

## Understanding and Accommodating the Department of Justice’s Evolving Policies Concerning Cooperation and Waiver of the Attorney-Client Privilege in Directing Effective Internal Investigations

David L. Douglass<sup>1</sup>  
Shook, Hardy & Bacon, LLP

The sanctity of the attorney-client relationship, in the form of the attorney-client communication privilege, is one of the oldest legally respected private relationships.<sup>2</sup> The legal profession has long appreciated that the assistance of legal professionals would be of little value if the system required the lawyer to reveal the interests his or her client was seeking to protect. In the nineteenth century the Supreme Court observed: “If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.”<sup>3</sup> The attorney-client privilege has long been extended to corporations as well as individuals.<sup>4</sup>

Like virtually any public policy, however, the attorney-client privilege entails trade-offs. After all, it deprives litigants, and derivatively society, of highly relevant evidence, possibly including evidence of crimes. Against the benefits described above – the right to effective legal representation -- one must weigh the costs, which include the risk that those who have caused harm may avoid being held accountable, civilly or criminally. The nature of the corporate person tends to highlight the compromises the privilege entails.<sup>5</sup> One commentator has noted that many courts around the country assume that corporations are especially prone to abusing the privilege by “funneling” documents through legal counsel, particularly in-house counsel, leading courts to

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<sup>1</sup> David Douglass co-chairs Shook, Hardy & Bacon’s Government Enforcement & Compliance Group. His practice focuses on defending companies and corporate executives facing criminal investigations as well as civil and regulatory government enforcement actions, including false claims act (whistleblower) suits. A former federal prosecutor, he has been trial counsel in over 20 trials in federal courts, including Washington, D.C., Maryland, Virginia, Massachusetts, and New York. In 2006, he successfully defended the first False Claims Act lawsuit brought against a private contractor, Custer Battles LLC, for work performed for the Coalition Provisional Authority in Iraq.

<sup>2</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”)).

<sup>3</sup> *Id.* (quoting *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876).)

<sup>4</sup> See *Upjohn*, 449 U.S. at 390, citing *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915).

<sup>5</sup> See e.g., *Id.* Susan W. Crump, The Attorney-Client Privilege and Other Ethical Issues in the Corporate Context Where There Is Widespread Fraud or Criminal Conduct, 45 S. TEX.L.REV. 171, 174-75 (2003).

impose a heavier burden on corporations in establishing privilege than they do on individuals.<sup>6</sup>

The Department of Justice (the “Department” or “DOJ”) has been a persistent critic of the use of the attorney-client privilege by corporations. Department attorneys have long chafed at being denied access to privileged information, such as the findings of an attorney’s internal investigation, complaining that defense counsel use the privilege to conceal inculpatory information. Defense counsel, defend the privilege as the cornerstone of effective legal representation. They also, understandably, take offense at the attacks on the integrity of defense counsel that the DOJ cooperation position implied.<sup>7</sup>

### **Evolution of Department of Justice Waiver Policy.**

In 1999 the Department attempted to shift the balance in favor of fact-gathering, at the expense of confidentiality when then Deputy Attorney General Eric Holder issued a memorandum to “All component Heads and United States Attorneys” entitled “The Federal Prosecution of Business Organizations.” (the “Holder Memorandum”)<sup>8</sup> The Holder Memorandum announced policies that prosecutors were encouraged but not required to consider in charging and resolving corporate prosecutions. It instructed that one of the facts prosecutors should consider in deciding whether to charge a corporation is “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including if necessary the *waiver of the attorney-client and work product privileges.*”<sup>9</sup>

In 2003, the Department, through then Deputy Attorney General Larry Thompson updated the Holder Memorandum to make explicit the Department’s attitude that corporations can abuse the attorney-client privilege stating, “[t]oo 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

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<sup>6</sup> Although the focus of this article is the corporate attorney client, many of the issues apply to any business or organization, including for example, non-profits, voluntary associations, and partnerships. See e.g., U.S. Sentencing Guidelines § 8A1.1 (defining an “organization” under the Organizational Sentencing Guidelines).

<sup>7</sup> Illustrating the intersection of criminal and civil enforcement policy, in 2001 the SEC followed the DOJ’s lead and issued a report articulating “a framework for evaluating cooperation in determining whether and how to charge violations of the federal securities laws,” which effectively but not explicitly invited privilege waivers. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001), *available at* [www.sec.gov/litigation/investreport/34-44969.htm](http://www.sec.gov/litigation/investreport/34-44969.htm) (last visited Feb. 18, 2009)

<sup>8</sup> Holder Memorandum, *available at* <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>. (Last visited March 16, 2009).

<sup>9</sup> *Id.* (emphasis supplied).

wrongdoing under investigation.”<sup>10</sup> (the “Thompson Memorandum”). The Thompson Memorandum then stated:

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its 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. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. [footnote omitted] The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

In an accompanying footnote the Thompson Memorandum stated, “This 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.”

The Thompson Memorandum raised simmering criticism of the Department's policy to a full boil. The revised policy was *heavily* criticized by the American Bar Association, the U.S. Chamber of Commerce, the ACLU, Senator Arlen Specter, former high-ranking DOJ officials, and even the SEC Commissioner. In 2006, in a memorandum from then Deputy Attorney General McNulty, the Department attempted to mollify its critics and foreclose threatened Congressional action by scaling back the more controversial aspects of the Thompson Memorandum.<sup>11</sup> It adopted a tiered approach to be followed before prosecutors were permitted to request that a corporation provide privileged materials. Under the McNulty Memorandum, a prosecutor seeking privileged client communications, legal advice or non-fact attorney work product was required to obtain written approval from the Deputy Attorney General before requesting the waiver from the privilege-holder. The McNulty Memorandum provided that the request for approval must set forth a *legitimate need* for

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<sup>10</sup> Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations* (January 20, 2003) *available at* [www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (“Thompson Memorandum”).

<sup>11</sup> The McNulty Memorandum was issued just four days after Senator Specter (R-Pa) introduced the Attorney Client Privilege Protection Act in the Senate, a bill to legislative overturn the Department's waiver policies.

the information and identify the scope of the waiver sought, including specifically the following issues; (i) the likelihood and degree to which privileged information will benefit the government investigation; (ii) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (iii) the completeness of the voluntary disclosure already provided; and (iv) the collateral consequences to a corporation of a waiver.<sup>12</sup>

The McNulty Memorandum also imposed new requirements for prosecutors seeking a privilege waiver for facts uncovered during an internal investigation of corporate misconduct. These provisions are an exception to the general rule that Department attorneys are not obligated to follow the Principles. A request for materials of this nature required the *prior approval* of the United States Attorney in consultation with the Assistant Attorney General of the Criminal Division. This procedure also applied to requests for (i) legal advice given contemporaneous to the misconduct being investigated, if the company is relying upon the advice of counsel defense; and (ii) legal advice or communications in furtherance of a crime or fraud, coming within the crime fraud exception to the attorney-client privilege. The McNulty Memorandum did not, however quell the controversy. Responding to demands for legislative action, on June 26, 2008, Senator Specter reintroduced his bill, the “Attorney-Client Protection Act of 2008” (S. 3217). A companion bill (H.R. 3013) was submitted by Rep. Robert Scott, and passed by the House.

### **Current DOJ Waiver Policy**

Bowing to congressional pressure, on July 9, 2008, the Department through testimony before the Senate Judiciary Committee by Deputy Attorney General Mark Filip announced that the DOJ would be updating the McNulty Memorandum. On August 28, 2008, the Department revised its waiver policy, substantially retreating from its view that disclosure of privileged information is an element of cooperation.<sup>13</sup> The revised principles state:

Often the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel.

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<sup>12</sup> McNulty Memorandum at 9, *available at* [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf) (last visited March 17, 2009)

<sup>13</sup> Principles of Federal Prosecution of Business Organizations (Revised Principles), *available at*, <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>

Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product material.<sup>14</sup>

The Filip Memorandum signaled a consequential shift in the Department's strategy concerning waiver as cooperation. Whereas previously, the Department's policy was to encourage waiver as an indicia of cooperation, the Filip Memorandum reversed that position stating that "prosecutors should not ask for [privilege] waivers and *are directed not to do so.*"<sup>15</sup> (It should be noted, however, that even the new policy does not preclude seeking waiver when a corporation invokes an advice of counsel defense or where the crime-fraud exception to the privilege may apply.) The Filip Memorandum offers some comfort to corporate counsel attempting to avoid prosecution. They should no longer face the prospect of an explicit demand for waiver of the attorney-client or work product privileges to show that the corporation is cooperating. Taking waiver demands off the negotiating table should make it easier for the corporation to persuade the government to accept alternative ways agree upon the material facts in the investigation.

Counsel should not take false comfort from the revised policy, however. Although Department attorneys are instructed not to request a waiver, the Filip Memorandum makes clear that disclosing the material facts under investigation remains a critical component of cooperation. While the prior policies implicitly assumed that internal investigations would typically be conducted by attorneys, the current policy states that organizations decide whether to conduct internal investigations in a privileged or non-privileged manner. Thus, the prospect of waiver becomes a consequence of that decision. The Department explicitly disclaims any view with respect to that decision and instead focuses on its need to obtain the facts. This new policy effectively shifts the onus with respect to disclosure of privileged internal investigations from the government to the organization, which in the Department's view has the option of gathering the facts in a non-privileged manner.

The current waiver policy does not relieve corporate counsel of the need to make difficult choices with respect to conducting an internal investigation. It is difficult to challenge the Filip Memorandum's assertion that the corporation determines in the first instance whether to conduct a privileged internal investigation. Thus, the current Departmental policy simply, and shrewdly, disclaims any role for the Department in determining whether to conduct a privileged internal investigation and, importantly, whether to waive the privilege. The policy does not solve the waiver problem. Instead, it shifts responsibility to the corporation and as a practical matter moves the waiver

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<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 9 (emphasis added).

decision to the front-end of the investigative planning rather than leaving it for the disclosure phase.

If disclosure is a possibility, counsel will need to have planned in advance of the disclosure whether to waive or whether to conduct a non-privileged investigation. In the vast majority of investigations, the decision will be to conduct a privileged investigation and then waive, if necessary and appropriate. Nevertheless, it remains essential to anticipate the potential consequences of the waiver in order to take steps to mitigate the potential harm.

Whether to waive the privilege to achieve a more lenient disposition is a decision that can have significant consequences for a company, its directors, officers and employees, and other relevant constituencies such as shareholders and lenders. A decision to disclose privileged information often results in the investigation and prosecution of corporate officials and employees. Moreover, as a general proposition, waiver is an all-or-nothing proposition. In most circuits, a privilege waived as to one party is lost as to all others.<sup>16</sup> Thus, a company that contemplates making a waiver to the government must consider the risks and likelihood that other litigants will obtain the information as well. (The risk is heightened for publicly traded companies due to the prospect of shareholder litigation in the wake of a disclosure of potential impropriety).

#### **Anticipating Waiver in Developing the Investigative Plan**

The Filip Memorandum notwithstanding there are many reasons counsel should develop a privilege-waiver plan at the outset of an investigation. The Department's current policy notwithstanding, there are many collateral considerations that weigh in favor of disclosure even at the expense of waiver. Of particular concern to companies that sell goods and services to federal health care programs, the knowing failure to disclose the wrongful receipt or retention of federal health care program payments can constitute a felony.<sup>17</sup> A conviction will lead to exclusion from eligibility to participate in federal health care programs. For government contractors generally, effective

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<sup>16</sup> See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294-95 (6th Cir. 2002) (stating general rule that voluntary disclosure of private communications by a corporation waives attorney-client privilege and rejecting selective waiver doctrine); accord, *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997), *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997), *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993), *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1414-26 (3d Cir. 1991), *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir.), cert. denied, 490 U.S. 1011 (1989), *Permian Corp. v. United States*, 665 F.2d 1215, 1220-21 (D.C. Cir. 1981), but see *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (recognizing selective waiver doctrine).

<sup>17</sup> 42 U.S.C. § 1320a 7b(a)(3). HHS-OIG also offers a voluntary disclosure program that provides incentives to health care providers to voluntarily self-disclose matters that implicate potential fraud against federal health care programs whether it be criminal, civil or administrative in nature. Provider Self-Disclosure Protocol, 63 Fed. Reg. 58399.

November 12, 2008, the Federal Acquisition Regulations (“FAR”) were amended to impose on all government contractors mandatory disclosure obligations for violations of certain federal criminal laws and the federal False Claims Act.<sup>18</sup> Other federal agencies and DOJ divisions offer leniency in various forms to organizations that voluntarily disclose non-compliance with federal laws or regulations.<sup>19</sup> And, while publicly traded companies have no general duty to affirmatively disclose wrongdoing, the public generally and regulators specifically consider disclosure of unlawful conduct to be a characteristic of good corporate citizenship. Thus, there are many pressures on a corporation to affirmatively disclose facts concerning a suspected or alleged violation of federal criminal or civil laws.

The more favorable waiver policy announced in the Filip memorandum notwithstanding, at the outset of any investigation of suspected wrongdoing, counsel should anticipate the possibility that the client subsequently will face little choice but to agree to waive the attorney-client privilege and/or work product protection.

The plan should consider the boundaries of the attorney-client privilege. The privilege does not embrace, for example, pure factual information, which is the information the Department purports to seek. Thus, consideration should be given to conducting witness interviews in a manner that narrows the potential scope of any waiver.<sup>20</sup>

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<sup>18</sup> F.A.R. 52.203-13 Contractor Code of Business Ethics and Conduct.

<sup>19</sup> The following agencies and entities offer formal disclosure programs; **DOJ Antitrust Division**, U.S. Department of Justice, Antitrust Division Grand Jury Practice Manual v-52 to v-53 (1st ed. Nov. 1991); **DOJ Environmental and Natural Resources Division**, Factors in Decisions On Criminal Prosecutions For Environmental Violations In the Context of Significant Voluntary Compliance or Disclosure Efforts By the Violator, July 1, 1991. *available at* [http://www.usdoj.gov/enrd/Factors\\_in\\_decisions.html](http://www.usdoj.gov/enrd/Factors_in_decisions.html) (last visited Feb. 18, 2009); **Securities and Exchange Commission**, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001), *available at* [www.sec.gov/litigation/investreport/34-44969.htm](http://www.sec.gov/litigation/investreport/34-44969.htm) (last visited Feb. 18, 2009); **Department of Defense**, The Department of Defense Voluntary Disclosure Program: A Description of the Process. IGDPH 5505.50 Change 1 (Feb. 7, 1996), *available at* <http://www.dodig.osd.mil/IGInformation/archives/vdguidelines.pdf> (last visited Feb. 18, 2009); **Environmental Protection Agency**, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” commonly referred to as the “Audit Policy.” 65 Fed. Reg. 19618, *available at* <http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditpolicy51100.pdf> (last visited Feb. 18, 2009); **Internal Revenue Service**, Revised IRS Disclosure Program, *available at* <http://www.irs.gov/newsroom/article/0,,id=104361,00.html> (last visited March 17, 2009)

<sup>20</sup> There are also important procedural and evidentiary consequences to the waiver decision. For example, an attorney’s memorandum of interview is the attorney’s statement (unless the witness has adopted it). Thus, the attorney is the foundational witness for the substantive information communicated by the witness. In criminal cases

Consideration should also be given to how consultants will be used to limit the potential scope of a waiver. For example, where it can be forecast with reasonable certainty that a consultant's analysis will in fact be disclosed to the government, consideration should be given to whether the analysis should be conducted within the scope of the privilege. There may be circumstances in which it will be appropriate to use consultants in both a privileged and non-privileged capacity.

### Confidentiality Agreements

One potential way to limit the scope of a waiver is to subsume the waiver in a broader confidentiality agreement. This approach is analytically sound. Parties are free to contract concerning the treatment of information they exchange regardless of whether it is privileged. The analysis of the contractual rights should be independent of the privilege analysis. If in consideration of receiving information to which it has no independent contractual right, the government agrees to abide by the terms of a confidentiality agreement, that agreement should be binding on the parties and thus should preclude access by third-parties. Although analytically sound, the approach has not fared well in the courts.

The Tenth Circuit, in *In Re Qwest Communications International, Inc.*<sup>21</sup> denied Qwest a writ of mandamus to overturn a district court's ruling that a confidentiality agreement between Qwest and federal agencies was insufficient to protect privileged materials from disclosure to third-parties.<sup>22</sup> The court did not hold that confidentiality agreements may not shield privileged information provided to government agencies from disclosure to third parties as a matter of law. Rather the Court held that on the facts before it the confidentiality agreements provided insufficient restriction on "the agencies' use of the materials they received from Qwest."<sup>23</sup> The Court observed that the DOJ retained great latitude to disseminate the information to other federal, state and local agencies and that the documents had been used in criminal proceedings and as exhibits in SEC investigative testimony.<sup>24</sup> The Court also observed that, "The DOJ informs us it was not required to "segregate material obtained from Qwest, file it under seal, keep records of its use, or otherwise deal with the information in any special way." And it had made no effort to determine what information had been disseminated to third parties."<sup>25</sup>

On this record the Court concluded:

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this implicates disclosure issues related to the Jencks Act, 18 U.S.C. §3500, which generally requires the government to disclose statements of witnesses it intends to call in its case-in chief, and Article XII of the Federal Rules of Evidence, Hearsay, Fed.R.Evid 801 et. seq.

<sup>21</sup> D.C. No. 01-CV-1451-REB-CBS (D.Colo.), *available at* <http://ca10.washburnlaw.edu/cases/2006/06/06-1070.htm> (last checked March 16, 2009).

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* quoting DOJ Response Brief at 6.

The record does not indicate whether Qwest negotiated or could have negotiated for more protection for the Waiver Documents, or whether, as it asserted at oral arguments, seeking further restrictions would have so diluted its cooperation to render it valueless. Be that as it may, the confidentiality agreements gave the agencies broad discretion to use the Waiver Documents as they saw fit, and any restriction on their use were loose in practice. As Qwest has conceded, it is unknown how many or which of the Waiver Documents the agencies have used or disclosed, how those uses or disclosures occurred, who might have had access to the Waiver Documents, and the extent of continuing disclosures. It is therefore not inappropriate to conclude that some undetermined number of Waiver Documents have been widely disseminated and have thus become public information.<sup>26</sup>

The Qwest decision does not foreclose the possibility of executing a confidentiality agreement that provides sufficient consideration to withstand challenge and the Court noted the existence of authority for the proposition that “the existence of a confidentiality agreement may justify adopting selective waiver.”<sup>27</sup> Yet the decision also signals some of the practical obstacles to entering into such an agreement; namely, the practical burden on the government to ensure compliance with the agreement, which the Tenth Circuit suggests is an important consideration, and also the prospect that a legally sufficient confidentiality agreement would substantially reduce the value the government would assign to the corporation’s cooperation.

### **Multiple Representations**

The prospect of waiving the privilege to disclose facts gathered in an internal investigation present specific challenges and risks with respect to interviews of corporate officers and employees. This risk can be especially acute for in-house counsel. They develop close relationships with officers and employees, obtaining information and rendering advice that benefits the corporation and the employee (or where there is no prospect of a conflict of interest between the employee and the corporation). Where the circumstance arises that the matter in-house counsel is investigating could present a conflict between the employee and the employer, counsel faces the two serious risks. First, counsel faces the risk of running afoul of his or her ethical obligation not to permit the employee to mistakenly believe that counsel is representing the employee. It also poses a risk to the employer that it will be denied the ability to use the information obtained from the employee.

The best preventative measure that counsel can take to avoid later misunderstandings is to give the employee what have come to be known as corporate Miranda warnings, notice to the witness that counsel represents the corporation and not the witness. A typical warning would at minimum advise the witness of the following:

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, citing, *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); *In re M&L Bus. Machine Co.*, 161 B.R. 689 (D. Colo. 1993).

- 1) Counsel represents the corporation and not the witness.
- 2) The interview is being conducted to assist counsel in discharging his or her responsibility to provide legal advice to the corporation. Consequently, the information that the witness provides is subject to the corporation's attorney-client privilege and the witness is not to disclose the substance of the interview unless authorized by counsel or an appropriately authorized corporate official.
- 3) Because the privilege belongs to the corporation, the corporation may choose to waive the privilege and disclose the substance of the interview to the government or other third-parties.

Some counsel choose to give two additional warnings:

- 4) Because the substance of the interview may be disclosed to law enforcement, any false statements made by the witness could be considered to constitute obstruction of justice by a prosecutor.
- 5) Because counsel does not represent the witness, should the witness feel a need for legal advice he or should retain counsel.

The obstruction warning arises from the indictment of Sanjay Kumar and Stephen Richards, former executives at Computer Associates ("CA"), for obstruction of justice under 18 U.S.C. §1512(c)(2), which was enacted in the wake of the Enron Scandal and provides in pertinent part:

c) Whoever corruptly--

... obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

The indictment alleged that the two individuals made false statements to counsel conducting an internal investigation on behalf of Computer Associates with the knowledge and intent that the false statements would be presented to the United States Attorney, the SEC and the FBI through CA's counsel.<sup>28</sup> Using statements made to private counsel in the course of a privileged internal investigation on behalf of a non-

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<sup>28</sup> See DOJ Press Release, *available at* [http://www.usdoj.gov/opa/pr/2004/September/04\\_crm\\_642.htm](http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm) (last checked March 16, 2009) ("The indictment alleges that Kumar, Richards and Woghin knew, and in fact intended, that the company's law firm would present these false justifications to the U.S. Attorney's Office, the SEC and the FBI in an attempt to persuade the government that the 35-day month practice never existed."). A copy of the indictment can be found at <http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/ca/uskumar904ind.pdf>. (last visited March 16, 2009).

governmental entity was unprecedented and caused great concern that the indictment signaled a new practice by the government to *de facto* deputize private counsel as government agents. This concern was fueled by two subsequent cases in which the government indicted defendants under the same statute for statements made to private counsel conducting an internal investigation on behalf of a non-governmental entity, *United States v. Singleton*, No. 4:04-cr-514-1 (S.D. Texas filed Nov. 17, 2004), and *United States v. Kevin A. Ring*.<sup>29</sup> In both of these cases, as in *Kumar*, the indictment alleged that the false statements were made with the *knowledge* that they would be communicated to the government for the *purpose* of obstructing the government's investigation. The basis for the obstruction charges was not the mere false statement made to private counsel that was provided to the government but the narrower basis that the false statement was made to private counsel knowingly for the purpose of obstructing the government investigation.<sup>30</sup> Nevertheless, concerns about the short and long-term consequences to both defense counsel representing companies under investigation and to the government's efforts to encourage witnesses to cooperate with investigations are well founded.

Advising a witness that counsel does not represent him or her and that any disclosure decision is exclusively within the province of the corporation typically will be sufficient to fulfill counsel's ethical obligations with respect to the witness. While practitioners may hold different views concerning the cost-benefit balance of providing an obstruction warning, it seems generally fair to say that whether to do so in a given case will be highly fact dependent.

Many lawyers are concerned that the final warning—the witness's right to retain counsel—is tantamount to an invitation to the employee to request separate counsel, which can impede the fact gathering effort and dramatically increase the costs of the investigation and subsequent defense.<sup>31</sup> This is especially a concern where experienced counsel believes the risk is more theoretical than real. Nevertheless, arranging separate counsel for employees is generally the prudent course and need not excessively increase

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<sup>29</sup> Department of Justice Press Release, available at, [http://www.usdoj.gov/usao/md/Public-Affairs/press\\_releases/press08/FormerAbramoffColleagueKevinRingIndictedonPublicCorruptionandObstructionofJusticeCharges.html](http://www.usdoj.gov/usao/md/Public-Affairs/press_releases/press08/FormerAbramoffColleagueKevinRingIndictedonPublicCorruptionandObstructionofJusticeCharges.html) (last visited March 17, 2009)

<sup>30</sup> For an excellent and concise analysis of these cases, see The Ring Case, the White Collar Crime Blog, available at, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2008/10/heres-an-evergr.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/10/heres-an-evergr.html) (October 13, 2008) (last visited March 16, 2009).

<sup>31</sup> An analysis of an employer's obligation to indemnify an employee's legal fees is outside the scope of this article. As a general proposition whether by common law, state law or corporate governance or practice, it is likely that an employer will have an obligation to indemnify an employee for legal fees incurred in the course of the employee's employment unless and until there is basis to believe that the employee violated the law. As a general legal matter, a corporation is not required to advance such fees but as a practical matter there are frequently reasons that it is in the employer's interest to do so, subject to recoupment in the event of a determination that the employee is not entitled to indemnification.

costs. An employee that enjoys the benefit of the advice of his or her own counsel may be more forthcoming. Additionally, corporate counsel may appreciate being relieved of the need to constantly assess the intersection of the employer's and employee's interest. In fact, the employer's counsel and the employee's counsel can often work together effectively to ensure that the employer obtains the information it needs without compromising the interests of the witness.

### **Conclusion**

The Department's current policy not to request corporations to waive the attorney-client privilege to demonstrate their sincere cooperation with a Department investigation provides greater latitude for corporate counsel to determine how to satisfy the cooperation element. Yet it does not relieve counsel of the burden and responsibility of making potentially consequential decisions concerning how to handle privilege and waiver issues. First, the current policy notwithstanding, at bottom the Department's position has always been that cooperation entail full access to the material facts under investigation. The obligation to provide those facts has not changed. Second, Department policy notwithstanding, corporations face many pressures to disclose potential wrongdoing, which can independently present the same decisions concerning privilege and waiver. By assessing the potential privilege and waiver issues and developing a plan for addressing them at the outset of an investigation and, of course, continually monitoring and re-evaluating those issues during the course of the investigation, counsel can mitigate the risks and can achieve a reasonable balance between disclosing material facts while preserving the confidentiality of legal advice and analysis.