

Criminalization of Corporate Law

David Anders

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Criminalization of Corporate Law¹

THANK YOU VERY MUCH FOR THE GRACIOUS INTRODUCTION. I appreciate the opportunity to come speak to you today to give you my thoughts about the prosecution of corporate fraud cases.

In 2002, I ended up in the middle of a wave of corporate fraud prosecutions. In particular, I was involved in the WorldCom prosecution from the beginning of the

* Mr. Anders is Counsel at Wachtell, Lipton, Rosen, & Katz. Prior to entering private practice, Mr. Anders was an Assistant United States Attorney in the Southern District of New York. Mr. Anders has also served as an Adjunct Associate Professor at the Fordham University School of Law. © David Anders 2007.

1. These remarks were made at the University of Maryland School of Law's Roundtable on the Criminalization of Corporate Law over a year ago, in April 2006. Since that time, the criminal enforcement landscape has evolved considerably. While there are still significant incentives for companies to cooperate with government prosecutors, 2006 saw the beginning of a push-back against what have come to be seen as overly aggressive government enforcement policies and practices. In June, in the *United States v. Stein* case, Judge Kaplan in the Southern District of New York held that the Thompson Memo's provision on advancing counsel fees, and the actions of the U.S. Attorney's Office in implementing those provisions, violated Fifth and Sixth Amendment rights of the defendants. 435 F. Supp. 2d 330 (S.D.N.Y. 2006). A month later, the Judge also found that the proffer statements of two former KPMG employees had been obtained in violation of their Fifth Amendment right against self incrimination due to KPMG's use of economic threats, deliberately precipitated by the government to coerce the proffer statements in question. *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

On December 12, 2006, in a memo from Deputy Attorney General Paul McNulty, the Department of Justice issued new guidance on the prosecution of corporations that superseded the Thompson Memo. The new policy continues to require prosecutors to consider a corporation's voluntary disclosure and willingness to cooperate in determining whether to seek an indictment. However, the policy states that corporate waiver of privilege is not a prerequisite to a finding that a company has cooperated. Moreover, the McNulty Memo restricts government requests for such waivers to those cases where there is a "legitimate need" for the privileged information, not simply because it is desirable or convenient for prosecutors. With respect to advancement of fees, the policy essentially codifies the decision in *United States v. Stein* and states that prosecutors should not take into account whether a company is advancing attorney's fees to its employees or agents.

In addition, there is federal legislation pending—the Attorney-Client Privilege Protection Act of 2007—that, if passed, would prohibit federal prosecutors and civil enforcement lawyers from requesting that corporations produce any privileged communications. The legislation would also bar federal prosecutors from considering a corporation's decision to waive privilege or advance fees to employees in determining whether to bring criminal charges.

Although the landscape has changed, corporations are still under great pressure to cooperate with government prosecutors and to waive privilege. Indeed, the McNulty Memo specifically provides that prosecutors may always "favorably consider" a corporation's agreement to waive privilege in response to the government's request. Moreover, nothing in the past year has changed the fundamental principle that companies will be liable, in virtually all cases, for criminal misconduct by their employees. Accordingly, prosecutors will continue to have significant leverage over corporations, and corporations will, in turn, continue to have great incentives to be cooperative.

investigation when the scandal broke in June of 2002 until the government resolved the investigation of the company in September of 2005. As you might imagine, a lot happened during that time.

While it was tempting, given the topic of the symposium, simply to just tell war stories about everything that happened during that process, that is really not appropriate, as the appeal of Ebbers' conviction is still pending.² So I am going to talk generally about corporate fraud prosecutions from the perspective of a former prosecutor. In particular, I am going to focus on the role that the corporate entity plays in a corporate fraud prosecution. That topic will let me talk about the entire scope of a corporate fraud prosecution from beginning to end, because, as you will see, the corporate entity itself plays a role in every step of a corporate fraud prosecution. And whether the company really intends it or not, in the government's view, the ultimate purpose of its role is to help the government convict its former employees. There is a role in this process for the defense attorneys who represent corporations and I will mention that briefly. I will conclude with a few words on what I think about the future of these cases.

Now, in many ways, a corporate fraud prosecution is really like any other case. Prosecutors find out about a potential crime, and they gather evidence, look at documents, talk to witnesses, and then make charging decisions. If they charge somebody, then either there is a guilty plea or there is a trial, and if there is a conviction, there is a sentencing.

What makes a corporate fraud prosecution a little bit different is that, in virtually every one of those stages, the corporate entity plays an important role in helping the government. That may sound a little bit counterintuitive: Why should a company help the government prove that its current or former employees committed a crime? The answer is that the company's own fate often rests on how much it helps the government.

The name of the game in corporate fraud prosecutions now is cooperation. Companies want to be viewed as good corporate citizens and being a good corporate citizen means helping the government.

This is a relatively new phenomenon. In the early 90's, this idea of corporate cooperation first took hold. It was through such cases as the prosecutions of Ivan Boesky³ and Michael Milken⁴ and some of the spin-offs of those cases, that the idea of corporate cooperation began to develop. Prosecutors at my old office in the Southern District of New York were able to get cooperation from the financial

2. Since the date of this speech, the United States Court of Appeals for the Second Circuit affirmed Ebbers' conviction and twenty-five year prison sentence. *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006), cert. denied, 127 S. Ct. 1438 (2007).

3. See Tim Metz & Michael W. Miller, *Widening Scandal on Wall Street: Boesky's Rise and Fall Illustrates a Compulsion to Profit by Getting Inside Track on Market*, WALL ST. J., Nov. 17, 1986, at 28.

4. See James B. Stewart, *Scenes from a Scandal: The Secret World of Michael Milken and Ivan Boesky*, WALL ST. J., Oct. 2, 1991, at B1.

institutions that those and other people worked for, and those various financial institutions strove to provide evidence to the government. The government obviously was happy to receive that evidence, and as a result was able to bring many more cases. It was in that early to mid-90's period that this whole notion of corporate cooperation really became prevalent.

By now, the notion of corporate cooperation is firmly entrenched in our system. In fact, it is part of Department of Justice policy. The document that I am referring to, and many of you may be familiar with this, is called the Principles of Federal Prosecution of Business Organizations,⁵ but it is more commonly known as the Thompson Memo.⁶ It is an exceedingly important document.

When it comes to corporate cooperation, I will refer to the Thompson Memo repeatedly. The memo is named for Larry Thompson who was the Deputy Attorney General when this particular document was created in 2003. Actually, it was just an update of the prior version of this policy, which was called the Holder memo, for Eric Holder who was the Deputy Attorney General in 1999 when it was created.

The Thompson Memo contains all the factors that prosecutors look at in determining whether to prosecute a corporation for the crimes of its employees.⁷ And one of the most significant factors in practice, and certainly the one that gets the most attention, is corporate cooperation.⁸

So what does that term mean, "cooperation?" Well, the best way to describe it is to walk through the steps of a corporate fraud prosecution so you can see all the ways that corporations can, and often do, cooperate with the government.

A company's efforts to cooperate may start even before prosecutors know about potential wrongdoing. Many corporate investigations begin with the company self-reporting the violation. Now, it is important to think about the significance of this. When a company, through its lawyers, walks into a prosecutor's office and explains that its own mid-level employee has committed a crime, the company is in effect confessing to itself committing a crime. There is strict respondeat superior liability for a company for the acts of its employees that are done in the course of their business.

When a company reports to the government that its employee did something wrong, it is confessing to its own liability. Yet companies do this all the time because they have learned that it is almost always better for the company to report the

5. Memorandum from Larry D. Thompson, Deputy Attorney Gen. to Heads of Dep't. Components, U.S. Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].

6. See Sean R. Berry, *Revised Principles of Federal Prosecutions of Business Organizations: An Overview*, U.S. ATTORNEYS' BULLETIN (U.S. Dep't. of Justice, Executive Office for U.S. Attorneys, Office of Legal Educ.), Nov. 2003, at 5-9, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf.

7. Thompson Memo, *supra* note 5, at § II.

8. *Id.* at § VI.

wrongdoing itself rather than for the government to find out about it some other way.

In fact, this notion of self-reporting is contained right in the Thompson Memo itself. The Thompson Memo talks about whether a company timely and voluntarily disclosed wrongdoing.⁹ Whether a company self-reported the violation is one of the factors that the government will look at in deciding ultimately whether the company itself should be charged criminally.¹⁰ So right from the very beginning of the process, companies know that if there is a problem, they need to bring it to the government's attention.

Once that happens and the company has alerted the government to a possible criminal act, a government investigation typically begins. There are a whole host of ways that companies cooperate with the government in the course of investigations. Many of those ways are described specifically in the Thompson Memo, and some of them are the subject of significant controversy these days.¹¹

Now, in any corporate fraud, or really any fraud investigation, there are two basic components to the investigation. There are the documents and there are the witnesses. And companies have roles in cooperating in connection with both of these components of an investigation.

First, the documents. This aspect of cooperation is not really controversial but it is, in fact, probably the aspect of cooperation that most disrupts a company's day-to-day business. Companies, particularly today, with electronic documents and electronic discovery, face huge hurdles in gathering all potentially relevant documents in a corporate fraud investigation. Companies have to freeze normal document retention policies; save backup tapes from computer servers; and restore old e-mails.¹² And then there is the old-fashioned way of collecting documents: going from office to office and collecting hard copy documents, which are just as important in many cases. In a corporate fraud investigation, this process could involve anywhere from a handful to tens or hundreds of employees.

Now, the process of gathering documents by itself is not unique to a corporate fraud investigation. In any litigation, a company is responsible for preserving documents and then producing them, say, to an adversary in civil litigation. But there are some important differences between producing documents in a civil case versus producing documents as part of a criminal investigation.

First, the consequences of making a mistake are much different. When I say making a mistake, I am not referring to a willful act, such as destroying documents—that conduct has criminal consequences no matter what the underlying

9. *Id.*

10. *Id.*

11. See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1170–84 (2006).

12. See Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171 (2006).

case is about. Let us think about a company that just does not do a particularly good job in preserving and producing documents. Well, the ramifications of that in a civil case could be nothing or there could be certain disadvantages to the company in the civil proceedings. The worst-case scenario that we have heard of recently is the case involving Ron Perelman's lawsuit against Morgan Stanley down in Florida.¹³ There, the court, in essence, directed a verdict against Morgan Stanley.¹⁴ I do not have any personal knowledge of the relevant facts, but, based on public reports, the document collection process was a debacle. As a result, Morgan Stanley lost the case and owed a lot of money.¹⁵

In a criminal investigation, making mistakes of the magnitude that Morgan Stanley reportedly made can have even worse ramifications. Prosecutors judge the way that the documents are produced, and the effort that is put in by the company in gathering documents. And mistakes, even inadvertent mistakes, sloppy types of mistakes, as what reportedly happened in the Morgan Stanley case, can anger prosecutors, lose the company cooperation credit, and take a company that much further down the road toward being charged criminally.

So the consequences can be much greater in the criminal investigation. At least in my experience, that is often why companies go to great lengths in the document collection process in responding to subpoenas. I think it is safe to say that is not the same attitude companies take in a civil litigation.

A second difference is the way that the documents are produced. In civil litigation, there are rules and companies produce the documents in a form prescribed by those rules. Typically, no extra steps are taken in a regular civil case in producing documents. By contrast, in criminal cases, companies often go above and beyond what is required when producing documents. When I was a prosecutor, I often was thoroughly impressed by how documents were physically produced: binders, chronological order, by witness, by whatever the prosecutor wants. In fact, often companies exceeded my expectations by thinking of different ways to format the documents to reduce my burden. Frankly, that effort worked, as it showed that the company was really cooperating, really trying to help the government. That is obviously a big difference from a civil case. I am pretty sure you will not see a party in a civil case trying to impress its adversary by making the production of documents more helpful than is required. So that is a second difference.

A third major difference that comes to mind is obviously a consequence of the first two differences, and that is money. In a civil litigation, companies try to keep

13. See Susanne Craig, *Moving the Market: Perelman to Press Morgan Stanley*, WALL ST. J., Nov. 3, 2005, at C3.

14. See Susanne Craig, *Perelman Wins Punitive Award of \$850 Million*, WALL ST. J., May 19, 2005, at C1.

15. *Id.* Ultimately, however, Morgan Stanley did not have to pay the judgment. On appeal, the Florida District Court of Appeal remanded the case with directions to enter judgment for the investment bank and reversed both the compensatory and punitive damage awards. *Morgan Stanley & Co, Inc. v. Coleman (Parent) Holdings Inc.*, 32 Fla. L. Weekly D773 (Fla. Dist. Ct. App. 2007).

the costs of document production down, or at least pay attention to it. In a criminal case, cost cannot prevent the company from producing documents that the government requests. Companies sometimes need to pay whatever it costs to gather documents and produce them in the form that the government requires, hoping that, at the end of the day, it is money well spent because it helped avoid a criminal charge.

I was just asking a colleague about how much it costs companies to produce documents. My colleague reported that he was aware of a case where a company paid \$10 million to produce documents to the SEC. That sounds like a lot of money because it is a lot of money. And yet, that is the mentality of some companies when it comes to producing documents in connection with a criminal or a regulatory investigation under the Thompson Memo regime. It does not matter what it costs, just cooperate and make the government happy.

In a corporate fraud investigation, almost all the relevant documents come from the company. That fact leads to an interesting question: Who is actually doing the investigation? It is rare that government agents will go into the corporate offices and find the documents themselves. Often, in large, document-intensive cases, all the documents come from the company through collections from its own employees, obviously in consultation with the government about search terms and other methods of collecting relevant documents. But at the end of the day, it is the company's lawyers who get the documents first, and then turn the documents over to the government. Those are the documents that end up being used in the case. It is an interesting dynamic to think about when, years later, a former employee is a defendant in a criminal case and the evidence being used against him was marshaled by the company's lawyers. Yet that just all fits into this notion of corporate cooperation, and how the process works.

The other basic aspect of an investigation involves interviewing witnesses. There are a lot of significant issues that arise when the government deals with corporate entities in the course of interviewing witnesses during an investigation. These are the areas that are the subject of the most controversy. I could probably speak about any single one of those issues for far longer than we have this morning, so I will just really touch on some of the issues.

One issue is what to do about current employees. To be viewed as cooperative under the Thompson Memo, companies essentially need to require all of their current employees to submit to an interview with government investigators. If an employee refuses to submit to an interview, the government expects some sanction to happen to that employee. That rarely happens. I never had a case as a prosecutor where a current employee refused to speak to the government.

It is an interesting question what happens when an employee is pressured by the company to speak with government investigators. Obviously, there are Fifth

Amendment¹⁶ issues, not to mention the ramifications of just submitting to an interview with the government. If a person lies in an interview with the government, that is a crime in and of itself; the person does not need to be under oath, the person does not need to be in a grand jury. Lying to a prosecutor or an FBI agent is a crime by itself, and you have Martha Stewart as perhaps the most famous example of that fact.¹⁷

A separate issue involves the representation of employees. Company counsel generally would prefer to represent as many employees as they can so they can remain aware of what is being said to the government, but often there is a conflict of interest involved in such multiple representations. Indeed, the whole premise of my talk this morning demonstrates that there can be a conflict between the interests of the company and the interests of an individual employee who is a potential wrongdoer. On the one hand, you have a company trying to uncover fraud for the government and, on the other hand, you have an individual employee who perhaps is the subject of an investigation and who, needless to say, does not want the government to uncover any criminal acts.

Often several individuals at a company will need to get their own counsel. The question obviously arises: who is going to pay for those lawyers? Individuals cannot generally afford the sort of legal defense that is required in a big corporate fraud investigation. For example, all the documents that I discussed earlier need to be reviewed and that takes a lot of work. Often, companies agree to advance legal fees for their employees, at least until a time when an employee is convicted of, or at least charged with, a crime.

But, under the Thompson Memo, many government prosecutors discourage companies from advancing legal fees to their employees who the government views as wrongdoers.¹⁸ Obviously, that is a significant hindrance to an individual's defense. This issue is the subject of particular controversy and it is particularly timely because in the KPMG tax fraud case,¹⁹ which is pending in the Southern District of New York. The judge in that case, Judge Lewis Kaplan, just ordered a hearing, which is going to be held on May 8. This very issue is the subject of the hearing. The defense has raised claims that their defense had been hindered because the government basically pressured KPMG into cutting off legal fees for the individual defendants and that infringed on their right to counsel.²⁰ And the judge has ordered a hearing which, as far as I can tell, is really a hearing on the Thompson Memo itself.²¹

16. U.S. CONST. amend. V.

17. See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006).

18. See Thompson Memo, *supra* note 5, at § VI.

19. See Kara Scannell, *KPMG Apologizes to Avert Charges*, WALL ST. J., June 17, 2005, at A3.

20. Paul Davies, *KPMG Case Sets Up Key Ruling on Legal Fees*, WALL ST. J., June 5, 2006, at C1.

21. See *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

Perhaps the biggest issue related to witnesses and corporate cooperation is the issue of the attorney-client privilege. In many, if not all, corporate fraud cases, at a very early stage, a lawyer for the company will interview some of the main players. Often a company's general counsel will rush over to an executive and ask what happened, or if outside counsel is brought in, they will quickly interview some of the main players to determine what happened. Those conversations are all privileged—but it is a privilege that belongs to the company, not to the individual.²² And inevitably, somewhere down the line in the investigation, the government will ask what happened in that interview. The government will often request to see a copy of the interview memo that was generated from that initial interview with company employees. Perhaps the subject of the interview is someone the government cannot talk to now because the person has invoked his Fifth Amendment rights. So the government will say to the company: "Well, he spoke to the general counsel the day the scandal was breaking, can we see that memo?" That request puts the company in a very difficult position. In most jurisdictions, to produce that memo would waive the company's privilege.

For the reasons I have described, companies want to help the government—they want to be viewed as cooperative. In a situation like this, therefore, the company may want to accede to the government's request for interview memos. But the company will certainly want to preserve its attorney-client privilege. One common step is to enter into a confidentiality agreement in an attempt to preserve the privilege while cooperating with the government. Those agreements essentially provide that the company will produce privileged materials to the government, but it is not doing so because it wants to waive the privilege, but only because the government is asking for privileged documents.

Courts are split as to whether those agreements, in fact, preserve the privilege.²³ There are many courts which essentially say, "too bad." The government is not a party within the realm of the attorney-client privilege, so as soon as the company produced privileged documents to the government, it waived the privilege. That fact has significant ramifications, obviously, for the company, in particular when the inevitable civil lawsuits follow, and the privilege has been waived.

The issue of government-forced waivers is probably the biggest hot button issue right now because of what has been viewed as an assault by the government on the attorney-client privilege. There were hearings in March of this year before a Congressional committee on this topic where a coalition of defense counsel explained

22. See, e.g., *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 876 (Ariz. 1993).

23. Compare, e.g., *In re Cardinal Health*, No. C2 04 575 ALM, 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007), and *In re Nat. Gas Commodities Litig.*, 232 F.R.D. 208 (S.D.N.Y. 2005) (both preserving privilege), with *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006), *cert. den.*, 127 S.Ct. 584 (2006), and *United States v. Reyes*, No. CR 06-0556 CRB, 2006 U.S. Dist. LEXIS 94457 (N.D. Cal. Dec. 22, 2006) (both finding waiver).

the problems—the obvious problems—with putting corporations in a position where they have to waive the privilege.²⁴

Just a couple of weeks ago, the United States Sentencing Commission voted to delete commentary from the Sentencing Guidelines that dealt with the waiver of attorney-client privilege when evaluating a company's cooperation for sentencing purposes.²⁵ That step was definitely viewed as a victory for those who are defenders of the privilege.²⁶ Yet there is only so much to be made of that event because, obviously, companies do not ever want to get to the point where they are subject to the Sentencing Guidelines because once a company is there it has already been convicted of a crime, and all the other ramifications that can occur often have already happened. The idea behind cooperation is not to be charged at all. What governs whether a company is charged is the Thompson Memo, and, at least for now, the Thompson Memo still requires companies in some cases to waive the privilege to be viewed as completely cooperative. As long as that is the case, then companies are going to be under pressure in certain circumstances to waive the privilege.

The next step in the process of a corporate fraud investigation is the charging decision. That is one place where the company does not have any role to play, but that does not mean that the company's role in the process or its requirement to cooperate is over. Certainly, recent history has shown that a lot of these cases go to trial. I had the good fortune of participating in three high profile corporate fraud trials. I was one of the prosecutors for the two previous trials of Frank Quattrone,²⁷ and I was one of the prosecutors in the trial of Bernard Ebbers, the former CEO of WorldCom.²⁸ As you might imagine, those trials were a lot of work and there were a lot of issues that arose during trial. In general, a company's obligation under the Thompson Memo to cooperate continues right through trial, and it continues in much the same way that cooperation is required in the investigation stage.

With regard to witnesses, it is usually company counsel who helps coordinate and accompany witnesses up to the prosecutor's office for a witness preparation. With respect to documents, as you might imagine in a trial, things come up quickly and prosecutors often need a document in a rush. Often, the easiest way to get a particular document is to call the company's lawyers who usually have ready access

24. *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers*, Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (2006), available at <http://judiciary.house.gov/media/pdfs/printers/109th/26409.pdf>.

25. Adele Nicholas, *Reviving Privilege: Corporate Counsel Reignite the Debate Over Privilege as Sentencing Commission Revises Rules*, *INSIDE COUNSEL*, June 2006, at 18.

26. See Marcia Coyle & John Caher, *Commission Votes to Delete Waiver Comments*, *N.Y.L.J.*, April 12, 2006, at 1 (discussing the U.S. Sentencing Commission's vote to delete language from the sentencing guidelines with respect to attorney-client privilege waivers).

27. See *United States v. Quattrone*, 441 F.3d 153, 160 (2d Cir. 2006); *United States v. Quattrone*, 402 F.3d 304, 306 (2d Cir. 2005).

28. See *United States v. Ebbers*, 458 F.3d 110, 112 (2d Cir. 2006).

to all of the documents. After one phone call, prosecutors have the document that they are looking for. Quite literally, companies do this to help the government convict their former employees and companies do it without any hesitation because, at the end of the day, their willingness to help the government will affect their own fate.

In some cases, the company's involvement in the prosecution even extends beyond the trial. It can extend to the financial components of sentencing individuals. This does not happen as often but, in fact, it happened in the WorldCom case. Because all this information is public, I can use WorldCom as an example of how a corporation, in the spirit of cooperation, can get involved in the sentencing of an individual defendant. After Mr. Ebbers was convicted of crimes, he owed restitution as part of his sentence.²⁹ He had also been named as a defendant in a massive class action lawsuit, which was also pending in the Southern District of New York.³⁰ What made this case complicated, but also presented an opportunity, was the debt that Mr. Ebbers owed WorldCom. Mr. Ebbers had borrowed hundreds of millions of dollars from WorldCom and now owed that money back.³¹ WorldCom had a priority interest over some of Mr. Ebbers' most valuable assets.³² The government's goal was to get the assets from Ebbers to the victims of the fraud.³³ The government succeeded in doing that, in part by bypassing WorldCom's priority interest and getting most of the money to the victims. The ability to do this existed because of the government's ongoing investigation of the corporate entity. The corporate entity, even at that time, had not had its own fate resolved. Speaking from my perspective at the time as the prosecutor, it seemed that, because there was still the possibility of a criminal prosecution of the entity, the company was willing essentially to give up its right to some of Mr. Ebbers' assets in the name of getting more cooperation credit with the government. In effect, it worked because, at the end of the day, WorldCom and the government entered into a non-prosecution agreement, which meant no criminal charges would be filed.³⁴ There was certainly a time when many claimed that, if there was ever a case crying out for criminal charges against an entity, WorldCom was that entity. Yet in the end, in part through its efforts to cooperate, it did not get charged.

29. See Gretchen Morgenson, *Ebbers Set to Shed His Assets*, N.Y. TIMES, July 1, 2005, at C1 (discussing the reparations deal between former WorldCom CEO Ebbers and U.S. Attorney for the Southern District of New York).

30. *In re Worldcom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 636 (S.D.N.Y. 2004).

31. *Times Wire Services, Markets; J.P. Morgan to Pay \$2 Billion in Settlement*, L.A. TIMES, March 17, 2005, at C4.

32. See Christopher Stern, *Worldcom Pursuing Ebbers Assets for Sale*, WASH. POST, Dec. 12, 2002, at E1.

33. See Bloomberg News, *An Appeals Court is Urged to Uphold Ebbers Conviction*, N.Y. TIMES, Nov. 12, 2005, at C3.

34. See Press Release, U.S. Attorney's Office, S.D.N.Y., U.S. Enters Non-Prosecution Agreement with MCI (Sept. 1, 2005), available at <http://www.usdoj.gov/usao/nys/pressreleases/September05/mcisettlementpr.pdf>.

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In fact, in fraud cases, corporations today are rarely charged for crimes themselves. I think a primary reason for this fact is the enormous collateral consequences that come from charging a corporate entity. Arthur Andersen is the leading example of what can happen to a large company when the government brings criminal charges against an entity and the effect that those charges can have on completely innocent employees of a company who essentially lose their jobs.

Fundamentally, though, the government can look at the collateral consequences and make decisions about whether to charge a company based largely on that important factor because cooperation is really not an issue anymore. Companies simply know what is expected of them when there is a criminal investigation. It is almost not an issue; companies understand when there is an investigation that the government expects them to cooperate completely and fully throughout the course of that investigation.

As I have described the role of the corporate entity in corporate fraud prosecutions, I've done so from the perspective of the prosecutor. And in particular, I've described situations where the facts are fairly black and white—cases such as *WorldCom*, where there really was not much serious debate about whether a fraud had occurred that involved high level executives at the company. In cases like those, there is only so much that the lawyers for the corporation can do. Their job is basically to assist the company in portraying itself as a cooperative corporate entity and to advocate that the government exercise its discretion not to bring criminal charges against the company.

Of course, there are many situations—perhaps most situations—where the facts and the law are not so clear and where it is not at all apparent that anyone has committed a crime. It is in those situations where the attorneys for the company may play a much more active role. Cooperation in the government's investigation can still be important and useful to the company. For instance, cooperation in complying with a subpoena or arranging witness interviews can prevent unwanted disruption of the company's business. But in these more subtle cases, the attorneys for the company may also play a substantial role in persuading the government that, for example, no crime was committed at all, or that high level employees were neither involved nor aware of the actions of lower level employees. As I've learned since leaving the government and joining the defense bar, there is a particular skill in simultaneously cooperating with the government and advocating for a particular result.

I will give you just a few words on the future of where I think this is going and whether corporate fraud prosecutions, and particularly the whole notion of corporate cooperation, is going to continue. I think the short answer is "yes" to both questions. There certainly are going to be more corporate crimes. I do not think there is any secret about that. It is not as if this is a new phenomenon. The really

big cases, such as *WorldCom*³⁵ and *Enron*,³⁶ obviously, stood out for their size, but crimes are going to happen.

In my experience, I have seen different types of securities fraud crimes as the economy changes. When the economy is doing well, I have seen the types of crimes that prey on gullible investors—boiler room cases, private placement frauds, IPO related crimes. Insider trading seems to be a popular crime when the markets are high. When the economy is down, I have seen accounting fraud crimes. There is pressure for companies to meet their numbers to keep Wall Street happy, and, in down economic times, companies often cannot do that. So that is when I saw accounting fraud crimes. That is precisely what happened in *WorldCom*, and that is probably what happened in *Enron* as well. *WorldCom* is an easy example. It could not meet Wall Street's expectations, so the participants in the fraud simply reported lower expenses by altering the company's financial records, all in an effort to try to fool the market and wait for the next economic cycle to come around.³⁷ So corporate crimes are going to happen, and prosecutors will always investigate those crimes.

Will corporate cooperation almost always be part of these cases? I think the answer is going to be yes. I would not be surprised to see some changes in the way the system works. As I mentioned, there are some areas of particular controversy. I think requiring attorney-client privilege waivers could certainly change. I think the issue about fees is particularly controversial and certainly could change.

But, as a general matter, the government is going to consider a company's cooperation in making charging decisions and so companies are going to cooperate. If we have learned anything from the last four years, it is that the government has had a lot of success. With a couple of exceptions, just about all the major corporate fraud cases have resulted in convictions. It is important to talk about the few high profile cases where there were not convictions. The *HealthSouth* case³⁸ comes to mind. Yes, there was one high-profile acquittal. However, look at that case from an overall perspective—fourteen people pled guilty in that case and those are convictions.³⁹

So there has been success in prosecuting these cases criminally and there has been success financially. I saw a statistic recently—in 2005, the government col-

35. See Dionne Searcey et al., *Ebbers is Sentenced to 25 Years for \$11 Billion Worldcom Fraud*, WALL ST. J., July 14, 2005, at A1.

36. See generally Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221 (2004).

37. Associated Press, *Ex-Worldcom Accountant Says She Was Told to Falsify Entries*, N.Y. TIMES, Feb. 3, 2005, at C14.

38. See SEC v. HealthSouth Corp., 261 F. Supp. 2d 1298 (N.D. Ala. 2003).

39. See Kyle Whitmire, *Executive Gets 5-Year Term in Fraud Case*, N.Y. TIMES, Dec. 10, 2005, at C13.

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lected over a billion dollars in settlements and judgments in civil fraud cases.⁴⁰ That is a success.

There were big problems in 2002 as all these scandals were unfolding. I think the purpose behind creating the Corporate Fraud Task Force and the focus on corporate fraud cases was to restore confidence in the markets, and I think ultimately that has happened a little bit. Perhaps the focus and pressure on companies in this pursuit of corporate fraud cases has become a bit too intense and maybe there will be some changes in some of the procedures the government follows in these cases. But I think we will see these cases for the foreseeable future.

40. See Press Release, Dept. of Justice, Justice Department Recovers \$1.4 Billion in Fraud & False Claims in Fiscal Year 2005; More than \$15 Billion Since 1986 (Nov. 7, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/November/05_civ_595.html.