By Samuel C. Damren

A Proposal to Amend the Rules of Professional Conduct

Prohibiting Thompson-Styled Waiver Requests

The Michigan Task Force

In April of 2006, State Bar President Thomas W. Cranmer, in response to an initiative of the American Bar Association provoked by the perception of an expanding "culture of waiver," formed the State Bar of Michigan Task Force on Attorney-Client Privilege (Michigan Task Force). The Michigan Task Force was charged with reviewing and making recommendations to the Representative Assembly for the State Bar on one aspect of the Thompson Memorandum:[1] requests by prosecutors and attorneys for regulatory agencies that companies waive the attorney-client privilege to demonstrate that they are "cooperating" with the government's investigation of alleged wrongdoing. Under this policy, companies that "cooperate" by waiving the privilege, engage independent attorneys to investigate alleged company wrongdoing, and report the investigating attorney's findings to the government, can improve their chances for receiving favorable treatment at the conclusion of the investigation. Companies that do not "cooperate" in this way risk receiving no consideration whatsoever in mitigating the charges that might ultimately be lodged against them and in plea and settlement negotiations.

The Michigan Task Force is in the process of collecting information from members of the Bar with respect to their experiences with Thompson-styled waiver requests, and is providing information to the Bar to educate and permit practitioners to better assess the implications of the perceived expanding "culture of waiver." I believe that Thompson-styled waiver requests improperly allow government attorneys to place private counsel in a direct conflict of interest with their company client by forcing the client to choose between having its own lawyers become witnesses against the company or having penalties and sanctions imposed on the company without possible mitigation if the company asserts its constitutional right to counsel and to attorney-client confidentiality. While the primary impact of Thompson-styled waiver requests has to date been limited to substantial businesses operating in a regulatory environment, the policy has application across the entire spectrum of legal entities and should be of concern to all practitioners. For these reasons, I proposed that the Michigan Task Force recommend to the Representative Assembly that the Michigan Rules of Professional Conduct (MRPC) be amended to prohibit such requests.[2] The proposal sparked sufficient interest from other members of the Michigan Task Force that they asked me to present the proposal to the entire Bar for comment. This article is intended to promote that discussion.

Some supporters of Thompson-styled waiver requests believe that the Bar should not interfere with the manner in which government attorneys choose to exercise their discretion. But the Bar does this all the time and has long endorsed similar restrictions on the manner in which attorneys, including prosecutors, can practice. Moreover, in contrast to the open discussion of these issues promoted by the ABA, the Michigan Task Force, and this article, Thompson-styled waiver requests were imposed on our clients and on the profession by the Justice Department without any prior discussion or consultation.

Your Experience with Thompson-styled Waiver Requests

The Michigan Task Force solicits the benefit of your experience,[3] asking the following question:

> *How many times have you, acting on behalf of a client, asked an adversary client to waive the attorney-client privilege to settle a lawsuit, resolve a regulatory dispute, or as part of a plea or sentencing negotiation in a criminal prosecution?*

My answer is never. I suspect that is your answer as well. In six years as a prosecutor—state and federal—and in 25 years of private practice in commercial litigation and business transactions, I have never made such a request. Frankly, until the Thompson Memorandum became public several years ago, it never even occurred to me to make such a request. Nevertheless, if you ever made such a request, please share with the Bar what benefit you believed would inure to your client if the request was granted and how your client benefited from the request. What effect did you believe the request might have on the relationship between your adversary and their lawyer, and what effect did it have?

I believe that Thompson-styled waiver requests improperly allow government attorneys to place private counsel in a direct conflict of interest with their company client.

Conversely, if you have ever been asked to waive the attorney-client privilege by an adversary to secure more favorable treatment in settlement negotiations (whether civil, regulatory, or criminal), what was your reaction to this request, and what was your client's reaction? Finally, if you knew that such requests might be part of the legal landscape for securing a favorable settlement for company clients at some time in the future, how would it affect the advice you give the client or the candor with which you present that advice? Also, do you think that if company employees knew that at some point in the future their communications with you as company counsel might be disclosed to a prosecutor or regulatory attorney to secure a favorable settlement for the company, that this knowledge might affect the quality of the information they would provide to you? To anyone who has acted as private counsel or received legal services, the latter two questions are rhetorical.

The type of instances and the frequency with which federal prosecutors in different regions of the country employ Thompson-styled waiver requests varies greatly. Here, in Michigan, federal prosecutors have rarely employed this tactic. In contrast, regulatory attorneys in Michigan, like federal prosecutors in many other states, routinely make their first question to company counsel: "Will you waive the privilege?" As part of the perceived expanding "culture of waiver," these requests will ultimately have a chilling effect on the reliability of the information that is provided to company counsel by employees, which in turn will inevitably reduce the effectiveness of the first line of defense that the public has against criminal or regulatory wrongdoing: in-house and outside company counsel. Nevertheless, many federal prosecutors and regulatory attorneys presently regard Thompson-styled waiver requests as an essential tool in the arsenal to combat business crime. As then Assistant Attorney General for the Criminal Division Christopher A. Wray stated to the Association of Certified Fraud Examiners Mid-South Chapter on September 2, 2004:

> *The message we're sending to corporate America [regarding cooperation] is twofold: Number one, you'll get a lot of credit if you cooperate, and that credit will sometimes make the difference between life and death for a corporation. Number two, if you want to ensure that credit, your cooperation needs to be authentic: you have to get all the way on board and do your best to assist the government.*[4]

The Effect of Thompson-Styled Waiver Requests on Traditional Attorney-Client Roles and Relationships

To begin to assess whether Thompson-styled waiver requests breach ethical and constitutional standards, you need to understand how dramatically the roles of the actors who occupy the legal landscape created by the Thompson Memorandum differ from their traditional roles and relationships.

The Investigating Attorney

An attorney who is engaged by a company, in compliance with Thompson-styled waiver requests, to investigate alleged wrongdoing does not function as a company attorney in any traditional sense. After all, at the conclusion of the investigation, the investigating attorney will turn over all documents and information that company employees provided to him to a regulatory or prosecuting attorney for criminal prosecution or regulatory sanction. Prudent investigating counsel, in fact, give a *Miranda*-type warning to each employee that they interview, including the affirmative statement that the attorney does not represent the employee. A minority of investigating attorneys additionally warn employees that they will not maintain any statements made by the employee in confidence. From the perspective of a company employee who is fully advised of the investigating attorney's true role, the investigating attorney is simply a proxy for the regulatory or prosecuting attorney. But there are two critical differences.

First, unlike prosecutors or regulatory attorneys who are prohibited by the Constitution from obtaining witness statements through economic coercion, investigating attorneys can have employees fired if they refuse to submit to an interview. So, an employee has two choices when meeting with an investigating attorney: (1) if you did nothing wrong, say so to the investigating attorney and hope that they believe you and correctly assess your credibility and non-involvement in any alleged wrongdoing; or (2) if you did participate in some wrongdoing, either admit wrongdoing, or lie and risk penalties for false statements to the government since the investigating attorney functions as the government's proxy, or say nothing and lose your job. And yes, individuals have been prosecuted for giving false statements to a company-hired investigating attorney under the rationale that such conduct is tantamount to giving false statements to government attorneys and investigators.[5]

The second critical difference is that, unlike a prosecutor or regulator, the investigating attorney cannot offer employees immunity or a reduced plea offer in exchange for their testimony. And yes, an employee can always try to deal with the prosecutor or regulator directly; but, absent extraordinary circumstances, prosecutors and regulators rarely intrude on the investigating attorney's ongoing investigation. So, if an employee wants to make a deal in exchange for his testimony, the employee will have to refuse to make a statement to the investigating attorney and get fired before those negotiations can begin.

Despite the fact that the investigating attorney calls himself an attorney for the company, the perspective that the company has of the investigating attorney is not at all different from the perspective of its employees and agents. Unlike its relationship with traditional company attorneys, a company cannot receive confidential advice from an investigating attorney and cannot provide information to the investigating attorney with any expectation that it will remain confidential. So, while the company pays the investigating attorney's fees, investigating counsel has little else in common with other attorneys that the company traditionally engages. Moreover, unlike its experience with traditional counsel, the company cannot give direction to the investigating attorney about how to conduct his work, i.e., who to interview, what documents to review, how many hours to spend, caps on fees, and the scope of the investigation. If the company attempts to do so, it faces two problems: (1) the company may be charged with obstruction of justice, and (2) the investigating attorney might not tell the prosecuting or regulatory attorney that the company

"cooperated" in the investigation, and, hence, is not entitled to any mitigation even though the company has irretrievably waived the attorney-client privilege.

From the perspective of the investigating attorney, this engagement is also unlike any other work he performs as a lawyer. First, the individuals that he really reports to—the regulatory attorney or prosecutor—do not pay his fees. Second, the entity that pays his fees cannot effectively give him direction or place limitations on his work. Third, the investigating counsel never has to present his case in front of a judge or jury, much less prove it. The engagement is complete when he reports to the prosecutor or regulatory attorney. Fourth, the report may be functionally equivalent to both an admission of guilt from an authorized agent of the company and a guilty plea. In this respect, the investigating "company" attorney acts as a witness against his purported client.

In light of these realities, referring to an investigating attorney as the company's lawyer is nonsense. In substance, an investigating attorney functions as an expert witness engaged by the company to investigate alleged wrongdoing and to report his findings to regulators or prosecutors. The premise underlying the business decision to engage such an expert is that, per the Thompson Memorandum, if there is wrongdoing uncovered as a result of the investigation, the prosecutor or regulatory attorney will hurt you less severely than he would if you had not engaged such an expert and "self-reported" the wrongdoing.

Employing an Investigating Attorney Does Not Require Waiver of the Attorney-Client Privilege

In the face of Thompson-styled waiver requests, the decision to employ such an expert may be a good business decision. However, when you examine the role of the investigating attorney from this functional perspective (i.e., as an expert witness), one fact becomes glaringly obvious: employing such an expert does not necessitate a waiver of the attorney-client privilege. A company could hire an investigating attorney/expert witness to conduct an investigation and report his findings to the prosecutor or regulatory attorney without waiving the attorney-client privilege. In fact, some companies have successfully negotiated with the government to limit the types of disclosures they make to the prosecutor or regulator so as to preserve the attorney-client privilege as to past communications while nevertheless providing access to interviews conducted by the investigating attorney and all or portions of the investigative report. So, what is the government's reason for requesting the waiver of the attorney-client privilege when it could just as well receive only the expert's report? It is twofold: (1) to ensure that the company is not hiding something from the expert and the government, and (2) to get access to all legal advice on the particular subject under investigation that the company or its employees may have received at any time from any lawyer to establish that the company is not hiding anything and is "all the way on board" in "cooperating."

As a consequence of the request that is embedded in the Thompson Memorandum for the waiver of all past attorney-client communications on a particular subject, not just communications with an investigating attorney, the lesson that must be learned by every company employee, agent, officer, and director in America is this: when you speak to a company lawyer—whether in-house or outside counsel—at any time for any reason, always remember you are also talking to the prosecutor or the regulator. And the lesson that must be learned by every lawyer in America from the Thompson Memorandum is that when you are engaged by a company to provide legal advice, remember that every time you speak to anyone at the company and for any reason, you are also talking to the prosecutor or the regulator.[6] Once learned, these lessons will cause a deep chill in the working relationship between company counsel and company employees.

The Role of the Prosecutor or Regulatory Attorney

The prosecutor or regulatory attorney who is able to extract Thompson-styled waivers from a business also functions in a completely different role than that of a traditional prosecutor or regulator. There are three principal differences: (1) the prosecutor/regulator can now indirectly threaten witnesses with job loss to obtain statements from them, (2) the prosecutor/regulator need not grant anyone immunity or plea deals to obtain testimony, and (3) the investigating attorney does the prosecutor's/regulator's work for him.

It is well established that a prosecutor who obtains waivers of the right against self-incrimination from individual employees through economic coercion—such as threats of job loss—violates the employees' constitutional rights. In *Garrity v New Jersey,*[7] the Supreme Court held that statements obtained by state officials from police officers under the threat that they would be removed from office unless they waived their privilege against self-incrimination were involuntary and inadmissible because the statements had been obtained by unconstitutionally coercive means. In *Lefkowitz v Turley,*[8] the Supreme Court held that a state could not compel incriminatory answers from independent contractors under the threat that unless they waived the privilege, they would be disqualified from contracting with state agencies, even though the governmental coercion was exerted on private rather than public employees. The Court explained that it did not "see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."[9] The Second Circuit Court of Appeals has observed that this same principle should be similarly extended where a private employer acts as an agent of the government:

> *The controlling factor is not the public or private status of the person from whom the information is sought but the fact that the state had involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement. Nor do we perceive any consequence flowing from the fact that the threat in the present case was conveyed through a private employer, admittedly acting as an agent for the police, rather than through a person on the public payroll. The state's involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect.*[10]

The ethical question presented by employee interviews conducted by investigating

counsel engaged in compliance with Thompson-styled waiver requests is whether this procedure improperly allows a prosecutor or regulator to indirectly use threats of discharge to obtain waivers from employees of their privilege against self-incrimination—a threat that the prosecutor could not lawfully use in dealing with the employees directly. Rule 4.4 of the MRPC provides that "(i)n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Rule 8.4(a) of the MRPC further provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

While the original intentions of the Thompson Memorandum did not include encouraging prosecutors to indirectly violate the rights of employees by providing inducements for leniency to private counsel conducting internal investigations, the practical results of this process have caused precisely such a circumstance. Experienced attorneys recognize that since the Thompson Memorandum was issued, federal prosecutors "expect the corporation's lawyers to conduct an investigation for the government with tools the government does not have, particularly the threat of firing employees who refuse to provide information."[11] Given these realities, the purported safe harbor for prosecutors or regulators who may assert that they have done nothing to induce company attorneys to threaten employees with job loss to obtain evidence does not withstand scrutiny. Indeed, investigating attorneys who make these demands may increasingly act at their peril. As U.S. District Court Judge Lewis A. Kaplan recently ruled in the KPMG case,[12] statements secured from KPMG employees by investigating attorneys using such tactics were made under duress and were inadmissible. A round of lawsuits by employees against the investigating attorneys may ensue. If such suits were instituted, the investigating attorneys might be well advised to assert governmental immunity as a defense given the fact that they were acting as proxies for government prosecutors. Of course, this assertion would completely lift the veil from the notion that they were really ever "company" attorneys.

Prosecutors often suggest that their reason for refusing to talk to employees about immunity or negotiating plea agreements during an investigating attorney's ongoing investigation is so as not to interfere with this "independent" investigation. However, given the functional reality of the investigating attorney's role as proxy for the prosecutor or regulator, this suggestion is disingenuous. The real reason for refusing to speak to these witnesses during the investigation is that it interferes with the investigating attorney's ability to use far more coercive tactics—threats of job loss—than the prosecutor or regulator could ever use.

Finally, unlike the traditional role of a prosecutor or regulator, the investigating attorney does the prosecutor's or regulatory attorney's work for him at no expense to the government. In essence, the company pays for the government's expert witness on trial strategy complete with witness statements, documents, and comprehensive analysis. The traditional adversarial relationship between government attorney and the attorney "defending" the company is neutered by this process. The company, in effect, submits to whatever demands the government's proxy, in the form of the investigating attorney, might make to avoid even greater punishment at the hands of the government.

Employees and the Company

Many of the differences for employees and the company between traditional investigations conducted by prosecutors and regulatory attorneys and those conducted by investigating attorneys have already been discussed, e.g., employees can lose their jobs if they do not give statements to the investigating attorney; they are unable to effectively make deals or ask for immunity with the prosecutor or regulator until after the investigation is complete; and they cannot trust that information given to, or advice received from, company counsel will remain confidential. There is an additional difference that merits consideration.

There is a risk that a prosecutor or regulatory attorney investigating a lead will get it wrong or that the lead will not result in any criminal or regulatory charge, but that the company, in response to Thompson-styled waiver requests, will nonetheless waive the privilege. As a result of this waiver, material that may have been within the scope of the privilege is exposed to the public and causes the company profound difficulties in a civil arena. To meet these concerns, proponents of Thompson-styled waiver requests have urged that the Rules of Evidence be amended to permit selective and confidential waivers so that prosecutors and regulators can continue to receive attorney-client information, without such disclosure destroying the confidentiality of the information as to others. How these rules might effectively function as a practical matter is highly questionable. In my view, this suggestion is merely a distraction to the more fundamental ethical and constitutional issues posed by Thompson-styled waiver requests.

Prosecutorial Need

Meetings that occurred over the past few months between members of the Michigan Task Force and representatives of the U.S. Attorney's offices for the Eastern and Western Districts of Michigan revealed a fact that has not changed since I was an assistant U.S. attorney in Detroit from 1978 to 1981. Federal prosecutors do not need a business entity to waive the attorney-client privilege or the work product privilege that applies to material containing counsel's mental impressions to properly investigate and prosecute alleged criminal activity. Assuming that the company has provided the government with access to all non-privileged historical documents, and is prepared to accept responsibility for whatever measure of culpability it may have for past acts, the primary concerns that I had in investigating alleged wrongdoing by business entities as an assistant U.S. attorney in the late '70s and early '80s do not differ from the concerns expressed by our current federal prosecutors. Then and now, federal prosecutors are principally concerned with the steps that business entities have undertaken to prevent the continuation of alleged wrongful activity, proof that the business entity is responsibly acting to address this issue through changes in their business procedures, and

proof that things are as the representatives of those business entities say they are. None of those concerns requires a wholesale waiver of the attorney-client privilege or work product privilege to be satisfied. The final step in this process may require business entities to present the substance of interviews with certain employees and third parties and documents that the business entities have assembled in their investigation of alleged wrongful conduct, but the production of this information does not cause nor necessitate a waiver of the attorney-client privilege or the disclosure of counsel's mental impressions contained in work product materials.

Prosecutors and regulatory attorneys also acknowledge that they do not need to secure a waiver of attorney-client confidentiality to gain access to communications between counsel and the company relating to future crime or fraudulent conduct by the client. These communications are not privileged under the crime-fraud exception to the attorney-client privilege.[13]

The Importance of Confidentiality

Cases upholding the attorney-client privilege first appeared in England in 1577.[14] Subsequent cases in the 1700s noted that the privilege prohibited a counselor from becoming a witness against his client's cause.[15] This article is not intended as a review of the countless cases that have discussed the "imperative need for trust and confidence"[16] between attorney and client for attorneys to provide sound legal advice. Supporters of Thompson-styled waivers do not attempt to debunk centuries of support for this bedrock imperative to our profession. Nor do they suggest that companies do not require legal advice to be successful, for they well know that in today's world it would be preposterous for a company not to seek the advice of counsel on countless issues.

Instead, the prosecutors and regulators rely on these facts and necessary relationships between a company and its employees and lawyers to place the company in an insolvable dilemma. Here are the business facts that lead up to the dilemma:

- A company needs employees to operate.
- A company needs company counsel to succeed.

What we demand of ourselves as company counsel and from government attorneys is that we all play by the rules that circumscribe and form the bedrock of our profession. Thompson-styled waiver requests confound these obligations.

- The company lawyer can only secure the reliable information that he needs to provide sound legal advice from persons that he does not represent (the company's employees) and who cannot require him to hold the information in confidence.

Given these circumstances, what options are presently available to a company if it wanted to avoid a future risk that traditional company lawyers could be turned into witnesses against the company through Thompson-styled waiver demands? None are realistic:

- A company could try to operate without employees.
- A company could try to operate without counsel.
- The company's lawyer could try to provide sound legal advice without access to reliable information provided in confidence.

One can, of course, observe that the last option is not what is happening in the real world since outside and in-house lawyers continue to receive reliable information from company employees. But the only reason that traditional company lawyers continue to receive reliable information today is because the vast majority of company employees do not appreciate the fact that when they are providing information to company lawyers, it is not provided in confidence and that in light of the coercive elements of the Thompson Memorandum they might as well be talking to a prosecutor or government regulator. However, as company counsel become more increasingly aware of this circumstance and as the "culture of waiver" continues to expand, this may change. In fact, it may be appropriate in the very near future for traditional company lawyers—just like investigating attorneys—to give *Miranda*-type warnings to all company employees when they talk to them. Indeed, such warnings may be mandated by MRPC 4.3:

DEALING WITH AN UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

If company lawyers, acting in compliance with MRPC 4.3, correct the misconception that employees generally have about the confidentiality of information that they provide to company counsel—for example, by inserting a *Miranda*-type warning in the section of the employee manual, entitled "When You Provide Information to Company Counsel"—the dilemma created by Thompson-styled waiver requests becomes insolvable. These warnings will deter employees from seeking legal advice on matters that might be of concern to them personally as well as to the company and will be a disincentive to providing the reliable information that is necessary to enable traditional company counsel to render sound legal advice. To date, the solution to this impending ethical crisis has been to ignore it and keep the employees in the dark. But as the "culture of waiver" continues to expand, and as our professional obligations under MRPC 4.3 to unrepresented employees to correct their misconceptions about confidentiality becomes less abstract and more and more certain, the ethical crisis is just over the horizon. This problem can only be solved by amending the MRPC to prohibit government attorneys from making Thompson-styled waiver requests. The only other two options—ignore our ethical obligations to unrepresented persons or make appropriate warnings to company employees and thereby greatly impede our ability to

secure reliable information necessary to provide sound legal advice—are not realistic.

The Government is Not Saying You Can't Have Counsel; the Choice is Up to You

As long as the Thompson Memorandum remains effective, its coercive effect touches on every interaction between companies and their employees and counsel. The threat, of course, is that if the company does not "cooperate" by voluntarily waiving its attorney-client privilege, then that failure, in the words of Christopher Wray, may cause the "death" of the company. Everyone in the business community knows what Christopher Wray is talking about. He is talking about Arthur Anderson and what happened to that company after it asserted its attorney-client's privilege: death. Prosecutors and regulators do not bring Arthur Anderson up often, but they do not need to. Like the rubber hose in "third-degree" interrogations of police lore, what happened to Arthur Anderson is always present at the negotiating table. In fact, as the "culture of waiver" has expanded during the past few years, regulators and prosecutors do not even need to "ask" for waivers. Instead, in their rush to demonstrate "cooperation," company counsel often offer to waive the privilege in certain respects without any request.

Given these practical realities, the prosecutor's or regulatory attorney's insistence that the decision by the company to waive the privilege is "voluntary" is pure fantasy. Remember what Christopher Wray said and then put it in context. Here is what government attorneys are really saying to the company when they make—either explicitly or implicitly—Thompson-styled waiver requests:

> *We know you have a constitutional right to counsel and not to have your attorney act as a witness against you. We respect those rights. We are only requesting that you waive those rights as a prerequisite to the possibility of any favorable treatment. The choice is yours: assert your rights and die or do not assert them and live.*

Listening to speeches from prosecutors and regulators about how they are merely requesting companies to make "voluntary" decisions to waive the attorney-client privilege is analogous to listening to spokespersons for dictators chortle about the fact that their citizens have the right to vote, and that in the last election the dictator was once again elected. To which we all respond, yes, the citizens have the right to vote; the problem is that there is only one choice on the ballot. The same thing is true for a company responding to Thompson-styled waiver requests in today's business environment.

Conclusion

Company attorneys, whether outside counsel, like me, or in-house counsel, do not support a world where cheats and crooks can operate with impunity from the boardrooms and management offices of corporate America. We want prosecutors and regulators to catch the cheats and crooks for reasons that include pure self-interest. We compete everyday in a difficult and hardball environment, but we play by the rules and we want prosecutors and regulators to ensure that our competitors play by the same rules. We want a fair competition.

What we demand of ourselves as company counsel and from government attorneys is that we all play by the rules that circumscribe and form the bedrock of our profession. Thompson-styled waiver requests confound these obligations. In my view, they should be prohibited through an amendment to the Michigan Rules of Professional Conduct.

This proposal would add a new paragraph (g) to Michigan Rule of Professional Conduct 3.4 (Fairness to Opposing Party and Counsel) as follows:

> *A lawyer shall not:*
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> * * *
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> *(g) when representing a government or governmental agency in a criminal or civil enforcement matter, obtain from an individual or entity any material protected by work product or the attorney-client privilege in exchange for the grant or denial of any benefit or advantage regarding:*
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> *(1) whether to proceed against the individual or entity;*
>
> *(2) the nature of the proceeding;*
>
> *(3) the severity of the charges and the extent of sanctions sought; or*
>
> *(4) plea and settlement offers.*
>
> *A government attorney may request that an individual or entity offer proof of factual assertions that the person has made to the government attorney without violating this prohibition.*
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> * * *

The Michigan Task Force requests the benefit of your insights on this proposal. ◆

Editor's note: Please watch for the November 2006 issue of the *Michigan Bar Journal* for more viewpoints on this controversial topic.

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FOOTNOTES

1. January 20, 2003 memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components regarding Principles of Federal Prosecution of Business Organizations (Thompson Memorandum), *Michigan Bar Journal,* June 2006, pp 14–16.
2. Under federal law, this prohibition would apply and be effective on all government attorneys practicing law in Michigan. 28 USC 530B.
3. The Michigan Task Force maintains a website where you can post your comments and experience; see http://www.michbar.org/generalinfo/attorney-client.cfm.
4. Earl J. Silbert and Demme Doufekias Jannou, *Under pressure to catch the crooks: The impact of corporate privilege waivers on the adversarial system,* 43 Crim L R 1225, 1228-9 (2006).
5. Grand Jury Indictment, *United States v Kumar,* Cr No 1:04-cr-00846-ILG-ALL (ED NY filed Sept. 22, 2004).
6. George Ellard, *Making the silent speak and the informed wary,* 42 Am Crim L R 985, 993 (2005).
7. 385 US 493 (1967).
8. 414 US 70 (1973).
9. Id. at 83
10. *United States ex rel Sanney v Montanye,* 500 F2d 411, 415 (CA 2, 1974).
11. Criminal Law-White Collar Crime: Programs Examine Trend Toward Seeking Corporate Waiver of Attorney-Client Privilege, 71 USLW 2625, 2635 (2003).
12. *United States v Jeffrey Stein, et al.,* 2006 US Dist LEXIS, 50723, United States District Court, Southern District of New York.
13. *People v Paasche,* 207 Mich App 698, 705 (1994).
14. *Berd v Lovelace,* 21 Eng Rep 33 (1577).
15. See Geoffrey C. Hazard, Jr., *A historical perspective on the attorney-client privilege,* 66 Cal L R 1061, 1070 (1978).
16. *Jaffee v Redmond,* 518 US 1, 10; 135 L Ed 2d 337, 344-5; 116 S Ct 1923 (1996).