PUBLIC HEARING HELD BY THE AD HOC ADVISORY GROUP ON ORGANIZATIONAL SENTENCING GUIDELINES

BREAKOUT SESSION IV

COOPERATION AND WAIVER OF PRIVILEGES

November 14, 2002

1:30 p.m. to 3:50 p.m.

Held at:

Thurgood Marshall Building

One Columbus Circle, N.E.

Judicial Conference Center

Washington, D.C. 20002

MODERATOR

GARY R. SPRATLING

IN ATTENDANCE

JAMES COMEY

DONALD C. KLAWITER

SHIRAH NEIMAN

EARL J. SILBERT

JOSEPH WHITLEY

ERIC H. HOLDER, JR.

B. TODD JONES

JULIE O'SULLIVAN

B-R-E-A-K-O-U-T S-E-S-S-I-O-N

(1:30 p.m.)

MR. SPRATLING: Good afternoon and welcome to this breakout session number four. I am Gary Spratling and I've been asked by Todd Jones, the Chair of the Advisory Group on Organizational Guidelines, to moderate this panel this afternoon.

Let me make a few introductory remarks before introducing the speakers and the other members of the Advisory Group who are present here.

The central objective of the organizational guidelines is to deter criminal conduct by corporations and other organizations by creating incentives for voluntary compliance and self-reporting and rewarding entities that cooperate; that is, entities that help the government ferret out the misconduct that they're investigating. Indeed, the introductory commentary to the guidelines sets forth

cooperation as a fundamental principal in the sentencing guidelines. Since fines are the basic form of punishment for organizations convicted of crime, cooperation is rewarded at the sentencing stage mainly by reduction in fines.

Fines are reduced in the organizational guidelines in two important ways. First, the culpability score by which the courts calculate the maximum and minimum fines may be significantly reduced as a result of credits awarded for compliance programs self-reporting, and what we're talking about today, cooperation. Second, if the Department of Justice concludes that the cooperation by an organizational defendant constitutes "substantial assistance," it may file a motion with the court requesting a downward departure from the minimum sentencing guidelines sentence. The organizational guidelines, however, offer only a partial picture of what constitutes cooperation such that an organization can reasonably expect a reduction in

fines.

In 1999 then Deputy Attorney General Eric Holder issued a memorandum to the heads of department components and all United States attorneys entitled "Federal Prosecution of Corporations," which you will hear referred to today as it was this morning as the "Holder memo," -- and, Eric, I guess we referred to it that way back then -- indicating that waiver of attorney/client and/or work-product privileges is a factor that may be considered by United States attorneys and other Department of Justice enforcement personnel in charging corporate defendants, reaching settlements, granting amnesty, and recommending sentences. While the policy statement, which has since been incorporated into the United States Attorneys' Manual, points out that waiver is not necessarily a prerequisite for leniency or for credits for cooperation and advises prosecutors that they should consider the willingness of an

organization to waive privileges to be only one of the factors in evaluating a corporation's cooperation, the express indication that waiver might ever be considered has at least the potential to muddle the incentives for organizational cooperation and to create some uncertainty as to whether or not cooperation with Department of Justice prosecutors will qualify for a reduction in fine at the sentencing stage.

The guidelines themselves are silent on the extent to which, if at all, waiver is a factor in obtaining credit for cooperation at the sentencing phase. The official comments explaining the provision on cooperation state that they encompass the "disclosure of all pertinent information known by the organization" and that disclosed material should be "sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual responsible for the criminal conduct."

Now, as we discussed in the plenary

session this morning, some commentators have asserted that federal prosecutors are increasingly insisting on waiver. Some as a matter of course and that, second, requiring organizations to waive privileges discourages them from reporting their offenses to the appropriate government authority in the first place and makes them less willing to cooperate with the government.

On the other hand, representatives of the Department of Justice counter that these assertions are misplaced and that they reflect a misunderstanding or a misconstruction of Department of Justice policy and Department of Justice practice. But if such assertions have any validity, then the Advisory Group on Organizational Guidelines may examine whether recommendations are necessary vis-a-vis waiver and credit for cooperation at the sentencing stage, whether or not any changes are necessary to restore the incentives for self-reporting and

cooperation consistent with what is the underlying theme of the guidelines.

So the Advisory Group decided that it would be an appropriate topic on which to seek public comment, and specifically we have articulated a question on which we are seeking public comment and specifically around which this hearing is built this afternoon. And that question, for the record, is -- I know all the people here know it -- but for the record is, Should the provision for "cooperation" at Section 8C2.5, comment 12, and/or the policy statement relating to downward departure for substantial assistance at

Section 8C4.1, clarify or state that the waiver of existing legal privileges is not required in order to qualify for a reduction either in culpability score or as predicate to a substantial assistance motion by the government?

And then kind of a clean-up question following that, Can additional incentives be

provided by the Chapter Eight Guidelines in order to encourage greater self-reporting and cooperation? And as I said, this breakout session has been set up to receive public comment on those two questions.

Before introducing the speakers, let me identify, although I think everybody in the room knows, but let me identify the members of the Advisory Group who are sitting in this breakout session.

To my right is Eric Holder, who's with Covington & Burling, and obviously formerly Deputy Attorney General at the Department of Justice and the person under whose name the famous Holder memo went out. Across the table from me is Mary Beth Buchanan, who is United States Attorney for the Western District of Pennsylvania. Next to her is Todd Jones, who as I mentioned before, is the Chair of our Advisory Group with Robins, Kaplan, et al., in Minnesota and formerly not only United States Attorney but

also the Chair of the Attorney General's Advisory Group. And Julie O'Sullivan next to Todd, who is a professor at Georgetown Law Center with a long time interest in the guidelines.

Still as a preliminary matter before introducing the speakers who will address the subjects, let me do some housekeeping events along the lines that Todd did this morning. As you can tell by the reporter in the room, these proceedings are being recorded, they will be transcribed, they will be put on the Commission’s website, once they are transcribed and we've had a chance to review them, to become a part of the public record. Therefore, before people speak, you should be sure that you've been recognized by the reporter. Unlike this morning's session where only members of the Commission and speakers were involved in the discussion, anybody in the room today who's not a part of -- though, there can't be very many people -- not a part of either of the Advisory

Group or the speaking panel is also welcome to speak, but must identify themselves by their full name and affiliation before they do so. I also want to mention for those in the room who -- well, is anybody in the room who wasn't here in the plenary session this morning besides our speakers?

(No response.)

MR. SPRATLING: All right. Then I don't need to talk about when the record closes and so on.

We've got just a terrific group of people and experienced people to address this subject, and what I propose we do this morning or this afternoon is to have the speakers make their presentations. And since they're all addressing in a fulsome manner a very discrete subject as distinguished from this morning where we had a whole plan of subjects, I suggest that we wait until the questions for the end, although we do want this interactive, if any of the presenters

would like it to be, and if one of you to put some questions to the other, I think we can do that. And I think that even though this is a formal recorded proceeding, we can maintain a bit of informality in the event that somebody has a burning question we can recognize it. But I know that each of you are going to address -- from talking to you ahead of time -- that each of you are going to address some point that other is making, and I think we ought to hear that before everybody jumps on whatever one or the other is saying.

I've asked James Comey to speak first because he has a bit of a time deadline, and in the event that this public session is not concluded by about three o'clock, I believe that he has to leave. And Jim is the United States Attorney for the Southern District of New York.

Next will be Earl Silbert, who is with Piper, Rudnick, and a person well known as a commentator on the subject through the American

College of Trial Lawyers, Inns of Courts, articles, and so on, and someone that we really wanted to be on this panel and appreciate his presence.

We've got Don Klawiter here. Don Klawiter is with the firm Morgan, Lewis & Bockius here in Washington, D.C. Don is also an officer of the Antitrust Section of the American Bar Association and will be presenting the section and Bar Association's views.

And lastly we have Joe Whitley, who is a late stand in for Mark Calloway, his partner from Alston & Byrd, who is not able to be here today. And we really appreciate you doing this on such short notice.

The government speakers, other government speakers that we had hoped would be here today, one is in San Francisco and one is in Japan, and so they weren't able to be here. And so with that, Jim, why don't I turn it over to you.

Oh, I should mention for those you who were here this morning, because the other speakers did not get a chance to hear Jim's remarks, I asked Jim in whatever way he choose to repeat the substance of those remarks. I, for one, don't mind hearing them again and I don't think anybody else will, either.

MR. COMEY: I wish I was in Japan. What I thought I would do was summarize my remarks this morning and what I focused on this morning -- and at the outset let me say I realize that I'm going to speak about policy, and then I'm sure when we have questions we're going to talk about practice. Because a lot of folks in the defense bar have told us that there is a division between what I understand the Justice Department policy to be and how the Southern District of New York and other districts may approach privilege and work-product protection, and how defense lawyers seem to be treated in many places by AUSAs. But let me talk first

about the policy.

What I said this morning was the touch stone for us is cooperation; that the Department of Justice policy and the Holder memo does not require waiver and makes that clear to anybody who reads it. But that what is required to make our system work, and that the guidelines insist upon, as we heard in the introduction, is that a corporation make full and complete disclosure of all facts if they want one of two things: If they're seeking leniency at the outset from the prosecutor, that decision is guided by the principles laid out in the Holder memo. And also if, after being charged, they want a reduction in their culpability score through the sentencing guidelines.

And what I tried to say this morning is, first of all, I think there's a lot of confusion in some of the commentary about this between attorney/client privilege and work-product protection. At the outset there are

circumstances in which a corporation that is dealing with a U.S. Attorney can make full disclosure without endangering the attorney/client privilege or being accused of waiving work-product protection. I recognize, though, that that is very challenging as to work-product protection because very often what we are going to say is, we need to know what your internal investigation turned up. And even if we find some mechanism for the person performing the investigation to give us the fruits of that without showing us reports, there's always a chance that someone will successfully argue that that cooperation was a wayward work-product protection. But that it is the rare case where a prosecutor should need and, in fact, should ask for a waiver of the attorney/client privilege.

Because as I said, in most circumstances what we want from you are the facts. We want to know who done it, who was involved, how was it done. And the example I

gave was -- and I just want to make sure I track my examples -- the example I gave was of a company -- the first example was a company who comes into us and says, "We've uncovered an accounting fraud and we have understated expenses by $1 billion. We know exactly what happened, how it happened, and who is responsible. But we know this from interview we have conducted that are covered by the work-product doctrine, and we don't want to waive that, so we are not prepared to tell you anything more."

We would not consider, I don't think anybody would consider that to be the kind of cooperation that would either support a legitimate claim for leniency under the principles in the Holder Memo or, if there were a charge that followed that would support a claim for reduction in the culpability score for cooperation.

The second example I used was another company that comes in and says, "We've uncovered

crime. There was a gross understatement of expenses. It happened in the widget department. We've conducted an internal, but we don't want to turn over the notes to you or the report. But we will bring in all the witnesses you need to figure out exactly what happened, who's responsible, and we will make sure the witnesses make full disclosures to you and provide you with all of the facts."

So long as the corporation follows through on that promise, the government would likely view that as appropriate and adequate cooperation under both, at both stages of the proceeding. Obviously, at this point we'd be talking about leniency. There would be no requirement for a waiver of attorney/client privilege.

Where we would enter into a situation where we'd be looking for a waiver. An explicit waiver of work product would be where we then follow up and we talk to a senior exec whose

lawyer says, "No, no, no. He's not going to talk to you without immunity." And then we're put on the horns of the dilemma, do we immunize this guy or do we say to counsel for the corporation, "We need your interview notes of this person's interview." That would be an expression of, we believe, work-product (inaudible). I don't believe it would operate to waive attorney/client privilege. And some might say, "Well, those notes are going to contain maybe more than just the facts. They may contain thoughts and impressions or editorial comments by counsel conducting the interview."

My response is, very unlikely with any kind of sophisticated counsel that the interview would contain anything beyond the facts that the lawyer obtained. So then I think the rarest of situations I hope is or at least should be where we say, Okay, now we need to know something about communications between counsel the counsel's client that are clearly privileged information.

We did a survey. Mary Beth Buchanan commissioned a survey of U.S. Attorneys' Offices and discovered that it is -- that no office, with one exception I'll talk about, has a policy of requiring waiver or attorney/client privilege with the exception of the Boston U.S. Attorneys' Office, which said that it will in a matter of course ask for such a waiver in healthcare fraud investigation where it's looking, what were the employees told about what the regs mean -- I assume that's it is -- and what guidance were they given by their lawyers about how to conduct themselves in billing and dealing with the Medicare system.

Beyond that, though, there is no -- my point this morning was, bad-mouthing a lot of defense lawyers without them being there, was to say, there seems to be a lot of confusion here. People say these guys in the government, they want us [that's going to be on the website, isn't it, what I just said.]

(Laughter.)

MR. COMEY: I've got to get used to this. I'm used to breakout sessions where there's nobody there. Now there's a lot of people here.

Those people in the government -- and you can't even say "strike that," can you? The people in the government are asking for waivers of attorney/client privilege. And frankly, if they are, I'm not sure they know exactly what they're doing, because I'm not sure that it's necessary. And I hope that what we're seeing and the people that objected to the Holder memo in '99 and since as a bit of a strawman, and it may be a problem of education. It may be a problem that the policy that we all who are running the U.S. Attorneys' Offices understand needs to communicated down to the troops so they will have a more sophisticated approach to counsel who come into see them. But don't start just using words like privilege.

But the one thing we believe we should not have is something in the guidelines that says "privilege is not required." "Privilege waivers are not required," whether that means both as to work-product protection and as to attorney/client privilege. The reason is where I started. Cooperation is touch stone. I don't believe you can define cooperation, and there well be circumstances where waiver of either work-product protection or privilege is essential to the adequate disclosure of wrongdoing at the company that we simply can't get it any other way and we have to ask the company to waive. And I think it would be -- it would undercut the public interest for the guidelines essentially to say, "You never have to do that. You never have to give up the privilege."

Because I think that would put in a lot of situations the government would be trying to say, "They didn't cooperate enough."

And a company would say, "Well, the

piece they say we didn't give them, the guidelines say we don't have to give them." And I don't think that would serve the public's interest in pursuing wrongdoing.

So that was the substance of what I said this morning. And I'll turn it over.

MR. SPRATLING: Thank you. Earl, do you want to follow?

MR. SILBERT: Thank you, and good afternoon everybody.

I think for purposes of the opening remarks, if you will, I'd like to talk generally, and then perhaps later in the give-and-take of the question get down to specifics, if they come up.

I suggest that it's a serious mistake to permit whether a corporation waives its legal privileges to be a factor in the sentencing process. I have two reasons for that suggestion.

The first is a, for want of a better term, perhaps jurisprudential. The process that

we have and the investigation and prosecution of criminal conduct is an adversary process. The government, on the one hand, and whoever is the subject of the investigation here, organizations, on the other.

The government, in order to carry out its responsibilities, is given a number of tools, and properly so, that they need, whether it be grand jury subpoena power, electronic surveillance, search warrants, and the like. The defense, on the other hand, is given a panoply of various constitutional and statutory rights. But for those rights to be exercised in any meaningful, productive way, particularly if you're dealing with a corporation, but even for individuals, that can only really be done through the effective assistance of counsel, which is also provided in the Constitution. And jurisprudentially where I have a problem with the waiver situation is permitting one of the two adversaries to have the authority or the power to

say to its other adversary, "Surrender your bedrock principle that serves as the fount for your protection of various rights that you are given, or be penalized under the proposal or, on the proposals that are being considered, penalized by the court."

Or to put it another way, for the court as a neutral arbiter in the adversary process to penalize one of the adversaries for not surrendering its bedrock principle by which it protects its rights to its opponent, I suggest is just simply poor policy. It should not be adopted.

I'd like now to turn -- and that's a very simple statement, as simple as I can try and make it, but it's one I really think is vital to a full appreciation and understanding of the importance of not undermining or taking steps that would undermine the delicate balance that we do have in our criminal process where we try to make sure that the government is able effectively

to investigate and prosecute criminal conduct where it's occurred. But also to protect the rights of individual organizations from unwarranted charges or treatment via or through the criminal process.

My second reason for suggesting that it would be a mistake for courts to factor in whether or not a company has waived its privileges is more a practical one. Because I suggest to you that while it may in certain cases bring some short-term benefits, in the long run there are, in my view, significant legal issues that may arise. And it also, I fear, will have an adverse impact on the ability of companies to get -- who are trying to do the right thing in the sense of correcting internal problems, from finding out and obtaining full and frank disclosure from their employees, so that as part of corporate governance they can investigate and hopefully implement procedures and policies or take steps to eradicate the wrongdoing to the

extent that it has occurred and hopefully to prevent its reoccurrence or deter its reoccurrence in the future.

If, in fact, the consideration of waiver is permitted, there is a likely reality that it will in effect, if it hasn't already become, but if in effect become mandatory. And even what -- certainly if it's mandatory, but even if it is not mandatory. If a company and if it's being asked to ferret out the wrongdoing and provide the benefit of its work product to the government, whether it be at the early stage of its own investigation or later, it is in effect becoming; that is, the company is in effect becoming a defacto agent of the government, and that starts to raise a number of problems both legal and factual.

As a legal matter, if in fact an employee -- it would impose, I think we all would agree, on the company an obligation in conducting its interviews to say to its employees or advise

them if the company's going to be truthful, that in effect "We are interviewing you; it's not your privilege. And what we obtain from you is going to be turned over to the government."

If an employee then decides not to cooperate with the investigators and, as has occurred recently, is terminated, having asserted their Fifth Amendment rights not to talk -- about individual employees as part of an organization -- and not to respond, I suggest that raises some legal questions and particularly under the Supreme Court decision of Spevack v. Klein. If to the contrary under threat of coercion of being fired or terminated if the employee does not respond to the investigator's questions in the situation where the company in effect is the defacto agent of the government, there is a serious question as to whether that statement that the company employs is involuntary and would be subject to dismissal under the line of reasoning in the Garrity v. New Jersey

decision of the Supreme Court. So on those two bases alone, whether the employee talks or not talks I suggest to you that implementing this policy will raise some serious constitutional questions.

Beyond that, if in fact the company again, as I think it must do fairly and honestly seeking the truth from its employees, is truthful with its employees by advising them of the status, advises the employees of what will happen, I suggest, respectfully suggest to you that one, that must have a morale impact on employees to kind of have a situation where it appears that the company is investigating them on behalf of the government. Secondly and beyond the morale impact is the question of how candid with counsel any employee will be, and I suspect and believe that under those circumstances companies simply will not be in a position to gather the kind of information that they need for their own internal corporate governance purposes.

The final point I wish to make here is that to the extent that privileges are asked to be waived, there is scarcely in this day and age a criminal investigation that is undertaken particularly of an organization in which there are not parallel proceedings, be they civil government, administrative government, private, civil, or the like. The law in most jurisdictions, with perhaps the major exception being the Eighth Circuit, the law in most jurisdictions -- I think it's somewhere a little uncertain in the Southern District of New York -- is that if you waive -- if a company waives its privilege to one party, to the government for example, then that is considered a waiver to all parties. You can't waive as to one and not waive as to the other. And when companies, again, are facing class actions, seeking amounts of money that dwarf the potential fines under the criminal code or in the sentencing manual, fines and seeking recoveries from companies that would put

them shortly into bankruptcy, they have to be under a tremendous pressure not to turn over their material and risk the fact or the likely fact in most jurisdictions that the waiver to the government will operate or function as a waiver to the third parties. So that for all these reasons I think, I suggest and submit to the advisory committee and ultimately to the Sentencing Commission that to permit the waiver of privilege for both practical and jurisprudential reasons to come into the sentencing process would be unwise policy at best. Thank you.

MR. SPRATLING: Thank you, Earl. Don, the American Bar Association.

MR. KLAWITER: Thank you. As Gary noted, I am with the law firm of Morgan, Lewis & Bockius here in Washington. I'm also a former prosecutor at the Antitrust Division with Gary[Sprating] for many years. But I am appearing here today in my capacity as an officer of the ABA, a section of

antitrust law, and as a former chair of its Criminal Practice and Procedure Committee. The views expressed in this statement and in our written statements are presented on behalf of the Section of Antitrust Law and are not approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the policy or the Association.

The Section of Antitrust Law supplied comments to the Advisory Group. First, initial comments on June 26th and supplemental comments on September 25th, which are in the record, and I would like to briefly talk to those comments and to some of the issues that we raised there.

First of all, you may want to know why antitrust lawyers are so concerned about these issues. I think as many of you know, the Sherman Antitrust Act passed in 1890 is a statute that provides for both civil and criminal remedies for violations. It is indeed exactly the kind of

statute that Earl noted a second ago that you have parallel proceedings no matter whichever way you look or go in any of your cases. But over the course of its history, of its 112-year history, there have been a substantial number of serious criminal investigations, and indeed the Antitrust Division, in my view at least, is second to none in prosecuting organizations and obtaining what I believe are substantial results on a public policy basis and for the tax payers of the country.

In recent years you will note the serious run of antitrust cases in the international cartel area, which is really a completely different animal from the days when I was a prosecutor and we were prosecuting either local cases or if you had a national conspiracy it was considered to be a big deal. But from 1986 to the present there has been an explosion of large multi- national cases in the antitrust field which are prosecuted as criminal cases

with, of course, the requisite civil damage actions that follow both in the United States and in other places.

You all recall the famous ADM case, which resulted in essentially overnight the maximum fine for a Sherman Act violation going from the previous record of $10 million, which is the statutory maximum, to $100 million, and then about two-plus years later in the vitamins cases on the same day the Antitrust Division was awarded fines of $500 million from one corporation and $225 million from another, a very nice day's work no matter how you look at it.

From 1996 until today there are 36 corporate organizations around the world who have paid in excess of the statutory maximum of $10 million to settle criminal antitrust charges. And after those cases are over and done with, as I noted earlier and as Earl noted in his comments, that's when the civil actions begin. And those cases have accounted for literally

billions of dollars of damage payments, both because these cases are generally, you know, significantly bad that they are not going to be tried to a jury in the civil actions, and also that the guilty pleas in the criminal antitrust cases are accorded prima facie effect in terms of the evidence of liability in the civil action. So there is a great deal riding on these cases from the perspective of the antitrust criminal practitioner.

The Antitrust Division during its entire history, as far as I know at least, has never required or even suggested that privilege be waived in any of its cases. Indeed, in dealing with the Antitrust Division in what is I think probably the most serious form of cooperation and that is the leniency program for which the Antitrust Division is now famous. The essential course of conduct is that there is no waiver of privilege, no one has ever asked for a waiver of privilege, and I think the enforcement

record of the Antitrust Division suggests that they are indeed able to get the evidence in a manner in which they handle procedures with the practitioners who deal with them sufficiently well and I think extraordinarily well to be able to establish their cases and prove them beyond a reasonable doubt and obtain the kind of success in terms of corporate fines and individual jail sentences that they have obtained.

Essentially, that process is, I think, a simple one and a direct one, and I think it's consistent with what James said a few minutes ago. The simple fact is that practitioners in the antitrust field who deal with the Antitrust Division on a regular basis understand that you are to disclose all of the evidence you have. The question is the manner in which you do it. Do you do it through a written report of an internal investigation? Never. Do you do it through proffers of evidence and statements of your witnesses? All the time.

I think if you are to look at the history of the cases that the Antitrust Division has done in this age of international cartels what you will find is a pretty standard set of procedures, whereby a cooperating lawyer will come in and basically present the evidence in whatever fashion the prosecutors want it. Because of the civil action ramifications of these cases, which as Earl noted, can be multiple times more serious than the amount of fines you're ultimately going to pay in a criminal case, there is great care that goes into this process and essentially that care suggests that there is very little in writing that is ever put forward, except, of course, the actual documents that are in the files of the company.

Proffers are oral, witness statements are oral and then put before the grand jury as necessary. But the procedure that has been worked out and I think has been worked out uniformly through the Antitrust Division cases

has been very, very successful, satisfying both the prosecutors that they are getting the full cooperation that they seek in these cases, and satisfying defense counsel that they are not, in fact, waiving any privileges or causing an undue amount of discovery that will come about in the civil actions that follow the cases. And that really has been the crux of the process as it has worked through the Antitrust Division.

From the perspective of the waiver issue in general terms, there are really three things that effect an antitrust practitioner and I think really any white-collar criminal practitioner in this area.

The first is in the area that essentially legal advice, full and effective legal advice to the client will probably be effected in some way if there is a possibility down the line of this waiver of attorney/client privilege. You are probably not going to be as careful, you are not going to be as candid either

in questioning your witnesses or your witnesses giving answers to your questions. Indeed, in your reports I think you are going to be less than candid and maybe somewhere circumspect simply because of the possibility somewhere down the line in some situation that that evidence could be turned over to a prosecutor and then ultimately turned over to private plaintiffs and others in these cases. So essentially the idea that the enforcement community should be encouraging full and effective legal advice suggests that the prospect of an attorney/client or work-product waiver in these situations should just not be on the table at all.

The second issue is really about waiver. Then again it doesn't have to be in every case, it doesn't have to be sort of a steady policy, but it has to be the possibility that there will be a requirement, a cooperation requirement of waiver. It inhibits in many ways the compliance programs that -- the compliance

audits that are very common, very customary in antitrust cases. And the situation there I think is very clear and very direct. If you are going into a company to do an antitrust compliance audit, you are basically trying to tear apart the entire structure and find out what is underneath. You are going to ask hard questions not only about a price-fixing situation, which would be the case, but any number of other antitrust issues or violations that could be criminal, could be civil, could be whatever. So you are opening, I think, a very broad array of issues with the client.

If the client believes that information is some day going to all be turned over in that fashion to a government enforcer, I think there is a candid -- I mean, we have enough of a candor problem to begin with in many of these cases, and the fact that there is another issue out there that will effect this I think is -- you know, will have a very chilling effect

on this.

The second (sic) issue is that in these cases it is necessary to do the full exploration because these antitrust issues for the most part are not always subtle. There's a lot of gray in there and there's a lot of half gray that you have to deal with in some situations. So the idea of having the opportunity for absolute candor with the client and some expectation that the client is going to give you back that same level of candor, and that your final report or analysis or statement to the board of directors or to the CEO is going to have that candor and express those issues I think is critical and clear in these kinds of cases. And I think any attempt to chill that, no matter how vague or how remote, is an issue that's out there, because we hear it.

There are many conversations with counsel -- I'm sorry, with employees of companies where you go in and say, you know, "This is

attorney/client privilege, this is all going to be, you know, part of our investigative record."

And they will have read about an instance where attorney/client privilege was waived in a case and say, "Well, how can I be sure or how do I know you're telling me the truth?"

And you really do have to work through and say at least for present purposes, "The Antitrust Division does not require the waiver of attorney/client previous. Therefore, you know, we can give you -- you can take that to the bank. That's pretty clear."

But in the future or if there's a possibility that this would not be case, I think all bets are off, and it certainly harms the relationship counsel has with those individuals and the prospect of getting to the truth and basically achieving the public policy goal of getting that effective cooperation out there.

And the third is that waiver does

discourage self-reporting and cooperation, at least in the context of antitrust prosecutions that I've been part of. Again, the simple fact is that the criminal case is part one of an on-going drama that will go on for many years. Once you get beyond the criminal case, you're into the civil damages cases, you're into cases that affect other governments in this world of multi- jurisdictional enforcement. And essentially a waiver will be a waiver for all purposes. And you in effect may be obtaining or giving cooperation to the government in exchange for a lower fine or in exchange for leniency only to have to pay much more, because at a later point the entire record of your attorney/client communications would somehow be out on the record in the civil actions implicating not only the case that you're involved in, but all the other advice at the same time and in the same situation and in the course of an audit, for example, that you would have given the client.

So essentially, that is a very, very strong disincentive to a corporation to cooperate, to self-report, to go for leniency. And the fact is that many, many companies in the current structure of the Antitrust Division not requiring waiver have employed the leniency program to great advantage for the Antitrust Division, for the U.S. government, and for the companies as well. But part of it is the simple fact that that opening is there, that they understand that there is some level of protection. And I think you need that level of protection stated as directly and succinctly as possible so that companies will know and counsel will know that they can deal with these issues in a way that I think will achieve the ultimate public policy results that we'd all like to have.

Thank you.

MR. SPRATLING: Thank you, Don. Joe.

MR. WHITLEY: Thank you. It's a pleasure to be here with such a distinguished

group and in the place of a colleague, Mark Calloway, who could not be here due to some conflicts in his schedule. So it's with some substantial amount of preparation beginning yesterday that I appear here before this August group.

First, let me say at the very outset, I have a background similar to many people in the room. I'm a former prosecutor, no longer a prosecutor. But a lot of times what one things about an issue depends on where one sits. I'm no longer in the prosecution position.

And I respect our esteemed colleague Jim Comey, from the Southern District of New York, and my experience in general has been very positive with U.S. Attorneys around the country. They've been exactly along the lines of Jim Comey as I characterize them as.

I think that the first point I'd like to make is that we have always had historically a good group of U.S. Attorneys in our country. The

point about where I sit at this table is that I'm no longer on the side of the prosecution. I'm now representing corporation and individuals, and I'm concerned about whether the bedrock of the Eric Holder memo is the right bedrock to build this house on. I think that we all have to respect the process in which memos are generated in the Department of Justice. And sometimes they're generated with a speed at which the Sarbanes-Oxley legislation was passed.

(Laughter.)

MR. WHITLEY: Sometimes there's not the kind of input that you'd like to have in these things that might address some of the issues that we're talking about here. That some of the concerns -- I doubt and maybe there was, and I don't know the answer to this question, so I shouldn't even bring it how. I don't know how much involvement there might have been by the professional bar in addressing that particular issue that was in that memo. And again, there

may have been substantial involvement. I'm just not aware of what that involvement was. But I understand that that's where we sort of start this process, because the Pandora's box of this issue is now open and other metaphors, the genie is out of the bottle at this point on this process.

The sanctuary of communicating with your client in a privileged way is extremely important to me as a defense attorney. I can't accomplish a representation of my client unless I have my client being absolutely and totally truthful with me, otherwise, I'll routinely employ a polygraph to find out what the truth is.

We're not like doctors, but we hope like doctors when someone comes into speak with us that they will tell us where the pain is. If a person goes in to see a physician and they tell that physician that the pain they are experiencing is in their neck when in fact it is in their foot, which is my view sort of where we

are if we have this experience with privilege being eroded, and again, I want to say that in my experience has been the case. But what I do worry about is the fact that we have -- and I always get this wrong -- 93 or 94 U.S. Attorneys' Offices out there, 93.

MR. COMEY: Ninety-four districts, Joe. Somebody got's two. I'm trying to get an extra one.

MR. WHITLEY: That's surprising that the Southern District of New York would try to being try to expand his territory.

MR. COMEY: Absolutely.

MR. WHITLEY: But in any event, those number of different personalities, that degree of distinction between very good lawyers who are in Assistant U.S. Attorney positions is you have 93 different interpretations of what all of this means. And I don't think we should be in that position. I think there should be bright lines.

Certainly, if a corporation chooses to

waive privilege voluntarily to provide assistance to the government, that's one thing. But if they're under the impression that the only way they can receive substantial assistance or credit for cooperation under the guidelines by having to waive their privilege, it creates a problem. And I think ethically at the very beginning of any investigation, and this has been pointed out by the commentary of my colleagues, at the very beginning of an investigation you're going to have to inform everybody you're speaking with that "Everything you're saying to me could at one time be shared with the government." With that in mind, I'm not as confident that I'll be getting at the truth of what actually happened.

And in fact, in more times than not in the cases that I handle, the results occur in this order. First and most prominently, the case is one that the government might choose not to pursue because there's not enough information upon which to determine if the crime has been

committed. Second, I might more likely come in and work out some accommodation with the government in that matter. And third, in the very most narrow of categories, there might be litigation about the matter.

I don't think I can accomplish the judicial efficiency that I'm accomplishing from the efficiency and the process in the system if I feel like I'm not getting the cooperation I need from my clients.

Those are some points I wanted to make at the very beginning.

And then I also wanted to say that, again, you know, this is not a finger being pointed at the prosecutors of this country. They are doing their job, they're doing it effectively. But there are a few bulwarks left that we have to have to defend our clients. And the touchstone of cooperation, I believe, is the ability of a lawyer to talk with his client and get full and complete information from their

client.

I think that the fact that we have any exception to this rule creates an opening for the different personalities and different prosecutors in the United States to treat matters differently.

And we heard about one office which apparently requires waiver in all circumstances. I have had prosecutors ask me for a waiver in cases, and I have said, "I'm not going to waive the attorney/client privilege," and they've moved along. I believe there are enough tools, as has been pointed out, that the government has currently to investigate these cases. One would be foolish to tell the government they're not going to come in and make any sort of proffer in a case. And I think the proffer experience I've had in cases I've been involved in serves a very useful purpose. I think it really does get things where they need to be.

I'm worried about the collateral

consequences of waiver, as has been pointed out already by the panel. I think there are serious concerns we should all have in this environment today when there is, whether one likes them or not, a very effective plaintiff's bar in this country that has become very effective in utilizing material obtained from prosecutions. We would not want it to ever appear that a prosecutor who's exercising his discretion in any way whatsoever to assist the private bar in the pursuit of their case, and I fear that that might be what would happen if we opened this door a little wide.

And in any event, these are some thoughts I had as I had a few hours to think about these issues. And they are not reflective of the kind of thought and a consideration that has been given to this issue by my colleagues. But they are concerns that are felt really from the point of view of a practitioner and being out there on a day-to-day basis knowing that, you

know, when I get asked that question how am I going to answer it. And I think I'm going to answer it no. But I think I'm going to have to tell my client that the consequences of me answering it no are going to be substantially adverse to you if I don't answer it in a yes fashion. But I think it does intrude into the last sanctuary, the most important sanctuary that an attorney and a client can communicate in, and I think it's important that we preserve it.

And I think that the guidelines should not require a waiver in order to qualify for a reduction. I think the guidelines -- and also I don't think that there should be a requirement, that there be a waiver for there to be a substantial assistance motion to be filed by the government. I think there are other ways to get at this.

And to Jim Comey's point, I think that there are -- this is the exception, this is the rare circumstance. And we've got to find a way

to work with the government, not against the government, but to find a way to get through this process, and I think it's something we should not do. And I think we should avoid weakening the process by trying to help the process.

Thank you.

MR. SPRATLING: Joe, thank you very much, and thank you for having the time to give this a little thought and to come and share your thoughts with us today. A very valuable contribution.

Before I give an opportunity for the speakers to address one another, 'cause I can see there's a little bit of that there -- and, Jim, I'm confident and I'm aware of your time constraints.

MR. COMEY: I shouldn't admit this, but I'm okay on time now.

MR. SPRATLING: Okay, great, good, great. Let me say something so that the speakers don't talk past one another and we all don't end

up arguing about something -- excuse me -- discussing something that I think need not be confrontational in any way.

I was struck both this morning during Jim's very thoughtful comments and your summary of them this afternoon as to what it is that the government says that it wants and -- which is largely what the sentencing guidelines say is required in order to give credit for cooperation -- and the distinction between the corporation deciding on its own to waive work-product privilege or waive at that point versus the prosecutor insisting on it. I don't think that anybody who works a lot in this area in representing corporations on either side of the table, on the DOJ side of the table or on the defense side of the table, believes that there's some rule or something adverse about a corporation deciding on its own to waive the attorney/client privilege or to waive the work-product privileges consistent with the

representations it has made to the people it's talked to about pursuant to the attorney/client privilege or the rest of the organization that it's worked with in developing the information pursuant to work product.

At least in my experience, both when I was at the Antitrust Division. I, like most other people here, am a former prosecutor. But during the years that I was at the Antitrust Division, I knew that virtually every time, I mean, I can't remember a time that someone came in and sought amnesty self-reporting under the corporate leniency policy of the Antitrust Division that they weren't waiving work product and attorney/client privilege. Of course they were. They had decided as a corporation to do that. I'm aware that many, many times the second, third, and fourth corporations had also decided to do that, to waive.

That is, that the corporations weren't coming in and seeking cooperation and saying,

"I've given you as much as I can, but, you know, I can't give you some of this 'cause it's protected by attorney/client," or "You'll have to go interview those witnesses." If that's what you do, then you risk not qualifying for cooperation.

And as far as the Antitrust Bar, that's completely understood by the prosecutors and defense counsel. If you aren't willing to disclose enough information to qualify for cooperation, then the game's over.

But the issue that has concerned a lot of people and we know this from the personal experiences of people on the Advisory Group and from reports, the public comments the we've gotten, is that across the country people are experiencing something else, and that is coming into prosecutors' offices and making a presentation, disclosing, waiving attorney/client privilege not in response to a request, but waiving attorney/client privilege to the extent

necessary to disclose that information which is the corporation's privilege to waive that is obtained pursuant to interviews with the witnesses, disclosing some work-product information -- as Don says in the antitrust field, it's always done orally rather than submission of anything in writing -- but disclosing all that so that the government has what the Department of Justice, what you listed this morning, Jim, as the, you know, identify all the culpable individuals, identify all the documents, and identify all the witnesses with knowledge. That's part of the problem. But after that hearing from a prosecutor's office, "Well, in addition to that, we'd like you to waive the privilege. We want to check this out. You know, we want to check it, we want the internal investigation, we'd like to see some of your notes on this" and so on.

And that, I believe, I can see by a couple of affirmative nods over here, that I

believe is what has caused the commentary. And what you've said this morning, Jim, is that -- and the Department of Justice's written statement makes it clear -- that is not the policy or the intended practice of the Department of Justice.

You and I know it was not the intended result of the Holder memo 'cause, you know, I worked a lot of hours on that thing just like Eric did when I was there. So it was not the intended. But that's what's happening at least that's what many represent is happening.

So that's the issue we're dealing with. We're dealing with a request, not the self-determination of a corporation to waive those privileges, which corporations do all the some and decided to do it and talk with their employees about doing it. "Listen, we're going to have to go, we'll going to give this up, but because it's going to be good for the corporation, whether or not it's going to be good for you, we're in a better position."

You have those types of conversations. That's not what's at issue. What's at issue is after you do that, someone saying, "We want you to waive the privilege and the work product in order to get at these underlying things.

So with that --

CHAIRMAN JONES: Another aspect to that, too, Gary, from a practical viewpoint, and it was mentioned by Earl and Don, and that's the waiver for a limited purpose is a waiver generally. And the concern in a very practical sense is we'd love to tell you. We would agree to it in the Eighth Circuit where Minnesota is part of, we'd love being able to have a "Diversified letter" that gives us some level of protection and confidence about waiver with the government for purposes of resolving the criminal case without waiver generally so that we don't have to worry about the civil actions that are out there that isn't true in the rest of the circuits. I think that's an issue of federal

jurisprudence.

But it is a real and valid concern when that runs up against trying to cooperate with the government, trying to do that dance with what you can disclose in good faith that will be helpful, that will exhibit a level of cooperation. But also knowing that it's not going to end with the criminal investigation in certain areas that there may be other litigation out there that you don't even know about that you're opening up the door to have people get access to you and your information that you don't want to have happen, even though you want to resolve the criminal matter. So there are some other dynamics --

MR. SPRATLING: And thanks for adding that, Todd. But I would like to do is to give the panelists a chance to respond to one another, then let's throw it open because they've each listened one another.

Jim, let's start with you.

MR. COMEY: What I'm hearing everybody say is what I heard this morning that there's a problem out there with the practice, but I worry that what we're talking about here is fixing a different problem. I don't think the answer to the problem with the practice, as I understand you to describe it to me, is to say through the guidelines that you don't have to waive to get credit for cooperation. It appears that the problem you're describing is that Assistant U.S. Attorneys are being too aggressive in asking for waivers.

See, the problem I have as a prosecutor is, if a company comes in -- and I don't know antitrust, so I'll talk about other area. But if Earl comes in with a client, a company, and says, "A crime was committed. The company has potential liability. We'd like leniency from you and we're going to tell you what happened here." Make oral disclosures, don't put anything in writing. And it appears

that the CFO was a key player in this. He's interviewed the CFO. The guy laid it out for him.

We send the FBI because we got an oral summary. We send the FBI out to interview the CFO, he takes five. I can't believe that people would expect me or the guidelines to give his company credit for cooperating if when I go back to Earl and say, "Look, I'm sorry. The guy took five. I can't immunize him. I really need you to give me your notes of interview."

He says, "No. We're not doing that." I mean, it's a choice he has to make, but from my perspective I wouldn't listen later if someone says, "We should have gotten credit for cooperation." So, you see, that's the problem that we face.

As I said this morning, I think we may face a problem of education out in the field where people don't understand perhaps as well as they should the difference between

attorney/client privilege and work product.

I mean, I can't imagine any circumstance in which a prosecutor, Joe, would need to know what you as outside counsel had said to your client. I mean, if they ask for a attorney/client privilege waiver, they don't know what they're asking for. What they probably want is work product, but they may, and I assume your answer to them is when they say, "We want a waiver, is to say, "Well, tell me what you want. I mean, maybe I can get it to you without a problem."

So it's another way of saying there may be a problem out there in the field. The way to fix it, though, is not to -- by putting language in the sentencing guidelines say, "You don't ever have to waive and you can still claim cooperation." Because I do believe, despite the important interests that Earl very eloquently laid out, public interest behind the privilege there's a competing public interest that would be

undercut if we cut off waivers absolutely through the sentencing guidelines.

MR. SPRATLING: Point taken. Yes, Earl.

MR. SILBERT: Thank you. This is -- the more you get into this issue, and frankly in my thinking, the more complicated the question becomes. One, even as to Gary's point that we're not talking about voluntary disclosure where a company comes in and lays out both its attorney/client and work-product privileges and we're going to say, "Well, that's okay, and that's something a company can be rewarded for if it does that." Not because it made a voluntary disclosure, but because in the course of making the voluntary disclosure it laid out work product and attorney/client privilege material.

It's one thing to talk about it and present it that way and say, "Well, if it's purely voluntary, it's okay. But when the prosecutor makes a request, then maybe there's a

problem." That's clear, but in reality there can be a lot of fuzz as between when is something purely voluntary and when are you responding to suggestion, maybe, or hint that maybe a disclosure would be warranted. So I must say I'm a little concerned about -- and the too easy solution of saying "voluntary disclosure here, therefore that's okay." But worrying about the request. I worry about the situation for the jurisprudential and practical reasons of the precedent in the long run of talking about waivers of privileges.

Getting to Jim's point, and I must say, you know, his is such a sophisticated presentation here that it's not something with all respect to assistants of whom I was one for many years, you know, I wouldn't have know what you are talking about because it would have been so far over my head, you know, in a sense. And dispute the skill of our, you know, Assistant U.S. Attorneys and some perhaps more so in

certain offices, Jim's for example, than others, he's drawing some pretty, some rather fine lines that might not be encompassed throughout the country.

But beyond that, if, in fact, the rule becomes askance that, you know, it's -- you may not get the benefits of a downward departure or a reduction in your culpability score if you don't waive, and that gets out, then I suggest that the example that Jim has given is not a realistic example.

He poses the question of the company having got into a problem, recognize it, and then gone out and, as does happen, you know, somehow the problem comes to light. The company discovers it. They go to outside counsel and outside counsel starts an investigation. And companies vary in how -- I'm sorry. Companies and law firms vary in how they do that.

Some companies through their law firms will go out and hit their employees fairly cold,

give them warnings and get the information, and then after they have elicited perhaps incriminating information from their employees will say, "Oh, now we'll get you counsel." You know, after, after the fact rather than before the fact.

What I'm suggesting here -- and then there are other companies through their counsel that will give warnings beforehand and perhaps obtain or provide counsel, for the CFO in Jim's example, before the interview. And then my experience has been, there's less information, you know, coming forth. But if this becomes incorporated -- by "this" I mean the fact that there can be -- that this nonwaiver may prevent you from getting the benefits under the Sentencing Commission, then it seems to me responsible lawyers, as I said, de facto agents for the government are contemplating that and likely realizing that will likely occur, I think there's going to be an obligation on the part of

lawyers for the company to give warnings and advice and suggestions to employees that they may need their own counsel before the first interview rather than after.

So that the hypothetical situation that Jim has posited, and it does occur from time to time now, the CFO when first approached laid it all out but after he has counsel he asserts his Fifth Amendment rights, that in fairness to the employee, if we're going to treat employees fairly, they ought to be advised beforehand, if they need counsel, they ought to have counsel, and then you won't have or likely have that dichotomy of the before the presentation in the U.S. Attorneys' Office and after.

MR. SPRATLING: Your last point, Earl, turns up the professional rule in both the model code and most state codes regarding adverse interests. And the greater the likelihood of an adverse interest, the earlier you have to disclose it and the more formal the setting of

the adverse interest is. And I appreciate the point.

I did want to comment, Earl, because in my rush to make the point and not take so much time, I fear I made it too simple. I was not suggesting that it is the difference between the voluntary waiver by the corporation versus the government asking for it, because obviously that can become a --

MR. SILBERT: Murky.

MR. SPRATLING: -- mirror-like -- yeah, murky, yes -- situation very quickly.

I instead meant to say that most of the time when dealing with prosecutors whether you're trying to get a pass from prosecution under the leniency of the Criminal Division or a U.S. Attorneys' Office or the amnesty program of the Antitrust Division, you know what the requirements are. And if you're not eligible for that and you're trying to get credit for cooperation, you know what the requirements are.

I mean, they are -- you've got to have come in, as Jim said this morning. You've got to identify the culpable individuals, you've got to make the documents available, you've got to identify the witnesses with knowledge.

In the Antitrust Division realms you have to go more. You sign a letter agreeing you're going to facilitate access to all those people, you're going to bring them to this country, you're going to bring to the offices. You undertake a huge obligation. But I'm saying when you do that, when you do that, you know what you have to do. If a consequence of that is that you have to waive some of the attorney/client privilege or the work product, you're prepared to do that. It's not because they haven't asked for it or have asked for it, you know what the standard is. You have to meet that standard to get credit for a pass or to get credit for a downward departure -- a two-point reduction or to get credit for an §8C4 motion. You know what you

have to do. And I'm distinguishing that, the recognition of that by a corporation and the decision to do what's necessary to get there from a later imposed requirement independent of what you've done as a check or as a -- for other reasons to waive privilege. And that was the distinction I was making.

MS. NEIMAN: Gary, how could you waive the privilege of the situation you've described if you -- unless you didn't conduct counsel.

MR. SPRATLING: State your name for the record, please, Shirah.

MS. NEIMAN: I'm sorry, Shirah Neiman, chief counsel to the U.S. Attorney for the Southern District of New York.

If you've made all these disclosures you've waived the privilege, and I just want to -- when Don said he makes informal proffers, if you're giving over the facts you've learned during an interview, you have waived the work-product privilege however you want to

describe it. Now whether later civil litigants can come and force the government to provide answers to interrogatories or the notes of their interview with you and you've made it more difficult 'cause it's all oral is really beside the point. Legally, you have waived the privilege.

MR. SPRATLING: Sure it may be beside the point as an academic matter, but it's not beside the point as a practical matter. Indeed, the whole area of international prosecutions has been governed by what organizations require written submissions versus oral submissions; is that correct, Don?

I mean, you decide where you go and who you're going to deal with according to that because it is the -- there's not question of what you're saying is correct, that there can be an oral waiver as much as a written waiver or the privilege; that is, by the submission of oral versus written documents. But the presentation

of the information, if you're in the area and you know what you're going to have to do, it effects the way you collect the information and it effects the record you're making and the record that would be available for that which you really get hammered for which is the collateral civil claims.

And in doing that, you structure your internal investigation with an eye toward what you're going to have to do with the enforcement authority, whatever one you're working with, and that is the nature of the disclosure you make. I mean, it's not with an eye towards keeping anything from the government.

Indeed, you know referring to the area that I know fairly well, the amnesty area with the Antitrust Division, you know, you join Team USA. I mean, you're a part of the team.

MR. COMEY: Can't the government coerce that?

MR. SPRATLING: No.

MR. COMEY: I mean, I know it's understood, but at some point --

MR. SPRATLING: No.

MR. COMEY: -- someone in the past set up the leniency program and said, "This is what will be required."

MR. SPRATLING: That's correct.

MR. COMEY: So there really isn't much difference, although perhaps older and maybe unwritten than the sentencing guidelines, which have been argued coerce waivers in certain circumstances. Right?

MR. SPRATLING: No, it's hugely different. Because the sentencing guidelines before the Holder memo was issued, I had never heard the suggestion anywhere at any time I'd been -- I was with the Department for 28 years. I had never heard the suggestion that a waiver might be required to get credit for cooperation.

MS. NEIMAN: It's not a question of require. If you come in -- the government

started an investigation and you come in -- your company's the target. And we say, "Do you want to cooperate?" And we want to know what all the facts are, just as the sentencing guidelines. That's the issue. Are you cooperating?

MR. SPRATLING: Yes, right.

MS. NEIMAN: It's not mandatory, not by the guidelines, not by the government. There's no penalty being imposed. The issue is, do you want to make the decision to cooperate by providing all the facts you know or don't you? A decision you may be able to make now or may not want to make it till later, at some point you make it one way or the other.

And whether you use the word "waiver" for the years in which you practiced in the Antitrust Division or not, that is what it is. And frankly, although I hear anecdotal stories, I also am familiar with the fact that when the Department has asked attorneys who complain that assistants require waivers to provide information

and evidence, what case; what are you talking about? No one comes back and does that.

And I haven't heard that assistants who get all the information they need from a corporation then go back and say, "Although I have no special need for it, I want all your notes, too." I mean, there may be a special need in a particular case to have the notes because someone's lied to them and they want to know what the person said when they were talking to you as opposed to whether they're talking to the government. But it is a waiver and it always has been a waiver legally.

MR. SPRATLING: But the difference we're talking about here or the difference we're talking about is the problem. I come in and I talk to you and I say that our company, ABC, wants to cooperate and this is what we're going to do. We're going to give you all this stuff and we're going to provide it to you orally. Anything you need we're going to give it to you.

We're going to give you access to the witnesses and so on.

If then you say in addition to that, "Can we see your investigative files? Can we" -- well, I mean, there are examples of that occurring. "Can we see your investigative files? Can we see your notes of the interview of the CFO? Can we see those notes?"

That is a request by the government after having, and there may be good reason for it, but it's a request by the government in one case for work product and in the second case I mentioned for a waiver of the attorney/client privilege; that is, when the attorney has interviewed the CFO as a person who is in the control group for that litigation.

And what I'm saying is that in the years when I was with the Department and we did that, I know of only two times when there was any type of what we refer to as a waiver beyond the normal privilege, and that was when -- and Don

knows about one of these examples -- that's when the company offered to do it.

The Antitrust Division didn't request it because they thought that the Antitrust Division was not giving sufficient credit. They thought that the Antitrust Division believed that they were undervaluing what they had because they had more to give than they did, and they wanted to prove that they didn't have any more.

But to me, in my mind at least, there is a distinct difference. I thought as a prosecutor, I think it now. There is a great difference between a company coming forward and making the proffers or giving all the information necessary to qualify for cooperation versus the government saying, "Well, in addition to that, we'd kind of like to look at some other things."

MS. NEIMAN: Well, the assistant shouldn't be doing that unless there's some need, and in my experience they're not. And we prosecute major corporations, and we've done it

for decades, including before the Holder memo. And if individual assistants are asking for something, -- and again, I think there's no legal distinction, but I understand your point -- they want the notes, too, and it's not sufficient --

And I've sat through attorney proffers where they read literally the notes. They just don't hand them over to you. And that's just fine so long as we get all the nitty gritty facts that are important to investigate and determine what, in fact, happened and who's responsible if a crime was committed. We're satisfied.

But that's very different from what everyone has said on this panel, which are: Don't. This is mandatory, which it's not. They're talking about credit for leniency, talking about penalizing people. No one's penalizing anybody. The question is, is Earl Silbert's client willing to come in and tell you everything that happened, what the corporation did, how they did it, and then who did it? And

if they're not, then they don't get credit, regardless of the consequences to civil litigation.

Those consequences may be very important and so important that the corporation in an individual case decides, "Look, we really can't cooperate." That may have negative consequences to us in the charging decision; it might, it might not. And it may, ultimately if they're charged, have negative consequences under the guidelines, or fines will be higher. But it's not a penalty, it's not mandatory.

MS. O'SULLIVAN: But it is. I mean, it is a matter of public policy, because the object is to get the companies to come in before greater harm occurs to cut off the crime, to deter crime, to prevent crime. And if people who aren't self-reporting don't have the incentive to self-report because of the economics of this third-party litigation, regardless whether you think, you know, that's their tough luck, it does

make sense as a public policy to try and give them the incentive to self-report.

One thing I was going to ask you, Earl, your position seems to be that quite apart from the third- party problem of giving the information the third parties, that there should never be a waiver asked for or tendered because it's going to effect the candor of the attorney/client relationship and ultimately the fact finding, and your ability to give the good advice. Is that your position?

MR. SILBERT: Ultimately, that's it. That is the answer. That's why I said, the problem is complicated.

MS. O'SULLIVAN: So even if you were in the Eighth Circuit and you had to select a waiver rule, you think there should be no waiver ever permitted?

MR. SPRATLING: That's basically correct because of the jurisprudential reason, you know, that I set forth. 'Cause I just think

once you start down that road, it's almost impossible, and it may be, in fact, impossible to draw appropriate lines as to when there's an interference or an imposition or an undermining of that privilege under pressure, you know, from the government. And for the judiciary to be doing it as a neutral arbiter, I think, if anything it's more exacerbated and aggravated.

MR. SILBERT: I would think there'd be times when, to adequately represent your client to advance the corporation's interest, you would want to waive. You would have learned something, and as Gary said, that the government doesn't know, it would really help your client to go tell the prosecutor this fact. You wouldn't stand on jurisprudential principles because you'd have to serve your client.

(Inaudible response.)

MR. SILBERT: I certainly agree with that.

MS. NEIMAN: And there were regulatory

obligations. The FCC, the OCC, the Fed. When you find these things out, the company has a duty to disclose and they have a duty to disclose to shareholders. So the notion that you could keep this all to yourself in the major industries that we're talking about, -- there's some that aren't regulated -- it's just not reality.

MR. SPRATLING: Mary Beth.

MS. BUCHANAN: I'd like to make a point for clarification. We seem to be confusing the issue of the sentencing process, as you've stated it, Earl, and the government's decision whether to seek a motion for downward departure, and these are very, very different points. Because the issue of whether the corporation gets five levels for downward departure or how many ever levels are appropriate is not ultimately the court's decision 'cause the government has to make the decision at the outset whether they want to make this motion or not.

And I think that possibly this panel,

with the exception of Jim Comey, is asking that corporations be treated differently than individuals. Because in the case of an individual prosecution, if the government is making the decision whether to use an individual as a cooperating witness and whether to seek their cooperation, they're asked to do all sorts of things. They're asked to cooperate against other people, they're asked to provide information, any and all, full and complete. And if an individual doesn't do that, then the individual doesn't get a motion for downward departure. And I think that what this panel is asking is that we, as the government, set up different rules for corporations than what we apply to individuals. And I'd like you to address that.

MR. SILBERT: I'm not sure that's true because with an individual, all those things that you asked, not one of them involved the attorney/client or work-product privileges; that

is, that you cooperate, that you set up, that you do this or you do that.

No one -- and I agree with Jim, that I've certainly never had the experience of any prosecutor saying to me, "Tell me what your client told you." You know, attorney/client privilege, and generally even when you're representing individuals, you don't get a request for your own individual work product. That is, when I went out and interviewed a witness in preparation for representing an individual, I don't think I've ever had a prosecutor say to me, "I want to notes of your interview of 'X' witness."

I think there's a very different, you know, there is an important distinction between individuals and companies here. And I think the only place where that, you know, on downward departure, I've never heard someone say, "I'm going to deny you downward departure" and for an individual "because you didn't waive your

attorney/client privilege and work-product privilege." I just haven't had that occur.

MS. O'SULLIVAN: Earl, actually, they're one of the cooperating witness -- I don't know if it's one of yours. But one of the conditions of his plea agreement, his corroboration agreement was to waive the attorney/client privileges to hence an individual. So it seems like the government's going to be going in that direction.

MR. SILBERT: Well, that's an even more alarming situation. And that's why I said, you know, once you open this, I really have a genuine concern about it spreading and where it goes and how it goes. And I do think there are legal issues that are abundant here, and I think the net result will be people will -- that the government companies -- well, I think there's an obligation --

It really changes, I think, the obligation of companies as to how they conduct

their investigations and their obligations to advise the employees they're interviewing of what rights they have and the like. And the failure of that to do or if you force companies to do that, or they don't do it with that threat hanging over their heads, then I think you're really affecting -- you're saying we want companies to be -- individuals to be honest but we're not going to be honest with them. That's very troubling.

MR. COMEY: I do think the analogy fits, though, not as tightly because the individuals won't have work-product issues. What we do with individuals is we say, "If we're going to make a downward departure motion with you, we want you completely naked. I mean, we want everything you know, everything you've done, everything you've thought." And if you were involved in criminal activity with your lawyer, I've asked for privileges and consents and all kinds of things to be able to investigate the

lawyer. But what we tell the person is, "We want it all. We want a total brain dump."

It's no different within a corporation. "If you want an downward departure motion, we need a total brain dump from you." And to dump the corporation's brain, we need to get past, maybe some of the work-product protection and the privilege. So I think we are asking that we set up a dual track with people we want a complete dump. With corporations we want a dump, unless what we want dumped is blocked from us by privileges.

MS. NEIMAN: Earl, I have a question. What do you consider to be cooperation for which a corporation should be given credit if you don't want to waive your privilege?

MR. SILBERT: The things that Gary mentioned that they do.

MS. NEIMAN: Telling the government everything: All the facts, all the information?

MR. SILBERT: Well, in addition to

that, you know, the typical kinds of things of, you know, making employees readily available, inviting, you know, the agency in, making documents available. I mean, there are whole host or panoply of things that --

MS. NEIMAN: But you think in doing that a corporation has to effectively have a disclosure made of all the facts to the government, even if they do it through bring than employees in, so that if the employees won't talk, no one's going to claim the corporation has cooperated if you don't tell the government anything.

MR. SILBERT: Well, I'm not -- I guess the reason I'm having trouble answering that is that I'm having trouble. I've never seen it and I'm even having trouble imaging where if there were 50 employees that were coming in, 50 would refuse to answer any questions. There might be several that might. So that if the company has made 50 employees available and has made all the

documents available and it has made the kind of oral presentation that Gary has talked about, I would think that's a fairly extensive cooperation.

MR. SPRATLING: Other comments by anyone else? Don.

MR. KLAWITER: I think there's a lot of common ground here, but I also think there are a lot semantic issues that we're all playing with.

I think that the situation Gary explained, which is the common way of doing it, you know, it is a waiver of work product to some extent, but it also depends in part how you present it to those employees when you first sat down to talk to them.

And it used to be that you'd go in and say, you know, "We represent the company. You know, you're in the family," all that, and "Please tell us everything you know." And that information that you had I think is somewhat than

today when you go in and say, "I don't represent you and I represent the company. And anything you tell me I can use in whatever I'm going to do with the company."

So, where we get into waiver versus nonwaiver as opposed to, you know, just the facts of the cases that come from an individual, I don't quite know. And I think you can argue it both ways. But I think the simple issue is --

MS. NEIMAN: Can you explain that?

MR. KLAWITER: You know, it is work product, sure, but it is not -- where I'm going is the whole issue of the written statement. That if we have a written set of notes and if the prosecutor wants those down the line, that is what causes us the trouble down the line in the civil actions and every place else. And I think that's the core of the concern here, not the waiver of work product that you pick up from a witness when you're interviewing the witness along the way.

And again, from my perspective in an antitrust case, you know, that's the concern that I see and that's the concern I'm worried about. I'm not worried about giving an appropriate warning to an individual when I question him and then using that information, you know, consistent with that warning with the corporation and with the government along the way.

MR. COMEY: Has the Antitrust Division ever asked for notes if you encounter a situation that I do where the senior executive takes five when the Antitrust Division goes to talk to him?

MR. SPRATLING: No. What would happen with the Antitrust Division in that situation. If the CFO in your hypothetical was critical, then they would say without that person's cooperation you don't get any credit for cooperation. That's what you tell the corporation.

MR. COMEY: So the corporation squeezes them?

MR. SPRATLING: So the corporation squeezes them or they don't get credit. But they don't get credit. And what the Antitrust Division does is they look for whether or not it's what they call a corporate act. Are there sufficient senior executives cooperating that the corporation deserves credit, or are key executives not cooperating in which case they don't deserve credit?

I think it's the same thing you were talking about. If the company can't give you what it's supposed to give you, how can anybody criticize the U.S. Attorneys' Office for not giving them credit for cooperation? I think that's a given. I think that's right.

You've been pretty quiet, Eric.

MS. O'SULLIVAN: Some of the people seem to be drawing distinction between disclosure of facts either orally or maybe in writing, but orally certain, which receives the lowest level of work-product protection anyway, and disclosure

of written witness statements which are opinion work product and practically undiscoverable anyway. So you could draw a distinction in waivers as you've only waived just to facts, I think.

One question I have just curiously. If you've waived the privilege as -- so if you turn over your notes of a witness interview, have you then made yourself a witness as a lawyer? 'Cause I know there was a Second Circuit opinion out just recently on waiver where the U.S. Attorneys' Office -- I don't know if it was years or the Eastern District of Western District -- subpoenaed a lawyer to come testify about what his client said during a proffer session.

MR. COMEY: What was the issue?

MS. O'SULLIVAN: It was whether it was attorney work product. And the court said basically because the U.S. Attorneys' Office was asking him to testify as to the previous crimes for which he was representing him in the proffer

session, they couldn't ask him any questions. But if they were asking about him lying during the proffer, then potentially you could, because they weren't -- he wasn't represented with respect to that.

MS. NEIMAN: It's wrong --

MS. O'SULLIVAN: Yeah, I know. It's weird, but it's --

CHAIRMAN JONES: Court reporter, court reporter. Don't talk over each other.

MS. O'SULLIVAN: This may not be pertinent, but I just wonder if the implications of a waiver of a privilege, if you waive the work product, does that make the lawyer the witness? Could the lawyer be a witness in that circumstance? Could it be restricted; in other words, if the U.S. Attorneys' Office now wants it from the corporation, corporate counsel to come into the grand jury and testify as to what went on during that? 'Cause you want not only to know what went on presumably want competent evidence,

right?

MR. COMEY: You look at my hypothetical.

MS. O'SULLIVAN: Yeah.

MR. COMEY: If the CFO takes the Fifth --

MS. O'SULLIVAN: Right.

MR. COMEY: -- and I turn to Earl, yes. I mean, Earl potentially might have to go. I mean, the guys made admissions to him.

MS. O'SULLIVAN: Right.

MR. COMEY: If we're going to prosecute that guy, here's my witness. You're right, potentially that is. I mean, he might be a witness.

MR. SILBERT: I once had an experienced Assistant U.S. Attorney who was, you know, investigating or prostituting somebody, an individual I was representing for a company who claimed that during the course of the interview by the company -- the company did its own

internal investigations -- in the course of the internal investigation the person I was representing made some statements to the company counsel, which the government, having obtained those statements -- in that case it was a voluntary disclosure case -- said, "Well, you made a false statement. Your client made a false statement to the company counsel and was aware at the time that there was a voluntary disclosure process going on." False statement to the government prosecution was the issue. And by a very, you know, very experienced, knowledgeable assistant.

Now I have to say, ultimately that the Attorney General's Office did not authorize that prosecution, but for the substantive offense. But for a conspiracy, yes. And I've never quite understood that resolution.

But, I mean, it gets back to the point of there, when you get into that issue, the issues I talked about Spevack v. Klein and the

Garrity issues, those are legal issues that are there. Fairness and honesty and decency in dealing with your own employees are issues in conducting an investigation if it's out there that the company may not get, you know, maybe required to waive privilege to get the benefit, whether it be substantial assistance or the culpability score, tremendous pressure here to get the information.

MR. HOLDER: What strikes me about this conversation is that I think we're dealing in a world here that's fundamentally different from that which I think exists outside these doors. In the sense that I hear the government saying we don't want you all to waive, necessarily want cooperation. I hear defense attorneys saying we give this stuff up. And, yet, and, you know, Mary Beth did her survey, and yet as I get outside I talk to defense lawyers. There's this notion, I don't know, you know, what the basis for it is, but whether there is no

basis for it. But there is this feeling that people are being forced by the government to waive privileges, give up information in an inappropriate way or to get through the door, you know, to start the process by which cooperation might be assessed that they're being asked to waive privileges. And I'm just wondering, you know, what's the basis for that feeling given, you know, this kind of lovefest that we have going on here.

(Laughter.)

MS. NEIMAN: It may be semantic because if the government is saying we want to know what the facts are and you then come in and make an oral presentation, the government considers that a waiver. It does not have to ask for the notes. But the government considers that a waiver.

MR. COMEY: But I've heard more than that. I've heard the same thing you have, that people have told me, not just here but in other

forums, that that's all well and good, and despite, you know, the survey didn't show it, down in the field people are walking in and saying, "I represent a corporation." And before you say, "What corporation?" They say, "We want you to waive attorney/client privilege."

We need to find a way to get our arms around that to figure out if it's happening or it's an urban myth of some sort. And what we're trying to encourage, and I hope -- maybe this is the forum to do it. I think I feel this way and Mary Beth feels that way, we would like people to push that up the chain so that U.S. Attorneys hear about it, because we need to push back down a more sophisticated approach to this.

MR. WHITLEY: The U.S. Attorneys' Manual says -- it has a proviso in there, a caveat, "This manual doesn't create rights substantive or procedural" and all that. And I know we were always reluctant when I was at main Justice to create more rules. And I know this

was a difficult process that Eric Holder went through putting together this memo, and I think it was a great exercise and I applaud you for it.

But I wonder to Jim Comey's point if we're dealing with a situation where we're trying to fix it on the wrong end, potentially, I don't know. But I do hear more and more, and again, whether it's supportable or not, Jim and Mary Beth, from people who are outside of this door to Eric's point, that they are greatly concerned about the direction that the Department of Justice is heading in in terms of its aggression to get at the wrongdoers in corporate America. And there is, I hope, 99 percent of corporate America is a legitimate, honest, and decent group of people.

However, that 99 percent today is totally frightened to death because they've seen and as probably the goal has been achieved, when you have the perp walks that you have, people being put in handcuffs, carried into confinement,

and that's a legitimate exercise of government power. I'm not criticizing it.

But there is a concern out there that you point to, Eric, that's very real that among my colleagues that practice in this area that what they're saying is, prosecutors are in search of crimes today as opposed to crimes coming to prosecutors. And there is a wide and vast area of cases that I'm working on now, more so than I ever have before, where I'm sort of scratching my head wondering why is this a "criminal" case? And it's because there has been a directive given by Congress and by the Department of Justice and by the American people through their votes to go out and find wrongdoers in corporate America. In that process of doing that, what I worry about is, do we need to have in the sentencing guidelines a provision that will perhaps stand in the way of finding those wrongdoers or be perceived?

I'm not talking about perception here,

Jim, as much as anything perceived. And also to your point, I'm coming closer to Earl as I get older and my perception of the attorney/client privilege and work product protections. But I tend to think there is a lot of perception out there right now that this is symbolic, the provision. The question we're addressing today, Gary, is very symbolic of the fear that's out there, and it's genuine and real.

I mean, I've never had more business than I have today, which I should not be complaining about. But at the same time, the presentations and programs that I'm giving on Sarbanes-Oxley are well-attended, people are listening, so there's some good that's been accomplished. I'm not criticizing the government, because I was in it too long to criticize it.

At the same time I think this is -- Earl would say it's not symbolic, it's not a perception. At the same time I think that to

make this a requirement will send the wrong message to corporate America about what the government is perusing and all about here in this effort.

MR. COMEY: Part of our concern is, there is no requirement. And part of what I'm against is, I don't want the guidelines to say the opposite, that is should never be asked for. But in terms of the memo, I can't figure out whether this concerns a recent vintage. There were a lot of articles that the sky was falling in 1999. We're now three years into the so-called Holder memo. I don't know how old the 8C is, I mean, ten years. So corporate cooperation has been a feature of our landscape for ten years and I had not heard hue or cry about this.

So you get the sense, Eric, that's it a recent thing because we're getting more aggressive on corporate stuff?

MR. HOLDER: Well, I think recent but not -- I wouldn't tie it, for instance, to the

change of administration of what has happened in this past year. I mean, I was starting to hear it when I was still at the Department. I think perhaps may need a little more loud. Now it's a more amplified. But I was hearing it back when I was in the Department back in --

MR. SPRATLING: Well, the Inn of Court on it was in '99, isn't that right, the Inn of Court here in D.C. was in '99.

MS. O'SULLIVAN: You hear it a lot just because, you know, it's not unreasonable for a prosecutor to ask for this stuff frankly in every case. Because, you know, whatever the countervailing policy considerations are, if there's an internal investigation, talk about saving the government time and money. You know, chances are the witnesses are more frank with them, so they may have access not only to more witnesses, witnesses who might take the Fifth, but the witnesses are probably going to be more honest with corporate counsel. And also for

nothing else you can use it for impeachment to make sure that your witnesses are saying, you know, consistent all around.

So, I mean, it's not crazy that people are asking for it. I think, frankly, I'm sorry. I agree with you the way the memo's written is that it says you may ask. It doesn't say you're required.

But I think people just took the memo and ran with it. Because from what I'm hearing from a lot of people in practice and from a lot of the things I'm reading, it's becoming increasingly common that line assistants are asking for this. Just as, you know, anytime you're representing a corporation and you've done any work before you --

MR. COMEY: I guess asking isn't the problem and then I guess I would ask because they're always beautifully Velobound. Very nice stuff you guys do. But, right, if the question is, if the answer is no, what's the next thing

the prosecutor says? "You're screwed, you know, if you don't give me that stuff."

MS. NEIMAN: Well, how could they not know? You should say, "No, I won't give you the Velobound, but I'll come in and tell you everything that's in it. I mean, that's usually the way reality ought to work, and it's only in the situation where the prosecutor says, "No, that's enough. I want the document," should be an issue of whether the prosecutor's going too far in the particular case, 'cause it's not required. It's not necessary.

But the definition of cooperation in the guidelines is really what governs and ultimately a judge decides whether you've provided enough information to constitute cooperation. And I'm not saying that I'm familiar with any cases in the country where that's been an issue and the defense has raised, "Well, they wanted us to waive the privilege, but we're still entitled to get cooperation."

MS. O'SULLIVAN: That's 'cause they always waive.

MS. NEIMAN: Well, not always. I mean, we've had -- we've indicted, in terms of the charging decision, many corporations that have cooperated fully and waived, and we've also not indicted corporations who have not cooperated and not waived, 'cause it really is a panoply of factors that go into the charging decision.

CHAIRMAN JONES: I want to go back for a minute, Gary, to the genesis of the question because we've had a good discussion at the macro level about some of the these practical dynamics. But the genesis of the question really is one that clarify both in the commentary, not anything in the guidelines itself. But, you know, I have been an assistant to know that you look at the guidelines' commentary for guidance in a practical aspect. The genesis of the question is just to clarify, and I don't hear any inconsistencies that it's not required. Not that

it's required, but just to clarify that it's not required. Waiver is not required for cooperation. Waiver is not required as a predicate for substantial assistance.

That doesn't mean that you can't negotiate it. That doesn't mean -- and it's not inconsistent with the Holder memo that says you may want to. But all it's talking about is a tweak to a commentary section in Chapter 8 that will carry some weight, but will be some clear guidance to both AUSAs preindictment and judge's post conviction to say that it's not required, leaving much room for people to argue the level of it, to argue what was done, what wasn't done, to make whatever that they need to do.

But just right there in black and white in a commentary section that says it's not required. I mean, that's the genesis of this question. And I haven't heard really between the lines any inconsistency with what people are saying just to clarify that in a commentary.

MR. WHITLEY: I think to your point, I think the tail is wagging the dog here because I think this is what drives all this to the commentary, because you've got to get to that point where it's being applied. And I think if a prosecutor thought or knew that a court could still determine that this company has substantially cooperated or been cooperative without having to require the waiver, that it might -- you might prevent the right out of the box comment.

You walk in the door to talk with a prosecutor, you're going to have to waive privilege, attorney/client privilege or work product privilege, to whatever it might be. It's so blurred in people's thinking out there that to Jim's point, I think he's absolutely right. But I think this tail wags the dog.

Although it is just commentary, I think it's very important. I think it's something that should reflect that it's not

required for you to -- even though in practice. In a practical application we all might agree in this room of having a hand-holding session to Eric Holder's point earlier, you know.

I think it's better that it not be in there because I think it sends the wrong signal to the Assistant U.S. Attorneys who are brand new, who are new, who've just been through the training facilities in Columbia, South Carolina, and have their badges or credentials and in the offices around the country who are prosecuting the cases who have in their hands the most substantial discretion in the entire process today.

Because the judges have had their discretion severely limited. Whether one likes the sentencing guidelines or not, there's substantially less discretion in the court. And you have a cadre of probation officers in every office around the country who feel like they are -- and no disrespect to the probation

officers duties who are performing great jobs out there in the field. But there are some probation officers who feel like they are aligned somehow with a prosecutor and they've got to keep the court in line.

I mean, there is such limited discretion currently today in the court, and this takes away even a little bit more discretion that those of you who may someday be on a court would want to have that discretion when you're making a sentencing determination. This seems not to be a good thing to do and something we ought to not inhibit the courts' discretion on this issue.

MR. HOLDER: I think Shirah's point, Eric, is bolstered by Jim's, too. We're not requiring waivers, but we are requiring cooperation. If I'm providing you all with information, I am in essence, am I not -- I'm asking the question -- am I not waiving the work-product privilege?

MS. NEIMAN: Absolutely, unless you

did conduct the interviews pursuant to an interview of counsel and you had someone else do the interviews. That's generally in the cases that come before the Department. It's attorneys' work product and so therefore to say you're not going to require a waiver doesn't really make any sense because almost all cases, if the corporation is cooperating, they are waiving. And so to say it.

MS. O'SULLIVAN: No court, I think, is going to make you. If you go in and describe the facts as you've discovered them in the course of your investigation, I don't think any court in the country is going to make you disclose your opinion work product based on that factual proffer.

MS. NEIMAN: No, but if they might make you disclosure your factual work product.

MS. O'SULLIVAN: No, that's what I'm saying. I mean, for instance, you know, I'm sure -- if I go in and tell you what the facts

are that I've uncovered, I don't think a judge in the country would make me turn over my actual witness notes. There's a distinction drawn, a sharp distinction drawn between facts and opinions.

MS. NEIMAN: There is. If the notes are taken factually, and any evaluation and editorializing can be redacted, the courts are going to turn it over. Of if some party --

MS. O'SULLIVAN: The facts, yeah. But the stuff that I guess you're caring about is the opinion work product.

MS. NEIMAN: No.

MR. SPRATLING: No, the facts.

MS. NEIMAN: The things that you care about are the opinion and you don't want disclosed. We want the facts. You're willing to give the facts.

MR. SPRATLING: No. We worry about the disclosure of fact to treble damage plaintiffs.

MS. NEIMAN: But you're willing to disclose them to the government, and it may be a waiver that you've done it.

MR. SPRATLING: Sure.

MS. NEIMAN: Be happy that nobody seems too happy that nobody seems to be noticing that you've waived and coming into the government saying, "Give it to us."

MS. O'SULLIVAN: So its elective waiver rule would work for you but not for Earl.

MS. NEIMAN: Well, we wouldn't want it 'cause we have civil -- the government has civil sides like the SEC and the FCC and the Fed and Civil Division that sues for false claims. And we would not want a --

MS. O'SULLIVAN: Presumably, if there's a limited waiver doctrine, one could negotiate that, just how broad the waiver within the government is.

MS. NEIMAN: You mean if the law said –

MS. O'SULLIVAN: Yeah.

MS. NEIMAN: -- there's a limited waiver, a federal law that would preempt state law privileges?

MS. O'SULLIVAN: Right.

MR. COMEY: I do think the devil's in the details. My concern -- I might want to tweak the tweak because I'm not sure I would want it to say a waiver's not required, because I could imagine standing at sentencing with a corporation that was in my first example.

They came in and said, "We've got a billion dollar fraud with all the details, but we got them all through our interview, so we're not giving them to you. But, you know good luck to you." And then we charge them, and at sentencing they say, "We want a reduction in our culpability score 'cause we told them everything we could tell them without a waiver. And see, it says, 'not required,' so therefore we should get the two points."

I'm just making this up, but I would want it to say something like, you know, "because" -- something more watered down than that that while a waiver might be appropriate for full cooperation, it's not necessarily appropriate in all cases. Something very commentary-like that would -- 'cause that could be used as a sword against --

MR. HOLDER: Sounds like the Holder memo.

(Laughter.)

MR. COMEY: Well, I was going to say the same thing.

MR. SILBERT: I mean, my thought on that would be, I mean, I have a problem with the language as it is, Todd. And my suggestion would be that if there's going to be a reference to it, it just should be that the waiver of legal privileges is not a factor to be considered in the sentencing process.

MS. BUCHANAN: But it is a factor,

Earl, and it can be a factor in certain situations. And I think that we're going to confuse the issue and make it more difficult at sentencing, and this may spawn a whole new host of litigation in determining whether the government acted properly or not in seeking the motion for downward departure. If we leave it exactly as it is and the government educates its lawyers across the country about the appropriate use of requesting a waiver, I think we will all be better off in the end. Both the government and corporations will be better served by that type of approach.

MR. SILBERT: But your approach is not to have anything put in.

MS. BUCHANAN: That's correct.

MR. SILBERT: Well, I don't differ with that. I'm saying that if you're going to put something in, it ought to be what I suggested and not the present language. But I don't differ with you about not -- you know, for the

Sentencing Commission not to get into that area at this time.

MS. O'SULLIVAN: So everybody's united with the Sentencing Commission to not do anything about it.

MR. SPRATLING: On this note of consonance here, maybe we should see if there are any last-minute comments on the second part of this inquiry, Can additional incentives be provided by Chapter Eight Guidelines in order to encourage greater self-reporting and cooperation?

Jim, you mentioned one this morning, which is the bump up for people to have an opportunity to self-report and don't do it. I know that some -- I know at the Antitrust Division has a way of dealing with that practically that are not in the guidelines. They change where they start negotiating with people that they find out didn't self-report. They do that in another way without it actually being in the guidelines.

But in addition to that, do either of the people on the government side of the table, on the defense side of the table have any other suggestions as to how we might encourage greater self-reporting and cooperation, which is at the heart of the guidelines?

MR. COMEY: I think to suggest -- I didn't discuss that this morning, that was Debra Yang from L.A., and I think what she said was that to encourage greater self-reporting, what you ought to do is find a way to make a bigger spread between people who self-report and those who don't. So that to get a reduction for self-reporting that there ought to be credit for self-reporting, and to make the spread the bigger, punish people for not self-reporting, was the idea. I supposed you could accomplish it other ways by giving extra credit for self-reporting.

MS. BUCHANAN: I believe that Debra Yang's proposal was to penalize corporations who

don't self- report sooner.

MR. SILBERT: Well, actually I would have a problem with that. You know, we're coming into something that has a long history. The voluntary disclosures and waiver of attorney/client privileges go back at least until the early '80s when the Defense Department first came out with their proposal for voluntary disclosures and the famous XYZ Agreement, which covered -- and at that time there was a decision, a policy decision not to require waivers of the attorney/client privilege, and yet you could still be eligible for voluntary disclosure.

And when you talk about practitioners, there are great differences among defense attorneys as to whether and under what circumstances they want to voluntarily disclose and not because of the agency of their dealing with, the attitude of the particular U.S. Attorneys' Office or the Assistant U.S. Attorney they're working with. There are a lot of factors

that go into that decision, not just do we report or not report? It is much more complicated than that.

So if you have a policy that says, "Well, if you don't report, even though you had an opportunity to do it, out it goes," that's just too simple. That's avoiding and overlooking a complicated issue that lawyers make out there on behalf of their clients, which they decide and make judgments. And it doesn't mean because they decide not to report they're going to try and hide it, that's different. But they may not decide to go voluntarily report.

And what I'm suggesting to you is, these are complicated issues that can vary, and to come out with a very simple, clean rule that's going to apply across the board, which, you know, is a problem in the guidelines anyhow, but I suggest that we ought to be careful, very careful in that direction.

MR. COMEY: I think the argument in

favor would be that many benefits are conferred by the public upon a corporation by allowing us to operate in a corporate forum and all the benefits that come with that.

One of the duties that might serve the public interest that you assign to them is, if you find something wrong, you've got to give it up. I mean, I could see -- all of us are concerned about blanket rules, but I could see someone saying, "That is something we want to encourage as a matter of public policy." So the way we encourage is making wider the spread.

There's already, in a sense, Earl, a punishment for not self-reporting, right, 'cause you don't get the reduction for self-reporting. So all it is is simply, it wouldn't be a change in kind, it would be a change in degree. We simply want to reflect the public's interest in having a stronger incentive to self-report.

MS. O'SULLIVAN: I'm wondering whether it's at all effective or simply an arbitrary

penalty. Because if you look at the statistics for the last ten years of the guidelines' experience, the overwhelming number of corporations plead guilty, about half cooperate, and almost no one self-reports. And apparently that's because self-reporting also potentially entails civil liability, treble damages, shareholder derivative suits, qui tam, debarment, you know, you name it. And so it's potentially too expensive to self-report.

I'm wondering if those two points, in the usual case at least with a large defendant, is going to make any difference; that is, their judgement is still going to be, "We're not go to self-report, given the financial and other consequences of this."

And so just taking on another -- I mean, I'm just wondering if two points are the answer. Is there some other way, for example, a selective privilege waiver might make more sense to give people an incentive to come in, 'cause if

what you're worried about is civil liability and all these potential awful consequences of putting this stuff out there, maybe a selective waiver might be more of an incentive for people to come in and self-report than two more points.

MS. NEIMAN: Can I ask you something? Because we're assuming here that we're dealing with a corporation that's committed a crime, --

MS. O'SULLIVAN: Yeah.

MS. NEIMAN: -- not one that hasn't. And restitution is an objection of the statutory sentencing scheme --

MS. O'SULLIVAN: Right.

MS. NEIMAN: -- and is a big factor in deciding whether to prosecute or not. And frankly, in a big case where there are many victims, if the government doesn't get restitution by either agreement, if they decide not to charge, or by charging, the government isn't doing its job. And here we are talking about doing something to keep from investors and

victims information with a selective privilege.

MS. O'SULLIVAN: Right.

MS. NEIMAN: I don't understand why that's in the public interest. I understand that there may be companies that waive the financial damage and decide they're not going to self-report because they may be prosecuted and they may have to pay huge amounts of restitution.

MS. O'SULLIVAN: I think the response would be that they're not entitled to privilege material anyway. If people want to make a case, the facts are still available to them as are the witnesses and the documents. They just don't get access to the company's own road map for liability. I mean, I'm not agnostic on this, but I think that would be the response.

MS. NEIMAN: If they self-report and they're not -- and it's going to be a selective privilege, it's going to encourage the government to prosecute because the government has an obligation to make sure that the victims are

reimbursed. That is the purpose of sentencing nowadays as well as punishment and deterrence.

MS. O'SULLIVAN: And that's bad.

MS. NEIMAN: And then the government will prosecute, and it doesn't matter if you have a selective waiver because you're going to have to pay the victims anyway. And now you're going to have a judgement, which is enforceable over 20 years, that --

MS. O'SULLIVAN: But the restitution often is just for the extent of the harm, whereas it could be trebled under the Antitrust Statute or other things. Plus you might also get -- you know, you're not just talking about one shareholder derivative suit, you're talking about, you know, all kinds of other stuff, as I understand it, and also business consequences such as debarment and suspension.

MS. NEIMAN: But they'll be collateral estoppel for the victims if you're prosecuted for a crime.

MS. O'SULLIVAN: Uh-huh.

MS. NEIMAN: I'm just pointing out that I'm not sure that this selective [waiver]is in the public interest or is really going to accomplish what you want, --

MS. O'SULLIVAN: Right.

MS. NEIMAN: -- if we're supposed to be making sure the corporation makes full restitution to victims.

MS. O'SULLIVAN: Well, what do you think would? I just was throwing that out as a potential for something that might spur self-reporting more than a two-point penalty. I mean, you all know a lot more than I do. Can you think of anything?

It is shocking when you look at the statistics how few companies self-report in relationship to --

MR. WHITLEY: We should encourage self-reporting. I think it's critical that we do because when I was in government, we couldn't

have an FBI agent behind every tree to see what was going on. And we are prosecuting -- you know, ten percent's the biblical number that's always given -- ten percent of the conduct out there that's wrong. Well, who knows what the actual percentage is. But we've got to find a better way to do it.

I think we should still try to explore encouraging companies to self-report and cooperate. But the only way they will is if they feel like the bottom line will be positively impacted by that decision. And to -- there are real concerns to address of whether these are meritorious or not, but those concerns are that there is a class action bar, a plaintiff's bar, in this country that with some prosecutors has a symbiotic relationship with that office, maybe it's a State Attorney General or maybe it's a state prosecutor or maybe it's someone else, but where information, you know, is actually fed to those people engaged in that litigation, and it

is a real problem. And we have to decide, you know, what's more important in our country, our economy, the vibrancy of our economy, companies being able to do what they need to do to make money without spending 90 percent of their day worrying about, "Have we complied, you know, absolutely with the law in all circumstances?"

I think that, you know, we're sort of reversing field to some extent, and we ought to really be encouraging them to self-report. And when they come to see Jim Comey in the Southern District, when they self-report, if they haven't dotted all the "I"s and crossed all the "Ts" of the XYZ Agreement or whatever it might be, I just think that there ought to be more case then not increasingly where they're not prosecuted. If they pay fines, they pay huge civil fines to the U.S. Attorneys' Office or the Department of Justice, that's one thing. I just think that the indictment of a corporation is the death warrant of that corporation to wit Anderson, to wit any

other corporation that's going to be indicted. It's the death warrant for that corporation, regardless of what happens later.

MR. SPRATLING: Julie, I don't think my --

MS. O'SULLIVAN: Well, you know, there may be low statistics on self-reporting simply because you guys don't prosecute the people who self-report. That might be it, I don't know.

MR. SPRATLING: I think that's part of it. My opinion on the plus two is suggested by Department of Justice as something for the group to consider is very positive. I think that because the difference I think that you're looking for, you're trying to encourage self-reporting, so the difference is not the difference between minus two for cooperation and minus five, which is the difference of three.

MS. O'SULLIVAN: Right, uh-huh.

MR. SPRATLING: If you had a plus two, you'd say, "Well, gee. Well, the difference is a

difference of five or seven." That's still not the difference. That's still not the difference.

The difference you have to look at is the analysis that every company goes through before they go self-report. If I self-report, I've got a chance for zero, not minus three, not minus five, but zero dollars versus the alternative. And if the alternative is where I normally end up in the guidelines plus two points -- in an antitrust case, that's plus 50 million bucks. I mean, it's a big difference.

So I think -- and who knows how much it would increase, but I think it's a positive effect, and I think as a policy matter -- the first I heard about was today -- but as a policy matter I think it's very positive in terms of encourage self-reporting.

MR. COMEY: All of you represent companies now, from my brief stint, I remember it well. The other key element to that matrix is chances of getting caught. You know, do we kick

the sleeping dog or are we going to get away with this? And maybe one of the things that some people call frenzy, I call it the excitement of the last year is that it has increased the perception that people get caught.

You know, 'cause part of our hope is that people do, Joe, see in their mind's eye an FBI guy's behind every tree. And maybe that will lead to more self-reporting. I don't know.

MR. HOLDER: Well, let me play devil's advocate. I mean, given the fact that you have all these civil derivative things that people are worried about, what about the DOJ perspective -- and this is, again, I'm just playing devil's advocate 'cause I only heard about this this morning. Instead of adding a plus two making it -- taking a negative or giving two more levels of credit if you decide to cooperate as opposed to penalizing if you decide not to voluntarily disclosure?

MR. SPRATLING: If you do that, Eric,

you lose the distinction I'm talking about. Because what you want to do is you want an aggregation of what the -- you're trying to make the difference between zero and effect greater, not the difference between the subtraction, because really people aren't looking at that when they self-report. I mean, they're not looking at that minus sign. That's not what causes people to come in. They're trying to get the big prize and they're comparing the big prize to what would be there otherwise, which would not -- and the otherwise would not include a self-reporting reduction.

I'm going to, if it's all right, wind up the public hearing by reminding everybody that given the comments that we've had today, if any of you would like to add anything or if the Department wants to add anything in terms of a short statement. I mean, I can imagine you saying, you know, "We don't think anything should be changed. But if it is changed, for heaven's

sakes don't do what is in this proposal, do something slightly difficult."

Or I can imagine the ABA saying, "Well, if you're not going to go that far, maybe you want to do something close to it or" --

Remember that the deadline for our consideration of that is December 1st. And anybody else here who wants to add any comments, December 1st.

And with having said that comment, thank you all very much for coming and a very informed discussion. Jim and Earl and Don and Joe. And, Shirah, thank you very much for joining as well. You've got a ton of experience in this area, as we all know. And so it's been very instructive.

Let's thank the panel.

(Applause.)

(Breakout Session adjourned 3:50 p.m.)