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Comments of the Association of Corporate Counsel (ACC) to the ABA Attorney-Client Privilege Task Force Hearings

*April 21, 2005: Waldorf Astoria Hotel, New York City
Susan Hackett, ACC's Senior Vice President and General Counsel*

Thank you for the opportunity to testify before you today. My name is Susan Hackett, and I am the Senior Vice President and General Counsel of the Association of Corporate Counsel or ACC. ACC is the in-house bar association, with over 17,000 members in the US and over 50 other countries; our members represent more than 8,000 different organizational clients, including small and large companies, public, private and non-profit entities, in every imaginable industry, and in every size of law department: from one-person shops to multiple thousand strong departments.

ACC supports the ABA's Attorney-Client Privilege Task Force and we commend you, Chairman Ide, and President Grey for the Task Force's mission and its work. We have been honored to participate through our liaison status to this Task Force. In addition to attending your meetings, I have heard and read the extensive testimony and many of the presentations offered to the Task Force.

I come before you today mindful of the dual role this Task Force must play in its work: you have an important responsibility as experts to examine the legal issues involved in this discussion of privilege, as well as an important role to play as stewards of our client's fundamental rights. For the issue of privilege before us is - at its core - about clients, and not about lawyers.

ACC members are very focused on protecting the rights of their clients, including their Constitutional rights to counsel and the concomitant expectation that these rights will may be exercised and supported by confidentiality. As a result, I am here today to urge this Task Force to focus its attention on two things: first, how we can fulfill corporate clients' legitimate expectations that the privilege will protect and promote their communications with counsel, and second, how we can redress any actions or policies that have the affect of diminishing the value of or brokering away clients' privilege protections.

ACC does not agree with a number of those who have addressed this Task Force who have come to the conclusion that it may be practically necessary for clients to cede their privilege rights in certain contexts in order to gain otherwise available favorable treatment from a prosecutor or regulator. Many addressing this group along these lines have endorsed the concept of limited waiver. It is ACC's position that trying to fashion an "acceptable" limited waiver puts in the position and on the slippery slope of acknowledging that it's okay to ask clients to waive their rights to the government. Limited waiver would not even be a topic of conversation if the government did not believe that it has the right to receive waivers in the first place, or punish those who refused to grant them.

The privilege is a not a bargaining chip to be played by the government in obtaining corporate cooperation or in making charging decisions. If we can find ways to make sure that such a chip is not a part of the hand that prosecutors or regulators feel entitled to play, the issue of whether to grant a waiver or seek a limited waiver's protections is moot. ACC believes that this Task Force's most valuable contribution would be to pursue actions that will stop government intrusions into the confidential relationship of attorney and client since such intrusions come at the expense of corporate compliance initiatives.

Diminishing a corporate client's privilege rights vis a vis the government puts the company at an unfair disadvantage in what is clearly an adversarial process staged on what should be a level playing field governed by established and predictable rules of practice. Whether or not to waive the privilege should not be a question that the government is allowed to pose and answer. If this Task Forces moves toward promoting limited waiver alternatives, then the presumption becomes that the government has a right to ask for a waiver, so long as they can "protect" the client from third party/subsequent discovery. While protection from future third party discovery requests is certainly important, employees who seek legal advice or feel obliged to report a potential legal problem are far more personally threatened by government access to their statements than they are by the longer term financial impact of a third party suit on the company.

Through the eyes of corporate employees, if the company's counsel may be compelled to divulge her attorney-client conversations, then talking to the company's counsel is really no different than talking to a prosecutor; company lawyers will be seen as deputized middlemen who are valued not by clients for their ability to helpfully advise company or help to prevent corporate wrong-doing, but rather who are valued by the government for their role in facilitating the prosecution of their corporate clients and employees when failures inevitably occur. Clearly, from the perspective of employees, and as suggested by the US Supreme Court in its landmark holdings supporting the privilege in the corporate context, an uncertain privilege is no privilege at all.

While we all know and appreciate the ethics axiom that the corporate lawyer represents the entity and not its individual managers, it bears repeating that on a practical level, companies cannot exist and work but through the actions of individual employees,

executives, and directors. And the corporate privilege does, in fact, thus facilitate and give comfort to the interaction of company lawyers and employees: if not for the corporate privilege, employees who are approached by the company's counsel otherwise face the Hobson's choice of either refusing to cooperate (which could lead to their dismissal), or cooperating fully, knowing that whatever they say to these lawyers could be turned over to a prosecutorial authority in the future.

Even those who are innocent of wrongdoing would rather take cover in these turbulent times than risk unforeseeable consequences. Such feelings are natural for employees in today's company where it is incredibly hard for even the most well-intentioned and diligent employees to feel confident about their ability to keep up with regulatory obligations and ever-changing legal standards of reasonable behavior. Corporate employees and executives alike worry that even an innocent action might appear in a less favorable light when subjected to the scrutiny of 20/20 hindsight in the aftermath of a corporate failure. Add to the mix the daily headlines about ever-increasing numbers of employee prosecutions which underscore the current environment of prosecutorial fervor for assigning responsibility to someone when corporate failures occur ... what results is an environment in which corporate counsel and employees operate at odds with each other in less than a trusting relationship. And a lawyer-client relationship without trust is one that cannot effectively operate to the company's or society's benefit.

The benefits of the privilege should be every client's expectation and right. For the protection of the privilege does not come at any significant cost. The privilege (and attendant work product protections of an attorney's thoughts) do not protect "facts" from the government's investigation of alleged wrongdoing, nor do they prevent clients from disclosing in a cooperative manner all relevant information about the client's activities in question. The argument that the government does not have the resources or should not have to shoulder the responsibility to investigate and make its own decisions about a company's alleged wrongdoing without access to privileged communications is simply not persuasive. What is left out of government purview by protection of the privilege is by definition very limited. The mistaken belief that the privilege inappropriately cloaks dark "secrets" and protects wrong-doers from the sunshine of corporate transparency suffers from a confusion between the purposes of obtaining legal counsel and the reasons for transparency in governance.

In the material I've included to accompany our testimony, you will find the results of our recent survey of over 700 corporate lawyers on these issues. Over 350 responses came from corporate counsel, many of them general counsel. Even the most casual reader should be struck by the incredible response rate and the unanimity of the message that our members and their outside peers are sending on these issues.

- **A personally-experienced erosion in the corporate client's privilege rights was confirmed by almost one-third of in-house counsel respondents (and almost one half of outside counsel respondents), indicating a growing**

problem for corporate clients who wish to exercise their right to confidential legal counsel, and for the first time quantifying a problem that is significantly more burdensome than prosecutors and others in government oversight positions have suggested exists: Erosion in the protections offered by privilege and work product doctrines was cited as experienced by 30% of inside counsel respondents, and 48% of outside counsel respondents in our companion survey.

- **Reliance on privilege:** In-house lawyers confirmed that their clients are aware of and rely on privilege when consulting them (93% affirmed this statement for senior-level employees; 68% for mid and lower-tier employees)
- **Absent privilege, clients will be less candid:** If the privilege does not offer protection, in-house lawyers believe there will be a “chill” in the flow or candor of information from clients (95%); indeed, in-house respondents stated that clients are more sensitive as to whether the privilege and its protections apply when the issue is highly sensitive (236 of 363), and especially when the issue might impact them personally (189 of 363).
- **Privilege facilitates delivery of legal services:** 96% of in-house counsel respondents believe that the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel.
- **Privilege enhances the likelihood that clients will proactively seek advice:** 94% of in-house counsel respondents believe that the existence of the attorney-client privilege enhances the likelihood that company employees will come forward to discuss sensitive/difficult issues regarding the company’s compliance with law.
- **Privilege improves the lawyer’s ability to guarantee effective compliance initiatives:** 97% of corporate counsel surveyed believe that the mere existence of the privilege improves the lawyer’s ability to monitor, enforce, and/or improve company compliance initiatives.

(an executive summary of this survey and its results is online at <http://www.acca.com/Surveys/attyclient.pdf>)

When offered a variety of options listing the potential circumstances under which government officials should be allowed to request disclosure of privileged information, corporate counsel were quite clear: the largest percentage of respondents (both inside and outside counsel) said that waiver of privilege to the government is not appropriate and should not be sought. Only 22% of in-house counsel and 17% of outside counsel indicated that they thought that the government’s request for waiver should be allowed if there was a guarantee that review by the government would not waive the privilege

as to third parties in the future. Both in-house and outside counsel want us to protect their client's privilege rights, not facilitate their waiver.

Corporate clients sitting on the other side of the table from the government are being pressured to waive privilege. The government's use of words like "cooperation" cannot hide the evidence that what is really happening is something more akin to coercion. Members are asking us to focus our efforts on finding out why prosecutors believe that they can remove the privilege from our legal system; then they want us to find a way to stop them from doing so in the future in order to avoid negative impacts on corporate compliance efforts.

Does ACC suggest that its members could never be well-served by limited waiver in some situations? No. And in fact, our board endorsed and still stands by the proposal made by the Corporate Counsel Consortium (which has presented its proposals to this Task Force as well) that would change the rules governing accountants (through the PCAOB) and seek legislative recognition of a limited waiver right for auditors who request certain kinds of privileged information in order to assess the nature of the company's business health and the accuracy of its books. The fundamental difference between this kind of limited waiver and that suggested as a remedy to prosecutorial erosion of the privilege is that the auditor is not the company's prosecutor; he performs quite a different function -- one presumably in concert with the client's interests.

There are probably current situations in which some corporate clients will seek a limited waiver from the government because it's the best they can get. And if they ask our assistance, we would seek to support their rights to do so. Far too often, companies under investigation today are subject to government policies and operating procedures that leave them no other choice but to waive their rights to the government in the hope that a limited waiver's assurances as to third parties at least allows them to minimize potential future losses. But even limited waivers would not be necessary if the government was barred from holding the company's defense, settlement, and sentencing options hostage to its agreement to waive the privilege in the first place. The latter is the far better solution for us to focus upon in our advocacy efforts on behalf of all of our members.

I would like to close with some specific thoughts about what ACC would encourage you to consider as you conclude these hearings and move toward the deliberation portion of your work.

We encourage this Task Force to focus not on addressing limited waiver alternatives, but on redressing government actions that force clients to choose between their privilege rights and their continued well-being. If the Task Force chooses to follow such a path, your proposals might include:

- **a commitment of the ABA to join with other bars to work cooperatively with the Department of Justice and its prosecutors, as well as federal agencies and their regulators, to persuade them that the privilege in the corporate context serves the public interest, deserves protection, and promotes compliant and responsible corporate behavior:** This means that we would jointly approach the appropriate

government authorities to ask them to shun, and – where codified – help us overturn inappropriate policies that de-value the privilege, such as those articulated in the Thompson Memorandum and Chapter Eight of the Sentencing Guidelines. It is crucial for prosecutors and regulators to agree that the client who chooses not to accept the government's offer for a limited waiver cannot be punished, deemed "uncooperative," or told that it is ineligible for more lenient treatment. We must help them understand that we are their partners in encouraging corporate responsibility and transparency, and that that partnership extends to supporting confidential communications between lawyers and clients which facilitate compliance efforts.

- **an effort to reach out to engage Judges and the court system in an effort to educate them about the ways that the privilege is under attack, and to offer alternatives that the courts might consider in supporting our efforts to stop its erosion, especially when deciding cases that come before them.** It is important for judges to correct the actions of lawyers appearing before them who attempt to diminish the other side's privilege protections in order to further their cause. And it is only when the case law governing privilege and waivers improves and the judiciary exerts its powers to dampen the government's enthusiasm for privilege-eroding tactics that our message will have its full impact. We need to enlist this country's judges in our efforts so that they may join us in protecting the judiciary's authority from executive branch intrusion when it comes to the appropriate application of the privilege in the corporate legal context.

- **the creation of educational resources for law students and members of the bar to help them from being their own worst enemies in protecting the privilege in their personal practices:** Too many lawyers rightfully invoke the ire of privilege critics by trying to cloak in privilege that which was never privileged to begin with. Educational efforts might therefore focus on addressing the shortcomings of many corporate lawyers in understanding what the privilege can and cannot protect, and how to instruct clients in its proper use, as well. My point is that when we ourselves engage in practices that over-inflate the application of the privilege, or suggest that it can cloak every word we utter, then it is no surprise that adversaries we encounter will question our judgment in making a self-determination about when the privilege actually should apply.

- **a slate of suggestions offered to the various national, state, and local bars, providing them menus of activities and relevant, practical resources they may use to join the ABA, ACC, and other bars in educating members about how to fight erosions of the privilege and promote its protection within their local legal, regulatory, judicial and prosecutorial communities;** the message that the privilege should be protected is one that needs to be echoed in every hallway, judicial chamber, office complex, and government office in the country. We've neglected our responsibility to spend more time underlining its value to compliance efforts and responsible corporate behavior.

- **the creation of a team of leaders tasked with overseeing these projects** and assuring the success and implementation of initiatives created to fulfill them: This likely requires

the dedicated commitment of financial, staff, and related ABA resources that would need to be planned and budgeted.

ACC is committed to pursuing these goals, tasking staff and financial support to these projects, and developing an aggressive plan of action. And as you know, ACC is already working with the ABA and other bar groups to some extent or another on most all of these initiatives. But we're all a long way from success in these efforts, and more and better good ideas on how to proceed will always be welcome. We encourage the ABA's involvement in order to multiply the impact of our advocacy, as well as the effect of our work. As the world's largest bar, your unified voice joining us on this issue is crucial to the protection of our shared interest in protecting corporate clients' rights.

I thank you for your time and the opportunity to appear before you today, as well as your willingness to include organizations such as ACC in the open process that this Task Force is engaged in offering. I look forward to continuing this dialogue and stand ready to address your questions and concerns as best I can, either now or as we continue our work in the business meetings of the Task Force that will follow.