ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

TESTIMONY OF
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NEW YORK, NEW YORK

BEFORE THE ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE
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Good afternoon. My name is Gerald Lefcourt, and I am a past-president of the National Association of Criminal Defense Lawyers. I also co-founded the New York State Association of Criminal Defense Lawyers. I practice law in New York City at my own firm, and I represent a large number of individuals who are implicated in corporate criminal investigations. On behalf of the National Association of Criminal Defense Lawyers, I would like to thank the Task Force for convening this very important hearing and for the opportunity to testify.

Both today in New York, and during your initial set of hearings in Salt Lake City, you have received extensive testimony from practitioners who typically represent businesses that are adversely affected by the erosion of attorney-client privilege. Many of our members represent these companies as well, and we agree wholeheartedly with the testimony presented so far concerning the impact that a weakened privilege has on corporate America. In order to broaden your perspective on this issue, I would like to talk today about the terrible impact that the weakened privilege has on individual employees who are caught up in the web of a corporate investigation.

First, however, we need to discredit the message that the Department of Justice and other federal enforcement agencies have been busily disseminating: There *is* a crisis in the current state of the attorney-client privilege. As you have heard already today, NACDL and the Association of Corporate Counsel have compiled the results of a survey of in-house and outside corporate counsel. (NACDL's Executive Summary is appended to this testimony.) Over 700 lawyers responded overwhelmingly that federal enforcement officials have challenged privilege within the past year; that corporations have no choice but to waive privilege when it is demanded, requested, or even suggested, because the

stakes of corporate prosecution are too high; and that the erosion of the privilege has severely compromised honest attempts at candor and compliance.[1]

I. The rise in the number of corporate investigations and the impact on law enforcement.

It is now standard that a corporation under investigation will, virtually as a matter of course, waive the attorney-client privilege at the first invitation to do so.[2] In the course of these hearings, the impact of the Holder and Thompson Memoranda on the prosecutors who now routinely require waiver has been well-vetted.

The question has been asked repeatedly: Why does this problem seem to have suddenly grown in importance? One need look no further than the First Year Report from the Corporate Fraud Task Force. The Corporate Fraud Task Force is an interagency law enforcement vehicle that was formed to respond to a supposed lag in law enforcement—a lag that was blamed for the Enron and WorldCom scandals. In its first year of existence, Task Force prosecutors, aided by numerous departments and agencies, netted over 250 corporate fraud convictions.[3] By contrast, in the year before the task force began operation, only 46 corporate convictions had been reported—an increase of 500 percent. Sentencing data from 64 of these corporate fraud convictions indicated that 75 percent of corporate fraud defendants were sentenced to a term of imprisonment, including 25 percent of whom were sentenced to terms in excess of 5 years.

Now, consider these figures in the following more general context: Even while the number of criminal defendants in federal court has risen dramatically (more than doubling from 31,975 in 1966 to 83,530 in 2003), the rate of jury trials has dropped precipitously, with 2,815 trials held in 1966—and only 28 more in 2003.[4] The inescapable conclusion is that the stakes have been raised considerably for corporate defendants. Both individuals and corporations are much more likely to be investigated and prosecuted, and much less likely to go to trial. For corporate lawyers, this is no surprise. A corporation cannot take a chance on criminal charges, much less a trial—witness the fates of Drexel Burnham Lambert and Arthur Andersen .

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[1] For example, 87 percent of outside counsel said that attorney-client privilege or work-product protection has recently been challenged; a combined 40 percent by federal prosecutors and regulators. In the "essay" portion of the survey, approximately 85 percent of the answers reflected that DOJ and the SEC routinely "discuss" waiver as part of "settlement" negotiations.

[2] *See* Testimony of James W. Conrad, Jr., Assistant General Counsel, American Chemistry Council, February 11, 2005 at 6 ("[I]n 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.").

[3] The first year of the task force was counted as running from July 9, 2002, through May 31, 2003. *First Year Report to the President: Corporate Fraud Task Force*, Practising Law Institute, PLI Order Number 3220, 1417 PLI/Corp 389, 405 & n.2.

[4] Statistical Table D4, Annual Report of the Director of the Administrative Office of the U.S. Courts (courtesy of John Keker, Keker & Van Nest LLP, prepared for the NACDL Spring Meeting, NY, NY, April 15, 2005).

And—important for our purposes here today—an individual cannot go to trial without access to the documents and legal advice that are critical to his or her defense. Without the protection of the attorney-client privilege (and the concomitant common interest privilege, discussed below), fewer and fewer individuals in the corporate setting will be willing, or able, to go to trial. Without trials, the third branch of government will no longer serve as a check on the government's prosecutorial powers; the judiciary, in fact, will be rendered irrelevant, and the development of criminal law would be left to Congress and the Executive.

As you move forward in your deliberations, I urge you to consider this broad ramification for the erosion of the privilege.

II. When a corporation waives attorney-client privilege, the individual employee loses.

The American Chemistry Council, the United States Chamber of Commerce, the Association of Corporate Counsel, and others have testified as to the significant impact that the erosion of the attorney-client privilege has wrought on the corporation itself. In short, the corporation is much less likely to follow-through with effective, meaningful, and candid compliance programs if it knows that the results will inevitably become part of the government's case.

My colleagues and I have personally witnessed, and NACDL has documented, the jeopardy that *individuals* face when their employer decides to waive the attorney-client privilege, or decides *ex ante* that it will be waived. When corporations waive attorney-client privilege, they have the knowledge that they will likely avoid criminal indictment. This is a critical pay-off; otherwise, corporate death is a near-certainty. However, individual employees—the CFO, the accountant, even the sales manager[5]--receive no similar benefit in return for waiver of their employers' privilege. Rather, all that they have told their company's lawyers is revealed to the government; all of their documents are turned over; and frequently, they will not be indemnified for their defense costs unless they are covered by insurance. Below, I outline some of the landmines faced by employees whose employers have waived or will inevitably waive their attorney-client privilege.

(1) The Hobson's choice an employee must make in deciding whether to talk to lawyers dangerously erodes the adversarial system. The ramifications for an employee who refuses to talk, on Fifth Amendment grounds or otherwise, to lawyers performing an internal investigation are extraordinarily severe. Increasingly, companies do not hesitate to fire individual employees who refuse to "cooperate." (This is in keeping with the blunt statement that Timothy Coleman, Counsel to the Deputy Attorney General, made during a panel at the

[5] *See, e.g., United States v. John Walker*, 03-CR-089 (D. Col.) (indictment of Qwest Communications sales manager for his role in arranging a single contract with an Arizona school district that included a side letter for accounting purposes).

American Bar Association's White Collar Institute in Henderson, Nevada on March 3, 2005: "Corporate employees have no right not to talk to internal investigators.") This has been the case recently at both KPMG LLP and American International Group, Inc. (AIG).[6]

In addition, un-insured officers and employees are unlikely to have their defense costs paid if there is even a hint that they are potential targets of the investigation; at the same time many companies will categorically refuse to pay defense costs of employees who are seen as non-cooperating.[7] In fact, the Thompson Memo explicitly *discourages* corporations from advancing defense costs to employees in connection with an investigation and related proceedings.[8] In the view and experience of NACDL's members, the result is that employees feel compelled to talk, but are understandably terrified at the prospect of full disclosure. This is, in effect, compelled self-incrimination. As one defense lawyer recently wrote, "Essentially, they [employers and government officials] are demanding a waiver of the employee's Fifth Amendment rights as a condition of continued employment. In an interesting contrast, the Supreme Court has found that the government itself cannot make such a demand on its own employees" (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)).[9]

In one recent case that may foreshadow a new frontier in criminal prosecution, employees of a company under criminal investigation were charged with fraud and causing false statements to be made *because of false material that they allegedly provided to lawyers conducting an internal investigation, and the privilege was later waived as to the entire investigation.*[10] In short, employees

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[6] *See* Laurie P. Cohen, "Prosecutors Tough new Tactics Turn Firms Against Employees," *Wall Street Journal*, June 4, 2004, at A1; Theo Francis and Ian McDonald, "AIG Fires Two Top Executives As Probe Intensifies," *Wall Street Journal*, March 22, 2005, at A1.

[7] According to an article in the Wall Street Journal, "KPMG … is refusing to pay the legal costs [of 32 employees who were subjects of a grand jury investigation] unless the partners and employees talk to prosecutors. KMPG believes it is expected to impose such a condition to be regarded by investigators as fully cooperating … . KPMG also is eschewing another traditional practice: joint defense agreements, in which a business under investigation shares information with employees who are also a focus. … Going still further, KPMG has agreed to tell prosecutors which documents the employees and partners are requesting to use in their own defense, say lawyers for some of them. Indeed, KPMG is taking the position that it must give copies of these documents to prosecutors at the same time as it provides them to the individuals' defense attorneys. This gives prosecutors a blueprint to the individuals' defense strategies, many attorneys complain." *See* Cohen, *supra* note 6.

[8] Thompson Memo at 8.

[9] N. Richard Janis, "Taking the Stand: Deputizing Corporate Counsel As Agents of the Federal Government," *Washington Lawyer*, March 2005.

[10] *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 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]."

can be criminally sanctioned for refusing to talk to internal investigators when it is clear, in the current climate, that the fruits of such conversations will be turned over to the government, and yet they cannot assert their Fifth Amendment rights without risking termination or financial ruination. We respectfully submit that in such instances, the erosion of the attorney-client privilege has resulted in the emasculation of the adversary system for individual corporate employees.

(2) Individuals cannot obtain documents that are necessary to their defense. At the same time that corporations have been faced with a do-or-die choice regarding waiving their attorney-client privilege, federal enforcement officials have stated in words and in deeds that joint-defense agreements, and the common-interest privilege, are a thing of the past. The Thompson Memo explicitly discourages cooperation between a corporation and its employees.[11] In the experience of our members, this results in a one-way flow of documents and testimony: from the employees, to the corporation, and inevitably to the government.[12] This gives the government a blueprint of an individual's strategy without allowing the individual the ability to obtain the documents he or she needs to prepare a defense.

(3) Individuals cannot communicate candidly and effectively with in-house counsel in order to prevent compliance problems. The results of the Association of Corporate Counsel's survey of in-house lawyers confirm that senior and mid-level employees rely heavily on the attorney-client privilege in communicating with in-house counsel. Effective compliance systems promote rapid identification and reporting-up of events and circumstances that may give rise to legal liability. It is difficult to persuade officers and line employees alike to be forthcoming and frank about potential problems or misfeasance. The attorney-client privilege insures that all employees are able to provide all the relevant information about a potential problem, before it happens or escalates, to the company's legal advisors. It prevents non-lawyer personnel from trying to "guess" what a lawyer would advise.[13]

In particular, the Thompson Memorandum (as compared to the Holder Memorandum) places greater emphasis on the need for voluntary cooperation by corporations wishing to avoid indictment. Rather than making the effectiveness of a corporation's compliance program a critical factor in deciding whether to charge a company with a criminal violation, the Memo elevates "voluntary disclosure" as especially important. Regarding corporate compliance, the Memo warns, "The existence of a compliance program is not sufficient, in and of itself,

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[11] Thompson Memo at 8.

[12] *See, e.g.*, Statement of Robert Morvillo, ABA White Collar Crime Institute, Henderson, Nevada, March 3, 2005 (explaining that even when he drafts joint defense agreements, they provide for document sharing from the employee to the corporation but not vice-versa).

[13] As the trial of former HealthSouth CEO Richard Scrushy and former WorldCom CEO Bernard Ebbers have shown, it is extremely difficult to determine who reported what to whom regarding alleged contemporaneous wrongdoing. *See, e.g.*, Dan Morse, "Fifth Finance Chief Adds To Pressure on Scrushy," *The Wall Street Journal*, March 22, 2005, at C4.

to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees or agents."[14] By contrast, the Memo spells out a number of ways that the assertion of the privilege or work-product protection can be viewed as non-cooperation: for example, "overly broad assertions of corporate representation of employees or former employees"; "incomplete or delayed production of records"; failure to promptly disclose illegal conduct known to the corporation."[15] This emphasis on transparency *at the expense of compliance* disserves the public interest in reducing the incidence of corporate crime.

The emphasis on "transparency" also redounds to the detriment of individual employees who are less likely to make disclosures to prevent violations, and therefore are more likely to face criminal charges in the future. Regardless of whether this is a rational decision in terms of risk, the testimony before this panel unanimously confirms that this is the case. Individuals are more afraid of the *certain* risks of disclosure than of the *uncertain* risks of non-disclosure; to wit, if they do not disclose, they might not get caught. If they do disclose, they will certainly pay for their decision.

(4) Employees cannot be candid with outside counsel conducting internal investigations: NACDL members reported that they believe that 88 percent of senior-level employees rely on the privilege when they are interviewed in the course of an internal investigation—especially when potential criminal behavior is implicated; similarly, they answered that 61 percent of mid-and lower-level employees rely on the privilege. More than 95 percent agreed that the erosion of the privilege has diminished the flow and candor of information from the employees of their clients. One respondent answered bluntly: "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." The problem has become so acute that companies are often willing to put waiver on the table before it is requested: a respondent said, "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."

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[14] Thompson Memo at 9-10.

[15] *Id.* at 7-8.

[22] *See, e.g.*, *In re Columbia/HCA*, 293 F.3d 289, 307 (6th Cir. 2002); *United States v. Bergonzi*, 214 F.R.D. 563 (N.D. Cal. 2003); *United States v. MIT*, 129 F.3d 681, 685 (1st Cir. 2003); *Westinghouse Elec. Co. v. Repub. of Phillipines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *Permian Corp. v. United State*, 665 F.2d 1214, 1220 (D.C. Cir. 1981).

(5) In a frightening new trend, lawyers may face debarment or even prosecution if they do not encourage clients to waive the attorney-client privilege. Although this point does not directly relate to the representation of individual employees, it bears noting that NACDL members have begun to report a disturbing trend: Federal prosecutors in at least one jurisdiction have routinely begun to ask for material that support lawyer-generated compliance documents such as Wells Submissions. If privilege is claimed as to this material, the prosecutors threaten to recommend debarring the lawyers before the SEC, or even to pursue obstruction charges against the lawyer. Beyond increased erosion the privilege, this might force a lawyer to stop representing a client because of the resulting conflict-of-interest. This, in turn, has dire consequences for the Sixth Amendment right to counsel.

Conclusion

Although NACDL has not formally adopted a policy endorsing any particular "fix" to the waiver of attorney-client privilege, there are several observations that we would like to make as the Task Force continues its important work:

- **As detailed above, the Department of Justice's current approach seems antithetical to attempts at compliance and true indicia of cooperation.** NACDL would encourage the Department to rework its 9 "charging" criteria to take stronger account of compliance programs, and on the self-reporting of "facts," as opposed to privileged material.
- **NACDL urges the Task Force to proceed with extreme caution if it considers endorsing a "limited waiver" approach, or an approach that distinguishes between "work product" and "privilege.**" Three concerns in particular animate our desire for caution in this area: first, selective waiver is generally not permitted in most jurisdictions[22]; second, we believe that it is unclear that federal legislation would solve this problem vis-à-vis state courts and state law actions; and third, we hesitate to endorse an approach that would give federal agencies carte blanche in requesting waiver. In other words, such legislation may be tantamount to codifying an erosion of the attorney-client privilege.
- **NACDL urges the Task Force to consider the option of requiring approval from a law-enforcement supervisor before waiver is sought, and for DOJ to require prosecutors to report all instances in which privileged material is obtained.** Oversight and transparency are the most effective first steps, we believe, in curbing this epidemic.

Thank you very much for your time today.