Confusing Prosecutorial Discretion With Ethics:

A Misguided Proposal to Amend the Michigan Rules of Professional Conduct

By Stephen L. Hiyama

Editor's note: This article was written in response to Samuel C. Damren's article, "A Proposal to Amend the Rules of Professional Conduct: Prohibiting Thompson-Styled Waiver Requests," which was published in the October 2006 issue of the Michigan Bar Journal.

Background

Federal agencies, in particular the Securities and Exchange Commission and the Department of Justice, have investigated and prosecuted securities fraud and other related civil and criminal offenses for decades.[1] In the last five years, however, beginning with the collapse of Enron in December 2001, such corporate fraud prosecutions and the unlawful conduct giving rise to such prosecutions have received unprecedented attention and scrutiny. Indeed, in response to Enron and other high-profile corporate scandals, Congress enacted sweeping legislation that substantially changed the requirements of corporate financial reporting: the Sarbanes-Oxley Act of 2002.[2]

The activities that corporate fraud investigations focus on tend to be complex. For any number of sound business reasons, a corporation under scrutiny will often, on its own initiative, conduct its own internal investigation, which is usually led by outside counsel. An internal investigation will enable the corporation to find out what happened; determine whether any laws were violated and, if so, what its civil and criminal exposure might be; fire or otherwise discipline wrongdoers; and put in place better internal controls that will make the problem's recurrence much less likely. Such corporations, especially those whose stock is publicly traded, have a strong interest in maintaining or regaining the confidence of the market in their financial integrity. And one common strategy for engendering market confidence is to come clean.

Attorneys who are hired by corporations to conduct internal investigations invariably find it necessary to interview corporate officers, directors, and employees. The results of such interviews can be useful to law enforcement. They can assist in the identification of transactions or practices that are non-compliant and of the individuals who participated in those transactions or practices. But most such interview materials are protected by the corporations' attorney-client or work product privileges or both[3] and, thus, cannot be disclosed to government investigators without a waiver of those privileges.

A fellow member of the State Bar of Michigan Task Force on Attorney-Client Privilege, Sam Damren, has proposed that a provision be added to the Michigan Rules of Professional Conduct (MRPC) that forbids government attorneys from

> obtain[ing] 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: (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.[4]

In other words, government attorneys would be prohibited from receiving the results of internal corporate investigations, whether the government requested such materials from a corporation or whether the corporation disclosed such materials to the government in the absence of a request.

The proposal represents a particular point of view concerning the manner in which prosecutorial discretion should operate in relation to a discrete category of wrongdoing, corporate fraud. It does not belong in a universal code of professional ethics.

Standards of Conduct for Prosecutors

Broad Prosecutorial Discretion

In the ordinary operation of our tripartite government, Congress decides what conduct should be sanctioned by federal penalties, civil or criminal, and the federal executive branch then enforces those laws. In *United States v Armstrong,*[5] the Supreme Court observed:

> The Attorney General and United States Attorneys retain "'broad discretion'" to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."

In *Wayte v United States,*[6] the Court explained the principle's rationale:

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and

> the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[7]

Falling within this broad prosecutorial discretion is not only the decision whether to prosecute an individual (a decision made hundreds of times every day by federal prosecutors across the country), but the decision whether to prosecute a corporation.

In addition, it is well established that in the course of negotiating guilty pleas and other dispositions with targets, prosecutors may offer incentives to targets in return for their waiver of constitutional and other significant rights. For example, an individual who is induced by a promise of leniency to plead guilty must necessarily agree to waive his privilege against self-incrimination, his right to a jury trial, and his right to confront government witnesses. The U.S. Supreme Court has ruled, in *United States v Mezzanatto,*[8] that this type of agreement is perfectly legal and acceptable:

> The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government "may encourage a guilty plea by offering substantial benefits in return for the plea." *Corbitt v. New Jersey,* 439 U.S. 212, 219 [ ] (1978). "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" *Bordenkircher v. Hayes,* 434 U.S. 357, 364 [ ] (1978).[9]

Rules of Professional Conduct

Federal prosecutors who work in Michigan, whether members of the State Bar of Michigan or not, are subject to the MRPC.[10] Like other Michigan practitioners, a prosecutor "shall not," for example, "represent a client if the representation of that client may be materially limited…by the lawyer's own interests,"[11] "knowingly make a false statement of material fact or law to a tribunal,"[12] "make a frivolous discovery request,"[13] or "engage in conduct that is prejudicial to the administration of justice."[14] These are general standards with which no one can seriously take issue (although their applicability to specific facts might be contested).

Likewise, the rule of professional conduct specifically directed at prosecutors, MRPC 3.8 ("Special Responsibilities of a Prosecutor"), prescribes minimal guarantees of procedural and adversarial fairness that are not reasonably disputable and which reflect external standards established elsewhere. For example, MRPC 3.8(d) requires prosecutors to disclose evidence "that tends to negate the guilt of the accused or mitigates the degree of the offense" and to disclose "in connection with sentencing,…all unprivileged mitigating information known to the prosecutor."[15]

Internal Department Policies

Federal prosecutors are bound not only by the commands of the Constitution, United States Code, and Federal Rules of Criminal Procedure, they must also comply with internal Department of Justice (DOJ) policies, which are collected in the *United States Attorneys' Manual (USAM).* In making the threshold decision to charge or not charge an individual, federal prosecutors are guided by a chapter of the *USAM* called the "Principles of Federal Prosecution."[16] With respect to targets that are corporations, those principles are further explicated in the McNulty Memorandum, issued on December 12, 2006, entitled "Principles of Federal Prosecution of Business Organizations."[17]

The McNulty Memorandum represents a revision of the DOJ's 2003 Thompson Memorandum,[18] which in turn was a revision of the 1999 Holder Memorandum.[19] The Thompson Memorandum provided, as did the Holder Memorandum before it, that in deciding whether to charge a corporation with a crime, federal prosecutors should consider a number of factors. One of the nine factors related to corporate cooperation, a concept that embraced, among other things, a "corporation's willingness…to disclose the complete results of its internal investigation[] and to waive attorney-client and work product protection."[20] This provision is the specific object of Mr. Damren's proposal.

The McNulty Memorandum revised the language of the Thompson Memorandum on the waiver of corporate privileges. Under the McNulty Memorandum, a corporation's cooperation with the government's investigation remains one of the nine factors prosecutors must consider in deciding whether to charge the corporation with a crime.[21] And disclosing internal investigations and waiving privileges remain ways in which a corporation may provide cooperation to the government.[22] But the "[wa]iver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation."[23]

Under the McNulty Memorandum, "[p]rosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations."[24] Moreover, before any federal prosecutor may seek internal investigation materials from a corporation or ask it to waive its privileges, the United States Attorney must consult with the head of the DOJ's Criminal Division, based in Washington, D.C., and then approve the action in writing.[25] If a federal prosecutor wants to request the disclosure of the most sensitive kind of privileged materials—direct attorney-client communications and opinion work product[26]—the United States Attorney must submit a request to the Deputy Attorney General, the DOJ's second highest-ranking official, and the Deputy Attorney General must provide written authorization for the request.[27]

Mr. Damren's Proposal

In contrast to the fundamental standards of conduct on which there is broad consensus within the legal profession, Mr. Damren's proposal would inject into the MRPC a particular view of how the executive branch should exercise its discretion in investigating and prosecuting a specific kind of white-collar crime, corporate fraud. His proposal would categorically bar government attorneys from "obtain[ing] from an…entity any material protected by work product or the attorney-client privilege," and would appear to not only prevent the government from requesting such materials from a corporation, but also forbid it from receiving such materials when the corporation decides to provide the materials in the absence of a request. Thus, the results of corporate internal investigations, which often contain information and evidence that can substantially advance government investigations of complex financial transactions and serious criminal wrongdoing, would be off limits.

Leaving aside the merits of Mr. Damren's rule for a second, it is not apparent why such a rule belongs in a code of professional responsibility. When investigators and prosecutors seek to obtain the results of a corporation's internal investigation, they are only trying to get the answer to the central question of every investigation: what happened? That is not conduct that can be characterized as being intrinsically unfair or unethical.

Rules of professional conduct are a serious matter; their violation can lead to professional discipline and even disbarment.[28] As noted above, the local rules of both federal district courts in Michigan subject government attorneys to the MRPC,[29] and a federal statute provides that state rules of professional conduct apply to federal government attorneys.[30] A law enforcement practice motivated by the desire to obtain evidence that may be relevant to the commission of criminal (or civil) offenses, evidence that may serve not only to inculpate but to exculpate, and by the desire to conserve scarce investigative resources should not be proscribed in the name of ethics.[31]

And what of the merits of Mr. Damren's proposal? Although prosecutorial charging policies are an executive prerogative, they are also a fair subject for public debate. Mr. Damren is not the only one who has been critical of the privilege-waiver provision of the Thompson Memorandum, which has also drawn fire from such organizations as the American Bar Association, the National Association of Criminal Defense Lawyers, the Association of Corporate Counsel, and the U.S. Chamber of Commerce. Two congressional hearings on the Thompson Memorandum were conducted in 2006.[32]

In response to this input and other considerations, the DOJ undertook a thorough review of the Thompson Memorandum, decided to revise certain parts of it, and, in December 2006, issued the McNulty Memorandum, which established a more centralized and rigorous internal review and approval process for prosecutors wishing to request privileged materials from a corporation.[33]

These revisions fall far short of what Mr. Damren would like with respect to what is essentially a very narrow question of public policy: the DOJ's charging policies in corporate fraud investigations. On this, much has been written over the last several years.[34] But arguments over public policy belong in political forums and should not be framed in terms of a lawyer's duty to act ethically. Indeed, the McNulty Memorandum can be viewed as the end result of a political process.

In sum, the MPRC should not be used to codify a specific position in an ongoing policy debate that would substantially narrow the executive branch's lawful prosecutorial prerogatives and eliminate the government's ability to obtain highly relevant and useful information in complex financial investigations.[35] ■

The views expressed in this article are those of the author and not necessarily those of the U.S. Attorney's Office for the Eastern District of Michigan or the U.S. Department of Justice.

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FOOTNOTES

1. See, e.g., *United States v BCCI Holdings, S.A.*, 69 F Supp 2d 36 (DDC, 1999); *United States v Milken*, 780 F Supp 123 (SD NY, 1991); *SEC v Drexel Burnham Lambert Inc*, 128 FRD 47 (SD NY, 1989); *PepsiCo, Inc v SEC*, 563 F Supp 828 (SD NY, 1983); *SEC v Texas Gulf Sulphur Co*, 401 F2d 833 (CA 2, 1968) (en banc).
2. PL 107-204 (July 30, 2002).
3. See, e.g., *Upjohn Co v United States*, 449 US 383, 391 (1981) (attorney-client); *In re Perrigo Co*, 128 F3d 430, 437 (CA 6, 1997) (attorney-client); *Upjohn*, 449 US at 399–400 (work product); *United States v Bergonzi*, 216 FRD 487, 495 (ND Cal, 2003) (work product). The rule that protects an attorney's work product is more commonly referred to as the "work-product doctrine," which "was announced by the [Supreme] Court…*in Hickman v Taylor*, 329 US 495 [] (1947)." *Upjohn*, 449 US at 397. But for the sake of simplicity, this article will refer to work product protection as a privilege.
4. Proposed Rule 3.4(g), MRPC. See Damren, *A proposal to amend the rules of professional conduct: Prohibiting Thompson-styled waiver requests*, 85 Mich B J 44, 49 (October 2006).
5. *United States v Armstrong*, 517 US 456, 464 (1996) (citations omitted).
6. *Wayte v United States*, 470 US 598, 607–08 (1985).

7. "Of course, a prosecutor's discretion is 'subject to constitutional constraints.' One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Armstrong,* 517 US at 464 (citations omitted).
8. *United States v Mezzanatto,* 513 US 196, 209–10 (1995).
9. Thus, in *United States v Cordell,* 924 F2d 614 (CA 6, 1991), the Sixth Circuit held that the federal Sentencing Guidelines provision that effectively reduces the sentences of defendants who plead guilty did not amount to an unconstitutional penalty on defendants who exercised their privilege against self-incrimination and right to a jury trial. "Although § 3E1.1 may well affect how criminal defendants choose to exercise their constitutional rights, 'not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.' *Corbitt v New Jersey,* 439 US 212, 218 [ ] (1978)." *Cordell,* 924 F2d at 619.
10. See ED Mich LCR 83.20(j); WD Mich LCR 83.1(j); 28 USC 530B (McDade Amendment). The MRPC can be found at <http://www.michbar.org/generalinfo/pdfs/mrpc.pdf> (accessed January 24, 2007).
11. MRPC 1.7(b).
12. MRPC 3.3(a)(1).
13. MRPC 3.4(d).
14. MRPC 8.4(c).
15. This is a codification of the holding of *Brady v Maryland,* 373 US 83 (1963), that constitutional due process requires prosecutors to disclose "evidence favorable to an accused [that is]…material either to guilt or to punishment," *id.* at 87, and the holding of *Giglio v United States,* 405 US 150 (1972), that due process requires prosecutors to disclose "evidence affecting [the] credibility" of key prosecution witnesses, *id.* at 154.
16. *United States Attorneys' Manual,* ch 9-27.000, available at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm> (accessed January 24, 2007).
17. This memorandum was issued by Deputy Attorney General Paul J. McNulty, and is available at <http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf> (accessed January 24, 2007).
18. This memorandum was issued in January 2003 by then Deputy Attorney General Larry D. Thompson, and is available at <http://www.usdoj.gov/dag/cftf/business_organizations.pdf> (accessed January 24, 2007).
19. This memorandum was issued in June 1999 by then Deputy Attorney General Eric H. Holder, Jr., and is available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> (accessed January 24, 2007).
20. Thompson Memorandum, p 6.
21. McNulty Memorandum, p 4.
22. *Id.,* pp 8–11.
23. *Id.,* p 8.
24. *Id.*
25. *Id.,* p 9.
26. The McNulty Memorandum states that information of this sort "should only be sought in rare circumstances." McNulty Memorandum, p 10.
27. *Id.*
28. See generally Hazard, Jr., *The future of legal ethics,* 100 YALE L J 1239, 1249-51 (1991) (describing evolution from the ABA's 1909 Canons ("fraternal admonitions, promulgated neither by the legislature nor the courts, but by the bar itself") to the ABA's 1970 Code of Professional Responsibility ("the Canons and the Ethical Considerations were intended to be admonitory," while the CPR's "third tier of norms consisted of black-letter law known as Disciplinary Rules" that could result in "disciplinary adjudication, with court-imposed penalties") to the ABA's 1983 Model Rules of Professional Conduct (consisting of "a two-level structure of Rules and Comments").
29. See n 10 *supra.*
30. 28 USC 530B ("Ethical standards for attorneys for the Government"); see also 28 CFR part 77 (Department of Justice regulations implementing 28 USC 530B). The operative language of the statute, commonly referred to as the McDade Amendment, provides: "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 USC 530B(a).
31. "'In one sense, the term ''legal ethics'' refers narrowly to the system of professional regulations governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion. From this broader perspective, legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers.'" Black's Law Dictionary (8th ed), quoting Deborah L. Rhode & David Luban, *Legal Ethics* 3 (1992).
32. March 2006 hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee, <http://judiciary.house.gov/oversight.aspx?ID=222> (accessed January 24, 2007); September 2006 hearing before the Senate Judiciary Committee, <http://judiciary.senate.gov/hearing.cfm?id=2054> (accessed January 24, 2007).
33. McNulty Memorandum Cover Memorandum, pp 1–2 (December 12, 2006), reproduced at <http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf> (accessed January 24, 2007).
34. See, e.g., Wray & Hur, *Corporate criminal prosecution in a post-Enron world: The Thompson memo in theory and practice,* 43 Am Crim L R 1095 (2006); Report, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege,* 60 Bus Law 1029 (2005); see also, e.g., Coleman & Chi, *Internal investigations: Who, what, when, why and how,* 1561 PLI/Corp 265 (2006).
35. In an article published in the November 2006 issue of the *Michigan Bar Journal,* another member of the State Bar of Michigan Task Force on Attorney-Client Privilege, co-chair John Allen, has concluded that Mr. Damren's proposed revision of the MRPC should not be adopted. "Acting urgently to protect the privilege is a good idea; adding MRPC 3.4(g) is not." See Allen, *Protecting the privilege—MRPC3.4(g) is NOT the Way,* 85 Mich B J 48, 48 (November 2006).