Introduction

Since the Enron debacle, both the government and the private sector have grappled with the issue of internal investigations and the very likely request of waiver of the privileges. However, such waivers come with a host of concerns that both the government and the target company must consider before “fully cooperating.” This article discusses some of the implications, doctrines, and constitutional issues that should be contemplated before acceding to waive the privileges.

The Attorney Client Privilege and Work Product Doctrines

The attorney-client privilege is believed to be the oldest of the confidential privileges in the common law and it dates back to the 16th century. The purpose of the privilege is to “ensure full disclosure by clients who feel safe confiding in their attorney.” This privilege is intended to open frank and full communications between attorneys and clients, encouraging clients to seek early legal advice and allowing attorneys to provide proper representation.

The right to assert the privilege belongs to the client and exists for their benefit. The privilege begins at the initial consultation between the client and the attorney, even if the attorney is not ultimately retained. The client can then invoke the privilege at any time during the attorney-client relationship, or after the representation ends. The privilege can survive even the client’s death.

In order for the privilege to apply, the client must claim the privilege with respect to each communication at issue and a court must scrutinize each communication independently to determine whether the privilege should attach. The form of the communication is irrelevant in determining whether the privilege should apply. The issue is whether the communication was intended to be confidential. However, the burden of proving that the privilege is applicable is on the party asserting it. Moreover, the applicable test is whether the communication satisfies the elements necessary to establish privilege, not whether the communication is labeled as confidential.

*Associate Editor, University of Miami Inter-American Law Review

2 Ibid. at 385
3 Ibid. at 386
4 Ibid. at 386
5 Ibid. at 386.
6 Ibid. at 386.
7 Ibid. at 387.
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Corporations and partnerships, just like individuals, can also assert the attorney-client privilege. When dealing with the application of the privilege to corporations, the most common problem is determining who speaks on behalf of the corporation.8 “Courts have traditionally applied two tests to analyze corporate privilege claims: the ‘control group’ test and the ‘subject matter’ test.”9

The attorney-client privilege is not unlimited; it may be waived either voluntarily or by implication:10

“The burden of establishing a waiver is generally borne by the party seeking to overcome the privilege, although some courts hold that the party asserting the privilege bears the burden of establishing that it has not been waived.”11

Even if the attorney-client privilege is not available for a particular corporate communication, protection may still be obtained if it can be shown that the attorney’s work product doctrine is applicable:

“The attorney-client privilege and the work product doctrine are separate and distinct.”12

“Unlike the attorney-client, which is the client’s to assert, it is commonly said that the lawyer holds work product immunity. In fact, both the lawyer and the client hold work product immunity, and either may assert it to avoid discovery.”13

Indeed, even though the attorney-client privilege and the work product doctrine differ both in rationale and in the specific elements comprising them, their application sometimes overlap so that the same document may be protected on both cases:

“There are two categories or types of attorney work product: ‘fact’ or ‘ordinary’ work product—better described as ‘tangible’ work product—and ‘opinion’ or ‘core’ work product—sometimes termed ‘intangible’ work product.”14

“To qualify as tangible work product, the material sought to be protected must be a document or tangible thing prepared by or for a party… in anticipation of litigation.

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8 Ibid. at 387.
9 Ibid. at 387. The differences between these two tests are beyond the scope of this writing, given that we are dealing with the waiver of such privilege, regardless of which test a court applies.
10 Ibid. at 390.
11 Ibid. at 390.
13 Ibid. at 390.
14 Ibid. at 391.
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Opinion work product refers to an attorney’s conclusions, legal theories, mental impressions or opinions.”

The work product doctrine is codified in the Federal Rules of Civil Procedure 26(b)(3), which provides:

“Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

As Rule 26(b)(3) makes clear, a party may:

“…discover its adversary’s tangible work product if it demonstrates substantial need of the material to prepare its case, and it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

On the other hand, communications protected by the attorney-client privilege do not become discoverable by virtue of the fact that the party seeking them is unable to obtain the information from other sources.

Waivers and the Post Enron Era

Despite the fact that a corporation’s legal right to invoke the attorney-client privilege in the context of corporate internal investigations has been settled for decades, the last few years have seen an attack on the privilege by both the Securities and Exchange Commission (hereinafter “SEC”) and the Department of Justice (hereinafter “DOJ”). In June 1999, Eric Holder, the DOJ’s then Deputy Attorney General, issued a memorandum containing guidelines for the federal prosecution of corporations (hereinafter “Holder Memo”). The Holder Memo identified a “corporation’s willingness to waive attorney-client and work product privileges” as one factor

16 Fed. R. Civ. P. 26(b)(3)
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to be considered in “gauging the extent of the corporation’s cooperation.”20 “While the [Holder] memo did not make waiver a prerequisite for being treated as a cooperator, it clearly provided prosecutors with leverage to seek such waivers.”21

In October 2001, the SEC issued a report in connection with its Enforcement Division’s decision not to recommend an enforcement action against the Seaboard Corporation for financial accounting fraud (“Seaboard Report”).22 The report indicated that the waiver of the privilege is one of the factors the Division considers in giving credit to a corporation for its self-policing efforts.23 “Although the Seaboard Report does not state the circumstances under which waiver will be sought, the implication was that waiver may be necessary in order to avoid an SEC enforcement action.”24 This has lead many lawyers to fear that a waiver might be a prerequisite to receiving any sort of leniency from the agency.25

In January 2003, Lawrence Thompson, “the DOJ’s then-Deputy Attorney General, issued a memorandum reaffirming that a corporation’s decision to assert the privileges might be viewed as a lack of cooperation and could lead to prosecution.”26 The Thompson Memo specifies nine factors that are considered in deciding whether to indict a company:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crimes.
2. The pervasiveness of wrongdoing within the corporation, including complicity in, or condemnation of, the wrongdoing by corporate management.
3. The corporation’s history of similar conduct, including prior criminal, civil and regulatory enforcement actions against it.
4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections.
5. The existence and adequacy of the corporation’s compliance program.
6. The corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.
7. The collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven personally culpable and the impact on the public arising from the prosecution.
8. The adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and

20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.
26 Ibid.
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9. The adequacy of remedies such as civil or regulatory enforcement actions.27

On October 21, 2005, Deputy Attorney General Robert McCallum Jr., issued a memorandum affirming the DOJ’s policy of seeking privilege waivers under certain circumstances, but emphasized that prosecutors should exercise appropriate prosecutorial discretion in deciding whether to seek a waiver (hereinafter “McCallum Memo”).28 To that end, the McCallum Memo directed all U.S. Attorneys to establish written processes requiring prosecutors to receive supervisory approval from the U.S. Attorney or component head before seeking a corporation’s waiver of the attorney-client privilege and the work product protection.29 The McCallum memo does not establish a standard uniform waiver process, but rather requires the U.S. Attorneys to develop written processes for their respective districts or components.30 The memo might be read as a signal towards closer scrutiny of such request for waivers and a more limited use of them.

On November 2004, the U.S. Sentencing Commission modified the provisions applicable to corporate cooperation with government investigations.31 It is important to note, that in a recent holding “the Supreme Court concluded that the Guidelines are advisory, rather than binding, this somewhat reducing their influence.”32 The guidelines provide for a reduction in culpability score if the company is forthcoming, reports the offense and “fully cooperate[s] in the investigation.”33 The Commission has explained that full cooperation may include, or even in some situations require a waiver of the attorney-client privilege and work product protection:

“Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score… unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”34

Additionally, it is also worth noting that despite the fact the guidelines apply after a company has been convicted, they provide prosecutors with an incentive to seek waivers by placing all the risk of non-waiving with the company. In other words, the company, in factoring how to conduct its defense, has to consider the ultimate consequences of its actions during the trial, especially relating to the waiver of the attorney-client privilege and work product protection, which if not waived, could result in a harsher penalty if convicted.

29 Ibid.
30 Ibid.
33 Ibid. citing U.S.S.G. §8C2.5(g).
34 Ibid. citing Federal Sentencing Guidelines Manual §8C2.5(g), comment.
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However, the aggressive position assumed by the DOJ in seeking waivers has resulted in growing criticism against the waiver, resulting in a possible review of the Guidelines in the near future.  

Selective Waivers, a Real Solution? Two McKesson Cases

Corporate defendants are faced with very difficult decisions upon the discovery of irregularities. Before launching an internal investigation, a company should consider the risk that the DOJ might bring criminal charges, and the DOJ’s policies and their definition of “cooperation.” As seen above, this cooperation might come accompanied by a waiver of the attorney-client privilege and the work product protection. “If an internal investigation is conducted, it is highly probable the government will ask for the fruits of your labor.” Therefore, a corporation has to consider the sharing of the outcome of its internal review with government investigator despite the lack of guarantee that it will avoid prosecution.

One of the first issues that the company must consider is the possibility of parallel proceedings. Many criminal defendants involved in corporate litigation are now faced with civil proceedings at the same time as their criminal proceedings. In a criminal proceeding, the defendant has the constitutional right of invoking her Fifth Amendment right not to testify. However, unlike criminal courts, civil courts allow for the drawing of an adverse inference against the defendant who invokes her Fifth Amendment right against self-incrimination.

Similarly, waiving the Fifth Amendment privilege against self-incrimination might also involve waiving the attorney-client privilege, with the host of consequences that comes with it. Traditionally, once the privilege was waived, it was also considered waived as to other parties trying to seek this information through discovery. “Most federal circuits that have addressed the issue have held that the voluntary disclosure of protected materials to the government, even for the purpose of cooperating with an official investigation, operates as a waiver.” Basically, this would allow the civil plaintiff free access to this information, including all internal reports prepared by the company, facilitating their case tremendously to the detriment of the company.

Therefore, recognizing the potential objections to their policy of demanding waivers, prosecutors and regulators have often accepted company requests for confidentiality agreements.

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35 “[I]n the last year, corporate executives and attorneys have argued that the prosecutorial push erodes legal protections such as the right to counsel. Attorney General Alberto Gonzales has expressed concern about prosecutors going too far.” Agency Weights Ending Leniency for Executive Cooperation in Probes, Anne Marie Squeo, Wall Street Journal Jan. 28, 2006.
37 Ibid.
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entering into these agreements, a corporation hopes it will be viewed as only selectively waiving the privilege.\textsuperscript{42} These agreements are also known as “selective waivers,” and refer to situations in which the client reveals confidential information to one outsider while withholding it from another.\textsuperscript{43} They are typically used by companies that believe they must waive the privilege as to the government to be seen as “cooperating” per the Thompson Memo. Typically, these companies would request a promise from the government to maintain the confidentiality of the disclosed information.\textsuperscript{44}

In 1978, the Eight Circuit decided the case of \textit{Diversified Industries, Inc. v. Meredith}, and was the first to establish the selective waiver doctrine as protecting from third party discovery work product disclosures made to the SEC during a private investigation.\textsuperscript{45} In that case the Court allowed for the protection of the information even though the company had not entered into a formal confidentiality agreement with the agency.\textsuperscript{46} The court explained that:

“(1) the disclosure occurred in a 'separate and nonpublic SEC investigation' and (2) '[t]o hold otherwise may have the effect of thwarting the developing procedures of corporation to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.'”\textsuperscript{47}

Although no other circuits have joined this view, some district courts have followed its reasoning.\textsuperscript{48} In \textit{McKesson HBOC, Inc. v. Superior Court}, the California Court of Appeals for the First District grappled with the issue of “whether a target of a government investigation may share privileged documents with the government without waiving the attorney-client privilege or the protection afforded by the attorney work product.”\textsuperscript{49} There, McKesson retained a law firm (“Skadden”) to represent it in the shareholder lawsuit and conduct an internal investigation following a disclosure of improperly recorded revenues (which had also prompted an investigation by DOJ and SEC).\textsuperscript{50} Skadden conducted interviews of several employees and prepared a report that was provided to McKesson.\textsuperscript{51} During the course of the internal review, Skadden informed the government that McKesson was willing to disclose the results of the

\textsuperscript{42} Ibid.
\textsuperscript{44} Ibid.
\textsuperscript{45} \textit{Diversified Industries, Inc. v. Meredith}, 572 F.2d 596, 611 (8th Cir. 1978).
\textsuperscript{48} Ibid. citing \textit{Byrnes v. IDS Realty Trust}, 85 F.R.D. 679, 689 (S.D.N.Y. 1980)(holding that “voluntary submissions to agencies in separate, private proceedings should be a waiver only as to that proceeding.”).
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
internal review subject to signing confidentiality agreements.\textsuperscript{52} Both the United States Attorney and the SEC agreed to enter into the confidentiality agreements.\textsuperscript{53} The agreements stated that McKesson and the government had a common interest, but provided for the disclosure of information under certain circumstances.\textsuperscript{54} It is important to note, that as of the date of this action, the government has not yet taken any action against McKesson in connection with the improperly recorded revenues.\textsuperscript{55} However, several civil actions against McKesson were commenced and consolidated.\textsuperscript{56}

Furthermore, the McKesson court noted that a key point of the argument was whether the government and McKesson shared a common interest.\textsuperscript{57} However, the court noted that despite the fact that they were both interested in uncovering the wrongdoing, McKesson’s and the government’s interest were not aligned.\textsuperscript{58} Moreover, the court explained that the agreements did not bind the government to maintain confidentiality under all circumstances.\textsuperscript{59} The court concluded by noting that there is a "split of authority on the selective waiver theory", but that under California law McKesson had waived the privilege.\textsuperscript{60}

In a recent case, the United States District Court for the Northern District of California faced a similar situation involving McKesson and the Skadden report.\textsuperscript{61} There, McKesson had agreed to disclose the findings and entered into the confidentiality agreements with the government, before the investigation was completed.\textsuperscript{62} The court explained that the attorney-client privilege had been waived as to these communications because "they were not made in confidence between the

\begin{enumerate}
\item\textsuperscript{52} Ibid.
\item\textsuperscript{53} Ibid.
\item\textsuperscript{54} Ibid at 1234. "Although the United States Attorney and the SEC agreed to protect the confidentiality of the documents, the agreement did provide for disclosure under certain circumstances, including the prosecution of McKesson. Specifically, the United States Attorney was permitted to disclose the documents ‘to a federal grand jury as the Office deems appropriate, and in any criminal prosecution that [might] result from the Office’s investigation.’ With respect to the SEC, the documents were to be protected ‘except to the extent that the [SEC] staff determines that disclosure is otherwise required by federal law or in furtherance of the Commission’s discharge of duties and responsibilities.’”
\item\textsuperscript{55} Ibid. at 1234.
\item\textsuperscript{56} Ibid. at 1234.
\item\textsuperscript{57} Ibid. at 1238. “[P]arties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege.” McKesson argued that they both shared the interest of discovering the irregularities in recorded revenues.
\item\textsuperscript{58} Ibid. at 1238, “we see no real alignment of interest between the government and persons or entities under investigation for securities law violations.”
\item\textsuperscript{59} Ibid. at 1239-1240, “[t]he SEC and the United States Attorney agreed to (conditional) confidentiality in order to obtain the documents. Their interest was not confidentiality, but instead to obtain the documents and thereby make their investigations and possible enforcement actions easier and more productive. In contrast, an interest in maintaining confidentiality exists when the parties are aligned on the same side of the litigation and have a similar stake in the outcome.”
\item\textsuperscript{60} Ibid. at 1241.
\item\textsuperscript{62} Ibid.
\end{enumerate}

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client and the attorney”, but rather for the purpose of relaying it to a third party. However, while the court found that McKesson waived the attorney-client privilege, it recognized that the communications might still be protected under the work product doctrine. The court rationalized the distinction between disclosing to a private entity, resulting in waiver, and disclosing to a government entity pursuant to a confidentiality agreement, maintaining work product protection. The court concluded that the materials provided to the government:

“...permit[ed] the government to focus its investigation on the primary wrongdoers, filtering documents produced to the SEC, and permitting the government to deploy fewer employees to investigate...taking into consideration the benefit to the public of permitting disclosure of work product to the government...under negotiated confidentiality...McKesson did not waive work product protection.”

Notwithstanding the foregoing, some statements by senior officials within both the SEC Enforcement Division and the DOJ indicate that change might be forthcoming. In June 2005, Peter Bresnan, Deputy Director of the SEC’s Enforcement Division, explained at a conference that there might be ways for a company to cooperate without waiving these privileges, such as by providing oral recitations, factual summaries, or access to witnesses. Timothy Coleman, senior counsel to the Deputy Attorney General, and also a panelist in the same conference, “indicated that DOJ investigators will often accept notes, memos, and oral presentations in lieu of demanding waivers of the privileges.”

Thinking About Waiving? Consider this:

Management and attorneys should seriously consider the impact of the waiver on the company and its employees. Aside from the legal concerns, the waiver can impact the morale of the employees, the operations, and the overall functioning of the company.

“If employees were forthcoming in their interviews during the internal investigation with an expectation that the interview fell within the ambit of the attorney-client privilege, those

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63 Ibid. citing United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958)(“Thus it is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others.”)
64 In re McKesson HBOC, Inc. Securities Litigation, 2005 U.S. Dist. Lexis 7098 (N.D.C.A. 2005) citing SNK Corp. of America v. Atlus Dream Entertainment Co., 188 F.R.D. 566, 571 (N.D. Cal. 1999)(“Because the attorney-client privilege and work product doctrines have different standards for waiver, they must be considered separately.”)
65 In re McKesson HBOC, Inc. Securities Litigation, 2005 U.S. Dist. Lexis 7098 (N.D.C.A. 2005), (“the principle of waiver should likewise be able to accommodate public policy recognizing the need for cooperation with the government where such cooperation does not distort the adversarial relationship protected by the work product doctrine.”).
68 Ibid.
employees might feel betrayed if notes or transcripts of those interviews were handed over to investigators, possibly subjecting them or their fellow coworkers to criminal liability."

During the internal investigation, the attorney conducting the interview should make sure to do the following: First, the attorney must explain to the employee that he is the attorney for the company and that he is not representing the employee in his individual capacity. In particular, the attorney should explain that the privilege that “might protect the subject matter of the interview belongs to the company alone.” Second, she should explain that the company, being the holder of the privilege, might choose to waive it and reveal that information to the government during an investigation.

At this point, the employee is faced with a dichotomy, to refuse to cooperate with an internal investigation, which might result in termination, or to cooperate fully, which might result in self-incrimination and the loss of the ability to assert the Fifth Amendment privilege. If during the investigation, "an employee responds to the corporate attorney in a manner which implicates him personally in criminal conduct, he may have unknowingly lost the value of his Fifth Amendment privilege against self incrimination."

However, making the employee choose between cooperating with an internal investigation, resulting in the waiver of his Fifth Amendment privilege, and not cooperating, resulting in termination, is not really giving the employee choice at all. Rather as explained below, it might be a forceful extraction of the employee’s testimony. In other words, the employee is being compelled to give incriminating testimony or face economic consequences, namely, the loss of her job and other benefits attached to it.

The Fifth Amendment privilege against self-incrimination extends to testimony compelled by the sovereign in civil, criminal, administrative, judicial, investigatory, or adjudicatory proceedings. Clearly, apart from the attorney-client privilege and work product protection explained above, the Fifth Amendment privilege could be invoked in a situation in which the government is seeking the disclosure of the possibly incriminating information provided by the employee. Nonetheless, it is important to note that the “government may compel an individual to give self-incriminating testimony only by granting an immunity that is at least as extensive as the privilege embodied in the Fifth Amendment.” Nevertheless, in a situation in which a waiver is requested, an argument could be made that the government, as per the Thompson Memo et al, is

70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 Sarah Helene Duggin, Internal Corporate Investigations: Legal Ethics, Professionalism, and the Employee Interview, 2003 Colum. Bus. L. Rev. 859, 910 (2003). ("[i]n most states a refusal to cooperate with an internal investigation ‘constitutes a breach of an employee’s duty of loyalty to the corporation and is good grounds for terminating his employment.’")
76 Ibid.
78 United States v. Nanni, 59 F.3d 1425, 1431 (2d Cir. 1995).
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compelling the disclosure of this information without providing the required immunity.\textsuperscript{79}
Moreover, as the Supreme Court explained in \textit{Murphy}, because this testimony was compelled, it should not be used in a subsequent prosecution against the employee.\textsuperscript{80}

The Supreme Court dealt with a similar issue in \textit{Garrity v. New Jersey}, where it ruled that statements obtained by using the threat of job forfeiture cannot be used in a subsequent criminal proceeding.\textsuperscript{81} In \textit{Garrity}, there was an investigation regarding some officers’ possible misconduct in fixing traffic tickets.\textsuperscript{82} The officers were given a choice between providing testimony that would be self-incriminating or losing their jobs.\textsuperscript{83} The Court determined that the statements were “infected by the coercion inherent in this scheme of questioning” and therefore not voluntary.\textsuperscript{84} The Court also explained that the “option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.”\textsuperscript{85}

The \textit{Garrity} rule is not limited to the loss of employment, but can be applied to any situation in which substantial economic pressure is used to extract testimony from a witness. For example in \textit{Lefkowitz}, the Supreme Court explained that “[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary.”\textsuperscript{86} Further, a statement will be deemed involuntary where “the pressure reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his ‘free choice to admit, to deny, or to refuse to answer.’”\textsuperscript{87}

Although \textit{Garrity} involved police officers who were public employees, the rule established in \textit{Garrity} has also been applied to private employees. For example, in \textit{Lefkowitz}, the person faced with an economic loss was an independent contractor threatened with the loss of access to government contracts.\textsuperscript{88} Additionally, in \textit{Sanney}, the court explained that 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.”\textsuperscript{89} In our example scenario above, both the state and

\textsuperscript{79} The employee is compelled to provide the information under the threat of losing her job. The company is then compelled to waive the privileges under the threat of harsher penalties under the Thompson Memo and the Sentencing Guidelines.
\textsuperscript{80} \textit{Murphy v. Waterfront Comm’n of N.Y. Harbor}, 378 U.S. 52, 94 (1964). “We hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a federal prosecution of him.”
\textsuperscript{82} Ibid. at 502.
\textsuperscript{83} Ibid. at 496-497.
\textsuperscript{84} Ibid. at 497.
\textsuperscript{85} Ibid. at 497.
\textsuperscript{86} \textit{Lefkowitz v. Turley}, 414 U.S. 70, 82-83 (1973).
\textsuperscript{87} \textit{United States ex rel. Sanney v. Monanye}, 500 F.2d 411, 415 (2d Cir. 1974) citing \textit{Garrity}, 385 U.S. at 496.
\textsuperscript{89} \textit{United States ex rel. Sanney v. Monanye}, 500 F.2d 411, 415 (2d Cir. 1974).
the company are using threats to coerce the person into furnishing the incriminating statements.\(^90\) Therefore, we have a clear chain reaction in which the government effectively forces a company to extract the privileged information under the threat of economic loss, to be later used in criminal prosecutions. As such, the use of this information might be foreclosed under the above cited precedent.

**Conclusion**

Given the crucial role of a company’s internal investigation as a tool that unravels irregularities, the government’s practice of requesting waivers of privilege should be revised. Failure to reign upon this practice could result in a disincentive to companies to perform such an important procedure of self-governance.

\(^{90}\) The government uses instruments such as the Thompson Memo and the Sentencing Guidelines, to compel the waiver by the company. The company in turn, is aware of the risk of a waiver request when conducting the internal investigation. The government is well aware that the information provided by the employee was given under the threat of economic loss, as in most states failure to cooperate with an internal investigation is grounds for termination.

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