EXECUTIVE SUMMARY

National Association of Criminal Defense Lawyers Survey: The Attorney-Client Privilege Is Under Attack

"In today's world, most non-employment issues trigger at least the consideration of outside counsel. … [In the course of an investigation], employees need some basic protection in order to feel comfortable and for the corporation to have a right to expect cooperation by the employee. Today's world [in which the attorney-client privilege is under attack] leaves these employees twisting in the wind. Ultimately, corporations and corporate America will be harmed by this uncertainty and the unnecessary risks being imposed on corporate management. The nation's best and brightest will eventually stay out of public companies if this trend isn't halted or even reversed."
--Respondent to NACDL survey regarding attorney-client privilege

It goes without saying—but bears repeating—that the attorney-client privilege is a bedrock of our criminal justice system. For centuries in western law, the privilege has been jealously guarded because, among its other important roles, it is critical to the right to a defense and it enables defendants to communicate freely in attempting to comply with the law. In short, the attorney-client relationship is sometimes all that stands between government law enforcement and each individual citizen, corporate or individual.

NACDL and other bar organizations have received widespread anecdotal reports that more and more state and federal law enforcement officials are requiring that clients waive the attorney-client privilege. These waiver requests come from prosecutors who insist that waiver is a critical component of deciding whether a defendant has cooperated sufficiently at the charging stage, the sentencing stage, and everywhere in between. In response to these concerns—and in conjunction with NACDL's new White Collar Crime Project—NACDL is examining how best to 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 a full defense and sound compliance. NACDL is already active in reaching out to the law enforcement community, other bar associations, and business groups to fight the erosion of the privilege and to debunk the myth that the exercise of a client's attorney-client privilege is only necessary if the client actually did something wrong.

First, though, we need to debunk the notion that the privilege isn't really under attack. Top-level federal law enforcement officials routinely claim that waiver is rarely requested, and the threat to privilege is nonexistent because it is undocumented. So, NACDL—as well as the Association of Corporate Counsel—asked members to complete

an online survey called "Is the Attorney-Client Privilege Under Attack?" This Executive Summary provides an overview of responses to that survey.[1] In sum, our members reported overwhelmingly that the privilege is in jeopardy.

Section I summarizes key themes in the survey's responses. Section II shows in tabular format summarized survey questions and responses from the first part of the survey. 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 white collar context. Section IV summarizes themes that emerged from Part II, which contained the open-ended questions on waiver.

I. Key Themes:

For the first time, through this survey, we were able to quantify a growing problem for corporate clients who wish to exercise their right to confidential legal counsel.

- **48 percent of outside counsel respondents (and more than 30 percent of in-house counsel respondents) reported an erosion of the privilege and work-product doctrine post-*Enron*.**
- **Lawyers overwhelmingly believe that their clients are aware of and rely on the privilege when consulting them—they reported that 88 percent of senior employees likely rely on the privilege, and 61 percent of mid- and lower-level employees.**
- **87 percent of lawyers said that attorney-client privilege or work-product has recently been challenged; a shocking 25 percent by federal prosecutors, 15 percent by federal regulators, and 16 percent by an opposing party in civil litigation.**
- **96 percent of lawyers agreed that "the privilege and work-product doctrine serve an important purpose in facilitating [their] work as a company's counsel."**
- **Several answers confirmed the importance of the privilege to *clients* and clients' ability proactively to seek legal advice. 83**

[1] In March 2005, NACDL emailed this survey (on two separate occasions) to all of its 12,000 members, not all of whom are white-collar defense practitioners. The survey was open for approximately three weeks and 365 outside counsel responded. Results were tabulated as of April 8, 2005, but the survey is still open.

The survey had two parts: the first part included 21 questions primarily seeking responses in multiple choice or yes/no question format; the second part consisted of 10 open-ended questions seeking text responses to inquiries about investigations, audits, and generally, circumstances in which waiver is requested or demanded. Respondents were given the option of completing both parts or submitting their responses following completion of Part 1. Of the 365 responses received, approximately 13 percent of respondents chose to complete the "essay" questions in Part 2.

At the same time, the Association of Corporate Counsel—who deserve the credit for initiating this survey and authoring the template for it—offered the same survey reworded for a different audience—in-house counsel. Those results can be found at http://www.acca.com/feature.php?fid=670.

percent said that the privilege was important to clients, as opposed to counsel; 44 percent said that the privilege was most important when the issues might have a personal impact on an individual or when they involve potentially criminal behavior; and 95 percent responded that the weakening of the privilege chills a client's frank discussion of legal issues.

II. Overview of Survey Results for Part 1

Do you believe that senior level employees of your corporate clients are aware of or rely on the privilege when they consult you?

	Percentage	Responses
Yes	88.5%	322
No	11.5%	42
	Total responses:	**364**

Do you believe that mid- and lower-tier level employees of your corporate clients are aware of or rely on the privilege when they consult you?

	Percentage	Responses
Yes	61.8%	223
No	38.2%	138
	Total responses:	**361**

Do you believe that there would be a "chill" in the flow or candor of information provided to you as counsel for the company if the privilege did not offer protection to client communications or your attorney work-product?

	Percentage	Responses
Yes	95.3%	346
No	4.7%	17
	Total responses:	**363**

Are employees of corporate clients more likely to want the protection of the privilege:

	Percentage	Responses
(a) when the issue concerns them personally or might have a personal impact on them?	23.1	225
(b) when the issue is highly sensitive?	17.7	173
(c) when the issue involves potentially criminal behavior?	21.2	207
(d) when the issue involves serious financial repercussions to the company?	15.0	146
(e) when the issue involves "entity-threatening" stakes, or severe reputational harm?	14.9	145
(f) I don't think clients are more or less sensitive about the privilege's application dependent on the situation.	8.1	79

Post-Enron, have your corporate clients experienced an erosion in the protections offered by the privilege and work-product doctrine (e.g., that waiver of privilege and work-product doctrine is expected in certain contexts, or that claiming privilege or work-product protection may be deemed inappropriate)?

	Percentage	Responses
Yes	47.4%	163
No	52.6%	181
	Total responses:	**344**

Which, if any, of the following has tried to dissuade you from asserting your clients' privilege or work product protections in the last four years?

	Percentage	Responses
(a) a federal prosecutor	24.8	162
(b) a state prosecutor	6.0	39
(c) a federal agency regulator	15.3	100
(d) a state agency regulator	3.8	25
(e) a federal court judge	2.3	15
(f) a local court judge	2.1	14
(g) the other side in litigation	16.3	106
(h) the other side in a non- or pre-litigation dispute or negotiation	5.5	36

(i) the company's auditor	7.1	46
(j) another authority not listed	2.8	18
(k) none of the above - it's not been challenged.	14.0	91

Do you believe that the general public:

	Percentage	Responses
(a) comprehends the limited nature of the privilege and work-produc doctrine?	20.1	31
(b) supports the attorney-client privilege and its application in the corporate context?	68.8	106
(c) understands the exceptions to the privilege, e.g., the crime-fraud exception?	11.0	17

Do you believe that the privilege and work-product doctrine serve an important purpose in facilitating your work as a company's counsel?

	Percentage	Responses
Yes	95.8%	344
No	4.2%	15
	Total responses:	**359**

Do you believe that the protection of the privilege and work-product doctrine is more important to:

	Percentage	Responses
(a) lawyers?	17.2	62
(b) clients?	82.8	298
	Total responses:	**360**

Under what circumstances, if any, should regulators be allowed to request disclosure of privileged information?

	Percentage	Responses
(a) in the context of a criminal investigation of a high-ranking leader of the company	5.3	25
(b) in the context of a criminal investigation of a company leader whom the company has "cut loose"	6.8	32
(c) when the investigation of the facts by the regulator/prosecutor by other means is not feasible or too onerous	3.0	14
(d) in the context of a government investigator's request to review the company lawyers' internal investigation files	1.7	8
(e) in the context of negotiating a settlement agreement with the government that would limit further corporate liability	9.4	44
(f) in the context of negotiating a settlement agreement with private parties that would limit further corporate liability	4.1	19
(g) if there was a guarantee that review by a regulator/prosecutor/auditor would not waive the privilege as to third parties in the future (limited waiver)	17.1	80
(h) none of the above as waiver should not be sought.	46.1	216
Other	6.6	31

In your opinion and/or experience, does the existence of the attorney-client privilege enhance the likelihood that company employees will come forward to discuss or agree to be interviewed about sensitive or difficult issues regarding the company's compliance with the law?

	Percentage	Responses
Yes	90.5%	323
No	9.5%	34
	Total responses:	**357**

Does the existence of the attorney-client privilege improve a lawyer's ability to monitor, enforce, and/or improve company compliance initiatives?

	Percentage	Responses
Yes	94.6%	336
No	5.4%	19

Total responses: **355**

Please choose as many of the following industry groupings as describe your major clients' lines of work:

	Percentage	Responses
Manufacturers	12.4	168
Finance / Insurance companies	14.3	195
Information Technology companies	6.9	94
Non-Profit / Charitable organizations	7.2	98
Professional Services clients	10.8	147
Scientific / Technical businesses	5.7	77
Health Care / Social Assistance clients	10.1	137
Retail Trade entities	4.0	55
Real Estate / Rental / Leasing interests	8.9	121
Telecommunications companies	4.0	55
Transportation / Warehousing businesses	2.6	35
Utilities / Energy companies	4.6	63
Wholesale Trade clients	2.1	29
Arts / Entertainment / Recreation providers	2.4	32
Accommodation / Food Services entities	2.4	33
Other	1.5	21

In general, are the majority of your clients:

	Percentage	Responses
Publicly-traded (less than $500 million annual revenue)?	12.5	55
Publicly-traded (more than $500 million annual revenue)?	19.8	87
Privately-owned (less than $100 million annual revenues)?	41.0	180
Privately-owned (more than $100 million annual revenues)?	12.1	53
Fortune 1000s?	7.1	31
FTSE 200s?	0.2	1

Non-Profit Organizations?	5.0	22
Quasi-Governmental Entities?	2.3	10

Number of lawyers in your law firm (in all offices):

	Percentage	Responses
Solo	18.3	66
2-5 Lawyers	23.0	83
6-15 Lawyers	10.8	39
16-40 Lawyers	7.5	27
41-100 Lawyers	7.2	26
100-500 Lawyers	20.5	74
500+	12.7	46
	Total responses:	**361**

Your position in the firm (choose as many as apply):

	Percentage	Responses
Partner	51.8	264
Associate	5.3	27
Of Counsel	5.7	29
General corporate legal advisor	4.9	25
Litigator or litigation manager	16.1	82
Transactional lawyer	5.1	26
Firm practice group Leader	5.3	27
Member of the firm's executive/management committee	5.9	30

Number of years since you were first admitted to the bar:

Average: 24.01

Range: 1<=>54

Median: 25

Standard Deviation: 10.40

Total Responses: 359

When retained by a corporate client, to whom do you most usually report?

	Percentage	Responses
A lawyer in the law department, including the GC	51.0	181
A non-legal manager of a division or corporate group	7.3	26
The CEO or COO	36.1	128
The CFO	1.4	5
The Board or the Board's Chairman	4.2	15
	Total responses:	**355**

III. Summary Of Examples and Themes From Questions On Erosions Of Privilege, and the Public's Interests Served by Privilege

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

More than 47 percent of outside counsel surveyed indicated that their clients had personally experienced an erosion in the protections offered by the privilege and work product doctrine after Enron. These respondents were asked to describe their experiences; approximately 130 text responses were received. **An overwhelming number of respondents—approximately 85 percent—reported that DOJ and the SEC frequently require "discussions" of waiver as part of "settlement" negotiations—in other words, in deciding whether to charge a company, accept a plea, or settle civilly. Lawyers reported: (1) that the results of internal investigations are routinely demanded; (2) that individuals are less forthcoming as a result; (3) that indemnification for legal bills and joint defense agreements are a thing of the past; and (4) that the climate is such that waiver is often offered before it is requested—at the cost of individual employees.** Some examples of responses which were frequently echoed throughout our results include:

- "Government prosecutors in every case involving potential corporate criminal conduct expect (1) an internal investigation; (2) turnover of the investigation to the government regardless of privilege; and (3) access to counsel conducting the investigation and to counsel who gave contemporaneous legal advice, assuming that the prosecutors determine that the situation is potentially indictable."

- "Clients' statements have been provided to the government and my client has been placed on an extended leave of absence without pay."
- "I have had numerous interviews with corporate employees in which I have felt compelled to warn them that there was, in light of the Thompson Memo, a serious possibility that the privilege might be waived at a later time. I sensed hesitance to be as cooperative after that point, although most employees feel like they have little choice but to cooperate. Those who are potential targets of investigations no longer will cooperate at all."
- "AUSA's want the privilege waived before they will seriously consider foregoing prosecution of a corporation. Also, they are hostile to joint defense agreements with employees. As a result of these policies, I discourage clients from asking for or receiving a written work product from me during internal investigations."
- "In several instances, government authorities have demanded that the privilege be waived as a condition of further discussions over potential government civil or criminal investigations of the company. These requests have reached internal investigations, compliance reviews and audit material prepared by outside counsel under clearly privileged circumstances. In one instance, an executive demanded that the privilege be waived and the results of a privileged analysis be disclosed to the government even without the demand because he believed that the current climate requires such 'openness' in order to be taken seriously in any discussion with the government."
- "Individuals are not willing to be forthcoming in internal investigations, even if they have nothing to hide, for fear of waiver of privilege and revelation to the government."

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 in the corporate context. Around 260 responses were received. **Overwhelmingly, in approximately 95 percent of the answers, lawyers responded that "candor" and "compliance" were the two most importance public interests served by the privilege. Others responded that the privilege is necessary to the defendant's right to a full defense. Only 10 responded that they could think of no public interest served by the privilege between an attorney and a corporation.**

- "To allow us to do our jobs. Without the free flow of communications between the lawyer and the client undeterred by the fear of disclosure, what use do we serve?"
- "Promotion of the fact-finding process by the attorney, and a consequent preservation of the integrity of evidence placed before tribunals."
- "It encourages corporate employees to seek advice of counsel, knowing that they can candidly describe the situation to counsel in a privileged conversation. The ability to seek such advice through confidential

communications improves the corporation's compliance with applicable laws."

- "Corporations must be encouraged to consult with corporate counsel and outside counsel whenever matters of importance arise. This protects the shareholders, the corporate employees, and the public by causing companies to seek out assistance in acting properly."
- "The free flow of information. Prosecutors will get more proffers if lawyers can debrief clients without fear of waiver."
- "Without the freedom to consult lawyers about the legal implications of conduct, clients hide the conduct."

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

As noted above, approximately 45 respondents agreed to complete the second section of the survey, which called for more individualized information about the attorney-client privilege in its most common contexts. Below is a summary of these responses:

A. Circumstances when involvement of a lawyer is likely and the role of outside counsel.

- **"Absent confidentiality, we would not be engaged": A common response was that the privilege was critical to a client's decision to hire objective outside counsel to report to the board and/or audit committee.** Respondents said: "The protection of the privilege is critical in determining to conduct an investigation and in deciding who will do it"; "Our mission would normally be to conduct an objective investigation and develop recommendations based on the results. Absent confidentiality, we would probably not be engaged."; "Why hire a lawyer and pay those rates if the lawyer is just a scrivener for the government?"
- **Outside counsel is critical to a thorough investigation of possible wrongdoing:** "The lawyer's mission is to (1) identify the problem; (2) identify the goal/solution for the client; (3) navigate through the problem and figure what will get the best result for the client."; "Clients engage outside counsel if the allegations appear to be serious and to have some factual support. Lawyer's goal is to find the facts and help the client formulate a response. Privilege is critical to obtaining prompt and thorough cooperation."; "I am retained when a problem is discovered and I am asked to find out the extent, cause, and responsible parties. More cases than not, because of the government's request for a waiver of privilege, the task is more difficult. No notes or only review documents—or just shadow the government's investigation."

B. Privilege challenges by prosecutors/regulators in the context of a government inquiry

Respondents were asked to provide views in response to a series of questions pertaining to privilege challenges by prosecutors and regulators. Specifically, they were asked how their investigations are affected by the expectation that material will be revealed to a prosecutor—whether this changes the initial decision to conduct an investigation, how interviewees are affected, and the effect of the subsequent threat of waiver to third-parties.

- **Responses were mixed regarding whether the erosion of privilege would affect the initial decision to conduct an investigation:** Slightly more than half of the respondents agreed with one lawyer's statement that "This will not likely affect the decision to use a lawyer, but will dramatically affect how the investigation is done and how it is documented. It may well delay actions that would uncover wrongdoing."; "Work would be severely truncated, possibly allowing the lawyer just limited inquiry." The others generally agreed more with one lawyer's response that "this would be a major factor in the decision" to conduct an investigation.
- **With the exception of one response, lawyers were unanimous in concluding that "the awareness that a regulator or prosecutor might obtain privileged information affects the willingness of certain officers or employees to speak candidly with the lawyers."** "Why would they bother to disclose anything to their attorney if there is no protection? It would make adequate (at a minimum) representation of the client extremely difficult if not impossible."; "I would not even advise a client to speak, if there was a realistic possibility that it would be disclosed and used against him/her."; "It is difficult to get people to disclose bad facts with the privilege; without it, it's much tougher."
- **Nearly all agreed that the risk of collateral exposure to third parties is a consideration in deciding whether to waive privilege to the government; a majority agreed that an enforceable "limited waiver" would allay concerns only marginally—because courts are hostile to limited waivers.** The knowledge of third-party waiver "would further discourage candid disclosures. Even if there is a promise not to disclose further, that is unlikely to assuage the basic concerns."; "This is a significant concern for all public companies … I do not think the 'limited waiver' agreements will stand judicial scrutiny and most corporate counsel have the same view."; "[Waiver to third parties] would have a chilling effect. [Limited waiver] might mitigate the impact of certain disclosures, but I think all involved would be unhappy about it."; "In most cases, the regulator/prosecutor first through the door may in fact be the

most difficult one."; "The protection would not be absolute or would be interpreted narrowly by some court."

- **More than 90 percent of respondents agreed that concerns about waiver would affect a company's compliance efforts**. A representative and articulate response is: "Our clients are more aware than ever that their corporate governance must be transparent, and that it is the age of disclosure. They are trying harder to be proactive in their management and decentralize management functions. However, in order to receive EFFECTIVE legal counsel before issues arise, and when issues arise, they must have the opportunity to have privileged discussions."
- **These concerns are largely the same in the audit context, but lawyers find the disclosure of information to an auditor to be a more complicated matter**. In light of Sarbanes-Oxley and the Public Company Accounting Oversight Board, auditors have put increasing pressure on companies to turn over privileged information as part of the audit process. One respondent said, "I am a strong advocate of repelling auditors' increasing efforts at intrusion in the attorney/client relationship and to obtain confidential information from counsel." Another observed, "This is the toughest question. It is easier to say the government has no business receiving privileged information. A public company's own auditor, however, has a better justification for having these materials if they affect the financials. It is certainly a concern but I don't have an answer." **Many agreed that the potential disclosure to an auditor would have a chilling effect on communication.** However, several lawyers did observe that the increasing concern with transparency has meant that disclosure to auditors will continue undeterred.

CONCLUSION

NACDL's survey remains open to any outside counsel who would like to participate. NACDL is working with ACC and other bars, business groups, prosecutors, and the courts to prevent further erosion to corporate clients' privilege rights. If you would like more information on these initiatives, please contact Stephanie Martz, director of NACDL's White Collar Crime Project, at **Stephanie@nacdl.org.**

If you would like to take the survey, please go to 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