coalition, including the President of the U.S. Chamber of Commerce and former U.S. Attorney General Dick Thornburgh, testified at the hearing and the ABA submitted a written statement for the hearing record. During the hearing, Chairman Howard Coble (R-NC), Ranking Member Bobby Scott (D-VA), and numerous other members of the Subcommittee expressed support for preserving the attorney-client privilege and concerns regarding both the Justice Department's internal waiver policy and the 2004 privilege waiver amendment to the Federal Sentencing Guidelines. The ABA, working in conjunction with the coalition and various state and local bars, will continue its efforts to persuade Congress and the Justice Department to reconsider and reverse the Department's waiver policy.

## **ABA Policy**

The ABA supports the preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage. The ABA also favors governmental policies, practices and procedures that recognize the value of the attorney-client privilege and work product doctrine.