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AUTHOR: Fandel, K. Michael

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Recent Events May Put the Brakes on Government Requests for Privilege Waivers in the Context of Corporate Criminal Investigations

I. Introduction

In response to the crisis caused by the recent spate of corporate scandals,[1] on January 20, 2003, Deputy Attorney General Lawrence D. Thompson issued a policy memorandum directing officers of the Department of Justice ("DOJ") to change the manner in which corporate fraud investigations are conducted.[2] The now infamous memorandum, commonly referred to as the "Thompson Memo," created a list of nine factors that prosecutors must consider when determining whether to charge a corporation with a crime.[3] One such factor is the extent of the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client privilege and work product protection."[4] The memorandum has also undermined the privilege by calling for consideration of a corporation's support for "culpable" employees, including the company's payment of an employee's legal fees.[5] The government's increasing reliance upon privilege waivers has been called "a requiem marking the death of privilege in corporate criminal investigations,"[6] and has been severely criticized by legal scholars,[7] former government prosecutors,[8] and trade and business groups.[9]

Recent judicial decisions, legislative efforts, DOJ policy revisions, and other government programs may signal a reassessment of the value and wisdom of adhering to the policies announced in the Thompson Memo. This article will examine these recent responses to the government's increasing culture of waiver, and whether those responses indicate renewed and reinvigorated protection of the attorney-client privilege.

II. The Government's Reliance on the Principles Enumerated in the Thompson Memorandum has Resulted in a Culture of Waiver

2003 did not mark a sudden shift in the government's attitude toward the attorney-client privilege. The Thompson Memo supplanted a 1999 policy memorandum written by Deputy Attorney General Eric Holder.[10] The "Holder Memo" represented the first time DOJ embraced privilege waivers as a prosecution policy. However, the Holder Memo was broadly worded and left the determination of whether to request or consider a privilege waiver to the discretion of the federal prosecutor.[11] The Thompson Memo revised government policy by dramatically emphasizing the importance of cooperation, primarily in the form of privilege waivers.[12] The Memo also made consideration of these factors mandatory for all federal prosecutors.[13] Thereafter, the U.S. Sentencing Commission amended federal sentencing guidelines, further weakening the privilege. The Sentencing Commission's amendments supported DOJ's waiver policy by permitting, or in some cases requiring, consideration of privilege waivers when evaluating the extent of a corporation's cooperation for the purposes of criminal sentencing.[14]

The potential consequences of widespread use of privilege waivers are serious. Privilege waivers permit the government to partake of the fruits of a corporation's confidential internal investigation. Once the privilege is waived, any prior or subsequent

statements made by an employee during the course of an investigation become available to the government. This can become a very effective investigative tool, since employees being interviewed by their employer may not refuse to speak by invoking their Fifth Amendment right against self-incrimination. With the knowledge that a single indictment could signal the end of the corporation, a company's incentive to fully cooperate with a government investigation is immense. [15] Consequently, employers may force employees to choose between retaining their job and potentially divulging information to the government that it might not otherwise be entitled to obtain.[16]

A less obvious but potentially more sinister effect of the Thompson Memo arises in the context of attorneys' fees. In addition to using privilege waivers to assess cooperation, the Memo suggests that prosecutors should consider the corporation's advancement of attorneys' fees to employees when evaluating cooperation.[17] Implicit in this provision is the notion that providing legal advice to employees will impede the government's ability to investigate.[18] Taken to its logical conclusion, this policy eliminates the attorney-client privilege for individuals in the corporate context by cutting off funding for legal advice.[19]

These effects are not speculative. Evidence indicates that the government's increasing reliance on privilege waivers has resulted in an erosion of the attorney-client privilege, despite assertions to the contrary by government officials[20] and legal scholars.[21] In response to hearings held by the U.S. Sentencing Commission on privilege waivers, the Association of Corporate Counsel performed a survey of trade and industry groups.[22] The survey found that 75% of corporate counsel agreed or strongly agreed with the statement that a "culture of waiver" has evolved in which government agencies believe it is reasonable and appropriate to expect a company under investigation to broadly waive attorney-client privilege or work product protections.[23]

Furthermore, although the Holder and Thompson Memos indicate that privilege waivers are not a prerequisite to cooperation, only 13% of outside counsel perceive that waiver requests are made without any suggestion of positive or negative consequences that may flow from the corporation's response to the request.[24] In the majority of cases, the corporate counsel surveyed indicated that requests for privilege waivers are accompanied by either a direct statement that waiver is a condition precedent to cooperation or an indirect statement suggesting that waiver is encouraged and in the company's interest.[25] These figures demonstrate that, in practice, the government has made the routine use of privilege waivers too enticing (or hazardous) to forego.

With respect to employees targeted for investigation, nearly a quarter of all survey respondents reported government expectations or demands that the corporation 1) not advance legal fees or agree to reimburse the employee, 2) not enter into a joint defense agreement with the employee, 3) refuse to share documents with the employee, or 4) dismiss an employee who would not consent to an interview.[26] In light of the potential for abuse, not to mention the probable constitutional problems associated with depriving individuals of legal counsel, the frequency of these coercive demands has raised great concern among those who believe the ability to obtain counsel, and to communicate with counsel confidentially, serve a beneficial purpose in our system of justice. After much hue and cry over the culture of waiver, certain facets of government have begun to reevaluate the wisdom of privilege waivers. It appears the pendulum may be swinging back, at least to some degree, in favor of a robust attorney-client privilege.

III. Recent Signs of a Resurgence of the Attorney-Client Privilege

Despite the government's increasing reliance on privilege waivers when conducting corporate criminal investigations, that trend has recently shown signs of slowing. In particular, steps taken by the U.S. Sentencing Commission, DOJ, Congress and the Federal Courts suggest that the war over the attorney-client privilege is far from over.

A. U.S. Sentencing Commission Reconsiders Language Permitting Consideration of Privilege Waivers when Assessing Cooperation

In 2003, the Ad Hoc Advisory Group on Organizational Guidelines to the U.S. Sentencing Commission published a report recommending that a discussion of privilege waivers be added to the guidelines.[27] The proposed language indicated that waiver of the privilege "is not a prerequisite… unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[28] This commentary was ultimately added to the guidelines in 2004.

Less than one year later, the Commission issued a notice of proposed priorities for the upcoming year.[29] In response to the deluge of public comments regarding the waiver issue, the Commission decided to review the new commentary on attorney-client privilege and work product waiver for possible amendment or repeal.[30] Based on the responses garnered at a public meeting, the Commission decided to hold a full hearing on the issue of the amendments.[31] On March 15, 2006, former Acting Deputy Attorney General Robert McCallum testified in support of the new sentencing guidelines. Under questioning McCallum strenuously defended the government's use of privilege waivers, but admitted that DOJ would be amenable to new language in the guidelines making it clear that requests for waiver should be rare.[32]

The commission contemplated three alternatives. First, it could simply leave the amendments alone, without any additional changes. Second, it could remove the language that had been added to the commentary in 2004. Finally, it could amend the guidelines to include a statement that privilege waivers can never be considered as an element of cooperation. The latter interpretation, favored by the ABA, would have permanently eliminated a corporation's decision to waive attorney-client privilege as an element when assessing the extent of the organization's cooperation.

Ultimately the commission decided to remove the language from the sentencing guidelines.[33] The Commission stated that the purpose of the revision was to address the public comments and testimony it had received indicating that the language could be misinterpreted to encourage waivers.[34] Although the Commission did not adopt the sweeping language favored by the ABA, the change indicates that routine use of privilege waivers is disfavored. The broader implications of the revision was suggested by Commissioner Howell's statement during the hearing that DOJ policies, specifically the Thompson Memo, should be amended concurrently with the Sentencing Guidelines to reflect a better understanding of government policy.[35]

B. DOJ Institutes Waiver Review Process

In response to the increasing criticism of DOJ's application of the Thompson Memorandum, Acting Deputy Attorney General Robert McCallum drafted a new policy memorandum in 2005.[36] The "McCallum Memo" directed all U.S. Attorneys to establish a written waiver review process whereby federal prosecutors must obtain approval from the U.S. Attorney before seeking a waiver.[37] McCallum stated that the purpose of the waiver review system was "to ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the *Thompson Memorandum*…."[38] Implicit in this statement is the recognition that the Thompson Memo was, by itself, inadequate guidance for prosecutors. In his testimony to the U.S. Sentencing Commission, McCallum had alluded to the Memo's deficiency, stating, "the national standards for waiver requests have already been set in the Thompson memo *in terms of substance*.[39] (emphasis added). McCallum's statement indicates that, at best, the Thompson Memo properly discussed the substantive elements a prosecutor must contemplate before considering privilege waivers. However, the very existence of the McCallum Memo seems to acknowledge that DOJ's procedural process for requesting privilege waivers has been inadequate, resulting in the inappropriate exercise of prosecutorial discretion. Theoretically, this implicit admission should operate to relieve some of the pressure government is placing on the privilege because the formality of a written review process should discourage overzealous prosecutors from seeking a waiver.

Unfortunately, although the McCallum Memo represents DOJ's first step back from its assault on the privilege, in practical terms, any changes that result may be less significant than expected. The broad language used in the McCallum memo leaves the creation of a waiver review procedure to the discretion of each U.S. Attorney.[40] The Memo also recognizes that "[s]uch waiver review processes may vary from district to district (or component to component), so that each United States Attorney or component head retains [prosecutorial discretion]."[41] It gives U.S. Attorneys wide latitude to formulate a procedural process consistent with his or her own interpretation of prosecutorial discretion. Therefore, it is conceivable that a review process will be formed that is consistent with each U.S. Attorney's current practice. The broad discretionary character of the McCallum Memo's mandate is not likely, by itself, to create substantial restrictions on the use of privilege waivers.

Nevertheless, in the grander scheme, the McCallum Memo represents another step back towards a robust attorney-client privilege. Ultimately it signals that DOJ, as the primary party responsible for the erosion of the privilege, recognizes that there are limits to how far it may go in carrying out its corporate investigations.

C. Congress Weighs In

The policy shift towards a weakened attorney-client privilege has also raised eyebrows in Congress. On March 7, 2006, the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held hearings on DOJ's use of privilege waivers in corporate criminal prosecutions.[42] The witnesses at the hearing were largely

the same individuals who thereafter testified to the U.S. Sentencing Commission, including former Acting Deputy Attorney General McCallum.

The committee members voiced nearly unanimous concerns over the direction taken by the justice department on privilege waivers. In particular, several members took issue with McCallum's introductory remarks in which he suggested that the department's policy on waiver stemmed from the 2002 enactment of the Sarbanes-Oxley legislation.[43] One committee member questioned this conclusion, arguing that the legislation did not call for a change in the manner in which investigations are performed.[44] Another remarked that the methods of prosecution had changed so dramatically as a result of the corporate scandals that "in some ways we may have overreacted."[45] Other committee members raised a myriad of concerns,[46] directing the most difficult questions to McCallum as the representative of DOJ.

In one notable exchange, when questioned about the necessity of using privilege waivers instead of more traditional investigatory methods, McCallum defended the policy by pointing to the complexity of the recent spate of corporate scandals.[47] Rep. Delahunt rejected this response outright, arguing that complex fraud existed long before DOJ instituted its new policy of seeking privilege waivers.[48] Several committee members agreed, characterizing DOJ's approach as "the easy way to [investigate]."[49] In practical terms, the waiver policy permits the government to piggyback on the investigation performed by the corporation.[50]

In a positive sign, committee members suggested alternative investigatory approaches to the privilege waiver system. Addressing the possibility that the new corporate fraud reforms had overwhelmed the government's capacity to investigate effectively, several committee members suggested increasing the resources available to DOJ.[51] By increasing the resources available to prosecutors, the government could more effectively prosecute cases using traditional techniques, thereby eliminating the need to infringe upon the attorney-client privilege and all of the associated negative consequences.

Based on the apparent bi-partisan consensus of the committee, DOJ's policy on privilege waivers does not have broad support in Congress. Although no date has been set for additional hearings on the issue, it remains on the House Judiciary Committee's agenda. The matter has also been brought before the Senate Judiciary Committee, and has been postponed twice.[52] Although any further action will probably be delayed until after the mid-term elections in November 2006, the legislature's willingness to enter the debate is another sign that government attempts to marginalize the attorney-client privilege are diminishing.

D. *United States v. Stein*:[53] The Federal Judiciary Weighs in on the Thompson Memorandum

Following the unofficial rebukes of DOJ policy on privilege waivers by Congress and the U.S. Sentencing Commission, a federal court in New York took umbrage at the other major aspect of the Thompson Memo undermining attorney-client privilege.[54] As part of the government's criteria for analyzing the extent of a corporation's cooperation with an investigation, the Thompson Memo recommends evaluating the extent to which the corporation is protecting its culpable employees.[55] The Memo also provides

examples of uncooperative conduct by the corporation, including advancing attorney's fees to the employee, refusing to discharge the employee, and entering into a joint defense agreement with the employee.[56]

The collateral effect of these factors operates to undermine the attorney-client privilege even further. For example, as one critic of the Thompson Memo has noted, courts have characterized joint defense agreements as an extension of the attorney-client privilege.[57] On a more basic level, the characterization of these factors as indicia of uncooperative conduct tends to eliminate defense attorney involvement at all.[58] Taken together, the Thompson Memo's policies become a thinly-disguised attempt to circumvent the privilege altogether. On the front end of the investigation, the government pressures the corporation to waive any attorney-client privilege. On the back end, the government coerces the corporation to refuse paying its employee's legal bills. In conjunction, these two actions effectively eradicate defense attorney involvement, and consequently, any privilege protections.

It is within this context that a Federal District Court Judge decided the government had gone too far. In *United States v. Stein*, Judge Lewis A. Kaplan severely chastised government prosecutors for their conduct in the investigation of accounting firm KPMG.[59] In that case, the government began investigating KPMG, one of the world's largest accounting firms, for alleged improper use of tax shelters.[60] At first the corporation was unconcerned with the allegations and did not fully comply with all of DOJ's demands.[61] However, in November of 2003, the Senate held hearings on abusive tax shelters and several of KPMG's senior partners testified.[62] The firm's reception at the hearing was decidedly unfavorable.[63] Thereafter, KPMG became very concerned about the possibility of an indictment and hired new legal counsel to pursue a more cooperative approach.[64] Company officials communicated their willingness to cooperate to DOJ investigators on several occasions, insisting, "the object was to save KPMG, not protect any individuals."[65] The corporation was concerned that an indictment would put the firm out of business, as happened with Arthur Anderson.[66]

According to Judge Kaplan, DOJ took full advantage of KPMG's weakened bargaining position, implicitly linking the corporation's cooperation to KPMG's policy of paying employee's legal bills.[67] An assistant government attorney indicated that the company retained the discretion to pay employee's legal bills, but that DOJ would look at such payments "under a microscope."[68] In response to the government's repeated representations, KPMG took several measures limiting its policy of paying the legal fees of its employees.[69] As the investigation wore on, desperate to show its willingness to cooperate, the company ultimately refused to pay any legal fees for several of its senior employees.[70]

In defense of its actions, the government argued that KPMG "decided of its own volition" to terminate payment of attorney's fees, and that "it was KPMG's decision alone."[71] The court rejected these arguments, holding that the government violated the Fifth and Sixth Amendments by causing KPMG to cut off payment of legal fees to its former employees.[72] Central to the court's holding was the factual findings that the threats inherent in the Thompson Memo caused the corporation to reconsider its policy of paying employee's legal fees,[73] and that its decision ultimately to cut off payment of legal fees was the direct consequence of the pressure applied by the Thompson Memorandum and the United States Attorney's Office.[74]

The court held that the right to an attorney, including the right to choose which attorney you feel is best, is a fundamental right which should be free from knowing or reckless interference from the government.[75] Applying strict scrutiny analysis to the Thompson Memo, the court held that its consideration of the advancement of attorneys' fees was facially unconstitutional.[76] Harshly criticizing the government, Judge Kaplan stated, "[t]he imposition of economic punishment by prosecutors before anyone has been found guilty of anything, is not a legitimate government interest—it is an abuse of power."[77]

The court's decision raises interesting questions about the future of government policy on corporate investigations. On the practical side, it is possible that future government attorneys will stop and reflect before utilizing a potentially questionable or unfair tactic in a corporate investigation. The case may also give pause to DOJ policymakers.

With respect to the legal conclusions in the case, they seem to raise new opportunities to challenge DOJ policy on privilege waivers. The central conclusion in the case is that the government improperly interfered with the defendant's right to present his own defense. This conclusion logically extends to government practices on privilege waivers. For example, by the admission of at least one high-ranking government official, corporations are encouraged to discharge any non-cooperating employee.[78] In addition, employees cannot assert their Fifth Amendment right against self-incrimination when being questioned by their employer. Consequently, employees are placed in the untenable position of choosing between retaining their jobs, or subjecting themselves to potential criminal liability when the company waives the privilege and turns records over to the government. As with *Stein*, such government action effectively intrudes on the employee's constitutional rights.

In *Stein*, the judiciary has weighed in for the proposition that the government may not circumvent the Fifth Amendment by applying pressure to the corporation, which in turn applies that pressure to the individual. As stated in *Stein*, government prosecutors understood "that the threat inherent in the Thompson Memorandum, coupled with their own reinforcement of that threat, was likely to produce the exact result that occurred—KPMG's determination to cut off the payment of legal fees…"[79] Government policy on privilege waivers is sufficiently analogous to render the possibility of future judicial action plausible.

IV. Conclusion

The United States Supreme Court has stated, "[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system."[80] DOJ policy on cooperation in corporate investigations reflects the underlying sentiment held by policymakers that a legal defense creates an obstacle to a successful investigation and prosecution of corporate wrongdoing. Since the Thompson Memorandum was created in 2003, the government has consistently indicated that its provisions on attorney-client privilege waiver, work product waiver, and the payment employees of attorneys' fees are not a prerequisite to effective cooperation by business

organizations. However, evidence continues to mount that some or all of these factors have indeed become prerequisites to cooperation.

The attorney-client privilege is rooted in our nation's history, and its benefits are almost universally acknowledged. Overzealous government policymakers, perhaps in their haste to prove to the public that prosecutors are using all means to punish wrongdoers, have strayed too far from our legal system's guiding principles. Although we all benefit from sound corporate governance, free from fraud and other illegal practices, we benefit more when the public has faith in the legal system. If individuals cannot have faith in the confidentiality of their communications with their attorney, it is impossible to build trust. Without trust between attorneys and clients, legal disputes will ultimately become intractable, thereby making government investigations even more difficult. Fortunately, in recent months, Congress, the courts, and other agencies have indicated their reluctance to depart from historic legal practices. These are positive signs which demonstrate that the shift away from the attorney-client privilege is probably a temporary deviation from historic norms.

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[1] Enron, Arthur Anderson, Tyco International, ImClone, Adelphia Communications, and Worldcom to name a few.

[2] Memorandum from Lawrence D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys (Jan. 20, 2003) *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

[3] Thompson, *supra* note 2, at 3.

[4] Thompson, *supra* note 2, at 3.

[5] Thompson, *supra* note 2, at 7.

[6] David. M. Zornow & Keith D. Krakur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147 (2000).

[7] *See* Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225 (2006); Priscilla L. Walton, *Waiving the Attorney-Client Privilege Goodbye: The Erosion of the Privilege by Federal Financial Regulatory Agencies*, 10 N.C. BANKING INST. 397 (2006); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005).

[8] Letter from nine former DOJ officials to Judge Ricardo H. Hinojosa, Chairman of the U.S. Sentencing Commission (Aug. 15, 2005) (on file with U.S. Sentencing Commission).

[9] For example, the U.S. Chamber of Commerce, American Civil Liberties Union, American Bar Association, Association of Corporate Counsel, and National Association of Manufacturers are some organizations that have advocated against the government's policy on privilege waivers.

[10] Memorandum from Eric H. Holder, Deputy Attorney General, on Federal Prosecution of Corporations (June 16, 1999) (on file with the Department of Justice).

[11] Holder, *supra* note 10.

[12] Thompson, *supra* note 2, at 1. ("The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation.").

[13] Thompson, *supra* note 2.

[14] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12. (2005).

[15] Lynnley Browning, *U.S. Tactic on KPMG Questioned*, N.Y. TIMES, June 28, 2006, at C1. "Indictment is often a death knell for a company, as it was for KPMG's rival, Arthur Anderson, which went out of business in 2002. Last month, the securities class-action law firm of Milberg Weiss Bershad & Schulman was indicted on charges of making more than $11 million in secret payments to three individuals who served as plaintiffs. Since then, the law firm has struggled to keep lawyers and clients from defecting."

[16] *See Interview with U.S. Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, 51 U.S. ATTY'S BULL. NO. 6, at 2 (2003) ("Q: Isn't the Government's desire to obtain

interview notes of employees just an end run around the Fifth Amendment? You know the employee has to talk to the corporation on pain of dismissal, and you expect the corporation to fire employees who won't speak, so you indirectly force employees to relinquish their Fifth Amendment rights by putting them between a rock and a hard place. Is that fair? A: If you are suggesting that a corporation should not have a policy of firing an employee who won't consent to be interviewed by the corporation about possible misconduct, I'm not sure that's a corporation acting in its shareholder's interests... It is obviously up to the corporation to decide whether it wants to cooperate and supply the details of the interviews.").

[17] Thompson, *supra* note 2, at 7-8. ("A corporation's promise to support culpable employees and agents, either through the advancing of attorneys' fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.").

[18] *See* Henning, *supra* note 7, at 673.

[19] *See infra* Part III.D.

[20] *Interview with U.S. Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, 51 U.S. ATTY'S BULL. NO. 6, at 2 (2003) ("Q: But what about the repeated complaints by the defense bar that prosecutors routinely ask for waiver? A: I have heard the complaints, but I don't see evidence of such a widespread practice."); RICHARD BEDNAR ET AL., REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 98-99 (2003) (Survey of United States Attorneys found that "responses indicate that the request for waiver of attorney-client privilege or the work product protection doctrine is the exception rather than the rule.").

[21] Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 598 (2004) ("[t]hose who argue that waivers are required frequently do so on the basis of anecdotes without any supporting data.").

[22] The Decline of the Attorney-Client Privilege in the Corporate Context, Survey Results (2006) *available at* http://www.acca.com/Surveys/attyclient2.pdf.

[23] *Id.* at 3.

[24] *Id.* at 7.

[25] *Id.* at 7.

[26] *Id.* at 12. (One respondent indicated that "[t]he biggest issue is the pressure that the government puts on companies to terminate employees under investigation (long before a status determination is made) and then not to cover legal fees for loyal employees. A criminal investigation can bankrupt an individual quickly then leave them unemployed and destitute. The government does not want people to have adequate and competent counsel.").

[27] BEDNAR ET AL., *supra* note 19, at 98-99.

[28] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12. (2005).

[29] 70 Fed. Reg. 37145 (June 28, 2005).

[30] 70 Fed. Reg. 51398 (August 30, 2005).

[31] The comments received at the public meeting were universally opposed to the new amendments. The Commission received comments from former U.S. Attorney General Richard Thornburgh, the ABA, U.S. Chamber of Commerce, and other trade and industry groups.

[32] *Hearing to Gather Testimony from Invited Witnesses Regarding Possible Changes to the Sentencing Guidelines*: *Before the United States Sentencing Commission*, 49-50 (March 15, 2006) *available at* http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf.

[33] 71 Fed. Reg. 28073 (May 15, 2006). The new language goes into effect on November 1, 2006.

[34] *Id.*

[35] *Hearing to Gather Testimony from Invited Witnesses Regarding Possible Changes to the Sentencing Guidelines*: *Before the United States Sentencing Commission*, 50 (March 15, 2006) *available at* http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf.

[36] Memorandum from Robert D. McCallum Jr., Acting Deputy Attorney General, on Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005) *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm

[37] McCallum, Jr., *supra* note 35.

[38] McCallum, Jr., *supra* note 35.

[39] *Hearing to Gather Testimony from Invited Witnesses Regarding Possible Changes to the Sentencing Guidelines*: *Before the United States Sentencing Commission*, 41-42 (March 15, 2006) *available at* http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf.
[40] *See* McCallum, Jr., *supra* note 35.
[41] *See* McCallum, Jr., *supra* note 35.
[42] *White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers: Oversight Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006)
[43] *Id.* (statement of Robert D. McCallum Jr., Associate Attorney General, United States Department of Justice) ("In passing the landmark Sarbanes-Oxley legislation in 2002, Congress gave the Department clear marching orders: prosecute fully those who would use their positions of power and influence in corporate America to enrich themselves unlawfully, restoring confidence in our financial markets.").
[44] *Id.* (statement of Rep. Delahunt (D) Massachusetts).
[45] *Id.* (statement of Rep. Feeney (R) Florida).
[46] For example, one concern raised was that the new Sarbanes-Oxley legislation prohibits corporate officers from consulting with auditors. Taken in conjunction with DOJ's waiver policy, a corporate officer seeking advice on a potentially sensitive legal question would be unable to ask for professional assistance for fear of either violating the law, or giving information to an attorney that might subsequently be used by the government in a criminal investigation. Accordingly, at a time when the responsibility placed upon corporate officers is the greatest in history, they have less access to the advice they require than any other time in history. A similar concern relates to the increasing difficulty to attract qualified corporate officers. With the newly attendant liability exposure, and no access to legal advice, the most qualified candidates for board positions refuse to serve. In addition, several members were concerned about the chilling effect DOJ's policy may have on internal investigations. Corporate officers being interviewed by the corporation's counsel have little incentive to cooperate, especially knowing that the interviewing attorney represents only the corporation and that any information gathered during the interview may be turned over to the government for a subsequent criminal prosecution.
[47] *White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers: Oversight Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006)
[48] *Id.* (statement of Rep. Delahunt (D) Massachusetts).
[49] *Id.*
[50] *Id.* (statement of William M. Sullivan, Jr., Litigation Partner, Winston & Strawn, L.L.P.)
[51] *Id.* (statements of Rep. Delahunt (D) Massachusetts; Rep. Chabot (R) Ohio; Rep. Lungren (R) California).
[52] *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations, Notice of Hearing Postponement by Order of the Chairman of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2006); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations, Notice of Hearing Postponement by Order of the Chairman of the S. Comm. on the Judiciary*, 109th Cong. (July 26, 2006).
[53] *United States v. Stein*, No. S1 05 Crim. 0888 (LAK), 2006 WL 1735260 (S.D.N.Y. June 26, 2006).
[54] *Id.*
[55] Thompson, *supra* note 2, at 7-8.
[56] Thompson, *supra* note 2, at 7-8.
[57] Henning, *supra* note 7, at 673, n.142, *citing United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) ("The joint defense privilege… has been described as an 'extension of the attorney client privilege,'… It serves to protect the confidentiality of communications passing from one party to the attorney for another party where joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.").
[58] *Cf.* Henning, *supra* note 7. Professor Henning argues that government mistrust of lawyers has driven the policy changes. Policymakers fear that legal advice impedes the government's ability to perform a complete investigation, and allows culpable individuals to escape punishment. However, Professor Henning points out that this conclusion necessarily indicates that the "Thompson Memorandum treats virtually any employee who might be involved in misconduct as culpable well before the investigation is complete. This turns the presumption of innocence on its head because a corporation that does not

immediately turn on a potentially culpable employee has not cooperated and may suffer an indictment itself." Henning, *supra* note 7, at 697.

[59] *United States v. Stein*, No. S1 05 Crim. 0888 (LAK), 2006 WL 1735260 (S.D.N.Y. June 26, 2006) ("The government's assertion that the legal fee decision was made without 'coercion' or 'bullying' by the government can be justified only be tortured definitions of those terms… Every court is entitled to complete candor from every attorney, and most of all from those who represent the United States. These actions by the [United States Attorney's Office] are disappointing. There should be no recurrence.").

[60] *Id.* at 3.

[61] *Id.* at 3.

[62] *U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals: hearing before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Security and Governmental Affairs* 1, 108th Cong. (Nov. 18, 2003).

[63] *Stein*, No. S1 05 Crim. 0888, at 3.

[64] *Id.* at 4.

[65] *Id.* at 5.

[66] *Id.*

[67] *Id; see id.* at 14. ("the [United States Attorney's Office did not give KPMG the comfort it sought. To the contrary, it deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum. It placed the issue of payment of legal fees high on its agenda for the first meeting with KPMG counsel…")

[68] *Id*. at 7.

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

[70] *Id.* at 9-10.

[71] *Id.* at 12.

[72] *Id.* at 16.

[73] *Id*. at 13.

[74] *Id*. at 14.

[75] *Id.* at 18.

[76] *Id.* at 21.

[77] *Id.* at 19.

[78] *See supra* note 15 and accompanying text.

[79] *United States v. Stein*, No. S1 05 Crim. 0888, 21 (LAK), 2006 WL 1735260 (S.D.N.Y. June 26, 2006)

[80] *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).