Attorney-Client Privilege Waivers in Criminal Investigations

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George J. Terwilliger III: Let us call a spade a spade and put this issue in perspective. While the matter is one of very great practical concern to counsel, business leaders and business managers who have to deal with it, what we are dealing with here are core aspects of our legal system. That is what the privilege of attorney-client communications and the work product doctrine are essentially—the pillars upon which the legal system and the operation of our ordered system of law depends. We ought to be careful about tinkering very much with these foundation stones.

Our present situation has evolved through a number of different elements, all of which are outlined in the paper, not the least of which is a much more aggressive policy attitude (appropriately so) on the part of the Justice Department, the SEC, and other federal and state enforcement entities, toward business crime and crime in the marketplace. I favor that approach. A dishonest marketplace cannot be a free marketplace, and it is important that the playing field be level. Prosecutors play a very important role in accomplishing that end. But, increasingly, as that has occurred—and in part because of some policy changes that were perhaps not too well thought-out, or executed poorly—we have reached the point where the privilege really is in peril, and we ought to be worried about that.

For those of you who do not deal with this issue, a brief: current Justice Department policy allows prosecutors to assess whether or not to prosecute a company, a corporation or another business entity, in part and in no small measure actually on the basis of whether that company has cooperated with the government; and, in assessing operation, in turn, as part of that cooperation, prosecutors are permitted to waivers of the attorney-client privilege or work product material. Now, as much as we would like to cooperate with prosecutors and provide such information, the problem this presents is the scope of the waiver that results in such circumstances.

We can agree on the importance of government policies that promote robust internal compliance programs and careful self-examination by companies of not just the ethics of their business behavior but the legal compliance of their operations. We can also agree that attorneys play a vital role in corporate governance: we want attorneys involved in business decisions and conducting the affairs of incorporation. When business decisions are made, lawyers ought to be in the room, particularly given the general complexity of the regulatory legal environment.

In the post-Enron world, as we have come to call it, corporations work under very tough enforcement. The use of criminal sanctions against businesses for conduct undertaken in the commercial marketplace is not at all uncommon. In this environment, it is only logical, common-sensical in fact, that legal advice be more important than ever in business decision-making.

Additionally, there is a long history of the SEC and, more recently, the Department of Justice, looking to counsel as adjuncts in their law enforcement functions. Right now I am involved in several cases where, in essence, we are conducting investigations in which the privilege has been waived, and the results of those investigations are being turned over to the Government in real time as a measure of the company's cooperation. Former Judge and SEC Director of Enforcement Stanley Sporkin, said recently (while he was still Director) that our budgets the agency was so limited in its resources, it could not do all the mop-up work in the cases it was handling. It decided then to enlist the private sector. This was an affirmative policy choice to use outside lawyers as adjuncts to the Government. Bill Kolasky, formerly Deputy Assistant Attorney General in the Antitrust Division, said in 2002 that it was critical the company's lawyers regularly attend management meetings and respond quickly to questions with advice that takes full account of the practical business issues a client faces.

I could give many more examples. Suffice it to say, the challenge this brings about is getting lawyers in the room, getting them involved in the discussion, without the burden of having business people looking over their shoulders at the lawyers thinking, "What are you going to reveal?" Is there really any confidentiality left? What trust can I enjoy with counsel when I share my concerns and look for advice? Can I speak freely now? Am I going to run afoul of the law? And so forth. So, I think the objective is finding a better way to do this under the law. And that is an objective on both the investigatory side and the business operations side. It is an objective common to both business and government.

The privilege waiver is getting them away from this common objective, because limited waiver agreements between investigating agencies (e.g. the Commission, the Justice Department and others) are for the most part ineffective in the face of challenges against a third party for communications or work product waivers. The majority view in the federal courts, to sum up as much as one can generalize, is that a waiver privilege is to one party as a waiver privilege is to all. The same goes generally for work product. If you disclose work product to the Government, the chances of being able to protect that disclosure in a challenge against third parties is pretty slim.

If you are interested in this issue and looking for a good discussion of the law on this issue, I would commend to your attention the Sixth Circuit's 2002 decision in the Columbia HCA Healthcare Fraud litigation; particularly the dissent of Judge Boggs, who was a Reagan appointee in that case. I think this is one of the most well-reasoned judicial explanations that I have ever seen. And it explains why recognizing some kind of

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limited waiver and enforcing limited waivers, where information has been turned over to the government in an investigatory setting, makes sense.

Where we stand today is perhaps best illustrated by a case recounted recently in a *National Law Journal* article. A law firm, in connection with McKesson's merger with HBOC, did an internal investigation and made certain disclosures concerning accounting irregularities of about $42 million. The firm that conducted the investigation wrote a report, and then turned it over to the authorities, at which point they limited waiver agreement; (the report was limited to authorities, not turned over to third parties, as we would typically expect). That report has now been the subject of litigation in five different courts, with the following results:

A state court in Delaware upheld the limited waiver (an opinion worth reading).

A Georgia state court refused to limit the waiver.

A California state court refused to limit the waiver.

A federal judge in the Northern District of California agreed to limit the waivers (there are differing results within the same jurisdiction).

Another federal judge, in the same district, hearing a case against a former executive of the company, refused to limit the waiver.

Needless to say, the results are all over the map. As the judge put it, the law is in the state of helpless confusion regarding enforcement of limited waivers. This only gets more complicated when you venture beyond the borders of the United States. Many European countries now have data protection or data privacy laws that prohibit companies or their agents from disclosing information obtained from their personnel or their personal files. While there are certain exceptions to this that can sometimes be used to interview employees and get information from them, if you want to turn that information over to the government under a limited privilege agreement or some other kind of an arrangement, the data protection laws further complicate that problem.

So, what can we do about this? I tried to address that question in the paper. There are a number of possibilities considered there, including legislative solutions. I think it is unlikely that there is judicial solution to this, absent some legislative initiative. Except for the Eighth Circuit, there has been little sympathy in the courts. Here in the D.C. circuit, Judge Mikva wrote a decision a long time ago that continues to hold sway, basically saying, "I don't see how it enhances the value of the attorney-client privilege to recognize a limited waiver. A waiver is waiver." And that seems basically to be the law.

The sentencing guidelines have some things now concerning cooperation that might be an avenue of redress. The SEC, I will say, to its credit, has introduced legislation that would try to address this issue. But there are a couple of immediate, practical things that can be done until some more comprehensive solution can be found, and they are discussed in the paper. One is to think about, when commencing an internal investigation with the idea that the results are to be disclosed to the government, doing it as a non-privileged exercise to begin with; making it clear to the Government, to the employees, to the company involved, that this is not a privileged exercise, "We intend to disclose this." The downside with that, of course, is that all of the information gathered is still available to the third parties from whom one is trying to shield it in a limited waiver agreement, and it is certainly a disincentive in the case where a company might suffer considerable exposure to third-party claims to even undertake the internal investigation.

Another possibility, which still has the advantage of cooperation with the government, and prosecutors' cooperation, is to provide the Government with a roadmap to conduct its own investigation. Obviously, you can turn over documents for the most part, company records, without waiving privilege' we are generally obligated to do that. But you can say, "You should look at these documents; you should talk to these individuals about these particular topics." You obviously must exercise care in how you do that—not waive privilege or to turn over work product. But it is a way to skirt the issue somewhat.

This is an important public policy issue, not just as a legal policy issue. It is about the Government being able to effectively regulate the commercial marketplace to make it honest—a laudable goal. For companies to play in that program, however—for them to conduct solid internal compliance programs, to do internal investigations, and, where appropriate, to engage in voluntary disclosures—a solution to this problem needs to be found.

Again, speaking very practical level, lawyers need to be woven into the fabric of business operations and business decisionmaking. And if they are not, it is not just the business that loses the benefit of sound legal advice, it is this entire endeavor to try and enhance the compliance and the ethics of business operations.

Mary Beth Buchanan: This is certainly an extremely important issue. And I think that, regardless of where you sit, whether you are on the enforcement side or a defense lawyer or even in the plaintiffs bar, you probably have a firmly held position. But I think that it is important for us to try to look at these issues from the various perspectives and try to understand why we each see these issues as we do and try for some solutions—try to discover how the government might continue to do what it needs to do to investigate fraud, and how the defense bar might protect its clients, and how the plaintiffs bar, of course, might do what it needs to do.

I think it is important to spend little time talking about what the Government's position is and why we hold this position, and then move on to whether the solutions that George Terwilliger has offered in his paper are viable ones. I will tell you at the outset that I think that some of them indeed are. First, it is important to understand what the Government is looking at when it decides to prosecute a corporation. I think most of you are probably familiar with the nine Thompson factors. I am not going to go over all of those because the one, for our purposes, that we are really concerned with is factor four. Number four says that we should consider the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents—including, if necessary, the waiver of corporate

attorney-client and work product protection.

Now, the reason that factor is so important is that when the Government uncovers wrongdoing, it has to decide who the culpable individuals or entities are and who should be prosecuted. Should we prosecute the individuals, or should we prosecute individuals and the corporation? Or, possibly, no one at all? We have to sort and figure out whether the corporation is really part of the wrongdoing or whether it might be a victim of wrongdoing; and we want corporations to help us to get to that answer as quickly as possible. I think that we have been pretty clearer in trying to spell out what we mean by cooperation, but as I attend these programs, and even as I read the first part of George's paper and listened to his remarks, I am still not sure that everyone understands; so, I am going to discuss that with you today.

What the Government wants to know is: What happened? Who did it? And, how did they do it? I submit that those things we are trying to find are factual, and for the most part they are not going to involve attorney-client privileged information. Most likely we are really talking work product. Because the individuals that probably hold the information the Government needs are not the clients of the counsel; they are the employees of the corporation. That is a very important fact to keep in mind. Not the client. So, there is not an attorney-client relationship (usually) between these witnesses and the counsel. These are generally the people that hold the information the Government needs. We want the counsel to tell us what they know, who's has talked to who, what might they tell us, and what documents we are going to need. And if we can get that information, then we do not need any type of waiver whatsoever.

Now, where does the problem come in? The problem generally comes in when these employees of the corporation are the ones who probably participated in the wrongdoing. For example, a CFO directs the accountant to the misstate earnings and expenses, to book these in wrong quarters to inflate the earnings of the corporation. The Government is going to be looking at the corporation, the CFO, possibly the accountants, and anyone else who may have helped in this process. Is the CFO going to want to talk to us? Probably not. The accountant? Probably not. So, if the counsel has interviewed these people, then the counsel could probably begin with saying, "You know, we think the CFOI instructed the accountant to incorrectly book these entries. And we think that if you get the information on these invoices and you get the accounting entries and you talk to everyone in the accounting department and you specifically talk to Joan and Barbara, you are probably going to get what you need." That is probably what they are going to say. And if we get that, that is a great start. That gives the Government the ability to undertake this investigation and figure out what it needs.

Now, sometimes we are going to need to compare what those witnesses told us, if we have reason to believe that they are not being totally honest, and if they refuse to talk with us at all. That is when we are most likely to need the statement counsel has taken. And certainly that statement could be work product, depending on how it was taken. If the counsel just goes to the employee and says, "Write down what happened," and the employee writes that down, they can turn that over and there may not be any waiver needed at all. But of course, if the counsel is undertaking some pretty extensive questioning of the witness, then, we are probably talking about work product.

So, we have not been walking into investigations asking corporations to waive privileges as a matter of course. We are trying to tell people that they need to be mindful of the problems that waiver does pose on a corporation, that they should try to use some other means first before they request waiver. I think that message is being heard. And it's been very helpful to us.

To give an example of what we encounter, when we are conducting an investigation: there are generally four types of corporations we meet. First, the corporation that says, "I'm not going to cooperate with you; I can't possibly cooperate because I'm not willing to waive, because if I wave, then I'm going to be subject to all this civil litigation, and I'm just not doing it." That particular corporation is not going to get any credit for cooperation, and they may very well be prosecuted.

The second is what I call the corporation that pretends to cooperate. That is the kind that will answer your subpoenas late; will not really give you what to asked for; might give you four times what you asked for in an attempt to try to hide the real thing that you wanted; and then claim that certain types of information are privileged, when in fact they are not. And that is a corporation which I would suggest is exactly the example used to the Thompson Memo for a corporation that is not cooperating.

The third kind realizes that it is in serious problems, and that the only way to possibly avoid being indicted, given the extent of harm and the far-reaching fraud within the corporation, is to come in and offer to waive privileges and give the Government everything it has in its possession, including the information from internal investigation.

Fourth and last is the kind that I actually prefer to deal with most. That is the corporation that comes in and says, "I want to cooperate with the Government. I made early disclosure. I understand what you need. I'm going to try to give you what you need. But you have to understand that I want to maintain my privileges if I can. So what do you need?" What happens next in this case is you sit down and you work through those issues, and usually you do some of the things George suggests in his paper. That is the optimal situation, I think.

As regards George's suggestions, I actually did not expect to agree as much as I do. But I do think that corporations should try to produce non-opinion work product, because that is what we want: the factual results of the investigation. And I think that the recommendation of "a roadmap" is well-prescribed. In fact, exactly what we want. As I told you at the outset of my remarks: Who did it? Where do we find it? What documents do we need? We can get them. And this roadmap would not, I think, contain so much analytical judgment that it would be viewed as work product.

The other issue, doing separate investigations, is also an interesting one. If, for example, counsel just tried to get the facts from the witnesses, those statements could then be turned over to the Government and would probably not constitute any work product at all. If, for example, the counsel needs to go back to those statements and try to uncover more information, then at

that point you may be bringing work product into the interview. So, if you could separate the counsel, have the general counsel just collect the facts and then perhaps have an outside counsel to do more analytical review, the document would stand a higher chance of being protected as work product.

I am very encouraged by the paper George has submitted. If we could only get more defense counsel thinking along these lines, I think we would get very close to meeting the goals that the Department of Justice has set and the goals of the Defense Bar.

William B. Mateja: To start, I will tell you that I think it is extremely helpful that people like George have given some thought to this issue. I agree with him; describing the issue, the words he used were that it was a "very practical concern." I am not sure that I would go quite so far as to echo him in that the privilege is "in peril." I was with the Department of Justice (DOJ), and I do not think that they would characterize it thusly, either. I do not think that our prosecutors believe that routine requests for waivers are being made—though, I know, the Defense Bar (which I am now part of) would disagree strongly. Somewhere in–between, I think, is where the truth lies. It is a concern, and I am glad people are giving it some thought.

From a personal standpoint, I would add, the idea that George's suggestion that businesses give the Government a roadmap, if no legislative solution proves forthcoming, is a great idea. Quite frankly, I already put it into practice. I have two cases at present, where that is what we have done. I represent a company, and I went to the Government, to two different U.S. attorney's offices, early on in each case, and said, "We want to cooperate. We want the benefit of cooperation, but we are not willing to waive the privilege. It's too important to us. It's sacrosanct. But I'll tell you what. We're going to get you the facts. We're going to make sure that's available to you. And if we can get the facts to you, then and only then will we get to the issue about whether or not we need to waive." We call this "an oral download."

So, in the cases that I happen to have, this is what we have done with the prosecutors and the FBI, and it has worked extremely well thus far. We got very close at times to thinking perhaps we might have to waive some limited privilege, but we were able to work through it and get the facts to the Government without. There's a lot of value to this approach.

But you do have to be careful. You cannot just take a report and read it verbatim to the government. You have to go through it and sort out the facts, if there is no waiver of privilege.

Now, I will say, as far as selective waiver and legislative selective waiver go, there might be a kind of slippery slope. When I was at DOJ, we looked at the issue. DOJ never came to a solid position, but I can relate a few practical concerns that came up during our review of selective waiver. It came up in connection with our review of House Bill 2179, which was the bill that was proposed by the SEC. It talked about how you can turn over certain information to the Government, without it constituting a waiver of privilege. The problems, as we saw it, was: What happens if that information is disclosed to the Government (say, the Justice Department), and the Department feels like it needs to go to the appropriate regulatory agency? Can they give it to the regulatory agency? For example, say it is the FDA that is the regulatory agency, and the issue happens to come up in the context of tobacco litigation. Say, all of a sudden we find out that the information that is going to be disclosed to the Government bears upon a very important public health risk, which the Government feels that it needs to make public—feels, that it would be remiss not to do so. What do you do, as the Government, once you have this information?

And so, that is just one problem. And for that reason, I am not necessarily sure that selective waiver is the answer. A lot of people do. But, as a defense lawyer, one of the concerns that I have is that I am not sure I want the Government coming to me every time, saying, "You have got to turn over x and y, because we have this statute." Is that really the right way to approach this?

The right way to approach it, in my opinion, is to better educate prosecutors and defense lawyers about what the DOJ's policy is right now. I have talked with various people in the Defense Bar and talked about it at length. The DOJ's policy is a very reasonable policy if it is followed; prosecutors just have to know about it. That policy, as Mary Beth said, is: the facts. "If you get us the facts, that's all we need." The Government is not going to bother you, unless, say—to pick from the few limited situations where perhaps waiver of the attorney-client privilege would be important to catch the crooks—unless reliance on counsel is the defense. Obviously, if reliance on counsel is the defense, then it is important to know about what happened during communications with counsel.

People that I have talked to, on the defense side, have looked at this, and this guidance is available; it is out in front. It is the Q&A contained in the United States Attorney's Bulletin, issued in November 2003. Back then, I was a U.S. attorney, and when Jim Comey became the Deputy Attorney General, he came to me and said, "You know what? I think it would be important for us to make this official department policy. How can we do it? I don't want to issue a Thompson Memo either. I don't want there to be the Comey Memo."

So what we did was put together a speech which embodies the Q&A, and it was delivered to the ABA at its annual Healthcare Fraud Institute. It was in New Orleans, in May 2004. Jim followed up on that at the White Collar Crime Institute, held in Las Vegas in March 2005. Both of those speeches, or at least pertinent excerpts from them, along with the Q&A, are available. And we need to do a better job of educating everybody about that policy.

A quick excerpt: this is from Jim's speech in New Orleans. He starts by saying, "I'd like to spend the remainder of my time with you this afternoon discussing an issue that has generated tremendous sound and fury, while at the same time generating a great deal of confusion. That is the Department's policies on requests for waivers of the work product protection and attorney-client privilege in the context of cooperation during our investigations of corporate wrongdoing."

Further on he says, "What constitutes thorough cooperation will necessarily vary in every case. At a minimum, it must be recognized that if a corporation has to learn precisely what happened and who is responsible, then they have to turn

this over to the government if they wish to make a claim that they've cooperated and deserve either the benefit of cooperation in the charging decision or a reduced culpability score under the sentencing guidelines. The bottom line is that for a corporation to get credit for cooperation, it must help the government catch the crooks. Sometimes a corporation can provide cooperation without waiving any privileges. Sometimes in order to fully cooperate and disclose all the facts, a corporation will to make some waiver because it gathers the facts through privileged interviews and protected work product of counsel. How a corporation discloses the facts will vary, and that's where the rubber hits the road. The government does not require any particular method so long as the cooperation is thorough. All pertinent facts are disclosed, including the identification of all culpable individuals, all relevant documents, and all witnesses with relevant information."

There are a couple things from this speech that I want to explore very quickly, because I think, perhaps, there are some notions I need to dispel. Mary Beth touched on one of them, a very important one, which is: What are we talking about when we talk about attorney-client privilege? I will tell you, ninety-five to ninety-nine percent of the time, from what I have seen, it is not attorney-client privilege at all that is asked to be waived, but work product. Work product, to my way of thinking, and I think for most, does not hold quite the same "sacrosanctness" as attorney-client privilege. If you think about it, even under the Federal Rules of Civil Procedure—at least as to fact work product—if the Government establishes substantial hardship, it is entitled to that. And even if it is opinion work product, if they show compelling evidence that they need that, they are still entitled to it (as opposed to attorney-client). That is something Jim speaks to a great deal, because sometimes what we are looking for is work product. When we are looking for attorney-client privilege, it is the kind of situation that I mentioned where there is reliance upon counsel, and that is where, no matter what you are able to put in front of us (at least in front of DOJ), it is probably going to entail a waiver of the privilege.

One last thing I just want to say. It is okay for the government to ask for this, to ask for cooperation from companies. George pointed that out. I think Mary Beth reiterated it. But I spoke, not too long ago, on this issue, at the National Chamber, and there were a number of people that spoke who said, "In some situations it is not appropriate for the Government to ask for cooperation."

But think about that. The Government needs Corporate America's help to get to the bottom of things, to make sure there is integrity in the financial marketplace. Sometimes, companies are in the position of being able to get us those facts. And if the company wants the benefit of cooperation… well, I know you may be thinking, "It's always going to want it." Well, you do want it, but sometimes there are pluses and minuses, and you have to weigh those things. If the company wants the benefit of cooperation, it has to help the Government.

Theodore Olson: I think I have been out of the Department of Justice too long, because I just do not buy some of the things I am hearing. Still, let me start by acknowledging my respect for the people in the Department of Justice that have established this program. Larry Thompson is a close friend and someone I admire enormously, as is Jim Comey, Mary Beth Buchanan and the rest of the U.S. attorneys. Everything I say should be framed within that context. I respect the people in Department of Justice. I respect their mission. I respect the way they go about discharging their duties and goals. But I respectfully disagree with some things about the policy.

Everyone understands that it is the mission of the Department of Justice to catch the crooks. But it turns out that it is a lot easier to catch the crooks if can have the help of their lawyers in catching them—or the alleged crooks, because these people do not all turn out to be crooks. Someone that is under investigation may not be a crook. But if you turn the lawyer into an agent of the Government, that has serious ramifications with respect to the Sixth Amendment right to counsel and the value that society for several centuries, going back to the English common law values, has placed on the relationship between an individual or a corporation and the attorney.

Society wants individuals, persons, corporations to seek the advice of counsel. It is seen as a way to ensure that citizens comply with the law, and the privilege, the right to confidentiality in communications, is fundamental, essential to the attorney-client relationship. You take away the privilege, you take away the relationship.

Now, first of all, why use the quotation marks. When the government says it is not an "absolute requirement," that is like saying "The money is of no object." You know immediately the money is an object. When the government says "It's not an absolute requirement," it may be a pretty important requirement. It is said to be a factor in evaluating cooperation, and failure to cooperate, according to the introduction of the Thompson Memorandum, should weigh in favor of corporate prosecution. So, if there is no waiver of the attorney-client privilege, there is no cooperation, and that is a factor that should weigh in favor of prosecution. Given the power and the impact of the prosecution, the word voluntary ought to be put in quotations. I will come back to that in a moment.

Mary Beth Buchanan and Bill Mateja said the same thing: all the Justice Department really wants is work product. But the policy does not say, "We only want work product;" it says "work product and attorney-client privilege." That is spread throughout the questions and answers, the policies, and everything else. Now, maybe in some cases, the Justice Department's desires can be satisfied by providing work product, but that threat of potential requirement hangs over the corporation—and without which there is a question about whether there has been actual cooperation.

I know there is dispute about what happens. But it is not just how often it happens, but the threat in the policy which states that cooperation will be ascertained in conjunction with the willingness to waive attorney-client and work product privileges. The corporation and its counsel are put in the position of *having* to come forward.

I know Bill and Mary Beth said that is not the model. The model is only number four, where it says, "We really don't do these things but let us help you to get what you want." But the policy says the willingness to waive attorney-client

privilege is a factor, and many corporations and many lawyers understandably think that the expression of that willingness is important. And, of course, work product alone encompasses, embraces, and entails attorney-client privileged material very, very often.

There is another point I wanted to make about the position that Mary Beth took. She articulates a much softer approach, but was very careful to say, "This is just my personal view." There are ninety-six U.S. Attorneys, and many, many other prosecutors in the Department of Justice and the other agencies of the government, including the SEC. Some of the policy recently articulated states that decisions with respect to waivers should be cleared with or are subject to supervision by the U.S. Attorneys. I probably do not have the details exactly right, but we know sometimes that works and sometimes it does not. We have all been in this business long enough to have witnessed, let us say, overzealous U.S. Attorneys. Sometimes they are well-supervised and sometimes not. And we are not just talking about the Department of Justice. We are talking about all kinds of law enforcement agencies at the federal level. Let us not forget the state agencies and prosecutors that can learn from this thing. I could mention some names of some state prosecutors… So, these are other factors. The policy may be enforced or applied in one way in one office, in a completely different way in another office.

Bill Mateja says that it is "okay" for the government to ask for this. Well, is it really okay to ask citizens to waive a constitutional privilege as a condition of not being prosecuted? The consequences of being prosecuted to a corporation include the immeasurable immediate damage to share price, and thus to the value of the stockholders' collective investment; the company's ability to raise capital; credit rating; reputational injury to the brand and product line; inability to transact certain business; issues of disbarment; serious injury to the officers' reputations; pressure on Boards of Directors to change management, wholesale housecleaning before there has been any determination of guilt of those individuals under Government suspicion; immense legal fees; damage to the company's credibility with regulators. And there are just a few things of immediate and inexorable consequence with an indictment.

With that Draconian potential out there, saying, "Well, this is a factor that we'll take into consideration that will auger in favor or against prosecution," makes it almost imperative for the corporation to acquiesce at virtually any cost to prevent indictment from taking place.

I hasten to add that I am not an expert in this field. Everyone else up here has been, I think, both a prosecutor and a defense lawyer. I have not. The positions I held in the Department of Justice did not directly involve me in prosecution. But I have been exposed to companies or clients that were in these situations, and while there is a lot of talk about internal investigation and the hiring of outside counsel to do special investigations, it seems to me that there is no principle that really limits the requested waiver to either outside counsel, to special investigations. Conceivably, and in most instances probably, all counsel is required—inside corporate counsel, outside counsel that were not hired for the special investigation—anyone with any information that would help the prosecutor catch the crooks.

The consequences of these waivers are not just that the information will be demanded in civil litigation. That is a very serious consequence. In fact, the existence of the waiver is an incentive to litigation because now you have all this information, "the roadmap," so to speak, available to the class action lawyers, making it much easier to collect those contingent fees. But that is not all. There are other governmental agencies that are likely to follow. There are congressional investigations. Those of us who have been in town a while know the consequence of congressional investigations and the synergy that exists between the congressional investigator and the congressional investigation staffers, the class-action lawyers and the press; a triangle that can get the company into sufficient trouble and cost a lot of money.

The other consequence which George mentioned is that people will not launch internal investigations. They will not rely as much as they normally would on their lawyers. They may withhold information if they know that it is not privileged, that it is at least a risk that it might not be privileged. They will assume that it might not be privileged. and that inhibits the whole attorney-client relationship.

It also affects the ability of the lawyer in charge of the process. He may couch things in terms that he thinks will be less harmful to the client. These days, lawyers are often the subject of investigation, if they are perceived as part of the problem or too much of an obstruction. Lawyers are at risk themselves, and will therefore tend to act in self-protective ways; which inhibits the effectiveness of the attorney-client relationship.

Now, let me come to a final couple points. It seems to me that the waiver of the attorney-client privilege amounts to a waiver of the Sixth Amendment right to counsel altogether. The waiver of the privilege means that the lawyer really cannot properly defend the client. Let us say, if plea bargaining negotiations break down, that the lawyer is of no use anymore. That lawyer's communications have been compromised. The lawyer has already become, to large degree, an agent of the Government, and, in part, a potential witness against the client. The attorney is seriously compromised at that point, and therefore the general ability to give legal advice is compromised.

We are thinking of this only in terms of the attorney-client privilege. Is there any principle that you know that prompt the Government to say, "If you're really want to be cooperative, waive the spousal privilege, the physician-patient privilege, the clergy privilege…" I cannot remember all the names of these privileges. But what is the principle that would limit it to the attorney-client privilege? The only one that I can think of is that the attorney is the one that really has, in most cases, the evidence to catch the crooks. But it might be the doctor. It might be the spouse. It might be someone else. It is not necessarily limited to attorney-client privilege.

And we are talking in terms of corporations, but what is the principal basis upon which this practice would be strictly limited to corporations as opposed to individuals? Why not say this to an individual that you are investigating? "I want to decide whether to prosecute you're not, and part of that decision is whether or not you wave the attorney-client privilege." If this

were widespread with respect to individuals, will the ultimate plea bargain be accepted by the judge as truly voluntary, truly knowledgeable, based upon advice of counsel—the counsel that has already been compromised? These are just some of the things that occur to me.

My final thought, with respect to Georgia's paper (which is really truly terrific): One of the points in there is to negotiate the agreement, even if you are in the districts where there is no such thing as a limited waiver, at least under some of these court decisions. If nothing else, this provides you with the opportunity to preserve the issue for appeal. There is going to be a decision someday, and you would not want to be the lawyer that did not have the agreement that would provide the predicate for the appeal that might be the case for the Supreme Court.

There is also some reference in the paper about putting in a provision that deals with the agreement which states that this can be submitted under appropriate circumstances to a court in the form of a stipulation, so it becomes part of a court order. That may not work in all cases, but it might in some. I think there is a hint of this in George's paper. And it seemed to me a good idea in the negotiations with the Government to put in a requirement that the Government come in and support the claim of privilege, limited privilege, when the class-action lawyers come after the materials; so that the lawyer for the defendant company is saying, "Not only we have disagreement. It was a limited waiver, but the Government's coming in and saying, 'Yes. That would do damage to the Government, and we think that the court should respect it.'" In fact, there is a common interest, something like a joint defense agreement basis for the Government entering into this deal with us with respect to the limited nature of the waiver, so the court has got some reason other than "Gee, we don't like to do it."