NACDL STATEMENT ON CORPORATE ATTORNEY-CLIENT PRIVILEGE

INTRODUCTION

The court-protected confidentiality of a client's communication with his or her lawyer is not only a characteristic of the adversarial system; it is part of the very foundation on which the adversarial system was built. In fact, the attorney-client privilege was the first evidentiary privilege recognized in Anglo-American law. In American law the privilege has always enjoyed a universal and instrumental purpose: It was recognized because it was viewed as essential to a citizen's ability to comply with the law and to mount a defense against the government. Therefore, the attorney-client privilege is appropriately viewed as an essential corollary to the Fifth and Sixth Amendments of the U.S. Constitution.[1]

The National Association of Criminal Defense Lawyers (NACDL) fulfills a unique and critical role in nurturing and defending the adversarial system of criminal justice. As individuals, NACDL's members aim zealously to represent their clients throughout every stage of a criminal investigation and prosecution. As an organization, NACDL helps to ensure that fairness remains the goal of American criminal justice, and that fairness is not sacrificed for expediency.

Indeed, when society faces a putative epidemic of criminal activity—gang violence, crack cocaine, terrorism—calls for immediate justice at all costs are difficult for politicians to ignore. Legislators, enforcement officials, and politicians at all levels of government create and endorse new tools to stop crime and procedures to prosecute it. In these times, it is all the more important for NACDL to give voice to the need for fairness and deliberation and to help to protect the rights of all defendants.

Now, in reaction to the financial accounting scandals at Enron and WorldCom, corporate governance and criminal enforcement have become indistinguishable. Indeed, the two sides of the adversarial system have begun to blur into one for corporate defendants. This is because, in order for a corporation to avoid prosecution, and certain death, there is substantial pressure for companies to appear to be "cooperating" with the government, even when cooperating means conducting an adversarial investigation of themselves.

One of the first concessions that corporations make in negotiations with enforcement officials and prosecutors, in the wide experience of NACDL's members, is waiving attorney-client privilege as to any communication with the company's lawyers leading up to disclosure of the problem. This is so regardless of whether the lawyer's

---

[1] Testimony of Paul Rosenzweig, The Heritage Foundtion, to the ABA Task Force on Attorney-Client Privilege, February 11, 2005.

advice is implicated, or whether there is a colorable crime-fraud exception to the privilege. Moreover, there is substantial evidence that some prosecutors have begun routinely to demand that companies refuse to enter into joint defense agreements or to pay defense costs.[2] The sum total of these demands has created a "culture of cooperation," in which companies try to reduce the risk of indictment by offering such concessions *before* they are requested or required.

The culture of cooperation that has led to frequent and wholesale waivers of a corporation's attorney-client privilege can be traced to several institutional sources. In 1999, Deputy Attorney General Holder issued a memorandum, *Federal Prosecution of Corporations*, identifying criteria for charging a corporation with criminal wrongdoing. The memo says that one criterion is the corporation's voluntary disclosure of wrongdoing and willingness to cooperate. It states further that the corporation's willingness to disclose the complete results of internal investigations, and to waive its attorney-client and work product privileges, are indicia of cooperation.

In 2003, Deputy Attorney General Thompson revised the Holder Memorandum to place greater emphasis on waiver as a condition of cooperation. Thompson wrote, "[i]n gauging the extent of a corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges." Both memoranda state that waiver is not an "absolute requirement" for cooperation, but in doing so, they more than imply that waiver of privileges is still a "requirement" for such consideration.

The Federal Sentencing Guidelines adopt a similar tact, stating explicitly that if waiver is necessary to provide "timely and thorough disclosure of all pertinent information known to the organization," it may be a prerequisite for a sentencing reduction. The SEC has also placed great emphasis on waiver as a demonstration of cooperation. In the "Seaboard Release," the SEC prosecuted a corporate official for wrongdoing, but took no action against the corporation itself, citing its cooperation and, in particular, its willingness to waive its privileges. The Seaboard Release has subsequently governed the SEC's decisions in the corporate enforcement context.

When waiver is prevalent and expected, corporations' private lawyers become deputies of the government. Incredibly, statements that are made to a company's lawyer can become the basis for "false statement" charges.[3] Indeed, reporting <u>after</u> an internal

---

[2] *See*, *e.g.*, *United States v. LeCroy*, 348 F. Supp. 2d 375 (E.D. Pa. 2004); *United States v. Wittig*, 333 F. Supp. 2d 1048 (D. Kan. 2004).

[3] *See* Department of Justice, Press Release, "Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges," Sept. 22, 2004. "In February 2002, Computer Associates retained a law firm to represent it in connection with the government investigations. Shortly after being retained, the company's law firm met with [CA executives] … During these meetings, the defendants and others allegedly failed to disclose, falsely denied and concealed the existence of [the allegedly fraudulent accounting practice]. The indictment alleges that [the CA executives] knew, and in fact intended, that the

investigation is not enough. Timothy Coleman, counsel to then-Deputy Attorney General James Comey, clarified the stakes in a recent presentation to the American Bar Association. When asked if companies are now expected to engage in "real-time" self-reporting, Coleman responded, without reference to (or concern for) privilege issues:

> Yes, I would expect that, if the company wants to be getting credit for cooperation, they should be coming in and giving us the information that they are getting on a real-time basis so we can use it and we can work with it. Unfortunately, we are still seeing lawyers out there with what we consider the "old school mentality" that to my mind is, "We understand there's a problem, we're going to conduct our internal investigation, we'll report to the board and management, and then when that is all done, Mister Prosecutor and Miss Regulator, we'll get back to you and let you know what we're going to disclose to you." That doesn't cut it any more.[4]

The requirement of self-reporting has deleterious implications for the already besieged attorney-client privilege in the corporate setting. First, it makes clear that the government's goal is easy access to *all* information, not just access to relevant facts and witnesses who will then be questioned by government investigators. Private lawyers are now expected to funnel this information to the government, in essence conducting the government's investigation for the prosecutor. Second, it poses serious challenges to mounting a meaningful defense because there is no role, or time, in this process for discussion and deliberation between a lawyer and client. Third, it inevitably results in the early, and not always accurate, scapegoating of specific employees, and requires those employees to give statements to private lawyers, to be turned over to the government, without regard to the right against self-incrimination. As two commentators have recently observed, "Once-celebrated goals of our legal system—the client's right of confidentiality and freedom from self-incrimination—are giving way to the government's powerful demands for the swift disclosure of all evidence relevant to its investigations of corporate misconduct."[5]

A recent survey by NACDL and the Association of Corporate Counsel confirmed what most members of the defense bar suspected to be true: That lawyers who investigate and defend corporations are frequently told that their clients need to waive their attorney-client privilege in order to receive full credit for cooperation. These corporate clients agree to make available lawyers' advice, the complete results of investigations, as well as employees' specific conversations with private lawyers (often in the form of a lawyer's interview notes).[6]

---

company's law firm would present these false justifications to the U.S. Attorney's Office, the SEC and the FBI in an attempt to [cover up the practice]."

[4] Statement of Timothy Coleman, Senior Counsel to the Deputy Attorney General, "Welcoming Remarks," ABA White Collar Crime Institute, Henderson, NV, March 3, 2005.

[5] David M. Zornow & Keith D. Krakaur, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations, 37 Am. Crim. L. Rev. 147, 147 (2000).

[6] These results can be found at www.nacdl.org.

When employees come to believe that anything they tell their companies' lawyers might or will be turned over to the government, the privilege is meaningless. Individuals—who, after all, comprise the fiction of the corporation—will no longer engage in candid discussions or seek help in complying with laws and regulations. As the U.S. Supreme Court held in its seminal opinion recognizing the corporate attorney-client privilege, unless the privilege is meaningful to *all* corporate employees, it will be "difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, [and it will] threaten[] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[7]

NACDL PRINCIPLES GOVERNING CORPORATE ATTORNEY-CLIENT PRIVILEGE

For these reasons, NACDL hereby adopts the following principles in support of the corporate attorney-client privilege. NACDL believes that preventing the erosion of the attorney-client privilege in all contexts is essential to its mission as an organization of criminal justice advocates, the rights of criminal defendants, and the adversarial system of justice.

RESOLVED, that the National Association of Criminal Defense Lawyers strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling; (2) ensure effective advocacy for the client; (3) ensure access to justice; and (4) promote the proper and efficient functioning of the American adversary system of justice; and

FURTHER RESOLVED, that NACDL opposes policies, practices, and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices, and procedures that recognize the value of those protections;

FURTHER RESOLVED, that NACDL believes that in a climate created by the current practices of the Department of Justice, the Securities and Exchange Commission, the United States Sentencing Commission, and other agencies, the waiver of privilege is necessarily coerced and therefore not a voluntary waiver. These practices jeopardize both the corporation's and its employees' Fifth and Sixth Amendment rights under the U.S. Constitution.[8]

Accordingly, NACDL opposes any governmental attempt to obtain waiver of the attorney-client privilege through the grant or denial of any benefit or advantage. Specifically, NACDL opposes any policy adopted by any governmental office that includes "guidelines" for appropriate waiver requests that do not fundamentally prohibit such requests outside of established exceptions, and unless information that is essential to a charging decision (civil or criminal) cannot be obtained in any other way.

---

[7] *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

[8] *See*, *e.g.*, Ellen S. Podgor & John Wesley Hall, Essay: Government Surveillance of Attorney-Client Commmunications: Invoked in the Name of Fighting Terrorism, 17 Georgetown J. L. Ethics 145, 159 (2003).

SPECIFIC MEASURES FOR ADOPTION:

NACDL urges consideration of the following measures:

1. Collection of reliable data by the Department of Justice.

It has been the position of the Department of Justice, as well as other federal enforcement agencies, that because waiver is not routinely requested, that there is no problem that needs to be addressed. It is NACDL's experience that this is an inaccurate assessment of the problem. If the Department of Justice (i) agrees to collect data each time material is obtained in the course of an investigation pursuant to a waiver (thereby including situations in which waiver is "offered" but never officially "requested") and (ii) agrees that waiver must be approved by an attorney in a supervisory role (thereby facilitating the collection of accurate data), then the problem will be capable of meaningful study and solution.[9]

2. Guidelines for waiver at all enforcement agencies/reform of memos.

Reforming the Thompson Memorandum[10]: NACDL endorses the following reforms to the Department of Justice's criteria for deciding whether to charge a corporation criminally.

i. A statement on the value of attorney-client privilege.[11]
ii. Clarification that waiver is not a necessary condition for cooperation, and that any waiver that might eventually be offered or obtained must be accorded no benefit nor burden.[12]
iii. Specification of conditions under which the government can request waiver, including:
   (1) The presence of judicially recognized exceptions to the privilege

---

[9] This mirrors the approach adopted by the Department of Justice in 1986, after the defense bar had become increasingly concerned that a recent change in the Department's internal policies resulted in the dramatically increased issuance of grand jury subpoenas to defense lawyers. *See*, *e.g.*, Max D. Stern & David A. Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Penn. L. Rev. 1783 (1988).

[10] These measures apply equally to the SEC's criteria governing corporate charging decisions, as well as those of other agencies, such as the CFTC.

[11] *See*, *e.g.*, United States Attorneys Manual 9-13.200 ("Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake such communications with great circumspection and care.")

[12] Interview with James B. Comey Regarding the Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product, U.S. Atty's Bull., Nov. 2003, at 1 ("If a corporation that chooses to cooperate can do so fully without waiving any privileges, that is fine. Waiver is not required as a measure of cooperation. … the [Thompson Memo does] not *require* waiver, and do[es] not even require cooperation.")

(2) Agreement that the information will be sought only if it cannot be obtained in any other way, including through waiver of the work-product protection.
(3) Approval from an agency supervisor
(4) General adherence to a system of guidelines for waiver that are uniform throughout the federal system and that encompass the preceding conditions.