

The Decline Of the Attorney-Client Privilege in the Corporate Context¹

Survey Results

**Presented to the United States Congress
and the United States Sentencing Commission
by the Following Organizations:**

**American Chemistry Council
American Civil Liberties Union
Association of Corporate Counsel
Business Civil Liberties, Inc.
Business Roundtable
The Financial Services Roundtable
Frontiers of Freedom
National Association of Criminal Defense Lawyers
National Association of Manufacturers
National Defense Industrial Association
Retail Industry Leaders Association
U.S. Chamber of Commerce
Washington Legal Foundation**

BACKGROUND

The coalition of organizations listed above² believes that the attorney-client privilege and work product doctrine as applied in the corporate context are vital protections that serve society's interests and protect clients' Constitutional rights to counsel. The attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner. In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief

¹ This survey is also available online at <http://www.acca.com/Surveys/attyclient2.pdf>

² The American Bar Association has also expressed similar views to Congress and the U.S. Sentencing Commission regarding the importance of preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights. The ABA has also worked in close cooperation with the coalition in the preparation and distribution of the surveys referenced in this document.

that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and laudably serve society's and our legal system's public policy goals.

Our coalition has been very active in protecting the attorney-client privilege in the corporate context from governmental policies and practices whose daily applications, we believe, erode the privilege. Our work has been advanced through educational programs, study groups and task forces, and various filings, communications, meetings, and testimony before authoritative bodies examining privilege erosions.³

In March of 2005, in response to increasing concerns expressed by in-house counsel and outside criminal defense counsel regarding their experiences with the policies and practices just noted, coalition members asked their respective constituencies to complete an online survey titled: "*Is the Attorney-Client Privilege Under Attack?*"⁴ According to the survey, approximately one-third of the survey respondents had personally experienced some kind of privilege erosion. This powerful finding offered some of the first empirical evidence documenting the difficulty – indeed, the Hobson's Choice – that corporate clients confront when the government begins an investigation into an allegation of wrongdoing and presumes that confidentiality should be waived, or when company auditors demand access to confidential information in order to certify the company's books. The 2005 survey also found that: 1) clients may be increasingly unwilling to rely on the long-established protections of the confidentiality of their lawyer's counsel (affirming the logic of the US Supreme Court's insight that "an uncertain privilege is no privilege at all"⁵); 2) companies that refuse to waive their privileges suffer consequences (being labeled uncooperative or obstructionist, even if they fully cooperated with every other legitimate request of the investigator); and 3) contrary to the claims of many prosecutors and other regulators, privilege waiver demands are neither uncommon nor rarely exercised.

On November 15, 2005, the results of this survey were presented to the United States Sentencing Commission, which had begun to re-examine the commentary language regarding privilege that the Commission had inserted into Chapter 8 of the guidelines in the 2004 amendment process.⁶ At that hearing, the Commission asked coalition members to help to gather additional information and data regarding the frequency with which governmental entities have been requesting that businesses waive

³ Representatives from all of the organizations listed here have participated in previous testimony before the US Sentencing Commission on this issue, some both prior and subsequent to the Commission's 2004 adoption of new commentary language on privilege in Chapter 8, which our organizations find offensive (see, most recently, http://www.ussc.gov/AGENDAS/agd11_05.htm). Please visit each organization's website or contact their staff for more information on educational programs, resources, and additional advocacy (including communication with Congressional leaders and their staffs, the Department of Justice, Securities & Exchange Commission, Public Company Accounting and Oversight Board, and others), which our organizations have engaged in to seek better protection of the attorney-client privilege.

⁴ An Executive Summary of the March 2005 survey may be accessed via the following links: for the in-house version: <http://www.acca.com/Surveys/attyclient.pdf>, and for the outside counsel version: http://www.acca.com/Surveys/attyclient_nacdl.pdf. Based on feedback from those who read the previous survey results, this document provides in one place the combined 2006 results of both the in-house and outside counsel surveys.

⁵ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

⁶ The USSC Commentary to Section 8C2.5 (adopted in November of 2004) states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." It is our position that the exception listed in the latter part of that sentence swallows the rule. Under this exception, prosecutors are free to make routine requests for waivers, and organizations will be forced routinely to grant them, because there is no obvious method by which the corporation can challenge the government's assertion that waiver is "necessary."

their attorney-client and work product protections as a condition for cooperation credit, as well as the effects of these waiver requests. In response to that and similar requests for more detailed information about the erosion of the privilege, our coalition undertook a second, more detailed survey, and obtained an even greater response rate (>1,400) from our constituents. We are pleased to present the findings of this second survey, which was designed to capture more detailed information about government and auditor requests and implicit expectations for privilege and work product waivers.⁷

Survey Results

We prepared two surveys with virtually identical questions except for some minor wording changes that reflected that one survey was for in-house counsel and one was for outside counsel.⁸ Section I summarizes key themes emerging from the survey. Section II shows information on respondent demographics. Section III summarizes results shared by companies who have experienced government expectations to waive attorney-client privilege or work product protections and/or expectations regarding other employee actions. Section IV summarizes themes that emerged from the open-ended questions on situational experiences regarding privilege waiver and additional commentary on privilege erosion. Quotes from survey respondents are also interspersed throughout the text as illustrations of the points made.

I. KEY THEMES *(additional discussion follows)*

- **A Government Culture of Waiver Exists:** Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement that a “‘culture of waiver’ has evolved in which governmental agencies believe it is reasonable

⁷ In January 2006, the Association of Corporate Counsel directly contacted approximately 4,700 members, whose titles included the words either “general counsel” or “chief legal officer,” requesting them to complete this web-based survey. The web link to the survey was also made available to the coalition partners offering this summary and the ABA Task Force on Attorney-Client Privilege, which in turn publicized it to the many groups participating in the Task Force’s endeavors. The survey was “open” for approximately 2 weeks. Five hundred sixty-six of the 676 responses to the in-house version of the survey were received from the Association of Corporate Counsel emailing to 4,700 general counsel members; the remaining corporate counsel responses are from contacts initiated by the other groups. Also in January, the National Association of Criminal Defense Lawyers emailed the web link for the survey to its 13,000 members. NACDL also posted the web link for the survey on its listserv for white collar practitioners, which has approximately 1,200 subscribers. The survey was also made available to approximately 5,000 members of the Business Law and Criminal Justice sections of the American Bar Association. Five hundred thirty-eight outside counsel responded to this survey.

Both surveys included 23 questions primarily seeking specific responses to multiple choice or yes/no questions, with 4 open-ended questions at the end seeking text responses with additional detail on situational experiences. Since the open-ended questions were not mandatory and did not “apply” to those who said they’d had no occasion to run into a privilege erosion situation, the number of responses to those questions was not as robust.

This document offers the survey results in numbers and percentages that are approximated by rounding to the nearest whole integer. Summaries of broad themes and quotations drawn from the open-ended text responses are also included, but not all responses to those questions are included out a concern for confidentiality and to avoid unnecessary repetition. We believe the survey’s response rate can be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession. We can note that statisticians have designated the Association of Corporate Counsel’s membership as statistically representative of the entire in-house legal profession.

⁸ The majority of differences between the two surveys were in the information requested in the respondent demographic information categories, and in general question phrasing such as “your company” for the in-house lawyers, and “your client(s)” for the outside lawyers. No “substantive” differences between the surveys’ questions exists. If you would like a copy of the questions asked on these surveys, please contact Susan Hackett at hackett@acca.com.

and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.” (Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)

- **Waiver is a Condition of Cooperation:** Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.
- **‘Government Expectation’⁹ of Waiver of Attorney-Client Privilege Confirmed:** Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.
- **Prosecutors Typically Request Privilege Waiver – It Is Rarely “Inferred” by Counsel:** Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.¹⁰ Only 8% percent of outside counsel and 3% of in-house counsel said that they “inferred it was expected.”
- **DOJ Policies Rank First, and Sentencing Guidelines Second, Among the Reasons Given For Waiver Demands:** Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind “a quick and efficient resolution of the matter,” and DOJ policies (Thompson/Holder/McCallum), respectively.
- **Third Party Civil Suits Among Top Consequences of Government Investigations:** Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits). Of the eight response options that asked respondents to list the ultimate consequences of their clients’ investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). “Related third party civil litigation” finished fifth (for outside counsel respondents) with 12%.

II. RESPONDENT DEMOGRAPHICS

In-house: Almost 90% of the in-house counsel survey respondents were General Counsel. Approximately 40% indicated that the government (federal or state) had initiated some form of investigation into allegations of wrongdoing at their company during the past 5 years. Below is a summary of information on the in-house counsel respondent demographics.

⁹ The survey defined ‘government expectation’ of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

¹⁰ Sixty percent of in-house counsel who’d had experience with a waiver request responded “N/A” (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

- **Company Type:** Fifty-one percent of the respondents indicated their companies were privately-held/owned; 35% said their companies were publicly-traded but not in the Fortune 500; and 9% of respondents worked for non-profits. Quasi-governmental entities and Fortune-ranked companies each represented 1% of the survey respondents, and less than 1% of the respondents said they worked for FTSE 200 companies.
- **Industry Group:** Respondents were asked to identify the primary industry that best describes their client company's main line of business and were given 22 response options. The top three industries selected were: Finance and Insurance (18%), Manufacturing (13%), and Information Technology (11%).
- **Size of Law Department:** Almost 90% of respondents had law departments of less than 20 lawyers: 33% were solo practitioners, 46% had offices of 2-7 lawyers, and 10% had offices of 8-19 lawyers. Of the remaining respondents, approximately 4% had law departments of over 100 lawyers, and less than 1% had law departments of over 500 lawyers.

These demographics are significant in that they show that even among a general population of company counsel, almost half have experienced some kind of privilege erosion. The vast majority of these respondents who experienced privilege erosions do not work for mega-corporations with extremely high visibility and the potential for “blockbuster” failures; they work for a wide variety of differently-sized businesses, representing the full spectrum of industries. While the companies participating in the survey are obviously large enough to afford full-time in-house counsel staff, only 1% of those responding worked for Fortune 1000 employer/clients, and three-quarters work in departments with fewer than 8 lawyers. We conclude that this sampling represents a breadth of experience from the “norm” of corporate America, and not just the perspective of the biggest companies, where the stakes and publicity attendant to the most prominent governance failures may attract disproportionate attention or be perceived as requiring “setting an example” responses.

Outside counsel: Seventy-one percent of those who answered the survey for outside counsel were partners in law firms, and 40% practiced criminal litigation as their primary area of concentration (26% indicated civil litigation and 20% indicated transactional work as their primary practice areas). Sixty-three percent represented companies that had been subject to a criminal or enforcement investigation in the last five years. Further demographics show:

- **Client Type:** Results were distributed in the following categories: Privately-held or -owned with revenues of less than \$200 million annually (22%); individual officers or employees of organizations (20%); publicly traded companies with more than \$1 billion in annual revenue (12%); publicly traded companies with between \$500 million and \$1 billion in annual revenue (11%).
- **Size of Law Practice:** Thirty-five percent of respondents worked for firms of between 2 and 20 lawyers. The rest of the responses were fairly evenly distributed among the following categories: solo (19%); 21-100 lawyers (17%); 101-500 lawyers (15%); more than 500 lawyers (14%).

As with the results of the survey of in-house counsel, these answers indicate that among a general population of outside counsel with a wide array of experience, both in terms of the types of law that they practice and the types of clients that they represent, 51% indicate that they experienced a demand, suggestion, inquiry, or other expectation of waiver by the government. A commanding 73% agree that a culture of waiver has evolved with respect to the corporate attorney-client privilege. The sizable plurality of lawyers who answered this survey represented either smaller, privately held companies or

individuals—thus belying the conclusion that waiver requests, demands, and expectations are a problem only for large, publicly-traded companies who are at the center of “headline” scandals.

III. SUMMARY OF WAIVER EXPECTATIONS AND EXPERIENCES

“Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit.” (Response to in-house counsel survey)

“I think the forced waiver and related policies have become a problem of Constitutional proportions. There are many examples of government pressuring companies to waive privileges, stop advancing legal fees, and make statements against employees, under pain of corporate destruction. ... When I was a prosecutor, we recognized that big white collar cases are hard and that they should be. Now, the attitude seems to have changed, and if the corporation does not partner with the government to prosecute individuals, the government views it as obstruction. This view is becoming part of the culture, having begun with the Thompson, Holder, and USSG pronouncements. It’s simply wrong” (Response to outside counsel survey.)

A. Experiences relating to waiver

Almost 60% of respondents identified government expectations of waiver of **attorney-client privilege/communications** as relevant to their personal experience with their clients. Of those respondents, almost 30% confirmed that they experienced a government expectation that the company should waive the attorney-client privilege if it wanted to engage in any form of bargaining or receive more favorable treatment from the government’s officials.

Almost 23% of respondents said that a question regarding government expectations for waiver of **work product protections** was applicable to their situations. Of those respondents, around 45% said their clients had experienced a governmental expectation of waiver of work product protections if the company wanted to engage in bargaining or receive more favorable treatment.

Responses regarding these experiences, including which agencies indicated an expectation of waiver, how these expectations were expressed, the type of requested material, justifications for waiver requests, and whether companies waived are summarized below.

1. AGENCIES REQUESTING WAIVER

For both in-house and outside counsel, the U.S. Attorneys’ Offices were identified as the government agency that most often indicated an expectation of waiver. The survey asked respondents to identify which agencies indicated an expectation of waiver and were given a choice of seven enumerated agencies/categories of agencies, as well as the opportunity to state that the question did not apply or to write-in a response. (About one-third of the in-house respondents and one-fourth of outside counsel

respondents indicated that this question was not applicable.) The top agencies/categories identified as most often expecting waiver (in descending order) were:

In-house counsel	Outside counsel
<ul style="list-style-type: none"> ▪ U.S. Attorneys’ Office 	<ul style="list-style-type: none"> ▪ U.S. Attorneys’ Office
<ul style="list-style-type: none"> ▪ SEC 	<ul style="list-style-type: none"> ▪ Department of Justice – ‘Main’ (e.g., Antitrust or Criminal Fraud)
<ul style="list-style-type: none"> ▪ Department of Justice-‘Main’ (e.g., Antitrust or Criminal Fraud) 	<ul style="list-style-type: none"> ▪ SEC
<ul style="list-style-type: none"> ▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.) 	<ul style="list-style-type: none"> ▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)
<ul style="list-style-type: none"> ▪ State Attorneys General Offices 	<ul style="list-style-type: none"> ▪ State Attorneys General Offices

“It is clear to me that this has become the ‘rage’ among prosecutors. ... In effect, prosecutors are overriding the [evidentiary precedent] that the attorney client privilege is to be maintained.” (Response to in-house counsel survey)

“[An AUSA told us] that he expected a full investigation and waiver of attorney-client privilege in order for my client to demonstrate that it was cooperating in an investigation into possible wrongdoing, including interviews of my client’s outside counsel who provided advice contemporaneous to one of the events the AUSA wanted to investigate. He also expected that we would conduct interviews of foreign personnel not subject to U.S. jurisdiction and obtain documents that had only ever existed in foreign jurisdictions. He described a scorecard method he used ... he defined cooperation as the company conducting a full internal investigation, including interviewing outside counsel, submitting a written report of the investigation to him, and giving full waiver of the attorney-client privilege – and no joint defense agreements with any other person or entity. He said that otherwise he would issue grand jury subpoenas and conduct the full investigation with DOJ resources and it would be much worse for us if he had to do that. This was after he informed us that our company was NOT the target!” (Response to in-house counsel survey)

2. HOW WAIVER EXPECTATIONS WERE EXPRESSED

Respondents were asked how prosecutors or enforcement officials conducting the investigation(s) have indicated that privilege waiver was expected.

Only 11 % of outside counsel who said that their clients had recently been involved in enforcement actions where there was an expectation that their clients would waive privilege said that prosecutors never mentioned waiver as an expectation. Nearly three-quarters (73%) of outside counsel said that the expectation was communicated and not inferred. Of these, 26% said that “waiver was requested in a direct and specific statement, along with an indication that waiver was a condition precedent for the company if it wishes to be considered cooperative.” Twenty-one percent indicated that waiver was “requested in an indirect statement that suggested (without explicit statements) that waiver was encouraged and in the company’s interests.” Only 13% said that waiver was requested directly but without any indication that positive or negative consequences would flow from the decision to waive.

Similarly, 66% of in-house respondents who indicated experience with this issue said that waiver expectations were communicated through direct and specific and/or indirect statements by prosecutors or enforcement officials. When waiver expectations were expressed, these in-house respondents said they were made using direct and specific statements more often than indirect statements. According to in-house counsel, direct statements with an indication that waiver was a condition precedent for the company to be considered cooperative occurred almost twice as often as direct statements indicating generally that positive or negative consequences would flow from the decision.

“The very nature of the self-reporting schema (at use in many federal and state regulatory contexts) is waiver of privileges.” (Response to in-house counsel survey)

“My company restated its earnings, after first notifying the SEC that we were about to do so. SEC’s Corp Fin referred the matter to Enforcement. During our first meeting with Enforcement, we described the internal investigation we conducted that led to the decision to restate. Enforcement expressed the opinion that ‘of course’ we would waive privilege as to the investigation report, as a condition of being deemed ‘cooperative.’” (Response to in-house counsel survey)

“During an investigation by a state attorney general, we were told that we would be considered uncooperative and would not be able to settle with the agency unless we turned over lawyers’ interview notes.” (Response to outside counsel survey)

3. KINDS OF MATERIALS REQUESTED IN WAIVER DEMANDS

On a 2:1 basis,¹¹ in-house counsel who experienced privilege waiver indicated that prosecutors or enforcement officials do not draw distinctions regarding attorney-client privilege and work-product protections and the kinds of materials these privileges protect. Outside counsel concurred with this observation by a margin of 4:3.¹² However, when a distinction is drawn in the course of a government investigation, both in-house and outside counsel respondents indicated again on almost a 2:1 basis¹³ that the distinctions were made at the initiative of defense or corporate counsel rather than by the prosecutor or enforcement official.

Respondents were asked about the types of privileged materials requested by the government in connection with **attorney-client privilege waiver requests** (as opposed to work product waiver requests). A choice of 11 types of possibly privileged materials was provided and respondents could check all that had been requested in their experiences. Respondents could also indicate that the question did not apply and/or include an additional text response.

About 46% of the responses of in-house counsel and 82% of the responses for outside counsel were for choices other than the “n/a” or the write-in category options. Around 90% of both in-house and outside counsel responses (other than the “n/a” group) identified specific types of material that enforcement officials had requested, with around 10% indicating that prosecutors or enforcement officials simply asked for complete waivers without articulating a specific material type.

Materials believed to be protected by attorney-client privilege and identified as most often requested by prosecutors or enforcement officials were (top 3, in descending order, for both categories of respondents):

- Written reports of an internal investigation (16% for outside counsel; 21% for in-house counsel)
- Files and work papers that supported an internal investigation (13% for outside counsel; 18% for in-house counsel)
- Lawyers’ interview notes or memos or transcripts of interviews with employees who were targets (13% for outside counsel, a tie with “files and work papers”; 13% for in-house counsel)

For in-house respondents, numbers 4 and 5 were:

- Regular compliance performance reports and audits (11%)
- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)

For outside counsel, numbers 4 and 5 were:

- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)
- Lawyers’ interview notes with employees who were not available for interviews by the government or memos/transcripts of the same (8%)

As part of this same question, respondents could also choose three categories of material related to advice of counsel: advice contemporaneous with the conduct being investigated absent the assertion of an advice of counsel defense; same as foregoing but requested after an advice of counsel defense was asserted; and advice relating to the investigation itself (rather than the underlying conduct being investigated). The responses selecting these three types of material comprised around 15% of requests experienced by in-

¹¹ 68% versus 31%.

¹² 56% versus 43%.

¹³ 66% versus 33 % for outside counsel; 65% versus 34% for in-house counsel.

house counsel and 20% of requests experienced by outside counsel. According to outside counsel, enforcement officials only asked for communications with counsel *pursuant to* the assertion of a company’s advice of counsel defense 6% of the time, placing it eighth among nine types of requested material.

Likewise, respondents were asked about the types of protected materials requested by the government in connection with **work product waiver requests**. Six types of material protected by work-product were listed and respondents could check all that applied. Respondents could also provide a text response. Of the six types, the three most often requested were:

In-house counsel:	Outside counsel:
<ul style="list-style-type: none"> Results of written internal investigation reports (29%); 	<ul style="list-style-type: none"> Interview memos with witnesses (30%);
<ul style="list-style-type: none"> Interview memos with witnesses (22%); and 	<ul style="list-style-type: none"> Results of written internal investigation reports (25%); and
<ul style="list-style-type: none"> Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (14%). 	<ul style="list-style-type: none"> Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (16%).

“Usually the government does not justify its request. They want you to make their case for them.” (In-house counsel respondent.)

“In my experience, government enforcement officials simply have no respect for the attorney-client privilege and simply demand it be waived. In some cases, the demand seems to have been driven by sheer laziness and an expectation that we would do all the government’s work for them” (In-house counsel respondent.)

4. JUSTIFICATIONS PROFFERED FOR WAIVER REQUESTS

Sixty-two percent of in-house respondents and 48% of outside counsel who had been asked to waive indicated that government officials did not give a specific reason to justify their waiver requests. In a question asking for additional details on justifications when they were received, nine possible justifications were provided, as well as the opportunity to indicate that the respondent didn’t remember or wished to submit a write-in response. The top “justification responses” follow (in descending order):

In-house counsel:	Outside counsel:
<ul style="list-style-type: none"> The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (19%) 	<ul style="list-style-type: none"> The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (18%)
<ul style="list-style-type: none"> The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (13%) 	<ul style="list-style-type: none"> The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (17%)

<ul style="list-style-type: none"> ▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (10%) 	<ul style="list-style-type: none"> ▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (15%)¹⁴
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“US Attorneys indicted my company despite complete cooperation and waivers of [attorney-client and work product] privileges, and despite the fact that only two lower-level employees were indicted.” (In-house counsel respondent)

“The Holder/Thompson policy and the Guidelines themselves have created an unintended result. To claim certain material rightfully to be privileged is now a bad thing, only someone hiding something would hide behind it. Waiving is a good thing. The result has led to such erosion of the concept behind a claim of privilege as to bring shame to whomever would make it.” (Outside counsel respondent)

“[The Sentencing Guidelines] came up at the first meeting with the US Attorney or the second meeting.” (Outside counsel respondent)

“[The Sentencing Guidelines] were mentioned in a not-so-subtle threatening manner.” (Outside counsel respondent)

“Prosecutors casually refer to Thompson and the Sentencing Guidelines.” (Outside counsel respondent)

“[The Sentencing Guidelines] were specifically discussed as a negotiating tool for a better or for any deal.” (Outside counsel respondent)

“[The Sentencing Guidelines] were cited in pre-indictment settings re: possible penalties if no cooperation.” (Outside counsel respondent)

“Waiver as an indicator of co-operation under the Guidelines was specifically mentioned.” (Outside counsel respondent)

5. WAIVER AND TIMING

Asked whether their clients ever waived the attorney-client privilege, approximately 52% of in-house counsel but only 23% of outside counsel said that they never had occasion to consider the issue (either

¹⁴ For outside counsel, the next most frequently cited justifications were: (4) privilege did not apply because of a crime-fraud exception (11%); (5) no reasons were offered—the demand was simply made (10%); (6) information protected by privilege was necessary to the investigation (8%). **Susan: complete.**

because they had not been subject to an investigation in the last five years or because waiver was not an issue in any particular representation). When clients did have occasion to consider waiver and decided to waive,¹⁵ the top two of six reasons (for both in-house and outside counsel) that the client decided to do so were:

- Government officials' stated expectations that waiver would be required for the company to be treated as cooperative (37% for outside counsel, 30% for in-house counsel), and
- Government officials' unstated but perceived expectations that the company would not be treated as cooperative if waiver were withheld (27% for outside counsel, 28% for in-house counsel).

In addition, when clients waived, the most frequent point in the process for waiver was during the government's fact-finding process (36% for inside counsel and 27% for outside counsel): waivers were most likely provided at this point when the investigator raised concerns that the investigation could not be completed through gathering non-privileged information. For in-house counsel, the next most frequent point for waiver to occur was during the first meeting or communication with the government: around 26% of waivers at that stage were at the government's request or implicit suggestion, as opposed to 8% which were offered by the client without formal prompting or demand (on the presumption that privilege waivers were expected). For outside counsel, the second-most frequent point for waiver to occur was during the bargaining and charging decision (25.5%). Twenty percent of outside counsel said that the decision to waive was made during the first meeting or communication with the government at the government's suggestion, with and only 11% said waiver was offered without prompting or demand. According to all respondents, about 10% of the waiver decisions were made when the problem first surfaced – before any contact with enforcement officials. Approximately 8% of in-house respondents and 5% of outside counsel indicated that their clients do not assert the privilege.

“My experience ... is that government agencies routinely ‘blackmail’ companies with threats of indictment, fines, etc., in order to get them to waive privilege and take other actions (discharge of employees, and so forth). This was true in my dealings at the federal level with agencies (FTC, for example) as well as with federal and state prosecutors.” (In-house counsel respondent)

“Federal prosecutors in particular have begun to treat waiver as almost synonymous with cooperation.” (Outside counsel respondent)

“The decision by a client to waive the privilege is always agonizing. In part, it has to do with the unexpected ... the law on partial waiver is so unclear, does a decision to waive once ever stop? What will other agencies or third parties do if they get the material? How will an internal investigation ever be conducted in the future if employees feel the company has ‘betrayed’ them? It’s the easy case when the company has identified a discrete problem. When the government seeks this material, however, the extent of the

¹⁵ Eighteen percent of outside counsel and 6% of in-house counsel said that their clients did not waive the privilege but instead asserted their rights when faced with pressure to waive.

problem is usually not known.” (Outside counsel respondent)

B. Experiences relating to employees

Respondents were asked whether the government had ever indicated certain expectations with regard to employees during the course of a governmental investigation. Around 60% of outside counsel indicated that this question applied to their own experiences. (Around 10% of in-house respondents to this question indicated that it applied.) Outside counsel who responded to this question said that they had experienced the following government expectations or demands with regard to employee actions:

- Not advance legal expenses (or agree to reimburse) to a targeted employee (26%);
- Not enter into, or breach, a joint defense agreement with a targeted employee (24%);
- Refuse to share requested documents with a targeted employee (21%)
- Discharge an employee who would not consent to be interviewed by the government (16%)

“The biggest issue is the pressure that the government puts on companies to terminate employees under investigation (long before any status determination is made) and then not to cover legal fees for loyal employees. A criminal investigation can bankrupt an individual quickly leaving them unemployed and destitute. The government does not want people to have adequate and competent counsel.” (Outside counsel respondent)

“[B]ecause of prosecutor demands for cooperation, corporate attorneys often decline to provide access to key documents critical to prepare a wholly legitimate defense based on actual facts. Government policies are interfering with the defense function, and will lead to increased charges against individuals who should not be charged.” (Outside counsel respondent)

“The culture of ‘cooperate or be fired’ has severely impacted the ability to represent executives in corporate investigations.” (Outside counsel respondent)

IV. SUMMARY OF WRITE-IN SITUATIONAL EXPERIENCES AND ADDITIONAL COMMENTARY

As noted above, some of the respondents completed open-ended text questions offered at the end of the survey, in which the survey requested them to provide examples of experiences they’d had with privilege

erosion and to provide feedback on the general subject. Highlighted below are a few of the many illuminating responses to these questions.

In-house counsel:

.....

“In connection with a routine SEC investigation we were told that if we did not produce e-mail the matter would be referred to enforcement (i.e., the only wrongdoing would be failure to produce the e-mail – there was no other allegation of misconduct). When we produced our e-mail with a privilege log, we were told that the privilege log was insufficient because it did not describe the content of the e-mails not produced (which on advice of our outside securities counsel, a major law firm, we were advised could serve to waive the privilege). After a conference call in which SEC attorneys advised us that they did not recognize the work product doctrine and that internal compliance investigations were not privileged,’ we ended up simply producing most of the e-mails without asserting privilege because ‘we had nothing to hide’.”

.....

“The company for which I work has commissioned an investigation of alleged accounting improprieties. The investigator is sharing its work with several outside regulators including the SEC and DOJ. All expect, and have received, a great deal of privileged material through this process. Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit. From speaking with my in-house counterparts, I know that my experience is not unique.”

.....

“Gov[ernment] lawyers and investigators have asked – demanded - that we produce attorney notes of interviews with employees as well as internal studies that constitute work product.”

.....

“The government investigated our company starting about four years ago. At the request of the FBI agent, with her suggestion that it would help us to cooperate, we proffered several upper level employees for them to interview... About a year later, the government executed a warrant on our office. They seized an entire closet full of legal documents, most of which were not related to the investigation or appropriately seized under the warrant. They returned copies of all of the documents after numerous requests, but never returned the originals... . Over the next two years, requests were made to interview several employees and repeated requests for information were made. It was repeatedly outright said or implied that cooperation would make things easier for us... Prior to joining this company, I worked for the government. I feel that the government has behaved inappropriately and illegally with respect to this ongoing investigation. They have abused their authority and terrorized our employees....”

.....

“...The real concern goes [to how the] judiciary ... react to and support such activities. Our matter focused on an alleged credit fraud charge that spread from the accused's business to his family and any attorney he had ever engaged. It was as if the government forgot how to spell privilege. They improperly sought and obtained warrants and subpoenas for everything, including protected matters. Eventually the matters were quashed, but only after significant effort.”

.....

“We produced the documents because the privilege claim was not beyond doubt and because we wanted to be viewed as cooperative.”

.....

“Our general practice is not to waive[] AC or work product protection. However, in circumstances in which a prior opinion of counsel was obtained and an ‘advice of counsel’ defense exists we will consider waiver of that opinion during the charging decision process.”

.....

“We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators. In addition to a chilling effect on communications with between the client and the lawyer, waiver of privilege subjects companies to disclosure of these materials in litigation, potentially causing grievous harm to the company.”

.....

“The assault on privilege seems to me deeply misguided from a long- or medium-term policy standpoint. Counsel serve a critical role in encouraging compliance and transparency. These current policies run a significant risk of chilling attorney client communications in the future which will heighten, rather than reduce, compliance risks. Simply, this is a terrible idea which is solving a problem which doesn't exist - ... agencies can proceed with their investigations on the basis of evidence obtained through [other means].”

.....

“The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: "under no circumstances may you do this," or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing... . When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government's inappropriate intrusion in this formerly sacrosanct land.”

.....

“Outside counsel urge their retention in part because they contend in-house counsel cannot assert the privilege as effectively as outside counsel.”

.....

“The privilege was established so persons could seek competent legal advice and thereby understand their rights and obligations under the law. To treat corporations differently creates the specter that companies won't seek appropriate legal advice, as they have no ability to feel confident in the confidentiality of their communications.”

.....

“Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior. This ‘prevention’ strategy demands on open dialogue with employees. DOJ demands for waiver have a chilling effect on our employees seeking out in-house counsel to discuss potentially tricky legal situations. We depend on open lines of communication with employees and these are being strained by DOJ's policy and their push to alter the Sentencing Guidelines. We should have policies in place that encourage dialogue with employees. DOJ's waiver push is short sighted and counter productive.”

.....

“It is my opinion that the concept of the government asking any person (either individual or corporate) to waive attorney-client privilege in order to facilitate their investigation is a travesty of justice. The

attorney-client privilege is there as a means to have open discussions between the client and their attorney regarding all possibilities. To allow for this type of request will merely result in many corporations no longer including in-house counsel in important decision making processes which may in fact lead to even more wrongdoing.”

.....

“In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today's environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company's ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, unable to give or seek advice freely. The important purposes behind the privilege are simply being ignored.”

.....

“I think the government's policy and position that companies should/must waive privilege and threatening criminal sanctions if they refuse to cooperate from the outset is frighteningly wrong, unconstitutional, over- reaching by the government, misguided, and is serving to undermine the efficacy of our system of jurisprudence and the assumption of innocent until proven guilty.”

.....

“Reviewing the reports of waivers and requested waivers in the general press and in the legal periodicals has had a chilling effect on my function as general counsel. I warn our senior managers regularly that they should not count on having any privilege regarding their communications with me. We try hard to follow the law at this organization, so criminal prosecution is not a concern. What is a concern is that the continued erosion of privilege in prosecution by state and federal agencies will spill over into the civil arena. We are in a business sector in which litigation is common and the stakes are often very large. The self-censoring I feel compelled to do at this point hinders the company's ability to protect against or plan for anticipated claims.”

.....

“While I have not experienced any problems, privilege erosion is a real fear that affects how we do business. A free and open dialogue between counsel (in house and outside) and management is critical to any business, and if the privilege becomes even more endangered, it will have a crippling effect on how we conduct our business.”

.....

“As a result of our experiences, we now routinely advise our clients that there is not such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds.”

.....

“At this stage, much of the damage is done--one has to conduct affairs, take (or not) notes, write communications and obtain information on the assumption that there will be no protection. In that environment, lawyers are already much less effective in discovering information and counseling compliant conduct.”

.....

“That waiver may be just ‘a factor’ in the determination of cooperation as mitigation under the Guidelines is very little - in fact, no - comfort at all.”

.....

“The government is out of control. The Bar and the Judiciary should stand up and recognize this is wrong. Individual companies cannot afford to do it on their own; the stakes are too high.”

.....

“We are involved in several investigations/subpoenas/lawsuits in which AGs, DOLs, or other regulators have retained plaintiffs firms and are using their state powers to demand production to those firms of documents we would not produce in discovery. Some of those law firms are paid on contingency basis. They typically ask for investigation reports.”

.....

“From discussions with other general counsel, top law firm partners, and reading case law, it appears that failure to "cooperate" with federal investigators will incur their wrath, whether it's obstruction of justice charges, increased fines/penalties, new charges, character assassinations, pressure on a company to terminate an employee, pressure to have a state bar "review" an attorney's conduct, etc. (translation of "cooperate" meaning, waive the privilege and work-product protection and give them everything they ask for; asserting one's rights is seen as trying to defy the federal government). This is frightening (the federal gov[ernment] becoming more like a police state), and just the threat of such action from the feds changes the way attorneys and their clients work together, and changes the defense strategies when handling such issues – all for the worse with regard to the Constitutional and legal rights of individuals and companies. The law becomes a weapon wielded by the feds against the "people," and the protections that people and corporations are entitled to become a meaningless facade.”

.....

“It is clear to me that this has become the "rage" among prosecutors. Frankly, if this is to be the expectation of all prosecutors in corporate criminal investigations, then it will essentially eliminate the privilege as to corporations in all of those cases. Indeed the waiver has also become prevalent in grand jury work with individuals in which the prosecutor hints at avoiding target status if the individual will waive his attorney client (and reporter/source) materials. In effect, prosecutors are overriding the legislative decision that the attorney client privilege is to be maintained.”

.....

“On more than one occasion in small group meetings with government lawyers, such as in discussions of the requirements and expectations under Sarbanes Oxley, government lawyers have stated in absolute terms that they expect complete, open and full cooperation and that any actions, including assertions of privilege, significantly affect their assessment of culpability, the level of fines or civil or criminal penalties that should apply.”

.....

“The attorney/client privilege is critical for clients, because they need to be frank with their attorneys in order to obtain accurate advice. If the privilege is not there or is likely to be waived, the client may not inform its attorneys of all the relevant facts. The heavy-handed "requests" for waiver of the attorney/client privilege, with heavy penalties levied for failure to "cooperate," will undermine the administration of justice in the long run. These requests are not fair or appropriate.”

.....

“The DOJ routinely ignores the role of corporate counsel in establishing the ground rules for communications with company employees and the rights of both the company employee and the company of having a company lawyer present during questioning.”

.....

“Waiving privilege through coercion is bad policy. It prevents an in-house attorney from advising his/her client the company. It interferes with the company’s and employees’ rights If the government can't make a case without waiver, then perhaps the case isn't that strong. [They already] have a large club they can use to access company records and interview employees, far beyond what is available in civil litigation.”

.....

“The balance of power in America now weighs heavily in the hands of government prosecutors. Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out for harsh treatment. See Arthur Andersen for details...oh yeah...they cease to exist.”

.....

“Currently, during the course of annual audit by a big 4 public accounting firm, the firm has demanded that the company waive privilege by turning over a legal memorandum prepared by outside tax counsel. The [accountants have] taken the position that their review of the memorandum is "necessary" to complete their Sarbox internal control review. We have been informed that our failure to waive will result in the firm not issuing a clean opinion in connection with our 10K. The firm has cited litigation as support for its position.”

.....

“Auditors are asking for privileged information in connection with reviewing the company's accrual of potential or contingent liabilities; opening the door even before investigations start. Need accountant client privilege in addition to attorney client privilege.”

.....

“Where we see the most potential for privilege erosion is during our regular interactions with our external auditors who are asking for more and more information impinging on attorney/client privilege...”

.....

“Privilege should be maintained inviolate, and pressure brought to force waiver should be prevented. If a company chooses to waive the privilege it should be purely voluntary and not coerced.”

.....

“I believe the issue of government supported waiver of attorney-client privilege and work-product is one of the most critical issues facing in-house companies, and, indeed, companies, today. Waivers will cause non-lawyers to avoid consulting with lawyers because to do so would expose the company to civil and/or criminal prosecution. The net result will be to reduce the effectiveness of counsel, particularly in-house counsel, and, ultimately, increased violations of regulations and rules.”

Outside counsel:

Two responses in particular to the long-answer questions in the outside counsel survey are discursive and thoughtful, and merit reproduction in their entirety:

“My practice focuses exclusively on environmental crimes cases most always being conducted out of the Environmental Crimes Section at the DOJ, an office I used to head. For many years now, dating back to the end of the Bush I administration the Section has become increasingly aggressive in demanding a waiver of the privilege, most always excluding materials on strategy, direct advice to the client and mental impressions of the lawyers. Everything else must be turned over. Sometimes explicitly, more often subtly it is expressed that the waiver is a condition for even entering into plea negotiations. In no case have I ever felt that the client received any benefit for the waiver (or for that matter overall cooperation), rather it had evolved over time to be an expectation that the client has to waive. More to the point, any claim of privilege or refusal to waive implies that something is being hidden from the government and that before a case can be concluded, the government must have that information even where it duplicates , for instance, information the government already has in its possession through the grand jury or otherwise. It has become so prevalent as to be casual. To fail to waive is to impede, it is said, often with the suggestion that a decision not to waive is to obstruct. I have been on many panels on this subject and I always hear the gov't representatives describe their request in sterile tones as if there were only infrequent demands for a waiver and then only when there was no other way for the government to obtain the evidence in counsel's possession. Something is missing in the discussion. The give and take with line prosecutors never sounds like the supervisor's view of how and when the demand for waiver takes place. What's more invidious in my view is how the concept of waiver/cooperation has made any suggestion or discussion of the concept of privilege a ‘dirty word.’ Prosecutors act as if a claim of privilege were an implement of the crime itself or a legal concept without any historical or important basis in our jurisprudential system. To claim a privilege is to force the government to work harder, they want a short cut. And yet, ironically, while I have never felt a client received any credit for waiving, I have also never felt that the material the government obtained from a waiver served any purpose. This has led me to conclude, it is not the actual material the government wants, it simply that the government wants to obtain waiver per se to be able to claim a thorough investigation.”

.....

“I was a federal prosecutor for 16 years, in the EDNY (6 years), District of Arizona (2.5 years) and NDCA (7 years) (where I was the Chief of the Criminal Division and the US Attorney (interim appointment) for the last five of those years). I have been in private practice for the past 3 years.

Several US Attorneys’ Offices were historically aggressive in demanding waivers, and that practice has become more prevalent, along with demands that companies fire employees who decline to talk to government investigators or who the government believes may have done wrong, even if those employees have not been indicted. The demands from some US Attorneys’ Offices have sometimes required an immediate response, without giving the company time to evaluate the demand or distinguish among different documents. For example, one US Attorney's Office accused a client of failing to cooperate because it spent 2 weeks reviewing the documents that would be the subject of the waiver.

Even more troubling, however, is the lack of consideration that government prosecutors have provided to companies that waive privileges. Unlike the Antitrust Division, which has a history of granting amnesty to those companies that waive the privilege and otherwise cooperate, some US Attorneys’ Offices demand waivers, demand that companies force executives and employees to be interviewed by the government on pain of termination, and suggest that the company should not pay the legal fees of those employees or officers (on pain of indictment of the company).

These tactics are intended to deprive employees of top legal representation and cause employees to resent the corporation for ‘abandoning’ them, both attempts by the government to convince those employees to

provide damning information about others in the company. While truthful cooperation is in the government's interest, several US Attorneys' Offices have resorted to making false statements to counsel for individual employees and mischaracterizing companies' cooperation in an effort to extract guilty pleas from individuals and from companies.

In addition, some prosecutors, including prosecutors at Main Justice in Washington, D.C., have demanded that companies retain separate 'independent' counsel to conduct internal investigations and turn the results of those investigations over to the government. In my experience, our client declined that demand, recognizing the client might incur the wrath of the prosecutor, because it was unnecessary. Such demands essentially require the companies to conduct the investigation for the government, turn over the results, and then agree to punitive measures for the company.

Finally, prosecutors recognize the difficult position that companies are in when they face criminal prosecution, because of negative public and shareholder reaction and because of possible government debarment. Some prosecutors exploit that fear to obtain information and then use it against the companies to extract unnecessary corporate guilty pleas or deferred prosecution agreements. Prosecutors' primary goal should be to indict individuals who commit crimes; in my experience, prosecutors have failed to give adequate weight to the factors identified in the Thompson memo and have disregarded mitigating factors when the companies do not accede to the prosecutors' version of events."

Other responses by outside counsel follow:

"Environmental enforcement case, handled by DOJ Environmental Crimes Section (ECS) and U.S. Atty. DOJ ECS lawyer made clear that favorable disposition (misdemeanor Water Act and diversion of felony hazardous waste charges) would not occur absent waiver. Produced approximately 80 typed interviews and notes. At other times in the litigation, was suggested that company terminate funding of counsel fees for employees (despite company bylaws authorizing). Demanded that company withdraw from all joint defense agreements in settlement agreement, despite pendency of continuing parallel civil litigation.

Environmental prosecution under Clean Water Act; U.S. Attorney and staff made clear that government decision to prosecute, despite company general cooperation and violation conduct caused by employee contrary to explicit company policy, hinged on company decision not to waive privilege. Govt immunized employee who committed violation then used him against company that had informed employee that pollution violations were contrary to company policy."

.....

"Typical situation: environmental crimes investigation in which the company is invariably expected to turn over its internal investigation. Although DOJ lawyers give lip service to the proposition that waiver is not required to get Thompson Memo cooperation credit, they invariably asked for the information (or the client knew they would invariably ask for the information) in such a manner as to make it plain they would not consider any company that did not waive to be a 'good corporate citizen' deserving of consideration for a charging decision less than 'the most serious readily provable offense.' In fact DOJ and USAO lawyers say the only way they are authorized under DOJ policy to charge less than the most serious readily provable offense is if the company shows it comes within the mitigating categories in the Thompson memo, and invariably waiver of work product and attorney client protections are discussed."

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“For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company. This is true for inside counsel as well as outside counsel. In-house counsel should probably periodically issue a blanket warning to senior executives that they should expect that, in the event of a future governmental investigation, any conversations that would otherwise be viewed as privileged will likely be disclosed to the government. For outside counsel coming in to perform an investigation, we do so now in the expectation that our client will instruct us to turn over all of our materials to the government. We are, as a consequence, also fair game for testimony in class action and other civil cases brought by shareholders. Public companies currently have little choice in this matter and it is likely, at least in my opinion, that executives are beginning to realize that they cannot bring difficult problems to their counsel and receive their advice for fear that advice will be disclosed and decisions will later be second-guessed by the government.”

.....

“The AUSA wrote a letter to the company's counsel explicitly stating that whether the company receives any credit for cooperation would be determined by whether it had ‘fully’ met the factors set forth in the Thompson Memo, including the company's willingness to make a firm commitment to provide the government prompt access to all ‘potentially relevant information, including information protected by the attorney-client privilege and work product privilege.’

Shortly thereafter, and even though the company waived privilege and work product with respect to the subject matter of the investigation, the prosecutor complained of a lack of cooperation, and demanded that the parent company’s General Counsel, Audit Committee Chairman and CEO meet with him personally so that they could respond directly to his demands. Surprisingly, the company acceded to this request and there were one or more meetings at which the General Counsel (and, I believe) other top executives were lectured by the AUSA in a threatening manner.

As he realized that these pressure tactics were actually working, the AUSA continued to make escalating demands, including a series of demands for virtually unlimited waiver of the attorney-client privilege. When the company's outside counsel pointed out that the company had in fact complied with the Thompson Memo by providing, inter alia, the facts, the identity of witnesses, the documents, voluntary presentations on various issues and even limited waivers of attorney-client privilege, the AUSA apparently concluded that this attorney was an obstructionist and not cooperating.”

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“When we assert privilege with regard to an independent counsel investigation report, records and recommendations, the government (in my case state attorneys general and state departments of insurance) tells us that we are being uncooperative and unreasonable and that we are the only person who has received such a subpoena that is withholding this kind of information. The state also requests information on the process our client followed to prepare its answers to other questions in the subpoena, including inquiries and analysis done by outside and inside counsel. We have also resisted that (on work product and other grounds) and received the same reply that we are the most unreasonable, uncooperative person in our industry, and that if we want to save the time and money of the government's investigation then we should cooperate.”

.....

“The Department of Justice and the CFTC have extorted the energy industry into waiving privileges and paying huge unjustified settlements for "false reporting" trade data to the trade publications.”

.....

“While guidelines for various agency voluntary disclosure programs may permit the assertion of privileges, in reality, agents who investigate apparent misconduct, those administering the disclosure programs and government lawyers who evaluate the issue that is the subject of the disclosure clearly expect waiver as a matter of course. Assertions of privilege, in such circumstances, are usually met with raised eyebrows and "tisk-tisks" rather than by direct threats or explicit statements of unfavorable treatment. Corporate clients, in particular, quickly get the message from the regulators and investigators and elect to waive the privilege in expectation favorable treatment in agency and prosecution decision making. The most common privileged material provided to government investigators and lawyers are interview memoranda prepared by counsel.”

.....

“Government suspension and debarment and exclusion officials routinely demand that companies disclose internal investigations, including notes, in order to be deemed ‘responsible’ contractors and receive Federal contracts. Also, Congressional investigators routinely request such waivers. I have not had a serious issue with the Civil Division of the Justice Department. I routinely get this request from Assistant US Attorneys when they are conducting grand jury investigations.”

.....

“The government now expects a waiver as their inherent right. In return, almost no credit is given.”

.....

“In situations where the government is aware that an investigation has occurred, it has been indicated directly and indirectly that they need all of the gathered information to make a proper assessment otherwise they view any claims of cooperation or truthfulness unacceptable.”

.....

“We generally advise clients to be prepared to waive certain privileges when the results of a preliminary investigation uncover a potential violation of law that, absent an affirmative disclosure, could subject the client to increased penalties or a potential qui tam action.”

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“AUSA stated that asserting the attorney-client privilege was inconsistent with cooperation.”

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“Corporate counsel are scared, and are the functional equivalent of AUSAs.”

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“Seems like the guidelines have bred a culture of arrogance in our US attorney's office since the late 1980s. Prosecutors seemed more human and reasonable before.”

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“The increase in pressure on companies to waive erodes the confidence some clients have in seeking advice from counsel who will then need to cooperate with the government.”

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“It seems the government has taken the stand that because they are the government the rules do not apply to them and can by force and intimidation take whatever they want.”

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(For further information on this survey and results, please contact Susan Hackett at hackett@acca.com, or Stephanie Martz at stephanie@nacdl.org.)