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## EXECUTIVE SUMMARY

### **Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?**

The Association of Corporate Counsel (ACC) believes that the attorney-client privilege and work product doctrines as applied in the corporate context serve society by encouraging corporate decision-makers to talk with their lawyers about how to conduct their daily work, as well as how to prevent, identify and report potential wrongdoing. ACC and its members contend that important lawyer-client conversations occur with greater meaning and effect when supported by the client's expectation of the corporate confidentiality of the consultation.

ACC members and others in the outside counsel defense bar have noted an increasing concern in recent years that prosecutors, regulators, civil litigation opponents and courts seem to be inappropriately mixing up the long-standing recognition and respect for a client's right to confidential counsel with the current focus on corporate transparency (and a related belief that anything kept secret is somehow a red flag to inappropriate activity). In response to these concerns, ACC is examining how to best encourage the continued protection of the privilege and how to act to ensure its continued application in support of a sound lawyer-client relationship that promotes corporate legal compliance. ACC is already active in reaching out to prosecutors, the US Sentencing Commission, federal regulatory agencies, and courts to support the application of the privilege and to debunk the myth that the exercise of a client's attorney-client privileges are somehow not appropriate in the post-Enron environment. But we first needed to debunk the notion that the privilege isn't really under any specific attack, since many prosecutors especially have suggested that corporate concerns that the privilege is under attack are overblown and undocumented. And so ACC asked members to complete an online survey titled: "*Is the Attorney Client Privilege Under Attack?*" This Executive Summary provides an overview of responses to that survey.<sup>1</sup>

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<sup>1</sup> In March 2005, ACC posted this survey on its website, promoted its availability to those members to whom we can email our "all-member" newsletter, and directly contacted approximately 3,000 random members (of our 17,500 member constituency) whose titles included the words either "general counsel" and "vice president," or "litigation," requesting them to complete the web-based survey. The survey was "open" for approximately 3 weeks and 363 corporate counsel responded.

The survey had two parts: the first part included 21 questions primarily seeking responses in multiple choice or yes/no question format ("Part 1"); the second part consisted of 10 open-ended questions seeking text responses to questions on privilege in the prosecutorial/regulatory investigation and audit contexts ("Part 2"). Respondents were given the option of completing both Parts 1 and 2 or submitting their responses following completion of Part 1. 363 responses were received as of the close date of March 25, 2005. Of these, 52 respondents indicated that they would proceed to answer some or all of the open-ended format questions in Part 2, and the majority of those respondents answered most of the Part 2 questions.

At the same time, ACC posted a "companion survey" offering essentially the same questions, but slightly reworded for a different audience: outside counsel. The outside counsel survey was offered to our colleagues at bars and business groups with a significant number of outside counsel members. The numbers discussed in this survey, however, are from the in-house survey; when comparative differences occurred between in-house and outside

Section I summarizes key themes emerging from the survey. Section II shows in tabular format summarized survey questions and responses from the first part of the survey.<sup>2</sup> Section III summarizes examples and views on experiences pertaining to erosions in the privilege and work product doctrine protections. This section also summarizes views describing the public interest in preserving the privilege and work product doctrines in the corporate context. Section IV summarizes themes that emerged from open-ended questions on privilege in the prosecutorial/regulatory investigation and audit contexts, from the second part of the survey.

## I. KEY THEMES

- **A personally-experienced erosion in the corporate client’s privilege rights was confirmed by approximately one-third of 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 approximately 40% of outside counsel respondents in our companion survey (see footnote one).
- **Reliance on privilege:** Lawyers believe that their clients are aware of and rely on privilege when consulting them (93% for senior-level employees; 68% for mid and lower-tier employees)
- **Absent privilege, clients will be less candid:** If privilege did not offer protections, lawyers believe there will be a “chill” in the flow or candor of information from clients (95%)
- **Privilege facilitates delivery of legal services:** Lawyers believe that the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel (96%)
- **Privilege enhances the likelihood that clients will proactively seek advice:** Lawyers 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 (94%)
- **Privilege improves the lawyer’s ability to guarantee effective compliance initiatives:** Existence of the privilege improves the lawyer’s ability to monitor, enforce, and/or improve company compliance initiatives (97%)

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respondents, they will be noted for your information. It is worth noting generally that the responses from both inside and outside counsel closely tracked each other and were amazingly consistent overall.

This document offers an Executive Summary of the survey results. Numbers and percentages are approximate and rounded to the nearest whole integer. Summaries of broad themes emerging from the open-ended text responses are also included. Our survey was not intended to provide anything other than information on the responses provided. We believe the response rate is quite robust, but we make no proffer that the sampling is statistically significant or representative of the entire profession. We would also note that there is a natural skew in responses in that the survey was offered to members and outside counsel to complete if they volunteered to do so: obviously, those most likely to complete the survey are also those more likely to hold strong opinions on this issue.

<sup>2</sup> A list of the questions and the raw data answers to the non-open ended questions in both the inside counsel and outside counsel surveys are available by contacting ACC ([Hbarre@acca.com](mailto:Hbarre@acca.com) or [Hhackett@acca.com](mailto:Hhackett@acca.com)).

## II. OVERVIEW OF SURVEY RESULTS FOR PART 1

SURVEY QUESTIONS	Answers
<p><b>Are senior level employees of your client aware of privilege when they consult you?</b></p>	<p><b>Yes: 93%</b> <b>No: 7%</b></p>
<p><b>Are mid- and lower-tier level employees are aware of/rely on privilege when they consult you?</b></p>	<p><b>Yes: 68%</b> <b>No: 32%</b></p>
<p><b>Would there be a “chill” in the flow/candor of information provided to counsel if the privilege did not offer protection to client communications or your attorney work-product?</b></p>	<p><b>Yes: 95%</b> <b>No: 5%</b></p>
<p><b>Post-Enron, has your client personally experienced an erosion in protections offered by privilege/work product?</b> (See section II for open-ended responses detailing how this 30% experienced the erosion.)</p>	<p><b>Yes: 30%</b> <b>No: 70%</b></p>
<p><b>Employees of corporate clients are more sensitive to the privilege and its protections when the issue:</b></p>	<p><b>Is highly sensitive.....23%</b></p> <p><b>Concerns them personally.....18%</b></p> <p><b>Involves serious financial repercussions to Company.....17%</b></p> <p><b>Involves potentially criminal conduct.....17%</b></p> <p><b>Involves “entity threatening” stakes/severe reputational harm.....17%</b></p> <p><b>Clients aren’t more/less sensitive dependent on the situation.....8%</b></p>
<p><b>Which, if any, authorities challenged the right to assert privilege/work product protections in the past 4 years (suggesting post-Enron)? [Top 6 answers shown:]</b></p>	<p><b>Not personally challenged.....33%</b></p> <p><b>Other side in civil litigation.....22%</b></p> <p><b>Auditor.....10%</b></p> <p><b>Federal agency regulator.....10%</b></p> <p><b>Other side in non/pre-litigation dispute or negotiation.....7%</b></p> <p><b>A federal prosecutor.....6%*</b></p> <p><b>*29% of outside counsel responding in the companion survey that federal prosecutors challenged the right to assert privilege/work product protections.</b></p>

SURVEY QUESTIONS	Answers
<p><b>Do privilege and work product doctrines serve an important purpose in facilitating your work as counsel?</b>  <b>Protection of privilege is more important to:</b></p> <p><b>Under what circumstances should regulators be allowed to request disclosure of privileged info?</b>  [Top 5 of 8 listed answers shown]</p> <p><b>Does the privilege enhance the likelihood that company employees will discuss sensitive/difficult issues regarding legal compliance?</b></p> <p><b>Does privilege improve a lawyer's ability to monitor/enforce/improve compliance initiatives?</b></p> <p><b>The general public:</b></p>	<p><b>Yes: 96%</b>  <b>No: 4%</b></p> <p><b>Lawyers: 15%</b>  <b>Clients: 85%</b></p> <p><b>Under no circumstances.....44%</b></p> <p><b>If guarantee that review would not waive privilege as to third parties.....22%</b></p> <p><b>In context of criminal investigation of leader company has cut loose.....8%</b></p> <p><b>Criminal investigation of a company leader.....7%</b></p> <p><b>Context of settlement agreement with authorities that would limit company liability.....7%</b></p> <p><b>Yes: 94%</b>  <b>No: 6%</b></p> <p><b>Yes: 97%</b>  <b>No: 3%</b></p> <p><b>Comprehends the limited nature of privilege/work product doctrines.....22%</b>  <b>Supports the privilege and its application in the corporate context.....71%</b>  <b>Understands the exceptions to privilege.....8%</b></p>
DEMOGRAPHIC INFORMATION	
<p><b>Is your company:</b>  [Top 5 of 8 listed answers shown]</p> <p><b>What industry grouping best describes the bulk of your company's main lines of business?</b>  [Top 4 of 15 listed answers shown]</p>	<p><b>Publicly-traded [&gt;\$500 Mil Annual Rev] ....36%</b>  <b>Privately-owned [&gt;\$100 Mil Annual Rev]....22%</b>  <b>Fortune 1000.....15%</b>  <b>Privately-owned [&lt;\$100Mil Annual Rev] ...11%</b>  <b>Publicly-traded [&lt;\$500 Mil Annual Rev]... 11%</b></p> <p><b>Manufacturing.....23%</b>  <b>Finance/Insurance.....22%</b>  <b>Utilities/Energy.....9%</b>  <b>Information Technology.....8%</b></p>

SURVEY QUESTIONS	Answers
<b>Number of lawyers in law department</b>	Solo.....18% 2-5 lawyers.....34% 6-15 lawyers.....19% 16-40 lawyers.....12% 41-100 lawyers.....9% 100-500 lawyers.....7% 500+ lawyers.....1%
<b>Position of Respondent</b>	Chief Legal Officer/General Counsel.....59% Assistant/Assoc/Deputy General Counsel.....18% Senior Attorney/Specialty Practice .....13% Managing Counsel.....7% Staff Attorney.....2% Vice President [Primary function isn't legal] 1%
<b>To whom does Respondent report:</b>	CEO or COO.....49% Another lawyer, incl. General Counsel.....38% CFO.....6% Board or Board Chairman.....6% Non-legal manager of Division/Corp Group...2%

### III. Summary Of Examples and Themes From Questions On Erosion Of Privilege, and the Public's Interests Served By Privilege

#### A. Experiences relating to erosion of privilege and work product protections

More than 30% of in-house counsel respondents indicated that their clients had personally experienced an erosion in the protections offered by the privilege and work product doctrine in the past four years (post-Enron). (The number of outside counsel surveyed separately who experienced this erosion is higher: 47.3%) These respondents were asked to briefly describe their experiences. Approximately 100 text responses were received. Respondents described situations involving pressure and requests from various sources, including: federal agency regulators, auditors, the other side in litigation, and federal prosecutors/ Department of Justice. They also described situations involving state and local governmental requests, state attorneys general, court decisions, insurance regulators, and Congressional hearings. Examples of some experiences relating to auditors, regulators, the SEC, and prosecutors are summarized below:

#### Outside auditor requests

- Representation/engagement letter provisions requesting waivers/requiring access to all files

- Requests for more detail on threatened/pending litigation, ongoing claims and disputes (including requests for copies of reports from outside counsel on pending litigation, copy of written litigation reserve analysis) and documents and analysis regarding potential exposure
- Insistence that privileged/work product information be disclosed prior to sign-off on annual audits, with threats to withhold signature absent access
- Claims from outside auditors that Sarbanes-Oxley and the Public Company Accounting Oversight Board (PCAOB) require them to include privileged evaluations of claims and litigation in work papers, and a desire for steps to extend the privilege to auditors, especially as regards litigation reserves
- Request for waiver of rights of foreign subsidiaries with respect to those entities otherwise refusing to disclose information to the SEC or PCAOB, which disclosure could not otherwise be compelled under the foreign subsidiaries' governing country laws.
- Desire for access to meetings between attorneys and clients
- Descriptions of adversarial or aggressive interactions

### **Regulators; government inquiries**

- Waivers or strong signals (i.e., threats) for waiver requested as matter of routine, and increasing demands for waivers as condition to participating in a voluntary disclosure program, resolving an investigation, and receiving benefits of/qualifying as “cooperative”
- Expectations that when making disclosures to government agencies, privileged information will be required to be included with other discovered documents in order to evidence cooperation
- Decisions to claim or waive privilege were a standard factor used by the government in deciding whether to charge, whom to charge, and the seriousness of the charges
- Requests for disclosures of internal investigation reports

### **SEC, IN SPECIFIC**

- Insistence on waiver as condition/evidence of cooperation
- Demand for waiver of privilege for documents relating to internal investigations into accountings
- Made known that waiver of privilege and otherwise cooperating with investigation would increase chances of avoiding significant monetary penalty (which was assessed anyway)
- Enforcement action initiated when privilege was claimed for audit of brokerage firm department prepared at specific request of counsel
- SEC staff made statements that companies where lawyers play a dual role as both chief compliance officer (a business, not legal function) and leading legal counselors should not expect privilege to apply to any compliance-related work conducted by lawyers. Combine this with the SEC's statements (Stephen Cutler, Director of Enforcement) that the SEC now expects lawyers to act as compliance “gatekeepers,” thus suggesting that

while privilege will not attach to compliance lawyers' work for / communications with clients, if lawyers don't act as compliance leaders, they may be found personally liable for fiduciary negligence – in other words privilege can never be established in the in-house counsel context in the SEC's eyes.

### **PROSECUTORS/DOJ**

- Strong pressure from DOJ not to keep information confidential/privileged; waiver urged to demonstrate client's "cooperation"
- Impression that prosecutors expect in-house lawyers to "act as investigative arm" and view negatively if privilege is invoked
- Direct or subtle demands by DOJ officials for waivers as a condition to settlements of disputes with government officials
- Waiver of privilege is described as being considered by some prosecutors as "hallmark of cooperation"
- Requirement of waiver of privilege for grant of immunity

### **B. PUBLIC INTEREST IN PRESERVING PRIVILEGE/ WORK PRODUCT DOCTRINES IN THE CORPORATE CONTEXT**

Respondents were asked to articulate their views on why there is or should not be a public interest in preserving attorney-client privilege and work product doctrines in the corporate context. Around 270 responses were received. While a few respondents answered by indicating that no direct public interest is served, the vast majority of respondents offered strong views on the benefits of preserving privilege. Some general themes emerged and examples of these views are summarized below.

#### **BENEFITS OF PRIVILEGE**

- Encourages consultation, leads to better results, and helps facilitate compliance, better policy decisions, and lower costs
- Promotes full and frank discussions and candor allowing lawyers to provide most competent and informed legal advice; can also lead to earlier remedy implementation and settlement of problems
- Promotes lawyer involvement and proactively seeking advice of counsel to review business practices and contingencies to assess ongoing legality and legal risk management; better legal counsel for corporate management and helps encourage full disclosure to the Board members
- Encourages and facilitates culture of legal compliance and engenders climate where business people are willing to seek legal advice and be forthright when doing so; good corporate citizenship best evolves in a climate that supports open communication
- For every instance where privilege may restrict the flow of information that would appropriately help weed out the "bad guys," there are many more numerous instances in which the advice of counsel enables individuals and corporate entities to avoid problems, remedy them early, and keep them from getting worse
- Encourages self-audit and self-correction, which saves time and public funds; lawyers serve as an important check on company activities and if locked out of conversations and information, they can't perform that function

- No difference between the role of lawyers in the corporate and individual contexts; protections are needed to permit and encourage full disclosure and analysis; equal protection of the company as a “person;” corporations should have same access and right to legal counsel as private clients; if corporations are placed in the same context as individuals concerning criminal and civil penalties, then the same protections should exist; corporation’s lawyers should be able to provide advice under the privilege

#### DETRIMENTAL RESULTS IF ERODED

- Chilling effect on way corporations make decisions on matters potentially involving legal risk; clients may make business choices without seeking advice of counsel, may think issues are business decisions rather than legal requirements, and may unknowingly accept what they believe to be mere business risks that could lead to entity-threatening illegal behaviors
- Clients will suffer because ability to communicate clearly and learn from their counsel will be impaired
- Fear of disclosure because of the potential personal or corporate consequences may impede candid discussions and resolution of issues; employees will avoid the hard conversations; questions may not be asked and problems might stay hidden
- Self-regulation will be impaired
- Corporations and their employees who will be individually named will be asked to forgo Constitutional rights generally provided to any defendant in a criminal case – 5<sup>th</sup> and 6<sup>th</sup> Amendment rights
- Slippery-slope of eroding privilege: if we erode the corporate privilege, then it’s a short step to eroding individuals’ privileges next; corporations and their management have and need a right to counsel with privilege just as individuals do – if companies are made up of people who can and will be charged for their corporate role in a crime, why shouldn’t those individuals in their corporate context enjoy the same protections the adversarial system affords non-corporate individuals?
- Less-informed, less useful advice, and less well-advised companies; far less clarity and discussion of complex legal issues as less may be put in writing frustrating the goal of rectifying/avoiding problems before significant injury/damage occurs
- Informal legal guidance on issues will shrink as cost demands permit only expensive initiatives to have input from outside counsel
- Increase in frivolous lawsuits

#### **IV. Summary of Part 2 Responses on Privilege in Prosecutorial/Regulatory Context and in the Audit Context**

As noted above, 52 of the 363 respondents indicated that they would complete some or all of Part 2’s survey questions; most questions had around 30 to 40 responses. Below is a summary of some responses and themes that emerged from all of these more open-ended questions about when and how the privilege is likely to arise in controversy in the corporate context.

## A. Circumstances when Involvement of a Lawyer is Likely; The Lawyer's Mission During An Investigation; Privilege Considerations in Staffing Investigations

Many respondents to this question indicated that a lawyer is almost always at least included on an investigative team and often performs the leadership role. Several respondents indicated that outside counsel might conduct the review in some cases for a variety of reasons including to further strengthen the opportunity to claim the privilege with less likelihood of challenge. Below is a summary of some general themes on circumstances for involving lawyers, the mission of lawyers, and expectations for in-house and outside counsel.

- **Circumstances for having lawyer investigate/ advise:** Respondents provided a range of responses on the circumstances for having a lawyer investigate. Range included having lawyers always investigate any allegations of wrongdoing to identifying specific circumstances and triggers for involving lawyers conduct the investigation. As noted above, several respondents indicated circumstances when outside counsel would likely be engaged to conduct the review.
- **Mission of lawyer:** Respondents generally noted a number of roles for lawyers, including: uncovering the facts, providing legal analysis and advising on options, determining whether the facts give rise to any affirmative responsibilities, evaluating how to help prevent the conduct from recurring, defending the company, and preparing to protect the company against potential adversaries. Additional aspects of the lawyer's mission described by some respondents include statements regarding protecting the company and the interests of the shareholder(s), helping to assure prompt corrective action, identifying steps to mitigate any exposure, and helping to ensure that no retaliatory actions are taken against the individuals reporting the allegation.
- **Privilege as factor in involving lawyer:** Many respondents said the expectation of privilege protections influenced decisions to have a lawyer conduct the investigation, describing this expectation as "significantly influencing," "a significant factor," "a large part of," "greatly influencing," "a primary factor," etc. in reasons for involving lawyers.
- **Expectations for in-house versus outside counsel:** Several respondents noted a recognition that privilege protections may be more easily asserted or more successfully sustained for outside counsel, and described situations in which they would involve outside counsel. Several respondents described views that the expectations are the same and should not be different, even if in practice, they often operated that way.

## B. PRIVILEGE CHALLENGES BY PROSECUTORS/REGULATORS IN CONTEXT OF GOVERNMENT INQUIRY

Respondents were asked to provide views in response to a series of questions pertaining to privilege challenges by prosecutors and regulators. Questions asked about the impact on the lawyer's role in conducting the investigation if clients were aware that prosecutors or regulators might obtain information gleaned from the investigation through subsequent waiver of privilege by the company. Also asked were questions concerning the effect on client candor if the prosecutors or regulators or additional downstream third parties might obtain the otherwise privileged information. Below is a summary of themes emerging from responses to these questions.

- **Possibility of disclosure and impact on having the lawyer conduct investigation:** Impacts listed were diverse, with several stating that the lawyer would still conduct the investigation and several indicating that this factor would have an impact on the decision to use a lawyer or conduct the investigation at all.
- **Effect on client candor and willingness to speak:** The majority of respondents indicated there would be a noticeable impact on client candor.
- **Waiver to subsequent third parties:** Risk of downstream disclosure to third parties was described as being of great concern to many respondents. With regard to the question's suggestion concerning protecting disclosed information from disclosure to third parties, respondents indicated that protection against downstream access would be helpful, though not totally satisfying for some, and some were skeptical about the ability to commit a court to honor the privilege. Limited waivers were also described as better than complete waivers but the limited waiver still was predicted to create a general chilling effect on the attorney-client relationship.
- **Impact on public interest in good corporate governance and corporate compliance:** Respondents identified a broad range of public interest impacts likely as a result of increased waivers. Some respondents expressed a view that the process of corporate governance will suffer if clients are reluctant to trust their lawyers and noted that public interest is best served by early involvement of lawyers to help influence compliant conduct and effective corporate governance. Some respondents also noted that there would likely be less candor and such waivers would undermine the effectiveness and value of in-house counsel.

### C. Privilege Waivers in Context of the Corporate Audit Process

The survey included a series of questions requesting views on impacts on the decision to hire a lawyer and on client candor if business clients were aware that an auditor might obtain privileged information. Views on these questions as well as on questions pertaining to downstream third party access, possible limitations on the extent of the waivers, and on possible distinctions between types of information subject to disclosure are summarized below.

- **Possibility of disclosure and impact on hiring a lawyer:** Respondents were nearly split on this question, with several stating that it would reduce the likelihood or have a chilling effect on the decision to engage counsel and several stating that the decision to use a lawyer would not or would probably not be affected. Some respondents also described distinctions between providing the final report of findings and the lawyer's notes of interviews, work product, correspondence or testimony.
- **Impact on client candor:** More respondents described an impact to client candor than those who didn't. Some respondents noted that while there might be an impact, it would be less than in a regulatory or prosecutorial setting.
- **Downstream disclosures to 3<sup>rd</sup> parties:** Several respondents indicated that disclosures to auditors with protections to limit waiver of privilege would help allay concerns. Some respondents stated that any waiver remains a problem.
- **Type of information provided to auditors:** Several respondents indicated their views that there is no distinction between the types of protected information they would or would not be willing to provide. Several others stated that distinctions do exist and

indicated they would not provide or be prepared to share certain types of information (examples include outside counsel tax opinions, legal advice on governance deficiencies, clearly legal opinion or strategy, or anything other than materials prepared specifically for the purposes of providing the auditor information it needs to thoroughly perform due diligence on the financial aspects of the company and complete the audit).

### **Concluding Note:**

ACC's surveys to collect this data were "closed" on March 25, 2005 to allow us to assemble a defined and analyzed summary of responses. We have reopened the surveys as of April 1, 2005 to allow us to continue to collect information that will provide context to the dialogue and our work with other bars, business groups, prosecutors, regulators, and courts.

ACC is developing a number of resources and taking a number of actions to support the effective and professional relationship of in-house lawyers and their clients, and to prevent further erosion to corporate clients' privilege rights. If you would like more information on these initiatives, please contact Susan Hackett, ACC's general counsel, at [hackett@acca.com](mailto:hackett@acca.com).

If you would like to take the survey, please go these URLs:

For in-house counsel: <http://survey.acca.com/rendersurvey.asp?id=84059>

For outside counsel: <http://survey.acca.com/rendersurvey.asp?id=84769>