

**McCurdy, Lauren**

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**From:** Harry Sondheim [hbsondheim@verizon.net]  
**Sent:** Tuesday, October 27, 2009 5:15 PM  
**To:** Melchior, Kurt W; Mark Tuft; Jerome Sapiro Jr.; avoogd@stanfordalumni.org  
**Cc:** Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren; Anthonie Voogd (E-mail); iDominique Snyder (Home) (E-mail); Ellen Peck (E-mail); Ignazio J. Ruvolo (E-mail); Jerome Sapiro Jr. (E-mail); JoElla Julien (E-mail); Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Home#2) (E-mail); Kevin Mohr (Work) (E-mail); linda.foy@jud.ca.gov (E-mail); Mark L. Tuft (E-mail); Paul W. Vapnek (E-mail); Raul Martinez (E-mail); Robert Kehr (E-mail); Stan Lamport (E-mail); Yen, Mary; Lee, Mimi  
**Subject:** Re: URGENT:: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION

Kurt--

If the answer to your question is "yes" (which it seems to me requires a "yes" answer because all possibilities are encompassed within your question), we still have to make a choice among the alternatives. All the alternatives you suggest are set forth in the e-mails you and I sent and will be discussed before we consider whether to vote on Mark's view which is to have no rule, followed, if necessary, by B or C. However, we can ascertain at the meeting what the Commission wants to do regarding the processing of this rule.

Cheers,  
Harry

----- Original Message -----

**From:** [Melchior, Kurt W](#)  
**To:** [Harry Sondheim](#) ; [Mark Tuft](#) ; [Jerome Sapiro Jr.](#) ; [avoogd@stanfordalumni.org](#)  
**Cc:** [Difuntorum, Randall](#) ; [Kevin Mohr G](#) ; [McCurdy, Lauren](#) ; [Anthonie Voogd \(E-mail\)](#) ; [iDominique Snyder \(Home\) \(E-mail\)](#) ; [Ellen Peck \(E-mail\)](#) ; [Ignazio J. Ruvolo \(E-mail\)](#) ; [Jerome Sapiro Jr. \(E-mail\)](#) ; [JoElla Julien \(E-mail\)](#) ; [Kevin Mohr \(Home#1\) \(E-mail\)](#) ; [Kevin Mohr \(Home#2\) \(E-mail\) \(E-mail\)](#) ; [Kevin Mohr \(Work\) \(E-mail\)](#) ; [linda.foy@jud.ca.gov \(E-mail\)](#) ; [Mark L. Tuft \(E-mail\)](#) ; [Paul W. Vapnek \(E-mail\)](#) ; [Raul Martinez \(E-mail\)](#) ; [Robert Kehr \(E-mail\)](#) ; [Stan Lamport \(E-mail\)](#) ; [Yen, Mary](#) ; [Mimi Lee](#)  
**Sent:** Tuesday, October 27, 2009 4:50 PM  
**Subject:** RE: URGENT:: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION

With due respect, I do not think the question should be, do you want A? and if not A, do you want B or C or no rule?

It should be, do you want A, B, C, something else, or no rule.

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**From:** Harry Sondheim [mailto:hbsondheim@verizon.net]  
**Sent:** Tuesday, October 27, 2009 3:53 PM  
**To:** Melchior, Kurt W; Mark Tuft; Jerome Sapiro Jr.; [avoogd@stanfordalumni.org](#)  
**Cc:** Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren; Anthonie Voogd (E-mail); iDominique Snyder (Home) (E-mail); Ellen Peck (E-mail); Ignazio J. Ruvolo (E-mail); Jerome Sapiro Jr. (E-mail); JoElla Julien (E-mail); Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Home#2) (E-mail) (E-mail); Kevin Mohr (Work) (E-mail); Melchior, Kurt W; [linda.foy@jud.ca.gov](#) (E-mail); Mark L. Tuft (E-mail); Paul W. Vapnek (E-mail); Raul Martinez (E-mail); Robert Kehr (E-mail); Stan Lamport (E-mail); Yen, Mary; Mimi Lee  
**Subject:** Re: URGENT:: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION  
**Importance:** High

Kurt, Mark and Jerry--

Thanks for bringing this to my attention. To simplify this matter I am sending my response to the entire Commission so that they can reflect upon what I am proposing as a temporary solution.

If, after discussion, the Commission concurs in Mark's view, there is no need to do anything other than explain why we are not recommending adoption of the rule, something that can be done for the Dec. meeting in light of the reasons already given by Mark.

If the Commission does not agree with Mark, then we can consider whether the Commission agrees with Kurt or Jerry or neither one of you and, depending upon the result, a chart can be prepared for the December meeting in accordance with the Commission's decision.

Thus further consideration of this rule will not interfere with your primary obligations to your clients (at least until we prepare for the Dec. meeting).

Cheers,  
Harry

----- Original Message -----

**From:** [Melchior, Kurt W](#)

**To:** [Harry Sondheim](#) ; [Mark Tuft](#) ; [Jerome Sapiro Jr.](#) ; [avoogd@stanfordalumni.org](mailto:avoogd@stanfordalumni.org)

**Cc:** [Difuntorum, Randall](#) ; [Kevin Mohr G](#) ; [McCurdy, Lauren](#)

**Sent:** Tuesday, October 27, 2009 1:59 PM

**Subject:** RE: URGENT:: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION

Harry: we need to address this to you.

Through Mark's message below and some direct messages from Jerry, it is clear that three out of four of the drafters believe that there is something in this proposal which the Commission should pursue (have not heard from Tony); but we are divided about the manner and scope of dealing with the subject. Mark believes that the subject is adequately addressed by other rules. Jerry is of the view that only government demands should be restricted in the way that the proposal's premise contemplates; and I believe that waivers of confidentiality and privilege at the instance of ANY third parties need to be separately addressed and should be forbidden -- and also that the Rules Mark cites do not accomplish that objective.

There simply is not enough time for us to address and thrash out this subtle subject, not revived since 2005, overnight and to reach sufficient closure to make a recommendation for the Commission by tomorrow -- even if we were all free to discard our primary obligations to our clients and just deal with this subject, which of course we are not. That does not mean, in my opinion, that this important subject should be dropped, swept into the dustbin, particularly since three out of four members of the drafting team believe that the subject is worth addressing or may have been addressed.

Where do we go from here? It just isn't possible to comply with this schedule.

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**From:** Mark Tuft [<mailto:MTuft@cwclaw.com>]

**Sent:** Tuesday, October 27, 2009 12:58 PM

**To:** Melchior, Kurt W; Jerome Sapiro Jr.; [avoogd@stanfordalumni.org](mailto:avoogd@stanfordalumni.org)

**Cc:** Harry Sondheim; Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren

**Subject:** RE: URGENT:: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION

Kurt, my views have not changed substantially since my January 2005 email. The concern raised is legitimate and is adequately covered, in my view, in Rules 4.2, 4.3 and hopefully, Rule 4.4(a), which

**McCurdy, Lauren**

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**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Tuesday, October 27, 2009 12:58 PM  
**To:** Melchior, Kurt W; Jerome Sapiro Jr.; avoogd@stanfordalumni.org  
**Cc:** Harry Sondheim; Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren  
**Subject:** RE: URGENT:: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION

Kurt, my views have not changed substantially since my January 2005 email. The concern raised is legitimate and is adequately covered, in my view, in Rules 4.2, 4.3 and hopefully, Rule 4.4(a), which will be on the agenda for the November 2009 meeting. We do not need a separate rule in addition to the Model Rules that currently exist.

Mark L. Tuft  
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**From:** Melchior, Kurt W [mailto:kmelchior@nossaman.com]  
**Sent:** Tuesday, October 27, 2009 11:11 AM  
**To:** Jerome Sapiro Jr.; avoogd@stanfordalumni.org; Mark Tuft  
**Cc:** Harry Sondheim; Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren  
**Subject:** URGENT:: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION  
**Importance:** High

Until I read Lauren's message last night, I had no idea that we are a drafting team and were to draft this rule by tomorrow. I hope that you read the material. It seems to have been 5+ years since we had any discussion; but here's how I see this:

1. The Commission voted 6:2 on 4/27/04 to pursue a study (well, you have to read it to try to figure out what happened):

MOTION: Support the principle of a rule that achieves the general purpose of his proposed rule:

“A member shall not be a party to or participate in offering,

REQUESTING or making an agreement, whether in

connection with the settlement of a lawsuit or otherwise, if the

agreement INVOLVES OR CONTEMPLATES THE WAIVER

OF THE ATTORNEY-CLIENT PRIVILEGE BY A PARTY

WHICH IS NOT THAT MEMBER'S CLIENT.”

Mark seconds, but friendly amendment: whether or not there is an

ethical principle here in what Kurt has proposed: Is there an ethical

principle that interfering with A-C relationship can undermine a

person's ability to obtain competent legal advice.

. MOTION: Allow Kurt and drafting team to pursue study to see if there

be such overreaching principle of professional responsibility that a

citizen is deprive of obtaining competent legal advice.

YES: 6 NO: 2 AGAINST: 1

I must admit that I do not understand the motion that passed. Given the motion stated earlier and Mark's amendment, my best try at interpreting the minutes is that the Commission endorsed a study of a rule which would protect a client's right to deal with his lawyers free of fear that outside pressure would cause him (the client -- I will use the male gender to save words) to give up his right to complete confidentiality of that relationship -- unless, of course, he the client wished to waive that confidentiality. (The latter has always been his right and is not under debate here.)

The simplest way to do that would be to adopt a rule such as I proposed 5+ years ago, namely that lawyers not within an attorney-client relationship may not put pressure on those within that relationship to force waiver of the privilege and confidentiality thereof. We have such a rule 1-500, which forbids "offering or making an agreement, whether in connection with a settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law," etc. To me, if we agree that waiver of attorney-client confidentiality should be a decision freely made by the client without outside demands or pressures, it seems a simple step to use the same formula and forbid demands for waiver.

My thinking was sufficiently stated in the 2004 correspondence which Lauren sent yesterday.

2. If you agree that this is a proper response to the 2004 motion, I will try to set this up in proper format (I have asked Lauren for blank forms), and try to circulate it to you before evening. There were a great many other thoughts expressed in 2004, and there was significant disagreement although ultimately only 2 No votes against the (surely unclear) motion. Reading the material, I could see no alternative which would move the ball forward; but I am glad to hear your thoughts. **If you want to propose an alternative solution, please advise asap.**

3. We do have the ABA to lean on. While there is no Model Rule on point, they are on record with 2 resolutions which (to quote one) "oppose[] the routine practice of government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or change."

4. Which reminds me -- we should include protection of the work product doctrine in any rule we propose.

**PLEASE LET ME HEAR FROM YOU ASAP. THERE SIMPLY IS NO TIME -- AND TO THE EXTENT THAT'S MY FAULT, I APOLOGIZE.**

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**From:** McCurdy, Lauren [mailto:Lauren.McCurdy@calbar.ca.gov]  
**Sent:** Monday, October 26, 2009 5:36 PM  
**To:** McCurdy, Lauren; Melchior, Kurt W; Jerome Sapiro; avoogd@stanfordalumni.org; mtuft@cwclaw.com  
**Cc:** Harry Sondheim; Difuntorum, Randall; Kevin Mohr; Kevin Mohr; pwvapnek@townsend.com  
**Subject:** RE: November Assignment for III.I. re A-C Privilege Waiver Rule - CORRECTION

All,

My apology. Here are the proper attachments and message for the A-C Privilege Waiver Rule. Sorry for the confusion on my part.

Lauren

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**From:** McCurdy, Lauren  
**Sent:** Monday, October 26, 2009 5:30 PM  
**To:** Kurt Melchior; Jerome Sapiro; avoogd@stanfordalumni.org; mtuft@cwclaw.com  
**Cc:** Harry Sondheim; Difuntorum, Randall; Kevin Mohr; 'Kevin Mohr'; pwvapnek@townsend.com  
**Subject:** November Assignment for III.I. re Advice of Counsel Rule

Kurt & Codrafters:

Please refer to Kevin's attachments and April 7, 2009 message below for background materials on this rule assignment.

The assignments for the November meeting are due this Wednesday, October 28<sup>th</sup>.

sent by:  
Lauren McCurdy  
Office of Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
phone 415-538-2107

fax 415-538-2171  
[lauren.mccurdy@calbar.ca.gov](mailto:lauren.mccurdy@calbar.ca.gov)

Greetings drafters - Kurt, Jerry, Mark & Tony:

As members of the drafting committee, I'm forwarding to you an e-mail I sent to Kurt on 4/5/09 with materials I have concerning the proposed "Attorney-Client Privilege Waiver" Rule. Kurt is lead drafter.

**Please refer to my comments in the e-mail to Kurt, below.** Previously, the RRC voted to defer consideration of this Rule. The e-mail below contains links to further information on the issues underlying this Rule and the reason for deferring consideration of it.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

**Finally, please note that this Rule is not calendared until the December 2009 meeting.** However, some of you have requested being provided with the relevant materials in the interim.

Please let me know if you have any questions. Thanks,

Kevin

----- Original Message -----

**Subject:**Re: RRC - E-mail #2 - A-C PRIVILEGE WAIVER RULE

**Date:**Sun, 05 Apr 2009 22:28:35 -0700

**From:**Kevin Mohr <[kemohr@charter.net](mailto:kemohr@charter.net)>

**To:**Melchior, Kurt W <[kmelchior@nossaman.com](mailto:kmelchior@nossaman.com)>

**CC:**Kevin Mohr <[kevin\\_e\\_mohr@csi.com](mailto:kevin_e_mohr@csi.com)>, Harry Sondheim <[hbsondheim@verizon.net](mailto:hbsondheim@verizon.net)>, Randall Difuntorum <[Randall.Difuntorum@calbar.ca.gov](mailto:Randall.Difuntorum@calbar.ca.gov)>, Lauren McCurdy <[Lauren.McCurdy@calbar.ca.gov](mailto:Lauren.McCurdy@calbar.ca.gov)>

**References:**<[158B1416CC7CC54C938D00455ED8438C029644EB@exsf001.nossaman.local](mailto:158B1416CC7CC54C938D00455ED8438C029644EB@exsf001.nossaman.local)>  
<[49AEBF8D.8030409@charter.net](mailto:49AEBF8D.8030409@charter.net)>

Kurt:

This is the second e-mail I'm sending you concerning your requests for materials. This one concerns the A-C privilege waiver rule.

I've attached the following:

1. An e-mail compilation dated 2/3/05, which is just before the last meeting at which we considered the Rule, 2/4/05. In Word.
2. My cumulative meeting notes for the Rule. In PDF.

3. Excerpt from the Supplemental Materials for my PR course last fall concerning this issue. They include the following (see my comment #3, below):

ABA Task Force on the Attorney-Client Privilege (2005) – Resolution (Prob. 8, 18) 317

ABA Task Force on the Attorney-Client Privilege (2006) – Resolution (Prob. 8, 18) 318

The Department Of Justice’s 12/12/2006 “McNulty Memorandum” On Corporate Compliance (Prob. 8, 18) 319

The Department Of Justice’s 7/9/2008 “Filip” Letter to Senate Judiciary Committee on Change in DOJ Policy on Corporate Compliance (Prob. 8, 18) 338

### **Some Comments:**

1. The first e-mail, your 5/27/04 e-mail, contains the proposal. At the August 2004 meeting, you, Mark & JoElla were named to the drafting team.
2. As near as I can tell no further drafting took place. Instead, at the February 4, 2005 meeting, the Rule was tabled pending action by the ABA, which had appointed a task force on the Attorney-Client privilege.
3. In the interim, the Thompson Memorandum was replaced by the McNulty Memorandum, which finally was superseded by the "Filip Letter" to the Senate Judiciary Committee. I've attached those items to this e-mail.
4. In the interim, Sen. Arlen Specter has at least twice introduced the "Attorney-Client Privilege Protection Act" (I'm aware of 2006 and 2008 versions). See, for example, the following on the 2008 act:

<http://www.govtrack.us/congress/bill.xpd?bill=s110-3217>

The foregoing never went to a vote.

5. The House, however, did pass a similar bill, but again, that never became law. See:

<http://www.govtrack.us/congress/bill.xpd?bill=h110-3013>

6. While I'm not positive, I believe these acts, unless passed, are put in the dustbin at the end of each Congress, and require reintroduction with the start of a new Congress. I haven't seen anything new on such an act, but I think the folks on Capitol Hill might have other fish to fry right now.

7. Here is the home page of the ABA ACP Task Force:

<http://www.abanet.org/buslaw/attorneyclient/>

Please let me know if you have any questions. I've been saving a number of short articles on the issue and I could send those to you in a zip file if you like. Thanks,

Kevin

Kevin Mohr wrote:

Kurt:

I can't get to these requests until the end of the week but I can assure you I have materials on all matters you've identified in items 1 to 3. I don't think we'll be addressing the first two items until later in the summer or fall. We will start on the ABA Rule without California counterparts in early summer, but I'm not sure when we'll get to 8.5 (Although 8.5 has some provisions that are also found in 1-100, there are some other aspects of it w/o a counterpart in our Rules -- i.e., choice of law in 8.5(b), so we put off consideration of 8.5 until the end of our journey.)

As to 1.8.13, that is the counterpart to MR 1.8(k), imputation of PERSONAL (and other) conflicts, i.e., conflicts identified in the MR counterparts to our rules (such as 3-300) and other Model Rule provisions that are all gathered in MR 1.8). Rule 1.8.13 will probably be on the agenda for either our May or our July meeting.

Have a safe journey to and from D.C., and good luck on your oral argument. The materials will be waiting for you upon your return from D.C. -- just in case you want to take them with you on vacation. :-)

Thanks,

Kevin

Melchior, Kurt W wrote:

Harry has been talking with me about assignments, and suggested that I ask you about certain details:

1. I am to be lead drafter for a topic "Advice of Counsel," with Nace and Jerry as co-drafters. Harry recalls that the topic was suggested by a message from Jerry in 2003 and that you might have that message, and/or any other materials we could use as a starting point, as this seems to be a new topic for rule making.

2. The same type of question for another topic for which I am to be lead drafter, and Jerry and Mark co-drafters: "Attorney-client privilege." Harry thinks this was my idea, bottomed in thinking about the efforts of the Justice Department to compel target corporations to waive the privilege. (Of course, since then a judge in NY has hit hard at that DoJ strategy; and I believe that the 2d Circuit more or less affirmed him. But that history and a change in administrations doesn't necessarily moot the question -- and the topic as stated in 2 words is so much broader than that.) I would ask for the same assistance.

3. I have been assigned as lead drafter for a Rule 8.5, which would be the equivalent of our 1-100, with Stan and Ellen as co-drafters. While I know what the subject matter is, I would also appreciate any relevant data you may have assembled.

4. Harry has on my list (as co-drafter) a rule 1.8.13; but neither he nor I could identify the subject matter by that number. Can you help on that?

Many thanks for your help. FYI, I am leaving tomorrow to argue a case in DC; will be back on Sunday and will go abroad for vacation on Tuesday, returning only at the end of the month. So this is either super-urgent or not urgent at all: best, of course, the latter.

Thanks again.

**Kurt W. Melchior**

Attorney at Law

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\*Melchior  
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**D. Consideration of Proposed New Rule or Amended Rule Prohibiting a Request or Agreement to Waive the Attorney-Client Privilege**

[anticipated 1/2-hour discussion]

(No materials enclosed. The chair has authorized a supplemental mailing for late materials for this item. Co-drafters are assigned to submit materials for this item to staff by 2:00 pm on August 10<sup>th</sup>, to be included in the supplemental mailing. The chair has requested that lead drafters confer with co-drafters in the development of materials.)

In his 5/27/04 E-mail, Kurt proposed the following rule:

“A member shall not be a party to or participate in offering, REQUESTING or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement INVOLVES OR CONTEMPLATES THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY A PARTY WHICH IS NOT THAT MEMBER'S CLIENT.”

1. Kurt: Proposes that we do something that has not been done anywhere else in the country.
  - a. DOJ requires clients to waive ACP to get a criminal plea.
  - b. Done for any number of reasons, etc.
  - c. Kurt's proposal has precedent in 1-500 – cannot offer or be party to K limiting member's practice.
2. Tony: Concerned about two things:
  - a. ACP is for the legislature, not for the courts to amend.
    - (1) We are trying to affect the waiver, which the legislature allows.
  - b. Question whether this is imposed upon people unfairly.
  - c. This may shield improper attorney conduct – nothing wrong with client selling his client down the road.
3. Nace: Agrees with Tony. Should not be crafting a rule that tells clients what they should or should not do in their best interests.
  - a. If voluntary waiver, then we should not concern ourselves with it.
4. Mary: Pass.
5. Jerry: Agrees w/ Kurt; a bit concerned with the language in the proposal.

**RRC – ACP Waiver Rule  
August 27, 2004 KEM Meeting Notes**

- a. Concerned that Pres. who is in trouble who can waive the corporation's ACP.
6. Mark: There is a problem with purview, though can bring it within our purview with some changes.
  - a. Tony is correct.
  - b. Nace is also correct in that clients often give up important constitutional rights.
  - c. The problem is that sometimes lawyers on the other side of the representation cross the line and interfere with the A-C relationship between lawyer and client.
    - (1) Can interfere with the administration of a case.
  - d. ABA considered sentencing guidelines to be amended that it would not be entitled to downward sentencing for cooperating unless gives up ACP and Work Product Immunity
    - (1) E.g., KPMG case in NYC – Bennett gave up the ACP in pre-indictment stage!!!!
    - (2) The problem here is that it will be very difficult for L to conduct that investigation if the information he is told is subject to later waiver.
  - e. In terms of a level playing field, has the government gone too far?
    - (1) Does this impede the corporation's ability to obtain competent counsel.
  - f. Just not sure that Kurt's solution is the best one.
7. Kurt: This does not change the nature of the privilege.
  - a. Leaves open opportunity for waiver of the privilege.
  - b. Client still continues to have the option; L can still advise the client re the pluses & minuses of a plea bargain, etc.
  - c. Corporation is a creature of the state, etc.
  - d. We're not hanging out any lawyers; the issue here is interference with the A-C relationship
8. Raul: We need to protect the A-C relationship but this is not the correct arena in which to address.
  - a. A-C privilege is not our bailiwick.

**RRC – ACP Waiver Rule  
August 27, 2004 KEM Meeting Notes**

9. Joella: Sarbanes-Oxley is a slippery slope, and how do you stop this rolling ball.
10. Tony: Assuming the DOJ is wrong, isn't the appropriate solution to vote out the current administration?
  - a. It's not our function to determine which K's are proper and which are improper.
  - b. We're trying to do too much.
11. Paul: Kurt has a valid complaint about what is going on; broader than the current administration.
  - a. Analogous situation from the past when state government L's would make a proposal against the state government that the plaintiff give up statutory attorney fees to get the full relief sought under the complaint.
  - b. RRC tried drafting a rule re this, but didn't
  - c. Paul didn't like it then, and doesn't like it now.
  - d. The appropriate solution is not in a rule.
12. Randy: Going after the ACP, we may be engaging in "inflammatory" conduct as perceived.
  - a. Almost like a throwing down of the gauntlet.
  - b. Perhaps better to cast it as protection of the A-C relationship.
13. Harry: Has concerns re all this, but probably should not tinker with it in the RRC.
  - a. In past, prosecutors demanded that criminal  $\Delta$  give up right to civil suit to get charges dismissed and S.Ct. Upheld the practice.
  - b. What we're doing is interfering with the independence of the L on the other side to reach settlement by offering a particular deal.
  - c. 1-500 has other policy issues – protection of public. Here, there is less protection of the public.
  - d. We will get a lot of flak over this.
  - e. This is a direct confrontation over policy which may not involve the protection of the public.

**RRC – ACP Waiver Rule  
August 27, 2004 KEM Meeting Notes**

14. Joella: Concerned that there is no way that her communications will be protected by ACP – so can't get competent advice (Mark, Kurt, Paul all concur).
15. Kurt: If we can have a rule like 2-100 against government ex parte contacts, then why can't we have a rule re ACP?
  - a. This is in the public interest – protecting the A-C relationship.
16. MOTION: Support the principle of a rule that achieves the general purpose of his proposed rule:

“A member shall not be a party to or participate in offering, REQUESTING or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement INVOLVES OR CONTEMPLATES THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY A PARTY WHICH IS NOT THAT MEMBER'S CLIENT.”

Mark seconds, but friendly amendment: whether or not there is an ethical principle here in what Kurt has proposed: Is there an ethical principle that interfering with A-C relationship can undermine a person's ability to obtain competent legal advice.

. MOTION: Allow Kurt and drafting team to pursue study to see if there be such overarching principle of professional responsibility that a citizen is deprive of obtaining competent legal advice.

YES: 6      NO: 2      AGAINST: 1

- a. **Thornburgh Memorandum**: DOJ said they were not subject to rules that were otherwise generally applicable to lawyers.

(1) **KEM 8/30/2004 Note**: On 8/30/04, Randy D circulated a 1993 RRC memo re Thornburgh Memorandum & possible approach to a rule to address the issue.

. DRAFTING TEAM:

- Kurt
- Mark
- Joella

\*Melchior  
Julien  
Tuft

H. **Consideration of Proposed New Rule or Amended Rule Prohibiting a Request or Agreement to Waive the Attorney-Client Privilege and the Relationship of Such a New Rule to Rule 3-110 (Agenda Item III.G Above)**

(Materials enclosed – Kurt Melchior’s January 17, 2005 memo; Mark Tuft’s January 18, 2005 memo; and materials from Randy concerning new ABA Task Force on Attorney Client Privilege.) **[pages 215 – 226]**

1. Harry: Should we wait to see what the ABA will do on this?
2. Mark: ABA hopes to have its report on ACP ready for the August meeting.

- |  |
|--|
| <ol style="list-style-type: none"><li>3. <b>Becky Stretch:</b> Has summary of ABA principles on this.<ol style="list-style-type: none"><li>a. She will send us a note on this.</li></ol></li></ol> |
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4. **Harry:** Tabled pending ABA action.
5. **Harry:** But any individual can submit his or her views.



**AMERICAN BAR ASSOCIATION**

**TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE  
SECTION OF CRIMINAL JUSTICE  
SECTION OF TORT TRIAL AND INSURANCE PRACTICE**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION\***

RESOLVED, That the American Bar Association supports the preservation of the attorney-client privilege and work-product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal problems fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American justice system;

FURTHER RESOLVED, That the American Bar Association believes that, although the protections arising from the attorney-client privilege and work-product doctrine may be voluntarily waived in particular instances by the holders of the protections, waiver should occur only under circumstances that do not erode those protections; and

FURTHER RESOLVED, That the American Bar Association opposes policies, practices and procedures of governmental agencies that have the effect of eroding the attorney-client privilege and work-product doctrine and favors policies, practices and procedures that recognize the value of those protections.

\* Adopted by the ABA House of Delegates at the 2005 Annual Meeting, August 2005.

The full report of the ABA's Task Force may be found at the following web address:

<http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>

The home page of the ABA's Task Force, with many numerous resources concerning the Task Force's charge and operation, may be reached at:

<http://www.abanet.org/buslaw/attorneyclient/>

The Department of Justice's "Thompson Memorandum" on Corporate Compliance, one of the principal catalysts to the appointment of the Task Force, was eventually superseded by the "McNulty Memorandum." That memorandum is found at page 319, below.

**RECOMMENDATION 111\***

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.

\* Adopted by the ABA House of Delegates at the 2006 Annual Meeting, August 2006.

The Department Of Justice's 12/12/2006 "McNulty Memorandum" On Corporate Compliance (Prob. 8, 18)

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MEMORANDUM

TO: Heads of Department Components  
United States Attorneys

FROM: Paul J. McNulty  
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Federal Prosecution of Business Organizations<sup>1</sup>

I. Duties of the Federal Prosecutor; Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating wrongdoing and bringing charges for criminal conduct, the Department plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate. In this respect, federal prosecutors and corporate leaders share a common goal. Directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in

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<sup>1</sup> While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

which we do our job as prosecutors – the professionalism we demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation – impacts public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action.

## II. Charging a Corporation: General Principles

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. See *United States v. Potter*, 463 F.3d 9, 25 (1<sup>st</sup> Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated--at least in part--by an intent to benefit the corporation ). In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Furthermore, in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 969-70 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999), the D.C. Circuit rejected a corporation's argument that it should not be held criminally liable for the actions of its vice-president since the vice-president's "scheme was designed to -- and did in fact -- defraud [the corporation], not benefit it." According to the court, the fact that the vice president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president's job was to cultivate the corporation's relationship with the congressional candidate's brother, the Secretary of Agriculture. Therefore, the court held, the jury was entitled to conclude that the vice-president had acted with an intent, "however befuddled," to further the interests of his employer. See also *United States v. Cincotta*, 689 F.2d 238, 241-42 (1 Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

[B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945)).

### III. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq.* Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see section IV, *infra*);
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section V, *infra*);
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (see section VI, *infra*);
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, *infra*);
5. the existence and adequacy of the corporation's pre-existing compliance program (see section VIII, *infra*);
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see section IX, *infra*);
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (see section X, *infra*);
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions (see section XI, *infra*).

B. Comment: In determining whether to charge a corporation, the foregoing factors must be considered. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

#### IV. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the

heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

V. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. *See* USSG §8C2.5, comment. (n. 4).

VI. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a

corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, e.g., subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment.(n. 6).

## VII. Charging a Corporation: The Value of Cooperation

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. Relevant considerations in determining whether a corporation has cooperated are set forth below.

### 1. Qualifying for Immunity, Amnesty or Pretrial Diversion

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

## 2. Waiving Attorney-Client and Work Product Protections<sup>2</sup>

The attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). As the Supreme Court has stated “its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Id.* The work product doctrine also serves similarly important interests.

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely

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<sup>2</sup> The Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5(g). The reference to consideration of a corporation's waiver of attorney-client and work product protections in reducing a corporation's culpability score in Application Note 12, was deleted effective November 1, 2006. *See* USSG §8C2.5(g), comment. (n.12).

desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation.

Whether there is a legitimate need depends upon:

- (1) the likelihood and degree to which the privileged information will benefit the government's investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and (4)

the collateral consequences to a corporation of a waiver.

If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I"). Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.

Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor's request to the United States Attorney for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category I information must be maintained in the files of the United States Attorney. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

A corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation.

Only if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product (“Category II”). This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.

This category of privileged information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel’s mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.

Prosecutors are cautioned that Category II information should only be sought in rare circumstances.

Before requesting that a corporation waive the attorney-client or work product protections for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney’s request for authorization to seek a waiver must set forth law enforcement’s legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category II information must be maintained in the files of the Deputy Attorney General. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision. Prosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.

Requests for Category II information requiring the approval of the Deputy Attorney General do not include:

- (1) legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and
- (2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

In these two instances, prosecutors should follow the authorization process established for requesting waiver for Category I information.

For federal prosecutors in litigating Divisions within Main Justice, waiver requests for Category I information must be submitted for approval to the Assistant Attorney General of the Division and waiver requests for Category II information must be submitted by the Assistant Attorney General for approval to the Deputy Attorney General. If the request is authorized, the Assistant Attorney General must communicate the request in writing to the corporation.

Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government. However, voluntary waivers must be reported to the United States Attorney or the Assistant Attorney General in the Division where the case originated. A record of these reports must be maintained in the files of that office.

### 3. Shielding Culpable Employees and Agents

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, e.g., 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.

Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.<sup>3</sup> This prohibition is not meant to prevent a prosecutor from asking questions about an

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<sup>3</sup> In extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny. *See discussion in* Brief of Appellant-United States, *United States v. Smith and Watson*, No. 06-3999-cr (2d Cir. Nov. 6, 2006). Where these circumstances exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions. Prosecutors should follow the authorization process established for waiver requests of Category II information (see section VII-2, *infra*).

attorney's representation of a corporation or its employees.<sup>4</sup>

### Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct intended to impede the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

### 5. Offering Cooperation: No Entitlement to Immunity

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

## VIII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is

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<sup>4</sup> Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, frequently arise in the course of an investigation. They may be necessary to assess other issues, such as conflict-of-interest. Such questions are appropriate and this guidance is not intended to prohibit such inquiry.

not adequately enforcing its program. In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. See *United States v. Basic Construction Co.*, 711 F.2d 570 (4<sup>th</sup> Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Potter*, 463 F.3d 9, 25-26 (1<sup>st</sup> Cir. According to the court, a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts; "even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." Similarly, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9<sup>th</sup> Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act."<sup>5</sup> It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." See also *United States v. Beusch*, 596 F.2d 871, 878 (9<sup>th</sup> Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American*

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*Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3 Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held

legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

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<sup>5</sup> Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that *Basic Construction* states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.<sup>6</sup> Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

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<sup>6</sup> For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG §8B2.1.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

#### IX. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

X. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

## XI. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

## XII. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

### XIII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq.* In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. *See* section VIII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. *See* generally section VII, *supra*.

This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

The Department Of Justice's 7/9/2008 "Filip" Letter to Senate Judiciary Committee on Change in DOJ Policy on Corporate Compliance (Prob. 8, 18)

**Office of the Deputy Attorney General  
Washington, D.C.**

July 9, 2008

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Arlen Specter  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

At your request during my confirmation proceedings last year, I committed to review the Department of Justice's Principles of Federal Prosecution of Business Organizations ("Principles"), the internal policy that governs how all federal prosecutors investigate, charge, and prosecute corporate crimes. I write to update you on my review, and to provide you with a summary of certain changes to the Principles that the Department intends to make in the coming weeks to address issues you have raised and that were echoed during my review. I respectfully ask that you give us an opportunity to implement these changes and then review their operation after a reasonable amount of time before pursuing legislation in this area.

As you are aware, some have raised concerns about the effect of the Principles on the preservation of the attorney-client privilege and work product protection. Specifically and most notably, some have argued that the Department has used the threat of criminal indictment and prosecution (or the threat of withholding cooperation credit) to coerce corporations to waive privilege or work product protection against their will and to provide information to the government that otherwise would be subject to these protections. Others have argued that the perceived widespread use of privilege waivers has inhibited candid communications between corporate employees and legal counsel whose advice has been sought. Additionally, some have expressed concern that the Principles improperly permit the government to limit or refuse cooperation credit to a corporation if the corporation has advanced attorneys' fees to its

employees, failed to sanction or fire allegedly culpable employees, or entered into joint defense agreements.

**[Page 2]** In response to these and other concerns, senior attorneys in the Department and I met internally and with several organizations and former government officials who expressed an interest in this issue, including representatives of the corporate community, criminal defense attorneys, in-house counsel, and civil liberties advocates. During those meetings, we discussed the matters noted above, as well as the Department's belief that we have been judicious in our limited requests for waivers. We pointed out that in the eighteen months since the Principles were last amended, the Department has approved no requests by prosecutors to obtain from corporations core attorney-client communications or non-factual attorney work product.

Despite the obvious difference of opinion between the Department and these groups in some key areas, our meetings were extremely productive and we did find common ground, particularly in the areas of joint defense agreements, attorneys' fees, and employee sanctions. I also came away impressed by the need for the Department to address any lingering perceptions that our conduct in corporate criminal investigations is anything other than fair and respectful of the attorney-client privilege. To that end, I have carefully reviewed the Principles and expect that the Department will make the following revisions to them in the next few weeks:

- Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges. The government's key measure of cooperation will be the same for a corporation as for an individual: to what extent has the corporation timely disclosed the relevant facts about the misconduct? That will be the operative question - not whether the corporation waived attorney-client privilege or work product protection in making its disclosures.
- Federal prosecutors will not demand the disclosure of "Category II" information as a condition for cooperation credit. To be eligible for cooperation credit, a corporation need not disclose, and the government may not demand, what the McNulty Memo defines as "Category II information" - namely, non-factual attorney work product and core attorney-client privileged communications. (Of course, attorney-client communications that were made in furtherance of a crime or fraud, or that relate to an advice-of-counsel defense, are excluded from the protection of the privilege by well-settled case law and will therefore continue to fall outside these principles.)

**[Page 3]**

- Federal prosecutors will not consider whether the corporation has advanced attorneys' fees to its employees in evaluating cooperation. The advancement of attorneys' fees or provision of counsel by a corporation to its employees will not be taken into account for the purpose of evaluating cooperation.

- Federal prosecutors will not consider whether the corporation has entered into a joint defense agreement in evaluating cooperation. The mere participation in a joint defense, common interest, or similar agreement by a corporation will not be taken into account for the purpose of evaluating cooperation. The government may, of course, request that a corporation refrain from disclosing to others sensitive information about the investigation that the government provides in confidence to the corporation, and may consider whether the corporation has abided by that request.
- Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation. How and whether a corporation disciplines culpable employees may bear on the quality of its remedial measures or its compliance program; it will not be taken into account for the purpose of evaluating cooperation.

During my tenure as Deputy Attorney General, I have appreciated the courtesy you have extended to me and to the Department, particularly your patience during my review of this important issue. I have come to the conclusion that the above changes to the Principles are preferable to any legislation, however well intentioned and diligently drafted, that would seek to address the same core set of issues. I think we all very much share an appreciation for the foundational role that the attorney-client privilege plays in our legal system, including our system of criminal justice. The interest that you both have shown in this matter, including your vigilance in protecting the attorney-client privilege, certainly has motivated the Department to pursue the changes I have outlined above.

I remain available to discuss this matter with you further at your convenience. Thank you again for considering our views.

Sincerely,

Sincerely,

Mark Filip  
Deputy Attorney General

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**RRC – ACP Waiver Rule  
Proposal & E-mails – Revised (02/03/2005)**

**May 27, 2004 Melchior E-mail to RRC Members:**

Let me take a moment at this early point before we get into a flurry of messages about the next meeting, to revive my proposal for an amendment to Rule 3-600 which I mentioned in preparation for the last meeting but we did not reach. (Rule 3-600 seems a logical place to discuss this item -- but it could be a part of 1-500 or a stand alone proposition.)

I propose that we adopt an amendment or rule which, to follow the language of 1-500, with new material in caps, will state that

"A member shall not be a party to or participate in offering, REQUESTING or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement INVOLVES OR CONTEMPLATES THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY A PARTY WHICH IS NOT THAT MEMBER'S CLIENT."

I have explained my reasons earlier: Government attorneys are increasingly demanding waiver of ac privilege as a condition of plea bargaining and of settlement of enforcement cases. The target has no real choice but to accede. That's not how the privilege was intended.

Since I said that, the courts have held -- correctly, in my view -- that such waiver is a voluntary disclosure which waives the privilege against the world. See McKesson, below. That may or may not be good social policy; but as long as the courts and the legislature strongly back the privilege, I think that we can do our part by making the privilege more vital. There have been no significant problems with 1-500 to my knowledge: this seems a good thing to do.

Here's the McKesson case; DISCLOSURE TO GOVERNMENT UNDER PROTECTIVE AGREEMENT WAIVES AC PRIVILEGE AND WORK PRODUCT PROTECTION  
McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229. Similar parsing of cases as Oxy: though cpn had ample motive to cooperate with DOJ and SEC in disclosing internal investigation by counsel (no prosecution v. it, at least yet), this was not "common interest" sharing. The disclosure, while no doubt helpful to cpn and to government, was to adverse parties, and party cannot prefer one adversary to another in selectively disclosing privileged material. Both privileges were waived by disclosure to govt.

**August 15, 2004 Voogd E-mail/Memo to RRC:**

The Legislature passed the attorney-client privilege. A court has construed the legislation in a manner that allows prosecutors to require waiver of the privilege as a condition of plea bargaining and the settlement of enforcement cases. It seems to me that we lack the authority to recommend the overruling the legislature and courts in this manner. The proposed rule is less a traditional rule of professional conduct than an effort to substitute our judgment for that of the Legislature.

Moreover, there is a risk of unintended consequences. Consider the client who is induced by his lawyer to engage in criminal conduct with his lawyer. The client fires his lawyer and retains a new lawyer in an effort to resolve the mess. The new lawyer calls on a prosecutor in an effort to obtain leniency for the client in return for outing the first lawyer. As I read the proposed rule, the prosecutor cannot make the deal.

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It is suggested that the prosecutor's target has no real choice but to accede to the prosecutor's deal. Innocent or guilty, the target is unlikely to make the deal if the information to be disclosed may harm him, her or it more than then any countervailing benefits of the deal. On the other hand, innocent or guilty, the target is inclined to make the deal if the information to be disclosed will only harm the target's lawyer. Only in the later sense the suggestion is correct.

Where does the public interest lie? It seems to me the proposed rule serves to protect lawyers from the disclosure of misconduct on their part and limits the rights of clients to use their usual waiver rights to advance their interests. I oppose the proposed rule as contrary to the public interest.

**November 4, 2004 Sondheim E-mail to Melchior, cc RD & LM:**

From: Harry Sondheim [mailto:hbsondheim@earthlink.net]  
Sent: Thursday, November 04, 2004 10:22 PM  
To: Melchior, Kurt W.  
Cc: lauren.mccurdy@calsb.org; Difuntorum, Randall  
Subject: Re: Agenda items IIID (2-300) and III. I (Waiver of A-C privilege)

Kurt--

. . . .

As indicated by Kevin's notes which Randy sent you, Mark, while he may be generally in agreement with you (as is JoElla), had some concerns about your approach. I, too, have my own concerns which perhaps are colored by my years as a prosecutor. If immunity or a deal is offered to a defendant in exchange for the defendant testifying against another defendant, it seems to me that a prosecutor would want some assurance that the story the client is going to relate is true and is consistent with what he or she told his or her lawyer. Thus the prosecutor may find it necessary to intrude into the A-C privilege before giving the defendant a free ride or a reduced charge, even in the absence of a formal policy such as may have been established by the feds. While I recognize that initially the client and the lawyer may not have to operate from the premise that the A-C privilege will eventually have to be waived, as things develop this waiver may come into play and may thus come within the parameters of your proposal. Consequently, the proposal you make may have ramifications far beyond the immediate issue you are seeking to resolve.

Cheers,

Harry

**November 5, 2004 Melchior E-mail to Sondheim, cc RD & LM:**

From: Melchior, Kurt W. [mailto:KMelchior@Nossaman.com]  
Sent: Friday, November 05, 2004 10:05 AM  
To: Harry Sondheim; mtuft@cwclaw.com  
Cc: McCurdy, Lauren; Difuntorum, Randall  
Subject: RE: Agenda items IIID (2-300) and III. I (Waiver of A-C privilege)

. . . .

**RRC – ACP Waiver Rule  
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Thanks. But the example you mention doesn't strike me as a problem. The defendant shouldn't cop a plea without the knowledge and involvement of his lawyer. If so, the prosecutor and the lawyer for the defendant can discuss the possibility of a waiver of the a/c privilege. Anyway, from my perspective there would usually be little by way of facts (evidence) that would be shielded by the privilege since facts or evidence the client knows do not become privileged because they are communicated to the lawyer. My concern is with the advice and also to a lesser extent the types of investigations made by the lawyer, which absolutely must be based on total freedom of inquiry and candor of advise.

**January 17, 2005 Melchior E-mail to RRC List (transmitted by Felicia Soria):**

I have little to add to my prior comments. The confidentiality of the lawyer-client relationship is in significantly greater peril today than it has been in my memory. I have not yet heard any conceptual opposition to my proposal – only, that we would be undertaking a new departure (concededly a correct observation) and that there are public policy considerations which warrant the use of the strongest tools in the hands of prosecutors in parlous times.

As to the latter point, I am by no means the first person to point out that times of stress and danger are the very points when we must be especially vigilant to protect any rights which are basic elements of our liberty. The right to receive plain, unvarnished advice from a skilled attorney in confidence is such a right, as courts and philosophers have repeated many times. The very fact that there are powerful institutions which use their positions of power to demand that others “voluntarily” forfeit this basic right is the impetus which led me to make this proposal in the first place. And it is by no means only government officials who demand the disclosure of confidential attorney-client communications: private interests are not beyond making such demands, and will at times succeed, based on their power position of the moment.

Put yourselves in the position of a colleague who sees serious problems with significant consequences facing a client, be it an individual accused of heinous conduct (especially in time of war) or a large organization which needs candid advice about choices facing it after some of its constituents may have committed acts of questionable nature and with perhaps enormous consequences to the organization, on which many thousands may depend on their livelihoods. In such situations, your advise must be fearless, and not limited by concerns as to how that advice might look – or what its disclosure might mean for your client – if your thoughts and comments became public.

It is not for your protection as lawyers that this proposal is put forward, but to protect our clients – so that they may expect and receive plain, honest and fearless advice at times when it is urgently needed.

I will await objections and criticisms, which I will consider and to which I may then reply.

**January 18, 2005 Tuft E-mail to RRC List:**

Kurt Melchior has raised a legitimate concern that deserves consideration by the Commission. This does not mean, however, that the issue Kurt raises should be the subject of a separate rule of professional conduct. In fact, I am not in favor of the proposed rule in Kurt's

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May 27, 2004 email. I believe the issue Kurt raises can be addressed as part of an existing rule or as a comment to an existing rule.

*The Problem*

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Importantly, the waivers at issue are completely voluntary. If a client does not want to take a proposed plea bargain because it requires a privilege waiver the client can reject it. Remember, the client is the holder of the privilege; it is not the lawyer's. The client, therefore, should have complete discretion to exercise the right of waiver if that client is convinced to do so is in his/her/its best interest. Conversely, a rule preventing waivers where the client feels it is in his/he/its interest to waive, interferes with the exercise of an important client right. How can we say that a general need to uphold the A/C privilege should prevail in every case where the client has more important interests (such as a liberty interest) at risk. It is the client's judgment on this question that is paramount.

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This brings me to the potential constitutional infirmities of such a proposed rule. To the extent a rule of professional conduct interferes with federal law, which is clearly to the contrary, we have very real supremacy clause issue. Where Congress had mandated certain actions to be taken to earn favorable sentencing consideration, how can we enact a rule that makes that action impossible?

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Lastly, proposing this rule is likely to raise a public perception, perhaps wrongly, that we are using the pretext of the A/C privilege to protect lawyers. More than a few will complain that our commission is engaged in professional wagon circling at the expense of the public. The absence of a similar ABA rule only exacerbates the problem, and will fuel more speculation about the motive of the state bar. While I know this is not the case, enacting a rule barring conditional waivers of the A/C privilege without a stronger justification than that yet proffered would do little to placate, or even adequately answer, these critics. I urge you to drop the idea now, and let's devote those energies to completion of the rules revisions.

**February 2, 2005 Voogd E-mail to RRC:**

I start from the assumption that secrecy is bad and transparency is good. Unjust results can readily ensue from secreting facts. The attorney-client rule and duty of confidentiality are justified by the value of clients making full disclosure to their attorneys. That value is not applicable to the proposed rule and for that reason alone the rule should be rejected.

**February 2, 2005 Tuft E-mail to RRC:**

In regard to Nace's January 21, 2005 memo on the wisdom of having a rule (or a comment as I propose) on the duty of lawyers not to deliberately undermine the attorney-client privilege of another person (or, I would add, the work product protection of another lawyer), the ABA House of Delegates recently adopted Report 303 presented by the ABA Antitrust Section urging Congress to amend the federal sentencing guidelines to state affirmatively that waiver of the attorney-client privilege and work product protection should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

In addition, an ABA Task Force on the attorney-client privilege has been formed in response to the widespread concern by attorneys that the privilege is under attack by law enforcement officials, regulators and others. The Task Force plans to present a set of recommendations for consideration by the HOD at the August meeting.

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**February 3, 2005 Diane Karpman E-mail to RRC List:**

Dear Commission Members:

Mark raised the issue of work product, and that is extremely relevant in conjunction with the ABA Task Force on Attorney-Client Privilege.

Would it be possible for there to be a comment, alerting lawyers that the CA work product privilege is vastly different than the Model Rule (MR) states? And. I am sorry but I do not know where such a comment should occur but since Mark raised the issue if figured I would suggest the need for such a comment.

MR states are governed by the principals expressed in Hickman v. Taylor, which in essence creates a work product **immunity**. In CA, work product is an extremely solid **privilege** expressed in CCP 2018.

Work product immunity is subject to the crime fraud exception, whereas, work product privilege in CA is not subject to the crime fraud exception. That, issue was recently addressed and may be addressed again in the Rico case which is currently pending at the Supreme Court. You may recall that the attorney in that case, claimed he was permitted to retain the inadvertently obtained document since he was going to employ it for impeachment (crime fraud) purposes and the court- in essence said that crime fraud, did not apply to work product.

In 2002, prosecutors in CA requested and successfully obtained an amendment to CCP 2018, that allows them to over come work product, because until that time a lawyer could successfully block governmental prosecutors with the assertion of work product privilege.

Out of state lawyers and for that matter many CA lawyers are unaware of this factor, which is the reason that I am suggested a comment-somewhere.

Additionally, Bruce Green, the Reporter of the ABA Privilege Task force is a member of APRIL who will be presenting an update on that Committee in Salt Lake City on Saturday, February 12, 2005 at 9:45 at the APRIL meeting at the Hotel Monaco. If any of you are attending the meeting and would like to attend this event, please contact me and I can make arrangements.

Finally, the ABA Privilege Task Force will be holding their first public hearings on Friday, February 11, 2005, and I can contact Bruce to find out the location if you are interested in attending that event.

**February 3, 2005 Sapiro Memo to RRC (transmitted by Lauren McCurdy):**

To: Commission For The Revision Of The Rules Of Professional Conduct  
From: Jerome Sapiro, Jr.  
Date: February 2, 2005  
Re: Proposed Prohibition Of Request Or Agreement To Waive Attorney-Client Privilege

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I agree with Kurt and Mark that there is a serious problem and that we should consider a rule on this subject. I might ultimately vote against a particular rule, depending on its wording, but I

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recommend that a subcommittee be authorized to proceed at least to the drafting stage so we can consider an appropriate rule.

On their facts, the holdings of McKesson v. Superior Court, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 12 (2004) [privilege waived; order that documents be produced in civil litigation affirmed]; and United States v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003) [attorney-client privilege and work product privilege not applicable to same documents] seem reasonable. I agree that prosecutors may have legitimate reasons in some cases for demanding disclosure of attorney-client communications or work product privilege.

However, we should also consider a possible rule or addition to an existing rule limiting or prohibiting such demands. I reached this conclusion for somewhat different reasons than expressed by Kurt and Mark.

If an individual chooses to plea bargain with a regulatory agency or prosecutor, he or she can decide whether it is in his or her best interests to waive Fifth Amendment rights, and he or she can discuss with his or her own attorney the pros and cons of authorizing the attorney to waive work product protection. In discussions with the individual, the prosecution would normally advise the individual about his or her Miranda rights and might negotiate a plea bargain or immunity in exchange for disclosure of otherwise confidential information. Those are matters for negotiations between the individual (whether represented by counsel or not) and the regulator or prosecutor. To me, those types of negotiations can legitimately be conducted.

On the other hand, in the context of regulation or prosecution of a corporation, partnership, or other organization, the same types of negotiations can deprive individuals of their constitutional rights. An organization does not have an institutional memory except through its directors, officers, partners, or employees. In order for counsel for the organization to investigate suspected misconduct, the attorney for the organization is forced to interview individuals. The individuals may decide to cooperate with the attorney for the organization for various reasons. However, unless they obtain independent advice, they probably are not aware that, by doing so, they risk loss of their Fifth Amendment rights.

Under the Holder and Thompson memoranda, the United States Attorneys' Manual, and Federal Sentencing Guidelines, only the prosecutor evaluates whether the organization has cooperated and the timeliness of that cooperation. Under those documents, the failure of the organization to waive attorney-client privilege and work product protections, and failure to disclose the results of internal investigations and supporting documents related to those investigations, enhance both the probability that the organization, itself, will be prosecuted and the probability of a harsher sentence if there is a conviction. Therefore, the organization, to protect itself, has strong incentive to waive attorney-client confidentiality and work product protection, and to surrender the results of the investigations by its own lawyers.

If the organization does so, the prosecution has then obtained incriminating evidence from the employee, officer, director, or partner without having to advise that individual about the individual's Miranda rights and without having to negotiate a plea bargain or immunity in exchange for disclosure of otherwise incriminating evidence.

If the organization does so, the attorney for the organization has then become an instrumentality for invading the Fifth Amendment rights of the individuals. The attorney for the organization is converted from investigating the facts on behalf of the organizational client, and for advising the organization about appropriate steps for the organization to take, into a conduit for communicating information from the individuals, who may or may not be represented by counsel, to the regulators or prosecutors. On top of this, the organization's attorney is made a

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potential witness either in civil or criminal litigation arising out of the subject of the attorney's investigation. The organization is therefore deprived of its counsel of choice.

These invasions of fundamental rights of both the organization and the individuals cause me to agree with Kurt and Mark and recommend that we proceed to the drafting stage.

With best regards to all of you,

Jerry



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**May 27, 2004 Melchior E-mail to RRC Members:**

Let me take a moment at this early point before we get into a flurry of messages about the next meeting, to revive my proposal for an amendment to Rule 3-600 which I mentioned in preparation for the last meeting but we did not reach. (Rule 3-600 seems a logical place to discuss this item -- but it could be a part of 1-500 or a stand alone proposition.)

I propose that we adopt an amendment or rule which, to follow the language of 1-500, with new material in caps, will state that

"A member shall not be a party to or participate in offering, REQUESTING or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement INVOLVES OR CONTEMPLATES THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY A PARTY WHICH IS NOT THAT MEMBER'S CLIENT."

I have explained my reasons earlier: Government attorneys are increasingly demanding waiver of ac privilege as a condition of plea bargaining and of settlement of enforcement cases. The target has no real choice but to accede. That's not how the privilege was intended.

Since I said that, the courts have held -- correctly, in my view -- that such waiver is a voluntary disclosure which waives the privilege against the world. See McKesson, below. That may or may not be good social policy; but as long as the courts and the legislature strongly back the privilege, I think that we can do our part by making the privilege more vital. There have been no significant problems with 1-500 to my knowledge: this seems a good thing to do.

Here's the McKesson case; DISCLOSURE TO GOVERNMENT UNDER PROTECTIVE AGREEMENT WAIVES AC PRIVILEGE AND WORK PRODUCT PROTECTION  
McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229. Similar parsing of cases as Oxy: though cpn had ample motive to cooperate with DOJ and SEC in disclosing internal investigation by counsel (no prosecution v. it, at least yet), this was not "common interest" sharing. The disclosure, while no doubt helpful to cpn and to government, was to adverse parties, and party cannot prefer one adversary to another in selectively disclosing privileged material. Both privileges were waived by disclosure to govt.

**August 15, 2004 Voogd E-mail/Memo to RRC:**

The Legislature passed the attorney-client privilege. A court has construed the legislation in a manner that allows prosecutors to require waiver of the privilege as a condition of plea bargaining and the settlement of enforcement cases. It seems to me that we lack the authority to recommend the overruling the legislature and courts in this manner. The proposed rule is less a traditional rule of professional conduct than an effort to substitute our judgment for that of the Legislature.

Moreover, there is a risk of unintended consequences. Consider the client who is induced by his lawyer to engage in criminal conduct with his lawyer. The client fires his lawyer and retains a new lawyer in an effort to resolve the mess. The new lawyer calls on a prosecutor in an effort to obtain leniency for the client in return for outing the first lawyer. As I read the proposed rule, the prosecutor cannot make the deal.

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It is suggested that the prosecutor's target has no real choice but to accede to the prosecutor's deal. Innocent or guilty, the target is unlikely to make the deal if the information to be disclosed may harm him, her or it more than then any countervailing benefits of the deal. On the other hand, innocent or guilty, the target is inclined to make the deal if the information to be disclosed will only harm the target's lawyer. Only in the later sense the suggestion is correct.

Where does the public interest lie? It seems to me the proposed rule serves to protect lawyers from the disclosure of misconduct on their part and limits the rights of clients to use their usual waiver rights to advance their interests. I oppose the proposed rule as contrary to the public interest.

**November 4, 2004 Sondheim E-mail to Melchior, cc RD & LM:**

From: Harry Sondheim [mailto:hbsondheim@earthlink.net]  
Sent: Thursday, November 04, 2004 10:22 PM  
To: Melchior, Kurt W.  
Cc: lauren.mccurdy@calsb.org; Difuntorum, Randall  
Subject: Re: Agenda items IIID (2-300) and III. I (Waiver of A-C privilege)

Kurt--

. . . .

As indicated by Kevin's notes which Randy sent you, Mark, while he may be generally in agreement with you (as is JoElla), had some concerns about your approach. I, too, have my own concerns which perhaps are colored by my years as a prosecutor. If immunity or a deal is offered to a defendant in exchange for the defendant testifying against another defendant, it seems to me that a prosecutor would want some assurance that the story the client is going to relate is true and is consistent with what he or she told his or her lawyer. Thus the prosecutor may find it necessary to intrude into the A-C privilege before giving the defendant a free ride or a reduced charge, even in the absence of a formal policy such as may have been established by the feds. While I recognize that initially the client and the lawyer may not have to operate from the premise that the A-C privilege will eventually have to be waived, as things develop this waiver may come into play and may thus come within the parameters of your proposal. Consequently, the proposal you make may have ramifications far beyond the immediate issue you are seeking to resolve.

Cheers,

Harry

**November 5, 2004 Melchior E-mail to Sondheim, cc RD & LM:**

From: Melchior, Kurt W. [mailto:KMelchior@Nossaman.com]  
Sent: Friday, November 05, 2004 10:05 AM  
To: Harry Sondheim; mtuft@cwclaw.com  
Cc: McCurdy, Lauren; Difuntorum, Randall  
Subject: RE: Agenda items IIID (2-300) and III. I (Waiver of A-C privilege)

. . . .

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Thanks. But the example you mention doesn't strike me as a problem. The defendant shouldn't cop a plea without the knowledge and involvement of his lawyer. If so, the prosecutor and the lawyer for the defendant can discuss the possibility of a waiver of the a/c privilege. Anyway, from my perspective there would usually be little by way of facts (evidence) that would be shielded by the privilege since facts or evidence the client knows do not become privileged because they are communicated to the lawyer. My concern is with the advice and also to a lesser extent the types of investigations made by the lawyer, which absolutely must be based on total freedom of inquiry and candor of advise.

**January 17, 2005 Melchior E-mail to RRC List (transmitted by Felicia Soria):**

I have little to add to my prior comments. The confidentiality of the lawyer-client relationship is in significantly greater peril today than it has been in my memory. I have not yet heard any conceptual opposition to my proposal – only, that we would be undertaking a new departure (concededly a correct observation) and that there are public policy considerations which warrant the use of the strongest tools in the hands of prosecutors in parlous times.

As to the latter point, I am by no means the first person to point out that times of stress and danger are the very points when we must be especially vigilant to protect any rights which are basic elements of our liberty. The right to receive plain, unvarnished advice from a skilled attorney in confidence is such a right, as courts and philosophers have repeated many times. The very fact that there are powerful institutions which use their positions of power to demand that others “voluntarily” forfeit this basic right is the impetus which led me to make this proposal in the first place. And it is by no means only government officials who demand the disclosure of confidential attorney-client communications: private interests are not beyond making such demands, and will at times succeed, based on their power position of the moment.

Put yourselves in the position of a colleague who sees serious problems with significant consequences facing a client, be it an individual accused of heinous conduct (especially in time of war) or a large organization which needs candid advice about choices facing it after some of its constituents may have committed acts of questionable nature and with perhaps enormous consequences to the organization, on which many thousands may depend on their livelihoods. In such situations, your advise must be fearless, and not limited by concerns as to how that advice might look – or what its disclosure might mean for your client – if your thoughts and comments became public.

It is not for your protection as lawyers that this proposal is put forward, but to protect our clients – so that they may expect and receive plain, honest and fearless advice at times when it is urgently needed.

I will await objections and criticisms, which I will consider and to which I may then reply.

**January 18, 2005 Tuft E-mail to RRC List:**

Kurt Melchior has raised a legitimate concern that deserves consideration by the Commission. This does not mean, however, that the issue Kurt raises should be the subject of a separate rule of professional conduct. In fact, I am not in favor of the proposed rule in Kurt's

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This brings me to the potential constitutional infirmities of such a proposed rule. To the extent a rule of professional conduct interferes with federal law, which is clearly to the contrary, we have very real supremacy clause issue. Where Congress had mandated certain actions to be taken to earn favorable sentencing consideration, how can we enact a rule that makes that action impossible?

As to state prosecutors' actions pre-filing, I also have a concern that Kurt's proposal, if adopted by the state Supreme Court, would necessarily result in the judicial branch (which has undisputed jurisdiction over lawyer licensing/ethics) interfering with the lawful exercise of prosecutorial discretion in violation of the separation or powers doctrine. (See generally, In re Rosenkrantz, (2002) 29 Cal. 4th 616 People v. Andreotti, (2001) 91 Cal. App. 4th 1263).

Lastly, proposing this rule is likely to raise a public perception, perhaps wrongly, that we are using the pretext of the A/C privilege to protect lawyers. More than a few will complain that our commission is engaged in professional wagon circling at the expense of the public. The absence of a similar ABA rule only exacerbates the problem, and will fuel more speculation about the motive of the state bar. While I know this is not the case, enacting a rule barring conditional waivers of the A/C privilege without a stronger justification than that yet proffered would do little to placate, or even adequately answer, these critics. I urge you to drop the idea now, and let's devote those energies to completion of the rules revisions.

**February 2, 2005 Voogd E-mail to RRC:**

I start from the assumption that secrecy is bad and transparency is good. Unjust results can readily ensue from secreting facts. The attorney-client rule and duty of confidentiality are justified by the value of clients making full disclosure to their attorneys. That value is not applicable to the proposed rule and for that reason alone the rule should be rejected.

**February 2, 2005 Tuft E-mail to RRC:**

In regard to Nace's January 21, 2005 memo on the wisdom of having a rule (or a comment as I propose) on the duty of lawyers not to deliberately undermine the attorney-client privilege of another person (or, I would add, the work product protection of another lawyer), the ABA House of Delegates recently adopted Report 303 presented by the ABA Antitrust Section urging Congress to amend the federal sentencing guidelines to state affirmatively that waiver of the attorney-client privilege and work product protection should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

In addition, an ABA Task Force on the attorney-client privilege has been formed in response to the widespread concern by attorneys that the privilege is under attack by law enforcement officials, regulators and others. The Task Force plans to present a set of recommendations for consideration by the HOD at the August meeting.

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**February 3, 2005 Diane Karpman E-mail to RRC List:**

Dear Commission Members:

Mark raised the issue of work product, and that is extremely relevant in conjunction with the ABA Task Force on Attorney-Client Privilege.

Would it be possible for there to be a comment, alerting lawyers that the CA work product privilege is vastly different than the Model Rule (MR) states? And. I am sorry but I do not know where such a comment should occur but since Mark raised the issue if figured I would suggest the need for such a comment.

MR states are governed by the principals expressed in Hickman v. Taylor, which in essence creates a work product **immunity**. In CA, work product is an extremely solid **privilege** expressed in CCP 2018.

Work product immunity is subject to the crime fraud exception, whereas, work product privilege in CA is not subject to the crime fraud exception. That, issue was recently addressed and may be addressed again in the Rico case which is currently pending at the Supreme Court. You may recall that the attorney in that case, claimed he was permitted to retain the inadvertently obtained document since he was going to employ it for impeachment (crime fraud) purposes and the court- in essence said that crime fraud, did not apply to work product.

In 2002, prosecutors in CA requested and successfully obtained an amendment to CCP 2018, that allows them to over come work product, because until that time a lawyer could successfully block governmental prosecutors with the assertion of work product privilege.

Out of state lawyers and for that matter many CA lawyers are unaware of this factor, which is the reason that I am suggested a comment-somewhere.

Additionally, Bruce Green, the Reporter of the ABA Privilege Task force is a member of APRIL who will be presenting an update on that Committee in Salt Lake City on Saturday, February 12, 2005 at 9:45 at the APRIL meeting at the Hotel Monaco. If any of you are attending the meeting and would like to attend this event, please contact me and I can make arrangements.

Finally, the ABA Privilege Task Force will be holding their first public hearings on Friday, February 11, 2005, and I can contact Bruce to find out the location if you are interested in attending that event.

**February 3, 2005 Sapiro Memo to RRC (transmitted by Lauren McCurdy):**

To: Commission For The Revision Of The Rules Of Professional Conduct  
From: Jerome Sapiro, Jr.  
Date: February 2, 2005  
Re: Proposed Prohibition Of Request Or Agreement To Waive Attorney-Client Privilege

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I agree with Kurt and Mark that there is a serious problem and that we should consider a rule on this subject. I might ultimately vote against a particular rule, depending on its wording, but I

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recommend that a subcommittee be authorized to proceed at least to the drafting stage so we can consider an appropriate rule.

On their facts, the holdings of McKesson v. Superior Court, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 12 (2004) [privilege waived; order that documents be produced in civil litigation affirmed]; and United States v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003) [attorney-client privilege and work product privilege not applicable to same documents] seem reasonable. I agree that prosecutors may have legitimate reasons in some cases for demanding disclosure of attorney-client communications or work product privilege.

However, we should also consider a possible rule or addition to an existing rule limiting or prohibiting such demands. I reached this conclusion for somewhat different reasons than expressed by Kurt and Mark.

If an individual chooses to plea bargain with a regulatory agency or prosecutor, he or she can decide whether it is in his or her best interests to waive Fifth Amendment rights, and he or she can discuss with his or her own attorney the pros and cons of authorizing the attorney to waive work product protection. In discussions with the individual, the prosecution would normally advise the individual about his or her Miranda rights and might negotiate a plea bargain or immunity in exchange for disclosure of otherwise confidential information. Those are matters for negotiations between the individual (whether represented by counsel or not) and the regulator or prosecutor. To me, those types of negotiations can legitimately be conducted.

On the other hand, in the context of regulation or prosecution of a corporation, partnership, or other organization, the same types of negotiations can deprive individuals of their constitutional rights. An organization does not have an institutional memory except through its directors, officers, partners, or employees. In order for counsel for the organization to investigate suspected misconduct, the attorney for the organization is forced to interview individuals. The individuals may decide to cooperate with the attorney for the organization for various reasons. However, unless they obtain independent advice, they probably are not aware that, by doing so, they risk loss of their Fifth Amendment rights.

Under the Holder and Thompson memoranda, the United States Attorneys' Manual, and Federal Sentencing Guidelines, only the prosecutor evaluates whether the organization has cooperated and the timeliness of that cooperation. Under those documents, the failure of the organization to waive attorney-client privilege and work product protections, and failure to disclose the results of internal investigations and supporting documents related to those investigations, enhance both the probability that the organization, itself, will be prosecuted and the probability of a harsher sentence if there is a conviction. Therefore, the organization, to protect itself, has strong incentive to waive attorney-client confidentiality and work product protection, and to surrender the results of the investigations by its own lawyers.

If the organization does so, the prosecution has then obtained incriminating evidence from the employee, officer, director, or partner without having to advise that individual about the individual's Miranda rights and without having to negotiate a plea bargain or immunity in exchange for disclosure of otherwise incriminating evidence.

If the organization does so, the attorney for the organization has then become an instrumentality for invading the Fifth Amendment rights of the individuals. The attorney for the organization is converted from investigating the facts on behalf of the organizational client, and for advising the organization about appropriate steps for the organization to take, into a conduit for communicating information from the individuals, who may or may not be represented by counsel, to the regulators or prosecutors. On top of this, the organization's attorney is made a

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potential witness either in civil or criminal litigation arising out of the subject of the attorney's investigation. The organization is therefore deprived of its counsel of choice.

These invasions of fundamental rights of both the organization and the individuals cause me to agree with Kurt and Mark and recommend that we proceed to the drafting stage.

With best regards to all of you,

Jerry

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**April 5, 2009 KEM E-mail to Melchior, cc Chair & Staff:**

This is the second e-mail I'm sending you concerning your requests for materials. This one concerns the A-C privilege waiver rule.

I've attached the following:

1. An e-mail compilation dated 2/3/05, which is just before the last meeting at which we considered the Rule, 2/4/05. In Word.
2. My cumulative meeting notes for the Rule. In PDF.
3. Excerpt from the Supplemental Materials for my PR course last fall concerning this issue. They include the following (see my comment #3, below):
  - ABA Task Force on the Attorney-Client Privilege (2005) – Resolution (Prob. 8, 18) 317
  - ABA Task Force on the Attorney-Client Privilege (2006) – Resolution (Prob. 8, 18) 318
  - The Department Of Justice's 12/12/2006 "McNulty Memorandum" On Corporate Compliance (Prob. 8, 18) 319
  - The Department Of Justice's 7/9/2008 "Filip" Letter to Senate Judiciary Committee on Change in DOJ Policy on Corporate Compliance (Prob. 8, 18) 338

**Some Comments:**

1. The first e-mail, your 5/27/04 e-mail, contains the proposal. At the August 2004 meeting, you, Mark & JoElla were named to the drafting team.
2. As near as I can tell no further drafting took place. Instead, at the February 4, 2005 meeting, the Rule was tabled pending action by the ABA, which had appointed a task force on the Attorney-Client privilege.
3. In the interim, the Thompson Memorandum was replaced by the McNulty Memorandum, which finally was superseded by the "Filip Letter" to the Senate Judiciary Committee. I've attached those items to this e-mail.
4. In the interim, Sen. Arlen Specter has at least twice introduced the "Attorney-Client Privilege Protection Act" (I'm aware of 2006 and 2008 versions). See, for example, the following on the 2008 act:

<http://www.govtrack.us/congress/bill.xpd?bill=s110-3217>

The foregoing never went to a vote.

5. The House, however, did pass a similar bill, but again, that never became law. See:

<http://www.govtrack.us/congress/bill.xpd?bill=h110-3013>

6. While I'm not positive, I believe these acts, unless passed, are put in the dustbin at the end of each Congress, and require reintroduction with the start of a new Congress. I haven't seen

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anything new on such an act, but I think the folks on Capitol Hill might have other fish to fry right now.

7. Here is the home page of the ABA ACP Task Force:

<http://www.abanet.org/buslaw/attorneyclient/>

Please let me know if you have any questions. I've been saving a number of short articles on the issue and I could send those to you in a zip file if you like.

**On 3/4/09, Kevin Mohr wrote:**

Kurt:

I can't get to these requests until the end of the week but I can assure you I have materials on all matters you've identified in items 1 to 3. I don't think we'll be addressing the first two items until later in the summer or fall. We will start on the ABA Rule without California counterparts in early summer, but I'm not sure when we'll get to 8.5 (Although 8.5 has some provisions that are also found in 1-100, there are some other aspects of it w/o a counterpart in our Rules -- i.e., choice of law in 8.5(b), so we put off consideration of 8.5 until the end of our journey.)

As to 1.8.13, that is the counterpart to MR 1.8(k), imputation of PERSONAL (and other) conflicts, i.e., conflicts identified in the MR counterparts to our rules (such as 3-300) and other Model Rule provisions that are all gathered in MR 1.8). Rule 1.8.13 will probably be on the agenda for either our May or our July meeting.

**April 7, 2009 KEM E-mail to Drafters (Melchior, Sapiro, Tuft & Voogd):**

As members of the drafting committee, I'm forwarding to you an e-mail I sent to Kurt on 4/5/09 with materials I have concerning the proposed "Attorney-Client Privilege Waiver" Rule. Kurt is lead drafter.

**Please refer to my comments in the e-mail to Kurt, below.** Previously, the RRC voted to defer consideration of this Rule. The e-mail below contains links to further information on the issues underlying this Rule and the reason for deferring consideration of it.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

**Finally, please note that this Rule is not calendared until the December 2009 meeting.** However, some of you have requested being provided with the relevant materials in the interim.

Please let me know if you have any questions.

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**August 27, 2009 McCurdy E-mail to Melchior, cc Chair, Vapnek, Tuft & Staff:**

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

**ASSIGNMENTS FOR SEPTEMBER MEETING**

**September 11, 2009 Meeting**

**Assignments Due: Wed., 9/2/09**

No lead drafter assignments.

**ASSIGNMENTS FOR OCTOBER MEETING**

**October 16 & 17, 2009 Meeting**

**Assignments Due: Wed., 9/30/09**

**1. III.EE. Rule 1.8.11 Relationship with Other Party's Lawyer [3-320] (Post Public Comment Draft #4 dated 5/16/08) Codrafters: Julien, Voogd**

**Assignment:** (1) a chart comparing proposed Rule 1.8.11 to RPC 3-320; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

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**2. III.FF. Rule 1.8.12 Purchasing Property at a Foreclosure Sale [4-300]  
(Post Public Comment Draft #2.2 dated 6/27/08) Codrafters: Foy, Lamport**

**Assignment:** (1) a chart comparing proposed Rule 1.8.12 to RPC 4-300; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

**November 6 & 7, 2009 Meeting**

**Assignments Due: Wed., 11/28/09**

**1. IV.I. Possible Rule re: A-C Privilege Waiver (no counterpart rules)  
Codrafters: Sapiro, Tuft, Voogd**

**Assignment:** (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

**2. IV.J. Possible Rule re: Advice of Counsel (see Oregon Rule 8.6)  
Codrafters: Ruvolo, Sapiro**

**Assignment:** (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

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**October 26, 2009 McCurdy E-mail to Drafters (Melchior, Sapiro, Tuft, Voogd), cc Chair, Vapnek & Staff:**

Kurt & Codrafters:

Please refer to Kevin's attachments and April 7, 2009 message below for background materials on this rule assignment.

The assignments for the November meeting are due this Wednesday, October 28th.

***Attachments:***

RRC - ACP Rule - E-mails, etc. - REV3 (020305).doc

RRC - ACP Waive - PR - F2008 - Supp Materials on ACP Waiver (Mohr).pdf

RRC - ACP Waive- 08-27-04 KEM Meeting Notes - CUMUL (02-10-05).pdf

**October 27, 2009 Melchior E-mail to Drafters, cc Chair, Vapnek & Staff:**

Until I read Lauren's message last night, I had no idea that we are a drafting team and were to draft this rule by tomorrow. I hope that you read the material. It seems to have been 5+ years since we had any discussion; but here's how I see this:

1. The Commission voted 6:2 on 4/27/04 to pursue a study (well, you have to read it to try to figure out what happened):

MOTION: Support the principle of a rule that achieves the general purpose of his proposed rule: "A member shall not be a party to or participate in offering, REQUESTING or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement INVOLVES OR CONTEMPLATES THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY A PARTY WHICH IS NOT THAT MEMBER'S CLIENT."

Mark seconds, but friendly amendment: whether or not there is an ethical principle here in what Kurt has proposed: Is there an ethical principle that interfering with A-C relationship can undermine a person's ability to obtain competent legal advice.

MOTION: Allow Kurt and drafting team to pursue study to see if there be such overreaching principle of professional responsibility that a citizen is deprive of obtaining competent legal advice.

YES: 6 NO: 2 AGAINST: 1

I must admit that I do not understand the motion that passed. Given the motion stated earlier and Mark's amendment, my best try at interpreting the minutes is that the Commission endorsed a study of a rule which would protect a client's right to deal with his lawyers free of fear that outside pressure would cause him (the client -- I will use the male gender to save words) to give up his right to complete confidentiality of that relationship -- unless, of course, he the client wished to waive that confidentiality. (The latter has always been his right and is not under debate here.)

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The simplest way to do that would be to adopt a rule such as I proposed 5+ years ago, namely that lawyers not within an attorney-client relationship may not put pressure on those within that relationship to force waiver of the privilege and confidentiality thereof. We have such a rule 1-500, which forbids "offering or making an agreement, whether in connection with a settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law," etc. To me, if we agree that waiver of attorney-client confidentiality should be a decision freely made by the client without outside demands or pressures, it seems a simple step to use the same formula and forbid demands for waiver.

My thinking was sufficiently stated in the 2004 correspondence which Lauren sent yesterday.

2. If you agree that this is a proper response to the 2004 motion, I will try to set this up in proper format (I have asked Lauren for blank forms), and try to circulate it to you before evening.

There were a great many other thoughts expressed in 2004, and there was significant disagreement although ultimately only 2 No votes against the (surely unclear) motion. Reading the material, I could see no alternative which would move the ball forward; but I am glad to hear your thoughts. **If you want to propose an alternative solution, please advise asap.**

3. We do have the ABA to lean on. While there is no Model Rule on point, they are on record with 2 resolutions which (to quote one) "oppose[] the routine practice of government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or change."

4. Which reminds me -- we should include protection of the work product doctrine in any rule we propose.

PLEASE LET ME HEAR FROM YOU ASAP. THERE SIMPLY IS NO TIME -- AND TO THE EXTENT THAT'S MY FAULT, I APOLOGIZE.

**October 27, 2009 Tuft E-mail to Drafters, cc Chair, Vapnek & Staff:**

Kurt, my views have not changed substantially since my January 2005 email. The concern raised is legitimate and is adequately covered, in my view, in Rules 4.2, 4.3 and hopefully, Rule 4.4(a), which will be on the agenda for the November 2009 meeting. We do not need a separate rule in addition to the Model Rules that currently exist.

**October 27, 2009 Melchior E-mail to Sondheim, cc Drafters, Vapnek & Staff:**

Harry: we need to address this to you.

Through Mark's message below and some direct messages from Jerry, it is clear that three out of four of the drafters believe that there is something in this proposal which the Commission should pursue (have not heard from Tony); but we are divided about the manner and scope of dealing with the subject. Mark believes that the subject is adequately addressed by other rules. Jerry is of the view that only government demands should be restricted in the way that the proposal's premise contemplates; and I believe that waivers of confidentiality and privilege at the instance of ANY third parties need to be separately addressed and should be forbidden -- and also that the Rules Mark cites do not accomplish that objective.

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There simply is not enough time for us to address and thrash out this subtle subject, not revived since 2005, overnight and to reach sufficient closure to make a recommendation for the Commission by tomorrow -- even if we were all free to discard our primary obligations to our clients and just deal with this subject, which of course we are not. That does not mean, in my opinion, that this important subject should be dropped, swept into the dustbin, particularly since three out of four members of the drafting team believe that the subject is worth addressing or may have been addressed.

Where do we go from here? It just isn't possible to comply with this schedule.

**October 27, 2009 Sondheim E-mail to Melchior, cc Drafters, Vapnek & Staff:**

Kurt, Mark and Jerry--

Thanks for bringing this to my attention. To simplify this matter I am sending my response to the entire Commission so that they can reflect upon what I am proposing as a temporary solution.

If, after discussion, the Commission concurs in Mark's view, there is no need to do anything other than explain why we are not recommending adoption of the rule, something that can be done for the Dec. meeting in light of the reasons already given by Mark.

If the Commission does not agree with Mark, then we can consider whether the Commission agrees with Kurt or Jerry or neither one of you and, depending upon the result, a chart can be prepared for the December meeting in accordance with the Commission's decision.

Thus further consideration of this rule will not interfere with your primary obligations to your clients (at least until we prepare for the Dec. meeting).

**October 27, 2009 Melchior E-mail to Sondheim, cc Drafters, Vapnek & Staff:**

With due respect, I do not think the question should be, do you want A? and if not A, do you want B or C or no rule?

It should be, do you want A, B, C, something else, or no rule.

**October 27, 2009 Sondheim E-mail to Melchior, cc Drafters, Vapnek & Staff:**

If the answer to your question is "yes" (which it seems to me requires a "yes" answer because all possibilities are encompassed within your question), we still have to make a choice among the alternatives. All the alternatives you suggest are set forth in the e-mails you and I sent and will be discussed before we consider whether to vote on Mark's view which is to have no rule, followed, if necessary, by B or C. However, we can ascertain at the meeting what the Commission wants to do regarding the processing of this rule.

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**October 31, 2009 Julien E-mail to RRC:**

Kurt is not alone...I did not know until I read this entire email exchange that I was appointed to this team in 2004. Two questions: (1) Am I really on this team because I do not have it as an assignment on any of my notes (2) If this rule is saying--an attorney should not seek a waiver from a person who is not her/his client, how can there be a privilege anyway between an attorney and the non-client?

Can you tell I am confused on this one? Please help because you know one of my big issues is preserving confidentiality where and whenever I can. I vote yes on confidentiality.

**October 31, 2009 Sondheim E-mail to Julien, cc RRC:**

Regarding question (1), let's see what happens at the Nov. meeting on this rule and if its resolution requires the Commission to consider it further in Dec., you will be part of the drafting team. Regarding question (2), the privilege exists between lawyer A and the client, but lawyer B is making an offer to lawyer A which includes waiver of the atty-client privilege by the client of lawyer A.