THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

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March 22, 2006

Michael Courlander, Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
Washington D.C. 20002-8002

Subject: Request for Public Comment on Proposed Amendments to the Sentencing Guidelines for the United States Courts (71 FR 4782-4804)

Dear Mr. Courlander:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct ("COPRAC")[1] appreciates this opportunity to submit its views on the commentary (the "Commentary") to Section 8C2.5 of the United States Sentencing Commission's ("Commission") 2004 amendments to Chapter Eight, the "Organizational Sentencing Guidelines."[2]

COPRAC's charge is to assist the more than 150,000 active members of the California State Bar in their desire to appreciate and adhere to ethical and professional standards of conduct. In so doing, we recognize that one of our primary constituencies is the public, and that our actions are governed by the objective of serving the public interest. These comments are submitted with those objectives in mind.

As explained below, COPRAC urges the Commission to delete the Commentary and instead adopt an alternate commentary providing that "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility]."

[1] This position is only that of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. This position has not been adopted by the State Bar's Board of Governors or overall membership and should not be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

[2] The Commentary provides: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

COPRAC begins by noting the purposes behind the attorney-client privilege and work product protection. Over a century ago, the United States Supreme Court declared that the assistance of lawyers "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981), quoting *Hunt v. Blackburn*, 128 U.S. 464 (1888). The existence of the privilege facilitates an important process. Privilege begets client trust, which in turn induces clients to make full and frank disclosures to their lawyers. Those disclosures enable effective legal representation, which entails the lawyer's assistance in helping the client comply with law. Any regulations or administrative policies that inhibit that process will impinge on the "broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. These concerns are more pressing than ever. We live in an evermore complicated regulatory environment where organizations turn to lawyers for assistance in compliance with law—compliance that inures to the benefit of the clients and the public as well.

The work product protection has different purposes but, like the attorney-client privilege, serves to "promote justice." As Justice Murphy noted in *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947):

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Because the work product protection dealt with representation before or during litigation, the protection historically served the legitimate adversarial needs of litigants. Consistent with that historical framework, an organization accused by the federal government of wrongdoing has a compelling need to draw upon the services of a lawyer who can prepare a legitimate defense without fearing that the government will coerce a waiver of the work product protection. But the work product protection does more than that. Today, a great deal of compliance activity is driven by the threat or presence of litigation that is then resolved through settlement, consent decrees, stipulated injunctions, and similar mechanisms. The vast majority of litigated cases now settle out of court—and that is particularly true for large organizational clients facing litigation initiated by the federal government. Thus, the work product protection now not only serves the legitimate adversarial needs of litigants but also facilitates the compliance function as well.

Unless the Commission deletes the Commentary and expressly provides that waiver of the attorney-client privilege or work product protections will never be a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and

Acceptance of Responsibility], the Commission will be doing serious long-term damage to the public benefits derived from the confidential nature of the attorney-client relationship.

First, although the Commentary suggests that waivers will not be a prerequisite to a reduction in culpability score except when necessary to provide timely and thorough disclosure, the exception is likely to swallow the rule. At sentencing, a federal prosecutor who did not receive the organization's privileged communications and work product is likely to argue in virtually all instances that waivers were necessary to effect a more timely and thorough disclosure from the organization. And, since the organization will at that time have been found culpable, there is a substantial likelihood that its earlier failure to provide a waiver will outweigh all other aspects of its self-reporting, cooperation and acceptance of responsibility. Thus, retaining this aspect of the 2004 amendment to the sentencing guidelines will contribute significantly to a new climate in which organizations expect that communications with their counsel will not be protected.[3]

But, in fact, waivers will virtually never be necessary to a timely and thorough investigation by a federal agency or prosecutor. Federal agencies and prosecutors will still have the full subpoena powers provided by federal law. Organizations will still have strong incentives to provide information to investigating agencies, and those agencies will have ample tools to test the veracity of that factual information. Further, federal prosecutors will still be able to assert the crime fraud exception to the attorney-client privilege and, if a prima facie showing is made, will gain access to otherwise privileged materials. However, there is a material difference between having a judge determine the privilege has been waived due to commission of a crime or fraud, and creating a climate where no organization can take comfort that any of its consultations with its counsel are confidential because a federal agency or prosecutor has essentially been empowered to demand a waiver without any finding that the attorney's services have been used in the commission of a crime or fraud.

Second, as waivers become more commonplace, compliance with law will suffer. The judicial opinions cited above, which draw on centuries of practical wisdom, make that point. But it also follows from common sense. In the modern regulatory environment, and especially after enactment of the Sarbanes-Oxley Act in 2002, organizations rely heavily on in-house and outside lawyers to gather facts, analyze compliance issues, conduct investigations and recommend courses of conduct that comply with law. Lawyers cannot represent organizations effectively if they are routinely seen by their clients as actively working as an arm of the federal government. For lawyers to fulfill their role, everyone at the organization from the board members down to the line employees must trust that the lawyers are working to represent the organization consistent with the long-recognized duty of undivided loyalty, and not as agents of the government.

The negative effects of having sentencing guidelines that result in routine waivers will only increase over time, as more and more organizations will come to doubt their lawyers' loyalties and as

[3] See the March 6, 2006 Association of Corporate Counsel Survey indicating that [in light of the Thompson Memorandum as well as the 2004 Amendments to the Organizational Sentencing Guidelines] the vast majority of corporations and their counsel are now operating in a climate in which they expect a request for waiver to be a part of any regulatory or prosecutorial investigation initiated by an arm of the federal government.

organizational agents will come to fear that the organization's lawyers are future federal informants. Those doubts and fears will necessarily reduce the amount and quality of information shared with the organization's lawyers as well as the amount and quality of legal advice provided by counsel. This slow erosion of the lawyers' role as agents of legal compliance would then take many years to reverse. In the meantime, the organization, its employees, its investors, and the public itself will be deprived of the benefits of the organization's compliance with law in accordance with the advice of counsel.

For these reasons, COPRAC urges that the Commentary be deleted and that the Commission take affirmative steps to prevent further erosion of the attorney-client privilege and work product protection by finding that waiver is not a prerequisite to a reduction in culpability score.

Thank you for your consideration of our opinion in this matter.

Very truly yours,

Steven A. Lewis, Chair
Committee on Professional
Responsibility and Conduct

cc: Hon. Diane Feinstein, United States Senate
Hon. Elton Gallegly, United States House of Representatives
Hon. Daniel E. Lungren, United States House of Representatives
Hon. Darrell E. Issa, United States House of Representatives
Hon. Howard L. Berman, United States House of Representatives
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