

**Statement of
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before the

**American Bar Association
Task Force on Attorney-Client Privilege
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Good afternoon. My name is Jamie Conrad, and I am an Assistant General Counsel with the American Chemistry Council. On behalf of the Council, I would like to thank the Task Force for convening this hearing, and for the opportunity to testify before it.

The American Chemistry Council (ACC or the Council) represents the leading companies engaged in the business of chemistry. Our roughly 135 members are responsible for about 90% of basic chemical production in the United States.² For the last eleven years, one of my roles at ACC has been to staff and counsel a group of member company in-house counsel whose job responsibilities encompass corporate compliance assurance. The perspective I bring to this hearing, therefore, is the accumulation, over many years, of the views of scores of corporate counsel for dozens of heavily-regulated businesses.³

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² The business of chemistry is a \$460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Our members employ approximately 556,000 employees, with sales of \$238 billion and 1,447 facilities. Chemistry companies invest more in research and development than any other business sector. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government at all levels, to improve security and to defend against any threat to the nation's critical infrastructure.

³ Prior to coming to the Council, I spent eight years at major law firms counseling regulated businesses.



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Executive Summary

As responsible managers of legal obligations in a highly regulated industry, American Chemistry Council members operate sophisticated compliance management systems. The effective operation of these systems is fundamentally impaired by the prospect that a company may have to waive the attorney-client privilege or work product protection to obtain favorable treatment from the government.

The ABA should continue to oppose coerced waiver of these protections, as it has done in the case of the Organizational Sentencing Guidelines. Only under a system that is carefully controlled by high-level agency management can ACC envision requests for waiver not severely undercutting the effectiveness of compliance systems.

ACC members are especially concerned about the likelihood that waiver as to the federal government will be held to constitute waiver as to all parties and as to the underlying subject matter, thereby promoting litigation by third parties. The ABA should seek enactment of federal legislation that would enable limited waiver to federal agencies, preempting any law to the contrary.

The American Chemistry Council's Stake in this Issue

Due to the nature of their business, ACC member companies are intrusively regulated under many federal and state laws regarding environmental protection, occupational safety and health, hazardous materials transportation, food and drugs, chemical weapons, and controlled substances -- in addition to the laws applicable to any substantial business, such as tax and antitrust, and for public companies, corporate and securities laws. New layers of regulation are continually being added to our members' operations -- for example, 2002 alone saw enactment of the Maritime Transportation Security Act, under which the Coast Guard regulates security at roughly 275 chemical facilities that have accommodations for vessels, and the Sarbanes-Oxley Act, which others will no doubt address today.

As well, and unfortunately, in addition to conventional commercial litigation, our members are often named as defendants in tort litigation alleging that damages or injuries were caused by releases or exposures to one or more "toxic" chemicals. The uncertainty and fear associated with such sorts of events and substances provide a veritable artesian well of litigation, albeit meritless in the vast majority of cases.

As a result of this possibly unique depth and breadth of involvement in legal proceedings, ACC member companies have developed extensive and sophisticated compliance management systems. We would venture to say that, along with the defense and health care industries, our members' compliance programs define the state of the art. Moreover, membership in our organization is contingent on implementation of the Responsible

Care® program, which requires members to implement a comprehensive environment, health, safety and security management system.⁴

The Roles of Counsel and the Attorney-Client Privilege

The Responsible Care Management System® prescribes the core elements of a high-performance environment, health, safety, and security management program, and thus goes beyond strictly legal compliance. But compliance and liability issues run throughout it. Accordingly, lawyers play a central role in the operations of these various management systems. Corporate counsel are continuously called upon to identify potential compliance and other liability issues, to advise their management, and – when such events regrettably happen -- to direct the investigation, defense, and remediation of possible violations, governmental investigations or enforcement actions, and private lawsuits.

By far, most potential compliance or liability issues are identified internally, by the company's management system doing what it is intended to do. By design, these systems promote internal identification, and prompt elevation within the company, of events or circumstances that may or may not involve legal violations or liabilities. An effective management system encourages internal reporting; it encourages line personnel to raise questions with management; it encourages people to flag issues about which they have concerns – all so that problems can be prevented, or addressed promptly.

Many of these behaviors are obviously not intuitive or natural, and it takes much effort to persuade line employees and management to initiate communications, and to be forthcoming and frank. The attorney-client privilege is crucial in this regard. The privilege allows corporate counsel to assure their colleagues that they can speak their minds, freely and without regard to collateral, adverse consequences flowing from what they say. It frees non-lawyer personnel from having to try to be lawyers -- i.e., from trying to make independent determinations about whether something is a compliance issue and should be reported at all to management or counsel, or shaping the communication in ways that seem to present the least risk of creating or increasing legal liability. The privilege also enables counsel to advise their colleagues quickly, frankly, and clearly, again without fear of thereby increasing legal exposure instead of diminishing it.

The attorney work product doctrine serves a similarly valuable purpose, protecting the mental impressions and other output of company counsel generated once litigation is anticipated. It is, if anything, even more crucial at this point that corporate counsel be able to communicate with their colleagues about compliance issues. While the work product doctrine is not explicitly referenced in the name of the Task Force or in the notice for this hearing, we note that it is discussed in the “Principal Issues for Further Review”

⁴ Information on the Responsible Care® initiative, begun in 1988, is available at www.responsiblecare.com.

memo prepared by the Task Force's Subcommittee on Issues. We encourage the Task Force to include the work product doctrine within the Task Force's final report and recommendations.⁵

Current Challenges to the Privilege and their Adverse Consequences

The Task Force has sought comment on four related developments,⁶ the first three of which have in common the practices of governmental entities to require actual or potential defendants to waive the attorney-client privilege and work product protection as a condition of potentially receiving some sort of favorable treatment from the government. These practices fundamentally undermine the privilege and largely destroy the benefits, just discussed above, that it provides.

Requiring waiver of either the privilege or work product protection creates two general problems. Both problems are described exceedingly well in the report entitled "Principal Issues for Further Review" prepared by the Task Force's Subcommittee on Issues, and in the *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, produced by a blue-ribbon panel convened by the U.S. Sentencing Commission in 2002-03, and which we commend to the Task Force's attention.⁷

Problem #1: Crippled internal communications, and thus internal management. When lawyers and their clients believe that their communications have a realistic chance of not being protected, the entire nature of those communications changes:

- *People stop writing things down.* A document that is never created cannot cause trouble later. This is bad for management systems, however, which by definition are a set of documents specifying roles and responsibilities that provide continuity, consistency and institutional memory, even as individuals come and go. When things aren't written down, the only "system" in place is oral communication and peoples' memories. These sorts of "systems" are inherently deficient in any sizable institution because they do not enable the rapid transmission of detailed information among multiple people at diverse locations.

⁵ Except where the context requires otherwise, references to the "privilege" in this document should be read to include the work product doctrine.

⁶ These are: (1) recent changes to the organizational sentencing guidelines; (2) DOJ policy and practice; (3) similar policies and practices of the SEC and other federal regulatory agencies; and (4) potential Public Company Accounting Oversight Board rules and tendencies of independent auditors to require corporations to provide privileged information.

⁷ *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines* (Oct. 7, 2003), available at www.ussc.gov/corp/advgrprpt/advgrprpt.htm. The Advisory Group's report was commissioned to inform the Commission's reconsideration of the Organizational Guidelines.

Rather, they depend upon a “telephone game”⁸ and inevitably fail over time, unintentionally exacerbating noncompliance.

- *People self-censor.* As noted earlier, when communications to counsel are not protected, nonlawyers make more legal decisions without consulting counsel. Or if they do consult counsel, they write bland, uninformative documents that often fail to convey crucial information needed for making legally correct or wise decisions.
- *Communications are restricted.* The less protected a document is believed to be, the more limited its distribution is likely to be. Thus important actors may not receive information they need to help solve (or avoid creating further) legal problems.
- *Investigations are discouraged or hampered.* One of the most direct consequences of required privilege waivers is that organizations are much less likely to conduct internal investigations. They are thus less likely to identify the root cause of a problem, or to discover its full extent. Where investigations are conducted, reports may be closely held or not written at all.
- *Corporate Miranda warnings plus.* Corporate counsel conducting investigations routinely advise employees that counsel represents the company, and not the employee. Now, however, counsel must also advise employees that they should assume their communications are not privileged – further limiting the utility of the communication.⁹

Problem #2: Third-party use of waived communication in collateral litigation. The second problem with government agencies or auditors requiring waiver of attorney-client privilege or work product protection is that, under the common law of privilege in various federal and state jurisdictions, (i) waiver as to one party may constitute waiver as to all, and (ii) waiver of a particular communication may constitute waiver of all communications relating to the same subject matter. The Advisory Group’s Report does a particularly good job of describing the crux of this “litigation dilemma”: “All of these critical aspects of a vigorous and effective compliance system [i.e., training, auditing and monitoring, internal reporting, and cooperation and self-reporting] can be compromised or rendered entirely worthless by entities more concerned about litigation exposure than the statistically less likely event of criminal prosecution.”¹⁰

⁸ *I.e.*, where one person tells another something orally, who then tells another, and so on, so that the end result is far different from the beginning, usually contains numerous errors, and cannot be replicated.

⁹ These problems are also discussed in the Advisory Group’s Report at 93-106.

¹⁰ *See id.* at 108; *see generally* 106-131.

This concern is very real; indeed, among ACC member companies, as among the two problems created by privilege waiver (crippled communication and the litigation dilemma), the latter is regarded as more troublesome. A company may, by especially diligent efforts, manage to operate a functional – though not high-quality – compliance management system without reliance on the privilege. It has no means of protecting itself from third party litigation using waived communications, however.

Beyond these two general categories of problems, the crowning blow is that demanding waiver of protected compliance information punishes most severely those companies that have the most comprehensive compliance programs. A company that conscientiously detects and addresses potential noncompliance issues, and that documents its systems and the bases for its decisions, has laid out a paper trail for the government. A company that is indifferent to compliance and makes no effort to document that process has little to worry about in the event of a waiver request. ACC members feel this unfairness acutely.

These Concerns Are Not Speculative – Response to Task Force Questions

The Task Force has requested responses to three frequently-asked questions:

1. To what extent do these encroachments actually interfere with corporate client-attorney relations and to what extent is the public interest thereby harmed?

ACC is aware that government agencies and prosecutors insist demands for waiver are the exception rather than the rule. However, the experience of ACC companies (and their outside counsel, who obviously represent a much broader universe of companies) is that waiver is now routinely requested to varying degrees, from waiver of all privileged communications pertinent to an investigation to “selective” waiver regarding specific topics or individuals. In any event, waiver requests are sufficiently common that, to be prudent, businesses must assume that they will occur. 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. To the contrary, these agencies give the impression that failure to cooperate, via waiver, will result in an indictment.

In his letter to the Task Force, Thomas Baxter of the FRBNY (i) says he has “[i]ncreasingly” seen engagement letters wherein companies hiring outside counsel to conduct investigations recite their prior decision to release the results of the work with regulatory agencies; and (ii) opines that such letters do not chill the candor of corporate witnesses. While our members may choose to disclose investigation results to the government, they typically do not decide to do so before commissioning the work. They

also feel that such a decision would, in fact, chill communications between employees and counsel.

Earlier in this letter, we recited the adverse consequences that flow, in our members' judgment, from the inability to conduct corporate legal communications under privilege. In our view, the greatly diminished effectiveness that this produces for corporate compliance and similar management programs outweighs the value that prosecutors gain by being able to scrutinize every corporate communication involving counsel.

2. Under what circumstances, if any, should particular regulators legitimately request disclosure of privileged information, and what privileged information may legitimately be sought?

The attorney-client privilege and work product doctrine are fundamental concepts of American jurisprudence, firmly embedded in Supreme Court case law. Coerced waiver of privilege may well implicate the Sixth Amendment right to effective assistance of counsel, a right that corporations as well as individuals enjoy. Much of the damage to compliance management caused by the specter of having to waive these protections is done as soon as there is any reasonable prospect of waiver being required. Thus, half-way, incremental or contingent protections are not likely to offer substantially more benefit than the current state of affairs. Accordingly, we urge the American Bar Association to advocate wherever possible – as it did last year in response to the revised Organizational Sentencing Guidelines – its opposition to demands for waiver from governmental entities or auditors.

In ACC's view, the only way waiver might be able to coexist with effective compliance management is via a system that is carefully and centrally controlled by high-level management within the relevant agency. For example, internal compliance communications might be less hampered if counsel knew that any waiver request originating from a U.S. Attorney's office or the Justice Department would have to receive approval by a Deputy Assistant Attorney General or higher within DOJ.

In such a system, the following limitations should apply:

- Waiver should ordinarily be limited to the provision only of any factual internal investigation conducted by 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 subject of the government's investigation.
- Waiver should not be requested in any case where the government has already conducted a thorough investigation of the facts, or where factual information is otherwise already (or readily) available to the government.

- Waiver should not be sought either (i) in circumstances in which the case against the corporation is being terminated by plea or declination, unless there are significant unresolved issues involving potential charges against individuals or other corporations, or (ii) for materials generated at the earliest states of an internal investigation by a company (typically in-house counsel), before detailed interviews are conducted.
- Waiver should be limited to crucial witnesses, and should exclude grand jury debriefings (because of the government's superior knowledge of such testimony).
- Waivers should only be sought under a confidentiality agreement.

Under this system, a company that chooses not to waive protections as to all or some information should not automatically be denied credit for the relevant favorable treatment. Rather, the entity responsible for making this determination (which could be the same high-level DOJ official, a high-level official of the SEC or other investigating agency, or the judge in the case of the Sentencing Guidelines) should provide the company with an opportunity to explain why it was declining to waive protections.

3. When an organization must disclose privileged information to an outside regulator or auditor, under what circumstances should the disclosure waive the privilege in its entirety, and to what extent should the privilege be preserved vis-a-vis third parties?

As noted earlier, coerced waivers of privilege create two problems: they harm internal management processes, and they can constitute waiver as to third parties and as to the underlying subject matter. We also noted earlier that, while both of these problems are important, the latter set of issues is more dire from our members' perspective. It is one thing to have to accept a somewhat greater risk of noncompliance, or less effective management, as the price for better treatment by the government. It is another thing altogether for that treatment to come at the price of prompting, or greatly aiding, potentially ruinous civil litigation based on the information disclosed.

Reasonable people may differ about whether the public interest is better served by companies being required to waive privilege as a condition of better enforcement treatment. There is very little reason, however, supporting the result that such waiver should constitute waiver to all parties or to all communications involving the same subject matter. The basic argument behind both concepts; i.e., that the privilege holder has shown it no longer cares about confidentiality, is plainly inapposite. The privilege holder in these cases has been coerced, in effect, to make the waiver. While there may be some policy evil associated with allowing entities in the normal course to selectively use waivers as both a sword and a shield, the equities of this analysis are very different when (i) that waiver is being coerced, rather than opportunistically advanced by the privilege holder, and (ii) the entity doing the coercion is the government. By definition, governmental entities represent the public, and the reason they are requesting privileged documents is to ensure that their ultimate treatment of the privilege holder furthers the

public interest. The only parties disserved by limiting waiver in these circumstances are private litigants (or would-be litigants) who are thus denied the fortuitous opportunity to build their case on documents they would not otherwise be entitled to. If limited waivers were the law, such parties would be no worse off than if the privilege holder had opted not to provide the privileged communications to the government.¹¹

A remarkable degree of consensus is emerging around the merits of a federal statute that would specifically authorize limited waivers to federal agencies and prosecutors and that would preempt any inconsistent state law regarding privilege:

- The SEC has argued for this result before the 9th Circuit. The ABA Section of Antitrust Law also filed a brief in that litigation supporting the SEC's position.¹²
- On behalf of the SEC, members of Congress last year introduced legislation (H.R. 2179) limiting any waiver of privilege for information submitted to the SEC pursuant to a written agreement.¹³
- The House Financial Services Committee favorably reported H.R. 2179 last year, with no dissenting views on this issue. The Committee noted that this provision would "enhance[] the Commission's access to significant, otherwise unobtainable information" and eliminate the "substantial disincentive" to such sharing currently created by privilege case law.¹⁴
- The Ethics Resource Center (ERC) Fellows Program has resolved to "support changes in government policy and law that will recognize privileges for the good faith use of effective compliance programs," and its report on the subject includes recommendations that disclosures to government agencies not constitute waivers of applicable protections.¹⁵

Significantly, H.R. 2179 did not seek to codify a "self-evaluative privilege," an approach that generated considerable controversy when Congress considered it in the mid-1990s in the context of environmental audits. While ACC, the ERC and others have argued the merits of such an approach, others complained that because such legislation prevents

¹¹ Interestingly, in its report opposing governmental practices and policies calling for waiver, the American College of Trial Lawyers, which is composed equally of counsel for plaintiffs and defendants, cites as one adverse result the prospect that waiver as to the government "is likely to be found to [be] waiver . . . in [other] proceedings as well." American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* 12 (March 2002).

¹² *U.S. v. Bergonzi*, No. 03-10024, 2003 WL 22716310 (9th Cir. April 29, 2003).

¹³ H.R. 2179, 108th Cong., 2d Sess., § 4.

¹⁴ H.R. Rep. 475, 108th Cong., 2d Sess. 13, 24-25 (April 27, 2004).

¹⁵ Ethics Resource Center Fellows Program, *Resolution and Report: Employee Confidentiality and Non-Retributory Reporting Systems* 3, 19 (May 7, 1999).

enforcement agencies from obtaining or reviewing corporate self-evaluations, it thus promotes violator “secrecy.” The SEC’s bill, by contrast, would *facilitate* access to such reports by such agencies. It only prevents others from piggybacking onto that disclosure.

ACC therefore urges the Task Force to recommend that the ABA House of Delegates endorse federal legislation along the lines of H.R. 2179.

Conclusion

The ABA was wise to charter this Task Force, and ACC looks forward to the Task Force’s final report and recommendations. The Task Force, and the ABA, have a significant opportunity to improve the state of the law in this area and thereby promote more effective compliance management and more just resolution of enforcement actions.

I appreciate the opportunity to speak before you today and would be happy, now or later, to respond to the Task Force’s questions.