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CISC

March 22, 2006

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affair – Sentencing Guidelines Comment

Re: Comments on Proposed Amendments to the Sentencing Guidelines
Chapter Eight – Privilege Waiver
Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the Bar Association of San Francisco, representing 8,500 attorneys in the State of California, we write in response to the Commission's request for comments on the above-referenced Proposed Amendments, Chapter Eight, Privilege Waiver. In particular, we write in regard to the 2004 Amendment to the commentary regarding Section 8C2.5(g). This new commentary authorizes the government to require entities to waive the attorney-client and related work product protections in order to show 'thorough' cooperation with the government.

We have several concerns, all flowing from our strongly-held belief in the fundamental character of the lawyer's duty of confidentiality to the client. In California, this duty of confidentiality has been expressed for more than 130 years in near-absolute terms through California Business and Professions Code Section 6068(e), which states: "It is the duty of an attorney ... [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." There has only been one express exception to this statutory duty: a very recent amendment, effective July 1, 2004, to allow disclosure to prevent a criminal act reasonably likely to result in death or substantial bodily harm.

California has been extremely zealous in guarding and protecting client confidences and secrets. We believe that such protection is necessary for the client to obtain sound legal advice. Such advice can only come after the client has fully disclosed the facts of the case without fear that these facts might later be disclosed to adverse parties. Without such protection, we believe a client would be far more guarded in discussions with counsel. This would have a direct negative effect on the quality of the legal advice.

Good legal advice assists clients in increased compliance with the law. Full knowledge of the client's facts and issues enables counsel to guide the client through complex issues and thus stay within the confines of the law. Limited knowledge hampers counsel and may lead to inappropriate advice, with resulting damage to the client and harm to the society. Fear of eventual disclosure through erosion of the attorney-client privilege and related work product rules is likely to hamper candid discussions with counsel, limit effective internal investigations, and curtail effective internal audits and compliance initiatives.

One of the purposes of work product protection is to prevent the parties from borrowing the work, insights, and wits of their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Work product protection is a right of the attorney, not of the client. The attorney has an independent right to assert the protection of his or her own work product. *In re Grand Jury Proceeding (FMC Corp.)*, 604 F.2d 798, 801-02 (3d Cir. 1979). *In re Sealed Case*, 676 F.2d 793, 812, fn. 75 (D.C. Cir. 1982).

The sentence added in 2004 to the Commentary at Section 8C2.5(g) is capable of misapplication, particularly in light of policies adopted by the Department of Justice. As set forth in the Holder Memorandum, attorney-client privilege and work product protections are not protected. Instead, they are deemed to be "... necessary in order to provide timely and thorough discussion of all pertinent information known to the organization." Waivers of privilege have become the standard for measuring the adequacy of cooperation in charging decisions and sentencing arguments. This means that prosecutors force the accused to have the accused's attorneys, accountants, and investigators prepare cases for them instead of using prosecutors' own diligence in preparing cases. As stated in the Holder Memorandum, "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements." The hidden agenda behind this statement is the implied addition of the phrase "... and so we do not have to conduct such investigations ourselves."

The requirements that cooperation be both "timely" and "thorough" are also abused. The requirement of "timeliness" means that disclosure must begin "... essentially at the same time as the organization is officially notified of a criminal investigation." Sentencing Guidelines § 2.5(g), Comment 12. This can be self-defeating. For example, it takes time to conduct an investigation. If a criminal investigation has begun before the organization's own internal investigation has been completed, the information disclosed when the organization is notified of a criminal investigation may be incomplete or inaccurate and therefore misleading. "Thoroughness" requires "the disclosure of all pertinent information known by the organization." *Ibid*. However, an organization can disclose the substance of its knowledge without having to disclose attorney-client communications and without having to divulge the work product of its counsel. For example, an organization can disclose that John Jones falsified a bookkeeping entry that materially affected a financial statement without also having to disclose that the organization's attorney communicated that information to its board of directors.

We suggest that the sentencing guidelines should honor attorney-client confidentiality and the work product doctrine. The philosophy that ought to be reflected in the sentencing guidelines appears in the United States Attorneys' Manual at Title 9, § 9-13.200:

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect *bona fide* attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.

After all, when the Department of Justice represents federal employees, its own standards explicitly recognize the value of attorney-client confidentiality:

Attorneys employed by any component of the Department of Justice ... undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. ... Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3).

The sentencing guidelines should honor that attitude when addressing issues of privilege for the accused. It should be unethical for a prosecutorial agency to demand that an accused waive attorney-client confidentiality or work product protection on threat of increased culpability scores. Whether the accused is an individual or a corporation, he, she, or it should be entitled as a matter of right to protection of the confidentiality of attorney-client

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The sentencing guidelines ~~should affirmatively state that:~~

1. Waiver of the confidentiality of attorney-client communications is not a prerequisite to a reduction in culpability score, without exception.
2. If the cooperation of the accused is timely and thorough, the refusal of the accused to waive privileges or to disclose otherwise privileged information is irrelevant.
3. Disclosure "... of all pertinent information ..." should be modified to say "of all non-privileged, pertinent information. ..."
4. If counsel for the accused asserts protection of the work product doctrine, that assertion will not affect the culpability score of the accused.

We believe that these amendments are consistent with those proposed by the American Bar Association in the submission to the Commission dated November 15, 2005. Such amendments would accomplish three important goals in the protection of client confidentiality:

- Make clear that cooperation only requires the disclosure of non-privileged information and
- Eliminate the concept that waiver of attorney-client privilege and related work product protections is a factor in the determination of the client's 'thorough' cooperation with the government.

We appreciate this opportunity to present our views to the Commission.

Yours very truly,

Joan Mei Haratani

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