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"The Department of Justice's Guidelines for the Prosecution of Business Organizations and Related Issues"

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I. DEPARTMENT OF JUSTICE GUIDELINES FOR THE PROSECUTION OF BUSINESS ORGANIZATIONS

a. Principles of Federal Prosecution of Business Organizations[2] (2003) –

i. In General – In 1999, Deputy Attorney General Eric Holder issued a set of guidelines that, according to the guidelines, "should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case." *See* Memorandum from Deputy Attorney General Holder to All Component Heads and United States' Attorneys, dated June 16, 1999, and attached Guidelines for Federal Prosecution of Corporations (hereinafter the "Holder Memo"). Recently, the DOJ issued revised "Principles of Federal Prosecution of Business Organizations." *See* Memorandum from Larry D. Thompson to Heads of Department Components and United States Attorneys, dated January 20, 2003, and attached Principles of Federal Prosecution of Business Organizations (hereinafter the "Thompson Memo" or "DOJ Principles").

ii. "Public Benefits" of Charging a Corporation – In making a decision to charge a corporate entity, federal prosecutors are directed by the Thompson Memo to "be aware of the important public benefits that may flow from indicting a corporation in appropriate cases." Thompson Memo at 2. These possible public benefits include the following: (i) "where criminal conduct is pervasive throughout a particular industry," the indictment of one corporation may lead to remedial steps by other

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[2] The Holder Memorandum referred only to guidelines for the prosecution of "corporations." The Thompson Memo clarifies that the revised DOJ principles "apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations." Thompson Memo at 1, n.1.

corporations, thus providing the "opportunity for deterrence on a massive scale"; (ii) an "indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees"; and (iii) indictment of a corporation has the benefit of ending criminal violations that "carry with them a substantial risk of great public harm."[3] Thompson Memo at 2.

iii. Factors to Be Considered – The Thompson Memo includes nine[4] factors that are intended to guide prosecutors in "conducting an investigation, determining whether to bring charges, and negotiating plea agreements." Thompson Memo at 3. The Thompson Memo makes clear that proper application of the factors will depend significantly on the facts of the case. Indeed, the Thompson Memo notes that the nine factors are "intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others." Thompson Memo at 4. The nine factors are:

1. Nature and Seriousness of Offense – The Thompson Memo states that "the nature and seriousness of the crime, including the risk of harm to the public from criminal conduct, are obviously primary factors in determining whether to charge a corporation." *Id*. There is no extended discussion of this factor found in the Holder Memo or the Thompson Memo.

2. Pervasiveness of Wrongdoing – No matter how minor the misconduct, corporations may be held vicariously criminally liable for acts of their employees performed within the scope of the employees' duties and animated, at least in part, by a desire to aid the corporation. *See*, *e.g.*, *United States* v. *Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); Thompson Memo at 1-2. The DOJ Principles aver that it sometimes may be appropriate to charge a corporation "for even minor misconduct" where the conduct was "undertaken by a large number of employees." Thompson Memo at 5. On the other hand, the Memo acknowledges – albeit rather grudgingly – that "in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for a single isolated act of a rogue employee." *Id*.

[3] In announcing the indictment of Arthur Andersen, LLP, for example, Deputy Attorney General Thompson explained that the indictment was brought for the purpose of "upholding the standards of the accounting profession on which hundreds of investors rely." Nicholas Kulish and John R. Wilke, "Indictment Puts Andersen's Fate on Line," Wall St. J. Mar. 16, 2002.

[4] As discussed below, the Thompson Memo includes an additional factor beyond those included in the Holder Memo. This additional factor permits prosecutors to consider "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance."

In assessing the pervasiveness of the alleged wrongdoing, the Memo urges that special attention be paid to the role, if any, that management and the "corporate culture" played in the alleged wrongdoing. *Id*. at 5. In charging Arthur Andersen, for instance, Deputy Attorney General Thompson averred that the alleged obstruction of justice effort at Andersen "was not just confined to a few isolated individuals. This was a substantial undertaking over an extended period of time with a very wide scope. The Andersen firm instructed Andersen [offices] in Portland, Oregon, Chicago, Illinois, and London England to join in the shredding." Transcript of DOJ News Conference, held March 14, 2002.[5]

3. The Corporation's Past History – The Thompson Memo provides that "[a] history of similar [misconduct] may be probative of a corporate culture that encouraged or at least condoned such conduct regardless of any compliance programs. Criminal prosecution may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and yet it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it." In announcing the Andersen indictment, Deputy Thompson stated that one factor that led to the indictment was the "firm's history of wrongdoing." Transcript of DOJ News Conference at ¶ 10. In presenting the criminal case against Andersen, moreover, prosecutors cited instances of alleged past misconduct by Andersen, including conduct in connection with audits of Waste Management, Inc. and the Cendant Corporation. *See* Jonathan Weill, Alexei Barrioneuve and Cassell Bryan-Low, "Auditor's Ruling: Andersen Win Lifts U.S. Enron Case," Wall St. J. June 17, 2002 at A1.[6]

4. Cooperation and Voluntary Disclosure – As discussed more fully below, the Thompson Memo places considerable emphasis on the importance of voluntary disclosure of wrongdoing and vigorous cooperation with government investigations. The Thompson Memo places particular emphasis on waivers of the attorney-client privilege and work-product protection, as well as the full and expeditious disclosure of facts and documents to investigators. In particular, the Memo states that "[o]ne factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is

[5] A transcript of the press conference is available at www.usdoj.gov/speech/2002/031402newsconferencearthurandersen.htm.

[6] In addition to the payment of a $7 million fine to the SEC in the Waste Management case, Andersen also submitted to a court order barring it from future violations of the securities laws. *See Id*.

the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigations and with respect to communications between specific officers, directors and employees and counsel." Thompson Memo at 7. In addition, the Thompson Memo urges prosecutors to consider whether "the corporation appears to be protecting its culpable employees and agents." *Id*. at 7-8. The Thompson Memo, for instance, discourages corporations from entering into joint defense agreements with employees who may have been engaged in misconduct. *Id*. at 8. The Memo suggests that the DOJ is concerned principally in this regard about what it views as the inappropriate sharing of information among persons involved in a government investigation. *Id*. The Memo also discourages corporations from advancing defense costs to employees in connection with an investigation and related proceedings. *Id*.

5. Corporate Compliance Programs – The Thompson Memo counsels prosecutors to consider, among other things, whether the corporation has in place a meaningful compliance program. The Memo notes, however, that "the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees or agents." Legally, the existence of a compliance program – including a flat prohibition on the misconduct at issue – does not exculpate a corporation from criminal liability. *See, e.g., United States* v. *Basic Constr. Co.*, 711 F.2d 570 (4th Cir. 1983); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1973). In crediting a corporation's compliance program, prosecutors will look at "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives." Thompson Memo at 9-10. In sum, prosecutors will "attempt to determine whether a corporation's compliance program is merely a 'paper program' or whether it was designed and implemented in an effective manner." Thompson Memo at 10; *see also* United States Sentencing Guidelines, § 8C2.5(f).

6. Restitution and Remediation – The guidelines state that prosecutors may consider a corporation's willingness to take remedial measures, including its willingness to make restitutionary payments to the victims of the wrongdoing and its willingness to take additional measures to "ensure that such misconduct does not recur." Thompson Memo at 11. Prosecutors will look for a

corporation to take "steps to implement personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated." *Id*. Echoing the independent requirement of cooperation and voluntary disclosure, discussed *supra*, the Thompson Memo adds that prosecutors should consider, in particular, whether "the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government." *Id*.

7. Collateral Consequences – In determining whether to charge a company, prosecutors may, according to the Memo, consider "the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g. publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it." Thompson Memo at 12. Arthur Andersen is, of course, the paradigmatic example of the collateral consequences of charging a business organization.[7] The Department of Justice, moreover, certainly knew of the fatal implications for Andersen when it obtained an indictment against the partnership for obstruction of justice.[8] Indeed, by all indications, DOJ weighed the likely collateral consequences before deciding to seek the indictment of Andersen.[9]

8. The Adequacy of Prosecuting Individuals – This factor was added to the "factors to be considered" in the Thompson Memo. The Thompson Memo, however, does not discuss at any length the substance and/or significance of this factor. The Memo does make the general observation that,

> [c]harging a corporation . . . does not mean that individual directors, officers, employees, or shareholders should not

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[7] *See, e.g.,* 17 C.F.R. § 201.102 (providing that an audit firm convicted of a felony or a misdemeanor "involving moral turpitude," "shall be forthwith suspended from appearing or practicing before the Commission."). The harm to Andersen's reputation for integrity was also evidently catastrophic.

[8] In a blunt exchange that reportedly took place between Andersen Managing Partner, Joseph Berardino, and DOJ Criminal Division Head, Michael Chertoff, on the eve of the return of the one count indictment of Andersen, Mr. Berardino is reported to have said to Mr. Chertoff in frustration, "[i]f you're going to kill us, go kill us." Richard B. Schmitt and Devon Spurgeon, "Behind Andersen's Tug of War with U.S. Prosecutors," Wall St. J. Apr. 19, 2002.

[9] *See, e.g.,* DOJ News Conference on March 14, 2002 (Q: [Andersen's] lawyers are claiming that the charges amount to the death penalty for the firm. What's your reaction to that? Do you have any sympathy for that rationale? MR. THOMPSON: As I mentioned previously, we considered a number of factors, and a number of factors are typically considered when a decision is made to charge an entity. And I am confident that the team, the task force, as well as myself, considered all the appropriate charges [sic] in making the decision to seek the indictment that we announce today.")

> also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas.

Thompson Memo at 1. Moreover, in the separate discussion of voluntary disclosure and cooperation with the government, the Thompson Memo states that, "a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents in lieu of its own prosecution." *Id*. at 8.

9. Non-Criminal Alternatives – The Thompson Memo directs prosecutors to consider "the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution." Thompson Memo at 13. Those factors include: "the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take enforcement action; the probable sanction if the regulatory authority's action is upheld; and the effect of a non-criminal disposition on Federal law enforcement interests." *Id*. at 13 (*citing* United States Attorney's Manual, §§ 9-27.240, 9-27.250).

iv. Plea Agreements – The Thompson Memo provides that "in negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged." The discussion of plea agreements echoes the requirement of cooperation and voluntary disclosure:

> In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive the attorney-client and work-product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted.

Thompson Memo at 13.

v. Immunity – The Thompson Memo also clarifies that "granting a corporation immunity, or amnesty or pretrial diversion may be considered in the course of the government's investigation." Thompson Memo at 6; *see also* USAM §§ 9-22.010; 9-22.100; 9-22.200 (concerning DOJ's pre-trial diversion program). These approaches are permitted when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Thompson Memo at 13. The Thompson Memo (unlike the Holder Memo) provides that such limited or general immunity agreements "may only be entered into with the approval of each affected district or the appropriate Department official." *Id*.

b. Similarities and Differences Between the Thompson Memo and the Holder Memo – The Thompson Memo tracks the original Holder Memo remarkably closely. The two memos are identical in nearly all respects. The chief differences between the two memos are as follows:

i. The Adequacy of Prosecuting Individuals – The Thompson Memo places marginally greater emphasis on the importance of prosecuting individuals in addition to – and, in certain circumstances, as an alternative to – the prosecution of a business organization. Specifically, the Thompson Memo adds to the Holder Memo's eight factors an additional factor that provides that prosecutors may consider, along with the Holder Memo factors, "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance." Thompson Memo at 3. The emphasis on the prosecution of individuals, as an alternative to charging a corporate entity, raises interesting questions concerning whether and when prosecuting a corporate entity, rather than the individuals responsible for the wrongdoing, is more likely to yield public benefits. Application of this factor, like application of many of the other factors in the Memo, will undoubtedly depend on the specific corporation and the type(s) of crime(s) alleged. By the same token, the Thompson Memo clarifies that the guidelines apply to a variety of business organizations – including (presumably multinational) corporations, partnerships, and sole proprietorships – without any discussion of the differences in the governance and ownership structures among these different types of organization and how those factors may weigh on the decision whether to seek the indictment of a business organization.

ii. Cooperation/Voluntary Disclosure – Certainly the most striking feature of the Thompson Memo is its greater emphasis on the need for voluntary cooperation by corporations wishing to avoid indictment. The Holder Memo had strongly encouraged cooperation with prosecutors and, indeed, had been criticized for the extent of cooperation that it demanded from corporations wishing to benefit from prosecutorial discretion. *See, e.g.,* Howard W. Goldstein, "The Thompson Memorandum," N.Y.L.J., Vol. 229, p. 5 (March 6, 2003) ("The Holder Memorandum was immediately

controversial, principally because of its discussion of corporate cooperation with the prosecutor's investigation as a factor in the charging decision and, more specifically, because of its discussion of waiver of the corporation's attorney-client and work-product privileges as an indication of the corporation's cooperation."). Specifically, the Holder Memo had provided that, in determining whether to charge a corporation, prosecutors should consider "the completeness of [a corporation's] disclosure including, if necessary, a waiver of the attorney-client and work-product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel."[10] Holder Memo at 6. The Holder Memo also discouraged corporations from assisting "culpable employees and agents," through advancement of attorneys fees, failing to sanction culpable employees and/or entering into joint defense agreements with possible "culprits." *Id*. The Thompson Memo reiterates the entirety of the Holder Memo's call for extensive cooperation by corporations and places increased emphasis on the importance of cooperation:

> Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

Thompson Memo at 7-8. Indeed, in the cover letter that accompanied the Thompson Memo, Deputy Thompson stated explicitly that,

> [t]he main focus of the revisions is increased emphasis on scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of the wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution.

Thompson Memo at cover letter.

[10] Both the Holder Memo and the Thompson Memo state that "[t]his waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work-product related to advice concerning the government's criminal investigation." Thompson Memo at 7, n.3.

iii. Effective Corporate Governance – The Thompson Memo also makes clear that prosecutors may consider the effectiveness of the company's corporate governance mechanisms. Specifically, the Thompson Memo adds the following to the Holder Memo's discussion of effective compliance programs:

> In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonable [sic] designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.

Thompson Memo at 10 (*citing In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959 (Del Ch. 1996)).

II. SELECTED LEGAL ISSUES RAISED BY THE DEPARTMENT OF JUSTICE GUIDELINES

a. Practical Challenges of Cooperation/Voluntary Disclosure – The DOJ's increased enthusiasm for cooperation and voluntary disclosure poses a number of challenges for corporate counsel. In particular, counsel must weigh carefully the decision *whether* to disclose wrongdoing voluntarily and cooperate with an investigation. If the decision to cooperate is made, counsel must also carefully consider whether to waive the attorney-client/work-product protections and at what stage of the investigation to do so.

i. Cooperation/Voluntary Disclosure – The corporation's voluntary disclosure of wrongdoing and/or cooperation with the investigation is only one among many factors in the analysis that prosecutors are to undertake in determining whether to charge a business organization. Indeed, the Thompson Memo states this explicitly: "a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing." Thompson Memo at 10. Any decision to self-report wrongdoing to the government and/or to cooperate by, for example, waiving the attorney-client privilege should be undertaken, whenever possible, only after conducting an analysis of the likely role that other factors will play in the

prosecutor's determination of whether to charge the corporation. It is possible to place too much emphasis on cooperation. Self-reporting and cooperation (including waiver of the attorney-client and work-product protections) provide no assurance of a business organization's ability to avoid prosecution.[11]

ii. Factors to Consider in Deciding Whether to Self-Report – First and foremost, counsel must assess whether a mandatory disclosure obligation exists. (*E.g.*, where an organization has unlawfully obtained funds from a federal healthcare program. *See* 42 U.S.C. §§1320a – 7b (a)(3)). Assuming there is no mandatory disclosure obligation, corporate counsel should consider a number of factors in deciding whether voluntarily to self-report. These considerations may include the following:

1. *Whether, if the corporation does not self-report, the government will discover the wrongdoing in any event.* If the conduct is likely to be discovered by the government in any case, the corporation may have little choice but to self-report. This is particularly true if the conduct is clearly criminal, egregious and pervasive. The company should also consider the risks of a *qui tam* action or other means by which the criminal conduct could become known to the government.

2. *Whether the corporation is in a highly regulated industry.* If so, this fact may weigh in favor of self-reporting because inevitably there will be future issues with regulators about which the organization will be subject to the exercise of discretion by regulatory officials. In such circumstances, the ability to reference past instances of self-reporting and zero tolerance of criminal conduct may be useful. Furthermore, if the organization touts its zero tolerance policy, it may not wish to impair its credibility with the government by being found to have ignored the policy.

3. *The policies and practices of potential prosecutors. A* corporation may have a choice to report the criminal conduct to more than one prosecutor – the corporation may have a choice among different U.S. Attorney's Offices, Main Justice in Washington, or state and county prosecutors. Depending on the nature of the conduct, it

[11] *See, e.g.,* Weill, *et al.*, "Andersen Ruling Lifts U.S. Enron Case," Wall St. J. June 17, 2002 ("One unintended result of the Andersen prosecution may be that white-collar criminal-defense attorneys urge their corporate clients to button up after discovering potential wrongdoing by their personnel. Soon after learning of last fall's widespread shredding in Houston, Andersen's top outside lawyers advised firm executives to disclose all they knew to the Justice Department. Andersen agreed to waive the attorney-client privilege to almost all internal material related to document destruction through Nov. 9, when the firm's shredding ceased. Andersen put itself at the mercy of the government. Prosecutors then used Andersen's own documents to indict the firm, after the two sides were unable to work out a settlement under which Andersen wouldn't have to plead guilty to a crime.").

may be that the office to which the conduct is reported will handle the matter, to the exclusion of other offices. It is important, therefore, to know the individuals in the various offices that have jurisdiction over the conduct. One office's policies and practices (or one prosecutor's policies and practices) may be more favorable to the company than others.

4. *The existence of alternatives to indictment of the entire corporation*. By self-reporting, the corporation may be able successfully to propose alternatives to indictment of the entire organization. First, the government may agree to charge culpable individuals only. *See* Thompson Memo at 3. Second, the government may agree to proceed with civil charges only. There is also a further potential non-criminal option available. Federal prosecutors have agreed to file civil actions under 18 U.S.C. §1345, the anti-fraud injunction statute in Title 18. Federal prosecutors have also entered into Pre-Trial Diversion agreements. Under such agreements, prosecution is deferred pending the passage of a stipulated period of time, at the conclusion of which prosecution cannot be commenced. *See* USAM, §§ 9-22.010, 9-22.100, 9-22.200. Finally, if the government insists upon bringing criminal charges, it may agree to charge a non-excludable offense, or a non-operating subsidiary or business unit of the organization, so that the collateral consequences to the organization are less severe.

5. *Potential disruption to the business*. In considering whether to self-report, a corporation should weigh the prospects for significant disruption to its business from whatever investigation is likely to result. An intensive and prolonged investigation may involve numerous government interviews or grand jury appearances for officers and employees, the production of large volumes of paper and electronic files and other impositions that could impair the company's ability to function normally. Such an investigation invariably generates negative publicity and corporate morale issues, which can lead to the departure of key employees and reduced profitability. These investigations are also extremely expensive for the company, which may need to engage multiple counsel to represent the company as well as certain individual employees; the company may also need to engage an audit firm to assist with the investigation.

6. *The risk of follow-on investigations.* Once the government is allowed "inside the tent," it may discover other issues to investigate which cause further disruption to the business.

7. *The risks of inadvertently "covering up" the problem*. Where the company elects *not* to self-report, it must be extremely careful to avoid inadvertently concealing the problem. In 1995, for example, Daiwa Bank Ltd. was indicted for, among other crimes, misprision of a felony in connection with steps that Daiwa took to conceal wrongdoing committed by one of its fixed income traders. Although the Daiwa case represents an extreme example, it nevertheless highlights the risks organizations face when they choose not to self-report. While courts have made clear that misprision of a felony requires an affirmative act of concealment – the mere failure to report wrongdoing is not sufficient – an organization that decides not to self-report must be careful not to attempt to reverse or otherwise quietly remedy the employee's wrongdoing and thereby inadvertently conceal the crime. *See, generally, United States* v. *Ryan*, 964 F. Supp. 526 (D. Mass. 1997); *see also* 18 U.S.C. § 4. In a regulated industry, such as the banking industry (as in the Daiwa case), where regular reporting of business details must be made, it may be particularly difficult to avoid this risk.

iii. The Decision Whether to Waive the Privilege – The Holder and Thompson Memos place considerable emphasis on waiver of the attorney-client and work product protections, and not only as to the pre-investigation conduct but also as to the internal investigation itself. Thompson Memo at 10; Holder Memo at 13-14. The decision whether to waive the privilege is perhaps the most difficult decision that counsel to a corporation *in extremis* must make. Above all, the decision should be made on a fully informed basis. Federal prosecutors may place pressure on the corporation to agree to a waiver at an early stage of the investigation.[12] Bearing in mind that, as the Thompson Memo states, cooperation is "merely one relevant factor, that needs to be considered in conjunction with the other factors," *see* Thompson Memo at 8, counsel should resist the temptation to favor cooperation above all else. One very significant risk in this regard is that, by agreeing to a waiver of the attorney-client and work-product protections, particularly at an early stage of an investigation, the corporation will thereby arm prosecutors with extensive information that could cut decidedly against favorable application of the other factors in the DOJ guidelines, and provide the prosecutors with a roadmap for charging the corporation.[13] An agreement

[12] *See* Vanesa Blum, "U.S. Mounts New Attack on Privilege," *Legal Times,* vol. 26, No. 11 (March 2003) ("Still, many white collar defense attorneys report having been asked to waive the attorney-client privilege in an initial meeting with prosecutors. 'That topic is now raised as one of the first in a series of requests made by prosecutors, before any discussion of the facts,' says Skadden, Arps, Slate, Meagher & Flom partner Keith Krakaur, a former federal prosecutor in the Eastern District of New York.").

[13] *See, e.g.,* Weill, *et al.*, "Andersen Ruling Lifts U.S. Enron Case," Wall St. J. June 17, 2002 ("These jurors said that the panel had focused not on the mounds of shredded documents highlighted by the government but on a single

to waive the attorney-client and work-product protections is not a panacea and carries with it potentially significant adverse consequences.

b. Selective Waiver of the Attorney-Client and Work Product Protections – The Thompson Memo stresses the importance of a corporation voluntarily waiving the attorney-client privilege and work-product protection in order to receive credit for "genuine" cooperation with the government. *See* Thompson Memo at 7. An agreement to waive the privilege may, however, have significant consequences for the corporation, even beyond the four corners of the criminal investigation. A number of courts have explored the consequences of waiving the privilege in this manner and, in particular, whether a waiver of the attorney-client privilege and/or work product protection in favor of the government will thereby effect a waiver of the protections as to all other parties. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig*., 293 F.2d 289, 299 (6th Cir. 2002).

i. Attorney-Client/Work Product Protections Generally – Courts have noted that the rationale and purpose of the attorney-client privilege differs significantly from that of the work product protection:

- Attorney-client Privilege – "It is often stated that the purpose of the attorney-client privilege is to encourage 'full and frank communication between attorneys and their clients.'" *Westinghouse Elec. Corp.* v. *Republic of Philippines*, 951 F.2d 1414, 1423 (3rd Cir. 1991) (*quoting Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id*. (*quoting Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888)). Uninhibited communication, however, "is not an end in itself . . . but merely a means to achieve the ultimate purpose of the privilege: 'promot[ing] broader public interests in the observance of the law and administration of justice.'" *Id*. (*quoting Upjohn*, 449 U.S. at 389).

- Work Product Protection – "While the attorney-client privilege is intended to promote communication between attorney and client by protecting client confidences, the work product privilege is a broader protection designed to balance the needs of the adversary

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e-mail written by [Andersen in-house counsel, Nancy] Temple that, by comparison, had received little attention from either side at trial. To jurors, the e-mail showed that Ms. Temple had at least attempted to get another Andersen employee to edit a file memo at a crucial point last October 'to protect ourselves' from SEC regulatory scrutiny. . . . Ultimately, it wasn't what the firm shredded that got it convicted, but what it turned over to the government. This example may well prompt large U.S. corporations and partnerships to think twice about reporting their own misdeeds to the government, says Judson Starr, a former Justice Department official, currently a corporate-defense lawyer in the Washington office of Venable LLP.")

> system to promote an attorney's preparation in representing a client against society's general interest in revealing all true and material facts relevant to the resolution of a dispute." *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371 (D.C. Cir. 1984). The work product protection "'does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of an opponent. . . .'". *Id*. (*quoting United States* v. *American Tel. & Telegraph Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). The work product protection "is designed to allow an attorney to 'assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . ." *In re Columbia/HCA*, 293 F.3d at 294; *quoting Hickman* v. *Taylor*, 329 U.S. 495 (1947).

ii. Attorney-Client and Work Product Waiver Generally – Because of the differing rationales underlying the attorney-client and work product protections, courts typically analyze the two protections differently for purposes of determining whether a party has waived one or both of the protections. In particular, "[w]aiver of the attorney-client privilege does not automatically relinquish the protection provided by the work product doctrine." *Saito* v. *McKesson HBOC, Inc.*, No. Civ. A. 18553, 2002 WL 31657622, at *1, *12 n.73 (Del. Ch. Oct. 25, 2002)(*citing Merisel, Inc.* v. *Turnberry Capital Mgmt., L.P.,* No. 15906-NC, 1999 WL 252724, at *1, *4 (Del. Ch. April 20, 1999)). As the court in *United States* v. *American Tel. & Telegraph*, 642 F.2d 1285 (D.C. Cir. 1980), explained:

> The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege. By contrast, the work-product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. . . . The purpose of the work-product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship in order to encourage effective trial preparation. A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege. We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally

suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.

Id. at 1299. To find a waiver of the work-product privilege, courts typically require that the disclosure be made to an "adversary" or "potential adversary." *See United* States v. *Massachusetts Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997) ("MIT's disclosure to the audit agency was a disclosure to a potential adversary. . . . The cases treat this situation as one in which the work product protection is deemed forfeit"); *Bank of Am., NA.* v. *Terra Nova Ins. Co.*, 212 F.R.D. 166, 170 (S.D.N.Y. 2002) ("[a] waiver will be found if the governmental agency was an adversary, a 'potential adversary' or even just 'stood in an adversarial position' with respect to the disclosing party"); *United States* v. *Bergonzi*, No. 00-CR-505-ALL, 2003 WL 1948783 (N.D. Cal. Jan. 10, 2003); *In re Bank One Sec. Litig., First Chicago S'holder Claims*, 209 F.R.D. 418, 424 (N.D. Ill. 2002) ("the heart of the waiver issue is the provision of information to an adversary as opposed to the voluntary nature of such disclosure"); *Westinghouse*, 951 F.2d at 1428 ("Most courts hold that to waive the protection of the work-product doctrine, the disclosure must enable an adversary to gain access to the information."). Moreover, "the presence of an adversarial relationship does not depend on the existence of litigation"; it exists, for example, in the context of voluntary cooperation with a pre-enforcement inquiry by the SEC. *See In re Steinhardt Partners, LP*, 9 F.3d 230, 234 (2d Cir. 1993).

1. "Common Interest" with the Government – Courts have been uniformly unsympathetic to arguments that a corporation that is within the ambit of a government investigation is not a "potential adversary" or somehow shares with the government a common interest in, for example, enforcing the laws or rooting out fraud. *See, e.g., Westinghouse*, 951 F.2d at 1428 ("Westinghouse was the target of the investigations conducted by [the DOJ and SEC]. Under these circumstances, we have no difficulty concluding that the SEC and the DOJ were Westinghouse's adversaries"); *Bergonzi*, 2003 WL 1948783, at *7 ("the Company and the government did not have a true common goal as it could not have been the Company's goal to impose liability onto itself, a consideration always maintained by the Government"); *MIT*, 129 F.3d at 686 ("MIT and [DCAA] do have a 'common interest' in the proper performance of MIT's defense contracts and the proper auditing and payment of MIT's bills. But this is not the kind of common interest to which the cases refer in recognizing that allied lawyers and clients . . . can exchange information among themselves without loss of the privilege.").

iii. The Law of Selective Waiver – The law of selective waiver differs significantly from jurisdiction to jurisdiction. *See In re Columbia/HCA*

Healthcare Corp., 293 F.3d at 308 ("[n]eedless to say, the circuit courts of appeal are deeply split on whether a disclosure of privileged information to the government . . . waives the privilege as to all other parties." (Boggs, J., dissenting)). Few courts have found selective waiver permissible, even where the party producing privileged documents to the government does so pursuant to a confidentiality agreement. *See Id*. The cases concerning selective waiver of the attorney-client and/or work product protections generally fall into one of three categories,[14] as follows:

1. Selective Waiver Permitted in Certain Jurisdictions – The selective waiver doctrine was first recognized by the Eighth Circuit in *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1977). *See also United States* v. *Shyres*, 898 F.2d 647, 657 (8th Cir. 1990); *but cf*. *In re Grand Jury Proceedings Subpoena*, 841 F.2d 230, 234 (8th Cir. 1988). Few courts have followed the Eighth Circuit in finding selective waiver permissible in all or most situations. *See In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D.Wis. 1979); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981).

2. Selective Waiver Generally *Not* Permitted in Many Jurisdictions – Many jurisdictions have found that selective waiver is generally not permitted, regardless of the circumstances. *See In re Columbia/HCA*, 293 F.3d at 307 ("preserving the traditional confines of the rule affords both an ease of judicial administration as well as a reduction of uncertainty for parties faced with such a decision"); *Bergonzi*, 2003 WL 1948783, at *8; *MIT*, 129 F.3d at 685; *Westinghouse*, 951 F.2d at 1425-26; *Permian Corp.* v. *United States*, 665 F.2d 1214, 1220 (D.C. Cir. 1981). The First Circuit, in particular, rejected the doctrine of selective waiver in *MIT*, 129 F.3d at 685.

3. Selective Waiver Permitted with Confidentiality Agreement – A few courts have held (or suggested) that the production of work product-protected documents to the government pursuant to an explicit confidentiality agreement limiting the government's ability to disclose the documents to third parties does not constitute a broad waiver of the work-product protection and preserves the protection. *See Saito*, 2002 WL 31657622, at *10; *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (citing *Steinhart*, 9 F.3d at 236); *Teachers Ins. & Annuity Ass'n. of Am.* v. *Shamrock Broad. Co.*, 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981); *cf. Steinhardt*, 9 F.3d at 236 ("[e]stablishing a rigid rule [against selective waiver] would fail to anticipate situations in

[14] The United States Court of Appeals for the Sixth Circuit collected and analyzed many of these cases in its recent decision in *In re Columbia/HCA*, 293 F.3d at 298-302.

which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.").

iv. Proposed Legislation to Permit Selective Waiver – The "most common cases [involving selective disclosure issues] have been disclosures of otherwise privileged attorney-client communications to the Securities and Exchange Commission by corporations during voluntary internal investigations or in response to SEC subpoenas." *MIT*, 129 F.3d at 685; *In re Columbia/HCA*, 293 F.3d at 299 (selective waiver cases "typically" involve disclosure to the SEC pursuant to its voluntary disclosure program). The SEC has recently reintroduced a proposal to amend the Securities and Exchange Act of 1934 to permit selective disclosure of privileged and work-product protected information to the Commission without effecting a broader waiver of those protections. *See* Securities and Exchange Commission, "Report Pursuant to Section 704 of the Sarbanes-Oxley Act of 2002," p. 45 (Washington, D.C.: 2002). The Commission has unsuccessfully proposed such legislation in the past. *See generally, Westinghouse*, 951 F.2d at 1427.

v. Limited or General Waiver – Courts have held that "extrajudicial disclosures of privileged information do not automatically result in a broad subject matter waiver and generally constitute a waiver only of the particular matters 'actually disclosed.'" *Johnson Matthey Inc.* v. *Research Corp.*, No. 01 Civ. 8115MBMFM, 2002 WL 1728566 at *5 (S.D.N.Y. July 21, 2002)(citing *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987); *Lehman Bros. Commercial Corp.* v. *Minmetals Int'l Non-Ferrous Metals Trading Co.*, No. 94 Civ. 8301, 1996 WL 345915, at *2 (S.D.N.Y. June 21, 1996). Because courts are generally hostile to partial waivers of the privilege, however, any attempt to rely on selectively waived information in a legal proceeding likely would result in a broad waiver of the privilege.[15] *See, e.g., In re von Bulow*, 828 F.2d at 102.

c. Joint Defense Agreements – Many prosecutors view joint defense agreements in the context of a government investigation unfavorably: "'[p]rosecutors are uneasy . . . because they see in [joint defense agreements], even unintentionally, an opportunity to get together and shape testimony.'" American College of Trial Lawyers, "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations," pp. E-27 – E-28 (March 2002). Several courts have, moreover, set "rigid standards for invoking the joint defense privilege." *Id*. at E-26.

[15] "Selective waiver permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications." *Westinghouse*, 951 F.2d at 1423 n.7.

i. Requirements for Joint Defense Privilege – The "joint defense" or "common interest" privilege is generally understood not as a stand-alone privilege but as an exception to the usual rule that disclosure of otherwise attorney-client privileged documents waives the privilege. *Matthey*, 2002 WL 1728566 at *6 ("[t]he common interest exception is not an independent privilege, but an extension of the attorney-client privilege which 'serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."). "[C]ourts have varied in their assessments of the ingredients necessary to create a joint defense privilege." *United States* v. *Weissman*, No. S1 94 CR.760, 1996 WL 737042 (Dec. 26, 1996 S.D.N.Y.). Generally, the requirements for finding the existence of a joint defense privilege are as follows:

1. Common Interest Effort – In order to establish the existence of a joint defense agreement, the party asserting the privilege bears the burden of showing that the "communications were made in the course of a joint defense effort. . . ." *United States* v. *Bay State Ambulance and Hosp. Rental Serv. Inc*, 874 F.2d 20 (1st Cir. 1989). Some courts have implied a common defense agreement between two or more parties based solely on a common interest in a proceeding or investigation. *See, e.g., United States* v. *Montgomery*, 15 F.3d 1093 (9th Cir. 1993) (citing cases); *SIG Swiss Indus. Co.* v. *Fres-Co. Sys., USA, Inc.*, No. 91-0699, 1993 WL 82286 (E.D. Pa. Mar. 17, 1993). Other courts have been far stricter in the requirements for a common interest privilege to attach and many decisions have required an explicit agreement to pursue a joint defense strategy before the privilege will attach. *See, e.g.*, *Weissman*, 1996 WL 737042, at *12; *United States* v. *Sawyer*, 878 F. Supp. 295, 297 (D. Mass. 1995). Courts do not, however, require that the parties have completely aligned interests in order for the privilege to attach. *See*, *e.g.*, *Matter of Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975) ("[t]hat a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or viability of the joint defense.").

2. Communications in Furtherance of Effort – Some courts have been strict in requiring that the communications in question must have been made in furtherance of the common interest or joint defense effort in order to be covered by the joint defense privilege. *See United States* v. *Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) ("only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected."); *In re Bairnco Corp. Sec. Litig.*, 148 F.R.D. 91 (S.D.N.Y. 1993) (holding that statistics summarizing the status of

asbestos claims processing and litigation, charts classifying the nature of claims by various categories, and other similar documents were not protected by the joint defense privilege because the documents could not "be characterized as communications pertaining to defense strategy, or designed to further a common defense in any particular litigation or claim for that matter.").

3. The Privilege has Not Been Waived – Like other evidentiary privileges, the joint defense privilege may be waived. The party asserting the privilege bears the burden of establishing non-waiver. *Bay State Ambulance*, 874 F.2d at 27-28. Ordinarily "[a] joint-defense privilege cannot be waived without the consent of all parties to the privilege." *Weissman*, 1996 WL 737042, at *26. Waiver of the joint defense agreement can occur, however, when the parties to a joint defense agreement become adversaries in the same or a related matter. *See Securities Investor Prot. Corp.* v. *Stratton Oakmont*, *Inc.*, 213 B.R. 433, 437 (Bankr. S.D.N.Y. 1997); *Robinson* v. *Texas Auto. Dealers Ass'n*, No. 5:97-CV-273, 2003 WL 1787352, at *7 (E.D. Tex. Mar. 28, 2003) ("[s]hould parties with a common legal interest who have shared privileged communications or work-product later become adverse, the joint defense privilege can be waived by any one of the persons who was privy to the communications or possessed the materials."). As the United States Bankruptcy Court for the Southern District of New York noted, "the few cases and voluminous commentary that do address the issue state that subsequent litigation *inter sese* operates to waive the joint defense privilege in both contexts [i.e. joint client and joint defense contexts]." *Stratton Oakmont*, *Inc.*, 213 B.R. at 437; *see also Ageloff* v. *Noranda, Inc.*, 936 F. Supp. 72, 76-78 (D.R.I. 1996). Until the parties become adversaries in litigation, joint defense materials typically are privileged from discovery by third parties. *Stratton Oakmont*. 213 B.R. at 439. The Court in *Stratton Oakmont* suggested, moreover, that even after co-defendants have become adverse, joint defense materials continue to be protected from discovery by third parties. *Id.* (noting that the fact that the joint defense has been waived by adversity "does not mean that the rest of the world suddenly becomes entitled to privileged information just because the internal structure of the joint defense has been changed.").

ii. Adversity Among Common Interest Members – As discussed above, in order for a common interest privilege to attach, the agreement must be in furtherance of a common interest. In corporate enforcement/litigation contexts, however, the level of common interests among the parties may vary considerably. Courts have taken a reasonably practical view of common interest situations and have found common interest agreements

enforceable, despite significant adversity or potential adversity among the parties. *See, e.g.*, *Hunydee* v. *United States*, 355 F.2d. 183 (9th Cir. 1965).

iii. Potential Ethical Issues Arising from Common Interest Agreements – Because parties to a common interest agreement and their counsel agree to share confidential – and often privileged – information, courts have considered the question of whether counsel to a party to the common interest agreement owes any duties of confidentiality or otherwise to the other members of the common interest consortium. This question has arisen in at least two contexts:

1. Representation of Non-Party Against JDA Party – An issue considered by certain courts concerns whether counsel to one member of a joint defense consortium who has received confidential information from other joint defense participants may represent a non-party to the JDA against another member of the consortium in a substantially related matter. Courts have indicated that they could disqualify counsel in these circumstances. *See, United States* v. *Stepney*, 246 F. Supp. 2d 1069, 1080 (N.D. Cal. 2003) (noting that "courts have also consistently ruled that where an attorney represents a client whose interests diverge from a party with whom the attorney has previously participated in a joint defense agreement, no conflict of interest arises unless the attorney actually obtained relevant confidential information. This position is inconsistent with a general duty of loyalty owed to former clients, which would automatically preclude an attorney from subsequently representing a client with adverse interests."); *Int'l Paper Co,* v. *Lloyd Mfg.. Co.*, 555 F. Supp. 125 (N.D. Ill. 1982); *Wilson P. Abraham Constr. Corp.* v. *Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977).

2. Representation of JDA Party Adverse to Former JDA Party – Another issue considered by a number of courts concerns the extent to which an attorney representing one party to a joint defense agreement may continue to represent that party after an adversity has arisen between or among the parties to the joint defense agreement. In *United States* v. *Henke*, 222 F.3d 633, 637 (9th Cir. 2000), the court ordered a retrial on the basis that defendants' counsel had been unable adequately to cross-examine a government witness because that witness had been part of a joint defense agreement with the defendants prior to agreeing to testify for the government. The court found that the joint defense agreement between the defendants had created an implied attorney-client relationship between their lawyers and the co-defendant-turned-witness which created a "disqualifying conflict." *Id.* The court averred that an attorney "should not be allowed to proceed against a co-defendant of a former client wherein the subject

matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense." *Id.* (*citing Wilson P. Abraham Constr. Corp.* v. *Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977)). In *United States* v. *Stepney*, 246 F. Supp. 2d 1069, 1079-84 (N.D. Cal. 2003), the United States District Court for the Northern District of California discussed (in *dicta*) the *Henke* case, noting that *Henke* "implicitly expanded the joint defense privilege . . . to impose on each attorney an additional general duty of loyalty to her client's co-defendants [in the JDA]." The *Stepney* court went on to note that the "*Henke* court suggests that the duty to protect confidential information divulged under a joint defense agreement may extend beyond the duty not to disclose and include a duty not to use the information gained in a manner adverse to the interests of the client." *Id.* at 1081.

iv. DOJ Disapproval of Joint Defense Agreements – The Thompson and Holder Memos reflect the long-standing government hostility to joint defense agreements.[16] The Thompson Memo suggests that the government disapproves of joint defense agreements, in particular, because they facilitate a level of sharing of information among differently represented parties that the government considers potentially inappropriate. Thompson Memo at 8. A related factor is the government's inability to obtain information from parties to the joint defense agreement because of the privilege. For example, under a typical joint defense agreement, the corporation is prevented from producing to the government memoranda documenting company counsel's interviews with parties to the joint defense agreement, such as company employees.

d. "Corporate Miranda" – The Thompson Memo's emphasis on voluntary disclosure to the government and cooperation with government investigations, coupled with its discouragement of joint defense arrangements, places a heightened importance on the manner in which corporate counsel conducts its investigation of possible wrongdoing. In particular, the increased likelihood, in view of the Holder Memo and the Thompson Memo, that a business organization may decide to waive the attorney-client privilege and provide confidential information – especially memoranda of internal interviews with employees – to government authorities, raises anew and in a more pressing way the question of counsel's responsibilities in communicating with unrepresented employees of the organization. Courts and ethics committees have imposed a duty to warn employees, in certain circumstances, when there is potential adversity or the

[16] The Thompson Memo also expresses hostility toward other forms of cooperation with potential "culprits." For example, "a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, or through retaining employees without sanction for their misconduct . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." Thompson Memo at 7-8.

possibility of a misunderstanding as to the role of corporate counsel. Given the support for this "corporate miranda" duty, corporate counsel should take appropriate precautions to ensure that she fulfills her ethical obligations.

i. Duty to Inform Employees – Both the Massachusetts Rules of Professional Conduct and the Model Rules of Professional Conduct impose restrictions on lawyers conducting interviews with employees in the context of an internal investigation:

1. Rule 1.13 – Rule 1.13(a) states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Mass. R. Prof. Conduct 1.13(a) (2000). Rule 1.13(d) imposes a duty to clarify the lawyer's role in certain circumstances, stating that "[i]n dealing with an organization's . . . constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Mass. R. Prof. Conduct 1.13(d).[17] Thus, a duty will arise when the facts of a particular case make it apparent that the corporation's interests are adverse to those of the interviewee. *See, e.g., Professional Servs. Indus., Inc. v. Kimbrell*, 758 F. Supp. 676 (D. Kan. 1991) (stating that, when a lawyer becomes aware of a potential adversity between the corporate client and the constituent being interviewed, the lawyer must fairly inform the constituent that his only client is the corporation).

2. Rule 4.3 – When interviewing unrepresented employees, the determination of whether a duty to warn exists will also involve Rule 4.3 of the Massachusetts Rules of Professional Conduct ("Rule 4.3"). Rule 4.3 addresses dealings with unrepresented persons. Rule 4.3(a) states that, not only must the lawyer avoid implying that she is disinterested, "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Mass. R. Prof. Conduct 4.3. Consequently, a duty to warn will also arise when corporate counsel knows or reasonably should know that the interviewee misunderstands the lawyer's role. *See, e.g.*, District of Columbia Ethic Op. 269 (1997) (stating that a warning is required when a possible conflict is apparent and when there is a misunderstanding regarding confidentiality).

[17] The comments to Rule 1.13 indicate that the existence of this duty is a factual question. See Mass. R. Prof. Conduct 1.13, cmt. 4 ("Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.").

ii. Determining When a Duty Arises – Determining whether a "corporate miranda" duty exists in a given factual situation can be difficult. Rules 1.13 and 4.3 work in tandem to impose a duty to warn an employee whenever (i) it is apparent that the organization's and the employee's interests are adverse, and (ii) when the lawyer has reason to believe the employee misunderstands the lawyer's role. *See* Mass. R. Prof. Conduct 1.13(d) and 4.3. The text of the rules seems to limit their application to circumstances wherein adversity is "apparent" or where the lawyer "knows or reasonably should know" of a misunderstanding. *See id*. Given the likelihood for adversity between an employee and the corporation in an internal investigation, particularly in the wake of the Thompson Memo, counsel should consider providing a "corporate miranda" instruction in most investigations. *See generally* Alan L. Silverstein, *Ethical Issues Facing Corporate Counsel*, 13-Fall Antitrust 18 (1998). Similarly, several aspects of the employee-corporate counsel relationship may tend to produce misunderstandings as to representation and confidentiality issues.[18] *See id*. Consequently, corporate counsel should consider providing a "corporate miranda" warning even when a strict interpretation of the rules may not call for one.

iii. Consequences of Failure to Warn – In addition to constituting a potential breach of an attorney's ethical obligations, the failure to fulfill a "corporate miranda" obligation could result in a court finding an imputed attorney-client relationship. The standard for finding an attorney-client relationship varies from state to state. Courts are increasingly looking at the reasonable expectations of the would-be client. *See* ABA Manual. Massachusetts, in particular, will find an imputed attorney-client relationship where: "(1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney's professional competence; and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *DeVaux v. American Home Assurance Co.*, 444 N.E. 2d. 355, 357, 387 Mass. 814, 817-18 (1983) (quoting *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977). Courts strictly interpret the requirements for finding an attorney-client relationship. *See, e.g. United States v. Sawyer*, 878 F. Supp. 295, 296 (D. Mass. 1995) (finding no attorney-client relationship where employee did not establish that corporate counsel represented him

[18] For instance, given the close relationship between employees and in-house counsel, a duty is more likely to exist when an employee is interviewed by in-house counsel, as opposed to outside counsel. *See ABA/BNA Lawyers' Manual on Professional Conduct Reference Manual: Types of Practice, Corporate, Client Identity*, L.M.P.C. 91:2001 (1998) (hereinafter "ABA Manual"). If counsel has represented the employee in her individual capacity in the past, a lawyer may have a duty to advise the client that the lawyer no longer represents her as an individual. See *In re Brown*, 956 P.2d 188, 198 (Or. 1998). Members of a small, closely-held corporation also are more likely to equate the corporation's interests with their own. *See, e.g.*, *Rosman* v. *Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding it reasonable for a shareholder in a close corporation to believe that corporate counsel was representing him in his individual capacity). Although these additional factors may make the existence of a duty more likely, a duty may exist without any of these factors.

in his individual capacity). Where the employee is not reasonable in her belief that the attorney is representing her individual interests, a court is unlikely to find an attorney-client relationship. *See, e.g., TJD Dissolution Corp. v. Savoie Supply Co.*, 460 N.W.2d 59, 62-63 (Minn. Ct. App. 1990) (finding it unreasonable for a major shareholder to believe that corporate counsel was representing the shareholder where corporation's and shareholder's interests were clearly adverse). Nevertheless, the consequences of a finding of *de facto* representation can be severe – for example, counsel could be found to have assumed a duty to the employee and, thereby, be disqualified from representing the corporation – and corporate counsel should therefore guard against this risk.

III. SELECTED PUBLIC POLICY ISSUES RAISED BY THE THOMPSON MEMO

a. **The Tension Between Self-Policing and Cooperation** – A clear goal of the Thompson Memo and the Department of Justice's approach to corporate criminal conduct in general has been to enlist the assistance of the corporation in advancing the investigation and getting to the bottom of any possible malfeasance. The Thompson and Holder Memos each state that "the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities." Thompson Memo at 7. The United States Sentencing Guidelines likewise encourage self-policing. *See* USSG at §8C2.5. The increasing pressure, significantly encouraged by the Thompson Memo, that prosecutors are bringing to bear on corporations to waive the attorney-client and work-product protections – and especially the pressure to waive those protections as to the investigation itself – may ultimately militate against a corporation's ability to self-police in a number of important respects:

i. Limits the Acquisition of Factual Information – As the seminal case on the corporate attorney-client privilege explained, limiting the corporate attorney-client protection in significant ways "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Upjohn Co.*. v. *United States*, 449 U.S. 383, 392 (1981). The looming prospect of routine demands for waiver of the attorney-client privilege will almost inevitably have the same effect of inhibiting the flow of information from relevant employees to corporate counsel. Experienced counsel must now conduct every internal investigation bearing in mind the very real possibility of a potential waiver in the future. As a consequence, in various more or less significant ways, corporate counsel may impose limitations on the collection, analysis and memorialization of relevant and helpful information. Furthermore, employees may be less willing to talk to corporate counsel in the context of an internal investigation, knowing that there is a substantial risk that the

substance of the discussion, including detailed written interview memoranda, will be conveyed to the government.

ii. Deters Candid Assessment of Potential Problems – The policies outlined in the Thompson Memo may tend to limit counsel's ability to provide effective advice to the corporation, and may also limit the corporation's ability to remedy possible problems within the company. Specifically, the Thompson Memo may hamper investigative and also subsequent remedial efforts by corporations in the context of apparent misconduct by one or more of their employees. Because the privilege is no longer a reliable protection, corporations may be discouraged from creating a thorough record and/or analysis of a possible problem that may later be used by the government to establish criminal conduct by the corporation. As one practitioner has explained, "[i]n the old days, [attorneys] would put work-product in their notes, in part to keep the privilege intact. Now, with the assumption that the notes will end up in the hands of the government, they try to stick straight to the facts. Lawyers will also forgo a written report of their findings. For the government, such a report is a 'road map with a red bow.'" Tamara Loomis, "Turn of the Screw," *The Daily Deal*, 2003 WL 4166961 (February 27, 2003). These developments limit counsel's effectiveness, and thereby also limit the corporation's ability to take appropriate disciplinary steps and/or implement socially beneficial remedial measures.

b. The Tension Between Self-Reporting and Cooperation – A related problem created by the policies affirmed in the Thompson Memo is the possible deterrent effect that the requirements of cooperation may have on self-reporting. In view of the daunting demands placed on corporations in order to receive credit for "authentic" cooperation, corporations may decide that bringing wrongdoing to the attention of the federal government is not in the best interests of the corporation. At the very least, corporate counsel will often factor into the decision whether voluntarily to self-report the extensive demands that likely will be made by government prosecutors in order for the corporation to reap a tangible benefit from its cooperation.

IV. CONCLUSION

In short, while there is not yet sufficient experience with the policies outlined in the Thompson Memo to answer the question definitively, the danger appears real that the government's enhanced requirements for "authentic" cooperation may prove to be inherently self-defeating, as they likely will make it extremely difficult for corporations simultaneously to cooperate effectively with the government and conduct meaningful internal investigations. The risk is that, by pushing the requirements of cooperation to an extreme where the corporation must become, for all intents and purposes, a virtual arm and ally of the government, the government will strip the corporation and its counsel of the unique roles they have played over time -- and of the tools historically at their disposal -- in ferreting out misconduct, taking appropriate

disciplinary actions, implementing effective remedial measures, and making voluntary disclosures in appropriate cases.