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Corporate Cooperation in Criminal Investigations: Waiving Privileges Without Coercion

Emily S. Keller

COMMENT

CORPORATE COOPERATION IN CRIMINAL INVESTIGATIONS:

WAIVING PRIVILEGES WITHOUT COERCION

INTRODUCTION

In response to major corporate scandals such as Enron's in 2001,[1] government investigation of corporate misconduct has become increasingly proactive.[2] Corporations that cooperate with government agencies and willingly "clean house" following suspected or actual illegal activity may be rewarded with reduced penalties under sentencing

[1] *See generally* John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 58-60 (2005) ("When Enron went bankrupt on December 2, 2001, after stunning revelations about the company's insider deals and faulty accounting, some 4,500 Enron workers had lost their jobs in Houston alone. Enron's employees, who had been encouraged to place their retirement savings in Enron stock, lost some $1.3 billion in 401(k) accounts. Nationwide, Enron's countless investors, who had seen the stock price decline over the course of the year from eighty-four dollars to mere pennies per share, lost some $61 billion. This disaster occurred largely because of a troubling gap between perception and reality.").

[2] Claudius O. Sokenu, *The Current Enforcement Environment and the Corporate Response*, Practising Law Institute, 1617 PLI/CORP 331, 333 (2007). For example, in 2002, President Bush established a Corporate Fraud Task Force to oversee all corporate fraud matters under investigation by the DOJ and to coordinate with federal regulatory agencies towards civil enforcement. *Second Year Report to the President, Corporate Fraud Task Force*, Practising Law Institute, 1492 PLI/CORP 543, 552 (2005), *available at* http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf at 1.2. From the Task Force's inception through May of 2004, the DOJ charged over 900 defendants and over 60 corporate CEOs and presidents with some type of corporate fraud crime in connection with over 400 filed cases. *Id.* at 558. This was up from corporate fraud charges pending against 354 defendants in connection with 169 filed cases in May of 2003. *First Year Report to the President, Corporate Fraud Task Force*, Practising Law Institute, 1478 PLI/CORP 613, 626 (2005), http://www.usdoj.gov/dag/cftf/first_year_report.pdf at 2.2.

guidelines if indicted,[3] deferred indictment, or no indictment at all.[4] At least since the 1999 publication of the Department of Justice's (hereinafter "DOJ") charging policies for business organizations,[5] prosecutors have consistently considered a corporation's waiver of its attorney-client privilege as an element of cooperation and regularly request that corporations turn over documents – sometimes privileged documents – that are relevant to the investigation.[6]

The DOJ's policy of treating waiver of the attorney-client privilege as an element of cooperation (hereinafter "waiver policy," which is part of the DOJ's charging policy) is controversial and one of the most widely discussed aspects of governmental efforts to investigate and prosecute corporate crime.[7] Commentators and critics commonly make the conclusory statement that the government coerces corporations into waiving their attorney-client privileges.[8] In fact, in 2006, the National

[3] In its 2006 annual report, the U.S. Sentencing Commission reported that 111 of the 217 organizations had detailed culpability score information that either increased or decreased the fines calculated at sentencing. Of the 111 cases, not one received a reduction in its culpability score for having in place an effective compliance and ethics program, but eighty-seven (78.3%) organizations received reductions for either self-reporting, cooperating, or accepting responsibility. Fifty-four organizations (48.6%) received reductions for cooperating with the government investigation. United States Sentencing Comm'n 2006 Annual Report, at 41 (2006), http://www.ussc.gov/ANNRPT/2006/chap5_06.pdf.

[4] Claudius O. Sokenu, *The Current Enforcement Environment and the Corporate Response*, Practising Law Institute, 1617 PLI/CORP 331, 333, 355-56 (2007).

[5] Eric H. Holder, Jr., Deputy Att'y Gen., United States Dep't of Justice, *Bringing Criminal Charges Against Corporations* (June 16, 1999), 1 White Collar Crime § 3:49 (2d ed.), http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.

[6] Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal For a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 215-16 (2006).

[7] Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 588 (2004) (U.S. Attorney Mary Beth Buchanan addresses how privilege waivers impact the DOJ's assessment of cooperation, and addresses common criticisms of the DOJ policy, finding that the benefits of cooperation outweigh perceived problems of waiver of the attorney-client privilege).

[8] *See, e.g.*, Adam Aldrich, Comment, In re Qwest Communications International: *Does Selective Waiver Exist for Materials Disclosed During a Government Investigation?*, 84 DENV. U. L. REV. 809, 826 (Sept. 2005-Sept. 2006) ("The SEC and DOJ are the ones coercing corporations to waive [the privilege's] protections 'or else,' . . . ."); Jack King, *NACDL, Chamber Of Commerce, ACLU, ABA, Corporate Counsel Ally in Support of Attorney-Client Privilege*, 29-DEC CHAMPION 8, 10 (2005) ("Section 8C2.5 of the Federal Sentencing Guidelines . . . allows the government to coerce an organization to waive attorney-client privilege to show "thorough" cooperation and thus qualify for a reduced sentence."); Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 156 (2006) ("[This article] concludes that selective waiver is inadequate in addressing the many problems created by policies that coerce waiver and that a more desirable solution is to eliminate or amend the governmental policies that coerce waiver."); Robert G. Morvillo, *The Decline of the Attorney-Client Privilege*, 12/2/97 N.Y. L.J. 3, col.1 (1997) ("The office of the United States

Association of Corporate Defense Lawyers ("NACDL") officially declared in its Statement on Corporate Attorney Client Privilege that the waiver policy necessarily coerces waivers of the attorney-client privilege.[9] However, these statements are not supported by an analysis of the waiver policy under the various legal standards for coerced waivers.[10]

A coerced waiver is involuntary and therefore invalid.[11] Thus, any privileged information a corporation discloses to government investigators pursuant to a coerced waiver would remain protected by the privilege and would not be discoverable by plaintiffs in subsequent civil actions.[12] Indeed, in 2007, several corporations successfully argued that the government had coerced them into waiving their attorney-client privileges by threatening indictment that, they alleged, would necessarily lead to corporate death.[13] The California Court of Appeal of the Fourth Appellate District found that the risk of significant costs and consequences associated with indictment coerced the corporations into

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Attorney for the Southern District of New York routinely coerces corporate waivers of the privilege by informing corporate managers that their failure to waive the privilege will be evaluated in determining whether the corporation has been sufficiently cooperative to avoid indictment and/or a severe guidelines sentence.").

[9] NACDL Statement on Attorney-Client Privilege, National Association of Corporate Defense Lawyers (2006), *available at* http://www.nacdl.org/public.nsf/WhiteCollar/WCnews024/$FILE/Privilege_Statement06.pdf ("NACDL believes that in a climate created by the current practices of the Department of Justice, the Securities and Exchange Commission, the United States Sentencing Commission, and other agencies, the waiver of privilege is necessarily coerced and therefore not a voluntary waiver.").

[10] There are various common-law tests courts use to determine whether coercion has occurred. Generally, the tests determine whether the waiver resulted from a free and rational choice. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 175-76 (1981); 86 C.J.S. *Threats* § 32 (2007); MODEL PENAL CODE § 212.5 (2001).

[11] A waiver must be given voluntarily. *See* Colorado v. Connelly, 479 U.S. 157, 169 (1986) ("Of course, a waiver must at a minimum be 'voluntary' to be effective against an accused.") (citation omitted); CAL. EVID. CODE § 912(a) (Westlaw 2008) (waiver occurs when "the holder of the privilege, *without coercion*, has disclosed a significant part of the communication or has consented to disclosure made by anyone") (citation omitted) (emphasis added).

[12] *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294 (6th Cir. 2002) ("As a general rule, the attorney-client privilege is waived by *voluntary* disclosure of private communications by an individual or corporation to third parties .... The prevailing view is that once a client waives the privilege to one party, the privilege is waived en toto.") (emphasis added) (internal quotation marks and citations omitted); X Corp. v. Doe, 805 F. Supp. 1298, 1306 (E.D. Va. 1992) ("Moreover, *voluntary* disclosure by the client to a third party waives the privilege as to both the specific communication and all other communications relating to the same subject matter.") (emphasis added).

[13] *In re* Natural Gas Anti-Trust Cases, JCCP 4221, 4224, 4226, 4428 San Diego Super. Ct., Tentative Ruling, Independent Plaintiff's *McKesson* Issue (June 12, 2007), *available at* http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CIVIL/JCCP/JCCPCASE2754/MINUTESORDERS/TAB146924/MCKESSON-RULING%205-14-07.PDF.

cooperating with the government.[14] As a result, the corporations managed to protect documents they had disclosed to the government from civil discovery.[15]

The difficult choice many corporations face – waive the attorney-client privilege to avoid possible indictment and thereby make the privileged materials available to third parties in civil suits, or assert the privilege and thereby increase the risk of indictment – does not rise to the level of coercion. As a general policy, coercion – like extortion and duress – requires some wrongful threat or undue influence that causes a victim's "choice" to be involuntary.[16] Corporations face only the "threat" of the reputational consequences that flow naturally from an indictment, and these are the same type of consequences any criminal defendant faces.[17] No matter how dire those consequences may be, they are not wrongfully compelled by prosecutors.

To accept that the DOJ's charging policy is sufficient to coerce a waiver, without any wrongful act by the DOJ, brings into question every settlement or plea bargain made in which one party has a strong incentive to avoid going to trial, such as risk of capital punishment or risk of a civil award that could cause a defendant to go bankrupt.[18] Furthermore, finding the DOJ's policy coercive may ultimately increase corporate

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[14] Regents of the Univ. of Cal. v. Super. Ct. of San Diego County, 81 Cal. Rptr. 3d 186, 188 (Ct. App. 2008).

[15] *Id.* at 188-89. The court drew upon California law, which protects privileged information from inadvertent disclosures, noting, "[T]he holder of the privilege need only take 'reasonable steps' to protect privileged communications. No case has required that the holder of a privilege take extraordinary or heroic measures to preserve the confidentiality of such communications." *Id.* However, a corporation does not choose to disclose privileged information when the disclosure is inadvertent. Nor, as the court noted, does it choose to disclose privileged information when compelled to do so by a court order. At issue in this case was a circumstance in which a corporation consciously disclosed privileged information to government agents without legal compulsion to do so. This circumstance requires an analysis distinct from situations in which an individual does not actually consent to the disclosure. An absence of such analysis weakened the court's additional reliance on two Ohio district court trade cases from the 1950's that opine that government requests for information are implicitly coercive. *See id.* at 192. This is especially true in light of the Sixth Circuit's position that a corporation cannot selectively waive the attorney-client privilege by releasing otherwise privileged documents to government agencies during an investigation, and then continue to assert privilege as to other parties. *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig. 293 F.3d 289, 302-04 (2002).

[16] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 175-76 (1981); 86 C.J.S. *Threats* § 32 (2007); MODEL PENAL CODE § 212.5 (2001).

[17] *See* Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part II)*, 7 U.C. DAVIS BUS. L.J. 2 (2006), *available at* http://blj.ucdavis.edu/article.asp?id=650 ("Unless the Constitution is read to bar all indictments that have adverse collateral impacts on defendants, the prospect of an indictment for a business organization should have no greater significance under the Constitution than the indictment of any other person or entity.").

[18] *See id.*

indictments. If the DOJ cannot access enough information to determine that a corporation has remediated any wrongdoing by its employees or has fully complied with the law (e.g., through waiver of the attorney-client privilege when there is a "legitimate need"),[19] then it will be more likely to indict the corporation.[20] Finally, a finding of coercion ultimately allows corporations to selectively waive the privilege to benefit from cooperating with the government, and then assert the privilege as a shield against civil opponents. Such selective waivers go against the public policy behind the privilege and have been rejected by all but one federal circuit and a California court of appeal.[21] As long as corporations knowingly and intelligently waive their attorney-client privileges for purposes of obtaining a benefit from the government, the mere threat of indictment without any wrongful act on the part of the prosecutor or impermissible curtailment of a constitutional right does not coerce the waiver.

Part I of this comment explains the attorney-client privilege and the waiver doctrine and demonstrates the important role the privilege plays in our legal system. It shows why, according to the DOJ charging policy, waiver of the privilege is often needed during corporate investigations. It also addresses how the charging policy erodes the privilege in the corporate context, thereby creating governance problems for

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[19] Memorandum of Paul J. McNulty, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (2003) at 8-9, http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

[20] By fully cooperating, a corporation literally shows the government that it is a "good corporate citizen" by fully disclosing any wrongdoing and taking steps to remediate. Without this full disclosure the government cannot know if indictment is unnecessary. *See* Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 995 (2002) ("[P]rosecutors put such great weight on cooperation that it can often save a corporation from indictment even if the corporation lacked a meaningful compliance program, even if top management knew about the criminal activity, and even if top management was involved in the criminal activity . . . ."). Full cooperation, however, is not a simple matter for management, and will likely raise ethical concerns regarding the disclosure of information about employee communications. *See* John Hasnas, *Department of Coercion*, WALL ST. J., Mar. 11, 2006, at A9, *available at* http://www.cato.org/pub_display.php?pub_id=5974 ("For example, most corporations solicit sensitive information from their employees by promising to keep communications . . . confidential. But whenever such communications suggest[] possible criminal activity within the firm, the corporation must disclose it to the government or risk indictment and increased fines. The responsible manager must then choose between protecting the corporation and reducing its promise of confidentiality to a fraud.").

[21] *In re* Qwest Commc'ns Int'l, 450 F.3d 1179, 1187 (10th Cir. 2006) (declining to adopt selective waiver: "Our review of the opinions of other circuits, however, indicates there is almost unanimous rejection of selective waiver. Only the Eighth Circuit has adopted selective waiver in circumstances applicable to Qwest."); *see* McKesson HBOC, Inc. v. Super. Ct., 9 Cal. Rptr. 3d 812, 821 (Ct. App. 2004) ("Given the Legislature's expressed desire to control evidentiary privileges and protections, adoption of the selective waiver theory should come from that body.").

corporations. Part II provides legal definitions and standards for coerced waivers to show that the choice corporations must make between waiving the privilege or increasing their risk of indictment does not meet any legal test for coercion. Part III concludes that although the waiver policy is problematic, it does not legally coerce corporations into compliance.

I. BACKGROUND

The attorney-client privilege is one of the oldest recognized privileges known to common law.[22] It dates back to ancient Rome[23] and is one that our judicial system has carefully protected with only a few specific exceptions.[24] In spite of its long history, the attorney-client privilege does not have constitutional protection.[25] Like other testimonial privileges, which keep truthful evidence from fact-finders,[26] the attorney-client privilege is disfavored by courts, which apply it narrowly and often resolve doubts in favor of disclosure.[27]

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[22] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[23] Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 157 (2006).

[24] People v. Gurule, 51 P.2d 224, 250 (Cal. 2002); *see* Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 505, 509 (W.D. Tenn. 1999) ("The attorney-client privilege is a hallowed principle of Anglo-American law . . . . Nevertheless . . . the privilege is not absolute, and in some situations, society's interest in preventing ongoing illegal conduct outweighs its interest in protecting confidential communications.").

[25] OKC Corp. v. Williams, 461 F. Supp. 540, 546 (N.D. Tex. 1978) ("[T]he attorney-client privilege . . . is not a principle of constitutional proportions but a rule of evidence. While unquestionably valued and significant, the attorney-client privilege has not been elevated to the stature of a constitutional right.").

[26] Testimonial privileges protect certain individuals from being forced to disclose confidential communications that occurred under specific circumstances. The purpose of testimonial privileges is to promote relationships that society values, such as husband and wife (marital privilege), doctor and patient (doctor-patient privilege), attorney and client (attorney-client privilege), and clergy and penitent (penitent privilege). *See* 1 Federal Evidence § 1:26 (3d ed.).

[27] *See* Trammel v. United States, 445 U.S. 40, 50 (1980) ("[Testimonial privileges] must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'") (citation omitted); United States v. Nixon, 418 U.S. 683, 710 (1974) ("[T]hese exceptions to the demand for everyman's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth."). *Contra* United States v. Mett, 178 F.3d 1058, 1065 (9th Cir.1999) ("[W]here the attorney-client privilege is concerned, hard cases should be resolved in favor of the privilege, not in favor of disclosure. . . . '[A]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'") (quoting *Upjohn Co. v. United States*, 449 U.S. at 393) (rejecting plaintiff's assertion that the fiduciary exception to the attorney-client privilege should be read expansively to include any information relating to the fiduciary relationship, even when the fiduciary seeks legal advice relating to personal liability arising from the fiduciary relationship).

The tension between the need for truth and the need for the privilege has generated a heated debate over the DOJ's waiver policy. Those who favor the policy note that investigations into corporate misconduct are complex and government agencies have limited resources.[28] Thus, a corporation's willingness to self-govern with sufficient transparency to assure government agencies of its compliance with the law is a valuable mechanism. It preserves government resources and at the same time protects shareholders from the reputational costs associated with indictment.[29]

Critics of the waiver policy point to potential government circumvention of employees' Fifth Amendment right against self-incrimination; interference with corporate counsels' ability to effectively guide corporate employees, officers, and directors toward compliance with the law; and arguably, erosion of a privilege that has a long, strong history in American jurisprudence.[30]

A. THE ATTORNEY-CLIENT PRIVILEGE AND THE WAIVER DOCTRINE

Although its scope may vary, the attorney-client privilege is the only communications privilege recognized by every state.[31] Generally, the privilege protects confidential communications between client and attorney made for the purpose of securing legal advice or representation.[32] However, the privilege protects only the actual communication between the client and the attorney, and not the underlying facts or subject matter of that communication.[33]

The purpose of the attorney-client privilege is to encourage a client's full and candid disclosure to his or her attorney so that the

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[28] *See* Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 167; *see also* Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part I)*, 7 U.C. DAVIS BUS. L.J. 2 (2006).

[29] *See* Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 167.

[30] *See, e.g., The Decline Of the Attorney-Client Privilege in the Corporate Context: Survey Results*, Presented to the United States Congress and the United States Sentencing Commission by the Following Organizations: American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce Washington Legal Foundation, http://www.acc.com/Surveys/attyclient2.pdf (last visited Aug. 28, 2008).

[31] Ford Motor Co. v. Leggat, 904 S.W.2d 643, 647 (Tex. 1995).

[32] *Id.*

[33] *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

attorney may best represent the client and encourage compliance with the law.[34] Likewise, corporate attorneys may have privileged communications with employees for the purpose of handling legal issues and guiding the corporation toward compliance, although they represent the corporation and not its employees.[35] Despite its importance, courts must apply the attorney-client privilege narrowly because it frustrates the fundamental principle that the public has a right to all available evidence.[36] Courts should ensure that the exclusion of relevant evidence serves the purpose of the privilege and is for the greater public good.[37]

The attorney-client privilege is not absolute. The holder of the privilege must be able to establish that the communication sought to be protected meets certain requirements.[38] If challenged, the holder of the

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[34] *Id.* at 389.

[35] *Id.* at 392-93. However, as long as a lawyer conducting an investigation for the corporation informs employees that the lawyer represents the company, not the employee, the employee has no legitimate expectation that the communication will remain confidential. Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part II)*, 7 U.C. DAVIS BUS. L.J. 2 n.180 (2006), *available at* http://blj.ucdavis.edu/article.asp?id=650.

[36] *See* United States v. Nixon, 418 U.S. 683, 709-10 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence .... [T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

[37] Trammel v. United States, 445 U.S. 40, 50 (1980) ("[Testimonial privileges] must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.").

[38] X Corp. v. Doe, 805 F. Supp. 1298, 1306 (E.D. Va. 1992) ("The party seeking to invoke the privilege bears the burden of establishing that the attorney-client relationship existed, that the particular communications at issue are privileged, and that the privilege has not been waived."). The "classic test" applied in federal courts to determine whether the privilege existed is as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to be come a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D.C. Mass. 1950). State courts have similar requirements. *See, e.g.*, Tien v. Super. Ct., 43 Cal. Rptr. 3d 121, 126-27 (Ct. App. 2006) ("'[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the

privilege must show that the communication does not fall into any exceptions.[39] Furthermore, a party can waive the privilege expressly or by implication through failure to assert the privilege in a proceeding, or through disclosure of privileged information to a third party.[40]

The purpose of the waiver doctrine is to prevent selective disclosure of privileged information that would allow the holder of the privilege to disclose the information as a sword against an adversary, and subsequently assert the privilege as a shield in a later proceeding.[41] Furthermore, once the holder of the privilege discloses confidential information to a third party, the purpose and policy behind the attorney-client privilege no longer apply because the information has ceased to be confidential.[42] The waiver doctrine is in line with both the narrow scope of the attorney-client privilege and the fundamental policy that the public should have full knowledge of all relevant facts to best support a truthful and fair result.

B. GOVERNMENT INVESTIGATIVE POLICIES: WAIVER AS AN ELEMENT OF COOPERATION

The nature of a corporation makes criminal investigations difficult. Prosecutors have trouble determining who the actors were, where the lines of authority lead, and how to locate relevant records that may be spread among a corporation's divisions.[43] As a result, government

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lawyer in the course of that relationship.") (quoting CAL. EVID. CODE § 952 (2003)).

[39] Although they will vary somewhat by jurisdiction, common exceptions to the attorney-client privilege include (1) when the communication is to further a crime or fraud, (2) when an attorney reasonably believes that disclosure is necessary to prevent a criminal act that will result in the death or great bodily injury of another, (3) when the client puts the communication at issue in a proceeding, (4) when the lawyer is an attesting witness concerning a client's intention or competence in executing the attested document, (5) when the intention or validity of a document executed by a deceased client concerning property interests is at issue, and (6) when a communication between joint clients is offered in evidence in subsequent civil litigation between them. *See* CAL. EVID. CODE §§ 956-62 (1967).

[40] *See X Corp. v. Doe*, 805 F. Supp. at 1306 n.15.

[41] Louis M. Brown, Anne O. Kandel, & Richard S. Gruner, *The Legal Audit: Corporate Internal Investigation Current Through the August 2007 Update, Chapter 9. Protecting the Confidentiality of Investigative Documents*, LEGAL AUDIT § 9:39 (2007); *see* Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 340-41 (9th Cir. 1996).

[42] Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 167 ("The justification for granting the privilege 'ceases when the client does not appear to have been desirous of secrecy.'") (citing Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981)).

[43] *Id.*; *see also* Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part I)*, 7 U.C. DAVIS BUS. L.J. 2 (2006) ("White collar crime often involves complex financial transactions where the 'money trail' is exceedingly difficult to trace. Moreover, the sophistication of the personnel involved makes

agencies such as the DOJ have placed high value on a corporation's willingness and ability to effectively cooperate with investigations and to proactively remediate any wrongdoing within the organization.[44] In exchange for cooperation, the DOJ may offer leniency in the form of lesser charges, or no indictment at all.[45] Corporations find this offered benefit difficult to turn down because they are under tremendous pressure to avoid the reputational effects of indictment and the resulting financial loss that innocent shareholders would likely suffer.[46] Therefore, it is argued, the DOJ charging policy coerces the waivers and ultimately erodes the attorney-client privilege by undermining its purpose.[47]

'smoking guns' rare. In addition, . . . the participants in such conduct [are] dependant on one another in a way that is difficult to disrupt.").

[44] Claudius O. Sokenu, *The Current Enforcement Environment and the Corporate Response*, Practising Law Institute, 1617 PLI/CORP 331, 333 (2007). The SEC has a similar program of leniency in exchange for cooperation. On October 23, 2001, the SEC released the Seaboard Report, which outlined criteria it will consider when determining whether to bring an enforcement action against a corporation. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act, Rel. No. 44969 (Oct. 23, 2001) *available at* http://www.sec.gov/litigation/investreport/34-44969.htm. First and foremost, the SEC considers what will best protect investors, and because cooperation with law enforcement can help accomplish that end, the Seaboard Report "set forth some of the criteria [the SEC] will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation." *Id.* Within these four broad categories, the Seaboard Report listed thirteen factors to consider. *Id.* Among the factors is whether the company voluntarily discloses information that the SEC otherwise might not have uncovered. *Id.* The Seaboard Report noted that companies may choose to waive the attorney-client privilege out of "desire to provide information"; however, it "does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information." *Id.*

[45] Claudius O. Sokenu, *The Current Enforcement Environment and the Corporate Response*, Practising Law Institute, 1617 PLI/CORP 331, 355-66, 362-63 (2007).

[46] For example, financial-services firms like Arthur Andersen LLP rarely survive criminal charges. *See* Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 981 n.9 (2002) (citing Lynn Cowan & Cheryl Winokur Munk, *Anderson: Called to Account: Criminal Charges Threaten Auditor's Survival*, WALL ST. J., Mar. 18, 2002, at col. 15 ("In the past two decades, no financial-services firm has remained in business after facing criminal charges.")). This is likely because such firms rely on their reputation and customer trust, both of which may be lost when allegations of fraud are made public. On the eve of its indictment (which followed massive shredding of documents in alleged obstruction of justice), Arthur Andersen's lawyer argued that criminal charges meant "'[d]eath, death, death'" for the firm." *Id.* (quoting Flynn McRoberts, *Repeat Offender Gets Stiff Justice*, CHI. TRIB., Sept. 4, 2002 at 1, *available at* 2002 WLNR 12598004).

[47] *See The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results*, Presented to the United States Congress and the United States Sentencing Commission by the Following Organizations: American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail

1. The Department of Justice's Charging Guidelines in Corporate Fraud Prosecutions

The DOJ publicly announced and later revised a set of principles designed to guide federal prosecutors in the decision whether to prosecute a business organization.[48] Generally, these principles require U.S. Attorneys to consider the culpability of the corporation, any remedial measures taken, and the corporation's willingness to cooperate with government investigations.[49] To avoid indictment, a corporation must convince prosecutors that prosecution will not serve the purposes of criminal justice and will only harm innocent shareholders.[50]

The charging policy lists nine factors for prosecutors to consider when deciding whether to charge a corporation.[51] These factors take into

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Industry Leaders Association, U.S. Chamber of Commerce Washington Legal Foundation, http://www.acc.com/Surveys/attyclient2.pdf (last visited Aug. 28, 2008).

[48] The DOJ's 1999 Holder Memorandum established the basic principles for charging business entities and the DOJ's 2003 Thompson Memorandum incorporated these principles and made them binding on prosecutors. Claudius O. Sokenu, *The Current Enforcement Environment and the Corporate Response*, Practising Law Institute, 1617 PLI/CORP 331, 349 (2007). The Thompson Memorandum also emphasized the need to distinguish true cooperation and reformation of the business entity from a corporation merely paying "lip service" to the government while protecting or failing to revamp the practices that allowed the illegal behavior. Memorandum of Larry D. Thompson, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. The 2006 McNulty Memorandum amended the charging policy to respond to criticisms about the inclusion of waiver of the attorney-client privilege as an element of cooperation. Memorandum of Paul J. McNulty, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (2003) at 8-9, http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

[49] *See* Eric H. Holder, Jr., Deputy Att'y Gen., United States Dep't of Justice, *Bringing Criminal Charges Against Corporations* (June 16, 1999), 1 White Collar Crime § 3:49 (2d ed.), http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html; Memorandum of Larry D. Thompson, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; Memorandum of Paul J. McNulty, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (2003), http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

[50] Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 995 (2002); *see* Memorandum of Larry D. Thompson, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* at Section X (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[51] These factors include the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, a history of similar conduct, the existence of an adequate compliance program, whether the corporation has taken any remedial actions, whether prosecution of the responsible individuals and/or civil and regulatory actions against the corporation will suffice, the collateral adverse consequences of prosecution for innocent parties, and cooperation with prosecutors. Memorandum of Larry D. Thompson, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* at Section II (Jan. 20, 2003),

account the nature of the corporate "person," including the extent of the corporation's cooperation with prosecutors.[52] Cooperation comes in many forms. Prosecutors expect corporations to admit to wrongdoing or at least take responsibility for employees' wrongdoing,[53] and refrain from impeding investigations.[54] Importantly, a corporation should act as soon as it has knowledge of the misconduct.[55] Firing employees involved in the illegal acts and the managers who were in charge of those employees,[56] as well as instituting structural, managerial, and policy changes designed to prevent a recurrence of the misconduct, have also helped corporations avoid indictment.[57] In other words, a corporation must convince prosecutors that prosecution is unnecessary.[58]

Cooperation includes, if necessary, waiver of corporate attorney-client privilege.[59] As of the 2006 amendments to the charging policy,

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available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[52] The Thompson Memorandum emphasized cooperation because "a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence." Memorandum of Larry D. Thompson, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* at Section IV (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[53] Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 1007 (2002) ("Most obviously, a corporation that denies wrongdoing and resists a criminal investigation is far more likely to be indicted than a corporation that cooperates with prosecutors. More particularly, a corporation's chances of avoiding indictment are much greater if the cooperation admits its responsibility for the wrongdoing, terminates the wrongdoers, rids itself of the top management in charge at the time of the wrongdoing, and waives its privileges so that its cooperation can be free and unfettered.").

[54] Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 593 (2004) (citing Thompson Memorandum).

[55] Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 999-1006 (2002) (*e.g.*, to protect his investment in Salomon Brothers, Warren Buffet acted within days; Daiwa was indicted after it waited almost two months after it learned of misconduct to inform regulators).

[56] *Id.* at 1007-08 ("[P]erhaps the most important [factor] in facilitating a corporation's full cooperation is a change in top management. . . . Indeed, without a change in top management, it can be nearly impossible for a corporation to fully cooperate, because the top managers will essentially be cooperating against themselves.").

[57] *Id.* at 999 (describing the actions of Kidder Peabody & Company in response to exposure of illegal trading schemes that took place within the company—within four months after the federal investigation began, prosecutors announced that no criminal charges would be filed against Kidder).

[58] As the Thompson Memorandum stated, "[t]he 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." Memorandum of Larry D. Thompson, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* at Section X (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[59] *See id.* at Section II: Charging a Corporation: Factors to Be Considered. Waivers of the attorney-client privilege "permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.

prosecutors may request waivers only if they can demonstrate a legitimate need to the U.S. Attorney General.[60] If a corporation asserts its privilege in the face of a waiver request, the DOJ may not deem the corporation uncooperative. However, the DOJ rewards voluntary waivers with favorable consideration.[61] Though it may help a corporation achieve cooperative status, waiver of the attorney-client privilege is not a guarantee against indictment.[62] There may be circumstances where corporate misconduct is so pervasive and serious that no amount of cooperation will prevent indictment.[63]

Additionally, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation." *Id.* at Section IV: Charging a Corporation: Cooperation and Voluntary Disclosure.

[60] In response to extensive criticism of the inclusion of waiver of the attorney-client privilege as an element of cooperation, the DOJ amended its charging guidelines in the 2006 McNulty Memorandum. *See* Memorandum of Paul J. McNulty, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (2003), http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. The revised guidelines "amplif[y] the limited circumstances under which prosecutors may ask for waivers of privilege," emphasizing that "legal advice, mental impressions and conclusions and legal determinations by counsel are protected." Prepared Remarks of Deputy Attorney General Paul J. McNulty at the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006), http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061212.htm (last visited Aug. 28, 2008). Now, a prosecutor must get approval directly from the Attorney General in writing before he or she may request a waiver of the attorney-client privilege. *Id.* To obtain approval, the prosecutor must show a "legitimate need" for the information, i.e.,

> (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 the corporation in requesting a waiver.

Id.

[61] *Id.*

[62] For example, Reliant Energy, one of the largest independent power producers in the United States, was indicted in April 2004 in spite of the fact that it voluntarily disclosed information to the DOJ. Reliant Energy Website, News Releases, *Reliant Resources Asserts Subsidiary Violated No Laws, Plans Vigorous Defense* (Apr. 8, 2004), http://www.reliant.com/PublicLinkAction.do?i_chronicle_id=09017522800026fe&language_code=en_US&i_full_format=jsp (click on link to "2004" then scroll down to link with article title) ("Moreover, any suggestion that Reliant did not fully cooperate with the Department of Justice investigation is inaccurate and unfair. The company voluntarily disclosed the conduct, agreed to a settlement with the FERC, assisted in making evidence available to the CFTC and Department of Justice, and made a series of presentations to the Department of Justice concerning the facts and the law. What Reliant did not do was agree that the conduct constitutes a criminal offense.").

[63] As the Thompson Memorandum stated, "[t]he 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." Memorandum of Larry D. Thompson, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* at Section X

2. Criticism of the Waiver Policy

The American Bar Association, American Civil Liberties Union, National Association of Criminal Defense Lawyers, legal scholars and others have sharply criticized the inclusion of waiver of attorney-client privilege as an element of cooperation.[64] Corporate executives and attorneys contend that federal prosecutors, far from respecting the privilege, routinely request waivers.[65] To support this contention, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel conducted a survey that indicated that corporate attorneys consider waiver requests the norm rather than the exception.[66] However, a government survey has shown the opposite.[67]

One criticism is that the waiver policy erodes the attorney-client

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(Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[64] *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results*, Presented to the United States Congress and the United States Sentencing Commission by the Following Organizations: American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce

Washington Legal Foundation, http://www.acc.com/Surveys/attyclient2.pdf (last visited Aug. 28, 2008); *see also* Stephanie A. Martz, *The Attorney-Client Privilege Protection Act of 2007*, CHAMPION, May 2007 at 40.

[65] Louis M. Brown, Anne O. Kandel, & Richard S. Gruner, *The Legal Audit: Corporate Internal Investigation Current Through the August 2007 Update*, LEGAL AUDIT § 9:39 (2007) ("waiver has become a standard expectation of federal prosecutors and is not merely requested 'when necessary'").

[66] NACDL Statement of Attorney-Client Privilege (2006) *available at* http://www.nacdl.org/public.nsf/WhiteCollar/WCnews024/$FILE/Privilege_Statement06.pdf; *see also* Marcia Coyle, *New Legislation Would Bolster Attorney-Client Rights in Investigations*, NATIONAL LAW JOURNAL (July 26, 2007), *available at* http://www.nacdl.org/public.nsf/whitecollar/wcnews082?OpenDocument ("[A] new survey by the Association of Corporate Counsel that found that more than 90 percent of 458 in-house counsel responding believe that the attorney-client privilege in the context of government investigations is either nonexistent or severely damaged. That is an increase from the organization's 2005 survey, when 74 percent of respondents shared those sentiments.").

[67] Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 588-98 (2004) ("In late 2002, at least partly in response to these criticisms, the Ad Hoc Advisory Group conducted a survey to determine the frequency of requests made by all ninety-four U.S. Attorneys' Offices for privilege waivers from organizational defendants. . . . [T]he survey revealed that requests for waiver of the attorney-client privilege . . . were the exception rather than the rule: Waivers were requested in a very small number of cases – four cases in the Southern District of New York, six cases in the District of Massachusetts, six cases in the Eastern District of Pennsylvania, and two cases in the Eastern District of North Carolina. The Northern District of Mississippi indicated that it has a practice of negotiating informal, partial, unwritten waivers."); *see also* The U.S. Sentencing Comm'n Ad Hoc Advisory Group, Report on The Organizational Sentencing Guidelines at 8 (Oct. 7, 2003), *available at* http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm.

privilege, which in turn chills corporate counsel's ability to advise and represent the corporation because employees will withhold information out of fear of exposure.[68] According to critics, employee fears are well founded because these waivers allow the government to circumvent employees' privileges against self-incrimination. The government encourages employers to pressure their employees to make potentially self-incriminating statements as part of an internal investigation, and these unprotected statements[69] are subsequently disclosed to the government when the corporation waives its attorney-client privilege.[70]

Furthermore, government investigation frequently results in third-party civil suits.[71] Civil plaintiffs may demand access to privileged information that a corporation disclosed to government prosecutors, on the grounds that the disclosure waived the privilege. In these situations, courts often grant plaintiffs' requests.[72] The likelihood of exposure in subsequent civil suits forces a corporation facing indictment to weigh the associated reputational costs of criminal charges against the potential cost of allowing civil plaintiffs access to privileged information.

Although the 2006 amendments to the DOJ's charging policy sought to address these concerns, critics believe that the revised guidelines still fail to adequately protect the privilege.[73] Because the

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[68] *See, e.g.*, Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 180-186 (2006); Louis M. Brown, Anne O. Kandel, & Richard S. Gruner, *The Legal Audit: Corporate Internal Investigation Current Through the August 2007 Update*, LEGAL AUDIT § 9:39 (2007).

[69] As long as a lawyer conducting an investigation for the corporation informs the employee that the lawyer represents the company, not the employee, the employee has no legitimate expectation that the communication will remain confidential. Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part II)*, 7 U.C. Davis Bus. L.J. 2 n.180 (2006), *available at* http://blj.ucdavis.edu/article.asp?id=650.

[70] *See, e.g.*, Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 595-96 (2004); Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 173-74 (2006) ("[S]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements . . . .") (citing the Thompson Memorandum).

[71] Louis M. Brown, Anne O. Kandel, & Richard S. Gruner, *The Legal Audit: Corporate Internal Investigation Current Through the August 2007 Update*, LEGAL AUDIT § 9:39 (2007) ("Fifteen percent of companies that experienced a governmental investigation within the past five years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits).").

[72] For a comprehensive discussion of selective waiver and its treatment by federal courts, *see In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 295-314 (6th Cir. 2002).

[73] Louis M. Brown, Anne O. Kandel, & Richard S. Gruner, *The Legal Audit: Corporate Internal Investigation Current Through the August 2007 Update*, LEGAL AUDIT § 9:39 (2007) ("By allowing privilege waiver requests under some circumstances and by providing large rewards for

reward for voluntary waiver – favorable consideration and a reduced risk of indictment – is so tempting, few corporations will resist.[74] As corporations continue to waive their privileges, guarantees of confidentiality become meaningless, thereby undermining the purpose of the privilege.[75] The growing movement against the waiver policy has been reflected in proposed legislative measures. For example, an early version of proposed Federal Rule of Evidence 502 would have expressly allowed selective waiver; i.e., disclosure of privileged documents to the government for purposes of government investigation would not constitute a waiver;[76] that provision, however, was omitted from Rule 502 as enacted.[77] The proposed Attorney-Client Privilege Protection Act of 2007 would prevent government agents from demanding waiver of the privilege under any circumstances and preclude favorable consideration of voluntary waivers.[78]

Until, if ever, the proposed legislation becomes law, the question remains: does the government policy of considering waiver of the attorney-client privilege as an element of cooperation rise to the level of coercion? If it does, corporations can save themselves from exposure in subsequent civil suits if they choose to disclose privileged information. Or, they can fight their indictments on the grounds that the government's evidence was gained through illegal coercion. However, as demonstrated below, as long as a corporation knowingly and intelligently waives its attorney-client privileges for purposes of obtaining a benefit from the government, the mere threat of indictment without any wrongful act on the part of the prosecutor or impermissible curtailment of a constitutional right does not coerce the waiver.

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voluntary privilege waivers, the standards in the McNulty Memorandum will still undercut the confidentiality guarantees that are necessary for the attorney-client privilege . . . to serve [its] important purpose in promoting corporate self-evaluations and legal advice.").

[74] *Id.*

[75] *Id.*

[76] Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal For a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 250-51 (2006); *see* Committee on Rules and Practices of the Judicial Conference of the United States, Report of the Advisory Committee on Evidence Rules, May 15, 2006 (revised June 30, 2006), FED. R. EVID. 502(c) (Proposed 2006), *available at* http://www.uscourts.gov/rules/Reports/EV05-2006.pdf (last visited Aug. 18, 2008).

[77] *See* FED. R. EVID. 502 (Pub. L. No. 110-322, § 1(a), 122 Stat. 3537 (2008)).

[78] The Attorney-Client Privilege Act of 2007 passed through the House of Representatives on November 13, 2007. House of Representatives Proceedings and Debates of the 110th Congress, The Attorney-Client Privilege Act of 2007, 153 Cong. Rec. H13562-01, 2007 WL 3355182 (Cong. Rec.) (Nov. 13, 2007); *see* Stephanie A. Martz, *The Attorney-Client Privilege Protection Act of 2007*, 31-May CHAMPION 40 (2007). The status of the bill can be tracked online at GovTrackUS, http://www.govtrack.us/congress/bill.xpd?bill=h110-3013.

II. LEGAL STANDARDS FOR COERCION

Like corporations, individual criminal defendants often face hard choices. For example, every plea bargain entered into by a criminal defendant requires waiver of constitutional privileges and rights to avoid risk of a more severe punishment.[79] Though these decisions may be difficult, they are not legally the result of coercion. What corporations face today are merely the accepted norms of our criminal justice system, which have always applied to natural persons accused of crimes.[80]

A. COERCION REQUIRES A WRONGFUL ACT

The only clear definition of coerced waiver of the attorney-client privilege arises in one context: disclosure erroneously compelled by court order.[81] For example, California Evidence Code section 919(b) provides that if a person asserts the attorney-client privilege in a proceeding,[82] but is erroneously compelled by an order of the presiding officer to disclose the privileged information, the disclosure has been coerced.[83]

Under this definition of coercion, the DOJ's waiver policy could only coerce a waiver when (1) the prosecutor issued a subpoena demanding disclosure of privileged information; (2) the corporation asserted the attorney-client privilege and refused to produce the documents; and (3) the court erroneously found that the information was not privileged and compelled disclosure. However, usually both the corporation and the prosecutor agree that the information is privileged,

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[79] U.S. v. Mezzanatto, 513 U.S. 196, 209-10 (1995).

[80] *See id.*

[81] *See* UNIF. R. EVID. 510(b) ("Involuntary disclosure. A claim of privilege is not waived by a disclosure that was compelled erroneously or made without the opportunity to claim the privilege."); CAL. EVID. CODE § 919(b) ("If a person authorized to claim the [attorney-client] privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion.").

[82] Government investigations constitute proceedings because a court can issue a subpoena to compel disclosure of information for purposes of the investigation. *See* 2 B.E.WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 65, at 316 (4th ed. 2000) ("If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in proceedings other than judicial proceedings. The protection afforded by a privilege would be insufficient if a court were the only place where the privilege could be invoked. Every officer with power to issue subpoenas for investigative purposes, every administrative agency, every local governing board, and many more persons could pry into the protected information if the privilege rules were applicable only in judicial proceedings.").

[83] CAL. EVID. CODE § 919(b).

and the corporation does not assert its privilege in court. Thus, the issue of being erroneously compelled to disclose privileged information does not arise.

Common-law definitions of coercion strongly suggest that without some improper act on the part of the prosecutor, a corporation's waiver of its attorney-client privilege is not coerced. For example, the Model Penal Code defines criminal coercion as making certain untruthful or unjustified threats "with the purpose of unlawfully restricting another's freedom of action to his detriment."[84] Thus, criminal coercion requires a wrongful act (the unjustified threat) and a wrongful purpose (unlawfully restricting another's freedom).

Under tort law, a plaintiff must meet three requirements to recover damages for coercion. First, there must be some wrongful or unlawful act or conduct on the part of the defendant; second, that wrongful or unlawful act must be sufficient to prevent the plaintiff from exercising his or her free will; and third, the plaintiff must suffer harm as a result.[85] Furthermore, and relevant to the assertion that the threat of indictment coerces waivers of the attorney-client privilege, "mere threats of criminal prosecution will not sustain a tortious coercion claim."[86]

Similarly, in contract law, a victim may void a contract if his or her consent to the contract was induced by improper threats that leave the victim with no reasonable alternative.[87] A threat of criminal prosecution is improper when the threat involves a misuse of power for personal

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[84] Scheidler v. Nat'l Org. for Women, 537 U.S. 393, 408 n.13 (2003) (citing MODEL PENAL CODE § 212.5, cmt. 2, at 264). The Model Penal Code states:

> (1) **Offense Defined.** A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:
> (a) commit any criminal offense; or
> (b) accuse anyone of a criminal offense; or
> (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
> (d) take or withhold action as an official, or cause an official to take or withhold action.
> It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

MODEL PENAL CODE § 212.5.

[85] 86 C.J.S. *Threats* § 32 (2007); *see, e.g.*, Agnew v. Parks, 343 P.2d 118, 123 (Cal. Ct. App. 1959) ("it is not actionable coercion or duress to threaten to do what one has a legal right to do") (citations omitted).

[86] 86 C.J.S. *Threats* § 32 (2007).

[87] RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (explaining when duress by threat makes a contract voidable).

gain.[88] However, a good-faith explanation of the criminal consequences of another's conduct may not be a threat at all. Generally, a threat to do that which one has the legal right to do will not be found coercive unless the right is abused or the threat is made in bad faith.[89] Under the definitions of coercion, it appears that the DOJ's waiver policy alone, without specific wrongful acts by prosecutors, could not legally coerce a corporation's waivers. The analysis of coercion claims in case law, as discussed below, reinforces this finding.

B. ANALYSIS UNDER EXISTING LEGAL STANDARDS FOR A FINDING OF COERCED WAIVER IN CASE LAW

Consistent with general common-law concepts of coercion, case law addressing the voluntariness of waivers focuses on government actions to determine whether coercion has occurred. The Supreme Court has analyzed claims of coerced waivers in at least three contexts: (1) waiver of *Miranda* rights[90] during government interrogation, (2) waiver of the Fifth Amendment right against self-incrimination in the face of a government threat of job loss, and (3) waivers of constitutional rights and privileges in the context of plea bargaining. Constitutional rights generally enjoy greater protection from the courts than do common-law privileges.[91] Thus, it is fair to say that constitutional protections create a baseline threshold for coercion; i.e., without specific statutory language to the contrary, non-constitutional privileges such as the attorney-client

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[88] RESTATEMENT (SECOND) OF CONTRACTS § 176, cmt. c (1981). Other improper threats include a threatened crime or tort, bad faith threat of civil proceedings, threatened breach of an existing contract, threatened use of power for illegitimate ends, threat strengthened by prior unfair dealings, and when the threatened act would harm the victim and not benefit the party making the threat (i.e., indicates vindictiveness). *Id.*, cmt. f.

[89] 28 WILLISTON ON CONTRACTS § 71:26 (4th ed. West 2007).

[90] In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court established that prosecutors cannot use statements made by a defendant during custodial interrogation unless certain procedural safeguards are in place to protect the defendant's Fifth Amendment right against self-incrimination. Namely, before being questioned, a person must be warned "that he has right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to presence of attorney, retained or appointed." *Id.* at 444. A defendant may waive the right to counsel and to remain silent, "provided that waiver is made voluntarily, knowingly and intelligently." *Id.*

[91] Constitutional rights are a part of the supreme law of the land which can only be changed through an amendment to the Constitution. U.S. CONST. art. VI, cl. 2; *see* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he United States Constitution is the supreme law of the land, it is binding to all states such that states cannot make laws that conflict with the Constitution, and every state legislator and executive and judicial officer is solemnly committed by oath to support the Constitution."). Statutory and common-law privileges, however, can be given or taken away by the legislature.

privilege will not require a test more stringent than one used to protect privileges of constitutional dimensions.[92] Under the legal standards for coercion established by the Supreme Court, in the absence of wrongful government conduct, corporations that knowingly and intelligently waive their attorney-client privilege in exchange for the benefit of reduced risk of indictment do so voluntarily.

1. The Legal Standard for Coerced Miranda *Waivers*

The Supreme Court has held that to determine whether a defendant voluntarily waived his or her *Miranda* rights, a court must consider two factors. First, it must consider whether the waiver was the product of a free and deliberate choice, and second, it must consider whether the defendant was fully aware of the nature of the right and the consequences of waiving it.[93] A court reviews these factors in light of the totality of the circumstances.[94]

The totality-of-the-circumstances approach requires consideration of "the defendant's age, experience, education, background, and intelligence, and whether the defendant has the capacity to understand the *Miranda* warnings, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[95] And, consistent with common-law definitions of coercion, some wrongful government activity must have occurred.[96] The requirement of wrongful government conduct comports with the rationale for excluding evidence obtained through coerced waivers of rights and privileges, specifically, that information acquired through coercion is not trustworthy and the methods used to

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[92] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) ("Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."); *see also* OKC Corp. v. Williams, 461 F. Supp. 540, 546 (N.D. Tex. 1978) ("[T]he attorney-client privilege . . . is not a principle of constitutional proportions but a rule of evidence. While unquestionably valued and significant, the attorney-client privilege has not been elevated to the stature of a constitutional right.").

[93] People v. Whitson, 949 P.2d 18, 28 (Cal. 1998) (citing Moran v. Burbine, 475 U.S. 412, 422-23 (1986)).

[94] *Id.*

[95] *Id.*

[96] *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' . . . ."); *id.* at 170 ("The voluntariness of a waiver of [the privilege against self-incrimination] has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word."); *see also* People v. Jablonski, 126 P.3d 938, 965 (Cal. 2006) ("Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.' . . . 'Coercive police activity is a necessary predicate . . . .' Additionally, 'such activity must be, as it were, the 'proximate cause' of the statement in question, and not merely a cause in fact.'") (citations omitted).

obtain it are unjust.[97]

Without improper acts by prosecutors, a corporation's subjective fear of the consequences of indictment cannot legally coerce a waiver. Even if prosecutors behave improperly, the totality of the circumstances weighs against coercion. Corporations facing indictment comprise successful, educated, experienced parties who employ sophisticated counsel to advise them as to their rights and privileges and the consequences of any waivers.[98] The sophistication of the parties and the presence of competent counsel will likely counteract any undue influence exerted by prosecutors.[99] Fear of the collateral consequences of indictment may create a strong incentive for corporations to do whatever is necessary to avoid indictment, but corporations will have to point to something more compelling to meet the totality-of-the-circumstances legal standard for coercion.

2. *The Legal Standard for Coercion Under* Garrity

The Supreme Court has held that threat of job loss was sufficient to coerce statements that otherwise would have been protected by the privilege against self-incrimination.[100] In *Garrity v. New Jersey*,[101] during an investigation of alleged fixing of traffic tickets, the New Jersey Attorney General questioned several police officers.[102] Before being questioned, each officer was warned that he could invoke his Fifth Amendment privilege against self-incrimination and refuse to answer, but that if he did so, he could be fired pursuant to a state statute that required complete candor of its officers.[103] The officers answered all

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[97] Rogers v. Richmond, 365 U.S. 534, 541 (1961) ("[T]he methods used to extract [involuntary confessions] offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured . . . .").

[98] Any reasonable corporate counsel should be aware that waiver to a government third party will likely constitute waiver for subsequent proceedings. As discussed, California and all but one federal circuit have ruled against selective waivers. Furthermore, the participation of the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel in the campaign against the DOJ's charging policy, as well as the extensive literature discussing the issue, create a fair assumption that corporate counsel are aware of the issue.

[99] Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.") (citation omitted).

[100] Lisa K. Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 353 (2007).

[101] Garrity v. New Jersey, 385 U.S. 493 (1967).

[102] *Garrity v. New Jersey*, 385 U.S. at 494.

[103] *Id.*

questions.[104] Prosecutors subsequently used the officers' responses to prosecute them for conspiracy to obstruct the administration of traffic laws.[105] The officers appealed their convictions on the ground that their statements had been coerced.[106]

The test for coercion was "whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer."[107] The Court analogized the loss of a government job to forfeiture of property protected by the Fourteenth Amendment, and held that the threat of losing one's livelihood could prevent a person from making a free and rational choice to invoke the constitutional right not to self-incriminate.[108] Key to the Court's decision was the constitutional stature of the protections that had been compromised by the state statute.[109]

A corporation could argue that an indictment will effectively destroy the corporation, which is equivalent to a threat of job loss, which in turn is a sufficiently severe sanction to coerce a waiver of the attorney-client privilege.[110] However, this analogy is flawed. A corporation's waiver of the attorney-client privilege to avoid indictment does not meet the *Garrity* standard of coercion for two reasons.

First, the *Garrity* analogy fails because a corporation's decision to disclose privileged information to government agents does not require the corporation to choose between two constitutional rights. Unlike the constitutional right against self-incrimination, the attorney-client privilege is statutory. Furthermore, a corporation does not have a constitutional right to a continued "means of livelihood" under the Fourteenth Amendment. Although a corporation qualifies as a "person" for purposes of the Fourteenth Amendment and enjoys the protection of its property rights through due process requirements,[111] the Supreme

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[104] *Id.*

[105] *Id.*

[106] *Id.* at 495.

[107] *Id.* at 496 (internal quotation marks and citations omitted).

[108] *Id.* at 497 (being faced with the "option to lose their means of livelihood or to pay the penalty of self-incrimination . . . is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'") (citation omitted).

[109] *Id.* at 500 ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.").

[110] Corporations have argued that indictment equals corporate death. *See, e.g.*, Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 981 n.9 (2002) (On the eve of its indictment (which followed massive shredding of documents in alleged obstruction of justice), "Arthur Andersen's lawyer argued that criminal charges meant '[d]eath, death, death' for the firm") (citing Flynn McRoberts, *Repeat Offender Gets Stiff Justice*, CHI. TRIB. at 1, Sept. 4, 2002).

[111] 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 1, at 775 (10th ed. 2005) ("the corporation is a '*person*' within the meaning of the Due Process and Equal Protection Clauses

Court has circumscribed corporate constitutional protections. For example, the Privileges and Immunities protection of the Fourteenth Amendment applies only to natural persons, not corporations.[112] Neither can corporations claim the right to Liberty under the Fourteenth Amendment.[113] Finally, some "purely personal" protections, such as the privilege against compulsory self-incrimination, have historically been reserved for natural persons due to the nature or purpose of the privilege and therefore do not apply to corporations.[114]

Though a corporation does have a constitutional right to its property, its continued "means of livelihood" does not have constitutional protection but is contingent upon the corporation's compliance with the state laws that created it.[115] For example, a corporation can be suspended and involuntarily dissolved for mere failure to file the proper documents with the secretary of state.[116] A suspended corporation loses its rights, powers, and privileges, is disabled from using courts for any purpose (except to apply for reinstatement), and loses the right to retain its corporate name.[117] A dissolved corporation, once its affairs have been wound up, simply ceases to

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of the federal Constitution and similar provisions of the California Constitution").

[112] Hague v. Comm. for Indus. Org., 307 U.S. 496, 514 (1939).

[113] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 (1978) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

[114] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 778 n.14 ("Certain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals. . . . Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.") (citing United States v. White, 322 U.S. 694, 698-701 (1944)); *see* Jed S. Rakoff, *Coerced Waiver of Corporate Privilege*, 7/13/95 N.Y. L.J. 3 at col.1 (July 13, 1995) ("The fundamental reason why a company is entitled to the protections of the attorney-client privilege but not to those of the privilege against self-incrimination is that 'the [attorney-client] privilege does not exist out of deference to any personal right, but rather . . . to facilitate the workings of justice.'") (citing Radiant Burners Inc. v. Am. Gas Ass'n, 320 F.2d 314, 321 (7th Cir. 1963)).

[115] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence") (citing Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1918)) (internal quotation marks omitted).

[116] *See* 16A Fletcher Cyclopedia Corp. § 7997 (2007) ("[A]ll jurisdictions require corporations to file either annual or biennial reports. Most states also require the annual payment of franchise taxes or license fees. If a corporation fails to comply with these requirements for a specified period of time after they become due, the state usually has authority to administratively suspend its activities and to dissolve the corporation without obtaining a judicial order. This is known as administrative dissolution . . . ."); *see, e.g.*, Cal. Corp. Code § 2205.

[117] *See, e.g.*, 9 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 75, at 845 (10th ed. 2005).

exist.[118] In other words, corporations do not enjoy a constitutional right to their continued existence or means of livelihood; thus, the *Garrity* analysis does not apply.

Second, the *Garrity* analogy fails because unlike the officers in *Garrity*, corporations exchange their waivers for a specific benefit: reduced risk of indictment. In *Garrity*, the officers had a choice between the status quo of job retention and the penalty of job loss. The officers did not gain any advantage by waiving their privileges against self-incrimination; they merely avoided being forced into a worse position. On the other hand, the status quo for a corporation being investigated by the government is a risk of indictment. Corporations waive their attorney-client privilege in exchange for a reduction of that risk, thereby moving themselves into a better position. Furthermore, the penalties in *Garrity* were statutorily compelled and certain to occur, whereas an indictment does not legally compel the dissolution of a corporation.[119] Though the reputational consequences of an indictment may affect a corporation's value, indictment will not necessarily result in the financial destruction of the company.[120]

For example, Reliant Energy was indicted in 2004 for alleged price-fixing during the 2001 California energy crisis. Since its indictment, Reliant Energy's stock has continued to rise steadily from approximately $5 a share in 2004 to around $25 a share in 2007.[121] However, Reliant experienced a significant drop in stock value from 2001 when the first

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[118] Although it is true that corporate employees may lose their jobs if a corporation dissolves, their rights are not at issue here, as they are not holders of the attorney-client privilege, nor are they being directly "threatened" by the DOJ. This does however, bring up the issue of "delegated coercion"; i.e., to cooperate, the corporation does an internal investigation, legally requiring its employees to respond to its questions on pain of job loss; the corporation then turns over employee statements to the government. The argument is that "when corporations themselves are compelling employee statements, but doing so at the behest of the government, the government's wrongful threat is delegated." Lisa K. Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 358-65 (2007). The solution for this problem may be "for corporations and the government to recognize employees' rights during the corporate investigatory phase . . . and to have counsel present during their interviews by corporation counsel." Marvin G. Pickholz & Jason R. Pickholz, *Investigations Put Employees in Tough Spot, Are 'Cooperating' Corporations Violating Constitutional Rights?*, 236 N.Y.L.J. 10 (Col. 4) (July 24, 2006).

[119] Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part II)*, 7 U.C. DAVIS BUS. L.J. 2 (2006), *available at* http://blj.ucdavis.edu/article.asp?id=650.

[120] *Id.*

[121] *See* NASDAQ Stock Market Charts for Reliant Energy (RRI) with 10-year time frame, http://quotes.nasdaq.com/quote.dll?page=charting&mode=basics&intraday=off&timeframe=10y&charttype=ohlc&splits=off&earnings=off&movingaverage=None&lowerstudy=volume&comparison=off&index=&drilldown=off&symbol=RRI&selected=RRI (last visited March 4, 2008).

allegations of wrongdoing were made public,[122] and its stock continued to drop until 2003 when the company reached settlements with the investigating agencies.[123] This kind of result apparently is quite common. Empirical studies show significant declines in reported earnings occur in the year of the announced allegation of misconduct.[124] On average, firms lose forty-one percent of their market value when news of the misconduct is revealed.[125] Damage to the share value of the company is done long before indictment: the first publicly announced allegations of illegal activities do the most harm to the company's reputation and value.

An indictment will, however, adversely affect the charged party. At the very least, any accused is likely to suffer reputational damage and the financial costs of defense. However, "the distinction between economic harm that is foreseeable in the marketplace and harm that is legally required by the state" places the waiver of the attorney-client privilege issue outside of the *Garrity* rule.[126]

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[122] *See* James F. Peltz, *Power Suppliers' Stocks Fall Under Strain of Public Attack, Wall Street: Analysts are split on whether lower prices make for a good opportunity to buy shares now*, LOS ANGELES TIMES, June 14, 2001, *available at* 2001 WLNR 10567770 ("The [power] companies' stocks are taking a beating lately from public allegations that these unregulated electricity and natural-gas providers are unfairly exploiting California's power crisis for their bottom lines.").

[123] *Id.* The Securities Exchange Commission (SEC) and Federal Energy Regulatory Commission (FERC) were investigating Reliant Energy prior to its indictment by the DOJ. *See Reliant Resources Inc.: SEC issues investigation order regarding 'round trip' trades*, WALL ST. J. (U.S. Edition), June 21, 2002, *available at* 2002 WLNR 3280917; *To move beyond Western investigations, Reliant settles*, INSIDE FERC, Oct. 6, 2003, *available at* 2003 WLNR 3216953.

[124] Deborah Murphy, Ronald E. Shrieves, and Samuel L. Tibbs, *Understanding the Penalties Associated With Corporate Misconduct: An Empirical Examination of Earnings and Risk*, JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS, manuscript at 2-3, http://www.corpgovcenter.org/Research/DetShrMurTib.pdf (last visited Aug. 31, 2008).

[125] *Id.* at 4. For example, McKesson HBOC lost $9 billion in shareholder value when its accounting fraud scheme was disclosed. Second Year Report to the President, Corporate Fraud Task Force at 3.8 (2004), http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf. Mercury Finance Company was not indicted; however, its Treasurer was charged with wire fraud and bank fraud in connection with a scheme to fraudulently inflate income and receivables while underreporting loan delinquencies. When the fraud was discovered, the company's stock value dropped from around fifteen dollars per share to approximately two dollars per share, representing a market capitalization loss of over $2 billion. *Id.* at 3.10. Dynegy's former Senior Director of Tax Planning/International Tax and Vice President of Finance was sentenced to more than twenty-four years for his role in a corporate fraud scheme. When the fraud was publicly disclosed, Dynegy's stock fell fifty-two percent in two days. *Id.* at 3.14. The former chairman and vice-chairman of Cendant Corp. were found guilty of conspiracy and securities fraud arising out of an accounting fraud scheme. When the fraud was made public, Cendant suffered a market capitalization loss of $14 billion in one day. Department of Justice, *Fact Sheet: President's Corporate Fraud Task Force Marks Five years of Ensuring Corporate Integrity* (July 17, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html.

[126] Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part II)*, 7 U.C. DAVIS BUS. L.J. 2 (2006), *available at*

3. *The Legal Standard for Coerced Plea Bargains*

The cooperation required by the DOJ to avoid indictment follows the long common-law history of rewarding a witness who is an accessory to a crime with leniency in exchange for giving information against another defendant.[127] A corporation can be held vicariously liable for the actions of its directors, officers, and employees if they were acting within the scope of their employment and for the benefit of the corporation.[128] In exchange for cooperation, including, if necessary, disclosing privileged information the corporation has regarding the criminal acts of its employees, the DOJ may offer the corporation leniency in the form of no indictment. Whether viewed as an offer of leniency or its natural inverse – a threat of indictment – this type of exchange has become integral to our criminal justice system and does not constitute coercion.[129]

For example, in *Bordenkircher v. Hayes*, the Supreme Court validated a prosecutor's threat to pursue more severe charges if the defendant did not accept a plea agreement. The Court reasoned that the prosecutor "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution."[130] Similarly, in *Brady v. United*

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http://blj.ucdavis.edu/article.asp?id=650.

[127] Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 979 (2002) ("Judicial leniency for cooperators traces its roots back hundreds of years to the common law practice of approvement, and American prosecutors have been striking deals with cooperators since at least the nineteenth century."); *see* United States v. Singleton, 165 F.3d 1297, 1301 (10th Cir. 1999) (citing United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987); United States v. Juncal, 1998 WL 525800 at *1 (S.D.N.Y. 1998) ("The concept of affording cooperating accomplices with leniency dates back to the common law in England and has been recognized and approved by the United States Congress, the United States Courts and the United States Sentencing Commission.").

[128] *See, e.g.*, Stephanie A. Martz, *The Attorney-Client Privilege Protection Act of 2007*, 31-May CHAMPION 40 (2007) ("Since the Supreme Court's 1909 decision in New York Central & Hudson R.R. v. United States, [212 U.S. 481 (1909),] corporations have been vicariously liable for the actions of their employees."); Memorandum of Paul J. McNulty, Deputy Att'y Gen., United States Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (2003) at 13, cmt. B, http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf (citing United States v. Basic Constr. Co., 711 F.2d 570 (4th 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.")).

[129] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion . . . ."); Santobello v. New York, 404 U.S. 257, 260-61 (1971).

[130] *Bordenkircher v. Hayes*, 434 U.S. at 365.

States, the Court rejected petitioner's assertion that his plea bargain had been coerced by the threat of capital punishment, by the prosecutor's offer of leniency, and by pressure from his attorney to accept the plea.[131] The Court held that as long as petitioner pleaded guilty with full knowledge of the direct consequences of his plea, the plea was voluntary unless it was induced by threats, misrepresentations, or improper promises.[132]

Corporate waiver of the privilege to avoid the risk of serious costs and consequences associated with indictment can be analogized to plea bargains made by criminal defendants to avoid the risk of a capital sentence.[133] Through plea bargains, criminal defendants waive constitutional rights such as the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers in exchange for a lesser charge or punishment.[134] A plea of guilty is itself a conviction, it is conclusive, and "the court has nothing to do but give judgment and sentence."[135]

In spite of the significant sacrifice an accused makes in a plea bargain, the Supreme Court acknowledges that this aspect of the criminal justice system is entirely acceptable, and "an essential component of the administration of justice."[136] The Court embraces plea bargaining because it helps both defendants and prosecutors by allowing each to avoid the expense and risks of trial.[137] As in *Garrity*, a prosecutor cannot

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[131] Brady v. United States, 397 U.S. 742, 743 (1970).

[132] *Id.* at 755 ("(A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).").

[133] *See* Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 981 n.9 (2002) (citing Lynn Cowan & Cheryl Winokur Munk, *Anderson: Called to Account: Criminal Charges Threaten Auditor's Survival*, WALL ST. J., MAR. 18, 2002, at col. 15 ("In the past two decades, no financial-services firm has remained in business after facing criminal charges.")).

[134] *Brady v. United States*, 397 U.S. at 748.

[135] Machibroda v. United States, 368 U.S. 487, 493 (1962) (citing Kercheval v. United States, 274 U.S. 220, 223 (1927)).

[136] Santobello v. New York, 404 U.S. 257, 260 (1971). For example, in 2006, 95.7% of successfully prosecuted criminal cases resulted from a guilty plea while only 4.3% had gone to trial. United States Sentencing Comm'n 2006 Annual Report at 34 (2006), http://www.ussc.gov/ANNRPT/2006/chap5_06.pdf.

[137] Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citing Brady v. United States, 397 U.S. 742, 752 (1970)); *see Santobello v. New York*, 404 U.S. at 260 ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("The defendant avoids extended pretrial incarceration . . . gains a speedy disposition of his

vindictively punish a defendant for asserting a right such as his right to trial,[138] but a prosecutor can offer the benefit of leniency in exchange for cooperation because "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[139] Furthermore, courts presume that a defendant armed with advice from competent counsel and procedural protections can make an intelligent decision in the face of prosecutorial persuasion.[140]

The same principles can be applied in the corporate context. Corporations and prosecutors both benefit from the exchange of cooperation for leniency. Prosecutors receive valuable information that helps them conserve resources, and corporations can avoid the reputational costs and uncertain results of an indictment. Like a criminal defendant who chooses to go to trial rather than accept a plea bargain, a corporation can refuse to waive its attorney-client privilege and take the chance that it may be indicted. The corporation is free to accept or reject the government's offer of leniency in exchange for cooperation. In other words, the offer does not coerce cooperation.

The Supreme Court's decision in *Trammel v. United States* supports this analogy.[141] In *Trammel*, a wife chose to waive her testimonial marital privilege and testify against her husband in exchange for a grant of immunity and assurances of leniency. The Court held that these proffered benefits did not render her testimony involuntary.[142] Similarly, although the coercion issue has not been considered specifically, lower federal courts have shown little sympathy for the tough decision corporations may be faced with when under investigation by the DOJ,

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case, . . . and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.").

[138] *Bordenkircher v. Hayes*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'") (citing Chaffin v. Stynchcombe, 412 U.S. 17, 32-33 n.20 (1973)).

[139] *Bordenkircher v. Hayes*, 434 U.S. at 363; *see id.* at 364 ("[T]he imposition of these difficult choices [is] an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas."); *see also* United States v. Stein, 435 F. Supp. 2d 330, 363 (S.D.N.Y. 2006) ("No one disputes the proposition that a willingness to cooperate with the government is an appropriate consideration in deciding whether to charge an entity."); 22 C.J.S. *Criminal Law* § 487 ("[T]he promise of a recommendation of a lenient sentence and the consequent fear of a greater penalty upon conviction after trial does not render the plea involuntary.").

[140] *Brady v. United States*, 397 U.S. at 758.

[141] Trammel v. United States, 445 U.S. 40 (1980).

[142] *Id.* at 53.

finding it an insufficient reason to create an exception to the waiver doctrine.[143]

This is not to say that waivers of rights and privileges can never be coerced. For example, a guilty plea may be found involuntary if the accused has been induced to enter it by deception, unfulfilled promises, misrepresentations, unethical threats, or improper promises not related to the prosecutor's business or the case at hand, such as bribes and third-party promises.[144] Thus, to continue the analogy to corporate waivers, if a prosecutor promised to refrain from indicting a corporation if the corporation waived its privileges, and then indicted the corporation anyway, the waiver could be deemed involuntary. However, regardless of the financial effects an indictment may have upon a corporation, no matter how onerous the decision to assert the privilege may be, a mere threat of indictment when properly made cannot be construed to coerce a waiver of a corporation's attorney-client privilege, when that waiver is given knowingly and intelligently and/or upon advice of counsel.

III. CONCLUSION

Neither the DOJ's general policy of considering waiver of the privilege in its charging decisions, nor the pressure to waive the privilege that prosecutors may apply, rises to the level of coercion. At all times, the corporation has a choice. Based upon a weighing of its financial interests, and upon the advice of experienced counsel, a corporation may or may not choose to waive its privilege. This may be a difficult choice, but it is a choice nonetheless, and it is the same kind of choice individual criminal defendants face every day.

This is not to say that corporate coercion could never occur. However, coercion requires a wrongful act or serious error. For example, a corporation could be coerced if a court erroneously orders disclosure of privileged information after the corporation has asserted its privilege; if a prosecutor makes a baseless and wrongful threat of indictment to obtain the waiver; or if a prosecutor fails to keep a promise made in exchange for the waiver.

Finding that the threat of indictment alone is sufficient to coerce a

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[143] *See In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) ("Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliché, the 'Hobson's choice' argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.").

[144] Mabry v. Johnson, 467 U.S. 504, 509 (1984); 21 AM. JUR. 2d *Criminal Law* § 686; 22 C.J.S. *Criminal Law* § 487.

corporate waiver requires one of two results: (1) either corporations accused of criminal activity are to be treated with more sensitivity than individual criminal defendants who also suffer the collateral impacts of indictment; or (2) threat of indictment must also be treated as coercing individual waivers. Neither result works. The former suggests, illogically, that corporations, in spite of the sophistication of their officers, directors and corporate counsel, are somehow more susceptible to coercion than an individual defendant facing criminal charges. The latter breaks down our entire system of criminal justice, as plea bargains and settlements become improper per se and every defendant who waived a right in exchange for leniency may claim coercion.

The proper source of protection for the corporate attorney-client privilege is the legislature. Policymakers may decide that corporate disclosures of privileged information to government agents are of sufficient value to society to warrant creating an exception to the waiver doctrine. Such legislation is currently pending. The proposed Attorney-Client Privilege Act of 2007 would prevent the DOJ from including a corporation's waiver of the privilege as an element of cooperation. In the meantime, courts should not treat corporations with favoritism by allowing these sophisticated parties to claim that a threat of indictment is sufficient to coerce their actions.

EMILY S. KELLER[*]

[*] J.D. Candidate, 2009, Golden Gate University School of Law, San Francisco, California; B.A. English, 1992, University of California, Berkeley. My thanks to members of the Golden Gate Law Review Editorial Board and Professor Peter Keane for their valuable time and insight. And special thanks to my husband, Shaun Keller, for his love and support.