



**Testimony of Kent Wicker
On behalf of
The National Association of Criminal Defense Lawyers**

**UNITED STATES SENTENCING COMMISSION
March 15, 2006
PROPOSED AMENDMENT OF COMMENTARY IN SECTION 8C2.5 OF THE
FEDERAL SENTENCING GUIDELINES REGARDING WAIVER OF
ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE**

Good afternoon. My name is Kent Wicker, and I practice white collar criminal defense and business litigation in Louisville, Kentucky. Before I went back into private practice, I was an assistant United States Attorney in the Western District of Kentucky, where I prosecuted white collar and public corruption cases. During part of that time I served as Criminal Division Chief and, later, First Assistant U.S. Attorney. I also teach Corporate and White Collar Crime at the Brandeis School of Law in Louisville.

I am here on behalf of the National Association of Criminal Defense Lawyers, a nearly 50-year-old organization of more than 13,000 criminal defense lawyers throughout the country. I want to present to you today the views of my organization, as well as the views of our coalition partners that feel as strongly about the issue of attorney-client privilege waiver as we do.

As a white collar prosecutor, and as the supervisor of other white collar prosecutors, I directed the prosecution of many cases in which corporations were or could have been targets. I also directed many cases in which a business executive was being prosecuted for activity he believed to be taken on behalf of his company.

As a prosecutor, I don't know of any case in which we required a corporation to waive its attorney-client privilege as a condition to receiving consideration for acceptance of responsibility. We believed that if a company admitted what it did was wrong and expressed contrition for its actions, it met the standard the sentencing guidelines required under Sections 8.C2.5(g) and 3E1.1. We treated corporations the same way we treated

individuals. If an individual pleaded guilty and admitted what he did was wrong, the Sentencing Guidelines didn't require him to waive his attorney-client privilege or to testify against any other participant merely to earn acceptance of responsibility points.¹ In sum, we did not see any need to impose a higher standard on a corporation than we did on an individual.

To the contrary, we believed the attorney-client privilege was an interest worth protecting. As desperately as I wanted to get a conviction, I never required a defendant to give up his right to an attorney who would protect his rights and protect his confidences. In fact, the better represented the defendant on the other side, the more confident I felt that justice would be done in the case. Ensuring a good, confidential relationship between an attorney and his client is part of ensuring not only a meaningful right to counsel, but a good result. As a fellow white-collar defense lawyer and former prosecutor told members of the House Judiciary Committee just last week, an unreliable attorney-client relationship means that corporate employees will be less forthcoming, an internal investigation will be less reliable, and both prosecutors and defense lawyers will be "frustrate[ed] in their search for truth."²

When I left the U.S. Attorney's Office in December 2002, I quickly learned that the landscape was changing for the attorney-client privilege. In many districts in which I found myself practicing as a defense lawyer, it was becoming more and more common for the prosecutor to invite himself into a position in the middle of the attorney-client relationship.

It's not easy giving a client accused of corporate wrongdoing the kind of defense he deserves, and the kind of defense our adversary system requires. The excesses of the Enron years can make juries less disposed to put the burden of proof on the prosecution. These are expensive cases to defend, and the government has substantially more resources to bring to bear than a defendant does. But without question, the demands of prosecutors on corporations to waive the attorney-client privilege present the biggest challenge to defending a white collar case, bar none.

In the corporate context, this prosecutorial intervention comes in two scenarios. One is when a prosecutor demands that a company give up the product of an internal investigation undertaken after a problem was detected, including interviews with employees who may have criminal exposure. The other is when a prosecutor demands that a company disclose the advice that its attorneys gave its executives before or during the activity in question.

¹ See U.S.S.G. §3E1.1, Application Note 1(a) (A defendant is not required to admit relevant conduct beyond the offense of conviction to receive credit for acceptance of responsibility).

² Testimony of William M. Sullivan Jr., Before the Committee on the Judiciary, United States House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, March 7, 2005.

Let me give you some real-life examples from my own practice. I was asked to represent the officer of a company in a federal investigation. Attorneys for the company and other officers exchanged drafts of a joint defense agreement and were ready to sign it -- until the company's lawyers met with the prosecution. After meeting with the prosecutors, the company's lawyers refused to enter into a joint defense agreement, which would have preserved the privilege among the employees and their employer. Instead, as a necessary component of "cooperation," the company waived the privilege, and also refused to let us interview company employees and made it difficult for counsel for the officers to obtain the documents. The attorneys for the company explained that they were prevented from cooperating with us because they were afraid they wouldn't be able to avoid indictment, *or to obtain acceptance of responsibility points if they were indicted*. The prosecutors also complained about the company's decision to advance its officers' legal fees, even though its bylaws clearly required it.

Because of the government's insistence on annihilating the privilege, my client and the other individuals were unable to forge a joint defense agreement, and consequently, unable to obtain the documents and testimony they needed to defend themselves. It is not enough that our clients would be entitled to discovery under the Rules of Criminal Procedure *after* they were charged. For many defendants, like many of us, the harm done to our careers and our reputations would not be repaired by a not guilty verdict. In a white collar case, it is essential to be able to prepare a defense at a time when it is still possible to affect a prosecutor's charging decision. Our ability to support a defense was impeded by the prosecutors' insistence that the company waive the privilege.

In another example, my client was a general manager of a product line for a multinational company accused of price-fixing. In early talks with the company, the Department of Justice relied on the commentary in the Sentencing Guidelines to demand waiver of the company's attorney-client privilege. My client was compelled to submit to an interview by company counsel, on pain of discharge if he refused. At the same time, the company's lawyers made it clear to us that they would give the government the product of the interview.

This compelled waiver of the attorney-client privilege forced my client to give up the protection at the heart of our criminal justice system: The privilege under the Fifth Amendment against self-incrimination. It is not enough to say he could have just given up his job and retained his Fifth Amendment rights. This is a real person, with a real family to support. The Supreme Court has prevented government employees from being compelled to make this choice in *Garrity* and similar cases, but it has not granted the same protections to private employees.³

I do not believe it was the intent of the Sentencing Commission to make it more difficult for the target of an investigation to assert his Fifth Amendment rights. But that is the effect of the erosion of the attorney-client privilege in the corporate context, and the Guidelines commentary has contributed to it.

³ See *Garrity v. New Jersey*, 385 U.S. 493 (1967).

I also do not believe that the Sentencing Commission sought to discourage executives in regulated industries from seeking legal advice. I think most of us agree that involving lawyers in the decision-making process is a good thing. In fact, an effective compliance program often requires seeking legal advice at appropriate times. Yet if an executive cannot be sure that his confidences will be protected by his lawyer, he will be considerably less likely to seek the advice in the first place.

Finally, I do not believe the Commission sought to enter the debate about joint defense agreements, or to limit the ability of defense lawyers to obtain the evidence needed to defend their clients. But this effect is another one of the unfortunate consequences of the Commission's amendments to the Guidelines.

The examples from my practice are not isolated anecdotes. In the survey conducted by the National Association of Criminal Defense Counsel and the Association of Corporate Counsel last month, the overwhelming majority of respondents indicated that they have experienced these kinds of compelled waivers in their cases. As one respondent wrote,

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 and should not happen in America.

More and more, in my own experience and in the experience of my fellow practitioners, prosecutors are specifically citing the Guidelines as the reason that the corporation must waive the privilege for its employees. Our respondents have told us that among outside counsel, the Sentencing Guidelines were the second-most cited reason for requesting the waiver, behind only the Thompson and Holder memoranda.

The Commission's recent amendments to the Sentencing Guidelines are not the only reason for the erosion of the privilege. The Thompson Memo and other Justice Department policy pronouncements certainly carry great responsibility for the situation. But the Guidelines give wind to the sails of prosecutors who want to compel companies to waive its privilege. The difference is that before the amendments, defense attorneys and corporate counsel could always look to impartial judges to decide whether the corporation's conduct evidenced acceptance of responsibility. A company which pleaded guilty, gave an accounting of its conduct and expressed remorse would be entitled to a reduction for acceptance of responsibility, just like an individual who did the same things.

Now the landscape is different. Now it is not merely a department policy, but the Guidelines themselves that are telling judges that the company which has not waived its privilege has not accepted responsibility. This fact has not been lost on prosecutors, who use the specter of judges who are forced to follow the commentary as a reason to force company counsel to waive the privilege.

To argue that the Guidelines have had no effect, or a negligible one, on the current climate regarding privilege is to argue against the very relevance of the Organizational Guidelines. In 2003, the Ad Hoc Advisory Group on the Organizational Guidelines concluded that an important role of the organizational guidelines was not just punishment, but “preventing and detecting violations of law”⁴—the very words used in Guideline 8B2.1. Because investigating a corporation is a complex process with many moving parts, the Advisory Group felt that the Organizational Guidelines needed to keep pace with “more detailed and sophisticated criteria for identifying organizational law compliance programs that warrant favorable organizational treatment.” The Advisory Group therefore proposed more detailed corporate governance standards for determining effective compliance programs. In doing this, the Advisory Group recognized that the Organizational Guidelines have a measurable impact on pre-offense conduct. Indeed, any criminal defense lawyer will tell you that the Guidelines are a looming omnipresence at the beginning and middle of a criminal case, as well as the end. And a criminal defense lawyer who is advising the board of a corporation whether to waive privilege would do well (to say the least) to point out the commentary in the Guidelines.

To summarize, the effects that the erosion of privilege works on the adversary system are as serious as the effects on individuals. Because of the erosion of the privilege:

1. Individuals are compelled to waive their rights under the Fifth Amendment;
2. Companies are compelled to stand in the way of their employees getting access to documents and interviews necessary to their defense;
3. Individuals are discouraged from seeking legal advice to avoid compliance problems, and
4. Individuals cannot be candid with outside counsel conducting internal investigations.

NACDL, along with its coalition partners, recommends that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of “all pertinent *non-privileged* information known to the organization,” (2) delete the existing Commentary language “unless such waiver is necessary . . . , and (3) make the

⁴ Report of the *Ad Hoc* Advisory Group on the Organizational Guidelines, October 7, 2003, “Executive Summary.”

other wording changes in the Commentary that are recommended by the American Bar Association.

We are beginning to see signs that the Justice Department is becoming more sensitive to the ramifications of its current practices regarding privilege – whether or not those practices are officially sanctioned, or even recognized,

Conclusion

We defense lawyers will continue to do battle on this issue for our clients in every case in which it arises. We will continue to assert and to protect the attorney-client privilege on their behalf, just as we do the other important rights that our constitutional system of government gives to them. The beauty of our adversary system permits these battles, and indeed requires them. We ask only that the Sentencing Commission recognize that the attorney-client privilege is not a luxury, or a bargaining chip, but an important right for our clients and the system itself.