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United States Sentencing Commission

Thurgood Marshall Building

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Washington, D.C. 20002-0082

Re: Comments on the Waiver Language of Application Note 12 of the Commentary to Section 8C2.5(g) of the *Organizational Guidelines*

Dear Judge Hinojosa and Members of the Commission:

We thank the Commission for taking time to review the November 2004 amendment to the Commentary to Section 8C2.5(g) of the *Organizational Guidelines* and for inviting public comment on this language. All members of the legal profession, including law faculties and students, have a great deal at stake with respect to measures pertaining to the attorney-client privilege. We recognize that the government has legitimate reasons to request information to ensure that corporations and other organizations comply with the law, and we understand that prosecutors must leverage resources to address the widespread improprieties that have occurred in recent years. However, exerting virtually irresistible pressure on entities to relinquish attorney-client and work product protections is unfair to both organizations and their human constituents. Because the waiver language of Application Note 12 invites this practice,¹ we urge the

¹ This is particularly evident when the waiver language of Application Note 12 of the Commentary to § 8C2.5(g) is read in conjunction with relevant Department of Justice (DOJ) policies. See Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components, United States Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00161.htm. See U.S. Department of Justice, *Federal Prosecution of Business Organizations*, in Criminal Resource Manual No. 162 (2003) (incorporating Thompson Memorandum), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm. See also Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All Component Heads and United States Attorneys, on Bringing Criminal Charges Against Corporations (June 16, 1999) (predecessor of Thompson Memorandum), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>, and Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components, United States Attorneys, on Waiver of Corporate Attorney-Client Privilege and Work Product Protection, (Oct. 21, 2005) (instructing United States Attorneys Offices to develop written waiver reviews processes), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

Commission to amend this portion of the Commentary.² In its place we propose a specific provision stating that waiver of attorney-client and work product protections should not be a factor in determining an entity's "cooperation," except in those rare instances in which the government demonstrates that the entity has inappropriately invoked these safeguards to shield specific, otherwise unprivileged, factual material.

In addition to the compelling arguments offered by the American Bar Association and others who previously have commented on the adverse impact of the November 2004 amendment of Application Note 12, we request the Commission to consider three specific points in support of our proposal: (1) As currently written, the waiver language invites unfair prosecutorial tactics inconsistent with the special responsibilities of government lawyers to seek justice under law; (2) it threatens to compromise constitutional rights of corporate constituents, particularly individuals who participate in corporate internal investigations; and (3) it undermines the legitimacy of our adversarial system.

I. THE CURRENT WAIVER LANGUAGE INVITES UNFAIR CONDUCT AT ODDS WITH THE SPECIAL RESPONSIBILITY OF GOVERNMENT COUNSEL TO SEEK JUSTICE

By empowering prosecutors to label an entity "uncooperative" for refusing to waive attorney-client and work product protections, the waiver language of Application Note 12 allows government lawyers to require corporations and other entities to do what the government itself would not do – relinquish safeguards critical to our adversarial system. At a very early point in their legal education students discover that zeal in representing clients is both a professional virtue and an ethical obligation. They learn that diligence is critical to good lawyering and that a careful lawyer searches out all potentially significant information. While, as noted below, government attorneys have a special obligation to work for justice, it is unrealistic to expect the dedicated, conscientious lawyers who represent the United States to refrain from seeking all material available to them within the bounds of ethics and the law. As currently written, the waiver language of Application Note 12 provides prosecutors with a means of pressuring corporations and other entities to jettison attorney-client and work product protections, thereby affording the government essentially unfettered access to the confidential communications of "cooperating" entities. Consequently, this language unfairly and unnecessarily encourages prosecutorial conduct that undermines attorney-client and work product protections. As recent incidents have shown, overly aggressive prosecutorial tactics can have disastrous consequences. *See, e.g., Editorial,*

² In expressing this view, we join with the American Bar Association, the Coalition to Preserve the Attorney-Client Privilege, former senior DOJ officials, and others who have requested the Commission to delete or revise Application Note 12 on various prior occasions.

Another Blown Case?, The Washington Post at A14 (Mar. 20, 2006) (discussing troubled prosecutions of alleged terrorists). At a minimum, in the corporate context coerced waivers are likely to chill the full and frank attorney-client communications essential to achieving justice in an adversarial system.

Government attorneys, no less than lawyers in private practice, rely on the protections of the attorney-client privilege and the work product doctrine in representing their client and its constituents. Permitting prosecutors unilaterally to coerce entities to abandon these important protections unfairly tilts the balance against organizational defendants and forces corporate constituents into the proverbial space between a rock and a hard place. If an entity's constituents avoid requesting legal advice, the corporation may violate the law or fail to correct an existing problem. If they do seek out the organization's lawyers, at some point everything they say in connection with a problem may end up in the hands of prosecutors. Forcing defendant entities and their constituents into these binds is inconsistent with the obligation of government attorneys first and foremost to seek justice.

While all members of the bar have a duty to uphold justice, this responsibility is especially important for those who represent the federal government. In *Berger v. United States*, 295 U.S. 78 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960), the United States Supreme Court recognized the special obligation of government attorneys to ensure that justice is done, particularly in criminal proceedings. In the Court's words:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88.

The Supreme Court clearly affirmed the vitality of corporate attorney-client privilege and work product protections in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Any measure that entitles law enforcement personnel to impose a high cost on the exercise of these protections threatens to strike the very kind of foul blow the Court condemned in *Berger*. We urge the Commission to amend the waiver language of Application Note 12 because we believe that it invites this kind of prosecutorial overreaching.

II. EMPOWERING PROSECUTORS TO PRESSURE ENTITIES TO WAIVE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS THREATENS TO COMPROMISE IMPORTANT INDIVIDUAL RIGHTS

In a pivotal scene in Arthur Miller's classic play *The Crucible*, the judge presiding over the Salem witchcraft trials declares: "The pure in heart need no lawyers." Arthur Miller, *The Crucible* at 93 (New York: Penguin Books 1973). Even so, when protagonist John Proctor rises to present evidence on behalf of his wife and others accused of witchcraft, Reverend Hale begs the court, "In God's name, sir, stop here; send him home and let him come again with a lawyer." *Id.* at 99. The judge, however, refuses to suspend the proceedings to allow Proctor to obtain counsel. Ultimately, the accused and Proctor himself are found guilty of working for the devil and sentenced to death. Nearly three hundred years after the Salem witchcraft trials, few Americans would be so foolish as to believe that even the purest among us have no need for lawyers. As a society, we hold the right to counsel in such high regard that we have incorporated it into our Constitution, and we require law enforcement authorities to inform individuals taken into custody of this safeguard. The right, however, has little meaning if clients cannot count on the confidentiality of their communications with counsel.

Coerced waivers of the corporate attorney-client privilege have far-reaching impacts for individuals. In an internal corporate investigation, for example, an employee has no right to counsel, and refusal to answer questions posed by investigators may result in termination. Consequently, employees face intense pressure to talk with internal investigators, even though they may inadvertently lose the protection of the Fifth Amendment when they do so. See Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Col. Bus. L. Rev. 859, 907-09; David M. Zornow and Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 157-58 (2000). See generally Joseph F. Coyne and Charles F. Barker, *Employees' Rights and Duties During an Internal Investigation*, in *Internal Corporate Investigations* at 169, 173 (Brad D. Brian, et al. eds., 2d ed. 2002).

For many years, although ethical investigators ordinarily informed interviewees that they represented the entity and that the entity could choose to disclose any information provided by the employee, corporate waivers of attorney-client and work product protections were rare. See Zornow and Krakaur, *supra*, at 153. In the current environment, however, disclosure is much more likely. By making waiver of attorney-client and work product protections a *quid pro quo* for recognition of corporate "cooperation," prosecutors can pressure entities to surrender these safeguards, thereby accomplishing indirectly what they could not do directly. When an organization discloses the fruits of an internal investigation to the government, prosecutors benefit from both the loyalty employees have to their employers and the threat that employees who refuse to participate in an investigation will lose their jobs. See Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?*,

23 Ind. L. Rev. 1, 11-13 (1990); Duggin, *supra* at 907-12. As many of those who oppose the practice have recognized, in conditioning recognition of corporate cooperation on attorney-client privilege and work product waivers, the government effectively “deputizes” corporate counsel to exploit the loyalty and fear of employees and then turn over the fruits of this labor to law enforcement personnel. N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, 19 Wash. Lawyer No. 7, 32, 36 (Mar. 2005); Zornow and Krakaur, *supra*, at 156-57.

The metamorphosis of corporate counsel into government agents is particularly dangerous for those employees who are least legally sophisticated and therefore unlikely to realize that responding to questions from corporate attorneys conducting an internal investigation may waive constitutional protections. *See, e.g.*, Tate, *supra*, at 5, 68; Duggin, *supra*, at 910. Ironically, even employees who regularly deal with corporate attorneys may be at risk because longstanding personal relationships may blind them to the ethical obligation of corporate counsel to represent the interests of the entity over all others. *See, e.g.*, *id.* at 910-11 (even savvy managers may respond on the basis of personal connections rather than consideration of attorney obligations); Geoffrey Hazard and William Hodes, *The Law of Lawyering* § 17.13, at 17-53 (2003) (corporate officials “may incorrectly assume that the entity lawyer is also ‘their’ lawyer”). The Commentary to the *Organizational Sentencing Guidelines* should not invite prosecutors to take unfair advantage of such circumstances.

III. ROUTINE PRESSURE ON ENTITIES TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE UNDERMINES THE LEGITIMACY OF OUR ADVERSARIAL SYSTEM

Our adversarial system rests on the notion that truth can be distilled and justice meted out in the structured battle that takes place in the courtroom – or in the preliminary encounters that so often lead parties to resolve their differences prior to trial. Lawyers keep faith with their clients by holding the matters they share in confidence. While ethical rules forbid lawyers to assist clients in ongoing illegal activity, as a society we have come to rely on the understanding that a client can disclose almost anything to his or her lawyer knowing that such a confidence will remain inviolate. Under Model Rule 1.13 and its analogues, a lawyer who represents an organization owes allegiance to the entity rather than to any of its constituents. However, while a lawyer’s ultimate duty is to the entity itself, the core relationships exist with living, breathing human beings. Constituents must have at least some level of trust that communications with corporate counsel are likely to remain confidential, or they will neither seek legal advice on behalf of the entity nor share confidences pertaining to its business.

When a corporate agent acts against the interests of an entity, corporate counsel have a duty to report the transgression – to the entity’s highest authority if necessary – and to advise the entity to correct any corporate legal violations resulting from the agent’s misconduct. On occasion, corporate decision makers may determine that they should or must disclose the matter to

government authorities and, in so doing, reveal otherwise privileged information. It is unjust, however, to refashion our legal system – formally or informally – to give prosecutors an unconstrained right to coerce such disclosures. Unfortunately, this is one of the unintended consequences of the waiver language of Application Note 12. This language, like any government measure that weakens the safeguards that keep the power of the state in balance, undermines the basic legitimacy of our adversarial system.

As law teachers, one of our most important tasks is to help our students understand that justice is not simply an abstract concept, but the concrete goal of our adversarial system. Achieving justice in an adversarial framework requires lawyers to represent their clients zealously within the bounds of law and professional ethics. The ability to hold client confidences inviolate in the absence of deliberate attempts to implicate counsel in illegal conduct is critical to the accomplishment of this objective. As the Supreme Court noted in *Upjohn*, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some certainty whether particular discussions will be protected.” 449 U.S. at 393. Similarly, where work product protections are uncertain, “much of what is now put down in writing [will] remain unwritten. . . [and] “[i]nefficiency, unfairness and sharp practices [will] inevitably develop in the giving of legal advice and in the preparation of cases for trial.” *Id.* at 398 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). Ultimately, “[t]he effect on the legal profession [will] be demoralizing. And the interests of the clients and the cause of justice [will] be poorly served.” *Id.* (quoting 329 U.S. at 511). By empowering prosecutors to deprive corporate decision makers of a real choice whether or not to relinquish attorney-client and work product protections, the waiver language of Application Note 12 inappropriately and unwisely tilts the scales in favor of securing convictions rather than attaining justice.

IV. PROPOSED REVISION OF APPLICATION NOTE 12

In its current form, the waiver language of Application Note 12 sweeps far too broadly. Accordingly, we urge the Commission to amend it. We respectfully propose the following revision:

Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization the government demonstrates with particularity that a defendant has inappropriately attempted to shield specific factual material under a claim of privilege or work product protection and that reasonable efforts to obtain knowledge through alternative means have proved unavailing.

The working premise of the adversary system is that each side builds its own case. As Justice Jackson wrote in his famous concurrence in *Hickman v. Taylor*, members of a learned profession should not be permitted to perform their functions "on wits borrowed from the adversary." 329 U.S. at 516. The above language safeguards the attorney-client privilege and, unlike the current formulation, strikes a balance between giving prosecutors unconstrained discretion to decide when a waiver is "necessary" and affording entity lawyers *carte blanche* to invoke protections.

In sum, our adversarial system of justice cannot operate fairly without safeguards designed to keep the playing field level. Providing prosecutors with leverage to coerce organizations to surrender attorney-client and work product protections under the guise of facilitating "cooperation" upsets the critical balance. When these protections lose their vitality, justice is unlikely to be done. We therefore respectfully request the Commission to amend the waiver language of Application Note 12 to the Commentary to Section 8C2.5(g) of the Organizational Sentencing Guidelines.

Respectfully submitted,

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