

**TESTIMONY SUBMITTED BY THE
UNITED STATES CHAMBER OF COMMERCE
TO THE AMERICAN BAR ASSOCIATION
TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE**

February 22, 2005

This testimony is submitted on behalf of the United States Chamber of Commerce. The Chamber is a business federation that represents three million American businesses of every size, from Fortune 500 companies to the smallest firms. The Chamber appreciates this opportunity to provide the Task Force with its views on the ongoing erosion of the attorney-client privilege. The privilege is under attack by federal and state governments as never before and the ability of businesses to obtain the advice they need to comply with the law is seriously threatened. We urge the Task Force to recommend changes in government policies to prohibit these new, radical tactics and restore an approach consistent with the long line of cases, legislative pronouncements, and government practice recognizing that compliance with the law is enhanced by respecting the relationship between client and counsel.

The Important Benefits to Society of the Attorney-Client Privilege

Today's businesses must comply with layers of complex regulations governing virtually every aspect of their operations while also protecting themselves as best they can against the threat of ruinous private litigation. All but a very few of the men and women who work in America's businesses are law-abiding citizens who want to comply with their legal obligations. The overwhelming majority are not lawyers, however, and the plain fact is that legal advice is essential in meeting this difficult challenge – businesses must consult with attorneys in order to

understand what today's extraordinarily complex laws and regulations require them to do in the myriad of factual situations that they confront every day.

The attorney-client privilege exists in order to promote this essential interaction. As the Supreme Court of the United States has explained, the privilege is socially valuable because it "encourage[s] full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and administration of justice."¹ The Court has emphasized the privilege's special importance in the context of corporations, where it advances "the valuable efforts of corporate counsel to ensure their client's compliance with the law."²

Privileges are grounded in the legal system's recognition of a fundamental principle of human nature: individuals will not seek advice that will benefit society – whether from a doctor, a religious advisor, or a lawyer – if they fear that discussions with those individuals may be used against them. As the Supreme Court has explained, "[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."³ Well over a century ago the Court recognized that 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

¹ *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

² *Id.* at 392-393. On the importance of the attorney-client privilege, see also *Swidler & Berlin v. United States*, 524 U.S. 399, 408-409 (1998).

³ *Upjohn*, 449 U.S. at 388.

only be safely and readily availed of when free from the consequences or the apprehension of disclosure."⁴

Thus, while issues regarding the privilege typically arise in situations in which there are claims of wrongdoing, the privilege exists in order to encourage the many millions of law-abiding businesspeople to seek the advice they need to conform their conduct to the requirements of the law. Generations of case law reaffirm these points; indeed, professional responsibility codes assign attorneys a “fundamental” ethical duty to protect the privilege.⁵

The Government’s Assault On The Privilege

In recent years, the federal government has turned its back on these long-standing principles. Demands for access to attorney-client consultations are now a routine feature of both civil and criminal investigations – demands in which companies typically have little choice but to acquiesce. As a result, society is beginning to suffer the harms that the privilege is designed to guard against: companies and individuals are becoming more reluctant to seek the legal advice that they need in order to comply with the law.

Notably, neither legislatures nor courts have played any role in this unprecedented rejection of the fundamental principles underlying the privilege. Rather, it is a product of recently-adopted enforcement policies that effectively override the judicial and legislative protections afforded to attorney-client communications. The most aggressive line of attack has come from the Department of Justice, but the Securities and Exchange Commission is pursuing similar policies.

⁴ *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

⁵ See, e.g., ABA Model Rules of Professional Conduct, Rule 1.6 and Comment 2.

The Department of Justice

Beginning in the 1990s, federal prosecutors started to press companies to waive the attorney-client privilege in criminal investigations. In 1999 and 2003, the Department of Justice issued two well-known memoranda establishing guidelines for charging corporations with crimes; those documents also articulated the Department's policy on waiver of the privilege. The first was the "Holder Memorandum," entitled "Federal Prosecution of Corporations," and the second, which updated the first, was the "Thompson Memorandum," entitled "Federal Prosecution of Business Organizations." Each identifies a company's willingness to cooperate with the government as a key factor in deciding whether the government will seek charges against the business. Both memoranda describe a company's willingness to waive the attorney-client privilege as an important factor relevant to a corporation's cooperation, and both authorize prosecutors to "request" waivers of the attorney client privilege.⁶

The approach adopted in these memoranda has made privilege waiver "requests" routine in criminal investigations. Reports from the field indicate that investigators routinely raise the waiver issue in their first meeting with defense counsel. Of course, the public position of the Department of Justice is that it never *demand*s waiver of the privilege, it only *request*s it. This is consistent with the language of the Department of Justice memoranda, which state that waiver is "critical" but "not . . . an *absolute* requirement."⁷

Although cloaked with the language of choice, however, these "requests" are anything but optional for the companies that receive them; as a practical matter they simply cannot be refused. Prosecutors exercise considerable power in criminal investigations. They have unreviewable discretion to decide whether to seek criminal charges against an entity or

⁶ The Holder Memorandum is dated June 16, 1999, and the Thompson Memorandum is dated January 20, 2003.

⁷ See *Federal Prosecution of Corporations* at VI.B and *Federal Prosecution of Business Corporations* at VI.B.

individual and, although approval of the grand jury is needed for an indictment, the grand jury process typically imposes little or no practical limitation upon the prosecutor's authority.

The prosecutor's power is enhanced still further by the United States Sentencing Guidelines. Although the recent Supreme Court decisions in *United States v. Booker* and *United States v. Fanfan*,⁸ have changed the legal status of the Guidelines, the Guidelines will continue to exert a tremendous practical impact upon the sentencing process. Under the Guidelines, a company can qualify for lenient treatment if it self-reports, cooperates, and accepts responsibility for the charged conduct. A company's level of cooperation depends on "timely and thorough disclosure of all pertinent information known by the organization," meaning information "sufficient for law enforcement personnel to identify the nature and extent of the offense and the individuals responsible."⁹ If this information was developed through counsel and is protected by the attorney client privilege, lenient treatment is impossible without waiver of that privilege. The Guidelines acknowledge that waiver can be a "prerequisite to a reduction in culpability score" where waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known by the organization."

For many companies, moreover, conviction – and even indictment – can have draconian collateral consequences. Regulatory prohibitions that could eliminate the company's ability to continue in some or all of its lines of business often are triggered by criminal proceedings, and loan agreements often give lenders the power to block a business's access to additional credit and require immediate repayment of all outstanding loans.

But the most significant risk for a company involved in a criminal investigation is the risk to the company's reputation. It is a reality of the current environment that business "scandal" is

⁸ 125 S. Ct. 738, 2005 WL 50108 (Jan. 12, 2005).

⁹ U.S.S.G. § 8C2.5, app. note 12.

given prominent attention – in print and broadcast media, by analysts, and by investors and customers. Other businesses and individuals are reluctant to maintain their relationships with a company that has been charged with criminal wrongdoing, or sometimes even one that is under investigation.

Once a criminal investigation starts, therefore, a company must give careful consideration to the impact on its key business relationships of the course of the criminal investigation. A path involving what will be described publicly by government investigators as a “failure to cooperate” can have a significant negative impact upon its ongoing business; indictment can be a business disaster. And, unfortunately, entities and individuals deemed uncooperative too often become the subject of leaks regarding the investigation despite the legal prohibitions against the release of such information.¹⁰

For all of these reasons, the “request” made by the government is the equivalent of a demand that leaves businesses no real choice at all; there simply is overwhelming pressure on a company to do what the government wants. Indeed, this is confirmed by the large number of companies that have given the privilege waivers requested by the government. As a practical matter, therefore, the government’s policy has dramatically reduced the scope of the attorney-client privilege.

The Securities and Exchange Commission

Like the Department of Justice, the SEC often seeks waivers of the attorney-client privilege in the course of its investigations. In October 2001, the SEC announced that when it evaluates whether to bring an enforcement action, it will look for “the results of [the company’s]

¹⁰ A search of news databases produces a large number of discussions and examples. See, e.g., *From Grand Jury Leaks Comes A Clash Of Rights*, New York Times (Jan. 15, 2005) (providing a general discussion of the problem); *Inquiry Into Grand Jury Leak Sought In Norman Case*, New York Law Journal (Oct. 15, 2003) at 1 (addressing an investigation involving Brooklyn Democratic leader Clarence B. Norman); *Stewart’s Legal Team Requests Probe of Leaks*, New York Law Journal (July 22, 2003) at 1 (addressing investigation involving Martha Stewart).

review and ... sufficient documentation reflecting its response to the situation ... [and] a thorough and probing written report detailing the finding of its review.”¹¹ These reports inevitably are prepared by counsel, and disclosing them to the Commission necessitates a waiver of the privilege.

In addition, like the Department of Justice, the SEC considers waiver of the attorney-client privilege an important element of cooperation in its investigations¹²; and our members report that enforcement staff often begin their communications with a company’s counsel by asking for privileged information. A company that refuses to turn over this information, or even postpones a decision about whether to do so, is viewed as uncooperative. Few companies want to be labeled as uncooperative by the SEC for the reasons discussed above. As a result, the Commission staff typically gets what it wants.

Waiver Of The Privilege For A Government Investigation Means Loss Of The Privilege In Civil Litigation

Although the pressure on a company to comply with a government waiver request is overwhelming, the adverse consequences of acquiescing range far beyond the government investigation. Most legal authority holds that if a person or corporation waives the privilege and discloses previously protected information to one individual or entity, the privilege cannot be invoked to prevent disclosure to anyone else. See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*¹³ ; *Westinghouse Electric Corp. v. Republic of the Philippines.*¹⁴ A

¹¹ See United States Securities and Exchange Commission, *Report of Investigation Issued 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 Release No. 44,969 at ¶ 11 (Oct. 23, 2001).

¹² *Ibid.*

¹³ 293 F.3d 289, 302 (6th Cir. 2002)

¹⁴ 951 F.2d 1414, 1414 (3d Cir. 1991).

corporation that waives the privilege for a government investigation thus opens up its privileged material to discovery by plaintiffs' lawyers for use against the company in civil litigation.¹⁵

The impact of such disclosures can be devastating. Plaintiffs' lawyers routinely select their targets by tracking government investigations and filing claims in the wake of those investigations. As a result, companies that are the subject of government investigations almost always face parallel private lawsuits. If the company waives the privilege, the plaintiffs will get the benefit of all of the company counsel's internal discussions and inquiries with respect to the subject of the litigation. It is likely that these written exchanges – taking place under what was believed to be the shield of the privilege – will contain precisely the sort of candid discussion that the privilege was designed to promote. And it is precisely that type of discussion that, even when not incriminating, can be taken out of context and used by a plaintiffs' lawyer to convince a jury to rule against the company. Of course, all of this occurs while the plaintiff's conversations with his or her lawyers remain protected by the privilege.

The choice for the company is thus excruciating: reject the government demand and risk immediate adverse consequences that could be devastating for its business, or do what the government wants and open the door to much more exorbitant settlements produced by the plaintiffs' knowledge that they will be able to use the formerly privileged material to great effect at trial.

The Government's New Policy Is Changing The Attorney-Client Relationship And Depriving Society Of The Benefits That The Privilege Is Designed To Produce

These new government policies have effectively trumped the case law, the rules, and the ethics codes that establish and support the attorney-client privilege. Now, any responsible corporation must operate under the assumption that communications with its counsel could be

¹⁵ *Ibid.*

disclosed to the government and to private lawyers who are suing the company. This makes running a business more difficult and more expensive. It makes compliance with today's complex regulatory world more difficult. And, most importantly, it makes companies more reluctant to consult with counsel. A policy that is defended as a law enforcement tool actually is thus undercutting the best method for achieving compliance with legal standards – close integration of legal advice into a company's decision making process.

Counsel's role in day-to-day operations

As already discussed, every responsible business works with counsel as part of its day-to-day operations. The Supreme Court has explained why this is necessary: “In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law.” This is important, the Court stated, “particularly since compliance with the law in this area [citing antitrust law as an example] is hardly an intuitive matter.”¹⁶ Because of this “complicated array” of regulation, virtually every company has attorneys who review its operations, conduct compliance programs, and perform many other critical tasks. Responsible businesses consult with counsel about topics too numerous to list; some of the more common ones include employment matters, workplace safety, environmental compliance, taxes, financial reporting, and the securities laws. Counsel's advice is essential to enable companies to comply with the multitudinous requirements of these and other laws; and, because corporate officials believed their conversations were privileged, they saw no downside to vetting their activities with lawyers.

Today, executives are realizing that their conversations with attorneys may not be protected, and are conforming their conduct to that new reality. Why check with the lawyers –

¹⁶ *Upjohn*, 449 U.S. at 392.

and thereby create a single, central repository of all of the company's legal compliance issues that is easily accessible by the government and plaintiffs' lawyers – when leaving the company's lawyers out of the discussion will require the government and plaintiffs to search through all of the company's records to try to find references to those issues? Indeed, numerous well-respected attorneys have warned of a recent chill in communications between attorney and client. These include, for example, Mary Jo White, the recent United States Attorney for the Southern District of New York.¹⁷ The American College of Trial Lawyers expressed its concerns about the trend in an extensive special report.¹⁸

This result is especially likely because waiver of the attorney-client privilege can affect huge amounts of material. Legal advice on a topic can date back years; all advice on a subject is vulnerable to disclosure if the company agrees to waive the attorney-client privilege in a government investigation into that subject matter. So, for example, an investigation in 2005 into an environmental or financial reporting matter could require disclosure of related privileged documents going back decades. Because a business person cannot know in advance whether a particular conversation might be revealed at some point in the future, he or she will conclude that the safest course is to stop all consultation with lawyers.

Counsel's role in internal investigations

Corporations also look to counsel for help in addressing special legal problems. In particular, a company that receives information suggesting it might have violated the law often will conduct an internal investigation. The purpose of the investigation is to learn the relevant

¹⁷ Mary Jo White is quoted in Andrew Longstreth, *Double Agent*, *The American Lawyer* (Feb. 2, 2005). Another example is comments by the Chairman of the Committee on Professional Responsibility of the Association of the State Bar of New York. See Robert J. Anello, *Justice Under Attack: The Federal Government's Assault On The Attorney-Client Privilege*, 1 *Cardozo Pub. Law, Policy & Ethics J.* 1, 9-13 (2003)

¹⁸ See *The Erosion Of The Attorney-Client Privilege And Work-Product Doctrine In Federal Investigations*, American College of Trial Lawyers (March 2002).

facts, stop wrongdoing if it in fact has occurred, use the example of the investigation to deter future wrongdoers, and evaluate the corporation's legal obligations. These investigations are a critical element of most modern corporate compliance programs and play a key role in identifying and eliminating malfeasance.

The usual practice is to retain counsel from outside the company to conduct the investigation. Counsel gathers relevant documents and data, interviews knowledgeable employees, and analyzes the facts and the law. Internal investigations can be extensive, involving scores or hundreds of interviews and thousands, even millions, of documents. Counsel often creates a written record of its investigation, a record that includes materials such as interview summaries and legal memos. This record can contain information dating back years. Counsel may write a report to the corporation's board of directors setting out factual and legal conclusions.

If the results of these investigations routinely are available to government agencies and plaintiffs' lawyers, companies are likely to reconsider whether they are worth conducting. The potential cost is high, because plaintiffs' lawyers would receive a complete roadmap and evidentiary package for use in their lawsuit. And, while a company may be forced to conduct such an investigation of high-profile matters that have come to the government's attention in order to gain the benefits of cooperation discussed above, it may decide to stop investigating more routine matters because this potential cost outweighs any benefit. That result would be a significant loss to society, because these routine compliance efforts produce great benefits in terms of detection of wrongdoing and deterrence of future wrongdoing.

The Supreme Court reached this conclusion more than twenty years ago in *Upjohn v United States*.¹⁹ The government argued in that case, much as it has contended recently, that narrowing the privilege would not reduce the amount of information generated by corporations, because corporations would continue to seek legal advice at the same rate “in the absence of the protection of the privilege.” The Supreme Court rejected that argument out of hand. To the contrary, the Court said, if the protection provided by the privilege is reduced, “the depth and quality of any investigations taken to ensure compliance with the law would suffer.” That is, the Supreme Court added, they would be reduced “if they were undertaken” at all in a system with a diminished attorney-client privilege.²⁰

The government’s waiver policy also discourages employee cooperation in internal investigations. During a typical internal investigation, outside counsel meets with company employees to gather the facts relating to the company’s legal problem. At the start of each interview, counsel gives the employee what is known as an “Upjohn” or “corporate Miranda” warning. This warning advises the employee that the conversation is privileged, but that the privilege belongs to the company and the company may at a later date decide to waive the privilege. Employees who understand that in the current environment the company is likely to waive the privilege virtually as a matter of course will be far less cooperative.

Further discouraging employee cooperation is another recent development: the use by the government of interview reports that company counsel prepare during internal investigations as the basis for obstruction of justice charges against the employees interviewed.²¹ The theory behind this charge is that the employee knows that the company’s counsel will communicate the

¹⁹ 449 U.S. 383 (1981).

²⁰ *Id.* at 393 n.2.

²¹ See, e.g., Indictment, *U.S. v. Grass, et al.*, Crim. No. 1:CR 02-146-02 (M.D. Pa. Mar. 14, 2003), Counts 33, 34, 35 (available on Department of Justice website).

statement to government investigators, so that the employee knows that a false statement to company counsel will be used to mislead government investigators. Not only does this tactic further discourage company personnel from cooperating with counsel, it confirms the conclusion that, in the government's view, employees should expect that interviews conducted by company lawyers will routinely be turned over to the government. That is why employee cooperation with these investigations is much lower now than it was in the past.

Penalizing Companies For Assisting Their Employees In Obtaining Counsel

Because few employees, even senior executives, can afford the high cost of individual counsel to see them through a complex investigation and related litigation, corporations typically pay for counsel for their employees. This often is a sound practice. As a practical matter, loss of indemnification often eliminates the employee's only opportunity to vindicate his or her right to counsel independent from counsel for the corporation. Given the inevitability and expense of litigation, competent executives would be discouraged from accepting high positions if allegations against the company were sufficient to force executives to pay for counsel themselves. Recognizing this fact, many companies state in their bylaws that they will pay for counsel for their employees in most circumstances. States themselves also recognize the point. In Delaware, the leading state in matters of corporate law, a statute acknowledges that this practice is appropriate. Del. Code Ann. Tit. 8, § 145(f) (2000). At least one state, Minnesota, goes still further and actually requires the practice. Minn. Stat. Ann. § 300.083(3) (West 2000).

These state laws may be no match for the new DOJ and SEC policies, however. Federal investigators often object to the payment by corporations of the legal fees for their employees. The Thompson memorandum specifically identifies advancement of legal fees to employees as a

negative factor when deciding whether a company has cooperated with the government.²² This policy deals a serious blow to the ability of employees to vindicate their legal rights without suffering financial ruin. The lower the level of employee, the greater harm this policy does, because lower level employees are less likely to have the financial resources to pay for their own counsel.

The Government Waiver Policy Will Not Produce A Net Gain In Information

Some have suggested that the government's new aggressive stance toward the privilege is justified because it enables the government to gather large quantities of information with the investment of relatively few resources. As we have discussed, that argument is simply wrong. Pressuring companies to waive the privilege may generate information in the short run, but only because the companies who waived the privilege had compiled that information based on the traditional assumption that the information was confidential. The government's argument that its waiver policy will continue to put more information in the government's hands assumes that corporations will not adjust their practices to take account of the new reality, under which companies cannot assume that previously-privileged information will remain confidential. But company executives, being rational, are in fact responding to changed circumstances, as we have discussed.

The waiver policy works against the search for the truth in other ways as well. Because the policy demands cooperation by a company at the beginning of the investigation process, it sharply reduces the chance that the company ever will challenge the view of the facts held by the government. But our system of justice is not inquisitorial – it does not reach the truth by empowering the government to go out and gather only the evidence that supports its case. Our system is accusatorial and adversarial. It requires the government to test its theories against an

²² See Thompson Memorandum at IV.B.

adversary. Before the government shifted the balance of power in investigations, the government benefited from the vigorous arguments of counsel about the underlying facts. By eliminating this check on the government's views, the new policy eliminates the benefits of our long-established adversarial system.

In sum, the government has worked a fundamental change in the law of attorney-client privilege. This change occurred without the participation of any court or legislature; indeed, it occurred without any public debate at all regarding the empirical assumptions underlying this new approach and the policy choices that it represents. This is not an appropriate way to make such a major change in a long-established protection – to the right, no less, that makes informed exercise of all other rights possible. If this new policy were subjected to evaluation and public debate, moreover, it would never receive the support of Congress, the courts or the public.

Conclusions and Recommendations

For all of these reasons, change is urgently needed to protect the extremely important societal interests that underlie the attorney-client privilege. We urge the Task Force to adopt the following recommendations.

First, the Department of Justice should revise its policies on the attorney-client privilege and related protections. The touchstone should be respect for the attorney-client privilege as reflected in judicial decisions and professional codes of ethics. The Department should issue new guidelines revising its definition of cooperation to eliminate any requirement of a privilege waiver. The guidelines also should identify the narrow circumstances under which the Department will even seek a privilege waiver, and should set forth the practical alternatives to a waiver request. While requesting a waiver may be the prosecutor's tool of choice, the government should be required to exhaust alternative, unprivileged means of obtaining

equivalent information. These can include, for example, interviews of witnesses or review of unprivileged documents.

Second, the Task Force should support legislation providing that waiver of the privilege in response to a request from the government is limited in scope to the government and does not eliminate the ability to assert the privilege against others, such as private litigants, and that a waiver of the privilege as to certain materials does not constitute a waiver as to any other materials. For example, a bill offered in the 108th Congress, H.R. 2179, would have codified the doctrine of selective waiver, though only with respect to disclosures to the SEC and certain other agencies.²³

Third, this limited-waiver provision also should permit the disclosure of privileged information to a company's auditor without triggering a broader waiver of the privilege. In the wake of the Sarbanes-Oxley Act of 2002, accountants have increasingly asked their clients to provide information that is protected by the attorney-client privilege. Historically, attorneys have provided the auditor a letter, but have not provided any privileged documents. Especially in light of the recent public recognition of the importance of audits, it would be reasonable to consider a limited exception allowing companies to provide material to auditors without waiving the privilege.

²³ See Securities Fraud Deterrence and Investor Restitution Act of 2004, HR 2179, 108th Cong. (2d sess. 2004); Securities and Exchange Commission Report pursuant to sec. 704 of the Sarbanes-Oxley Act of 2002, at 45.

The Chamber appreciates the opportunity to provide this testimony. We would be happy to answer any questions or meet with you to discuss this important matter.

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