

House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
Oral testimony on Attorney-Client privilege
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Good afternoon, Mr. Chairman and members of the committee. My name is Tom Donohue. I am president and CEO of the U.S. Chamber of Commerce, the world's largest business federation, representing some 3 million businesses.

I am also here today on behalf of the Coalition to Preserve the Attorney Client Privilege, which includes most of the major legal and business associations in the country, including:

- o The American Chemistry Council
- o The American Civil Liberties Union
- o The Association of Corporate Counsel
- o Business Civil Liberties, Inc.
- o The Business Roundtable
- o The Financial Services Roundtable
- o Frontiers of Freedom
- o The National Association of Criminal Defense Lawyers
- o The National Association of Manufacturers
- o The National Defense Industrial Association
- o Retail Industry Leaders Association
- o The U.S. Chamber of Commerce; and
- o The Washington Legal Foundation

I should add that the coalition is working closely with the American Bar Association, which has separately submitted written testimony here today detailing its concerns about the erosion of attorney-client privilege. ABA policy prevents the organization from being listed as a member of broader coalitions.

The privilege to consult with an attorney freely, candidly, and confidentially is a fundamental Constitutional right that is under attack.

Recent policy changes at the Department of Justice and the SEC have permitted and encouraged the government to demand or expect companies to waive their attorney-client privilege or work-product protections during an investigation.

A company is required to waive its privilege in order to be seen as cooperating with federal

investigators.

A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a settlement or receive leniency in their sentencing or fine.

But it goes far beyond that. The “uncooperative” label can severely damage a company’s brand, shareholder value, their relationships with suppliers and customers, and their very ability to survive.

The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigations.

The opposite is true. An uncertain or unprotected attorney-client privilege actually diminishes compliance with the law.

If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek legal guidance.

The result is that the company may fall out of compliance – not intentionally – but because of a lack of communication and trust between the company’s employees and its attorneys.

Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won’t say anything at all.

That means that both the company and the government will be unable to find out what went wrong, punish the wrongdoers, and correct the company’s compliance system.

And there’s one other major consequence – once the privilege is waived, third party private plaintiffs’ lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settlements.

How pervasive has the waiving of attorney-client privilege become?

Last November, we presented findings to the U.S. Sentencing Commission showing that approximately one-third of inside counsel respondents – and as much as 48% of outside counsel respondents – said they had personally experienced erosion of attorney-client privilege or work-product protections.

This was according to a survey by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers.

After that presentation, the Sentencing Commission asked us for even more information about the frequency of waivers and their impact.

So our coalition commissioned a second, more detailed survey and got an even greater response rate from the members of our coalition partners.

We publicly released the results of this second survey just yesterday. They have been provided to the Committee, along with a more detailed coalition written statement. Here are a few highlights:

Almost 75% of both inside and outside counsel agree with the statement that a “culture of waiver” has evolved to the point that governmental agencies believe it is reasonable and appropriate to expect a company under investigation to broadly waive attorney-client privilege or waiver protections.

Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.

Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true – 60% responded that they were not directly involved with waiver requests. Only 8% percent of outside counsel and 3% of in-house counsel said that they “inferred waiver was expected.”

Our coalition is aggressively seeking to reverse this erosion of confidential attorney-client conversations.

We are pleased that the U.S. Sentencing Commission has decided to revisit recently amended commentary to the guidelines that allows waiver to be a cooperation factor in sentencing formulas, and we have submitted detailed comments on the ramifications of this policy.

We would encourage the Committee to weigh in with its support of the attorney-client privilege to the United States Sentencing Commission as it reconsiders the 2004 amendments to the Guidelines’ commentary language.

It is important to note that the Department of Justice and other regulatory agencies have created this erosion of the privilege without seeking input, oversight, or approval from Congress or the judiciary.

We seek your input and strongly urge you to exercise your oversight of DOJ and the SEC to ensure protection of the attorney-client privilege.

Let me be very clear: our efforts are not about trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than legitimate and honest businesspeople.

Rather, this is about protecting a well established and vital Constitutional right. Thank you very much. I look forward to your questions.